UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH 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' REPLY IN SUPPORT OF THEIR
MOTION TO DISMISS PURSUANT TO RULES 12(B)(1) AND 12(B)(6)

Defendants file this reply brief in support of their motion to dismiss pursuant to FED. R. CIV. P. 12(b)(1) and 12(b)(6). Dkts. 18-19.

I. IFS Lacks Standing and Has Not Pleaded a Ripe Case.

A. IFS has not alleged an injury in fact.

In its response to the motion to dismiss, IFS fails to articulate how its allegations in the case, if true, would support a finding of standing. In *Clapper v. Amnesty International USA*, the Supreme Court held that to show an injury in fact in a pre-enforcement challenge, a plaintiff must show an "imminent" risk of prosecution that is "certainly impending" as opposed to "speculative." 568 U.S. 398, 409 (2013). A law being merely "on the books" is "insufficient to justify federal intervention in a pre-enforcement suit." *Whole Woman's Health v. Jackson*, 595 U.S. 30, 50 (2021) (quotation omitted).

An advisory opinion from the Texas Ethics Commission does not establish the requisite intent or likelihood of enforcement for purposes of showing injury. Under state law, the Commission "shall prepare a written opinion answering the request of a person subject to" various

provisions of law "about the application of any of these laws to the person in regard to a specified existing or hypothetical factual situation." TEX. GOV'T CODE § 571.091(a). It must do so "no later than the 60th day after the date the commission receives the request," though the Commission may vote to grant up to two 30-day extensions. TEX. GOV'T CODE § 571.092. The only legal effect of an advisory opinion is to serve as a defense in any enforcement proceeding for a person who relies on the advisory opinion in taking actions. TEX. GOV'T CODE § 571.097(a) ("It is a defense to prosecution or to imposition of a civil penalty that the 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.").

It is undisputed that no enforcement proceeding against IFS is pending, and that no complaint against IFS is pending. Instead, IFS alleges only that it requested an advisory opinion and that the Commission issued one. The advisory opinion challenged in this case, EAO-580, was approved at a public meeting of the Commission by a vote of five to three. Dkt. 1 at ¶ 27. A finding of a violation of state law by the Commission, however, requires "a vote of at least six members." TEX. GOV'T CODE § 571.132(b). Six votes are also needed for a complaint to be resolved through an agreed resolution. TEX. GOV'T CODE § 571.121(a)(1); 1 T.A.C. § 6.7. IFS does not allege that any Defendants have ever enforced the interpretation of state law contained in EAO-580. And given that the Commission adopted the advisory opinion on a vote of fewer than six votes, there could never be any actionable allegation that the Commission would enforce, much less imminently, Texas Election Code § 253.094 against IFS for any alleged desired conduct. This only adds to the absence of any actionable allegations that IFS is threatened by an "imminent" risk of prosecution that is "certainly impending" rather than "speculative." *Clapper*, 568 U.S. at 409.

The case law IFS cites concerning advisory opinions highlights the deficiencies of IFS's case regarding the threat of enforcement. In *Center for Individual Freedom v. Carmouche*, the threat of enforcement was established by a $20,000 fine that the Louisiana Board of Ethics imposed on the Republican State Leadership Committee based on the legal reasoning in an advisory opinion. 449 F.3d 655, 660-61 (5th Cir. 2006). In *Joint Heirs Fellowship Church v. Akin*, the court noted that it has held "that a credible threat of enforcement also exists when an agency issued an advisory opinion on the relevant statute's meaning, intended enforcement, *and recently enforced the statute against another party*." 629 F. App'x 627, 631 (5th Cir. 2015) (emphasis added). The court went on to say that in the case before it, the plaintiffs' failure to show "any similar action by the [Texas Ethics] Commission" meant that there was not "a credible threat of enforcement by the Commission." *Id.* Thus, the cases cited by IFS militate in favor of dismissal of IFS's complaint here.

Moreover, IFS's complaint does not allege facts that if true would show a constitutionally recognized injury for purposes of standing. IFS alleges that it is injured by Texas Election Code § 253.094. However, both the United States Supreme Court and Texas Supreme Court have upheld bans on corporate campaign contributions. *Federal Election Commission v. Beaumont*, 539 U.S. 146, 149 (2003) (federal ban); *King Street Patriots v. Texas Democratic Party*, 521 S.W.3d 729 (Tex. 2017) (Texas state ban). Therefore, IFS has not alleged a cognizable First Amendment injury due to its inability to participate in its allegedly desired conduct.

IFS has also failed to allege facts that if true would demonstrate that its claimed inability to represent Chris Woolsey ("Woolsey") and the Texas Anti-Communist League PAC (the "League") would impair its organizational mission. Based on the dearth of factual allegations in IFS's complaint, IFS has not established that Woolsey or the League (which is not alleged to have

ever been involved in politics) would have standing to challenge Texas Election Code § 259.001(a) or would make out a cognizable First Amendment injury that would survive a Rule 12(b)(6) motion to dismiss or summary judgment. Section 259.001(a) on its face simply requires signage to contain somewhere on the sign: "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." Even assuming *arguendo* that Woolsey and the League were able to establish standing to bring a hypothetical challenge to the statute, the language that would be at issue in that hypothetical challenge provides notice to those placing signs that putting the signs in highway rights-of-way violates state law—a notice that plainly advances the State's interest in traffic and public safety. The requirement to include the language on signs could never be found to prevent Woolsey or the League from spreading any messages, political or otherwise. Such a minor requirement to remind sign-posters not to place signs in Texas highway rights-of-way would survive constitutional scrutiny under any standard of review.

This case is not properly pled as a case raising a genuine dispute about political activists who need legal representation to engage in political speech. Rather, IFS has presented this Court with a set of allegations about hypothetical litigation to seek an advisory opinion on the constitutionality of Texas's ban on corporate and union contributions in Texas Election Code § 253.094. "Under Article III, federal courts do not adjudicate hypothetical or abstract disputes" and "do not possess a roving commission to publicly opine on every legal question." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021). IFS has failed to meet its burden to plead a cognizable injury in fact.

B. IFS has not alleged an injury traceable to Defendants.

IFS likewise fails to articulate in its response how its allegations satisfy the requirement of traceability. The only conduct by the Defendants alleged in the complaint concerns the issuance

of the advisory opinion EAO-580. Defendants' claimed actions in relation to the issuance of that opinion are too attenuated to any alleged injury that IFS could hypothetically suffer. Multiple intervening steps, including actions by third parties—such as Woolsey, the League, or witnesses to any alleged violation of state law by IFS—would have to occur before any genuine threat of enforcement could ever be alleged with sufficient particularity. *See Clapper*, 568 U.S. at 410 (noting that a "theory of standing, which relies on a highly attenuated chain of possibilities, does not satisfy the requirement that the threatened injury must be certainly impending"); *id.* at 417 (holding that "self-inflicted injuries are not fairly traceable" to the government). And as discussed previously, the issuance of the advisory opinion alone could never be properly pled as causing cognizable injury to IFS. IFS has therefore failed to meet its burden to plead an injury traceable to Defendants.

C. IFS's claims are not ripe.

IFS has likewise failed to address adequately the argument that its allegations do not raise a ripe case or controversy that would fall within the Court's jurisdiction. As an additional example of the factual inadequacies discussed in Defendants' motion, IFS has not pled sufficient facts to show that it faces a threat of enforcement. There is no allegation that anyone is enforcing any statute against IFS, and to top that off, it is undisputed that the Commission adopted advisory opinion EAO 580 on a five to three vote and that any finding of a hypothetical violation in a hypothetical enforcement proceeding would require a vote of at least six members. TEX. GOV'T CODE § 571.132(b). Accordingly, "further factual development is required," and this case is not ripe for adjudication. *Monk v. Huston*, 340 F.3d 279, 282 (5th Cir. 2003). As the Fifth Circuit explained in *Huston*:

> Even assuming plaintiffs have identified constitutionally protected property interests that would be harmed by approval of the permit application, they have not suffered any deprivation, because the TCEQ permitting process has not yet run its course. The application may or may not be granted, and thus plaintiffs may or may not be harmed. Therefore, until TCEQ issues the permit, this dispute remains "abstract and hypothetical" and thus unripe for judicial review.

Id. at 283; *see also Texas v. United States*, 523 U.S. 296, 300 (1998) ("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.").

II. IFS's Claims Are Barred by Sovereign Immunity.

In its response to the motion to dismiss, IFS fails to overcome Defendants' sovereign immunity arguments. Under Fifth Circuit case law, for a plaintiff to overcome sovereign immunity by invoking *Ex parte Young*, the plaintiff must show both "a particular duty to enforce the statute in question" and "*a demonstrated willingness to exercise that duty*." *Ostrewich v. Tatum*, 72 F.4th 94, 100 (5th Cir. 2023) (emphasis added) (quoting *Tex. Democratic Party v. Abbott*, 978 F.3d 168, 181 (5th Cir. 2020)). IFS has not pled sufficient facts to meet this burden. As discussed previously, the advisory opinion was approved by a five to three vote of the Commission, but six votes would be needed for the Commission to find a violation of state law in a hypothetical enforcement action. TEX. GOV'T CODE § 571.132(b). Plaintiff has failed to allege a demonstrated willingness on the part of the Commission to enforce Texas Election Code § 253.094 against IFS. *See* Dkt. 1 ¶ 27; TEX. GOV'T CODE § 571.132(b). Thus, Plaintiff cannot overcome sovereign immunity.[1]

[1]IFS cites *Joint Heirs Fellowship Church v. Akin*, 629 F. App'x 627 (5th Cir. 2015), *Catholic Leadership Coalition of Texas v. Reisman*, 764 F.3d 409 (5th Cir. 2014), *Texans for Free Enterprise v. Texas Ethics Commission*, 732 F.3d 535 (5th Cir. 2013), and *Center for Individual Freedom v. Carmouche*, 449 F.3d 655 (5th Cir. 2006), but none of those cases presented the court with the question of state sovereign immunity.

III. Qualified Immunity Bars IFS's Individual-Capacity Claims.

IFS's efforts to justify having sued certain commissioners in an individual capacity is relegated to the tail end of its response. Dkt. 23 at 18-23. The short shrift on IFS's hyper-aggressive approach to civil-rights litigation is telling. In evaluating an assertion of qualified immunity, courts apply "the familiar two-step analysis" of (1) whether the defendant "violated a constitutional right" and (2) "whether the right was clearly established." *Keller v. Fleming*, 952 F.3d 216, 221 (5th Cir. 2020). Defendants' arguments concerning IFS's failure to state a claim due to their arguments being foreclosed by *Federal Election Commission v. Beaumont*, 539 U.S. 146 (2003), establish that IFS has not pled a violation of a constitutional right at step one of the qualified-immunity analysis. *See infra* Part IV.

Even in cases where a plaintiff establishes a violation of a constitutional right at step one, qualified immunity "gives government officials breathing room to 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) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011)). A court may address "either step or both of them" in its decision, and if "the plaintiff fails at either step, the federal court can grant qualified immunity." *Cleveland v. Bell*, 938 F.3d 672, 676 (5th Cir. 2019). In situations where there are conflicting cases "cutting both ways," those cases "do not clearly establish the law." *Morrow v. Meachum*, 917 F.3d 870, 879 (5th Cir. 2019).

IFS cites as its principal authorities *NAACP v. Button*, 371 U.S. 415 (1963), and *In re Primus*, 436 U.S. 412 (1978),[2] but neither provides any support for a contention that Texas Election

[2]The U.S. Supreme Court has made clear that it has only ever stated that its own precedents can constitute clearly established law for purposes of qualified immunity. *See District of Columbia v. Wesby*, 583 U.S. 48, 66 n.8 (2018).

Code § 253.094 or its potential application to IFS's claimed desired activities would violate clearly established law. *Button* and *In re Primus* established that non-profits such as the NAACP and ACLU have a First Amendment right to solicit clients that cannot be infringed by regulations of the legal profession that ban the solicitation of clients. Neither case involved the interplay of that right with the government's interest in and constitutional authority to restrict political contributions to limit corruption and the appearance of corruption, as recognized in *Buckley v. Valeo*, 424 U.S. 1 (1976), and *Federal Election Commission v. Beaumont*, 539 U.S. 146 (2003).

The Fifth Circuit has recognized that there "is no constitutional minimum contribution amount below which legislatures cannot regulate." *Zimmerman v. City of Austin*, 881 F.3d 378, 387 (5th Cir. 2018) (upholding a $350 contribution limit for an Austin City Council election). The legal inquiry under the First Amendment is whether the limitation is "so radical in effect as to render political association ineffective, drive the sound of a candidate's voice below the level of notice, and render contribution pointless." *Id.* at 387 (quoting *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 397 (2000)).

Thus, IFS cannot produce any fig leaves to hide the inadequacy of its efforts to sue commissioners in their individual capacities. IFS's disappointment over five commissioners disagreeing in an advisory opinion with IFS's preferred interpretation of Texas state law does not translate into a violation of clearly established law. IFS points to no legal authority clearly establishing the unconstitutionality of the Texas Legislature's decision to ban corporate and union contributions in Texas Election Code § 253.094. Texas's ban on corporate and union contributions has been in effect since 1987 and was upheld as constitutional by the Texas Supreme Court in *King Street Patriots*. *King Street Patriots* noted that the "Supreme Court's *Citizens United* decision did not overturn its earlier holding in *Federal Election Commission v. Beaumont* that laws barring

corporate political contributions are 'consistent with the First Amendment' and are not subject to strict scrutiny." 521 S.W.3d at 742 (quoting *Beaumont*, 539 U.S. at 149).

Here, for purposes of application of qualified immunity, IFS has identified no contrary case that would even arguably hold that Texas Election Code § 253.094 is unconstitutional. In light of this case law supporting Defendants' interpretation of the law, IFS has failed to meet its high burden of pleading that Defendants acted so unreasonably that they were "plainly incompetent" or "knowingly violate[d] the law." *Messerschmidt*, 565 U.S. at 546. IFS's individual-capacity claims should never have been brought and should be dismissed.

IV. IFS Has Failed to State a Claim on Which Relief Can Be Granted.

Finally, IFS's efforts to defend its allegations as stating actionable claims for relief fare no better.

IFS seeks to mount a facial challenge to the long-standing Texas ban on corporate and union contributions in Texas Election Code § 253.094 as well as an as-applied challenge to that statute's application to IFS. However, both federal and state case law squarely foreclose the argument. In *Federal Election Commission v. Beaumont*, the Court considered the constitutionality of a federal statute that "barred corporations from contributing directly to candidates for federal office" as applied "to nonprofit advocacy corporations." 539 U.S. at 149. Noting that corporations could establish political action committees through which they could lawfully make contributions and expenditures, the Court held that the ban on corporate contributions was "consistent with the First Amendment." *Id.*

The Texas Supreme Court recognized the controlling nature of *Beaumont* in *King Street Patriots*, which specifically upheld Texas Election Code § 253.094 against a First Amendment challenge. The court in *King Street Patriots* reasoned that although *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010), held that bans on corporate *expenditures* violated the

First Amendment, its holding did not overturn *Beaumont*'s approval of bans on corporate *contributions*. 521 S.W.3d at 742. This distinction between expenditures and contributions traces back to *Buckley v. Valeo*, which recognized that expenditures are necessary for political expression but also held that contributions may be restricted by the government to limit corruption and the appearance of corruption. 424 U.S. at 26-27. IFS has wholly failed to state claims that are not foreclosed by binding United States Supreme Court precedent in *Beaumont*.

Furthermore, it is clear from IFS's response that it has failed to allege facts making out any § 1983 individual-capacity claims because IFS has failed to allege that any of the individual-capacity Defendants personally caused a purported injury to IFS. *See Moore v. LaSalle Mgmt. Co., LLC*, 41 F.4th 493, 503 (5th Cir. 2022) ("The Supreme Court has told us to read § 1983's causation requirement 'against the background of tort liability that makes a man responsible for the natural consequences of his actions.'"); *Burleson v. Tex. Dep't of Criminal Justice*, 393 F.3d 577, 590 (5th Cir. 2004) ("Without proof of causation, [Plaintiff] cannot met his constitutional burden."). As discussed previously, this lawsuit is not ripe and IFS has not suffered any injury, let alone one caused by any Defendants. *See supra* Part I. IFS therefore cannot satisfy the § 1983 requirement of causation. If the Defendants had initiated an administrative enforcement proceeding against IFS, they would be entitled to absolute quasi-judicial immunity from any individual-capacity claims for money damages under circuit precedent. *See O'Neal v. Miss. Bd. of Nursing*, 113 F.3d 62 (5th Cir. 1997) (granting absolute quasi-judicial immunity to the executive director and board members of the Mississippi Board of Nursing). Here, where no such proceeding has even been initiated and commissioners could still vote not to enforce the legal interpretation in EAO-580, no injury has occurred and there is no legal basis to impose personal financial liability on the individual-capacity Defendants.

CONCLUSION

For the foregoing reasons and those set out in their motion to dismiss, Defendants respectfully request that the Court dismiss IFS's claims for lack of jurisdiction under FED. R. CIV. P. 12(b)(1) or for failure to state claims on which relief can be granted 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 October 20, 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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