IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

TEXAS; and KEN PAXTON, in his official capacity as Texas Attorney General,

Plaintiffs,

v.

TRAVIS COUNTY, TEXAS; SALLY HERNANDEZ, in her official capacity as Sheriff of Travis County; 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; STEVE ADLER, in his official capacity as Mayor of the City of Austin; ELAINE HART, in her official capacity as Interim City Manager of the City of Austin; 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 Mayor of the City El Cenizo; TOM SCHMERBER, 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; the MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND; and the LEAGUE OF UNITED LATIN AMERICAN CITIZENS,

Defendants.

Civ. Action No. 1:17-cv-425-SS

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS (ECF NOS. 60, 61, 62, 64, 65 & 66)

Texas and Ken Paxton, in his official capacity as the Attorney General of Texas (collectively, "Texas"), respond to the Texas Organizing Project Education Fund's ("TOPEF's") Motion to Dismiss (ECF No. 62), the County of El Paso and Sheriff Richard Wiles's Motion to Dismiss (ECF No. 64), and El Cenizo Defendants'[1] Motion to Dismiss (ECF Nos. 60 & 61) and Amended Motion to Dismiss (ECF Nos. 65 & 66)[2] as follows:

INTRODUCTION

This is the second round of largely repetitive motions to dismiss Texas's declaratory judgment action seeking a ruling on the constitutionality of Senate Bill 4 ("SB 4"), which prohibits localities from implementing policies against cooperation with federal immigration officials. Since SB 4 passed, at least a dozen localities, local officials, and nonprofits sued Texas and its officials in three lawsuits, claiming SB 4 infringes on constitutional protections and impermissibly treads on powers exclusively reserved to the federal government. Those cases have since been consolidated before Judge Garcia in the San Antonio Division. On June 26, 2017, Judge Garcia held a lengthy hearing on several separate applications for preliminary injunction challenging the constitutionality of SB 4.

The State of Texas understood the concrete dispute over the constitutionality of SB 4 and filed suit here, first and in the proper venue, to ensure timely consideration by the Court under the Declaratory Judgment Act. The events since Texas's filing, namely a multiplicity of lawsuits facially challenging SB 4, only

[1] El Cenizo Defendants are the City of El Cenizo, Texas, Raul L. Reyes, Maverick County, Tom Schmerber, Mario A. Hernandez, and the League of United Latin American Citizens ("LULAC").

[2] El Cenizo Defendants' amended motion is largely identical to the prior motion to dismiss, with the exception that LULAC joins in the amended motion to dismiss, but not the original version. In an abundance of caution, Texas responds to both motions in this brief and asserts that both should be denied.

underscore the propriety of the State's action. Because there is a ripe controversy for adjudication, Defendants' motions to dismiss should be denied, and the question of SB 4's constitutionality should be answered in an orderly, unified fashion in this Court—the only proper venue for this action. *See* Plaintiff's Memorandum of Law in Support of Plaintiff's Motion to Consolidate, ECF No. 35-1.

ARGUMENT

Defendants bring their motions to dismiss for lack of subject-matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1).[3] "A case is properly dismissed for lack of subject matter jurisdiction when the court lacks statutory or constitutional power to adjudicate the case." *Home Builders Ass'n of Miss., Inc. v. City of Madison, Miss.*, 143 F.3d 1006, 1010 (5th Cir. 1998) (citation omitted). "A motion under 12(b)(1) should be granted only if it appears certain that the plaintiff cannot prove any set of facts in support of his claim that would entitle him to relief." *Id.*

I. Texas's Action Is Proper Under the Declaratory Judgment Act.

Texas's Amended Complaint is proper under the Declaratory Judgment Act, which grants every federal court the power "in a case of actual controversy within its jurisdiction . . . [to] declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201(a). As the Supreme Court explained, "the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007); *see also Orix Credit*

[3] TOPEF also asserts that Texas has failed to state a claim under Rule 12(b)(6). That argument melds into TOPEF's assertion that Texas lacks standing to pursue its claims and is addressed in Section II, *infra*.

Alliance, Inc. v. Wolfe, 212 F.3d 891, 896 (5th Cir. 2000) ("As a general rule, an actual controversy exists where 'a substantial controversy of sufficient immediacy and reality [exists] between parties having adverse having adverse legal interests.'" (citation omitted)). "Whether particular facts are sufficiently immediate to establish an actual controversy is a question that must be addressed on a case-by-case basis." *Wolfe*, 212 F.3d at 896.

A declaratory judgment action is ripe for judicial determination when "an issue presents purely legal questions" and the plaintiff shows "some hardship." *Cent. & S.W. Servs., Inc. v. EPA*, 220 F.3d 683, 690 (5th Cir. 2000). Thus, the mere threat of litigation can "establish a controversy upon which declaratory judgment can be based." *Wolfe*, 212 F.3d at 897. Therefore, the Court has the authority to provide Texas with declaratory relief. *See Sherwin-Williams Co. v. Holmes Cty.*, 343 F.3d 383, 388 (5th Cir. 2003); *St. Paul Ins. Co. v. Trejo*, 39 F.3d 585, 591 (5th Cir. 1994); *Travelers Ins. Co. v. La. Farm Bureau Fed'n, Inc.*, 996 F.2d 774, 776–77 (5th Cir. 1993).

In *Travelers*, the declaratory judgment action was preemptively brought "to avoid a multiplicity of suits in various forums . . . ." *Travelers*, 996 F.2d at 777. As explained in the complaint, suit was brought "so that the one pertinent issue, which involved [several individuals] who could have brought suit in multitudinous forums . . . could be resolved consistently in one, rather than multiple, forums." *Id.* "Such a goal, unlike that of changing forums or subverting the real plaintiff's advantage in state court, is entirely consistent with the purposes of the Declaratory Judgment Act." *Id.* Thus, consistent with the purposes of the Declaratory Judgment Act, Texas brings this action "to avoid a multiplicity of suits in various forums . . . so that the one pertinent issue . . . [can] be resolved consistently in one, rather than multiple, forums." *Id.*

Here, not only was there a valid threat of litigation, but that threat was in fact carried out, as all of the defendants filed lawsuits against Texas over the same constitutional questions addressed in this action. Texas initiated this action based on Defendants' assertions that SB 4 is unconstitutional, TOPEF Mot. to Dismiss 7, ECF No. 62; First Am. Compl. ¶¶ 11–16, 223, 231, 233, 240, ECF No. 23, they maintain policies or will create policies of noncompliance with SB 4, First Am. Compl. ¶¶ 201–09, 213–14, 218, 224–25, 229–31, 234, and they are preparing litigation against Texas over SB 4, *id.* ¶¶ 19, 211–17, 221, 227, 240. These allegations, standing alone, are sufficient to demonstrate a substantial controversy and give the Court jurisdiction over Texas's declaratory judgment action. But, in addition, each defendant later filed suit against Texas over the constitutionality of SB 4. *Id.* ¶¶ 222, 226, 228, 232, 236, 240; *see Texas v. West Publ'g. Co.*, 882 F.2d 171, 176 (5th Cir. 1989) (noting that "the plaintiff must allege a course of conduct that implies an imminent threat of impending legal action by the defendant." (quotation marks omitted)).

In a quite similar circumstance, though with far less public attention and without any pending affirmative litigation, a federal district court determined that a government could seek a determination of the constitutionality of its school board apportionment plan based on their adversaries' "doubts about the constitutionality" of the plan, their opposition to the previous version of the plan, and the fact that they could clearly seek invalidation of the plan in the future. *See Baker v. Reg'l High Sch. Dist. No. 5*, 476 F. Supp. 319, 321 (D. Conn. 1979) (ultimately declining to decide the issue at that time for prudential reasons); *see also NUCOR Corp. v. Aceros Y Maquilas de Occidente, S.A. de C.V.*, 28 F.3d 572, 578 (7th Cir. 1994) (affirming exercise of jurisdiction under Declaratory Judgment Act when party sent "notice letter" to opponent indicating intent to sue). This case law, in combination with Defendants' actions vis-à-vis SB 4, establishes a "case of actual controversy" under the

Declaratory Judgment Act, and the appropriateness of Texas invoking the Act to obtain relief in this Court.

II. Texas Has Standing to Bring This Case.

For the same reasons that this case is ripe for review, Texas has standing against each defendant to bring this action. El Paso and Sheriff Wiles argue that Texas fails to allege any constitutional injury sufficient to confer standing because the "State has failed to allege any conduct by the County has violated" the constitutional provisions Texas cites in its Amended Complaint. ECF No. 64 ¶ 16. And TOPEF likewise asserts that Texas has "failed to establish a causal connection between any injury it has suffered, or could imminently suffer, and TOPEF." ECF No. 62 at 4. But in a pre-enforcement declaratory judgment action, the Fifth Circuit asks whether the *defendant* has standing to sue the plaintiff:

> [s]ince it is the underlying cause of action of the defendant against the plaintiff that is actually litigated in a declaratory judgment action, a party bringing a declaratory judgment action must have been a proper party had the defendant brought suit on the underlying cause of action.

Collin Cty., Tex. v. Homeowners Ass'n for Values Essential to Neighborhoods, (HAVEN), 915 F.2d 167 (5th Cir. 1990); *see Md. Cas. Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941) ("It is immaterial that frequently, in the declaratory judgment suit, the positions of the parties in the conventional suit are reversed; the inquiry is the same in either case."). Thus, the proper inquiry is whether El Paso County, Sheriff Wiles and TOPEF have standing to sue Texas. TOPEF claims it does, as does El Paso County. Hr'g Tr. 22–23, 27, June 29, 2017. TOPEF further alleges in its San Antonio complaint it "is injured as an organization by SB 4," claiming "both organizational and associational standing." *See El Paso Cty. v. Texas*, No. 5:17-cv-459-OLG, Compl. ¶¶ 6, 19, ECF No. 1 (May 22, 2017) (W.D. Tex., San Antonio Division). If TOPEF has standing to challenge SB 4, this is a substantial controversy

under the Declaratory Judgment Act. TOPEF claims a controversy with Texas over SB 4.[4] The same is true for El Paso County and Sheriff Wiles. *Id.* ¶¶ 7–8, 18.

As explained above, one way to establish a "substantial controversy" and "sufficient immediacy" is through a valid "threat of litigation." *Orix Credit*, 212 F.3d at 897. "The focus is on defendant's conduct toward plaintiff," *Morris v. Dearborne*, 69 F. Supp. 2d 868, 880–81 (E.D. Tex. 1999), demonstrating "a threat that is real and immediate, not conjectural or hypothetical." *Id.* at 881. Because Texas's anticipation of litigation materialized after it filed this action, *see* Section I, *supra*, Defendants' threats could not be second-guessed as anything but a ripe controversy.

SB 4 was designed to prevent localities from forming a patchwork of inconsistent policies of federal cooperation across Texas. First Am. Compl. ¶¶ 218, 224, 229, 234. By ending local policies that block the federal government's ability to enforce immigration law, SB 4 aims to ensure that suspected and convicted criminals are not released back onto the streets and that the respect for the rule of law continues to preserve the safety of citizens throughout the State. When immigration laws are not enforced, Texas citizens are harmed. The numerous local governments and officials who have sued Texas alleging that SB 4 is unconstitutional and thereby unenforceable, presents just the sort of injurious uncertainty that declaratory judgments are aimed at remedying. Like Plaintiffs, localities that want to enforce

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[4] At the June 29, 2017 hearing, TOPEF acknowledged an active and ongoing controversy with Texas:

> THE COURT: Are you in the San Antonio suit?
> MS. MARZIANI: Yes.
> THE COURT: Do you want out of that?
> MS. MARZIANI: No.

Hr'g Tr. 27, June 29, 2017.

their policies and practices against federal immigration cooperation on September 1st, Texas likewise has the right to defend assaults claiming its general laws are unconstitutional and unenforceable. *Cf. True the Vote v. Hosemann*, 43 F. Supp. 3d 693, 742 (S.D. Miss. 2014) (noting that "[t]o the extent Mississippi suffers harm from the inability to enforce its laws, the Mississippi public—and registered voters in particular—would suffer harm as well."). This is not a hypothetical dispute; it is public, alive, and active.[5]

For all of these reasons, Texas has standing to assert its declaratory judgment action against all defendants, including El Paso County, Sheriff Wiles and TOPEF.

III. TOPEF's Retaliation Argument Is Meritless.

Texas did not retaliate against TOPEF by including it as a defendant after TOPEF filed a related lawsuit against Texas. And TOPEF cannot demonstrate, nor do they attempt to do so, the elements necessary to establish a retaliation claim. *See Keenan v. Tejeda*, 290 F.3d 252, 258 (5th Cir. 2002). The addition of TOPEF as a defendant in this case is not "retaliatory action."

While access to courts is constitutionally protected, TOPEF cannot meet the second or third prongs of the retaliation test. Retaliation claims are concerned with government conduct intended to and likely to "chill" the exercise of constitutional rights. For example, in *Keenan*, constables and officers detained the plaintiff, a reserve deputy constable, at gunpoint "for an inordinate period of time," charged him

[5] Notably, the relief that Texas seeks to address its injuries—a declaration that SB 4 is constitutional, First Am. Compl., Prayer for Relief—is appropriate and of a similar nature to what El Paso County is requesting in the San Antonio litigation. *See City of El Cenizo v. Texas,* No. 5:17-cv-404-OLG, Consolidated Plaintiffs El Paso County, Et Al.'s First Amended Complaint for Declaratory Judgment and Injunctive Relief, ECF No. 51 ¶¶ 177, 181 (W.D. Tex., San Antonio Division) ("In the alternative, Plaintiffs El Paso County and Sheriff Wiles' adherence to the County's adopted policies in relation to federal immigration enforcement comply with SB 4. . . . Absent declaratory relief, Plaintiffs will continue to be harmed."); *see also* Texas Association of Hispanic County Judges and County Commissioners' Complaint in Intervention, ECF No. 142 ¶¶ 50, 54 (asserting the same declaratory relief).

with a crime "under suspicious circumstances," forcing him to "spend thousands of dollars to exonerate himself at trial," and refused to return his gun and concealed carry license, all because he criticized the Constable. *Keenan*, 290 F.2d at 249.

Here, Texas added TOPEF as a defendant to a preexisting declaratory judgment action—concerning only the constitutionality of SB 4—*after* TOPEF filed a related lawsuit against Texas. No facts indicate TOPEF is chilled by Texas's lawsuit. In fact, its continued participation in the San Antonio case indicates the Texas lawsuit has had little effect on it whatsoever.

Moreover, Texas filed this action for a proper purpose, namely to "resolve a dispute without waiting to be sued or until the statute of limitations expires." *Sherwin-Williams Co.*, 343 F.3d at 397. TOPEF was properly added as a defendant in this action "to resolve issues pertinent to the suits in 'one, rather than multiple, forums.'" *Id.* at 399 (quoting *Travelers*, 996 F.2d at 777).

IV. The Court Should Exercise Its Discretion to Hear This Case.

Finally, El Cenizo Defendants assert that the Court should decline to exercise its discretionary jurisdiction to hear this matter under the Declaratory Judgment Act. ECF No. 66 at 4–7. But in "cases raising issues of federal law or cases in which there are no parallel state proceedings," *Wilton v. Seven Falls Co.*, 515 U.S. 277, 290 (1995), the Fifth Circuit has suggested that a court's discretion to decline jurisdiction is more limited. *See Sherwin-Williams Co.*, 343 F.3d at 394 (noting that the "absence of any pending related state litigation strengthens the argument against dismissal of the federal declaratory judgment action.").

Here, of course, there is no pending state court action, and the claims at issue invoke important issues of federal constitutional law. Moreover, the unique context in which this case arose demonstrates why the Court should exercise its discretion to hear the case. Texas has brought a proper suit, in the proper venue, and was the first party to do so. Thus, declining to exercise jurisdiction would lend unwarranted

deference to a deliberate circumvention of the Fifth Circuit's longstanding first-to-file rule, which posits that "when related cases are pending before two federal courts, the court in which the case was last filed may refuse to hear it if the issues raised by the cases substantially overlap." *Cadle Co. v. Whataburger of Alice, Inc.*, 174 F.3d 599, 603 (5th Cir. 1999); *see also Superior Sav. Ass'n v. Bank of Dall.*, 705 F. Supp. 326, 330 (N.D. Tex. 1989) ("The rule of thumb in the Fifth Circuit is that the court initially seized of a controversy should be the one to decide whether it will try the case."). Under the first-to-file rule, it is the Austin litigation, not the San Antonio cases, through which the parties should resolve SB 4's constitutionality.

Of even greater concern is that venue as to Defendants is inappropriate in the San Antonio Division, and only appropriate here. Venue lies where "any defendant resides," or "a substantial part of the events or omissions giving rise to the claim occurred." 28 U.S.C. § 1391(b)(1–2). But no defendant in the San Antonio cases resides in the San Antonio Division and the events giving rise to that action, and this one, did not occur within the division. Moreover, the "general rule in suits against public officials is that a defendant's residence for venue purpose[s] is the district where he performs his official duties." *Fla. Nursing Home Ass'n v. Page*, 616 F.2d 1355, 1360 (5th Cir. 1980), *rev'd on other grounds*, *Fla. Dep't of Health & Rehab. Servs. v. Fla. Nursing Home Ass'n*, 450 U.S. 147 (1981). Thus, a suit against Texas officials should have been brought in Austin. *See*, *e.g.*, *Procario v. Ambach*, 466 F. Supp. 452, 454 (S.D.N.Y. 1979). Because of the prejudice to Texas if those cases proceed any further, and because this case is ripe for review, this Court should hear this declaratory judgment action and deny Defendants' motions to dismiss. *Cf. Venator Grp. Specialty, Inc. v. Matthew/Muniot Family, LLC.*, 322 F.3d 835, 842 (5th Cir. 2003) (finding that district court abused its discretion when the only reason district court offered for denying review of declaratory judgment action was erroneous conclusion that the controversy was not ripe for review).

CONCLUSION

The motions to dismiss pending before the Court should be denied.

Respectfully submitted this the 12th day of July, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that on this the 12th day of July, 2017, a true and correct copy of the foregoing document was transmitted using the CM/ECF system. A copy of this document will be served on each defendant.

/s/ Darren McCarty
Darren McCarty

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TEXAS; and KEN PAXTON, in his official capacity as Texas Attorney General,

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Defendants.

Civ. Action No. 1:17-cv-425-SS

ORDER DENYING DEFENDANTS' MOTIONS TO DISMISS (ECF NOS. 60, 61, 62, 64, 65 & 66)

On this day the Court considered the Defendants' Motions to Dismiss (ECF NOS. 60, 61, 62, 64, 65 & 66). After due consideration of the law and the filings of the parties, the Court finds said motions are not meritorious.

It is therefore ORDERED that Defendants' Motions to Dismiss are hereby DENIED.

SO ORDERED this the ____ day of _____, 2017.

_____
HON. SAM SPARKS
UNITED STATES DISTRICT JUDGE