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. 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; TROY FINNER, Chief of the Houston Police Department, in his official capacity, *Defendants.*	CIVIL ACTION NO. 4:20-cv-3081

PLAINTIFFS' CONSOLIDATED OPPOSITION TO DEFENDANTS' MOTIONS TO CERTIFY ORDER FOR INTERLOCUTORY APPEAL

INTRODUCTION

In its order on Defendants' motions to dismiss, this Court held that Plaintiffs have standing to bring an as-applied challenge to the gun signage requirements in Texas's trespass laws. ECF Doc. 68, at 12, 17 ("Order"). Defendants now ask this Court to certify this standing question for immediate interlocutory review under 28 U.S.C. § 1292(b). "Interlocutory appeals are generally disfavored, and statutes permitting them must be strictly construed." *Allen v. Okam Holdings, Inc.*, 116 F.3d 153, 154 (5th Cir. 1997) (per curiam). Most saliently, certification under § 1292(b) is appropriate only where a district court's order involves a controlling question of law *as to which there is substantial ground for difference of opinion*." 28 U.S.C. § 1292(b). Standing in this case is straightforward, and nothing in Defendants' motions shows that there is "substantial ground for difference of opinion" as to whether this Court's analysis in its order is correct. This Court should deny Defendants' motions.

BACKGROUND

Sections 30.06 and 30.07 of the Texas Penal Code establish burdensome notice requirements for private-property owners who wish to exclude those carrying licensed firearms.[1] Section 30.05(b) of the Texas Penal Code allows owners wishing to exclude visitors for almost any other reason at all to provide notice through signs "reasonably likely to come to the attention of intruders." Tex. Penal Code § 30.05(b)(2)(C). If an intruder enters the owner's property despite the existence of such a sign, he or she has committed the crime of trespass and is subject to police removal, arrest, prosecution, and criminal penalties. *See* Tex. Penal Code § 30.05(d). But under sections 30.06 and 30.07, written notice of the property owner's intent to exclude is not valid

[1] As of September 1, 2021, individuals in Texas may also carry firearms without a license. *See* Firearm Carry Act of 2021, 87th Leg., R.S., ch. 809, § 22, sec. 46.02(a) (codified at Tex. Penal Code § 46.02(a)). To exclude such individuals, a property owner now has to put up a third burdensome sign. *See* Tex. Penal Code § 30.05(c).

unless it conforms to an onerous government script. The statutes require signs with large block letters (at least an inch tall), in two languages, which take up at least ten square feet of space. ECF Doc. 1, ¶¶ 24–25, 75 ("Compl."). If a property owner puts up a nonconforming sign—for example, a simple pictograph—and an individual carrying a licensed firearm ignores the notice and enters the property, he or she has *not* committed the crime of trespass and is *not* subject to police removal, arrest, prosecution, or criminal penalties. That means that Defendants—police and prosecutors charged with enforcing the law where Plaintiffs are located—cannot remove, arrest, or prosecute individuals who carry guns onto a property with nonconforming signage unless Defendants ignore Texas law.

This scheme injures Plaintiffs on an ongoing basis by putting them to an unconstitutional choice: they must either post the signs, in violation of their First Amendment rights, or forgo their right to exclude licensed gun carriers. Plaintiffs have, for now, posted some of the mandated signs rather than give up their right to exclude entirely, which means that they are suffering a First Amendment injury every day as a result of Texas's statutory scheme. Plaintiffs wish to see the burdensome signage requirements of sections 30.06 and 30.07 invalidated; Plaintiffs could then post less-intrusive signs, such as simple pictographs, and Defendants could be called upon to give force to Plaintiffs' right to exclude by removing, arresting, and prosecuting individuals who ignored these simple pictograph signs and brought firearms onto Plaintiffs' premises.

Accordingly, Plaintiffs filed this lawsuit seeking (i) a declaration that the heightened notice requirements of sections 30.06 and 30.07 of the Texas Penal Code are unconstitutional and (ii) an injunction against their enforcement. Compl. at 29–30. Because Plaintiffs are located in the cities of Houston and Webster, in Harris County, Plaintiffs' complaint named as defendants the local officials charged with enforcing these laws: Kim Ogg, the District Attorney of Harris County,

Vince Ryan, the County Attorney of Harris County, and Ed Gonzalez, the Sheriff of Harris County (the "Harris County Defendants"), as well as Pete Bacon, the Acting Chief of the Webster Police Department, and Art Acevedo, then Chief of the Houston Police Department[2] (the "Police Defendants"). *Id.* at 1. Plaintiffs' complaint also originally named as defendants Ken Paxton, the Attorney General for the State of Texas, and Kim Lemaux, the Presiding Officer for the Texas Commission on Law Enforcement (the "State Defendants"). *Id.*[3]

Defendants moved to dismiss the complaint, on various grounds, under Rule 12(b)(1) and (6) of the Federal Rules of Civil Procedure, *see* ECF Doc. 28 ("State MTD"); ECF Doc. 38 ("Harris County MTD"); ECF Doc. 42 ("Acevedo MTD"); ECF Doc. 52 ("Bacon MTD"), and certain Defendants asserted sovereign immunity, *see* State MTD at 19; Harris County MTD at 8. This Court granted in part and denied in part each of Defendants' motions. Order at 28. Relevant here, the Court ruled that Plaintiffs have standing to proceed against each of the Defendants, *id.* at 9–19, and that Plaintiffs' complaint states a claim against each of the Defendants for as-applied violations of the First Amendment, *id.* at 22–27. This Court also agreed with Plaintiffs that Defendants do not enjoy sovereign immunity from the Plaintiffs' federal claims. *Id.* at 19–21.

The State Defendants then sought to take an immediate appeal of this Court's sovereign-immunity ruling, under the collateral-order doctrine. ECF Doc. 77 ("Notice of Appeal"); *see Texas v. Caremark, Inc.*, 584 F.3d 655, 658 (5th Cir. 2009). Plaintiffs have since voluntarily dismissed the State Defendants from the case with prejudice, ECF Doc. 81, and upon motion by the State Defendants, the Fifth Circuit has dismissed the appeal, *Bay Area Unitarian Universalist Church v. Paxton*, No. 21-20491 (5th Cir. Oct. 15, 2021).

[2] Art Acevedo has since been replaced as Chief of the Houston Police Department by Troy Finner, who is now substituted as a defendant in this case. *See* Fed. R. Civ. P. 25(d).

[3] All Defendants were sued in their official capacities only. Compl. at 1.

The Police Defendants and the Harris County Defendants (the "Movants") have filed the instant motions asking this Court to certify its order for an interlocutory appeal. ECF No. 84 ("Police Mot."); ECF No. 86 ("Harris County Mot.").

ARGUMENT

I. THIS COURT'S DECISION DOES NOT MERIT AN INTERLOCUTORY APPEAL.

"[A]s a general rule, all claims and issues in a case must be adjudicated before appeal, and a notice of appeal is effective only if it is from a final order or judgment." *Swope v. Columbian Chems. Co.*, 281 F.3d 185, 191 (5th Cir. 2002). This Court may thus certify its nonfinal order for an interlocutory appeal only if the order "involves a controlling question of law as to which there is substantial ground for difference of opinion." 28 U.S.C. § 1292(b); *see Clark-Dietz & Assocs.-Eng'rs, Inc. v. Basic Constr. Co.*, 702 F.2d 67, 68 (5th Cir. 1983). Interlocutory appeals are appropriate only in "exceptional" cases, *Clark-Dietz*, 702 F.2d at 69, and this case is far from exceptional.

To deny Defendants' motions, this Court need look no further than the requirement that its order present a legal question "as to which there is substantial ground for difference of opinion." "The threshold for establishing a 'substantial ground for difference of opinion' is higher than mere disagreement or even the existence of some contrary authority." *Coates v. Brazoria County*, 919 F. Supp. 2d 863, 868 (S.D. Tex. 2013) (Costa, J.):

> Courts traditionally will find a substantial ground for difference of opinion "if a trial court rules in a manner which appears contrary to the rulings of all Courts of Appeals which have reached the issue, if the circuits are in dispute on the question and the court of appeals of the circuit has not spoken on the point, if complicated questions arise under foreign law, or if novel and difficult questions of first impression are presented."

Id. at 868–69 (quoting 4 Am. Jur. 2d *Appellate Review* § 123 (2012)). None of those circumstances is present here.

A. There is no substantial ground as to difference of opinion regarding Plaintiffs' standing.

To have standing, a "plaintiff must establish (1) that he or she suffered an injury in fact, which is (2) fairly traceable to the defendant's conduct, and (3) will be redressed by a favorable decision." Order at 9–10; *accord Fusilier v. Landry*, 963 F.3d 447, 454 (5th Cir. 2020). As this Court explained, those requirements are all easily met here, under well-settled principles of law. *See* Order at 10–17. Movants now attempt to cast doubt on this Court's determination, but they fail to demonstrate that this Court's decision was even arguably erroneous.

1. Plaintiffs have alleged a constitutional injury.

As this Court explained in its order, Plaintiffs are injured by their "being forced to make a choice between a benefit and their constitutional rights." Order at 10. Namely, "if [Plaintiffs] do not comply with the Acts' heightened notice requirements, they are unable to exclude licensed handgun carriers with the support of police protection and the threat of criminal prosecution." *Id.* In other words, "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)." ECF No. 57, at 17 ("Pls.' Opp'n Br."). Plaintiffs have, for now, posted conforming signs in order to retain some of their right to exclude, which means that they are currently suffering a concrete First Amendment injury on an ongoing basis. *See* Compl. ¶¶ 61, 64, 72.

Movants assert that there is substantial ground for difference of opinion on the question of injury, but they misunderstand the applicable law, as well as this Court's reasoning. Movants' primary argument is that the Supreme Court's recent opinion in *California v. Texas*, 141 S. Ct. 2104 (2021), alters this Court's conclusion that Plaintiffs here have suffered a cognizable injury. That is wrong. In *California v. Texas*, the Supreme Court held that individual plaintiffs lacked

standing to challenge the Affordable Care Act's mandate that they purchase health insurance because there are no penalties for noncompliance. *Id.* at 2113–16. The Supreme Court recognized that those plaintiffs may have suffered a "pocketbook injury," but it concluded that their injury was not traceable to the challenged statute, nor redressable by a favorable ruling, because the plaintiffs "ha[d] not shown that any kind of Government action or conduct ha[d] caused or w[ould] cause the injury they attribute[d] to" the statute." *Id.* at 2114.

California v. Texas does not support Defendants' argument. Defendants observe that the Court emphasized "the need to assert an injury that is the result of a statute's actual or threatened *enforcement*," *id.* at 2114, and they claim that this language is fatal to Plaintiffs' standing, because there is no reason to think that Plaintiffs will be prosecuted as trespassers. *See* Police Mot. at 8; Harris County Mot. at 6. But as this Court recognized, "[w]hile the Acts are not directly enforceable against Plaintiffs, the Acts enumerate notice requirements that property owners must comply with to gain the protection of the Acts." Order at 12. As such, "Plaintiffs' alleged injury *results from* the Acts' enforcement. Plaintiffs' alleged injury is the deprivation of their free speech right *as a result of* the Acts' heightened notice requirements." *Id.* at 13 (emphasis added). The principle that underscored this Court's ruling—that "the Government may not deny a benefit to a person on a basis that infringes the person's constitutionally protected rights"—is "well established." Order at 13–14; *see Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 214 (2013). *California v. Texas*, which reiterated longstanding precedent, was not an unconstitutional-conditions case and in no way calls that principle into question.

The Police Defendants attempt to avoid this conclusion by arguing that Plaintiffs are not compelled to post notices because Plaintiffs have the option to "orally instruct" entrants of their no-guns policies. Police Mot. at 7. But as this Court already recognized, Plaintiffs have alleged

that "providing oral communication to each individual patron would be unduly burdensome and impractical." Order at 25. Because this Court must accept these factual allegations as true, *see id.*, there is no ground for difference of opinion here.[4]

The Police Defendants also assert, without citation, that "no Plaintiff is required to post any of the notices provided in the statutes to obtain the protection of Texas trespass laws." Police Mot. at 7; *accord id.* at 5. But that is clearly what the laws say. Similarly, the Harris County Defendants now argue—as the Police Defendants did previously, *see* Acevedo MTD at 6; Bacon MTD at 8—that Plaintiffs are not put to an unconstitutional choice because "Plaintiffs do not allege that Harris County Officials have ever denied police protection to them" or "will deny future protection to them." Harris County Mot. at 7. Yet despite some intimations that they might ignore the laws' text, *see, e.g.*, Bacon MTD at 12, Defendants have thus far avoided "represent[ing] that they will simply *not follow* state law," Pls.' Opp'n Br. at 22. Accordingly, this Court must continue to "assume that [Defendants] will conduct their activities within the law." *O'Shea v. Littleton*, 414 U.S. 488, 497 (1974); *see also United States v. Mezzanatto*, 513 U.S. 196, 210 (1995) ("[T]radition and experience justify our belief that the great majority of prosecutors will be faithful to their duty." (quoting *Newton v. Rumery*, 480 U.S. 386, 397 (1987) (plurality opinion))).

The Harris County Defendants also argue, for the first time, that Plaintiffs are not injured by the Acts because "prosecutors have discretion in determining which cases to pursue and whether to file charges" and because "Plaintiffs do not have a right to have an accused individual criminally prosecuted, nor are they injured by someone not being prosecuted." Harris County Mot.

[4] Indeed, this factual allegation was a key reason why the Court allowed Plaintiffs' as-applied claims to proceed despite dismissing Plaintiffs' facial claims. *See* Order at 13, 25. Because the challenged laws narrow *all* property owners' options for providing notice, and therefore differentially burden *all* property owners' speech when it comes to the right to exclude licensed gun carriers, Plaintiffs maintain that they are facially invalid—even if some property owners will ultimately choose oral notice from the narrow range of options available to them. But in any event, Defendants cannot ignore facts pleaded in the complaint.

at 7–8. *But see Agency for Int'l Dev.*, 570 U.S. at 214 ("[T]he Government 'may not deny a benefit to a person on a basis that infringes his constitutionally protected … freedom of speech even if he has no entitlement to that benefit.'" (quoting *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 59 (2006))). These arguments—which Defendants forfeited by failing to raise them earlier—miss the point. Plaintiffs are not asking that the Harris County Defendants be *required* to prosecute every person who trespasses on Plaintiffs' properties; rather, Plaintiffs simply want the *threat* of prosecution to be a legal possibility. *Cf.* Order at 15. If the Harris County Defendants cannot legally prosecute licensed-handgun-carrying trespassers, there will be little to deter such trespassers from entering Plaintiffs' properties; and indeed one could hardly expect the police to arrest those individuals if they have committed no crime.[5]

2. This Court has power to redress Plaintiffs' injuries, which are traceable to Defendants.

Both sets of Movants also argue that declaratory and injunctive relief would not redress Plaintiffs' harms. That is wrong. Plaintiffs seek a declaration that "the heightened notice requirements imposed by Texas Penal Code §§ 30.06 and 30.07 [are] unconstitutional … and that property owners seeking to exclude handguns from their properties need only follow the notice requirements under the General Trespass Law." Compl. at 29. If this Court grants Plaintiffs their requested relief, Plaintiffs will be able to post signs of their choosing giving reasonable notice of their desire to exclude licensed gun carriers; and if licensed gun carriers ignore that notice and enter anyway, they will be subject to removal, arrest, prosecution, and criminal penalties.

[5] As the Harris County Defendants note, "Plaintiffs do not allege that Harris County Officials have ever refused to prosecute a real person who *actually violated* the Texas Penal Code." Harris County Mot. 8 (emphasis added). This is precisely why Plaintiffs are seeking an order from this Court invalidating the Penal Code's heightened notice requirements.

The Harris County Defendants assert that "[e]ven if Plaintiffs were able to get their requested relief of a declaration that the Acts are unconstitutional as applied to them, it would not change the requirement under the Acts that, to prosecute an individual under the statute, notice that complies with the requirements of the Acts must be provided to that individual." Harris County Mot. at 9–10 (footnote omitted) (citing Tex. Penal Code §§ 30.06–.07). That is simply not accurate. If a federal court declares the heightened signage requirements unconstitutional and enjoins their application, neither the Harris County Defendants nor any other Defendant could rely on those signage requirements to refrain from removing, arresting, or prosecuting a gun-carrying trespasser. *Cf.* Order at 17 ("Harris County Officials do not cite to case law indicating that courts are unable to declare statutes unconstitutional or enjoin the enforcement of unconstitutional statutes.").

By contrast, the Police Defendants correctly observe that "striking down the statute … will not change the requirement that, before there is probable cause to arrest an alleged trespasser … the property owner will still have to demonstrate [that] the accused '(1) had notice that the[ir] entry was forbidden; or (2) received notice to depart but failed to do so.'" Police Mot. at 8 (quoting Tex. Penal Code § 30.05(a)). But the Police Defendants are wrong to imply that this result would not redress Plaintiffs' injuries. What they describe is exactly what Plaintiffs are seeking: the ability to provide reasonable notice in the format of their choosing. *See* Compl. ¶ 69 ("[T]he Church would prefer to display simpler signage that is smaller and more easily understandable."); *id.* ¶ 82 ("If the current signage requirements were not in place, Antidote would post a no-guns sign similar to the pictographic sign it used to display."). Plaintiffs are not looking to do away with notice requirements altogether; this case is about the unconstitutionally compelled speech inherent in the Acts' *heightened* notice requirements.

Finally, the Harris County Defendants object that they "did not create the Acts' notice requirements and have no power to change those requirements," Harris County Mot. at 9, but this is beside the point. Constitutional challenges to state statutes are properly filed against the state officials who are charged with *enforcing* the statutes—and who rarely, if ever, have unilateral authority to change them. *See, e.g.*, *Valentine v. Collier*, 993 F.3d 270, 280 (5th Cir. 2021) ("[T]he proper defendant is a state official acting in violation of federal law who has a 'sufficient "connection" to *enforcing* an allegedly unconstitutional law.'" (emphasis added) (quoting *In re Abbott*, 956 F.3d 696, 708 (5th Cir. 2020))); *Daves v. Dallas County*, 984 F.3d 381, 407 (5th Cir. 2020) ("Because she is 'statutorily tasked with enforcing the challenged law,' the Sheriff when enforcing state law would be a proper defendant under *Ex parte Young*."), *reh'g granted*, 988 F.3d 834 (5th Cir. 2021) (en banc); *see also Abbott*, 956 F.3d at 709 ("The power to promulgate law is not the power to enforce it."). That the Harris County Defendants did not legislatively enact these statutes is utterly irrelevant.[6]

B. The Fifth Circuit does not regularly accept interlocutory appeals regarding questions of standing under § 1292(b).

Movants' suggestion that questions of standing are regularly appealed to the Fifth Circuit via § 1292(b) is unsupported by their citations. *See* Harris County Mot. at 4; Police Mot. at 6. *City of Austin v. Paxton*, 943 F.3d 993 (5th Cir. 2019), *cert. denied*, 141 S. Ct. 1047 (2021), was an appeal as of right of an immunity decision under the collateral-order doctrine, not a discretionary appeal under § 1292(b). *See id.* at 997. Moreover, the Fifth Circuit in that case *declined to address* the district court's standing ruling. *Id.* at 1003 n.3. Similarly, *Walker v. Livingston*, 381 F. App'x

[6] The Police Defendants assert that "the State—and the State alone—has the right to defend the constitutionality of the State's statutes." Police Mot. at 2. But that's not right. Any defendant properly sued under *Ex parte Young* can defend the constitutionality of a statute. And in any event, a notice of constitutional question has been filed in this case, ECF No. 85, and the State may yet attempt to intervene.

477 (5th Cir. 2010), was an appeal as of right of an immunity decision under the collateral-order doctrine. *See id.* at 478. And *Bertulli v. Independent Ass'n of Continental Pilots*, 242 F.2d 290 (5th Cir. 2001), was a class-action appeal under Rule 23(f) of the Federal Rules of Civil Procedure. *See id.* at 294. The Movants come closest with *DDB Technologies, LLC v. MLB Advanced Media, LP*, 676 F. Supp. 2d 519 (W.D. Tex. 2009), but even there, the certification was to the *Federal* Circuit, and that court ultimately *denied* permission to appeal, *DDB Techs., LLC v. MLB Advanced Media, LP*, No. 925, 2010 U.S. App. LEXIS 6578, at *2–3 (Fed. Cir. Feb. 24, 2010). Movants have thus not identified *a single example* of the Fifth Circuit reviewing a standing question on an interlocutory § 1292(b) appeal. To the contrary, Defendants' citations merely underscore that interlocutory review is an "extraordinary" measure, *United States v. Bear Marine Servs.*, 696 F.2d 1117, 1119 (5th Cir. 1983), that would be inappropriate here.

C. The State Defendants' dismissed appeal is irrelevant to this Court's analysis.

Finally, the Police Defendants intimate—without explaining the legal relevance of this discussion—that the dismissal of the State Defendants weighs in favor of certifying this case for an interlocutory appeal. That is also wrong. In their motion to dismiss, the State Defendants asserted sovereign immunity. State MTD at 19. This Court denied them immunity with respect to Plaintiffs' federal-law claims and granted it with respect to Plaintiffs' state-law claims. Order at 20–21. The State Defendants, as was their right, sought immediate review of the sovereign-immunity question. Notice of Appeal at 1 & n.3; *see also Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985). The State Defendants also asserted their intention to ask the Fifth Circuit to exercise supplemental jurisdiction over their standing arguments. *See* Notice of Appeal at 1. But contrary to the Police Defendants' suggestion, the State Defendants did *not* have any entitlement to a review of standing issues by the Fifth Circuit. *See Woods v. Smith*, 60 F.3d 1161, 1166 (5th Cir. 1995) (noting that collateral-order doctrine "does not confer 'pendent appellate jurisdiction' over …

other issues"); *see also City of Austin*, 943 F.3d at 997, 1003 n.3 (declining to consider standing on interlocutory appeal of sovereign-immunity ruling). Plaintiffs dismissed their claims against the State Defendants rather than engage in parallel litigation on sovereign immunity with a subset of Defendants. And the State Defendants have since dismissed their appeal. *Bay Area Unitarian Universalist Church*, slip op. at 1. Accordingly, any suggestion that certification of the question of standing is appropriate because the now-dismissed State Defendants had intended to seek discretionary Fifth Circuit review of that question should be rejected.

II. THIS CASE SHOULD NOT BE STAYED PENDING APPEAL.

The Harris County Defendants, though not the Police Defendants, also request that, if this Court does agree to certify its order for an interlocutory appeal, this case be stayed pending that appeal. Harris County Mot. at 10–11. But although the Harris County Defendants correctly recite the standard for granting a stay, they fail to demonstrate how those factors are met in this case. *See id.* at 11.

First, the Harris County Defendants have not "made a strong showing that [they are] likely to succeed on the merits" in their appeal. *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). Even if this Court finds that Movants have demonstrated substantial ground for difference of opinion as to this Court's ruling, that would still not amount to a strong showing that success is likely. *See La. State Conf. of the NAACP v. Louisiana*, 495 F. Supp. 3d 400, 418 (M.D. La. 2020). Because the Movants have failed to identify any authority that contradicts the settled principles underlying this Court's ruling, *see supra* Section I.A, the Harris County Defendants are unlikely to succeed on appeal.

For much the same reason, the public interest would not be served by a stay. The Harris County Defendants assert that a stay would "conserve judicial and party resources," Harris County

Mot. at 11, but that would be true only if the Movants are successful on appeal. Otherwise, a stay will serve only to prolong this litigation.

Finally, the Harris County Defendants fail to identify how they would be "irreparably injured absent a stay." *Hilton*, 481 U.S. at 776. They suggest that a stay pending appeal would "avoid costly and lengthy litigation," Harris County Mot. at 11, but "the expense and annoyance of litigation does not constitute irreparable injury," *Am. Airlines, Inc. v. Herman*, 176 F.3d 283, 291 (5th Cir. 1999) (citing *FTC v. Standard Oil Co.*, 449 U.S. 232, 244 (1980)). Indeed, were it otherwise, "every denial of [a motion to dismiss] would result in an injury justifying interlocutory review." *EEOC v. Kerrville Bus Co.*, 925 F.2d 129, 133 (5th Cir. 1991). What's more, although any litigation costs would be borne by both Plaintiffs and Defendants, a stay would work an independent injury on Plaintiffs alone, by prolonging the burden on their constitutional rights. "[T]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Google, Inc. v. Hood*, 822 F.3d 212, 227 (5th Cir. 2016) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion)). This Court should not grant a stay pending appeal.

CONCLUSION

For the foregoing reasons, Plaintiffs request that the Court deny Defendants' motions to certify its order for an interlocutory appeal.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 20, 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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