

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

CITY OF ALPINE, CITY OF BIG LAKE, §
CITY OF PFLUGERVILLE, §
CITY OF ROCKPORT, §
CITY OF WICHITA FALLS, §
Diana Asgeirsson, Angie Bermudez, §
Jacques DuBose, James Fitzgerald, §
Jim Ginnings, Victor Gonzalez, §
Russell C. Jones, Mel LeBlanc, §
Lorne Liechty, A.J. Mathieu, §
Johanna Nelson, Todd Pearson, §
Arthur “Art” Reyna, Charles Whitecotton, §
Henry Wilson, §
Plaintiffs, §

v. §

Civil Action No. P:09-CV-59

GREG ABBOTT, §
Texas Attorney General, and §
THE STATE OF TEXAS, §
Defendants. §

DEFENDANTS’ MOTION TO DISMISS CITIES AS PLAINTIFFS

This motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) serves in lieu of an original answer to Plaintiff’s [sic] First Amended Original Complaint, Request for Injunctive Relief, & Request for Declaratory Judgment (“Complaint”). FED. R. CIV. P. 12(a)(4).

INTRODUCTION

In attempting to join this suit, the cities of Alpine, Pflugerville, Rockport, and Wichita Falls misunderstand fundamental principles of government structure and constitutional rights. These cities claim that the criminal penalty provisions of the Texas Open Meetings Act (“TOMA”) violate their First Amendment rights. But only citizens have constitutional rights. Cities do not—especially not against the very state from which they derive their powers—and especially not against criminal

penalties that do not apply to them in the first place. Notably, the Big Lake City Council has already voted to withdraw from the suit.

The four remaining cities in this case lack standing for three separate and independent reasons: (1) because they are creatures of the state and thus cannot sue the state, (2) because cities have no First Amendment rights, and (3) because they are not subject to the provisions they propose to challenge in any event. Accordingly, the Court should dismiss the cities as plaintiffs in this suit.

STANDARD FOR DISMISSAL

Rule 12(b)(1) permits dismissal 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 v. City of Madison*, 143 F.3d 1006, 1010 (5th Cir. 1998) (quotation and citation omitted). “[T]he burden of establishing federal jurisdiction rests on the party seeking the federal forum.” *Howery v. Allstate Ins. Co.*, 243 F.3d 912, 916 (5th Cir. 2001) (citation omitted).

ARGUMENT

I. CITIES LACK STANDING FOR THREE SEPARATE AND INDEPENDENTLY FATAL REASONS.

The issue of “standing is jurisdictional, and may be raised at any time.” *Johnson v. City of Dallas*, 61 F.3d 442, 443-44 (5th Cir. 1995). As plaintiffs who attempt to invoke the Court’s jurisdiction, the cities bear the burden to establish that they have standing to sue. *Delta Commercial Fisheries Ass’n v. Gulf of Mexico Fishery Mgmt. Council*, 364 F.3d 269, 272 (5th Cir. 2004). To establish standing, a litigant must prove: (1) an injury in fact “to himself that is distinct and palpable,” (2) causation, by “showing that the injury fairly can be traced to the challenged action,”

and (3) redressability, by showing that the injury “is likely to be redressed by a favorable decision.” *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990) (quotations and citations omitted).

The cities in this case lack standing for three distinct and independently dispositive reasons. First, as creatures of the state, cities have no standing to sue the state. Second, cities have no First Amendment rights to begin with, and are thus incapable of suffering the injuries alleged here. Finally, the cities are not subject to the criminal penalty provisions they challenge here in any event.

A. As “Creatures of the State,” Cities Lack Standing To Sue the State.

It is a bedrock principle of our structure of government that a municipality is but a “creature of the state.” See, e.g., *City of Trenton v. New Jersey*, 262 U.S. 182, 187 (1923) (“However great or small [a municipality’s] sphere of action, it remains the creature of the state exercising and holding powers and privileges subject to the sovereign will.”) (citation omitted); *City of Worcester v. Worcester Consol. St. Ry. Co.*, 196 U.S. 539, 549 (1905) (“The city is the creature of the state.”) (citation omitted); *Barnes v. District of Columbia*, 91 U.S. 540, 544 (1875) (“A municipal corporation, in the exercise of all of its duties, including those most strictly local or internal, is but a department of the State.”); *Harris v. Angelina County*, 31 F.3d 331, 339 (5th Cir. 1994) (characterizing a municipality as a “state subdivision”).

As creatures of the state, cities may not assert constitutional claims against the state. “[P]ublic entities which are political subdivisions of states do not possess constitutional rights . . . in the same sense as private corporations or individuals.” *City of Safety Harbor v. Birchfield*, 529 F.2d 1251, 1254 (5th Cir. 1976). “Such entities are creatures of the state, and possess no rights, privileges or immunities independent of those expressly conferred upon them by the state.” *Id.* (The same analysis applies with respect to both Defendants in this case, the State of Texas and Attorney General

Greg Abbott. After all, “[s]uits against state officials in their official capacity . . . should be treated as suits against the State.” *Hafer v. Melo*, 502 U.S. 21, 25 (1991) (citation omitted.)

Accordingly, the cities in this suit lack standing to bring constitutional claims against the state. *See Ysursa v. Pocatello Educ. Ass’n*, 129 S.Ct. 1093, 1101 (2009) (while “[a] private corporation enjoys constitutional protections, [] a political subdivision, ‘created by the state for the better ordering of government, has no privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator’”) (quoting *Williams v. Mayor of Baltimore*, 289 U.S. 36, 40 (1933)); *Harris*, 31 F.3d at 339 (“state subdivisions, such as counties and municipalities, cannot assert constitutional claims in federal court against their creator, the state itself, or other state political subdivisions”); *Appling County v. Mun. Elec. Auth. of Ga.*, 621 F.2d 1301, 1308 (5th Cir. 1980) (“a city or county cannot challenge a state statute on federal Constitutional grounds”); *City of Safety Harbor*, 529 F.2d at 1254-55 (“In contrast to private individuals and entities, municipal corporations have repeatedly been denied the right to challenge state legislation allegedly violative of the Federal Constitution.”) (citations omitted).¹

B. Cities Lack First Amendment Rights.

According to the complaint, the criminal penalty provisions of TOMA “cause[] a violation of each plaintiffs’ [sic] First Amendment rights each time he or she self censors.” Compl. ¶ 11.

¹ To our knowledge, the Fifth Circuit has recognized, at most, only one exception to this principle, not applicable here. In *Donelon v. La. Div. of Admin. Law*, 522 F.3d 564 (5th Cir. 2008), the court acknowledged “the anomalous, if not unique, position that a political subdivision might have standing to challenge state laws that allegedly violate the Supremacy Clause”—that is, state laws that are preempted by federal statute—noting in a footnote that there is no “per se” rule that “political subdivisions may not sue their parent states under *any* constitutional provision.” *Id.* at 567 n.6 (citing *Rogers v. Brockett*, 588 F.2d 1057 (5th Cir. 1979) (emphasis added)). This exception appears to be obsolete, however. In *Ysursa*, the U.S. Supreme Court made clear just last year that “a political subdivision, created by the state for the better ordering of government, has no privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator.” 129 S. Ct. at 1101 (quotations omitted). And in any event, the cities have not raised a Supremacy Clause challenge here.

Unlike ordinary citizens, however, cities have no First Amendment rights. *See Muir v. Ala. Educ. Television Comm'n*, 688 F.2d 1033, 1038 & n.12 (5th Cir. 1982) (“Government expression, being unprotected by the First Amendment, may be subject to legislative limitation which would be impermissible if sought to be applied to private expression.”) (citing *Columbia Broad. Sys., Inc. v. Democratic Nat’l Comm.*, 412 U.S. 94, 139 n.7 (1973) (Stewart, J., concurring) (“Government is not restrained by the First Amendment from controlling its own expression. . . . The purpose of the First Amendment is to protect private expression and nothing in the guarantee precludes the government from controlling its own expression or that of its agents.”) (citations and quotation omitted)).

There being no constitutional rights for the cities in this case to assert—and thus no constitutional injury for the cities to suffer—the cities lack standing.

C. Cities Lack Standing to Challenge Criminal Penalty Provisions That Do Not Apply To Them.

The cities lack standing for one final reason: They are not subject to the criminal penalty provisions of TOMA—and thus have no standing to challenge their validity. *See* TEX. GOV’T CODE § 551.144 (“*A member of a governmental body* commits an offense if”) (emphasis added).

The cities cannot claim *parens patriae* standing in order to invoke the rights of citizens or officials within their jurisdiction. Their complaint alleges that cities “advocate for, and protect the First Amendment rights of, their respective elected officials, and of their citizens”—an apparent attempt to invoke the doctrine of *parens patriae* standing. Compl. ¶ 2. But unlike states, cities have no *parens patriae* standing to assert the rights of citizens or officials—and especially not against the state. “As a creature of the state, [a city] is not endowed with the same prerogatives in representing the interests of its residents as is the state in protecting the interests of its citizens, *particularly*

where, as here, city and state level interests may be in conflict.” *City of Safety Harbor*, 529 F.2d at 1256 n.7 (emphasis added). *See also id.* (“We are . . . aware of a number of recent cases which have held that a state, suing in a *parens patriae* capacity on behalf of its citizens, may institute a section 1983 action. Without expressing any view as to the merits of these cases, we merely note their inapplicability here. The City . . . does not enjoy the quasi-sovereign status of a state.”); *In re Multidistrict Vehicle Air Pollution M.D.L. No. 31*, 481 F.2d 122, 131 (9th Cir. 1973) (“political subdivisions such as cities and counties, whose power is derivative and not sovereign, cannot sue as *parens patriae*”); *Brazoria County, Tex. v. Hartford Cas. Ins. Co.*, No. Civ. A. G-04-691, 2005 WL 1364837, at *3 (S.D.Tex. June 7, 2005) (“States do have the power to sue at least in some circumstances as *parens patriae* Counties and other political subdivisions do not have this right.”) (citations omitted). As a result, the cities may not bring suit on behalf of citizens for the alleged deprivation of their First Amendment rights by the state.

Nor does the fact that this suit is a facial challenge under the First Amendment save the cities. After all, “First Amendment challenges do not eliminate the need for a party to demonstrate it has constitutional standing.” *Serv. Employees Int’l Union, Local 5 v. City of Houston*, No. 08-20616, 2010 WL 323550 (5th Cir. Jan. 28, 2010). To be sure, a plaintiff in a facial challenge under the First Amendment may in some cases sue to vindicate not only his own First Amendment rights, but also the First Amendment rights of others. But the plaintiff must still first allege his own distinct injury. Only then can a plaintiff argue that a law violates the First Amendment rights of others, even if the law may be constitutional as applied to the plaintiff himself. *See Virginia v. Am. Booksellers Ass’n, Inc.*, 484 U.S. 383, 392-93 (1988) (“To bring a cause of action in federal court requires that plaintiffs establish at an irreducible minimum an injury in fact; that is, there must be some threatened or actual

injury resulting from the putatively illegal action”) (quotations and citation omitted); *Sec’y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 958 (1984) (“Facial challenges to overly broad statutes are allowed not primarily for the benefit of the litigant, but for the benefit of society—to prevent the statute from chilling the First Amendment rights of other parties not before the court. Munson’s ability to serve that function has nothing to do with whether or not its own First Amendment rights are at stake. *The crucial issues are whether Munson satisfies the requirement of ‘injury-in-fact,’* and whether it can be expected satisfactorily to frame the issues in the case.”) (emphasis added); *Warth v. Seldin*, 422 U.S. 490, 499-500 (1975) (“The Art. III judicial power exists only to redress or otherwise to protect against injury to the complaining party, even though the court’s judgment may benefit others collaterally. A federal court’s jurisdiction therefore can be invoked only when the plaintiff himself has suffered ‘some threatened or actual injury resulting from the putatively illegal action’”) (citation omitted).

Here, the cities suffer no such distinct injury—both because they lack First Amendment rights, and because they are not subject to the criminal provisions of TOMA in any event.

* * *

The Big Lake City Council has already voted to withdraw the city as a plaintiff in this case, as of January 19—less than one week after Plaintiffs served Defendants with a summons and amended complaint on January 13. *See Texas town backs out of open meetings suit*, AP, Jan. 21, 2010, *available at* <http://www.chron.com/disp/story.mpl/ap/tx/6829200.html>; News Release, Jan. 21, 2010, *available at* <http://www.foift.org/biglaketoma.aspx>.

That is a good start. The State of Texas asks the Court to finish the job and to remove the remaining cities from this case.

CONCLUSION

The Court should grant Defendants' motion to dismiss the cities as plaintiffs from this case.

Respectfully submitted,

GREG ABBOTT
Attorney General of Texas

C. ANDREW WEBER
First Assistant Attorney General

DAVID S. MORALES
Deputy Attorney General for Civil Litigation

/s/ James C. Ho

JAMES C. HO
Solicitor General
Texas Bar No. 24052766

JAMES C. TODD
Assistant Attorney General
Texas Bar No. 20094700

SEAN D. JORDAN
Deputy Solicitor General
Texas Bar No. 00790988

THOMAS M. LIPOVSKI
Assistant Solicitor General
Texas Bar No. 00791121

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
[Tel.] (512) 936-1823
[Fax] (512) 474-2697

COUNSEL FOR DEFENDANTS

