UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

INSTITUTE FOR FREE SPEECH, *Plaintiff*, vs. 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*.	§ § § § § § § § § § § § § § § § § § § §	No. 1:23-cv-01370-DAE

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

The matter before the Court is Defendants J.R. Johnson, Mary Kennedy, Chris Flood, Richard Schmidt, Randall Erben, Chad Craycraft, Patrick Mizell, Joseph Slovacek, and Steven Wolens's ("Defendants") Motion to Dismiss Plaintiff Institute for Free Speech's ("IFS") Complaint, filed on September 15, 2023. (Dkt. # 18.) IFS filed its Response to Defendants' Motion to Dismiss on

October 6, 2023. (Dkt. # 23.) Defendants filed a Reply on October 20, 2023. (Dkt. # 26.)[1]

The Court finds this matter suitable for disposition without a hearing. After careful consideration of the filings and relevant case law, the Court, for the following reasons, **GRANTS** the Motion to Dismiss **WITHOUT PREJUDICE**.

BACKGROUND

The Institute for Free Speech ("IFS") is a non-profit corporation and law firm whose "mission is to promote and defend the political rights to free speech, press, assembly, and petition guaranteed by the First Amendment[.]" (Dkt. # 1 at ¶ 4.) IFS provides pro bono representation to those who claim violations of their free-speech rights. (Id.) Two of IFS's prospective clients are Chris Woolsey ("Woolsey") and the Texas Anti-Communist League ("TACL" or "The League"). (Id. at 2.) Woolsey is an elected city council member in Corsicana, Texas, who may run for re-election in the future. (Id. at ¶¶ 30–31.) TACL is a newly created political action committee based in Fort Worth, Texas, that allegedly intends to participate in future Texas elections to promote its anti-communist mission. (Id. at ¶¶ 39–43.)

[1] There is also a pending Motion for Summary Judgment filed by IFS on September 27, 2023. (Dkt. # 20.)

Both Woolsey and TACL allegedly plan to print and display political advertising signs. (Id. at ¶¶ 34, 44.) If they were to make such signs, Texas Election Code requires the signs to bear the 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." Tex. Elec. Code § 259.001(a). Neither Woolsey nor TACL wish to put this notice on their political advertisements, as they believe the notice requirement is compelled speech in violation of the First Amendment. (Dkt. # 1 at ¶¶ 34, 44.) Both want to mount a legal challenge to Texas Election Code Section 259.001(a) as a violation of the First Amendment but claim that they cannot afford to hire counsel for such a suit. (Id. at ¶¶ 37, 45.)

IFS wants to represent both Woolsey and TACL in their First Amendment lawsuits, as well as other such plaintiffs who may bring a First Amendment claim in Texas on a pro bono basis. (Id. at ¶¶ 48–49.) At present, however, IFS has refrained from providing such representation to Texas candidates or political committees for fear of prosecution under Texas Election Code Section 253.094 ("Section 253.094"). (Id. at ¶ 50.) Section 253.094 makes it a third-degree felony for a corporation to make political contributions that are not otherwise authorized by law. Tex. Elec. Code § 253.094(c).

Unsure if providing pro bono legal services to political candidates or committees for constitutional challenges to Texas law counts as a "political contribution" under Section 253.094, IFS requested an advisory opinion on the matter from the Texas Ethics Commission ("TEC") in early 2022. (Dkt. # 1 at ¶ 14–15.) On May 12, 2022, the TEC issued Draft Advisory Opinion No. AOR-660. (Id. at ¶ 19; Dkt. # 1-1 at 1.) The draft characterized pro bono legal services as in-kind campaign contributions that would be barred under Section 253.094 if the provider gives them "with the intent that they be used 'in connection with' a campaign." (Dkt. # 1-1 at 2.)

The draft further opined that the kind of legal services IFS wants to provide to Woolsey and TACL would be given "with the intent that they be used 'in connection with' a campaign" for three main reasons: (1) the phrase "in connection with" has an expansive definition and has been held to include costs of litigation both directly related to a campaign and more indirectly related to a person's status as a candidate; (2) TEC adopts a broad view of what legal expenses are 'in connection with' a campaign, including any legal fees a candidate uses in responding to a TEC complaint, "which would continue to be true even if a candidate or committee challenges the interpretation or constitutionality of a law in response"; and, most importantly, (3) "if a person's standing to bring a lawsuit depends on his status as a candidate or political committee . . . then the lawsuit is

connected with a campaign." (Id. at 2–4.) Thus, the draft opinion's reasoning led IFS to conclude that representing Woolsey and TACL in their First Amendment lawsuits would constitute a third-degree felony. (Dkt. # 1 at ¶¶ 12, 20.)

During a Commission Meeting on May 12, 2022, the TEC set aside the draft for public comment. (Id. at ¶ 20.) IFS, the Institute for Justice ("IFJ") and the American Civil Liberties Union of Texas ("ACLU"), two other nonprofits that engage in similar work, all argued that the draft opinion violated the First Amendment. (Id. at ¶ 21; Dkts. ## 1-2; 1-3.) In response, the TEC issued a revised draft opinion. (Dkt. # 1 at ¶ 22.)

At the next meeting, the TEC addressed the revised draft opinion once more. (Id. at ¶ 25.) Again, IFS and a representative of ACLU argued against its adoption. (Id. at ¶ 26.) Despite their arguments, the TEC adopted the revised draft by a 5-3 vote and formally published it as Ethics Advisory Opinion No. 580 ("EAO 580"). (Id. at ¶ 37; Dkt. # 1-4.) The published opinion characterizes IFS's prospective representation of Woolsey and TACL as an in-kind campaign contribution that would be barred by Section 253.094 of the Texas Election Code. (Dkt. # 1-4 at 4.)

IFS then filed this pre-enforcement lawsuit against Defendants J.R. Johnson, Randall Erben, Chad Craycraft, Patrick Mizell, Joseph Slovacek, and Steven Wolens ("Individual-Capacity Defendants"), in both their official and

individual capacities, alleging that Defendants violated the First Amendment by interpreting Section 253.094 to apply to pro bono legal services and threatening to enforce that law against IFS through EAO 580. (Dkt. # 1 at ¶¶ 5, 7.) The Individual-Capacity Defendants were those who either supported or voted in favor of EAO 580. (Dkt. # 1 at ¶ 7.) IFS also filed the lawsuit against Defendants Mary Kennedy, Chris Flood, and Richard Schmidt, but only in their official capacities, as these commissioners voted in opposition of EAO 580. (Id. at ¶ 6.) IFS alleges four claims for relief: (1) violation of the rights of free speech and association; (2) violation of the right to petition; (3) overbreadth of the law; and (4) federal preemption under the Supremacy Clause. (Id. at 13–17.)

IFS seeks to enjoin TEC from enforcing Section 253.094 and EAO 580 against itself "or any other corporate legal-service provider" with respect to the First Amendment, and "against any person as facially overbroad[.]" (Id. at 19.) IFS also seeks a declaratory judgment holding Section 253.094 and EAO 580 unconstitutionally void and unenforceable. (Id.) IFS seeks nominal damages against each defendant in their individual capacities, and attorney's costs and fees. (Id. at ¶ 68.) Defendants filed a Motion to Dismiss under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). (Dkts. ## 18, 19.) Defendants offer five bases for dismissal: (1) IFS's official-capacity claims are barred by sovereign immunity; (2) IFS's individual-capacity claims are barred by qualified immunity; (3) IFS

failed to state any individual-capacity claims on which the Court can grant relief; (4) IFS lacks standing to bring any of its claims; and (5) none of IFS's claims are ripe. (Dkt. # 18 at 1–2.)

LEGAL STANDARD

I. 12(b)(1)

A motion to dismiss under Rule 12(b)(1) of the Federal Rules of Civil Procedure challenges a federal court's subject matter jurisdiction. See Fed. R. Civ. P. 12(b)(1). Under Rule 12(b)(1), a claim is properly dismissed for lack of subject matter jurisdiction when a court lacks statutory or constitutional authority to adjudicate the claim. Home Builders Assoc. of Mississippi, Inc. v. City of Madison, 143 F.3d 1006, 1010 (5th Cir. 1998). When a Rule 12(b)(1) motion is filed in conjunction with other Rule 12 motions, courts should consider the "jurisdictional attack before addressing any attack on the merits." Ramming v. United States, 281 F.3d 158, 161 (5th Cir. 2001). The Court must first address subject matter jurisdiction because, without it, the case can proceed no further. Ruhrgas Ag v. Marathon Oil Co., 526 U.S. 574, 583 (1999); Ramming, 281 F.3d at 161.

In considering a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction, "a court may evaluate (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." Den Norske Stats Oljeselskap As v. HeereMac Vof, 241 F.3d 420, 424 (5th Cir. 2001) (citation omitted).

II. 12(b)(6)

Federal Rule of Civil Procedure 12(b)(6) authorizes dismissal of a complaint for "failure to state a claim upon which relief can be granted." Review is limited to the contents of the complaint and matters properly subject to judicial notice. See Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 322 (2007). In analyzing a motion to dismiss for failure to state a claim, "[t]he [C]ourt accepts 'all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff.'" In re Katrina Canal Breaches Litig., 495 F.3d 191, 205 (5th Cir. 2007) (quoting Martin K. Eby Constr. Co. v. Dallas Area Rapid Transit, 369 F.3d 464, 467 (5th Cir. 2004)). To survive a Rule 12(b)(6) motion to dismiss, the plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

A complaint need not include detailed facts to survive a Rule 12(b)(6) motion to dismiss. See Twombly, 550 U.S. at 555–56. In providing grounds for

relief, however, a plaintiff must do more than recite the formulaic elements of a cause of action. See id. at 556–57. "The tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions," and courts "are not bound to accept as true a legal conclusion couched as a factual allegation." Iqbal, 556 U.S. at 678 (internal quotations and citations omitted). Thus, although all reasonable inferences will be resolved in favor of the plaintiff, the plaintiff must plead "specific facts, not mere conclusory allegations." Tuchman v. DSC Commc'ns Corp., 14 F.3d 1061, 1067 (5th Cir. 1994); see also Plotkin v. IP Axess Inc., 407 F.3d 690, 696 (5th Cir. 2005) ("We do not accept as true conclusory allegations, unwarranted factual inferences, or legal conclusions.")

When a complaint fails to adequately state a claim, such deficiency should be "exposed at the point of minimum expenditure of time and money by the parties and the court." Twombly, 550 U.S. at 558 (citation omitted). However, the plaintiff should generally be given at least one chance to amend the complaint under Rule 15(a) before dismissal with prejudice, "unless it is clear that the defects are incurable[.]" Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co., 313 F.3d 305, 329 (5th Cir. 2002).

DISCUSSION

Defendants argue the Court should dismiss IFS's claims for multiple reasons. (Dkt. # 18 at 1–2.) First, Defendants allege that IFS lacks standing

because it has not plausibly pled an injury-in-fact, resulting in unripe claims. (Id. at 3.) Secondly, Defendants argue that sovereign immunity bars IFS's official capacity claims. (Id. at 2.) Lastly, Defendants argue doctrine of qualified immunity bars individuals from liability. (Id.) The Court will address each argument in turn.

I. Standing.

"Article III of the Constitution limits the jurisdiction of federal courts to 'Cases' and 'Controversies.'" Murthy v. Missouri, 144 S.Ct. 1972, 1985 (2024). "A proper case or controversy exists only when at least one plaintiff 'establishes that [he or she] has standing to sue.'" Id. at 1986 (quoting Raines v. Byrd, 521 U.S. 811, 818 (1997)). A plaintiff establishes standing by sufficiently alleging: "(1) an 'injury in fact' that is 'concrete and particularized' and 'actual or imminent'; (2) is fairly traceable to the defendant's actions; and (3) is likely to be redressed by a favorable decision." Barilla v. City of Houston, 13 F.4th 427, 431 (5th Cir. 2021) (citing Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992)). The Court may decide whether to dismiss a claim for lack of standing based on "(1) the complaint alone; (2) the complaint supplemented by undisputed facts evidence in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." Kling v. Hebert, 60 F.4th 281, 284 (5th Cir. 2023) (quoting Ramming v. United States, 281 F.3d 158, 161 (5th Cir. 2001)).

Still, "'standing is not dispensed in gross.'" Murthy, 144 S.Ct. at 1988 (quoting TransUnion L.L.C. v. Ramirez, 594 U.S. 413, 431 (2021)). Indeed, "'plaintiffs must demonstrate standing for each claim they press' against each defendant, 'and for each form of relief they seek[.]'" Id. Thus, IFS must independently establish standing for all its claims. Given that Defendants attack each element of standing, the Court will address each in turn.

A. Injury-In-Fact.

To satisfy the injury-in-fact requirement, IFS must allege facts that, taken as true, establish "an invasion of a legally protected interest which is (a) concrete and particularized; and (b) actual or imminent, not conjectural or hypothetical." Lujan, 504 U.S. at 560.

In a pre-enforcement case that alleges a violation of the First Amendment, a plaintiff "need not have experienced 'an actual arrest, prosecution, or other enforcement action' to establish standing." Barilla, 13 F.4th at 431 (quoting Susan B. Anthony List v. Driehaus, 573 U.S. 149, 158 (2014)). Rather, a plaintiff need only allege: "(1) an intention to engage in a course of conduct arguably affected with a constitutional interest, (2) the intended future conduct is arguably proscribed by [the statute] in question, and (3) the threat of future enforcement of the challenged [statute] is substantial." Id. (quoting Speech First, Inc. v. Fenves, 979 F.3d 319, 330 (5th Cir. 2020)).

1. Intent to engage in conduct arguably affected with a constitutional interest.

The Court must first determine whether IFS has sufficiently pleaded its "intention to engage in a course of conduct arguably affected with a constitutional interest." Fenves, 979 F.3d at 330. A plaintiff must demonstrate a "serious intent" to engage in proscribed conduct by taking some steps toward their desired activity. Barilla, 13 F.4th at 432.

IFS alleges: (1) that "on multiple occasions, [it] has foregone legally representing a candidate or political committee in Texas due to concern that it could be prosecuted" under Section 253.094; (2) it is actively refraining from representing any Texas candidates or political committees; (3) it wants to provide pro bono legal services to Woolsey and TACL; (4) Woolsey and TACL would accept IFS's representation if offered; (5) "IFS has refrained from offering or providing any pro bono legal services to either Woolsey or [TACL]" because doing so would expose it and its attorneys to liability; and (6) it "would also potentially like to represent other Texans, including other candidates and political committees . . . if such a lawsuit fits within IFS's mission." (Dkt. # 1 at 6, 9–12.)

Defendants argue "[t]here 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." (Dkt. # 19 at 18.)

As an initial matter, IFS's allegations that it has forgone representing any unnamed Texas candidate or committee "on multiple occasions" in the past, and that it "would also potentially like to represent" other Texas candidates and committees in the future is not enough to support a finding of injury in fact. See Renne v. Geary, 501 U.S. 312, 321–22 (1991). In Renne, the Supreme Court found no live case or controversy when a party had refrained from endorsing candidates for fear of prosecution, but the party gave "no indication whom [they] wished to endorse, for which office, or in what election." Id. "Absent a contention that [the challenged statute] prevent a particular endorsement," the Court held, "this allegation will not support an action in federal court." Id. IFS's vague allegations as to unnamed candidates or committees are insufficient to support a concrete injury in fact for standing. See (Dkt. # 1 at ¶ 49.) Thus, any standing IFS may have rests on the factual allegations relating specifically to its intent to represent Woolsey and TACL.

As for IFS's allegations of its specific intent to represent specific parties in a specific constitutional challenge, the Court finds these allegations are also insufficient to support injury-in-fact. While IFS pled it intends to provide pro bono legal representation to a potential Texas candidate and political committee,[2] it

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[2] See infra Section II at 18.

did not plead any facts sufficient to demonstrate it has taken some steps towards this desired activity. Barilla, 13 F.4th at 432 (Dkt. # 1 at ¶¶ 48, 50.)

The Court acknowledges IFS pled facts that show it "wants to" potentially represent specific clients on a pro bono basis and that this is constitutionally protected conduct. (Id. at 12–13.) The First Amendment protects the rights of free speech and association, including the right to solicit pro bono representation. NAACP v. Button, 371 U.S. 415, 428 (1963). In Button, the Supreme Court found that the NAACP had a constitutional right to solicit legal services. Id. IFS alleges it intends to associate for the purpose of assisting Woolsey and TACL in a constitutional challenge, which is constitutionally protected by the First Amendment. (Dkt. # 1 at ¶¶ 48, 54.)

However, the Complaint is without any facts demonstrating how IFS has taken steps to show that there is a plausible future course of representation of Woolsey and the TACL that is affected by either Section 253.094 or the EAO 580. The Court agrees that IFS is not required "to violate the TEC's regime and wait to be prosecuted before challenging it." (Dkt. # 23 at 23.) However, there are other facts IFS may plead to demonstrate it has taken steps to represent the identified clients other than "filing a complaint or appearing for a client at a hearing." (Id.) As the Complaint stands, IFS has only pled its "desire" to represent Woolsey and the Texas Anti-Communist League in future litigation. Therefore, IFS has not pled

facts showing the requisite "serious intent" to engage in a constitutionally protected course of conduct.

2. Arguable proscription of desired conduct by Texas law.

The Court finds IFS has pled facts sufficient that could show that its alleged "intended course of conduct" is arguably prohibited by Section 253.094. (Id. at ¶ 19.) EAO 580 specifically states that the kind of services IFS intends to offer "are in-kind contributions" that "would be used in connection with a campaign" and thus barred by Section 253.094. (Id. at ¶ 28.) Further, Defendants do not dispute that IFS's intended conduct would run afoul of the statute.

3. Threat of future enforcement.

For IFS to establish pre-enforcement standing, it must sufficiently plead whether a credible threat of enforcement exists against it. See Barilla, 13 F.4th at 431. The Court "'assumes a credible threat of prosecution in the absence of compelling contrary evidence'" when handling a *facial* pre-enforcement challenge to a non-moribund statute. Ostrewich v. Tatum, 72 F.4th 94, 102 (5th Cir. 2023), cert. denied sub nom. Ostrewich v. Hudspeth, 144 S. Ct. 570 (2024) (quoting Fenves, 979 F.3d at 335). However, when the plaintiff brings an *as-applied* challenge to a statute's constitutionality, "there must be some evidence that [the] rule would be applied to the plaintiff[.]" Fenves, 979 F.3d at 335 (quoting Speech First, Inc. v. Schlissel, 939 F.3d 756, 766 (6th Cir. 2019)). IFS brings as-

applied challenges to Section 253.094 and the interpretation found in EAO 580 for infringing on its rights to free speech, association, and petition. (Dkt. # 1 at 13–15.) It brings a facial challenge to the statute for overbreadth. (Id. at 16.)

Because IFS brings a pre-enforcement freedom-of-expression challenge to Section 253.094, the Court may assume a substantial threat of future enforcement absent compelling contrary evidence, provided that Section 253.094 is not moribund. Speech First, 979 F.3d at 335; see also Babbitt, 442 U.S. at 302, 99 S.Ct. 2301. As a corporation seeking to make a political contribution, through pro bono representation, IFS plainly belongs to the class arguably facially restricted by Section 253.094.

IFS also asserts that Section 253.094's threat of enforcement is presently causing IFS to self-censor and this immediate hardship is not contingent on any future events. (Dkt. # 23 at 23.) The Court disagrees. As discussed in further detail below, IFS's claims are contingent upon Woolsey's future status as a candidate, the TACL's future status as a political committee engaging in campaign expenditures, and IFS's future, hypothetical representation of these identified potential candidates.

Because IFS did not sufficiently plead a serious intent to engage in conduct arguably affected with a constitutional interest, IFS has not adequately pled a justiciable injury.

B. Traceable and Redressable.

Defendants argue "[b]ecause EAO [ ] 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." (Dkt. # 19 at 16.) As a preliminary manner, the Court agrees with IFS that its claims are based on Section 253.094 and the TEC's regulatory regime rather than the issuance of EAO 580 alone. (Dkt. # 23 at 19.) Thus, an injunction or declaratory judgement, the relief requested, would not only be applied to EAO 580 as Defendants contend. (Dkt. # 19 at 16.).

Where potential enforcement of a statute causes the plaintiff's self-censorship, and the injury could be redressed by enjoining enforcement of the statute, the causation and redressability prongs of the standing inquiry are easily satisfied. Ctr. for Individual Freedom v. Carmouche, 449 F.3d 655, 661 (5th Cir. 2006).

As in Carmouche, IFS alleges the potential enforcement of Section 253.094 caused IFS's self-censorship. (Dkt. # 23 at 23.) And the injury could be redressed by enjoining enforcement of Section 253.094. Accordingly, IFS has shown that, if it could establish injury-in-fact, its injury would be traceable and redressable. However, IFS has not shown an injury in fact because did not

sufficiently plead a serious intent to engage in conduct arguably affected with a constitutional interest.

Based on the foregoing analysis, the Court finds IFS lacks standing to bring its claims against Defendants at this time.

II. Ripe for Adjudication.

"Justiciability concerns not only the standing of the litigants to assert particular claims, but also the appropriate timing of judicial intervention." Renne, 501 U.S. at 320. "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). 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. 2021) (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, 684 (5th Cir. 2010)).

Ripeness is decided on a case-by-case basis, considering (1) the likelihood that the complainant will disobey the law, (2) the certainty that such disobedience will take a particular form, (3) any present injury occasioned by the

threat of [enforcement], and (4) the likelihood that [enforcement efforts] will actually ensue. Regional Rail Reorganization Act Cases, 419 U.S. 102, 143, n. 29 (1974).[3]

IFS argues its "purely legal argument" is ripe as it is unable to represent identifiable clients falling within the purview of Section 253.094 as of now. (Dkt. # 23 at 23.) Defendants argue that IFS failed to allege sufficient facts that, if true, would demonstrate a genuine intent to represent legitimate parties in a legitimate lawsuit. (Dkt # 19 at 15.) Specifically, Defendants claim IFS's intention to represent Woolsey or the TACL is based on future, hypothetical litigation that may arise from currently non-existent facts. (Id. at 17.)

The first issue for consideration is whether Woolsey and the TACL are a "candidate" or "political committee" subject to Texas Election Code Section 259.001(a). Woolsey is currently an elected official, and IFS alleges he "intends to seek reelection" for his current position or a different office. (Dkt. # 1 at ¶ 31.) Looking at the well pleaded complaint, the Court concludes there are insufficient facts to qualify Woolsey as a "candidate" under Texas Election Code Section 251.001(1). The fact that Woolsey is currently in office does not mean that he will actually seek reelection. Simply stating one intends to run for election is not

[3] "The standard for constitutional ripeness mirrors the injury-in-fact requirement for standing." See Driehaus, 573 U.S. at 157–58 n.5.

enough to qualify as a "candidate" under Texas Election Code Section 251.001(1). Under the code, candidate "means a person who knowingly and willingly takes affirmative action for the purpose of gaining nomination or election to public office or for the purpose of satisfying financial obligations incurred by the person in connection with the campaign for nomination or election. Examples of affirmative action include . . . before a public announcement of intent, the making of a statement of definite intent to run for public office and the soliciting of support by letter or other mode of communication." Tex. Elec. Code § 251.001(1). Thus, IFS failed to allege sufficient facts that would demonstrate any affirmative action taken by Woolsey to qualify as a candidate.

IFS's alleged prohibition on representing Woolsey in a pro bono case depends on his status as a candidate subject to Texas election laws. And Woolsey's status as a candidate depends on future events that have yet to occur, namely actually running for re-election rather than alleging an intent to run in the future. Therefore, IFS's allegation of its intent to represent Woolsey is currently based on facts needing further development.

Next, Defendants argue "[t]he League has not yet made any political contributions, campaign expenditure, direct campaign expenditure, or political expenditure." (Dkt. # 19 at 14.) As currently alleged, the TACL does not qualify as a political committee under Texas Election Code Section 251.001(12) because

there are insufficient facts to show the committee has acted with the purpose of "accepting political contributions or making political expenditures." Tex. Elec. Code § 251.001(12). Therefore, the Court finds that this case would benefit from further factual development to be ripe for adjudication. See DM Arbor Court, Ltd., 988 F.3d at 218.

Even if Woolsey and the TACL qualify as a candidate and political committee, another issue is whether there are sufficient facts to demonstrate IFS's intent to represent Woolsey and TACL in filing a First Amendment challenge against Texas Election Code Section 259.001(a).

This case is analogous to Renne. There, the Supreme Court discerned there was no ripe controversy in the allegations that the respondents desired to endorse candidates in future elections, either as individual committee members or through their committees because the "[r]espondents [did] not allege an intention to endorse any particular candidate, nor that a candidate want[ed] to include a party's or committee member's endorsement in a candidate statement." Renne, 501 U.S. at 321.

While IFS pled it intends to represent a specific potential candidate and political committee, there are no factual allegations that, if true, would demonstrate that IFS has taken any steps toward actually representing Woolsey or the TACL. Nor are there factual allegations that demonstrate Woosley or the

TACL have the proper status to bring forth constitutional challenges to Texas election laws. Therefore, the Court finds IFS's claims are not ripe because it did not sufficiently allege an intention to represent legitimate parties in a legitimate lawsuit.

Assuming arguendo Plaintiff has demonstrated sufficient standing and that the case is ripe for adjudication, the Court will assess Defendants' remaining arguments as to whether Defendants are entitled to immunity on their respective official capacity and individual capacity arguments.

III. Official-Capacity Claims Not Barred by Sovereign Immunity.

Sovereign immunity "operates like a jurisdictional bar[.]" Kling, 60 F.4th at 284. The Eleventh Amendment typically deprives federal courts of jurisdiction over "suits against a state, a state agency, or a state official in his official capacity unless that state has waived its sovereign immunity or Congress has clearly abrogated it." Moore v. La. Bd. of Elementary & Secondary Educ., 743 F.3d 959, 963 (5th Cir. 2014). Under the Ex parte Young exception to sovereign immunity, lawsuits may proceed in federal court when a plaintiff requests prospective relief against state officials in their official capacities for ongoing federal violations. 209 U.S. 123, 159–60 (1908). "For the [Ex parte Young] exception to apply, the state official, 'by virtue of his office,' must have 'some connection with the enforcement of the [challenged] act, or else [the suit] is merely making him a party as a

representative of the state, and thereby attempting to make the state a party.'" City of Austin v. Paxton, 943 F.3d 993, 997 (5th Cir. 2019) (quoting Ex parte Young, 209 U.S. at 157).

Neither a specific grant of enforcement authority nor a history of enforcement is required to establish a sufficient connection. City of Austin, 943 F.3d 993 at 1001; Air Evac EMS, Inc. v. Tex., Dep't of Ins., Div. of Workers' Comp., 851 F.3d 507, 519 (5th Cir. 2017). There need be only a "scintilla of enforcement by the relevant state official" for Ex parte Young to apply. City of Austin, 943 F.3d at 1002 (quotations omitted). Actual threat of or imminent enforcement is "not required." Air Evac, 851 F.3d at 519.

Here, IFS points to specific grants of enforcement authority given to Defendants that warrant the application of the Ex parte Young exception. (Dkt. # 23 at 11.) Specifically, the Texas Government Code statutorily grants the TEC commissioners, in their official capacity, enforcement authority over the Election Code. Section 571.171 provides: "On a motion adopted by an affirmative vote of at least six commission members, the commission may initiate civil enforcement actions and refer matters to the appropriate prosecuting attorney for criminal prosecution." Tex. Gov't Code § 571.171. Section 571.172 provides: "The commission may: (1) issue and enforce a cease and desist order to stop a violation; and (2) issue an affirmative order to require compliance with the laws administered

and enforced by the commission." Tex. Gov't Code § 571.172. Finally, Section 571.173 provides: "The commission may impose a civil penalty of not more than $5,000 or triple the amount at issue under a law administered and enforced by the commission, whichever amount is more, for a delay in complying with a commission order or for a violation of a law administered and enforced by the commission." Tex. Gov't Code § 571.173. Therefore, there is more than a "scintilla of enforcement by the relevant state official" for Ex parte Young to apply.

Defendants rely on City of Austin v. Paxton to argue "[t]he mere fact that the [Defendants have] the authority to enforce [Tex. Elec. Code § 253.094] cannot be said to 'constrain' [Plaintiff's actions]." 943 F.3d at 1001. However, this case is unlike City of Austin because there, the City claimed the "Attorney General ha[d] a 'habit of suing or intervening in litigation against the City' involving municipal ordinances and policies to 'enforce the supremacy of state law'" to demonstrate a showing of "enforcement." Id. at 1000. Moreover, "the City face[d] no consequences if it attempt[ed] to enforce its Ordinance." Id. at 1002. Here, IFS sufficiently alleges that if it pursues its intended pro bono representation of political candidates or committees, it will be subject to consequences that can be and will be enforced by the TEC.

Therefore, the Court finds IFS's official capacity claims are not barred by sovereign immunity.

IV. Individual-Capacity Claims Barred by Qualified Immunity.

IFS brought individual-capacity claims against the TEC's executive director and five of its commissioners on the basis that these individuals are "liable for helping to create a regime that disregards clearly established rights." (Dkt # 23 at 1.) Defendants assert IFS's individual capacity claims are not sufficiently pled, and in any event, are barred by qualified immunity. (Dkt. # 19 at 1.)

"The doctrine of qualified immunity protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a person would have known." Pearson v. Callahan, 555 U.S. 223, 231 (2009) (internal quotation marks omitted); see also City of Tahlequah v. Bond, 595 U.S. 9, 12 (2021) (per curiam). It protects "all but the plainly incompetent or those who knowingly violate the law." Malley v. Briggs, 475 U.S. 335, 341 (1986); see also City of Tahlequah, 595 U.S. at 12.

When considering a qualified immunity defense raised in the context of a Rule 12(b)(6) motion to dismiss, the Court must determine whether "the plaintiff's pleadings assert facts which, if true, would overcome the defense of qualified immunity." Backe v. LeBlanc, 691 F.3d 645, 648 (5th Cir. 2012) (quoting Wicks v. Miss. State Emp't Servs., 41 F.3d 991, 994 (5th Cir. 1995)). "Thus, a plaintiff seeking to overcome qualified immunity must plead specific facts that

both allow the court to draw the reasonable inference that the defendant is liable for the harm he has alleged and that defeat a qualified immunity defense with equal specificity." Backe, 691 F.3d at 648. A "plaintiff seeking to defeat qualified immunity must show: '(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.'" Morgan v. Swanson, 659 F.3d 359, 371 (5th Cir. 2011) (quoting Ashcroft v. al-Kidd, 563 U.S. 731, 735 (2011)).

The Court applies a two-step analysis to determine whether a government official performing discretionary functions is entitled to qualified immunity. Bush v. Strain, 513 F.3d 492, 500 (5th Cir. 2008). In the first step, the Court analyzes whether the facts, taken in the light most favorable to the party asserting the injury, show that "the defendant violated the plaintiff's constitutional rights." Freeman v. Gore, 483 F.3d 404, 410 (5th Cir. 2007). If not, then the court's analysis must end. Id. Otherwise, the second step requires the court to "consider whether the defendant's actions were objectively unreasonable in light of clearly established law at the time of the conduct in question." Id. The government official is still entitled to qualified immunity as long as his conduct was objectively reasonable—even if the conduct violated a clearly established right. Davis v. McKinney, 518 F.3d 304, 317 (5th Cir. 2008) (citing Hare v. City of Corinth, 135 F.3d 320, 325 (5th Cir. 1998)).

A. Plaintiff's constitutional rights.

IFS argues it has a First Amendment right to solicit pro bono clients and advocate for the civil rights of those clients in our courts, without burdensome interference by state authorities. (Dkt. # 1 at ¶ 13.) As discussed above, in Button, the Supreme Court held the right to solicit clients and provide representation is protected by the First Amendment. Button, 371 U.S. at 428. IFS also argues the "Fifth Circuit [ ] 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.'" (Dkt. # 23 at 30.)

In contrast, Defendants argue "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 Section 253.094." (Dkt. # 26 at 8.) In issuing EAO 580, the TEC noted 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.'" (Dkts. ## 19 at 2; 1-4 at 2.) Indeed, at the September 29, 2022 meeting discussing the draft advisory opinion, "Executive Director Johnson argued that [IFS's] concerns over First Amendment violations were inapplicable, because the cited cases focus

on the restrictions of the practice of law, not on campaign finance." (Dkt. # 1 at ¶ 23.)

Thus, based on the allegations, it is not certain that Defendants violated the IFS's "clearly established constitutional rights" in its enforcement authority of Section 253.094 and upon issuing EAO 580. Nevertheless, the Court moves on to the second inquiry in the qualified immunity analysis.

B. Defendants' objectively reasonable conduct.

The Court next turns to whether the Individual-Capacity Defendants' conduct was objectively reasonable in light of clearly established law at the time of the conduct in question. Freeman, 483 F.3d at 410.

Defendants point to King St. Patriots v. Tex. Democratic Party, 521 S.W.3d 729 (Tex. 2017), in which the Texas Supreme Court held that the Election Code's general prohibition on corporations making political contributions does not violate the First Amendment. Similarly, in Fed. Election Comm'n v. Beaumont, 539 U.S. 146 (2003), the Supreme Court held that applying a prohibition on corporations from contributing directly to candidates for federal office to nonprofit advocacy corporations is consistent with the First Amendment. Id. at 149. Applying the caselaw, the TEC's executive director and commissioners made a reasonable determination to vote in favor of EAO 580 and conclude Section

253.094 applies to corporations intending to provide pro bono services, as in-kind contributions of services, to candidates and political committees. (Dkt. # 19 at 11.)

The Court finds that the Individual-Capacity Defendants acted objectively reasonably in issuing Section 253.094 and EAO 580. Moreover, the process of submitting the advisory opinion for comment and review, holding multiple discussions and meetings, and acceptance of public letters demonstrates Defendants' "thoughtful decision-making" process in seeking to appropriately apply the law. (Id. at 19; Dkt. # 1 at ¶¶ 17, 21.)

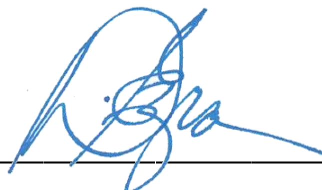
In sum, the Court finds that the Individual-Capacity Defendants are protected by qualified immunity.

CONCLUSION

For the reasons stated above, the Court **GRANTS** Defendants' Motion to Dismiss (Dkt. # 18) **WITHOUT PREJUDICE.**

IT IS SO ORDERED

DATED: Austin, Texas, August 30, 2024.



David Alan Ezra
Senior United States District Judge