In the United States District Court
for the Southern District of Texas
Houston Division

Bay Area Unitarian Universalist Church, *et al.*, Plaintiffs, v. **Ken Paxton, Attorney General for the State of Texas, in his official capacity, *et al.*,** Defendants.	**Civil Action No. 4:20-CV-3081** Jury Demanded

City of Webster's Motion to Dismiss

Defendant, City of Webster, sued through its Acting Chief of Police, Pete Bacon in his official capacity,[1] moves to dismiss Plaintiffs Bay Area Unitarian Universalist Church, Drink Houston Better, LLC d/b/a Antidote Coffee, and Perk You Later, LLC's claims because the Court lacks subject matter jurisdiction and, moreover, Plaintiffs have failed to state a claim upon which relief can be granted. In support, the City would submit the following motion under Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure:

[1] Because "[o]fficial-capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent," *Monell v. New York City Department of Social Services*, 436 U.S. 658, 690 n.55 (1978), Plaintiffs' claims against the City of Webster's Acting Chief of Police, Pete Bacon in his official capacity, must be treated as claims against the City. *Hafer v. Melo*, 502 U.S. 21, 25 (1991).

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Nature and Stage of the Proceedings

On September 2, 2020, Plaintiffs Bay Area Unitarian Universalist Church, Drink Houston Better, LLC d/b/a Antidote Coffee, and Perk You Later, LLC filed suit against numerous state, county, and municipal defendants seeking declaratory and injunctive relief challenging the constitutionality and enforcement of sections 30.06 and 30.07 of the Texas Penal Code. As the only Plaintiff *arguably* owning any property within the City of Webster,[2] Bay Area is the only Plaintiff who asserts any claim or seeks any relief against the City.[3]

Because Bay Area did not suffer an injury in fact and, even if Bay Area had suffered an injury in fact, a favorable decision would only speculatively redress such injury, Bay Area does not have standing to bring this suit or to obtain the prospective relief sought. Accordingly, the Court should dismiss Bay Area's claims for lack of standing.

Even if, *arguendo*, Bay Area has standing to bring this suit, the Court should dismiss Bay Area's claims because Bay Area has failed to state a claim against the City under the First, Fifth, or Fourteenth Amendments to the U.S. Constitution or Article I, Section 8 of the Texas Constitution.

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[2] Plaintiffs allege, in pertinent part, that "[Bay Area's] building is located at the border between the City of Houston and the City of Webster." *Id.*, ¶ 5. Notably, however, Bay Area's address is 17503 El Camino Real, Houston, Texas 77058. Plaintiffs Antidote Coffee and Perk You Later are located wholly within the City of Houston, *id.*, ¶ 6, and any criminal offenses occurring on Antidote Coffee or Perk Later's property are not subject to the Webster Police Department's jurisdiction

[3] Bay Area alleges the Webster Police Department "is responsible for enforcing criminal violations of [sections 30.06 and 30.07] in the City of Webster….[and] responds to calls for police assistance made by…Bay Area Unitarian."

Summary of the Argument

Under sections 30.06 and 30.07 of the Texas Penal Code, a person licensed to carry a handgun commits criminal trespass if the license holder "carries a handgun…on property of another without effective consent…and [the license holder] received notice that entry on the property by a license holder with a…handgun was forbidden." Tex. Pen. Code §§ 30.06(a), 30.07(a).[4] "[A] person receives notice if the owner of the property or someone with apparent authority to act for the owner provides notice to the person by oral or written communication." *Id*., §§ 30.06(b), 30.07(b).

Seeking only declaratory and injunctive relief, Plaintiffs contend sections 30.06(c)(3)(B) and 30.07(c)(3)(B), which provide requirements for a sign forbidding entry to license holders carrying handguns, "discourage property owners from excluding individuals carrying guns"[5] by requiring property owners "to post several square feet of government-scripted signage on their property to communicate that they object to handguns on their property."[6]

Bay Area's argument, however, fails because Bay Area has no standing or judicially cognizable right to sue for alleged violations of, or for enforcement of the Texas Penal Code. Even if, *arguendo*, Bay Area could have a private cause of action to enforce section 30.06 or 30.07, Bay Areas still lacks standing to obtain declaratory and injunctive relief against the City because Bay Area has not, and indeed cannot establish an injury in

[4] Section 30.06 applies to trespass by a license holder with a concealed handgun. Section 30.07 applies to trespass by a license holder with an openly carried handgun.

[5] *Id*.

[6] *Id*.

fact that is fairly traceable to the challenged action of the City that will likely be redressed by a decision favorable to Bay Area.

Further, dismissal under Rule 12(b)(6) is appropriate because Bay Area has failed to state a claim against the City under the First, Fifth, or Fourteenth Amendments to the U.S. Constitution or Article I, Section 8 of the Texas Constitution. To be sure, Bay Area's argument is belied by its own pleading admission that "under Texas criminal trespass law, property owners can provide notice to potential trespassers that entry is unwelcome through a variety of means."[7] Indeed, other than posting a sign, property owners can orally instruct license holders to leave, Tex. Pen. Code §§ 30.06(b), 30.07(b), or can provide invitees a card or other written communication forbidding entry to license holders with hand guns:

> (3) "Written communication" means:
>
> > (A) a card or other document on which is written language identical to the following: "Pursuant to Section 30.06, Penal Code (trespass by license holder with a concealed handgun), a person licensed under Subchapter H, Chapter 411, Government Code (handgun licensing law), may not enter this property with a concealed handgun"; or[8]
> >
> > (B) a sign posted on the property that:
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> > > (i) includes the language described by Paragraph (A) in both English and Spanish;
> > >
> > > (ii) appears in contrasting colors with block letters at least one inch in height; and
> > >
> > > (iii) is displayed in a conspicuous manner clearly visible to the public.

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[7] ECF No. 1, p. 2.

[8] Section 30.07(c)(3)(A) states, in pertinent part, that:

> a card or other document on which is written language identical to the following: "Pursuant to Section 30.07, Penal Code (trespass by license holder with an openly carried handgun), a person licensed under Subchapter H, Chapter 411, Government Code (handgun licensing law), may not enter this property with a handgun that is carried openly"

Id., § 30.06.[9] In other words, neither section 30.06 nor section 30.07 *requires* property owners to post any sign to forbid entry to persons licensed to carry handguns. Rather, each section simply provides property owners *options* to provide notice forbidding entry to individuals carrying a handgun.

Even if, *arguendo*, either section required Bay Area to post a compliant sign to exclude licensed handgun carriers, the City is still not a proper party because the City had no input on, let alone control over the drafting or enactment of section 30.06 or section 30.07 and, moreover, the City has no input on or control over the operation of either section. The City simply enforces the statutes as written.

Issues Presented

1. The Court lacks subject matter jurisdiction because Bay Area lacks standing to obtain declaratory and injunctive relief against the City.

2. The Court lacks subject matter jurisdiction because Bay Area's claims against the City are not ripe.

3. Bay Area has failed to state a claim for relief under the First, Fifth, or Fourteenth Amendment to the U.S. Constitution or Article I, Section 8 of the Texas Constitution.

[9] Section 30.07(c) is nearly identical

Argument & Authorities

1. The Court should dismiss Bay Area's claims under Rule 12(b)(1) for lack of subject matter jurisdiction because Bay Area lacks standing to sue

1.1. Standard of Review under Rule 12(b)(1)

"Under Rule 12(b)(1), a claim is 'properly dismissed for lack of subject-matter jurisdiction when the court lacks the statutory or constitutional power to adjudicate' the claim." *Griener v. United States*, 900 F.3d 700, 703 (5th Cir. 2018).[10] A challenge to subject matter jurisdiction under Rule 12(b)(1) may be raised at any-time, by any party, or by the Court, *sua sponte*. *Giles v. NYLCare Health Plans, Inc.*, 172 F.3d 332, 336 (5th Cir. 1999). Where, as here, a party moves to dismiss a claim under Rules 12(b)(1) and 12(b)(6), the Court "must consider the Rule 12(b)(1) jurisdictional attack before considering the Rule 12(b)(6) merits challenge." *Wilson v. Houston Cmty. College Sys.*, 955 F.3d 490, 494 (5th Cir. 2020).

1.2. Bay Area fails to alleged facts demonstrating Bay Area has standing to sue the City of Webster

"No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). "'One element of the case-or-controversy requirement' is that plaintiffs 'must establish that they have standing to sue." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013).[11]

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[10] Quoting *Home Builders Ass'n of Miss., Inc. v. City of Madison, Miss*, 143 F.3d 1006, 1010 (5th Cir. 1998).

[11] *Raines v. Byrd*, 521 U.S. 811, 818 (1997).

"To have standing, a plaintiff must (1) have suffered an injury in fact, (2) that is fairly traceable to the challenged action of the defendant, and (3) that will likely be redressed by a favorable decision." *Speech First, Inc. v. Fenves*, 979 F.3d 319, 330-31 (5th Cir. 2020).[12] "If the party invoking federal jurisdiction fails to establish any one of injury in fact, causation, or redressability, then federal courts cannot hear the suit." *Williams v. Parker*, 843 F.3d 617, 621 (5th Cir. 2016).[13] That is certainly the case as to Bay Area's claims against the City.

Because the precise requirements for standing depend on "the nature and source of the claim asserted," *cf., Warth v. Seldin*, 422 U.S. 490, 511 (1975),[14] "to demonstrate…Article III standing…when a plaintiff is seeking injunctive or declaratory relief, a plaintiff must allege facts from which it appears there is a substantial likelihood that he will suffer [similar] injury in the future." *Waller v. Hanlon*, 922 F.3d 590, 603 (5th Cir. 2019).[15] In this context, the Fifth Circuit has held "requests for injunctive and declaratory relief implicate the intersection of the redressability and injury-in-fact requirements." *Stringer v. Whitley*, 942 F.3d 715, 720 (5th Cir. 2019).

Thus, for Bay Area "[t]o invoke a federal trial court's jurisdiction, [Bay Area] 'must demonstrate a realistic danger of sustaining a **direct injury** as a result of [section 30.06 or

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[12] Citing *Lujan v. Def's of Wildlife*, 504 U.S. 555, 560-61 (1992).

[13] Quoting *Rivera v. Wyeth-Ayerst Labs.*, 283 F.3d 315, 319 (5th Cir. 2002).

[14] *Accord Riley v. Hous. Northwest Operating Co., L.L.C.*, No. H-19-2496, 2020 U.S. Dist. LEXIS 102697, *5-6 (S.D. Tex. June 11, 2020) (Lake, J. presiding).

[15] Quoting *Bauer v. Texas*, 341 F.3d 352, 358 (5th Cir. 2003)).

section 30.07's] operation or enforcement.'" *KVUE, Inc. v. Moore*, 709 F.2d 922, 927 (5th Cir. 1983) (emphasis added).[16]

1.2.1. Bay Area has not suffered and cannot suffer any injury-in-fact pertaining to the City's hypothetical enforcement of Tex. Pen. Code §§ 30.06, 30.07.

To demonstrate an injury in fact, Bay Area must allege a prior or threatened future injury: (1) potentially suffered by Bay Area, not someone else; (2) concrete and particularized, not abstract; and (3) actual or imminent, not conjectural or hypothetical. *Cf.*, *Stringer*, 942 F.3d at 720-21. "When [as here] plaintiffs 'do not claim that they have ever been threatened with prosecution, that a prosecution is likely, or even that a prosecution is remotely possible,' they do not allege a dispute susceptible to resolution by a federal court." *Babbitt v. UFW Nat'l Union*, 442 U.S. 289, 298-99 (1979).[17] In other words, "[a] litigant may not challenge the constitutionality of a state criminal statute merely because he or she desires to wipe it off the books or even because he may some day wish to act in a fashion that violates it." *KVUE*, 709 F.2d at 928 (citing *Lyons*, 461 U.S. at 105).

As discussed *supra*, section 30.06 and section 30.07 of the Texas Penal Code are enforceable only against individuals licensed to carry handguns who "carr[y] a handgun…on property of another without effective consent." Tex. Pen. Code §§ 30.06(a), 30.07(a). The statutes in question merely provide a property owner a means of identifying the property owner's lack of consent. Moreover, because the Texas Penal Code does not

[16] *Aff'd sub nom. Texas v. KVUE-TV, Inc.*, 465 U.S. 1092 (1984) (quoting *Babbitt v. UFW Nat'l Union*, 442 U.S. 289, 298 (1979).

[17] Quoting *Younger v. Harris*, 401 U.S. 37, 42 (1971).

create any private cause of action, *cf.*, *Brown v. De La Cruz*, 156 S.W.3d 560, 567 (Tex. 2004),[18] neither section 30.06 nor section 30.07 is not enforceable by a private party.

Despite the undeniable *fact* that section 30.06 and section 30.07 are not enforceable by or enforceable against Bay Area and, moreover, despite Bay Area's failure to allege any facts demonstrating any governmental entity, let alone the City of Webster, has previously enforced either section against Bay Area or has threatened to do so – indeed there is simply no means by which the City could enforce these statutes *against* Bay Area – Bay Area nonetheless alleges section 30.06 and section 30.07 burden its rights to speak freely and to peaceably assemble or associate.[19] Under both the facts and the law, Bay Area is clearly incorrect.

Again, Bay Area's *choice* of compliance with the notice requirements in section 30.06(c)(3)(B) or section 30.07(c)(3)(B) is immaterial since Bay Area could only demonstrate an injury in fact if Bay Area "ha[d] faced prosecution under [section 30.06 or section 30.07] in the past and faces the real possibility of prosecution in the future." *Roark & Hardee LP v. City of Austin*, 522 F.3d 533, 543 (5th Cir. 2008). Indeed, the only consequence of Bay Area's noncompliance with the signage requirements in either pertains to the government's ability to criminally prosecute individuals removed from Bay Area's property for carrying a handgun without Bay Area's consent.

Even that consequence, which falls far short of any prosecution of or even penalty to Bay Area, is tempered by the fact Bay Area may also provide effective oral notice under

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[18] *Accord Allen v. Walmart Stores, L.L.C.*, 907 F.3d 170, 180 (5th Cir. 2018).

[19] ECF No. 1, ¶¶ 56-69.

sections 30.06(b) and 30.07(b), or by providing effective written notice in cards or other documents Bay Area provides under section 30.06(c)(3)(A) or section 30.07(c)(3)(A). Further, as Defendant, Office of the Attorney General observes, "[a] property owner can have gun-carrying persons excluded [for criminal trespass] under § 30.05 for any reason other than that 'entry with a handgun was forbidden.'"[20] Indeed, Bay Area could even post a noncompliant sign and refuse entry to a license holder carrying a handgun under the common law tort of trespass to real property.[21] Accordingly, Bay Area's compliance with the signage requirements in section 30.06(c)(3)(B) and section 30.07(c)(3)(B) is immaterial to Bay Area's right to exclude individuals from its property.

Even if, *arguendo*, either section were enforceable by or against Bay Area, Bay Area fails to allege any facts supporting the requisite element of an injury-in-fact. Instead, Bay Area's complaints pertain to Bay Area's aesthetic preferences caused by compliance with only one of three separate notice provisions in section 30.06(b)-(c) and section 30.07(b)-(c), not any threatened concrete, particularized, and imminent future injury:

> [Bay Area] believes that displaying…signs [under Section 30.07 and Section 30.07], given their size and imposing nature, would detract from the church experience.[.][22]

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[20] ECF No. 28, p. 4.

[21] A trespasser is "a person who enters the land of another without any legal right, express or implied." Tex. Civ. Prac. & Rem. Code § 75.007(a). Trespass to real property is an unauthorized entry upon the land of another, and may occur when one enters—or causes something to enter—another's property. Every unauthorized entry upon land of another is a trespass even if no damage is done or injury is slight." *Cf.*, *Barnes v. Mathis*, 353 S.W.3d 760, 764 (Tex. 2011) (citations omitted).

[22] ECF No. 1, ¶ 61.

> [Bay Area's] leadership deems the signs ugly and intimidating, and the group debated whether to display the signs at all, as they were likely to make the congregants uncomfortable and detract from the desired religious experience.[23]
>
> —
>
> If given a choice, [Bay Area] would prefer to display simpler signage that is smaller and more easily understandable.[24]

Further, despite alleging its greeters might "feel[] uncomfortable" asking an individual potentially carrying a handgun to leave, Bay Area concedes "[its] [g]reeters…are trained that if someone appears to have a firearm, to ask the person to leave the firearm outside[.]"[25] **Problem solved** because, by doing so, Bay Area would be complying with the oral notice requirement in section 30.06(b) and section 30.07(b). Tex. Pen. Code §§ 30.06(b), 30.07(b).

Moreover, although Bay Area contends it is burdensome for any greeter who "feels uncomfortable [providing oral notice], or if the conversation [with a license holder] becomes confrontational,…to immediately call 911,"[26] such action is necessary, regardless of whether or how Bay Area provides notice, for the City to remove a trespasser from Bay Area's property. The content or placement of an effective sign under section 30.06(c)(3)(B) or section 30.07(c)(3)(B) would, in other words, have no impact on Bay Area's procedure for removing trespassers.

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[23] *Id.*, ¶ 67.

[24] *Id.*, ¶ 69.

[25] *Id.*, ¶ 68.

[26] *Id.*

Accordingly, Bay Area has failed to allege any threatened concrete and particularized, and imminent future injury, and, thus, Bay Area has not alleged facts supporting its standing under Article III. *Stringer*, 942 F.3d at 720-21.

1.2.2. Bay Area fails to allege facts demonstrating redressability

Bay Area also cannot carry its burden in demonstrating redressability. "To satisfy redressability, a plaintiff must show that 'it is *likely*, as opposed to merely *speculative*, that the injury will be redressed by a favorable decision.'" *The Inclusive Cmtys. Project, Inc. v. Dep't of Treasury*, 946 F.3d 649, 655 (5th Cir. 2019) (emphasis added).[27] Notably, "[i]n the absence of an injury established by [Bay Area], the Court cannot [even proceed to] measure the issue[] of…redressability." *Rancho Viejo Waste Mgmt., LLC v. City of Laredo*, 364 F. Supp. 3d 698, 706 (S.D. Tex. 2019) (Marmolejo, J., presiding).[28]

To be sure, because equitable relief "cannot conceivably remedy any past wrong," *Steel Co.*, 523 U.S. at 108, plaintiffs seeking such relief can only satisfy the redressability requirement by demonstrating a threatened or continuing threatened injury, i.e., an injury in fact. *City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983). However, beyond mere hypotheticals, Bay Area does not, and indeed cannot, allege any fact causally connecting Bay Area's hypothetical injury to what Bay Area *imagines* the City's hypothetical enforcement of Section 30.06 or 30.07 might be.

Even if, *arguendo*, Bay Area had alleged facts demonstrating an injury in fact, Bay Area also fails to allege any fact demonstrating the declaratory and injunctive relief Bay

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[27] Quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs (TOC), Inc.*, 528 U.S. 167, 181 (2000).

[28] *See also, Williams*, 843 F.3d at 621.

Area seeks will redress its *merely potential* injury. As discussed *supra*, because neither section 30.06 nor section 30.07 is enforceable by or enforceable against Bay Area, declaratory or injunctive relief against the City will not redress Bay Area's hypothetical injury. To be sure, Bay Area presents no facts to show the Webster Police would not respond to a call to remove a trespasser from Bay Area's property without regard to Bay Area's compliance with either section's signage requirements.

Notably, "[w]ith respect to the enforcement of an existing law or ordinance, the Supreme Court has explained that police officers are 'charged to enforce laws until and unless they are declared unconstitutional.'" *Muniz v. City of San Antonio*, No. SA-18-cv-01002-OLG, 2020 U.S. Dist. LEXIS 140546, *34 (W.D. Tex. Aug. 5, 2020).[29] Indeed, the "enactment of a law forecloses speculation by enforcement officers concerning its constitutionality—with the possible exception of a law so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws." *DeFillippo*, 443 U.S. at 38. Since the City and its police merely enforce the law as written, Bay Area's alleged harm could not be redressed by the declaratory or injunctive relief Bay Area requests.

Further, but importantly, by instructing its greeters to provide oral notice refusing entry to individuals who appear to be carrying handguns, Bay Area has complied with the oral notice provision of sections 30.06. and 30.07 and, thus, has completely redressed its own purely hypothetical injury. Thus, even if Bay Area had suffered or could suffer an

[29] Citing *Michigan v. DeFillippo*, 443 U.S. 31, 38 (1979).

injury in fact - which Bay Area clearly has not and clearly will not if the Court does nothing as it should - such self-inflicted harm would only be speculatively redressed, at best. Bay Area's decision not take advantage of the statutory *opportunity* to give notice to handgun carriers is a self-inflicted condition which does not confer Bay Area standing because "standing cannot be conferred by a self-inflicted injury," *Zimmerman v. City of Austin*, 881 F.3d 378, 389 (5th Cir. 2018).

1.3. Because Bay Area's claims against the City are also not ripe, the Court must dismiss Bay Area's suit for lack of subject matter jurisdiction.

"Ripeness is a component of subject matter jurisdiction, because a court has no power to decide disputes that are not yet justiciable." *Lopez v. City of Houston*, 617 F.3d 336, 341-342 (5th Cir. 2010) (citation omitted). "The 'basic rationale [behind the ripeness doctrine] is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements.'" *Roark*, 522 F.3d at 544.[30] "For these reasons, a ripeness inquiry is often required when a party is seeking pre-enforcement review of a law or regulation." *Id*. (citation omitted).

"[A] case is not ripe if further factual development is required," *Waller*, 922 F.3d at 603 (citation omitted), or if the "purported injury is 'contingent [on] future events that may not occur as anticipated, or indeed may not occur at all,' the claim is not ripe for adjudication." *Lopez*, 617 F.3d at 341.[31] "A court should dismiss a case for lack of 'ripeness' when the case is abstract or hypothetical." *Id*.[32]

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[30] Quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967).

[31] Citing *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580–81 (1985).

[32] Citing *Monk v. Huston*, 340 F.3d 279, 282 (5th Cir. 2003).

Here, Bay Area's dissatisfaction with the statutes pertain only to Bay Area's subjective, aesthetic preferences and Bay Area's abstract, hypothetical concerns regarding the merely *potential* effect of Bay Area posting noncompliant signs. But, since Bay Area has never sought to enforce a complaint of trespass against a handgun carrying individual, **Bay area has absolutely no idea what will happen if and when it attempts to so, so Bay Area's complaint is not yet ripe either.** To be sure, Bay Area's grievances do not and cannot pertain to the City's enforcement of section 30.06 or section 30.07 against Bay Area, because, again, that is not how these statutes operate. Because Bay Area "ha[s] no fear[] of state prosecution [for Bay Area's own failure to comply with section 30.06(c)(3)(B) or section 30.07(c)(3)(B)] except those that are imaginary or speculative," Bay Area's claims against the City are not — and will never be — ripe and Bay Area "[is] not to be accepted as [an] appropriate plaintiff[]." *Younger*, 401 U.S. at 42.

2. Consistent with Rule 12(b)(6), the Court should dismiss Bay Area's claims against the City of Webster because Bay Area has failed to state a claim for which relief can be granted.

Even if, *arguendo*, Bay Area had standing to sue the City and its claims were ripe, Bay Area has failed to state a plausible claim for relief under the First, Fifth, or Fourteenth Amendments to the U.S. Constitution or Article I, Section 8 of the Texas Constitution.

2.1. Standard of Review under Rule 12(b)(6)

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).[33] A claim is facially plausible *only* when the plaintiff pleads

[33] Quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

facts that allow the court to "draw the reasonable inference that the defendant is liable for the misconduct alleged," and the complaint must establish more than a "sheer possibility" that plaintiff's claim is true. *Id.*

Since "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice," *Iqbal*, 556 U.S. at 678, merely listing generalized legal standards, without providing substantive factual matter to support them, as Bay Area has done here, simply does not state a claim. *Vulcan Materials Co. v. City of Tehuacana*, 238 F.3d 382, 387 (5th Cir. 2001). Legal conclusions only provide framework for a complaint which is properly supported by accompanying **factual allegations**. *Id*. at 679. A court is not required to accept Bay Area's mere legal conclusions as true. Instead Bay Area's complaint "must be supported by factual allegations," *id*., which must "raise a right to relief above the speculative level." *Cuvillier v. Taylor*, 503 F.3d 397, 401 (5th Cir. 2007). The Court should not "strain to find inferences favorable to the plaintiff[]" or "accept conclusory allegations, unwarranted deductions, or legal conclusions." *R2 Investments LDC v. Phillips*, 401 F.3d 638, 642 (5th Cir. 2005). A complaint states a claim only where well-pleaded factual allegations plausibly support an entitlement to relief. *Iqbal*, 556 U.S. at 679.

Bay Area asserts claims under 42 U.S.C. § 1983 for alleged violations of its right to free speech and association or assembly under the First Amendment, as well as violations of Bay Area's right of due process under the Fifth and Fourteenth Amendments, but Bay Area's vague *theories* against the City of Webster are simply not plausible. Thus, while

Bay Area "complains [it] is entitled to relief[,]…[Bay Area's] complaint does not show it." *Shaw v. Villanueva*, 918 F.3d 14, 415 (5th Cir. 2019).

It is well-established that "Section 1983 is not itself a source of substantive rights, but rather merely provides a method for vindicating federal rights elsewhere conferred." *Brown v. Bd. of Trs. Sealy Indep. Sch. Dist.*, 871 F. Supp. 2d 581, 596 (S.D. Tex. 2012) (Ellison, J. presiding) (internal quotations omitted).[34] To state a claim under Section 1983, Bay Area must (1) allege **actual conduct** constituting a violation of a right secured by the Constitution or laws of the United States and (2) demonstrate the alleged deprivation was committed by a person acting under color of state law. *Cf., James v. Tex. Collin County*, 535 F.3d 365, 373 (5th Cir. 2008).

2.2. Bay Area fails to allege a First Amendment claim against the City of Webster.

Bay Area's own pleadings admit that, as to the statutes it contests, **the City has done nothing at all, let alone anything unconstitutional**. Other than alleging its property is "located in partly in the City of Houston and partly in the City of Webster, Texas"[35] and that "[t]he Webster Police Department responds to calls for police assistance made by…Bay Area,"[36] Bay Area makes absolutely no allegation of **any conduct by the City at all.**[37] Thus Bay Area has failed to allege, and indeed Bay Area cannot allege, any fact

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[34] Citing *Albright v. Oliver*, 510 U.S. 266, 271 (1994).

[35] ECF No. 1, ¶¶ 5, 56.

[36] ECF No. 1., ¶ 11. The full paragraph states:

> Defendant Pete Bacon is the Acting Chief of Police for the Webster Police Department. He is responsible for enforcing criminal violations of the Acts in the City of Webster. The Webster Police Department responds to calls for police assistance made by the Bay Area Unitarian Universalist Church.

[37] *See id., passim.*

demonstrating the City of Webster, through its Police Department or otherwise, has enforced or will imminently enforce section 30.06 or 30.07 to Bay Area's detriment, let alone facts demonstrating the City has – or how it has by doing nothing - violated Bay Area's First Amendment right to speak freely or to peaceably associate or assemble.

Instead, Bay Area's claims pertain only to "the Acts"[38] and not the actions of the City — which, as discussed at-length *supra*, has not and cannot enforce, prosecute, or penalize Bay Area for Bay Area's noncompliance with Section 30.06 or Section 30.07. Accordingly, Bay Area's First Amendment claims against the City — to the extent the Bay Area has even asserted any First Amendment claim against the City — fails.

2.3. Bay Area fails to allege facts which state a plausible claim under the Fifth Amendment.

Bay Area also vaguely asserts a due process claim under the Fifth Amendment,[39] but Bay Area provides no additional explanation for its claim and, again, fails to even identify against which Defendant Bay Area is asserting that claim. Regardless, Bay Area's Fifth Amendment claim fails because "the Fifth Amendment applies only to the actions of the federal government, and not to the actions of a municipal government as in the present case." *Cf.*, *Morin v. Caire*, 77 F.3d 116, 120 (5th Cir. 1996), *accord Longoria v. San Benito Consol. Indep. Sch. Dist.*, No. 1:17-cv-160, 2018 U.S. Dist. LEXIS 187415, *53 (S.D. Tex. July 31, 2018). Here, Bay Area's allegations fail to allege – and indeed actually disprove – that the City, let alone any Defendant, was a federal law enforcement officer as would be

[38] *Id.*, ¶¶ 103-111, 113, 118-19.

[39] *Id.*, ¶¶ 124-26.

necessary to state a claim under the Fifth Amendment. Accordingly, Bay Area's Fifth Amendment claim should be dismissed.

2.4. Bay Area fails to allege facts which state a plausible claim under the Fourteenth Amendment.

Bay Area's purported substantive due process claim under the Fourteenth Amendment similarly fails. To establish a due process violation, Bay Area must allege facts which show the City infringed a right protected by the 14th Amendment. *Cf.*, *County of Sacramento v. Lewis*, 523 U.S. 833, 842 n.5 (1998). Bay Area fails to do so. Instead, Bay Area alleges only that:

> The Acts are so vague that persons of common intelligence must necessarily guess at what they require. Specifically, it is unclear whether the Acts require property owners to provide oral notice in addition to posting the burdensome signs.
>
> For the reasons set forth above, the Acts also lack even a rational connection to any legitimate governmental purpose, and therefore violate Plaintiffs' substantive due process rights.[40]

Fatally, Bay Area has failed to plead facts identifying which vested property right sections 30.06 and 30.07 have deprived Plaintiffs, let alone facts supporting how the City, which, again, neither drafted, enacted, controlled, nor sought to enforce against Bay Area either statute, has deprived Bay Area's substantive due process.

Further, Bay Area's "speculation about possible vagueness in hypothetical situations not before the Court will not support [its] facial attack on a statute when it is surely valid in the vast majority of its intended applications." *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972). Indeed, the Fifth Circuit "has resisted vagueness challenges

[40] ECF No. 1, ¶¶ 125-126.

when the challenged law is couched in 'commonly understood' language, because such language tends to provide notice to the public and meaningful guidance to the authorities." *Roy v. City of Monroe*, 950 F.3d 245, 253 (5th Cir. 2020). Here, where the purportedly vague term is a simple, disjunctive "or," it is clear that Bay Area has failed to allege a violation of any constitutionally protected right, let alone Bay Area's due process right.

2.5. Bay Area fails to allege facts showing any City policy caused a violation of Bay Area's rights.

Bay Area also fails to state a claim against the City because Bay Area has not alleged facts showing an unconstitutional City policy caused Acting Chief Bacon or another officer with the Webster Police Department to violate Bay Area's rights.

Under section 1983, local governments are responsible only for their own illegal acts. *Cf., Connick v. Thompson*, 560 U.S. 51, 60 (2011). A city is not vicariously liable for its employees' actions, even if they are unconstitutional. *Id*. Thus, to state a claim for municipal liability under Section 1983, Bay Area must identify (a) a policy maker, (b) an official policy or custom or widespread practice, and (c) a violation of constitutional rights whose "moving force" is the policy or custom. *Cf., Piotrowski v. City of Houston*, 237 F.3d 567, 578 (5th Cir. 2001). A plaintiff cannot conclusorily allege a policy or a custom and its relationship to the underlying constitutional violation; instead the plaintiff must plead specific facts. *Spiller*, 130 F.3d at 167.

Because Bay Area has failed to allege any facts supporting municipal liability against the City under section 1983, let alone facts to support each element, the Court must dismiss Bay Area's claim for municipal liability.

2.6. The Texas Constitution provides no private right of action.

It is well-established that "Texas courts have not recognized a violation of Article I, Section 8, as an actionable constitutional tort." *Gillum v. City of Kerrville*, 3 F.3d 117, 122 (5th Cir. 1993) (citations omitted). To be sure, there is no Texas law equivalent to section 1983, and the Texas Constitution does not create an implied private right of action. *Cf.*, *City of Beaumont v. Bouillion*, 896 S.W. 2d 143, 147 (Tex. 1995). Therefore, the Texas Constitution provides no basis for Bay Area's claims against the City.

Conclusion & Prayer

Plaintiff Bay Area Unitarian Universalist Church does not have standing bring its claims against the City of Webster and, even if it had standing to bring this action, Bay Area's request for declaratory and injunctive relief is not ripe. Accordingly, the City of Webster respectfully requests the Court dismiss Bay Area's claims against the City under Rule 12(b)(1) of the Federal Rules of Civil Procedure.

Because Bay Area has also failed to plead facts supporting a plausible claim for relief, the Court should dismiss Bay Area's claims against the City under Rule 12(b)(6) of the Federal Rules of Civil Procedure.

Dated: January 4, 2021

Respectfully submitted,

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Certificate of Service

I hereby certify that on January 4, 2021, I electronically filed the foregoing document with using the CM/ECF system, and a copy of this filing has been forwarded to all counsel of record in accordance with the ECF local rules.

/s/ *William S. Helfand*
William S. Helfand

In the United States District Court
for the Southern District of Texas
Houston Division

Bay Area Unitarian Universalist Church, *et al.*, Plaintiffs, v. **Ken Paxton, Attorney General for the State of Texas, in his official capacity, *et al.*,** Defendants.	**Civil Action No. 4:17-CV-3081** Jury Demanded

ORDER

Defendant, City of Webster's Motion to Dismiss is **GRANTED.** It is therefore;

ORDERED that all claims against Defendant, City of Webster are **DISMISSED WITH PREJUDICE.**

SIGNED this _____ day of _____, 2021.

_____
Hon. Vanessa D. Gilmore
United States District Judge