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-03081** Jury Demanded

Defendant Webster Chief of Police Pete Bacon's Motion to Dismiss for Lack of Subject Matter Jurisdiction, or in the alternative, Motion for Summary Judgment.

Defendant, City of Webster, sued through its Chief of Police, Pete Bacon in his official capacity,[1] moves to dismiss Plaintiffs' claims, under FED. R. CIV. P. 12(b)(1), because the Court lacks subject matter jurisdiction. In the alterative, Webster moves for summary judgment under FED. R. CIV. P. 56.

Since the Webster Police Department provides Plaintiff Bay Area Unitarian Universalist Church ("Bay Area" or "Church") with the same police protection regardless of the Church's or the Church's members' compliance with the challenged statutes, Bay Area presents not only a hypothetical legal question, but one founded on a false premise. Thus, lacks standing to bring suit against the City of Webster.

[1] By suing the City of Webster's Chief of Police, Pete Bacon, in his official capacity, Plaintiffs' claims are a suit against the City . *See Hafer v. Melo*, 502 U.S. 21, 25 (1991).

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Evidence in Support

Webster's challenge to lack of subject matter jurisdiction is based on the following evidence:

Exhibit 1 Excerpts from Sharlene Rochen's deposition testimony

Exhibit 2 Declaration of Chief Pete Bacon

Exhibit 3 Verification of evidence in support of the motion

Nature and Stage of Proceedings

A. Factual and Statutory Background.

1. 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 certain aspects of Texas Penal Code § 30.06 ("Concealed Carry Trespass Law") and § 30.07 ("Open Carry Trespass Law"). [Doc. 1].

2. Plaintiffs contend, but present no evidence to show, these provisions "discourage property owners from excluding individuals carrying guns"[2] 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."[3]

3. As the only Plaintiff that owns property within the City of Webster,[4] Bay Area is the only Plaintiff that asserts any claim or seeks any relief against Webster.[5]

4. Under Texas Penal Code §§ 30.06 and 30.07 (collectively, the "Acts"), a person licensed to carry a handgun commits criminal trespass if the license holder "carries a

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[2] [Doc. 1, Introduction ¶ 2].
[3] [*Id.*].
[4] "[Bay Area's] building is located at the border between the City of Houston and the City of Webster." [Doc. 1, ¶ 5]. Plaintiffs Antidote Coffee and Perk You Later are located wholly within the City of Houston, [*id.* at ¶ 6], and any request for police protection emanating from Antidote Coffee or Perk You Later's property are not addressed by the Webster Police Department.
[5] 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," [Doc. 1, ¶ 11], which Webster concedes for purposes of this motion.

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).[6]

5. Notably, like any other person, a person with a firearm can be arrested for trespass without regard to any signage available under the Acts. A licensed person commits an offense if the person carries a concealed handgun (or an openly carried handgun) on the property of another without consent and receives notice by oral **or** written communication that the concealed (or open-carried) handgun was forbidden. Bay Area ignores the oral-communication method of warning a trespasser and that always exists for any form of trespass, to argue the *option* to post a written communication in the form of either "a card or other document,"[7] or a "sign posted on the property" meeting certain specifications,[8] is somehow unconstitutional.[9]

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[6] 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.

[7] TEX. PEN. CODE §§ 30.06(c)(3)(A), 30.07(c)(3)(A).

[8] TEX. PEN. CODE §§ 30.06(c)(3)(B), 30.07(c)(3)(B). Additionally, the signs must be in both English and Spanish with block letters at least one inch in height an in contrasting colors. TEX. PEN. CODE §§ 30.06(c)(3)(B)(i) & (ii), 30.07(c)(3)(B)(i) & (ii). For the provision applicable concealed-carry license holders, the sign must be "clearly visible" in a "conspicuous manner. TEX. PEN. CODE § 30.06(c)(3)(B)(iii). For provision applicable to open-carry license holders, the sign must be posted "at each entrance to the property." TEX. PEN. CODE § 30.07(c)(3)(B)(iii).

[9] Bay Area also complains of the requirement that a third sign must be posted under the General Trespass Law, TEX. PEN. CODE § 30.05, to prohibit firearms aside from handguns. [Doc. 1, ¶ 26]. Bay Area, however, does not seek injunctive or declaratory relief as to this provision. [*Id.*, Prayer for Relief (b)].

6. Despite Plaintiffs' contrived argument, the City of Webster has repeatedly made clear the Webster Police Department does not *require* a land owner or occupant to have a posted sign to enforce the trespass laws; the Webster Police Department will enforce any trespass, without regard to any signage or lack thereof, provided the elements of the trespass statute exist. Bay Area has not only presented no evidence otherwise, Bay Area has admitted it does not even know of any evidence to the contrary. Thus Bay Area's lawsuit is based on no more than a theory; a theory that is roundly disproven.

7. The testimony of Bay Area's administrator, Sharlene Rochen,[10] and declaration testimony of Chief Bacon[11] demonstrate that, just like all other Webster property owners, neither Bay Area nor Bay Area's members must choose between rights under the First Amendment and police protection, as Bay Area inaccurately posits. Indeed, disproving this is mere theory, Ms. Rochen testified the Webster Police Department has always responded to calls for service whenever the Church has called the police and that all responding Officers have always behaved professionally. Ex. 1 (p. 42, ll. 2-9). Over the last five years, Rochen called the Webster Police Department for the Church around ten times, *id*. (p. 42, l. 25 – p. 43, l. 5), and the Webster Police Department's response time to the Church's calls has averaged under nine minutes, *id.* (p. 43, ll. 6-13). Further, Rochen

[10] Excerpts of the March 23, 2022, Deposition of Sharlene Rochen are attached as **Exhibit 1** to this motion.

[11] The November 1, 2022, Declaration of City of Webster Chief of Police Pete Bacon is attached as **Exhibit 2** to this motion.

could not identify anything in these interactions Rochen wished the responding Webster police officers had done but did not do. *Id*. (p. 42, ll. 10-12). The evidence disproves the Church's purely theoretical hypothesis.

8. In fact, further belieing the Church's pleading allegations, Ms. Rochen testified to a specific incident in which Rochen felt unsafe due to a suspicious person on Bay Area's land causing Rochen to call the Webster Police Department. *Id*. (p. 66, l. 1 – p. 67, l. 3). Despite the fact Bay Area does not display any of the signs Plaintiffs allege are required, [Doc. 1, ¶ 61], Rochen testified she would have called the Webster Police Department if she had observed the suspicious person possessing a firearm, Ex. 1 (p. 71, l. 4-6). In fact, Rochen acknowledged Rochen had no reason to believe the Webster Police Department would not respond to a call of an individual possessing a firearm on the Church's premises regardless of the presence of any signs permitted under the Acts. *Id*. (p. 71, ll. 18-25).

9. Consistent with the Church's sworn testimony, Chief Bacon has testified the Webster Police Department responds to investigate reports of trespass and other calls in the very same manner, completely without regard to whether the property utilizes the signage *options* under the Acts. Ex. 2 ¶ 7. Chief Bacon's testimony expressly confirms Rochen's testimony on behalf of the Church, that the Webster Police Department has not withheld police protection to Bay Area in the past, *id*. at ¶ 8, and would never do so in the future based on Bay Area's decision or whether to utilize notice provision options under the Acts, *id*. at ¶ 9.

10. Both the church's and Chief Bacon's testimony stand for the unequivocal position that the signs in question have absolutely no bearing on the City of Webster Police

Department's response to a request for any police service, including a call involving a potential trespass. The Church's *allegation* to the contrary is both completely inaccurate – at best – and clearly disproven by the evidence.

B. Procedural Background.

11. Plaintiffs filed suit on September 20, 2022. [Doc. 1].

12. Webster filed a motion to dismiss, asserting both a "facial attack" to Plaintiffs' standing under Rule 12(b)(1) as well as asserting that Plaintiffs could not state a claim for relief may be granted under Rule 12(b)(6). [Doc. 52]. Attorney General, Kim Lemaux, Presiding Officer of the Texas Commission on Law Enforcement, Kim Ogg, Harris County District Attorney, Ed Gonzalez, Harris County Sheriff, Vince Ryan, Harris County Attorney, and Art Acevedo, City of Houston Chief of Police – all sued in their official capacities – filed similar motions to dismiss. [Docs. 28, 38 & 42].

13. The Court, the Honorable Vanessa D. Gilmore, presiding, denied the motions. [Doc. 68]. The state officials, General Paxton and Lemaux, filed an interlocutory appeal asserting sovereign immunity, [Doc. 78] in response to which Plaintiffs dismissed the state officials from the suit, [Doc. 81], and after which the Fifth Circuit dismissed the appeal. [Doc. 87]. After all state officials were dismissed from the suit, Chief Acevedo filed a motion for judgment on the pleadings under Federal Rule of Civil Procedure 12(c), persuasively asserting the Court could not fashion any relief by enjoining the remaining municipal defendants. [Doc. 115]. The Court has since granted that motion, vacating Judge

Gilmore's earlier order at least as to the City of Houston. [Doc. 147].[12] Yet the Church's claim against Webster is the same claim against the City of Houston this Court dismissed. The same ground that supported the City of Houston's dismissal, plus more, are grounds for Webster's dismissal for lack of standing. As this Court, Judge Werlein presiding, concluded, "nothing in the statutes themselves compel Plaintiffs to provide the statutory notice to exclude patrons with handguns or suggest that police protection will only be afforded to those who provide statutory notice." [*Id*. at 10–11]. Further, Plaintiffs have not "pled facts to show that their decision to post the §§ 30.06 and 30.07 signs was in any way coerced or compelled." [*Id*. at 11]. Rather, "Plaintiffs have failed to meet their burden to allege a plausible set of facts establishing 'a concrete and particularized,' and 'actual or imminent,' injury for which the" police chiefs are responsible. [*Id*. at 12]. Those findings and the Court's holding are just as applicable to claims against Webster.

14. Because Plaintiffs fail to plead or show an evidentiary basis to treat Webster different from Houston, this Court's Order relates to an identical claim against another municipality and should end the litigation. Nevertheless, the evidentiary record developed through discovery provides this Court further support for its September 29, 2022, finding of Plaintiffs' lack of standing, and further bases upon which the Court should dismiss the Church's claims against the City of Webster.

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[12] The Court revised the prior judge's ruling because of Article III jurisdictional limitation's uniquely important role in checking federal judicial overreach, concluding "[t]he law of the case doctrine is not, however, a barrier to correction of judicial error.…If the facts presented to [the successor judge] truly showed a lack of jurisdiction, it would have been sheer waste for him to permit a trial in Texas and await reversal by this court for want of jurisdiction." [*Id*. at 11 n. 4 (quoting *Loumar, Inc. v. Smith*, 698 F.2d 759, 762–63 (5th Cir. 1983))].

Issue Presented and Standard of Review

1. Whether, after a review of facts in the evidentiary record, the Church can prove the Court has subject matter jurisdiction because Bay Area lacks standing to obtain declaratory and injunctive relief against Webster.

2. Whether Bay Area merely seeks an impermissible advisory opinion from this Court, and that the Court lacks subject matter jurisdiction.

Standard of Review under 12(b)(1)

15. Webster moves to dismiss the Church's complaint as the sole Plaintiff suing Webster, for lack of subject matter jurisdiction under Rule 12(b)(1). "The burden of proof for a Rule 12(b)(1) motion to dismiss is on the party asserting jurisdiction." *Raj v. La. State Univ.*, 714 F.3d 322, 327 (5th Cir. 2013); *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001).

16. Webster presents a factual attack on subject matter jurisdiction. "A 'factual attack' under Rule 12(b)(1) may occur at any stage of the proceedings, and plaintiff bears the burden of proof that jurisdiction does in fact exist." *S. Recycling, L.L.C. v. Aguilar, (In re S. Recycling, L.L.C.)*, 982 F.3d 374, 386 (5th Cir. 2020) (quoting *Menchaca v. Chrysler Credit Corp.*, 613 F.2d 507, 511 (5th Cir. 1980). "[T]he trial court may proceed as it never could under 12(b)(6) or 56." *Williamson v. Tucker*, 645 F.2d 404, 412 (5th Cir.), *cert. denied*, 454 U.S. 897 (1981) (quoting *Mortensen v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977)).

17. Because "a 'factual attack' challenges the existence of subject matter jurisdiction in fact, irrespective of the pleadings…matters outside the pleadings, such as testimony and affidavits, are considered." *Daniel v. Ferguson*, 839 F.2d 1124, 1127 n. 5 (5th Cir. 1988). And the trial court may resolve disputed jurisdictional facts by making findings of fact.

Robinson v. TCI/US West Communs., 117 F.3d 900, 904 (5th Cir. 1997). "Unlike in a facial attack where jurisdiction is determined upon the basis of allegations of the complaint…when a factual attack is made upon federal jurisdiction, no presumption of truthfulness attaches tothe plaintiffs' jurisdictional allegations, and the court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case." *Evans v. Tubbe*, 657 F.2d 661, 663 (5th Cir. 1981). The defendant may "submit[] affidavits, testimony, or other evidentiary materials." *Irwin v. Veterans Admin.*, 874 F.2d 1092, 1096 (5th Cir. 1989).

Standard of Review Under Rule 56

18. Alternatively, Webster moves for summary judgment jurisdiction under Rule 56. Summary judgment is appropriate if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). Factual disputes are material if they "might affect the outcome of the suit under the governing law," and they are genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). To overcome this motion, the Plaintiffs must identify "significant probative evidence" which demonstrates a genuinely disputed material fact that presents a triable issue. *Renfroe v. Parker*, 974 F.3d 594, 599 (5th Cir. 2020).

Summary of the Argument

19. Because the evidence demonstrates that Bay Area receives the same treatment from the Webster Police Department regardless of whether the Church displays the signs in

question, or provides "a card or other document,"[13]Bay Area cannot establish standing to sue Webster.

20. Without the benefit of the factual development Webster now presents, the Court, Judge Gilmore presiding, concluded that Bay Area *pleaded* allegations of injury-in-fact because Bay Area claimed Plaintiff "must comply with the Acts' notice provisions in order to receive the benefit of police protection." [Doc. 68, 14]. The evidence disproves the conclusory allegation. Furthermore, this Court, Judge Werlein presiding, has already concluded neither Plaintiffs' complaint nor the statutory scheme supports these purely conclusory allegations. [Doc. 147, 11 n. 4]. The evidentiary record now demonstrates Bay Area does not have to comply with the Acts' notice provisions to receive police protection as those who may choose to avail themselves of this option; that is, Bay Area is subject to equal protection regardless of whether Bay Area uses the signs about which Plaintiffs complain.

21. Bay Area's administrator, Ms. Rochen, testified to making numerous calls for service to the Webster Police Department. The Webster Police Department unfailingly responded in a professional manner and Ms. Rochen had no reason to doubt the Police Department will continue to do so. Chief Bacon testified that compliance with the Acts' written notice options is not required for any complainant to receive police protection from trespass or any other call for service. Therefore, Bay Area lacks standing to assert the claim against Webster.

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[13] TEX. PEN. CODE §§ 30.06(c)(3)(A), 30.07(c)(3)(A).

22. Further, since Bay Area has never experienced anything but the police protection it has requested, Bay Area requests no more than an advisory opinion from this Court based on hypothetical theories, not evidentiary facts. Because federal courts cannot issue advisory opinions, such represents an independent reason why Bay Area does not present a justiciable claim against Webster and why Bay Area's claims must be dismissed.

23. Alternatively, Webster moves for summary judgment. Given the Court's September 29, 2022, order granting the City of Houston's motion to dismiss, it is difficult to conceive of a legally cognizable claim against Webster. However, should the Court conclude Plaintiffs have a federal right to police protection under 42 U.S.C. § 1983 under these circumstances, no reasonable factfinder could conclude Webster has denied such a protection to Bay Area. Indeed, the evidence affirmatively disproves Bay Area's bald allegation of *potential* denial.

Argument & Authorities

24. "Federal courts are courts of limited jurisdiction, possessing only that power authorized by Constitution and statute." *Gunn v. Minton*, 568 U.S. 251, 256 (2013). "Courts created by statute can have no jurisdiction but such as the statute confers." *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 449 (1850).

25. "[F]ederal courts are under an independent obligation to examine their own jurisdiction and standing 'is perhaps the most important of [the jurisdictional] doctrines.'" *FW/PBS, Inc. v. City of Dall.*, 493 U.S. 215, 231 (1990) (quoting *Allen v. Wright*, 468 U.S. 737, 750 (1984)). "[T]he district court [must] carefully consider each jurisdictional challenge – including whether and how they impact each of the plaintiffs and each of the

claims – before proceeding to the merits." *Planned Parenthood Gulf Coast Inc. v. Phillips*, 5 F.4th 568, 582 (5th Cir. 2021).

A. The Court should dismiss Bay Area's claims for lack of subject matter jurisdiction because Bay Area lacks standing to sue Webster.

26. "[P]laintiffs can seek judicial review of state laws and regulations only insofar as they show a plaintiff was (or imminently will be) actually injured by a particular legal provision." *In re Gee*, 941 F.3d 153, 160 (5th Cir. 2019). "To have standing, a plaintiff must present an injury that is concrete, particularized, and actual or imminent; fairly traceable to the defendant's challenged behavior; and likely to be redressed by a favorable ruling." *Dep't of Commerce v. New York,* 139 S. Ct. 2551, 2565 (2019) (internal quotation marks omitted).[14]

27. "[T]he standing inquiry must be answered by reference to the Art. III notion that federal courts may exercise power only 'in the last resort, and as a necessity.'" *Allen v. Wright*, 468 U.S. 737, 752 (1984) (quoting *Chi. & Grand Trunk R. Co. v. Wellman*, 143 U.S. 339, 345 (1892)). "The law of Article III standing…serves to prevent the judicial

[14] Because Plaintiff Bay Area is an organization, it may establish injury-in-fact standing under either a theory of "associational standing" or a theory of "organizational standing." *OCA-Greater Houston v. Texas*, 867 F.3d 604, 610 (5th Cir. 2017). Under an associational theory, the association's "injuries must be sufficient to confer standing to the individual members to sue in their own right." *Tenth St. Residential Ass'n v. City of Dall.*, 968 F.3d 492, 500 (5th Cir. 2020). Under an organizational theory, the organization can establish standing in its own name if "it meets the same standing test that applies to individuals." *Ass'n of Cmty. Orgs. for Reform Now v. Fowler*, 178 F.3d 350, 356 (5th Cir. 1999). These concepts are interrelated and often confused. *See N.A.A.C.P. v. City of Kyle*, 626 F.3d 233, 236 (5th Cir. 2014) (organization abandoning associational standing theory at oral argument to instead rely upon organizational standing theory). The facts make clear that Bay Area cannot establish standing under either associational or organizational standing.

process from being used to usurp the powers of the political branches." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013).

1. Because the Webster Police Department provides police protection regardless of a complainant's compliance with the Acts' written notice requirements, Bay Area cannot establish the injury-in-fact element of standing.

28. To be concrete, an injury "must actually exist." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 340 (2016). Charitably construed, Bay Area asserts an intangible injury to its First Amendment free speech and associational rights based upon being forced to choose between that right and police protection. [Doc. 1, ¶¶ 56–69 & ¶¶ 99–123].[15] Infringement of rights under the Free Speech Clause of the First Amendment is the archetypical example of an intangible concrete injury. *See Pleasant Grove City v. Summum*, 555 U.S. 460, 467–70 (2009).

29. While it is true injury can be intangible and still concrete, *Spokeo*, 578 U.S. at 340, Bay Area does not allege facts establishing a concrete injury. Both Rochen's and Chief Bacon's *consistent* testimony demonstrate Bay Area does not have to choose between rights under the Free Speech and Freedom of Association Clauses of the First Amendment and police protection, the only governmental benefit Bay Area asserts Webster could burden by enforcing the Acts. In fact, as this Court has already concluded with respect to the City of Houston, "Plaintiffs do not allege facts to show that they would be denied any government benefit if they exercise their right to remain silent and refuse to employ the

[15] Judge Gilmore dismissed Plaintiffs' claims under the Texas Constitution and the Due Process Clauses of the Fifth and Fourteenth Amendments to the U.S. Constitution. [Doc. 68].

statutory notice language." [Doc. 147, 11]. That funding applies equally to the Church's claims against Webster.

30. Chief Bacon testified the Webster Police Department investigates and responds to trespass and other calls in the same manner regardless of whether the property complies with the Acts' written notice provisions. Ex. 2 ¶¶ 6–7. Regardless of whether a property owner posts the signs identified §§ 30.06 or 30.07, a Webster police officer responds to a call for service complaining of trespass and advises the suspect the owner requests the suspect depart the property and the suspect's refusal may result in arrest. *Id*. ¶ 7. Chief Bacon also stated the Webster Police Department has not withheld police protection in the past on any individual's or entity's failure to comply with the Acts' notice provisions, *id*. at ¶ 8, and would not do so in the future based on any individual's or entity's failure to comply with the Acts' notice provisions, *id*. at ¶ 9.

31. The injury-in-fact analysis for injunctive or declaratory relief requires a substantial likelihood of future injury, *Waller v. Hanlon*, 922 F.3d 590, 603 (5th Cir. 2019), yet here past is prologue. Ms. Rochen testified Webster police officers have always responded promptly whenever the Church called for service, the Officers behaved professionally, and Rochen could not think of anything she would have wanted a responding officer to have done differently. Ex. 1 (p. 42, ll. 2-12). Ms. Rochen could not identify a single instance of the Webster Police Department failing to respond to a call from the Church. *Id*. (p. 69, ll. 3-6).

32. Ms. Rochen's testimony concerning one incident at the Church is particularly illustrative of the patent falsity of the Church's merely conclusory allegations. Ms. Rochen

called the Webster Police Department shortly after Noon on August 7, 2020. *Id*. (p. 66, ll. 1-6). Shortly before services began at the adjoining Islamic Center, a woman, who claimed to have been sexually assaulted, became belligerent with Ms. Rochen and others. *Id*. (p. 66, l. 7 – p. 67, l. 3). Despite Rochen providing the woman with an HEB gift card, on behalf of the Church, Rochen did not feel safe going to Rochen's car in the Church's parking lot with the stranger in the area. *Id*. (67:2-3, 13-15). Ms. Rochen testified she would have called the Webster Police Department if she had observed the suspicious person possessing a firearm, *id*. (p. 71, l. 4-6), and Rochen acknowledged her belief the Webster Police Department would have responded to a call for service complaining of an individual possessing a firearm on the Church's premises regardless of the Church's choice of whether to display the challenged signage. *id*. (p. 71, ll. 18-25).

33. The undisputed evidence shows the Webster Police Department has provided Bay Area with the same level and type of police protection enjoyed by other businesses and that the City will continue to provide the Church the same police protection in the future. Because "there must be a 'substantial risk that the [future] injury will occur," *Stringer v. Whitley*, 942 F.3d 715, 721 (5h Cir. 2019), and Ms. Rochen's testimony demonstrates not only a lack of evidence, but the very opposite contention, Bay Area cannot demonstrate injury-in-fact standing required to maintain this suit for injunctive and declaratory relief. Rather, as this Court has already concluded, "Plaintiffs' claims are based on conjectural and hypothetical imaginings of what the police might do or might not do and what the prosecutors might not do under various scenarios." [Doc. 147, 12].

2. Even if Bay Area could somehow concoct an injury on these facts, as a matter of law it would not be attributable to Webster.

34. The Church's claim fails on traceability grounds as well. The traceability element of standing requires "a federal court act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court." *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41–42 (1976). Bay Area's grievance, that the signs are "ugly and intimidating," [Doc. 1, ¶ 67], even if somehow actionable, is only attributable to the State of Texas, not Webster. Because the Webster Police Department treats Bay Area service calls the same regardless of Bay Area's compliance with the Acts' written notice requirement, Ex. 2 ¶¶ 6–9, this and any other cognizable injury Bay Area may have is not traceable to Webster's actions. The court may take judicial notice that the City of Webster has no control over any aspect of the statute and that a judgment against the City of Webster would have no effect on any aspect of the statute.

35. Thus, the complete lack of a "fairly traceable connection between the plaintiff's [merely alleges] injury and the complained-of conduct of the defendant," *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103 (1998), provides yet another reason to grant Webster's motion to dismiss. Since the Webster Police Department indisputably provides police protection to Bay Area equivalent to that provided all others, Ex. 1 (p. 42, ll. 2-6; p. 43, ll. 6-13; & p. 71, ll. 18-25) & Ex. 2 ¶¶ 7–9, any cognizable injury Bay Area *might* have in the future would be "the result of the independent action of some third party not before the court," *Bennett v. Spear*, 520 U.S. 154, 167 (1997).

3. Because a favorable decision would not alter the Webster Police Department's treatment of Bay Area, Bay Area cannot demonstrate the redressability element of standing.

36. The redressability element of standing requires that it is "'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (quoting *Simon*, 426 U.S. 38, 43). Because the Webster Police Department provides police protection regardless of a complainant's compliance with the Acts' written notice provisions, Ex. 1 (p. 42, ll. 2-6; p. 43, ll. 6-13; & p. 71, ll. 18-25) & Ex. 2 ¶¶ 6–9, an injunction against the State's Acts or enforcement of the Acts will not alter any action by the Webster Police Department. Compare, *Inclusive Cmtys. Project, Inc. v. Dep't of Treasury*, 946 F.3d 649, 655 (5th Cir. 2019). A judicial decision in favor of Bay Area against Webster will not redress any of the alleged wrongs of the state legislative act of which Plaintiffs complain. Bay Area lacks standing to request such relief, particularly from a municipality like Webster.

B. The Court should also dismiss Bay Area's claims because Bay Area seeks an advisory opinion.

37. "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." *Raines v. Byrd*, 521 U.S. 811, 818 (1997). "[T]he oldest and most consistent thread in the federal law of justiciability is that the federal courts will not give advisory opinions." *Flast v. Cohen*, 392 U.S. 83, 96 (1968).[16] Bay Area (and the other Plaintiffs) pleaded that the Acts hypothetically require "relay[ing] a government-drafted

[16] "The rule against advisory opinions was established as early as 1793…and has been adhered to without deviation." *Id.* at 97 n. 14.

script in a highly burdensome manner in order to avail themselves of the protection of criminal law." [Doc. 1, ¶ 104]. Judge Gilmore transmogrified this contention into an allegation that Bay Area's compliance with the Acts' written notice provisions are a prerequisite to "police protection." [Doc. 68, 14].

38. As detailed above, Bay Area's contention the Church must comply with the Act's notice provisions to receive protection from the Webster Police Department is just that – a mere conclusory contention – flatly disproved by the evidence in this matter, including the testimony of the Church's representative. Thus, Bay Area requests this Court render an opinion that Webster would be denying Bay Area's and Bay Area's members' First Amendment rights **if,** purely hypothetically, the Webster Police Department denies Bay Area and its members police protection for failure to follow the Acts' written notice provisions. Respectfully, that hypothetical question is not one Article III permits this Court to address.

39. "[T]he rule against advisory opinions also recognizes that such suits often 'are not pressed before the Court with that clear concreteness provided when a question emerges precisely framed and necessary for decision from a clash of adversary argument exploring every aspect of a multifaced situation embracing conflicting and demanding interests.'" *Id.* at 96–97 (quoting *United States v. Fruehauf*, 365 U.S. 146, 157 (1961)). And such is the case here. Webster can neither defend nor resolve a suit where the question framed is not based on the actual policies and procedures of its police department but the hypothetical

policies and procedures of Bay Area's imagination.[17] The Court should – indeed must – reject Bay Area's request for an advisory opinion.

C. Alternatively, the Court should grant Webster summary judgment because no reasonable factfinder could conclude Webster has denied police protection based on compliance with the Acts.

40. Assuming *arguendo*, Bay Area could demonstrated a concrete, redressable injury traceable to Webster's conjectured denial of "police protection," Bay Area still must come forward with evidence from which a reasonable factfinder could find in Bay Area's favor. *See Renfroe*, 974 F.3d at 599. Bay Area's injunctive and declaratory burden is further heightened since Bay Area must demonstrate a substantial likelihood of future injury. *Waller*, 922 F.3d at 603.

41. Bay Area admits it cannot point to *any* evidence to discharge this burden. The Webster Police Department investigates and responds to calls for service in the same manner regardless of whether an individual or entity complies with the Act's written notice provisions. Ex. 2 ¶ 6–7. Simply put, and as the Church agrees, Webster has not withheld service based on compliance with the Act's written notice provisions and it will not do so in the future. *Id*. at ¶¶ 8–9. Indeed, Bay Area's representative, Rochen, could not articulate any reason why Webster Police Department would not respond to a future call for service

[17] Not surprisingly, considering if purely hypothetical conclusory allegations, Bay Area does not allege how its *theory* of a denial of "police protection" would work if a police department were to deny "police protection" on the basis of non-compliance with the Acts' written-notice provisions. Would a police department dedicate a unit of officers to the task of inspecting every establishment's signs? Would such officers carry a tape measurer to ensure the sign had letters one-inch in length? How often would these inspections occur? Such a hypothetical case presents such absurdities that any rational municipal policymaker would conclude it much easier to simply respond to a trespass call, which is how the undisputed evidence demonstrates the Webster Police Department operates.

complaining of an individual possessing a firearm on the Church's premises. Ex. 1 (p. 71, ll. 18-25).

42. Accordingly, Bay Area also cannot meets its summary judgment burden for its non-justiciable denial-of-the-protection-of-criminal-law theory as to Webster.

Conclusion

For the foregoing reasons, the Court should grant Webster's motion to dismiss for lack of subject matter jurisdiction. FED. R. CIV. P. 12(b)(1). Further, the Court should enter a separate final judgment of dismissal with respect to Chief Bacon, sued in his official capacity as the City of Webster's chief of police. FED. R. CIV. P. 54(b).

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Respectfully submitted,

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Certificate of Service

I certify a true and correct copy of the foregoing has been served on all counsel of record through the Court's electronic filing system on November 1, 2022.

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