IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

ANDREW WILLEY, Plaintiff, v. THE HONORABLE JACK EWING, in his capacity as Judge of Galveston County Court at Law Number Three, Defendant.	Case No. 18-CV-81 The Honorable George C. Hanks, Jr. The Honorable Andrew M. Edison

PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS

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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 that advocacy, it threatens the fairness of the legal system and the ability of citizens to criticize their government. This case is about these principles.

Defendant, Judge Jack Ewing, retaliated against Plaintiff, Andrew Willey, by removing him from cases to which he was assigned and refusing to assign him to new cases because he spoke out about unconstitutional practices in the Galveston criminal courts. Judge Ewing acted against Willey in retaliation for three categories of protected speech: out-of-court political advocacy, reasonable requests for funding, and in-court advocacy. Willey seeks only a declaratory judgment that he must receive assignments as any other qualified attorney would and that he may continue to speak out without fear of continued reprisal. This is a straightforward retaliation case.

Judge Ewing retaliated against Willey by acting against his concrete legal interests. Therefore, Judge Ewing's legal interests are adverse to Willey's, and Willey is entitled to a declaratory judgment to protect him against further retaliation. Willey, in an effort to spare the Court's time and to minimize the burden on Judge Ewing, conceded in the Complaint that injunctive relief and attorneys' fees are unavailable in this case. Therefore, the only issue before this Court is whether Willey has stated a claim for declaratory relief against Judge Ewing. Willey has stated a claim, and Judge Ewing's motion should be denied.

II. STATEMENT OF THE ISSUES AND STANDARDS OF REVIEW

The questions before this Court are (a) whether it has subject matter jurisdiction to decide this case, (b) whether Judge Ewing is immune from a suit for a declaratory judgment, and (c) whether Willey states a claim on which relief can be granted. All three are pure questions of law and are reviewed de novo. *See Randall D. Wolcott, M.D., P.A. v. Sebelius*, 635 F.3d 757, 762 (5th Cir. 2011); *Kemp ex rel. Kemp v. Perkins*, 324 Fed. App'x 409, 411 (5th Cir. 2009) (unpublished) (citing *Mays v. Sudderth*, 97 F.3d 107, 110 (5th Cir. 1996)); *United States v. Am. Commercial Lines, L.L.C.*, 759 F.3d 420, 424 (5th Cir. 2014). The well-pleaded facts of the Complaint (Doc. 1) (all citations are to the Complaint unless otherwise specified) are taken as true, and reasonable inferences are drawn in Willey's favor. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

III. FACTS

Willey spoke out against unconstitutional practices in the Galveston criminal courts in three ways: He advocated out of court (*e.g.*, ¶¶ 42, 47) and filed complaints with state agencies (¶¶ 62, 63); he made reasonable requests for fees (¶¶ 36, 46) and appealed their denial (¶ 39); and he advocated in court (*e.g.*, ¶¶ 51, 54 & n.3, 56).

All three categories of protected speech were substantial factors motivating Judge Ewing to retaliate against Willey. The well-pleaded facts give rise to a reasonable inference that Judge Ewing removed Willey from cases and began refusing to assign him to more cases immediately after Willey filed a complaint with a state agency. (*E.g.*, ¶¶ 62–64.) Judge Ewing's abruptly shifting explanations during his conversation with Willey—and his false insistence that he does not "have to answer to you why I appoint people and why

I don't" (¶ 83)—support the inference that his true motivation was retaliatory. (*E.g.*, ¶ 85–88.) And on several occasions Judge Ewing directly said that he was motivated by Willey's speech. (¶ 68; ¶ 85.)

In response to Willey's protected speech, Judge Ewing retaliated against Willey by removing him from his cases (¶¶ 64, 71) and refusing to assign him to more (¶¶ 103–05).

IV. ARGUMENT

a. Summary of Argument

Judge Ewing argues that this Court should dismiss the Complaint principally because the Court lacks subject matter jurisdiction, because the Complaint does not state a claim on which relief can be granted, and because Willey is not, for equitable reasons, entitled to a declaratory judgment. None of these arguments has merit. And Judge Ewing has conceded that neither judicial immunity nor § 1983 bars declaratory relief against him.

First, this Court has subject-matter jurisdiction. Willey suffers the concrete harm of being removed from his position representing indigent defendants (for pay). And Judge Ewing acted against a *non-litigant* in his capacity as the administrator of a judicial program that distributes funds, and therefore did not act in a purely adjudicative capacity. *E.g.*, *Caliste v. Cantrell*, No. CV 17-6197, 2017 WL 6344152, at *3 (E.D. La. Dec. 12, 2017) ("When judges are themselves the actors in an alleged violation of plaintiff's rights . . . they are the proper parties in a §1983 suit."); *De Luna v. Hidalgo Cty.*, No. CV M-10-268, 2011 WL 13282104, at *3–4 (S.D. Tex. June 24, 2011) ("Through their claims for declaratory and injunctive relief against the Judicial Defendants, Plaintiffs are challenging acts or omissions taken within the Defendants' judicial capacities. [Therefore], the Court

finds that Plaintiffs are statutorily barred from seeking injunctive relief, but not declaratory relief, against the Judicial Defendants in their official capacities.").

Second, Plaintiff states a claim on which relief can be granted. Willey expressed three categories of protected speech, each of which caused an adverse action against him, and the benefits of each of which clearly outweigh any potential for disruption—indeed, the speech at issue in this case *forwards*, rather than impedes, Judge Ewing's proper goals for his docket. *See, e.g.*, *Brawner v. City of Richardson*, 855 F.2d 187, 192 (5th Cir. 1988) (holding that speech addressing mismanagement of law enforcement resources serves public interest in use of those resources). Although two of the categories of protected speech at issue in this case present novel questions of law in this circuit, Supreme Court precedent shows that those categories are protected. *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 542 (2001). One of the categories of speech—public complaints to state agencies and out-of-court advocacy—is obviously protected from retaliation. This Court should deny Judge Ewing's motion on that basis alone, regardless of its conclusions on the other categories of speech.

Finally, this case asks for a paradigmatic declaratory judgment. Willey was removed from his cases and denied further appointments because of his protected expression. He seeks only a legal ruling that he receive cases as any other attorney would and that he not be retaliated against further. In a First Amendment retaliation case, an order of reinstatement in the form of an *injunction*—which, in the standard employment case, requires that an employee be restored to her job—is typical. *E.g.*, *Lane v. Franks*, 134 S. Ct. 2369, 2376 (2014) (discussing "equitable relief, including reinstatement" in First

Amendment retaliation case). And the Supreme Court has instructed federal courts to be more permissive with declaratory relief than they are with injunctive relief. *E.g.*, *Steffel v. Thompson*, 415 U.S. 452, 469–71 (1974). Therefore, declaratory relief is warranted in this case.

b. This Court Has Subject-Matter Jurisdiction

This Court has subject-matter jurisdiction to decide this case. Willey has standing to bring this case because he suffers a concrete harm to his own legal interests. Judge Ewing took action directly against Willey's rights—rather than in a purely adjudicative capacity—and therefore is a proper defendant in this case. And Judge Ewing's other arguments against jurisdiction—causation, redressability, and mootness—are without merit.[1]

i. Willey Suffered and Continues to Suffer a Concrete Harm to His Legally Cognizable Interests

Willey's loss of appointments is a concrete harm. "To establish injury in fact, a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized.'" *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)). Before Judge Ewing retaliated against him, Willey received appointments to represent defendants in Judge Ewing's court. Those appointments came with monetary payments. (*E.g.*, ¶ 36.) Since

[1] In Section IV.B. of his brief, Judge Ewing argues that Willey "cannot meet [his] burden" to establish subject-matter jurisdiction. To the extent Judge Ewing argues that the Court should not assume the truth of Willey's factual allegations when considering his claims, this argument is incorrect. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) ("Where, as here, a case is at the pleading stage, the plaintiff must clearly *allege* facts demonstrating each element." (emphasis added) (citation and alteration omitted)).

Judge Ewing's May 2016 retaliation, Willey has not received any appointments from Judge Ewing. (¶¶ 102–105.) That is a concrete harm.

In an attempt to resist this conclusion, Judge Ewing argues that Willey has failed to demonstrate a "legally protected interest" because Texas law "is clear [that] [e]mployment is terminable at will absent a contract . . . ." (Doc. 14, at 13.) This argument conflates two questions, misunderstands Willey's claim, and is false in any event. First, whether Willey could lawfully be removed from his cases is a merits question addressed below; that he *was* removed is beyond doubt. Second, because this is a First Amendment retaliation case, even if Judge Ewing could terminate Willey from cases for *no* reason, that does not mean that he may terminate Willey for a *protected* reason. *E.g.*, *Rankin v. McPherson*, 483 U.S. 378, 383–84 (1987) ("[E]ven if [plaintiff] could have been discharged for any reason or for no reason at all, she may nonetheless be entitled to reinstatement if she was discharged for exercising her constitutional right to freedom of expression."). Finally, Judge Ewing's argument is simply false: Texas law, through—among other things—the Plan, constrains the reasons that Judge Ewing can remove Willey from his cases. (*E.g.*, ¶ 15 (providing for removal "for cause at the discretion of a majority vote of the criminal courts board").)

ii. Judge Ewing's Interests Are Adverse to Willey's Because Judge Ewing Acted Against Willey's Rights

Judge Ewing next argues that this Court lacks subject-matter jurisdiction because he and Willey lack adverse legal interests. According to Judge Ewing, Willey's complaint against him is "for actions . . . taken while handling litigation on his docket" (Doc. 14, at 10), and, therefore, the parties lack adverse interests because a judge ordinarily has no

institutional stake in the outcome of litigation on his docket. Judge Ewing's argument confuses two questions: whether the complained-of action is *judicial* and whether the complained-of action is *purely adjudicative*. Because Willey alleges that Judge Ewing acted against *Willey*'s legal rights, and because Willey was not a party to a case before Judge Ewing, Judge Ewing's actions were not purely adjudicatory, and therefore Judge Ewing is a proper defendant.

Although judges are not proper parties when they act in an "adjudicatory capacity," *Bauer v. Texas*, 341 F.3d 352, 359 (5th Cir. 2003), where "judges are themselves the actors in an alleged violation of plaintiff's rights, rather than merely adjudicators of disputes between third parties, they are the proper parties in a § 1983 suit," *Caliste*, 2017 WL 6344152, at *3; *see also De Luna*, 2011 WL 13282104, at *2. Actions taken in a judicial capacity, therefore, are not necessarily taken in an adjudicative capacity. Where, as here, a judge takes action against the plaintiff's rights, and where, as here, the case is not about a suit with a third party, the judge is the proper defendant. *E.g.*, *Pulliam v. Allen*, 466 U.S. 522, 541–42 (1984) (judicial policy of jailing defendants for inability to pay money); *Supreme Court of Virginia v. Consumers Union of U. S., Inc.*, 446 U.S. 719, 734 (1980) (judges with enforcement role over state bar discipline); *Ward v. City of Norwalk*, 640 Fed. App'x 462, 464 (6th Cir. 2016) (unpublished) (policy of extending sentences for defendants who cannot pay court costs); *Caliste*, 2017 WL 6344152, at *3 (policy of jailing defendants pretrial who cannot pay money); *De Luna*, 2011 WL 13282104, at *2 (policy of jailing juveniles who cannot pay money).

Section 1983 contemplates exactly this scenario. After the Supreme Court in *Pulliam v. Allen*, 466 U.S. 522 (1984), held that judges are not immune from prospective relief for judicial acts, Congress amended § 1983 to forbid injunctive relief in most such circumstances, but to allow declaratory relief for judicial acts. *Bolin v. Story*, 225 F.3d 1234, 1242 (11th Cir. 2000); *Brandon E. ex. rel. Listenbee v. Reynolds*, 201 F.3d 194, 198 (3d Cir. 2000). Cases like *Bauer* address circumstances in which a judge does no more than adjudicate a dispute between parties in his court; where, as here, a judge takes action directly against the plaintiff's rights, the judge is a proper party. Although the Fifth Circuit has described the role of a judge administering an indigent defense plan as judicial, *Davis v. Tarrant Cty.*, 565 F.3d 214, 226 (5th Cir. 2009), it did not hold that this role is adjudicative as that term is used in cases like *Bauer*. And the role is not adjudicative: in administering the Plan, judges resolve no disputes between parties.

Judge Ewing removed Willey from cases to which he was assigned and refuses to assign him to further cases. The dispute is exclusively between Judge Ewing, in his role managing the assignment of counsel under the Plan, and Willey, in his role as an attorney receiving appointments under the plan.

iii. Judge Ewing's Other Arguments Against Jurisdiction Lack Merit

Judge Ewing argues that this Court lacks subject-matter jurisdiction because Willey has not demonstrated a causal connection between Judge Ewing's actions and Willey's harm, because a favorable judgment in this Court would not remedy that harm, because "there is no continuing controversy" (Doc. 14, at 11), and because Willey "lacks standing to challenge the statutory indigent defense system" (*id.*, at 16). These arguments are without

merit. First, Willey alleges that Judge Ewing *himself* removed Willey from cases and refuses to assign him to new ones. Whether that removal and that refusal are retaliatory is a merits question addressed below, but there is no question of causation, and Judge Ewing does not support the argument with any citation to authority. Second, a favorable judgment in this case would declare that federal law requires that Willey receive appointments as any other attorney would; such a judgment would no doubt redress Willey's harm of not receiving appointments. *Lujan*, 504 U.S. at 561–62 ("If [plaintiff] is . . . himself an object of the action (or forgone action) at issue . . . , there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it."). Third, this case is not moot merely because Judge Ewing and Willey can settle their *fees* disputes through other means. Willey does not seek to recover his fees here, but he does continue to seek appointments and Judge Ewing continues to refuse them. The parties have an ongoing controversy. Finally, Willey's standing to challenge the indigent defense system is irrelevant because Willey does not challenge that system.

c. Willey Has Already Conceded That Injunctive Relief and Attorneys' Fees Are Unavailable

Willey included claims for injunctive relief and attorney's fees in the Complaint merely to preserve his argument that *Davis v. Tarrant County*, 565 F.3d 214, 227 (5th Cir. 2009), is incorrect. Willey has already conceded that this case is controlled by *Davis*. (nn. 5, 6.) Judge Ewing's discussion of these claims (*e.g.*, Doc. 14, at 14–15) is irrelevant.

d. Judge Ewing Concedes that He Is Not Immune from Willey's Declaratory-Judgment Claim, and He Is Not

Judge Ewing argues that he "is entitled to judicial immunity in all actions taken in his judicial capacity." (*Id.*, at 26.) Judicial immunity does not apply to claims for prospective relief. *Pulliam*, 466 U.S. 522. Congress amended § 1983 to forbid injunctive relief unless declaratory relief was unavailable or violated, but did nothing to alter the availability of declaratory relief. *Bolin*, 225 F.3d at 1242; *Brandon E.*, 201 F.3d at 198. Judge Ewing does not argue that he is immune specifically from a declaratory judgment, and he is not.

e. Willey States a Claim on Which Relief Can Be Granted

Willey pleads facts sufficient to give rise to a claim that Judge Ewing retaliated against him because of his protected speech. Speech is protected from retaliation when it is (1) made as a citizen rather than as a government employee, (2) made on a matter of public concern, and (3) its value outweighs its potential for disruption in the government workplace. *See Lane v. Franks*, 134 S. Ct. 2369, 2375 (2014); *Garcetti v. Ceballos*, 547 U.S. 410, 419 (2006); *Juarez v. Aguilar*, 666 F.3d 325, 336 (5th Cir. 2011). To state a claim for relation based on protected speech, the plaintiff must plead facts that gave rise to a reasonable inference that the protected speech was a "substantive factor" in the defendant's decision to take an "adverse" action against the plaintiff. *E.g.*, *Charles v. Grief*, 522 F.3d 508, 516 n.28 (5th Cir. 2008).

i. Willey Expressed Three Categories of Speech, Each of Which He Expressed as a Citizen, and Each of Which Addressed a Matter of Public Concern

Willey alleges that three categories of protected speech were substantial factors in Judge Ewing's decision to remove him from his cases and refuse to appoint him to more:

(1) complaints to state agencies and out-of-court advocacy, (2) requests for funds and fee-voucher appeals, and (3) in-court advocacy. The first category is quintessential citizen speech on a matter of public concern: Willey, in his capacity as a private citizen, publicly complained about unconstitutional practices by government actors. On this basis alone, the Court should deny Judge Ewing's motion. The second category is protected because public requests for additional funding are protected speech. *Flora v. Cty. of Luzerne*, 776 F.3d 169, 180 (3d Cir. 2015). And the third category is protected under clear Supreme Court precedent. In *Legal Services Corporation v. 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. 533, 542 (2001). Willey alleges a significant limitation on his in-court advocacy, and, therefore, he has stated a claim that Judge Ewing violated his First Amendment rights.

1. Complaints to State Agencies and Out-of-Court Advocacy

Willey alleges that he publicly criticized the conduct of government officials in the Galveston criminal courts. Those criticisms took the form of a letter to Judge Ewing (¶ 47), a conversation with Judge Ewing (¶ 42), and two complaints to relevant state agencies (¶¶ 62, 100). This is indisputably protected speech on a matter of public concern, and it is therefore protected from retaliation. *E.g.*, *Juarez*, 666 F.3d at 336 (holding that where defendant did not "extend [plaintiff's] contract" because plaintiff "report[ed] illegal activities," plaintiff's claim "f[e]ll well within the clearly established elements of

retaliation in violation of [plaintiff's] First Amendment rights"). Judge Ewing does not appear to contend that this category of speech is not protected from retaliation.

2. Requests for Funds and Fee-Voucher Appeals

Next, Willey alleges that he made reasonable requests for the funds necessary to provide a constitutionally adequate defense and that he appealed the denial of those funds. (¶¶ 36, 39, 41, 45, 46.) This speech was made as a citizen on a matter of public concern.

In *Flora*, 776 F.3d at 180, the Third Circuit held that a chief public defender's in-court demands for additional funding (through a class-action lawsuit that he brought on behalf of his clients) were protected from retaliation. "A straightforward application of *Lane*, [134 S. Ct. at 2378–79]," the court wrote, "leads us to conclude that . . . Flora's speech with respect to . . . the funding litigation . . . was not part of his ordinary responsibilities," and therefore that it was citizen speech protected from retaliation. *Id.* *Flora*'s holding fits within a doctrinal framework that the Supreme Court established decades ago, and Willey's activities are at the core of that framework. "[L]itigation," the Court has held, "is . . . a form of political expression." *NAACP v. Button*, 371 U.S. 415, 429 (1963); *see also Borough of Duryea v. Guarnieri*, 564 U.S. 379, 386 (2011) (holding that filing a lawsuit is speech protected from retaliation by the first amendment); *In re Primus*, 436 U.S. 412, 433 (1978) (holding that solicitation of clients is protected expression). In *Button*, the Supreme Court held that the First Amendment protects the right of attorneys to solicit clients for the purpose of challenging unconstitutional state policies because such challenges are often essential to the people's right to "petition for redress of grievances." *Button*, 371 U.S. at 430.

Willey requested funds necessary to provide a constitutionally adequate defense, just as the *Flora* plaintiff did. When those requests were denied, Willey filed appeals and spoke to Judge Ewing. Willey's requests and appeals are in-court demands, adjudicated by a judge, that public officers remedy constitutional violations. And Willey made clear to Judge Ewing that his concern was with the principle that the county should provide constitutionally adequate funds for indigent defense, not with a small amount of money. (¶ 42.) His speech was made as a citizen, *Flora*, 776 F.3d. at 180, on an obvious matter of public concern (¶ 42). It is therefore protected from retaliation.

3. In-Court Advocacy

Finally, Willey alleges that Judge Ewing retaliated against him because he filed motions and memoranda of law in court. Willey's in-court advocacy is speech protected by the First Amendment. Because that speech was also made as a citizen about a matter of public concern, it is protected from retaliation.

a. In-Court Advocacy is Speech

The Supreme Court's holding in *Velazquez* proves that in-court advocacy can be speech protected by the First Amendment. In *Velazquez*, 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 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 (2d Cir. 1999) (emphasis added). The Court, therefore, treated the courtroom as the proper forum for political advocacy of the kind Willey engaged in: claiming that governmental practices are unconstitutional.

Judge Ewing relies 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 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 Cty., 753 F.3d 639, 655 (6th Cir. 2014).

Mezibov's "overly broad" language, *id.*, 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 721. 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 by allowing the lawyers' case to proceed, the Court necessarily relied on the lawyers' own rights; in this context, the prudential limitation on third-party standing would otherwise have barred the attorneys from asserting only their clients' rights. *Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004).

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. Willey, 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 because of his in-court speech. Unlike in *Mezibov*, Willey's in-court speech prompted retaliation *in court*: Willey can no longer speak in Judge Ewing's court (¶¶ 102–05), and therefore he alleges a prior restraint on his in-court speech.

Mezibov also claimed that "*Velazquez* involved the complicating twist of a government funding program that the Court deemed a limited public forum for First Amendment purposes; the instant case involves only speech in the courtroom, which as a nonpublic forum is less conducive to free speech rights." *Id.* Here, the graduated list created by the Plan (¶ 14) is akin to the funding program in *Velazquez*, while *Mezibov* concerned a retained attorney, and therefore did not consider this issue. If the funding program in *Velazquez* is treated as a "limited public forum," as *Mezibov* suggested, the list in this case must be treated as one too: both are government programs designed "to represent the interests of indigent clients." *Velazquez*, 531 U.S. at 542. The funding programs in these cases are where the retaliatory consequences are visited on the plaintiffs; the courtrooms are the fora in which protected speech is expressed.

b. In-Court Advocacy by Appointed Counsel Is Speech as a Citizen

Finally, Willey spoke as a citizen, not as a government employee,[2] when he filed motions in court on behalf of his indigent clients. Although, in *Garcetti*, 547 U.S. at 421, the Supreme Court held that speech "pursuant to official duties" is not protected from

[2] Willey is an independent contractor, but that is irrelevant for this purpose. *Bd. of Cty. Comm'rs, Wabaunsee Cty.. v. Umbehr*, 518 U.S. 668, 675 (1996).

retaliation, that case does not apply to appointed defense counsel when they are advocating on behalf of their clients because they are not even state actors in that capacity. *Polk Cty. 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 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 because he must "be free of state control." *Polk Cty.*, 454 U.S. at 321. 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." *Id.* Because non-state actors cannot create official consequences, *Garcetti* cannot apply to non-state actors.

Willey represented his clients when he advocated on their behalf in court. He was not a state actor in that capacity. Therefore, he could not, *a fortiori*, be speaking pursuant to official duties. His in-court advocacy is therefore protected from retaliation.[3]

ii. All Three Categories of Speech Motivated Judge Ewing to Act Against Willey

Willey has adequately pleaded that all three categories of speech were substantial motivating factors in Judge Ewing's decision to remove Willey from cases and to refuse to assign him to more. To plead a First Amendment retaliation claim, a plaintiff "must show that her speech motivated the defendants' decision" to take adverse action. *Frazier v. King,* 873 F.2d 820, 825 (5th Cir. 1989) (citing *Mt. Healthy City Sch. Dist. v. Doyle*, 429 U.S. 274, 287 (1977)). Courts in the Fifth Circuit analyze retaliation claims under the Supreme Court's *Mt. Healthy* framework. *Gonzales v. Dallas Cty.*, 249 F.3d 406, 412 (5th Cir.

[3] Although the Third Circuit held that a public defender advocating for clients can be speaking pursuant to official duties, *e.g.*, *De Ritis v. McGarrigle*, 861 F.3d 444 (3d Cir. 2017), that court did not address this issue because the plaintiff did not brief *Polk County*, Brief of Appellee, *De Ritis v. McGarrigle*, No. 16-1433, 2016 WL 3568446 (3rd Cir. June 29, 2016).

2001). Under the *Mt. Healthy* framework, courts ask whether the plaintiff has pleaded facts sufficient to "show that his [protected] conduct . . . was a 'substantial factor' or to put it in other words, that it was a 'motivating factor'" for an adverse employment action. *Mt. Healthy*, 429 U.S. at 287. The protected conduct need not be the *only* motivating factor, and if an employee has shown that protected activity was a substantial factor, it becomes the defendant's burden to prove that it would have taken the adverse action regardless. *Id.* Because this Court is limited to the facts in the Complaint (and the Plan, to which Willey does not object), and because Judge Ewing does not suggest *any* non-protected reason for his adverse actions, the only question is whether Willey has pleaded facts sufficient to give rise to a reasonable inference that each category of protected speech was a substantial factor in Judge Ewing's adverse action.

The Complaint pleads facts sufficient to give rise to a reasonable inference that Judge Ewing's ongoing failure to appoint Willey to cases is substantially motivated by Willey's public advocacy and complaints to state agencies. Judge Ewing claims that "there is no indication that Judge Ewing even had knowledge of any of the complaints." (Doc. 14, at 26.) This is false. Willey pleads that "Judge Ewing met with Willey to discuss *the response to his complaint* . . . ." (¶ 79 (emphasis added).) And it is reasonable to infer from the allegations of the Complaint that Judge Ewing retaliated against Willey on that basis. First, it is reasonable to infer that Judge Ewing removed Willey from cases and began refusing to assign him to more cases immediately after Willey filed his complaint. *See Click v. Copeland*, 970 F.2d 106, 113 (5th Cir. 1992) (holding *summary judgment*, let alone dismissal, inappropriate based on timing of retaliatory action). Second, Judge Ewing's

abruptly shifting explanations during his conversation with Willey—and his false insistence that he does not "have to answer to you why I appoint people and why I don't" (¶ 83)—are evidence that his true motivation was retaliatory. *See Mayeaux v. Hous. Indep. Sch. Dist.*, 986 F. Supp. 2d 842, 850 (S.D. Tex. 2014) ("[The] jury could conclude that employer's rationale for terminating plaintiff's employment was pretextual in light of employer's 'inconsistencies and shifting explanations, along with the timing of [defendant's] changing rationale.'" (quoting *Martin v. J.A.M. Distrib. Co.*, 674 F. Supp. 2d 822, 842 (E.D. Tex. 2009)). Judge Ewing's motion should be denied on these bases alone.

Next, the Complaint pleads facts sufficient to give rise to a reasonable inference that Judge Ewing acted against Willey because of his reasonable requests for funds and because of his in-court advocacy. Judge Ewing explicitly said that he removed Willey from his cases because of the funding requests. (¶¶ 85–88.) And the Complaint pleads facts to show that Judge Ewing removed Willey from his cases because Judge Ewing was upset over "something that happened in jail docket." (¶ 68.)

iii. Judge Ewing Took and Continues to Take Adverse Action Against Willey

Judge Ewing argues that Willey has not adequately pleaded that he suffered an adverse action despite the fact that Willey pleaded (a) that Judge Ewing abruptly removed him from cases to which he was assigned (¶¶ 64, 71) and (b) that, since then, Judge Ewing has not assigned him to *any* more (¶¶ 102–05). According to Judge Ewing, this is because Willey *also* pleads that random selection makes it very unlikely that Willey would not be at the top of the graduated list at all during the relevant time period. (¶ 106.) There is no merit to this argument. Willey pleads facts regarding random selection *in addition to* facts showing

that Judge Ewing retaliated against Willey by kicking him off cases and not assigning him to more. Judge Ewing does not, and cannot, argue that is not an adverse action.

iv. Willey More than Adequately Satisfies Pickering *at This Stage*

Finally, Willey easily satisfies *Pickering* at this stage. Judge Ewing argues that "Willey's Complaint . . . fails to address this element." (Doc. 14, at 25.) This is both false and irrelevant. Under clear Fifth Circuit law, *Pickering* balancing is an issue for summary judgment, not a motion to dismiss, because a Complaint alleging protected speech (as here) generally alleges value that outweighs its disruptive capacity. *Burnside v. Kaelin*, 773 F.3d 624, 628 (5th Cir. 2014) ("In stating a prima facie case at the motion-to-dismiss stage of a case, there is a rebuttable presumption that no balancing is required to state a claim."); *Kennedy v. Tangipahoa Parish Library Bd. of Control*, 224 F.3d 359, 366 n.9 (5th Cir. 2000) (stating that *Pickering* "implicates only the summary judgment [analysis], not [a Rule 12(b)(6)] analysis"), *abrogated in part by Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007). And in any event Willey's speech *forwards*, rather than disrupts, the proper functioning of Judge Ewing's court; if the speech is true, as it must be treated to be at this stage, its value necessarily outweighs its potential for disruption. *Brawner v. City of Richardson*, 855 F.2d 187, 192 (5th Cir. 1988) (holding that employee's "statements could not have adversely affected the proper functioning of the department since the statements were made for the very reason that the department was not functioning properly"); *Jackler v. Byrne*, 658 F.3d 225, 242 (2d Cir. 2011) (emphasizing that defendants must protect the "'*proper* performance of governmental functions'" (emphasis in original) (quoting *Garcetti*, 547 U.S. at 419)). Judge Ewing does not contend otherwise, nor could he.

f. This Is a Paradigmatic Declaratory Judgment Case

Willey seeks a declaratory judgment restoring him to the position he was in before Judge Ewing retaliated against him: receiving appointments in the regular order under the Plan, and free to criticize unconstitutional practices in court, out of court, and to state agencies. Willey seeks no preferential treatment, and he seeks a clear order. Because Willey seeks only an order that he ought to be free from unconstitutional retaliation for taking actions in the future, and because he seeks relief that is generally easier to get than standard retaliation cases regularly offer, Willey has pleaded facts sufficient to state an entitlement to a declaratory judgment.

In analyzing whether to decide or dismiss declaratory judgment suits, courts in the Fifth Circuit follow the three steps set out in *Orix Credit Alliance, Inc. v. Wolfe*, 212 F.3d 891, 895 (5th Cir. 2000). "A federal district court must determine: (1) whether the declaratory action is justiciable; (2) whether the court has the authority to grant declaratory relief; and (3) whether to exercise its discretion to decide or dismiss the action." *Sherwin-Williams Co. v. Holmes Cty.*, 343 F.3d 383, 387 (5th Cir. 2003). The first two elements are not in dispute here: the case is justiciable, *see supra* Part III.B, and the Court has authority to issue the requested relief because no impediment exists to its doing so, *Orix*, 212 F.3d at 895 (discussing the Tax Anti-Injunction Act). Instead, Judge Ewing argues that declaratory relief is inappropriate because the Plan forbids Judge Ewing's retaliation and because a declaratory judgment would somehow violate the Texas Code of Judicial Conduct. Both arguments are without merit, and this Court should hear the suit.

"The Fifth Circuit uses the *Trejo* factors to guide a district court's exercise of discretion to accept or decline jurisdiction over a declaratory judgment suit." *Sherwin-Williams*, 343 F.3d at 390 (citing *St. Paul Ins. Co. v. Trejo*, 39 F.3d 585 (5th Cir. 1994)). The Fifth Circuit has distilled the *Trejo* factors to three categories of issues: (a) whether there is a pending state proceeding to which a federal court should defer, (b) whether the plaintiff has engaged in impermissible forum shopping or "procedural fencing," and (c) whether efficiency concerns weigh in favor of state-court adjudication. *Id.* When analyzing the *Trejo* factors, "labels cannot be literally applied." *Id.* The first factor is particularly "important." *Id.*

Willey easily satisfies the *Trejo* factors in this case. (Judge Ewing does not discuss, let alone apply, the factors.) First, not only is there no *pending* state proceeding regarding the subject of this case, there is not even an anticipated one. Federal court is not only an appropriate forum for this action, it is likely the only forum for this action. Second, for the same reasons, Willey could not have engaged in impermissible forum shopping: this is the only forum to which he could bring these claims. And regardless these claims present paradigmatically federal issues: Willey contends that his First Amendment rights are being violated by a state official. Finally, efficiency concerns weigh in favor of litigating this case here and now. If this Court declines to exercise its jurisdiction, neither Willey nor Judge Ewing will know the specific limitations of their conduct, and both will be forced to address each appointed case piecemeal. A declaratory judgment is appropriate.

Supreme Court precedent shows that courts should be *more* liberal with the issuance of a declaratory judgment than they are with the issuance of an injunction. *E.g.*, *Steffel v. Thompson*, 415 U.S. 452, 462–63 (1974) ("That Congress plainly intended declaratory

relief to act as an alternative to the strong medicine of the injunction . . . is amply evidenced by the legislative history of the Act."); *Perez v. Ledesma*, 401 U.S. 82, 104 (1971) (Brennan, J., concurring) ("[W]hen no state prosecution is pending and the only question is whether declaratory relief is appropriate[,] . . . the congressional scheme that makes the federal courts the primary guardians of constitutional rights, and the express congressional authorization of declaratory relief, *afforded because it is a less harsh and abrasive remedy than the injunction*, become the factors of primary significance." (emphasis added)). And courts freely issue injunctions in First Amendment retaliation cases. *E.g.*, *Lane v. Franks*, 134 S. Ct. 2369, 2376 (2014) (discussing "equitable relief, including reinstatement" in First Amendment retaliation case); *Rankin v. McPherson*, 483 U.S. 378, 383–84 (1987). This Court should allow this case to proceed because it seeks only declaratory relief in a circumstance where the Supreme Court has regularly authorized even injunctive relief.

Judge Ewing's two objections to declaratory relief are without merit. First, nothing about Willey's requested relief would cause Judge Ewing to violate the judicial canons.[4] All Willey is asking for is that Judge Ewing appoint him to cases as he would any other attorney. The Plan already requires Judge Ewing to state his reasons for removing an attorney or for passing her over, and the canons require that Judge Ewing exercise "the power of appointment impartially and on the basis of merit." (Doc. 14, at 28.) If Willey is granted all the relief he asks for in this case, Judge Ewing may still remove him from cases

[4] Furthermore, federal law is supreme. U.S. Const. art VI. Even if it were true that complying with the federal constitution required Judge Ewing to violate state law, that is still no defense.

for any non-retaliatory reason; all Judge Ewing has to do is appoint Willey when his name is at the top of the graduated list, impartially, and on the basis of merit.

Second, the mere existence of the Plan does not defeat Willey's request for relief. The Complaint clearly shows that Judge Ewing does not follow the Plan. (*Compare* ¶ 80, *with* ¶¶ 17, 18; *compare* ¶¶ 80, 84, *with* ¶ 19.) And in any event, Willey has no obligation to present his federal constitutional claims to the Galveston County Criminal Courts board before he files suit in federal court to vindicate them. (*Contra* Doc. 14, at 28.) The mere fact that Judge Ewing's conduct *also* violated Texas law and the Plan does not deprive this Court of the obligation to hear Willey's Complaint. *E.g.*, *Monroe v. Pape*, 365 U.S. 167, 184 (1961), *overruled in part on other grounds by Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658 (1978). There is no obstacle to this Court's consideration of this case.

V. CONCLUSION

For the foregoing reasons, Judge Ewing's motion should be denied.

Respectfully submitted,

/s/ Charles Gerstein
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CERTIFICATE OF SERVICE

I, Charles Gerstein, hereby certify that I served a copy of the foregoing order on all parties using the CM/ECF System for the Southern District of Texas.

/s/ Charles Gerstein
Charles Gerstein