No. 24-2910

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SUSAN VANNESS, ALEXANDREA SLACK, MARTIN WALDMAN, ROBERT BEADLES,

Plaintiff-Appellants,

v.

FRANCISCO V. AGUILAR, in his official capacity as Nevada Secretary of State, JOSEPH M. LOMBARDO, in his official capacity as Governor of the State of Nevada,
Defendants-Respondents

On Appeal from the United States District Court
for the District of Nevada
No. 2:23-cv-01009-CDS-MDC
Hon. Christina Silva

APPELLANTS' REPLY BRIEF

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INTRODUCTION

Respondents concede that the main issue on appeal is Appellants' standing to challenge SB-406. Appellants have adequately demonstrated they have standing articulating a credible threat of prosecution, which is an essential part of establishing an injury in fact.

In their Second Amended Complaint, Appellants carefully delineate how SB-406 violates their due process rights and directly affects them by a refusal to subject themselves to prosecution under a vague and overbroad statute by working as poll observers and elections day poll workers. While the District Court questioned the validity of "threat of prosecution", the adjudication on standing occurred before the statute could have been triggered, since no election occurred prior to the adjudication of the Motion to Dismiss by the Court, creating an impossibility to demonstrate prior prosecution or likelihood thereof on the statute.

Despite same, it is clear that SB-406's overbreadth and suppression of free speech is greater than necessary to further any compelling government's interest. Notwithstanding same, Nevada's Attorney General's previous threat of prosecuting poll watchers for benign actions such as poll watching, based on his own speculation of their intent, should have been sufficient to adjudicate an actual threat of harm existed for Appellants to bring this facial challenge.

The threat of prosecution under SB-406 remains real and there is no guarantee that Appellants would not be prosecuted under SB-406. Moreover, the vagueness of the statute makes it impossible for Appellants to specify violating SB-406, since the subjectivity of what intimidation and harassment is makes it nearly impossible for Appellants to delineate what behavior would meet the threshold of actual or imminent injury.

Therefore, the novelty of the statute and the Attorney General's previous threat to prosecute poll observers (years before the passage of SB-406) created a reasonable fear of prosecution in Appellants providing them with standing for a facial challenge of SB-406. Further, a credible threat of prosecution exists when Appellants' previous acts would have been prosecutable offenses under SB406 with such vague and overbroad terminology.

Additionally, Appellants' due process rights would be violated and they would be harmed for benign acts subjecting them to prosecution for any of the following protected acts: 1) Raising one's voice at an election worker; 2) Challenging an election worker's act and being viewed as disruptive or unlawfully confrontational; 3) Questioning an election worker's act and having it being interpreted as interference, or intimidating; 4) Using the wrong words to question an elections worker and having them think its threatening or harassing. Clearly,

any combination of these acts by Appellants could result in prosecution under the current vague and overbroad statutory scheme of SB-406.

LEGAL ARGUMENT

I. APPELLANTS BROUGHT THE FOREGOING *YOUNG* ACTION AGAINST THE CORRECT PARTIES IN CHARGE OF ENFORCEMENT OF THE STATUTE

The Eleventh Amendment bars federal courts from hearing certain "suit[s]" filed by individual citizens against a state without the consent of the state. *U.S. Const. amend. XI; see generally Hans v. Louisiana, 134 U.S. 1 (1890).* But that Amendment does not bar actions when citizens seek only injunctive or prospective relief against state officials who would have to implement a state law that is allegedly inconsistent with federal law. *See generally Ex parte Young, 209 U.S. 123 (1908).* "The *Ex parte Young* doctrine is founded on the legal fiction that acting in violation of the Constitution or federal law brings a state officer into conflict with the superior authority of the Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct." C*ardenas v. Anzai, 311 F.3d 929, 935 (9th Cir. 2002).*

The allegations in the Second Amended Complaint clearly delineate that this matter is brought under 42 U.S.C. §1983, brought under *Ex Parte Young*, requesting an injunction to enjoin the State from enforcement of Sections 1 and 2

of SB-406, suing the Defendants in their capacities as Governor and Secretary of State, respectively, since as delineated *infra*, they are the two State Officials in charge of execution of the laws and in charge of elections in the State of Nevada.

A. THE NAMED OFFICIALS HAVE A SUFFICIENT ROLE IN ENFORCEMENT AND ADMINISTRATION OF ELECTION LAWS TO FALL WITHIN THE EXCEPTION TO ELEVENTH AMENDMENT IMMUNITY

Immunity is an affirmative defense that protects an individual from liability for alleged wrongful conduct. In general, immunity attaches to the *particular act* performed by the official, not to the official's title [*Emphasis added*].[1] Accordingly, the immunity alleged by Respondents, should be examined only in the context of Respondents' official acts concerning enforcement of SB406 in Nevada. Thus, most government officers receive only qualified immunity, *see, e.g., Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982), under which they are often shielded but may be sued if they violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818.

Here both Respondents' introduction and passage of SB-406 exists with an utter disregard to the overbreadth and vagueness of the statute. The disregard of

[1] Black's Law Dictionary defines immunity to be "[e]xemption... from ... performing duties which the law generally requires other citizens to perform." BLACK'S LAW DICTIONARY 751 (6th ed. 1990).

First Amendment and Due Process guardrails that should've been allocated and assured to poll workers and observers was willful and renders them culpable even in light of the Eleventh Amendment.

Under the *Ex Parte Young* exception to a state's Eleventh Amendment immunity from suit in federal court, a plaintiff may bring federal claims under §1983 asking for prospective declaratory or injunctive relief against state officials acting in their official capacities to enjoin their allegedly unconstitutional actions. *Id.* 209 U.S. 123, 15-56 (1908).

Appellants brought this §1983 seeking to enjoin enforcement of SB-406, sections 1 & 2 as they violate Appellants' constitutional rights of due process and free speech under the First Amendment.

1. Defendant Joseph M. Lombardo is the Chief Executor of the Laws of the State of Nevada and is Correctly Named in His Capacity as Governor of the State

Article 5 of the Nevada Constitution specifies acts assigned to the Executive Department, the Governor's office. Article 5, §7, entitled *Responsibility for execution of laws* provides that the "[G]overnor shall see that the laws are faithfully executed." *Id.*

Furthermore, Article 5, §13 of the Nevada Constitution entitled *Pardons, reprieves and commutations of sentence; remission of fines and forfeitures* provides that "[T]he Governor shall have the power to suspend the collection of

fines and forfeitures and grant reprieves for a period not exceeding sixty days dating from the time of conviction, for all offenses, except in cases of impeachment.

As Chief Executor of the laws of the State of Nevada and the Government official who has the power to issue pardons, reprieves, and commute sentences, for a law that criminalizes conduct that would otherwise be a civil matter, the Governor of the State of Nevada is the proper party to be named in a *Young* Action. Notwithstanding same, Defendant Lombardo willfully signed SB-406 into law.

2. Defendant Francisco Aguilar as Chief Elections Officers is Correctly Named in His Official Capacity as Nevada Secretary of State.

Defendant Francisco V. Aguilar, Nevada's Secretary of State is sued in his official capacity. He serves "as the Chief Officer of Elections" for Nevada and "is responsible for the execution and enforcement of the provisions of title 24 of NRS and all other provisions of state and federal law relating to elections in" Nevada. NRS §293.124.

NRS 293.124 entitled *Secretary of State to serve as Chief Officer of Elections;* provides that "[T]he Secretary of State shall serve as the Chief Officer of Elections for this State. As Chief Officer, the Secretary of State is responsible for the execution and enforcement of the provisions of title 24 of NRS and all other provisions of *state and federal law relating to elections* in this State. The

Secretary of State shall adopt such regulations as are necessary to carry out the provisions of this section." [*Emphasis added*] *Id.*

As Chief Elections officer, Defendant is tasked with ensuring that all election laws, including SB-406 are enforced. These two Defendants working in tandem to enforce SB-406 qualifies both of them to be named in their official capacity in this action.

II. SB-406 IS VAGUE BECAUSE IT DOES NOT GIVE FAIR NOTICE OF WHAT IS PROHIBITED AND OVERBROAD BECAUSE IT CRIMINALIZED FREE SPEECH

The Supreme Court has previously resolve cases involving the vagueness doctrine. This doctrine permits the Court to strike down legislation that violates due process because it either (1) fails to give "a person of ordinary intelligence fair notice of what is prohibited" (the "fair notice" prong), or (2) is "so standardless that it authorizes or encourages seriously discriminatory enforcement" (the "arbitrary enforcement" prong). *Federal Communications Commission v Fox Television Stations, Inc*, 567 US 239, 253 (2012), quoting *United States v Williams*, 553 US 285, 304 (2008).

In the election context and context of SB-406, the terms "intimidation" "undue influence" and "interfere" are too vague and can be interpreted inconsistently leading to arbitrary enforcement. An ordinary person might be unsure if his/her actions violate the law. Further, SB-406 changes the *mens rea* of

the crime and inserts a subjective impression by expanding criminal liability for acts that may not be criminal. It is also significant to note that, even in situations where criminal liability is not a realistic outcome, a poll watcher may be removed from a polling location stifling election oversight and precluding objection to unlawful or inappropriate activities by election officials.

SB-406's prohibitions could be interpreted differently by different people. How does a poll observer get trained on compliance with SB-406, when the interpretation of SB-406 isn't specific. Appellants have concerns about prosecution for objections made to elections officials, and noted said concerns, in the District Court record along with confusion about the speech restrictions in SB-406.

What an election worker would consider threatening, harassing, or intimidating, are terms that use of a wrong word at a poll/election site, might lead an election worker to think it's threatening or harassing and would give an election official the ability to force a watcher to leave or can lead to other legally catastrophic consequences.

If anyone of the Appellants speaks loudly at an election worker, it could be misconstrued as being aggressive, but it may simply be passionate articulation. Appellants have to self-censure their speech so as not to offend or intimidate someone out of concern of being prosecuted. Likewise, if somebody wears a shirt

that upsets another person, how does that that type of speech get mitigated. What is intimidating to one person may not be to another, rendering the subjective nature of SB-406 problematic.

Recently, the Superior Court of Arizona, Maricopa County, noted a similar challenge to a vague and overbroad policy in *Arizona Free Enterprise Club v Fontes*[2], regarding a challenge to the Elections Procedure Manual (EPM) making it a Class 2 misdemeanor to engage in such intimidation. The Lawsuit filed by Arizona Free Enterprise Club against Arizona's Secretary of State, Adrian Fontes, alleged that the 2023 EPM limits free speech because it allows local election officials to prevent outside groups or individuals from observing drop boxes and polling locations in ways that might intimidate or harass voters or election workers.

In *Arizona Free Enterprise Club*, Plaintiffs therein alleged that the EPM's newest terms on speech restrictions "contains some of the most onerous restrictions on speech" and "is breathtakingly broad in its application." Plaintiffs' recourse sought that the Court reject the speech restrictions for overbreadth and for conflicting with, and revising, the applicable criminal code associated with voter intimidation.

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[2] CV 2024-002760

In *Arizona Free Enterprise Club,* the Court sided with Plaintiffs stating that it was "…unpersuaded by Defendants' argument that the EPM does not restrict speech. "[W]hen public officials . . . change the law based on their own perceptions of what they think it should be, they undermine public confidence in our democratic system and destroy the integrity of the electoral process." *Ariz. Pub. Integrity All. v. Fontes, 250 Ariz. 58, 61 ¶ 4 (2020)(emphasis in original).* The Court finds that in some instances this is exactly what the EPM does." *Id*.

Using the same example discussed in the *Arizona Free Enterprise Club* court, an Appellant could wear a t-shirt while observing polls that an elections official finds "offensive." That "offensive" content, having the effect of causing another to be offended or harassed, could result in either a call to law enforcement or, possibly, ejection from the polling place."

Respondents allege that Appellants fail to articulate an intent to violate SB-406, precluding them from demonstrating standing. However, it is impossible to specify an intent to violate a statute that is so vague that any benign action such as raising one's voice or wearing politically charged clothing might be misinterpreted as harassment construed as a violation of SB-406. Notwithstanding same, Appellants' Second Amended Complaint lists a slew of possibilities that may be construed as harassment and result in prosecution, as delineated therein, whether from a poll worker/observer to an actual elections

official.[3] Moreover, training poll workers/observers to comply with SB-406 becomes an onerous task because of the subjective nature of SB-406 and what is acceptable behavior that is not intimidating or harassing.

Criminal statutes that lack sufficient definiteness or specificity are commonly held void for vagueness. *Cantwell v. Connecticut*, 310 U.S. 296, 308 (1940). Men of common intelligence cannot be required to guess at the meaning of [an] enactment. *Winters v. New York*, 333 U.S. 507, 515–16 (1948). *Cf. Colten v. Kentucky*, 407 U.S. 104, 110 (1972). Courts have previously required that a penal statute define the offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. *See Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

One of the most significant and crucial parts of the vagueness doctrine is that it protects due process, because a law that is too vague does not provide adequate direction to law-abiding citizens which can result in unfair prosecutions. An average individual cannot be expected to guess whether his/her conduct will be subject to prosecution or not, because the law does not specify the perimeters of what is allowed versus what is prohibited.

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[3] See ER 0079; 1-8, and ER-0080; 1-7.

Additionally, SB-406 violates due process because it criminalizes protected speech under the First Amendment since the law could be applied in a way that chills lawful, constitutionally protected activities such as observing elections or reporting irregularities. SB-406 suppresses more speech than necessary to achieve its objectives, especially in light of NRS 200.5711 and NRS 199.3003.

This Supreme Court has previously struck down laws that have been found to be overbroad and having a chilling effect on expressive conduct prohibiting First Amendment speech. See *United States v. Alvarez*, 567 U.S. 709 (2012) (the Stolen Valor Act); *United States v. Stevens* 559 U.S. 460 (2010) (dissemination of materials depicting animal cruelty)

Most important though, Nevada already has laws that preclude harassment, intimidation or coercion of a public employee, regardless of where the act occurs or whether it involves elections without necessitating additionally broad and subjective provisions of SB-406. *See* NRS 200.5711; NRS 199.3003. It is unnecessary to have duplicative laws to protect public employees (*i.e.* election workers) at the expense of violating First Amendment freedoms when such laws already exist; specifically, as SB-406 potentially criminalizes political dissent or public commentary at polls/election sites. It is clear that the purpose of SB 406, is to have a law based on the Respondents' perceptions of what protected speech should be. Allowing Defendants to determine what is protected versus unprotected

speech undermines public confidence in our system and destroys the integrity of election oversight.

Notwithstanding same, had the Court contemplated the duplicative nature of SB-406 as opposed to other laws already criminalizing harassment of public employees/officials, *i.e.* NRS 200.5711; NRS 199.3003, the Court would have shifted the burden on Defendants to demonstrate that SB-406 would not be applied arbitrarily or subject to conflicting adjudications resulting in inappropriate law enforcement actions and violations of Appellants' due process rights.

A. THE SPECIFIC INTENT REQUIREMENT DOES NOT MITIGATE POTENTIAL OVERBREADTH OR VAGUENESS ISSUES

In *Kashem v Barr*, No. 17-35634 (9th Cir. 2019) this Court found "The void-for-vagueness doctrine . . . guards against arbitrary or discriminatory law enforcement by insisting that a statute provide standards to govern the actions of police officers, prosecutors, juries, and judges…[I]f arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them." [*Internal citations omitted*].

Who determines what an act conducted with intent to interfere or retaliate against elections officials is? Even with the specific intent requirement, the broad and undefined language of SB-406 creates a significant risk of misinterpretation and wrongful prosecution. Most dangerous though is if an individual might be accused of violating the law based on subjective interpretations of one's intent.

The specific intent requirement does not sufficiently protect arbitrary enforcement of SB-406.

The statute places an onerous burden on an individual to defend against accusations, given the ambiguous definitions and the challenges a defendant has in proving or disproving specific intent in situations involving subjective interpretations of actions. While Respondents' Answering brief cites to cases to support the District Court's ruling, those cases are not directly applicable to SB-406 because of differences in legal context, the specifics of statutes involved and the nature of Appellants' claims.

Here, a vague and overbroad SB-406, duplicates existing laws and expands these laws to a particular class of victims, while chilling protected speech and undermining election security and oversight in the interim. Most significant though is that Respondents provide no explanation as to any guardrails or measures that would ensure that Appellants' due process and First Amendment rights would be protected under the duplicative nature of SB-406.

Most important though is that Respondents' justifications do not sufficiently protect against constitutional infringements, especially in light of the existence of NRS 200.5711; NRS 199.3003 providing sufficient protection against harassment and intimidation without needing additional broad provisions of SB-406. More specifically, as noted *supra* and reiterated in the *Arizona Free*

Enterprise Club, it would be extremely difficult for an individual to defend against accusations under SB-406, as disproving specific intent in situations involving a subjective interpretation of one's actions.

CONCLUSION

Appellants adequately demonstrate sufficient standing to assert this facial challenge of SB-406. SB-406, like other past laws challenged in this Circuit, should be struck down as overinclusive in its restriction of free speech that will lead to the suppression of more speech necessary to achieve its objectives as the law fails to sufficiently guard against arbitrary enforcement. Its overbreadth could be applied in a discriminatory and arbitrary manner especially since existing criminal laws render SB406 duplicative. For the foregoing reasons, the judgment of the District Court should be reversed reinstating the Second Amended Complaint to allow the facial challenge proceed on the merits.

Dated this 6th day of September, 2024.

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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Service on Appellees

I certify that a true and correct copy of the **Appellants' Reply Brief and Excerpts of Record** were served electronically on September 6, 2024 to the attorneys of record for Appellees in the district court action at the addresses listed below: