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

BRIEF FOR PLAINTIFFS-APPELLANTS

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CERTIFICATE OF INTERESTED PERSONS

Under the fourth sentence of Fifth Circuit Rule 28.2.1, because Appellants are governmental parties, they need not furnish a certificate of interested parties.

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Statement Regarding Oral Argument

Because this case involves the interplay between multiple lawsuits—including actions producing a separate appeal in which oral argument was held on both the merits and a stay action—and because of the complexity of the standing arguments involved here, Appellants believe that oral argument may assist the Court and respectfully request oral argument.

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Introduction

Sanctuary city policies have risen to the forefront of the nation's conscience over the past few years. At the national level, attention to these policies resulted in a congressional hearing on their threat to public safety. Sanctuary Cities: A Threat to Public Safety, *Hearing Before the Subcomm. on Immigration and Border Sec. of the H. Comm. on the Judiciary*, 114th Cong., 1st Sess. (2015), https://perma.cc/847D-5E4U. That was followed by an executive order in January 2017 declaring: "Sanctuary jurisdictions across the United States . . . have caused immeasurable harm to the American people and to the very fabric of our Republic." Executive Order 13,768, § 1, 82 Fed. Reg. 8799, 8799 (Jan. 25, 2017). Texas, concerned for the safety of its citizenry, also looked to address the issue, and passed Senate Bill 4 (SB4) to prohibit individual localities within the State from enacting or enforcing policies to be a sanctuary for illegal immigrants.

Prior to passage of the law, the defendants here signaled both their intention to challenge the law once it was enacted and to disregard its legal mandates once it went into effect. The localities, and their leadership, believe that cities and counties have the authority to follow their preferred policy directives concerning immigration enforcement, notwithstanding SB4's contrary directives, and planned to continue acting as sanctuary cities. Given defendants' direct challenge to the State's sovereignty as expressed in SB4 and given defendants' threat of imminent suit, Texas filed suit under the Declaratory Judgment Act (DJA or the Act) to affirm the constitutionality of SB4. The next day, multiple lawsuits against the State were filed in the San Antonio Division of the Western District of Texas.

This appeal is from the dismissal of the State's Austin Division lawsuit. The district court dismissed the suit based upon finding a lack of standing, a decision "driven in large part" by the court's belief that to find otherwise would be to issue an advisory opinion. ROA.643. The ban on advisory opinions prevents courts from addressing hypothetical fact patterns. *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 325 (1936) (noting that declaratory judgments are limited "to 'cases of actual controversy,' a phrase which must be taken to connote a controversy of a justiciable nature, thus excluding an advisory decree upon a hypothetical state of facts."). The problem with addressing such hypothetical fact patterns is the lack of parties sufficiently motivated by adverse interests in an actual controversy; the resulting lack of adversarial testing may mean that issues "are not pressed before the Court with that clear concreteness provided when a question emerges precisely framed and necessary for decision from a clash of adversary argument exploring every aspect of a multifaceted situation embracing conflicting and demanding interests." *United States v. Fruehauf*, 365 U.S. 146, 157 (1961).

Those concerns are far removed from the facts of this case. Here, defendants' policies, statements, and threats were and are concrete. The State is not seeking an advisory opinion on a law. Nor is the State trying to avoid adversarial testing of the issues by selecting sham parties. Instead Texas sued exactly those parties who were threatening suit and non-compliance, and whose actions presented an imminent threat to State sovereignty (all confirmed by the fact that other localities, later joined by the defendants here, sued Texas the very next day after this suit was filed).

The DJA does not require a potential defendant to sit by, waiting for a known potential plaintiff to carry out a mature, substantial threat of litigation. It allows the potential defendant to sue in federal court using the potential plaintiff's cause of action. Furthermore, under this Court's precedents, the State has multiple avenues of meeting its Article III burden. These include pointing to the now-pending litigation that the State was facing when it brought its DJA action, to harms to the State's sovereign interests from defendants' position that they need not comply with the law, and to harms to the safety and welfare of the State's citizens. Texas had standing to bring its DJA action, and the order dismissing that action should be reversed.

Statement of Jurisdiction

This Court has jurisdiction under 28 U.S.C. § 1291.

Issue Presented

Whether the State of Texas had standing to pursue relief under the Declaratory Judgment Act based on the threat of imminent litigation by localities within the State that have policies conflicting with a State law and that will not change them.

Statement of the Case

I. Statutory Background

In light of nationwide events, Texas looked at the problem of sanctuary cities within its borders. One notable concern for the State was the Travis County Sheriff's policy, which picked the crimes that Sheriff Sally Hernandez deemed serious enough to require officers to comply with ICE-detainer requests. Exhibit in Support

of Complaint in Intervention of Travis County, Travis County Judge Sarah Eckhardt, and Travis County Sheriff Sally Hernandez, *City of El Cenizo v. State*, No. 5:17-cv-00404, (W.D. Tex. June 20, 2017), ECF No. 78.1 ("Ex. 1, *City of El Cenizo*, ECF No. 78.1"); ICE, *Enforcement and Removal Operations*: Weekly Declined Detainer Outcome Report For Recorded Declined Detainers Jan. 28—Feb. 3, 2017 at 10, https://www.ice.gov/doclib/ddor/ddor2017_01-28to02-03.pdf (last visited Dec. 18, 2017) ("Detainer Outcome Report"). Texas lawmakers disagreed with her stance: "[The Travis County Sheriff] has labeled three offenses that she is willing to detain people for [at ICE's request]. Notably, what is not in those is rape, child pedophilia[, and] other offenses that are just as heinous and just as personal." Enforcement by Certain Local Government Entities and Campus Police Departments of State and Federal Laws Governing Immigration: Hearing on S.B. 4 Before the S. Comm. on State Affairs, 85th Leg., R.S., at 01:29:15-:30 (Feb. 2, 2017) (statement of Sen. Charles Perry).

To resolve the issue, the Texas Legislature enacted Senate Bill 4 (SB4), prohibiting sanctuary-city policies throughout Texas. Act of May 3, 2017, 85th Leg., R.S., ch. 4, 2017 Tex. Gen. Laws 7, reproduced at ROA.292-307 (signed into law on May 7, 2017). SB4 has two main components: (1) its ICE-detainer provisions, and (2) its enforcement-cooperation provisions.

SB4 authorizes and generally requires Texas law-enforcement agencies to comply with federal ICE-detainer requests, unless the subject of the request provides proof of their lawful presence in the United States. Tex. Code Crim. Proc. art. 2.251(a)-(b). An ICE detainer is a formal request sent by the U.S. Immigration and

Customs Enforcement agency (ICE) to other law enforcement groups (such as local police) giving notice that ICE has probable cause to believe that a specific individual, already under arrest, is removable from the United States, and that ICE intends to assume custody of that individual. Department of Homeland Security, Q&A: U.S. Immigration and Customs Enforcement Declined Detainer Outcome Report (DDOR), March 20, 2017, https://www.dhs.gov/news/2017/03/20/qa-us-immigration-and-customers-enforcement-declined-detainer-outcome-report. The detainer requests that the law enforcement agency notify ICE as early as practicable before the removable alien is released from criminal custody and to briefly maintain custody for up to 48 hours to allow the government to assume custody for removal purposes. *Id.* SB4 separately prohibits intentional violations of the article 2.251 duty to comply with ICE-detainer requests. Tex. Gov't Code § 752.053(a)(3).

SB4 separately directs Texas entities and law-enforcement agencies not to prohibit or materially limit their officers from cooperating with federal officials in the enforcement of immigration law. Subsections (a)(1) and (a)(2) of Government Code § 752.053 establish a general ban on policies and practices that prohibit or materially limit the enforcement of immigration laws. Subsections (b)(1) through (b)(4) then provide four concrete examples of actions that a local entity may not prohibit or materially limit, including: inquiring into the immigration status of a person under a lawful detention or under arrest; exchanging information related to the immigration status of any person under lawful detention or arrest with other local, state, or federal entities; assisting or cooperating with a federal immigration officer as reasonable or

necessary, including providing enforcement assistance; and permitting a federal immigration officer to enter and conduct immigration enforcement activities at a jail. *Id.* § 752.053(a)-(b).

SB4 is enforced through consequences for agencies and officials who disregard their state-law duties. One potential consequence is an injunction and monetary penalty against a noncompliant entity. *Id.* §§ 752.055(a)-(b), 752.056(a). Another potential consequence is removal from elective or appointive office of a political subdivision of the State. *Id.* § 752.0565. Further, certain officials' failure to comply with SB4's ICE-detainer provision is a misdemeanor offense. Tex. Penal Code § 39.07(a)-(c). Conversely, local entities are entitled to defense and indemnification by the State for any claim arising out of their good-faith compliance with an ICE-detainer request as required by article 2.251, Tex. Gov't Code § 402.0241(b)(2), and SB4 creates a grant program for local law-enforcement entities to offset costs related to ICE-detainer compliance, *id.* § 772.0073.

II. Factual Background

Both before and after SB4 was passed, defendants maintained policies at variance with those set out in SB4, ROA.250-51, evinced an intent not to comply with SB4 after its enactment, ROA.254-62, threatened litigation to forestall enforcement of SB4, ROA.256, 380, 642-43, and claimed sovereign authority to defy the Texas legislature, ROA.274-80.

a. On February 1, 2017, after SB4 was introduced in the Texas Legislature, Defendant Sally Hernandez issued a revised, written policy concerning Travis County's non-cooperation with federal immigration authorities. ROA.275; Ex. 1,

City of El Cenizo, ECF No. 78.1. Under the policy, Travis County would not cooperate with federal immigration officials and their lawful activities, except in limited circumstances determined solely by the Travis County and its sheriff. ROA.275; Detainer Outcome Report at 10.

Defendant Hernandez described the County's policy in a publicly available video statement: "The Travis County Sheriff's Office will not 'conduct or initiate any immigration status investigation' into those in custody. The Travis County Sheriff's Office prohibits the use of county resources to communicate with ICE about an 'inmate's release date, incarceration status, or court dates, unless ICE presents a judicial warrant or court order.' Absent such a warrant or order, ICE will not be allowed to conduct 'civil immigration status investigations at the jail or [Travis County Sheriff's Office].' Furthermore, 'no [Travis County Sheriff's Office] personnel in the jail, on patrol, or elsewhere may inquire about a person's immigration status.'" ROA.275; Travis County Sherriff's Office, ICE Policy, https://www.youtube.com/watch?v=7i0sVnW_h_w (last visited December 18, 2017) ("ICE Policy Video").

b. Travis County Judge Sarah Eckhardt also made a public statement in support of Travis County's policy and practice, including saying that she "fully support[s]" Sherriff Hernandez' policy of refusing ICE detainer requests unless accompanied by a warrant. ROA.275-76; Casey Claiborne, *Travis Co. Commissioners Discuss Hernandez ICE Policy*, FOX 7 (Jan. 24 2017, 06:20 PM), http://www.fox7austin.com/news/local-news/231502450-story.

c. Defendant Travis County's failure to cooperate with federal immigration officials is pervasive. ROA.274-76. According to a report by the U.S. Department of Homeland Security, of 206 detainer requests denied between January 28 and February 3, 2017, Travis County declined 142 requests to hold unauthorized immigrants, or about 69%. ROA.276; Detainer Outcome Report at 8-20.

d. Prior to SB4's passage, Defendants City of Austin, Adler, and Hart, the City Council Defendants, and other city officials publicly endorsed and engaged in patterns and practices of ignoring ICE detainer requests and not cooperating with federal immigration officials. ROA.276. After SB4 became law, Austin's Mayor, Steve Adler, publicly vowed to continue to pursue policies contrary to SB4, just before joining a vote of the Austin City Council resolving to pursue litigation against SB4, publicly acknowledging that "we're here today representing a policy contrary to Senate Bill 4." Calily Bien and Alyssa Goard, Austin Leaders Lay Out Their Claim That Sanctuary City Law Is Unconstitutional, Austin KXAN News (June 19, 2017 at 5:00 PM), http://kxan.com/2017/06/19/austin-leaders-lay-out-their-claim-that-sanctuary-city-law-is-unconstitutional/. Austin City Council Member Greg Casar responded to SB4 and this lawsuit by saying that "[i]nstead of complying with the Governor's mandates, we will double down on our pro-immigrant policies. Instead of being silenced by the Attorney General's threats, we will rise up and speak truth to power. The fight against Senate Bill 4 is just beginning." Mary Tuma, In Preemptive Attack, Texas Files Suit Against Austin Over "Sanctuary Cities," The Austin Chronicle (May 8, 2017, at 4:20 PM), https://www.austinchroni-

cle.com/daily/news/2017-05-08/in-pre-emptive-attack-texas-files-suit-against-austin-over-sanctuary-cities/. These statements implicitly acknowledged that the city had policies which conflicted with SB4, and intended to maintain them in defiance of SB4. *See* ROA.276-77.

e. Maverick County, the City of El Cenizo, and their officials specifically admit to policies which prohibit local officials and law enforcement from gathering information about an individual's immigration status or cooperating with ICE detainer requests. Complaint for Declaratory Judgment and Injunctive Relief at 5, *City of El Cenizo v. State*, No. 5:17-cv-00404 (W.D. Tex. May 8, 2017), ECF No. 1 ("El Cenizo Complaint, *City of El Cenizo*, ECF No. 1"). The City of El Cenizo even has a city ordinance barring city employees from requesting or exchanging information concerning the immigration status of any city resident, and prohibiting any assistance with state or federal entities. Exhibit 2 in Support of Complaint for Declaratory Judgment and Injunctive Relief, *City of El Cenizo v. State*, No. 5:17-cv-00404 (W.D. Tex. May 8, 2017), ECF No. 1.2 ("City of El Cenizo, Safe Haven Ordinance, Ordinance Number 1999-8-3(b)").

f. Not only do these political subdivisions maintain policies that violate state and federal law, but Maverick County, the City of El Cenizo, and their officials specifically claim "sovereign authority to set and follow their own laws" and "autonomy" to "control the exercise of its own police powers," even in defiance of state law. El Cenizo Complaint at 8, *City of El Cenizo*, ECF No. 1. They have further asserted that the State has no authority to "wrest this autonomy from local governments." *Id.* Furthermore, the City of Austin has also claimed sovereign authority to

ignore law passed by the State sovereign. City of Austin's Complaint in Intervention at 17, *City of El Cenizo v. State*, No. 5:17-cv-00404, (W.D. Tex. June 12, 2017), ECF No. 37 ("Austin Complaint, *City of El Cenizo*, ECF No. 37") ("[T]o the extent that SB4 seeks to regulate the manner in which the City provides for the public health and safety of all of its residents and visitors, including foreign nationals, the law is unconstitutional.").

g. Likewise, El Paso County finds it "insulting" that the State "erode[s]" the "sovereignty of local communities" through SB4. Consolidated Plaintiffs El Paso County, et al.'s First Amended Complaint for Declaratory Judgment and Injunctive Relief at 2, *City of El Cenizo v. State*, No. 5:17-cv-00404, (W.D. Tex. June 19, 2017), ECF No. 51 ("El Paso Complaint, *City of El Cenizo*, ECF No. 51"). Because it disagrees with the State's sovereign law and finds it "insulting," El Paso has vowed to maintain its course of conduct in violation of state law, saying that, rather than comply with SB4, "El Paso will protect its heritage, identity and adherence to constitutional values such as equality and justice—and will do so with everything that it has." *Id.* at 2-3. El Paso County further claims that its sheriff's office has "discretion to make and enforce rules, regulations, and policy regarding his officers' interactions with federal immigration officials," even if it conflicts with state law. *Id.* at 31. El Paso County also claims that it has a right, purportedly grounded in the state constitution, to violate state laws which limit the "broad discretion" the county claims it is entitled to with regard to how to "provide county government services to all its residents." *Id.* at 30.

h. As of the filing of this suit, the sanctuary city policy of Sheriff Hernandez and Travis County remained in place. ROA.276. After this Court's ruling on the stay motion in *El Cenizo*, Travis County agreed to honor ICE detainer requests. Stef Manisero, Travis County Sheriff's Office to Honor ICE Detainer Requests After Court Ruling, Spectrum News Austin (Sept. 26, 2017 at 8:02 AM), http://spectrumlocalnews.com/tx/austin/news/2017/09/26/travis-county-sheriff-s-office-to-honor-ice-detainer-requests-after-court-ruling. It is unclear to what extent the defendants' other policies remain in place.

III. Procedural History

After the Governor signed Senate Bill 4 into law, Texas filed the present suit on May 7, 2017, seeking declaratory relief that defendants' bases for their threatened challenges to the law are without merit. ROA.21; ROA.637. The State sought declaratory relief on claims arising under the Fourth Amendment, ROA.280, the Fourteenth Amendment (Equal Protection and Due Process), ROA.282-83, preemption doctrine, ROA.284, the First Amendment, ROA.286, and separation-of-powers doctrine under the Texas Constitution, ROA.287.

Defendants filed motions to dismiss, arguing primarily that the State had not alleged an injury sufficient to confer standing and that the suit sought an impermissible advisory opinion. ROA.638. In response, the State advanced two primary arguments: (1) if standing is appropriate for the potential coercive plaintiff (the cities), it is also appropriate for the declaratory plaintiff (the State); and (2) the State is harmed by threatened (and now filed) imminent lawsuits and promises of violations of SB4 by the cities. ROA.641.

The district court granted the motions to dismiss. ROA.644. First, the court held that "simply because the declaratory judgment plaintiff is the proper defendant in another suit does not mean it is exempt from Article III's standing requirements in a declaratory judgment action." ROA.641. The district court pointed to the Supreme Court's direction in *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667 (1950), that "[w]hile the Declaratory Judgment Act 'enlarged the range of remedies available in federal courts,' it 'did not extend their jurisdiction.'" ROA.641 (quoting *Skelly Oil*, 339 U.S. at 671). The district court also relied on this Court's statement that "a plaintiff in a declaratory judgment action must satisfy the standing requirements of Article III." ROA.641-42 (citing *BroadStar Wind Sys. Grp. Ltd. Liab. Co. v. Stephens*, 459 F. App'x 351, 356 (5th Cir. 2012) (per curiam)).

The district court went on to reject the argument that the State had an "actual or imminent injury." ROA.642. The court found that "[b]ecause SB4 does not take effect until September 1, 2017, it is impossible for Defendants to take any action that would violate the not-yet-effective law." ROA.642. Believing that the "Defendants' statements that they intend[ed] to sue the State" was not "evidence of their intent to violate the law," the district court held that the State had "not shown it faced an imminent injury sufficient to confer standing." ROA.643. At base, the district court believed that it was avoiding "the well-established constitutional ban on advisory opinions" and that holding otherwise would "'open a Pandora's box and invite every local government to seek a court's judicial blessing' on a law prior to it taking effect." ROA.643-44 (quoting *Villas at Parkside Partners v. City of Farmers Branch*, 577 F. Supp. 2d 880, 884-85 (N.D. Tex. 2008) (mem. op.)).

The day after this suit was filed, the City of El Cenizo—along with other localities—sued Texas and its officials in the San Antonio Division of the Western District of Texas. ROA.638. The plaintiffs there claim that SB4 infringes on constitutional protections and impermissibly treads on powers exclusively reserved to the federal government. First Amended Complaint for Declaratory and Injunctive Relief at 11-14, *City of El Cenizo v. State*, No. 5:17-cv-00404 (W.D. Tex. May 18, 2017), ECF No. 4. The City of San Antonio and El Paso County also filed separate lawsuits, joined by other localities, in the same court, alleging claims similar to El Cenizo's lawsuit. Austin Complaint at 12-16, *City of El Cenizo*, ECF No. 37; El Paso Complaint at 23-32, *City of El Cenizo*, ECF No. 51; Complaint in Intervention of Travis County, Travis County Judge Sarah Eckhardt, and Travis County Sheriff Sally Hernandez at 11-16, *City of El Cenizo v. State*, No. 5:17-cv-00404, (W.D. Tex. June 20, 2017), ECF No. 78.

Those cases were consolidated before Judge Garcia in the San Antonio Division. ROA.638. The Cities of Austin, Houston, and Dallas, Travis County, and other local officials and organizations later moved to intervene in those consolidated cases. Two days before SB4's September 1, 2017 effective date, the district court entered a preliminary injunction of several key SB4 provisions. *City of El Cenizo v. State*, No. SA-17-CV-404-OLG, 2017 WL 3763098 (W.D. Tex. Aug. 30, 2017). This Court subsequently granted a stay of the injunction in significant part. *City of El Cenizo v. Texas*, No. 17-50762, 2017 WL 4250186 (5th Cir. Sept. 25, 2017) (per curiam). A merits panel heard argument concerning the preliminary injunction on November 6, 2017.

Summary of the Argument

The district court erred in finding that this case was a request for an advisory opinion and thus did not present an actual controversy for purposes of the Declaratory Judgment Act and Article III of the Constitution. First, defendants here threatened litigation *against* the State and have now brought that litigation. To the extent those threatened claims *against* the State are justiciable (as the district court there has held), the State validly relied on the same controversy here in filing a declaratory judgment action. The State's case is just the "mirror image" of the cities' coercive suit. The Declaratory Judgment Act does not require a potential defendant to sit around waiting for the other party's shoe to drop. So long as the district court's jurisdiction is not enlarged—*i.e.*, so long as the same parties would properly be before the court upon application of the well-pleaded-complaint rule—the potential defendant in an action can preemptively go to district court for a ruling on an existing controversy.

Second, the State can show its standing here through multiple avenues that were overlooked by the district court. These include the threat of pending litigation and harms to the State's sovereign interests, including the threatening of the health, safety, and welfare of Texas citizens.

When the State filed suit, the dispute between Texas and local governments over SB4 was definite and concrete. And it was a matter of significant public interest. Courts will and already do face multiple challenges to SB4's constitutionality. The State of Texas understood the concrete dispute over the constitutionality of SB4, and filed suit first—in a venue where the law was passed and where state officials do

business—to ensure timely consideration by the court under the Declaratory Judgment Act and to prevent a multiplicity of lawsuits in various courts. *See* ROA.169-75. The events since Texas's filing, namely a multiplicity of lawsuits facially challenging SB4, only underscore the propriety of the State's action here.

The district court's order dismissing this action for lack of standing should be reversed.

Standard of Review

"A case is properly dismissed for lack of subject matter jurisdiction [only] when the court lacks the 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). A district court's grant of a motion to dismiss for lack of subject matter jurisdiction under 12(b)(1)—including "the jurisdictional issue of standing"—is a question of law subject to *de novo* review. *Crane v. Johnson*, 783 F.3d 244, 250 (5th Cir. 2015). "It has long been the case that 'the jurisdiction of the court depends upon the state of things at the time of the action brought.'" *Grupo Dataflux v. Atlas Global Group, L.P.*, 541 U.S. 567, 570 (2004) (quoting *Mollan v. Torrance*, 22 U.S. (9 Wheat.) 537, 539 (1824)). And in assessing subject matter jurisdiction, this Court accepts as true the allegations set forth in the complaint. *Crane*, 783 F.3d at 251. While a district court has discretion in determining whether to hear a case under the Declaratory Judgment Act, *Mission Ins. Co. v. Puritan Fashions Corp.,* 706 F.2d 599, 601 (5th Cir. 1983), that discretion is not implicated where the decision to dismiss the case rests on a legal error regarding standing. *Rowan Cos. v. Griffin*, 876 F.2d 26, 29 (5th Cir. 1989).

Argument

I. The State's Declaratory Judgment Action Satisfies Article III's Case Or Controversy Requirement.

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 interested party." 28 U.S.C. § 2201(a). The phrase "cases of actual controversy" refers to Article III's case or controversy requirement. *Aetna Life Ins. Co. of Hartford, Conn. v. Haworth*, 300 U.S. 227, 239-40 (1937). To meet that threshold, a dispute must be "definite and concrete, touching the legal relations of parties having adverse legal interests." *Id.* at 240-41. The Supreme Court later summarized that, "[b]asically, 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." *Md. Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273 (1941); *see also MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007) (same).

"The doctrine of standing gives meaning to these constitutional limits by 'identify[ing] those disputes which are appropriately resolved through the judicial process.'" *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014) (quoting *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992) (footnote omitted)). "To establish Article III standing, a plaintiff must show (1) an 'injury in fact,' (2) a sufficient 'causal connection between the injury and the conduct complained of,' and (3) a 'likel[ihood]' that the injury 'will be redressed by a favorable decision.'" *Id.*

(quoting *Lujan*, 504 U.S. at 560-61). A party seeking a declaratory judgment must therefore meet these Article III standing requirements. *BroadStar Wind Sys.*, 459 F. App'x at 356.

Texas's Article III standing is shown here in (i) the existence of a cause of action held by the declaratory defendants (coercive plaintiffs in the San Antonio lawsuits), (ii) the threat of immediate litigation warranting a declaration of the parties' rights, and (iii) the imminent threat of harm to the State's sovereign interests, including the health, safety, and welfare of Texas citizens. Because those factors give Texas standing to bring this suit, it is a proper use of Article III power and would not constitute an impermissible advisory opinion.

A. The Declaratory Judgment Act allows courts to address actual controversies at the behest of defendants in a putative lawsuit.

The Declaratory Judgment Act provides an expanded procedural device for federal courts to address substantive controversies prior to a plaintiff filing a traditional suit against a defendant. It lets the potential coercive defendant preemptively bring suit against the coercive plaintiff in order to clarify the rights of parties prior to enforcement of a law. *See, e.g.*, *Cardinal Chem. Co. v. Morton Int'l, Inc.*, 508 U.S. 83, 95 (1993) ("[A] party seeking a declaratory judgment has the burden of establishing the existence of an actual case or controversy. In patent litigation, a party may satisfy that burden, and seek a declaratory judgment, even if the patentee has not filed an infringement action." (citing *Aetna Life Ins.*, 300 U.S. at 240-41). This case presents just such a scenario—the State seeks a declaratory judgment in a case where the defendants claimed an existing cause of action.

To determine if a suit brought under the Act presents a controversy for Article III purposes, "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." *Rowan Companies*, 876 F.2d at 28 (quotation marks omitted). When a party brings a pre-enforcement challenge under the Act, the proper standing analysis determines whether the defendant could have brought the claim against the plaintiff. *See Collin Cty., Tex. v. Homeowners Ass'n for Values Essential to Neighborhoods*, 915 F.2d 167, 169-71 (5th Cir. 1990) (*HAVEN*). It is thus "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." *Maryland Casualty*, 312 U.S. at 273. Rather than fixating on a formulaic rule based on which party happens to be the plaintiff, this Court merely requires that, "[a] controversy, to be justiciable, must be such that it can presently be litigated and decided and not hypothetical, conjectural, conditional or based upon the possibility of a factual situation that may never develop." *Rowan Companies*, 876 F.2d at 28 (quoting *Brown & Root, Inc. v. Big Rock Corp.*, 383 F.2d 662, 665 (5th Cir. 1967)). In other words, the nature of the Act allows a federal district court to examine a case regardless of which side of the "v." a party might be on.

This is often seen in the patent context, where potential infringers may bring a preemptive suit under the DJA to obtain a ruling on their rights with respect to a potentially patented invention. *Cardinal Chem.*, 508 U.S. at 95. Courts do not force the party to rack up potential violations prior to a definitive ruling on whether the

patent is valid. *See Arrowhead Indus. Water, Inc. v. Ecolochem, Inc.*, 846 F.2d 731, 734-35 (Fed. Cir. 1988) ("After the [Declaratory Judgment] Act, [competitors in the market of the patent holder] were no longer restricted to an *in terrorem* choice between the incurrence of a growing potential liability for patent infringement and abandonment of their enterprises; they could clear the air by suing for a judgment that would settle the conflict of interests."). Instead, because the patent holder—the coercive plaintiff in an infringement suit—has a cause of action against the potential coercive defendant, the defendant may initiate legal action as a declaratory plaintiff against the patent holder. *Cardinal Chemical*, 508 U.S. at 96 ("Merely the desire to avoid the threat of a 'scarecrow patent,' in Learned Hand's phrase, may therefore be sufficient to establish jurisdiction under the Declaratory Judgment Act." (footnote omitted)). The declaratory defendant's lurking cause of action thus satisfies Article III's standing requirements for the declaratory plaintiff's suit. *Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Tr. For S. Cal.*, 463 U.S. 1, 19-20 (1983).

Consequently, Texas has standing to bring the pre-enforcement challenge at issue here by virtue of being on the other side of the "v." in a case addressing constitutional challenges to its enacted law. The Declaratory Judgment Act's procedural expansion allows the exact same parties to be in the exact same court on the exact same claims without worrying about the procedural element of which one decided to file suit first. If the San Antonio cases presented a justiciable controversy before the law's effective date—as the district court there accepted—then the State likewise had standing to present that same controversy in this Austin Division action.

The district court below concluded that the State had not accounted for the fact that "a plaintiff in a declaratory judgment action must satisfy the standing requirements of Article III." ROA.641-42 (citing *BroadStar Wind Sys.*, 459 F. App'x at 356). The court relied heavily on *Skelly Oil*'s teaching that the Act "enlarged the range of remedies available in federal courts," but "did not extend their jurisdiction." ROA.641 (quoting *Skelly Oil*, 339 U.S. at 671). Ultimately, the district court determined that the State was both trying to sidestep the standing rules and enlarge the court's jurisdiction. ROA.642. This interpretation and application of *Skelly Oil*'s prohibition on expanding jurisdiction, however, is wrong for three reasons.

First, the State never argued that traditional standing requirements were abolished in these types of cases. ROA.381-89; ROA.616-21. The State's position continues to be that the standing requirements—those elements that demonstrate a case or controversy—were fulfilled by the nature of the Act and the facts of this case. *See id.* As shown above, the State met 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.

Second, application of the DJA to the facts here does not extend the jurisdiction of the court. In other words, no case is presented that could not otherwise be presented if the sides of the "v." were flipped. *Skelly Oil*'s reluctance to "extend" jurisdiction was based on strict adherence to the well-pleaded-complaint rule stated in *Louisville & N.R.R. v. Mottley*, 211 U.S. 149 (1908). There, the Mottleys alleged a breach of contract, and the railroad sought a federal forum in which to argue that it

was prevented from honoring the contract by a federal statute. *Id.* at 152. The existence of multiple federal questions, however—the applicability of the statute and its constitutionality—would have only arisen in defense, after the original complaint, and thus federal jurisdiction was unsupported. *Id.* Similarly, the issue between the parties in *Skelly Oil* was a contract for natural gas. 339 U.S. at 669. Phillips Petroleum was unable to obtain a necessary federal certificate before a certain date (though it had been approved already) and Skelly exercised its option to cancel the contract. *Id.* Phillips tried to sue Skelly in federal court under the Declaratory Judgment Act for a ruling that the contract was still in force. *Id.* at 669-71. The only federal question, however, would have arisen when Skelly pled the cancellation of the contract and Phillips replied that termination was improper since the certificate had been issued (at least in some sense). *Id.* at 672. There was no federal question on the face of the coercive plaintiff's well-pleaded complaint—as in *Mottley*, it was just a state-law contract issue.

Thus, in the context of the admonition that the Act "is procedural only" and does not "extend [federal court] jurisdiction], *Skelly Oil*, 339 U.S. at 671, the Court was only concerned with preventing a coercive defendant from getting into federal court based on the existence of a federal defense raised as a declaratory plaintiff. Since Phillips was not "asserting a federal right," using the DJA in that case would have expanded jurisdiction to two parties that should not have been in federal court. *Id.* at 672; *see also Franchise Tax Board*, 463 U.S. at 16 ("*Skelly Oil* has come to stand for the proposition that 'if, but for the availability of the declaratory judgment pro-

cedure, the federal claim would arise only as a defense to a state created action, jurisdiction is lacking.'" (quoting 10A Charles A. Wright, et al., Federal Practice and Procedure § 2767, at 744-45 (2d ed. 1983))). That is not the situation in this case. Here, the federal question appeared on the face of the coercive plaintiff's (potential) well-pleaded complaint: the cities and other coercive plaintiffs claimed a violation of their equal-protection, due-process, First Amendment, and other constitutional rights. The federal cause of action putatively possessed by those coercive plaintiffs (defendants here) therefore provides federal jurisdiction consistent with *Skelly Oil*. *See Franchise Tax Board*, 463 U.S. at 19 ("Federal courts have regularly taken original jurisdiction over declaratory judgment suits in which, if the declaratory judgment defendant brought a coercive action to enforce its rights, that suit would necessarily present a federal question.").[1]

Third, the procedural device the State seeks to use in this case would not extend the jurisdiction of a court any more than the coercive defendants who use declaratory judgment actions to "clear the air" when facing a potential coercive plaintiff. Even if one sought to distinguish the patent cases because they are subject to exclusive federal court jurisdiction, 28 U.S.C. § 1295(a), that is irrelevant here. That is be-

[1] Moreover, though it more frequently would happen through an individual suing the state, the Supreme Court has noted that "Congress anticipated that the declaratory judgment procedure would be used by the federal courts to test the constitutionality of state criminal statutes." *Steffel v. Thompson*, 415 U.S. 452, 467-68 (1974). The present case's consistency with that purpose further undermines the argument that it represents an expansion of jurisdiction.

cause the provision for exclusive jurisdiction does not alter the calculus for classifying whether a coercive defendant has an "injury in fact" when he or she seeks to bring the preemptive lawsuit. It merely identifies where the federal question lies. It is thus unsurprising that the Supreme Court did not rely whatsoever on an "exclusive federal jurisdiction" argument in explaining why declaratory plaintiffs (coercive defendants) did not need a showing of standing beyond the existence of the declaratory defendant's cause of action. *See Cardinal Chem.*, 508 U.S. at 95-96.

The district court could have presented what would have facially seemed like a more difficult question by relying on *Franchise Tax Board*. 463 U.S. at 21-22. There, the Supreme Court noted that "[t]here are good reasons why the federal courts should not entertain suits by the States to declare the validity of their regulations despite possibly conflicting federal law." *Id.* at 21. The Court went on to hold that "a State's suit for a declaration of the validity of state law . . . is not within the original jurisdiction of the United States district courts." *Id.* at 21-22. These statements must be read in context, however, and do not foreclose the State's declaratory judgment argument here.

Franchise Tax Board—like *Skelly Oil*—addressed a state-law cause of action where a federal defense was anticipated; the case was about where the federal question arose. *Id.* at 13-14. The primary difference was that tax board filed a *state* declaratory action on a state tax-law claim which referenced an underlying ERISA issue; the other party then sought to remove it to federal court. *Id.* at 13-17. Though a federal question "arose" in the state declaratory judgment action, *id.* at 23, the Supreme Court determined that such actions must be subject to the same limitation

as *Skelly Oil* since the goal was to determine whether the case would have original jurisdiction. *Id.* at 19. This led to the holding that the suit was not within the district court's original jurisdiction, and thus not removable either. *Id.* at 22. While ERISA allowed for an injunctive suit by the appellees that would have been proper in federal court, the Supreme Court determined that there was no significant prejudice in preventing a state from coming "to federal court for a declaratory judgment in advance of a possible injunctive suit by a person subject to federal regulation." *Id.* at 21. There was merely a specific statutory provision to allow for that anomaly. *Id.* at 20-21 ("The express grant of federal jurisdiction in ERISA is limited . . . .").

Franchise Tax Board is not controlling here for several reasons. First, it dealt with whether a case arose under federal law rather than the existence of a case or controversy, and it principally stands for the proposition that *Skelly Oil* does not allow federal jurisdiction in a case where the federal question would not have arisen in federal court until a defense. *Id.* at 18-22. Second, not only does the present case not involve a potential *Mottley* violation, there is no federal regulation at issue here that would allow an injunctive suit by the defendants. Without that specific statutory wrinkle, this case should follow the normal rules of declaratory judgment actions. Third, the fact that the state's declaratory judgment action in *Franchise Tax Board* was filed in state court weighed heavily in the decision of the Court not to find jurisdiction. *Id.* at 21 n.22 ("[C]onsiderations 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."). Again, that consideration is not present here. Finally, the issue in *Franchise Tax Board* can be distinguished from the constitutional questions at issue here.

The determinations in this case—dealing with alleged violations of individual rights—are a more substantial cause of action than mere preemption, and thus more likely to be in the "substantial" category of situations warranting federal jurisdiction. *See id.* at 20.

Ultimately, one can see that it is improper to read the narrow circumstances of *Franchise Tax Board* to foreclose jurisdiction here because of the result that would obtain. Under such an interpretation, the defendants in this case—as there—would not have been able to remove the case from state court had Texas filed suit there. Yet there is no reason to believe that defendants could not have removed a state-court action based on the federal law questions in this case—questions raised either by virtue of the claims in the complaint or by virtue of the state law at issue (SB4) being completely derivative of federal law. This is not a case where the federal question is in the defense and thus it is a case that should follow the normal rules for declaratory judgment actions.

As this Court has held, "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." *HAVEN*, 915 F.2d at 171. Because defendants were threatening to sue (and later did sue) the State here, *see City of El Cenizo*, there was standing for the State to bring this declaratory judgment action. *See Aetna Life Ins.*, 300 U.S. at 243 (holding that if an insured individual, who claimed disability, had filed his traditional cause of action first, "there would have been no question that the controversy was of a justiciable nature" and that the Act

merely provided a different procedural tool to bring that justiciable controversy before the federal court). Nothing in *Skelly Oil* or *Franchise Tax Board* prevents adherence to this Court's direction in *HAVEN*. The State's declaratory judgment action satisfies the requirements of Article III.

B. Impending Litigation Also Gives the State Standing Here.

Defendants' preparation for and threatened litigation on the constitutionality of SB4 also created standing for the State, as a credible threat of imminent litigation is sufficient to create standing to seek a declaratory judgment. *Orix Credit All., Inc. v. Wolfe*, 212 F.3d 891, 897 (5th Cir. 2000) ("The threat of litigation, if specific and concrete, can indeed establish a controversy upon which declaratory judgment can be based." (citing *NUCOR Corp. v. Aceros Y Maquilas de Occidente*, 28 F.3d 572, 578 (7th Cir. 1994)). "The fact that the filing of the lawsuit is contingent upon certain factors does not defeat jurisdiction over a declaratory judgment action." *Id.* (citing *Associated Indem. Corp. v. Fairchild Indus., Inc.*, 961 F.2d 32, 35 (2d. Cir. 1992)); *see also* 10B Charles A. Wright, et al., Federal Practice & Procedure § 2757, at 476 (4th ed. 1984) ("It is clear that in some instances a declaratory judgment is proper even though there are future contingencies that will determine whether a controversy ever actually becomes real."). What matters is that the threatened dispute has "taken on final shape so that the court can see what legal issues it is deciding." *El Paso Bldg. & Constr. Trades Council v. El Paso Chapter Associated Gen. Contractors of Am.*, 376 F.2d 797, 800 (5th Cir. 1967).

The State offered 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. *See* ROA.642-43 (noting the defendants' public statements that they would challenge the constitutionality of SB4, as well as the votes by both Austin and El Paso County to do so). These statements were sufficiently "specific and concrete" enough to meet the State's burden of showing an imminent threat of litigation. *Orix*, 212 F.3d at 897; *see also Associated Indem. Corp.*, 961 F.2d at 35 (noting that, in determining the threat of litigation, "courts should focus on 'the practical likelihood that the contingencies will occur'"). The State had far more than mere conjecture here. As the district court recognized, Texas cities were virtually certain to sue over SB4. ROA.642-43. And a suit was filed the day after the State filed this suit.[2]

The district court rejected standing on this point based on the argument that the threat to sue is not the same as the intent to break the law. ROA.643. That was error for several reasons. To begin, defendants did more than threaten to sue; they did, in fact, state their intent to violate the law. ROA.249. Yet even under the district court's own formulation, standing is still proper since the imminent threat of a lawsuit is sufficient—in itself—to support a claim under the Act. *Lower Colo. River Auth. v. Papalote Creek II, L.L.C.*, 858 F.3d 916, 924 (5th Cir. 2017) ("Notably, '[t]he threat of litigation, if specific and concrete, can indeed establish a controversy upon

[2] Though defendants here were not among the cities that initially filed in the San Antonio division, they immediately sought to have this suit dismissed and joined the one there.

which declaratory judgment can be based.'" (quoting *Orix*, 212 F.3d at 897)). As it turns out, defendants' credible promises to flout the law were superfluous to the standing analysis because of their credible promises to sue.

The fact that defendants' lawsuit was to be filed imminently, in advance of SB4's effective date, is irrelevant to the analysis; what matters is the certainty of that suit. *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) (quoting *Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923)) ("[O]ne does not have to await the consummation of threatened injury to obtain preventative relief. If the injury is certainly impending, that is enough."); *cf. Epperson v. Arkansas*, 393 U.S. 97, 101-02 (1968) (accepting jurisdiction over a challenge to a state statute despite finding that "[t]here is no record of any prosecutions in Arkansas under its statute" and noting it was "possible that the statute is presently more of a curiosity than a vital fact of life"). SB4 had been signed into law and the parties were in the period prior to enforcement where judicial review is available.[3]

All this aligns with the Supreme Court's direction in *MedImmune* that "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."

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[3] Neither side appears to contest the availability of pre-enforcement review. So long as enforcement is sufficiently imminent, judicial review may be had prior to any actual enforcement action. *Driehaus*, 134 S. Ct. at 2342 ("[W]e have permitted pre-enforcement review under circumstances that render the threatened enforcement sufficiently imminent.").

549 U.S. at 127. In this case, the issues had taken shape, as seen by the filing against the State, on virtually the same claims, the day after this suit was filed. *See* ROA.638 (noting the filing of El Cenizo's lawsuit on May 8, 2017, and its consolidation with other cases involving the same issues of law regarding whether SB4 was unconstitutional). The law in dispute had already been enacted and its enforcement was imminent. "[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 567 U.S. 1301, at *3 (2012) (Roberts, C.J., in chambers) (quotation marks omitted). That exact irreparable injury was threatened here, as the various political subdivisions credibly threatened suit for a court order that SB4 is unconstitutional and preempted. Because both the threatened suits and the enforcement of the law were imminent, the controversy was "of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *MedImmune*, 549 U.S. at 127.

C. Pending violations of the law were an imminent harm to the State's interests in protecting its citizens, enforcing its laws, and having its sovereignty recognized by other government actors.

As the City of El Cenizo acknowledged in its complaint—commenced the day after this suit was filed—"[t]his lawsuit is about sovereignty." El Cenizo Complaint at 8, *City of El Cenizo*, ECF No.1. The City claims that "SB4 is a severe invasion of Plaintiffs' sovereign rights as local governments to form their own laws and policies." *Id.* at 7. And the localities in this suit—both the original defendants and those added in the amended complaint from the San Antonio suits—believe that they have the right and duty to defy Texas law on this issue. ROA.275-78. Defendants have

not only previously maintained policies that violate the law, they broadcast their intention to do so after the law's effective date. ROA.254-62. These policies and actions harm the State's sovereign interests in protecting its citizens, enforcing its laws, and having its sovereignty recognized by other political subdivisions of the State.

Texas has a sovereign interest in protecting its citizens, and it enacted SB4 to assist in that effort. Despite the imminent threat to Texas citizens from sanctuary city policies—acknowledged by the Legislature—some of Texas's political subdivisions continue to support and maintain such policies. *See* ROA.254-62. For instance, Travis County prohibits the use of county resources to communicate with federal immigration officials about incarcerated undocumented immigrants (absent a judicial order or warrant), and also prohibits personnel from inquiring about any person's immigration status. ROA.34; ICE Policy Video, *supra* at 7. These policies restrict the ability of personnel to maintain information regarding individual's immigration status and exchange information with federal immigration officers.

Even after this Court's ruling on the stay motion for the preliminary injunction in *City of El Cenizo*, 2017 WL 4250186, at *2 (noting the constitutionality of multiple provisions of SB4), Defendant Greg Casar encouraged the Austin City Council to pass immigration policies contrary to SB4, arguing that local governments had the ability to defy what he called "[Governor] Abbott's racist coercion." Philip Jankowski, *Sheriff Will Enforce Immigration Detentions After SB 4 Court Ruling*, Austin American Statesman (Sept. 25, 2017), http://www.mystatesman.com/news/crime--law/sheriff-will-enforce-immigration-detentions-after-court-ruling/AjUnEtr3aKxr

6DoGmf7YdL/. Similarly, El Paso not only disagrees with the State's law, but finds the law "insulting" and has vowed to maintain its course of conduct in violation of state law. El Paso Complaint at 2-3, *City of El Cenizo*, ECF No. 51. Likewise, the City of El Cenizo still has an official policy—based on its city ordinance—of non-compliance with federal immigration enforcement, in violation of SB4. City of El Cenizo, Safe Haven Ordinance, Ordinance Number 1999-8-3(b). These actions are direct affronts to both the State's interest in enforcing its laws and its interest in cities recognizing their proper role in the Texas legal system. That harm to Texas was imminent upon SB4's effective date and also created standing to avoid that looming injury through this declaratory action.

A state also has a sovereign interest in enforcing its laws. *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 601 (1982) (identifying as a sovereign interest "the power to create and enforce a legal code, both civil and criminal"); *Tex. Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 449 (5th Cir. 1999) ("[S]tates have a sovereign interest in 'the power to create and enforce a legal code.'"); *cf. Texas v. United States*, 805 F.3d 653, 663 (5th Cir. 2015) ("[T]he [United States] Government's 'interests are in securing an expansive interpretation of executive authority, efficiently enforcing the immigration laws, and maintaining its working relationship with the States, who often assist it in detaining immigrants like the Jane Does.'"). This Court has found that a state necessarily suffers irreparable harm to this sovereign interest if it is unable to enforce its laws. *See, e.g., Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 734 F.3d 406, 419 (5th Cir. 2013) ("When a statute is enjoined, the State necessarily suffers the irreparable harm of denying the

public interest in the enforcement of its laws."). Relatedly, injunctions providing local law enforcement with the discretion to act at variance with state law present a harm to the sovereign interests of the State. *Castillo v. Cameron Cty., Tex.*, 238 F.3d 339, 350–51 (5th Cir. 2001) ("[The] injunction allows the sheriff, in violation of state law, to refuse to incarcerate state parole violators for whom blue warrants have been issued . . . . Because the State has a sovereign interest in enforcing its laws, it has a personal stake in appealing the October 1997 injunction that gives the County discretion to violate those laws.").

Notably, this Court has already found that it would create "irreparable injury to Texas" for the State to not to be able to enforce at least some portions of SB4. *City of El Cenizo*, 2017 WL 4250186, at *2. Defendants' course of conduct—in contravention of state and federal law, and the State's sovereignty—presents just such a situation. The timing of the State's lawsuit before SB4's effective date merely meant that the many harms to State sovereign and quasi-sovereign interests were imminent rather than present. But imminent harm still creates a concrete stake in an actual controversy. *See Surrick v. Killion*, 449 F.3d 520, 527 (3d Cir. 2006) ("It is not necessary for the party seeking review to have suffered a completed harm in order to establish adversity of interest so long as there is a substantial threat of real harm that remains throughout the course of the litigation.").

Not only do defendants' threats present an imminent challenge to the State's enforcement of its law, they further undermine the rule of law by their attack on the proper role of cities vis-à-vis the State. The State has a sovereign interest in being properly recognized as a sovereign. *See, e.g.*, *Snapp*, 458 U.S. at 601 (identifying

"easily" the sovereign interest of "recognition"). This interest in having the State's sovereignty properly recognized goes beyond horizontal interactions between the various States, to also encompass vertical interactions between levels of State and federal government. *See id.* at 607–08 (noting that "the State has an interest in securing observance of the terms under which it participates in the federal system"). If an interest in maintaining the proper relationship between state and the federal government constitutes a sovereign interest which justifies standing, there is an analogous sovereign interest in securing the terms under which the state interacts with its constituent units that should justify standing as well.

In our federal system, the atom of sovereignty was split between the federal government and the States. Not so at the State level. The State's political subdivisions have no sovereignty except as delegated by the State. *Cmty. Commc'ns Co. v. City of Boulder, Colo.*, 455 U.S. 40, 53 (1982) ("Ours is a dual system of government which has no place for sovereign cities." (internal quotation marks, citation, and emphasis omitted)); *City of Galveston v. State*, 217 S.W.3d 466, 477 & n.18 (Tex. 2007) ("[Municipalities] are created as political subdivisions of the state as a convenient agency for the exercise of such powers as are conferred upon them by the state. They represent no sovereignty distinct from the state and possess only such powers and privileges as have been expressly or impliedly conferred upon them." (quoting *Payne v. Massey*, 196 S.W.2d 493, 495 (Tex. 1946)); 18 Eugene McQuillin, The Law of Municipal Corporations § 53:5:2 (3d ed., rev., 2013) (stating that "municipalities, unlike states, are not sovereigns"). This is true even for "home rule" cities that are allowed to make laws in areas where the State has not limited their discretion. Tex. Const.

art. XI, § 5 (specifically providing with regard to home rule cities that "no charter or any ordinance passed under said charter shall contain any provision inconsistent with . . . the general laws enacted by the Legislature of this State"); *cf. Tyra v. City of Houston*, 822 S.W.2d 626, 628 (Tex. 1991) ("The Texas Constitution prohibits a city from acting in a manner inconsistent with the general laws of the state. . . . Thus, the legislature may, by general law, withdraw a particular subject from a home rule city's domain.").[4]

The actions of defendants in this case present an actual and imminent harm to the State's unitary sovereignty by purporting to have the authority to pursue their policies despite state law. For instance, Maverick County, the City of El Cenizo, and their officials specifically claim "sovereign authority to set and follow their own laws" and "autonomy" to "control the exercise of its own police powers," even in defiance of state law. El Cenizo Complaint at 8, *City of El Cenizo*, ECF No. 1. They have argued that the State has no authority to "wrest this autonomy from local gov-

[4] The only relevant difference between home rule cities and other municipalities is that a general law municipality only has those powers which the state expressly grants it, whereas a home rule city is implied to have any power which the state has not expressly denied it. *See Town of Lakewood Vill. v. Bizios*, 493 S.W.3d 527, 530-31 (Tex. 2016). In either case, all municipalities—including home rule cities—are "creatures of law that are created as political subdivisions of the state . . . for the exercise of such powers as are conferred upon them . . . . They represent no sovereignty distinct from the state and possess only such powers and privileges as have been expressly or impliedly conferred upon them." *Id.* at 530 (quotations omitted) (alterations in original).

ernments." *Id.* Similarly, El Paso County claims that its sheriff's office has "discretion to make and enforce rules, regulations, and policy regarding his officers' interactions with federal immigration officials," even if it conflicts with state law. El Paso Complaint at 31, *City of El Cenizo*, ECF No. 51. The county also claims that it has a right, purportedly grounded in the state constitution, to violate state laws which limit the "broad discretion" the county claims it is entitled to with regard to how to "provide county government services to all its residents." *Id.* at 30.

Likewise, Austin City Council Member Greg Casar responded to SB4 and this lawsuit by saying: "Instead of complying with the Governor's mandates, we will double down on our pro-immigrant policies. Instead of being silenced by the Attorney General's threats, we will rise up and speak truth to power. The fight against Senate Bill 4 is just beginning." *In Pre-emptive Attack, Texas Files Suit Against Austin Over "Sanctuary Cities,"* The Austin Chronicle (May 8, 2017), https://www.austinchronicle.com/daily/news/2017-05-08/in-pre-emptive-attack-texas-files-suit-against-austin-over-sanctuary-cities/. This statement implicitly acknowledges that the city had policies that conflicted with SB4, and intended to maintain those policies in defiance of state sovereignty. The State's allegations also show that the district court was wrong to assume that there was "no evidence at the time of filing suit" that "it was clear Defendants planned to violate the law once it t[ook] effect." ROA.643. Even apart from defendants' own words, the State's allegations—which must be taken as true at the pleading stage—outline the fact that defendants would continue their policies in the face of SB4. ROA.254-62. Such behavior created an

imminent harm to the state's sovereign interest in being recognized as sovereign over its constituent political subdivisions.

As sovereign, the State has a significant interest in avoiding this very scenario, where its constituent political units refuse to recognize the sovereignty of the State legislature by refusing to carry out its validly enacted laws. This is a direct challenge to the State's sovereign power. *See* ROA.279. Furthermore, the State need not wait until its constituent units have actually jeopardized its sovereignty by acting in defiance of the law. Even if the harm would only be completed on the effective date of the law, the fact that these political subdivisions credibly evinced an intent to defy SB4 once it was passed constitutes a harm to the sovereignty of the State.

The citizens of Texas were imminently threatened by non-enforcement of SB4's mandates about federal immigration enforcement. ROA.249 (highlighting threat to public safety "deriving from the failure of localities to cooperate with federal immigration policies"). Because the State has a sovereign interest in protecting its citizens, Texas has standing to pursue the claim here. Indeed, the State has a stronger claim of harm from the defendant's actions than defendants had in challenging the state law. Political subdivisions have a limited interest when compared to the State. *City of Galveston*, 217 S.W.3d at 477. By contrast, Texas has an interest in its laws being enforced and being properly recognized by other governmental entities, including its political subdivisions. *Snapp*, 458 U.S. at 607–08; *see also Castillo* 238 F.3d at 350–51. Defendants' imminent threats and attacks on the sovereignty of the State demonstrate a cognizable harm for standing purposes.

* * *

The nature of the Declaratory Judgment Act, as well as the imminent concrete harms to the State and its interests, show that the district court erred in finding that this case was a mere request for an advisory opinion which did not present an actual controversy for purposes of the Declaratory Judgment Act and Article III.

II. Policy Considerations Support Federal Court Jurisdiction In The Narrow Set Of Cases Presented Here.

Federal courts have a "virtually unflagging obligation . . . to exercise the jurisdiction given them." *Colo. River Water Conservation Dist. v. United States,* 424 U.S. 800, 817 (1976). Furthermore, this Court is particularly solicitous toward rare claims, such as this case, where the claim is brought in a proper forum with the purpose of avoiding a multiplicity of lawsuits. *Travelers Ins. Co. v. La. Farm Bureau Fed'n, Inc.*, 996 F.2d 774, 776–77 (5th Cir. 1993). Such a purpose "is entirely consistent with the purposes of the Declaratory Judgment Act." *Id.* at 777. Because this is just such a circumstance, the district court should have heard Texas's suit for 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*, 996 F.2d at 776–77.

In *Travelers*, the declaratory judgment action was preemptively brought "to avoid a multiplicity of suits in various forums . . . ." 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 Act, Texas brought 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.*[5]

Moreover, 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), this Court has suggested that a court's discretion to decline jurisdiction is 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—though Texas could have filed there—and the claims at issue involve important issues of federal constitutional law.

Additionally, the unique context in which this case arose demonstrates why the case should be heard in the Austin Division. Texas brought a proper suit, in a proper venue, and was the first party to do so. Thus, declining to exercise jurisdiction would allow 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

[5] While the San Antonio version of this case has now been before this Court twice, both instances involved a preliminary injunction posture. The San Antonio court has not ruled on all of the issues there yet. *See City of El Cenizo*, 2017 WL 3763098, at *3 (expressly noting that "[t]here are numerous claims that the Court does not address, either because it is unnecessary to reach them or because they are 'as applied' challenges"); *cf. id* at *10 n.23; *id.* at* 15 n.39; *id.* at *38 n.93.

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) (mem. op.) ("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."). Applying the first-to-file rule to the two Divisions here, it is the Austin litigation, not the San Antonio litigation, through which the parties should resolve SB4's constitutionality.

Contrary to the trial court's concern, a ruling for the State in this case would not open a Pandora's box of requests for advisory opinions. *See* ROA.644. First, as demonstrated, the State is not seeking an advisory opinion. This case involves a live controversy, and the fact that the defendants have initiated nearly identical lawsuits in another venue indicates that they likewise believe that this is a substantial controversy with real legal consequences. Furthermore, this Court's precedent, combined with the unique facts of this case, present several safeguards against the slippery slope imagined by defendants.

Finally, the facts of this case—a law aimed at localities rather than individuals, where the localities are threatening to sue the State and defy the duly enacted law—allows for a narrow ruling, limited to cases and controversies between the State and its constituent units, and then only cases where constituent units intend to violate the law by refusing to enforce it or are on the precipice of litigation against the State. Such an extreme example as presented by the actions and assertions of the defendants in this case would not result in the chaos imagined by the district court.

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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Certificate of Service

On December 19, 2017, 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 11,013 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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No. 17-50763 Texas, et al v. Travis County, Texas, et al
USDC No. 1:17-CV-425

Dear Mr. Sullivan,

We have reviewed your electronically filed appellants' brief and it is sufficient.

You must submit the 7 paper copies of your brief required by 5TH CIR. R. 31.1 within 5 days of the date of this notice pursuant to 5th Cir. ECF Filing Standard E.1.

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