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

REPLY IN SUPPORT OF PLAINTIFFS'
MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION & SUMMARY OF ARGUMENT

As set forth in Plaintiffs' Motion for Summary Judgment, the record in this case supports all the elements of Plaintiffs' claims: They have standing because (1) they are presently suffering harms to their speech, property, and associational rights; (2) that injury is traceable to Defendants, who apply the challenged notice requirements of Texas Penal Code §§ 30.06(c)(3) and 30.07(c)(3) in enforcing Texas trespass law; and (3) and Plaintiffs' injury will be redressed if this Court enjoins the application of Texas Penal Code §§ 30.06(c)(3) and 30.07(c)(3) by Defendants, because then Plaintiffs will be free to provide reasonable notice in the form of their choice, like other property owners. And on the merits, the challenged statutes violate the First Amendment because they are not narrowly tailored to serve any legitimate government purpose; rather, they were deliberately designed to burden the speech and property rights of owners who wish to exclude firearms.

Defendants barely offer any response. The Harris County Defendants did not even file a brief opposing Plaintiffs' Motion for Summary Judgment.[1] Webster's arguments in opposition go primarily to standing and rest on a basic fallacy about "police protection." Specifically, Webster argues that the Church is not injured because deposition testimony indicates that Webster police officers have previously responded professionally to calls from the Church and will not refuse to come when called in the future, regardless of whether the Church posts the §§ 30.06 and 30.07 signs. Webster Opp., ECF No. 164 at 7-8. But the record evidence is that Webster police officers enforce §§ 30.06 and 30.07 as written, that officers evaluate posted "no-guns" signage when responding to calls for service, and that Plaintiffs rely on the deterrent effect of the criminal law to enforce their right to exclude entrants with licensed handguns. These facts are not in dispute.

[1] This Reply uses the defined terms set forth in Plaintiffs' Motion for Summary Judgment, ECF No. 155.

Webster's half-hearted arguments on traceability and redressability fare no better. Webster is among those who cause the Church's injury because Webster enforces the challenged statutory scheme as written. A declaration and injunction precluding Webster from enforcing the heightened notice requirements of §§ 30.06(c)(3) and 30.07(c)(3) will redress the Church's injuries and place the Church on the same footing as property owners seeking to exclude entrants for any other reason.

On the merits, Webster argues that Plaintiffs are not injured because they have a choice whether to comply with the notice requirements of §§ 30.06 and 30.07. But that again misses the point; the choice is itself the constitutional violation. The fact that police and prosecutorial enforcement of Plaintiffs' property rights is conditioned on engaging in a manner of speech offensive to Plaintiffs subjects the scheme to heightened scrutiny under the First Amendment. No Defendant argues that the scheme survives heightened scrutiny, and for good reason: the law is not tailored to serve a legitimate government interest.

The relevant facts of this case are not in dispute, and the law of unconstitutional conditions is clear. Plaintiffs are entitled to summary judgment.

NATURE AND STAGE OF THE PROCEEDING

As stated in Plaintiffs' Motion for Summary Judgment, Plaintiffs filed this action challenging the heightened notice requirements of §§ 30.06 and 30.07 on September 2, 2020. ECF No. 1. The Court granted in part and denied in part Defendants' Motions to Dismiss, permitting Plaintiffs' as-applied First Amendment claims to move forward. ECF No. 68. On September 29, 2022, the Court granted the motion of Defendant Troy Finner for judgment on the pleadings. ECF No. 147. On November 1, 2022, Plaintiffs moved for summary judgment against all remaining Defendants. ECF No. 155. The deadline to oppose Plaintiffs' Motion for Summary Judgment fell on November 22, 2022. Webster filed a brief in opposition to Plaintiffs' Motion for Summary Judgment. ECF No. 164. The Harris County Defendants did not file a brief in opposition. Pursuant to S.D. Tex. L.R. 7.4,

"[f]ailure to respond to a motion will be taken as a representation of no opposition." Plaintiffs now file this reply in further support of their motion.

ISSUE PRESENTED

The issue before the Court is whether Plaintiffs are entitled to summary judgment in their favor. Summary judgment is proper if "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). The movant "bears the initial burden of informing the district court of the basis for the motion, and … demonstrat[ing] the absence of a genuine issue of material fact." *Becerra v. Asher*, 921 F. Supp. 1538, 1542 (S.D. Tex. 1996). "Once the movant carries this burden, the burden shifts to the nonmovant to … set forth specific facts showing the existence of a genuine issue for trial." *Id.*

ARGUMENT

I. DEFENDANTS DO NOT DISPUTE THE MATERIAL FACTS UPON WHICH PLAINTIFFS RELY

The material facts that support Plaintiffs' Motion for Summary Judgment are not contested by the Harris County Defendants or Webster. In fact, the Harris County Defendants did not file an opposition to Plaintiffs' motion. And while Webster did file an opposition, it does not identify any factual assertions with which it disagrees. Rather, Webster points to *other* facts and argues that they undermine the Church's standing and merits claims. Plaintiffs address those arguments below. *See infra* Parts II-III. At the outset, however, it is worth taking stock of all the important factual points that are undisputed by Defendants and that this Court may therefore take as true. *See* Fed. R. Civ. P. 56(e)(2)-(3) (where a party fails to properly "address another party's assertion of fact as required by Rule 56(c), the court may … consider the fact undisputed for purposes of the motion" and may "grant summary judgment if the motion and supporting materials—including the facts considered undisputed—show that the movant is entitled to it"); *Smith v. Guild Mortg. Co.*, 2020 WL 1686274, at *2 (S.D. Tex. Apr. 6, 2020) ("[W]hen a nonmoving party fails to respond to a motion for summary judgment, the court may

accept the movant's uncontroverted factual assertions as true." (citing *Eversley v. MBank of Dall.*, 843 F.2d 172, 174 (5th Cir. 1988))).

Defendants do not dispute that all options for providing notice under §§ 30.06 and 30.07 are highly burdensome and demand a manner of speech offensive to Plaintiffs. *See* Ex. G, App. 207 ¶¶ 14-15; Ex. I, App. 223 ¶¶ 14-15.[2] Nor do they dispute that providing individual notice either orally or by card would impair Plaintiffs' expression to an even greater extent than posting §§ 30.06 and 30.07 signage. *See* Ex. G, App. 207 ¶ 16; Ex. I, App. 223 ¶¶ 16-17.

Defendants do not dispute that 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, or that the political valence of the signs has transformed them into a "Scarlet Letter." *See* Ex. J, App. 229; Ex. I, App. 221 ¶ 6.

Defendants do not dispute that they enforce the Texas Penal Code as written, including applying the heightened notice requirements of §§ 30.06 and 30.07. *See* Ex. C, App. 24-26; Ex. D, App. 66-68, 78-80; Ex. E, App. 137, 146-47, 152-53. They do not dispute that they must have probable cause to believe that a trespasser received notice compliant with §§ 30.06 or 30.07 in order to remove, arrest, charge, or prosecute a trespasser on the basis that they entered Plaintiffs' property with a licensed handgun. *See* Ex. E, App. 146-47, 152-53 (Defendant Bacon testifying that if any one requirement of §§ 30.06 or 30.07—such as block lettering at least one inch in height—is not satisfied, an individual who ignored the sign would not be in violation of the statute, and an officer could not make an arrest for violation of the statute); Ex. C, App. 26-35; Ex. D, App. 70-72, 75-80.

Defendants do not dispute that their officers and prosecutors are specifically trained on the notice requirements that Plaintiffs challenge. Ex. O, App. 312 (noting "*two separate signs*" are required

[2] All record citations to the Appendix ("App.") herein refer to Plaintiffs' Appendix filed in support of their Motion for Summary Judgment, ECF No. 155-2.

to give notice to both open and concealed handgun carriers); Ex. P, App. 362-63, 366-67; Ex. E, App. 140-41, 174-75 (explaining this training is mandatory); Ex. D, App. 97-99. Nor do they dispute that when they respond to calls for service, are on patrol, or make charging and prosecutorial decisions, they put that training into practice. They do not dispute that Webster's own police report shows that when officers respond to calls for service implicating the firearm trespass statutes, they assess the property's signage to ensure compliance. Ex. T, App. 420; Ex. E, App. 161-63.

Defendants do not dispute that law enforcement officers are trained to respond to Second Amendment auditors who patrol Texas and seek opportunities to test the limits of their ability to carry firearms onto others' property. *See* Ex. L, App. 268-75. They do not dispute that these individuals are emboldened by the impossibility of criminal sanctions where signage is nonconforming. *See* Ex. K, App. 264-65; Ex. J, App. 226-33. Nor do they dispute that online forums such as Texas3006.com are dedicated to tracking businesses that post §§ 30.06 and 30.07 signage and evaluating the sufficiency of the signage. *See* ECF Nos. 163-4, 163-5. They do not dispute that 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."). Defendants do not dispute that this is the political and social backdrop against which Plaintiffs seek to enforce their right to exclude through the deterrent effect of the criminal law of trespass, backed by the threat of arrest and prosecution.

In fact, Defendants do not dispute a single specific factual proposition set forth in Plaintiffs' detailed recitation of what the record in this case shows. *See* ECF No. 155, at 2-10. This Court may therefore take all of those facts as established. *See* Fed. R. Civ. P. 56(e)(2).

II. PLAINTIFFS HAVE STANDING

On this record, Plaintiffs have standing. They are presently injured because they must choose—and indeed have chosen, to their detriment—between their First Amendment rights and their fundamental property right to exclude. This injury is traceable to Defendants—a low bar—because Defendants apply the challenged laws as written when carrying out their duty to enforce the Texas Penal Code. And it is redressable because if this Court enjoins the application of the heightened notice requirements of §§ 30.06(c)(3) and 30.07(c)(3), Plaintiffs could give legally effective notice of their intent to exclude licensed handguns in the form of their choosing. None of this analysis is altered by Webster's assertion that police will come when called after a trespasser has already entered Plaintiffs' premises.

A. Plaintiffs have shown multiple, independent injuries-in-fact

As explained in Plaintiffs' Motion for Summary Judgment and the Church's opposition to Webster's Motion to Dismiss, ECF Nos. 155, 165, Texas's scheme injures Plaintiffs in multiple independent ways. Texas's trespass-notice scheme puts to Plaintiffs an unconstitutional choice: either forfeit their First Amendment rights—*i.e.*, post government-scripted signage to which they object on expressive, religious, and aesthetic grounds, or (worse) provide individualized notice (orally or by card) that is even *more* burdensome than signage—or lose the deterrent effects of Texas trespass law. *See* Tex. Penal Code §§ 30.06, 30.07; *see also* ECF No. 165 at 11. Meanwhile, property owners who seek to exclude entrants for *any other* reason (say, for not wearing shoes or a shirt) do not face this choice; they may use any "oral or written communication" or post any sign "reasonably likely" to notify entrants "that entry is forbidden." Tex. Penal Code § 30.05(b)(2). In short, Texas requires only one disfavored set of property owners—those seeking to exclude firearms—to jump through expressive hoops to do so. Because the scheme requires Plaintiffs to "follow Marquis of Queensberry rules," while allowing

property owners with any other viewpoint to "fight freestyle," it violates the First Amendment. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 392 (1992).

While not disputing that the Texas statutes impose more onerous notice requirements for the crime of trespass when the basis for exclusion is a licensed handgun, Webster argues that the Church itself has not suffered any concrete injury. It emphasizes that "[t]o be concrete, an injury 'must actually exist,'" ECF No. 164, at 6 (quoting *Spokeo, Inc. v. Robins*, 578 U.S. 330, 340 (2016)); and it urges that the Church's claimed injury is only illusory because "the Webster Police Department investigates and responds to trespass and other calls in the same manner regardless of whether the property complies with the Acts' written notice provisions." *Id.* at 8. Webster also points to testimony from Sharlene Rochen, the Church's office administrator, that in the past Webster police have responded promptly to calls from the Church and have always behaved professionally.[3] *Id.* at 7. It claims this shows that the Church receives "the same level and type of police protection enjoyed by other businesses," so it cannot show it is denied any government benefit if it refuses to post the signs. ECF No. 156 at 14. This argument fails for a number of reasons.

First, Webster entirely ignores the precedents cited in Plaintiffs' opening brief establishing that the Church, which wishes to exclude all firearms, is cognizably injured by being simply subjected to Texas's lopsided scheme for doing so. In *Davis*, for example, the plaintiff "faced [a real, immediate, and direct] injury" merely after "declar[ing] his candidacy and his *intent* to spend more than $350,000 of personal funds in the general election campaign"—even though his opponent had not yet opted into the expanded, asymmetric contribution limits (and never did). *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008) (emphasis added); *see also Texas v. Yellen*, 2022 WL 989733, at *5 (N.D. Tex. Mar. 4, 2022) (placing "an 'unconstitutional condition'" on a government benefit confers "a

[3] Ms. Rochen was *not* deposed as a Rule 30(b)(6) witness on behalf of the Church, and, importantly, none of the Church's calls involved entrants with handguns.

'constitutionally cognizable injury'" sufficient for standing (quoting *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 607 (2013))). Article III does not require threatened harm to be "actualized" as a matter of fact. *Davis*, 554 U.S. at 734.

Here, in any case, the Church is not only threatened with cognizable injury, its injury is "actualized," in two forms. It has forgone its right to free speech and posted the § 30.07 signs in order to deter and exclude openly carried, licensed handguns. Ex. G, App. 204 ¶¶ 3-4. At the same time, to avoid an even greater burden on its expression, it has forgone its right to exclude concealed, licensed handguns under § 30.06. *Id.*; Ex. H, App. 217 ¶¶ 2-4. This means it is sacrificing its property rights *and* its First Amendment associational right not to have concealed handguns at its services. Either of these sacrifices alone would be a sufficient injury to have Article III standing, even though the Church has made a voluntary choice among evils. *See, e.g.*, *Rumsfeld v. Forum for Acad. & Inst. Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006) (association of academic institutions possessed standing to bring unconstitutional conditions claim where they chose to accept federal funds and objected on First Amendment grounds to a condition placed on receiving them). Combined, it is not a close question.

Second, Webster's argument entirely ignores that a key function of the criminal law is to act as a deterrent because citizens know they can be arrested and prosecuted for committing crimes. *See, e.g.*, *Reno v. ACLU*, 521 U.S. 844, 872 (1997) (recognizing the heightened deterrence that flows from "[t]he severity of criminal sanctions" and "the opprobrium and stigma of a criminal conviction"); *Virginia v. Hicks*, 539 U.S. 113, 119 (2003) (similar). In this way, the criminal law provides meaningful protection to citizens' interests, including their property rights, long before the police are ever called to respond to a crime. The government benefit at issue here is that protection; Texas requires Plaintiffs to choose between having the benefit of the deterrent effect of criminal law and expressing themselves in the manner of their choosing.

The record bears out that unless the Church complies precisely with the requirements of §§ 30.06 and 30.07, it cannot invoke Texas trespass law to exclude licensed handguns—since Webster's officers are trained on, and enforce as written, Texas's scheme. *See* Ex. O, App. 312; Ex. T, App. 420; Ex. E, App. 161-63. Webster cannot, and will not, arrest someone on the basis that they ignored *non-compliant* signage and carried a handgun onto Plaintiffs' premises. Ex. E, App. 138, 147 (Chief Bacon testifying as much); *id.* at 161-64 (similar); Ex. O, App. 312 ("Importantly, though, the owners must have the applicable (i.e., separate) signage *for each type* of carriage they wish to prohibit. If they want to prohibit both types[,] [i.e., open and concealed carry,] *there must be two separate signs*."); Ex. T, App. 420 (Webster police incident report indicating officers confirmed that the premises posted signage excluding only openly carried handguns and thus could not arrest an entrant for carrying concealed); Ex. E, App. 161-63 (describing this report). And, without the threat of arrest and prosecution, firearm-carriers will not be deterred from entering the Church's premises—as the existence of the Texas3006 website and Second Amendment auditors shows. *See* Ex. K, App. 264-65; Ex. J, App. 226-33; Ex. L, App. 268-75. The Church seeks the power to deter firearms *in the first place*. Texas's scheme, however, places unconstitutional hurdles in its way.

Webster is wrong to contend that, notwithstanding all of this evidence, the fact that Webster police will respond to the scene when called means the Church lacks standing to contest the Texas trespass scheme. *See* ECF No. 164 at 7-8; *see also* ECF No. 147 at 9-10 (adopting similar reasoning as to the Houston Police Department). Even if the police would respond and eject a trespasser, such a response would not cure the Church's injuries.

Imagine, for example, that a state passed a vandalism statute making it a crime to deface the exterior of any religious building with paint, but then in a separate subsection set forth requirements applicable to Methodist churches only. For this group, the law provided that unless the church posted a 10' x 10' sign saying "This Is a House of God," there would be no criminal penalties for defacing its

building, unless the vandal—if caught—refused to clean off the graffiti. On an internet message board called "churchvandals.net," members of the public posted the names of Methodist churches that failed to post the "House of God" signs along with comments like "it's open season for graffiti on these places!"

Next imagine that a Methodist church sued police (among others) seeking an injunction against application of the Methodist-specific signage requirements on First Amendment grounds. But the police argued the church lacked standing because, if they were called by the Methodist church with a complaint of vandalism, they would respond with professionalism and diligence; do their best to find the perpetrator; tell the perpetrator—if she was caught—to clean up the graffiti; and then arrest the perpetrator if she said no. Would Article III bar the doors of the federal courthouse to the church?

Of course not. The Methodist church would be suffering a present injury. The vandalism law would put it to an unconstitutional choice between its First Amendment right against compelled speech and its property interest in not having its walls defaced, backed by the deterrent effect of the criminal law. In order to retain the full protection of the criminal law to vindicate its property rights, the church would have to engage in objectionable speech—a presently occurring First Amendment harm. It would not matter if the police could prove they would provide "police protection" *once they were called by the church*, because that would not safeguard the church's property interest in not having its building defaced in the first place. Meanwhile, all other religious groups could rely on the backstop of arrest and possible criminal prosecution to deter vandals, with no strings attached.

The facts of this case are not materially different. Plaintiffs here wish to exercise their core property right to exclude individuals carrying firearms, backed by the deterrent effect of the criminal law. In order to do so, however, they must engage in speech they find objectionable. If they do not provide notice in one of the burdensome ways the statute allows, individuals carrying guns can (and will) come onto their property—just as vandals can deface the Methodist church with impunity. The

ability to call the police *later* does not undo the injury, because Plaintiffs will already have suffered the trespass—just as the Methodist church is already injured by the defacement. Meanwhile, property owners wishing to exclude for *other* reasons can provide notice in any reasonable manner, and would-be trespassers know that it is a crime to enter the property and will stay away. That all adds up to a present First Amendment injury for Plaintiffs.

B. Plaintiffs' injuries are fairly traceable to Webster

Next, Webster argues that "any cognizable injury Bay Area *might* have in the future would be 'the result of the independent action of some third party not before the court,'" and thus would not be traceable to Webster. ECF No. 164, at 8 (quoting *Bennett v. Spear*, 520 U.S. 154, 167 (1997)). This argument is misplaced.

It is not fatal to standing that some portion of Plaintiffs' harm is due to the actions of absent third parties, so long as those "third parties will likely react in predictab[ly harmful] ways" absent judicial intervention. *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2566 (2019). It is predictable that Webster police will follow the law when they respond to a trespass call and require the statutory notice requirement to be met before finding probable cause for arrest. That was the testimony of its own representative and what its own documents show. *See, e.g.*, Ex. E, 137-40, 145-47, 152-53, 162-63, Ex. T, App. 420.

Moreover, Webster's argument confuses traceability with assessing an injury's "proximate cause," which is not the inquiry. *K.P. v. LeBlanc*, 627 F.3d 115, 123 (5th Cir. 2010). Rather, traceability is satisfied if Webster is "among those who cause [the Church's] 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 met here, as the record shows that Webster's officers are trained on, and enforce as written, the notice requirements of Texas's scheme—thus rendering Webster part of the causal chain leading to Plaintiffs' injuries. *See id.*; *see also, e.g.*, Ex. O, App. 312; Ex. E, App. 162-63. It does not matter what Webster police do when

they respond to a particular incident. All that matters, for traceability purposes, is that by enforcing the law as written the Webster police contribute to the harm, depriving the Church of the deterrent effect of the criminal law. And that harm is amply demonstrated by the record. Again, the existence of the Texas3006 website and Second Amendment auditors shows that members of the public will carry firearms where they are not welcome if conforming signs are not posted. *See* Ex. K, App. 264-65; Ex. J, App. 226-33.

C. Plaintiffs' injuries are redressable by a favorable decision against Webster

Webster asserts in half a sentence that "no remedy [sic] against Webster would be 'redressed by a favorable decision.'" ECF No. 164 at 8 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992)). Redressability requires showing only that a favorable decision likely "will relieve a discrete injury," *not* that it will relieve "*every* injury." *K.P.*, 627 F.3d at 123 (quoting *Larson v. Valente*, 456 U.S. 228, 243 n.15 (1982)). Webster has "definite responsibilities relating to the application of" Texas's trespass regime. *Air Evac EMS*, 851 F.3d at 515 (citation omitted); *see also* ECF No. 165 at 24-25. A declaration and injunction precluding Webster from applying the heightened notice requirements of §§ 30.06(c)(3) and 30.07(c)(3) will redress the Church's injuries.

III. THE CHURCH IS ENTITLED TO SUMMARY JUDGMENT ON THE MERITS OF ITS FIRST AMENDMENT CLAIMS

Conspicuously, Webster does not argue that any legitimate government interest justifies the burden the challenged statutes place on the Church's speech and associational rights, nor that the statutes are tailored (let alone narrowly tailored) to further any such interest in the least restrictive manner possible. *Cf.* ECF No. 155 at 23-24. Rather, it argues that the Church's free-speech claim fails because it is not coerced into speaking in an objectionable manner. It further argues that the Church's free-association claim fails because, first, it has other means of excluding licensed handgun carriers besides posting signs; and second, its associational rights have not been interfered with in a "direct and substantial" or "significant" way. ECF No. 164 at 9 (citation omitted). All of these arguments fail.

A. Sections 30.06 and 30.07 unconstitutionally condition a government benefit on Plaintiffs' forfeiture of their First Amendment rights

"[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." *Agency for Int'l Dev. v. All. for Open Soc. Int'l, Inc.*, 570 U.S. 205, 214 (2013) (citation omitted); *see also Dep't of Tex., Veterans of Foreign Wars of U.S. v. Tex. Lottery Comm'n*, 760 F.3d 427, 438 (5th Cir. 2014) (en banc). Here, Plaintiffs seek the benefit of police and prosecutorial enforcement of the law of criminal trespass to exclude persons with licensed handguns on the basis that the person is carrying a licensed handgun. Plaintiffs also seek the benefit of the deterrent effect of criminal trespass law in excluding such entrants. But under Texas's scheme, Plaintiffs are denied both benefits unless they comply with the heightened notice requirements of §§ 30.06 and 30.07, which amount to onerous, government-scripted speech. The facts are not in dispute, and the law of unconstitutional conditions is clear. Plaintiffs are entitled to summary judgment.

Webster's opposition to Plaintiffs' free-speech claims hinges on a fundamental misunderstanding of the unconstitutional conditions doctrine. Webster argues that Plaintiffs have a choice and are not compelled by §§ 30.06 or 30.07 to provide statutorily compliant notice. ECF No. 164 at 9. That much is true—Plaintiffs have a choice: either forfeit their right to exclude licensed handgun carriers, or forfeit their right to free speech by accepting the burdens that §§ 30.06 and 30.07 place on the manner in which they communicate. The plaintiffs in *Texas Lottery Commission* had a similar choice: either accept the burden on their right to engage in political speech imposed by the challenged Texas law, or give up the right to host charitable bingo games. 760 F.3d at 438-39. Applying the unconstitutional conditions doctrine, the Fifth Circuit ruled the law unconstitutional and affirmed the district court's permanent injunction against its enforcement. *Id.* at 441. The same is true here, and the same result should follow.

B. The Church's associational rights are infringed

The Church's desire not to associate with anyone carrying a firearm is protected by the First Amendment. *See, e.g.*, *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000) ("Forcing a group to accept certain members may impair the ability of the group to express those views, and only those views, that it intends to express."). But under Texas's statutory scheme, in order to effectively exclude firearms from Church premises, the Church must engage in onerous, government-scripted speech in violation of the First Amendment.

Webster counters that the Church has not suffered infringement of an associational right because it has options other than posting signage to exclude licensed handgun-carriers. But the record is clear that *all* forms of notice under §§ 30.06 and 30.07, including posting the required signage, providing individualized notice by card, or providing oral notice, require the Church to engage in a manner of speech it finds burdensome and offensive. *See* Ex. G, App. 206-07 ¶¶ 9, 14-16 ("The Church believes that, of the available methods of notice under § 30.06 and § 30.07, posting signs is the least obtrusive option."). Webster does not contest these record facts.

Webster further argues that the Church's right to freely associate has not been injured because §§ 30.06 and 30.07 do not "directly and substantially interfere" with its associational rights, citing *Lyng v. International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW*, 485 U.S. 360 (1988), and *Fighting Finest, Inc. v. Bratton*, 95 F.3d 224 (2d Cir. 1995). But neither case is analogous.

Lyng involved a challenge to a law restricting food-stamp eligibility for households while any member of the household was on strike. The Court held that the relationship between a striker's associational interest and the challenged statute was too tangential, finding it "exceedingly unlikely" that the provision would actually cause any striking individual to leave his or her family in order to increase the family's allotment of food stamps. 485 U.S. at 365. In this case, by contrast, the Church's

associational interest—excluding congregants with firearms—is directly harmed by the heightened notice requirements of §§ 30.06 and 30.07. *See Boy Scouts of Am.*, 530 U.S. at 648 ("Freedom of association … plainly presupposes a freedom not to associate." (citation omitted)). Unless the Church complies with these notice requirements, the Church forfeits the ability to exclude entrants with licensed handguns using the deterrent effect of criminal trespass law. The uncontested record evidence regarding Second Amendment auditors and online forums dedicated to collecting information on the sufficiency of property owners' §§ 30.06 and 30.07 signage demonstrates that the relationship between the challenged notice requirements and the Church's associational interest in excluding persons with firearms is direct, not tangential. *See* Ex. K, App. 264-65; Ex. J, App. 226-33; Ex. L, App. 268-75; ECF Nos. 163-4, 163-5.

Webster's citation to *Bratton* is similarly unpersuasive. There, the Second Circuit held that the plaintiffs' associational rights were not impaired where a police department withdrew its official recognition of an employee boxing team and barred the team from posting notices on police premises. 95 F.3d at 228. Because plaintiffs did not allege these actions caused members of the boxing team to suspend or even curtail their associational activities, the claim was dismissed. *Id.* But here, Webster's enforcement of §§ 30.06 and 30.07 as written does impair the Church's associational interest in having religious services at which no firearms are present. Again, the Church cannot exclude persons with licensed handguns, backed with the threat of enforcement of criminal sanctions, unless it complies with the onerous notice requirements of the challenged statutes.

The Church has a right to communicate the message that firearms are unwelcome, in the manner it chooses, and a right not to associate with individuals carrying firearms. The heightened notice requirements of §§ 30.06 and 30.07 violate the First Amendment by forcing them to choose between the two. *See Boy Scouts of Am.*, 530 U.S. at 648; *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622-23 (1984); *cf. also United States v. Herrera-Ochoa*, 245 F.3d 495, 500 (5th Cir. 2001) ("The Supreme Court

has deemed such a choice, in which 'one constitutional right should have to be surrendered in order to assert another,' 'intolerable.'" (quoting *Simmons v. United States*, 390 U.S. 377, 394 (1986))).

CONCLUSION

For the foregoing reasons, and those set out in Plaintiffs' brief in support of their Motion for Summary Judgment, the Court should enter judgment for Plaintiffs, declaring the heightened notice requirements imposed by §§ 30.06 and 30.07 of the Texas Penal Code unconstitutional and enjoining their further enforcement against Plaintiffs.

Dated: December 6, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 6, 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
William R. Taylor