UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

TEXAS, et al.

Plaintiffs,

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.

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CIVIL ACTION NO.: AU:17-cv-00425-SS

DEFENDANT TEXAS ORGANIZING PROJECT EDUCATION FUND'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS

The Texas Organizing Project Education Fund ("TOPEF") files this reply to Plaintiffs' Response In Opposition to Defendants' Motion To Dismiss ("State's Response").

I. INTRODUCTION

The State's Response offers no new support to the State's argument that the case against Defendant TOPEF should not be dismissed. It is clear that Texas has suffered no harm from any actions or omissions by Defendant TOPEF. Texas improperly filed the instant case in an attempt to obtain an impermissible advisory opinion, deny Plaintiffs their choice in forum, and punish TOPEF in retribution for bringing suit against Plaintiffs in San Antonio.

II. ARGUMENT

A. Texas Does Not Have Standing To Bring This Case

Texas attempts to argue that it does not need to meet any standing requirements to bring this lawsuit. Plaintiffs' Response in Opposition to Defendants' Motion to Dismiss, ECF No. 71, at 6. Such a position is simply untenable. The Plaintiff in a declaratory judgment action has the burden of establishing the same three elements for Article III standing: (1) an injury in fact; (2) a sufficient causal connection between the injury and the conduct complained of; and (3) a likelihood that the injury will be redressed by a favorable decision. *Arnett v. Strayhorn*, 515 F. Supp. 2d. 699, 703 (W.D. Tex. 2006)(Sparks, J.). Because Texas has not and cannot show Article III standing in this case, Texas also cannot meet the standing requirements for declaratory relief.

The State also alleges that it brought the instant suit against TOPEF based on the threat of litigation. ECF No. 71, at 3. But in fact, TOPEF did not threaten to sue Texas. TOPEF was added as a defendant in the case at hand in retaliation *after* TOPEF filed a suit for declaratory and injunctive relief in San Antonio. *See* Consolidated Plaintiffs El Paso County, et al.'s First Amended Complaint for Declaratory Judgment and Injunctive Relief, El Paso Cnty. et al. v.

Texas, No. 5:17-CV-00459-OLG (W.D. Tex. S.A. Div. June 19, 2017) (hereinafter "Defendants' Amended Complaint").

The State cites *HAVEN* for the proposition that it does not need to establish standing but that TOPEF must have standing. *Collin Cty., Tex. v. Homeowners Ass'n for Values Essential to Neighborhoods, (HAVEN)*, 915 F.2d 167 (5th Cir. 1990). The case is misinterpreted by the State. The case does not allow a plaintiff to avoid the jurisdictional question of standing, which is mandated by Article III of the U.S. Constitution. *See id.* Rather, *HAVEN* concerns the question of standing and whether a plaintiff is able to anticipatorily challenge a potential complaint from a potential adversarial party. *Id.* These pre-enforcement declaratory relief challenges are brought before a complaint is filed, not after. *See id.*; *Orix Credit Alliance, Inc. v. Wolfe*, 212 F.3d 891, 896 (5th Cir. 2000) (stating that there was an imminent threat of a lawsuit that was not yet filed). In *HAVEN*, the plaintiff, a Texas county, believed the defendant, a neighborhood association, would file a complaint against the county to stop highway construction plans because the county believed the association would challenge the environmental impact statements (EIS) for the highway project under the National Environmental Policy Act (NEPA). *Id.* at 168-69. The court reasoned that the county did not establish that there was an actual controversy in place. *Id.* at 171-72. The county failed to establish its standing because there was no imminent threat of a lawsuit against it from the neighborhood association. *Id.* at 171. [1]

The purpose of a declaratory judgment action is to clarify the legal rights of parties. In the case at hand, Texas has shown no substantial and continuing controversy between TOPEF and Texas. *Schedeler v. Wells Fargo, N.A.*, No. 13-CA-875-SS, 2013 WL 12133969, at *3 (W.D.

[1] Even if there is standing, the filing of TOPEF's lawsuit before being added as a defendant to Texas' lawsuit should render any need for declaratory judgment sought by Texas moot. The controversy that Texas alleges only occurred after TOPEF filed a lawsuit against Texas, and as a result Texas sued TOPEF. Texas argues that it seeks declaratory judgment to avoid litigation, but only added TOPEF as a defendant after TOPEF commenced litigation. *See United States Parole Commn. v. Geraghty*, 445 U.S. 388, 397 (1980) ("[T]he requisite personal interest that must exist at the commencement of the litigation must continue throughout its existence.")

Tex. Dec. 20, 2013)(Sparks, J.). A declaratory action is not merely a substitute for a suit for injunctive relief. Here, TOPEF filed suit against the State of Texas in San Antonio seeking injunctive relief. *See* Defendants' Amended Compl. Following TOPEF's filing in San Antonio, Texas sued TOPEF in the instant case. The timeline clearly shows that Texas is not attempting to use the declaratory action to clarify the rights of the parties, but rather to force Plaintiffs to litigate in Defendants' chosen forum and deny TOPEF access to the court and the remedy that TOPEF seeks in the San Antonio action.

B. Texas's Addition of TOPEF to this Lawsuit is Retaliatory

The State's Response alleges that because TOPEF successfully filed suit in San Antonio, Plaintiff's addition of TOPEF as a defendant in this action was not retaliatory because TOPEF was not chilled from accessing the courts. Chilling access to the courts, however, is not the only prohibited retaliatory activity. Retaliatory litigation against a party after that party has exercised their constitutional right to seek judicial relief is also prohibited. *See Harrison v. Springdale Water & Sewer Comm'n*, 780 F.2d 1422, 1428 (8th Cir. 1986).

Here, the State is attempting to punish Plaintiff TOPEF for exercising their right to seek judicial relief, as is made clear by their amended complaint.[2] First Amended Complaint for Declaratory Judgment, ECF No. 23. In fact, the only substantive allegation made by the State in their Amended Complaint underscores the impermissible purpose for which they sought to bring this suit. Texas's *only* substantive allegation against TOPEF is that Defendant TOPEF "sued Texas over the constitutionality of SB 4." ECF No. 23, at 15, ¶ 112. As the *Harrison* Court noted, "it is not necessary that individual succumb entirely or even partially to [the] threat." *See Harrison v. Springdale Water & Sewer Comm'n*, 780 F.2d 1422, 1428 (8th Cir. 1986).

[2] Critically, Texas's Amended Complaint contains not a single allegation of injury or threatened injury against TOPEF. Although Texas alleges that "all defendants" fail to comply with federal immigration officials, TOPEF and the other organizational defendants have no obligation whatsoever to assist in federal immigration enforcement, and Texas does not argue that they do. ECF No. 23, *generally*.

C. Venue is Proper in San Antonio

Further, the State *again* attempts to argue that Austin is the only appropriate venue for litigation regarding SB 4. ECF No. 71, at 10. This is incorrect. The State insists that San Antonio is not a proper venue because none of the Defendants reside in San Antonio and events giving rise to these events did not occur within the San Antonio division. *Id.* Here, TOPEF resides in San Antonio for venue purposes and its choice of forum holds due weight. *See* Defendants' Amended Complaint.

Because all defendants reside in the Western District, SB 4 was enacted in the Western District, and San Antonio—where a substantial part of the events giving rise to this litigation will occur—is located within the Western District, any division in the Western District of Texas is proper for venue purposes under 28 U.S.C. § 1391(b). Federal civil cases need not be filed in a particular division of a judicial district. *See In re Gibson*, 423 F. App'x 385, 388 (5th Cir. 2011); 14D Charles Alan Wright et al., *Federal Practice and Procedure* § 3809 (4th ed. 2017).

III. CONCLUSION

Because Texas lacks standing, has failed to state a claim upon which relief can be granted, and sued TOPEF as retaliation, TOPEF respectfully requests that the Court dismiss Texas' Amended Complaint under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).

Dated: July 19, 2017.

Respectfully submitted,

/s/ Mimi Marziani

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ATTORNEYS FOR DEFENDANT TEXAS ORGANIZING PROJECT EDUCATION FUND

CERTIFICATE OF SERVICE

I, Mimi Marziani, hereby certify that, on July 19, 2017, in compliance with the Federal Rules of Civil Procedure, I filed the foregoing document via the Court's ECF/CM system on all parties or their attorneys of record.

/s/ Efrén C. Olivares
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