IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

XTC CABARET (DALLAS) INC. D/B/A XTC CABARET et al. Plaintiffs,	§ § §	
v.	§ §	Civil Action No. 3:24-CV-00042-B
THE CITY OF DALLAS TEXAS et al., Defendants.	§ §	

THE CITY OF DALLAS'S BRIEF IN SUPPORT OF MOTION TO DISMISS FIRST AMENDED COMPLAINT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Charter Provisions and Ordinances

Rules

TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

Defendant City of Dallas on behalf of itself and its nonjural subdivision the Dallas Police Department (together, the "City") files this motion to dismiss Plaintiffs' First Amended Complaint ("Complaint") pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. In support, the City would show the Court as follows:

I. OVERVIEW

This lawsuit is an obvious attempt by Plaintiffs to avoid the impact of the Fifth Circuit's recent decision in *Association of Club Executives of Dallas, Incorporated v. City of Dallas*, 83 F.4th 958 (5th Cir. 2023), *cert. denied*, 2024 WL 1143708 (U.S. Mar. 18, 2024), which vacated a preliminary injunction issued by another judge in the Northern District of Texas and allowed section 41A-14.3 of the Dallas City Code (the "Ordinance"), a City ordinance that places restrictions on the hours of operation for businesses licensed as sexually-oriented businesses ("SOB"), to go into effect. Faced with the need to comply with the Ordinance, Plaintiffs now seek to have this Court direct the City that its police officers must interpret the Dallas City Code so that enforcement of chapter 41A depends not on whether a business holds a license under that chapter but instead on the activity being conducted on the premises at any given time – that is, to enforce or not enforce chapter 41A through a purely content-based test.

The Ordinance requires that an SOB "must be closed for business each day between the hours of 2:00 a.m. and 6:00 a.m." (City App'x at 4); Dallas, Tex., Code § 41A-14.3(a). The Ordinance does not state that an SOB must cease only sexually-oriented activities between the hours of 2:00 a.m. and 6:00 a.m., but states clearly that an SOB must close for business each day during those hours. Ultimately, Plaintiffs' claims either relate to actions that cannot be attributed to the City under *Monell* or are attacks on the requirements of the Ordinance itself, which

necessarily fail in light of the Fifth Circuit's determination that "the City is substantially likely to show that the Ordinance was designed to further a substantial governmental interest" and does not "substantially or disproportionately restrict[] speech." *Ass'n of Club Execs.*, 83 F.4th at 969 (cleaned up).

Ultimately, the lawsuit suffers from jurisdictional issues that necessitate dismissal of particular claims and parties under Rule 12(b)(1), certain claims should be stayed or dismissed in deference to state court proceedings, and all of the claims should be dismissed with prejudice under Rule 12(b)(6) because they either are not properly alleged against the City itself under *Monell*, do not plausibly plead any constitutional violation, or both. For the reasons set out below, the City requests that portions of the Complaint be dismissed for lack of jurisdiction or stayed and that the Complaint be dismissed in its entirety and with prejudice as to the City for failure to state a claim.

II. FACTUAL BACKGROUND

On January 26, 2022, the Dallas City Council adopted the Ordinance. (*See* City App'x at 2-7.) In relevant part, the Ordinance states, "A sexually-oriented business must be closed for business each day between the hours of 2:00 a.m. and 6:00 a.m." (*Id.* at 4); Dallas, Tex., Code § 41A-14.3(a). As set out in its whereas clauses, the Ordinance was enacted to combat the secondary effects of SOBs and was specifically supported by, among other things, "crime data show[ing] a significant increase in violent crime and drug and gun arrests at or near [SOBs] between the hours or 2:00 a.m. and 6:00 a.m.," as well as "a significant increase in the number of calls for service" to the Dallas Fire-Rescue Department at SOBs between those hours. (City App'x at 2-3); *see Ass'n of Club Execs.*, 83 F.4th at 962-63. Under the Dallas City Code, an SOB is defined as a "commercial enterprise the *primary business* of which is the offering of a service or the selling, renting, or exhibiting of devices or any other items intended to provide sexual

stimulation or sexual gratification to the customer." Dallas, Tex., Code § 41A-2(31) (emphasis added). That is, being regulated as an SOB does not preclude a business from engaging in other activities, but engaging in other activities also does not prevent a business from being regulated as an SOB and subjected to the requirements of chapter 41A of the Dallas City Code.

On the same day the Ordinance was enacted, the local SOB trade association and several SOBs (including Plaintiff Silver City Cabaret) sued the City alleging that the Ordinance was unconstitutional on its face in violation of the First Amendment and seeking declaratory and injunctive relief. *Ass'n of Club Execs.*, 83 F.4th at 963. Although the district court granted the motion for preliminary injunction in that case, that decision was reversed by the Fifth Circuit, which determined that the "preliminary injunction was . . . unwarranted." *Id.* at 970.

After the mandate issued in that case, Major Devon Palk sent a letter to licensed SOBs in the City, informing them that the Dallas Police Department ("DPD") would begin enforcement of the Ordinance on November 30, 2023. (*See* ECF 27 at 4; *id.* Ex. A.) The letter also set out penalties for violation of the Ordinance, including that DPD intended to pursue criminal charges for violation of the Ordinance as permitted under section 41A-21 of the Dallas City Code and section 243.010(b) of the Texas Local Government Code. The letter also set out DPD's interpretation of section 41A-4(e) of the Dallas City Code as requiring holders of both an SOB license and a dance hall license under chapter 14 of the Dallas City Code to comply with the hours of operation in section 41A-14.3(a) without exemption. (*See id.* Ex. A.)

After receiving the letter, one of the Plaintiffs, XTC Cabaret, sent a letter to Major Palk and DPD Chief Eddie Garcia explaining that they intended to stop SOB activity at or before 2:00 a.m. and then continue to operate as a restaurant with artistic shows "from time to time." (*Id.* Ex. C.) Major Palk responded by email, stating, in relevant part, that "all businesses with SOB licenses

. . . must comply with the hours of operation requirement in Dallas City Code Section 41A-14.3(a). XTC may not operate between 2:00 a.m. and 6:00 a.m." (*Id.* Ex. D.)

Separately from the allegations about the interpretation of the Ordinance, Plaintiffs also allege that in the early morning of December 3, 2023, patrons and employees of Tiger Cabaret went to an adjacent business, Malibu, which began operating just before 2:00 a.m. that day. (*Id.* at 7.) Plaintiffs allege that DPD officers arrived at Malibu "[a]t the close of operations" and "wrongfully arrested persons who were in the process of closing Malibu for 'operating a sexually oriented business.'" (*Id.*) Plaintiffs assert that this enforcement action "exceeded the scope of [Defendants'] authority resulting in harm and threat of harm to employees and patrons of Tiger Cabaret who wish to patronize Malibu after leaving Tiger Cabaret." (*Id.* at 8.)

III. ARGUMENT AND AUTHORITIES

A. Legal Standards

"Federal courts are courts of limited jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). The plaintiff bears the burden of overcoming the presumption "that a cause lies outside this limited jurisdiction." *Id.* In reviewing a Rule 12(b)(1) motion to dismiss for lack of subject-matter jurisdiction, the district court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case. *Williamson v. Tucker*, 645 F.2d 404, 413 (5th Cir. 1981). The court may rely on "(1) the complaint alone; (2) the complaint supplemented by undisputed facts; or (3) the complaint supplemented by undisputed facts and the court's resolution of disputed facts." *Id.* at 413.

A factual attack on subject-matter jurisdiction based on matters outside the complaint is treated differently in a motion under Rule 12(b)(1) than it would be under Rule 12(b)(6). *Id.* at 412-13. In a Rule 12(b)(1) motion, "no presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for

itself the merits of jurisdictional claims." *Id.* at 413. This is so because "[j]urisdictional issues are for the court – not a jury – to decide, whether they hinge on legal or factual determinations." *Id.* When a court is presented with motions under both Rule 12(b)(1) and Rule 12(b)(6), the court "must consider first the Rule 12(b)(1) jurisdictional challenge prior to addressing the merits of the claim." *Alabama-Coushatta Tribe of Tex. v. United States*, 757 F.3d 484, 487 (5th Cir. 2014).

Rule 12(b)(6) provides for the dismissal of a plaintiff's complaint when it fails "to state a claim upon which relief can be granted." In evaluating a motion to dismiss under Rule 12(b)(6), courts are to accept well-pleaded facts as true. *See, e.g.*, *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009). "Conclusory statements or legal conclusions couched as a factual allegation are not accepted as true." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Plaintiffs must plead facts with enough specificity "to raise a right to relief above the speculative level" so as to "nudge[] their claims across the line from conceivable to plausible." *Id.* In short, a complaint must contain sufficient factual matter, accepted as true, to "state a claim for relief that is plausible on its face." *Id.* "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." *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 556). "[T]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 677 (citing *Twombly*, 550 U.S. at 555). Further, "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 'show[n]'—'that the pleader is entitled to relief.'" *Iqbal*, 556 U.S. at 679. "[A] court ruling on a 12(b)(6) motion may rely on the complaint, its proper attachments, 'documents incorporated into the complaint by reference, and matters of which a court may take judicial notice.'" *Randall D.*

Wolcott, M.D., P.A. v. Sebelius, 635 F.3d 757, 763 (5th Cir. 2011) (quoting *Dorsey v. Portfolio Equities, Inc.*, 540 F.3d 333, 338 (5th Cir. 2008) (citations and internal quotation marks omitted)).

B. Certain claims should be dismissed for lack of jurisdiction under Rule 12(b)(1).

1. DPD is a nonjural entity and should be dismissed as a defendant.

It is not clear whether Plaintiffs still purport to bring claims against DPD. DPD has been dropped from the listing of parties in the Complaint, but it remains listed as a defendant in the caption and the introductory paragraph. (*See* ECF 27 at 1, 2-3.) DPD is a nonjural entity that has not been granted a separate capacity to sue and be sued from the City. *See, e.g.*, *Darby v. Pasadena Police Dep't*, 939 F.2d 311, 313-14 (5th Cir. 1991) (government subdivision cannot engage in litigation unless "true political entity has taken explicit steps to grant the servient agency with jural authority"); *Phillips v. Dall. Cnty. Sheriff's Dep't*, No. 3:16-CV-2680-D, 2017 WL 658749, at *2 (N.D. Tex. Jan. 12, 2017), *report and recommendation adopted*, No. 3:16-CV-2680-D, 2017 WL 635086 (N.D. Tex. Feb. 16, 2017) (section 1983 claims against DPD dismissed because it is nonjural entity). Plaintiffs have not – and cannot – allege any facts to indicate that the City has taken explicit steps to grant DPD separate jural authority or any separate legal existence. As the City is already a defendant in this action, DPD should be dismissed.

2. The Individual Plaintiffs' claims should be stayed or dismissed for lack of standing.

Tirado, Nero, and Bothmann (the "Individual Plaintiffs") allege that DPD violated their rights "by arresting them for engaging in lawful activity." (ECF 27 at 13.) They have not, however, alleged that the criminal case (or likelihood of a criminal case) has ended, and in fact, those cases are still pending (*see* City App'x at 22). "If a plaintiff files a false-arrest claim before he has been convicted (or files any other claim related to rulings that will likely be made in a pending or anticipated criminal trial), it is within the power of the district court, and in accord with common

practice, to stay the civil action until the criminal case or the likelihood of a criminal case is ended." *Wallace v. Kato*, 549 U.S. 384, 393-94 (2007). "If the plaintiff is ultimately convicted, and if the stayed civil suit would impugn that conviction, *Heck* will require dismissal; otherwise, the civil action will proceed, absent some other bar to suit." *Id.* at 394 (citing *Edwards v. Balisok*, 520 U.S. 641, 649 (1997); *Heck v. Humphrey*, 512 U.S. 477, 487 (1994)). That is, until the Individual Plaintiffs can show that their criminal cases have ended without a conviction, any claim for false arrest should be stayed. Furthermore, even if the false arrest claims could be pursued at this time, "allegations of past harm cannot establish standing for a request for prospective relief." *James v. Hegar*, 86 F.4th 1076, 1081 (5th Cir. 2023). Allegations that the Individual Plaintiffs were purportedly wrongfully arrested for violation of the Ordinance do not establish standing for a claim for declaratory relief or to enjoin enforcement of the Ordinance going forward, and claims for damages or other relief should be stayed.

3. The Court should decline to exercise jurisdiction over declaratory and injunctive claims of the Individual Plaintiffs and Tiger Cabaret.

Under the *Younger* abstention doctrine, a federal court may decline to exercise jurisdiction involving claims for injunctive and declaratory relief that may be regarded as an improper intrusion on the right of a state to enforce its own laws in its own court. *Younger v. Harris*, 401 U.S. 37 (1971). "*Younger* . . . and its progeny espouse a strong federal policy against federal-court interference with pending state judicial proceedings absent extraordinary circumstances." *Middlesex Cnty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 431 (1982); *see Baran v. Port of Beaumont Nav. Dist.*, 57 F.3d 436, 441 (5th Cir. 1995). The doctrine reflects the principle that equitable remedies are inappropriate "when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief" and also protects our federal system's "notion of 'comity,' that is, a proper respect for state functions." *Younger*, 401 U.S. at

43-44. Generally, *Younger* abstention requires federal courts to decline to exercise jurisdiction where: "(1) the federal proceeding would interfere with an 'ongoing state judicial proceeding'; (2) the state has an important interest in regulating the subject matter of the claim; and (3) the plaintiff has 'an adequate opportunity in the state proceedings to raise constitutional challenges.'" *Bice v. La. Pub. Defender Bd.*, 677 F.3d 712, 716 (5th Cir. 2012) (citing *Middlesex Cnty. Ethics Comm.*, 457 U.S. at 432).

Specifically, *Younger* abstention applies to three categories of state proceedings: ongoing criminal prosecutions, certain civil enforcement proceedings akin to criminal prosecutions, and "pending 'civil proceedings involving certain orders . . . uniquely in furtherance of the state courts' ability to perform their judicial functions.'" *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 72-73, 78 (2013). If the state proceedings fit into one of these categories, a court should consider whether there is (1) an ongoing state judicial proceeding, which (2) implicates important state interests, and (3) provides an adequate opportunity to raise federal challenges. *Id.* at 81. There are currently four ongoing state judicial proceedings related to this federal lawsuit – three are the ongoing criminal prosecutions of the Individual Plaintiffs and the fourth is Tiger Cabaret's appeal in state district court of the Chief of Police's determination to revoke Tiger Cabaret's SOB license for violation of section 41A-12 of the Dallas City Code. (*See* City App'x at 8-22.) These proceedings implicate important state interests in public safety, specifically with respect to enforcement of criminal laws and civil proceedings relating to civil penalties for violation of the Dallas City Code. (*Id.*)

Furthermore, the Individual Plaintiffs and Tiger Cabaret have adequate opportunity to raise any constitutional claims in the state court proceedings. The Supreme Court has made clear that federal constitutional rights can be protected in state court as well as federal court. *See, e.g.*, *Middlesex Cnty. Ethics Comm.*, 457 U.S. at 431 ("Minimal respect for state processes, of course,

precludes any *presumption* that the state courts will not safeguard federal constitutional rights."). Moreover, because it did not first attempt to bring these claims in state court, Plaintiff bears the burden of establishing that it did not have an adequate opportunity to raise the claim in the state proceedings. *Bice*, 677 F.3d at 718-19 (citing *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 14 (1987)). The Individual Plaintiffs and Tiger Cabaret have pled no facts to show that they do not have the opportunity to raise constitutional claims and defenses in state court. Therefore, this Court should decline to exercise jurisdiction over claims by the Individual Plaintiffs and Tiger Cabaret for injunctive or declaratory relief.

4. The SOB Plaintiffs lack standing as to their Fourth Amendment claims.

The SOB Plaintiffs assert that they have standing to assert a Fourth Amendment claim on behalf of their "patrons, guests, workers, and visitors" to be free from "the chilling effect of having to walk through a crowd of armed law enforcement officers to reach the business." (ECF 27 at 12-13.) "Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted." *Rakas v. Illinois*, 439 U.S. 128, 133-34 (1978) (quoting *Alderman v. United States*, 394 U.S. 165, 174 (1969)). Although the SOB Plaintiffs purport to assert Fourth Amendment claims vicariously on behalf of their patrons, they do not have standing to do so, and their Fourth Amendment claims should be dismissed for lack of jurisdiction.

C. Plaintiffs' claims should be dismissed under Rule 12(b)(6).

A municipality does not incur section 1983 liability for an injury caused solely by its employees, and therefore, it cannot be held liable based on a theory of *respondeat superior*. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978); *Valle v. City of Houston*, 613 F.3d 536, 541 (5th

Cir. 2010).[1] The bar on vicarious liability means that a municipality can only be liable when it causes the constitutional violation by the execution of the municipality's official policy or custom. *Monell*, 436 U.S. at 694; *Valle*, 613 F.3d at 541; *Piotrowski v. City of Houston*, 237 F.3d 567, 579 (5th Cir. 2001). Moreover, to impose liability on a municipality, a section 1983 plaintiff must establish both the causal link (that the policy is the "moving force" behind the constitutional violation) and the municipality's degree of culpability ("deliberate indifference" to the known or obvious consequences of the municipality's unconstitutional policy). *Bd. of Cnty. Comm'rs of Bryan Cnty. v. Brown*, 520 U.S. 397, 415 (1997).

Accordingly, establishing a valid *Monell* claim requires a plaintiff to demonstrate three elements in addition to the underlying claim of a violation of rights: "(1) a policymaker; (2) an official policy; and (3) a violation of a constitutional right whose 'moving force' is the policy or custom." *Cox v. City of Dallas*, 430 F.3d 734, 748 (5th Cir. 2005); *Piotrowski*, 237 F.3d at 578. Proof of all three attribution principles is necessary to distinguish individual violations perpetrated by local government employees from those that can be fairly identified as actions of the government itself, and to avoid municipal liability claims collapsing into *respondeat superior* liability. *Piotrowski*, 237 F.3d at 578; *Brown*, 520 U.S. 397 at 415; *Zarnow v. City of Wichita Falls*, 614 F.3d 161, 167 (5th Cir. 2010).

1. Plaintiffs misidentify the policy at issue.

Plaintiffs' amended complaint is inconsistent about whether the policy at issue is the Ordinance itself or a letter and email that allegedly wrongfully interprets the Ordinance. (*See, e.g.*,

[1] Although Plaintiffs appear to assert a separate claim for declaratory judgment (ECF 27 at 14-15), the Federal Declaratory Judgment Act is merely procedural and does not create any substantive federal claims, *see, e.g.*, *Aetna Life Ins. Co. of Hartford, Conn. v. Haworth*, 300 U.S. 227, 240 (1937); *Reid v. Aransas County*, 805 F. Supp. 2d 322, 339 (S.D. Tex. 2011). Declaratory relief is simply one type of relief potentially available to a plaintiff under a substantive cause of action such as section 1983.

ECF 27 at 8-9, 12.) The Ordinance is admittedly an official policy of the City promulgated by its policymaker, the Dallas City Council, but as set forth below in section III.C.3, it is *not* the moving force behind any constitutional violation. To the extent that Plaintiffs' claims are based on an assertion that DPD officers have announced a policy that differs from the Ordinance, those claims ignore the language of the Ordinance and other sections of chapter 41A of the Dallas City Code.

As stated above, the Ordinance states that an SOB "must be closed for business each day between the hours of 2:00 a.m. and 6:00 a.m." (City App'x at 4); Dallas, Tex., Code § 41A-14.3(a). It is not wholly clear, therefore, on what basis Plaintiffs are distinguishing the requirements of the Ordinance itself and the November 21, 2023 letter stating that the Ordinance provides that SOBs "may not operate between 2:00 a.m. and 6:00 a.m. each day" (ECF 27 Ex. A), or the November 29, 2023 email responding to a letter from XTC Cabaret asking if it can operate as a restaurant after 2:00 a.m. to clarify that SOBs "may not operate between 2:00 a.m. and 6:00 a.m." (*id.* Ex. D). Similarly, to the extent Plaintiffs complain about the statement in the November 21, 2023 letter that a late-hours dance hall permit does not exempt an SOB from the requirements of section 41A-14.3, that also merely sets out the requirements of the Dallas City Code. Specifically, section 41A-4(e) states, "A person who operates a sexually oriented business and possesses a dance hall license shall comply with the requirements and provisions of this chapter as well as the requirements and provisions of Chapter 14 of this code when applicable." Dallas, Tex., Code § 41A-4(e). Possessing a late-hours dance hall permit does not require a business to stay open after 2:00 a.m., and nothing about section 41A-4(e) supports Plaintiffs' arguments that such a permit exempts any business from the requirements of chapter 41A. On the contrary, section 41A-4(e) makes clear holders of both SOB and dance hall licenses "*shall comply* with the requirements" of chapter 41A, *id.* (emphasis added), as reiterated in the November 21, 2023 letter. Therefore, Plaintiffs' attempt to

imply that the letter or email constitute a different policy from the Ordinance – which has already been analyzed under the preliminary injunction standard by the Fifth Circuit – fails.

Moreover, the claims of Individual Plaintiffs and Tiger Cabaret do not relate to the letter or email. Instead, their allegations relate to an incident leading to the Individual Plaintiffs' arrest at Malibu, which does not hold an SOB license. Although the City does not agree with Plaintiffs' account of events that night, even assuming the allegations were true, Plaintiffs do not point to any official policy of the City to arrest individuals for violation of section 41A-14.3 simply for working at a business that Plaintiffs contend "is not a[n SOB] and does not operate as such" (ECF 27 at 7-8) or in retaliation for "being associated with a business that has an SOB permit" (*id.* at 11-12). Therefore, there is no allegation of an official policy that was the moving force for the purported violations alleged as to Tiger Cabaret and the Individual Plaintiffs.

To the extent the Individual Plaintiffs allege that the November 21, 2023 letter is the moving force behind the purported violations because it states that DPD will seek criminal charges for violation of section 41A-14.3, the letter is simply setting out the penalties for violation of the Ordinance under state law. Section 243.010(b) of the Texas Local Government Code states, "[a] person commits an offense if the person violates a municipal or county regulation adopted under this chapter. An offense under this subsection is a Class A misdemeanor." Tex. Loc. Gov't Code § 243.010(b). Chapter 243 grants municipalities and counties the authority to regulate SOBs, *id.* § 243.003, and chapter 41A of the Dallas City Code was adopted under the authority granted by that chapter of the Local Government Code, Dallas, Tex., Code § 41A-1(b). Therefore, at most, the statement in the November 21, 2023 letter that DPD will pursue criminal charges for violation of the Ordinance is a statement that the City will enforce state law, which is not sufficient to meet *Monell* pleading requirements. *See Vives v. City of New York*, 524 F.3d 346, 353 (2d Cir. 2008)

(holding that *Monell* requires more than a policy to enforce state law but instead requires that municipal policymakers establish a discrete policy to enforce an allegedly unconstitutional law); *Surplus Store and Exchange, Inc. v. City of Delphi*, 928 F.2d 788, 791–92 (7th Cir. 1991) ("[I]t is difficult to imagine a municipal policy more innocuous and constitutionally permissible, and whose causal connection to the alleged violations is more attenuated, than the 'policy' of enforcing state law").

2. Plaintiffs fail to allege facts to plead the necessary link to the City's policymaker for any purported policy other than the Ordinance itself.

To the extent that the Court determines the policy at issue is not the Ordinance or another provision of the Dallas City Code, Plaintiffs have failed to tie any other alleged policies to the City's policymaker. For purposes of section 1983, a policymaker is one who takes the place of the governing body in a designated area of city administration. *Zarnow*, 614 F.3d at 166 (citing *Webster v. City of Houston*, 735 F.2d 838, 841 (5th Cir. 1984) (en banc)). While the operative pleading need not supply an answer to the legal question of the specific identity of the city's policymaker, Plaintiffs still must establish that the alleged policy was promulgated or ratified by the City's final policymaker. *Groden v. City of Dallas*, 826 F.3d 280, 282 (5th Cir. 2016). Policymaking authority requires more than a showing of mere discretion or decision-making authority on the part of the official. *Webster*, 735 F.2d at 841. For municipal liability to attach, a policymaker must have "final authority to establish municipal policy with respect to the action ordered." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 481 (1986). "A municipality can be held liable only when it delegates policymaking authority, not when it delegates *decisionmaking* authority." *Longoria ex rel. M.L. v. San Benito Indep. Consol. Sch. Dist.*, 942 F.3d 258, 271 (5th Cir. 2019) (citing authorities).

Under Texas law, the final policymaker for the City is the Dallas City Council. *See Groden*, 826 F.3d at 286. Although as set out above the City contends that other than allegations related to the incident at Malibu, this case is an attack on the Ordinance itself, Plaintiffs generally assert otherwise. They do not, however, allege any facts to support a claim that the Dallas City Council delegated its policymaking authority as opposed to decision-making authority to any DPD officer. Instead, as discussed above, Plaintiffs' allegations primarily relate to the alleged "wrongful interpretation" by DPD officers of the Ordinance that was passed by the Dallas City Council and a police action resulting in the alleged wrongful arrest of the Individual Plaintiffs. (*See* ECF 27 at 3-9.) These assertions are not equivalent to the allegations in *Groden* of a publicly announced policy and media interviews to inform the general public about the policy. *See Groden*, 826 F.3d at 286; *see also Pena v. City of Rio Grande*, 879 F.3d 613, 622-23 (5th Cir. 2018) (distinguishing *Groden* from facts about written policies and practices at issue and emphasizing public announcement of policy and media interviews as "connecting the policy to the city council").

Multiple decisions from the Fifth Circuit and the Northern District of Texas have considered whether there has been a delegation of policymaking authority to top decisionmakers at the City such as the city manager or the chief of police and have found no such delegation. *See, e.g.*, *Bolton v. City of Dallas*, 541 F.3d 545, 550 (5th Cir. 2008) (fact that city manager had final decision-making authority as to employment decision insufficient to show delegation of policymaking authority from city council); *Dobbins v. City of Dallas*, No. 3:20-cv-1727-K, 2021 WL 3781927, at *1-2 (N.D. Tex. Aug. 25, 2021) (allegations as to "Mass Arrest Plan" issued by chief of police insufficient to show policy was promulgated or ratified by Dallas City Council); *Harper v. City of Dallas*, No. 3:14-CV-2647-M, 2018 WL 11408879, at *3-4 (N.D. Tex. Nov. 20, 2018) (while chief of police "exercised significant control over the day-to-day operations within

the DPD, including overseeing the issuance of the DPD's 'general orders,'" chief is not the City's policymaker and has not been delegated policymaking authority because he is subject to supervision of city manager and city council). Here, similarly, Plaintiffs have failed to allege any connection to the Dallas City Council other than the existence of the Ordinance itself or other ordinances being enforced such as sections 41A-4(e) and 41A-21(a). To the extent Plaintiffs' claims are about DPD officers' decision-making about how to enforce the Ordinance, other provisions of chapter 41A, and state law rather than being directed at the Ordinance itself or other provisions of the Dallas City Code, those enforcement decisions do not equate to policymaking and do not give rise to liability for the City under *Monell*.

3. Plaintiffs fail to allege any constitutional violation.

Plaintiffs cannot meet the elements of *Monell* because they have failed to sufficiently demonstrate any constitutional violation, much less one whose moving force is a policy or custom promulgated or ratified by the Dallas City Council.

a. First Amendment

In their amended complaint, Plaintiffs state that the City has violated their rights to free expression and association. (ECF 27 at 10.) As to their putative free-expression claim, Plaintiffs state three bases: (1) a lack of audience for the protected expression, which Plaintiffs allege to be exotic dancing, due to a purported pervasive police presence at the SOB Plaintiffs (*id.* at 10-11); (2) a purported policy to target and retaliate against "non-SOB activity" because of protected expression at other times (*id.* at 11-12); and (3) overbreadth of the Ordinance itself "as to non-SOB operations" (*id.* at 12).

1. Pervasive police presence

To the extent that the First Amendment claim is purportedly based on a "pervasive presence of uniform officers and patrol vehicles on the business's property" (*id.* at 11), the only

nonconclusory allegation of police presence is of a single incident that did not occur at any of the SOB Plaintiffs' locations. (*See generally id.*) Therefore, Plaintiffs have not pleaded, much less demonstrated, a pervasive police presence sufficient to give their claims facial plausibility.

2. Retaliation

From the vague allegations in the amended complaint, it is unclear whether Plaintiffs are alleging that the purported retaliation is requiring the SOB Plaintiffs to close their businesses at 2:00 a.m. or the arrest of Individual Plaintiffs at Malibu. (*See id.* at 11-12.) Although there are different standards depending on the type of retaliation alleged, generally, "to establish a First Amendment retaliation claim against an ordinary citizen, [plaintiffs] must show that (1) they were engaged in constitutionally protected activity, (2) the defendants' actions caused them to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity, and (3) the defendants' adverse actions were substantially motivated against the plaintiffs' exercise of constitutionally protected conduct." *Keenan v. Tejeda*, 290 F.3d 252, 258 (5th Cir. 2002). In a retaliatory arrest claim specifically, a plaintiff "generally 'must plead and prove the absence of probable cause for the arrest.'" *Grisham v. Valenciano*, 93 F.4th 903, 909 (5th Cir. 2024) (quoting *Nieves v. Bartlett*, 587 U.S. __, 139 S. Ct. 1715, 1724 (2019)). Here, Plaintiffs have not stated a plausible First Amendment retaliation claim.

First, with respect to the Ordinance's requirement that SOBs close for business between 2:00 a.m. and 6:00 a.m., that restriction is motivated by the City's substantial governmental interest in addressing crime at SOB locations, not the expressive conduct itself. *See Ass'n of Club Execs.*, 83 F.4th at 969. The Ordinance sets out the evidence on which the Dallas City Council relied in

passing it. (City App'x at 2-3.)[2] That evidence includes data about crime levels and service calls at those locations between the hours of 2:00 a.m. and 6:00 a.m. (*Id.*) Therefore, although it is not clear that Plaintiffs have met their pleading burden or can meet their evidentiary burden as to the second prong with respect to the Ordinance itself, they have not sufficiently pled that the Ordinance's enactment and enforcement was substantially motivated against the exercise of constitutionally protected conduct.

With respect to the apparent retaliatory arrest claim, Plaintiffs also have not sufficiently pled that the motivation for the arrests was in retaliation for the Individual Plaintiffs' conduct rather than simply to enforce the Ordinance. As discussed above, violations of chapter 41A of the Dallas City Code are Class A misdemeanors under state law. Tex. Loc. Gov't Code § 243.010(b); *see* Dallas, Tex., Code § 41A-21(a). Plaintiffs' reliance on the allegation that Malibu is not a licensed SOB is not sufficient to allege or prove the motivation of the DPD officers involved in the arrest (much less to meet the high burden of alleging the claim against the City itself). The allegation also is not sufficient to allege a lack of probable cause for the arrests. Therefore, Plaintiffs have not alleged any basis for a First Amendment retaliation claim, and that claim should be dismissed for failure to state a claim.

3. Overbreadth

As an initial matter, Plaintiff's overbreadth claim may not fall under the First Amendment free expression clause. As the Fifth Circuit set out in its prior decision relating to the Ordinance,

[2] In considering a motion under rule 12(b)(6), a court may take judicial notice of matters of public record. *See Funk v. Stryker Corp.*, 631 F.3d 777, 783 (5th Cir. 2011); *see also* Fed. R. Evid. 201(b) ("The court may judicially notice a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned."). A district court may also consider documents referenced in a complaint that are central to a plaintiff's claim even if the documents are not attached to the complaint. *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498-99 (5th Cir. 2000).

the second part of the test set out in *Renton* directs courts to determine "whether the regulation is 'designed to combat the undesirable secondary effects' of 'businesses that purvey sexually explicit materials' rather than to restrict their 'free expression.'" *Ass'n of Club Execs.*, 83 F.4th at 963 (quoting *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48-49 (1986)). Plaintiffs' claim seems to turn this standard on its head and demand that the City regulate the SOB Plaintiffs only when they are engaged in the protected activity of exotic dancing but not when they claim to be engaged in non-expressive activities such as operating a restaurant or a dance hall, *see, e.g.*, *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989), creating a higher standard for protection of their non-expressive activities than their expressive activities. In addition, they seek to have this Court determine that rather than uniformly applying the Ordinance to all businesses that have self-identified as an SOB by obtaining an SOB license (as well as unlicensed businesses engaged in sexually-oriented activity in violation of chapter 41A of the Dallas City Code), the City should look at the activity a licensed SOB is engaged in at a particular time and make a determination whether to enforce the requirements of chapter 41A of the Dallas City Code based not on the secondary effects of the business, but on whether it is currently engaged in protected expressive conduct.

Even if Plaintiffs are correct that they are entitled to First Amendment protection as to activities not protected by the First Amendment,[3] they have not pled sufficient facts to meet the standard for evaluating a First Amendment challenge under *Renton* and *Alameda Books*. Under *Renton*, a policy does not violate the First Amendment if it "is designed to serve a substantial governmental interest and allows for reasonable alternative avenues of communication." *Renton*,

[3] To the extent that Plaintiffs are not entitled to such protection with respect to their non-expressive activities, the standards for a substantive due process challenge to an ordinance are discussed in more detail in section III.C.3.c below.

475 U.S. at 50. A policy regulating SOBs is "designed to serve a substantial government interest" when the municipality can "provid[e] evidence that supports a link" between the regulated business and the targeted secondary effects. *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 434, 437 (2002); *see also id.* at 449 (Kennedy, J., concurring) (agreeing that plurality "gives the correct answer" to issue of evidence needed to satisfy *Renton*). A municipality may rely on evidence "reasonably believed to be relevant," but not on "shoddy data or reasoning" that does not "fairly support" the ordinance's rationale. *Id.* at 438; *see also id.* at 451 (Kennedy, J., concurring). A plaintiff may show evidence is "shoddy" either because it "does not support the municipality's rationale," or because the plaintiff's own evidence is contrary to the municipality's findings. *Id.* at 438-39. If the plaintiff meets its burden, the burden then shifts back to the municipality to provide additional evidence. *Id.* at 439. With respect to the requirement that the municipality rely on evidence "reasonably believed to be relevant," *Alameda Books* notes that "a city must have latitude to experiment" in addressing secondary effects, and, therefore "very little evidence is required." *Alameda Books*, 535 U.S. at 451 (Kennedy, J., concurring); *see also Ass'n of Club Execs.*, 83 F.4th at 969 ("The district court applied *Renton*'s reasonable belief standard too strictly" with respect to the Ordinance); *N.W. Enters. Inc. v. City of Houston*, 352 F.3d 162, 180 (5th Cir. 2003) (under "deference" demanded by *Renton*, "legislators cannot act, and cannot be required to act, only on judicial standards of proof"); *Ctr. for Fair Pub. Pol'y v. Maricopa County*, 336 F.3d 1153, 1168 (9th Cir. 2003) ("The record here is hardly overwhelming, but it does not have to be.").

As discussed above, the Ordinance sets out the evidence on which the Dallas City Council relied in passing it, including data about crime levels and service calls at SOB locations between the hours of 2:00 a.m. and 6:00 a.m. (City App'x at 2-3.) Plaintiffs allege that the evidence supporting the Ordinance is insufficient because it does not include "data or information relating

to crime rates for non-SOB activity." (ECF 27 at 12.) Plaintiffs' argument is flawed, however, in several ways. First, as the Fifth Circuit noted in its opinion, the data includes all licensed SOB locations including those not operating as SOBs at any time of the day. *Ass'n of Club Execs.*, 83 F.4th at 966 & n.11. Furthermore, because the SOB Plaintiffs hold SOB licenses, the data analysis included their specific locations. Finally, Plaintiffs' assertion that the City must specifically provide data about crime levels at dance halls to justify the Ordinance is not supported by case law. As the Fifth Circuit stated, "The standard does not require a city to forge an ironclad connection between SOBs and secondary effects or to produce studies examining precisely the conditions at issue." *Ass'n of Club Execs.*, 83 F.4th at 967. That is precisely what Plaintiffs seek to require the City to do here in asking the Court to set a higher evidentiary standard for non-expressive activity than for expressive activity. The evidence considered by the Dallas City Council is more than sufficient to meet the City's light evidentiary burden under *Renton* to show the requirement that SOBs close for business between 2:00 a.m. and 6:00 a.m. furthers a substantial government interest in addressing crime levels at SOB locations.

The Ordinance also meets the second element under *Renton* because there are reasonable alternative avenues for communication. Just as the Fifth Circuit found with respect to the Ordinance, "Plaintiffs still have a 'reasonable opportunity to open and operate' their businesses." *Ass'n of Club Execs.*, 83 F.4th at 969. That determination, however, was looking at whether reducing the hours at which the plaintiffs could offer protected SOB activity like exotic dancing "substantially or disproportionately restricts speech." *Id.* Here, however, there is little to no reduction of protected expression because the restaurant and dance hall uses that Plaintiffs seek to provide between the hours of 2:00 a.m. and 6:00 a.m. are not protected speech. *See Stanglin*, 490 U.S. at 25 ("We think the activity of these dance-hall patrons—coming together to engage in

recreational dancing—is not protected by the First Amendment."). Furthermore, to the extent that Plaintiffs' vague references to providing "artistic shows" "from time to time" do constitute protected speech, there is nothing to prevent Plaintiffs from providing those shows during the twenty hours each day that they may be open. Therefore, Plaintiffs have not alleged any basis for a First Amendment overbreadth claim, and that claim should be dismissed for failure to state a claim.

d. Right of association

The enforcement actions alleged by Plaintiffs also do not violate any right of association because there is no "generalized right of 'social association' that includes chance encounters in dance halls" (or restaurants or SOBs). *Stanglin*, 490 U.S. at 28. Therefore, Plaintiffs have not alleged any basis for a First Amendment right of association claim, and that claim should be dismissed for failure to state a claim.

b. Fourth Amendment

"The Fourth Amendment prohibits 'unreasonable searches and seizures.'" *United States v. Flowers*, 6 F.4th 651, 655 (5th Cir. 2021) (citing U.S. Const. amend. IV). "A seizure occurs when, under the totality of the circumstances, a law enforcement officer, by means of physical force or show of authority, terminates or restrains a person's freedom of movement." *Id.* at 655. With respect to a search or seizure of materials, a plaintiff must show it was subjected to a search or seizure of material in which they have a legitimate expectation of privacy. *Rakas*, 439 U.S. at 143-44.

Other than with the arrests of the Individual Plaintiffs, Plaintiffs do not allege any search or seizure. Moreover, they do not allege any legitimate expectation of privacy in the public areas of businesses open to the general public. The SOB Plaintiffs allege only that the Fourth

Amendment rights of their patrons, guests, workers, and visitors have been violated by the "chilling effect of having to walk through a crowd of armed law enforcement officers to reach the business." (ECF 27 at 12-13.) This assertion, however, is not sufficient to state a claim under the Fourth Amendment. First, the only nonconclusory allegations relating to police presence set out in the Complaint relate to one incident at Malibu after the SOB Plaintiffs had purportedly closed. (*See generally* ECF 27.) Otherwise, the SOB Plaintiffs only make conclusory allegations about a "pervasive presence of uniformed officers and patrol vehicles" that is not supported by any specific facts in the Complaint. Therefore, the SOB Plaintiffs have not sufficiently alleged facts to support the conclusory allegations that form the basis of their Fourth Amendment claim, and that claim should be dismissed for failure to state a claim.

c. Fifth and Fourteenth Amendments

In their due process claims under the Fifth and Fourteenth Amendments,[4] Plaintiffs allege that Defendants' "actions are an arbitrary and capricious abuse of rulemaking authority that shocks the conscience and bears no reasonable relationship to any governmental interest" and that those actions "violate[] Plaintiffs' right to use their property and conduct private business as guaranteed by the Federal and Texas Bills of Rights." (ECF 27 at 14.) Plaintiffs also assert that there is "no statutory basis (under the Texas Penal Code or otherwise) to threaten arrest of Plaintiffs' representatives and employees or close the Plaintiffs' operations (pursuant to [chapter] 41A of the Dallas City Code or otherwise)." (*Id.*)

[4] In their complaint, Plaintiffs also purport to assert a claim under the Texas due course of law clause. (ECF 27 at 13-14.) Although, under *Patel v. Tex. Dep't of Licensing & Regulation*, 469 S.W.3d 69 (Tex. 2015), there are some differences between the standards for a due process claim under the U.S. Constitution and a due course of law claim under the Texas Constitution, Plaintiffs have not pled facts to require this Court to conduct a different analysis under the due course of law provision than the due process clause.

With respect to Plaintiffs' Fifth Amendment due process claim, the due process clause of the Fifth Amendment applies only to the federal government. *See, e.g.*, *Dusenberry v. United States*, 534 U.S. 161, 167 (2002) ("The Due Process Clause of the Fifth Amendment prohibits the United States, as the Due Process Clause of the Fourteenth Amendment prohibits the States, from depriving any person of property without 'due process of law.'"). As to their Fourteenth Amendment due process claim, a substantive due process claim under the Fourteenth Amendment is limited to those where there is no specific protection in the Bill of Rights. *Albright v. Oliver*, 510 U.S. 266, 273 (1994). "Where a particular Amendment 'provides an explicit textual source of constitutional protection' against a particular sort of government behavior, 'that Amendment, not the more generalized notion of "substantive due process," must be the guide for analyzing these claims.'" *Id.* (quoting *Graham v. Connor*, 490 U.S. 386, 395 (1989)). Therefore, if the Court determines that Plaintiffs' claims are properly considered under the First and Fourth Amendment, Plaintiffs cannot also pursue a substantive due process claim.

Assuming, however, that the City is correct that Plaintiffs are not entitled to rely on the First Amendment with respect to the Ordinance's restriction on their hours of operation with respect to non-expressive activities in addition to sexually-oriented activity, they have not pled a plausible substantive due process claim. First, to succeed on such a claim, a plaintiff must establish a constitutionally protected property interest. *See Shelton v. City of College Station*, 780 F.2d 475, 479 (5th Cir. 1986) ("Deprivation by the state of a protected interest in life, liberty, or property is prerequisite to a claim for denial of due process."). What constitutes a protected property interest is defined by state law. *See Dennis Melancon, Inc. v. City of New Orleans*, 703 F.3d 262, 269 (5th Cir. 2012). The Texas Supreme Court has held that "[a] constitutionally protected right must be a vested right, which is 'something more than a mere expectancy based upon an anticipated

continuance of an existing law.'" *Klumb v. Hous. Mun. Emp. Pension Sys.*, 458 S.W.3d 1, 15 (Tex. 2015). Plaintiffs allege a general "right to use their property and conduct private business." (ECF 27 at 14).) Texas law, however, does not recognize such a general right, but instead recognizes that certain occupational interests exist subject to the government's ability to impose and change regulations, including for businesses operated through a government license. *See Tex. Dep't of State Health Servs. v. Crown Distrib. LLC*, 647 S.W.3d 648, 654-56 (Tex. 2022).

Additionally, for claims of substantive due process violations relating to an ordinance, a "court reviews [the city's] actions 'against the deferential "rational basis" test that governs substantive due process.'" *Energy Mgmt. Corp. v. City of Shreveport*, 467 F.3d 471, 481 (5th Cir. 2006) (quoting *Simi Inv. Co. v. Harris Cnty.*, 236 F.3d 240, 249 (5th Cir. 2000)). If a Plaintiff can first establish a constitutionally protected property right, "the next step in the substantive due process inquiry is whether the action is rationally related to a legitimate government interest." *Simi*, 236 F.3d at 250-51 (citing *FM Props. Operating Co. v. City of Austin*, 93 F.3d 167, 174 (5th Cir. 1996)). "The question is only whether a rational relationship exists between the [policy] and a conceivable legitimate objective. If the question is at least debatable, there is no substantive due process violation." *Id.* (alteration in original). Public safety has long been recognized as a legitimate governmental interest, *see, e.g.*, *FM Props.*, 93 F.3d at 172, and the City has provided far more evidence than is required in a basic due process analysis to establish a rational relationship between the Ordinance and its interest in public safety (*see, e.g.*, City App'x at 2-3); *see also Ass'n of Club Execs.*, 83 F.4th at 969.

Furthermore, Plaintiffs' assertion that there is no statutory basis for threatening arrest or closure of a business for violations of chapter 41A of the Dallas City Code is incorrect. As discussed above, section 243.010(b) of the Texas Local Government Code provides that a person

who violates a municipal or county regulation relating to SOBs commits a Class A misdemeanor. Tex. Loc. Gov't Code § 243.010(b). The Texas Local Government Code also authorizes municipalities to require licenses to operate SOBs and that local regulations may provide for the denial, suspension, or revocation of such a license. *Id.* § 243.007(a), (b); *see also* Dallas, Tex., Code §§ 41A-9 (suspension of licenses), 41A-10 (revocation of licenses). Plaintiffs do not allege that these statutes or ordinances are unconstitutional or a violation of due process, and their assertions that DPD officers should not be allowed to enforce them do not rise to the level of a due process violation. For these reasons, Plaintiffs' due process and due course of law claims should be dismissed for failure to state a claim.

IV. CONCLUSION

For the foregoing reasons, the City respectfully requests that, pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure: (1) claims against the nonjural DPD be dismissed; (2) the Individual Plaintiffs' claims for monetary relief be stayed until such time as they can show that their criminal proceedings have ended without a conviction; (3) the prospective relief claims of the Individual Plaintiffs be dismissed for lack of standing, or in the alternative, that the Court decline to exercise jurisdiction over them under *Younger*; (4) that the Court decline to exercise jurisdiction over Tiger Cabaret's prospective relief claims under *Younger*; and (5) that the Court dismiss the SOB Plaintiffs' Fourth Amendment claims for lack of standing. The City further requests that, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, the Complaint should be dismissed in its entirety and with prejudice as to the City for failure to state a claim.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was submitted to the Clerk of Court using the CM/ECF System for such electronic filing on this 5th day of April, 2024. Based on the records currently on file, the Clerk of Court will transmit a Notice of Electronic Filing to all parties registered under the CM/ECF System to receive service electronically.

By: /s/ *Kathleen M. Fones*