UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

TEXAS, *Plaintiff,* v. TRAVIS COUNTY, TEXAS; SALLY HERNANDEZ, in her official capacity as Sheriff of Travis County, Texas; CITY OF AUSTIN, TEXAS; ORA HOUSTON, DELIA GARZA, SABINO RENTERIA, GREGORIO CASAR, ANN KITCHEN, JIMMY FLANNIGAN, LESLIE POOL, ELLEN TROXCLAIR, KATHIE TOVO, and ALISON ALTER, all in their official capacities as City Council Members of the City of Austin, Texas; STEVE ADLER, in his official capacity as Mayor of the City of Austin, Texas; ELAINE HART, in her official capacity as Interim City Manager of the City of Austin, Texas; EL PASO COUNTY, TEXAS; RICHARD WILES, in his official capacity as Sheriff of El Paso County; CITY OF EL CENIZO, TEXAS; RAUL L. REYES, in his official Capacity as Sheriff of Maverick County; MARIO A. HERNANDEZ, in his official Capacity as Constable Pct. 3-1 of Maverick County; the TEXAS ORGANIZING PROJECT EDUCATION FUND and the LEAGUE OF UNITED LATIN AMERICAN CITIZENS, *Defendants.*	§ §	CIVIL ACTION NO.: AU:17-cv-00425-SS

DEFENDANT TEXAS ORGANIZING PROJECT EDUCATION FUND'S MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT PURSUANT TO F.R.C.P. 12(b)(1) and 12(b)(6)

The Texas Organizing Project Education Fund ("TOPEF") files this motion to dismiss Texas' First Amended Complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).

I. SUMMARY

This Court should immediately dismiss Texas' frivolous suit against TOPEF — a San Antonio-based nonprofit — for at least three reasons. First, Texas lacks standing. Second, Texas fails to state a claim upon which relief can be granted. In over forty pages of pleadings, Texas refers to TOPEF in just four paragraphs. Am. Compl., ECF No. 23 ¶¶ 16, 116, 117, 223. None come close to articulating any connection between TOPEF's conduct and an injury suffered by Texas or identifying any cause of action upon which a lawsuit against TOPEF could be based.

The only explanation for Texas' lawsuit against TOPEF is one that violates the First Amendment of the United States Constitution — retaliation. The First Amended Complaint for Declaratory Judgment states plainly that it sued TOPEF *because* the community organizing group sought access to the federal courts "over the constitutionality of SB 4" and has characterized SB 4 as "a cruel and racially animated law." Am. Compl. ¶¶ 117, 223. These grave First Amendment concerns provide the third reason for dismissal.

II. FACTUAL BACKGROUND

On May 7, 2017, the same day Governor Abbott signed SB 4 into law, the State of Texas filed a complaint seeking a declaratory judgment from this Court that SB 4 is constitutional. Compl., ECF No. 1. On May 22, 2017, TOPEF, along with El Paso County and the Sheriff of El Paso County, Richard Wiles, brought suit against Texas for declaratory judgment and injunctive relief, alleging SB 4 violates the Constitution of the United States, the Texas Constitution, and federal law. *See El Paso, et al. v. State of Texas, et al.*, 5:17-cv-00459 (W.D. Tex- San Antonio Division), Compl., ECF No. 1.

Just nine days later, Texas amended its complaint, adding TOPEF as a defendant. *See* Am. Compl. The Amended Complaint argues that the defendants, most of whom are elected officials in county and city governments, do not cooperate with federal immigration officials and have sued Texas over the constitutionality of SB 4. Am. Compl. ¶¶ 237, 239-40. The Amended Complaint advances no specific allegations against TOPEF. *See* Am. Compl. ¶¶ 16, 111-12, 223 (the only paragraphs that reference TOPEF).[1] The Amendment Complaint does, however, correctly note that:

> [TOPEF] is self-described as an education organization with a focus on working class neighborhoods in Dallas, Houston, and San Antonio. TOPEF claims to improve the lives of low-income and working class Texas families through education, civil engagement, and community organizing.

Id. ¶ 111.

III. ARGUMENT

A. THIS COURT LACKS JURISDICTION TO HEAR THIS CASE DUE TO TEXAS' LACK OF STANDING

Article III of the Constitution limits the jurisdiction of federal courts to "cases and controversies." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (quoting U.S. CONST., Art. III, §§ 1, 2). Standing to sue, a doctrine rooted in the traditional understanding of a case or controversy, serves to "confine[] the federal courts to a properly judicial role." *Id.* "As the part[y] invoking jurisdiction," Texas bears the "burden of establishing standing." *Texas v. U.S.*, 809 F.3d 134, 154-5 (5th Cir. 2015), *as revised* (Nov. 25, 2015), *cert. granted*, 136 S. Ct. 906 (2016).

[1] A day after filing its Amended Complaint, Texas sought to consolidate the instant case with *El Paso, et al. v. State of Texas*; that motion has been held in abeyance pending the Court's decision on the pending preliminary injunction motions filed in the consolidated cases. *See* Pls.' Opposed Mot. to Consolidate, ECF No. 24; Pls.' Mot. to Consolidate and Req. for Expedited Ruling, ECF No. 35; Order Setting All Pending Matters, ECF No. 54.

Here, Texas is subject to the same Article III standards for establishing standing as any non-governmental plaintiff.[2] Accordingly, for Texas to seek this Court's protection against TOPEF, the State must establish "(1) an injury in fact, (2) a sufficient causal connection between the injury and the conduct complained of, and (3) and a likelihood that the injury will be redressed by a favorable decision." *Crane v. Johnson,* 783 F.3d 244, 251 (5th Cir. 2015) (quoting *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014)). Any alleged injury which is not actual, but rather imminent, must be "certainly impending" and not just "possible" to constitute an injury in fact. *Crane*, 783 F.3d at 251-52.

Texas has utterly failed to establish a causal connection between any injury it has suffered, or could imminently suffer, and TOPEF. Again, Texas refers to TOPEF in just four paragraphs. *See* Am. Compl. ¶¶ 16, 111-12, 223. After describing TOPEF's mission as an "education organization with a focus on [improving] working class neighborhoods," *id*. ¶ 111, Texas describes TOPEF's involvement as a plaintiff in *El Paso, et al. v. State of Texas, id.* ¶ 112, *see also id*. ¶ 16, and complains that TOPEF has characterized SB 4 as "a cruel and racially animated law," *id*. ¶ 223. These paragraphs are later incorporated into Texas' boilerplate recitation of six causes of action, insisting that SB 4 does not violate the Constitution or other law, and "[a]bsent declaratory relief, Texas will continue to be harmed." *See* Am. Compl. ¶¶ 259-262, 275-278, 289-292, 304-307, 316-320, 327-329. That's it.

[2] The "special solicitude" consideration applicable in *Texas v. U.S.*, for instance, does not apply when Texas sues a community organization like TOPEF, with no federal authority, rather than the United States government. In *Texas v. U.S.*, Texas' standing was established based on the limited facts where there was "direct, substantial pressure directed at the states" and where it surrendered some of its control to the federal government, and highlighted that "pressure to change state law may not be enough — by itself — in other situations. *Id.* at 154-5. This is similar to the requirements articulated in *Massachusetts v. EPA*, where the court found Massachusetts to have standing when it faced actual and imminent harm from a federal agency's refusal to act. *Massachusetts v. E.P.A.*, 549 U.S. 497, 518-21 (2007).

Of course, then, Texas has failed to show "a sufficiently high degree of likelihood" it will be injured by TOPEF. *Pharmacy Buying Ass'n, Inc. v. Sebelius*, 906 F. Supp. 2d 604, 614 (W.D. Tex. 2012) (Sparks, J.) (finding lack of standing when plaintiffs had not "identified a single example" of harm in the complaint, so their allegations were "conjectural or hypothetical"). Nor could it — the State's general interest in statutory compliance does not by itself constitute injury, *see Delta Commercial Fisheries Ass'n v. Gulf of Mex. Fishery Mgmt. Council*, 364 F.3d 269, 273 (5th Cir. 2004) (holding that plaintiff's interest in statutory compliance is not by itself an injury in fact for purposes of standing); C*oastal Habitat All. v. Patterson*, 601 F. Supp. 2d 868, 881 (W.D. Tex. 2008) (holding that desire for defendant to follow the law, alone, "is not an injury sufficient to confer standing"), and TOPEF is not even a "local entity" that is regulated by SB 4 and could therefore even violate SB 4. *See* Ex. 1 to Compl., ECF. No. 1-1 at 2 (§ 752.052(5)) (defining local entities as municipalities, counties, or special districts or authorities, and their employees).

Even if this Court were to conclude that Texas has sufficiently pleaded an injury in fact, Texas has failed to show a connection between TOPEF's conduct and a threatened injury suffered by the state. This Court has dismissed complaints for this exact reason. *See Koym v. Fry's Elecs.*, No. A-08-CA-689-LY, 2009 WL 1883763, at *10 (W.D. Tex. June 30, 2009) (dismissing case for lack of standing where plaintiff failed to identify the specific actions of named defendants causing harm to plaintiff); *City of San Antonio v. Edwards Aquifer Auth.*, No. SA-12-CA-620-OG, 2014 WL 12495605, at *6 (W.D. Tex. Mar. 31, 2014) (dismissing case for plaintiff's failure to show how defendant played a causal role in injury, a "requirement for

Article III standing"). Lacking any explanation of how it is or will be harmed by TOPEF's conduct, Texas' allegations are insufficient to establish standing.[3]

B. TEXAS' CLAIMS AGAINST TOPEF SHOULD BE DISMISSED PURSUANT TO RULE 12(b)(6)

1. Texas Fails to State a Claim Upon Which Relief can be Granted

The Amended Complaint provides no particularized allegations against TOPEF for engaging in any conduct (other than seeking to vindicate protected rights in federal court), much less any act that could form the basis of a cognizable claim. As is well established, to avoid dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6), a plaintiff must present "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *see also In re Southern Scrap Material Co., LLC*, 541 F.3d 584, 587 (5th Cir. 2008) (citing *Bell Atl. v. Twombly*, 550 U.S. 544, 555, 570 (2007)). Well-pleaded factual allegations "must establish more than a sheer possibility that a defendant has acted unlawfully," *Peck v. First State Home Loan, Ltd.*, No. A-13-CA-168-SS, 2013 WL 12121108, at *1 (W.D. Tex. Apr. 10, 2013) (Sparks, J.), and "conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss." *Taylor v. Books A Million, Inc.*, 296 F.3d 376, 378 (5th Cir. 2002).

[3] Texas also does not have statutory standing under the Declaratory Judgment Act, which requires a plaintiff to show a substantial and continuing controversy between the adverse parties. *Schedeler v. Wells Fargo, N.A.*, No. 13-CA-875-SS, 2013 WL 12133969, at *3 (W.D. Tex. Dec. 20, 2013) (Sparks, J.). A district court does not have subject matter jurisdiction to issue a declaratory judgment when no controversy exists between the plaintiff and defendant. *State of Tex. v. West Publ'g Co.*, 882 F.2d 171, 175 (5th Cir. 1989). To establish standing in an action seeking a declaratory judgment in federal court, the plaintiff confronts the same burden of establishing the same three elements necessary for Article III standing. *Arnett v. Strayhorn*, 515 F. Supp. 2d. 699, 703 (W.D. Tex. 2006) (Sparks, J.) (citing *Lawson v.* Callahan, 111 F.3d 403, 405 (5th Cir. 1997)). Therefore, Texas' failure to establish Article III standing, described above, also means that it cannot establish standing under the Declaratory Judgment Act. *Marketing On Hold, Inc. v. Jefferson*, No. A-10-CA-104-SS, 2010 WL 2900492, at *7 (W.D. Tex. July 19, 2010) (Sparks, J.).

Here, Texas has provided no particularized factual allegations about TOPEF at all, so the Amended Complaint fails to raise any possibility that TOPEF has acted unlawfully. This Court should reject Texas' improper invitation to blindly guess how declaratory relief against TOPEF could, somehow, someway, remedy the injuries alleged by Texas.

2. The Only Plausible Explanation for Texas' Lawsuit Against TOPEF is Prohibited

TOPEF challenged the constitutionality of SB 4 due to the harms the law would cause to the organization, including racial profiling and a chilling effect on their First Amendment-protected rights to freely associate, assemble and petition in San Antonio, TX. *See El Paso, et al. v. State of Texas, et al.*, 5:17-cv-00459 (W.D. Tex- San Antonio Division), Compl., ECF No. 1. Mere days later, Texas added as a defendant every plaintiff who had sued it to that point, including TOPEF. As explained above, Texas did not and cannot allege any injury because of TOPEF's conduct; the only plausible explanation for Texas' lawsuit against TOPEF is retaliation.

As TOPEF has explained in its San Antonio action, "the law is settled that as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions . . . for speaking out." *Hartman v. Moore*, 547 U.S. 250, 256 (2006). It is well established that "[t]he right of access to the courts is . . . one aspect of the right of petition." *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972); *Jackson v. Procunier*, 789 F.2d 307, 310 (5th Cir. 1986). Thus, federal courts have specifically held that retaliatory lawsuits, like that brought by Texas against TOPEF, are unlawful. *See, e.g.*, *Anderson v. Davila*, 125 F.3d 148, 161 (3d Cir. 1997) ("[n]umerous claims brought under *Mt. Healthy* — both in this Circuit and in others — have involved fact patterns in which the government took retaliatory action in response to an individual's filing of a lawsuit"); *Harrison v. Springdale Water & Sewer Comm'n*, 780 F.2d 1422, 1428 (8th Cir. 1986) ("state officials may not take retaliatory action

against an individual designed either to punish him for having exercised his constitutional right to seek judicial relief or to intimidate or chill his exercise of that right in the future"). Indeed, in its Response to Applications for Preliminary Injunction in *El Paso v. Texas*, the State *agreed* that that it is impermissible to retaliate "against individuals for speech or engaging in other constitutionally protected activity." *See El Paso, et al. v. State of Texas, et al.*, ECF No. 91 at 45 (citing *Hartman*, 547 U.S. at 256).

Because it was brought in retaliation against TOPEF for engaging in protected activities, including accessing the federal courts, the State's continued litigation against TOPEF raises serious First Amendment concerns. This provides another reason dismissal is proper.

IV. CONCLUSION

TOPEF respectfully requests that the Court dismiss Texas' Amended Complaint under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) because the Court lacks subject matter jurisdiction and Texas has failed to state a claim upon which relief can be granted. For these reasons, TOPEF's Motion to Dismiss should be granted.

DATED: June 28, 2017

Respectfully submitted,

/s/ Mimi Marziani

Mimi Marziani
State Bar No. 24091906
Texas Civil Rights Project
1405 Montopolis Drive
Austin, Texas 78741
T: (512) 474-5073
mimi@texascivilrightsproject.org

Efrén C. Olivares
Texas Bar No. 24065844
Texas Civil Rights Project
1017 W. Hackberry Ave.
Alamo, Texas 78516
T: (956) 787-8171
efren@texascivilrightsproject.org

Cassandra Champion
Texas Bar. No. 24082799
Texas Civil Rights Project
1405 Montopolis Drive
Austin, Texas 78741
T: (512) 474-5073
champion@texascivilrightsproject.org

ATTORNEYS FOR DEFENDANT TEXAS ORGANIZING PROJECT EDUCATION FUND

CERTIFICATE OF SERVICE

I, Mimi Marziani, hereby certify that, on June 28, 2017, in compliance with the Federal Rules of Civil Procedure, I filed the foregoing Defendant TOPEF's Motion to Dismiss Plaintiffs' First Amended Complaint via the Court's ECF/CM system on all parties, or their attorneys of record.

/s/ Mimi Marziani
MIMI MARZIANI

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[PROPOSED] ORDER GRANTING DEFENDANT TEXAS ORGANIZING PROJECT EDUCATION FUND'S MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT PURSUANT TO F.R.C.P. 12(b)(1) and 12(b)(6)

Before the Court is Defendant Texas Organizing Project Education Fund's Motion to Dismiss Plaintiff's First Amended Complaint Pursuant to F.R.C.P. 12(b)(1) and 12(b)(6). Having duly considered all the parties' papers filed in support and in opposition to the motion, the Court finds the motion should be GRANTED.

It is therefore ORDERED that Plaintiff's claims against Defendant Texas Organizing Project Education Fund are hereby DISMISSED.

SIGNED AND ENTERED this _____ day of _____, 2017.

_____
HON. ORLANDO L. GARCIA
CHIEF U.S. DISTRICT JUDGE