IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

CATHOLIC LEADERSHIP COALITION OF TEXAS, d/b/a Texas Leadership Coalition; TEXAS LEADERSHIP COALITION-INSTITUTE FOR PUBLIC ADVOCACY; FRIENDS OF SAFA TEXAS; and TEXAS FREEDOM PAC,

Plaintiffs,

-vs-

Case No. A-12-CA-566-SS

DAVID A. REISMAN, in his official capacity as Executive Director of the Texas Ethics Commission; HUGH C. AKIN; PAUL W. HOBBY; BOB LONG; PAULA M. MENDOZA; TOM RAMSAY; and CHASE UNTERMEYER, in their official capacities as members of the Texas Ethics Commission; and SUSAN REED, in her official capacity as District Attorney for Bexar County, Texas,

Defendants.

ORDER

BE IT REMEMBERED on this day the Court reviewed the file in the above-styled cause, and specifically Defendant Susan Reed's Motion to Dismiss [#55], and Plaintiffs Catholic Leadership Coalition of Texas, Texas Leadership Coalition-Institute for Public Advocacy, Friends of SAFA Texas, and Texas Freedom PAC's Response [#56]. Having reviewed the documents, the governing law, and the file as a whole, the Court now enters the following opinion and orders.

Background

Plaintiffs are political advocacy groups based in San Antonio. Plaintiffs allege various provisions of the Texas Election Code violate the First Amendment and are therefore unconstitutional. Defendants are the members of the Texas Ethics Commission, the entity charged with enforcing the challenged provisions, and the District Attorney empowered to prosecute Plaintiffs under the statutes.

Two specific provisions of the Texas Election Code are at issue. First, section 253.037(a) prohibits a "general-purpose committee" from making political contributions or expenditures (1) more than sixty days before the filing of a campaign treasurer appointment, and (2) before at least ten people have made political contributions to the committee. TEX. ELEC. CODE § 253.037(a). Second, Plaintiffs challenge section 253.094(a), which prohibits a corporation from making a political contribution "not authorized by" the Election Code. *Id.* § 253.094(a). Plaintiffs argue this latter provision prevents a non-profit corporation from making contributions to political committees.

On June 28, 2012, Plaintiffs filed their original complaint, and the next day filed their motion for a preliminary injunction, arguing the challenged provisions of the Texas Election Code would impermissibly interfere with their ability to engage in political advocacy prior to the July 31, 2012 Texas primary runoff elections. This Court denied the motion for a preliminary injunction. Order of July 20, 2012 [#32]. After the elections, this Court granted Defendant Susan Reed's motion to dismiss because criminal prosecution under the statutes appeared moot.

With leave of the Court, Plaintiffs filed a first, and eventually a second, amended complaint. The amended pleadings added new plaintiffs—Friends of SAFA Texas and Texas Freedom PAC—and again named Reed as a defendant. In the Second Amended Complaint [#49], Plaintiffs

express desires to engage in political advocacy in various elections, including the November 2012 General Election and the May 2013 San Antonio mayoral election, but argue the Texas Election Code provisions prevent or hinder them from raising money and engaging in political advocacy.

Defendant Reed again moves to dismiss, raising essentially the same arguments as her first motion to dismiss. Specifically, Reed argues this Court lacks jurisdiction because the dispute between Plaintiffs and Reed is not ripe and because Plaintiffs lack standing to sue. Additionally, Reed argues Plaintiffs fail to state a claim upon which relief can be granted.

Analysis

I. Motion to Dismiss—Rule 12(b)(1)

A. Legal Standards

A motion under Rule 12(b)(1) asks a court to dismiss a case for "lack of subject matter jurisdiction." FED. R. CIV. P. 12(b)(1). "A case is properly dismissed for lack of subject matter jurisdiction when the court lacks the statutory or constitutional power to adjudicate the case." *Home Builders Ass'n of Miss., Inc. v. City of Madison, Miss.*, 143 F.3d 1006, 1010 (5th Cir. 1998). Reed raises three challenges to the Court's jurisdiction in this case: (1) ripeness, (2) standing, and (3) absolute immunity.

"A court should dismiss a case for lack of 'ripeness' when the case is abstract or hypothetical." *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 833 F.2d 583, 587 (5th Cir. 1987). The ripeness doctrine "is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction." *Reno v. Catholic Social Servs., Inc.*, 509 U.S. 43, 57 n.18 (1993). "The key considerations are 'the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.'" *New Orleans*, 833 F.2d

at 587 (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977)). "[A] ripeness inquiry is often required when a party is seeking *pre-enforcement* review of a law or regulation." *Roark & Hardee LP v. City of Austin*, 522 F.3d 533, 544 (5th Cir. 2008).

"To establish standing, a plaintiff must show: (1) it has suffered, or imminently will suffer, a concrete and particularized injury-in-fact; (2) the injury is fairly traceable to the defendant's conduct; and (3) a favorable judgment is likely to redress the injury." *Houston Chronicle Publ'g Co. v. City of League City, Tex.*, 488 F.3d 613, 617 (5th Cir. 2007) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)).

B. Application

1. Ripeness

"When contesting the constitutionality of a criminal statute, 'it is not necessary that [the plaintiff] first expose himself to actual arrest or prosecution to be entitled to challenge [the] statute that he claims deters the exercise of his constitutional rights.'" *Babbit v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) (quoting *Steffel v. Thompson*, 415 U.S. 452, 459 (1974)). "When the plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by statute, and there exists a credible threat of prosecution thereunder, he 'should not be required to await and undergo a criminal prosecution as the sole means of seeking relief.'" *Id.* (quoting *Doe v. Bolton*, 410 U.S. 179, 188 (1973)).

Plaintiffs' Second Amended Complaint clearly expresses their desire to engage in "conduct arguably affected with a constitutional interest, but proscribed by statute." *Id.* Plaintiffs wish to engage in various forms of political advocacy, but have been prevented by the provisions of the

Texas Election Code prohibiting their conduct. The ripeness of this pre-enforcement challenge thus hinges on whether Plaintiffs face a "credible threat of prosecution." *Id.*

Reed asserts Plaintiffs do not face a credible threat of prosecution because she has never threatened to enforce the challenged provisions against them. Examples of cases holding an explicit threat of prosecution is essentially required are not difficult to find. *See, e.g.*, *Renne v. Geary*, 501 U.S. 312, 320–23 (1991) (holding controversy nonjusticiable where record contained no evidence challenged statute would be enforced against plaintiffs). Notwithstanding such examples, there is no brightline rule requiring explicit threats in order for a controversy to be ripe. In *Babbitt*, for example, the United States Supreme Court found a ripe controversy existed where a statute was fairly read to apply to conduct plaintiffs sought to engage in and the state had "not disavowed any intention of invoking the criminal penalty provision" against them. 442 U.S. at 302; *see also Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 392–93 (1988) (finding credible threat of enforcement where state had "not suggested that the newly enacted law will not be enforced").

This case, like *Babbitt* and *American Booksellers*, involves litigants who would engage in certain activities but for statutes prohibiting those activities. Additionally, as in both those cases, Reed has not disavowed any intention to enforce the Texas Election Code provisions against Plaintiffs. Indeed, Plaintiffs represent they have repeatedly offered to drop Reed from the suit if she would agree in writing to not independently prosecute Plaintiffs under the challenged statutes. Second. Am. Compl. [#28] ¶ 15 n.2. Because Reed remains free to prosecute Plaintiffs at any time should they violate the challenged provisions of the Texas Election Code, Plaintiffs face a credible threat of prosecution and their controversy is ripe. *See* 13B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 3532.5 (3d ed. 2008), *available at* Westlaw FPP ("Lack of enforcement

of a clearly applicable statute, in short, is a slender reason for denying review. . . . If a statute clearly applies to ongoing conduct, or to conduct that is imminent, lack of enforcement should not defeat ripeness.").

The case for ripeness is strengthened by the otherwise concrete nature of the dispute between the parties. The "basic rationale" of the ripeness doctrine is to prevent federal courts from "entangling themselves in abstract disagreements." *Abbott Labs.*, 387 U.S. at 148. This case presents purely legal issues, and would not benefit from further factual development. *See id.* at 149. Rather than presenting abstract disagreements, this case presents relatively narrow issues of law. The hardship to the parties is also significant, as Plaintiffs will be forced to choose between refraining from exercising their First Amendment rights or exercising them at the risk of criminal prosecution. *See Am. Booksellers*, 484 U.S. at 393 ("[T]he alleged danger of this statute is, in large measure, one of self-censorship; a harm that can be realized even without an actual prosecution."). The Court therefore finds a ripe controversy exists between Plaintiffs and Reed, and Reed's motion to dismiss for lack of subject matter jurisdiction is DENIED on this ground.

2. Standing

Reed's standing argument is a variation on her ripeness argument. Relying on *American Booksellers* and other cases, the Fifth Circuit has recognized "a chilling of speech" out of fear of punishment under an allegedly unconstitutional statute "can be sufficient injury to support standing." *Ctr. for Individual Freedom v. Carmouche*, 449 F.3d 655, 660 (5th Cir. 2006). However, as in the ripeness context, this "self-censorship" harm only satisfies the standing doctrine's injury-in-fact requirement where it is based on a credible threat of prosecution. *Id.* (citing *Babbitt*, 442 U.S. at

302). Reed argues the lack of a credible threat of prosecution in this case precludes a finding of an injury-in-fact and thus prevents Plaintiffs from establishing standing.

For the same reasons discussed in the ripeness section above, the Court finds a credible threat of prosecution exists and therefore Plaintiffs have suffered an injury-in-fact for standing purposes. The chilling of speech in the face of an allegedly unconstitutional statute is "'a harm that can be realized even without an actual prosecution.'" *Id.* (quoting *Am. Booksellers*, 484 U.S. at 392). Because Reed has not disavowed her intent to enforce the challenged provisions of the Texas Election Code, Plaintiffs face a credible threat of prosecution. *Am. Booksellers*, 484 U.S. at 392–93; *Babbitt*, 442 U.S. at 302.

Although the parties did not raise the argument, the Court also notes the controversy in this case has not been mooted by the passing of the various election dates. Mootness is sometimes referred to as "'the doctrine of standing in a time frame.'" *Carmouche*, 449 F.3d at 661 (quoting *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 397 (1980)). There is a well established exception to the mootness doctrine for "'controversies capable of repetition, yet evading review.'" *Id.* (quoting *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 774 (1978)). This doctrine applies where the limited duration of an event practically precludes litigation before the event ceases, and the same party is likely to be subjected to the same action again in the future. *Id.*

As the Fifth Circuit has recognized, challenges to "the validity of state election laws are classic examples of cases in which the issues are capable of repetition, yet evading review." *Id.* (internal quotation marks omitted). The sixty-day window in the challenged provisions of the Texas Election Code is precisely the kind of event that expires too quickly to allow a full resolution of a constitutional challenge. In this case, multiple relevant elections have come and gone before the

parties could even complete discovery or advance beyond Rule 12 motions. Although nearly every particular advocacy opportunity described in Plaintiffs' Second Amended Complaint has now passed, the case is not moot because the disputes are capable of repetition, yet evade review. *See id.* ("Controversy surrounding election laws, including campaign finance regulations, is one of the paradigmatic circumstances in which the Supreme Court has found that full litigation can never be completed before the precise controversy (a particular election) has run its course.").

The second requirement for this exception to the mootness doctrine to apply is often described as the "reasonable expectation that the same complaining party would be subject to the same action again." *Id.* at 662 (internal quotation marks omitted). Taken at face value, this requirement would seem to preclude application of the exception to situations like this one, where the sixty-day no-advocacy period will never again apply to these particular plaintiffs because they now have their paperwork on file. However, the Fifth Circuit has acknowledged the United States Supreme Court "does not always focus on whether *a particular plaintiff* is likely to incur the same injury." *Id.* (emphasis added). Both courts have therefore applied the doctrine where "other individuals" not party to the suit "will be affected by the continuing existence" of the challenged statute. *Id.* The present case is not moot, even though the named Plaintiffs may never face the sixty-day prohibition again, because other similarly situated advocacy groups will as long as the challenged provisions of the Texas Election Code remain in force.

3. Immunity

Reed argues she enjoys absolute prosecutorial immunity from civil suit with regard to prosecutorial activities "intimately associated with the judicial phase of the criminal process." *Imbler v. Pachtman*, 424 U.S. 409, 430–31 (1976). The immunity Reed cites, however, relates to *monetary*

damages under § 1983. *Id.* at 431. Plaintiffs' constitutional challenges seek declaratory and injunctive relief, claims from which Reed, sued in her official capacity, is not immune. *Ex parte Young*, 209 U.S. 123 (1908). Reed's motion to dismiss on the ground of absolute immunity is DENIED.

II. Motion to Dismiss—Rule 12(b)(6)

A. Legal Standard

Federal Rule of Civil Procedure 8(a)(2) requires a complaint to contain "a short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a)(2). A motion under Federal Rule of Civil Procedure 12(b)(6) asks a court to dismiss a complaint for "failure to state a claim upon which relief can be granted." FED. R. CIV. P. 12(b)(6). The plaintiff must plead sufficient facts to state a claim for relief that is facially plausible. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *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." *Iqbal*, 566 U.S. at 678. Although a plaintiff's factual allegations need not establish that the defendant is probably liable, they must establish more than a "sheer possibility" that a defendant has acted unlawfully. *Id.* Determining plausibility is a "context-specific task," and must be performed in light of a court's "judicial experience and common sense." *Id.* at 679.

In deciding a motion to dismiss under Rule 12(b)(6), a court generally accepts as true all factual allegations contained within the complaint. *Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 164 (1993). However, a court is not bound to accept legal conclusions couched as factual allegations. *Papasan v. Allain*, 478 U.S. 265, 286 (1986).

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). In deciding a motion to dismiss, courts may consider the complaint, as well as other sources such as documents incorporated into the complaint by reference, and matters of which a court may take judicial notice. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007).

B. Application

Reed argues Plaintiffs fail to state a claim against her because she is not a necessary party to the constitutional challenge. In other words, Reed recasts her ripeness and standing arguments as failure-to-state-a-claim arguments. Those arguments are unpersuasive for the reasons described above. Especially in the First Amendment context, litigants need not wait until they are actually prosecuted in order to challenge the constitutionality of a statute affecting their speech. *Babbitt*, 442 U.S. at 302 (1979).

Reed likens this case to another suit in which the "law makers," rather than the "law enforcers," were deemed the proper defendants. *See Children's Healthcare is a Legal Duty, Inc. v. Deters*, 894 F. Supp. 1129, 1131–32 (S.D. Ohio 1995), *rev'd on other grounds*, 92 F.3d 1412 (6th Cir. 1996). But the claims against the prosecutors in *Deters* were based on the prosecutors' failure to prosecute individuals under a state endangerment law based on a state law exemption for religious practices. *Id.* ("Prosecutors can only bring criminal charges for activities the state has deemed criminal."). This case, by contrast, seeks to prevent—rather than compel—enforcement of (allegedly unconstitutional) state laws. Because *Deters* is distinguishable, and because Plaintiffs have standing to sue as discussed above, Reed's motion to dismiss under Rule 12(b)(6) is DENIED.

Conclusion

Accordingly,

IT IS ORDERED that Defendant Susan Reed's Motion to Dismiss [#55] is DENIED.

SIGNED this the 9th day of January 2013.

SAM SPARKS
UNITED STATES DISTRICT JUDGE