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 reply in support of their respective dispositive motions

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 (collectively, "Remaining Defendants"), jointly reply in support of their respective dispositive motions, 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). The same is true as to Sheriff Ed Gonzalez and District Attorney Kim Ogg.

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 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 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].

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

[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].

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 November 1, 2022, Webster filed a motion to dismiss Plaintiffs' complaint for lack of subject matter jurisdiction based on the facts adduced in the discovery record, or in the alternative, motion for summary judgment largely on the same grounds. [Doc. 156]. Harris County and the Harris County District Attorney's Office filed a motion for judgment on the pleadings under Federal Rule of Civil Procedure 12(c) raising similar arguments. [Doc. 152].

7. Plaintiffs filed responses in opposition to the motion for judgment on the pleadings, [Doc. 163], and Webster's motion to dismiss/summary judgment, [Doc. 165]. Remaining Defendants file this joint reply in support of their respective dispositive motions.

Summary of the Argument

8. 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 the Harris County District Attorney's Office.

9. Plaintiffs' evidence fails to show a single instance where an agent of the Remaining Defendants failed to provide them a governmental service – or in the case of the Harris County Sheriff's Office was even called upon to provide them a governmental service – let alone for lack of a posted sign. Plaintiffs fail to explain how an action by an agent of the Remaining Defendants could cause their purported injury or how any prohibition on the Remaining Defendants would prevent their purported injury. For the same reasons, Plaintiffs' suit requests an impermissible advisory opinion from this court.

10. Plaintiffs' assertion that these threshold mandatory subject-matter determinations are intertwined with the merits is a meaningless assertion because, "[t]he court must find jurisdiction **before** determining the validity of a claim." *Moran v. Kingdom of Saudi Arabia*, 27 F.3d 169, 172 (5th Cir. 1994) (cleaned up). The Court should dismiss Plaintiffs case for lack of Article III standing as to Remaining Defendants.

Argument & Authorities

I. Plaintiffs lack standing to sue Remaining Defendants.

11. 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)). "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). Plaintiffs cannot demonstrate standing on any prong.

A. Plaintiffs' assertion of constitutional deprivation does not, and indeed cannot demonstrate an injury sufficient to confer standing.

12. 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 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]. To maintain an action for injunctive or declaratory relief, Plaintiffs' 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).

13. Charitably construed, Plaintiffs assert intangible injuries to their First Amendment free speech and/or associational rights based upon being forced to choose between that right and police protection. [Doc. 1, ¶¶ 56–82 & ¶¶ 99–119]. The discovery record does not provide a single instance where Plaintiffs were denied assistance after calling either the Webster Police Department or the Harris County Sheriff's Office. 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 any Plaintiff.

14. Plaintiffs do not challenge the overwhelming evidence that law enforcement officers responded to calls for service (and will respond to calls for service) regardless of

any individual's or entity's failure to comply with the Acts' notice provisions. Rather, Plaintiffs assert injury based on uneven burdens on Plaintiffs' expression, coerced speech, and burdens on associational rights arguing the Acts limit Remaining Defendants' ability to arrest and prosecute gun-carrying persons. [Doc. 163, 9–12; Doc. 165, 10–14]. Peace officers are able to ask gun-carrying individuals to leave the premises and the record here conclusively shows they do so and will do so in the future. [Doc. 156, Ex. 2 ¶¶ 6–9].

15. Even if Plaintiffs somehow had a constitutional right to a suspect's arrest and prosecution, which Remaining Defendants vigorously contest, this difference between arrest/prosecution and mere intervention is far too insubstantial to state a cognizable injury under the First Amendment. For compelled speech, "[a] discouragement that is 'minimal' and 'wholly subjective' does not…impermissibly deter the exercise of free speech rights." *Phelan v. Laramie Cnty. Cmty. Coll. Bd. of Trustees*, 235 F.3d 1243, 1247–48 (10th Cir. 2000) (quoting *United States v. Ramsey*, 431 U.S. 606, 623–24 (1977)). For an associational rights claim, the interference must be "direct and substantial" or "significant." *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).

B. Plaintiffs' assertion of injury is not attributable to Remaining Defendants.

16. Even if Plaintiffs' were injured by the statute, which they are not, Plaintiffs cannot meet their summary judgment burden demonstrating a "fairly traceable connection between the plaintiff's injury and the complained-of conduct of the defendant." (quoting *Steel Co. v. Citizens for Better Env't*, 523 U.S. 80, 103 (1998)). 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].

17. Plaintiffs assert Remaining Defendants overlook the deterrent effect of criminal law in causing their injuries. [Doc. 163, 11–12; Doc. 165, 17–18]. As to the Webster Police Department and the Harris County Sheriff's Office, Plaintiffs do not submit any evidence that a peace officer advising "the suspect the owner requests the suspect depart the property, and that the suspect must leave the property or the suspect may be arrested," as Chief Bacon testified is the standard procedure, [Doc. 156, Ex. 2 ¶ 7], is any more likely to prevent Plaintiffs' purported injuries than Plaintiffs' unspecified scenario in which peace officers would presumably summarily arrest gun-carrying individuals if the property owner has posted any sort of gun-prohibiting sign regardless of that sign's compliance with the Acts. As to the Harris County District Attorney's Office, Plaintiffs offer no evidence as to the connection between prosecution and their purported injuries.

C. Plaintiffs cannot demonstrate a favorable decision would alter Remaining Defendants conduct towards Plaintiffs.

18. To satisfy redressability, a plaintiff must show 'it is likely, as opposed to merely *speculative*, that the injury will be redressed by a favorable decision." *Inclusive Cmtys. Project, Inc. v. Dep't of Treasury*, 946 F.3d 649, 655 (5th Cir. 2019) (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000)). Because any cognizable injury Plaintiffs *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 Remaining Defendants would be "redressed by a

favorable decision." *Lujan*, 504 U.S. at 561 (quoting *Simon*, 426 U.S. 38, 43). No relief could possibly be fashioned against the Harris County District Attorney's Office because "[t]he district attorney has absolute control over criminal prosecutions, and can dismiss or refuse to prosecute, any of them at his discretion."[3] *United States v. Cox*, 342 F.2d 167, 191 (5th Cir. 1965).

19. Last, the remedies sought by Plaintiffs are not permissible even if the Court had the appropriate defendants before the Court. Federal courts cannot rewrite state penal statutes to Plaintiffs' liking. *See, e.g.*, *King Ranch, Inc. v. United States*, 946 F.2d 35, 37 (5th Cir. 1991); *Hill v. City of Houston, Tex.*, 789 F.2d 1103, 1112 (5th Cir. 1986), *aff'd*, 482 U.S. 451 (1987); *McLaughlin v. Lindemann*, 853 F.2d 1307, 1310 (5th Cir. 1988); *Universal Amusement Co. v. Vance*, 587 F.2d 159, 172 (5th Cir. 1978), *aff'd*, 445 U.S. 308 (1980).

20. Plaintiffs even admit as much in their response in opposition to Webster's motion to exclude, or alternatively limit Dawn Jourdan's expert testimony, noting Plaintiffs only seek an injunction against the enforcement of Act's "heightened notice requirements." [Doc. 162, 9–10]. But this argument demonstrates the impossibility of Plaintiffs ever establishing the redressability element of standing. Because police cannot arrest a suspect without probable cause and prosecutors cannot prosecute unless the prosecutor can establish all elements of the offense beyond a reasonable doubt, Plaintiffs sought injunction

[3] Though not necessary for this Court to reach, during the pendency of this litigation, the State's highest court on criminal matters has reaffirmed that a prosecutor exercising charging decisions is imbued with the authority of the State of Texas. *State v. Stephens*, 2021 Tex. Crim. App. LEXIS 1194, at *21-*23, — S.W.3d — (Tex. Crim. App. Dec. 15, 2021), *reh'g denied*, 2022 Tex. Crim. App. LEXIS 677 (Tex. Crim. App. Sept. 28, 2022) (citing TEX. CONST. art. 5, § 21).

would not relieve Plaintiffs' most recent asserted injury of not being able to have gun-carrying individuals arrested and prosecuted regardless of a property owner's display of signage compliant with the Acts or not.

II. Plaintiffs seek an advisory opinion.

21. Even if this Court could rewrite the Texas Penal Code in a manner befitting Plaintiffs' preferences, Plaintiffs seek an advisory opinion here because this matter does not advance that (hypothetical) question "precisely framed and necessary for decision from a clash of adversary argument exploring every aspect of a multifaced situation embracing conflicting and demanding interests." *United States v. Fruehauf*, 365 U.S. 146, 157 (1961).

22. Plaintiffs' dismissal of the Attorney General, whose duties include defending acts of the Texas Legislature, *Tex. Democratic Party v. Abbott*, 978 F.3d 168, 181 (5th Cir. 2020) (citing *City of Austin v. Abbott*, 385 F. Supp. 3d 537, 544 (W.D. Tex. 2019)), turns Plaintiffs' suit into a request for an advisory opinion. Remaining Defendants lack authority to assist the Court in directing the manner in which the Texas Legislature drafts the State's penal laws.

III. Plaintiffs must prove jurisdiction before turning to the merits.

23. Last, in arguing the Court should defer ruling on subject-matter jurisdiction because the "issues of fact are central to both subject matter jurisdiction and the claim on the merits," [Doc. 165, 7 (citing *Montez v. Dep't of Navy*, 392 F.3d 147, 150 (5th Cir. 2004))], Plaintiffs demonstrate Plaintiffs' lack of understanding of the limited nature of the Court's subject matter jurisdiction as well the Plaintiffs' threshold burden to prove it. Federal courts are courts of limited jurisdiction. *Peoples Nat'l Bank v. Office of the Comptroller of the*

Currency of the U.S., 362 F.3d 333, 336 (5th Cir. 2004). "The requirement that jurisdiction be established as a threshold matter…is inflexible and without exception," *Ruhrgas Ag v. Marathon Oil Co.*, 526 U.S. 574, 577 (1999) (quoting *Steel Co.*, 523 U.S. at 94–95).

24. Where, as here, a defendant makes "a factual attack, the plaintiff[s] [have] the burden of **proving** that federal jurisdiction does in fact exist." *Evans v. Tubbe*, 657 F.2d 661, 663 (5th Cir. 1981). *Montez*, upon which Plaintiffs rely, involves a Federal Tort Claims Act ("FTCA") complaint against the Navy. 392 F.3d at 148. But since FTCA claims are routinely dismissed on whether the alleged tortfeasor was an independent contractor rather than federal governmental employee, *Creel v. United States*, 598 F.3d 210, 213 (5th Cir. 2010 (Owen, J.),[4] a fact-based motion to dismiss is a proper method to dismiss a claim in an FCTA claim as well as here.

25. Plaintiffs fail to bear their burden of demonstrating cognizable injury against the Remaining Defendants rather than what they have done here, which is posit a speculative future injury Plaintiffs *might* have as "the result of the independent action of some third party not before the court," *Bennett*, 520 U.S. at 167.

Conclusion

26. For the foregoing reasons, the Court should grant Webster's motion to dismiss for Plaintiffs' lack of standing, FED. R. CIV. P. 12(b)(1), and Harris County's and the Harris County District Attorney's motion for judgment on the pleadings, FED. R. CIV. P. 12(c).

[4] The Honorable Priscilla Richman Owen, Chief Judge of the United States Court of Appeals for the Fifth Circuit, has since reverted back to her maidan name, Priscilla Richman, after entering into marriage with Texas Supreme Court Chief Justice Nathan L. Hecht earlier this year.

Dated: December 6, 2022

Respectfully submitted,

Lewis Brisbois Bisgaard & Smith, LLP

/ s / Justin C. Pfeiffer
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

AND

Office of The Harris County Attorney

CHRISTIAN D. MENEFEE
HARRIS COUNTY ATTORNEY
JONATHAN G.C. FOMBONNE
FIRST ASSISTANT HARRIS COUNTY ATTORNEY
TIFFANY S. BINGHAM
MANAGING COUNSEL,
AFFIRMATIVE LITIGATION DIVISION

/s/ Heena Kepadia
HEENA KEPADIA
Assistant Harris County Attorney
State Bar No. 24110080
Heena.Kepadia@harriscountytx.gov
MATTHEW P. MILLER
Assistant County Attorney
State Bar No. 24051959
Matthew.Miller@harriscountytx.gov
1019 Congress Plaza, 15th Floor

Houston, Texas 77002
Telephone: (713) 274-5101
Facsimile: (713) 755-8924

Attorneys for Defendants,
Kim Ogg and Ed Gonzalez

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 December 6, 2022.

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