IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

RONALD B. PALMER AND SHERRY L. PALMER, Plaintiffs, v. KENNETH PAXTON, JR., ATTORNEY GENERAL OF TEXAS, ET. AL, Defendants.	§ § § § § § § § § § §	CIVIL ACTION NO. 4:15-CV-00657-ALM-CAN

REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE

Pending before the Court is Defendants the State of Texas, Kenneth Paxton, Jr., the Honorable Margaret Barnes, and the Honorable Johnathan Bailey's (collectively "Defendants") Motion to Dismiss [Dkt. 11] and Defendants' Motion to Dismiss Plaintiffs' Second Amended Complaint [Dkt. 29]. After reviewing the Motions, Response, Reply, and all other relevant filings, the Court recommends that Defendants' Motion to Dismiss Plaintiffs' Second Amended Complaint [Dkt. 29] be **GRANTED** and Defendants' Motion to Dismiss [Dkt. 11] be **DENIED AS MOOT**.

BACKGROUND

I. Factual Background

This matter arises from Plaintiffs Ronald B. Palmer ("Mr. Palmer") and Sherry L. Palmer ("Ms. Palmer") (collectively "Plaintiffs") divorce, and subsequent child custody battle, with their respective prior spouses. Plaintiffs filed this suit on September 25, 2015 [Dkt. 1]. On October 28, 2015, Plaintiffs filed their First Amended Complaint [Dkt. 10]; and on February 18, 2016,

Plaintiffs filed their Second Amended Complaint (hereinafter "Complaint") [Dkt. 24], which is the live pleading in this case. Plaintiffs' Complaint seeks a declaratory judgment that certain Texas Family Code statues are unconstitutional; and, also seeks to enjoin Defendants, and all state court judges, from actions taken pursuant to these allegedly unconstitutional statues [*see generally* Dkt. 24].

The facts surrounding Plaintiffs case are as follows. Mr. Palmer and his ex-wife, Nakasone Julie Palmer-Lynch ("Ms. Palmer-Lynch"), have "an agreed judgment issued in 2007" that grants Mr. Palmer and Ms. Palmer-Lynch a divorce and "establishes a parenting plan where each parent has essentially equal rights and equal time" with their minor child, M.C. Palmer [Dkt 24 at 11]. Mr. Palmer and Ms. Palmer-Lynch are subject to the continuing jurisdiction of the Denton County Courts until June, 6, 2017, when their child reaches the age of majority. *Id*. Ms. Palmer and her ex-husband, Jeffrey Michael Schneider ("Mr. Schneider"), also had an "agreed divorce decree that granted [Ms. Palmer and Mr. Schneider a] divorce and established a 50/50 parenting plan" for their remaining minor child, M.J Schneider[1] [Dkt. 24 at 12-13]. Ms. Palmer and Mr. Schneider are also subject to the continuing jurisdiction of Denton County Courts until June 2017.[2] *Id.* In 2009, Mr. Schneider filed a petition seeking to modify the parenting plan. *Id*. at 13. Plaintiffs allege that Mr. Schneider was "not required to prove [Ms. Palmer] to be unfit or that there was any specific danger to the child[] before the court assumed all rights of the child[] and proceeded to act as though each parent only had the right that [the court] granted to each of them." *Id*. Plaintiffs further alleged that Ms. Palmer "was denied her

[1] Ms. Palmer's other children "subject to this suit are now adults and are no longer subject to the jurisdiction of this state" [Dkt. 24 at 12].

[2] Defendant the Honorable Margaret Barnes is the presiding judge over the 367th Judicial District Court of Denton County, Texas, and presided over Mr. Palmer's SAPCR [Dkt. 24 at 4]. Defendant the Honorable Johnathan Bailey is the presiding judge over the 431st Judicial District Court of Denton County, Texas, and presided over Ms. Palmer's SAPCR. *Id.*

constitutional presumptions" and was not "allowed proper adjudication or opportunity to rebut state authority ...." *Id.* Ms. Palmer alleges that she was "denied care, custody, control, and possession at multiple times for constitutionally significant periods of time based solely on temporary orders and without a deprivation hearing where she could contest state authority to act;" and, such deprivation "caused extreme damage to all of her children emotionally and to the relationship between her and her children." *Id*. In May 2012, a new agreed parenting plan was issued (under which Ms. Palmer and Mr. Schneider are now acting), wherein Ms. Palmer has possession of the child during the school year and Mr. Schneider has possession of the child during the summer months and on holidays. *Id*.

Plaintiffs contend that, despite both Mr. Palmer's parenting plan with Ms. Palmer-Lynch and Ms. Palmer's parenting plan with Mr. Schneider, "[a]t any time up to the date [their children reach majority in June 2017] either party can file for modification [of either parenting plan,] at which point both parents would lose all parental rights subject to nothing more than the filing of a petition and the best interest determination of a district court judge." *Id*. at 14. Plaintiffs also contend that the "Texas Family Code requires nothing more than a written finding stating its actions are in the best interest of the child for the district court judge to deny any and all fundamental parental rights to either parent and/or the child...." *Id*. (citing TEX. FAM. CODE § 153.072). Plaintiffs assert that the filing of a Suit Affecting the Parent-Child Relationship (hereinafter "SAPCR") "effectively terminates all parenteral and child rights in favor of a state determination of a child's best interest without any requirement to give the parent's determinations any weight" and thus, all parents who are seeking a divorce –who have minor children and are required to file a SAPRC – will have their constitutional rights violated in Texas. *Id*. at 15.

II. Plaintiffs' Declaratory and Injunctive Relief Sought

Based upon the above facts, Plaintiffs' filed their Complaint seeking certain declarations from this Court pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201, that various Texas Family Code statues are unconstitutional [*see* Dkt. 24 at 15-27]. Specifically, Plaintiffs' seek a declaration that:

> [1.] the Fourteenth Amendment limits the authority of state court judges at any level to infringe the fundamental rights of fit parents or their children without due process of law and/or equal protection of the laws even in [SAPCR] ... [Dkt. 24 at 15;]
>
> [2.] parental rights are individual rights attaching to each parent individually irrespective of the marital status of the parents or of changes in the marital status of the parents and that fit parents may not be treated differently from other fit parents based on their marital status without fact-specific compelling state justification ... [Dkt. 24 at 16;]
>
> [3.] parents and their children share a First Amendment free association right to have and maintain an intimate and expressive familial relationship, to live together as a family, and to teach, learn, and share moral, religious, and vici values between each other free form unwarranted government interference into the family relationship ... [Dkt. 24 at 17;]
>
> [4.] parents and their children are protected from possession orders that create a meaningful interference with their possessory interest of a child and with a child's possessory interest to be in the possession of each fit parent by the Fourth Amendment's restrictions on unreasonable seizures ... [and, further, that] possession orders that deprive a parent of equal time with a child implicate [First] Amendment protections in that it reduces the quantity and depth of communications within the parent-child relationship [Dkt. 24 at 18;]
>
> [5.] parents and their children are protected from unreasonable searches by the Fourth Amendment and that the states' assertion of the best interest of a child does not justify an exploratory search even in [SAPCR]... [Dkt. 24 at 19;]
>
> [6.] Tex. Fam. Code § 107.051 is unconstitutional on its face" and that "a broad best interest inquiry into the best interest of a child in the SAPCR context is an impermissible 'exploratory search' into the private protected family relationships designed to explore for and collect evidence for the purpose of deprivation of fundamental rights [Dkt. 24 at 19;]

[7.] the Fourteenth Amendment prohibits state court judges from making best interest determinations for a child in the face of objections by either parent even in [SAPCR] except where the court has shown a compelling state interest and a necessity to act ... [Dkt. 24 at 20;]

[8.] the Fourteenth Amendment prohibits state court judges from limiting the fundamental rights of parents or child, even in [SAPCR], without providing an evidentiary hearing where the parent has been properly served with written charges or where a parent can assert their legal and constitutional rights and their child's legal and constitutional rights in a hearing designed to balance all private interests involved against the asserted need for state action to infringe those rights and where the state bears the burden of proof ... [Dkt. 24 at 20-21;]

[9.] Tex. Fam Code § 154.001 is unconstitutional on its face and as generally applied as it provides unrestrained discretion to a trial court judge to deprive apparent of property rights without appropriate [Fourth] Amendment protections and creates a class of parent subject to quasi-criminal and criminal sanctions without appropriate procedural safeguards or even the minimum requirement of an evidentiary deprivation hearing [Dkt. 24 at 21;]

[10.] the public policy of Texas that allows a state court judge to infringe, limit, or unduly burden fundamental rights of parent or child based solely on a state judge's determination of a child's best interest is unconstitutional[,] that there is a constitutional presumption that parents are fit and that fit parents act in the best inters of their children[,] that the public policy of Texas with authorizes a state judge to deny this parental presumption in a modification proceeding is unconstitutional[,] that Tex. Fam. Code § 153.001(a)(1) impermissibly shifts the burden of proof onto fit parents and contravenes the parental presumption and is unconstitutional[,] that Tex. Fam. Code § 153.002 places state policy above the constitutional rights of parent and child and is unconstitutional[,] that Tex. Fam. Code § 153.072 and the Tex. Fam. Code generally fail to provide sufficient procedural protection for fundamental rights and [are] unconstitutional ... [Dkt. 24 at 23;]

[11.] Tex. Fam. Codes § 153.002, 153.072. 156.001, 156.101, and 154.001 [are] overbroad and unconstitutional as [they] chill[] the exercise of protected [First] Amendment rights of parent, of child, and of the legal community without a legitimate state interest ... [Dkt. 24 at 26; and,]

[12.] [Tex. Fam. Code] § 153.001(a)(1) is unconstitutionally vague [Dkt. 24 at 27.]

Plaintiffs' Complaint also requests that this Court enjoin Defendants and/or all state court judges:

> [1.] from infringing the fundamental rights of parents or children in [SAPCR] [Dkt. 24 at 15;]
>
> [2.] from infringing the right of the parties to raise constitutional issues with the district court [Dkt. 24 at 15-16;]
>
> [3.] to affirmatively provide constitutionally appropriate procedural protections in SAPCR [Dkt. 24 at 16;]
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> [4.] to affirmatively inform the parties on the record [in a SAPCR] that they have constitutional right as parents, that their child has constitutional rights, and that each family unit consisting of parent and child is constitutionally protected and that they have a right to assert those constitutional rights ... in every SAPCR [Dkt. 24 at 16;]
>
> [5.] from infringing the fundamental rights of parents based on [their] marital status ... in [SAPCR] without due process of law ... [Dkt. 24 at 16-17;]
>
> [6.] to affirmatively provide constitutionally appropriate procedural protections in SAPCR [Dkt. 24 at 17;]
>
> [7.] from interfering with the family relationship that exists between each parent and their child, from unreasonably limiting their ability to live together as a family free from government interference, and/or from liming a parent's or child's right to communicate with each other based on the content of that speech even in [SAPCR] ... [Dkt. 24 at 17-18;]
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> [8.] to affirmatively provide strict scrutiny procedural protections to these rights in SAPCR [Dkt. 24 at 18;]
>
> [9.] from limiting the amount of money a parent can directly contribute to the parent-child relationship by requiring that parent to pay a third party except upon showing of a compelling state interest, a necessity to act, and that the state's actions are the least restrictive means of achieving the State's interest [Dkt. 24 at 18;]
>
> [10.] from issuing possession orders in [SAPCR] except where the court has fully complied with all relevant Fourth Amendment jurisprudence ... [Dkt. 24 at 18;]
>
> [11.] to affirmatively provide constitutionally appropriate procedural protections in SAPCR ... [Dkt. 24 at 18;]

> [12.] limiting either parent's possession time below 50% except upon showing of a compelling state interest, a necessity to act, and that the state's actions are the least restrictive means of achieving the State's interest [Dkt. 24 at 18-19];
>
> [13.] from issuing search orders, family studies, social studies, child custody evaluations, guardian ad litem appointment, psychological studies, or any other intrusive search including broad best interest inquiries into the conditions of the family even in [SAPCR] except where the court has fully complied with all relevant Fourth Amendment jurisprudence ... [Dkt. 24 at 19;]
>
> [14]. from making best interest determinations for children over the objections of a fit parent in [SAPCR] even when the parents are in disagreement except where the court has shown a compelling state interest and a necessity to act, where statues that authorize action are narrowly tailored, and where the action taken is the least restrictive means possible to achieve the state's legitimate purpose ... [Dkt. 24 at 20;]
>
> [15.] from infringing the fundamental rights of parents or children in [SAPCR] prior to holding an adjudicative hearing affording parents and children all proper due process and from denying parents the opportunity to present constitutional arguments against state action, (where probable cause of harm to a child has been shown, courts may take temporary actions consistent with Fourth Amendment jurisprudence to protect a child)... [Dkt. 24 at 21;]
>
> [16.] from issuing any orders under authority granted by Tex. Fam. Code § 154.001 ... [Dkt. 24 at 23;]
>
> [17.] to order the payment of support to a third part only after a showing that the paying parent failed to meet minimum standards of care for the child and satisfying all relevant [Fourth] [A]mendment jurisprudence [Dkt. 24 at 23; and,]
>
> [18.] from issuing any child custody or possession orders infringing the rights of fit parents based solely on a judge's determination of a child's best interest ... [Dkt. 24 at 25.]

On November 19, 2015, Defendants filed a Motion to Dismiss [Dkt. 11] based on Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6); and, Plaintiffs filed a Response to Defendants' Motion to Dismiss on November 25, 2015 [Dkt. 13]. Defendants filed a Reply to Plaintiffs' Response on December 4, 2015 [Dkt. 16]; and, on December 17, 2016, Plaintiffs filed a Sur-Reply [Dkt. 19]. On February 18, 2016, Plaintiffs filed their Second Amended Complaint [Dkt. 24]. On March 3, 2016, Defendants filed a Motion to Dismiss Plaintiffs' Second Amended Complaint

[Dkt. 29] requesting dismissal of Plaintiffs' claims on the same bases as the November 19 Motion to Dismiss. Plaintiffs filed their Response to Defendants' Motion to Dismiss Plaintiffs' Second Amended Complaint on March 11, 2016 [Dkt. 30].[3]

LEGAL STANDARD

I. 12(b)(1) Motion to Dismiss

Defendants move to dismiss based on Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). "When a Rule 12(b)(1) motion is filed in conjunction with other Rule 12 motions, the court should consider the 12(b)(1) jurisdictional attack before addressing any attack on the merits." *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001).

The Court has subject matter jurisdiction over those cases arising under federal law. U.S. CONST. ART. III § 2, cl. 1; 28 U.S.C. § 1331. A case arises under federal law if the complaint establishes that federal law creates the cause of action or the plaintiff's right to relief necessarily depends on the resolution of a substantial question of federal law. *Empire Healthchoice Assur., Inc. v. McVeigh*, 547 U.S. 677, 689-90 (2006). The Court also has subject matter jurisdiction over those cases between citizens of different states and where the matter in controversy exceeds $75,000. 28 U.S.C. § 1332.

A motion under Federal Rule of Civil Procedure 12(b)(1) should be granted only if it appears beyond doubt that Plaintiff cannot prove a plausible set of facts in support of its claim. *Lane v. Halliburton*, 529 F.3d 548, 557 (5th Cir. 2008) (citing *Bell Atl. Corp. v. Twombly*, 550

[3] The Parties agreed, and the Court ordered, an expedited resolution of this case by submission of dispositive motions [*see* Dkt. 21]. Plaintiffs filed a Second Amended Complaint on February 18, 2016 [Dkt. 24]. Defendants' Second Motion to Dismiss states that, "[f]or reasons substantially similar to those set for in Defendants' [first] motion to dismiss Plaintiff's first amended complaint, Plaintiffs' claims must be dismissed because: 1. Plaintiffs lack standing; 2. Plaintiffs' claims are barred by the *Rooker-Feldman* Doctrine; ... 3. All Defendants have Immunity from Suit [sic] under the Eleventh Amendment; and 4. Plaintiffs fail to state a claim upon which relief can be granted [Dkt. 29 at 2]. Plaintiffs also have on file a Motion for Summary Judgment [Dkt. 27]; not addressed herein, which will be addressed separately. While Plaintiffs' Motion for Summary Judgment was filed prior to Defendants' Second Motion to Dismiss; the Court must first take up Defendants' Second Motion to Dismiss in light of the jurisdictional challenge presented therein [*see* Dkt. 29].

U.S. 544, 556-57 (2007)). The Court may find a plausible set of facts by considering: "(1) the complaint alone; (2) the complaint supplemented by the undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." *Spotts v. United States,* 613 F.3d 559, 565 (5th Cir. 2010) (quotation marks and citation omitted). The Court will accept all well-pleaded allegations in the complaint as true, and construe those allegations in a light most favorable to Plaintiff. *Truman v. United States*, 26 F.3d 592, 594 (5th Cir. 1994). The party asserting jurisdiction bears the burden of proof for a 12(b)(1) motion to dismiss. *Ramming*, 281 F.3d at 161.

II. 12(b)(6) Motion to Dismiss

A Rule 12(b)(6) motion to dismiss argues that, irrespective of jurisdiction, the complaint fails to assert facts that give rise to legal liability of the defendant. The Federal Rules of Civil Procedure require that each claim in a complaint include "a short and plain statement… showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). The claims must include enough factual allegations "to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555. Thus, "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570).

The Court must again accept as true all well-pleaded facts contained in Plaintiff's Complaint and view them in the light most favorable to Plaintiff. *Baker v. Putnal*, 75 F.3d 190, 196 (5th Cir. 1996). In deciding a Rule 12(b)(6) motion, "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555; *Gonzalez v. Kay*, 577 F.3d 600, 603 (5th Cir. 2009). The Supreme Court has further expounded upon the *Twombly* standard, "explaining that '[t]o survive a motion to dismiss, a complaint must contain

sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.'" *Gonzalez*, 577 F.3d at 603 (quoting *Iqbal*, 556 U.S. at 678). "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." *Id*. "It follows, that 'where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged - but it has not 'shown' - 'that the pleader is entitled to relief.'" *Id*.

In *Iqbal*, the Supreme Court established a two-step approach for assessing the sufficiency of a complaint in the context of a Rule 12(b)(6) motion. First, the Court identifies conclusory allegations and proceeds to disregard them, for they are "not entitled to the assumption of truth." *Iqbal*, 556 U.S. at 681. Second, the Court "consider[s] the factual allegations in [the complaint] to determine if they plausibly suggest an entitlement to relief." *Id*. "This standard 'simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of' the necessary claims or elements." *Morgan v. Hubert*, 335 F. App'x 466, 470 (5th Cir. 2009). This evaluation will "be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 679.

In determining whether to grant a motion to dismiss, a district court may generally not "go outside the complaint." *Scanlan v. Tex. A&M Univ.*, 343 F.3d 533, 536 (5th Cir. 2003). However, a district court may consider documents attached to a motion to dismiss if they are referred to in the plaintiff's complaint and are central to the plaintiff's claim. *Scanlan*, 343 F.3d at 536.

ANALYSIS

Defendants contend Plaintiffs' Complaint should be dismissed because: (1) Plaintiffs lack standing; (2) Plaintiffs' Complaint is barred by the *Rooker-Feldman* Doctrine; (3) Defendants are entitled to immunity from suit under the Eleventh Amendment; and, (4) Plaintiffs' Complaint fails to state a claim upon which relief can be granted because it fails to allege an actual injury, and the constitutionality of the provisions Plaintiffs challenge are well-settled [Dkt. 29 at 3-11]. Plaintiffs contend, to the contrary, that they have established the jurisdictional requirements for standing, their suit is not barred by any abstention doctrine, Defendants are not entitled to Eleventh Amendment immunity, and they have sufficiently stated a claim [*see* Dkt. 13].[4] The Court first takes up Defendants' standing argument as a threshold matter to this Court's jurisdiction. See *Ramming*, 281 F.3d at 161 (explaining that courts must consider a motion to dismiss pursuant to Rule 12(b)(1) before any other challenge).

I. Standing

As previously noted, Plaintiffs seek a declaratory judgment from this Court that various Texas Family Code statues are unconstitutional; and, further requests the Court to permanently enjoin Defendants, and all state court judges, from enforcing such statutes [*see generally* Dkt. 24]. Defendants argue that "[a]s a threshold matter, Plaintiffs have not demonstrated standing with regard to their claims ... [and] '[b]efore a federal court can consider the merits of a legal claim, the person seeking to invoke jurisdiction must establish the requisite standing to sue'" [Dkt. 29 at 3 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 154-55 (1990)]. Specifically, Defendants contend that Plaintiffs' Second Amended Complaint "generally alleges that several provisions of the Texas Family Code [are] unconstitutional[]" however, absent from Plaintiffs'

[4] The Court notes that Plaintiffs' Responses to Defendants' first Motion to Dismiss substantively addresses Defendants' standing arguments [*see* Dkt. 13; Dkt. 19]; Plaintiffs' Response to Defendants' Second Motion to Dismiss does not [*see* Dkt. 30]. The Court considers each of Plaintiffs' responses herein.

Second Amended Complaint "is any alleged injury [in fact] that has been caused by any ... Defendants." *Id*. at 4.

Standing is a threshold requirement to establish subject matter jurisdiction; in order to have standing a plaintiff must demonstrate: (1) they have suffered an injury in fact, (2) a causal relationship between such injury and the challenged conduct exists, and (3) there is likelihood that the injury will be redressed by a favorable decision from the Court. *United Food & Commercial Workers Union Local 751 v. Brown Group, Inc*., 517 U.S. 544, 550 (1996) (internal quotations omitted). An injury in fact is an "invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-60 (1992) (internal quotations and citations omitted). The party invoking the jurisdiction of the Court – here Plaintiffs – bears the burden of establishing an injury in fact. *see Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.,* 454 U.S. 464, 472 (1982) ("at an irreducible minimum, article III [standing] requires the party who invokes the court's authority to show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant ... .") (quotation omitted).

The Declaratory Judgment Act authorizes federal district courts to "declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201(a). However, "[a] party is not entitled to declaratory relief in the absence of an "actual controversy." 28 U.S.C. § 2201(a); *Cardinal Chemical Co. v. Morton International, Inc.,* 508 U.S. 83, 95 (1993). The actual controversy requirement encompasses concepts such as standing, ripeness, and the prohibition against advisory rulings. *See Roark & Hardee L.P. v. City of Austin*, 522 F.3d 533, 541-42 (5th Cir. 2008) ("The many

doctrines that have fleshed out that 'actual controversy' requirement – standing, mootness, ripeness, political question, and the like – are 'founded in concern about the proper – and properly limited – role of the courts in a democratic society.'") (citations omitted). Indeed, hypothetical, conjectural, or conditional disputes based on factual situations that may never develop will not support a request for declaratory relief. *Brown & Root, Inc. v. Big Rock Corp.,* 383 F.2d 662, 665 (5th Cir.1967). Thus, "[i]n the context of an action for declaratory judgment, [to establish an actual controversy/injury in fact], the facts must demonstrate 'a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.'" *Texans Against Censorship, Inc. v. State Bar of Texas*, 888 F. Supp. 1328, 1340 (E.D. Tex. 1995) (quoting *Golden v. Zwickler,* 394 U.S. 103, 108, (1969)).

On the record before the Court, Plaintiffs lack standing to pursue the relief requested in Plaintiffs' Second Amended Complaint. As an initial matter, Plaintiffs' Second Amended Complaint, interpreted broadly, constitutes an expansive attack on Texas' child custody statutes. Indeed, Plaintiffs allege they "bring these actions on their own behalf and on behalf of all fit parents in Texas who are now subject to this state policy or who may become subject to this state policy as a result of nothing more than the filing of a SAPCR" [Dkt. 24 at 10]. Plaintiffs lack standing to challenge these statutes in a manner that implicates legal interests that are not their own. *Cty. Ct. of Ulster Cty., N.Y. v. Allen*, 442 U.S. 140, 154-55 (1979) ("A party has standing to challenge the constitutionality of a statue only insofar as it has an adverse impact on his own rights. As a general rule, if there is no constitutional defect in the application of the statute to a litigant, he does not have standing to argue that it would be unconstitutional if applied to third parties in hypothetical situations.").

Even viewed more narrowly, Plaintiffs still cannot demonstrate standing. The facts alleged by Plaintiffs assert past wrongs, as well as possible future injuries, that have been and/or could be imposed upon them as a result of the allegedly unconstitutional statues. The United States Supreme Court has explained that in order to obtain equitable relief for past wrongs, a plaintiff must demonstrate either continuing harm or a real and immediate threat of immediate injury in the future; past exposure to illegal conduct does not itself show a present case or controversy if unaccompanied by any continuing, present adverse effects. *Society of Separationists, Inc. v. Herman,* 959 F.2d 1283, 1285 (5th Cir. 1992) (citing *City of Los Angeles v. Lyons,* 461 U.S. 95, 101-02 (1983)). Consider in *Lyons,* the Supreme Court held that an individual who was previously subjected to a chokehold by police officers upon being stopped for a traffic violation lacked standing to obtain an injunction because it was entirely speculative that police officers would stop him again in the future and choke him without provocation.[5] *Lyons*, 461 U.S. at 101-02; *see also Cain v. City of New Orleans*, No. 15-4479, 2016 WL 1598606, *6-7 (E.D. La. Apr. 21, 2016) (holding that two former criminal defendants challenging the constitutionality of a method of collecting post-judgment court costs from criminal defendants did not satisfy the threatened or actual injury requirement for Article III standing because they did not owe any outstanding court costs for which they may be imprisoned under the allegedly unconstitutional policy).

Similarly, with respect to potential future wrongs, the Supreme Court in *Lujan* reviewed a challenge by a group of environmental organizations to a regulation, promulgated by the Secretary of the Interior, which interpreted the Endangered Species Act as applying only to

[5] Similar reasoning has been applied to lawsuits for declaratory judgments. *Society of Separationists,* 959 F.2d at 1285 (*citing Ashcroft v. Mattis,* 431 U.S. 171, 172 (1997)) (explaining that "[t]o obtain equitable relief for past wrongs, a plaintiff must demonstrate either continuing harm or a real and immediate threat of repeated injury in the future" and such requirements are equally applied in suits for declaratory judgment).

actions within the United States and on the high seas. *Lujan,* 504 U.S. at 562-63. The plaintiffs' alleged that the Secretary's failure to regulate activities abroad increased the rate of extinction of certain species and, consequently, adversely affected their ability to observe and enjoy those species in the future. *Id.* The Supreme Court held that the plaintiffs failed to show an "imminent" injury insofar as their intentions to travel abroad to observe endangered species lacked any specific, concrete plans. *Id.* at 564. The Court stated: "Such 'some day' intentions – without any description of concrete plans, or indeed even any specification of *when* the some day will be – do not support a finding of the 'actual or imminent' injury that our cases require." *Id.* The Court elaborated:

> Although "imminence" is a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes – that the injury is "*certainly* impending." It has been stretched beyond breaking point when, as here, the plaintiff alleges only an injury at some indefinite future time, and the acts necessary to make the injury happen are at least partly within the plaintiff's own control. In such circumstances we have insisted that the injury proceed with a high degree of immediacy, so as to reduce the possibility of deciding a case in which no injury would have occurred at all.

Id. at 564 n.2 (citing *Whitmore v. Arkansas,* 495 U.S. 149, 156–60 (1990); *Lyons,* 461 U.S. at 102-06) (punctuation and internal citations omitted). Therefore, the basis of the Supreme Court's decision was not that the injury had not yet taken place; but, rather, that the threat of injury was not sufficiently certain.

Plaintiffs' Second Amended Complaint attempts to allege various violations of their individual constitutional rights as a result of Texas's child custody statutes, including alleged violations of their due process, equal protection, and free speech rights. Plaintiffs have not shown, however, that the alleged threat of injury is sufficiently certain and/or is not merely speculative and hypothetical in nature. Rather, Plaintiffs readily admit that they are not currently

participating or subject to any pending state court child custody cases; and, also that their alleged injury is purely hypothetical and/or speculative:

> Neither Rooker-Feldman [sic] nor any other abstention doctrine applies here as there are **no open or active cases involving petitions in litigation in any state court related to these statutes** [Dkt. 24 at 6 (emphasis added)].
>
> **Neither [P]laintiff seeks to appeal any current orders.** The relief sought in this action will not alter existing court orders regarding custody or possession of children regarding divorce [Dkt. 24 at 6 (emphasis added)].
>
> This petition has become necessary because [Plaintiffs] seek to modify child custody agreements and are subject to the other parent seeking modification and **Plaintiffs' political activities against the Texas Family Code and beliefs leave them susceptible to threats to punish and enforce the statutes against Plaintiffs** ... [Dkt. 24 at 7 (emphasis added)].
>
> **Plaintiffs, if they file for modification [of their child custody agreements], would be subject to punishment** for their beliefs and their political activism through deprivation of rights with their children [Dkt. 24 at 7 (emphasis added)].
>
> [Plaintiffs] have standing to pursue this allegation as a consequence of the law barring parents from seeking any modification of the custody/possession/ parenting plan order ... without subjecting themselves to absolute deprivation of fundamental rights for themselves and their children ... [Plaintiffs] are in fear of seeking such modification on the grounds that they must relinquish all parental rights to the state as a prerequisite for seeking modification. **[Plaintiffs] are also subject to having their rights infringed at any time based on a filing for modification by the other parent; and live in constant fear of invidious state authority that has a chilling effect on the parenting choices they might make if not subject to the absolute whim of a district court judge** [Dkt. 24 at 7-8 (emphasis added)].

As in *Lyons*, even if Plaintiffs' past SAPCR and/or child custody proceedings in the 367th and 431st District Courts of Denton County were unconstitutional (which the Court does not opine or address), such proceedings do not in and of themselves constitute a present injury in fact because past exposure to allegedly illegal conduct does not, in itself, show a present case or controversy. *See e.g. Lyons*, 461 U.S. at 102. Moreover, Plaintiffs here are concerned that their political activities and beliefs could come under review by a court, in a possible future

modification proceeding [Dkt. 24 at 7]. However, Plaintiffs are not currently threatened by either Ms. Palmer-Lynch or Mr. Schneider with a modification proceeding, and Plaintiffs themselves are also not currently seeking a modification. Nor has any court at present threatened Plaintiffs or questioned their activities or beliefs as parents. Further, the hypothetical injuries Plaintiffs allege – *if*, *may*, *susceptible*, *would be* – are not sufficient to confer standing. It is entirely speculative whether Ms. Palmer-Lynch, Mr. Schneider, or either of Plaintiffs will someday seek a modification of their current child custody agreement. *See Lujan*, 504 U.S. at 565 (holding held that the plaintiffs failed to show an "imminent" injury insofar as their future intentions lacked any specific, concrete plans). Plaintiffs have no concrete plans; merely a general intent to someday file at an indefinite future date. Plaintiffs readily admit there are no current custody issues pending before any state court, and they fail to plead any facts demonstrating they plan to seek modification in the *imminent* future [*see* Dkt. 13 at 6 ("Plaintiffs have been clear ... that their intent is not hypothetical but proscriptive pending resolution of federal questions ... [and, further,] Plaintiffs intend to seek modification of their custody orders [and] seek declaratory relief to protect their fundamental rights before proceeding with the modification")]. Plaintiffs' allegations, therefore, do not state an actual controversy and/or injury in fact, but merely speculate that should Plaintiffs or their prior spouses seek modification, at such time their constitutional rights would be violated [*see* Dkt. 24 at 7]. Such future, abstract plans – which may never develop – are precisely the type of hypothetical, conjectural, or conditional legal dispute that does not support a request for declaratory relief. *See Brown & Root, Inc. v. Big Rock Corp.*, 383 F.2d 662, 665 (5th Cir.1967). In addition, even if Plaintiffs are concerned that their political ideologies or parental teachings could come under review by a family court judge in a future custody agreement modification proceeding, Plaintiffs have not

alleged that any particular judge – in any particular hearing – at present has threatened either of Plaintiffs due to their ideologies or teachings.[6]

Because Plaintiffs have failed to plead facts sufficient to constitute a "real and immediate threat of future injury," they lack standing to pursue the prospective declaratory and injunctive relief requested in their Second Amended Complaint.[7] Accordingly, Plaintiffs' claims must be dismissed because this Court lacks subject matter jurisdiction over their case. Plaintiffs lack standing to assert their claims; thus, this Court need not address the applicability of the *Rooker-Feldman* doctrine, Eleventh Amendment Immunity, and/or Plaintiffs' failure to state a claim.

II. Overbreadth Doctrine

The Court notes that Plaintiffs also "invoke the overbreadth doctrine, as the public policy of the State of Texas regarding best interest of a child in [SAPCR] grants broad sweeping powers to family court judges that quall [First] Amendment speech between parent and child ..." in support of their contention that they have standing to bring this action [Dkt. 24 at 5]. Plaintiffs contend that standing must be independently determined under the overbreadth doctrine [Dkt. 13

[6] Similarly, Plaintiffs' claims have not ripened. While standing is concerned with *who* is a proper party to litigate a matter, the ripeness doctrine prevents premature adjudication. *See Thomas v. Union Carbide Agr. Products Co.,* 473 U.S. 568, 580 (1985). "[R]ipeness is peculiarly a question of timing. [I]ts basic rationale is to prevent the courts, through premature adjudication, from entangling themselves in abstract disagreements." *Id.* (citations omitted). Here, Plaintiffs have not tried to seek any modification to either of their current parenting plans. While Ms. Palmer did undergo a request for modification by her ex-husband, Mr. Schneider, that suit was six years ago, in 2009, resolved in 2012, and Ms. Palmer has made clear that the current matter does not seek review of any previous child custody cases [*see* Dkt. 24 at 6]. Because Plaintiffs have not actually tried to modify their parenting agreements, nor do they have any concrete plans to do so, Plaintiffs' claims are too speculative and abstract to be properly adjudicated.

[7] Plaintiffs also contend that the Denton County Standing Order, which applies in every SAPCR or modification thereof, infringes the privacy of the family and place prior restraints on speech [Dkt. 19 at 4]. The Denton County Standing Order specifically states: "No party to this lawsuit has required this order. Rather this order is a standing order of the Denton County District Courts that applies in every divorce suit and every [SAPCR], including a suit for modification or enforcement of a prior order, filed in Denton County, Texas" [Dkt. 19-1 at 2]. The Standing Order specifically states that it becomes effective upon the filing of a SAPCR, or a filing of a modification of a prior order. Id. Plaintiffs are currently not participating in any SAPCR, nor have they filed a modification of their current agreements. Thus, Plaintiffs again lack standing to seek a declaratory judgment that the standing order will or could violate their constitutional rights.

at 5].[8] The Court agrees. However, the overbreadth doctrine does not circumvent the requirements of Article III standing.

"The overbreadth doctrine permits a litigant to 'challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression.'" *Nat'l Fed'n of the Blind of Texas, Inc. v. Abbott,* 647 F.3d 202, 210 (5th Cir. 2011) (quoting *Broadrick v. Oklahoma,* 413 U.S. 601, 612 (1973)). "But the overbreadth doctrine applies on a *provision by provision* basis: the plaintiff must establish injury under a particular provision of a regulation that is validly applied to its conduct, then assert a facial challenge, under the overbreadth doctrine, to vindicate the rights of others not before the court under that provision." *Id.* (quoting *SEIU, Local 5 v. City of Hous.,* 595 F.3d 588, 598 (5th Cir.2010) (internal quotation marks omitted)). Thus, "[t]he overbreadth doctrine does not relieve [p]laintiffs from establishing Article III standing. Rather, the doctrine allows [p]laintiffs to bring a facial challenge to the provision of the law that caused their injury-in-fact." *Houston Balloons & Promotions, LLC v. City of Houston*, 589 F. Supp. 2d 834, 846 (S.D. Tex. 2008) (citing *Sec. of State of Maryland v. Joseph H. Munson Co., Inc*., 467 U.S. 947, 958 (1984)); *see also Bordell v. Gen. Elec. Co*., 922 F.2d 1057, 1061 (2d Cir. 1991) (explaining that the overbreadth doctrine is a "slender exception to the prudential limits on standing" and "does not affect the rigid constitutional requirement that plaintiffs must demonstrate an injury in fact to invoke a federal court's jurisdiction"); *Koger v. Dart*, 114 F. Supp. 3d 572, 577 (N.D. Ill. 2015) ("An overbreadth challenge is therefore no cure for mootness, an Article III defect."). As with Article III standing, one of the requirements of the overbreadth doctrine, therefore, is that Plaintiff must demonstrate an injury in fact. *See id.* The Court has already determined that Plaintiffs herein have failed to

[8] Plaintiffs also assert that their declaratory judgment claims confer standing (discussed *supra*).

plead an injury in fact; thus, the Court must similarly recommend that Plaintiffs' overbreadth argument be dismissed because they have failed to establish standing under the overbreadth doctrine – there is currently not an actual case or controversy before the Court.

III. Plaintiffs' Request for a Three-Judge Court

Plaintiffs also request "that a Three-Judge Court be convened to hear this cause" [Dkt. 24 at 27]. While Plaintiffs fail to state which statute might require a three-judge court to consider this action, the Court construes Plaintiffs request as a 28 U.S.C. § 2284 request. Section 2284 provides that a three-judge court "shall be convened when otherwise required by an Act of Congress, or when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body." Plaintiff has provided nothing to indicate that the instant action requires a three-judge court as contemplated by § 2284. Accordingly, the Court recommends denial of such a request.

CONCLUSION AND RECOMMENDATION

Based on the foregoing, the Court recommends that Defendants' Motion to Dismiss Plaintiffs' Second Amended Complaint [Dkt. 29] be **GRANTED** and Defendants' Motion to Dismiss [Dkt. 11] be **DENIED AS MOOT** because Plaintiffs lack standing to pursue their claims. Accordingly, the Court recommends Plaintiffs' claims against Defendants be dismissed without prejudice.

Within fourteen (14) days after service of the magistrate judge's report, any party must serve and file specific written objections to the findings and recommendations of the magistrate judge. 28 U.S.C. § 636(b)(1)(C). In order to be specific, an objection must identify the specific finding or recommendation to which objection is made, state the basis for the objection, and specify the place in the magistrate judge's report and recommendation where the disputed

determination is found. An objection that merely incorporates by reference or refers to the briefing before the magistrate judge is not specific.

Failure to file specific, written objections will bar the party from appealing the unobjected-to factual findings and legal conclusions of the magistrate judge that are accepted by the district court, except upon grounds of plain error, provided that the party has been served with notice that such consequences will result from a failure to object. *See Douglass v. United Services Automobile Ass'n*, 79 F.3d 1415, 1417 (5th Cir. 1996) (en banc), *superseded by statute on other grounds*, 28 U.S.C. § 636(b)(1) (extending the time to file objections from ten to fourteen days).

SIGNED this 25th day of August, 2016.

Christine A. Nowak
UNITED STATES MAGISTRATE JUDGE