IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

INSTITUTE FOR FREE SPEECH, a nonprofit corporation and public interest law firm, Plaintiff, v. J.R. JOHNSON, in his official and individual capacities as Executive Director of the Texas Ethics Commission; MARY KENNEDY, CHRIS FLOOD, and RICHARD SCHMIDT in their official capacities as commissioners of the Texas Ethics Commission; and RANDALL ERBEN, CHAD CRAYCRAFT, PATRICK MIZELL, JOSEPH SLOVACEK, and STEVEN WOLENS, in their individual and official capacities as commissioners of the Texas Ethics Commission; Defendants.	Cause No. 4:23-cv-00808-P

PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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Introduction

The Texas Ethics Commission's ("TEC" or "commission") regulatory regime treats pro bono legal services in defense of constitutional rights as a crime—at least, if the firm delivering these services happens to be registered as a corporation, rather than a partnership or limited liability company. The TEC's regime also insulates the commission's own actions from constitutional scrutiny and threatens public-interest firms who happen to be organized as corporations with enormous financial liability or criminal prosecution if they challenge the TEC's policies in almost the only way they can: by bringing suits with standing dependent on their client's status as a candidate or political committee. Public-interest law firms repeatedly warned the commission that its regime violates the First Amendment. But the commission ignored these warnings.

The Institute for Free Speech ("IFS") has standing to pursue its pre-enforcement challenge to the commission's regulatory regime because the substantial threat of future enforcement constitutes an injury in fact traceable to the TEC and redressable by this court. Moreover, this case falls within the *Ex parte Young* exception to sovereign immunity. And the TEC's executive director and five of its commissioners are individually liable for helping to create a regime that disregards clearly established rights. This Court should allow IFS's lawsuit to proceed.

Facts and Background

The TEC, acting through its executive director and commissioners, is responsible for administering and enforcing the Texas Election Code, including provisions concerning political

advertising, contributions, and expenditures. ECF No. 1, ¶¶ 8-12; *see also* TEX. GOV. CODE § 571.061. The commission has the authority, among other things, to initiate civil enforcement actions for violations of the Texas Election Code, refer criminal prosecutions, disclose confidential information to a prosecutor, issue compliance orders, and impose civil fines. *Id.* § 571.171(a), (c), § 571.172(2), § 571.173. On receipt of a sworn complaint, the executive director can also unilaterally refer violations of Chapter 36 or 39 of the Penal Code to a criminal prosecutor and reveal confidential information to that prosecutor, without waiting for the commission. *Id.*, § 571.171(b).

The Texas Election Code declares it a felony for corporations to make political contributions, including in-kind contributions of services, to candidates and political committees. TEX. ELEC. CODE § 251.001(2), (21), § 253.094. Corporations can also be held civilly liable "in the amount of triple the value of the unlawful contribution or expenditure." *Id.* § 253.133. A political contribution, if offered "pursuant to an express agreement to take or withhold a specific exercise of official discretion," is a crime under Chapter 36 of the Penal Code—and the executive director can refer alleged violations for prosecution on his own. TEX. PENAL CODE § 36.02(a)(4); *cf.* TEX. GOV. CODE § 571.171(b).

IFS is a nonprofit corporation that supplies pro bono legal services to clients who litigate against the government to vindicate and expand First Amendment rights, especially the right to political expression. ECF No. 1, ¶¶ 3-4. Repeatedly, IFS has foregone representing a Texas candidate or political committee for the purpose of challenging the interpretation or

constitutionality of a Texas law or regulation in court, out of fear that its pro bono legal representation might violate the state's ban on in-kind corporate contributions. *Id.*, ¶¶ 13-16. On January 18, 2022, IFS requested an advisory opinion from the commission to resolve this question. *Id.*, ¶¶ 17-18.

The TEC has the power to issue advisory opinions answering legal questions about the Texas Election Code. *See* TEX. GOV. CODE § 571.091(a)(7). These advisory opinions are legally binding documents, that create an affirmative defense in any later criminal prosecution or civil litigation, against the government or a private party. *Id.*, § 571.097(a); *cf.* TEX. ELEC. CODE § 253.131 (establishing a private right of action against corporations that illegally contribute to candidates or political committees).

On December 14, 2022, after several meetings and public comments on the issue, the TEC adopted and published Ethics Advisory Opinion No. 580 ("EAO No. 580") by a 5-3 vote. ECF No. 1, ¶¶ 19-27. Before the vote, TEC's executive director briefed the commission on the proposed advisory opinion, advocating for its adoption. *Id.*, ¶¶ 5, 22-23. The opinion advised that the TEC viewed a corporation's pro bono legal services as in-kind political contributions, prohibited by the Texas Election Code. *Id.*, ¶ 28.

Chris Woolsey, a Texas candidate, and the Texas Anti-Communist League, a Texas political committee, both would like to mount a constitutional challenge to TEX. ELEC. CODE § 259.001(a), which they view as compelling speech, and would gladly accept IFS's free representation, if offered. *Id.*, ¶¶ 30-46. IFS would like to represent Chris Woolsey and the Texas Anti-Communist

League in that challenge and also other Texas candidates and committees in other future cases. *Id.*, ¶¶ 47-49. However, the commission's regulatory regime has deterred IFS from offering or providing legal services to any Texas candidate or political committee. *Id.*, ¶¶ 29, 50-51.

Argument

I. IFS has standing to mount a pre-enforcement challenge against the TEC's threatened enforcement of the Texas Election Code

A. IFS suffered an injury in fact due the substantial threat of future enforcement

IFS has standing because its lawsuit is a typical pre-enforcement challenge to a regulatory regime that burdens First Amendment rights. "Article III standing, at its irreducible constitutional minimum," requires plaintiffs to demonstrate that "they have suffered an injury in fact; the injury is fairly traceable to the defendant's actions; and the injury will likely be redressed by a favorable decision." *Pub. Citizen Inc. v. Bomer*, 274 F.3d 212, 217 (5th Cir. 2001) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)) (cleaned up). An injury in fact is "an invasion of a legally protected interest that is concrete and particularized and actual or imminent, not conjectural or hypothetical." *E.T. v. Paxton*, 41 F.4th 709, 716 (5th Cir. 2022) (quoting *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339 (2016)) (cleaned up). Both the Supreme Court and Fifth Circuit have recognized standing to bring pre-enforcement challenges to speech restrictions where a credible threat of enforcement exists. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158-61 (2014) (collecting Supreme Court cases); *Speech First, Inc. v. Fenves*, 979 F.3d 319, 330-31, 335 (5th Cir. 2020) ("This court has repeatedly held, in the pre-enforcement context, that chilling a

plaintiff's speech is a constitutional harm adequate to satisfy the injury-in-fact requirement") (cleaned up).

IFS challenges TEX. ELEC. CODE § 253.094 and the commission's interpretation of that statute, which applies the corporate contribution ban to the provision of pro bono legal services. *See* ECF No. 1, ¶¶ 58, 62, 68, 75. "In pre-enforcement cases alleging a violation of the First Amendment's Free Speech Clause, the Supreme Court has recognized that chilled speech or self-censorship is an injury sufficient to confer standing" so that plaintiffs "need not have experienced 'an actual arrest, prosecution, or other enforcement action' to establish standing." *Barilla v. City of Houston*, 13 F.4th 427, 431-32 (5th Cir. 2021) (quoting *Driehaus*, 573 U.S. at 158) (internal citations omitted).

Instead, a plaintiff only must show 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 policy in question, and (3) the threat of future enforcement of the challenged policies is substantial." *Speech First*, 979 F.3d at 330 (cleaned up); *see also Paxton v. Restaino*, No. 4:22-cv-0143-P, 2023 U.S. Dist. LEXIS 123895, at *5 (N.D. Tex. July 18, 2023) (plaintiffs intending to engage in proscribed conduct may challenge the law if they allege prosecution likely or threatened). "[W]hen dealing with pre-enforcement challenges to recently enacted (or, at least, non-moribund) statutes that facially restrict expressive activity by the class to which the plaintiff belongs, courts will assume a credible threat of prosecution in the absence of compelling contrary evidence," as "threat is latent in the existence of the statute." *Speech First*, 979 F.3d at 335 (citations omitted); *see also Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 302

(1979) (concluding that where "the State has not disavowed any intention of invoking" the "allegedly unconstitutional statute," plaintiffs are "not without some reason in fearing prosecution").

"[W]hen an agency issued an advisory opinion on the relevant statute's meaning," that opinion is evidence of "a credible threat of enforcement." *Joint Heirs Fellowship Church v. Akin*, 629 F. App'x 627, 631 (5th Cir. 2015); *see also Center for Individual Freedom v. Carmouche*, 449 F.3d 655, 660-61 (5th Cir. 2006) (agency's "advisory letter" interpreting statute created "a nonspeculative risk" that the agency would prosecute willful disobedience to letter and "constitutes sufficient injury to confer standing to challenge the constitutionality of [the statute] on its face").

IFS pled a classic pre-enforcement case. First, IFS intends to represent a specific Texas non-federal candidate and political committee in a pro bono lawsuit challenging another TEC speech regulation but is unable to act on its intent because of the TEC's regulatory regime. ECF No. 1, ¶¶ 48-51, 55-56, 61. Pro bono legal representation is a mode of expression and association protected by the First and Fourteenth Amendments. *See NAACP v. Button*, 371 U.S. 415, 428-29 (1963); *see also In re Primus*, 436 U.S. 412, 432 (1978); ECF No. 21, at 9-11, 14. Woolsey intends to run for re-election and raise money for that purpose, ECF No. 1, ¶ 31, and the League similarly plans to be active in future Texas elections, *id.*, ¶¶ 43-44. They qualify as a "candidate" and a "political committee" respectively under Texas law and thus already have an obligation to obey the state's election laws. *See* TEX. ELEC. CODE § 251.001(1), (12), (14); ECF No. 1, ¶¶ 31-32, 42-43.

Texas's notice requirement for signs, for instance, applies to all political advertising signs, displayed at any time, including those Woolsey and the League intend to commission for production. TEX. ELEC. CODE § 259.001(a). In light of the Supreme Court's decision in *Reed v. Town of Gilbert*, 576 U.S. 155 (2015), older lower court precedents upholding Section 259.001(a) and similar laws as content neutral are now legally suspect. *Contra* ECF No. 19 at 15. As a result, IFS, with Woolsey and the League as putative clients, intends to bring a nonfrivolous, viable challenge to Section 259.001(a), but for the TEC's regulatory regime. ECF No. 1, ¶¶ 37-38, 45-46, 48-51.

Second, IFS's intended future conduct violates Section 253.094, as interpreted by EAO No. 580. Defendants admit this. ECF No. 19 at 2 ("pro bono legal services fit within the definition of an in-kind corporate contribution under the Texas Election Code.").

Finally, there is a substantial threat that the commission would enforce Section 253.094, as interpreted in EAO No. 580, against IFS, if IFS carried out its intention of representing Woolsey and the Texas Anti-Communist League. Section 253.094 is not moribund. Both the TEC and private citizens have sued corporations that supposedly violated this law. *See, e.g.*, *Sylvester v. Tex. Ass'n of Bus.*, 453 S.W.3d 519, 522 (Tex. App. 2014) (unsuccessful candidates sue nonprofit over mailers and volunteer services); *Cook v. Tom Brown Ministries*, 385 S.W.3d 592, 595 (Tex. App. 2012) (elected candidate sues nonprofit over recall petition); *Tex. Mun. Police Assoc. v. Tex. Ethics Comm'n*, No. A-08-CA-741-SS, 2010 U.S. Dist. LEXIS 145554, at *2 (W.D. Tex. Oct. 28, 2010)

(TEC investigated and concluded nonprofit's internet endorsement illegal); *Ex parte Ellis*, 279 S.W.3d 1, 5 (Tex. App. 2008) (accused indicted for violating Section 253.094).

The commission adopted EAO No. 580 less than a year ago, interpreting Section 253.094 as expressly restricting pro bono legal services by IFS and other corporations as a class. Under circuit precedent, statutes that explicitly restrict expressive activity by the class to which the plaintiff belongs create a presumption of a credible enforcement threat. *See Speech First*, 979 F.3d at 335. TEC has offered no compelling evidence to rebut this presumption. *Cf. Turtle Island Foods, S.P.C. v. Strain*, 65 F.4th 211, 218 (5th Cir. 2023) ("we assume a credible prosecutorial threat absent compelling evidence to the contrary.").

IFS's injury is even more concrete and imminent than those of successful plaintiffs in recent Fifth Circuit cases. In *Speech First*, for instance, the circuit court reversed the lower court and found an injury, when three members of a student group stated their desire to debate other university students about controversial topics like immigration and gun rights. *Speech First*, 979 F.3d at 327, 331-32. Even though no students had been disciplined for such speech, the university has rescinded parts of its policies, and the university's president avowed that the school would not enforce its remaining policies in way contrary to the First Amendment, the court held that the threat of enforcement credible. *Id.* at 328-29, 336-37. Indeed, the court allowed the student group's facial challenge, despite uncontroverted evidence that the university would not penalize the plaintiffs' intended conduct. *Id.* at 336.

Likewise, in *Ostrewich v. Tatum*, the Fifth Circuit found an injury in fact simply because state electioneering rules chilled the plaintiff's right to wear clothing with expressive logos at polling places, even though the state had not prosecuted a voter for over a decade. *See* 72 F.4th 94, 99, 102 & *n.5 (5th Cir. 2023). In *Barilla*, a sidewalk musician had standing to challenge the city's anti-busking ordinances, despite never even having been threatened with a citation—let alone punished—because the ordinances remained in force and were not moribund. 13 F.4th at 430, 433.

IFS has more evidence for standing than the plaintiffs in all these cases. Not only are IFS's activities chilled by a non-moribund statute that expressly restricts the provision of pro bono legal services to Texas non-federal candidates and political committees by members of IFS's class (nonprofit corporations), but also the TEC recently issued its opinion confirming that IFS's intended actions would be illegal. IFS, therefore, has pleaded facts in its complaint that establish an injury in the pre-enforcement context.

B. IFS's injury is traceable to the defendants and can be redressed by the requested relief

The Defendants enforce the TEC's regulatory regime, making IFS's injury both traceable and redressable. The causation prong of standing requires "a fairly traceable connection between a plaintiff's injury and the complained-of conduct of the defendant." *Restaino*, 2023 U.S. Dist. LEXIS 123895, at *4 (citing *Simon v. E. Ky. Welfare Rts. Org.*, 426 U.S. 26, 41-42 (1976)). "The causation element does not require a party to establish proximate causation." *LULAC v. City of Boerne*, 659 F.3d 421, 431 (5th Cir. 2011). For the redressability prong, plaintiffs must allege facts

from which it reasonably could be inferred that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 561 (internal quotation omitted). According to the TEC, EAO No. 580 does not enforce anything, so this opinion did not cause IFS's injury and enjoining it would not bring IFS any relief. ECF No. 19 at 16.

The commission misreads IFS's complaint. IFS expressly requests injunctive and declaratory relief, preventing TEC "from enforcing any part of Tex. Elec. Code § 253.094 or EAO No. 580" as applied "against IFS, or any other corporate legal-service provider, for providing pro bono legal services." ECF No. 1, at 19. IFS never asks this Court to enjoin an advisory opinion alone; it asks the Court to enjoin TEC's unconstitutional practice of treating pro bono corporate legal services as a violation of TEX. ELEC. CODE § 253.094. *See id.*, ¶¶ 58, 62, 68, 75. At a minimum, the advisory opinion is conclusive evidence of how the commission reads TEX. ELEC. CODE § 253.094 and how Defendants would apply it to IFS's intended activity.

TEC's executive director and commissioners are duty-bound to administer and enforce the Texas Election Code; they have established a regulatory regime for those purposes. *See id.*, ¶ 50-51; *see also* TEX. GOV. CODE § 571.061. The advisory opinion is evidence of the Commission's unconstitutional regulatory regime—it is not the whole regime. *See* ECF No. 1, ¶ 56 ("The Commission's interpretation of Tex. Elec. Code § 253.094, including EAO No. 580, is unconstitutional"). "The purpose of a TEC advisory opinion is not to make specified conduct illegal" but rather to declare which actions the Commission understands to be already legal or

illegal under state statute. *Tex. Ethics Comm'n v. Goodman*, No. 2-09-094-CV, 2010 Tex. App. LEXIS 607, at *9 (Tex. App. Jan. 28, 2010).

In addition to seeking as-applied relief, IFS argues that Section 253.094 itself is facial overbroad and preempted by 42 U.S.C. § 1983. ECF No. 1, ¶¶ 56, 65, 73-74. IFS's injury, thus, is traceably caused both by the statute itself and by TEC's larger regulatory regime. This Court could redress IFS's injury, for example, by enjoining the Defendants from enforcing Section 253.094 "against any person," by enjoining it from applying Section 253.094 to nonprofit corporations "providing pro bono services" in the public interest, or by a declaratory judgment of equivalent scope. *Id.*, at 19.

In addition to forward-looking injunctive and declaratory relief, IFS also seeks nominal damages from TEC's executive director and each of the five commissioners who voted for the advisory opinion, to compensate IFS for the past harm of self-censorship. *See id.*, at 20. "[A] request for nominal damages satisfies the redressability element of standing where a plaintiff's claim is based on a completed violation of a legal right," though "[i]t remains for the plaintiff to establish the other elements of standing," such as traceability. *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 802 (2021). "[A] plaintiff must demonstrate standing separately for each form of relief sought." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc*., 528 U.S. 167, 185, (2000). Accordingly, to proceed against a defendant in the individual capacity, plaintiffs must allege facts tending to establish that his injuries are fairly traceable to misconduct engaged in by each specific defendant. *High v. Karbhari*, 774 F. App'x 180, 183 (5th Cir. 2019).

As IFS's complaint stated, the five members of the commission sued individually all voted in favor of EAO No. 580, despite the opposition of IFS, other nonprofits, and three dissenting members of the commission. ECF No. 1, ¶¶ 7, 19-27. TEC's director advocated for adoption of the advisory opinion and briefed the commission on why, in his judgment, concerns over First Amendment violations were inapplicable. *Id.*, ¶¶ 5, 22-23. These six defendants personally played an active role in formulating and justifying TEC's unconstitutional regime, and IFS's injury can be fairly traced to their conduct, which prevented IFS taking on its proposed legal representations, and still does so today.

Indeed, the level of these six defendants' personal involvement contrasts sharply with the comparative non-involvement of the high-level university administrators who were defendants in *High v. Karbhari*. *Contra* ECF No. 19 at 16. *High* held that the plaintiff failed to prove traceability, because he never even named two of the three defendants nor explained how they personally caused his injury. 774 F. App'x at 183. The final defendant's only action was assigning someone else to investigate the plaintiff's unsuccessful disability complaint, so the plaintiff's injury "depend[ed] on the decisions of third parties not before the court." *Id.*

The executive director and five commissioners, in comparison, were the very people whose decisions set up the unconstitutional regulatory regime that stops IFS from associating, speaking, and petitioning on behalf of itself, Chris Woolsey, and the League. When given an opportunity to state that the TEC would not enforce the corporate contribution ban against IFS, the individual-

capacity defendants instead doubled down and affirmed that their regime applies to IFS's intended activity.

C. IFS's pre-enforcement challenge is ripe because IFS's harm is ongoing

IFS's claim is ripe today and it need not wait until the TEC enforces its regime against IFS. "Ripeness is a justiciability doctrine designed to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements" until a "decision has been formalized and its effects felt in a concrete way by the challenging parties." *Nat'l Park Hosp. Ass'n v. Dep't of Interi*or, 538 U.S. 803, 807-08 (2003) (cleaned up). Courts determine ripeness by examining "[t]he fitness of the issues for judicial decision" and "the hardship to the parties of withholding court consideration." *Id.* at 809; *see also Umphress v. Hall*, 500 F. Supp. 3d 553, 561 (N.D. Tex. 2020) ("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.") (cleaned up). "[S]tanding in pre-enforcement cases . . . tracks closely with ripeness." *Walmart Inc. v. United States DOJ*, 21 F.4th 300, 313 (5th Cir. 2021).

IFS's claims are ripe because the TEC's regime prevents IFS from associating, speaking, and petition today, and that harm is ongoing. ECF No. 1, ¶¶ 55-58, 61-62. 67-68. IFS brings a classic pre-enforcement challenge, and those are "generally ripe if the questions are purely legal ones, and not if further factual development is required." *Olivier v. City of Brandon*, No. 22-60566, 2023 U.S. App. LEXIS 22506, at *6-7 (5th Cir. Aug. 25, 2023) (internal quotation marks omitted) (noting that plaintiffs must also show hardship). "[W]here a regulation requires an immediate and

significant change in the plaintiffs' conduct of their affairs with serious penalties attached to noncompliance, hardship has been demonstrated." *Roark & Hardee LP v. City of Austin*, 522 F.3d 533, 545 (5th Cir. 2008) (citation omitted).

IFS's inability to represent Texas clients right now is precisely the hardship that makes this pre-enforcement challenge ripe. IFS is making a purely legal challenge to Section 253.094 and EAO No. 580, which does not need any further factual development. The threat of enforcement is presently causing IFS to self-censor. ECF No. 1, ¶¶ 16, 29, 50-51. This is an immediate hardship, not contingent on any future events.

Moreover, IFS is not required to violate the TEC's regime and wait to be prosecuted before challenging it. Defendants maintain that this claim is not ripe because IFS has not "taken any steps toward actually representing Woolsey or the Texas Anti-Communist League," such as filing a complaint or appearing for a client at a hearing, ECF No. 19 at 18, but representing candidates or political committees presently carries the risk of criminal prosecution, which is exactly why IFS has brought a pre-enforcement challenge.

II. The *Ex parte Young* exception applies because defendants have a particular duty to enforce Section 253.094

A. State officials possessing a mere scintilla of enforcement power with respect to the challenged law are subject to suits for injunctive and declaratory relief

A lawsuit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office. *Culbertson v. Lykos*, 790 F.3d 608, 623 (5th Cir. 2015) (citing *Will v. Mich. Dep't. of State Police*, 491 U.S. 58, 71 (1989)). The *Ex parte Young*

exception "allows private parties to bring suits for injunctive or declaratory relief against individual state officials" in their official capacity for ongoing violation of federal law, if those officials "by virtue of office" have "some connection with the enforcement of the challenged act." *City of Austin v. Paxton,* 943 F.3d 993, 997 (5th Cir. 2019) (cleaned up).

To determine whether the *Ex parte Young* exception applies, a court does not analyze the merits of the claim but needs only to conduct a straightforward inquiry into whether the complaint alleges an ongoing violation of federal law. *Id.* at 998 (citing *Verizon Md., Inc. v. Pub. Serv. Comm'n*, 535 U.S. 635, 646 (2002)). IFS's complaint easily meets this standard. *See* ECF No. 1, ¶¶ 20-21, 27-28, 50-51, 67, 72-73. Moreover, Defendants do not have viable arguments that they lack an enforcement connection to the regulatory regime that IFS now challenges.

To show sufficient enforcement connection, a state officer must have "not merely the general duty to see that the laws of the state are implemented, but the particular duty to enforce the statute in question and a demonstrated willingness to exercise that duty." *Tex. Democratic Party v. Abbott*, 978 F.3d 168, 181 (5th Cir. 2020) (quoting *Morris v. Livingston*, 739 F.3d 740, 746 (5th Cir. 2014)). A state official only needs "a mere scintilla of enforcement" with respect to the challenged law to satisfy the connection requirement. *Jackson v. Wright*, No. 22-40059, 2023 U.S. App. LEXIS 24670, at *7 (5th Cir. Sep. 15, 2023) (cleaned up).

"Enforcement" for *Ex parte Young* purposes means "compulsion or constraint." *Richardson v. Flores*, 28 F.4th 649, 655 (5th Cir. 2022) (quotation omitted). Offering advice, guidance, or interpretive assistance, by itself, does not qualify. *Id.*; *see also Tex. All. for Retired Ams. v. Scott*,

28 F.4th 669, 673 (5th Cir. 2022) (duty to supply information and design forms not enforcement if no one is "required to use" this material). But direct governing authority over lower officials who commit the actual violation does. *Jackson*, 2023 U.S. App. LEXIS 24670, at *9. "Caselaw shows that a finding of standing tends toward a finding that the *Young* exception applies to the state officials in question" because if "a threatened injury becomes sufficiently imminent and particularized to confer Article III standing," then "the official has engaged in enough compulsion or constraint to apply the *Young* exception." *City of Austin*, 943 F.3d at 1002.

B. Defendants all have a particular duty to enforce the Texas Election Code, including Section 253.094

TEC contends that the *Ex parte Young* exception cannot operate here, because TEC took no actions besides issuing an advisory opinion and, as a matter of law, an advisory opinion cannot constitute enforcement or the threat of enforcement. ECF No. 19 at 5-8. Even if IFS's claims were based solely on the adoption of EAO No. 580 (they are not), TEC cites no case law for this novel legal conclusion. *See* ECF No. 19 at 7 (putatively deriving this "matter of plain law" from the text of TEX. GOV. CODE § 571.091 directly).

In truth, the Fifth Circuit repeatedly has allowed nonprofits to sue the Executive Director and members of the TEC in their official capacity for injunctive and declaratory relief. *See, e.g.*, *Catholic Leadership Coal. of Tex. v. Reisman*, 764 F.3d 409, 419, 445 (5th Cir. 2014) (upholding as-applied Section 253.094(a)'s ban on in-kind donation of email contact list); *Texans for Free Enter. v. Tex. Ethics Comm'n*, 732 F.3d 535, 536 (5th Cir. 2013) (enjoining preliminarily the

enforcement of Section 253.094); *Tex. Mun. Police Assoc.*, 2010 U.S. Dist. LEXIS 145554, at *3, *28 (severing unconstitutional provisions from the remainder of Section 253.094). Sovereign immunity impeded none of these cases, for they rested upon the commission's and its executive director's particular duties to administer and enforce the Texas Election Code. *See* TEX. GOV. CODE § 571.061, § 571.171.

Furthermore, IFS's claims are based on the commissioners' and the director's role establishing the TEC's entire regulatory regime, rather than upon EAO No. 580 alone. These officials are "statutorily tasked with enforcing" Section 253.094 and the rest of the state's election code. *See City of Austin*, 943 F.3d at 998. State law gives the commission and its director the authority to enforce election laws by initiating civil enforcement actions, referring criminal prosecutions, disclosing confidential information, issuing compliance orders, and imposing fines. TEX. GOV. CODE § 571.171, § 571.172(2), § 571.173. The commission has proved its willingness to exercise these powers. *See, e.g.*, *Sullivan v. Tex. Ethics Comm'n*, 551 S.W.3d 848, 851 (Tex. App. 2018); *Tex. Mun. Police Assoc.*, 2010 U.S. Dist. LEXIS 145554, at *2; *Goodman*, 2010 Tex. App. LEXIS 607, at *7. This is far more than a mere scintilla of enforcement power, and the threat of this power compels and constrains IFS and other legal nonprofit corporations from exercising their First Amendment rights.

Likewise, the TEC's advisory opinion is much weightier than mere advice or interpretive assistance. Receiving a favorable advisory opinion essentially would have guaranteed that neither the TEC nor private parties would enforce Section 253.094 against IFS. *Goodman*, 2010 Tex. App.

LEXIS 607, at *9, *12 ("the stated purpose" of this legally effective document is to create an affirmative defense).

In the injury-in-fact context, the Fifth Circuit has declared that an agency's unfavorable advisory opinion can constitute a threat of enforcement sufficient for standing. *Carmouche*, 449 F.3d at 660-61; *see also Joint Heirs Fellowship*, 629 F. App'x at 631 (5th Cir. 2015). Given the similarities between standing analysis and *Ex parte Young* analysis, this logic should apply to the *Young* exception too.

The commissioners and the director, by virtue of their office, all have sufficient connection with the enforcement of Section 253.094 to fall with the *Ex parte Young* exception to sovereign immunity.

III. IFS's individual-capacity claims are plausible and not barred by qualified immunity

A. The individual-capacity defendants were directly involved in the past injury giving rise to nominal damages

Qualified immunity does not apply to IFS's claims for injunctive or declaratory relief, but could theoretically apply to its claim for nominal damages. *Singleton v. Cannizzaro*, 956 F.3d 773, 778 n.3 (5th Cir. 2020) (citations omitted). Defendants assert that the executive director and the five commissioners who voted in favor of EAO No. 580 cannot be individually liable for establishing unconstitutional policies and practices, both because they acted within the normal scope of their official roles at the commission and because they are protected by qualified immunity. ECF No. 19 at 8-11.

Government officials are liable for damages in their individual capacity pursuant to 42 U.S.C. § 1983 if they act under the color of state law to violate a right secured by the Constitution or laws of the United States. *Parker v. LeBlanc*, 73 F.4th 400, 404 (5th Cir. 2023). Qualified immunity does not shield officials when their conduct violates clearly established statutory or constitutional rights. *Ramirez v. Guadarrama*, 3 F.4th 129, 133 (5th Cir. 2021). For a right to be clearly established, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right" at the time of the conduct. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). The unlawfulness of the official's actions must have been readily apparent from sufficiently similar situations, but it is not necessary that the defendant's exact act previously has been declared illegal. *Brown v. Callahan*, 623 F.3d 249, 253 (5th Cir. 2010).

TEC's first contention is a non-sequitur. IFS does not need to plead that the individual capacity defendants acted "outside the scope of their authority." *Contra* ECF No. 19 at 9. If IFS did so, it would arguably be alleging that defendants failed to act under color of state law, which would undermine the applicability of 42 U.S.C. § 1983. Moreover, no state can empower its officials to commit unconstitutional actions with impunity as long as they act in the normal scope of their duties. *Cf. People for the Ethical Treatment of Animals, Inc. v. Welsh*, No. 4:20-cv-02913, 2023 U.S. Dist. LEXIS 155069, at *8 (S.D. Tex. Sep. 1, 2023) (explaining that *Ex parte Young* depends on "the fiction" that "because a sovereign state cannot commit an unconstitutional act, a state official enforcing an unconstitutional act is not acting for the sovereign state"). A defendant acts

"under color of state law" pursuant to Section 1983 when exercising power "possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." *Gomez v. Galman*, 18 F.4th 769, 775-76 (5th Cir. 2021) (quoting *West v. Atkins*, 487 U.S. 42, 48 (1988)); *see also* Fifth Circuit Pattern Jury Instructions (Civil Cases) (2020 version), 10.1 ("Plaintiff [name] must prove by a preponderance of the evidence that: 1. Defendant [name] committed an act that violated the constitutional right[s] Plaintiff [name] claims [was] [were] violated…"). Simply put, proving individual liability does not require IFS to prove that any defendant was acting outside the course-and-scope of his or her duty. Quite to the contrary. *See id.,* 10.2 (Under Color of Law: "Under color" of state law means under the pretense of law. An officer's acts while performing [his/her] official duties are done "under color" of state law whether those acts are in line with [his/her] authority or overstep such authority.").

While wrongs committed by an official on a frolic or detour from his duties may not be cognizable under Section 1983, no one is asserting that Defendants acted here for wholly selfish reasons—nor is that required for IFS to prevail. *See, e.g.*, *Townsend v. Moya*, 291 F.3d 859, 861-62 (5th Cir. 2002) (guard stabbed inmate while engaging in unofficial horseplay); *Luce v. Town of Campbell*, 872 F.3d 512, 514 (7th Cir. 2017) (police chief's vigilante justice "a lark and a frolic"); *Kach v. Hose*, 589 F.3d 626, 649 (3d Cir. 2009) (security guard's "impermissible relationship" with school child a frolic); *Martinez v. Colon*, 54 F.3d 980, 986-87 (1st Cir. 1995) (police hazing a "singularly personal frolic"). The commission and executive director acted inside "the usual course and scope of [their] official roles with the Commission" when they set up their

unconstitutional regulatory regime. *Cf.* ECF No. 19 at 9. But that is why Section 1983 liability applies.

B. Courts have recognized the right to associate and speak for the purposes of pro bono litigation for six decades

The Supreme Court clearly established sixty years ago that the First Amendment protects the right to solicit pro bono clients and advocate for their civil rights in courts, without burdensome interference by state authorities. *See Button*, 371 U.S. at 429-31; *In re Primus*, 436 at 431-32. Before the commission adopted EAO No. 580, the Executive Director justified the proposal by insisting that IFS's First Amendment objections were inapplicable, because these precedents focus on state statutes regulating the practice of law, rather than on campaign finance. ECF No. 1, ¶¶ 22-23.

The Fifth Circuit—looking to cases such as *Button* and *Primus*—has recognized a "clearly established right to access the courts" that prohibits "systemic official action frustrating a plaintiff or plaintiff class in preparing and filing suits at the present time." *Waller v. Hanlon*, 922 F.3d 590, 601 (5th Cir. 2019) (cleaned up); *see also Willey v. Harris Cty. DA*, 27 F.4th 1125, 1129-30 (5th Cir. 2022) (*Button* and its progeny command that law hindering lawyer from representing clients pro bono for political reasons be strictly scrutinized); *Ryland v. Shapiro*, 708 F.2d 967, 971-72 (5th Cir. 1983) ("It is by now well established that access to the courts is protected by the First Amendment right to petition for redress of grievances.") (citing *Button* and other cases).

Forward-looking access-to-court cases only require plaintiffs to plead plausibly that they seek court access for a nonfrivolous underlying claim and that some official action frustrates the litigation. *Gonzalez v. Gillis*, No. 21-60634, 2023 U.S. App. LEXIS 10691, at *7-8 (5th Cir. May 2, 2023). In one case, for instance, the district court denied a qualified immunity defense because an officer threatened to prosecute the plaintiffs if they filed a complaint. *Robles v. Aransas Cty.*, No. 2:15-CV-495, 2016 U.S. Dist. LEXIS 103119, at *18-19 (S.D. Tex. Aug. 5, 2016) (citing *Button* and finding a "well-established" petition right). Similarly, another district court found a clearly established right, overcoming qualified immunity, when a university board refused to grant plaintiff a hearing before demoting him. *Johnson v. San Jacinto Junior Coll.*, 498 F. Supp. 555, 578-79 (S.D. Tex. 1980) (citing *Button* and finding that "each defendant should have known of plaintiff's rights"). Over sixty years after *Button* was first decided, the rights IFS claims here are as well established as any can be.

Personal involvement is an essential element of Section 1983 liability. *Thompson v. Steele*, 709 F.2d 381, 382 (5th Cir. 1983). A member of a policymaking body is individually liable if "(1) he affirmatively participates in the acts that cause the constitutional deprivation, or (2) he implements unconstitutional policies that causally result in the constitutional injury." *Porter v. Epps*, 659 F.3d 440, 446 (5th Cir. 2011) (citation omitted). Indeed, supervisory officials become liable for their "failure to adopt a policy" if "it is obvious that the likely consequences of not adopting a policy will be a deprivation of constitutional rights." *Rhyne v. Henderson Cnty.*, 973 F.2d 386, 392 (5th Cir. 1992).

In this case, five members of the TEC implemented an unconstitutional regulatory regime by, among other things, adopting EAO No. 580 and ignoring the advocacy of IFS and other firms to interpret Section 253.094 so as not to criminalize pro bono litigation in defense of constitutional rights. ECF No. 1, ¶¶ 27-28; *cf. Princeton Cmty. Phone Book v. Bate*, 582 F.2d 706, 711-12 (3d Cir. 1978) (ethics committee's advisory opinion "is unconstitutional as violating the First Amendment" and potentially made committee individually liable). Although he did not vote, the TEC's Executive Director personally and affirmatively participated in this deprivation of constitutional rights by advocating for EAO No. 580 and unreasonably arguing that IFS's First Amendment fears were misplaced. ECF No. 1, ¶¶ 22-23; *cf. Henagan v. City of Lafayette*, No. 6:21-CV-03946, 2022 U.S. Dist. LEXIS 176644, at *23, *25 (W.D. La. Aug. 16, 2022) (allowing individual capacity claim against mayor who was "the moving force" behind police department's informal adoption of unconstitutional anti-panhandling practices). As IFS's complaint pleaded with specificity, the executive director and five commissioners together established an illegal policy infringing clearly established constitutional rights and should be held individually liable for nominal damages for their misconduct.

Conclusion

This Court should deny Defendants' motion to dismiss.

Respectfully submitted,

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