

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

CITY OF ALPINE, CITY OF BIG LAKE,	§	
CITY OF PFLUGERVILLE,	§	
CITY OF ROCKPORT,	§	
CITY OF WICHITA FALLS,	§	
Diana Asgeirsson, Angie Bermudez,	§	
Jacques DuBose, James Fitzgerald,	§	
Jim Ginnings, Victor Gonzalez,	§	
Russell C. Jones, Mel LeBlanc,	§	
Lorne Liechty, A.J. Mathieu,	§	
Johanna Nelson, Todd Pearson,	§	
Arthur “Art” Reyna, Charles Whitecotton,	§	
Henry Wilson,	§	
Plaintiffs,	§	
	§	
v.	§	Civil Action No. P:09-CV-59
	§	
GREG ABBOTT,	§	
Texas Attorney General, and	§	
THE STATE OF TEXAS,	§	
Defendants.	§	

DEFENDANTS’ REPLY IN SUPPORT OF MOTION TO DISMISS CITIES

Plaintiffs’ complaint turns the First Amendment on its head—and in more ways than one.

This suit is meritless, because open meeting laws further, rather than frustrate, First Amendment values. Indeed, courts have invoked the First Amendment itself to require public access to certain government proceedings—surely, the Constitution does not forbid what in many contexts it actually requires. Not surprisingly, then, every court in the nation to have addressed a First Amendment challenge to an open meeting law has rejected the challenge—and upheld the law.¹

What’s more, the cities’ claims are also fatally flawed as a jurisdictional matter, because the First Amendment protects citizens against government—not government against its citizens.

Accordingly, the Court should dismiss the claims of the cities in this case.

1. See, e.g., *Cole v. State*, 673 P.2d 345, 350 (Colo. 1983) (per curiam); *People v. Barr*, 414 N.E.2d 731, 739 (Ill. 1980); *State v. Palmgren*, 646 P.2d 1091, 1099 (Kan. 1982); *St. Cloud Newspapers, Inc. v. Dist. 742 Cmty. Schs.*, 332 N.W.2d 1, 7 (Minn. 1983); *Sandoval v. Bd. of Regents*, 67 P.3d 902, 907 (Nev. 2003) (per curiam).

I. Cities Lack Standing Because They Have No First Amendment Rights To Vindicate.

As the U.S. Supreme Court has repeatedly observed, “[t]he Free Speech Clause restricts government regulation of private speech; it does not regulate government speech.” *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1131 (2009) (collecting cases).

Accordingly, cities—unlike ordinary citizens—have no First Amendment rights. As the Fifth Circuit has held, and Defendants previously noted (Defts’ Br. at 5), “[g]overnment expression, being unprotected by the First Amendment, may be subject to legislative limitation which would be impermissible if sought to be applied to private expression.” *Muir v. Ala. Educ. Television Comm’n*, 688 F.2d 1033, 1038 & n.12 (5th Cir. 1982). *See also id.* (citing *Columbia Broad. Sys. v. Democratic Nat’l Comm.*, 412 U.S. 94, 139 n.7 (1973) (Stewart, J., concurring) (“Government is not restrained by the First Amendment from controlling its own expression. . . . The purpose of the First Amendment is to protect private expression and nothing in the guarantee precludes the government from controlling its own expression or that of its agents.”) (citations and quotation omitted)).

Plaintiffs disagree. They rely exclusively on *Citizens United v. FEC*, 130 S. Ct. 876 (2010). But their reliance on *Citizens United* is both wrong—and dangerous.

To begin with, *Citizens United* affirms the First Amendment rights of private corporations—not cities. Plaintiffs invoke *Citizens United* in an apparent bid to analogize “municipal corporations” to private corporations. Pltfs’ Br. at 5. But *Citizens United* says not a single word to that effect—and certainly Plaintiffs cite nothing to that effect.

To the contrary, the same justices who formed the majority in *Citizens United* also *rejected* a similar gambit to analogize cities to private corporations for First Amendment purposes just last year: “A *private corporation* enjoys constitutional protections, but a *political subdivision*, ‘created by the state for the better ordering of government, has no privileges or immunities under the federal

constitution which it may invoke in opposition to the will of its creator.” *Ysursa v. Pocatello Educ. Ass’n*, 129 S. Ct. 1093, 1101 (2009) (quoting *Williams v. Mayor of Baltimore*, 289 U.S. 36, 40 (1933)) (citation omitted, emphasis added). The Fifth Circuit has held likewise: “[P]ublic entities which are political subdivisions of states do not possess constitutional rights . . . in the same sense as private corporations or individuals. . . . In contrast to private individuals and entities, municipal corporations have repeatedly been denied the right to challenge state legislation allegedly violative of the Federal Constitution.” *City of Safety Harbor v. Birchfield*, 529 F.2d 1251, 1254 (5th Cir. 1976). In sum, Plaintiffs’ “analogy is misguided.” *Ysursa*, 129 S. Ct. at 1101.

Plaintiffs’ analogy to private corporations is not only wrong—it is self-destructive. If their analogy holds—and “municipal corporations” are indeed constitutionally indistinct from private ones—then cities will no longer enjoy sovereign immunity. After all, it is precisely because cities are creatures *of* the State—and not private entities entitled to constitutional protection *against* the State—that cities enjoy immunity against suit. In Plaintiffs’ world, by contrast, the foundation of sovereign immunity fails—and city treasuries will be vulnerable to all manner of suit as a result.²

II. Cities Have No Standing To Invoke the First Amendment Rights of Their Citizens.

Plaintiffs’ half-hearted reliance on *Citizens United* is understandable in light of *Ysursa* and *Birchfield*. Their *real* claim instead seems to be that cities have standing to assert the rights of citizens and city officials. *See, e.g.*, Pltfs’ Br. at 4 (“Cities represent the interests of the public”); *id.* at 5 (“Cities . . . must protect the Constitutional rights of the affected public officials”); *id.* at 6.

Plaintiffs do not say so, but their real theory is nothing more than a claim of *parens patriae* standing. They decline to use those words presumably because, as previously noted (Defts’ Br. at

2. Other than *Citizens United*, the only case Plaintiffs mention that even remotely suggests that cities have First Amendment rights (*Bd. of Educ. v. Allen*, 392 U.S. 236 (1968); Pltfs’ Br. at 4) is obsolete, at least in the Fifth Circuit. *See, e.g., City of S. Lake Tahoe v. Cal. Tahoe Reg’l Planning Agency*, 449 U.S. 1039, 1041 (1980) (White, J., dissenting).

5-6), only States—not cities—have *parens patriae* standing to sue on behalf of citizens: “As a creature of the state, [a city] is not endowed with the same prerogatives in representing the interests of its residents as is the state in protecting the interests of its citizens, *particularly where, as here, city and state level interests may be in conflict.*” *Birchfield*, 529 F.2d at 1256 n.7 (emphasis added). As the Fifth Circuit further observed: “We are . . . aware of a number of recent cases which have held that a state, suing in a *parens patriae* capacity on behalf of its citizens, may institute a section 1983 action. Without expressing any view as to the merits of these cases, we merely note their inapplicability here. The City . . . does not enjoy the quasi-sovereign status of a state.” *Id.* See also *In re Multidistrict Vehicle Air Pollution M.D.L. No. 31*, 481 F.2d 122, 131 (9th Cir. 1973) (“political subdivisions such as cities and counties, whose power is derivative and not sovereign, cannot sue as *parens patriae*”); *Brazoria County v. Hartford Cas. Ins.*, 2005 WL 1364837, at *3 (S.D. Tex. June 7, 2005) (“States do have the power to sue at least in some circumstances as *parens patriae* Counties and other political subdivisions do not have this right.”) (citations omitted).

III. Plaintiffs Have Inadvertently Uncovered Another Jurisdictional Defect In Their Suit.

Finally, Plaintiffs open their response by attacking an argument Defendants have not actually made. They claim that cities may indeed sue as plaintiffs in § 1983 actions. Their attack backfires, however: The cities have now made their case worse, not better—by uncovering yet an additional, fourth jurisdictional flaw in their complaint, to add to the three that Defendants previously identified.

Under *Monell v. Department of Social Services*, 436 U.S. 658 (1978), cities are “persons” who may be sued under § 1983. Plaintiffs contend that, if cities can be defendants in § 1983 actions after *Monell*, they may likewise be plaintiffs in such actions. And they contend that the Fifth Circuit ruling to the contrary in *City of Safety Harbor v. Birchfield* is no longer good law due to *Monell*. See *Birchfield*, 529 F.2d at 1256 n.7 (cities may not institute section 1983 actions).

But Plaintiffs cite no actual Fifth Circuit law to support this claim. Instead they rely exclusively on a single case from the Sixth Circuit. *See* Pltfs' Br. at 2 (citing *S. Macomb Disposal Auth. v. Township of Washington*, 790 F.2d 500, 503 (6th Cir. 1986)).

There is just one problem with Plaintiffs' claim—it is not the law of the Fifth Circuit. As the Fifth Circuit has made clear, “[t]he *Monell* decision does not call into question the principle that a city or county cannot challenge a state statute on federal Constitutional grounds.” *Appling County v. Mun. Elec. Auth.*, 621 F.2d 1301, 1308 (5th Cir. 1980). Accordingly, contrary to Plaintiffs' protestations, *City of Safety Harbor v. Birchfield* remains the law of the Fifth Circuit—and the cities therefore have no standing to pursue actions under section 1983.³

* * *

Texas cities have not rallied to Plaintiffs' side. To the contrary, Beaumont recently adopted a resolution rejecting this suit and supporting the Texas Open Meetings Act—while El Paso likewise declined Plaintiffs' invitation to join their cause by a resounding, and unanimous, 7-0 vote.⁴ Even the original parties to this suit are beginning to abandon ship: As noted, one of the five cities who initially joined this suit—Big Lake—has already voted to withdraw its claims. Defts' Br. at 7. The reason is simple: The First Amendment protects citizens against government, not the other way around—and open meeting laws further, rather than frustrate, First Amendment values.

3. *See, e.g., City of New Rochelle v. Town of Mamaroneck*, 111 F. Supp. 2d 353, 368 (S.D.N.Y. 2000) (“[T]he Fifth, Seventh, and Eleventh Circuits have held that municipalities are not ‘persons’ who may seek relief under Section 1983. These courts reasoned that *Monell*’s holding that municipal entities may be proper Section 1983 *defendants* does not render them proper Section 1983 *plaintiffs*. These courts further noted that *City of Safety Harbor*’s reliance on congressional intent remains valid after *Monell*.”) (citing, *inter alia*, *Appling County v. Mun. Elec. Auth.*).

4. *See* Mike D. Smith, *Beaumont council endorses Open Meetings Act*, BEAUMONT ENTERPRISE, Feb. 16, 2010, available at http://www.beaumontenterprise.com/news/local/Beaumont_council_endorses_Open_Meetings_Act.html; Gustavo Reveles Acosta, *City will not join lawsuit against Texas Open Meetings Act*, EL PASO TIMES, Feb. 23, 2010, available at http://www.elpasotimes.com/news/ci_14454596?source=rss.

CONCLUSION

For the reasons set forth herein and in Defendants' Motion to Dismiss Cities as Plaintiffs, the Court should grant the motion and dismiss the cities as plaintiffs from this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have electronically submitted for filing a true and correct copy of the foregoing document, in accordance with the Electronic Case Files System of the Western District of Texas, on this the 1st day of March, 2010, to:

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