IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

BAY AREA UNITARIAN UNIVERSALIST CHURCH; DRINK HOUSTON BETTER, LLC d/b/a ANTIDOTE COFFEE; PERK YOU LATER, LLC, *Plaintiffs*, v. KEN PAXTON, Attorney General for the State of Texas, in his official capacity; KIM OGG, District Attorney for Harris County, in her official capacity; VINCE RYAN, County Attorney for Harris County, in his official capacity; ED GONZALEZ, County Sheriff for Harris County, in his official capacity; PETE BACON, Acting Chief of Police for the Webster Police Department, in his official capacity; ART ACEVEDO, Chief of the Houston Police Department, in his official capacity; KIM LEMAUX, Presiding Officer for the Texas Commission on Law Enforcement, in her official capacity, *Defendants.*	CIVIL ACTION NO. 4:20-cv-3081

PLAINTIFFS' CONSOLIDATED OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS THE COMPLAINT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

STATUTES

INTRODUCTION

This case implicates two fundamental rights that should be in no tension: the right to free expression and the right of property owners to exclude. "At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence." *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 213 (2013) ("*USAID*"). Likewise, a core government function is protection of the "fundamental right of a private property owner to exercise exclusive dominion and control over [her property]." *GeorgiaCarry.Org, Inc. v. Georgia*, 687 F.3d 1244, 1265 (11th Cir. 2012). As the Texas Supreme Court has recognized, "[p]rivate property rights have been described 'as fundamental, natural, inherent, inalienable, not derived from the legislature and as pre-existing even constitutions.'" *Severance v. Patterson*, 370 S.W.3d 705, 709 (Tex. 2012).

But Texas has created an unconstitutional conflict between these two fundamental rights. Through an ill-conceived amendment to its criminal trespass law, Texas forces property owners to *choose* between their right to expression and their right to exclude—specifically, their right to exclude guns from their property. Under the *general* Texas criminal trespass law, property owners need only provide "notice" to potential entrants that they are prohibited from entering. So, historically, Texas property owners could exclude guns from their property via unobtrusive, pictographic signs—just as one might exclude pets or bicycles or anything else. And if a trespasser nevertheless entered, property owners could summon the police to enforce their rights. But Texas amended this law to exempt licensed handgun-carriers. Now, licensed handgun owners can carry their weapons onto private property *without consent*, unless property owners post multiple large signs containing government-scripted speech across at least ten square feet, thus conflicting with and "drown[ing] out" property owners' preferred expression. *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2378 (2018) ("*NIFLA*").

Plaintiffs here, a church and a coffee shop, wish to exclude guns from their properties, so they are put to this choice between fundamental rights. They can either comply with the Texas laws and post large, overly burdensome signs that interfere with their preferred messaging, or they can give up the protections of criminal trespass law and the police. *See GeorgiaCarry.Org*, 687 F.3d at 1263 ("[C]riminal law principles drawn from the common law reinforce the fundamental nature of a property owner's rights.").

But "the government 'may not deny a benefit to a person on a basis that infringes his'" constitutional rights in this way. *United States v. Am. Libr. Ass'n*, 539 U.S. 194, 210 (2003). "Under this principle, known as the unconstitutional conditions doctrine," a speech requirement, necessary to obtain a government benefit, is "unconstitutional if [Texas] could not directly require" it. *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 59 (2006).

And here, there is no question that the compelled speech at issue—overly large, needlessly wordy signs imposed only on those who wish to express one disfavored message—would violate the First Amendment in multiple ways if directly required. These laws could not satisfy even the most lenient of First Amendment scrutiny, as they are overly burdensome for *no reason at all*. *See, e.g.*, *Am. Beverage Ass'n v. City & Cnty. of San Francisco*, 916 F.3d 749, 756 (9th Cir. 2019) (holding that California could not require a warning label to cover 20% of advertisement where it failed to justify why a smaller label would be insufficient). And in any case, strict scrutiny would apply, because the requirements are content-based: they necessarily alter Plaintiffs' preferred expression. Defendants could not (and do not even try to) prove that these laws satisfy strict scrutiny. Worse still, Texas discriminates on the basis of viewpoint, as *only* those property owners who wish to exclude guns are subject to heightened notice requirements; anyone else can exclude for virtually any reason at all with reasonable notice.

Texas cannot then circumvent these constitutional problems by indirectly imposing its speech requirements as a condition on state protection.

Rather than challenge these basic points in their motions to dismiss, Defendants assert a variety of overlapping arguments regarding standing, ripeness, and the proper defendants to § 1983 suits. These arguments, however, misunderstand the doctrine of unconstitutional conditions, which does not depend on the state "enforcing" any law against Plaintiffs, but instead on the state *denying* a benefit, which is exactly what Texas has done here. That alone is sufficient to provide Plaintiffs with immediate standing to sue the law enforcement officials responsible for implementing these unconstitutional laws. To hold otherwise would mean Texas could demand that property owners profess communism as a condition of receiving fire department services, or fascism as a condition of receiving garbage pickup. That cannot be right, and Defendants' motions should be denied.

BACKGROUND

A. Statutory Background

Texas protects the right of property owners to exclude unwanted entrants through its criminal trespass law. Texas Penal Code § 30.05 provides that a "person commits an offense if the person enters or remains on or in [the] property of another … without effective consent and the person … had notice that the entry was forbidden." The statute defines the necessary "notice" broadly to include, among other things, "oral or written communication by the owner or someone with apparent authority," "fencing or other enclosure obviously designed to exclude intruders," "identifying purple paint marks on trees or posts," and, relevant here, "a sign or signs posted on the property or at the entrance to the building, *reasonably likely to come to the attention of intruders*, indicating that entry is forbidden." *Id*. § 30.05(b)(2) (emphasis added).

Historically, property owners could exclude entrants for almost any reason at all (e.g.,

"no shirt, no shoes, no entry"), as long as they provided some form of notice listed in § 30.05. But in 2003, the Texas Legislature altered the scope of its criminal trespass law to disfavor property owners who want to exclude guns from their property. Texas exempted from § 30.05 any intruder whose entry is "forbidden" on the "basis" that "entry with a handgun was forbidden," as long as that entrant carried a concealed carry permit and a concealed handgun. *Id*. § 30.05(f). In 2015, that exemption was expanded to include openly carried weapons as well. *Id*.; ECF Doc. 1 ¶18 ("Compl.").

Texas replaced property owners' general protection from gun-carrying trespassers with new, less protective provisions: Texas Penal Code §§ 30.06 and 30.07 (the "Acts"). These provisions (which relate to concealed carry and open carry, respectively) prohibit handgun-carriers from entering property as long as they had "notice" that such entry was forbidden; but unlike the general trespass law, the Acts include heightened "notice" requirements, defining "notice" to require unwieldy, government-scripted speech. Under §§ 30.06(b), (c)(3) and 30.07(b), (c)(3), "notice" includes only "oral or written communication." And "written communication," in turn, is defined to include only two options:

> (A) a card or other document on which is written language identical to the following: "Pursuant to Section 30.06, Penal Code (trespass by license holder with a concealed handgun), a person licensed under Subchapter H, Chapter 411, Government Code (handgun licensing law), may not enter this property with a concealed handgun"; or
>
> (B) a sign posted on the property that:
> (i) includes the language described by Paragraph (A) in both English and Spanish;
> (ii) appears in contrasting colors with block letters at least one inch in height; and
> (iii) is displayed in a conspicuous manner clearly visible to the public.

Id. § 30.06(c)(3); *see also id*. § 30.07(c)(3) (identical but applied to openly carried handguns).

In other words, after the passage of the Acts, property owners who wish to exclude handguns have only three options for invoking the protection of Texas's criminal trespass law:

(1) orally notifying every single person who enters their property that handguns are prohibited; (2) handing a written card to every single person who enters their property with the required language; or (3) posting a sign with the exact language and size requirements provided in §§ 30.06(c)(3)(B), 30.07(c)(3)(B). On the other hand, property owners who wish to exclude any other kind of objects or people—knives, intoxicated patrons, snarling dogs—may do so through significantly less onerous methods. *See id.* § 30.05(b)(2).

This narrow set of choices in itself differentially burdens the speech of property owners who wish to exclude guns from their premises. Moreover, the only feasible option for most property owners is posting the signs required by the Acts, given the self-evident problems in individually notifying every single entrant onto a property. Compl. ¶ 42. As a practical matter, to exclude guns, property owners have to notify every single entrant because there is no way of knowing who carries a concealed weapon. *Id.* And posting the required signs greatly burdens property owners. The size and language requirements necessitate large, cumbersome signs. Property owners must also post the required language for *both* concealed and openly carried weapons. *Id*. ¶ 24. The signs require large block letters (at least an inch tall) and the signs must be displayed in two languages, so the signage takes up at least ten square feet of space at a *single* entrance to the property. *Id*. ¶¶ 24–25, 75.[1]

Of course, signs the size of movie posters necessarily alter the aesthetic that property owners wish to present. *Id*. ¶¶ 44–46. The size and wording of the signs turns what would have been an unobtrusive or nuanced notice into a conspicuous, quasi-political statement, a "Scarlet Letter" that suggests the property owner has strong anti-gun views—whether they do or not. *Id.*

[1] And this does not even take into account that property owners must post a *third* sign to exclude weapons *other* than handguns and that the open-carry signs must be placed at *each* entrance to the property. Compl. ¶¶ 23–26.

¶¶ 48, 73. And the signs turn a patron's thoughts to guns, violence, and the political controversy over open- and concealed-carry laws, rather than coffee, shopping, or faith—the messages the Plaintiffs actually desire to convey. *Id*. ¶¶ 44–48, 61, 66, 73.

Nowhere has the Texas Legislature (or anyone else) tried to explain why these signage requirements are necessary—let alone beneficial—as compared to the ordinary requirements that constitute "notice" under § 30.05, which the Legislature has deemed sufficient to notify *any other* would-be trespasser. *Id*. ¶¶ 86–88. Indeed, simple pictographic signs are more likely to be understood than the complicated, wordy language required by Texas law—which probably explains why no other state employs signage requirements like those in Texas. *Id*. ¶¶ 93–95.

B. Plaintiffs' Objections to the Acts

Plaintiffs—a church and a coffee shop—do not wish to convey notice to exclude guns in the unnecessarily burdensome format the Acts require, but they do wish to exercise their right to exclude handguns. Plaintiff Bay Area Unitarian Universalist Church—which sits on the border between Houston and Webster—professes a message of non-violence and does not wish to permit guns on its property. *Id*. ¶¶ 64–67. The Church begrudgingly displays on its front and side entrances the signs required to prohibit concealed handguns. *Id*. ¶¶ 59, 61. The Church would like to prohibit all weapons, but it believes that posting any further signs would detract too much from the religious message the Church wants to express, turning entrants' thoughts immediately to guns and violence. *Id*. ¶¶ 61–67. Church leadership debated whether to post any signs, as they are "ugly and intimidating" and diminish the experience the Church wishes to cultivate. *Id*. ¶ 67.

Plaintiff Antidote[2] is a small coffee shop, located in Houston, that sells coffee, wine, ice

[2] Antidote Coffee is the trade name for Plaintiff Drink Houston Better LLC; Plaintiff Perk You Later, LLC, shares ownership with Antidote Coffee and owns the building where it operates. Compl. ¶ 6. For convenience, this brief uses the name "Antidote" to refer to these Plaintiffs.

cream, and related goods. *Id.* ¶ 70. Antidote believes that guns would be unsafe in a family atmosphere where patrons bring pets and children, as well as drink alcohol. *Id*. ¶ 71. Accordingly, Antidote used to display a three inch by three inch pictographic sign prohibiting guns. *Id*. But since 2016, Antidote has posted the new, intrusive signs required by Texas law (and has had to replace them, at considerable expense, several times). *Id*. ¶ 72. These signs cover a large portion of the shop's frontage and are detrimental to Antidote's desired aesthetic; they also force Antidote to make what it considers a "bold political statement" regarding guns. *Id*. ¶ 73. Indeed, Antidote's staff have encountered customers bothered by the large signs. *Id*. ¶ 77.

Both the Church and Antidote would like to be able to rely on criminal trespass law backed by police protection in the event that someone attempts to carry a gun onto the premises, as that is the only effective way to prevent gun-carrying trespassers from entering their properties (or to remove those who do). *Id*. ¶ 55. They cannot feasibly provide oral notice or a written card to every single individual who enters their premises—and even if they could, it would likely engender tense encounters with gun owners that they would prefer to avoid. *Id*. ¶¶ 68, 79, 81. So to obtain police enforcement of their right to exclude, they must engage in the excessively burdensome, government-scripted speech required by the Acts. *Id*. If not for the Acts, both the Church and Antidote would post smaller, more easily understood signs notifying entrants that guns are prohibited. *Id*. ¶¶ 69, 82.

C. Procedural History

Because the Act's heightened notice requirements force Plaintiffs to either engage in unjustified government-scripted speech or forgo their rights, they filed suit against Defendants here, asserting claims under 42 U.S.C. § 1983, as well as *Ex parte Young*, 209 U.S. 123 (1908). Compl. ¶ 2. Plaintiffs sought declaratory and injunctive relief to remedy violations of their right to free speech, association, and due process under the U.S. Constitution, as well as their right to

free speech under the Texas Constitution. *Id.* ¶¶ 99–126. The various Defendants filed four motions to dismiss. *See* ECF Doc. 28 ("Texas AG MTD"); ECF Doc. 38 ("Harris County MTD"); ECF Doc. 42 ("Acevedo MTD"); ECF Doc. 52 ("Bacon MTD"). Because the motions assert overlapping arguments, Plaintiffs file this consolidated opposition to all four.

STATEMENT OF THE ISSUES AND STANDARDS OF REVIEW

The first issue is whether Plaintiffs have standing to pursue their claims in this Court. When a court reviews a motion to dismiss for lack of jurisdiction, the party asserting jurisdiction bears the burden of proof. *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001). Where, as here, defendants provide no additional evidence and assert only a *facial* challenge to a plaintiff's standing, the allegations in the complaint "are presumed to be true." *Paterson v. Weinberger*, 644 F.2d 521, 523 (5th Cir. 1981).

The second issue is whether Plaintiffs sufficiently pleaded a claim. When reviewing a motion to dismiss for failure to state a claim, the complaint must merely "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, 674 (2009) (citation omitted).

SUMMARY OF ARGUMENT

I. The government cannot "deny a benefit to a person on a basis that infringes his constitutionally protected ... freedom of speech." *USAID*, 570 U.S. at 214. Yet that is precisely what Texas's Acts do, as they demand that Plaintiffs *either* recite unnecessarily and differentially burdensome government-scripted speech *or* forfeit their core property right to exclude. Defendants' numerous arguments to the contrary are based on a misunderstanding of the doctrine of unconstitutional conditions.

II.A. Defendants first challenge Plaintiffs' standing, but to no avail. Plaintiffs presently suffer a concrete injury, in that they must choose between compelled speech or a diminished

right to exclude. That injury is redressable because the Court can enjoin law enforcement actors to enforce Texas criminal trespass law without the heightened notice requirements, restoring the full scope of Plaintiffs' property rights. And the injury is traceable to these Defendants, the law enforcement officials responsible for protecting private property under Texas criminal trespass law. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992).

Defendants' contrary arguments hold no water. *First*, they assert that Plaintiffs lack injury-in-fact since the Plaintiffs voluntarily posted the signs, but posting the signs is not truly "optional"—Plaintiffs must comply or lose police protection. Nor does it matter that the Acts are not "enforced" against Plaintiffs, as the injury is the unconstitutional choice between police protection or First Amendment rights. Likewise, it is irrelevant that Plaintiffs want to post some variety of a "no guns" sign—the Acts compel Plaintiffs to engage in government-scripted, onerous speech that changes the content of Plaintiffs' desired, welcoming message, while other property owners may exclude persons or objects through less onerous means. Defendants argue that Plaintiffs have "other options" rather than post the signs, but those "options"—individually notifying *every single entrant* as to Plaintiffs' no-guns policy—are impracticable, and, if anything, even *more* injurious to Plaintiffs' First Amendment rights. Plaintiffs also correctly assert both as-applied and facial challenges; the Acts are unconstitutional not only with respect to these Plaintiffs but with respect to *all* property owners. Last, Defendants assert there is no injury because the police will remove trespassers anyway. This argument is not only implausible—Defendants cannot seriously contend that law enforcement will *violate the law* to remove gun-holders—but also flies in the face of Plaintiffs' allegations, which must be presumed true.

Second, Defendants assert that there is no possible "remedy" because this Court cannot "rewrite" Texas statutes to provide criminal trespass protection where there no longer is any. But

Plaintiffs seek ordinary declaratory and injunctive relief holding the relevant Texas heightened notice requirements unconstitutional. Such relief is well within the Court's remedial powers; if it were not, federal courts would have only illusory power to enforce the supremacy of the Constitution. And, contrary to Chief Bacon's assertions, the Court can in fact meaningfully enjoin Defendants, all of whom are bound by the Acts in question but would *not* be once the Court enjoins them from relying on the unconstitutional, heightened noticed requirements.

Third, some Defendants claim that they are not responsible for enacting state legislation, and so Plaintiffs' injury is not traceable to them. But Defendants—all law enforcement officials—are charged with implementing these unconstitutional state laws, so they are proper defendants, regardless of whether they "enacted" the offending provisions.

II.B. The municipal Defendants also assert that they are improperly sued under 42 U.S.C. § 1983 because Plaintiffs supposedly must identify an invalid "municipal policy" and failed to do so. But Plaintiffs correctly filed suit under both *Ex parte Young*, 209 U.S. 123 (1908), and § 1983. Under *Ex parte Young*, Plaintiffs can sue state officials for prospective, injunctive relief where state officials act in violation of the Constitution. And as the Fifth Circuit has made clear, Plaintiffs can also sue municipal actors under § 1983 where they are enforcing state law. *Echols v. Parker*, 909 F.2d 795, 801 (5th Cir. 1990).

II.C. Finally, Defendants raise a handful of arguments on the merits of Plaintiffs' legal claims, but none is persuasive. The Attorney General argues that the Acts regulate only "non-expressive" conduct and constitute merely a "minimal" burden on speech, but that is plainly incorrect. Compelled speech is a serious injury, and unnecessarily large written signs regarding a controversial topic (like whether to allow guns on one's private property) are plainly "expressive." A few municipal Defendants also assert that Plaintiffs failed to state a claim, but

they simply repeat their argument that Plaintiffs have not alleged any "enforcement" action by Defendants. Defendants' protestations that they will not *affirmatively* act against Plaintiffs are simply irrelevant. Law enforcement is not immunized from suit merely because its unconstitutional activity is an act of *omission*.

ARGUMENT

Texas singles out property owners who wish to exclude guns from their property and compels them to recite burdensome, state-scripted language as a condition of receiving the protection of criminal trespass law. This requirement violates Plaintiffs' rights under the "unconstitutional conditions" doctrine, because "state legislatures may not condition the conferral of a government benefit on the forfeiture of a constitutional right." *Dep't of Tex., Veterans of Foreign Wars of U.S. v. Tex. Lottery Comm'n*, 760 F.3d 427, 438 (5th Cir. 2014).

In their motions to dismiss, Defendants fire a scattershot round of arguments, asserting that Plaintiffs are not "required" to engage in compelled speech, that the Acts will not be "enforced" against Plaintiffs, that law enforcement cannot remedy their injury, and that their injury is not actually traceable to law enforcement in the first place, among others. But all of these arguments overlook the fundamental point of an unconstitutional conditions claim: Plaintiffs have a choice, but *both* choices are injurious. Plaintiffs are not the subject of an enforcement action, they are the subject of a *deprivation* because they either must forfeit their constitutional right to free speech or their property right to exclude (and police protection of that right to exclude).

With Plaintiffs' legal claims properly understood, Defendants' various arguments melt away. Accordingly, Plaintiffs first explain the contours of their unconstitutional conditions claim. Second, Plaintiffs explain why Defendants' various jurisdictional and merits arguments all miss the mark.

I. THE ACTS UNCONSTITUTIONALLY CONDITION THE PROTECTIONS OF CRIMINAL TRESPASS LAW ON GOVERNMENT-COMPELLED SPEECH.

It is "a basic First Amendment principle that freedom of speech prohibits the government from telling people what they must say." *USAID*, 570 U.S. at 213 (citation omitted). Indeed, "law[s] commanding involuntary affirmation" of government speech "require even more immediate and urgent grounds than a law demanding silence." *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2464 (2018) (citation omitted). That is true whether the government statement is itself objectionable or simply "alte[rs]" the content of Plaintiffs' preferred expression. *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988). And it is *especially* true where the government seeks to hobble a disfavored viewpoint, as "[t]he First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others." *Matal v. Tam*, 137 S. Ct. 1744, 1757 (2017).

Nor can the government "deny a benefit to a person on a basis that infringes his constitutionally protected ... freedom of speech." *USAID*, 570 U.S. at 214. "Under this principle, known as the unconstitutional conditions doctrine," a government speech requirement, necessary to obtain a government benefit, is "unconstitutional if [Texas] could not directly require" it. *Rumsfeld*, 547 U.S.at 59.

Critically, this doctrine does not depend on "enforcement" or "affirmative acts" by government—it is the conditioning of a benefit on a forfeiture of a constitutional right that creates the claim. If it were otherwise, states could circumvent constitutional constraints by attaching burdensome conditions to everything from public funding to "state-furnished services" of "such necessities of life as electricity, water, and police and fire protection." *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 173 (1972).

Applying these principles here, Texas cannot condition property rights or associational

rights on Plaintiffs' expressing state-mandated speech *unless* Texas "could … directly require" such speech. *Rumsfeld*, 547 U.S. at 59. But Texas could not directly require this overly burdensome compelled speech; so it cannot circumvent constitutional rules and apply the same burdensome requirement as a condition on governmental benefits.

1. Compelling Property Owners To Display The Signs Required By The Heightened Notice Requirements Violates The First Amendment.

If imposed directly on property owners, instead of as a condition on the right to exclude, the signage requirements would not survive even the most minimal constitutional scrutiny.

To start, in *all* cases, compelled speech must "remedy a harm that is 'potentially real[,] not purely hypothetical'"; and the required speech must "extend 'no broader than reasonably necessary.'" *NIFLA*, 138 S Ct. at 2377 (citing *Zauderer v. Off. of Disciplinary Counsel of Sup. Ct. of Ohio*, 471 U.S. 626 (1985)). Texas has not tried (nor could it) to satisfy its burden on this score. *See id.* (burden is on the state to justify requirements). For instance, governments cannot require advertisements to include warning labels that are larger than they need to be. *Am. Beverage Ass'n*, 916 F.3d at 756. Here, Texas cannot justify requiring huge, wordy signs that go far beyond what is accepted as "reasonable" under Texas's general trespass law, § 30.05.

Worse, the signage laws are content-based. A speech regulation is "content-based" if it "cannot be 'justified without reference to the content of the regulated speech.'" *Reed v. Town of Gilbert*, 576 U.S. 155, 163–64 (2015). And compelled speech is virtually always "content-based" because "compelling individuals to speak a particular message" necessarily "alte[rs] the content of [their] speech." *NIFLA*, 138 S. Ct. at 2371. Content-based laws are subject to strict, and generally fatal, scrutiny. *Reed*, 576 U.S. at 166.

For example, the Supreme Court held that similar signage requirements could not be directly imposed in *NIFLA*, and that analysis would control here, as well. The Court invalidated

California requirements that crisis pregnancy centers post information about state-sponsored abortion services because the signs were "content-based" and could not survive strict scrutiny. Although the signs were accurate, by "compelling individuals to speak a particular message, such notices 'alte[r] the content of [their] speech.'" *NIFLA*, 138 S. Ct. at 2371 (citing *Riley*, 487 U.S. at 795). And the compelled speech also threatened to "drown[] out the facility's own message." *Id*. at 2378. The Court thus held the signage requirements invalid. *Id.*[3]

Worst of all, the signage requirements, "[i]n [their] practical operation . . . [go] even beyond mere content discrimination, to actual viewpoint discrimination." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992). The Acts impose uniquely burdensome speech requirements on those who wish to exclude guns, precisely because the Texas Legislature disagrees with that stance. *See* Compl. ¶ 85 (legislative drafter admitted that he "intentionally made the sign's language cumbersome so as to discourage businesses from curbing the right to bear arms"). They "allow[] [less burdensome language to be used] when [property owners'] messages accord with, but not when their messages defy, [the Texas Legislature's] sense of … propriety." *Iancu v. Brunetti*, 139 S. Ct. 2294, 2300 (2019). Texas could not directly impose signage requirements affecting *only* a disfavored viewpoint: that handguns are not welcome on private property. Texas "has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules." *R.A.V.*, 505 U.S. at 392.

[3] The fact that here, the Plaintiffs *want* to convey a message of exclusion does not alter the outcome. Plaintiffs do not want to post poster-sized, government script. A small, pictographic sign informs entrants that guns are forbidden. The signs required by the Acts go further, suggesting Plaintiffs hold "bold political" views, Compl. ¶ 73, such as opposition to guns or gun rights more generally; and they counteract the aesthetic and messaging that Plaintiffs affirmatively wish to express, *id*. ¶¶ 66–67, 73. The Acts thus "alter[]" Plaintiffs' preferred message in addition to "drown[ing] out" their own message. *NIFLA*, 138 S. Ct. at 2371, 2378; *see also Riley*, 478 U.S. at 795 ("Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech.").

2. Texas Cannot Condition State Police Protection Or The Right To Association On Property Owners' Speech.

For these multiple reasons, Texas's signage requirements would be invalid if directly mandated. The only remaining question under the unconstitutional conditions doctrine is whether it can do so *indirectly*. Under the Acts, there is no crime of trespass when a visitor brings a gun onto an owner's property *unless* the owner has parroted Texas's overly-burdensome message that applies only to excluding guns. Thus, the question is whether Texas can condition police protection for property owners who wish to exclude guns on their agreement to engage in excessively burdensome government-scripted speech. Compl. ¶¶ 55, 68, 81.

It cannot. States "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech," even if the person has no entitlement to the benefit. *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). That is, Texas cannot use conditions on government benefits to "produce a result which [it] could not command directly," *id.*, because such a law runs afoul of the "unconstitutional conditions doctrine," *Tex. Lottery Comm'n*, 760 F.3d at 437.

The Supreme Court and the Fifth Circuit have repeatedly relied on this doctrine to invalidate speech requirements tied to government benefits. To name just a few examples: The government cannot condition its contracts on speech requirements, *Bd. of Cnty. Comm'rs. v. Umbehr*, 518 U.S. 668, 678 (1996); the government cannot issue bingo licenses on the condition that licensees will refrain from spending their profits on political speech, *Tex. Lottery Comm'n*, 760 F.3d at 437; the government cannot condition employment on speech requirements unnecessary to the employee's job duties, *see Umbehr*, 518 U.S. at 674 (listing cases). The government cannot even condition its *own* funding on private parties making controversial policy statements in exchange for the funds. *USAID*, 570 U.S. 205.

And that rule is even clearer where the government seeks to *compel* speech. In *USAID*, for instance, the Supreme Court examined a Congressional program directed at reducing the prevalence of HIV abroad. Recipients of the funding were required to issue a policy statement declaring their opposition to prostitution. *Id.* The Supreme Court invalidated the latter as an unconstitutional condition on the former, and it relied on the point that Congress was not merely requiring silence but was instead *compelling* private entities to speak. "[B]y requiring recipients to profess a specific" message, Congress made it impossible for recipients to maintain their own speech. *Id.* at 218. "A recipient cannot avow the belief dictated … and then turn around and assert a contrary belief, or claim neutrality." *Id*. The same holds here: Plaintiffs cannot post the "Scarlet Letter" signage and then somehow neutralize it by further explanation. Compl. ¶ 48.

And by burdening Plaintiffs' property rights in this way, the Acts *also* violate the Church's right to association. Compl. ¶¶ 114–19. The First Amendment protects "expressive association[s]" created "for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618 (1984). As with speech, the "[f]reedom of association… plainly presupposes a freedom not to associate." *Id*. at 623. Texas may not require the Church "to forfeit one constitutionally protected right as the price for exercising another." *Lefkowitz v. Cunningham*, 431 U.S. 801, 807–08 (1977) (holding that state may not prohibit private association because an individual refuses to self-incriminate). Yet that is precisely what the Acts do: either the Church must spend its own money to post unnecessarily burdensome, government-scripted speech on its doors, or it must give up police protection of its right to form the expressive association it desires: namely, one without handguns.

II. DEFENDANTS' ARGUMENTS FOR DISMISSAL ARE MISTAKEN.

With Plaintiffs' arguments correctly understood, Defendants' contentions all ring hollow.

Plaintiffs first address Defendants' challenges to standing, which all Defendants assert in a variety of forms. Next, Plaintiffs address the arguments, raised by the municipal Defendants, that they are not the proper subjects of a suit under § 1983. Finally, Plaintiffs address Defendants' halfhearted arguments on the merits.

A. Plaintiffs Have Standing Because They Are Currently Injured By The Acts And This Court Can Remedy That Injury By Enjoining These Defendants.

To establish standing, Plaintiffs need to allege (1) injury-in fact, (2) redressability, and (3) traceability to Defendants. *Lujan*, 504 U.S. at 560–61. The Complaint establishes all three.

1. Plaintiffs' Are Subject To Ongoing Injury Because They Must Either Speak The Government's Message Or Forfeit Police Protection.

As explained above, Plaintiffs have established injury-in-fact. Specifically, Plaintiffs must either post burdensome, government-scripted-speech (a First Amendment injury), *or* they must forfeit core rights, including police protection of their property (also a clear injury). The "drag on First Amendment rights is not constitutional simply because it attaches as a consequence of a statutorily imposed choice." *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 739 (2008). Defendants make a number of arguments as to standing, but they all miss this basic point, and they all therefore fail.

a. Defendants first assert that there is no "injury" because the signs are "optional," so any injury is "self-inflicted." Harris County MTD at 4; Texas AG MTD at 7–8. But this argument ignores the very point of an unconstitutional conditions claim: *either* Plaintiffs are injured by posting the compelled speech *or* they are injured by the loss of police protection (and the loss of associational rights). That Plaintiffs must choose between these evils *is* the injury. Although the Texas Attorney General states that an unconstitutional conditions claim requires "government compulsion or coercion," Texas AG MTD at 1–2, the Supreme Court has held precisely the opposite: "[The Court's] precedents" are "not … limited" to situations where the "condition is

actually coercive." *USAID*, 570 U.S. at 214. Instead, merely denying someone a government benefit is sufficient. *Id.* And in any event, as explained above, the Acts' conditions are highly coercive, as they demand unduly burdensome compelled speech on pain of losing a fundamental state protection. *Cf. Okpalobi v. Foster*, 244 F.3d 405, 435 (5th Cir. 2001) (Benavides, J., concurring in part and dissenting in part) (recognizing the "the classic situation for declaratory relief" as one "where the plaintiff is put to the Hobson's choice of giving up an intended course of conduct" or facing potential consequences if he does not).

These sorts of injuries are quite common, and certainly sufficient for standing here. For instance, in *Davis*, 554 U.S. at 734, a political candidate challenged an electoral regulation providing that, if he spent $350,000 of his own funds, the individual contribution limits for the opposing candidate would be tripled. *Id.* at 729. The Supreme Court held that the challenger had standing, even though he had the choice to spend less money: he would either have to reduce his own spending, *or* suffer the injury of his opponent gaining greater access to funds. *Id.* at 734–35. It is not a standing problem that a plaintiff must choose between two bad options.

b. Defendants argue in the same vein that the laws at issue will not be "enforced" against Plaintiffs because they regulate gun-holders, not property owners. Harris County MTD at 4; Bacon MTD at 7–8; Acevedo MTD at 5–6. That argument, too, misses the point. Defendants will not arrest Plaintiffs for criminal trespass, but they *will* deny them police protection without the required signs. *See, e.g.*, *Parkhurst v. Tabor*, 569 F.3d 861, 866 (8th Cir. 2009) ("[P]olice action is subject to … section 1983 whether in the form of commission of violative acts or omission to perform required acts pursuant to the police officer's duty to protect."); *Bunkley v. City of Detroit*, 902 F.3d 552, 565 (6th Cir. 2018) (citation omitted) ("Acts of omission" can be actionable "to the same extent as are acts of commission.").

Defendants' cited cases thus have nothing do with Plaintiffs' claims. In *Clapper v. Amnesty International USA*, 568 U.S. 398 (2013), for instance, the plaintiffs could only "speculate" whether the government was doing *anything* to them. By contrast, Plaintiffs here *know* they must post the signs or suffer a diminished right to exclude. (And that is why they have, in fact, purchased and posted the required signs.) Even further afield is *Glass v. Paxton*, 900 F.3d 233 (5th Cir. 2018). *Glass* stands for the proposition that a professor lacks standing to assert a First Amendment violation when her only claimed injury is that she self-censors in class out of fear that students armed with guns might become agitated and *use them* if she says something controversial. *Id.* at 238. Plaintiffs are not self-chilling their speech because they are afraid of what a gun-owner *might* do; they are being *compelled* to speak in a certain way because of what the government *already has done*.

Several Defendants relatedly assert that the case is not "ripe" because they have not personally threatened to "enforce" the statute against anyone, and so there is no present injury-in-fact. Acevedo MTD at 7–9; Harris County MTD at 6–7; Bacon MTD at 14. But this is simply a restatement of the argument that Defendants must affirmatively "enforce" the statute against Plaintiffs for standing to exist, and it fails for the same reason. Plaintiffs' injury is the choice between compelled speech and loss of police protection *right now*. *See, e.g.*, *New York v. United States*, 505 U.S. 144, 175 (1992) (case was ripe because the state had to make a choice between two unconstitutional alternatives immediately, even though the contested provision would not take effect for several years).

c. Defendants next suggest that there is no injury because, even if Plaintiffs must post the required signs to obtain police protection, Plaintiffs *want* to post a notice barring guns. Texas AG MTD at 12; Bacon MTD at 8–10; Harris County MTD at 4 (asserting that Plaintiffs could post

their desired signage "in conjunction or without the required language"). True enough, but Plaintiffs have the right to form their *own* message, and Texas does not get to force Plaintiffs to convey that message in a particular way simply because, in Texas's view, the content is sufficiently similar to Plaintiffs' preferred message. "The First Amendment mandates that we presume that speakers, not the government, know best both what they want to say and *how* to say it." *Riley*, 487 U.S. at 790–91 (emphasis added). Plaintiffs reasonably believe that the required signs are a "Scarlet Letter," a "bold political statement" that immediately turns the mind to thoughts of gun violence. Compl. ¶¶ 48, 66, 73. They would prefer unobtrusive, pictographic signs, every bit as effective but nowhere near as problematic in form or content—such as those that suffice for communicating *any other* basis for exclusion. The Acts change Plaintiffs' message from a polite announcement into a full-throated shout. Indeed, one of the Plaintiffs has received complaints about the obtrusive, state-mandated signs. *Id.* ¶ 77. Plaintiffs have the "right to tailor the[ir] speech," including speech they would like to "avoid." *Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 573 (1995). Texas cannot simply wish the injury away by asserting—contrary to the allegations in the Complaint—that the substance of Plaintiffs' preferred messaging is the same as its own compelled messaging.

d. Defendants also assert that Plaintiffs suffer no injury because they have numerous "other options" for excluding "gun-carrying persons." Texas AG MTD at 15–16; Bacon MTD at 9–10, 13. But as a practical matter, and as alleged in the Complaint, that is simply not true. Compl. ¶¶ 54–55. And even if it were somehow practicable to individually notify every single entrant on Plaintiffs' property, that is an even *more* intrusive burden on speech. Plaintiffs' message, aesthetic, and desired atmosphere would be fundamentally altered if they had to orally address or hand a written card to *every single entrant* onto their property. And property owners

who wish to keep out anything or anyone else—including even other types of dangerous objects—are not forced to choose among these burdensome methods of notice.

The Attorney General also briefly suggests that Plaintiffs could post "noncompliant signs" and rely on the "civil law of trespass," Texas AG MTD at 12, but this suggestion is nonsensical. Civil remedies would usually amount only to nominal damages in a lawsuit. *See, e.g.*, *Brown v. Ultramar Diamond Shamrock Corp.*, No. 13-02-535-CV, 2004 WL 1797580, at *8 (Tex. Ct. App. Aug. 12, 2004) (without proof of actual injury, civil trespass provides for only nominal damages). Moreover, it is wholly impracticable (and greatly burdensome) for Plaintiffs to sue every single person who enters their establishment with a handgun. Nor do civil remedies offer the "prophylactic … protect[ion]" provided by the criminal law, *Cuero v. State*, 845 S.W.2d 387, 392 (Tex. Ct. App. 1992), most obviously because they do not include police arrest and expulsion of the trespasser. Texas's diminishment of Plaintiffs' right to exclude is not somehow saved by the fact that Texas has not destroyed *all* aspects of Plaintiffs' property rights.[4]

e. The Attorney General asserts that Plaintiffs cannot challenge the statutes as-applied *or* facially, but these arguments badly miss the mark. In the Attorney General's view, Plaintiffs cannot challenge the acts as-applied because they do not "'proscribe[] any course of conduct'" Plaintiffs want to take. Texas AG MTD at 13. This is little more than a restatement of the Defendants' argument that the Acts do not injure Plaintiffs, and it is plainly false, as being put to an unconstitutional choice is exactly the sort of injury that Plaintiffs can challenge as applied to their property. *See, e.g.*, *All. for Open Soc'y Int'l, Inc. v. U.S. Agency for Int'l Dev.*, 430 F. Supp.

[4] Chief Bacon makes the related, confusing argument that the Church suffers no injury because it would have to call 911 to obtain police protection regardless of whether it first posts compliant signs or orally notifies trespassers. Webster MTD at 10. This argument misses the point; the injury comes not from calling the police but the burdensome notice requirements that are necessary to make a call to the police useful. If the owner does not provide the statutorily-required notice, there is no crime of trespassing to report to the police in the first place. In any event, the Church's greeters cannot necessarily identify those carrying concealed weapons. Compl. ¶ 42.

2d 222, 239 (S.D.N.Y. 2006), *aff'd*, 651 F.3d 218 (2d Cir. 2011), *aff'd sub nom.*, *USAID*, 570 U.S. 205 (as-applied challenge to Congressional funding conditions). The Attorney General next asserts that Plaintiffs cannot challenge the Acts facially because the Acts are not invalid under "*every* set of circumstances." Texas AG MTD at 13 (citations omitted). That, too, is simply wrong. The Acts are a rare example of a law that is, in fact, invalid everywhere. *No one* can be forced to choose between their First Amendment rights and police protection of property. The Attorney General does not even try to identify circumstances where the Acts would be lawful.

f. Without any factual support, some Defendants try to deny Plaintiffs' allegation that "police intervention" depends on "whether [the] signs are posted." Texas AG MTD at 17; Bacon MTD at 8. But at the motion-to-dismiss stage, Plaintiffs' allegations must be presumed true, *see* Compl. ¶¶ 55, 68, 81, and regardless, the contrary assertion does not pass the smell test. Defendants are law enforcement officials sworn to uphold Texas law; they cannot seriously maintain that they would intervene, arrest, and remove someone *in the absence of any criminal violation*. *See O'Shea v. Littleton*, 414 U.S. 488, 497 (1974) ("We assume that respondents will conduct their activities within the law."). The Acts "tie[]" law enforcement's "hands." *Amawi v. Pflugerville Indep. Sch. Dist.*, 373 F. Supp. 3d 717, 742 (W.D. Tex. 2019). If Defendants truly represented that they will simply *not follow* state law, perhaps this argument would have merit. But surely they do not, and so it does not.

* * *

In sum, none of Defendants' challenges to Plaintiffs' standing are valid. Indeed, their arguments prove far too much, as they would allow states to impose nearly *any* unconstitutional condition on property owners. Under Defendants' various theories, Texas could require citizens to profess communism as a condition of fire department protection—and then claim that no one

has standing to challenge such a law because no one *knows* that their property will light on fire. Likewise, Texas could demand that citizens donate to preferred political causes, take loyalty oaths, or any number of unseemly requirements, as a condition of police protection of their private residence—and under Defendants' theory, no one could challenge such a requirement because they would have the "option" of declining to participate. Any argument inviting those results cannot be right.

2. Plaintiffs' Injury Is Redressable Because This Court Can Enjoin Defendants From Complying With The Acts' Heightened Notice Requirements.

Plaintiffs' injury is also clearly "redressable." "[R]edressability" means "a likelihood that the requested relief will redress the alleged injury." *Servicios Azucareros de Venezuela, C.A. v. John Deere Thibodeaux, Inc.*, 702 F.3d 794, 799–800 (5th Cir. 2012). Here, Plaintiffs seek declaratory and injunctive relief that the Acts are unconstitutional and that the relevant law enforcement officials must not adhere to them in the performance of their duties. That relief would not only "likely," but necessarily, solve Plaintiffs' problem. Defendants nevertheless contest redressability in two ways, but both fail.

1. A few Defendants confusingly assert that this Court cannot redress Plaintiffs' injuries because it cannot "rewrite" the Texas statute. Texas AG MTD at 12–13; Harris County MTD at 5. In support, Defendants do little more than cite cases standing for the proposition that courts must read statutes according to their text, which is hardly disputed. Texas AG MTD at 13 n.68; Harris County MTD at 5. Defendants also appear to believe that if the Court enjoined enforcement of the Acts it would not help Plaintiffs, since § 30.05(f) exempts handgun-carriers from the general trespass law, and that section would remain in operation.

But the Court could easily provide a remedy; it need not be flummoxed by the organization of Texas's statute. The Court can enjoin the heightened notice requirements in

§§ 30.06(b), (c)(3) and 30.07(b), (c)(3), and require that state officials not apply any stricter notice requirements to property owners wishing to exclude guns than those wishing to exclude for any other reason.

In any event, states cannot play a game of constitutional keep-away by dividing their unconstitutional statutes into numerous sections and then asserting that federal courts have no power to "rewrite" the law. Federal courts have the power to enjoin state officers to follow constitutional commands, and this Court has that power here. *See, e.g.*, *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 15 (1971) ("[T]he scope of a district court's equitable powers … is broad, for breadth and flexibility are inherent in equitable remedies.").

2. Next, Chief Bacon asserts that there is no redressability because Plaintiffs "present[] no facts to show the Webster Police would not respond to a call to remove a trespasser from [their] property without regard to [their] compliance with [the Acts'] signage requirements." Bacon MTD at 12. This erroneous argument is a regurgitation of Defendants' flawed argument that police will intervene even in the face of the Acts. *See supra* at 22–23. But as Chief Bacon himself points out, "police officers are 'charged to enforce laws until and unless they are declared unconstitutional.'" Bacon MTD at 12. Because the Acts are still Texas law, there is no crime of trespass until a visitor receives notice *as defined by the Acts*, which means that Plaintiffs cannot rely on police protection without first engaging in the injurious speech they wish to avoid. It remains implausible that the Webster Police would ignore or violate state law—until this Court enjoins that state law and requires them to comply with the Constitution. In any event, Plaintiffs' Complaint was clear on this point, *see* Compl. ¶¶ 55, 68, 81, and Webster cannot simply assert that those factual allegations are incorrect.

3. Plaintiffs' Injury Is Traceable To The Municipal Defendants Because They Are Law Enforcement Officials Constrained By The Acts.

Some of the municipal Defendants assert that Plaintiffs fail to link their injury specifically to the municipal actors. Chief Acevedo argues there are no allegations that he "had any role in authoring or enacting" the Acts, nor that he would "enforce the Acts against the Plaintiffs." Acevedo MTD at 6. Likewise, the Harris County Defendants argue that Plaintiffs "fail to demonstrate a causal connection" between their actions and Plaintiffs' injury. Harris County MTD at 5–6.

These arguments again miss the mark, as Plaintiffs' injury is traceable to each of them. Whether the municipal Defendants "enacted" the Acts is wholly irrelevant. *Buchanan v. Alexander*, 919 F.3d 847, 854 (5th Cir. 2019) ("The proper defendants … are the parties responsible for creating *or* enforcing the challenged law or policy." (emphasis added)). What matters is that they are responsible for enforcement of Texas's criminal laws, which Plaintiffs made clear in their Complaint. *See* Compl. ¶¶ 9–12 (alleging that municipal Defendants are responsible for responding to violations of Texas's criminal trespass law). Plaintiffs are injured because these Acts preclude Defendants from enforcing those laws to protect Plaintiffs. *Id.* ¶ 55 (alleging that Plaintiffs cannot rely on law enforcement to remove trespassers due to the Acts).

To be sure, law enforcement has discretion in whether to arrest, remove, or prosecute particular offenders. But Plaintiffs seek relief that makes clear that law enforcement cannot rely on *these particular Acts* when doing so. *Perry*, 408 U.S. at 597 ("[T]he government may deny [a] benefit for any number of reasons, [but] there are some reasons upon which the government may not rely."). That is, Plaintiffs may not have a right to law enforcement services in every conceivable scenario; they do have the "right, however, to have police services administered in a nondiscriminatory manner." *Estate of Macias v. Ihde*, 219 F.3d 1018, 1028 (9th Cir. 2000).

For instance, in *Macias*, the plaintiff's estate alleged that a police deputy and the county violated her "right to equal protection by providing inadequate police protection based on her status as a woman, a victim of domestic violence, and a Latina." *Id.* at 1020. The court acknowledged that the plaintiff had no right to be protected from murder; but the plaintiff did have a right to nondiscriminatory treatment. *Id*. at 1028. Likewise here, if police fail to respond to protect Plaintiffs' property due to some *valid* reason such as lack of resources, Plaintiffs would have no complaint—but police cannot rely on *illegal* statues to decline to execute their duties.

B. The Municipal Defendants Are Proper Defendants Under § 1983 and *Ex parte Young*.

Although some of the Defendants assert otherwise, each of the Defendants is a proper subject of suit under *Ex parte Young* and § 1983, each of which independently provides Plaintiffs with a mechanism to bring this suit. Ordinarily, the Eleventh Amendment immunizes state officials from suit in federal court, but that immunity does not protect them from suits for prospective relief, alleging violations of federal law. *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002). Under *Ex parte Young*, 209 U.S. 123, 155–56 (1908), Plaintiffs can sue Defendants because they seek only prospective, declaratory and injunctive relief regarding violations of federal law. Likewise, where municipal actors enforce a state law, they are *state* officials for the purposes of *Ex parte Young* and § 1983. *Echols v. Parker*, 909 F.2d 795, 801 (5th Cir. 1990). So the municipal Defendants, too, are subject to suit.

The state Defendants appear to recognize that they can be sued for prospective relief under the *Ex parte Young* exception to sovereign immunity. At the same time, however, the Attorney General asserts that § 1983 claims against state defendants are somehow barred. Texas AG MTD at 19. He cites no authority for this, and it is well established that Plaintiffs can sue

state officials for prospective injunctive relief under § 1983. *See, e.g.*, *Edelman v. Jordan*, 415 U.S. 651, 675–77 (1974).[5]

The municipal Defendants argue that § 1983 claims against them are improper in the absence of an alleged municipal "policy or custom" under *Monell v. Department of Social Services*, 436 U.S. 658 (1978). Harris County MTD at 8; Acevedo MTD at 10–12; Bacon MTD at 19. This reliance on *Monell*—which addresses municipal liability for damages—is misplaced, because Plaintiffs seek prospective, injunctive relief. And "a state official in his or her official capacity, when sued for injunctive relief, [is] a person under § 1983." *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 n.10 (1989).

Moreover, claims that meet the requirements of *Ex parte Young* can proceed as "a cause of action … *at equity*, regardless of whether [Plaintiffs] can invoke § 1983." *Green Valley Special Util. Dist. v. City of Schertz*, 969 F.3d 460, 475 (5th Cir. 2020). So even if Defendants were somehow correct that § 1983 does not reach their conduct, the suit cannot be dismissed. The municipal Defendants are still subject to suit under *Ex parte Young*. State officers are proper defendants when they have "some connection with the enforcement of the act" by virtue of their office. *Ex parte Young*, 209 U.S. at 157. "Enforcement" is not limited to civil or criminal prosecution; it need only involve "compulsion or constraint." *K.P. v. LeBlanc*, 627 F.3d 115, 124 (5th Cir. 2010) (holding that the state board's responsibility to deny coverage if a medical malpractice claim was related to abortion was sufficiently connected to the enforcement of the law). As the law enforcement officials who respond (or fail to respond) to trespassing

[5] The Attorney General does assert sovereign immunity with respect to Plaintiffs' state law constitutional claim. Plaintiffs acknowledge that state actors can assert such immunity, so Plaintiffs' state-law claim is now barred.

complaints, the municipal Defendants have "some connection" to enforcement as required under *Ex parte Young*.

Moreover, that the municipal Defendants are "local" officials is irrelevant. Under both *Ex parte Young* and § 1983, if "a state statute directs the actions of an official, as here, the officer, be he state or local, is acting as a state official." *Echols*, 909 F.2d at 801. Texas "cannot dissociate itself from actions taken under its laws by labeling those it commands to act as local officials." *Id.* Thus, unless the municipal Defendants have discretion to decline to comply with the Acts (and they do not) they are subject to suit for prospective relief as state officials. *See Robinson v. Harrison*, No. 18-4733, 2020 WL 3892814, at *7 (E.D. La. July 10, 2020) (holding that municipal police officers enforcing a state sex offender registry law are state actors); *Viet Anh Vo v. Gee*, No. 16-15639, 2017 WL 1091261, at *4 (E.D. La. Mar. 23, 2017) (holding that county clerks who "had no choice but to follow the mandates of state law" were state actors for the purpose of *Ex parte Young*).

C. Defendants' Minimal Merits Arguments Also Fail.

Defendants make a few underdeveloped arguments on the merits. They each fail.

1. The Acts Compel Expressive Speech, Not "Nonexpressive Conduct."

To start, the Attorney General argues that the Acts regulate "nonexpressive conduct," Texas AG MTD at 15, relying on *Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986). But that case is wholly irrelevant. In *Acara*, the Supreme Court held that a state law prohibiting prostitution did not violate the First Amendment when applied to a bookstore that was also used for illicit sexual activity and the solicitation of prostitutes. *Id.* at 707. The mere fact that a store *also* sells books does not mean it has a right to violate criminal laws. Sensible as that holding is, it has no connection to this case. Plaintiffs do not object to a law prohibiting non-expressive activity; they object to a law conditioning fundamental rights on the *forfeiture* of explicitly

expressive activity: written speech. *See, e.g.*, *City of Ladue v. Gilleo*, 512 U.S. 43, 48 (1994) ("[S]igns are a form of expression protected by the Free Speech Clause."). *Acara* is not an unconstitutional conditions case and has no application here.

2. The Burden On Plaintiffs' Rights Is Not "Minimal."

The Attorney General also contends that the Acts do not "significant[ly]" impair Plaintiffs' free speech or associational rights, Texas AG MTD at 16–18, but his argument is unpersuasive. The loss of these expressive rights is certainly "significant," and it is not the sort of minimal burden found in the Attorney General's cited cases. *E.g.*, *Lyng v. Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am., UAW*, 485 U.S. 360 (1988) (prohibition on food stamps for households with members conducting workers' strike did not interfere with right to intimate association); *Fighting Finest, Inc. v. Bratton*, 95 F.3d 224 (2d Cir. 1996) (boxing team's loss of police sponsorship not a significant burden on associational rights).[6]

3. Plaintiffs' Complaint Alleges Plausible Claims Of Constitutional Violations.

Police Chiefs Acevedo and Bacon assert that Plaintiffs fail to state a claim because they "identifie[d] no action or conduct" by *them*, specifically, that abridges their rights. Acevedo MTD at 9; Bacon MTD at 17 (Plaintiffs' "claims pertain only to 'the Acts' and not the actions of the City"). Though styled as arguments on the merits, these arguments simply repeat (yet again) Defendants' misunderstanding of what Plaintiffs' claim and injury is.

Plaintiffs allege that they do not want to comply with the onerous notice requirements in

[6] The Attorney General also challenges Plaintiffs' vagueness claim, asserting that the statute is clear that either written or oral notice is sufficient. Texas AG MTD at 18–19. Plaintiffs' concerns arise not from the fact that notice may initially be given orally or in writing, but rather from the affirmative defense in §§ 30.06(g), 30.07(g), which appears to contemplate a separate oral notification to the entrant before criminal liability attaches. Nevertheless, the Attorney General provides authoritative interpretations of state law. Compl. § 7. If the Attorney General is willing to state that the crime of trespass is complete when an entrant disregards written notice at the point of entry, Plaintiffs will accept that interpretation.

the Acts, but if they do not, the police—including the Webster Police Chief and the Houston Police Chief—will have no basis for removing trespassers with handguns from Plaintiffs' properties. Compl. ¶¶ 55, 68, 81. Plaintiffs are injured by what Defendants will *not* do, and that is sufficient to state a claim. There is no principle of law that says that unconstitutional *omissions* are less legally problematic than affirmative acts. The very existence of the unconstitutional conditions claims—not to mention common sense—establish the opposite. Texas law enforcement likewise cannot defend laws conditioning police protection on First Amendment violations by asserting they have not "done" anything to Plaintiffs.

CONCLUSION

For the foregoing reasons, Plaintiffs request that the Court deny Defendants' motions to dismiss.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 15, 2021, I electronically filed a true and correct copy of the foregoing with the Clerk of the District Court of the Southern District of Texas by using the CM/ECF system, which will send notification to all participants in the case who are registered CM/ECF users.

/s/ William R. Taylor
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