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 response in opposition to Plaintiffs' motion for summary judgment

Defendants, City of Webster, sued through its Chief of Police, Pete Bacon in his official capacity, oppose Plaintiffs' motion for summary judgment, [Doc. 155], 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 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.[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. 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 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).[4]

4. 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 Ken Paxton, 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

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[1] "[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].

[2] [Doc. 1, Introduction ¶ 2].

[3] [*Id.*].

[4] 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.

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].

5. 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]. The parties proceeded through discovery, which closed on September 1, 2022. [Doc. 108].

6. 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].

7. 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].

8. On October 31, 2022, Plaintiffs filed a motion to amend their complaint. [Doc. 150]. Remaining Defendants Webster, Harris County, and the Harris County District Attorney's Office filed a joint opposition on November 21, 2022, primarily asserting that Plaintiffs' and Remaining Defendants' dispositive motions will resolve this matter with finality. [Doc. 161]. On November 1, 2022, Plaintiffs filed a motion for summary judgment. [Doc. 155].

9. To avoid restating arguments and authorities already presented to the Court in Webster's pending motion to dismiss or for summary judgment [Doc. 156], which is incorporated into this brief under Rule 10, as if fully restated here, Webster provides a short opposition here, but requests the Court consider these issues with the briefing and authority presented by Webster's and the remaining Defendants' dispositive motion briefing.

Issue Presented and Standard of Review

1. Whether Plaintiffs have adduced sufficient evidence to prove beyond all peradventure that Plaintiffs *will* suffer an injury caused by Webster that a judgment of this Court would likely alleviate.

10. When a plaintiff moves for summary judgment, the plaintiff "must establish beyond all peradventure *all* essential elements of the claim…to warrant judgment in the plaintiff's favor." *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1192 (5th Cir. 1986).

11. 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).

Summary of the Argument

12. 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.

13. Bay Area's evidence fails to show a single instance where a peace officer from the Webster Police Department failed to provide them a governmental service let alone for lack of a posted sign. Bay Area fails to explain how an action by a peace officer from the Webster Police Department could cause the Church's purported injury or how any prohibition on Webster would prevent the Church's purported injury.

14. Bay Area's members are neither coerced nor compelled to engage in any speech. As Bay Area concedes, nothing about the statutes of which Bay Area complains affects in any way the Church's ability to obtain police protection for any trespass, including one based on the trespasser's possession of a firearm. The Church cannot demonstrate beyond peradventure infringement of an associational right[5] because asking a person orally to leave

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[5] Because Plaintiff Bay Area is an organization, it may establish injury-in-fact standing to bring a substantive claim 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*

is not a sufficiently direct and substantial interference to come within the ambit of a constitutional right.

Argument & Authorities

I. Bay Area cannot demonstrate beyond peradventure all elements of standing against Webster.

15. Because 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. 555 555, 561 (1992) (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 43 (1976)), Bay Area must prove all elements of standing by peradventure. 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).

16. To be concrete, an injury "must actually exist." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 340 (2016). As this Court, Judge Werlein presiding, concluded, "Plaintiffs have failed to meet their burden to allege a plausible set of facts establishing 'a concrete and

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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 nor make an associational or organizational claim with respect to any purported First Amendment rights.

particularized,' and 'actual or imminent,' injury for which the" police chiefs are responsible. [Doc. 147, 12]. 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].

17. 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 & ¶¶ 99–119]. Plaintiffs' summary judgment motion does not provide a single instance where Plaintiffs were denied assistance after calling either the Webster Police Department.

18. To maintain an action for injunctive or declaratory relief, Bay Area's injury-in-fact pleadings and proof must demonstrate a substantial likelihood of future injury, *Waller v. Hanlon*, 922 F.3d 590, 603 (5th Cir. 2019). As further detailed in Webster's motion for summary judgment, [Doc. 156, ¶¶ 28–33], 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 a single instance of the Webster Police Department failing to respond to a call from the Church. [*Id*. (p. 69, ll. 3-6).]

19. And because Webster police officers, unlike peace officers from the Harris County Sheriff's Office have responded to a Plaintiff's call for service, Chief Bacon's testimony, at a minimum creates a fact issue as to the Church's likely future injury resulting from

Webster. 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].

20. Even if Bay Area can adduce an injury related to the Acts, which it cannot, Bay Area cannot meet their summary judgment burden with respect to the other standing elements. Since Bay Area provides police protection regardless of whether a property owner or manager posts the signs required by the Acts, Bay Area cannot demonstrate an injury having a "fairly traceable connection between the plaintiff's injury and the complained-of conduct of the defendant." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103 (1998).

21. Bay Area cannot meet its burden for summary judgment, 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]. Rather, because 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)," no remedy against Webster would be "redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (quoting *Simon*, 426 U.S. 38, 43).

II. Bay Area cannot demonstrate beyond peradventure all elements of their claims under the First Amendment.

22. Bay Area's evidence is insufficient to demonstrate that they are coerced or compelled to engage in any speech. To compel or coerce "the exercise or suppression of speech, the governmental measure must punish, or threaten to punish, protected speech by governmental action that is 'regulatory, proscriptive, or compulsory in nature.'" *Phelan v. Laramie Cnty. Cmty. Coll. Bd. of Trustees*, 235 F.3d 1243, 1247 (10th Cir. 2000) (quoting Laird v. Tatum, 408 U.S. 1, 11 (1950)). "A discouragement that is 'minimal' and 'wholly subjective' does not…impermissibly deter the exercise of free speech rights." *Id*. at 1247–48 (quoting *United States v. Ramsey*, 431 U.S. 606, 623–24 (1977)). Because the Church has admitted police service has not been, and Chief Bacon has made clear such service is not and will not be, conditioned on compliance with any of the Acts – that is no sign is necessary to seek enforcement of the trespass laws in Webster – Bay Area cannot establish a claim for coerced or compelled speech.

23. Last, the Church cannot demonstrate beyond peradventure infringement of an associational right. First, the Church has many other options to exclude gun-carrying persons for reasons that have been extensively briefed. Second, a viable associational rights claim requires a "direct and substantial" or a "significant" interference with Bay Area's associational rights. *See*, *e.g.*, *Lyng v. Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am., UAW*, 485 U.S. 360, 367, n.5 (1988); *Fighting Finest, Inc. v. Bratton*, 95 F.3d 224, 228 (2d Cir. 1996). Because asking a person orally to leave is not a sufficiently direct and substantial interference to come within the ambit of the

constitutional right. The Church's *preference* not to post any signs, because the Church believes the signs detract from the Church's mission to address "conflict through conversation, non-violence, love, and compassion," [Doc. No. 155–2, Ex. G ¶ 8], is of no moment, because Webster has made clear no signs are a required element of police protection for any act of trespass, including one with a gun. Thus, even crediting Bay Area's aesthetic *desire*, the Church does not demonstrate a constitutional interest, let alone a constitutional violation.

Conclusion

24. For the foregoing reasons, the Court should deny Bay Area's motion for summary judgment as to Webster.

Dated: November 22, 2022

Respectfully submitted,

Lewis Brisbois Bisgaard & Smith, LLP

<u>/ s / Justin C. Pfeiffer</u>
William S. Helfand
Attorney-In-Charge
Texas Bar No. 09388250
S.D. Tex. Bar No. 8791
Justin C. Pfeiffer
Texas Bar No. 24091473
S.D. Tex. Bar No. 2533035

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 Chief of Police Pete Bacon

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 22, 2022.

/s/ *Justin C. Pfeiffer*
Justin C. Pfeiffer