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

WHITE LODGING SERVICES CORPORATION and AUSTIN 18 HOTEL, LLC	§	
Plaintiffs,	§	
	§	Civil Action No. A-13-CV-0825-SS
V.	§	
	§	
ANTHONY SNIPES and THE CITY OF AUSTIN, TEXAS	§	
Defendants.	§	

DEFENDANTS' RULE 12(b)(1) AND 12(b)(6) MOTION TO DISMISS

TO THE HONORABLE JUDGE SAM SPARKS:

Defendants, Anthony Snipes, in his official capacity, and the City of Austin (the "City") file this Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6).

I. INTRODUCTION

Defendants urge the Court to dismiss this lawsuit for lack of jurisdiction because Plaintiffs' claims under the U.S. Constitution are not ripe for review. Alternatively, Defendants urge the Court to decline to exercise jurisdiction under federal law based on the *Pullman* Abstention Doctrine because preliminary determinations of state law must be made prior to reaching the federal constitutional claims raised. Plaintiffs challenge the City's authority to charge them any amount (a single cent) for encroachment upon and temporary use of the City's right-of-way in the public streets of the City of Austin. Further, Plaintiffs' arguments in regard to their promissory estoppel claim and alleged "vested rights" in fee waivers are frivolous, because they are directly contrary to the terms of the Texas Constitution, Texas statutory law, and Texas case law, as well as the legislative decision of the Austin City Council, and reconsideration of that decision by council after lengthy discussion, including ample input by

Plaintiffs during two public meetings of the Austin City Council. Special Called Meeting of the Austin City Council, item 3, http://www.austintexas.gov/department/city-council/2011/20110629-spec.htm; Regular Meeting of the Austin City Council, item 11, http://www.austintexas.gov/department/city-council/2013/20130808-reg.htm.

II. UNDISPUTED FACTS AND OVERVIEW OF THE ISSUES

By admissions in their First Amended Original Complaint, Plaintiffs concede that: (1) they are the tenant and developer of real property surrounded by public streets of the City of Austin; and (2) that the owner of the property has fee simple ownership up to the centerline of the public streets abutting its property. (Doc. 5) *Plaintiffs' First Amended Original Complaint ("Amd Compl.").* ¶¶ 1-2, 21 and 23. Plaintiffs do not allege that they have paid a single cent in what the City asserts is owed in temporary use of right-of-way fees, and Plaintiffs have paid no temporary use of right-of-way fees. *Id.* Plaintiffs' pleadings appear to challenge the fees in their entirety—not the amount of the fees, and Plaintiffs have failed to advise the Court that the undersigned counsel agreed to Plaintiffs' submitting the amount of temporary use of right-of-way fees into the court's registry as such fees become due.[1] *See id.* (Doc 5) pp. 8-14.

Plaintiffs challenge the City's authority to charge them for any temporary use of right-of-way fees and the City's interpretation of the fee waiver ordinance, which was the subject of a public hearing on August 8, 2013. A video of the public hearing held during the August 8, 2013

[1] Lynn Carter and Bruce Scrafford spoke by phone between the date of the filing of *Plaintiffs' Original Complaint* (Doc 1) and the date of filing of *Plaintiffs' First Amended Complaint* (Doc 5, filed 10/21/13). Ms. Carter informed Mr. Scrafford that the City would not halt Plaintiffs' construction of the hotel by prohibiting their use of the right-of-way at issue and also agreed to Plaintiffs' depositing the amount of money owed in disputed fees into the registry of the court, or into some other interest-bearing escrow account. Yet Plaintiffs have not revised their request for temporary injunctive relief or Plaintiffs' allegation that "Defendants have threatened to prohibit Plaintiffs' use of the right-of-way for reasonable construction access and staging if Plaintiffs fail to pay the…'right-of-way…fees'" Doc. 5 at ¶ 24.

regular city council meeting of the Austin City Council is a matter of public record and available on video at the City's website at: http://austintx.swagit.com/play/08082013-523, Item 11 (11:42 p.m. to 12:18 a.m. 8/8-8/9/13). Plaintiffs' representative, Deno Yankes, President, CEO of White Lodging Services Corp., spoke from 11:52 p.m. to 11:58 p.m. on August 8, 2013, and Plaintiffs' attorney, Richard Suttle of Armbrust & Brown, spoke on behalf of White Lodging from 11:58 p.m. to 12:07 a.m. on August 8-9, 2013. *See Amd Compl*, Ex. B. The meeting agenda and the entire video of the meeting are available at http://www.austintexas.gov/department/city-council/2013/20130808-reg.htm. Thus, because Plaintiffs have had a public hearing before the Austin City Council on the fee waiver issue, Plaintiffs' procedural due process claims are without basis in law, and their remaining constitutional claims appear to be unripe for review—as Plaintiffs have not alleged—and have not paid—a single cent in temporary use of right-of-way fees (listed as one category of fees waived under the ordinance.) (Doc. 5, Ex. A, p. 2 of 3.)

The City asks the Court to take judicial notice of the public hearings in which Plaintiffs had full opportunity to air their complaints that occurred. Despite having not used all of their time to speak, Plaintiffs did not as part of either public hearing challenge the rate or amount of temporary use of right-of-way fees charged by the City. At present Plaintiffs are occupying the City's right of way under a temporary use of right-of-way permit. Austin City Code §14-11-131. Plaintiffs have not paid the temporary use of right-of-way fees for such permit; and no enforcement actions have been instituted against Plaintiffs to date by the City as permitted by the Austin City Code. *Id.* §14-11-222.

III. ARGUMENTS & AUTHORITIES

At the outset it is important for the court to understand that there are preliminary issues of state law that must be determined prior to the court's reaching any constitutional questions that would invoke consideration of any matter of federal law. Because the following issues of state law bear such prominent import in regard to Plaintiffs' claims, Defendants address these first prior to addressing their arguments on standing and abstention.

A. STATE LAW CLEARLY ESTABLISHES MUNICIPAL CONTROL OF THE CITY STREETS

"A home-rule municipality[2] has exclusive control over and under public highways, streets, and alleys of the municipality." TEX. TRANSP. CODE § 311.001(a). "The municipality may: (1) control, regulate, or remove an encroachment or obstruction on a public street or alley…; (2) open or change a public street or alley…." *Id.* Additionally, home-rule municipalities possess the authority to close, vacate, or abandon streets and to regulate the movement of a structure over or on a street of the municipality. *Id.* at §§ 311.004 and 311.007. "No individual has the inherent right to use a street or highway for business purposes." *West v. City of Waco*, 116 Tex. 472, 479, 294 S.W.832, 834 (Tex. 1927); *see City of San Antonio v. San Antonio Street Railway Co.*, 15 Tex.Civ.App. 1, 39 S.W136 (1986, writ ref'd)(rights of railway were subject to the city's right to locate sewers in the street as provided in the City Charter.)

1. State Property Rights

Interestingly, in Plaintiffs' zeal to attempt to assert property rights superior to that of the City of Austin, Plaintiffs relied on Senate Bill 18 of the 41st Texas Legislature, but failed to advise the court that this same legislation made abutting property owners' fee simple interest "subject to the reservations, rights, privileges and easements" set forth in the legislation. Tex. Atty. Gen. Op. GA-0270 (2004), *citing* the Act, effective August 9, 1929, 41st Leg., 3d C.S., ch.

[2] Plaintiffs admit that the City of Austin is a home-rule municipality. (Doc. 5) *Plaintiffs' First Amended Complaint*, p. 2 ¶ 4.

7, § 1, 1929 Tex. Gen. Laws 239 (Attached as Exhibit "1" to this motion.); *see* Doc. 5 *Pl. Amd Compl.* ¶ 23. Section 2 of the legislation relied on by Plaintiffs granted to the City of Austin an easement in perpetuity in the streets of the City of Austin. *Id.* However, the legislation granted no rights in the city streets to tenants or developers of abutting property owners, which raises the issue of whether Plaintiffs, who are admittedly the "developer" and "tenant" of the private property abutting city streets possess standing to bring any claim based on real property interests. *Id.*

Section 2 of the legislation addresses the public easement in, on, and along the city streets of Austin:

> There is hereby perpetually reserved and retained an easement in, on and along all such streets, alleys and highways for street and highway purposes, and for such other public purposes as now exist, and the right and privilege to use same or any part thereof for constructing, maintaining and repairing water, sewer, drainage, gas, telephone,…lighting, and other public utility mains, systems and purposes….

Id. Additionally, the legislation made the fee simple interests of abutting landowners "subject to the reservations, rights, privileges and easements" set forth in the same piece of legislation. *Id.* By the clear language of this legislation, the public easement stands superior to any fee simple rights held by abutting property owners. *Id.* Moreover, the legislation suggests that the State of Texas simply found that the remaining interest in fee simple (which was expressly made subject to the public easement) was of no value to the State. "Except for the purposes, uses, privileges and easements hereby reserved and retained, the fee title to such streets...is useless to the State of Texas though useful to the owners of abutting property,…" *Id.*

Likewise, Texas case law upholds municipalities' right to control public right-of-ways:

> When a street is dedicated to the public, the governmental entity taking control of the street ordinarily acquires only an easement that it holds in trust for public benefit. *Humble Oil & Ref. Co. v. Blankenburg*, 149 Tex. 498, 235 S.W.2d 891, 893 (1951). The easement, however, carries with it the right to use and control as

> much of the surface and subsurface of the street as may be reasonably needed for street purposes. *Hill Farm, Inc. v. Hill Cnty.*, 436 S.W.2d 320, 321 (Tex.1969). These purposes, of course, include transporting people and property, but a public street may also be used as a passageway for utilities and other public purposes. *Harris Cnty. Flood Control Dist. v. Shell Pipe Line Corp.*, 591 S.W.2d 798, 799 (Tex.1979).

State v. NICO-WF1, LLC, 384 S.W.3d 818, 821 (Tex.2012). An encroachment on a public street is a nuisance per se, and may be abated, regardless of whether space is left for passage of the public. *Id., citing Dozier v. City of Austin*, 253 S.W. 554, 556 (Tex.Civ.App.-San Antonio 1923, writ dism'd w.o.j.)

Plaintiffs' interests fare no better due to their association with the abutting land owner. Under Texas law, "unless otherwise provided in the grant or conveyance, the owner of land abutting a street, alley, or public highway owns the fee to the center of the road, subject only to the easement in favor of the public to a right of passage." *City of San Antonio v. City of Boerne*, 111 S.W.3d 22, 31 (Tex. 2003). "The easement in a city street is generally held to be quite comprehensive" and to include rights above and below the surface *Hill Farm, Inc. v. Hill County*, 436 S.W.2d 320, 321-22 (Tex. 1969). Abutting property owners have a right to access, light, and air. *Id.* at 323. The right of a fee owner, however, is to use the property in a manner that does not affect or impair enjoyment of the public easement. *Id.* at 323.

2. Plaintiffs' Promissory Estoppel Claim

A private property owner's claim of estoppel cannot be predicated on the act of a single legislator. *See Hill Farm, Inc. v. Hill County*, 436 S.W.2d at 321 and 324. (Estoppel against the county cannot be predicated on the act of a single commissioner who acts without legislative authority by granting permission for installation of a pipeline under a public road in his precinct.) In the present case, Plaintiffs claim promissory estoppel based on the interpretation of an ordinance by a member of the city staff. Plaintiffs' suggestion that they can rely on statements of

city staff in interpreting a city ordinance, is simply frivolous, because city employees, like a single member of the city council, have no authority to override the decisions of the City's legislative body, which decisions under the Texas Open Meetings Act must be made by the body as a whole in a public meeting. TEX. GOV'T CODE § 551.002.

During the August 8, 2013 regular meeting of the Austin City Council, Plaintiffs stated their case to the Austin City Council for why they believed they met the prevailing wage conditions of the fee waiver ordinance. Regular Meeting of the Austin City Council, item 11, http://www.austintexas.gov/department/city-council/2013/20130808-reg.htm. (See agenda item 11 and video of Plaintiffs' argument from 11:52 p.m. to 12:07 a.m. 8/8-8/9/13). Council disagreed with Plaintiffs' position and declined to amend the ordinance to comport with Plaintiffs' interpretation. *Id.* The City Council, as the legislative body of the City, is the only body authorized to revise legislation.

Additionally, Defendants are immune from suit and from liability. Generally, cities are immune from suit for their governmental functions. *Tooke v. City of Mexia*, 197 S.W.3d 325, 343 (Tex.2006). The establishment, design, construction, and control of public streets are primarily governmental functions over which the government has full authority. *State v. NICO-WF1, L.L.C.*, 384 S.W.3d 818, 822 (Tex.2012); *see Tex. Dep't of Transp. v. City of Sunset Valley*, 146 S.W.3d 637, 645 (Tex.2004) *(quoting Robbins v. Limestone Cnty.*, 114 Tex. 345, 268 S.W. 915, 918 (1925) ("Public roads are state property over which the state has full control and authority."). The Texas Tort Claims Act also recognizes the following as part of the Act's non-exclusive list of governmental functions: street construction and design, street maintenance, traffic regulation, transportation systems, and parking facilities. TEX. CIV. PRAC. & REM CODE § 101.0215(a)(3), (4), (21), (22) and (25). The issuance and denial of permits is also classified as a

governmental function. *Maguire Oil Co. v. City of Houston,* 69 S.W.3d 350, 364 (Tex.App.-Texarkana 2002, pet. denied); see *City of Austin v. Teague,* 570 S.W.2d 389, 393 (Tex.1978); *Trevino & Gonzalez Co. v. R.F. Muller Co.*, 949 S.W.2d 39, 42 (Tex.App.-San Antonio 1997, no writ). Moreover, Texas courts have held that a municipality is immune from suit for equitable estoppel. *Dillard v. Austin Indep. Sch. Dist.,* 806 S.W.2d 589, 59496 (Tex.App.-Austin 1991, writ denied); *Univ. of Tex. Sys. v. Courtney,* 946 S.W.2d 464, 468 (Tex.App.-Fort Worth 1997, writ denied). The Texas Tort Claims Act provides no waiver of immunity for claims of promissory estoppel. TEX. CIV. PRAC. & REM CODE § 101.021, *et. seq.*

3. Plaintiffs Challenge to the City's Right-of-Way Fee

Municipalities routinely charge fees for use of the public right-of-way. *See e.g., Tex. Coalition of Cities for Utility Issues v. FCC,* 324 F.3d 802, 805-06 (5th Cir. 2003)(Franchise fees routinely charged by municipalities are essentially a form of rent: the price to be paid to rent use of public right-of-ways." A governmental entity holding a public easement has the right to remove all buildings or constructions located upon its right-of-way, or that interfere with its use. *Brunson v. State,* 418 S.W.2d 504, 506 (Tex. 1967). A public easement includes all rights reasonably necessary for enjoyment consistent with its intended use. *Coastal Indus. Water Auth. v. Celanese Corp. of Amer.,* 592 S.W.2d 597, 601 (Tex.1979). Even a public easement for a pedestrian walkway includes the right to remove fixtures on the walkway, as well as the air and subsurface rights necessary for the contemplated use of the easement. *City of Dallas v. Pacifico Partners, Ltd.,* 289 S.W.3d 371, 379-381 (Tex.App.-Dallas 2006, no pet.).

Accordingly, Texas law clearly establishes that the City's interests in protecting public easement rights are superior to those of an abutting property owner. Further, the right of access to one's property does not translate to the right to block or occupy the public right-of-way

abutting one's property for purposes of construction or staging. By use of the terms "access" and "staging", Plaintiffs seem to imply that their use of the public right-of-way may be only momentary and infrequent. However, the court may take judicial notice of the open and obvious condition of the barricaded public right of ways surrounding the property—and that sidewalks, parking lanes, and lanes of traffic are being used for purposes of construction on the streets listed in the amended complaint (Congress, Second Street, Brazos and Third Street)—thereby cutting off some use of the public right-of-way by public citizens of Austin on each of these streets. Doc. 5 ¶ 21.

B. STANDARD OF REVIEW

1. Standard of Review related to Subject-Matter Jurisdiction

Determinations of standing and ripeness are threshold questions that must be addressed before addressing the merits of a claim. *Roark & Hardee v. City of Austin,* 522 F.3d 533, 541 (5th Cir. 2008). "The standing doctrine defines and limits the role of the judiciary and is a threshold inquiry to adjudication." *McClure v. Ashcroft,* 335 F.3d at 408. "[T]he plaintiff constantly bears the burden of proof that jurisdiction does in fact exist." *In re FEMA Trailer Formaldehyde Products Liab. Litig.*, 646 F.3d 185, 189 (5th Cir. 2011).

A court should dismiss a case for lack of ripeness when the case is abstract or hypothetical. *New Orleans Public Service, Inc. v. Council of the City of New Orleans,* 833 F.2d 583, 586 (5th Cir. 1988). Speculation about the possibility of future unconstitutional acts of officials under a statute is insufficient to create a ripe case or controversy. *Hometown Co-operative Apartments v. City of Hometown,* 515 F.Supp. 502, 505 (N.D. Ill. 1981). A federal court must find that Article III standing requirements are met before proceeding. These requirements include (1) "injury in fact—an invasion of a legally protected interest which is (a)

concrete and particularized and (b) actual or imminent, not conjectural or hypothetical"; (2) causation, meaning that the injury is "fairly traceable to the challenged action of the defendant"; and (3) redressability, meaning that "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Valley v. Rapides Parish School Board,* 145 F.3d 329, 332 (5th Cir.1998), *citing Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560–61 (1992). The element of standing that deals directly with ripeness is the requirement of "imminence," and in a declaratory action, the threatened injury must be "sufficiently 'imminent' to establish standing." *Id*. A claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.' *See Texas v. United States,* 523 U.S. 296, 300 (1998).

To establish a causal connection between the injury and the conduct complained of, the injury must be "fairly trace[able] to the challenged action of the defendant and not . . . the[e] result [of] the independent action of some third party not before the court." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-561 (1992). Finally, the injury must be "likely" as opposed to merely "speculative," that the injury will be "redressed by a favorable decision." *Id*. "Failure to establish any of these three elements deprives the federal court of jurisdiction . . . ." *Rivera v. Wyeth-Ayerst Labs,* 283 F.3d 315, 319 (5th Cir. 2002).

2. Standard of Review for Failure to State a Claim on which Relief can be Granted

Rule 12(b)(6) authorizes dismissal of a complaint for "failure to state a claim upon which relief can be granted." Review is limited to the questions of law, contents of the complaint, and matters properly subject to judicial notice. *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.,* 551 U.S. 308, 322, (2007). In analyzing a motion to dismiss for failure to state a claim, "[t]he court accepts 'all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff.'"

In re Katrina Canal Breaches Litig., 495 F.3d 191, 205 (5th Cir.2007)(*quoting Martin K. Eby Constr. Co. v. Dallas Area Rapid Transit,* 369 F.3d 464, 467 (5th Cir.2004)). However, a court is not bound to accept legal conclusions couched as factual allegations. *Papasan v. Allain*, 478 U.S. 265, 286 (1986).

The plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570, (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Although a plaintiff's factual allegations need not establish the defendant is probably liable, they must establish more than a "sheer possibility" that a defendant has acted unlawfully. *Id.* The court, drawing on its judicial experience and common sense, must undertake the "context-specific task" of determining whether the plaintiff's allegations "nudge" its claims against the defendant "across the line from conceivable to plausible." *See id.* at 679.

C. LACK OF SUBJECT MATTER JURISDICTION

As addressed in the City's initial argument related to state law (pp. 4-6 herein), Plaintiffs were granted no rights in the City's streets under the specific state law relied on by Plaintiffs. Secondly, as admitted tenant and developer, Plaintiffs do not stand in the shoes of the property owner whose land abuts city streets. Third, the property owner's rights are subservient to the public easement in the city streets. (*see* pp. 4-6 herein) Thus, Plaintiffs fail to establish standing based on any alleged "vested rights" or any rights superior to that of the City of Austin or its public citizens.

Defendants also assert that Plaintiffs' have failed to establish standing because Plaintiffs' constitutional claims are not ripe for review, because Plaintiffs have made no payment for the

temporary use of the public right-of way, and Plaintiffs do not allege they have paid a single cent in temporary use of right-of-way fees. Accordingly, Plaintiffs' takings claims under the U.S. and Texas constitutions are not ripe for review.

Moreover, the Texas Constitution prohibits making unconditional gifts or donations to private entities, which precludes the City from giving away the public right-of-way without just compensation. The Texas Constitution prohibits the City from giving away something of value to a person or corporation without receipt of just compensation or consideration in return. *See* TEX. CONST. art. III, § 52 ("[T]he Legislature shall have no power to authorize any county, city, town or other political corporation or subdivision of the State to lend its credit or to grant public money or thing of value in aid of, or to any individual, association or corporation whatsoever, or to become a stockholder in such corporation, association or company."). Article III, section 51 contains a similar provision. *See id.* § 51.

Because Plaintiffs cannot establish vested rights in the use of the public right-of-way and do not allege that they have paid just compensation to the City for use of the public right-of-way, Plaintiffs have failed to establish: (1) an "injury in fact, which requires an invasion of a legally protected interest that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical"; (2) causation, meaning that the injury is "fairly traceable to the challenged action of the defendant"; and (3) redressability, meaning that "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision."

D. ABSTENTION

Alternatively, the City requests that the Court abstain from ruling on Plaintiffs' claims because preliminary determinations of state law should be addressed prior to consideration of Plaintiffs' federal constitutional claims. *See Railroad Comm'n of Tex. v. Pullman Co.*, 312 U.S.

496, 500-501(1941)(exercising abstention so as to defer determinations of state law to the state supreme court). As discussed in the state law argument herein (pp. 2-8), this Court would be required to make preliminary determinations of state law before reaching any of Plaitniffs' constitutional claims. Further, Defendants' counsel has found no Texas case law related to allegedly unlawful exactions or excessive temporary use of right-of-way fees. Thus, Plaintiffs' constitutional claims present unique questions involving state law.

Similarly, Defendants urge the court to abstain under the holding of *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 191 (1985). In *Williamson County*, the Court held that "[t]he Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation." *Id.* at 194. Further, the court stated:

> The Fifth Amendment does not require that just compensation be paid in advance of, or contemporaneously with, the taking. If a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation….

Id. at 194-95. Thus, even if Plaintiffs were to pay a minimal amount of the fee owed to the City and amend their pleadings to challenge the City's temporary use of right-of-way fees as excessive, the state courts, as the courts that decide issues of inverse condemnation such as the value of an easement, are the courts with expertise to address the appropriate value to be considered roughly proportionate to the amount charged by the City as temporary use of right-of-way fees. *See Town of Flower Mound Town of Flower Mound v. Stafford Estates Ltd. P'ship*, 71 S.W.3d 18, 30 (Tex.App.-Fort Worth 2002), *aff'd, Town of Flower Mound v. Stafford Estates Ltd. P'ship*, 135 S.W.3d 620 (Tex.2004).

Finally, in the event Plaintiffs challenge the amount of the fees charged by the City for temporary use of the public right-of-way as being unjust and excessive, the City is willing to provide a method for Plaintiff to make argument and offer evidence in an administrative

proceeding before the City, and encourages the Court to require Plaintiffs to request an administrative process with the City, for review of the amount of temporary use of right-of-way fees charged. Plaintiffs' pleadings, however, appear to complain that the City has no right to charge any temporary use of right-of-way fee to Plaintiffs.

PRAYER

Premises considered, Defendants request that the Court dismiss Plaintiffs' claims in their entirety for lack of subject matter jurisdiction, and that the Defendants be granted any and all other relief to which the Court finds them entitled. In the alternative, Defendants request that the court decline to exercise jurisdiction over Plaintiffs' claims until Plaintiffs resolve matters of state law that must be determined prior to a determination of whether Plaintiffs' federal law claims are ripe for review.

RESPECTFULLY SUBMITTED,

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ATTORNEYS FOR DEFENDANTS ANTHONY SNIPES and THE CITY OF AUSTIN, TEXAS

CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of November, 2013, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

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/s/ Lynn E. Carter
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