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

BAY AREA UNITARIAN UNIVERSALIST CHURCH; *et al.*	§	
	§	
Plaintiffs,	§	
v.	§	**Civil Action No. 4:20-cv-3081**
	§	
KEN PAXTON, Attorney General for the State of Texas, in his official capacity, *et al.*	§	**JURY TRIAL DEMANDED**
	§	
Defendants.	§	

DEFENDANT ART ACEVEDO'S MOTION TO DISMISS
UNDER RULE 12(b)(1) AND 12(b)(6)

Defendant Art Acevedo ("Chief Acevedo"), in his official capacity, files its Motion to Dismiss under Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure as follows:

I. BACKGROUND

This is a lawsuit with no justiciable controversy, and Plaintiffs do not have standing to pursue the relief they seek as to Chief Acevedo. Bay Area Unitarian Universalist Church; Drink Houston Better, LLC d/b/a Antidote Coffee; and Perk You Later, LLC. (collectively "Plaintiffs") challenge the constitutionality of two State statutes—Texas Penal Code § 30.06 and § 30.07 (the "Acts"). Plaintiffs allege that the Acts, which prescribe requirements for signs posted by property owners to

exclude gun carriers, violate their First Amendment rights. Plaintiffs seek a declaratory judgment on the constitutionality of the *State* Acts and an injunction against any alleged enforcement of the Acts by Chief Acevedo, although Plaintiffs allege no facts that Chief Acevedo previously enforced or threatened to enforce the Acts against them or any other property owner. Accordingly, in the absence of any enforcement action by Chief Acevedo, this Court lacks jurisdiction because Plaintiffs lack standing to assert their claims against Chief Acevedo and Plaintiffs' claims are not ripe.

Moreover, Plaintiffs' Complaint fails to state a First, Fifth or Fourteenth Amendment claim against Chief Acevedo because the challenged Acts are not City of Houston laws; the Acts were not authored or enacted by Chief Acevedo or the City. Additionally, Plaintiffs' Complaint fails to state a claim for municipal liability under 42 U.S.C. § 1983 because Plaintiffs pled no facts to support a constitutional violation by Chief Acevedo and Plaintiffs pled no facts of an official City policy that caused the alleged violation of Plaintiffs' constitutional rights. Nevertheless, Plaintiffs improperly filed claims against Chief Acevedo. This Court should dismiss Plaintiffs' claims under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).

II. ISSUES PRESENTED

1. **Whether the Court lacks jurisdiction because Plaintiffs lack standing to seek injunctive relief against Chief Acevedo when there are no facts to show that Chief Acevedo has previously enforced or even threatened to enforce the challenged Acts against Plaintiffs.**

2. **Whether the Court lacks jurisdiction because Plaintiffs' claims are not ripe because there is no live case or controversy between Plaintiffs and Chief Acevedo when Chief Acevedo did not author or enact the challenged Acts and has taken no action to enforce the Acts against Plaintiffs.**

3. **Whether Plaintiffs failed to plead facts to state a First, Fifth or Fourteenth Amendment claim against Chief Acevedo when the challenged Acts are admittedly State Acts that were not authored, enacted or enforced by Chief Acevedo.**

4. **Whether Plaintiffs failed to plead facts to state a claim under 42 U.S.C. § 1983 when Plaintiffs plead no facts to show a constitutional violation by Chief Acevedo, and Plaintiffs plead no facts of an official City policy that caused the alleged constitutional violations.**

III. STANDARD OF REVIEW

Motions filed under Rule 12(b)(1) of the Federal Rules of Civil Procedure allow a party to challenge the subject matter jurisdiction of the district court to hear a case. Fed. R. Civ. P. 12(b)(1). Lack of subject matter jurisdiction may be found in any one of three instances: (1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts. *Barrera–Montenegro v. United States*, 74 F.3d 657, 659 (5th Cir.1996). The burden of proof for a Rule 12(b)(1) motion to dismiss is on the party asserting jurisdiction. *Menchaca v. Chrysler Credit Corp.*, 613 F.2d 507, 511 (5th Cir.1980).

When reviewing motions filed under Rule 12(b)(6) of the Federal Rules of Civil Procedure, the court "accepts all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff." *In re Katrina Canal Breaches Litig*., 495 F.3d 191, 205 (5th Cir. 2007) (internal quotations omitted). The plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 1974, 167 L.Ed.2d 929 (2007). "Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Id*. at 1965 (citation and footnote omitted).

IV. ARGUMENT AND AUTHORITY

A. THE COURT LACKS JURISDICTION OVER PLAINTIFFS' CLAIMS AGAINST CHIEF ACEVEDO.

1. Plaintiffs Lack Standing to Bring Their Claims Against Chief Acevedo.

"The 'gist of the question of standing' is whether the party seeking relief has 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult ... questions.'" *Flast v. Cohen*, 392 U.S. 83, 99, 88 S.Ct. 1942, 1952, 20 L.Ed.2d 947 (1968) (quoting *Baker v. Carr*, 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L.Ed.2d 663 (1962)). To meet the constitutional standing requirements, (1) the plaintiff must have suffered an "injury

in fact," defined as an invasion of a legally protected interest that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical;[1] (2) there must be a causal connection between the injury and the conduct complained of, such that the injury is fairly traceable to the challenged action of the defendant; and (3) it must be likely, not merely speculative, that the injury will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61, 112 S.Ct. 2130, 2136, 119 L.Ed.2d 351 (1992). Plaintiffs must establish that the standing requirements are met to invoke federal jurisdiction. *See id*. at 561; *Texas v. United States*, 497 F.3d 491, 496 (5th Cir. 2007).

Plaintiffs lack standing to bring their claims against Chief Acevedo because they have suffered no concrete or particularized injury caused by Chief Acevedo's enforcement of the Acts. The gravamen of Plaintiffs' complaint is that the State Acts are unconstitutional. Plaintiffs specifically allege that "Texas has ignored the First Amendment and enacted legislation that singles out a group with which it disagrees …." (Dkt # 1, p. 1). Plaintiffs' 30-page Complaint mentions Chief Acevedo only twice—in the case caption and in the "Parties" section where Chief Acevedo is simply identified as a Defendant "responsible for enforcing criminal

[1] Recently, the Fifth Circuit has opined that a "plaintiff has suffered an injury in fact if he (1) has an intention to engage in a course of conduct arguably affected with a constitutional interest, (2) his intended future conduct is arguably ... proscribed by [the policy in question], and (3) the threat of future enforcement of the [challenged policies] is substantial. *Speech First, Inc. v. Fenves*, 979 F.3d 319, 330–31 (5th Cir. 2020), as revised (Oct. 30, 202) (citation and internal quotation marks omitted).

violations of the Acts in the City of Houston." (Dk #1, ¶12). However, Plaintiffs do not (and cannot) allege that Chief Acevedo had any role in authoring or enacting the allegedly unconstitutional State Acts. Furthermore, Plaintiffs do not (and cannot) allege that Chief Acevedo has taken any action to enforce the Acts against the Plaintiffs.

To establish standing to seek *prospective* injunctive relief, *Appellants* had the burden to demonstrate, with jurisdictional evidence, that the "threatened injury is 'certainly impending'" or that there is a "'*substantial risk' that the harm will occur*."[2] To the contrary, Plaintiffs complain that they "want to be able to call the police to remove individuals who enter the property carrying a gun despite [their] no-guns signs." (Dkt #1, ¶18). Plaintiffs, therefore, do not allege that Chief Acevedo prosecuted or cited them under the Acts; nor do Plaintiffs plead that Chief Acevedo took any action or made any threat to enforce the Acts against them. Finally, Plaintiffs plead no facts that Chief Acevedo chilled or otherwise impacted their freedom of speech. Indeed, Plaintiffs' Complaint conveys their disdain for the politics associated with the "intrusiveness and size of the signs" (Dkt # 1, ¶ 20). Plaintiffs' Complaint also conveys their discomfort encountering customers

[2] *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014) (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409, 414, n.5 (2013)); *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 565 n.2 (1992); *Stringer v. Whitley's*, 942 F.3d 715, 721 (5th Cir. 2019); *Justice v. Hosemann*, 771 F.3d 285, 291 (5th Cir. 2014) (quoting *Int'l Soc'y for Krishna Consciousness of Atlanta v. Eaves*, 601 F.2d 809, 815 (5th Cir.1979)).

"bothered by the required signage" and "providing personal oral notice" to armed individuals. (Dkt # 1, ¶ 21). Plaintiffs only possible fear is of "verbal or physical altercations in a family-type environment" with handgun owners—***not*** Chief Acevedo or Houston police. (Dkt # 1, ¶ 21). Plaintiffs may want Chief Acevedo and Houston police to remove these handgun owners from their property, but Plaintiffs plead no facts that show a justiciable controversy with Chief Acevedo, who neither enacted the Acts nor enforced the Acts against them.

The standing doctrine precludes this court's review of Plaintiffs' substantive claims, as well as the related requests for declaratory and injunctive relief, as to Chief Acevedo.[3]

2. Plaintiffs' Claims are not Ripe Because Plaintiffs Plead No Facts that Demonstrate a Live Case or Controversy Exists Between Plaintiffs and Chief Acevedo, Who Has Not Enforced or Threatened to Enforce the Acts Against Plaintiffs.

Ripeness is a component of subject matter jurisdiction because a court has no power to decide disputes that are not yet justiciable. *See Sample v. Morrison*, 406 F.3d 310, 312 (5th Cir.2005) (per curiam). Article III of the Constitution confines

[3] Plaintiff's Claims for Declaratory and Injunctive Relief must be dismissed because they are remedies and do not create jurisdiction. "The Declaratory Judgment Act is not an independent ground for jurisdiction; it permits the award of declaratory relief only when other bases for jurisdiction are present." *E.g., Skelly Oil Co. v. Phillips Petroleum Co*., 339 U.S. 667, 671 (1950); *see also Jones v. Alexander*, 609 F.2d 778, 781 (5th Cir.1980). Similarly, "a permanent injunction is not an independent cause of action but an equitable remedy that depends on an underlying cause of action." *Donnelly v. JPMorgan Chase Bank, N.A*., No. CIV.A. H-15-1671, 2015 WL 6690257, at *4 (S.D. Tex. Oct. 16, 2015), report and recommendation adopted, No. CIV.A. H-15-1671, 2015 WL 6701922 (S.D. Tex. Nov. 3, 2015) (citing *Massey v. EMC Morg. Corp*., 546 F. App'x 477, 483 (5th Cir.2013) (unpublished)). Because Plaintiffs' Constitutional claims fail as a matter of law as to Chief Acevedo, there is no jurisdictional bases for the Court to award declaratory or injunctive relief.

federal courts to adjudicating "cases" and "controversies." *Lower Colorado River Auth. v. Papalote Creek II, L.L.C.*, 858 F.3d 916, 922 (5th Cir. 2017), *cert. denied*, 138 S. Ct. 747, 199 L. Ed. 2d 608 (2018) (citation omitted). Article III requires that the "litigation must be ripe for decision, meaning that it must not be premature or speculative." *Id.* (citation and internal quotation marks omitted). Accordingly, "ripeness is a constitutional prerequisite to the exercise of jurisdiction." *Id.* (citation and internal quotation marks omitted)

When the case is abstract or hypothetical, the court should dismiss it for lack or ripeness. *See Lopez v. City of Houston*, 617 F.3d 336, 341–42 (5th Cir. 2010). To determine ripeness, the court evaluates "(1) the fitness of the issues for judicial resolution, and (2) the potential hardship to the parties caused by declining court consideration." *Id.* (citing *Texas v. United States*, 497 F.3d 491, 498 (5th Cir.2007), *cert. denied*, 555 U.S. 811, 129 S.Ct. 32, 172 L.Ed.2d 18 (2008)). When 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." *Id.* (citing *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580–81, 105 S.Ct. 3325, 87 L.Ed.2d 409 (1985)).

In this case, Plaintiffs allege no facts or conduct that implicate Chief Acevedo's involvement in the drafting, enactment or enforcement of the Acts. *See discussion infra* at Section IV. A.1. The Ripeness doctrine "protect[s] the agencies

from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Laboratories,* 387 U.S. at 148–49; *see also, e.g., Dickinson Leisure Indus., Inc. v. City of Dickinson*, 329 F. Supp. 2d 835, 842 (S.D. Tex. 2004). That has not occurred here. This court should dismiss Plaintiffs' claims under Rule 12(b)(1).

B. PLAINTIFFS FAIL TO PLEAD FACTS TO STATE A CONSTITUTIONAL CLAIM AGAINST CHIEF ACEVEDO.

1. Plaintiffs Fail to Plead Facts to State a First, Fifth, or Fourteenth Amendment Claim Against Chief Acevedo.

Plaintiffs' Complaint alleges violations of their First Amendment rights of free speech and association. Plaintiffs' allegations with respect to the constitutionality of the Acts are detailed at pages 6-29 in their Complaint. Chief Acevedo is not mentioned or referenced at any point in pages 6-29 of Plaintiff's Complaint. Accordingly, Plaintiffs' Complaint identifies no action or conduct by Chief Acevedo that chills, abridges, or impairs their right to speak freely under the First Amendment of the U.S. Constitution or the Texas Constitution. *See discussion infra* at Section IV. A.1. Similarly, Plaintiffs' Complaint identifies no action or conduct by Chief Acevedo that abridges Plaintiffs' right to peaceably assemble or associate under the U.S. Constitution.

Plaintiffs' Complaint on page 29 further alleges a substantive due process claim under the Fifth and Fourteenth Amendments of the U.S. Constitution without

reference to any act or conduct by Chief Acevedo. Further, Plaintiffs have failed to identify or alleged that they were deprived of a vested property right to sustain a due process claim against Chief Acevedo.[4] As such, Plaintiffs' due process claims fail.

2. Plaintiffs' 42 U.S.C. § 1983 Claim Fails Because Plaintiffs Failed to Plead facts of an Official City of Houston Policy or Custom by a Final Policymaker and a Violation of Plaintiffs' Constitutional Rights whose "Moving Force" is that Policy or Custom.

a. Elements for Municipal Liability

To prevail on a claim under 42 U.S.C. § 1983, a plaintiff must show the deprivation of rights, privileges, or immunities secured by the Constitution and its laws by a person acting under color of state law. *See Parratt v. Taylor*, 451 U.S. 527, 535, 101 S.Ct. 1908, 1912 (1981), *overruled on other grounds by Daniels v. Williams*, 474 U.S. 327, 106 S.Ct. 662 (1986).

Plaintiff has sued Chief Acevedo in his official capacity, which is tantamount to a claim against the City. *See Hafer v. Melo*, 502 U.S. 21, 25, 112 S.Ct. 358, 116 L.Ed.2d 301 (1991). A municipality may only be liable under § 1983 if the execution of one of its policies or customs deprives a plaintiff of her constitutional rights. *Monell v. Dep't of Social Servs.*, 436 U.S. 658, 690-91, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). The municipality, however, is not vicariously liable under § 1983 for

[4] To establish a due process violation, Plaintiffs must first show that it has been deprived of a protected interest in property or liberty. *See Residents Against Flooding v. Reinvestment Zone No. Seventeen*, 734 Fed. Appx. 916 (5th Cir. 2018) (citing *Edionwe v. Bailey*, 860 F.3d 287, 292 (5th Cir. 2017)). Plaintiffs have no vested property right to post signs to exclude gun carriers in the manner in which they prefer.

its employees' actions. *Monell*, 436 U.S. at 691.[5] In order to impose liability on the City of Houston, a plaintiff must prove that "action pursuant to official municipal policy" was taken and caused her injury. *Id.*

In this case, Plaintiffs' Complaint fails to state a claim under § 1983 because there are no facts of (1) acts pursuant to an official policy or a custom; (2) by a final policymaker; or (3) a violation of Plaintiffs' constitutional rights whose "moving force" is that policy or custom. *See Monell v. New York City Dept. of Soc. Servs.*, 436 U.S. 658, 694-95 (1978).

An official policy "usually exists in the form of written policy statements, ordinances, or regulations[.]" *James v. Harris County*, 577 F.3d 612, 617 (5th Cir. 2009) (quoting *Piotrowski*, 237 F.3d at 579). In requiring the existence of an official policy before municipal liability under §1983 can attach, the Supreme Court "intended to distinguish acts of the *municipality* from the acts of the *employees* of the municipality, and thereby make clear that municipal liability to the action for which the municipality is actually responsible." *Pembaur v. City of Cincinnati*, 475

[5] As a matter of law, a city may be held liable under Section 1983 only for its own illegal acts, not pursuant to a theory of vicarious liability. *Connick v. Thompson*, 563 U.S. 51, 131 S.Ct. 1350, 1359 (2011); *Peterson v. City of Fort Worth*, TX, 588 F.3d. 838, 847 (5th Cir. 2009) (citing *Monell v. Dep't. of Soc. Servs. v. New York*, 436 U.S. 658, 694 (1978)). The Supreme Court has held that "a municipality cannot be held liable solely because it employs a tortfeasor—or, in other words, a municipality cannot be held liable under §1983 on a *respondeat superior* theory." *Id.* at 694. In requiring the existence of an official policy or custom before municipal liability under §1983 can attach, the Supreme Court "intended to distinguish acts of the *municipality* from the acts of the *employees* of the municipality, and thereby make clear that municipal liability to the action for which the municipality is actually responsible." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 479, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986)(emphasis in original). A municipality is only liable under §1983 for acts that are "directly attributable to it 'through some official action or imprimatur.'" *James v. Harris County*, 577 F.3d 612, 617 (5th Cir. 2009).

U.S. 469, 479, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986)(emphasis in original). Thus, a municipality is only liable under § 1983 for acts that are "directly attributable to it 'through some official action or imprimatur.'" *James*, 577 F.3d at 617.

Plaintiffs' Complaint fails to identify any specific City ordinance, law, or regulation that constitutes an official municipal "policy" for liability under liability under 42 U.S.C. § 1983. Moreover, Plaintiffs state no facts regarding a consistent, widespread, and repeated pattern by the City of enforcing or even threatening to enforce the Acts against property owners (if even possible) as opposed to handgun carriers.[6]

Additionally, Plaintiffs' § 1983 claim fails because Plaintiffs pled no facts to support a constitutional violation by Chief Acevedo (or the City), and the Complaint is devoid of facts of a direct causal link between the municipal action and the deprivation of their constitutional rights. *See Bd. of Cty. Comm'rs v. Brown*, 520 U.S. 397, 404–05, 117 S.Ct. 1382, 137 L.Ed.2d 626 (1997). As such, this court should dismiss Plaintiffs' § 1983 claims.

[6] A municipality may be liable for a custom or practices so *consistent* and *widespread* as to practically have the force of law. *See Pembaur v. Cincinnati*, 475 U.S. 469, 480-81 (1986).

V. PRAYER FOR RELIEF

For the foregoing reasons, the City prays that Plaintiffs' claims be dismissed for want of jurisdiction, for failure to state a claim, and for such further relief to which it may be justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 15, 2020, I served the following attorneys with a true and correct copy of the foregoing document in accordance with Rule 5(b)(3) of the Federal Rules of Civil Procedure via the court's electronic filing / service system.

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ORDER GRANTING DEFENDANT ART ACEVEDO'S
MOTION TO DISMISS

BE IT REMEMBERED that on this day, the Court considered Defendant Art Acevedo's Motion to Dismiss.

After due consideration of the motion, the Court has found it meritorious. Therefore, the Motion to Dismiss should be granted.

It is therefore, ORDERED that Plaintiffs' claims against Defendant Art Acevedo, in his official capacity, are hereby DISMISSED WITH PREJUDICE.

SIGNED on this _____ day of _____, 202__.

_____
VANESSA D. GILMORE
UNITED STATES DISTRICT JUDGE