IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Docket No. 17-50763

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

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CERTIFICATE OF INTERESTED PARTIES

No. 17-50763

STATE OF TEXAS; KEN PAXTON, Texas Attorney General,
Appellants.

v.

TRAVIS COUNTY, TEXAS, et al.
Appellees.

The undersigned counsel of record certifies that pursuant to the fourth sentence of Rule 28.2.1, the following listed persons or entities have an interest in the outcome of this case. These representations are made so that the judges of this Court may evaluate possible disqualification or recusal.

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STATEMENT REGARDING ORAL ARGUMENT

Appellees respectfully request oral argument.

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JURISDICTIONAL STATEMENT

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

STATEMENT OF ISSUE PRESENTED FOR REVIEW

Whether the district court properly dismissed the State of Texas's request for a declaration that its newly-enacted law is valid under federal law.

INTRODUCTION

Just before midnight on a Sunday, mere hours after the Governor signed Senate Bill 4 ("SB4") into law, the State of Texas filed this lawsuit asking to have its new law declared constitutional. As defendants, the State named municipalities and local officials who had criticized SB4 leading up to its enactment, along with a non-profit civil rights organization. After lawsuits challenging SB4 were filed in a different division, the State asserted that all challenges would have to be transferred to the division the State had chosen on the evening of enactment. Instead, however, the challenges were consolidated in the other venue, where they have made significant progress, including hundreds of pages of briefing on the merits, an all-day evidentiary hearing, a 94-page decision by the district court, and an appeal to this Court.

The district court properly dismissed Texas's unusual suit. Under binding Supreme Court precedent, federal district courts lack statutory jurisdiction over suits by States seeking preemptive declarations that state regulations comply with federal law. Indeed, Texas has ample means to enforce SB4 in its own courts, with penalties that include fines, prosecution, and removal from office. It faced no imminent harm when it filed this lawsuit, four months before SB4 would even go into effect. Texas claims that the defendants' criticism of SB4 and eventual legal challenges harmed the State in various ways, but a State has no cognizable interest

in punishing critics or preempting possible legal challenges. And as the natural defendant, the State has no right to dictate where and when injured parties must seek judicial review, even if it beats them to the courthouse on the evening it enacts a new law.

The State's preemptive lawsuit therefore serves no purpose. The validity of SB4 will be resolved in the separate case where all challenges are already consolidated. Allowing this declaratory suit to proceed would needlessly waste judicial resources and deny the natural plaintiffs their traditional choice of timing and venue. It would invite the State and other governments to file day-of preemptive lawsuits every time they enact controversial laws. And, perhaps worst of all, it would allow the State to put its residents to the expense of litigation any time they criticize a new piece of legislation—as Texas did here. The Court should affirm the district court's dismissal of this case.

STATEMENT OF THE CASE

A. Senate Bill 4.

The State enacted SB4 on May 7, 2017. ROA.292-307. SB4 seeks to ensure that local police in Texas spend their time and resources on immigration enforcement. Among other things, it forbids policies and practices that "materially limit" police officers, sheriff's deputies, and all other local employees from helping enforce federal immigration law. Tex. Gov't Code § 752.053(a)(1)-(2), (b). It

punishes local officials who "endorse" such policies or practices. *Id.* § 752.053(a)(1). And it requires Texas jail officials to comply every time federal immigration officers ask them to extend a person's detention, unless the person can prove their citizenship or lawful immigration status. Tex. Code Crim. Proc. art. 2.251(a).

The State elected to include multiple severe penalties to enforce SB4. Local government officials and employees who restrict subordinates' ability to engage in immigration enforcement are subject to daily penalties of up to $25,500. Tex. Gov't Code § 752.056. Elected and appointed officials can be forcibly removed from office for a single violation. *Id.* § 752.0565. And a law enforcement leader who knowingly fails to hold a person for ICE is subject to criminal prosecution and up to a year in jail. Tex. Penal Code § 39.07. These penalties are imposed in state courts, which must give an action to remove a non-compliant official "precedence" over other matters. Tex. Gov't Code § 752.0565(b).

Under Texas law, a bill cannot go into immediate effect unless two thirds of all state legislators vote for it. Tex. Const. art. III, § 39. SB4 failed to meet that threshold, and so its effective date was set for September 1, 2017—four months after enactment. *See* SB4 § 7.02.

B. This Lawsuit.

1. Governor Abbott signed SB4 into law on Sunday evening, May 7. A few hours later, just before midnight, the State filed this case in the Austin Division of the Western District of Texas, seeking a declaration that the just-enacted law was constitutional and not preempted. ROA.21, 46. As defendants, the State named a non-profit civil rights law firm, two municipalities, and several local officials who had expressed opposition to SB4 while it was being debated in the Legislature.[1] ROA.25-27.

The complaint alleged that the non-profit and officials were all "publicly hostile" to SB4's policies and had "publicly endorsed" limitations on local immigration enforcement, as evidenced by their pre-SB4 policies and "through various public statements." ROA.22, 34, 35 (Compl. ¶¶ 3-5, 104, 107, 112); *see also* ROA.251, 252, 275, 276 (Am. Compl. ¶¶ 9, 10, 14, 15, 205, 210). The State also noted Travis County's policy of limiting the time and resources its sheriff's deputies devote to immigration enforcement. The State alleged that this policy had been revised even "after SB4 was introduced in the Texas Legislature," and that a county official had "publicly endorsed" it. ROA.34 (Compl. ¶¶ 105, 107). Even though Texas had enacted SB4's enforcement provisions just hours earlier, the

[1] The defendants were Travis County, the City of Austin, multiple officials from both municipalities, and the Mexican American Legal Defense and Educational Fund.

complaint asserted that, if Travis County maintained its policy once SB4 took effect, "Texas has no adequate remedy at law." ROA.43 (Compl. ¶ 170); *see* ROA.42, 45, 46 (Compl. ¶¶ 153, 186, 201).

2. On May 8, the day after Texas enacted SB4 and filed its "preemptive[]" suit, Br. 14, the first challenge to SB4 was filed in the San Antonio Division by the City of El Cenizo and co-plaintiffs. *City of El Cenizo v. State of Texas*, No. 5:17-cv-404 (W.D. Tex.). The plaintiffs asserted both constitutional and preemption claims, and sought an injunction barring SB4's enforcement. Another challenge was filed by El Paso County and co-plaintiffs on May 22. *El Paso County v. State of Texas*, 5:17-cv-459 (W.D. Tex.). The State had not sued any of the El Cenizo or El Paso plaintiffs in its preemptive suit. But on May 24, the State moved to transfer their cases to the Austin Division, arguing that because the State filed its declaratory suit hours before any challenges were filed, the challenges could not proceed elsewhere. ROA.168. On May 31, the State filed an amended complaint in the present case, adding all of the El Cenizo and El Paso challengers as defendants. ROA.248.

On June 1, the City of San Antonio and co-plaintiffs filed another challenge against SB4 in the San Antonio Division. *City of San Antonio v. State of Texas*, 5:17-cv-489 (W.D. Tex.). On June 6, Judge Garcia in San Antonio consolidated the El Paso and San Antonio challenges into the El Cenizo case. *City of El Cenizo*

v. State of Texas, No. 5:17-cv-404 (W.D. Tex.), ECF No. 27. Within several weeks, four municipalities—Austin, Travis County, Dallas, and Houston—moved to intervene in the consolidated action. *Id.*, ECF Nos. 33, 37, 67, 99. As a result, by June 2017, every case challenging SB4 was consolidated in the same division before the same district judge. None has ever been filed in any other division.

Nevertheless, the State moved to transfer and consolidate every one of these challenges with the declaratory judgment action it filed the day it enacted SB4. ROA.308, 312, 421, 425. The State claimed that by filing the first case related to SB4, it was entitled to consolidate every forthcoming challenge to the statute with its own case—in the forum of its choosing. ROA.428, 449, 545. The defendants in Texas's declaratory case moved to dismiss, arguing that the court lacked jurisdiction and, in any event, should dismiss in its discretion. ROA.571-74, 606-09.

Meanwhile, the challenges in San Antonio moved forward. All plaintiff groups filed motions for preliminary injunction, numerous *amici* filed briefs, and the United States filed a statement of interest. The district court held an all-day hearing on June 26, where the parties took oral testimony and presented oral argument, followed by post-hearing briefing from all parties. *City of El Cenizo v. State of Texas*, No. 5:17-cv-404 (W.D. Tex.), ECF No. 140.

C. The Decision Below.

The district court, per Judge Sam Sparks, dismissed this case for lack of jurisdiction on August 9, 2017. ROA.635-45. First, it rejected the State's standing arguments. Texas had maintained that it did not need to have standing in its declaratory suit, so long as the defendants would have had standing in their own suit; the district court disagreed, explaining that a declaratory judgment plaintiff is not "exempt from Article III's standing requirements." ROA.641. The State had also alleged that the local entities it sued were planning to violate SB4 once it took effect, citing their public advocacy against the law, and the fact that they did not change their policies prior to SB4's enactment and effective date; the district court, however, found "no evidence" that any of the defendants planned to violate SB4. ROA.643.

Second, the district court described the problems that would result from allowing a declaratory suit like Texas's to proceed. After noting the progress of the challenges to SB4 in the San Antonio Division, ROA.638, the court explained that it would be a waste of "judicial resources" to entertain the State's declaratory judgment action. ROA.644. And it would "open a Pandora's box" by "invit[ing] every local government to seek a court's judicial blessing on a law prior to it taking effect." ROA.644 (quotation marks omitted). The district court further cited a case where the court called preemptive suits to declare a law's validity

"troubl[ing]" and "premature," and where the court explained that it would dismiss the declaratory claim in its discretion, even if it had jurisdiction. *Villas at Parkside Partners v. City of Farmers Branch*, 577 F. Supp. 2d 880, 884-85 (N.D. Tex. 2008) (cited ROA.644).[2]

D. Subsequent Developments.

After Judge Sparks dismissed the Austin action, Judge Garcia in San Antonio preliminarily enjoined parts of SB4 on August 30, 2017. In a 94-page opinion, the court addressed numerous justiciability questions and ruled on the merits of the plaintiffs' First Amendment, Fourth Amendment, Fourteenth Amendment, and preemption claims. *City of El Cenizo v. State of Texas*, 264 F. Supp. 3d 744 (W.D. Tex. 2017).

The State appealed the preliminary injunction the next day, on August 31. That same day, it also filed a notice of appeal in the present case. ROA.647. On September 5, the State filed a motion to stay the San Antonio preliminary injunction pending appeal.

In the San Antonio cases, the stay motion and merits appeal were set for highly expedited schedules. On September 25, a motions panel of this Court partially stayed the preliminary injunction entered by the San Antonio district

[2] The district court also recognized that even if the State had standing, its claims may not be ripe. ROA.643 n.6.

court. *City of El Cenizo v. Texas*, No. 17-50762, 2017 WL 4250186 (5th Cir. Sept. 25, 2017) (per curiam). Merits briefing in that case was completed on October 27, the Court held oral argument on November 7, and the case is under submission.

SUMMARY OF ARGUMENT

I. The district court does not have statutory subject-matter jurisdiction over this case. The Supreme Court has held that federal district courts' original jurisdiction does not extend to preemptive suits by States to have their laws declared valid. As the Court explained, States have no need to preempt challengers with declaratory suits like Texas's, because States have ample means to enforce their own laws in their own courts. Texas's suit is foreclosed by that rule, because it seeks nothing more than a declaration that SB4 is valid under federal law. The Court should affirm on this basis alone.

II. The State lacks standing, because it faces no cognizable injury, and certainly none that a declaration could redress. It filed this lawsuit hours after enacting SB4, months before the statute went into effect. All it has alleged is that local officials criticized SB4, that those officials later challenged SB4 in court, and that the defendants did not change their policies months in advance of SB4's effective date.

None of those circumstances causes the State any injury. Critical statements do not imply any intention to violate the law. Neither does filing a lawsuit and

asking a court to review a statute's validity. And even if one of the defendants had somehow intended to violate SB4—and thereby face criminal liability, civil fines, and removal from office—a declaratory judgment would not have redressed the violation.

Aware that it has no real injuries to assert, the State advances the sweeping alternative theory that it can have standing *without* an injury in fact, as long as it sues someone who could challenge SB4. That is wrong. A declaratory judgment plaintiff, like every other plaintiff, must satisfy Article III's core requirements of injury, causation, and redressability before it can invoke federal jurisdiction. Unlike alleged patent infringers, alleged libelers, potential criminal defendants seeking pre-enforcement review, and other plaintiffs who seek declaratory judgments to forestall actual liability, the State faced no liability or other injury.

Finally, even if an imminent suit could provide standing, the State filed this case *before* any of the current defendants threatened to sue. While challenges were filed soon after, a plaintiff must establish standing as of the date it files its lawsuit. As this Court has held, post-filing conduct is irrelevant.

III. Dismissal is appropriate even if the district court had statutory jurisdiction and Texas had standing. Courts may dismiss wasteful or unnecessary declaratory suits, especially preemptive ones, and especially once the natural plaintiff files the anticipated challenge. As the district court correctly

recognized—and this Court may independently decide—there is no reason to retain jurisdiction over this case, and every reason not to.

The State filed this case for the avowed purpose of preempting challenges to SB4 and forcing them to be brought in the State's chosen venue. But as the natural defendant, it is not the State's choice to decide where, when, and against whom its laws are reviewed. Entertaining the State's unusual suit would invite every state and local government that passes a controversial new law to rush into court and seek a declaration of the law's validity against anyone who has previously criticized it.

Every challenge to SB4 is currently consolidated in a single division before the same judge. The court in those cases has already expended considerable resources reviewing the claims against SB4, and the challenges are already before this Court on appeal. As a result, it would be a remarkable waste of judicial resources to adjudicate the State's suit in parallel, or to transfer the challenges to a division where the district court would have to start from scratch.

STANDARD OF REVIEW

The Court reviews the district court's legal conclusions de novo and factual findings for clear error. *Rivera-Sanchez v. Reno*, 198 F.3d 545, 546 (5th Cir. 1999); *United States v. Scher*, 601 F.3d 408, 412 (5th Cir. 2010). The district court's decision to dismiss a claim brought under the Declaratory Judgment Act is

reviewed for abuse of discretion. *Am. States Ins. Co. v. Bailey*, 133 F.3d 363, 368 (5th Cir. 1998). The Court "may affirm the district court's judgment on any basis supported by the record." *United States v. Chacon*, 742 F.3d 219, 220 (5th Cir. 2014).

ARGUMENT

The district court was correct to dismiss this case for at least three reasons. First, as the Supreme Court has held, federal courts lack subject-matter jurisdiction over claims by States seeking advance declarations that their enactments comply with federal law. Second, Texas lacks Article III standing because it faces no cognizable injury, and certainly none that a declaration could redress. Third, in any event, the district court properly recognized that dismissal is required by the relevant factors governing the propriety of declaratory relief. This Court should affirm.

I. The District Court Lacks Statutory Jurisdiction.

1. This case is controlled by the Supreme Court's decision in *Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust for So. Cal.*, 463 U.S. 1, 20-21 (1983), which held that federal courts lack original subject-matter jurisdiction over suits by States seeking declarations that their regulations comply with federal law.[3]

[3] Although the district court did not address this issue, this Court may affirm on any ground supported by the record, *Chacon*, 742 F.3d at 220, and "[e]very federal

The Declaratory Judgment Act "is not an independent source of federal jurisdiction." *Schilling v. Rogers*, 363 U.S. 666, 677 (1960); *see* 28 U.S.C. § 2201 (titled "Creation of remedy"). Instead, for statutory jurisdiction, declaratory judgment plaintiffs must look to the federal-question statute, which provides district courts with "original jurisdiction of all civil actions arising under" federal law. 28 U.S.C. § 1331. But in *Franchise Tax Board*, the Supreme Court squarely held that such jurisdiction does not extend to "suits by the States to declare the validity of their regulations despite possibly conflicting federal law." 463 U.S. at 21. Therefore, "such a suit is not within the original jurisdiction of the United States district courts." *Id.* at 22. *See* 13D Wright & Miller, Federal Practice & Procedure § 3566 (3d ed. 2017) ("[T]here is no federal jurisdiction of a suit by a state to declare the validity of its regulations despite possibly conflicting federal law."). This rule is fatal to Texas's suit, which seeks nothing more than "to declare the validity of" SB4 "despite possibly conflicting federal law." *Franchise Tax Board*, 463 U.S. at 21; *see* ROA.288 (Prayer for Relief) (seeking only declaratory judgment, and identifying possibly conflicting federal laws).

The Court in *Franchise Tax Board* acknowledged that, ordinarily, federal courts take "jurisdiction over declaratory judgments in which, if the declaratory

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appellate court has a special obligation to satisfy itself not only of its own jurisdiction, but also that of the lower courts," *Steel Co. v. Citizens for a Better Envm't*, 523 U.S. 83, 95 (1998) (quotation marks omitted).

judgment defendant brought a coercive action to enforce its rights, that suit would necessarily present a federal question." 463 U.S. at 19. But "a State's suit for a declaration of the validity of state law is sufficiently removed from the spirit" of the federal-question statute that it "is not within the original jurisdiction of the United States district courts." *Id.* at 21-22.

The Court identified "good reasons" why federal jurisdiction should not extend to preemptive suits like Texas's. *Id.* at 21. "States are not significantly prejudiced by an inability to come to federal court for a declaratory judgment in advance of a possible injunctive suit." *Id.* Indeed, States "have a variety of means by which they can enforce their own laws in their own courts"—like SB4's criminal penalties, civil fines, and removal from office—and States "do not suffer" by having to use those means to enforce their laws. *Id.*

The relevant circumstances in *Franchise Tax Board* were the same as in this case. There, a California tax board sued a trust seeking a declaration that ERISA did *not* preempt a state tax law that applied to the trust, *id.* at 6-7; the trust had maintained that ERISA *did* preempt the state tax law, *id.* at 6, and the Court assumed that the trust "could have sought an injunction" of the state law on those grounds, *id.* at 19-20. The exact same is true here. Texas's whole theory of standing is predicated on the fact that the State and the defendants disagree about

SB4's validity under federal law, and that the defendants can seek to enjoin the State's law. Br. 17-23.

Following *Franchise Tax Board*, the lower courts have consistently rejected governmental attempts to obtain declarations against those who might challenge their laws. *See, e.g.*, *State of Missouri ex rel. Missouri Highway and Trans. Comm'n v. Cuffley*, 112 F.3d 1332, 1336-37 (8th Cir. 1997) ("[A] declaratory judgment suit brought by a state to uphold the constitutionality of its action is not within the federal-question jurisdiction of the federal courts."); *Republican Party of Guam v. Gutierrez*, 277 F.3d 1086, 1090 (9th Cir. 2002) (same in a suit between a state and its sub-entities); *Int'l Society for Krishna Consciousness of Cal., Inc. v. City of Los Angeles*, 611 F. Supp. 315, 318 (C.D. Cal. 1984).

2. The State's attempts to distinguish *Franchise Tax Board* are unpersuasive. First, the State points out that *Franchise Tax Board* dealt with statutory jurisdiction, not standing. Br. 24. But the State needs *both* for its suit to proceed. If a court lacks subject-matter jurisdiction, it need not even consider standing. *Stockman v. Federal Election Comm'n*, 138 F.3d 144, 150-51 (5th Cir. 1998).

Second, the State claims that, unlike in *Franchise Tax Board*, "there is no federal regulation at issue here that would allow an injunctive suit by the defendants." Br. 24. But its principal standing contention is that the defendants

can sue to enjoin SB4, and it has never claimed that they lack a cause of action in the San Antonio cases. Br. 20 (stating that the defendants have "a live federal cause of action"). Moreover, those challenges are grounded in a "federal regulation" that allows for an "injunctive suit" against the State, Br. 24: 42 U.S.C. § 1983 (providing for a "suit in equity").

Third, the State suggests that this case is different because it does not involve ERISA and includes constitutional claims. Br. 24-25. But *Franchise Tax Board*'s rule is categorical: "federal courts should not entertain suits by the States to declare the validity of their regulations"; "a State's suit for a declaration of the validity of state law . . . is not within the original jurisdiction" of federal district courts. 463 U.S. at 21-22. Moreover, the "good reasons" for the rule apply equally no matter what federal law is at issue.[4] 463 U.S. at 21. Courts have consistently refused similar attempts to artificially confine *Franchise Tax Board*. *See Cuffley*, 112 F.3d at 1336 (holding that *Franchise Tax Board* applies to constitutional claims); *Republican Party of Guam*, 277 F.3d at 1090 (rejecting exception for disputes between state entities); *Ohio v. Nobile & Thompson Co., LPA*, 2013 WL 753837, at *6 (S.D. Ohio Feb. 27, 2013) (rejecting ERISA-based limit); 13D Wright & Miller, Federal Practice and Procedure § 3566 (3d ed. 2017)

[4] The Court mentioned ERISA's jurisdictional provision, *id.* at 21, but only to explain that the provision did not confer jurisdiction over the state's claim.

(summarizing the rule in *Franchise Tax Board* as being, simply, that "there is no federal jurisdiction of a suit by a state to declare the validity of its regulations despite possibly conflicting federal law").

Finally, Texas suggests this case is different because, unlike *Franchise Tax Board*, it was not removed from state court. Br. 23-24. But the relevant legal question—whether the district court has original jurisdiction—is exactly the same in both situations, because removal jurisdiction depends entirely on "whether the case originally could have been filed in federal court." *City of Chicago v. Int'l College of Surgeons*, 522 U.S. 156, 163 (1997) (citing 28 U.S.C. § 1441(a)); *see Franchise Tax Board*, 463 U.S. at 21-22 (denying removal because "original jurisdiction" was lacking). Texas notes that the Court, in a footnote, mentioned "considerations of comity," Br. 24, but the Court did so to *justify* the broadly-applicable rule it was adopting, not to limit the rule to the removal context. 463 U.S. at 21 n.22.

The Supreme Court has thus foreclosed the precise kind of lawsuit the State has brought. This ground alone is a dispositive basis to affirm.

II. Texas Lacks Standing.

Even if this kind of suit fell within the district court's subject-matter jurisdiction, the State lacks standing to advance its declaratory claims. The State has not established any cognizable injury, and certainly none that a declaratory

judgment would redress. The only facts the State has put forward to support standing are the defendants' pre-SB4 policies, public statements criticizing the bill, and legal filings that post-date Texas's complaint. On those facts, the State argues three theories of standing: that the policies and critical "statements implicitly acknowledged" an intent to violate SB4, Br. 9, 35; that those same critical statements proved an intent to sue imminently, Br. 26; and, most sweepingly, that the State has standing to sue *any* regulated party, along with anyone else who could sue the State, Br. 16-17. Each of those theories is wrong.

To have standing, a plaintiff must face an "actual or imminent" injury in fact that is "redressable" by a favorable decision on the merits. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). "Standing to seek declaratory judgment is subject to these same requirements." *BroadStar Wind Sys. Grp. LLC v. Stephens*, 459 Fed. App'x 351, 356 (5th Cir. 2012) (unpublished); *see Lawson v. Callahan*, 111 F.3d 403, 405 (5th Cir. 1997) (declaratory judgment standards are "identical" to normal Article III requirements); *accord* Br. 16. Therefore, to seek a declaratory judgment, a plaintiff must establish that it faces an injury in fact that would be redressed by a declaration. "The declaratory judgment plaintiff must establish that this requirement was satisfied at the time the complaint was filed—post-filing conduct is not relevant." *Vantage Trailers, Inc. v. Beall Corp.*, 567 F.3d 745, 748 (5th Cir. 2009).

The standing inquiry asks "not whether the issue itself is justiciable," but whether the plaintiff is the "proper party to request an adjudication of [that] particular issue." *Flast v. Cohen*, 392 U.S. 83, 100 (1968). As a State whose laws are presumed constitutional until a court rules otherwise, *see Burlington N. & Santa Fe Ry. Co. v. Poole Chem. Co.*, 419 F.3d 355, 361 (5th Cir. 2005), Texas is not a proper party to seek a preemptive declaration of SB4's validity. Without an injury of its own, the State's suit is a request for an impermissible "advisory opinion." *Flast*, 392 U.S. at 96.

A. Speculation About Violations of SB4 Does Not Create Standing.

The State maintains that it needed a declaratory judgment to address future violations of SB4. Br. 29 (asserting "[p]ending violations" of SB4); Br. 31 (describing the State's harm from being "unable to enforce its laws"); Br. 32 (describing harm of "not [being] able to enforce" SB4 because of "Defendants' course of conduct"). This is a strange contention in light of SB4's *own* enforcement mechanisms—fines, termination, imprisonment—which the State itself chose. Gov't Code § 752.056, .056; Penal Code § 39.07. The State fails to explain how a declaratory judgment would redress violations that its own enforcement mechanisms would not.

In any case, the State produced nothing to prove that it faced any future violations of SB4. The only evidence it has ever cited are legal arguments in filed

complaints, public statements criticizing SB4, and policies adopted before SB4 was enacted. The State is wrong to suggest that, by criticizing a bill or seeking judicial review, local officials somehow demonstrate a plan to violate state law.

1. The district court rejected the State's claim that it faced pending violations of SB4. As the court found, "[t]he State has produced no evidence that at the time of filing suit," violations of SB4 were imminent or likely. ROA.643. That finding was not "clearly erroneous." *Williamson v. Tucker*, 645 F.2d 404, 413 (1981) (clear error review for district court's resolution of disputed facts going to jurisdiction). Nor was the district court required to credit the State's "conclusory statements" that violations were imminent, *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *see* ROA.254-62 (Am. Compl. ¶¶ 35, 40, 43, 48, 66, 72, 78, 82, 92, 97, 103, 108) (bare allegations that the defendants plan to violate SB4), or the State's "implausible" equation of criticism and legal challenges with plans to violate the law once in effect, *Harold H. Huggins Realty, Inc. v. FNC, Inc.*, 634 F.3d 787, 796 (5th Cir. 2011).

The State does not address these standards. It simply asserts that its allegations "must be taken as true at the pleading stage." Br. 35. But it is black-letter law that a district court need not accept conclusory or implausible allegations, and may "resolve factual disputes" in deciding a motion to dismiss for lack of jurisdiction. *In re Complaint of RLB Contracting, Inc.*, 773 F.3d 596, 601

& n.7 (5th Cir. 2014) ("No presumptive truthfulness attaches to the plaintiff's allegations.") (quotation marks and alterations omitted).

In any case, the district court's conclusion was correct. The State plainly did not face any imminent violations of SB4. To begin with, at the time it filed suit—hours after the Governor signed the bill on May 7—no violations could occur, because the law would not go into effect for almost four months, on September 1. And the civil-rights organizations the State sued were not capable of *ever* violating SB4, which only applies to government entities and officials. Tex. Gov't Code § 752.051(5). The State could never have standing to sue the organizational defendants on this basis.

More fundamentally, the State's brief, like its complaint, is devoid of any evidence that anyone planned to violate SB4 once the statute took effect and its harsh penalties kicked in. The State cites legal allegations from the complaints in the San Antonio cases, which were filed after the State filed this case. Br. 29, 31, 34, 35. It cites a policy that Travis County adopted in *January 2017*—four months before SB4 was enacted and a full eight months before it took effect. Br. 7, 30; *see also* Br. 31 (citing El Cenizo policy from 1999). And it cites statements by elected officials publicly criticizing SB4, which were made *after* Texas filed this suit,[5] and

[5] Many of the statements the State cites were not alleged in the complaint or presented to the district court. *See, e.g.*, Br. 8, 9, 30, 35. The State may not rely on

none of which evinces a plan to violate SB4 and incur removal from office, tens of thousands of dollars in fines, and possible jail time.[6] Br. 30, 35. The Court should reject Texas's assumption that law enforcement officials would disregard state law simply because they lobby against a bill or seek judicial review.

2. Even if the State could somehow prove that some defendants intended to violate SB4 once the law took effect, a declaratory judgment would not redress any violations. A declaratory judgment simply "declare[s] the rights and other legal relations" of the parties. 28 U.S.C. § 2201(a). It does not order either party to do or not do anything. The State's imminent-violation theory of standing therefore fails not just for lack of injury, but also for lack of redressability. *See Danos v. Jones*, 652 F.3d 577, 584 (5th Cir. 2011) (no standing to seek declaratory judgment because a declaration would not redress the asserted injury).

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these statements on appeal. *Theriot v. Parish of Jefferson*, 185 F.3d 477, 491 n.26 (5th Cir. 1999) ("An appellate court may not consider new evidence furnished for the first time on appeal and may not consider facts which were not before the district court at the time of the challenged ruling.").

[6] *See also, e.g.*, ROA.277 (allegation that local official "said SB4 was pointless"); ROA 278 (allegation that defendants "characterize[d] SB4 as a cruel and racially animated law"); ROA.278 (allegation that local official said that SB4 was "'dangerous and discriminatory' and that it 'opens up the door to racial profiling against Hispanics'"); ROA.277 (allegation that official "stated that a city should be able to have their culture reflected in the ordinances, rules, and policies they adopt. In other words, [the official] does not believe the City of Austin . . . must comply with Texas law.").

This, of course, does not leave the State "unable to enforce its laws," as the State claims. Br. 31. The State "can enforce [its] own laws in [its] own courts" and "do[es] not suffer" from "an inability to come to federal court for a declaratory judgment in advance." *Franchise Tax Board*, 463 U.S. at 21.

3. The State also appears to argue that it is injured by some of the defendants' public statements, which failed to give proper respect to the State's sovereignty. Br. 32 ("The State has a sovereign interest in being properly recognized as a sovereign."); Br. 32 (critical statements and certain legal allegations "undermine the rule of law by their attack on the proper role of cities vis-à-vis the State"); Br. 34 (injury from officials "purporting to have the authority to pursue their policies despite state law"); Br. 34-35 (injury from legal allegations that SB4 improperly restricted local police autonomy); Br. 35 (injury from criticism of SB4 and promise to "speak truth to power"); Br. 31 (injury of calling SB4 "insulting").

These are troubling contentions, as the district court recognized. ROA.643 (noting "First Amendment concerns"). The State is not injured when its residents and local officials criticize its laws, articulate legal theories with which it disagrees, or seek judicial review. The Court should emphatically reject these theories of standing, by which the State asserts a right to sue people simply for criticizing the State's policy choices, either because their critical statements fail to

"properly recognize[]" the State "as a sovereign," Br. 32, or because their statements "implicitly acknowledge[]" an intention to violate state law, Br. 9, 35. The State's view threatens to chill free expression and political dialogue, because it would allow the State to put critics to the expense of litigation every time it passes a controversial new law. *Cf.* Gov't Code § 752.053(a)(1) (SB4 provision that local officials may not "endorse" limits on immigration enforcement); ROA.582-83.

B. Other Parties' Ability to Sue Does Not Give Texas Standing.

Texas's broadest standing theory is that it does not need to have standing at all. According to the State, it does "not need a showing of standing beyond the existence of the declaratory defendant's cause of action." Br. 23; *see* Br. 20 ("[T]he State met the standing requirements" simply by "being across the 'v.' from a potential coercive plaintiff asserting a live federal cause of action."); Br. 17 (arguing that "the existence of a cause of action held by the declaratory defendants" establishes "Texas's Article III standing").

1. At the outset, the State has conflated the concepts of Article III standing and a cause of action. *See Steel Co.*, 523 U.S. at 89 (discussing the difference). A plaintiff must have both for its case to proceed. In a declaratory judgment case, "the underlying *cause of action*" that gets litigated "is the declaratory defendant's, not the declaratory plaintiff's." *Lowe v. Ingalls Shipbuilding*, 723 F.2d 1173, 1179 (5th Cir. 1984) (emphasis added). Texas has therefore correctly stated the rule for

its *cause of action*: The State does not need one of its own "beyond . . . the declaratory defendant's cause of action." Br. 23. Being across the "v." from a "potential coercive plaintiff" with a "federal cause of action" is enough for these purposes. Br. 20.

But having a cause of action does not mean the State has Article III standing. And while it may borrow the defendants' causes of action, it cannot somehow borrow the defendants' standing. The cases the State relies on simply establish that a declaratory plaintiff can litigate the defendant's cause of action. *See Collin Cty. v. Homeowners Ass'n for Values Essential to Neighborhoods ("HAVEN")*, 915 F.2d 167, 171 (5th Cir. 1990) (cited Br. 18). The State cites nothing to suggest that it is excused from personally satisfying "the irreducible constitutional minimum of standing." *Lujan*, 504 U.S. at 560.

To the contrary: Under Article III, "*the plaintiff* must have suffered an injury in fact" that is "actual or imminent" and "redressable by a favorable decision" on the merits. *Id.* at 560-61 (quotation marks omitted, emphasis added). As this Court put it, "[i]f *the party invoking federal jurisdiction* fails to establish any one of injury in fact, causation, or redressability, then federal courts cannot hear the suit." *William v. Parker*, 843 F.3d 617, 621 (5th Cir. 2016) (emphasis added); *see Caraco Pharm. Labs., Ltd. v. Forest Labs., Inc*., 527 F.3d 1278, 1291 (Fed. Cir. 2008) (declaratory judgment action "is justiciable under Article III only

where [] *the plaintiff* has standing") (emphasis added). Elsewhere in its brief, the State seems to agree: "A party seeking a declaratory judgment must therefore meet these Article III standing requirements." Br. 17.

The State's broadest theory of standing is therefore wrong. The fact that "the defendants claimed an existing cause of action" does not *ipso facto* cause Texas an injury that a declaratory judgment would redress. Br. 17. As this Court has held, "threats of legal action, alone, cannot create an actual controversy under the Declaratory Judgment Act." *Vantage Trailers*, 567 F.3d at 751.

2. The State does not face the kind of injury that creates standing to seek a declaratory judgment. Declaratory judgment plaintiffs have standing when they are "threatened with liability"—criminal, financial, or otherwise—which an "early adjudication" allows them to avoid. *HAVEN*, 915 F.2d at 170 (cited Br. 18, 25). For instance, when a patent holder threatens to sue for infringement, alleged infringers are put "to an *in terrorem* choice between . . . growing potential liability for patent infringement and abandonment of their enterprises." *Cardinal Chem. Co. v. Morton Int'l, Inc.*, 508 U.S. 83, 96 (1993) (quotation mark omitted). A declaratory judgment redresses the dilemma of having to choose between those two options—accruing liability or abandoning one's right to pursue the allegedly infringing activity. *See also Franchise Tax Board*, 463 U.S. at 21 n.23.

The same is true in the criminal context. When a person believes he has a right to do something that a criminal law prohibits, a declaratory judgment allows him to test the law's validity in advance. If the person were to avoid the action for fear of prosecution, he would be giving up his own rights; but if he took the action and was wrong about the law's validity, he would incur punishment. A declaratory judgment redresses this "dilemma" of having to choose between "abandoning his rights or risking prosecution." *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 129 (2007) (describing *Steffel v. Thompson*, 415 U.S. 452, 480 (1974)).

Examples abound of plaintiffs seeking declarations to avoid actual or imminent liability. *See, e.g.*, *MedImmune*, 549 U.S. at 122, 130-31 (injury of paying royalties or facing liability for treble damages); *Waste Connections, Inc. v. Chevedden*, 554 Fed. App'x 334, 335-36 (5th Cir. 2014) (unpublished) (injury of "spending a significant sum to revise its proxy statement" or face "an SEC enforcement action or liability from other shareholders"); *Sherwin-Williams Co. v. Holmes Cty.*, 343 F.3d 383, 399 n.9 (5th Cir. 2003) (cited Br. 37) (injury of facing "liab[ility] for damages caused by lead paint"); *Rowan Companies, Inc. v. Griffin*, 876 F.2d 26, 28 (5th Cir. 1989) (cited Br. 18) (injury of paying medical costs or facing "liability" and "damage [that] has accrued") (quotation marks omitted). In each case, the plaintiff had standing because she faced some actual injury, which a declaratory judgment would redress.

Where a declaratory judgment plaintiff faces "no actual liability," however, it has no "cognizable interest" in obtaining a declaration, absent some other injury. *HAVEN*, 915 F.2d at 171. And where a plaintiff faces no cognizable injury of its own, its request for a declaration of the law amounts to an impermissible request for an advisory opinion. *Flast v. Cohen*, 392 U.S. 83, 100 (1983) (holding that an un-injured plaintiff is not the "proper party to request an adjudication of a particular issue," even if "the issue itself is justiciable"). That is true for Texas here. It has identified no liability that it would have accrued while SB4's validity went unlitigated. It has identified no actions it took or activities it avoided to forestall the threat of liability. And it has identified no other injury that a declaratory judgment would redress. *See supra* Part I.A. Moreover, the State concedes that it believed local officials were "certain[]" to file lawsuits "in advance of SB4's effective date," in which the statute's legality would be adjudicated. Br. 28. The State faced no harm in the meantime.

Nor are the lawsuits themselves a cognizable injury. A State is not injured when its residents seek judicial review of its laws.[7] *See Hispanic Interest Coalition of Alabama v. Governor of Alabama*, 691 F.3d 1236, 1249 (11th Cir. 2012) (States

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[7] Some cases describe injuries that are cognizable, like "risk[ing] liability for treble damages and attorney's fees," using the shorthand "risking suit." *Medtronic, Inc. v. Mirowski Family Ventures, LLC*, 134 S. Ct. 843, 850 (2014). In those circumstances, it is clear that the injury is increased liability, not the suit itself.

have "no interest in enforcing a state law that is unconstitutional"). And to the extent Texas considers itself injured simply by becoming a litigant, its declaratory suit *caused* that injury by making Texas a litigant.

C. Even If Threats of Litigation Created Standing, Texas Did Not Identify Any Threats by the Current Defendants When It Filed Suit.

As explained above, "[i]mpending litigation" (Br. 26) does not, by itself, create standing. *See supra* Part I.B. But even if it did, the State had identified virtually no threats of imminent litigation by the time it filed its complaint, mere hours after SB4 became law. Even though challengers filed lawsuits soon after, a plaintiff must have standing at the moment the complaint is filed. *See Lujan*, 504 U.S. at 570 n.5 ("[S]tanding is to be determined as of the commencement of suit."); *Vantage Trailers*, 567 F.3d at 748 ("post-filing conduct is not relevant" for standing to seek declaratory judgment); *Kitty Hawk Aircargo, Inc. v. Chao*, 418 F.3d 453, 460 (5th Cir. 2005) ("The party invoking the jurisdiction of the court cannot rely on events that unfolded after the filing of the complaint to establish its standing."). And it is the plaintiff's burden to produce facts that establish its own standing. *See Raines v. Byrd*, 521 U.S. 811, 818-19 (1997) ("insist[ing] on strict compliance" with the rule that plaintiffs, "based on their complaint, must establish that they have standing to sue").

The State's complaint cited only a single statement where a defendant planned to file suit, ROA.36 (Compl. ¶ 114 & n.5), and the State later voluntarily

dismissed its claims against that defendant, ROA.553-54. The complaint alleged no facts indicating that any of the current defendants would file "imminent litigation." Br. 26. It simply alleged that some defendants had criticized SB4, and that other defendants had pre-SB4 policies that would have to change once SB4 became effective, four months later. *See* ROA.25-27. These policies and criticisms do not establish the "certainty" Texas claims. Br. 28. As its own cases demonstrate, in the circumstances where imminent litigation *can* give rise to standing, *see supra* Part II.B, far more concrete facts are required to prove that litigation is imminent. *See NUCOR Corp. v. Aceros Y Maquillas de Occidente*, 28 F.3d 572, 578 (7th Cir. 1994) (cited Br. 26) ("notice letter" promising suit within 60 days); *Travelers Ins. Co. v. La. Farm Bureau Fed'n, Inc.,* 996 F.2d 774, 775 & n.2 (5th Cir. 1993) (cited Br. 37) (multiple demand letters explicitly threatening to sue; five suits already filed); *see also Orix Credit Alliance, Inc. v. Wolfe*, 212 F.3d 891, 897 (5th Cir. 2007) (cited Br. 25-27) (no standing even where the threatened legal filing was already drafted and shared).

As the district court observed, the defendants in this case did not announce any intention to sue until "*after* the law was signed and the Austin case was filed." ROA.643 (emphasis added). The critical public statements Texas cited likewise were made "*after* . . . the Austin case was filed." ROA.643 (emphasis added). The district court thus did not conclude that, as of the date of the complaint, "Texas

cities were virtually certain to sue," as the State claims. Br. 27. Exactly the opposite. As the plaintiff, it was the State's burden to establish standing, and it failed to do so here.

The defendants' "later suits" therefore do not "change the fact that" the litigation threats Texas claims did not "exist[] at the time the original complaint was filed." *Innovative Therapies, Inc. v. Kinetic Concepts, Inc.*, 599 F.3d 1377, 1383 (Fed. Cir. 2010) (upholding dismissal of a declaratory suit on this basis). To hold otherwise would "invite a declaratory judgment plaintiff" to file suit "at the earliest moment," before it actually has standing to sue. *Id.* at 1384.

Texas's impending-litigation theory amounts to the same assertion that it has standing to seek a declaratory judgment against anyone who criticizes its laws, or who "publicly endorse[s]" differing policies. Br. 14. Under its reasoning, any public criticism proves an intent to sue, which creates standing. That theory, like the State's impending-violations theory, would have troubling First Amendment consequences and should be rejected.

III. The District Court Was Correct to Decline Jurisdiction.

1. Even if the district court had subject-matter jurisdiction, and even if Texas had standing, dismissal was still appropriate. District courts are free to decline jurisdiction where entertaining a declaratory action would be "a wasteful expenditure of judicial resources," *Wilton v. Seven Falls Co.*, 515 U.S. 277, 278

(1995), "deprive[] the [natural] plaintiff of his traditional choice of forum and timing," *Morgan Drexen, Inc. v. CFPB*, 785 F.3d 684, 697 (D.C. Cir. 2015), "encourage forum shopping [or] races to the courthouse," *AmSouth Bank v. Dole*, 386 F.3d 763, 788 (6th Cir. 2004), or "serve no useful purpose," *Odeco, Inc. v. Bridgett*, 22 F.3d 1093 (5th Cir. 1994) (unpublished).

Each of those factors independently warrants dismissal here, as the district court recognized. The court's dismissal was "driven in large part" by a desire not to waste "judicial resources." ROA.644. Indeed, as the court noted, the plaintiffs in the San Antonio cases had already filed preliminary injunction motions, "submitted evidence," and "presented arguments" on "the same legal issues" as this case. ROA.638. Even worse than wasting resources, entertaining the State's claims 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.644 (quotation marks omitted). In short, the district court saw no reason to retain jurisdiction and many reasons to reject it.

The district court did not explicitly issue a separate holding that discretionary dismissal was appropriate, because it dismissed for lack of standing. *Cf. Steel Co.*, 523 U.S. at 94-95 (courts must address jurisdiction first). But the court clearly stated that it had no intention of entertaining this unusual suit, as it highlighted numerous factors strongly favoring dismissal: the conservation of

judicial resources, the progress of the San Antonio challenges, and the danger of encouraging states to race challengers to the courthouse to have their new laws declared valid. Under these circumstances, this Court should uphold dismissal even if it concludes that Texas has standing. The district court's reasoning makes it crystal clear that "remand would be futile and a waste of judicial resources." *Austin v. Davis*, 693 Fed. App'x 342, 343 (5th Cir. 2017) (unpublished); *see United States v. Alvarez*, 210 F.3d 309, 310 (5th Cir. 2000) (same); *Camper v. Calumet Petrochem., Inc.*, 584 F.2d 70, 71 (5th Cir. 1978) ("Remand would be futile and mere academic error correcting.") (quotation marks omitted).

2. In any event, this Court may decide for itself whether dismissal is proper. *See, e.g.*, *Travelers*, 996 F.2d at 779. Doing so here would be "judicious," *id.*, because the relevant considerations all favor dismissal.[8]

The State filed this lawsuit hours after enacting SB4, for the avowed purpose of preempting challengers and forcing them to litigate in the State's chosen venue. As it concedes in its brief, it believed "that defendants' lawsuit was to be filed imminently, in advance of SB4's effective date." Br. 28; *see* Br. 39 (State believed

[8] The Court declined to reach the dismissal factors "[u]nder the[] circumstances" of *MedImmune*. 549 U.S. at 136. Unlike in the present case, the district court had expressed "serious misgivings" about dismissing the case, practical considerations had been "irrelevant" to the lower courts, and the parties had not even briefed the dismissal factors below. *Id.*; *compare* ROA.571-74, 606-09 (briefing below). The Court's reliance on these circumstances suggests it would have reached this question had the circumstances been different.

localities were "on the precipice of litigation"). Accordingly, there was no prospect of ongoing uncertainty to resolve. Instead, the State filed suit to avail itself of "the first-to-file rule" and ensure that all challenges would be "heard in the Austin Division." Br. 38-39.

Courts typically frown on that sort of behavior. *See, e.g.*, *Morgan Drexen*, 785 F.3d at 697 ("The anticipation of defenses is not ordinarily a proper use of the declaratory judgment procedure."); *J.B. Hunt Trans., 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."); *Mission Ins. Co. v. Puritan Fashions Co*., 706 F.2d 599, 602 & n.3 (5th Cir. 1983) ("anticipatory suits are disfavored"); *Cunningham Bros., Inc. v. Bail*, 407 F.2d 1165, 1167 (7th Cir. 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."). And courts certainly do not defer to first-filed declaratory actions once the plaintiff-in-fact has filed the anticipated lawsuit. *See, e.g.*, *AmSouth Bank*, 386 F.3d at 786 ("[C]ourts will decline to hear the [first-filed declaratory] action in favor of a subsequently-filed coercive action by the 'natural plaintiff.'"); *Wilton v. Seven Falls Co.*, 41 F.3d 934, 934 (5th Cir. 1994) (declining to proceed with first-filed declaratory suit filed to "[a]nticipat[e] litigation"), *aff'd*, 515 U.S. 277 (1995); *Travelers*, 996 F.2d at 779 n.15 (rejecting the "quixotic"

argument that the order of filing trumps the dismissal factors); *Serco Servs. Co., L.P. v. Kelley Co.*, 1994 WL 715913, at *1 (N.D. Tex. May 24, 1994), *aff'd*, 51 F.3d 1037 (Fed. Cir. 1995) ("[T]he filing of an anticipatory suit trumps the 'first-filed' rule.").

The State claims that this case should proceed to "avoid[] a multiplicity of lawsuits in various forums." Br. 37. But even if lawsuits had been filed in multiple venues, which they were not, the State could have used the exact same consolidation mechanisms it invoked in this case. *See* 28 U.S.C. § 1404 (transfer); Fed. R. Civ. P. 42(a)(2) (consolidation). In fact, if it wanted to consolidate multiple challenges, it was always going to have to file transfer and consolidation motions; its preemptive suit did not change that. The State could have simply moved to consolidate wherever the first injunctive action was filed. Thus, the possibility of needing to file a consolidation motion does not justify allowing the State, as the defendant-in-fact, to dictate where consolidation must occur.

By contrast, in cases where a multiplicity of suits has supported retaining jurisdiction over a declaratory action, the defendant-in-fact faced suits that *could not* be consolidated directly (and possibly not at all), because plaintiffs-in-fact were suing in multiple *state* courts. *See Travelers*, 996 F.2d at 777 (declaratory plaintiff faced "suit in multitudinous forums in Louisiana and Mississippi"); *Sherwin-Williams*, 343 F.3d at 398 n.8 (explaining that there was "no assurance

that all the anticipated state court suits could be removed"). In such cases, the defendant-in-fact would not simply have to file a consolidation motion, as in this case, but would also have to repeatedly litigate removal—and removal may not have even been possible.

Moreover, at the time the State filed this case, it gave no reason to think it would face litigation in an unmanageable multitude of forums. Its complaint cited only a *single* pledge to sue, ROA.36 (Compl. ¶ 114 & n.5), from a non-profit law firm whom the State subsequently dismissed from the case. ROA.553-54. And by the time of its amended complaint, every single challenge to SB4 had been filed in the same venue. By contrast, in the case the State relies on, a declaratory plaintiff faced up to seventeen lawsuits in different appellate circuits across two states, three of which had already been filed. *Travelers*, 996 F.2d at 777 & n.9. Even there, the Court only retained jurisdiction after observing that the declaratory case had progressed the farthest, and that judicial economy "overwhelmingly support[ed] retention of the case." *Id.* at 779. *See also Sherwin-Williams*, 343 F.3d at 398 (declaratory plaintiff faced lawsuits in multiple state and federal courts).

Regardless, the multiplicity of forums that the State claims to fear did not come to pass. No challenge was ever filed outside the San Antonio Division, and all the challenges are currently consolidated there. The State's own case is the only source of multiplicity. And the San Antonio district court has now invested

significant resources reviewing the merits of the claims against SB4, which have already reached this Court on appeal. Now, even more than when the district court ruled, retaining jurisdiction over the State's suit would be a monumental waste of judicial resources. *See, e.g.*, *Mission*, 706 F.2d at 602-03 (declaratory actions can be dismissed based on post-filing events, including "the pendency" of another case that "will completely settle the disputed issues").

Retaining jurisdiction would also reward litigation behavior that this Court should discourage. States and localities enact controversial policies all the time. Those policies elicit robust debate from many quarters about their wisdom and legality. Thousands of them trigger legal challenges each year. Texas's position would invite all of those governments to file immediate complaints to dictate when and where challenges must be brought, simply by citing the possibility of multiple lawsuits. Most troublingly of all, this would allow States to single out anyone who criticizes their new laws, making constituents think twice about speaking out against regulations with which they disagree.

Thus, even if the Court were to remand, it would be an abuse of discretion for the district court to retain jurisdiction. *See, e.g.*, *AmSouth Bank v. Dale*, 386 F.3d 763, 791 (6th Cir. 2004) (abuse of discretion not to dismiss where "the declaratory judgments would serve no useful purpose" and the case was filed to anticipate a defense); *BASF Corp. v. Symington*, 50 F.3d 555, 559 (8th Cir. 1995)

(abuse of discretion not to dismiss when the "declaratory plaintiff raises chiefly an affirmative defense," and when failing to dismiss could deprive the plaintiff-in-fact of its "legitimate choice of the forum and time for suit"). Under those circumstances, the Court should simply affirm.

CONCLUSION

The Court should affirm the district court's dismissal of the complaint.

Date: February 16, 2018

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 16, 2018 I electronically filed the foregoing with the Clerk for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. A true and correct copy of this brief has been served via the Court's CM/ECF system on all counsel of record.

/s/ Lee Gelernt
Lee Gelernt
Dated: February 16, 2018

CERTIFICATE OF COMPLIANCE

I certify that the required privacy redactions have been made per Fifth Circuit Rule 25.2.13 and that the electronic submission has been scanned with the most recent version of commercial virus-scanning software and was reported free of viruses. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i) because this brief contains 9,103 words, excluding parts of the brief exempted by Fed. R. App. P. 32(f).

I certify that this brief complies with typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the motion has been prepared in a proportionally-spaced typeface using Microsoft Office 2013 in 14 point Times New Roman.

/s/ Lee Gelernt
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United States Court of Appeals

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February 21, 2018

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No. 17-50763 Texas, et al v. Travis County, Texas, et al
USDC No. 1:17-CV-425

Dear Mr. Gelernt,

The following pertains to your brief electronically filed on February 16, 2018.

We filed your brief. However, you must make the following corrections within the next 14 days.

You need to correct or add:

1) Caption on the brief does not agree with the caption of the case in compliance with FED R. APP. P. 32(a)(2)(C). Caption must exactly match the Court's Official Caption **(See Official Caption below)**

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Sincerely,

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Ms. Sherine Elizabeth Thomas
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Mr. Luis Roberto Vera Jr.

THIS COURT'S CAPTION

Case No. 17-50763

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

United States Court of Appeals

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No. 17-50763 Texas, et al v. Travis County, Texas, et al
USDC No. 1:17-CV-425

Dear Mr. Gelernt,

We have reviewed your electronically filed Appellees Brief and it is now deemed 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.

Failure to timely provide the appropriate number of copies may result in the dismissal of your appeal pursuant to 5TH CIR. R. 42.3.

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Sincerely,

LYLE W. CAYCE, Clerk

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