UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

INSTITUTE FOR FREE SPEECH, *Plaintiff*, v. J.R. JOHNSON, in his official and individual capacities as Executive Director of the Texas Ethics Commission, et al., *Defendants.*	§ § § § § § § § § § §	Case No. 4:23-CV-00808-P

DEFENDANTS' BRIEF IN SUPPORT OF THEIR MOTION TO DISMISS PURSUANT TO RULES 12(B)(1) AND 12(B)(6)

Defendants submit this brief in support of their motion to dismiss this case under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).

Plaintiff Institute for Free Speech ("IFS") has not properly invoked this Court's jurisdiction with respect to its claims regarding the issuance by the Texas Ethics Commission (the "Commission") of an advisory opinion. IFS's official-capacity claims are barred by sovereign immunity. IFS's individual-capacity claims are not sufficiently pled and, in any event, are barred by qualified immunity. Further, IFS cannot establish standing or ripeness to allow for adjudication of any of its claims. For these reasons, IFS's lawsuit should be dismissed in its entirety.

BACKGROUND

IFS, which claims to be headquartered in Washington, D.C., states that it is a 501(c)(3) non-profit organization that provides free legal services to clients. Doc. 1 ¶ 4. IFS asserts that it has "foregone legally representing a candidate or political committee in Texas due to concern that it could be prosecuted under the Election Code for providing an in-kind contribution in the form of pro bono legal services." *Id.* ¶ 13.

In January 2022, IFS requested an advisory opinion from the Commission on whether IFS could provide pro bono legal services to political candidates without running afoul of Texas's prohibition on corporate political contributions. *Id.* ¶ 17; *see also* TEX. ELEC. CODE § 253.094. In May 2022, the Commission issued a draft opinion (AOR-660), which opined that pro bono legal services fit within the definition of an in-kind corporate contribution under the Texas Election Code. *Id.* ¶ 19. The Commission adopted a revised draft of the opinion (officially titled Ethics Advisory Opinion No. 580 or "EAO No. 580") at the Commission's December 14, 2022 meeting. Doc. 1 ¶ 25-28.

EAO No. 580 states that "[p]ro-bono legal services provided to a candidate or political committee are in-kind *campaign* contributions if they are given with the intent that they be used 'in connection with' a campaign." *See* Doc. 1., Ex. 4 (EAO No. 580) at 2 (emphasis in original). The advisory opinion notes that this conclusion reflects the plain text of the Texas Election Code, which defines a "campaign contribution" as any "contribution to a candidate or political committee that is offered or given with the intent that it be used in connection with a campaign for elective office or on a measure." *Id.* (quoting TEX. ELEC. CODE § 251.001(3)). Importantly, EAO No. 580 concluded by opining that nothing in Texas law prohibits candidates from filing lawsuits to challenge an election law. "They may accept pro bono representation to challenge the law. Alternatively, they may use their political contributions to pay for such litigation. . . . They may even be represented by corporations, as long as they pay a fair market rate for the representation." *Id.* at 4.

IFS obviously disagrees with the advisory opinion, and that disagreement led to this lawsuit. IFS did not just bring this suit expressing its disagreement against the Commission through its Executive Director. It also brought suit against each of the persons who serve on the

Commission, in their official capacities. And that's not all. IFS also sued the five Commissioners who voted to adopt EAO No. 580 *in their individual capacities*. *Id.* ¶¶ 6-7. To top it off, IFS sued Executive Director J.R. Johnson not only in his *official* capacity as Executive Director but also in his *individual* capacity, on purported grounds that he "briefed the Commission on the proposal that became [EAO] No. 580." *Id.* ¶ 5. IFS took this litigation tack despite not having any basis to allege that any of the Commissioners or the Commission's Executive Director engaged in any wrongful conduct outside the scope of their official duties.

IFS's overall efforts to invoke this Court's jurisdiction on the issuance of a Commission advisory opinion fall flat. First, IFS's official-capacity claims are barred by sovereign immunity and do not fall within *Ex parte Young* because IFS has not alleged—nor could it given the nature of Commission advisory opinions—that the Executive Director on behalf of the Commission (much less individual Commissioners) took or could take any action to "enforce" the Commission's advisory opinion against IFS or anyone else. In essence, IFS asks this Court to serve as an appellate body on an administrative opinion.

Second, IFS endeavors to plead standing to challenge the issuance of EAO No. 580 but fails to do so. IFS's standing contentions are allegations that it has turned down legal representation of Chris Woolsey, who according to the allegations, *might* run for re-election to city council or for election to a different office, and the Texas Anti-Communist League, a newly created political action committee that has not yet engaged in any political activity. *Id.* ¶¶ 31-34, 39, 43. IFS claims that Woolsey and the Texas Anti-Communist League may want to engage in future political advertising without including a safety notice required by Texas law, which they consider to be "compelled speech." *Id.* ¶¶ 34-37, 44-45. IFS contends that it would "potentially like to represent other Texans, including other candidates or political committees, on a pro bono basis"

but is refraining from doing so as a result of the Commission's opinion concluding that pro bono legal services fit within the Election Code's definition of an in-kind contribution. *Id.* ¶ 49.

LEGAL STANDARDS

The Defendants seek dismissal of the case on the basis that IFS has failed to place its claims within the court's subject-matter jurisdiction. FED. R. CIV. P. 12(b)(1). "Lack of subject-matter jurisdiction can be found in: (1) the complaint alone, (2) the complaint supplemented by undisputed facts evidenced in the record, or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." *Biggers v. Massingill*, No. 4:23-CV-0359-P, 2023 WL 5826971, at *2 (N.D. Tex. Sept. 8, 2023) (citing *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001)). Here, the Court can determine the motion by reviewing IFS's complaint (including its attachments) and the governing law and rules of the Commission.

The Defendants also seek dismissal on the basis that IFS has failed to state a claim upon which relief can be granted. FED. R. CIV. P. 12(b)(6). "To survive a motion to dismiss under Rule 12(b)(6) a plaintiff must plead 'enough facts to state a claim to relief that is plausible on its face.'" *Biggers*, 2023 WL 5826971, at *2 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "The Court, in turn, must accept all well pleaded facts in the complaint as true and view them in the light most favorable to the plaintiff." *Id.* (citing *Sonnier v. State Farm Mut. Auto. Ins. Co.*, 509 F.3d 673, 675 (5th Cir. 2007)). "If there are well-pleaded factual allegations, the Court assumes their veracity and then determines whether they plausibly give rise to an entitlement to relief." *Id.*

ARGUMENT

I. The Court should dismiss IFS's official-capacity claims because they are barred by sovereign immunity.

State sovereign immunity generally precludes suits against state officials in their official capacities. *E.g.*, *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 400 (5th Cir. 2020) (hereinafter "*Tex. Democratic Party I*"). Unless waived by the state, abrogated by Congress, or an exception applies, sovereign immunity precludes suit. *Tex. Democratic Party v. Abbott*, 978 F.3d 168, 179 (5th Cir. 2020) (hereinafter "*Tex. Democratic Party II*"). There is no allegation (nor could there be) that any of the Defendants has somehow waived sovereign immunity from IFS's claims or that Congress has abrogated immunity from these claims. IFS will undoubtedly attempt to resort to the *Ex parte Young* exception to sovereign immunity, but that exception does not and cannot apply based on the allegations in IFS's complaint.

In *Ex parte Young*, 209 U.S. 123 (1908), the United States Supreme Court recognized that sovereign immunity does not bar "suits for prospective injunctive relief against state officials acting in violation of federal law." *Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 437 (2004). Under *Ex parte Young*, "individuals who, as officers of the state, are clothed with some duty in regard to the enforcement of the laws of the state, *and who threaten and are about to commence proceedings*, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal court of equity from such action." 209 U.S. at 155-56 (emphasis added).

To fit within the *Ex parte Young* exception, it is not enough to allege that the defendant-official has a "general duty to see that the laws of the state are implemented." *Morris v. Livingston*, 739 F.3d 740, 746 (5th Cir. 2014). A mere connection by statute or otherwise to a law's *potential* enforcement is insufficient. Rather, the state official "must have taken some step to enforce" the

statute. *Tex. Democratic Party I*, 961 F.3d at 401; *see, e.g.*, *City of Austin v. Paxton*, 943 F.3d 993, 1000 (5th Cir. 2019) (holding that "Attorney General Paxton is not subject to the *Ex parte Young* exception because our *Young* caselaw requires a higher showing of 'enforcement' than the City has proffered"); *Air Evac EMS, Inc. v. Tex. Dep't of Ins*., 851 F.3d 507, 510-13 (5th Cir. 2017) (noting that the state officials at issue were actively involved in rate-setting and overseeing the arbitration processes which constrained plaintiff's ability to collect reimbursements under the challenged law); *NiGen Biotech, L.L.C. v. Paxton*, 804 F.3d 389, 392-95 (5th Cir. 2015) (*Ex parte Young* exception applied when the attorney general had sent "numerous 'threatening letters'" to the plaintiffs). The Fifth Circuit has repeatedly held that a plaintiff must plead and sufficiently demonstrate that the state official took some "affirmative action" regarding enforcement of the challenged provision, such that the official has "a demonstrated willingness to enforce that duty." *See id.* at 400 ("some step" and "affirmative action"); *Morris*, 739 F.3d at 746 ("demonstrated willingness"); *Tex. Democratic Party II*, 978 F.3d at 179 (same).

The Fifth Circuit has recognized guideposts in applying the "enforcement" aspect of *Ex parte Young*. Specifically, the Fifth Circuit re-emphasized that "enforcement" includes a showing of "compulsion or constraint." *Texas All. for Retired Americans. v. Scott*, 28 F.4th 669, 671-73 (5th Cir. 2022) (citing, among other cases, *City of Austin v. Paxton*, 943 F.3d at 1000). Accordingly, if there is no showing—as is the case here—that the government official has compelled or constrained anyone to obey a challenged provision of law, then a plaintiff has not pled facts sufficient to overcome a governmental defendant's sovereign immunity.

Here, IFS alleges that through the issuance of EAO No. 580, the Defendants are "threatening to enforce Tex. Elec. Code § 253.094 and EAO No. 580 against IFS . . . under color of law," which potentially would "deprive Plaintiff and its donors of the right to petition." Doc. 1

¶¶ 58, 62, 75. IFS's allegations about the issuance of a Commission advisory opinion do not, on their face and as a matter of law, constitute a complaint about enforcement of law that could ever meet the requirements of the *Ex parte Young* exception to sovereign immunity. The Commission issues advisory opinions such as EAO No. 580 under a provision of Texas law stating that the "commission shall prepare a written opinion answering the request of a person subject to [certain chapters of the Election Code] for an opinion about the application of [the] laws to the person in regard to a specified existing or hypothetical factual situation." TEX. GOV'T CODE § 571.091. Nothing in the Government Code suggests that the Commission's advisory opinions constitute enforcement or even a threat of enforcement of Texas law. As a matter of plain law, there is no penalty or other enforcement against anyone associated with an advisory opinion: an advisory opinion is merely that. The Government Code states that the Commission's advisory opinions may serve as an affirmative defense to prosecution or imposition of a civil penalty if a "person reasonably relied on a written advisory opinion of the commission relating to the provision of the law the person is alleged to have violated or relating to a fact situation that is substantially similar to the fact situation in which the person is involved." *Id*. § 571.097(a). There is no such affirmative defense if there is no enforcement proceeding, and IFS has not pled the existence of any such enforcement.

Thus, IFS has wholly failed to allege—nor could it allege—that the Commission is enforcing the Election Code prohibition on corporate campaign contributions against anyone in the manner IFS claims would be unconstitutional, much less "compulsion or constraint" of IFS's rights. *See City of Austin v. Paxton*, 943 F.3d at 1000. IFS has not demonstrated any purported enforcement action beyond the Commission's adoption of EAO No. 580, which does not represent enforcement of any law against IFS.

Moreover, IFS has not demonstrated that the particular Defendants' alleged actions in conjunction with the issuance of EAO No. 580 form a basis for official-capacity claims not barred by sovereign immunity. IFS's official-capacity claims center entirely on the Commissioners' actions in voting on the adoption of EAO No. 580 and Defendant Johnson's role as Executive Director in "briefing" the Commission on the opinion. Doc. 1 ¶¶ 5, 6, 23, 27. There is no authority to support IFS's apparent position that government officials who work on or vote in favor of or against adopting an agency advisory opinion that, at most, would serve as an affirmative defense in hypothetical enforcement proceedings took steps toward enforcement sufficient to trigger the *Ex parte Young* exception. "The mere fact that the [Defendants have] the authority to enforce [Tex. Elec. Code § 253.094] cannot be said to 'constrain' [Plaintiff's actions]." *City of Austin v. Paxton*, 943 F.3d at 1001. Based on the face of its complaint, IFS has failed to allege that the actions of the Commissioners or the Commission's Executive Director have a sufficient "connection to the enforcement" of section 253.094 of the Election Code to allow a plaintiff to invoke the *Ex parte Young* exception. Accordingly, IFS's official-capacity claims should be dismissed because they are barred by sovereign immunity.

II. IFS's individual-capacity claims should be dismissed because IFS has failed to state an individual-capacity claim on which relief can be granted and these claims are barred by qualified immunity.

In addition to its official-capacity claims, IFS has also brought individual-capacity claims against five Commissioners (Craycraft, Erben, Mizell, Slovacek, and Wolens) and against Executive Director Johnson ("Individual Capacity Defendants") under Section 1983. *See* Doc. 1 ¶¶ 5, 7. "To survive a motion to dismiss under Rule 12(b)(6) a plaintiff must plead 'enough facts to state a claim to relief that is plausible on its face.'" *Biggers*, 2023 WL 5826971, at *2. To plead a Section 1983 individual-capacity claim, IFS must "(1) allege a violation of a right secured by the Constitution or laws of the United States and (2) demonstrate that the alleged deprivation was

committed by a person acting under color of state law." *James v. Tex. Collin Cnty.*, 535 F.3d 365, 373 (5th Cir. 2008) (citation and internal quotation marks omitted); *see also Anderton v. Tex. Parks & Wildlife Dep't*, No. 3:13-CV-01641-N, 2014 WL 11281086, at *7 (N.D. Tex. Feb. 14, 2014), *aff'd*, 605 F. App'x 339 (5th Cir. 2015).

Moreover, governmental officials sued in their individual capacities are entitled to qualified immunity. *Walker v. Howard*, 517 F. App'x 236, 237 (5th Cir. 2013); *see also Reitz v. City of Abilene*, No. 1:16-CV-0181-BL, 2017 WL 3046881, at *12 (N.D. Tex. May 25, 2017), report and recommendation adopted, No. 1:16-CV-181-C, 2017 WL 3034317 (N.D. Tex. July 17, 2017). To overcome qualified immunity, IFS must demonstrate that the Individual Capacity Defendants violated a constitutional right that was clearly established at the time of the challenged conduct. *Walker*, 517 F. App'x at 237; *see also Chao v. DARS of Texas*, No. 4:15CV169, 2015 WL 6522818, at *7 (E.D. Tex. Oct. 27, 2015).

A. IFS has failed to state a claim against the Individual Capacity Defendants on which relief can be granted.

IFS's individual-capacity claims are based on nothing more than the Commissioners' votes in favor of EAO No. 580 and the Executive Director's briefing the Commission on the advisory opinion. *See* Doc. 1 ¶¶ 5, 7. IFS could never properly allege that this conduct was outside the usual course and scope of the Defendants' official roles with the Commission. IFS's disagreement with the substance of EAO No. 580 could never change that bedrock principle. It is not surprising that IFS wholly fails to articulate how the Individual Capacity Defendants acted "outside the scope of [their] authority" sufficient to plead viable individual-capacity claims. *Fuller v. Eagle Constr. & Env't Servs., L.P.*, No. 6:08CV326, 2009 WL 10677615, at *3 (E.D. Tex. Feb. 9, 2009). As a result, IFS "fails to allege facts to support that the Individual [Capacity] Defendants were acting

outside of their professional capacities." *Anyadike v. Coll.*, No. 7:15-CV-00157-O, 2016 WL 7839341, at *7 (N.D. Tex. June 21, 2016).

In short, IFS's Complaint "is devoid of allegations that [the Individual Capacity Defendants] undertook 'specific conduct' that led to the deprivation of [IFS's] rights, apart from [their] role as" Commissioners and Executive Director of the Commission. *Brown v. McLane*, No. EP-13-CV-00017-FM, 2018 WL 9868737, at *4 (W.D. Tex. Aug. 17, 2018), *aff'd*, 807 F. App'x 410 (5th Cir. 2020). As a result, IFS has failed to plead facts sufficient to overcome the Rule 12(b)(6) standard as to IFS's individual-capacity claims, and all of IFS's claims asserted against the Individual Capacity Defendants should be dismissed with prejudice.

B. IFS's individual-capacity claims are also barred by qualified immunity.

Beyond the pleading defects suffered by IFS's individual-capacity claims, these claims are also barred by qualified immunity. Qualified immunity shields a governmental official sued in his individual capacity "from civil liability for damages based upon the performance of discretionary functions if the official's acts did not violate clearly established constitutional or statutory law of which a reasonable person would have known." *Hampton v. Oktibbeha Cnty. Sheriff Dep't*, 480 F.3d 358, 363 (5th Cir. 2007); *see also Reitz v. City of Abilene*, No. 1:16-CV-0181-BL, 2017 WL 3046881, at *12 (N.D. Tex. May 25, 2017), report and recommendation adopted, No. 1:16-CV-181-C, 2017 WL 3034317 (N.D. Tex. July 17, 2017). The qualified immunity doctrine recognizes government officials may "make reasonable but mistaken judgments and protects all but the plainly incompetent or those who knowingly violate the law." *Messerschmidt v. Millender*, 565 U.S. 535, 546 (2012). "Abrogation of qualified immunity requires a two-tier analysis. Plaintiff must show that the evidence, viewed in the light most favorable to him, is sufficient to establish a genuine dispute '(1) that the official violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct.'" *Chao v. DARS of Texas*,

No. 4:15CV169, 2015 WL 6522818, at *7 (E.D. Tex. Oct. 27, 2015) (quoting *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2080 (2011)). "Heightened pleading in qualified immunity cases requires that plaintiffs rest their complaint on more than conclusions alone and plead their case with precision and factual specificity." *Nunez v. Simms*, 341 F.3d 385, 388 (5th Cir. 2004).

IFS has not adequately pled facts that, if true, could ever result in a finding that the Individual Capacity Defendants violated a constitutional right that was clearly established at the time of the challenged conduct. All of the actions by the Individual Capacity Defendants that IFS complains of were indisputably taken in their capacities as Commissioners and as an employee (Executive Director) of the Texas Ethics Commission. There is no actionable allegation that the Individual Capacity Defendants' actions violated a clearly established constitutional right; instead, IFS alleges that in issuing an advisory opinion, the Individual Capacity Defendants disagreed with IFS's interpretation of a Texas law.

The Texas Supreme Court in *King St. Patriots v. Tex. Democratic Party*, 521 S.W.3d 729 (Tex. 2017), held that Texas law's general prohibition on corporations making political contributions does not violate the First Amendment. The challenged advisory opinion is a reasonable application of that caselaw, and even if it is disputed by IFS on the merits, it is clearly the product of thoughtful decision-making by policymakers seeking to reasonably apply the law. The Individual Capacity Defendants were not "plainly incompetent" and did not "knowingly violate the law." *Messerschmidt*, 565 U.S. at 546; *see also, e.g.*, *Mullenix v. Luna*, 577 U.S. 7, 12 (2015) (per curiam) (summary reversal by the U.S. Supreme Court of a denial of qualified immunity). Accordingly, qualified immunity bars IFS's individual-capacity claims, and these claims should be dismissed.

III. All of IFS's claims should also be dismissed for lack of standing.

IFS purports to plead claims against the Commissioners and Executive Director based on their conduct in voting on, briefing, and issuing EAO No. 580 (as addressed in Arguments I-II) and against the Commission (by and through its Executive Director in his official capacity) to challenge the constitutionality of Texas Election Code section 253.094. Doc. 1, Claims I-IV. All of these claims should be dismissed with prejudice because IFS has failed to allege, in an adequate manner, standing to assert them.

Federal Rule of Civil Procedure 12(b)(1) "authorizes dismissal of a suit when the court lacks subject-matter jurisdiction." *Texas v. U.S. Dep't of Health & Hum. Servs.*, No. 4:23-CV-66-Y, 2023 WL 5333274, at *2 (N.D. Tex. Aug. 18, 2023). "Because Article III standing is a central concern regarding the court's subject-matter jurisdiction over an action, it is properly addressed under Rule 12(b)(1)." *Id*. (citing *Lujan v. Defs. Of Wildlife*, 504 U.S. 555, 561 (1992)).

Article III standing is the "fundamental limitation" on federal judicial power. *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017). It is built on "'a single basic idea—the idea of separation of powers.'" *TransUnion v. Ramirez*, 141 S. Ct. 2190, 2203 (2021) (quoting *Raines v. Byrd*, 521 U.S. 811, 820 (1997)). The doctrine of standing "confines the federal courts to a properly judicial role," *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016), and "serves to prevent the judicial process from being used to usurp the powers of the political branches." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013). It thus "ensur[es] that the Federal Judiciary respects 'the proper—and properly limited—role of the courts in a democratic society.'" *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006) (citations omitted). Federal courts thus have an "obligation" to assure themselves that litigants have Article III standing. *Id.*; *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 180 (2000). Notably, "standing is not dispensed in gross." *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996). Rather, plaintiffs must

demonstrate standing for each claim and each form of relief. *DaimlerChrysler Corp*, 547 U.S. at 352 (2006). This core prerequisite is "jurisdictional and not subject to waiver." *Lewis*, 518 U.S. at 348-49 n.1; *see also Doe v. Tangipahoa Parish Sch. Bd.*, 494 F.3d 494, 496 n.1 (5th Cir. 2007) (en banc) (same).

The "irreducible constitutional minimum of standing" has three elements. *Lujan*, 504 U.S. at 560. A plaintiff must show:

> **Injury-in-fact**: the actual or imminent invasion of a legally protected interest, which must be concrete and particularized;
>
> **Traceability**: a causal connection between the injury and the conduct by the defendant complained of; and
>
> **Redressability**: the likelihood that the injury will be redressed by a favorable decision.

Id. at 560-61.

In other words, to invoke a federal court's jurisdiction, a plaintiff "must satisfy the familiar tripartite test for Article III standing: (A) an injury in fact; (B) that's fairly traceable to the defendant's conduct; and (C) that's likely redressable by a favorable decision." *E.T. v. Paxton*, 41 F.4th 709, 714 (5th Cir. 2022) (citing *Lujan*, 504 U.S. at 560); *see also City of Austin v. Paxton*, 943 F.3d at 1002. "If the party invoking federal jurisdiction fails to establish any one of injury in fact, causation, or redressability, then federal courts cannot hear the suit." *Williams v. Parker*, 843 F.3d 617, 620 (5th Cir. 2016) (citing *Rivera v. Wyeth-Ayerst Labs.*, 283 F.3d at 315, 319 (5th Cir. 2002)).

In a pre-enforcement case like this one alleging violation of the First Amendment's Free Speech Clause, the plaintiff may demonstrate an injury in fact by showing that he "(1) has an intention to engage in a course of conduct arguably affected with a constitutional interest, (2) his intended future conduct is arguably proscribed by the law in question, and (3) the threat of future

enforcement of the challenged law is substantial." *Barilla v. City of Houston, Texas*, 13 F.4th 427, 431-32 (5th Cir. 2021) (cleaned up).

A. IFS has not pled an actionable injury in fact.

IFS's claims arise from its supposed desire to represent Chris Woolsey and the Texas Anti-Communist League in future litigation challenging the constitutionality of Texas Election Code section 259.001(a), based on hypothetical circumstances of Woolsey deciding to run for office and engaging in political advertising that violates section 259.001(a) as part of that campaign, and of the Texas Anti-Communist League also hypothetically engaging in such advertising for an unidentified purpose. Such allegations are a far cry from demonstrating that Woolsey or the Texas Anti-Communist League will actually initiate such litigation and, even if they did, that they would ask IFS to represent them on a pro bono basis, and that IFS would ultimately decline to represent them based on a fear of enforcement of EAO No. 580 or Texas Election Code Section 253.094.

Not only does IFS fail to allege an intent to bring a concrete lawsuit, but IFS also fails to set forth allegations that, if proven to be true, would demonstrate that the Texas Anti-Communist League could or would ever be a client of IFS in such a lawsuit. IFS admits that "[t]he League has not yet made any political contributions, campaign expenditure, direct campaign expenditure, or political expenditure." Doc. 1 ¶ 43.

Similarly, IFS does not allege that Woolsey—who was just elected to a two-year city council term in May 2023—is currently campaigning. IFS's own pleadings admit this and merely speculate that Woolsey may seek reelection in the future or might seek election for some other office. *Id*. at ¶ 43. As with the allegations about the Texas Anti-Communist League, IFS has not alleged that Woolsey has any legitimate intention to bring litigation challenging the constitutionality of a provision of the Texas Election Code, much less litigation in which IFS would represent him.

Likewise, IFS has not demonstrated any legitimate constitutional challenge that it or even a potential client could make against Texas Election Code Section 259.001(a), which requires that any political advertising sign designed to be seen from a road, other than a bumper sticker, must bear the government's warning message: "NOTICE: IT IS A VIOLATION OF STATE LAW (CHAPTERS 392 AND 393, TRANSPORTATION CODE), TO PLACE THIS SIGN IN THE RIGHT-OF-WAY OF A HIGHWAY." Doc. 1 ¶ 33. Similar laws regarding safety have been upheld as constitutional by the Supreme Court of Texas and other courts across the nation. *Tex. Dep't of Transp. v. Barber*, 111 S.W.3d 86, 99-100, 103-04 (Tex. 2003) (holding outdoor sign ordinance regulating election signs was content neutral because its purpose was to beautify and improve safety on roadways, not to prevent advertisement of a particular topic, and was "sufficiently narrowly tailored to serve a substantial state interest" because it "contains exemptions to accommodate as much speech as possible and still accomplish the goals of preserving the landscape and promoting travel safety"); *see also, e.g.*, *Wheeler v. Commissioner of Highways, Com. of Ky.*, 822 F.2d 586 (6th Cir. 1987) (holding, *inter alia*, that the Kentucky Billboard Act contained content-neutral place and manner restrictions, that the restrictions were narrowly tailored to achieve the State's interests, and left open ample alternative channels for communication of the information).

IFS failed to allege sufficient facts that, if true, would demonstrate a genuine intent to represent legitimate parties in a legitimate lawsuit. Hence, IFS fails to demonstrate that it has suffered any injury in fact arising out of its alleged inability to represent Woolsey or the Texas Anti-Communist League in such hypothetical lawsuits. *See Barilla v. City of Houston, Texas*, 13 F.4th 427, 432 (5th Cir. 2021).

B. Any injury allegedly suffered by IFS is not traceable to any conduct by the Commissioners in their official or individual capacities.

For purposes of standing, IFS must also demonstrate "traceability," *i.e.*, "a causal connection between the injury and the conduct by the defendant complained of." *Lujan*, 504 U.S. at 560. IFS cannot trace any alleged injury to any conduct of the Commissioners in voting on or issuing, or of the Executive Director in briefing the Commission about, EAO No. 580. As discussed above, EAO No. 580 does not actually "enforce" anything against IFS. It is merely an interpretation of a provision of the Texas Election Code, as requested by IFS. Hence, IFS has no standing against these Defendants in their official or individual capacities for such claims. *See High v. Karbhari*, 774 F. App'x 180, 183 (5th Cir. 2019) (dismissing claims against defendants in individual capacities for lack of standing based on failure to establish injury traceable to misconduct by specific defendants in such capacity).

C. IFS has failed to allege a redressable injury related to EAO No. 580.

For purposes of standing, IFS must also demonstrate "redressability" *i.e.*, "the likelihood that the injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 561. Even if IFS could establish the other elements, IFS still lacks standing to seek relief related to EAO No. 580 because there is no action the Court could take regarding the advisory opinion that would redress Plaintiff's supposed injury. *DaimlerChrysler Corp.*, 547 U.S. at 352 (holding that plaintiff must demonstrate standing for each form of relief sought). Because EAO No. 580 does not enforce anything, an injunction prohibiting its enforcement or a declaration that it is unenforceable would not redress any alleged injury suffered by IFS as pled in this lawsuit. Thus, IFS lacks standing.

IV. All of IFS's claims should be dismissed because they are not ripe.

Ripeness is also an essential component of federal subject-matter jurisdiction and is properly addressed under Rule 12(b)(1). *In re Jillian Morrison, L.L.C.*, 482 F. App'x 872, 875

(5th Cir. 2012). "A claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Texas v. United States*, 523 U.S. 296, 300 (1998) (quoting *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580-81 (1985)). The requirement of ripeness "ensures that federal courts do not decide disputes that are 'premature or speculative.'" *DM Arbor Court, Ltd v. City of Houston*, 988 F.3d 215, 218 (5th Cir. 2015) (quoting *Shields v. Norton*, 289 F.3d 832, 835 (5th Cir. 2002)). "A case becomes ripe when it 'would not benefit from any further factual development and when the court would be in no better position to adjudicate the issues in the future than it is now.'" *Id.* (quoting *Pearson v. Holder*, 624 F.3d 682 (5th Cir. 2010)). In evaluating ripeness, the "key considerations are 'the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.'" *Choice Inc. of Tex. v. Greenstein*, 691 F.3d 710, 715 (5th Cir. 2012).

A. Withholding court consideration will not cause IFS hardship.

As demonstrated above, IFS does not adequately plead an intention to represent Woolsey or the Texas Anti-Communist League in anything other than future, hypothetical litigation that may arise from currently non-existent facts. Additionally, as demonstrated above, EAO No. 580 does not actually enforce nor create a threat of enforcement of Texas Election Code section 253.094 against anyone, much less IFS. At this point, IFS's claims of harm are speculative, hypothetical, and uncertain. Thus, the Court withholding consideration of this case does not prolong any hardship being suffered by IFS. *Choice Inc. of Tex. v. Greenstein*, 691 F.3d 710, 715 (5th Cir. 2012).

B. The issues are not fit for judicial decision.

Because there are no allegations regarding actions IFS took or would legitimately take, the issues in this case are not fit for judicial decision. Instead, IFS invites the Court to entertain a matter that only involves, at the most, "abstract disagreements." *Abbott Labs. v. Gardner*, 387

U.S. 136, 148 (1967). As a result, IFS has failed to present a controversy that is ripe for judicial review.

This case has little factual foundation. Even assuming IFS actually intends to represent Woolsey and the Texas Anti-Communist League in some future litigation, the only facts before the Court are the existence of Texas Election Code section 253.094 (Doc. 1 ¶ 9) and EAO No. 580 (Doc. 1 ¶ 27), and IFS's supposed desire to represent Woolsey and the Texas Anti-Communist League in future litigation concerning Texas Election Code section 259.001(a) (Doc. 1 ¶¶ 38, 46, 48). There are no factual allegations that, if true, would demonstrate that IFS has taken any steps toward actually representing Woolsey or the Texas Anti-Communist League; that any sworn complaint has been filed regarding such actions by IFS (TEX. GOV'T CODE § 571.122); that any preliminary review of such a complaint has taken place (TEX. GOV'T CODE §§ 571.124, 571.1242); that a preliminary review hearing has been conducted regarding the complaint (TEX. GOV'T CODE §§ 571.125, 571.126); that a formal hearing has been had regarding the complaint (TEX. GOV'T CODE § 571.131); or that any final order has been issued regarding the complaint (TEX. GOV'T CODE § 571.132). Not a single aspect of actual enforcement of the challenged law, in the manner alleged by IFS to be unconstitutional, is alleged to have occurred. This case currently rests on nothing more than IFS's disagreement with the Commission's advisory opinion and hypothetical possibilities. *DM Arbor Court, Ltd*, 988 F.3d at 218. As the facts stand, IFS's claims are contingent upon "future events that may not occur as anticipated, or indeed may not occur at all." *Thomas*, 473 U.S. at 580-81. Thus, these claims are not ripe for judicial review and should be dismissed. *Texas v. United States*, 523 U.S. at 300.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court dismiss IFS's claims for lack of jurisdiction under FED. R. CIV. P. 12(b)(1) because the claims are barred by sovereign immunity, qualified immunity, and a lack of standing or ripeness; and for failure to plead claims on which relief can be granted against the Defendants in their individual capacities under FED. R. CIV. P. 12(b)(6). Defendants further request any additional relief to which they may be entitled.

Respectfully submitted,

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ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF SERVICE

I hereby certify that on September 15, 2023, a true and correct copy of the foregoing document was served on all counsel of record by filing with the Court's CM/ECF system.

/s/ Eric J.R. Nichols
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