

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

TEXAS,	§	
Plaintiff,	§	
	§	
v.	§	
	§	
TRAVIS COUNTY, TEXAS, ET AL.	§	CIVIL ACTION NO. 1:17-CV-425-SS
Defendants.	§	

**THE COUNTY OF EL PASO AND SHERIFF RICHARD WILES’ MOTION TO  
DISMISS**

The County of El Paso, and its Sheriff, Richard Wiles, file this motion to dismiss Texas’ First Amended Complaint for Declaratory Relief [Dkt. 23] pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure.

**I. SUMMARY**

1. Texas’ suit seeks to conjure a case or controversy out of thin air based solely on El Paso County’s decision to file suit against the State of Texas grounded in its belief that SB 4 is unconstitutional and would impermissibly interfere with the judicial and executive discretion of El Paso’s constitutional officers. Texas has no jurisdiction to seek relief from this Court as it has suffered no cognizable or justiciable injury, as SB 4 is not in effect and won’t be until September 1, 2017. Instead, Texas seeks an advisory opinion based not any real or concrete injury, but the misadventure of its assumptions, assertions, and baseless allegations. Federal courts have declined to enter the fray of advisory opinions, and instead have focused their energies on cases with actual injury. Texas has no pre-enforcement injury that would give rise to case or controversy before this Court. Thus, the County’s motion to dismiss should be granted.

## II. FACTS

2. The State filed this suit on May 7, 2017. Dkt. 1. El Paso County nor any of its officials were included as defendants at this time.

3. On May 22, 2017, El Paso County filed suit against the State of Texas alleging violations of state and federal law in the San Antonio Division of the Western District of Texas. *See El Paso, et al. v. Texas, et al.*, 5:17-cv-00459-OLG (W.D. Tex., San Antonio Division).

4. Between May 22, 2017 and May 31, 2017, El Paso County, nor any of its public officials, have changed any of their policies concerning ICE detainers or compliance with federal immigration laws.

5. The State then filed an amended complaint on May 31, 2017. Dkt. 23. The amended complaint, like the original complaint, seeks only declaratory relief that SB 4 is constitutional and valid and it added several new defendants including El Paso County and its Sheriff.

6. SB 4's effective date is September 1, 2017.

7. The County of El Paso nor any of its public officials have violated any law, statutory duty, or administrative rule currently in effect nor has Texas alleged any violation of any law currently in effect that would confer standing for this lawsuit.

8. Texas spends 16 of its 329 paragraphs describing El Paso and its Sheriff. See Dkt. 23, ¶¶ 71-80, 218-223. In 4 of those paragraphs, Texas alleges that El Paso has a policy of ignoring federal immigration law and not honoring ICE detainers. Texas further alleges that El Paso engages in a pattern and practice of prohibiting enforcement of federal immigration law. See Dkt. 23, ¶¶ 72, 78, 218-9.

9. Texas, then, cites that Sheriff Wiles described SB 4 as "pointless." Dkt. 23, ¶

220.

10. Finally, Texas describes the decision by El Paso to sue the State of Texas before implementation of SB 4. Dkt. 23, ¶¶ 219-223.

### III. ARGUMENT AND AUTHORITIES

11. None of these averred facts as to El Paso County and its Sheriff create the particularized injury necessary to confer jurisdiction on this Court.<sup>1</sup> There have been several motions to dismiss in this litigation filed by other jurisdictions that are similarly situated as El Paso County and its public officials. We join those efforts and motions. If those motions to dismiss are granted, then the case against El Paso and its public officials must be dismissed as well.<sup>2</sup>

12. The United States Constitution limits the jurisdiction of the federal courts to “Cases” or “Controversies.” U.S. CONST., Art. III, § 2; *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).

13. Texas 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)

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<sup>1</sup> To be clear, El Paso and its Sheriff dispute the veracity of several of these allegations. But, at this stage of the litigation, they must be taken as true.

<sup>2</sup> There are no distinguishable facts averred against El Paso or its Sheriff that would differentiate the pending motions to dismiss.

(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 cannot meet these standards as to El Paso or its Sheriff.

**Neither El Paso nor its Sheriff has injured Texas**

14. Texas does not point to any conduct by El Paso County or its Sheriff that would form the basis of a cognizable claim under current federal or state law. 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)). The injury alleged by Texas is that the El Paso defendants have a policy of non-cooperation with federal immigration laws, ignore ICE detainer requests, and engage in a pattern or practice of prohibiting federal immigration enforcement. Dkt. 23, ¶¶ 72,78, 218-9. Currently, Texas has no standing nor ability to seek a remedy for these alleged violations, as immigration policy and compliance with that policy is wholly dedicated to the federal government. U.S. CONST., Art. I, § 8, cl. 3. In fact, none of Texas’ stated causes of actions ask this Court to force the El Paso defendants to change its policies and enforce federal immigration law. Texas only seeks a declaratory judgment that SB 4 is constitutional, which in no way would cure any alleged injury. Where there is no remedy, there is no right.

15. Texas alleges several federal and state constitutional provisions as the bases for its suit. Dkt. 23 ¶¶ 246-329. These bases are made clear in its prayer for relief: “[d]eclare that SB 4 is valid under the First, Fourth, and Fourteenth Amendments to the United States

Constitution; SB 4 is not preempted by federal law; and SB 4 does not violate provisions of the Texas Constitution.” Dkt. 23, p. 41.

16. The State has failed to allege any conduct by the County has violated any of these constitutional provisions. Texas does not allege that it has suffered any unreasonable search or seizure. It has not averred that the County is responsible for any such injury. Thus, it has failed to establish standing to sue under the Fourth Amendment. Texas does not allege that the County has deprived it of the equal protection of the law. Instead, Texas alleges that SB 4 does not violate this fundamental right. Therefore, Texas cannot assert this claim against the County. Texas also does not allege that the County has taken any action to deprive it of due process of the law. The State does not cite any County order or policy that would be preempted by federal law. Accordingly, the State has failed to establish jurisdiction for its preemption cause of action or its cause of action pursuant to the due process clause of the 14<sup>th</sup> Amendment. Texas makes no allegation that the County has violated the First Amendment. Therefore, it has not properly alleged any facts that would grant this court jurisdiction to issue a remedy against El Paso pursuant to the First Amendment. Texas argues that SB 4 does not violate the separation of powers in the Texas Constitution. This claim cannot be a claim against the County, as Texas has not stated any facts that the County is violating the separation of powers of the Texas Constitution. Texas, simply, has not pled these causes of action in a way that would confer standing on Texas to seek a remedy against the El Paso defendants.

17. If the injury alleged by Texas is not actual, then it must be impending or there must be “a sufficiently high degree of likelihood” that it will be injured by the El Paso defendants. *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”). The State has not pled an injury or an factual allegations that El Paso’s injury against Texas is impending or even likely. However, even if Texas has sufficiently pled this, then injury it has pled is not a judicially sanctioned injury. The State’s need for El Paso to comply with a law that is not in effect is not injury in fact. *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); *Coastal 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”). If the injury alleged is not an injury recognized by federal courts, then Texas has no standing to file this suit.

18. The U.S. Constitution prevents Texas from seeking a remedy El Paso’s supposed non-compliance with federal immigration law enforcement. Texas has not plead any injury by El Paso that would give rise to the causes of action that it asserts. The injury that Texas alleges, (i.e. violations of SB 4) are not injuries in fact as SB 4 is not in effect. And, that injury also is not injury recognized by this Court or any other, because the need for compliance with statutes is not injury in fact. In short, if the El Paso defendants are violating federal immigration law, then the United States would be the proper party to seek that remedy. If El Paso is violating SB 4, then Texas will have the right to seek a remedy in state court for that violation, once SB 4 is in effect. Unless and until then, Texas has not alleged an injury and has no standing to file this suit against El Paso for an imagined injury.

**Texas also does not have standing to seek a Declaratory Action**

19. 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.).

20. Even if Texas has sufficiently plead injury for a declaratory action, this Court has the discretion to dismiss this suit and should exercise that discretion. A court may properly consider the existence of an adequate alternate remedy when dismissing a declaratory judgment claim for lack of jurisdiction. *Granite State Ins. Co. v. Tandy Corp.*, 986 F.2d 94, 95-96, fn. 3 (5th Cir. 1992) . In this case, when SB 4 becomes effective, it will have multiple avenues to remedy the alleged injury of the El Paso plaintiffs, including severe civil penalties, removal from officer, and criminal sanctions for the Sheriff.

#### **Judicial Policy Reasons to Deny Texas' legal fiction**

21. Texas has invoked the jurisdiction of this Court to seek a declaration that a law is constitutional. Laws are presumed constitutional, and it is up to plaintiffs to prove otherwise. *Burlington Northern & Santa Fe Ry.Co. v. Poole Chemical Co.*, 419 F. 3d 355, 361 (5th Cir. 2005) citing *Enron Corp. v. Spring Indep. Sch. Dist.*, 922 S.W. 2d 931, 934 (Tex. 1996). If SB

4 becomes effective, then it will have adequate remedies in state law to solve El Paso's supposed failure to comply with federal immigration enforcement. If Texas' laws are presumed constitutional and it will soon have the ability to remedy the alleged injuries of the Defendants, then what is Texas' real purpose in seeking this suit?

22. Texas filed this lawsuit just a few short hours before it was signed by the Governor and months before it will ever be enforced. The motive for filing action could be the common desire of litigants desire to control venue in courts that they believe will be most receptive to their arguments. This is a desire with which many plaintiffs are acquainted. However, there could be a darker desire in filing this suit by Texas, the elimination of dissent. Texas began this lawsuit by suing the Mexican American Legal Defense and Education Fund. And, now, it has enlarged this suit to include other nonprofits like the Texas Organizing Project Education Fund. These are entities that cannot violate federal immigration law nor SB 4 in any circumstances, now or in the future. They are, however, vocal dissidents of the policy and perspectives that fuel SB 4. It is important to note, if Texas is engaging in litigation to curtail dissent, then under Texas Law this suit would be subject to dismissal. *See Texas Civ. Prac. & Rem. Code § 27.03.* Either of these motivations should be rejected by this Court.

23. This is not the first time in recent history that the State of Texas has sought to control impending litigation. Before the passage of any redistricting bill, the staff of the Speaker of the House met with and advised a litigant on filing suit against the State of Texas to try and control any ensuing redistricting litigation pursuant to the first filed rule. This attempt failed as the suit was dismissed. If this Court allows Texas to move forward with this suit, then it can expect many more suits to be pre-emptively filed by Texas and many other jurisdictions in the very near term. Jurisdictions large and small seeking to enact deeply controversial bills will



seek forums that are inconvenient for most litigants and seek injury against parties that cannot defend those suits. While the burden legally is flipped (i.e. Texas must prove by a preponderance in this litigation that SB 4 is constitutionally valid), the resource burden on future “defendants” would be too onerous to vigorously seek their rights. This would cut-off access to courts by litigants seeking to remedy actual and concrete injuries. This is especially true of nonprofits like TOPEF and MALDEF who routinely represent plaintiffs that do not have the resources to seek redress. That is a genuine misadventure this Court must reject.

### **CONCLUSION & PRAYER**

24. Texas has failed to establish an injury in fact. It does not have standing to seek the remedies it seeks. The causes of action cannot sought cannot apply to any alleged activity of the El Paso defendants. And, even if the Court, finds that Texas has plead adequate injury, it still should decline this attempt at a declaratory action because Texas has multiple other remedies at law. El Paso and its Sheriff requests that this Court grant its motion to dismiss.

DATED: June 28, 2017

Respectfully,

By: /s/ Jose Garza

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**CERTIFICATE OF SERVICE**

I certify that, on June 23, 2017, I filed the foregoing Plaintiffs El Paso County, et al.'s Motion to Dismiss with the Court's ECF/CM system, which will serve a copy on all counsel of record.

/s/ Jose Garza  
Jose Garza