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

BAY AREA UNITARIAN UNIVERSALIST CHURCH et al.,	§	
	§	
Plaintiffs,	§	
v.	§	Civil Action No. 4:20-CV-03081
	§	
KEN PAXTON, Attorney General For the State of Texas, in his official Capacity, et al.	§	
	§	
Defendants.	§	

REPLY IN FURTHER SUPPORT OF DEFENDANTS PAXTON'S AND LEMAUX'S MOTION TO DISMISS

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INTRODUCTION

It simply isn't true that the Acts condition police protection on posting "no gun" signs—these laws offer various other options for excluding gun-carrying persons from an owner's premises. Due to these other available methods, Plaintiffs cannot show they were "coerced" into posting the Acts' signs, which is a requirement for their unconstitutional conditions claim. It also means that Plaintiffs' injuries were self-inflicted, as Plaintiffs were not required to post the Acts' signs and can take them down any time they wish. Binding precedent—including the directly-on-point *Glass v. Paxton*—dictates that self-inflicted injuries are insufficient to confer standing.

These are just a few problems with Plaintiffs' Complaint and Opposition. Otherwise will be discussed below and are equally fatal to this suit. Plaintiffs' claims are meritless and should be dismissed accordingly.

ARGUMENT

I. Plaintiffs Lack Standing as Their Injuries are Self-Inflicted.

Plaintiffs argue they engaged in the injury-causing act (posting the Acts' signs) "because of what the government already has done," not because of what might happen.[1] They claim this distinguishes this case from *Clapper v. Amnesty Intern. USA* ("*Amnesty International*")[2] and *Glass v. Paxton*.[3]

This is nonsense. The plaintiffs in *Amnesty International* and *Glass* challenged enacted laws, so they too were reacting to things "the government already has done."[4]

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[1] Plaintiffs' Opp. (ECF 57), 25 (emphasis omitted).
[2] 568 U.S. 398 (2013).
[3] 900 F.3d 233 (5th Cir. 2018).
[4] *See Amnesty International*, 568 U.S. at 401–02 (challenging 50 U.S.C. § 1881a); *Glass*, 900 F.3d at

The question in those cases was whether the plaintiffs' injuries were impermissibly self-inflicted as the challenged laws did not, on their face, require them to engage in the injury-causing acts.[5] The same issue arises here.

Per *Glass*, this question involves a two-step inquiry: (1) "identify the harm serving as the catalyst for [the plaintiff's injury]" and (2) "identify each contingency prompting" the plaintiff to engage in the injury-causing act.[6] Plaintiffs here cannot meet this test, and they ignore it entirely.[7]

Plaintiffs posted the Acts' signs (the injury-causing act) out of concern that without them they could not exclude guns from their premises (the harm).[8] This presents two underlying contingencies. Per *Glass*, "[e]ach contingency must be 'certainly impending'" to confer standing.[9]

Contingency #1: Oral Notice is Unworkable: The Acts let property owners remove gun-carrying persons by orally telling them to leave.[10] Plaintiffs allege this is unworkable as they would need an "employee specifically dedicated to providing oral notice to each customer who enters the property."[11] This is a mere interpretation of what the Acts' oral notice provisions require, making it a legal conclusion that need not be accepted as true.[12]

236–37 (challenging TEX. GOV'T CODE § 411.2031 and a university's corresponding policy).
[5] *See Amnesty International*, 568 U.S. at 408–23; *Glass*, 900 F.3d at 237–43.
[6] *Glass*, 900 F.3d at 240.
[7] *See* Plaintiffs' Opp., 23–32.
[8] *See, e.g.*, Complaint ("Compl."), pgs. 1–2; *id.* at ¶¶ 40, 42, 44, 55; Plaintiffs' Opp., 7–9, 12, 14, 17, 25.
[9] *Glass*, 900 F.3d at 240.
[10] TEX. PENAL CODE §§ 30.06(b), 30.07(b).
[11] Compl., ¶ 42; *see also* Plaintiffs' Opp., 26.
[12] *See, e.g.*, *Stein v. Royal Bank of Canada*, 239 F.3d 389, 392 (1st Cir. 2001).

It is also clearly wrong. Plaintiffs say they must provide oral notice to every entrant as "there is no way of knowing who carries a concealed weapon."[13] This overlooks the fact that Plaintiffs' desired method of exclusion—calling the police on a person with a gun—*also requires they know the person has a gun*. Injuries stemming from Plaintiffs' inability to detect when patrons are carrying guns are not fairly traceable to the Acts.

Plaintiffs' main argument was that oral notice "risks physical . . . [and] potentially dangerous one-on-one confrontations with individuals carrying weapons."[14] They appear to abandon this argument in their Opposition.[15] And rightly so, as *Glass* effectively foreclosed the point.[16] Further, the Acts specifically state that either "the owner of the property *or someone with apparent authority to act for the owner*" can provide the required oral notice.[17] Thus, the owner need not even confront a gun-carrying patron himself. Rather, he can call the police and have the police ask the person to leave—since the police would clearly have "authority to act for the owner" under this circumstance. Plaintiffs lack standing as they have not plausibly alleged, with certainty, that the Acts' oral notice provisions are unworkable.

Contingency #2: The Civil Law of Trespass is Unworkable: Plaintiffs can also exclude gun-carrying persons by posting their desired pictograph "no gun" signs and relying on the civil law of trespass. Plaintiffs do not, and cannot, argue otherwise.[18]

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[13] Plaintiffs' Opp., 11.
[14] Compl., ¶ 42.
[15] Plaintiffs' Opp., 25.
[16] Defendants Paxton's and Lemaux's Motion to Dismiss ("State's MTD"), 15–18.
[17] TEX. PENAL CODE §§ 30.06(b), 30.07(b).
[18] Plaintiffs' Opp., 27; *Barnes v. Mathis*, 353 S.W.3d 760, 764 (Tex. 2011) (explaining that a person commits civil trespass if he enters "the land of another" without consent and that "[e]very

Rather, they object to the effectiveness of the remedies available in a civil trespass action.[19] But this misses the point. The law assumes people "will conduct their activities within the law"[20] regardless of the magnitude or effectiveness of the civil or criminal penalties at issue.[21] Thus, Plaintiffs have not plausibly alleged, with certainty, that the civil law of trespass is unworkable.

The standing analysis here is not complicated. *Glass* is binding on this Court. That Plaintiffs devote two measly sentences to analyzing this clearly relevant decision[22] is just more proof that *Glass* is indistinguishable and fatal to their case.

II. The Additional Problems with Plaintiffs' Standing Arguments.

There are three additional problems with Plaintiffs' standing arguments. First, Plaintiffs' reliance on *Davis v. Fed. Election Comm'n*[23] is misplaced. There, the harm serving as the catalyst for the plaintiff's injury (an asymmetrical increase to his political opponent's contribution limits) was contingent on the plaintiff spending more than $350,000 of his own funds on his campaign.[24] The plaintiff had a certainly impending injury as he intended to spend more than $350,000 of his own funds on his campaign, meaning he would necessarily trigger the statutory increase to his

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unauthorized entry upon land of another is a trespass even if no damage is done or injury is slight") (quotations and brackets omitted).

[19] Plaintiffs' Opp., 27.

[20] *O'Shea v. Littleton*, 414 U.S. 488, 497 (1974).

[21] *See, e.g. id.*; *Honig v. Doe*, 484 U.S. 305, 320 (1988) ("[W]e generally have been unwilling to assume that the party seeking relief will repeat the type of misconduct that would once again place him or her at risk of that injury."); *Caribbean Marine Servs. Co. v. Baldrige*, 844 F.2d 668, 675 (9th Cir. 1988) ("[W]e must assume that the owners and their employees will not . . . commit intentional torts against the observer."); Plaintiffs' Opp., 28 (arguing that the Defendant law enforcement officers are presumed to follow the law, without concern for the magnitude of the penalty they would face or the likelihood that they would be prosecuted if they did not comply with the law).

[22] Plaintiffs' Opp., 25.

[23] 554 U.S. 724 (2008).

[24] *Id.* at 728–30, 734–35.

opponent's contribution limits.[25] The instant case is different as Plaintiffs did not assert a viable certainly impending injury, as explained above.

Second, in *Amnesty International*, the Court found the plaintiffs' injuries were not fairly traceable to the challenged statute because "even before [the statute] was enacted, they had a similar incentive to engage in many of the countermeasures that they are now taking."[26] The same reasoning applies here. Plaintiffs complain that the Acts' signs are a "Scarlet Letter" that "immediately turns the mind to thoughts of gun violence."[27] But they admit they want to post "no gun" signs,[28] which at a minimum must be reasonably noticeable to be effective.[29] As Plaintiffs intend to engage in the injury-causing activity (posting noticeable "no gun" signs) regardless of the Acts, they cannot claim their injuries are fairly traceable to the Acts.

Finally, Plaintiffs' injuries are not redressable. They ask this Court to invalidate "the heightened notice requirements in §§ 30.06(b), (c)(3) and 30.07(b), (c)(3) . . . ."[30] But this would merely remove property owners' option to exclude gun-carrying persons. It would not allow owners to exclude gun-carrying persons under § 30.05 (aka Texas's general criminal trespass law), which is what Plaintiffs really want.[31] This is because § 30.05(i)(1) provides: "This section does not apply if . . . the basis on which entry on the property or land or in the building was forbidden is that

[25] *Id.* at 734–35.
[26] *Amnesty International*, 568 U.S. at 417.
[27] Plaintiffs' Opp., 25–26.
[28] *See id.*
[29] *See* TEX. PENAL CODE § 30.05(b)(2)(C).
[30] Plaintiffs' Opp., 29–30.
[31] *See, e.g.*, Compl., pgs. 29–30.

entry with a handgun or other weapon was forbidden[.]"[32] And invalidating § 30.05(i)(1) is not an option as (1) Plaintiffs do not challenge this provision[33] and (2) doing so would lead to absurd results—gun-carrying firefighters could not enter a burning building sporting a "no gun" sign, a tenant could not carry a handgun into his own apartment if the building owner prohibits guns on the premises, and so on.[34]

Plaintiffs blame these problems on the organization of Texas's criminal trespass statutes.[35] But the fault is more properly attributable to Plaintiffs' unprecedented decision to challenge two criminal laws that did not require them to do or say anything. In sum, Plaintiffs' injuries are not redressable as this Court cannot completely rewrite Texas's criminal trespass laws in a way the Legislature never intended.[36]

III. Plaintiffs' Claims Fail as the Acts Present No Risk to Them and Impose No Meaningful Burden on Their First Amendment Rights.

As shown above, this suit's unique nature inevitably leads to standing issues. It also creates four insurmountable problems for Plaintiffs on the merits.

Problem #1: Plaintiffs do Not Assert a Valid Facial or As-Applied Challenge: Plaintiffs' as-applied argument is based solely on the out-of-circuit decision *All. for Open Soc'y Int'l Inc. v. U.S. Agency for Int'l Dev.* ("*Alliance for Open Society*").[37] There,

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[32] *See* TEX. PENAL CODE § 30.05(i)(1).
[33] *See* Compl., pgs. 29–30; *see also Davis*, 554 U.S. at 734 ("[A] plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought.").
[34] *See, e.g.*, TEX. PENAL CODE §§ 30.06(e-1)–(f), 30.07(e-1)–(g) (giving firefighters, tenants, and various other individuals affirmative defenses "to prosecution under this section," which would not cover a prosecution under § 30.05).
[35] *See* Plaintiffs' Opp., 29–30.
[36] *See* State's MTD, 18–19.
[37] 430 F. Supp. 2d 222 (S.D.N.Y. 2006), *aff'd,* 651 F.3d 218 (2d Cir. 2011), *aff'd sub nom. Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205 (2013); Plaintiffs' Opp., 27–28.

various non-profit organizations challenged the government's broad interpretation of a statute forbidding federal agencies from awarding funds to any "organization that does not have a policy explicitly opposing prostitution."[38] The plaintiffs asserted a valid as-applied challenge as they had to, for example, stop "organiz[ing] sex workers in India" or else they would risk losing their funding due to the government's interpretation.[39]

The Acts' sign provisions, which Plaintiffs can ignore and which impose no meaningful burden on their constitutional rights,[40] are not comparable to the explicit funding condition at issue in *Alliance for Open Society*. Plaintiffs' as-applied challenge fails as the Acts have not been meaningfully "applied" to them.

Their facial challenge fares no better. Our Motion to Dismiss lists three circumstances in which the Acts would be constitutional.[41] In return, Plaintiffs falsely claim that "[t]he Attorney General does not even try to identify circumstances where the Acts would be lawful."[42] Also, it is their burden, not ours, to explain why the Acts are invalid under *every* set of circumstances.[43] Plaintiffs do not meaningfully try to meet this burden. Thus, they did not assert valid as-applied or facial challenges to the Acts.

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[38] *Alliance for Open Society*, 228–35 (quotations and brackets omitted).
[39] *See id.* at 238–39 (quotations omitted).
[40] *See infra*, 8–10.
[41] State's MTD, 19–20.
[42] Plaintiffs' Opp., 28.
[43] *See, e.g.*, *Roark & Hardee LP v. City of Austin*, 522 F.3d 533, 548 (5th Cir. 2008); State's MTD, 19–20.

Problem #2: The Acts are Not Subject to Constitutional Scrutiny: In *Arcara v. Cloud Books, Inc.*,[44] the Supreme Court explained that, in the First Amendment context, constitutional scrutiny is only appropriate: (1) where there was "conduct with a significant expressive element that drew the legal remedy in the first place," or (2) "where a statute based on a nonexpressive activity has the inevitable effect of singling out those engaged in expressive activity."[45] Plaintiffs ignore the relevant standard, and thus they do not explain how their claims satisfy either situation.[46] In contrast, the State properly applied *Arcara's* test and explained why the Acts are not subject to constitutional scrutiny under it.[47]

Problem #3: The Acts did Not Significantly Impair Plaintiffs' Associational Rights: Plaintiffs do not explain how the Acts "significantly" or "directly and substantially" impair their right to associate.[48] Nor could they, as the Acts do not require them to interact with gun-carrying persons in any meaningful sense.

And Plaintiffs' associational claim is foreclosed by *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*[49] There, the issue was whether the "Solomon Amendment"—which required universities to give equal access to military recruiters to receive certain federal funds—violated law schools' associational rights.[50] The Supreme Court found it did not. The Court explained that, even though the Solomon Amendment required law schools to allow military recruiters on campus, it critically

[44] 473 U.S. 697 (1986).
[45] *Id.* at 706–07.
[46] Plaintiffs' Opp., 34–35.
[47] *See* State's MTD, 20–22.
[48] *See* Plaintiffs' Opp., 35; State's MTD, 23–24.
[49] 547 U.S. 47 (2006).
[50] *Id.* at 51–55.

did not require recruiters to become part of the law schools themselves.[51] The Court noted that the school's students and faculty remained "free to associate to voice their disapproval of the military's message."[52] The Court held that "[a] military recruiter's mere presence on campus does not violate a law school's right to associate . . . ."[53] The same reasoning applies here.

Problem #4: Plaintiffs' Speech Claim Fails Due to Lack of Coercion: Plaintiffs' speech claim is based on the unconstitutional conditions doctrine.[54] But such a claim requires there to be some meaningful "coercion" at issue; here, there is none.[55]

Plaintiffs counter that the unconstitutional conditions doctrine does not require coercion.[56] They support this point by misquoting *Agency for Int'l Dev. v. All. for Open Soc't Int'l, Inc.* ("*USAID*").[57] Plaintiffs quote *USAID* as follows: "'[The Court's] precedents' are 'not . . . limited' to situations where the 'condition is actually coercive.'"[58] The full quote, however, shows the Supreme Court merely explaining that unconstitutional conditions claims are not limited to Godfather-type conditions on benefits:

> The dissent thinks that [a funding condition can result in an unconstitutional burden on First Amendment rights only] when the condition is not relevant to the objectives of the program (although it has its doubts about that), or when the condition is actually coercive, *in the sense of an offer that cannot be refused*. Our precedents, however, are not so limited.[59]

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[51] *Id.* at 69.
[52] *Id.* at 69–70.
[53] *Id.* at 70.
[54] *See* Plaintiffs' Opp., 18–23.
[55] State's MTD, 22–23.
[56] Plaintiffs' Opp., 23–24.
[57] 507 U.S. 205 (2013); Plaintiffs' Opp., 23–24.
[58] Plaintiffs' Opp., 23–24 (brackets and ellipses in original) (quoting *USAID*, 570 U.S. at 214).
[59] *USAID*, 507 U.S. at 214 (emphasis added) (citation omitted).

Indeed, in *Koontz v. St. Johns River Water Mgmt. Dist.*, issued just five days after *USAID*, the Supreme Court repeatedly framed the unconstitutional conditions doctrine in terms of coercion.[60] Even if the Supreme Court left the "coercion" issue an open question, then *Pace v. Bogalusa City Sch. Bd.* would control given the Fifth Circuit's explicit statement that "the unconstitutional conditions doctrine . . . is anchored at least in part in a theory of coercion or compulsion."[61] Plaintiffs' unconstitutional conditions claim fails as they did not show they were meaningfully "coerced" into posting the Acts' signs.[62]

CONCLUSION

Plaintiffs' claims are nonsensical and barred by various binding precedents. They should be dismissed in their entirety.

Date: February 4, 2021.

Respectfully submitted.

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[60] 570 U.S. 595, 604 (2013) ("Those cases reflect an overarching principle, known as the unconstitutional conditions doctrine, that vindicates the Constitution's enumerated rights *by preventing the government from coercing people into giving them up*.") (emphasis added); *id.* at 606 ("[T]he unconstitutional conditions doctrine forbids burdening the Constitution's enumerated rights *by coercively withholding benefits* from those who exercise them.") (emphasis added).

[61] 403 F.3d 272, 286 (5th Cir. 2005); *cf. United States v. Petras*, 879 F.3d 155, 164 (5th Cir. 2018) ("[F]or a Supreme Court decision to overrule a Fifth Circuit case, the decision must unequivocally overrule prior precedent; mere illumination of a case is insufficient.").

[62] Plaintiffs explicitly abandon their vagueness challenge in their Opposition. *See* Plaintiffs' Opp., 35 n.6. And they implicitly abandon their Texas Constitution claims as they do not explain how these claims could survive a *Pennhurst* analysis. *See generally* Plaintiffs' Opp.; State's MTD, 25.

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of this foregoing motion has been served on all parties of record by electronic notification through ECF by the United States District Court for the Southern District of Texas, Houston Division, on February 4, 2021.

/s/ Todd Dickerson
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