

**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.

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Civil Action No. 4:20-cv-3081

**DEFENDANT ART ACEVEDO’S REPLY IN SUPPORT OF
HIS MOTION TO DISMISS UNDER RULE 12(b)(1) AND 12(b)(6)**

Pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6), Defendant Art Acevedo (“Chief Acevedo”), in his official capacity, files his Reply in Support of his Motion to Dismiss as follows.

I. NATURE AND STAGE OF THE PROCEEDINGS

Chief Acevedo filed his Motion to Dismiss (Dkt. 42) and Plaintiffs filed their Consolidated Opposition to Defendants’ Motions to Dismiss (Dkt. 57). Chief Acevedo now files his Reply to Plaintiffs’ Consolidated Opposition to Defendants’ Motions to Dismiss.

II. STATEMENT OF THE ISSUES

1. Whether this 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 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. SUMMARY OF THE ARGUMENT

Plaintiffs fail to offer any sufficient factual or legal basis for opposing dismissal of their Complaint as against Chief Acevedo. Their Complaint confirms that they have no justiciable controversy with Chief Acevedo, and they do not allege that he authored, enacted, or promulgated the State Acts or that he enforced or threatened to enforce the State statutes that Plaintiffs challenge in this case (“the Acts”) in any way. It bears noting that in the event the Houston Police Department were to ever attempt to enforce the Acts at an as-yet to be determined time for an as-yet to be determined reason, such enforcement would be against the individuals carrying guns and not against Plaintiffs. And finally, the Complaint makes it very clear that the actions complained of by Plaintiffs – the enactment of enhanced signage requirements communicating a “no guns” message on their property and the resulting alleged constitutional violations - were undertaken by the state and have nothing to do with Chief Acevedo.

IV. ARGUMENT AND AUTHORITY

A. DISMISSAL FOR LACK OF STANDING

Plaintiffs have not met their burden of establishing the three required elements of Article III standing: (1) an injury in fact, (2) causation, and (3) redressability. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992). Because Plaintiffs are seeking prospective injunctive relief, Plaintiffs must demonstrate that the “threatened injury is ‘certainly impending’” or that there is a “‘substantial risk’ that the harm will occur.” *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 134 S. Ct. 2334, 2341, 189 L. Ed. 2d 246 (2014) (quoting *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 409, 414, n.5, 133 S. Ct. 1138, 185 L. Ed. 2d 264 (2013)). Plaintiffs cannot establish standing to sue Chief Acevedo here because his actions did not cause their alleged injury. In addition, the Acts regulate gun-owners, not the Plaintiffs. There simply is no chance that the Plaintiffs would be prosecuted under the Acts and there is no allegation that Chief Acevedo may ever attempt to enforce the Acts against Plaintiffs. There are likewise no allegations that Chief Acevedo has taken any action or threatened to take any action to enforce the Acts (which neither he nor any employee of the City had any part in crafting) or that he has infringed in any way upon their rights to free speech or association. There is no justiciable controversy against Chief Acevedo.

B. DISMISSAL FOR LACK OF RIPENESS

Plaintiffs’ Complaint makes no mention of any harm – real or imagined – by Chief Acevedo. They merely point out that he is the Houston Police Chief and is responsible for

“enforcing criminal violations of the Acts in the City of Houston.” (Dkt. 1 at 5). Plaintiffs do not allege that Chief Acevedo was involved in the drafting or enactment of the challenged Acts. And insofar as Plaintiffs rely on the possibility of enforcement one day by Chief Acevedo, any such enforcement would be against the trespassers on Plaintiffs’ property and not against Plaintiffs. “A court should dismiss a case for lack of ‘ripeness’ when the case is abstract or hypothetical.” *Monk v. Huston*, 340 F.3d 279, 282 (5th Cir. 2003). Here, Plaintiffs do not allege that they have been threatened with prosecution or that prosecution is likely. Their claim is “contingent [on] future events that may not occur as anticipated, or indeed may not occur at all” and is thus not ripe for adjudication. *See Thomas v. Union Carbide Agr. Prod. Co.*, 473 U.S. 568, 580–81, 105 S. Ct. 3325, 87 L. Ed. 2d 409 (1985)).

C. FAILURE TO STATE A CLAIM – 1st, 5th AND 14th AMENDMENT

Here again, Plaintiff’s allegations regarding the constitutionality of the Acts have nothing to do with Chief Acevedo or the City of Houston. Neither Chief Acevedo nor any City of Houston official had any involvement in drafting or enacting the challenged Acts, and there is no allegation that Chief Acevedo has engaged in – or threatened to engage in – any conduct that would impair Plaintiff’s constitutional rights to free speech, assembly or association. Likewise there is nothing in Plaintiffs’ Complaint alleging any conduct or act by Chief Acevedo to support a claim under the Fifth or Fourteenth Amendment.

D. FAILURE TO STATE A CLAIM – 42 U.S.C. § 1983 AND EX PARTE YOUNG

1. 42 U.S.C. § 1983

The Supreme Court has made it clear that “[i]t is well established that in a §1983 case a city or other local governmental entity cannot be subject to liability *at all* unless the harm was caused in the implementation of ‘official municipal policy.’” *Lozman v. City of Riviera Beach, Fla.*, 138 S. Ct. 1945, 1951, 201 L. Ed. 2d 342 (2018) (emphasis added) (quoting *Monell v. Dep’t of Soc. Servs. of City of New York*, 436 U.S. 658, 691, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978)). Plaintiffs have not alleged any official municipal policy here and cannot hope to prevail on their §1983 claim.

2. Ex Parte Young

There is no *Ex Parte Young* cause of action against Chief Acevedo. Because Plaintiffs lack a cause of action under § 1983, they argue that they are entitled to equitable relief under *Ex Parte Young*. Plaintiffs’ argument fails for two reasons. First, Chief Acevedo is a local official, not a state actor. Second, even where a government official “has the authority to enforce” a challenged statute, *Ex Parte Young* still requires the plaintiff to show that the official “is likely to do so.” *City of Austin v. Paxton*, 943 F.3d 993, 1001–02 (5th Cir. 2019), *cert. denied sub nom. Austin, TX v. Paxton*, No. 19-1441, 2021 WL 78079 (U.S. Jan. 11, 2021). Without evidence of likely enforcement, the government official lacks the requisite connection to the enforcement of the challenged law. *Id.* Plaintiffs have not shown and cannot show that Chief Acevedo is likely to enforce the Acts in this case and Plaintiffs do not meet the *Ex Parte Young* threshold.

V. CONCLUSION

For the foregoing reasons, Chief Acevedo respectfully requests that the Court grant his Motion to Dismiss Plaintiffs' Complaint pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6).

Respectfully submitted,

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By: /s/ Charles H. Houston III

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CERTIFICATE OF SERVICE

I hereby certify that on February 5, 2021, I electronically filed the foregoing document with 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/ Charles H. Houston III
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