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 BRIEF IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Treatises

I. INTRODUCTION

Criminal defense lawyers must be free to advocate for their clients against the government. Their advocacy is at the core of both the American criminal legal system and the freedoms protected by the First Amendment. When the government suppresses their advocacy, it threatens the fairness of the legal system and the ability of citizens to criticize their government. And when the government forces an attorney to personally forswear legal arguments as a condition of representing her clients, it suppresses her advocacy. This case is about these principles.

Plaintiff Patricia Stone made a bold argument in her appeal of a client's conviction: That plea bargaining violates the Texas Constitution because it denies the people of the State their constitutional right to serve on a jury and decide the validity of criminal convictions. Rather than allow that argument to be evaluated by the appellate courts, Defendants Alison Palmer and John Best, on behalf of Tom Green County, resolved to prevent Stone from ever making it again. To do this, Defendants implemented a policy requiring Stone to personally aver her belief that plea bargaining is constitutional in any case in which her client seeks to enter a plea bargain. Defendants' policy puts Stone in an impossible position: Either make a statement with which she passionately disagrees (and thereby undermine a position she has taken on behalf of a client), or deny all of her clients the opportunity to avail themselves of the criminal system as it is, albeit not as Stone thinks it should be. Unable to adequately represent her clients in the face of this choice, Stone withdrew from all of her cases and has declined to accept any more.

The plea-bargaining system, which this case does not challenge, relies on agreements between *defendants* and the state, not *lawyers* and the state. That is the crucial problem with Defendants' policy: instead of conditioning a plea deal on, say, a person's waiver of his right to appeal—which, under federal law, is constitutional—Defendants seek to condition plea deals on his *lawyer*'s agreement not to make a legal argument in *all* appeals. Because Defendants are doing

this in response to Stone's protected speech, and because they force her to say something with which she disagrees without a good reason for doing so, Defendants' policy violates the First Amendment.

Tom Green County is liable for these violations, and even if it were not, Defendants Palmer and Best are liable for prospective relief as state actors. Fifth Circuit precedent holds that when Texas district attorneys make policy they bind the counties that they serve. Here, Defendant Alison Palmer stated, on the record, that she was responsible for a policy requiring Stone to sign the additional admonishment in *all* future cases. But regardless, even if this Court concludes that Palmer and Best are not Tom Green County policymakers, Stone's claim for injunctive relief against them may proceed under *Ex parte Young*. Stone is therefore entitled to partial summary judgment that Palmer, Best, and Tom Green County are liable for violating the Constitution.

II. FACTS AND PROCEDURAL HISTORY

The following facts are agreed to by the parties, and, pursuant to this Court's order (Doc. 17), Stone submits this motion to resolve the question of liability in this case. Questions regarding appropriate relief will be addressed after this Court's resolution of the instant motions. Because the facts for purposes of this motion are stipulated, the only question for this Court is whether Stone or Defendants prevail as a matter of law. Fed. R. Civ. P. 56.

In the summer of 2018, Patricia Stone was appointed to represent Austin Ray Carpenter on appeal of his criminal conviction. (The Parties' Proposed Stipulation of Fact, Doc. 22 ¶ 3 ["Stip"].) Shortly thereafter, Stone argued in *Carpenter*'s case that the plea-bargaining system was illegal. (*Id.* ¶ 4; *see also* App'x, Doc. 23-1 at 115–208.) While the *Carpenter* appeal was pending, Stone filed a federal habeas petition on Carpenter's behalf, again arguing that plea bargaining is illegal. (Stip. ¶ 4.) Throughout the briefing on appeal and habeas, no one ever contended that Stone's arguments were frivolous. (*See generally* App'x.)

In response to Stone's arguments in the *Carpenter* case, District Attorneys Palmer and Best directed their subordinates to require Stone to sign a document described as "the Additional Admonishment." (Stip. ¶ 8.) The Additional Admonishment reads

> Additional Admonishment for defense counsel seeking to undermine and overturn at least one conviction by filing at least one appellate brief raising the issue that plea agreements are unconstitutional and/or at least one writ of habeas corpus alleging that plea agreements are unconstitutional: I do not believe that entry into this plea agreement is or has been unconstitutional in any way. I believe my client has freely and voluntarily entered this plea of guilty and I have fully explained his constitutional rights in connection with his guilty plea to him. I do not believe I have offered ineffective assistance of counsel in advising my client of his rights and advising my client to enter into this agreement. I believe based on the evidence I have reviewed and based on communications with my client that this agreement is in my client's best legal interests and advise him to enter into this agreement as part of our defensive trial strategy. In no way do I believe this defendant's plea of guilty in exchange for the State's punishment recommendation in this case to have violated my client's constitutional rights, including his due process rights.

(App'x at 253–54.) At the direction of District Attorneys Palmer and Best, no assistant district attorney will enter into a plea bargain with any client represented by Stone unless Stone agrees to sign the Additional Admonishment. (Stip. ¶ 8.)

Defendant Palmer explained her office's decision to require Stone to sign the Additional Admonishment in court, on the record:

> Judge, this is our position. We need to insulate ourselves against these attacks. This is our position. This is the position we've chosen to make only with Ms. Stone because she's the only one raising this belief, this assertion that plea bargains are unconstitutional. Of course we can't dictate what the Court does, but this is something we feel we need to do to protect our [interruption from the court]— . . . . My concern is that Ms. Stone is saying that she believes if an attorney enters into the plea bargain process, they are ineffective. So is she calling herself, then, ineffective in entering into this plea and setting up sort of a writ situation, some sort of appellate situation? We just want to insulate ourselves from it to the degree that we can. And so for that reason, I—I'm responsible for this. Mr. Holden [an

> assistant district attorney] stated in there, and I appreciate that, but I'm responsible for this. This is my decision.

(App'x at 260–61.) District Attorneys Palmer and Best plan to require Stone to sign the Additional Admonishment or a functionally equivalent document indefinitely. (Stip. ¶ 13.)

III. ARGUMENT

Stone raises two related, but independent, claims in this action, and she seeks both damages and injunctive relief for each. First, Stone alleges that Defendants retaliated against her in violation of the First Amendment when, in response to her brief in *Carpenter*, they implemented a policy of requiring her personally to forswear her protected speech as a condition of plea bargaining. Second, Stone alleges that Defendants unconstitutionally compelled her protected speech by requiring, without any valid justification—let alone a compelling one—that she personally subscribe to a statement with which she disagrees as a condition of plea bargaining. The first claim requires the conclusion that in-court speech is, under certain circumstances, protected from retaliation. Although the Fifth Circuit has not yet addressed the issue, Supreme Court precedent shows that in-court speech may be protected from retaliation. And Stone's second claim succeeds even if this Court ignores Supreme Court precedent and concludes that in-court speech cannot, under any circumstances, be protected by the First Amendment. That is because Stone's second claim does not depend on the *Carpenter* brief at all, and instead requires only that Stone show that Defendants are compelling her to engage in protected speech without an adequate reason to do so. Because both of Stone's claims succeed as a matter of law, against both the County and Palmer and Best, she is entitled to partial summary judgment.

A. Stone's Retaliation Claim Prevails as a Matter of Law

Defendants refuse to plea bargain with Stone unless she personally disavows the arguments that she made in *Carpenter*. Under a long line of Supreme Court precedent culminating in *Legal*

Services Corporation v. Velazquez, 531 U.S. 533 (2001), Stone's arguments in *Carpenter* are protected by the First Amendment; Defendants concede that they are requiring Stone to sign the additional admonishment because of her arguments in *Carpenter*; and being forced to sign the additional admonishment, on pain of being unable to adequately represent clients in a system currently dependent on plea bargains, constitutes adverse action that would chill any lawyer from protected speech. Stone's retaliation claim succeeds as a matter of law.

1. Legal Standard for Employment and Non-Employment Retaliation Claims

Stone alleges that Defendants retaliated against her in violation of the First Amendment by requiring her to sign the additional admonishment in response to her arguments in *Carpenter*. Retaliation claims come in several different forms. The most common form of retaliation claim is the employment retaliation claim, which arises when a government employee[1] suffers an adverse employment action in retaliation for her speech made as a citizen on a matter of public concern. *See, e.g.*, *Juarez v. Aguilar*, 666 F.3d 325, 336 (5th Cir. 2011). But the First Amendment also forbids the government to take retaliatory action against *any* citizen on the basis of her protected speech. *See, e.g.*, *Keenan v. Tejeda*, 290 F.3d 252, 258 (5th Cir. 2002). These two types of retaliation claims—employment and non-employment—are related, but distinct. Stone's retaliation claim is most appropriately understood as a non-employment claim. But because it succeeds under either rubric, a detailed explanation of both claims and the relationship between them may be helpful to the Court.

To establish an employment retaliation claim, plaintiffs must show that "(1) [they] suffered an adverse employment action; (2) [their] speech involved a matter of public concern; (3) [their] interest in commenting on matters of public concern outweighed the defendant's interest in

[1]In her role as appointed counsel, Stone is an independent contractor, but that is irrelevant to this case. *Bd. of County Comm'rs, Wabaunsee County v. Umbehr*, 518 U.S. 668, 675–78 (1996).

promoting . . . efficiency; and (4) [their] speech was a substantial or motivating factor in the defendant's adverse employment action." *Burnside v. Kaelin*, 773 F.3d 624, 626 (5th Cir. 2014) (collecting cases). In addition, an employee plaintiff must show that her speech was not made pursuant to her official government duties. *See Garcetti v. Ceballos*, 547 U.S. 410, 419 (2006). But "to establish a First Amendment retaliation claim against an ordinary citizen," the Fifth Circuit has explained, plaintiffs need only "show that (1) they were engaged in constitutionally protected activity, (2) the defendants' actions caused them to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity, and (3) the defendants' adverse actions were substantially motivated against the plaintiffs' exercise of constitutionally protected conduct." *Keenan,* 290 F.3d at 258.

Both types of claims share a common structure: When the government does something harmful to the plaintiff because of her protected speech, it is liable to her unless the harmful action was justified by the government's legitimate needs under the circumstances. The claims differ only in the content of that harmful action. Where it involves disciplining a government employee, special rules apply because "[a] government entity has broader discretion to restrict speech when it acts in its role as employer." *Garcetti*, 547 U.S. at 418. That broader discretion allows the government to discipline its employees for speech that a private citizen could make without consequence, so long as "the restrictions [the government entity] imposes [on its employees] [are] directed at speech that has some potential to affect the entity's operations." *Id.* By contrast, when the government takes adverse action against someone in her capacity as a private citizen in retaliation for protected speech, the government does not enjoy the broader discretion afforded by the employment context. For this reason, non-employment plaintiffs need only show that the government's adverse action was motivated by their protected speech (rather than by some other,

legitimate concern) and that the government's adverse action was sufficiently severe to chill a person of ordinary firmness from continuing with that speech. *See Keenan*, 290 F.3d at 258.

Stone's claims are best understood as non-employment ones for three reasons. First, although she voiced constitutionally protected speech while serving as appointed counsel for Mr. Carpenter, she suffered consequences for that speech in *all* of her future cases, including privately retained cases outside her role as appointed counsel. Second, those consequences were visited on her by Tom Green County[2] not in its capacity as manager of the county's appointed-counsel system, but rather in its general governmental capacity, and they concerned not her employment status, but rather her general status as an attorney and citizen. And finally, the County's only stated justification for its actions had nothing to do with managing the quality of assigned counsel—in fact, the County justified its decision by contending that it needed the additional admonishment to ensure the validity of criminal *convictions*, which is the opposite of what court-appointed *defense* counsel is supposed to be doing. (App'x at 261.)

In any event, these same three reasons also show why Stone's claims would succeed under the employment rubric because they all show that Defendants' purpose in taking adverse action was unrelated to its role as government employer. Accordingly, this Brief addresses both standards, and does so by arguing as follows: (1) Stone's *Carpenter* brief is protected from non-employment retaliation, and additionally from employment retaliation; (2) Stone's *Carpenter* brief was made as a citizen and addressed a matter of public concern; and (3) Stone suffered an actionable harm because being barred from plea bargaining absent forswearing political speech would deter a person of ordinary firmness from continuing to voice that speech, and additionally

[2] If this Court concludes that Palmer and Best acted on only behalf of the State as relevant to this case, this is true *a fortiori*: Texas counties, not the State, are responsible for managing appointed counsel systems. *See generally* Vernon's Ann. Tex. Code Crim. P. art. 26-04 (2019).

because being barred from plea bargaining is effectively to be barred from practicing criminal law in the system as it exists today and, therefore, is equivalent to being fired from government employment.

2. Stone's Carpenter *Brief Is Protected from Retaliation*

Stone's arguments on behalf of Mr. Carpenter are protected speech in all relevant senses of the word "protected."[3] Here, Stone's speech was protected *from employment retaliation* because it was made as a citizen on a matter of public concern. This, *a fortiori*, means that Stone's speech was protected in the broader sense and, therefore, was protected from non-employment retaliation.

a. In-Court Speech May Be Protected From Retaliation

The Supreme Court's holding in *Velazquez* proves that in-court advocacy can be speech protected by the First Amendment. In *Velazquez*, the Supreme Court held that restrictions imposed by Congress on the Legal Services Corporation (LSC)—a program designed "to represent the interests of indigent clients"—violated the First Amendment rights of LSC lawyers because the restrictions limited the attorneys' in-court advocacy. 531 U.S. at 542. Specifically, the Court held that Congress violated the First Amendment when it disabled recipients of LSC funds from advocating against the constitutionality of any welfare-benefit program. "The disability," the Court wrote, "is inconsistent with the proposition that attorneys should present all the reasonable and

[3] *See Lynch v. Ackley*, 811 F.3d 569, 578 n.8 (2d Cir. 2016) ("Moreover, as a prerequisite to th[e] whole [retaliation] analysis, the speech must come within the protection of the First Amendment to begin with. This element is rarely in dispute, as practically all speech enjoys some First Amendment protection—with rare exceptions for such things as obscenity, fighting words, and yelling 'fire' in a movie theater. *See Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942). And perhaps because it is hardly ever in dispute, it is generally assumed, rather than explicitly stated, that this is an essential element of the claim. A semantic confusion does, however, often arise in the explanation of a ruling on a State employee's claim of unconstitutional retaliation for speech. Courts sometimes characterize the determinative question in § 1983 First Amendment retaliation suits as whether the employee speech at issue was 'constitutionally protected.' In most cases, such words seem intended as shorthand for whether the speech was constitutionally protected from employer retaliation." (citation omitted)).

well-grounded arguments necessary for proper resolution of the case," *Velazquez*, 531 U.S. at 545, and, therefore, "[t]here can be little doubt that the LSC Act [which funded in-court litigation] funds constitutionally protected expression," *id.* at 548. Indeed, the decision of the Second Circuit that the Supreme Court affirmed in *Velazquez* explained that:

> [A] lawyer's argument to a court that a . . . governmental practice standing in the way of a client's claim is unconstitutional or otherwise illegal falls far closer to the First Amendment's most protected categories of speech than [other categories in which the Court allowed viewpoint discrimination] . . . . Such a restriction is a close kin to those calculated to drive certain ideas or viewpoints from the marketplace. If the idea in question is the unconstitutionality or illegality of a governmental rule, *the courtroom is the prime marketplace for the exposure of that idea*.

Velazquez v. Legal Servs. Corp., 164 F.3d 757, 771–72 (2d Cir. 1999) (emphasis added). The Court, therefore, treated the courtroom as the proper forum for political advocacy of the kind Stone engaged in: claiming that governmental practices are unconstitutional.

Defendants will likely rely on *Mezibov v. Allen*, 411 F.3d 712 (6th Cir. 2005), which upheld the dismissal of a private lawyer's First Amendment claim based on in-court advocacy on the ground that the lawyer-plaintiff's advocacy was not protected by the First Amendment *at all*, let alone not protected from employment retaliation. Another panel of the Sixth Circuit, in *Bright v. Gallia County*, later explained that

> The panel's opinion in *Mezibov* deployed overly broad, general language and drew several controversial conclusions. For instance, the majority opined that "the courtroom is a nonpublic forum where the First Amendment rights of everyone (attorneys included) are at their constitutional nadir," 411 F.3d at 718, and that "an attorney's job in the courtroom, although it necessarily includes speech, is fundamentally inconsistent with the basic concept of 'free' speech," *id.* at 719. These statements and others drew an emphatic dissent, see *id.* at 723–26 (Moore, J., dissenting), and judges in subsequent cases have not been shy in expressing their displeasure with the decision, *see, e.g.*, *Lewter v. Kannensohn*, 159 Fed. App'x 641, 648 (6th Cir. 2005) (Keith, J., dissenting) (stating that *Mezibov*'s

> protected-interest holding was "an unwarranted extension of prior law").

Bright v. Gallia County, 753 F.3d 639, 655 (6th Cir. 2014). And a federal district court in Texas has already rejected a nearly identical invitation to rely on *Mezibov* to foreclose all claims based on in-court speech. *Willey v. Ewing*, No. 3:18-CV-00081, 2018 WL 7115180 at *6 (S.D. Tex. Dec. 17, 2018), *report and recommendation adopted*, 2019 WL 313432 (S.D. Tex. Jan. 24, 2019).

Mezibov's "overly broad" language, *Bright,* 753 F.3d at 655, is inconsistent with *Velazquez*. *Mezibov* claimed that "*Velazquez* was a challenge by the Legal Services Corporation and its indigent clients seeking to vindicate the clients' own First Amendment interests in having their otherwise-reasonable arguments heard in court; nowhere does *Velazquez* recognize a First Amendment right personal to the attorney independent of his client." 411 F.3d at 720. This is incorrect. In *Velazquez*, lawyers were *plaintiffs*, and the Supreme Court explicitly allowed the case to proceed on the theory that *their* rights were violated. Congress, the Court wrote, "may not design a subsidy to effect this serious and fundamental restriction on advocacy *of attorneys* . . . ." *Velazquez*, 531 U.S. at 544 (emphasis added). And lower courts have accordingly held that attorneys' personal speech rights are implicated when they face retaliation for in-court advocacy on behalf of their clients. *See Flora v. County of Luzerne*, 776 F.3d 169, 178–80 (3d Cir. 2015) (holding in case where a public defender filed suit on behalf of clients that he voiced citizen speech on a matter of public concern).

Finally, even if this Court follows *Mezibov*, the grounds on which *Mezibov* distinguished *Velazquez* show that *Mezibov* does not control here. *Mezibov* claimed that "*Velazquez* involved a regulation akin to a prior restraint (i.e., the clients' otherwise-reasonable arguments were entirely excluded from the courtroom before the clients had a chance even to advance them), among the most noxious of affronts to the First Amendment. . . ." *Mezibov*, 411 F.3d at 720. Stone, like the

Velazquez plaintiffs, claims a "prior restraint," as *Mezibov* uses the term. *See Near v. Minnesota ex rel. Olson,* 283 U.S. 697, 716 (1931) (holding that government actions preventing speech before it is made are permissible "only in exceptional cases"). In *Velazquez*, the plaintiffs alleged that their speech was barred from the courtroom; in *Mezibov*, the plaintiff alleged *only* that he suffered other adverse consequences unrelated to speech because of his in-court speech. Unlike *Mezibov*, but like *Velazquez*, Stone's in-court speech prompted retaliation that hampers her future speech in court, *see infra* Section III.A.4, and therefore she alleges a prior restraint on her in-court speech.

b. Stone Spoke as a Citizen on a Matter of Public Concern

Stone's speech is not excluded from protection by *Garcetti*[4] because her speech in Mr. Carpenter's case could not have been state action and, therefore, could not have been made pursuant to official duties. For this reason, another district court has rejected an identical invitation to use *Garcetti* to bar retaliation claims brought by appointed counsel. *Willey*, 2018 WL 7115180 at *6.

In *Garcetti*, 547 U.S. at 421, the Supreme Court held that speech "pursuant to official duties" is not protected from retaliation. But *Garcetti* cannot apply to appointed defense counsel when they are advocating on behalf of their clients because they are not state actors. *Polk County v. Dodson*, 454 U.S. 312, 318–19 (1981). Appointed counsel cannot speak pursuant to "official" duties when advocating on behalf of clients because appointed counsel cannot speak officially at all.

Garcetti is a case about government speech. *See, e.g.*, *WV Ass'n of Club Owners & Fraternal Servs., Inc. v. Musgrave*, 553 F.3d 292, 299 (4th Cir. 2009) (interpreting *Garcetti* as "holding that speech made by government employee pursuant to official duties is government

[4] No Court, to the undersigned's knowledge, has held that *Garcetti* applies to non-employment cases.

speech"). In *Garcetti*, the Supreme Court disallowed retaliation claims based on government speech because they undermine the purpose of the government-speech doctrine: when the government speaks it may say what it wishes. *See Garcetti*, 547 U.S. at 422; *see also, e.g.*, *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2245–46 (2015). Because the government can speak only through its employees, allowing those employees to sue the government for things that they were ordered (or forbidden) to say would make it impossible for the government to speak. *E.g.*, *Garcetti*, 547 U.S. at 422 (speech pursuant to official duties "simply reflects the exercise of employer control over what the employer itself has commissioned or created").

Polk County is a case about government control. In *Polk County*, the Court held that a public defender was not a state actor when sued for malpractice he must "be free of state control." *Polk County*, 454 U.S. at 322. That freedom means that appointed counsel's actions cannot be attributed to the government. *Id.* For this reason, the *Velazquez* Court explained that *Polk County* stands for the proposition that appointed lawyers cannot speak for the government in court. 531 U.S. at 542 ("The LSC lawyer, however, speaks on the behalf of his or her private, indigent client. *cf. Polk Cty. v. Dodson*, 454 U.S. 312, 321–322 (1981) (holding that a public defender does not act "under color of state law" because . . . there is an "assumption that counsel will be free of state control"')."). *Garcetti* rested on the principle that "[o]fficial communications have official consequences." 547 U.S. at 422. Because non-state actors cannot create official consequences, *Garcetti* cannot apply to non-state actors.

3. Causation is Conceded

Defendants concede that causation is established in this case. (Stip. ¶ 8 ("In response to Stone advancing the position that plea bargains are unconstitutional and that lawyers who enter plea bargains are ineffective, District Attorneys Allison Palmer and John Best directed assistant

district attorneys to require Stone to sign an 'additional admonishment' prior to entering a plea bargain with a client represented by Stone.").)

4. Defendants' Refusal to Plea Bargain in Any Case with Stone Constitutes Adverse Action

Defendants' policy requires Stone to make an impossible choice: Either deprive her clients of the opportunity to enter a plea bargain as offered by the government or proclaim a personal belief that runs counter to her deeply held convictions. Both requirements constitute adverse action regardless of whether the court determines that they were imposed in the non-employment context (because they would chill an attorney of ordinary firmness in speaking), or in the employment context (because they effectively bar Stone from taking appointed cases).

a. An Attorney Cannot Effectively Represent Clients in Criminal Cases if She Cannot Plea Bargain

Refusing to plea bargain with a criminal-defense attorney constitutes adverse action. Although no one is entitled to a plea offer from the government *a priori*, the government may not deny plea offers to a single attorney's clients as retaliation for that attorney's protected speech. And although Stone believes that plea bargaining violates the Constitution of Texas, she does not deny that bargaining is essential to the criminal system as it functions today.

The Supreme Court has explained that, notwithstanding the fact that no defendant has a freestanding right to be offered a plea bargain, the criminal system today centrally relies on plea bargains to administer criminal cases and, therefore, if the government offers a plea bargain the defendant's constitutional rights are implicated by that offer. *See Lafler v. Cooper*, 566 U.S. 156, 167–68 (2012). "Plea bargaining," the Court declared, "is not some adjunct to the criminal justice system; it *is* the criminal justice system." *Missouri v. Frye*, 566 U.S. 134, 144 (2012) (quoting Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 Yale L.J. 1909, 1912 (1992) (emphasis in Scott & Stuntz)). Accordingly, the mere fact that a given defendant is not

entitled to a plea offer of its own force does not say anything about whether otherwise unlawful deprivation of the opportunity to plea bargain violates the constitution. *See, e.g.*, *Lafler*, 566 U.S. at 168 (holding that right to counsel is violated when defendant turns down plea offer based on incompetent advice even though defendant had no right to that offer in the first place); *Frye*, 566 U.S. at 145–6 (same); *see also Evitts v. Lucey*, 469 U.S. 387, 401 (1985) (holding that defendants are entitled to effective assistance of counsel on appeal even though there is no constitutional right to an appeal at all because "when a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution").

To forbid an attorney to participate in the plea-bargaining system, then, can be adverse action for non-employment purposes and additionally for employment purposes. Under a non-employment rubric, to forbid an attorney to plea bargain is well beyond what is necessary to chill a person of ordinary firmness. Indeed, an attorney can no longer continue to practice criminal law if she is the only attorney in town who cannot plea bargain, and losing one's chosen profession is far beyond the sorts of minimal harms that the ordinary-firmness test is meant to weed out. *Compare, e.g.*, *Keenan*, 290 F.3d at 259 (relying on and quoting *North Miss. Comm., Inc. v. Jones*, 951 F.2d 652, 653–54 (5th Cir. 1992) (county board's decision to withhold legal notice advertising satisfies reasonable-firmness test) and *Nestor Colon Medina & Sucesores, Inc. v. Custodio*, 964 F.2d 32, 40–41 (1st Cir. 1992) (denial of a land use permit satisfies reasonable firmness test)). And, under an employment rubric, to forbid an attorney to plea bargain is essentially to forbid her to practice criminal law. An attorney, the Supreme Court has held, owes her client adequate advice in accepting or rejecting a plea deal. *Lafler*, 566 U.S. at 168 (holding clients entitled to adequate advice in rejecting plea offer); *Hill v. Lockhart*, 474 U.S. 52, 58 (1985) (holding clients entitled to

adequate advice in accepting plea offer). If she cannot provide that advice, she cannot competently practice law.

b. Stone May Not be Forced to Sign the Additional Admonishment

If Stone wishes to plea bargain, she must sign the additional admonishment and, therefore, personally proclaim her belief that plea bargaining is constitutional. As explained below, merely conditioning plea bargaining on a lawyer's personal agreement that a government practice is constitutional gives rise to a compelled-speech claim. For that reason alone, doing so constitutes adverse action for retaliation purposes. But of particular relevance to the retaliation context, requiring Stone to sign the additional admonishment forces her into an impossible position of conflicting professional obligations: Either she advises a client to forgo a plea bargain that may be in his considered best interest, or she takes a position that is in conflict with one that she has taken on behalf of another client in another pending case. Although Stone does not contend in this case that Defendants violated the Texas Rules of Professional Responsibility, those rules are relevant here because they show that Defendants' policy forced *Stone* into a position that the rules recognize to be at least a very difficult one. Therefore, requiring Stone to sign the additional admonishment in response to the Carpenter brief is especially adverse, for both employment and non-employment purposes.

Requiring Stone to publicly proclaim her agreement with a position that is directly contrary to one that she is taking on behalf of a client in an appellate court forces her into an impossible position. Forcing Stone into this position may create a conflict of interest forbidden by the Texas Rules of Professional Conduct. *See, e.g.*, John S. Dzienkowski, *Positional Conflicts of Interest*, 71 Tex. L. Rev. 457, 461 (1993) (explaining that a "positional conflict" arises under the model rules whenever a lawyer "adopts a legal position for one client seeking a particular legal result that is directly contrary to the position taken on behalf of another present or former client, seeking an

opposite legal result, in a completely unrelated matter"). But even if it does not create a formal conflict—and this may be so only because, as discussed below, the additional admonishment may not bind Stone's *clients*—it surely puts her in a position where she is actively undermining a position that she is taking on behalf of a client in court, which in turn undermines her own professional integrity. Even if they are permitted to do so, few lawyers would want to say publicly that positions they have taken on behalf of clients are wrong; Stone refuses to.

Similarly, requiring Stone to agree to a plea bargain that restricts her ability to make legal arguments in the future (which the admonishment, phrased to bind *Stone*, does) may force her to violate Texas Rule of Professional Responsibility 5.6. That rule provides that "[a] lawyer shall not participate in . . . making . . . an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a suit or controversy." *Id.* Ethical guidance makes clear that this rule applies to any arrangement that restricts the lawyer's right to practice *in any way*. *See* Tex. Prof'l Ethics Comm., Op. 505 (1995) ("Under Rule 5.06(b), the key issue is whether or not a settlement agreement such as this would in any way prevent a lawyer from representing another person."). So requiring Stone to personally forswear a legal argument may force Stone to violate this rule because it makes it more difficult for her to make that legal argument in the future. But regardless, requiring Stone to personally forswear a legal argument constitutes adverse action, under both an employment and non-employment rubric, because it hampers her ability to ply her chosen profession in the future. *See supra* Section III.A.4.a.

B. Stone's Compelled-Speech Claim Prevails as a Matter of Law

Even if this Court concludes, contrary to Supreme Court precedent, and in conflict with another recent district court decision, *see Willey*, 2018 WL 7115180 at *6, that Stone's *Carpenter* brief is completely unprotected by the First Amendment, her compelled-speech claim nonetheless entitles her to partial summary judgment. Defendants' policy violates the Constitution regardless

of whether it was motivated by Defendants' opposition to Stone's protected speech because it compels Stone to personally proclaim a belief with which she disagrees as a condition of participating in her chosen profession. Stone is entitled to summary judgment on liability for her compelled-speech claim.

1. Legal Standard for Compelled Speech Claims

Compelled speech claims fall into two basic categories: "true 'compelled-speech' cases, in which an individual is obliged personally to express a message he disagrees with, imposed by the government; and 'compelled-subsidy' cases, in which an individual is required by the government to subsidize a message he disagrees with, expressed by a private entity." *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 557 (2005). This is a true compelled-speech case because Defendants' policy requires Stone personally to agree with a message that she herself delivers. A true compelled-speech claim is essentially a claim for content discrimination in reverse. Rather than forbid a person to speak a message on the basis of its content, the government in a compelled-speech case forces a person to voice speech containing certain content with which the person disagrees. "The constitutional equivalence of compelled speech and compelled silence in the context of fully protected expression," the Supreme Court has explained, "was established in *Miami Herald Publishing Co. v. Tornillo*, [418 U.S. 241, 256 (1974), in which] the Court considered a Florida statute requiring newspapers to give equal reply space to those they editorially criticize . . . [and] unanimously held the law unconstitutional as content regulation of the press, expressly noting the identity between the Florida law and a direct prohibition of speech." *See Riley v. Nat'l Fed'n of the Blind of N. Carolina, Inc.*, 487 U.S. 781, 797 (1988); *see also Jackler v. Byrne*, 658 F.3d 225, 241 (2d Cir. 2011) ("[T]he First Amendment protects [from employment retaliation] the rights of a citizen . . . to refuse to make a statement that he believes is false.").

Therefore, a compelled-speech plaintiff states a claim if she shows that she is compelled to voice speech that the government could not legitimately have forbade her to voice. To make such a showing, a plaintiff must show that she was compelled to voice speech on the basis of its content or viewpoint and that the government's purpose in compelling that speech was "not germane to the regulatory interests that justified [the] comp[ulsion] . . . ." *Johanns*, 544 U.S. at 558; *see also Wooley v. Maynard*, 430 U.S. 705, 714–15 (1977) (striking down a state law requiring someone "to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable . . . [because the requirement was not justified by] the State's countervailing interest [that] is sufficiently compelling"); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 633 (1943) (striking down compelled salute to the flag because "the compulsory flag salute and pledge requires affirmation of a belief and an attitude of mind"). And the Court has been clear, in the context of a compelled-subsidy case—which requires an even higher showing than "pure" compelled speech claims, *see Johanns*, 544 U.S. at 577—that conditioning the practice of law on objectionable speech violates the First Amendment. *See Keller v. State Bar of California*, 496 U.S. 1, 14 (1990) (striking down requirement that California lawyers fund political speech unrelated to the regulation of the practice of law as a condition of practicing law).

2. The Additional Admonishment Expresses a Political Viewpoint with Which Stone Passionately Disagrees

Although she understands that plea bargaining is essential to the current functioning of the criminal system—and, for that reason, cannot ethically deprive her clients of the opportunity to reap its temporary benefits—Stone passionately believes that it violates the Texas Constitution. In order to plea bargain on behalf of her clients, Stone must now *personally* aver her belief that plea bargaining is constitutional. The requirement that she do so violates the Constitution.

In *Velazquez*, the Supreme Court held that attorneys may not be denied government funding because they argued that government welfare policies violated the Constitution. As explained above, arguments regarding the constitutionality of government practices are at the core of the protections afforded by the First Amendment. *See, e.g.*, *Velazquez*, 164 F.3d at 771. Therefore, according to the rule in *Riley* and *Miami Herald*, the attorneys could not constitutionally be denied a government subsidy if they *refused* to declare that a government practice *was* constitutional. *E.g.*, *Riley*, 487 U.S. at 797. So too here. Defendants are attempting to force Stone to personally proclaim that their own practices are constitutional, and "a lawyer's argument to a court that a . . . governmental practice . . . is unconstitutional . . . falls . . . close[] to the First Amendment's most protected categories of speech . . . ." *Velazquez*, 164 F.3d at 771.

3. Defendants Have no Legitimate Purpose in Compelling the Admonishment

Defendants may constitutionally compel Stone's protected speech as a condition of plea bargaining only where their purpose in exacting the speech is germane to the constitutionally permissible purposes of plea bargaining. *E.g.*, *Johanns*, 544 U.S. at 558; *see also Seattle Mideast Awareness Campaign v. King County*, 781 F.3d 489, 496 (9th Cir. 2015) (explaining that government may regulate speech related to government programs where its regulation is germane to the purpose of the program). Defendants' stated purpose for requiring Stone to sign the additional admonishment is to "protect [themselves] from some sort of writ situation [or] some sort of appellate situation." (App'x at 261.) There are two problems with this purpose. First, although in a plea-bargaining system the prosecution may legitimately require parties to agree to foreclose arguments on appeal, it may not legitimately require lawyers to personally proclaim their belief that those arguments are wrong. And, second, Defendants' stated purpose fails because an appellate court may not constitutionally enforce a waiver against the argument that the waiver itself was illegal.

First, in an ordinary plea agreement, the defendant waives his right to make arguments (on motions, to the jury, and sometimes to the courts of appeals) in exchange for leniency from the prosecution. The government's permissible purpose in extracting these waivers is to save the time, expense, and uncertainty of a trial, and therefore to convict people who the government believes committed crimes. The additional admonishment cannot forward this purpose because it does not bind the client at all; it binds only Stone. And this suggests that Defendants' purpose in exacting the waiver was in fact targeted at compelling protected speech, rather than at the permissible purpose of attempting to convict people Defendants believe are guilty.

Second, even if the additional admonishment had bound Stone's clients, it could not have forwarded the purpose that Defendants claim it does. Plea agreements cannot waive the right to challenge their own validity because if they are invalid, the waiver of the right to challenge their validity is invalid too. *See, e.g.*, *United States v. White*, 307 F.3d 336, 343 (5th Cir. 2002) ("[A]n impermissible boot-strapping arises where a waiver is sought to be enforced to bar a claim that the waiver itself—or the plea agreement of which it was a part—was unknowing or involuntary."). Similarly, statements by lawyers of the form "I have not given incompetent advice in advising my client to accept this plea bargain" cannot bar claims of ineffectiveness because the lawyers may have incompetently declared their own competence. If, in fact, advising the client to enter the plea bargain is incompetent, then the quoted statement is false. One cannot credibly disclaim one's own ineffectiveness just as one cannot credibly proclaim one's own veracity: Both statements rely on their own truth to be true. And so, although clients may waive the right to claim their attorney's ineffectiveness in future proceedings, *see* Nancy J. King, *Plea Bargains That Waive Claims of Ineffective Assistance - Waiving* Padilla *and* Frye, 51 Duq. L. Rev. 647, 661 (2013), merely requiring an attorney to declare that she believes herself effective does not forward that end.

The challenged policy in this case seeks not to do what ordinary plea bargains do—trade the defendants' rights for the government's leniency—but rather to compel an attorney's separate, collateral agreement with protected speech. That policy violates the First Amendment.

C. The County is Liable for Violating Stone's Rights

Tom Green County is liable for the violation of Stone's rights 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.

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 691–2; *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 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 proven the existence of a policymaker: district attorneys in Texas have final policymaking authority over their offices' conduct, *e.g.*, *Crane v. Texas*, 759 F.2d 412, 430 (5th Cir. 1985), and Palmer admitted, on the record, that the challenged actions in this case are "[her] responsib[ility]" (App'x at 261). And the question of injury is uncontroversial too: Stone has pleaded a cognizable harm (*see supra* Section III.A.3), and

there is no question that Palmer's decision is the cause of that harm (Stip. ¶ 8). Similarly, this is not a case in which Stone must plead a custom or practice so pervasive as to constitute municipal policy; Palmer made an official policy statement on the record. (App'x at 261.) The only question is whether Palmer's decision constitutes county policy as opposed to state policy.

In cases where plaintiffs contend that the actions of county prosecutors[5] 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 v. Brock*, 106 F.3d 674, 678 (5th Cir. 1997) ("Texas law makes clear, however, that when acting in the prosecutorial capacity to 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. *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

[5] Roughly the same inquiry governs cases against county judicial officers for decisions alleged to constitute county policy. *Compare ODonnell v. Harris County*, 892 F.3d 147, 155 (5th Cir. 2018) ("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.").

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' 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*. (Stip. ¶ 13.) Palmer declared that she, and she alone, was responsible for this decision. (App'x at 261 ("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.

D. In the Alternative, The District Attorneys as State Actors are Liable for Violating Stone's Rights

Stone pleads claims against Palmer and Best in their capacity as policymakers for 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. Therefore, even if this Court concludes that Stone has not stated a claim against Tom Green County, Palmer and Best remain liable for prospective relief (and the question of relief is not at issue in this motion) in their capacity as state officials.

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))). And Stone 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*, 766 F.2d at 429–39 (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 she has stated a claim that Palmer and Best are enforcers of unconstitutional state action. 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.").

IV. CONCLUSION

For the foregoing reasons, Stone's motion for partial summary judgment that Palmer, Best, and Tom Green County are liable for violating her First Amendment rights should be granted.

Respectfully submitted,

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