UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Texas, *et al*.	)	CIVIL ACTION NO:
	)	1:17-CV-00425-SS
vs.	)	
	)	
Travis County, Texas, *et al*.	)	
	)	

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS BY DEFENDANTS CITY OF EL CENIZO, TEXAS, RAUL L. REYES, MAVERICK COUNTY, TOM SCHMERBER, AND MARIO A. HERNANDEZ

Defendants City of El Cenizo, Texas, Raul L. Reyes, Maverick County, Tom Schmerber, and Mario A. Hernandez ("the *El Cenizo* parties") move to dismiss Texas's First Amended Complaint pursuant to Fed. R. Civ. P. 12(b)(1).

Immediately after SB 4 was signed, Texas filed this suit. Its barefaced attempt to outrun the lawsuits it anticipated, and thus upend the ordinary rule that plaintiffs—not governmental entities—decide the forum for challenges to statutes, fails. Indeed, permitting this case to proceed would set a dangerous precedent, inviting any state to run into court any time it enacts a controversial and legally vulnerable statute. Such requests for advisory opinions would be anathema to the constraints on federal judicial power.

This case should be dismissed. Texas lacks standing, because it asserts no concrete harm. Even if Texas did have standing, the Court should nonetheless dismiss its lawsuit. The Declaratory Judgment Act provides for *discretionary* jurisdiction, and that discretion should not be exercised in favor of Texas's highly unusual preemptive action that is now entirely redundant of *El Cenizo, et al. v. Texas*, No. 5:17-cv-404 (W.D. Tex. May 8, 2017). The *El Cenizo* case, which seeks injunctive relief from actual harm, provides the proper vehicle for litigation of

Texas's defense of SB 4. Applications for preliminary injunction have already been submitted and joined in that case, and a hearing was held on June 26. Texas has every opportunity to raise its claims in support of SB 4's legality in that lawsuit—and has, in fact, done so. No purpose is served by Texas's lawsuit, and it should be dismissed.[1]

In the alternative, if this Court does not dismiss, it should transfer the cases to Judge Garcia in San Antonio so he can make a comprehensive decision about all of these actions.

Background

Texas filed its declaratory lawsuit late at night on Sunday, May 7, just hours after Governor Abbott signed SB 4 into law. *See* Compl. ¶ 115, *Texas v. Travis County, et al.*, No. 1:17-cv-425 (W.D. Tex. May 7, 2017) ("Tex. Compl."). Its complaint openly admitted that it was filed in anticipation of challenges to SB 4, *id.* ¶¶ 5, 10, 12, 113, 148, and sought nothing more than a declaration that SB 4 is constitutional, *id*. at 26. The complaint named only Travis County, Texas, the City of Austin, Texas, officials from Travis County and Austin (collectively, "Original Defendants"), and MALDEF – not the *El Cenizo* parties.

On May 31, weeks after the *El Cenizo* plaintiffs sued Texas in San Antonio, the State amended its complaint in this case. The amended complaint added the *El Cenizo* plaintiffs as defendants, and added additional claims, including a First Amendment claim that was previously raised in *El Cenizo*'s Amended Complaint.

On June 5, El Cenizo applied for a preliminary injunction in its own case. On June 6, the court consolidated *El Cenizo* with two other pending cases in the same division: *El Paso County, et al. v. Texas, et al.*, No. 5:17-cv-459-OLG and *City of San Antonio, et al. v. Texas, et al.*, No.

[1] Several defendants have already moved to dismiss Texas's lawsuit.

5:17-cv-489-OLG. Numerous other parties, including the cities of Dallas, Houston, and Austin, and Travis County moved, and were allowed, to intervene in the San Antonio action.

All plaintiffs in the consolidated cases subsequently filed applications for a preliminary injunction in the San Antonio action. The State filed its response on June 23.

On June 26, a hearing was held on the preliminary injunction in *El Cenizo*, at which parties presented live witnesses and presented argument. Texas appeared and argued that the law is constitutional and not preempted.

ARGUMENT

I. Texas Lacks Standing

Texas's complaint makes its lack of standing plain, because the State is not facing any actual injury. *See Bauer v. Texas*, 341 F.3d 352, 357-58 (5th Cir. 2003) (declaratory plaintiffs must satisfy normal Article III standards). It recites one speculative injury: "Until SB 4 is declared constitutional, Defendants will continue with their unlawful policy or practice." Tex. Compl. ¶ 154. And even if defendants' continuation of their policies were a cognizable injury, *this* suit would not redress it: A declaration that SB 4 is legal would not end any policies. Defendants have sought to protect their policies, not through some campaign of noncompliance, but in suits to *enjoin* SB 4 in other litigation. Thus, it appears the actual "harm" Texas asserts is that jurisdictions will maintain their policies *if and when SB 4 is enjoined*. In other words, Texas appears to claim it will be injured by a ruling that SB 4 is *unconstitutional*. But any such injury would not be cognizable, as the State has no legitimate interest in enforcing a void statute.

In any event, even if the State has some cognizable interest in halting the policies, it surely has failed to demonstrate that, as it conclusory alleges, "Texas has no adequate or speedy remedy at law to correct or redress these violations of Texas law." Amended Compl. ¶ 244. If

the defendants were to refuse to comply with the law once it goes into effect, SB 4 *itself* imposes multiple draconian remedies, including jail time, Tex. Penal Code § 39.07, removal from office, SB 4 § 752.0565(a)-(c), and heavy fines, *id.* § 752.056(a). The statute even instructs state courts to fast-track these remedies. *Id.* § 752.0565(b). Thus Texas clearly has both an "adequate" and a "speedy" remedy at law for any violations of the statute—indeed, Texas itself enacted SB 4, deciding *precisely* what remedies it could invoke. It cannot, therefore, now complain that it lacks some *further* unnamed remedy at law that would be adequate. Declaratory relief exists for parties to resolve uncertainty that might cause actual harm—like accruing prospective liability—not for state governments to dictate the terms of litigation against their enactments.[2]

II. Even if the Case is Justiciable, the Court Should Dismiss Texas's Suit

Even if this case satisfies the minimum requirements of Article III, the Court should exercise its discretion to dismiss Texas's Complaint for Declaratory Judgment, because the claims are duplicates of their defenses to El Cenizo's injunctive action, reflect an improper "race to the courthouse," and run the risk of creating inconsistent judgments.

The Declaratory Judgment Act provides that "[i]n a case of actual controversy within its jurisdiction, . . . any court of the United States . . . *may* declare the rights and other legal relations of any interest party seeking such declaration." 28 U.S.C. § 2201(a) (emphasis added). "Since its inception, the Declaratory Judgment Act has been understood to confer on federal courts unique and substantial discretion in deciding whether to declare the rights of litigants." *Wilton v. Seven Falls Co.*, 515 U.S. 277, 286 (1995). It is settled that a district court may "decline to hear a

[2] *See McDonald v. Equifax, Inc.*, 2008 WL 5156690, at *2 (N.D. Tex. Dec. 8, 2000) ("The primary purpose the Declaratory Judgment Act is to avoid accrual of avoidable damages to one not certain of his rights . . . .") (quotes omitted). Texas's own citations illustrate this purpose. *See, e.g., Yeti Coolers, LLC v. Beavertail Products, LLC*, 2015 WL 4759297, at *1 (W.D. Tex. Aug. 12, 2015) (declaration of rights needed to avoid accruing patent damages).

declaratory judgment suit at the outset" if doing so would be "a wasteful expenditure of judicial resources." *Id.* at 287-88.

Texas's lawsuit is not an appropriate use of the declaratory judgment procedure because it was filed *only* to present anticipatory defenses—and to claim the choice of forum for a defendant-in-fact. "The anticipation of defenses is not ordinarily a proper use of the declaratory judgment procedure," because "[i]t deprives the plaintiff of his traditional choice of forum and timing, and it provokes a disorderly race to the courthouse." *Morgan Drexen, Inc. v. Consumer Fin. Protection Bureau*, 785 F.3d 684, 697 (D.C. Cir. 2015) (quotation marks omitted); *see J.B. Hunt Transport, Inc. v. Innis*, 985 F.2d 553 (Table), at *2 (4th Cir. 1993) ("Declaratory relief should not be used to deprive the real plaintiff of the choice of forum or to determine merely the 'validity of a defense' which would be asserted and could be determined in another action."); *Cunningham Bros., Inc. v. Bail*, 407 F.2d 1165, 1167 (7th Cir. 1969), *cert. denied*, 395 U.S. 959 (1969) ("[T]o compel potential . . . plaintiffs to litigate their claims at a time and in a forum chosen by the alleged tort-feasor would be a perversion of the Declaratory Judgment Act."); *909 Corp. v. Village of Bolingbrook Police Pension Fund*, 741 F. Supp. 1290, 1292-93 (S.D. Tex. 1990).

That Texas's suit serves no other purpose, such as the mitigation of damages while waiting for a potential lawsuit, is clear from its relationship to the other SB 4 litigation. Texas's lawsuit is duplicative of El Cenizo's injunctive lawsuit. The claims in Texas's lawsuit are mirror images of the defenses raised in El Cenizo's pending lawsuit in the San Antonio Division. El Cenizo claims that SB 4 violates the Supremacy Clause and the First, Fourth, Tenth, and Fourteenth Amendments of the Constitution; Texas's complaint claims that SB 4 *does not* violate

the Supremacy Clause and the First, Fourth, Tenth Amendments of the Constitution, and Texas raises these identical claims as defenses in the San Antonio case.

Ultimately, it appears that Texas immediately filed this suit principally to take advantage of the first-filed rule—which is *not* a legitimate use of the declaratory judgment mechanism. And, indeed, that Texas's is the first-filed case does not make declaratory relief more proper. "[T]he real question for the court is not which action was commenced first but which will most fully serve the needs and convenience of the parties and provide a comprehensive solution of the general conflict." *Morgan Drexen*, 785 F.3d at 697 (quoting 10B Charles Alan Wright, et al., *Federal Practice and Procedure* § 2758, at 530-31 (3d ed. 2013)) (dismissing declaratory claims after an enforcement action was filed one month later); *see also AmSouth Bank v. Dale*, 386 F.3d 763, 786 (6th Cir. 2004) ("Normally, when a putative tortfeasor sues an injured party for a declaration of nonliability, courts will decline to hear the action in favor of a subsequently-filed coercive action by the 'natural plaintiff.'"); *Tempco Elec. Heater Corp. v. Omega Engineering, Inc.*, 819 F.2d 746, 749-50 (7th Cir. 1987) (upholding dismissal of declaratory action after enforcement action was subsequently filed, explaining that, because of the now-pending enforcement action, "a declaratory judgment would serve no useful purpose"). And, at any rate, the *El Cenizo* parties sued Texas weeks before Texas sued them. Texas cannot force *all* possible challengers to its new enactment to bring suit in the forum it chooses the day it enacts a law.

Dismissal will result in no prejudice to Texas. Texas has an adequate venue in which to litigate its defenses to challenges to SB 4. In fact, in its Response to the Applications for Preliminary Injunctions in *El Cenizo*, it has done just that. As numerous courts have recognized, a party in Texas's situation "almost by definition [has] an adequate remedy in a court, that is, the remedy of opposing the Attorney General's motions in the court in which he files his papers."

NAACP v. Meese, 615 F. Supp. 200, 203 (D.D.C. 1985); *see Parke, Davis & Co. v. Califano*, 564 F.2d 1200, 1206 (6th Cir. 1977) ("[P]ending enforcement actions provided an opportunity for a full hearing before a court.").

III. In the Alternative, Texas's Case Should be Transferred to San Antonio

Finally, in the alternative, if this Court does not dismiss, it should transfer the cases to Judge Garcia in San Antonio so he can make a comprehensive decision about all of these actions.

CONCLUSION

For the foregoing reasons, the Court should dismiss or, in the alternative, transfer Texas's Amended Complaint.

Dated: June 28, 2017

Respectfully Submitted,

/s/ *Luis Roberto Vera, Jr.*

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