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; and 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; CHRISTIAN MENEFEE, 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; KIM LEMAUX, Presiding Officer for the Texas Commission on Law Enforcement, in her official capacity, *Defendants.*	CIVIL ACTION NO. 4:20-cv-3081

MEMORANDUM OF LAW IN OPPOSITION TO HARRIS COUNTY OFFICIALS' RULE 12(c) MOTION FOR JUDGMENT ON THE PLEADINGS

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INTRODUCTION

After extensive discovery, Defendant Ed Gonzalez, County Sheriff for Harris County, and Defendant Kim Ogg, District Attorney for Harris County (collectively, "the Harris County Defendants") have filed a Rule 12(c) motion asking this Court to enter final judgment against Plaintiffs on the basis of the pleadings alone. That is improper; a Rule 12(c) motion is a device to forestall the burdens of discovery where a complaint is facially defective, not a device to allow a defendant to obtain final judgment without regard to what the facts in the developed record actually show.

Even taking this Rule 12(c) motion on its own terms, it fails. The facts alleged in the Complaint establish that Plaintiffs are suffering ongoing injury sufficient to confer standing under Article III. Specifically, Plaintiffs are injured by being subjected to an asymmetrical scheme that regulates their speech on the basis of content and viewpoint; they are further injured because both have engaged in burdensome, government-scripted speech in order to avoid forfeiting their core property right to exclude; and the Church has separately suffered injury to its associational freedom and property rights because it has been coerced into foregoing its right to exclude concealed, licensed firearms.

The Harris County Defendants dispute these injuries on the ground that the challenged laws are not "enforced against" Plaintiffs. But to show injury in an unconstitutional conditions case, it is enough if the plaintiff is forced to forego a benefit in order to exercise a constitutional right. The Harris County Defendants further argue that Plaintiffs are not injured because they will not be denied police protection if they fail to post the signs. This argument is belied by the fact that Defendants have admitted they enforce Texas law *as written*, and under that law, there is no crime of trespass unless the entrant defies *statutorily conforming* notice of the property owner's intent to exclude. Plaintiffs cannot have the benefit of the deterrent effect of the criminal law unless they post the mandated signage. Finally, the Harris County Defendants argue that Plaintiffs lack standing because, in light of prosecutorial discretion, they do not have an interest in the arrest or prosecution of any particular

individual. But it is settled law that the government can violate the First Amendment by placing unconstitutional conditions on a discretionary benefit.

For all of these reasons, this Court should deny the Harris County Defendants' Rule 12(c) motion. If this Court instead converts it to a Rule 56 motion for summary judgment, it should also be denied, because the facts in the record fully support the existence of Plaintiffs' injuries.

NATURE AND STAGE OF THE PROCEEDING

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] The Texas Penal Code allows owners who wish to exclude entrants for almost any other reason to provide notice through signs "reasonably likely to come to the attention of intruders." Tex. Penal Code § 30.05(b)(2)(C). An intruder who enters the owner's property despite the posting of such a sign has committed the crime of trespass and is subject to police removal, arrest, and prosecution. *See* Tex. Penal Code § 30.05(d). But under §§ 30.06 and 30.07, written notice of the property owner's intent to exclude individuals with licensed firearms is not valid unless it conforms to an onerous government script. These statutes require signs with particular phrasing, in large block letters at least one inch tall, in two languages, which take up at least ten square feet of space. *See* ECF No. 1 ("Compl."), ¶¶ 24-25, 75; Tex. Penal Code §§ 30.06(c)(3); 30.07(c)(3). The Texas state land commissioner who drafted these requirements stated that he intentionally designed them to discourage businesses from prohibiting entry to customers carrying guns. Compl. at 2 & n.1. If a property owner provides notice using a nonconforming sign—for example a simple pictograph, or a sign that says, "No Guns Allowed"—then an individual who nonetheless enters the property carrying a licensed firearm is not subject to police removal, arrest, or prosecution on that basis. *See* Tex. Penal Code §§ 30.05(f); 30.06; 30.07.

[1] The specifics of Texas's statutory scheme are more fully set out in Plaintiffs' Motion for Summary Judgment, ECF No. 155 at 2-4.

Plaintiffs filed suit challenging these burdensome notice requirements on September 2, 2020, naming a number of state and local officials, including the Harris County Defendants. ECF No. 1. All Defendants moved to dismiss, and on August 27, 2021, this Court entered an order granting those motions in part while allowing Plaintiffs' as-applied First Amendment claims to proceed. ECF No. 68. State Defendants Kim Lemaux and Ken Paxton noticed an appeal of the Court's ruling on sovereign immunity. ECF No. 77. Rather than continue to litigate the State Officials' immunity, Plaintiffs voluntarily dismissed them from the case. ECF No. 81. The remaining Defendants sought certification of an interlocutory appeal to challenge, among other things, the Court's ruling on standing. That motion was denied, Order, ECF No. 99, and the parties proceeded to discovery, *see* ECF No. 108.

On December 23, 2021, Defendant Troy Finner, Chief of the Houston Police Department, moved for judgment on the pleadings, principally arguing that because Plaintiffs had voluntarily dismissed the State Officials, Plaintiffs had failed to join a necessary party and dismissal was required under Rule 19(b). ECF No. 115. Defendant Finner also briefly renewed his previously rejected argument that Plaintiffs lacked standing. *Id.* at 12-15. No other Defendant joined this motion.

The parties engaged in discovery during the pendency of the motion, expending substantial resources in doing so. Counsel for Plaintiffs served initial and supplementary discovery requests, and deposed four 30(b)(6) witnesses—one for each remaining Defendant. To facilitate the production of responsive documents in discovery, the parties negotiated and this Court entered an agreed protective order. ECF No. 132. Plaintiffs also briefed and argued a motion to compel after discovery negotiations with Defendant Pete Bacon, Chief of Police of the Webster Police Department, reached an impasse, ultimately obtaining a favorable decision. *See* ECF Nos. 129-131, 135-140. Defendants also conducted defensive discovery. Counsel for Defendant Finner served written discovery requests and deposed three representatives of Plaintiff Antidote Coffee. And counsel for Defendant Bacon deposed Sharlene Rochen, an employee of the Church. Discovery closed on September 1, 2022.

After the close of discovery, on September 29, 2022, this Court granted Chief Finner's motion for judgment on the pleadings and dismissed Plaintiffs' claims against Chief Finner without prejudice. ECF No. 147. On October 31, 2022, Plaintiffs moved to amend the Complaint to reflect the evidence adduced in discovery and address the issues identified in the Court's September 29, 2022 Order. ECF No. 150. That motion remains pending. On October 19, 2022, Plaintiffs also moved to hold the deadline for dispositive motions in abeyance pending resolution of their motion to amend the Complaint. ECF No. 148. The Harris County Defendants declined to consent. *See id* at 6.

November 1, 2022 was the dispositive motions deadline in this Court's scheduling order. *See* ECF No. 145. On that date, Plaintiffs filed a motion for summary judgment against the Harris County Defendants and Defendant Bacon. ECF No. 155. Defendant Bacon moved to dismiss the complaint for lack of subject matter jurisdiction or, in the alternative, for summary judgment. ECF No. 156. And the Harris County Defendants filed a motion for judgment on the pleadings. ECF No. 152. Plaintiffs now file this response to the Harris County Defendants' Rule 12(c) motion.

ISSUE PRESENTED AND STANDARD OF REVIEW

The first issue is whether the Harris County Defendants' motion for judgment on the pleadings is procedurally improper at this stage, where discovery has closed and the case is ripe for summary judgment. "[W]hile district courts enjoy broad discretion in managing their dockets . . . once the parties have invested substantial resources in discovery, a district court should hesitate to entertain a Rule 12(c) motion that asserts a complaint's failure to satisfy the plausibility requirement." *Grajales v. Puerto Rico Ports Auth.*, 682 F.3d 40, 46 (1st Cir. 2012). Their motion is all the more misguided where Plaintiffs have lodged a proposed amended complaint to cure perceived deficiencies.

The second issue is whether, assuming for the purpose of this motion that a Rule 12(c) motion is permissible, Plaintiffs have adequately alleged standing against the Harris County Defendants. "A motion for judgment on the pleadings under Rule 12(c) is subject to the same standard as a motion to

dismiss under Rule 12(b)(6)." *Doe v. MySpace, Inc.*, 528 F.3d 413, 418 (5th Cir. 2008). To survive such a motion, a plaintiff need only plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). In determining whether *Twombly*'s plausibility standard is met, a court must "accept[] all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff." *In re Katrina Canal Breeches Litig.*, 495 F.3d 191, 205 (5th Cir. 2007) (citation and quotation marks omitted).

The third issue is whether, if this Court considers record evidence and converts Harris County's Rule 12(c) motion into a Rule 56 motion, Harris County is entitled to summary judgment. Rule 12(d) provides that "[i]f, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56." Summary judgment is proper where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *Cleotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). "All justifiable inferences to be drawn from the underlying facts must be viewed in the light most favorable to the nonmoving party." *Malm v. Holder*, 2012 WL 2568172, at *5 (S.D. Tex. 2012). If "the factfinder could reasonably find in [the nonmovant's] favor, then summary judgment is improper." *Kelley v. Price-Macemon, Inc.*, 992 F.2d 1408, 1413 (5th Cir. 1993).

SUMMARY OF ARGUMENT

I. By moving for judgment on the pleadings at this belated stage in the proceedings, where discovery has closed and a proposed amended complaint has been filed, the Harris County Defendants are attempting to use an inappropriate procedural mechanism to dispose of this lawsuit. The Court should deny Harris County's motion as procedurally inappropriate or, in the alternative, consider its arguments against the full factual record presently before the Court.

II. Assuming for the sake of argument that the Rule 12(c) standard applies, Plaintiffs have adequately alleged Article III standing. Plaintiffs have suffered, and are suffering, an injury in fact

because the challenged statutes burden their speech, discriminate on the basis of content, and subject them to viewpoint discrimination. These injuries are traceable to Defendants and would be redressed by a favorable decision in this case. Because Defendants enforce the challenged statutes *as written*—as they must—Plaintiffs must adhere to the statutory notice requirements in order to obtain criminal-law protection for their core property right to exclude. If the Court enjoins the burdensome notice requirements, Plaintiffs will be free to communicate, in their own words, the message that firearms are unwelcome on their properties, while retaining the full scope of their right to exclude.

III. If the Court converts the Harris County Defendants' Rule 12(c) motion into a motion for summary judgment, the motion should be denied. The Harris County Defendants have argued solely that the injury in fact element of standing is not satisfied. The record evidence establishes, at minimum, that material fact questions exist with respect to this issue.

ARGUMENT

I. FEDERAL RULE OF CIVIL PROCEDURE 12(C) IS AN INAPPROPRIATE PROCEDURAL MECHANISM AT THIS STAGE IN THE PROCEEDINGS.

The Harris County Defendants' motion for judgment on the pleadings at this stage in the proceedings is procedurally inappropriate and should be denied on that basis. Both common sense and precedent dictate that where a Rule 12(c) motion is brought after the close of discovery, it is error to ignore the record developed by the parties and to dispose of a lawsuit solely on the basis of the pleadings. *See, e.g.*, *Ideal Steel Supply Corp. v. Anza*, 652 F.3d 310, 325 (2d Cir. 2011) (reversing dismissal under Rule 12(c) where facts learned in discovery remedied "perceived gaps in the Complaint"); *Grajales*, 682 F.3d at 46 ("once the parties have invested substantial resources in discovery, a district court should hesitate to entertain a Rule 12(c) motion that asserts a complaint's failure to satisfy the plausibility requirement"); *Madrid v. Wells Fargo Bank, N.A.*, 2017 WL 5653906, at *3 (W.D. Tex. Mar. 17, 2017) ("It would seem to be a mechanical, perfunctory exercise to ignore such facts and dismiss Plaintiffs' claims for want of sufficient factual allegations at this stage of litigation."); *In re Waggoner*

Cattle, LLC, 2022 WL 5264707, at *1-2 (Bankr. N.D. Tex. Apr. 28, 2022) (denying Rule 12(c) motion where extensive discovery had already been completed).

As the Harris County Defendants acknowledge, Rule 12(c) motions are evaluated under the same *Iqbal/Twombly* plausibility framework as Rule 12(b)(6) motions. ECF No. 152 at 4-5 (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Twombly*, 550 U.S. at 570). But it is a "misapplication of *Twombly*" to focus solely on the allegations in the Complaint after substantial discovery has already occurred. *Ideal Steel Supply*, 652 F.3d at 325. The plausibility standard is intended "to allow the parties and the court to avoid the expense of discovery and other pretrial motion practice when the complaint states no plausible claim on which relief can be granted." *Id.* Where, as here, discovery has already been completed, "the point of minimum expense ha[s] long since been passed." *Id.*; *see also Rios-Campbell v. U.S. Dep't of Com.*, 927 F.3d 21, 26 (1st Cir. 2019) ("[G]oing through a lengthy period of discovery only to ignore the fruits of the discovery process by focusing single-mindedly on the adequacy of the allegations of the complaint would make little sense in the mine-run of cases.").

Discovery in this case closed September 1, 2022—two full months prior to the date the Harris County Defendants filed their Rule 12(c) motion. *See* ECF Nos. 108, 152. Hundreds of pages of documents have been produced and reviewed by the parties. Eight witnesses have been deposed. Plaintiffs provided an expert report, and the parties are currently briefing a motion to exclude it. ECF Nos. 157, 157-1. The parties have negotiated multiple discovery disputes culminating in, among other things, Plaintiffs' successful motion to compel and an agreed protective order. ECF Nos. 140, 132. Plaintiffs have filed a motion for leave to amend the complaint and a summary-judgment motion. At this advanced stage of the litigation, "[i]gnoring the entire panoply of facts developed during discovery makes little sense" and would result in an "artificial evaluation" of the case. *Grajales*, 682 F.3d at 46.

Moreover, judgment on the pleadings is inappropriate "if evidence . . . produced during discovery would fill the perceived gaps in the Complaint." *Ideal Steel Supply*, 652 F.3d at 325. Here, the

Harris County Defendants' challenge is that the Complaint does not adequately allege Plaintiffs suffered an injury in fact sufficient to confer standing or present a ripe controversy. As set out below, *see infra* Part III, discovery in this case has only strengthened Plaintiffs' claim of injury.

While these factors alone are sufficient to require denial of the instant Rule 12(c) motion, its impropriety is further underscored by the fact that Plaintiffs' motion for leave to amend the complaint is currently pending. *See, e.g.*, *Edwards v. City of Goldsboro*, 178 F.3d 231, 246 (4th Cir. 1999) (holding that the district court erred in granting defendant's Rule 12 motion on certain claims after discovery and while motions for leave to amend the complaint were pending, and noting that "all of the allegations sought to be added … derived from evidence obtained during discovery regarding matters already contained in the complaint in some form"). Moreover, Plaintiffs notified all Defendants of their intent to seek leave to amend well in advance of the November 1, 2022 dispositive motion deadline, and sought Defendants' consent to continue the briefing schedule in light of the forthcoming amended complaint. *See* Ex. 2. The Harris County Defendants declined to consent to a continuance, but have now filed a motion asking this Court to enter judgment in their favor on the basis of a Complaint that they know Plaintiffs are poised to amend by incorporating record evidence going directly to the issue—standing—challenged in this motion.

Faced with similar scenarios, courts have denied motions for judgment on the pleadings as procedurally inappropriate without consideration of the merits. *See, e.g.*, *Perez v. Oak Grove Cinemas, Inc.*, 2014 WL 1796674, at *3-4 (D. Or. May 5, 2014) (concluding that the "*Iqbal/Twombly* plausibility standard is inappropriate" post-discovery, and denying Rule 12(c) motion without considering defendants' motion under any other standard); *Redono Constr., Co. v. Izquierdo*, 929 F. Supp. 2d 1, 5 (D.P.R. 2012) ("declin[ing] to entertain the Rule 12(c) motion because substantial pretrial discovery has taken place," and advising defendants to file a motion for summary judgment). The Court should do the same and not reward the Harris County Defendants' evident gamesmanship. If, however, the

Court elects to consider the arguments raised in Harris County's motion, the motion fails regardless of whether it is evaluated under the Rule 12(c) or the Rule 56 standard.

II. PLAINTIFFS HAVE PLAUSIBLY ALLEGED STANDING.

To sufficiently plead Article III standing, a plaintiff must plausibly allege (1) an injury in fact, (2) fairly traceable to the challenged action of the defendant and (3) likely to be redressed by a favorable ruling. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992). The Harris County Defendants argue exclusively that Plaintiffs have failed to plausibly allege an injury in fact. Even setting aside all of the record evidence and considering the issue solely on the pleadings, this argument fails.

A. Plaintiffs have plausibly alleged an injury in fact.

Plaintiffs are injured by the Harris County Defendants' enforcement of §§ 30.06 and 30.07 of the Texas Penal Code in at least three ways: (1) the scheme unevenly burdens Plaintiffs' expression, (2) it mandates that Plaintiffs speak in a manner they find offensive, and (3) it impairs the Church's freedom to associate with only unarmed entrants as well as its property rights. ECF No. 155 at 12-15. Each of these injuries is concrete and legally cognizable for standing purposes. Harris County's arguments to the contrary are inapposite.[2]

1. Texas's scheme unevenly burdens Plaintiffs' speech.

Before Plaintiffs ever posted any signs compliant with § 30.06 or § 30.07 of the Texas Penal Code, they were injured for Article III purposes merely by being subjected to Texas's lopsided scheme. The First Amendment mandates evenhanded treatment of speech. The government may not "license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 392 (1992). Nor may the government burden only

[2] This Court previously held that the existing Complaint fails to adequately allege an "injury in fact for which the Houston Chief is responsible." ECF No. 147 at 12. Plaintiffs respectfully disagree with this conclusion and wish to preserve their arguments on the issue for appeal.

disfavored expression by enacting an "asymmetrical" regulatory regime attaching negative consequences to speech depending on its content. *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734-35 (2008). Anyone subjected to such a regime suffers a First Amendment injury sufficient for standing—even if the burden threatened by the regulatory regime is never "actualized." *See id.* at 734 (finding Davis had standing even though his opponent opted out of the challenged contribution limits).

Here, Texas's trespass scheme discriminates on the basis of content and viewpoint by burdening the expression of only one set of disfavored speakers, giving them a narrow set of burdensome options to express their desire to exclude licensed firearms and thereby assert their core property right. They must choose between oral notice—which, as alleged in the complaint, is burdensome and impracticable—or distributing cards or signs containing a lengthy, government-scripted message. *See* Tex. Penal Code §§ 30.06(b)-(c), 30.07(b)-(c); Compl. ¶¶ 41-43. Those who seek to exclude entrants for other reasons—for example, that they are unarmed—are treated more favorably. Such property owners can use any "oral or written communication" or post any sign that is "reasonably likely" to notify entrants "that entry is forbidden." Tex. Penal Code § 30.05(b)(2).

The First Amendment does not allow this asymmetry. *See Davis*, 554 U.S. at 734. Plaintiffs allege that they intend to exclude those carrying firearms, and that they post signs compliant with §§ 30.06 and/or 30.07 to effectuate that intent. Compl. ¶¶ 59, 61, 64, 71-72. Like Davis, therefore, Plaintiffs wish to engage in speech disfavored by the government and are subjected to government-mandated burdens when they do so. No more is required to allege an Article III injury.

2. Texas's scheme compels a manner of expression offensive to Plaintiffs.

Even setting aside the injury caused by the content and viewpoint discrimination of Texas's asymmetrical statutory scheme, Plaintiffs have suffered an independent injury by posting signs compliant with §§ 30.06 and/or 30.07, which is a manner of expression Plaintiffs find offensive.

Antidote Coffee alleges that it posts signs compliant with both §§ 30.06 and 30.07, and the Church alleges that it posts signs compliant with § 30.07; both Plaintiffs object to the manner of expression mandated by the Acts. Compl. ¶¶ 59, 61, 65-67, 69, 72-73, 82. Plaintiffs believe that the required signs are a "Scarlet Letter," or a "bold political statement" that immediately turns the mind to gun violence. *See* Compl. ¶¶ 48, 66, 73. They would rather post unobtrusive, pictographic signs, such as those sufficient to communicate almost any other basis for exclusion. *See* Compl. ¶¶ 68, 82.

"[W]e presume that speakers, not the government, know best both what they want to say and how to say it." *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 791 (1988); *see also Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 573 (1995) (similar). Being forced by the government to convey one's message in a particular manner therefore confers standing under the First Amendment. Even a slight alteration of one's mode of expression is cognizable: Being forced to dance in a g-string, rather than nude, sufficiently burdens an expressive interest to trigger First Amendment scrutiny, *see City of Erie v. Pap's A.M.*, 529 U.S. 277, 289 (2000), as does requiring films to be labeled "political propaganda" when they are displayed, *Meese v. Keene*, 481 U.S. 465, 473 (1987).

Texas's trespass regime puts Plaintiffs to an unconstitutional choice: either abandon their expressive preferences or forego their core property right to exclude individuals carrying licensed firearms. Accordingly, Plaintiffs are injured under §§ 30.06 and 30.07 because they coerce Plaintiffs into adopting a manner of expressing their desire to exclude licensed firearms that offends them. Plaintiffs have alleged that providing notice orally or by card is burdensome and impracticable. Compl. ¶¶ 41-43. They have therefore opted to use signage to convey their message; but Texas's trespass regime requires three separate signs: one under § 30.05(c) (for unlicensed firearms), another under § 30.06(c) (for licensed concealed firearms), and another under § 30.07(c) (for licensed openly carried firearms). Plaintiffs object to posting all three signs on expressive, practical, aesthetic, and—with

respect to the Church—religious grounds. Compl. ¶¶ 61-69, 71-73, 117. To achieve a gun-free environment, they would prefer to post smaller, simpler signs. *See* Compl. ¶¶ 69, 71, 82.

This constitutes a cognizable injury for standing purposes. *See Dep't of Texas, Veterans of Foreign Wars of U.S. v. Texas Lottery Comm'n*, 760 F.3d 427, 432-34 (5th Cir. 2014) (finding standing to assert unconstitutional conditions claim). This would hold true even if Plaintiffs' only objections to the signs were aesthetic. *See Lujan*, 504 U.S. at 562–63 (reasoning that plaintiffs' desire to observe wild animals "for purely esthetic purposes" would be "undeniably a cognizable interest for purpose of standing").

3. Texas's scheme injures the Church's freedom of association and property rights.

Texas's scheme separately injures the Church's freedom associate with only persons who are not carrying a firearm. *See, e.g., Boy Scouts of Am. v. Dale*, 530 U.S. 640, 650 (2000). The Church alleges that carrying weapons is incompatible with its fundamental religious beliefs, including conversation-based conflict resolution, nonviolence, love, and compassion. Compl. ¶ 117. The Texas scheme puts it to the unconstitutional choice between excluding all firearms from its services or engaging in burdensome, government-scripted speech. This is a cognizable injury for the same reasons just set forth. *See Dep't of Texas, Veterans of Foreign Wars of U.S.*, 760 F.3d at 432-34. Relatedly, the expressive burdens imposed by the Texas trespass scheme have already coerced the Church into foregoing its property right to exclude concealed, licensed firearms. The Church posts only § 30.07 signs because posting § 30.06 signs as well would interfere too greatly with its preferred mode of expression. Compl. ¶ 61. This means that, contrary to the Church's internal policies, *id.* ¶ 64, entrants are currently legally able to bring concealed, licensed firearms onto its premises.

4. These injuries are not self-inflicted.

Although it is true that "standing cannot be conferred by a self-inflicted injury," ECF No. 147 at 11 (quoting *Zimmerman v. City of Austin*, 881 F.3d 378, 389 (5th Cir. 2018)), Plaintiffs' injuries are not self-inflicted. In an unconstitutional conditions case, such as this one, a plaintiff that engages in

unwanted speech in order to obtain a governmental benefit has not inflicted her own injury. *See, e.g.*, *Agency for Int'l Dev. v. All. for Open Soc. Int'l, Inc.*, 570 U.S. 205, 219 (2013) (rejecting as "[in]sufficient" the government's suggestion that funding recipients who object to a program's conditions may decline the funds and thereby avoid being subjected to the condition).

Plaintiffs cannot opt out of the asymmetrical Texas scheme, because—to state the obvious—it is the only criminal trespass law there is. And *all* the options available to them to express their desire to exclude firearms are objectionable. *See* Compl. ¶¶ 41-48. The only way they can choose not to engage in burdensome expression is if they forgo their right to exclude—which is precisely the problem. Under the circumstances, Plaintiffs have chosen to post all or some of the government-scripted signs, but that choice among evils does not make their constitutional injury voluntary.

5. The Harris County Defendants' arguments to the contrary are inapposite.

First, the Harris County Defendants assert that Plaintiffs are not injured because the Acts are not enforceable against them. ECF No. 152 at 6-7. Harris County misconceives of the nature of Plaintiffs' unconstitutional conditions claim, which does not depend on the enforcement of any law against Plaintiffs, but on the denial of a benefit. Just as it would violate the First Amendment for the state to make citizens calling 911 recite the Pledge of Allegiance before it dispatches assistance, *cf. W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943), here it violates the First Amendment to make Plaintiffs post the signs in order to obtain the benefit of the law of criminal trespass. Specifically, Plaintiffs are denied the deterrent effect of the criminal law backed by police and prosecutorial protection against entrants with licensed firearms—if they decline to provide notice of their intent to exclude in the manner prescribed by §§ 30.06 and 30.07.

Second, the Harris County Defendants assert Plaintiffs are not injured because Harris County has not denied police protection to Plaintiffs and will not do so in the future. ECF No. 152 at 7. But Plaintiffs' injury does not depend on demonstrating that the Harris County Defendants broadly refuse

to provide police protection or prosecute crimes that occur on Plaintiffs' premises. Rather, Plaintiffs' injury exists because unless they provide notice compliant with §§ 30.06 and 30.07, the Harris County Defendants will not—indeed, *cannot* under Texas law—remove, arrest, or prosecute for trespass entrants carrying licensed firearms on the basis that they ignored Plaintiffs' expressed desire to exclude them. As alleged in the Complaint, Texas's firearm-owning residents know this and have a practice of carrying their licensed firearms onto premises that display non-conforming signs. *See* Compl. ¶ 49. That is enough to allege an Article III injury. *See Davis*, 554 U.S. at 734-35.

Finally, Harris County argues that Plaintiffs are not injured because prosecutors act with prosecutorial discretion, and Plaintiffs do not have an interest in the arrest or prosecution of any particular person. ECF No. 152 at 7-8. But a party need not be entitled to the government benefit that is the predicate for an unconstitutional conditions claim. *Agency for Int'l Dev.*, 570 U.S. at 214. And in any event, even absent actual arrest and prosecution in any given instance, Plaintiffs have a strong interest in the deterrent effect of the criminal law in helping to exclude unwanted entrants from their premises. As the Supreme Court has recognized, "[t]he severity of criminal sanctions," especially when combined with "the opprobrium and stigma of a criminal conviction," results in criminal law's having an "increased deterrent effect" over and above that of civil regulations. *Reno v. ACLU*, 521 U.S. 844, 872 (1997); *see, e.g., Virginia v. Hicks*, 539 U.S. 113, 119 (2003) (observing that threat of "criminal sanctions" creates greater deterrence). Unless Plaintiffs post signs compliant with §§ 30.06 and 30.07, persons with licensed firearms will not be deterred by the threat of criminal sanctions from entering Plaintiffs' establishments. *See* Compl. ¶ 55 ("The only effective way for property owners to exclude guns from their property is through the criminal law of trespass.").

B. Plaintiffs have plausibly alleged their injury is traceable to the Harris County Defendants' conduct and will be redressed by a favorable decision.

The Harris County Defendants offer no argument to this Court challenging the traceability and redressability elements of standing. But in any event, Plaintiffs have plausibly alleged both that

their injury is traceable to the Harris County Defendants' conduct, and that their injury is likely to be redressed by a favorable decision. *See* ECF No. 155 at 16-18.

Traceability is a low bar, and should not be confused with seeking an injury's "proximate cause." *K.P. v. LeBlanc*, 627 F.3d 115, 123 (5th Cir. 2010). Rather, traceability is satisfied if the Harris County Defendants are "among those who cause [Plaintiffs'] injury." *Air Evac EMS, Inc. v. Texas, Dep't of Ins., Div. of Workers' Comp.*, 851 F.3d 507, 514 (5th Cir. 2017). That standard is adequately alleged in this case. Plaintiffs allege that the Harris County Defendants are charged with enforcing the laws of the State of Texas, including §§ 30.06 and 30.07. *See* Compl. ¶¶ 8, 10.

And because the Harris County Defendants are charged with enforcing the Acts, an injunction against the enforcement of the heightened notice requirements of §§ 30.06(c)(3) and 30.07(c)(3), or a declaration that those provisions are unconstitutional—or both—would redress Plaintiffs' First-Amendment injury. *See Air Evac EMS*, 851 F.3d at 515.

C. Plaintiffs' claims are ripe.

The Harris County Defendants also argue that Plaintiffs' claims should be dismissed as unripe, because "Plaintiffs have not felt the effects of the Acts in a concrete way." ECF No. 152 at 10. For the reasons just set forth, Plaintiffs are presently and concretely injured—they are currently subject to an asymmetrical scheme and are suffering injury to their expressive, associational, and property rights. *See supra* Part II.A. "'[A]n actual arrest, prosecution, or other enforcement action is not a prerequisite to challenging' the constitutionality of a law regulating an organization's ongoing and expected future behavior." *Tenn. State Conf. of the NAACP v. Hargett*, 441 F. Supp. 3d 609, 625 (M.D. Tenn. 2019) (quoting *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014)). Plaintiffs therefore readily satisfy the standard for ripeness, which the Harris County Defendants do not discuss in any detail.

"To determine whether claims are ripe, we evaluate (1) the fitness of the issues for judicial resolution, and (2) the potential hardship to the parties caused by declining court consideration." *Lopez*

v. City of Houston, 617 F.3d 336, 341 (5th Cir. 2010). Plaintiffs' First Amendment challenge to Texas's statutory scheme is fit for judicial resolution; because they are suffering a present and ongoing harm, there is no need to await any further developments to determine the legal question whether the asymmetrical trespass notice scheme violates their First Amendment rights. And declining judicial consideration would harm Plaintiffs by extending the ongoing violation of Plaintiffs' constitutional rights. *See Opulent Life Church v. City of Holly Springs*, 697 F.3d 279, 288 (5th Cir. 2012) (finding First Amendment and statutory challenge to zoning ordinance ripe in part because "[e]ach day that passes" with the ordinance in effect "is a day in which [Plaintiffs'] religious free exercise is curtailed").

III. DEFENDANTS ARE NOT ENTITLED TO SUMMARY JUDGMENT.

For the foregoing reasons, if this Court chooses to address the Harris County Defendants' motion under the Rule 12(c) standard, it should deny their request for judgment on the pleadings. But at this juncture, in light of the existence of a fully developed record, the Court should take account of the facts developed during discovery. *See Ideal Steel Supply*, 652 F.3d at 323-26; *supra* Part I. When a court considers matters outside of the pleadings, a motion for judgment on the pleadings "must be treated as one for summary judgment under Rule 56." Fed. R. Civ. P. 12(d). Summary judgment is only proper where, construing the evidence in the light most favorable to the non-movant, "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *Cleotex*, 477 U.S. at 322-23. The Harris Count Defendants have moved for final judgment solely on the basis that Plaintiffs lack an injury sufficient to confer Article III standing. The existing record demonstrates, at minimum, that disputed fact issues preclude summary judgment in the Harris County Defendants' favor.[3]

[3] Rule 12(d) provides that where a motion is converted to a motion for summary judgment, "[a]ll parties must be given a reasonable opportunity to present all the material that is pertinent to the motion." Here, the Harris County Defendants are well aware that materials outside the pleadings exist

A. Plaintiffs are displaying §§ 30.06 and 30.07 signs contrary to their preferred means of expressing their desire to exclude licensed firearms.

Both the Church and Antidote Coffee are located in Harris County, and receive governmental services, including police and prosecutorial services, from the Harris County Defendants.[4] Brandon Decl., Ex. G, App. 207-08 ¶ 17; Callaway Decl., Ex. I, App. 223-24 ¶ 18.[5] And both Plaintiffs wish to exclude licensed firearms from their property. Ex. G, App. 204 ¶ 3; Ex. I, App. 220 ¶ 2. Both Plaintiffs are therefore presently posting signs to which they object in order to exercise their right to exclude.

The Church Plaintiff. The Church professes a message of nonviolence, and, consistent with that, has an official policy of disallowing all firearms on Church grounds. Ex. G, App. 204 ¶¶ 2-3. The Church displays on its front and side entrances signs that it believes compliant with § 30.07, to prohibit the open carry of licensed handguns. *Id.* at 204 ¶ 4. The Church believes that posting any further no-gun signs, including § 30.06 signs, would detract too much from its religious message, and would turn entrants' thoughts immediately to guns and violence. *See id.* at 204, 206 ¶ 4, 9. The Church also believes that posting any additional no-guns signs would impair the safety and accessibility of the Church building. *Id.* at 205 ¶ 6. Church greeters need to be able to see through the clear glass doorways to determine whether an entrant needs assistance entering, or whether an approaching entrant may pose a safety risk. *See id.* As a result, the Church's signage does not match its official policy of excluding all firearms, which is confusing to congregants. *Id.* at 205 ¶ 5. The Church would prefer to communicate

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to rebut its Rule 12(c) motion, which it filed in lieu of a summary judgment motion. Accordingly, this "reasonable opportunity" provision has been satisfied.

[4] Although calls for service within the incorporated areas of Harris County, including the Cities of Houston and Webster, are not routed to the Harris County Sheriff's Office ("HCSO"), HCSO has "situational" law enforcement responsibilities in such incorporated areas. Ex. C, App. 21. Officers employed by the HCSO have authority to arrest individuals for violations of the Texas Penal Code anywhere in Harris County, including within the cities of Houston and Webster. *Id.* at 23.

[5] All record citations to the Appendix ("App.") are to Plaintiffs' Appendix filed in support of its motion for summary judgment, ECF No. 155-2.

that guns are disallowed by posting a sign in its own words, in a way that situates the prohibition on firearms within the Church's larger religious philosophy. *See id.* at 206 ¶ 11. But the requirements of § 30.07(c)(3) provide no leeway to convey the Church's "no guns" message in a more positive way. *See* Jourdan Expert Report, Ex. F, App. 195-96 ¶ 19. The Church would also prefer to post a smaller sign that does not drown out other messaging, as the § 30.07 signs do. *See* Ex. G, App. 206 ¶¶ 7, 11.

Plaintiff Antidote Coffee. Antidote Coffee is a small, family-oriented coffee shop. Ex. I, App. 219 ¶ 1. In prior years, Antidote displayed a small three-inch-by-three-inch pictographic "no-guns" sign in its front window. *Id* at 220 ¶ 4. Today, Antidote posts signs that it believes are compliant with §§ 30.05(c), 30.06, and 30.07, taking up a total of 10.33 square feet—over five feet at each entrance. *Id.* at 220 ¶ 5. These signs cover a large portion of Antidote's storefront and are detrimental to its desired aesthetic. *Id.* at 220-22 ¶¶ 5-6, 10. The signs also force Antidote to make what it considers a "bold political statement" about guns. *Id.* at 221 ¶ 6. Indeed, members of the public have stated that they view the "big ugly sign[s]" required by §§ 30.06 and 30.07 to be "social[]" and "political[]" statements on behalf of the institutions who post them.[6] The political valence of the signs has transformed them into a "Scarlet Letter" provoking passers-by. For example, Antidote received a one-star rating from one Google user who explained: "The coffee shop posts 30.06 and 30.07 signage."[7] Another member of the public posted about Antidote on an online forum known as Texas3006.com, which provides "a centralized location for reporting and retrieving businesses and other facilities that deny our right to defend both ourselves and our families from criminals."[8] On the website, users post the addresses of various properties that display no-guns signs along with detailed descriptions of

[6] Post by The Annoyed Man, TEXASCHLFORUM.COM, https://bit.ly/3WlIlEs (Mar. 11, 2019 12:39 PM), Ex. J, App. 229.

[7] GOOGLE.COM, https://bit.ly/3FEBFuW (last visited Nov. 22, 2022), Ex. 3.

[8] Russell Jones, TEXAS3006.COM, https://bit.ly/3t33aHr (last visited Nov. 22, 2022), Ex. 4.

whether the signs meet the statutory requirements, such as whether the letters are less than an inch tall. One Texas3006 user noted that Antidote Coffee posts valid §§ 30.06 and 30.07 signs at both entrances and commented, "I guess I have to go somewhere else for coffee."[9]

As the existence of the Texas3006 website demonstrates, the complicated statutory signage framework in Texas encourages some members of the public to bring firearms into environments where they are not welcome in order to test the reaction of the public and of law enforcement. Such persons are known to law enforcement in Texas and are sometimes referred to as "Second Amendment Auditors." *See* Duplechain Dep. Tr., Ex. L, App. 267-75.

Dawn Callaway, an owner of Antidote, has had firsthand experience with this. On one occasion, while replacing the §§ 30.06 and 30.07 signs outside Antidote, a man approached Ms. Callaway to tell her that "those signs don't matter, that he can come in anyway, and that … [she would have] to verbally tell him that he wasn't allowed because those signs didn't actually mean anything, and that he teaches a concealed handgun course so he knows." D. Callaway Dep. Tr., Ex. K, App. 264-65. This interaction was not an isolated incident. Public message boards across the internet reflect the view of gun-bearing members of the public that the complex statutory requirements of §§ 30.06 and 30.07 allow them to circumvent property owners' attempts to exclude firearms, while remaining technically compliant with the law. *See, e.g.*, Ex. J, App. 228 ("I walked right past a sign yesterday that said 'No firearms allowed'. I thought it was cute."). Despite Antidote's posting all signs required by §§ 30.05(c), 30.06, and 30.07, individuals with firearms have entered Antidote's property. When confronted, these individuals have become verbally combative and resisted leaving. One gun-bearing patron falsely asserted that he was an off-duty police officer and so was permitted to have his gun in the coffee shop. *See* Ex. K, App. 247-49. In another case, an individual with a firearm initially

[9] Post by Texas12Gauge, TEXAS3006.COM (June 3, 2017), https://bit.ly/3sIyuuy, Ex. 5.

departed the premises but later returned with a sword, in an apparent reaction to being prohibited from carrying a firearm into the coffee shop. *Id.* at 254-56.

Alternate Forms of Notice. Sections 30.06 and 30.07 provide that, in lieu of posting compliant signs, a property owner may provide individualized notice that licensed firearms are prohibited, orally or via card. Providing individual notice by either method is impracticable for Plaintiffs and places an even greater burden on speech than posting signs. *See* Ex. G, App. 207 ¶¶ 14-16; Ex. I, App. 223 ¶¶ 14-17. First, because there is no way to know whether a given entrant has a concealed firearm, Plaintiffs would have to give individual notice to every person who enters the premises. *See id.*. Second, the Church feels that providing individual notice to every churchgoer, either by card or orally, would substantially alter the religious experience it wishes to provide. Ex. G, App. 207 ¶¶ 15-16. Antidote similarly feels that a practice of providing individual notice to every customer, either by card or orally, would substantially alter the customer experience. Ex. I, App. 223 ¶¶ 16-17. It is also intimidating and uncomfortable for Plaintiffs' staff to confront an individual carrying a firearm to ask them to leave. *See generally* Ex. G, App. 207 ¶ 13; Ex. I, App. 223 ¶ 15.

B. The Harris County Defendants Enforce §§ 30.06 and 30.07.

The record confirms that the Harris County Defendants enforce Texas's scheme in a manner that deprives Plaintiffs of the deterrent effect of the criminal law, backed by police and prosecutorial action, if they fail to provide conforming notice. The Harris County Sheriff's Office ("HCSO"), through Sheriff Ed Gonzalez, enforces the laws of Texas in Harris County, including §§ 30.06 and 30.07. Lee Dep. Tr., Ex. C, App. 23-26. The Harris County District Attorney's Office ("HCDA"), through District Attorney Kim Ogg, prosecutes violations of Texas Law, including §§ 30.06 and 30.07, in Harris County. Wilhelm Dep. Tr., Ex. D, App. 61, 66-67; Ogg Resp. to Pls.' Req. for Admis., Ex. M, App. 280.

Before making an arrest for a violation of §§ 30.06, or 30.07, officers employed by the HCSO must have probable cause to believe all elements, including the notice requirements, are satisfied. Ex. C App. 26-27; Gonzalez Resp. to Pls. Req. for Admis., Ex. N, App. 291. And prosecutors employed by the HCDA must ascertain probable cause as to all elements, including notice requirements, before accepting charges or pursuing prosecution for violations of §§ 30.06 or 30.07. *See* Ex. D, App. 70-72, 75-80. For this reason, officers and prosecutors employed by Defendants are specifically trained on the nuances of the signage requirements under §§ 30.05, 30.06, and 30.07. *See* TCOLE Course 3184, Ex. O., App. 297; TCOLE Course 3187, Ex. P, App. 350; Tex. D. & Cnty. Att'ys Assoc. 2015-2017 Leg. Update, Ex. Q, App. 396; Tex. D. & Cnty. Att'ys Assoc. 2019-2021 Leg. Update, Ex. R, App. 402; HCDA Slide Deck, Ex. S, App. 407; Ex. D, App. 96-99. Officers and prosecutors are further trained that signs compliant with §§ 30.05(c), 30.06, and 30.07 are all required if a property owner wants to provide notice that long guns as well as unlicensed, licensed concealed, and licensed openly carried handguns are all prohibited. *See id.*

Officers are expected to put this training into practice when they perform their law-enforcement duties. Indeed, it is the policy of the HCSO that an officer may not arrest an individual for violation of §§ 30.06 or 30.07 if the officer is aware that the individual did not receive notice as defined by the relevant statute. Ex. C, App. 26-28, 30-35. Similarly, prosecutors are expected to put this training into practice when making charging decisions and prosecuting cases. Prosecutors employed by the HCDA are not permitted to charge offenses under §§ 30.06 and 30.07 if they are aware that the trespassing individual did not receive notice compliant with the relevant statute. *See* Ex. D, App. 77-80, 87-89. This record evidence directly rebuts the Harris County Defendants' assertion that there is no substantial risk that Defendants will deny future protection if Plaintiffs do not comply with the Acts' heightened notice requirements. ECF No. 152 at 7.

C. The record demonstrates, at minimum, disputed issues of material fact with respect to Plaintiffs' injury.

As described above, *supra* Part II.A., the enforcement of Texas's trespass regime concretely injures Plaintiffs in at least three ways: it selectively burdens the speech of property owners who wish to exclude firearms; it compels Plaintiffs to speak in a manner they find offensive; and it impairs the Church's freedom of association and property rights. Applying the legal principles discussed above, *see supra* Part II, the record demonstrates that Plaintiffs have standing on each of these grounds.

1. The evidence shows that Plaintiffs are injured by §§ 30.06 and 30.07 because unlike property owners who wish to exercise their right to exclude on any other basis, they must choose among forms of notice that are all burdensome to them. As already discussed, the First Amendment does not tolerate differential treatment of speech based on content and viewpoint, and persons subjected to a regime that burdens their speech in an "asymmetrical" manner are sufficiently injured for standing purposes. *See, e.g.*, *R.A.V.*, 505 U.S. at 392; *Davis*, 554 U.S. at 734-35. Here, the testimony of the Harris County Defendants' 30(b)(6) witnesses confirms that both police and prosecutors apply, in practice, the differential notice requirements for general trespass, on the one hand, and trespass with a licensed firearm, on the other. *See* Ex. C. App. 29-35; Ex. D. App. 75-90. The record further confirms that if doing so were legally sufficient to exclude entrants with licensed firearms, Plaintiffs would post signs compliant with § 30.05(b)(2)(A); but instead, if they choose to employ signage, they must post signs that are large, unsightly, and provocative to many visitors. *See* Ex. G, App. 206 ¶ 11; Ex. I App. 221 ¶ 8; Ex. K App. 247-49, 254, 264-65; Ex. J. App. 226-223; Exs. 3-5. The option of providing notice orally or by card is also burdensome and oppressive. The Church feels that providing individual notice to every churchgoer, either by card or orally, would substantially alter the religious experience it wishes to provide. Ex. G, App. 207 ¶¶ 15-16. Antidote similarly feels that providing individual notice to every customer, either by card or orally, would substantially alter the customer experience. Ex. I, App. 223 ¶¶ 16-17 ("To an even greater extent than the § 30.06 and § 30.07 signage, I believe that oral notice

would convey a message of confrontation, combativeness, and abrasiveness towards my customers."). Simply being subjected to this asymmetrical scheme—which singles out property owners wishing to exclude licensed firearms and gives them narrower and more burdensome options for how to convey that message—is a First Amendment injury. *See Davis*, 554 U.S. at 734-35.

2. The evidence shows that §§ 30.06 and 30.07 impermissibly compel a manner of expression offensive to Plaintiffs, which is an injury in fact. Again, being told how to speak by the government is a cognizable First Amendment injury for standing purposes. *Riley*, 487 U.S. at 791. The difference between one's desired manner of expression and the government-mandated manner need not be vast for an injury to exist. *See, e.g., City of Erie*, 529 U.S. at 289. Here, Antidote Coffee posts §§ 30.06 and 30.07 signs, and the Church posts § 30.07 signs. Ex. G App. 204 ¶ 4; Ex. I App. 220 ¶ 5. Both Plaintiffs object to the manner of speech in which they are compelled to engage in order to obtain the protection and deterrent effect of the criminal law in excluding licensed firearms. *See* Ex. G App. 205-06 ¶¶ 6-11 ("The Church believes that the signs required by the Acts detract from [its] religious principles."); Ex. I App. 221-22 ¶¶ 6, 10 ("the signs are detrimental to my desired 'neighborhood coffee shop' aesthetic and undermine my preferred business theme and messaging"). That alone constitutes a cognizable injury. And it does not matter, for standing purposes, that Plaintiffs' objection to the signs is in part aesthetic. As the Supreme Court observed in *Lujan*, the desire to observe wild animals "for purely esthetic purposes" would be "undeniably a cognizable interest for purpose of standing." 504 U.S. at 562-63. Having engaged in speech contrary to one's own aesthetic preferences is an even more concrete and particularized injury. *See, e.g., Jacobs v. Clark Cnty. Sch. Dist.,* 526 F.3d 419, 425-27 (9th Cir. 2008) (finding students had standing to challenge a mandatory dress code as injuring their "First Amendment rights to engage in expressive conduct via [their] choice of clothing").

The record further shows that Plaintiffs' decision to post these signs is not a self-inflicted injury, because they cannot have the benefit of the deterrent effect of the criminal law of trespass

against entrants carrying licensed firearms, as backed up by the Harris County Defendants, unless they post the signs. Harris County law enforcement officers cannot arrest or prosecute trespassers who ignore non-conforming signs. *See* Ex. C. App. 26-28, 30-35 (pursuant to HCSO policy, an officer many not arrest an individual for violations of §§ 30.06 or 30.07 if the officer is aware that the individual did not receive notice as defined by the relevant statute); Ex. D App. 77-80, 87-89 (HCDA prosecutors are not permitted to charge offenses under §§ 30.06 or 30.07 where the trespassing individual did not receive notice compliant with the relevant statute); *see also supra* Part II.A.5 (discussing *Reno*, 521 U.S. at 872, and *Hicks*, 539 U.S. at 119); *Prantil v. Arkema Inc.*, 986 F.3d 570, 577 n.29 (5th Cir. 2021) (damages for civil trespass claim unavailable unless plaintiff can prove injury).

And the record shows that the deterrent value of the criminal law of trespass in excluding licensed firearms from Plaintiffs' property is at a premium. Law enforcement is trained on how to deal with Second Amendment Auditors, who are members of the public who bring firearms into environments where they are not welcome in order to test the reaction of the public and of law enforcement. *See* Ex. L, App. 268-75. The existence of Second Amendment Auditors puts the Harris County Defendants' specific training on the nuances of statutorily sufficient notice under §§ 30.06 and 30.07 to the test. Additional evidence shows that, in the social and political environment in which Plaintiffs operate, members of the public are acutely familiar with the notice requirements applicable to property owners seeking to exclude firearms. *See, e.g.*, Ex. K, App. 264-65 (testimony of Antidote owner describing man who approached her to tell her that her §§ 30.06 and 30.07 signs "don't matter, that he can come in anyway" absent verbal notice); Ex. J, App. 226-233 (online forum discussing signage requirements); Exs. 4-5 (excerpts from Texas3006.com, an online forum with detailed descriptions of whether posted signs meet statutory requirements). Posting a simple "no guns" sign has little to no deterrent value. *See* Ex. J, App. 228 ("I walked right past a sign yesterday that said 'No firearms allowed'. I thought it was cute.").

As already established, the fact that Harris County prosecutors enjoy prosecutorial discretion does not alter the standing analysis, because Plaintiffs need not have a legal entitlement to police or prosecutorial action to state a valid unconstitutional conditions claim. *Supra* Part II.A.5 (citing *Agency for Int'l Dev.*, 570 U.S. at 214). In any event, Defendant Ogg confirmed, through her 30(b)(6) witness, that the HCDA does not have a policy of declining to enforce §§ 30.06 or 30.07. See Ex. D App. 66.

3. Finally, the record confirms that Sections 30.06 and 30.07 injure the Church by preventing it from effectively excluding entrants with licensed firearms, which impairs the Church's freedom of association and property rights. *See Boy Scouts of Am.*, 530 U.S. at 650. The Church wishes to exclude firearms for both expressive and associational reasons. *See* Ex. G, App. 204-07 ¶¶ 2-4, 6-10. Yet Texas's convoluted scheme emboldens members of the public to flout what they perceive to be inadequate signage on no-gun premises, *see* Ex. J, App. 228; Ex. K, App. 245-59, 264-66, making it exceedingly difficult for the Church to exclude firearms. And this injury is particularized to the Church—carrying weapons runs counter to the Church's most fundamental religious tenets, including nonviolence, love, and compassion. Ex. G, App. 206 ¶ 8; *id.* at 210.

Moreover, because Plaintiffs are concretely injured by the enforcement of §§ 30.06 and 30.07, the Harris County Defendants are not entitled to summary judgment on the issue of ripeness. The remaining issues are fit for judicial resolution, and the potential hardship to Plaintiffs of declining court consideration is severe. *See supra* Part II.C (citing *Tenn. State Conf. of the NAACP*, 441 F. Supp. 3d at 625; *Lopez*, 617 F.3d at 341; *Opulent Life Church*, 697 F.3d at 288). Plaintiffs' claims are ripe for adjudication.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny the Harris County Defendants' motion for judgment on the pleadings.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 22, 2022, I electronically filed a true and correct copy of the foregoing document 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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