IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
SAN ANGELO DIVISION

PATRICIA STONE, Plaintiff, v. TOM GREEN COUNTY, Texas; ALLISON PALMER, in her official capacity; and JOHN BEST, in his official capacity, Defendants.	Case No. 6:19-CV-61

PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO DISMISS

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I. INTRODUCTION

This is a straightforward First Amendment case. Plaintiff Patricia Stone argued on behalf of a client that a government practice was unconstitutional. In an attempt to silence that argument, Defendants Alison Palmer and John Best, on behalf of Tom Green County, Texas, conditioned Stone's future ability to adequately represent *other* clients on her *personal* averment that the government practice was constitutional. Defendants' attempt has been temporarily successful: unwilling to disavow her considered view of the Texas Constitution, Stone has been forced to withdraw from all of her pending representations and to decline future ones. She brings this suit to seek compensation for the harms she suffered as a result and to seek a court order forbidding Defendants from continuing to inflict them.

Defendants do not challenge any of this in their motion to dismiss. Instead, they argue only that because Stone sues Palmer and Best in their official capacities she must be suing only the county, and because she once used the word "state" to refer to a different party in a different case she is estopped to argue that Palmer and Best act on the county's behalf. (Defendants' Motion to Dismiss, Doc. 6 at 4–5.) This argument fails at both steps. Plaintiffs are permitted to plead in the alternative, and that is what Stone does here: Palmer and Best act either for the State or for the County (*see* Complaint, Doc. 1 ¶ 62), but *either way* Stone's claims for injunctive relief survive. And Plaintiff is not plausibly estopped to argue otherwise for the simple reason that she has never taken a position on the question whether Palmer and Best act for the County, let alone one inconsistent with her position here; her only statements regarding Palmer and Best came in the context of a habeas corpus petition, in which the State is, in fact, the real party in interest, and in which the question of County policy is completely irrelevant.

Stone adequately pleads a County policy and, as a result, her claims for damages survive Defendants' motion. District Attorney Palmer announced, on the record, that she "[is]

responsible for this . . . decision" to require Stone to disavow her argument about the Texas Constitution *in every case* in order to "insulate" the prosecutors' office "from . . . some sort of appellate situation." (Doc. 1 ¶ 37.) Although Texas district attorneys are state actors when they make individual prosecutorial decisions, the Fifth Circuit has been clear that they are county policymakers where, as here, their actions govern more broadly. *See, e.g.*, *Crane v. Texas*, 766 F.2d 193, 194 (5th Cir. 1985). Defendants' motion should be denied.

II. ARGUMENT

Defendants' motion reflects a fundamental misunderstanding of the claims in this case. Stone sues Defendants Palmer and Best in their official capacities for injunctive relief and for damages. A Texas district attorney may act in at least two official capacities: state and county. Thus, although it is true that if this Court concludes—as it should, *see infra* Subsection C—that Palmer and Best act on behalf of the County, Stone's claims against them would be duplicative of her claims against the County,[1] that does not mean that Stone is somehow forbidden to argue that they are State actors. And that is precisely what Stone does here: she pleads in the alternative. Because she pleads a claim against the County, and because judicial estoppel poses no barrier to her ability to do so, Defendants' motion should be denied.

A. Plaintiff's Official-Capacity Claims Against Palmer and Best Are Pleaded in the Alternative and Concededly Survive At Least as to Palmer and Best's State Capacity

Defendants contend that because Stone pleads claims against Palmer and Best in their capacity as county policymakers, Stone may plead claims against them *only* as county policymakers and may not, therefore, plead claims against them as state officials. (Doc. 6 at 4.) This is wrong. Stone pleads claims against Palmer and Best in their capacity as policymakers for

[1] If this Court concludes that Palmer and Best act for the County, Stone does not object to dismissing them from the case and proceeding against the County alone.

Tom Green County "or, *in the alternative*, as state officials." (Doc. 1 ¶ 62 (emphasis added).) Both capacities are accurately described as "official," and there is nothing impermissible, nor even unusual, about pleading in the alternative. Defendants themselves argue that the challenged policies are those of the State of Texas. (Doc. 6 at 6.) Even according to Defendants' own arguments, then, Stone's claims against them in that capacity survive.

Stone is permitted to plead her claims against Palmer and Best under mutually inconsistent theories of liability. Federal Rule of Civil Procedure 8(d)(3) is entitled "Inconsistent Claims or Defenses." It reads that "[a] party may state as many separate claims or defenses as it has, *regardless of consistency*." *Id.* (emphasis added). Indeed the leading treatise on federal civil procedure notes specifically that a plaintiff may "allege that the defendant is liable to her either in one or in an alternative capacity." 5 Charles Alan Wright et al., *Federal Practice and Procedure* § 1283 (3d ed. 2019) ("Wright & Miller"); *accord Leal v. McHugh*, 731 F.3d 405, 414 (5th Cir. 2013) ("[T]he court could not construe the plaintiff's claim as an admission against another or inconsistent claim . . . ." (citing *Henry v. Daytop Vill., Inc.*, 42 F.3d 89, 95 (2d Cir. 1994))). Defendants ask the Court to treat Stone's lawsuit against Tom Green County as an admission that she lacks a lawsuit against Palmer and Best in their capacity as state officials (Doc. 6 at 5 ("As such, *all* of Plaintiff's claims are asserted against Tom Green County." (emphasis added))), even though she says plainly in the Complaint that it is pleaded in the alternative (Doc. 1 ¶ 62). Stone sues Palmer and Best in both their capacities as county policymakers and their capacities as state officials.

Both capacities are accurately described by the phrase "official capacity." This is because "[o]fficial capacity suits generally represent another way of pleading an action against an entity of which an officer is an agent." *Burge v. Parish of St. Tammany*, 187 F.3d 452, 466 (5th Cir.

1999). When a complaint pleads a case against an actor in her "official capacity," whether she is a state or municipal actor depends on the "entity of which [the] officer is an agent," *id.*, which in turn depends on the facts of the complaint, *see Crane v. Texas*, 766 F.2d 193, 194 (5th Cir. 1985) (distinguishing when district attorney acts as a state or municipal official); *Familias Unidas v. Briscoe*, 619 F.2d 391, 404 (5th Cir. 1980) (distinguishing when county judge acts as a state or municipal official); *ODonnell v. Harris County*, 227 F. Supp. 3d 706, 747–48, 750–51 (S.D. Tex. 2016) (denying motion to dismiss where plaintiffs sued sheriff "in his official capacity," and concluding that "[t]he Sheriff is a County Policymaker to the extent he knowingly enforces invalid orders of detention. . . . [and t]he Sheriff represents the State . . . to the extent he enforces judicial orders of detention.") (subsequent history omitted). Therefore, even if Stone had pleaded only claims against Palmer and Best in their official capacities without saying more, Defendants' arguments still would fail.

And Stone's state-actor claim easily survives. If Stone fails to allege a county policy of retaliating against her and unconstitutionally compelling her speech, then—as Defendants admit—she has stated a claim that Palmer and Best are enforcers of unconstitutional state action. According to *Defendants* "[the] alleged[ly] discriminatory practices are not attributable to Tom Green County, but to the state of Texas." (Doc. 6 at 5.) Even if that were true (which, as explained below, it is not), Stone's claims for prospective relief survive. Plaintiffs may sue state officials in federal court to enjoin ongoing violations of constitutional rights: "The landmark case of *Ex parte Young* created an exception to [state sovereign immunity] by asserting that a suit challenging the constitutionality of a state official's action in enforcing state law is not one against the State." *Green v. Mansour*, 474 U.S. 64, 68 (1985) (citation omitted). In cases—like this one—where plaintiffs seek prospective relief, "[a]n allegation of an ongoing violation of

federal law . . . is ordinarily sufficient to invoke the [*Ex parte*] *Young* fiction." *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 281 (1997); *see also McNeil v. Cmty. Prob. Servs., LLC*, 945 F.3d 991, 994–95 (6th Cir. 2019) ("[T]he plaintiffs can sue the sheriff, and it makes no difference whether he acts for the State or the county. If he acts for the State, *Ex parte Young* permits this injunction action against him. If he acts for the county, neither sovereign immunity, qualified immunity, nor any other defense stands in the way at this stage of the case."). Defendants do not contest that Stone alleges an ongoing violation of federal law, and indeed she alleges one.[2] Stone's claims for prospective relief, therefore, may not be dismissed regardless of this Court's conclusion on her claims for damages.

B. Plaintiff Is Not Estopped to Argue that Palmer and Best Act on Behalf of the County

Defendants contend that Stone is judicially estopped to argue that Palmer and Best are county actors because while representing a client in a habeas corpus case Stone used the word "state" to refer to the respondent. This argument is meritless.

The doctrine of judicial estoppel exists to protect the courts from litigants who take inconsistent positions in related litigations to gain unfair advantage over their adversaries. *E.g.*,

[2] Defendants do not raise the defense of absolute prosecutorial immunity and, for that reason, it is waived or forfeited. *See, e.g., Tully v. Barada*, 599 F.3d 591, 594 (7th Cir. 2010) (holding in appeal from order dismissing case on 12(b)(6) motion that "the defendants waived their absolute-immunity defense by failing to raise it in the district court"); *see also Brandley v. Keeshan*, 64 F.3d 196, 200 (5th Cir. 1995) (describing absolute immunity as affirmative defense), *abrogation on other grounds recognized in Mapes v. Bishop*, 541 F.3d 582, 584 (5th Cir. 2008).

Regardless, prosecutors are not immune from suits for prospective relief. *Supreme Court of Virginia v. Consumers Union of U.S., Inc.*, 446 U.S. 719, 736 (1980) ("Prosecutors enjoy absolute immunity from damages liability, but they are natural targets for § 1983 injunctive suits since they are the state officers who are threatening to enforce and who are enforcing the law." (citation omitted)). And the question of prosecutorial immunity from damages would not be relevant to this suit anyway. Under Fifth Circuit law, the question whether a challenged act is "prosecutorial" is the mirror image (in this context) of the question whether it is a county policy: Prosecutors act for the state when they act in a prosecutorial capacity, *e.g.*, *Coates v. Brazoria County*, No. CIV.A. 3-10-71, 2012 WL 6160678, at *9 (S.D. Tex. Dec. 11, 2012), and they act for the county when they act otherwise, *e.g.*, *Booth v. Galveston County*, 352 F. Supp. 3d 718, 745 (S.D. Tex. 2019).

18 Wright & Miller, *Federal Practice and Procedure* § 4477.3 (2d ed. 2019). Although the doctrine's requirements are not always clear, *see Alt. Sys. Concepts, Inc. v. Synopsys, Inc.*, 374 F.3d 23, 33 (1st Cir. 2004) ("The contours of the [judicial estoppel] doctrine are hazy . . . ."), the doctrine always has a core requirement: that the party against whom it is urged have (a) taken a position in the past that is (b) inconsistent with a position she is taking now, *see* 18 Wright & Miller § 4477.3 ("Inconsistency is the basic element that runs through . . . theories of judicial estoppel."); *Hall v. GE Plastic Pac. PTE Ltd.*, 327 F.3d 391, 396 (5th Cir. 2003) ("First, it must be shown that the position of the party to be estopped is clearly inconsistent with its previous one . . . ." (citation omitted)). Additionally, courts (including the Fifth Circuit) require that a party urging judicial estoppel show that a court has previously agreed with a litigant's allegedly inconsistent position. 18 Wright & Miller § 4477.2 ("Several cases [hold that] . . . judicial estoppel requires reliance by a tribunal."); *Hall*, 327 F.3d at 396 ("[S]econd, that party must have convinced the court to accept that previous position." (citation omitted)).

Defendants do not come close to showing any of this. First, Stone has never taken a position on whether Palmer and Best act for the county or the state at all, let alone a position on whether they act for the county or the state *when retaliating against Stone*. The Fifth Circuit has already rejected an identical attempt to wring an identical conclusion out of the word "state" in Texas law. Defendants argue that *Wayne v. State*, 756 S.W.2d 724, 728 (Tex. Crim. App. 1988), stands for the proposition that Texas prosecutors cannot be county actors because that case referred to prosecutors as "agent[s] of the State." (Doc. 6 at 5 (emphasis omitted) (quoting *Wayne*, 756 S.W.2d at 728).) In *Crane*, the Fifth Circuit rejected a Texas district attorney's attempt to use the phrase "officers of the state" in a Texas case to show that he was not a county policymaker for § 1983 purposes. *Crane*, 766 F.2d at 195 n.1 ("Another cited basis is dubious, a

reference to the duties of prosecutors in *Lackey v. State*, 190 S.W.2d 364, 365 (Tex. 1945) ('[P]rosecuting attorneys are officers of the state, whose duty is to see that justice is done, ...'). It seems plain that this reference is to the 'state' in the abstract, rather than as a particular political entity." (alterations in *Crane*)). When Stone referred to "the state" in her earlier briefing, she was "plain[ly]" referring to "the 'state' in the abstract." *Id.* She did not take a position on whether Palmer and Best acted for Tom Green County.

Second, even if Stone had meant to refer to "the State" as Defendants use the term, it is not inconsistent to refer to "the State" in a habeas case but still argue that prosecutors are county actors in a separate 42 U.S.C. § 1983 case. Under 28 U.S.C. § 2254 and § 2241, the only proper parties in a habeas-corpus case are (a) the jailed petitioner, whose physical liberty is being constrained and (b) the custodian respondent, who is the state official with physical custody over the petitioner. In that context, the "state" is sometimes referred to as the real party in interest because often the respondent custodian has no material interest in the suit; he may be just the person with the keys to the jail cell. *See, e.g., Saldano v. Roach*, 363 F.3d 545, 551 (5th Cir. 2004) ("In this [habeas-corpus] suit . . . , the real party in interest is the State of Texas."). So there is no inconsistency whatsoever, let alone a clear one, in referring to "the State" in a habeas case while arguing that the district attorneys—who are not empowered to represent the state in habeas cases, *id.* ("Texas law does not grant district attorneys the authority to represent either state officials . . . or the State in a federal habeas corpus proceeding.")—are county policymakers. *See* 18 Wright & Miller, § 4477.3 (noting that "[a]rguments that an adversary has taken inconsistent positions often are rejected" and that "a common term may have different meanings in different contexts").

Finally, no court has yet relied—in a ruling, opinion, judgment, statement, or otherwise—on Stone's supposed argument that Palmer and Best are state actors. As Defendants' own exhibits show,[3] the Court *dismissed* Stone's motion for sanctions against the respondent's attorneys in an earlier matter, noting that the instant case might decide the legal questions presented there. This Court has never accepted any positions regarding Palmer and Best in prior litigation, let alone the position that they may act only on behalf of the State. Stone is free to argue in this case that Palmer and Best are county policymakers.

C. Plaintiff Adequately Pleads a Claim Against the County

Defendants argue that the Complaint does not contain "any facts demonstrating that the alleged injuries were the result of an official custom or policy of the county" (Doc. 6 at 5 (emphases omitted)) because the alleged violations were "attributable to . . . the state of Texas" (*id.*). Because a county policymaker stated on the record that she is responsible for the challenged official policy in this case, which governs generally an indefinite number of future situations, Defendants' arguments fail and their motion must be denied.

Counties are liable under 42 U.S.C. § 1983 for actions taken pursuant to municipal policy. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978). A municipal policy can be established in two ways: (1) the municipality's government adopts an official policy by way of a statement, ordinance, regulation, or administrative decision; or (2) the municipality employs a custom or practice so persistent and widespread as to fairly represent municipal policy. *Id.* at 691; *see also Pembaur v. City of Cincinnati*, 475 U.S. 469, 480–81 (1986); *Johnson v. Moore*, 958 F.2d 92, 94 (5th Cir. 1992). "*Monell*," the Court has held, "is a case about responsibility." *Pembaur*, 475 U.S. at 478. The core inquiry is whether the challenged action is the

[3] Stone does not object to the court taking judicial notice of Defendants' exhibits 1–4.

municipality's action, rather than its employees' or the state's. *Id.* The Fifth Circuit has established a three-part test to determine whether a municipality can be liable under *Monell*. The Plaintiffs must show (1) a policymaker, (2) a policy, and (3) that the policy was the "moving force" behind the plaintiff's injury. *Piotrowski v. City of Houston*, 237 F.3d 567, 578 (5th Cir. 2001).

Here, there can be no serious dispute that Stone has pleaded the existence of a policymaker: district attorneys in Texas have final policymaking authority over their offices' conduct, *e.g.*, *Esteves v. Brock*, 106 F.3d 674, 678 (5th Cir. 1997), and Palmer admitted, on the record, that the challenged actions in this case are "[her] responsib[ility]" (Doc. 1 ¶ 37). And the question of injury is uncontroversial too: Defendants do not argue that Stone has failed to plead a cognizable harm under § 1983 (and she obviously has), and there is no question that Palmer's decision is the cause of that harm. Similarly, this is not a case in which Stone must plead a custom or practice so pervasive as to constitute municipal policy; here, Palmer made an official policy statement on the record. (Doc. 1 ¶ 37.) The only question here is whether Palmer's decision constitutes county policy as opposed to state policy.

In cases where plaintiffs contend that the actions of county prosecutors[4] occasion municipal liability, the question whether plaintiffs have pleaded a county policy collapses into the question whether the challenged actions are "prosecutorial" or not. *Compare Esteves*, 106 F.3d at 678 ("Texas law makes clear, however, that when acting in the prosecutorial capacity to

[4] Roughly the same inquiry governs cases against county judicial officers for decisions alleged to constitute county policy. *Compare ODonnell*, 892 F.3d at 155 ("Though a judge is not liable when acting in his or her judicial capacity to enforce state law, . . . the County Judges are policymakers for the municipality [when making bail policy] . . . . [Plaintiffs] sue the County Judges as municipal officers in their capacity as county policymakers. Section 1983 affords them an appropriate basis to do so." (citation omitted)), *with Krueger v. Reimer*, 66 F.3d 75, 77 (5th Cir. 1995) ("A local judge acting in his or her judicial capacity is not considered a local government official whose actions are attributable to the county.").

enforce state penal law, a district attorney is an agent of the state, not the county in which the criminal case happens to be prosecuted."), *with Crane*, 759 F.2d at 430 ("[B]ecause the ultimate authority for determining [the challenged] procedures reposed in the District Attorney, an elected County official, his decisions in that regard must be considered official policy attributable to the County.").

To answer that question, courts look to whether the challenged actions govern only one case or whether they may fairly be characterized as setting policy for a broader range of cases, or other issues.[5] *Compare Coates v. Brazoria County*, No. CIV.A. 3-10-71, 2012 WL 6160678, at *9 (S.D. Tex. Dec. 11, 2012) (holding that district attorney acted in prosecutorial capacity when she declined to prosecute an individual), *and Jones v. Pillow*, No. CIV.A.3:02-CV-1825-L, 2003 WL 21356818, at *2 (N.D. Tex. June 10, 2003) (holding that district attorney acted in prosecutorial capacity when she decided to prosecute an individual), *with Wooten v. Roach*, 377 F. Supp. 3d 652, 668 (E.D. Tex. 2019) ("Here, the County is alleged to have a policy of 'pursuing wrongful arrests and prosecution without probable cause and without due process.' This policy would be outside of the district attorney's role as a prosecutor *in one case* and instead is the implementing of a policy that is contrary to state and federal law." (emphasis added)), *and Brown v. City of Houston*, 297 F. Supp. 3d 748, 766 (S.D. Tex. 2017) (holding that district attorney did not act in prosecutorial capacity when acquiescing in "'do whatever it takes'

[5] Defendants appear to contend that any case involving plea bargaining cannot form the basis for a county policy. (Doc 6 at 5.) This is wrong for at least two reasons. First, as discussed above, the case Defendants cite referring to plea-bargaining prosecutors as "agents of the state" does not prove anything about the state or local capacity of prosecutors. Second, prosecutors can indeed create county liability through policies governing plea bargaining. *Cf. Brown v. City of Houston*, 297 F. Supp. 3d 748, 756 (S.D. Tex. 2017) (noting that district attorney defendant secured plea bargain from potential witness as part of allegations of "do whatever it takes" policy to secure convictions). If the law were otherwise, a county would not be liable for its prosecutors' decision to plea bargain only with white defendants but not black ones, or to plea bargain only with Christian defendants but not Jewish ones. That cannot be the law.

conviction culture"), *and Booth v. Galveston County*, 352 F. Supp. 3d 718, 745 (S.D. Tex. 2019) (holding that district attorney did not act in prosecutorial capacity when setting policy for requesting money-bail amounts).

In this case, Palmer announced that her office would require Stone to abandon her Constitutional arguments *in all future cases*. (Doc. 1 ¶ 45.) Palmer declared that she, and she alone, was responsible for this decision. (*Id.* ¶ 37 ("I'm responsible for this. Mr. Holden [her subordinate] stated [it] in there, and I appreciate that, but I'm responsible for this. This is my decision.").) Although several decisions concerning individual, *past* cases in which Stone participated may have been prosecutorial—the decision to plea bargain with some of Stone's clients and the decision to charge them in the first place—Defendants' challenged policy concerns *all* of her *future* cases. Palmer stated an official policy, for which she took responsibility, which will govern an indefinite number of future cases. If this is not a county policy formulated by a county prosecutor, it is hard to imagine what would be. Defendants' motion should be denied as to Stone's claims against Tom Green County.

III. CONCLUSION

For the foregoing reasons, Defendants' motion to dismiss Stone's case against District Attorneys Palmer and Best in their state and county capacities should be denied, as should Defendants' motion to dismiss Stone's case against Tom Green County. If this Court concludes that the case against Tom Green County may proceed, Stone does not object to dismissing Palmer and Best as redundant; if the Court concludes that the case against Tom Green County may not proceed, Stone will continue with her injunctive-relief claims against Palmer and Best in their capacity as officials executing the policy of the State of Texas.

Respectfully submitted,

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