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, *et al.*,** Defendants.	**Civil Action No. 4:20-CV-3081** Jury Demanded

City of Webster's Reply in Support of its Motion to Dismiss

Defendant, City of Webster, sued through its Acting Chief of Police, Pete Bacon in his official capacity, replies in support of its motion to dismiss Plaintiff Bay Area Unitarian Universalist Church's claims challenging the constitutionality and enforcement of sections 30.06 and 30.07 of the Texas Penal Code.[1]

Since Bay Area admits it has not suffered any injury in fact as a result of Bay Area's merely hypothetical suggestion of the City's potential enforcement of section 30.06 or section 30.07, Bay Area lacks standing to assert its claims against the City and dismissal is appropriate under Rule 12(b)(1) of the Federal Rules of Civil Procedure.

Dismissal is also appropriate under Rule 12(b)(6) because Bay Area has failed to state a plausible claim against the City under the First, Fifth, or Fourteenth Amendment, or under Article I, Section 8 of the Texas Constitution.

[1] ECF No. 52. Even though Plaintiffs filed suit against the City and several other governmental defendants, only Bay Area asserts any claim or seeks any relief against the City. *See id.*, p. 1 n.2 & 3.

Argument & Authorities

1. Bay Area lacks standing to assert any claim against the City of Webster

As the party seeking to assert subject matter jurisdiction, Bay Area "constantly bears the burden of proof that jurisdiction does in fact exist." *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001). "Where, as here, the movant mounts a 'facial attack' on jurisdiction based only on the allegations in the complaint," *Lee v. Verizon Communs., Inc.*, 837 F.3d 523, 533 (5th Cir. 2016), dismissal under Rule 12(b)(1) is appropriate "if it appears certain that the plaintiff cannot prove any set of facts in support of his claim that would entitle plaintiff to relief." *Ramming*, 281 F.3d at 161.

1.1. Bay Area has not suffered and cannot suffer any injury in fact arising from the City's enforcement of section 30.06 or 30.07.

Despite its verbose ramblings about the applicability of "the doctrine of unconstitutional conditions" and reliance on cherry–picked words or phrases construed out of reasonable context, both in its complaint and opposition to the City's motion to dismiss, Bay Area simply fails to meet its burden of "demonstrating a realistic danger of sustaining a direct injury as a result of [section 30.06 or section 30.07's] operation or enforcement.'" *KVUE, Inc. v. Moore*, 709 F.2d 922, 927 (5th Cir. 1983).

To be sure, Bay Area admits section 30.06 and 30.07 "are not 'enforced' against [Bay Area]," and Bay Area "ha[s] 'other options' rather than post the signs" prescribed under section 30.06(c)(3)(B) and section 30.07(c)(3)(B) for asserting Bay Area's right to exclude individuals carrying handguns from Bay Area's property as trespassers.[2] In doing

[2] ECF No. 57, p. 9.

so, Bay Area has effectively admitted any alleged harm would be "contingent on future events that...[will] not occur at all." *Compare, Lopez v. City of Houston*, 617 F.3d 336, 342 (5th Cir. 2010). Accordingly, Bay Area has failed to demonstrate it has standing to seek, let alone obtain injunctive and declaratory relief against the City. Indeed, Bay Area's admissions show the very contrary.

Unable to overcome the fatal flaw in its complaint, Bay Area instead asserts *for the first time* in its opposition brief that it "presently suffer[s] a concrete injury" since Bay Area "either must forfeit [its] constitutional right to free speech [by complying with the signage provisions in section 30.06 and section 30.07] or [its] property right to exclude...and police protection of that right to exclude,"[3] should Bay Area fail to comply with the signage provisions. Beyond the fact that Bay Area suggests only two choices when in fact the briefing and law shows Bay Area has many, this contrived "injury" appears to be an impermissible and untimely attempt to amend Bay Area's facially deficient complaint.[4]

"[I]t is axiomatic that the complaint may not be amended by the briefs in opposition to a motion to dismiss." *Langston v. San Jacinto Junior College*, 25 F. Supp. 3d 1009, 1016 (S.D. Tex. 2014) (Ellison, J. presiding) (quoting *Roebuck v. Dothan Sec., Inc.*, 515 F. App'x 275, 280 (5th Cir. 2013)). Since Bay Area "makes these claims only in...response to the [City's] Motion to Dismiss[,] [t]he Court may not consider these statements as allegations." *Thomas v. City of Galveston*, 800 F. Supp. 2d 826, 838-39 (S.D. Tex. 2011)

[3] ECF No. 57, p. 9.

[4] A party may amend its pleading once as a matter of course within twenty-one (21) days after service of a motion under Rule 12(b). Fed. R. Civ. P. 15(1)(B). Bay Area has failed to timely amend its complaint or seek leave to do so.

(Ellison, J. presiding) (citations omitted). Bay Area's unpled and insupportable assertion that its decision whether to comply with section 30.06 and section 30.07 deprives Bay Area of its rights under the First Amendment, or its common law right as a property owner to exclude trespassers cannot save Bay Area's baseless claims against the City within Bay Area's complaint.

1.1.1. Bay Area's unpled assertion that section 30.06 and section 30.07 deprive Bay Area of any constitutional or common law right also fails as a matter of law

Even if, *arguendo*, the Court could consider Bay Area's unpled allegations of a constitutional deprivation, Bay Area's argument – that sections 30.06 and 30.07 condition Bay Area's right to exclude and right to receive police protection on Bay Area's compliance with the signage requirements in section 30.06(c)(3)(B) and section 30.07(c)(3)(B) – still fails as a matter of law, because Bay Area may always utilize the basic law of trespass to protect its property, regardless of its compliance or non-compliance with the contested statutory provisions.

"The Supreme Court of Texas has described the basic principles of private property rights 'as fundamental, natural, inherent, inalienable, not derived from the legislature and as pre-existing even constitutions.'" *Redburn v. City of Victoria*, 898 F.3d 486, 495 (5th Cir. 2018) (quoting *Severance v. Patterson*, 370 S.W.3d 705, 709 (Tex. 2012)). Since "an owner suffers a special kind of injury when a stranger directly invades and occupies the owner's property," *Loretto v. Teleprompter Manhattan Catv Corp.*, 458 U.S. 419, 436 (1982), "an owner of realty [generally] has the right to exclude all others from use of property.'" *Redburn*, 898 F.3d at 495 (quoting *Severance*, 370 S.W.3d at709).

Texas law "has long protected…[property] owner[s]," *see Loretto*, 458 U.S. at 436, by maintaining as an actionable claim common law trespass to real property. *Barnes v. Mathis*, 353 S.W.3d 760, 764 (Tex. 2011). "At its core, a [t]respass to real property is an unauthorized entry upon the land of another, and may occur when one [simply] enters—or causes something to enter—another's property." *Envtl. Processing Sys., L.C. v. FPL Farming Ltd.*, 457 S.W.3d 414, 424 (Tex. 2015) (quotation omitted). "[E]very unauthorized entry upon land of another is a trespass even if no damage is done or injury is slight and gives a cause of action to the injured party." *Coastal Oil & Gas Corp. v. Garza Energy Trust*, 268 S.W.3d 1, 12 n.36 (Tex. 2008).

While the government may limit a property owner's right to exclude by taking "appropriate...action under its police power," *Severance*, 370 S.W.3d at 710, the Texas legislature did not do so in enacting section 30.06 and section 30.07 of the Texas Penal Code. Indeed, the Texas Penal Code expressly;

> does not bar, suspend, or otherwise affect a right or liability to damages, penalty, forfeiture, or other remedy authorized by law to be recovered or enforced in a civil suit for conduct [the Penal] [C]ode defines as an offense, and the civil injury is not merged in the offense.

Tex. Pen. Code § 1.03(c). Thus, despite pertaining to an act of "trespass," neither section 30.06 nor 30.07 abrogates Bay Area's right to exclude anyone based on the basic law of civil trespass. *Cf., Brown v. De La Cruz*, 156 S.W.3d 560, 567 (Tex. 2004). Rather, like the general criminal trespass law in section 30.05, sections 30.06 and 30.07 "are prophylactic[,] they protect [property owners] against intruders," *Oliver v. United States*, 466 U.S. 170, 183 n.15 (1984), *accord*, *Carroll v. State*, 911 S.W.2d 210, 221 (Tex. App.—Austin 1995, no pet.), by permitting the removal, arrest, and criminal prosecution of

individuals who merely "carr[y] a handgun…on property of another without effective consent" after "receiv[ing] notice that entry on the property...with a...handgun was forbidden." Tex. Pen. Code §§ 30.06(a), 30.07(a). However, neither section precludes any landowner or occupier from excluding anyone – gun possessor or not – based on a trespass.

Nonetheless, Bay Area inaccurately argues sections 30.06 and 30.07 "impose uniquely burdensome speech requirements" by conditioning "police enforcement of [Bay Area's] right to exclude...[on complying with] government-scripted speech required by the Acts."[5] Neither section, however, limits or conditions Bay Area's right to exclude or right to receive police protection on its freedom of speech or association. To the contrary, "[t]he purpose of the criminal trespass statute is not to regulate speech. Its purpose is to regulate conduct." *Cf., Spingola v. State*, 135 S.W.3d 330, 335 (Tex. App.—Houston [14th Dist.] 2004, no pet.).[6] Thus, "a [criminal] trespass statute, 'may be constitutionally applied...so long as it is applied without discrimination and is not used to purposefully suppress speech.'" *Gollinger*, 834 S.W.2d at 556 (quotation omitted).

Further, Bay Area's *ipse dixit* musing that "police intervention depends on whether ...signs [compliant with sections 30.06(c)(3)(B) and 30.07(c)(3)(B)] are posted,"[7] and Bay Area's "injury comes not from calling the police but the burdensome notice requirements

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[5] ECF No 57, p. 7.

[6] *See also, e.g., Otwell v. State*, 850 S.W.2d 815, 818 (Tex. App.—Fort Worth 1993, pet. ref'd); *Gollinger v. State*, 834 S.W.2d 553, 556 (Tex. App.—Houston [14th Dist.] 1992, no pet.); *Gibbons v. State*, 775 S.W.2d 790, 794 (Tex. App.—Dallas 1989, no pet.); *Reed v. State*, 762 S.W.2d 640 644 (Tex. App.—Texarkana 1988, pet. ref'd) (collecting cases).

[7] ECF No. 57, p. 22.

that are necessary to make a call to the police useful,"[8] is not only merely fanciful, it is directly inconsistent with the statutory duties of every Texas peace officer including, e.g., "the duty...to preserve the peace within the officer's jurisdiction," Tex. Code Crim. Proc. Art. 2.13(a),[9] and;

> It is the duty of every peace officer, when he may have been informed in any manner that a threat has been made by one person **to do some injury to...the person or property of another**,...to prevent the threatened injury, if within his power.

Id., art. 6.05 (emphasis added). Further, "[a]s part of his duty 'to serve and protect,' a police officer may stop and assist an individual whom a reasonable person...would believe is in need of help." *United States v. Ramirez*, 213 F. Supp. 2d 722, 726 (S.D. Tex. 2002) (Kazen, J., presiding) (citations omitted). Accordingly, because each Texas peace officer including, each officer employed by the City of Webster, has a duty to respond to Bay Area's calls to protect its clergy and congregants without regard to Bay Area's decision to comply with the signage provisions of section 30.06 or section 30.07, Bay Area's tortured hypothetical cannot demonstrate any injury-in-fact based upon any purported "unconstitutional condition."

1.2. Bay Area fails to demonstrate redressability.

Bay Area has likewise failed to carry its burden to show "it is *likely*, as opposed to merely *speculative*, that [Bay Area's] 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)

[8] *Id.*, p. 21.

[9] *See Bustos v. Martini Club*, 599 F.3d 458, 466 (5th Cir. 2010).

(quotation omitted). As discussed *supra*, Bay Area's "injury" is not only factually speculative, it is a legal impossibility because neither section 30.06 nor 30.07 limit or deprive Bay Area's right to exclude *anyone* and, moreover, because Bay Area cannot alleged credible *facts* to show the Webster Police would respond any differently to any call for police service regardless of Bay Area's compliance with sections 30.06 and 30.07. *Compare, Rancho Viejo Waste Mgmt., LLC v. City of Laredo*, 364 F. Supp. 3d 698, 706 (S.D. Tex. 2019). Moreover, the injunctive and declaratory relief Bay Area seeks would have no effect on Bay Area's right to exclude individuals carrying handguns and to assert claims for common law trespass to real property against any individual who trespasses, for any reason, including carrying a firearm, and who may refuse to leave Bay Area's property after simply being asked to do so.

2. Bay Area's contrived claims are not ripe and they will never be ripe

This Court does not have subject matter jurisdiction over Bay Area's claims because Bay Area's claims, based solely on a hypothetical belief, are simply not ripe. "A case or controversy must be ripe for decision, meaning that it must not be premature or speculative." *Shields v. Norton*, 289 F.3d 832, 834-35 (5th Cir. 2002). "In this sense, the doctrines of ripeness and standing often overlap in practice, particularly in an examination of whether a plaintiff has suffered a concrete injury." *Lopez v. City of Houston*, 617 F.3d 336, 341 (5th Cir. 2007) (quotation omitted).

Since Bay Area cannot suffer any injury as a result of the City's enforcement of sections 30.06 and 30.07 and, further, since the City has demonstrated that Bay Area cannot as a matter of law suffer a deprivation of its right to exclude or right to police protection

based upon its failure to comply with either section, 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.

3. Bay Area fails to state a plausible claim for relief.

Even if Bay Area had standing to sue the City and its claims were ripe, Bay Area fails to state a plausible claim for under 42 U.S.C. § 1983 for alleged violations under the First Amendment, or under the Fifth and Fourteenth Amendments, or Bay Area's rights under Article I, Section 8 of the Texas Constitution.

3.1. Bay Area concedes it has no claim against the City under the Fifth Amendment, Fourteenth Amendment, or Texas Constitution

In its opposition brief, Bay Area fails to dispute, and thus concedes, that Bay Area has not pled a plausible claim under the Fifth Amendment[10] or Fourteenth Amendment to the U.S. Constitution, or Article I, Section 8 of the Texas Constitution.[11] Under Local Rule 7.4, the Court may consider these bases presented by the City as unopposed, S.D. Tex. L.R. 7.4, and "the [C]ourt may accept as true the [City's] factual allegations." *Waggoner v. Deutsche Nat'l Bank Trust Co.*, 181 F. Supp. 3d 445, 448 (S.D. Tex. 2016) (Hanks, J. presiding) (citing *Eversley v. MBank Dallas*, 843 F.2d 172, 173-174 (5th Cir. 1988)). *See also, e.g., Morgan v. Fed. Express Corp.*, 114 F. Supp. 3d 434, 438 (S.D. Tex. 2015) (Harmon, J. presiding).

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[10] Nonetheless, Bay Area fails to allege – and indeed actually disprove – that the City, let alone any Defendant, was a federal law enforcement officer as would be necessary to state a claim under the Fifth Amendment. *See* ECF No. 52, pp. 17-18.

[11] Like its Fifth Amendment claim, Bay Area's "claim" under Article I, Section 8 of the Texas Constitution is "dead on arrival" because there is no Texas law equivalent to section 1983, and the Texas Constitution does not create an implied private right of action. *See id.*, p. 20.

3.2. Bay Area fails to state a claim of a First Amendment claim against the City.

Even though Bay Area zealously *argues* it has pled a plausible claim under the First Amendment, Bay Area fails to allege *facts* which plausibly show how the City, by actually or even hypothetically enforcing section 30.06 or section 30.07 against trespassers carrying handguns, has deprived or could ever deprive Bay Area of its right to free speech or association. "Post-*Iqbal*, [such] formulaic recitations or bare-bones allegations [as those Bay Area asserts in its opposition] will not survive a motion to dismiss." *Shaw v. Villanueva*, 918 F.3d 414, 419 (5th Cir. 2019). Where, as here, "a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557). By failing to allege facts demonstrating the City has enforced or will imminently enforce section 30.06 or 30.07 to Bay Area's detriment, or how the City has by doing nothing thus far, Bay Area has not alleged a First Amendment violation.

3.3. Bay Area fails to allege facts showing any City policy caused an actual violation of Bay Area's rights

Since Bay Area complains of state statute and no *actual* act or failure to act by the City, Bay Area has also failed to identify any constitutionally deficient City policy, much less alleged facts which plausibly show that *a known unconstitutional existing and identifiable* **City policy** was the "moving force" that **has caused** an actual deprivation of Bay Area's rights. *See Board of County Commissioners of Bryan County, Oklahoma v. Brown*, 520 U.S. 397, 407 (1997); *Spiller v. City of Texas City*, 130 F.3d 162, 167 (5th Cir.1997).

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.

Even if the Court finds it has subject matter jurisdiction, because Bay Area has also failed to plead facts supporting a plausible claim for relief, including under the particular requirements necessary to state a claim of municipal liability under 42 U.S.C. § 1983, the Court should dismiss Bay Area's claims against the City under Rule 12(b)(6) of the Federal Rules of Civil Procedure.

Dated: February 12, 2021

Respectfully submitted,

Lewis Brisbois Bisgaard & Smith, LLP

/ s / William S. Helfand
William S. Helfand
Attorney-In-Charge
Texas Bar No. 09388250
S.D. Tex. Bar No. 8791
Norman Ray Giles
Texas Bar No. 24014084
S.D. Tex. Bar No. 26966
Sean O'Neal Braun
Texas Bar No. 24088907
S.D. Tex. Bar No. 2210748

Of Counsel:

Lewis Brisbois Bisgaard & Smith, LLP
24 Greenway Plaza, Suite 1400
Houston, Texas 77046
(713) 659-6767

(713) 759-6830 (Fax)

Attorneys for Defendant,
City of Webster

Certificate of Service

I hereby certify that on February 12, 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