No. 17-50763

In the United States Court of Appeals for the Fifth Circuit

TEXAS; KEN PAXTON, IN HIS OFFICIAL CAPACITY AS TEXAS ATTORNEY GENERAL,

Plaintiffs - Appellants

v.

TRAVIS COUNTY, TEXAS; SALLY HERNANDEZ, IN HER OFFICIAL CAPACITY AS SHERIFF OF TRAVIS COUNTY, TEXAS; CITY OF AUSTIN, TEXAS; ORA HOUSTON, IN HER OFFICIAL CAPACITY AS CITY COUNCIL MEMBER OF THE CITY OF AUSTIN, TEXAS; DELIA GARZA, IN HER OFFICIAL CAPACITY AS CITY COUNCIL MEMBER OF THE CITY OF AUSTIN, TEXAS; SABINO RENTERIA, IN HIS OFFICIAL CAPACITY AS CITY COUNCIL MEMBER OF THE CITY OF AUSTIN, TEXAS; GREGORIO CASAR, IN HIS OFFICIAL CAPACITY AS CITY COUNCIL MEMBER OF THE CITY OF AUSTIN, TEXAS; ANN KITCHEN, IN HER OFFICIAL CAPACITY AS CITY COUNCIL MEMBER OF THE CITY OF AUSTIN, TEXAS; JIMMY FLANNIGAN, IN HIS OFFICIAL CAPACITY AS CITY COUNCIL MEMBER OF THE CITY OF AUSTIN, TEXAS; LESLIE POOL, IN HER OFFICIAL CAPACITY AS CITY COUNCIL MEMBER OF THE CITY OF AUSTIN, TEXAS; ELLEN TROXCLAIR, IN HER OFFICIAL CAPACITY AS CITY COUNCIL MEMBER OF THE CITY OF AUSTIN, TEXAS; KATHIE TOVO, IN HER OFFICIAL CAPACITY AS CITY COUNCIL MEMBER OF THE CITY OF AUSTIN, TEXAS; ALISON ALTER, IN HER OFFICIAL CAPACITY AS CITY COUNCIL MEMBER 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; MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND; EL PASO COUNTY, TEXAS; RICHARD WILES, IN HIS OFFICIAL CAPACITY AS SHERIFF OF EL PASO COUNTY, TEXAS; CITY OF EL CENIZO, TEXAS; RAUL L. REYES, IN HIS OFFICIAL CAPACITY AS MAYOR OF EL CENIZO, TEXAS; MAVERICK COUNTY, TEXAS; TOM SCHMERBER, IN HIS OFFICIAL CAPACITY AS SHERIFF OF MAVERICK COUNTY, TEXAS; MARIO A. HERNANDEZ, IN HIS OFFICIAL CAPACITY AS CONSTABLE PRECINCT 3-1 OF MAVERICK COUNTY, TEXAS; TEXAS ORGANIZING PROJECT EDUCATION FUND; LEAGUE OF UNITED LATIN AMERICAN CITIZENS,

Defendants - Appellees

On Appeal from the United States District Court
for the Western District of Texas, Austin Division, No. 1:17-CV-425

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

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Summary of the Argument

I. In defense of the district court's jurisdictional dismissal, defendants raise what they admit is an argument not raised below. El Cenizo Br. 12 n.3. They now argue that, regardless of plaintiffs' standing, this suit does not fall within 28 U.S.C. § 1331's grant of subject-matter jurisdiction to federal courts for civil actions "arising under the Constitution, laws, or treaties of the United States." *Id.* at 12-13. Specifically, defendants invoke the well-pleaded-complaint rule to argue a lack of statutory jurisdiction over suits to declare a state law's "validity under federal law." *Id.* at 15.

Defendants are incorrect. Under the well-pleaded-complaint rule, a declaratory action arises under federal law if the suit for coercive relief that could be brought, absent the Declaratory Judgment Act, would present a federal issue as a necessary part of the plaintiff's claim. That test is satisfied here. Defendants had an affirmative claim for an injunction arising from their alleged violation of the Supremacy Clause. That federal issue of preemption would appear on the face of their well-pleaded complaint for coercive relief. Accordingly, this suit seeking a declaration of that federal claim likewise arises under federal law.

Defendants seek to avoid regular application of the well-pleaded-complaint rule by relying on *Franchise Tax Board of California v. Construction Laborers Vacation Trust for Southern California,* 463 U.S. 1 (1983), but defendants' overbroad reading of that decision would turn the Supreme Court's rationale upside down. In *Franchise Tax Board*, the Court first noted a statutory feature that made the existence of statutory jurisdiction unclear, and the Court then abstained from finding jurisdiction because the State had chosen to present the federal question in a pending state-court action—

meaning the State was content with adjudication of the issue there. The Court explicitly relied on the interest in comity between the federal and state governments, declining to "snatch" a case that the State chose to bring in state court. In contrast, no statutory feature here even creates doubt that § 1331 should apply as it normally does. And the comity rationale of *Franchise Tax Board* would only cut in *favor* of federal jurisdiction on these facts. The State here has chosen a federal forum for adjudication of a federal issue arising on the face of a well-pleaded complaint for coercive relief. Those were not the facts in *Franchise Tax Board*. And rejecting a regular application of § 1331 because the plaintiffs here are the State and a state official would uniquely disrespect the State—turning *Franchise Tax Board*'s comity principle on its head.

II. Defendants also continue to dispute plaintiffs' Article III standing. Defendants suggest that a concrete case or controversy did not exist on May 7, 2017—despite defendants' public statements threatening litigation and reporting in newspapers of record on imminent litigation—but did exist on May 8, 2017 when that threatened litigation materialized. That bizarre suggestion blinks reality.

The original complaint here specifically alleged imminent litigation by the City of Austin and other defendants. ROA.35, 41 (¶¶113, 148). That allegation must be accepted at this motion stage if plausible, as it plainly was. And that imminent litigation created the requisite "substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant" a declaratory suit. *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007); *see Texas v. W. 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)).

The district court's fundamental error was failing to accept the plausible allegation of imminent suit by defendants. The district court addressed this standing theory without even a full page of analysis, simply stating that the relevant question is whether a plaintiff has standing when it sued, as opposed to "whether the defendant has standing to sue the plaintiff in a different lawsuit" later in time. ROA.641-42. But the State is not trying to leap forward in time. The State's point is that, on May 7, 2018, there was a concrete controversy based on threatened litigation by defendants. A declaratory suit anticipating that litigation is entirely proper: "Declaratory judgments are often 'anticipatory,' appropriately filed when there is an actual controversy that has resulted in or created *a likelihood of litigation*." *Sherwin-Williams Co. v. Holmes Cty.*, 343 F.3d 383, 391-92 (5th Cir. 2003) (emphasis added).

Either party could properly sue before SB4 became effective in September 2017, based on the concrete controversy as of May 2017. A party suffers a justiciable injury-in-fact from a credible threat of future litigation to prohibit its desired future activity. *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979). That is why defendants could sue in May 2017, seeking relief allowing them to act as they desired in September 2017 (by violating SB4 once it took effect). Likewise, the State could sue in May 2017 so it could freely plan to act as it desired in September 2017 (by enforcing SB4 once it took effect).

As then-Justice Rehnquist put it, "the declaratory judgment procedure is an alternative to pursuit of the arguably illegal activity." *Steffel v. Thompson*, 415 U.S. 452,

480 (1974) (Rehnquist, J., concurring). Here, the activity that either party desired to take starting in September 2017 would be allegedly illegal—whether illegal under SB4 (for defendants' desired activity) or under the federal constitution (for plaintiffs' desired enforcement of SB4). The State is not a second-class litigant, unable to access federal court for a declaration that the State's future activity is lawful, whereas a private party to the same concrete controversy can do so.

III. Finally, defendants offer an alternative theory of affirmance based on a hypothetical prediction of what the district court would do on remand. That plea is inconsistent with precedent from both the Supreme Court and this Court. *MedImmune,* 549 U.S. 118; *Rowan Cos. v. Griffin*, 876 F.2d 26, 29 (5th Cir. 1989). As defendants admit, "the district court did not dismiss the State's case on discretionary grounds." El Paso Br. 8. Because the district court's standing conclusion was based on legal conclusions, rather than any exercise of its discretion under the Declaratory Judgment Act, the order dismissing this action should be reversed and the case remanded for further proceedings.

ARGUMENT

I. Congress Has Granted Subject-Matter Jurisdiction to Hear This Case Because It Is an Action Arising Under Federal Law.

The district court dismissed this action based on an alleged lack of standing, not a lack of subject-matter jurisdiction. ROA.640-44. In defending that ruling, however, defendants primarily raise what they admit is an argument not raised below. El Cenizo Br. 12 n.3. They now argue that this suit does not fall within Congress's grant of subject-matter jurisdiction to district courts for civil actions "arising under the

Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. That is wrong.

A. Under the well-pleaded-complaint rule, this action arises under federal law because defendants have a claim to enjoin SB4 as allegedly preempted under the Supremacy Clause, and this action seeks a declaration on that federal claim.

In creating federal district courts, Congress assigned them jurisdiction over all civil actions "arising under" federal law. 28 U.S.C. § 1331. Despite the similar phrasing to Article III's creation of a federal judicial power over cases "arising under" federal law, the jurisdiction statutorily conferred by § 1331 has been held narrower than Article III permits. *See Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804, 807-08 (1986). Specifically, a case "arises under" federal law for statutory purposes if a federal issue is among the allegations necessary for the plaintiff to state a claim, as opposed to possible defenses to that claim. *See Gully v. First Nat'l Bank*, 299 U.S. 109, 112-13 (1936). This is sometimes known as the well-pleaded-complaint rule. And because the Declaratory Judgment Act did not expand federal jurisdiction, a declaratory action invokes federal-question jurisdiction only if the action for coercive relief (such as damages or an injunction) that would have been brought, were declaratory judgments not available, would have been within federal-question jurisdiction. *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 673-74 (1950). Only one claim need be within the Court's subject-matter jurisdiction under § 1331 to let it hear all claims part of the same controversy. 28 U.S.C. § 1367.

A straightforward application of the well-pleaded-complaint rule shows the district court's subject-matter jurisdiction under § 1331. For instance, the State's declaratory action raises the question whether SB4 is preempted by federal immigration law. ROA.45-46 (Third Cause of Action). That federal question is not a mere defense to a state-law action. It is a claim that defendants could raise in their own affirmative suit for coercive relief. As this Court has held: "*Shaw*, among the progeny of *Ex parte Young*, clearly establishes a federal right of action against 'state officials' to enjoin the enforcement of preempted state regulations. This cause of action against state officials is *an affirmative federal claim* that can form the basis for federal jurisdiction." *New Orleans & Gulf Coast Ry. Co. v. Barrois*, 533 F.3d 321, 329-30 (5th Cir. 2008) (emphasis added). In fact, such an affirmative claim for an injunction under the federal Supremacy Clause is exactly what defendants later raised in the San Antonio lawsuit.

Because defendants had an affirmative claim for coercive relief arising under federal law, this action to declare the merits of that claim also arises under federal law for purposes of § 1331. *Skelly Oil*, 339 U.S. at 673-74. The well-pleaded-complaint rule is no bar to subject-matter jurisdiction.

B. *Franchise Tax Board*'s limitation on statutory jurisdiction where it would disrupt a pending state-court enforcement action does not apply here.

Defendants resist this straightforward application of the well-pleaded-complaint rule by overreading the Supreme Court's holding in *Franchise Tax Board*. *E.g.*, El

Cenizo Br. 12-17. *Franchise Tax Board* adjusted the well-pleaded-complaint rule for the specific circumstances before it, which are not the circumstances here.

1. In *Franchise Tax Board*, the Court confronted an action brought by a State *in state court* to declare that a state taxing regulation was not preempted by ERISA, and to collect those taxes from the defendant. 463 U.S. at 5-7. The defendant wanted to remove that pending state-court action to federal court and the Supreme Court rejected the attempt. *Id.* at 7. The Court noted the "regular[]" rule, described above, in which courts take jurisdiction over declaratory actions where the defendant has a coercive action arising under federal law. *Id.* at 19.

But the Court carved out an exception for the circumstances there, based on a confluence of factors that the Court concluded made it "somewhat unclear" whether Congress meant to allow federal jurisdiction. *Id.* The Court emphasized two factors absent here:

- *First*, the federal question of preemption would have arisen under ERISA, and that statute expressly creates a cause of action for preemption that is limited to certain parties (unlike the *Ex parte Young* cause of action). *Id.* at 21. That fact made it "unclear" to the Court whether Congress meant to allow federal-question jurisdiction under § 1331 in that scenario. *Id.*
- *Second*, because of state-court enforcement actions that allow resolving the preemption question, the Supreme Court held that States "do not suffer if the preemption questions *such enforcement* may raise are tested there." *Id.* (emphasis added). Hence, the Court relied on comity to interpret § 1331 narrowly where a pending state-court action allowed resolution of the federal issue:

> "considerations of comity make us reluctant to *snatch cases* which a State has brought *from the courts of that State*, unless some clear rule demands it." *Id.* at 21 n.22 (emphases added).

In other words, *Franchise Tax Board* relied on a statutory feature of ERISA to find it "unclear" whether Congress intended the separate statutory grant of jurisdiction in § 1331 to apply, and *Franchise Tax Board* then applied a comity-based clear-statement rule to limit § 1331 from covering cases that a State has brought in state court.

This case is distinguishable from *Franchise Tax Board* on both fronts. First, nothing in the Immigration and Nationality Act allows preemption suits in a more limited class of cases, creating uncertainty about whether Congress meant for federal jurisdiction over preemption claims to be controlled by regular application of § 1331. Indeed, defendants cannot credibly question whether § 1331 confers subject-matter jurisdiction over their preemption challenge—as defendants themselves brought that challenge in the San Antonio court, affirmatively pleading the existence of subject-matter jurisdiction under § 1331. Complaint for Declaratory and Injunctive Relief, *City of El Cenizo v. State of Texas*, 264 F.Supp.3d 744 (W.D. Tex. 2017) (No. 5:17-cv-404), ECF 1, at 9, 28. Because there is no statutory basis for avoiding the regular application of § 1331—under which subject-matter jurisdiction exists here—*Franchise Tax Board*'s subsequent reasoning does not even apply.

Second, even assuming some uncertainty about whether Congress meant § 1331 to confer federal-question jurisdiction here, the comity-based clear-statement rule of *Franchise Tax Board* cuts in the opposite direction in this case, where the State invoked federal jurisdiction and had no state-court enforcement action pending. There

is no comity concern with "snatching" a case from state court here. Congress need not give a clear statement to afford the States the same rights as any other litigant.

In fact, defendants' request to expand *Franchise Tax Board* would be a unique affront to comity. It would deny subject-matter jurisdiction when *the State* seeks to invoke regular principles of law, but allow jurisdiction when any other litigant seeks to invoke those same principles. *Franchise Tax Board* should not be twisted into such a comity-wrecking rule unless the Supreme Court clearly directs such a result. And it has not: that decision did not address depriving a plaintiff of its own choice of forum where federal jurisdiction would exist, only because the plaintiff is a State.

Lastly, defendants cite *Franchise Tax Board* to argue that the State is not "significantly prejudiced," 463 U.S. at 21, by being denied a federal forum for adjudication of a claim arising under federal law. But, again, the context of that statement in *Franchise Tax Board* was that the State already brought an enforcement action in state court, in which the federal issue could be adjudicated. Here, defendants' threatened preemption challenge to SB4 would arise in a *pre-enforcement* posture: both before SB4's enforcement against defendants in state court and even before SB4's effective date. When facing threatened federal-question litigation in that posture, it significantly *benefits* the State to have the federal-question determined in a declaratory action before attempting to enforce the law—the State and its officials can thereby know in advance whether any portion of the law is unconstitutional. That declaratory determination will both help state officials ensure they comply with their oaths to respect the Constitution, and avoid claims for liability against state officials who would enforce the state law. And, of course, denying the State a federal forum for

such a declaration of this controversy—while allowing private plaintiffs to the same controversy a federal forum—would uniquely disrespect the States as second-class litigants in the federal judicial system.

2. Defendants wrongly argue that the blanket rule they urge—a State may never sue under § 1331 in federal court for a declaration on state law—was adopted by the Eighth Circuit in *State of Missouri ex rel Missouri Highway & Transportation Commission v. Cuffley*, 112 F.3d 1332, 1334-35 (8th Cir. 1997). Of course, this out-of-circuit decision is not controlling. But it is also distinguishable.

In *Cuffley*, the State attempted to bring a declaratory judgment action that it could make an administrative interpretation of a law that prevented the KKK from participating in the state's "Adopt-A-Highway" program. The court declined jurisdiction even though a putative declaratory defendant (the KKK) could have brought a § 1983 action in federal court for the claim that its First Amendment rights had been violated if the state went through with the ban. *Id.* at 1335. Based on its reading of *Franchise Tax Board*, the court would have found "that this case is properly in federal court" except that the declaratory action had been brought by a State. *Id.*

In *Cuffley*, the State had the benefit of taking its action to state court since it dealt with an administrative action on a law already in effect. The suit was not in a pre-enforcement posture where the federal forum made sense for the constitutional question. And, as the Eighth Circuit acknowledged, it was the unique factors related to a State bringing the claim—no prejudice by not having the claim heard in federal court and lack of increased exposure in waiting until declaratory defendant brought

suit—that prevented jurisdiction. *Id.* at 1335-36. As explained above, this suit is in a different posture.[1]

3. Finally, defendants argue that the State's suit "'is sufficiently removed from the spirit' of the federal-question statute." El Cenizo Br. 14 (quoting *Franchise Tax Board*, 463 U.S. at 21). But determination of an important constitutional claim in a pre-enforcement posture is squarely within the spirit of § 1331's grant of subject-matter jurisdiction. As this Court has noted, because "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. v. Homeowner's Ass'n for Values Essential to Neighborhoods* (*HAVEN)*, 915 F.2d 167, 171 (5th Cir. 1990). As that reasoning shows, the State is a proper party here.

A "common-sense accommodation of judgment" confirms that the regular principles of subject-matter jurisdiction should apply. *Franchise Tax Board*, 463 U.S. at 20 (quoting *Gully*, 299 U.S. at 117). The State chose a federal forum for adjudication of a federal challenge, to avoid expected duplicative challenges from cities across

[1] Even less applicable is defendants' reliance on the Ninth Circuit's decision in *Republican Party of Guam v. Gutierrez*, 277 F.3d 1086 (9th Cir. 2002). There, the Legislature of Guam attempted to sue the Governor in federal court for not following state law, and the Ninth Circuit rejected federal court jurisdiction based on the Legislature's ability to bring the claim in Guam court. *Id.* at 1090. Moreover, "the intra-governmental nature of the dispute ma[de] invocation of federal jurisdiction even less appropriate." *Id.*

Texas. *See, e.g.*, *Travelers Ins. Co. v. La. Farm Bureau Fed'n, Inc.*, 996 F.2d 774, 777 (5th Cir. 1993) (noting that the declaratory plaintiff brought action "to avoid a multiplicity of suits in various forums"). That is entirely proper, and regular principles of subject-matter jurisdiction should apply. *Cf., e.g.*, *Colo. River Water Conservation Dist. v. United States,* 424 U.S. 800, 817 (1976) (noting federal courts' "virtually unflagging obligation" to exercise jurisdiction assigned them).

II. The Court Has Constitutional Jurisdiction Over the State's Declaratory Judgment Claims.

In addition to statutory jurisdiction, the State's declaratory judgment action also satisfies Article III, as the State has standing stemming from multiple sources. First, "the nature of the declaratory remedy itself, which was designed to permit adjudication of either party's claims of right," provides a basis for jurisdiction. *Franchise Tax Board*, 463 U.S. at 19 n.19. Based on the cause of action held by the declaratory defendants, Texas officials might be subject to legal action—much like an accused patent infringer—thus creating standing under the Act. Defendants seem to argue (El Cenizo Br. 24-29; El Paso Br. 21-26) that Appellants must show a wholly separate injury from the declaratory defendants in order to support Article III jurisdiction. But this misses the point of the DJA: in allowing the declaratory plaintiff to bring the declaratory defendant's cause of action, the declaratory plaintiff is able to avoid liability for that cause of action and thus avoid the otherwise imminent injury that would stem from it. In other words, the State meets the standing requirements for a

declaratory judgment action by virtue of being across the "v." from a potential coercive plaintiff asserting a live federal cause of action that would create legal liability for Texas officials.[2]

This is why the Supreme Court, in cases such as *Skelly Oil* and *Franchise Tax Board*, never looks for a *separate* injury apart from the coercive plaintiff's cause of action in the DJA analysis. *See Franchise Tax Board*, 463 U.S. at 17-20. If, however, defedants were correct (El Paso Br. 22) that the "proper jurisdictional analysis" would have to consider "the injuries suffered by the State and the link between those injuries and the actions of [the declaratory] defendants," the DJA would be rendered a dead letter. The State would have its own cause of action for whatever injuries had been caused to it. This would obviously be wrong—the Act was created as a procedural device for adjudicating the alleged injury to the potential coercive plaintiff, not some harm that exists for the coercive defendant (at least not a harm independent of the litigation to be brought against it). Therefore, while a stranger to the intended litigation cannot use the Act to create standing when there is no legal liability on the line for them (El Paso Br. 24, citing *HAVEN*, 915 F.2d at 172), that is not a concern here since the State would face direct legal liability from the defendants in this action.[3]

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[2] Additionally, the State would also be harmed by the injunction sought by declaratory defendants here that would allow them discretion in enforcing SB4. *See Castillo v. Cameron Cty.,* 238 F.3d 339, 350–51 (5th Cir. 2001).

[3] Even the Eighth Circuit, in *Cuffley*, would have found jurisdiction absent its interpretation of *Franchise Tax Board*'s prohibition on states bringing suit in federal court when they could bring suit in state court on a state law enforcement action.

Beyond that, the State showed (at 26-29) that the imminent litigation it faced was sufficient to establish standing here. *See Lower Colo. River Auth. v. Papalote Creek II, L.L.C.*, 858 F.3d 916, 924 (5th Cir. 2017). Defendants complain (El Cenizo Br. 29-31; El Paso Br. 12-15) that the State did not face imminent suit or that threats of litigation cannot create standing. Both claims are incorrect. "The threat of litigation, if specific and concrete, can indeed establish a controversy upon which declaratory judgment can be based." *Orix Credit All., Inc. v. Wolfe*, 212 F.3d 891, 897 (5th Cir. 2000).

Defendants dismiss *Orix* (El Cenizo Br. 30) due to the fact that this Court determined there that the case was not ripe for adjudication because of uncertainties about future litigation. *Orix*, 212 F.3d at 896 (holding that "unasserted, unthreatened, and unknown claims do not present an immediate or real threat"). Defendants miss the fact, however, that the claims here were not unasserted, unthreatened, or unknown. *See* ROA.642-43 (highlighting an uncontroverted showing of the imminent threat of impending legal action by defendants, including statements that defendants would file lawsuits against Texas prior to the September 1, 2017 effective date of the statute, as well as the votes by both Austin and El Paso County to do so). It was enough, then, that the State alleged that defendants—including the City of Austin, ROA.35, 41—were going to sue. This Court, when "review[ing] a district court's dismissal under Rule 12(b)(6) . . . 'accept[s] all well-pleaded facts as true and view[s] those facts in

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Defendants' crabbed interpretation of the Act on this point does not align with the jurisprudence enforcing it.

the light most favorable to the plaintiffs.'" *Doe ex rel. Magee v. Covington Cty. Sch. Dist. ex rel. Keys*, 675 F.3d 849, 854 (5th Cir. 2012) (en banc) (quoting *Dorsey v. Portfolio Equities, Inc.*, 540 F.3d 333, 338 (5th Cir. 2008)).

Defendants also miss the broader point made by this Court that the contingency of the actual filing of a lawsuit (or even the final decision to do so) by the declaratory defendant(s) is not relevant to the analysis, nor could it be. A "controversy exists '(1) when the declaratory plaintiff has a real and reasonable apprehension of litigation and (2) when the declaratory plaintiff has engaged in a course of conduct that brings it into adversarial conflict with the declaratory defendant.'" *Orix,* 212 F.3d at 897 (quoting *W. Publ'g Co.*, 882 F.2d at 176). Here, the State had a real and reasonable apprehension of litigation founded in the statements of defendants that the State knew would be realized by its continued course of conduct in passing SB4. Though the ripeness issue may be difficult sometimes in the declaratory judgment context, it is not in this case. The district court should have considered "the likelihood" that the State would be sued over SB4 "in determining whether a justiciable controversy exists." *Id.* The district court simply overlooked the fact that the State was facing imminent suit and, as such, had standing to challenge the coercive plaintiffs in a declaratory judgment action. Unlike the facts of *Orix*, there were no contingencies left (as proven by the subsequent filings of the defendants here).

Finally, the State has standing here based on its sovereign interest in not only seeing its laws enforced but also in protecting its citizens. Tex. Br. 29-36. Defendants complain of a lack of "evidence that anyone planned to violate SB4 once the statute took effect," El Cenizo Br. 20-22, while simultaneously acknowledging the contrary

policies set forth by Travis County and the City of El Cenizo that were previously referenced by the State. Tex. Br. 7, 30-31. Notably, defendants do not aver that these policies have changed. Given (1) the local laws and policies at stake; (2) local officials' beliefs that SB4 violated the Constitution; (3) local officials' statements that they could—based on their discretion to enforce immigration law or not—violate the law; and (4) past instances of local officials refusing to cooperate with federal immigration officials, it was both reasonable for the State to assume that local law enforcement officers would disregard SB4 and prudent for the State to pave the way for SB4's enforcement. *See* ROA.34, 249-52, 254-62, 275; Travis County Sherriff's Office, ICE Policy, https://www.youtube.com/watch?v=7i0sVnW_h_w (last visited March 15, 2018); Exhibit 2 in Support of Complaint for Declaratory Judgment and Injunctive Relief, *City of El Cenizo v. State of Texas*, 264 F.Supp.3d 744 (W.D. Tex. 2017) (No. 5:17-cv-404), ECF No. 1-2 (City of El Cenizo, Safe Haven Ordinance, Ordinance Number 1999-8-3(b)).

A declaration that SB4 was constitutional, prior to the law taking effect, would have remedied that situation. As always, "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*, 549 U.S. at 127 (quoting *Md. Cas. Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941)). Jurisdiction is not enlarged by the suit here and the real stake by both sides in this real controversy therefore satisfies all of the hallmarks of traditional litigation contemplated by Article III.

III. Defendants' Alternative Argument for Affirmance Based on Discretion that the District Court Never Exercised Is Foreclosed by Supreme Court Precedent.

Lastly, defendants argue that, even assuming Article III jurisdiction and subject-matter jurisdiction under § 1331, this Court should step into the district court's shoes and exercise its discretion under the Declaratory Judgment Act to decline to hear an otherwise proper declaratory suit. El Cenizo Br. 32-33. That presumptuous argument is foreclosed by Supreme Court precedent.

In *MedImmune, Inc. v. Genentech, Inc.*, the Supreme Court rejected that exact argument. 549 U.S. at 122. There, the district court dismissed a declaratory judgment action, believing there was no reasonable apprehension of litigation under Federal Circuit precedent. *Id.* The Supreme Court reversed, holding that the litigation anticipated if the declaratory plaintiff acted as it believed it was entitled to act created a justiciable controversy. *Id.*

The Supreme Court then rejected the defendant's alternative argument that the order of dismissal should be affirmed on the alternative basis of the district court's discretion to decline declaratory actions:

> Lastly, respondents urge us to affirm the dismissal of the declaratory-judgment claims on discretionary grounds. The Declaratory Judgment Act provides that a court "may declare the rights and other legal relations of any interested party," 28 U.S.C. § 2201(a) (emphasis added), not that it must do so. . . . We have found it "more consistent with the statute," however, "to vest district courts with discretion in the first instance, because facts bearing on the usefulness of the declaratory judgment remedy, and the fitness of the case for resolution, are peculiarly within their grasp." The District Court here gave no consideration to discretionary dismissal, since, despite its 'serious misgivings' about the Federal Circuit's rule, it considered itself bound to dismiss by *Gen-Probe*. Discretionary dismissal was irrelevant

> to the Federal Circuit for the same reason. Respondents have raised the issue for the first time before this Court, exchanging competing accusations of inequitable conduct with petitioner. Under these circumstances, it would be imprudent for us to decide whether the District Court should, or must, decline to issue the requested declaratory relief. We leave the equitable, prudential, and policy arguments in favor of such a discretionary dismissal for the lower courts' consideration on remand. Similarly available for consideration on remand are any merits-based arguments for denial of declaratory relief.

Id. at 136-37 (citations omitted).

That same result obtains here. It is undisputed that the district court here "gave no consideration to discretionary dismissal." *Id.* at 136; *see* El Paso Br. 8. Defendants have raised the issue for the first time on appeal. As in *MedImmune*, "it would be imprudent" for this Court to assess that discretionary decision in the first instance, and the Court should refuse to do so. 549 U.S. at 136.

In any event, even were the Court inclined to peek ahead at the decision the district court will face on remand, there is substantial reason to believe the district court would exercise its jurisdiction here, once this Court clarifies its existence. First, although "the district court's discretion is broad, it is not unfettered." *Travelers*, 996 F.2d at 778. The district court may not dismiss merely "on the basis of whim or personal disinclination." *St. Paul Ins. Co. v. Trejo*, 39 F.3d 585, 590 (5th Cir. 1994) (citation omitted). And on remand, "unless the district court addresses and balances the purposes of the Declaratory Judgment Act and the factors relevant to the abstention doctrine on the record, it abuses its discretion." *Id.*

Here, those policy considerations cut in favor of exercising jurisdiction. The claim here was brought with the purpose of avoiding a multiplicity of lawsuits and,

indeed, would have that effect. *See Travelers*, 996 F.2d at 776–77. Citing the San Antonio litigation, defendants complain (El Cenizo Br. 35-37; El Paso Br. 30-31) that there was no multiplicity of suits to avoid and that this case can (and was) easily consolidated. That misses the point. Just because it has worked that way (so far) does not mean that it had to. Rather than (i) potentially going to various federal courts at different times with different defendants, or (ii) seeking to enforce SB4 in state court on multiple occasions (as defendants seem to believe is the only acceptable route for the State to determine the constitutionality of its law), or even (iii) seeking a declaratory judgment in state court while multiple federal suits were filed, the State chose the most sensible path forward.[4] It set the stage for one suit that would both allow the constitutionality of the law to be legitimately challenged in a federal forum and involve parties that were interested and able to challenge the law. Also, if both parties are correct that the law needed to be vetted prior to taking effect, Texas was right to get the ball rolling as soon as possible. It is disingenuous of defendants to argue that perhaps they were not going to sue over SB4 and to simultaneously fault the State for taking quick action to ensure that the case was heard in the relatively tight timeframe at issue.

Additionally, instead of opening a Pandora's box for the State, a rule allowing the State to bring such a declaratory action—again, under a very narrow set of cir-

[4] The absence of any state court litigation—as was present in *Franchise Tax Board*—only "strengthens the argument against dismissal of the federal declaratory judgment action." *Sherwin-Williams*, 343 F.3d at 394.

cumstances—prevents forum shopping and gamesmanship by plaintiffs. When facing a potential multiplicity of suits, it is far more efficient and judicious for the State to file a declaratory action and have the issue decided by the first court to have the controversy presented to it. Under defendants' view, though, not only would cities be able to forum shop for a court known to be friendly to their cause, localities could coordinate to file across the State and then, needing only one suit to succeed, withdraw any suits not in a favorable court. Tellingly, a finding of jurisdiction would resolve the irony of the City of Austin and Travis County arguing so vehemently against an Austin-based federal forum.

Finally, retaining jurisdiction in this case would underscore both this Court's longstanding first-to-file rule and the commitment of the federal courts to exercising the jurisdiction given to them. If a court has a legitimate reason for exercising its discretion to decline jurisdiction in a declaratory judgment case, that is one thing. But the court here did not do that. The dismissal was based purely on the argument that the court did not have jurisdiction available. *See* El Paso Br. 8 ("[T]he district court did not dismiss the State's case on discretionary grounds."). Defendants' argument (El Cenizo Br. 32-33) that the district court would have used its discretion to decline jurisdiction anyway was not made by the district court and therefore

should not be countenanced. A rejection of jurisdiction based on legal error is unacceptable, *Rowan Cos.*, 876 F.2d at 29—even if the San Antonio litigation has progressed somewhat further, the case should be remanded to the Austin court.[5]

Conclusion

The Court should reverse the district court and remand for consideration of the State's declaratory judgment claims.

Respectfully submitted,

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[5] In the interest of judicial efficiency, and because the parties are the same, the San Antonio case should be transferred back to Austin; the Austin court can then continue with the post-preliminary-injunction-motion proceedings. *See Sutter Corp. v. P&P Indus., Inc.*, 125 F.3d 914, 920 (5th Cir. 1997).

Certificate of Service

On March 16, 2018, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

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This brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 5764 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii); and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Equity) using Microsoft Word (the same program used to calculate the word count).

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