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, Defendant Harris County Sheriff Ed Gonzalez's, and Defendant Harris County District Attorney Kim Ogg's Joint response in opposition to Plaintiffs' motion to modify the scheduling order and for leave to amend complaint

Defendants, City of Webster, sued through its Chief of Police, Pete Bacon in his official capacity,[1] Harris County, sued through its elected Sheriff, Ed Gonzalez in his official capacity, and the Harris County District Attorney's Office, sued through its elected District Attorney, Kim Ogg in her official capacity, jointly oppose Plaintiffs' motion to modify the scheduling order and for leave to file a first amended complaint, and would respectfully show the Court as follows:

Nature and Stage of Proceedings

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

[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).

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) (collectively, the "Acts"). [Doc. 1]. Bay Area is the only Plaintiff that owns property within the City of Webster and Harris County while Drink Houston Better, LLC d/b/a Antidote Coffee, and Perk You Later, LLC are located in Houston and Harris County.[2]

2. 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 to 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].

3. On August 27, 2021, this Court, 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]. On December 7, 2021, the Court issued an amended scheduling order. [Doc. 108]. The amended scheduling order set December 15, 2021, as the deadline to seek

[2] "[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].

amendments to the pleadings and September 1, 2022, as the deadline for the close of discovery. [*Id.*].

4. The City of Houston Chief of Police filed a motion for judgment on the pleadings under Federal Rule of Civil Procedure 12(c). [Doc. 115]. On September 29, 2022, this Court, Judge Werlein presiding, granted the motion, concluding, "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. [Doc. 147, 12].

5. Shortly after the Court's ruling, on October 19, 2022, Plaintiffs filed a motion requesting the Court hold the dispositive motions deadline in abeyance. [Doc. 148]. Webster filed a response in opposition on November 9, 2022, [Doc. 159], noting the November 1, 2022, deadline – already moved back once at Plaintiffs' urging [Docs. 144, 145] – had come and gone with all remaining parties to this suit filing dispositive motions, including Harris County defendants and Plaintiffs. [Docs. 152, 155 & 156].

6. On October 31, 2022, Plaintiffs filed a motion to amend their complaint. [Doc. 150]. Plaintiffs included a proposed first amended complaint. [Doc. 150–2 (redacted) & 151–1 (sealed)]. Plaintiffs also included a redline demonstrating how the proposed first amended complaint differed from the original complaint. [Doc. 151–2 (sealed)].

Issue Presented and Standard of Review

1. May Plaintiffs amend their first original complaint two years after filing and shortly after this Court issued a dispositive ruling against them and on the eve of the long-established deadline for dispositive motions?

7. Ordinarily, Rule 15(a) of the Federal Rules of Civil Procedure governs the amendment of pleadings. *Filgueira v. US Bank Nat'l Ass'n*, 734 F.3d 420, 422 (5th Cir. 2013). Where the district court must grant permission for leave to amend because the amendment is not a matter of course, FED. R. CIV. P. 15(a)(1), leave should be "freely given when justice so requires." *S&W Enters., L.L.C. v. SouthTrust Bank of Ala., NA*, 315 F.3d 533, 535 (5th Cir. 2003). This more lenient standard "does not apply if an amendment would require the modification of a previously entered scheduling order." *Filgueira*, 734 F.3d at 422. Rather, Rule 16(b) governs the amendment of pleadings "after a scheduling order's deadline to amend has expired." *Fahim v. Marriott Hotel Servs., Inc.*, 551 F.3d 344, 348 (5th Cir. 2008).

8. As is the case here, once the scheduling order's deadline has passed, that scheduling order may be modified "only for good cause and with the judge's consent." FED. R. CIV. P. 16(b)(4). The Fifth Circuit considers the following four factors relevant to a good-cause determination under Rule 16(b)(4): "(1) the explanation for the failure to timely move for leave to amend; (2) the importance of the amendment; (3) potential prejudice in allowing the amendment; and (4) the availability of a continuance to cure such prejudice." *Equal Emp. Opportunity Comm'n v. Serv. Temps Inc.*, 679 F.3d 323, 333 (5th Cir. 2012).

Summary of the Argument

9. This Court has already concluded Plaintiffs do not have standing to sue the similarly situated Houston Police Chief, noting, "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." [Doc. 147, 10–11].

This conclusion is equally applicable to the Webster Police Department, the Harris County Sheriff's Office, and Harris County District Attorney's Office. The amendment's futility is thus the most compelling factor to deny leave to amend, which is actually only a factor under the more lenient Rule 15(a)(2) rather than the stricter 16(b)(4) standard. *See Smith v. EMC Corp.*, 393 F.3d 590, 595 (5th Cir. 2004).

10. Plaintiffs cannot establish good cause under Rule 16(b)(4). Seeking leave to amend a year after the scheduling order's deadline, after the completion of discovery, and on the eve of this matter's dispositive motions deadline is not timely. It also greatly prejudices Defendants.

Argument & Authorities

I. Plaintiffs' proposed amended complaint is futile.

11. As more fully explained in briefings related to the parties' pending dispositive motions, [Docs. 152 & 156], Plaintiffs cannot establish standing to sue these Defendants. "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).

12. 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. 150–2, ¶¶ 86–100 & 129–49].[3] Indeed, Plaintiffs' proposed amended complaint hardly changes these paragraphs. [*Compare* Doc. 150–2, ¶¶ 86–100 & 129–49 *with* Doc. 1, ¶¶ 56–69 & ¶¶ 99–119].[4] As such is the gravamen of Plaintiffs' injury-in-fact allegations and as they essentially unchanged from the original pleading that the Court deemed did not invoke its jurisdiction, it is difficult to see how the proposed first amended complaint sufficiently states an Article III injury.

13. The injury-in-fact analysis for injunctive or declaratory relief, which is unchanged in Plaintiffs' proposed first amended complaint, requires a substantial likelihood of future injury, *Waller v. Hanlon*, 922 F.3d 590, 603 (5th Cir. 2019), yet as demonstrated by Webster's motion for summary judgment, Bay Area's administrator's, Sharlene Rochen, testimony negates the Church's injury. Ms. Rochen testified Webster police officers have always responded promptly whenever the Church called for service, the Officers behaved professionally, and could not think of anything she would have wanted a responding officer to have done differently. [Doc. 156, Ex. 1 (p. 42, ll. 2-12).] Ms. Rochen could not identify

[3] Defendants cite to the unredacted proposed first amended complaint, [Doc. 150–2], given the fundamental importance to open court proceedings in our society. This should not be construed as any criticism of Plaintiffs' counsel who appropriately sealed a scant amount of material protected from public disclosure by important law enforcement and prosecutorial privileges. In fact, these proceedings demonstrate counsel and the Court following the Rules, which, as the Fifth Circuit has repeatedly noted of late, is something the bar and district courts need to improve. *See, e.g.*, *Bing Hoa Le v. Exeter Fin. Corp.*, 990 F.3dd 410, 419 (5th Cir. 2021); *Vantage Health Plan, Inc. v. Willis-Knighton Med. Ctr.*, 913 F.3d 443, 449–50 (5th Cir. 2019).

[4] With respect to the Houston-based Plaintiffs, the Houston Police Department rather than the Harris County Sherriff's Office responds to calls for service in Houston. While theoretically possible sheriff's deputies could respond to a call for service, Webster's dismissal compels dismissal of the Houston County Sheriff.

a single instance of the Webster Police Department failing to respond to a call from the Church. [*Id*. (p. 69, ll. 3-6).] The testimony from the other Harris County-based Plaintiffs is essentially the same. Plaintiffs could not testify to a single instance where they were denied assistance when Harris County defendants were called for service. Further, in no instance in the discovery record, did a peace officer from the Harris County Sheriff's Office rather than a Houston police officer respond to a call for service by the Houston-based Plaintiffs.

14. Moreover, Chief Bacon testified that 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. [*Id*. Ex. 2 ¶¶ 6–7]. 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].

15. Because "there must be a 'substantial risk that the [future] injury will occur," *Stringer v. Whitley*, 942 F.3d 715, 721 (5th Cir. 2019), 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].

16. Plaintiffs' proposed first amended complaint also fails to state a claim on the traceability element of Article III standing. 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). The court may take judicial notice that Defendants have no control over any aspect of the statute and that a judgment against the remaining Defendants would have no effect on any aspect of the statute. Arrests may only occur where the *statute* provides probable cause. Prosecutions may only occur where the prosecutor may present evidence beyond a reasonable doubt with respect to all of the statute's elements.

17. The proposed amended complaint also fails on the redressability element of standing, which 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). A judicial decision in favor of Plaintiffs against the remaining Defendants will not redress any of the alleged wrongs of the state legislative act of which Plaintiffs complain. Plaintiffs lack standing to request such relief, particularly from municipal entities.

18. Plaintiffs proposed first amended complaint still cannot state a sufficient claim of standing. Because the elements of standing "are not mere pleading requirements but rather an indispensable part of the plaintiff's case," *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992), this Court should deny Plaintiffs' motion for leave to amend as futile.

II. Plaintiffs cannot establish good cause to file an amended complaint nearly a full year after the scheduling order's deadline.

19. Even if Plaintiffs' proposed first amended complaint actually stated a claim for which Plaintiffs have standing, which it does not, Plaintiffs cannot establish good cause. While Plaintiffs have recognized that Defendants would be prejudiced if the Court granted their motion making the fourth factor debatable, the other three factors strongly weigh in favor of the remaining Defendants.

20. Good cause requires a party "to show that the deadlines cannot reasonably be met despite the diligence of the party needing the extension." *Fahim*, 551 F.3d at 348. Plaintiffs mistakenly assert their diligence should be measured from the Court's grant of City of Houston Police Chief Finner's Rule 12(c) motion. But Chief Finner, whose counsel filed his motion shortly after the pleadings' amendment deadline, based their motion on the State Defendants' dismissal from the suit. That occurred on September 24, 2021. [Doc. 81].

21. The importance of Plaintiffs' amendment weighs heavily in favor of remaining Defendants. An amendment unlikely to change a motion's outcome is unimportant. *Filgueira*, 734 F.3d at 423. Plaintiffs' proposed amendment is futile for the reasons discussed above, *supra* I.

22. Even if the proposed amendment was not futile, prejudice to the remaining Defendants should be dispositive. The remaining defendants have filed dispositive motions. [Docs. 152 & 156]. A significant delay to the resolution of the dispute is sufficiently prejudicial. *Phelps v. McClellan*, 30 F.3d 658, 663 (6th Cir. 1994) (Rule 15(a)). "A trial court may deny leave to amend [under Rule 15(a)] when the amendment would cause the opposing party to bear additional discovery costs litigating a new issue and the

moving party does not offer to reimburse the nonmoving party for its expenses." *Campania Mgmt. Co. v. Rooks, Pitts & Poust*, 290 F.3d 843, 849 (7th Cir. 2002). In fact, in circumstances very analogous to those here (and under the more lenient Rule 15(a) standard to boot), the Fifth Circuit affirmed a district court's finding of bad faith and dilatory motive where "[t]he motion is obviously interposed by plaintiffs in an attempt to avoid summary judgment," *Wimm v. Jack Eckerd Corp.*, 3 F.3d 137, 139 (5th Cir. 1993).

23. Plaintiffs cannot establish good cause.

Conclusion

24. For the foregoing reasons, the Court should deny Plaintiffs' motion to modify the scheduling order and for leave to file a first amended complaint.

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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 21, 2022.

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