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**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

SUSAN VANNESS, an individual, )  
ALEXANDREA SLACK, an individual )  
MARTIN WALDMAN, an individual, )  
ROBERT BEADLES, an individual )

Plaintiffs, )

vs. )

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, DOES )  
I-X, inclusive: ROE )  
CORPORATIONS 11-20, inclusive. )

Defendants. )

Case No: 2:23-cv-01009-JCM-VCF

**PLAINTIFFS' MOTION FOR  
PRELIMINARY INJUNCTION**

**MOTION FOR PRELIMINARY INJUNCTION**

COME NOW, Plaintiffs, SUSAN VANNESS *Et Al*, by and through the undersigned attorney of record, SIGAL CHATTAH, ESQ., of the CHATTAH LAW GROUP, and pursuant to Fed. R. Civ. Pro. 65, hereby move this Court for a preliminary injunction against Defendants, to enjoin them from wanton and arbitrary enforcement of sections 1 and 2 of SB 406, known as the Election Worker Protection Act, and declaration rendering said sections unconstitutional as delineated *infra*.

1 Plaintiffs' Motion is based upon the pleadings and papers on file herein and the  
2 following points and authorities.

3 **INTRODUCTION**

4 Plaintiffs bring this action facially challenging the Constitutionality of SB 406 which  
5 provides in pertinent part:

6 “[C]hapter 293 of NRS is hereby amended by adding thereto a new section to read as follows:

- 7
- 8 1. It is unlawful for any person to use or threaten or attempt to use any force,  
9 intimidation, coercion, violence, restraint or undue influence *with the intent* to:  
10 (a) *Interfere with the performance of the duties* of any *elections official* relating  
11 to an election; or  
12 (b) Retaliate against any *elections official* for performing duties relating to an  
13 election.
  - 14 2. The provisions of subsection 1 apply regardless of whether a person uses or  
15 threatens or attempts to use such force, intimidation, coercion, violence, restraint  
16 or undue influence at a polling place or a location other than a polling place.

17 [Emphasis added]

18 Plaintiffs' facial constitutional challenge of sections 1 and 2 of the Statute is on the  
19 basis that it is vague, overbroad, calls for criminal punishment despite of failing to specify a  
20 victim and violates the First Amendment to Free Speech and the Fourteenth Amendment's  
21 Due Process Clause.

22 Plaintiffs seek injunctive relief hereby requesting this Court declare sections 1 and 2 of  
23 SB 406 [and/or subsequent codification of same] facially unconstitutional.

24 **JURISDICTION**

25 This court has subject matter jurisdiction over Plaintiffs' claims arising under federal  
26 law pursuant to 42 U.S.C. §1983. Plaintiffs further allege that the exercise of this court's  
27 jurisdiction over such claims is proper under the rule of *Ex Parte Young, 209 U.S. 123 (1908)*  
28 (plaintiffs alleging violation of federal law may seek prospective injunctive relief against  
responsible state official).

**STATEMENT OF FACTS**

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On or about May 30, 2023, after passing both chambers of the Nevada Legislature, Nevada’s Secretary of State Francisco V. Aguilar and Nevada’s Governor Joseph M. Lombardo signed SB 406 into law. SB 406 is described as “AN ACT relating to elections; making it unlawful for a person to use or threaten or attempt to use any force, intimidation, coercion, violence, restraint or undue influence with the intent to interfere with the performance of duties of an elections’ official or retaliate against an elections official for the performance of such duties;”

Sections 1 and 2 of SB 406 impose impossible—and unpredictable—burdens on individuals that come into contact with “election officials” during elections at voting centers and ballot processing centers.

The consequence of said sections in SB 406 is a sweeping and unwieldy regulation that leaves the identification of what an offense is so opaque, uncertain, and all-encompassing that Plaintiffs and others similarly situated cannot determine whether and when the most basic activities undertaken will subject them to drastic criminal penalties.

The failure to precisely define the identification of a protected class or victim to be covered by said sections in SB 406 so opaque and uncertain, that Plaintiffs and others similarly situation cannot determine who an election official is and who is protected under SB 406.

Furthermore, SB 406 provides no classification for immunity or exemption for “election officials’ or election observers as defined under NRS 293.274 [*and/or supervisors*] whom are paid to ensure election oversight, management and transparency among themselves.

Since sections 1 and 2 SB 406 are facially unconstitutional, Plaintiffs respectfully demand this Court render it void and unenforceable.

**LEGAL AUTHORITY**

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**A. STANDARD FOR INJUNCTION**

A motion for a preliminary injunction is governed by the multi-factor test outlined by the Supreme Court in *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008). Under the *Winter* test, the plaintiff has the burden to establish: (1) likelihood of success on the merits; (2) that the plaintiff is likely to suffer irreparable harm if the preliminary injunction is not granted; (3) that the balance of equities favors the plaintiff; and (4) that the injunction is in the public interest. *Id.* Likelihood of success on the merits is a threshold inquiry and the most important factor. *See, e.g., Edge v. City of Everett*, 929 F.3d 657, 663 (9th Cir. 2019).

Alternatively, a court may grant the injunction if the plaintiffs demonstrate either a combination of probable success on the merits and the possibility of irreparable injury or that serious questions are raised and the balance of hardships tips sharply in their favor. In our circuit, there is no presumption that the issuance of a preliminary injunction requires an evidentiary hearing. *See Int’l Molders’ & Allied Workers’ Local Union v. Nelson*, 799 F.2d 547, 555 (9th Cir. 1986).

**1. Likelihood of Success on the Merits**

Plaintiffs are likely to prevail on the merits, or at least have raised a serious question to the merits of their substantive due process claims against Defendants. To prevail on a claim under 42 U.S.C. § 1983, Plaintiffs must show the deprivation of a federal right by a person acting under color of state law.

The Ninth Circuit has repeatedly stated that “[t]o obtain relief on a procedural due process claim, the plaintiff must establish the existence of (1) a liberty or property interest

1 protected by the constitution; (2) a deprivation of the interest by the government; 3) lack of  
2 process.” See *Shanks v Dessel*, 540 F.3d 1082, 1090 (9<sup>th</sup> Cir. 2008).

3 In *American Trucking Associations v. City of Los Angeles*, the Ninth Circuit  
4 referenced *Winter* in its application of the traditional test and held that “as the Court  
5 explained, an injunction cannot issue merely because it is possible that there will be an  
6 irreparable injury to the plaintiff; it must be likely that there will be.” See *Am. Trucking*  
7 *Ass’ns v. City of Los Angeles*, 559 F.3d 1046, 1052 (9<sup>th</sup> Cir. 2009).

9 The Supreme Court made clear in *Winter* that the balancing of harms, and review of  
10 the public interest, must occur in the context of the specific relief requested. *Winter v.*  
11 *Natural Res. Def. Council (Winter)*, 129 S. Ct. 365, 376 (2008). This approach was applied by  
12 the Ninth Circuit in *Sierra Forest Legacy v. Rey*, when it overturned a district court’s denial of  
13 preliminary injunctive relief for failure to analyze the balancing of harms and public interest  
14 in the context of the narrow injunction requested by environmental plaintiffs. *Sierra Forest*  
15 *Legacy v. Rey*, 577 F.3d 1015, 1022–23 (9<sup>th</sup> Cir. 2009); (“When deciding whether to issue a  
16 narrowly tailored injunction, district courts must assess the harms pertaining to injunctive  
17 relief in the context of that narrow injunction.”).

19 Here, the potential of criminal prosecution under an extraordinarily vague and  
20 overbroad law is imminent. The subjective application of what “intimidation” refers to  
21 coupled, with “intent to interfere” and the lack of exemption of supervisory or even lateral  
22 “election officials” and election observers from prosecution, renders the legislation  
23 unconstitutional.  
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1           **2. The Matter is Ripe For Adjudication as it Involves Criminal Penalties and**  
2           **Does Not Require Factual Development for Determination of the**  
3           **Constitutionality of the Legislation.**

4           “A claim is fit for decision if the issues raised are primarily legal, do not require  
5 further factual development, and the challenged action is final.” *Skyline Wesleyan Church v.*  
6 *Cal. Dep’t of Managed Health Care*, 968 F.3d 738, 752 (9th Cir. 2020). On the hardship  
7 prong, the Ninth Circuit considers whether the action “requires an immediate and significant  
8 change in the plaintiffs’ conduct of their affairs with serious penalties attached to  
9 noncompliance.” *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1126 (9th Cir. 2009).

10           Prudential considerations of ripeness are amplified where constitutional issues are  
11 concerned.” *Scott v. Pasadena Unified Sch. Dist.*, 306 F.3d 646, 662 (9th Cir. 2002) (citing  
12 *United Pub. Workers v. Mitchell*, 330 U.S. 75, 90–91 (1947)).

13           The First Amendment usually prohibits the government from enacting laws that  
14 regulate protected speech, and it “prohibits government officials from subjecting individuals  
15 to ‘retaliatory actions’ after the fact for having engaged in protected speech. *Houston Cmty.*  
16 *Coll. Sys. v. Wilson*, 142 S. Ct. 1253, 1259 (2022) (quoting *Nieves v. Bartlett*, 139 S. Ct. 1715,  
17 1722 (2019)).

18           If an official takes adverse action against someone based on that forbidden motive, and  
19 non-retaliatory grounds are in fact insufficient to provoke the adverse consequences, the  
20 injured person may generally seek relief by bringing a First Amendment claim.” *Id.*

21           In evaluating standing in a pre-enforcement challenge to a speech regulation, the Ninth  
22 Circuit’s inquiry focuses on (1) whether the plaintiffs have articulated a concrete plan to  
23 violate the law in question, (2) whether the prosecuting authorities have communicated a  
24 specific warning or threat to initiate proceedings, and (3) the history of past prosecution or  
25 enforcement under the challenged statute. *Alaska Right to Life Pol. Action Comm. v. Feldman*,

1 504 F.3d 840, 849 (9th Cir. 2007) (quoting *Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d  
2 1088, 1094 n.2 (9th Cir. 2003).

3 “The potential plaintiff must have an ‘actual or well-founded fear that the law will be  
4 enforced against’” it. *Id.* at 851 (quoting *Getman*, 328 F.3d at 1095). Given that pre-  
5 enforcement claims necessarily occur before enforcement actions have begun, the standing  
6 factors for pre-enforcement claims are substantively similar to the ripeness factors and  
7 identical concerns motivate both analyses. *See Getman*, 328 F.3d at 1093–94.

9 Here, due to the fact that that Plaintiffs, have previously been elections officials and  
10 elections observers, without specific definitions of prohibited conduct or a protected class,  
11 violation of sections 1 and 2 may be inevitable. Secondly, the criminal penalties as delineated  
12 in indictment of a Class E felony is very possible and likely. Finally, elections violations have  
13 historically been prosecuted as most recently noted below<sup>1</sup>.

15 Due to the nature of the legislation and the high probability of prosecution of offenses  
16 concerning election activities, the portions that are unconstitutional must be voided as same to  
17 prevent any violation of civil liberties by Plaintiffs or individuals similarly situated as them.

18 **B. SB 406 VIOLATES THE FREE SPEECH CLAUSE OF THE FIRST**  
19 **AMENDMENT AS UNCONSTITUTIONALLY OVERBROAD AND VAGUE**

20 The Free Speech Clause of the First Amendment provides that the government “shall  
21 make no law . . . abridging the freedom of speech.” *U.S. CONST. amend. I*. This prohibition  
22 applies to state and local governments by way of incorporation. *Nordyke v. Santa Clara Cty.*,  
23 110 F.3d 707, 710 (9th Cir. 1997).

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28 <sup>1</sup> State of Nevada v, Hartle, Donald, EJDC No. 21-CR-046327

1           **1. SB 406 Violates the First Amendment as it is Unconstitutionally Overbroad**

2           The facial overbreadth doctrine “purports to grant federal courts the power to  
3 invalidate a law” that is constitutional as applied to the party before it ““if a substantial  
4 number of its applications are unconstitutional, judged in relation to the statute’s plainly  
5 legitimate sweep.”” *Americans for Prosperity Foundation v. Bonta*, 141 S. Ct. 2373 (2021) In  
6 such a circumstance, society’s interest in free expression outweighs its interest in the statute’s  
7 lawful applications *U.S. v Hansen*, 599 U. S. \_\_\_\_ (2023).

9           A regulation of speech is unconstitutionally overbroad if it regulates a substantial  
10 amount of constitutionally protected expression. Defendants may restrict speech “in a few  
11 limited areas,” including obscenity, defamation, fraud, incitement, and speech integral to  
12 criminal conduct. *United States v. Stevens*, 559 U.S. 460 (2010). Furthermore, the First  
13 Amendment protects against the government; it does not leave us at the mercy of *noblesse*  
14 *oblige*.

16           The overbreadth doctrine instructs a court to hold a statute facially unconstitutional  
17 even though it has lawful applications, and even at the behest of someone to whom the statute  
18 can be lawfully applied. The overbreadth doctrine allows a litigant (even an undeserving one)  
19 to vindicate the rights of the silenced, as well as society’s broader interest in hearing them  
20 speak. *U.S. v Williams*, 553 U. S. 285, 292 (2008).

22           The Constitution gives significant protection from overbroad laws that chill speech  
23 within the First Amendment’s vast and privileged sphere. *Ashcroft v. Free Speech Coal.*, 535  
24 U.S. 234, 244 (2002). Facial overbreadth challenges are permitted because an overly broad  
25 statute may chill the speech of individuals, including individuals not named herein.  
26 *Massachusetts v. Oakes*, 491 U.S. 576, 581 (1989). SB 406 violates the First Amendment's  
27



1 prohibition against government abridgment of speech because it overbroadly criminalizes  
2 speech that civil remedies can sufficiently address.

3 **2. SB 406 Violates the Due Process Clause of the 5<sup>TH</sup> and 14<sup>TH</sup> Amendments**  
4 **Because it is Unconstitutionally Vague**

5 Plaintiffs are entitled to constitutional protection for certain rights or “liberty interests”  
6 related to speech under the Due Process clause of the Fourteenth Amendment. Plaintiffs’ right  
7 to due process includes protection against the ills of laws whose ‘prohibitions are not clearly  
8 defined.’ ” *Nat’l Org. for Marriage v. McKee*, 649 F.3d 34, 62 (1st Cir. 2011) (quoting  
9 *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S. Ct. 2294, 33 L.Ed.2d 222 (1972) ).  
10

11 Plaintiffs are entitled to a ‘fair warning’ of what a law prohibits to prevent ‘arbitrary  
12 and discriminatory enforcement’ of laws by requiring that Defendants provide explicit  
13 standards for those who apply them. Plaintiffs are entitled to engage in conduct without criminal  
14 prosecution of basic First Amendment freedoms under a statute that should avoid chilling the  
15 exercise of First Amendment rights.

16 The criminal liability the attaches to an individual that violates SB 406, lies in the  
17 following statement “It is unlawful for any person to use or threaten or attempt to use any force,  
18 intimidation, coercion, violence, restraint or undue influence *with the intent to interfere* with the  
19 performance of the duties of any elections official” [*Emphasis added*].  
20

21 Litigants mounting a facial challenge to a statute normally “must establish that no set  
22 of circumstances exists under which the [statute] would be valid.” *United States v. Salerno*,  
23 *481 U. S. 739, 745 (1987)*.  
24

25 If the challenger demonstrates that the statute “prohibits a substantial amount of  
26 protected speech” relative to its “plainly legitimate sweep,” then society’s interest in free  
27 expression outweighs its interest in the statute’s lawful applications, and a court will hold the  
28 law facially invalid. *Ibid.*; see *Virginia v Hicks*, 539 U. S. 113, 118-119 (2003) Because it

1 destroys some good along with the bad, “[i]nvalidation for overbreadth is “strong medicine”  
2 that is not to be ‘casually employed.’” *Williams*, 553 U. S., at 293.

3 To justify facial invalidation, a law’s unconstitutional applications must be realistic,  
4 not fanciful, and their number must be substantially disproportionate to the statute’s lawful  
5 sweep. *New York State Club Assn., Inc. v. City of New York*, 487 U. S. 1, 14 (1988); *Members*  
6 *of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U. S. 789, 800–801 (1984).

7  
8 **(a) The Legislation is Vague and Fails to Identify What Intimidation Is In  
A Subjective Context of the Law**

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10 It is significant to note that in 2013, the Nevada Legislature repealed the definition of  
11 intimidation in NRS 388.129, rendering no criminal definition of intimidation as to what to  
12 define it in the context of SB 406. Accordingly, SB 406 is susceptible to policy determinations  
13 of what “intimidation” is and what intent to interfere with an election official is.<sup>2</sup> It creates a  
14 subjective victim by resorting to a policy analysis grounded in social, economic, and political  
15 concerns. Because of the subjectivity surrounding the requirements of intimidation with intent  
16 to interfere, and no bright line of who a victim or protected class is, the discretionary nature of  
17 application of SB406 renders it vague.

18  
19 The prohibition of vagueness in criminal statutes, is an “essential” of due process,  
20 required by both “ordinary notions of fair play and the settled rules of law.” *See Dimaya v*  
21 *Lynch*, 803 F. 3d 1110 (9th Cir. 2015) citing to *Johnson v. United States*, 576 U. S., at \_\_\_\_  
22 (*slip op.*, at 4) (*quoting Connally v. General Constr. Co.*, 269 U. S. 385, 391 (1926)). The  
23  
24 void-for-vagueness doctrine guarantees that ordinary people have “fair notice” of the conduct

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28 <sup>2</sup> It should be noted that NRS 199.300 entitled Intimidating public officer, public employee, juror, referee, arbitrator, appraiser, assessor or similar person, is devoid of any definition in how it describes intimidation in the context of SB 406.

1 a statute proscribes. *Papachristou v. Jacksonville*, 405 U. S. 156, 162 (1972). And the doctrine  
2 guards against arbitrary or discriminatory law enforcement by insisting that a statute provide  
3 standards to govern the actions of police officers, prosecutors, juries, and judges. *Kolender v.*  
4 *Lawson*, 461 U. S. 352, 357– 358 (1983).

5 **(b) SB406 Fails to Designate a Victim of Crime or Provide Immunity or an**  
6 **Affirmative Defense to Paid Election Officials or Election Workers**  
7 **with Supervisory Authority**

8 NRS 217.070, Nevada’s criminal statute defines “*Victim*” as a person who suffers  
9 direct or threatened physical, financial or psychological harm as a result of the commission of  
10 a crime.” *Id.*

11 “The definition of the elements of a criminal offense is entrusted to the legislature,  
12 particularly in the case of [federal crimes], which are solely creatures of statute.” *Liparota v.*  
13 *United States*, 471 U. S. 419, 424 (1985). *See also Dixon v. United States*, 548 U. S. 1, 7  
14 (2006). Here, likewise, in SB 406, the Nevada Legislature passed a statute that created a crime  
15 for a specific type of conduct, involving specific people, and fails to exclude any affirmative  
16 defense for a susceptible protected class such as supervisors or election officials themselves.

17 An affirmative defense—that is, a “justification or excuse which is a bar to the  
18 imposition of criminal liability” on conduct that satisfies the elements of an offense. *I W.*  
19 *LaFave, Substantive Criminal Law §1.8(c) (3d ed. 2018)*. The Supreme Court established that  
20 governments are “foreclosed from shifting the burden of proof to the defendant only ‘when an  
21 affirmative defense . . . negate[s] an element of the crime.’” *Martin v. Ohio*, 480 U. S. 228,  
22 237 (1987).

23 In criminal law, the distinction between the elements of an offense and an affirmative  
24 defense is well-known and important. *Kahn v U.S.* 597 U. S. \_\_\_\_ (2022). The common law  
25 rule that the burden of proving “affirmative defenses— indeed, ‘all . . . circumstances of  
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1 justification, excuse or alleviation’—rest[s] on the defendant.” *Patterson v. New York*, 432 U.  
2 S. 197, 202 (1977).

3 Immunity from prosecution is a legal protection granted to a person that shields them  
4 from criminal prosecution for a particular offense or set of offenses. SB 406 also fails to  
5 provide that there are no defenses to the violation of said statute.<sup>3</sup> There are certain  
6 prohibitions on public observers are codified in Nev. Admin. Code § 293.245 and include the  
7 following:  
8

9 “...[An]ny person may observe the conduct of voting at a polling place, including,  
10 without limitation, a polling place for early voting and a vote center. Before observing the  
11 conduct of voting at a polling place pursuant to subsection 1, a person must sign an  
12 acknowledgment in the form prescribed by the Secretary of State stating that the person, during  
13 the time the person observes the conduct of voting:

14 (a) Acknowledges that he or she is prohibited from:

15 (1) Talking to voters within the polling place;

16 (2) Using a mobile telephone or computer within the polling place;

17 (3) Advocating for or against a candidate, political party or ballot question;

18 (4) Arguing for or against or challenging any decisions of county or city election  
19 personnel; and

20 (5) Interfering with the conduct of voting; and

21 (b) May be removed from the polling place by the county or city clerk for violating  
22 any provision of title 24 of NRS or any of the provisions of paragraph (a).

23 However, because the statute does not proscribe any defenses to conduct in the  
24 ordinary course of an election official or observer’s course of conduct, an observer under  
25 293.245, can potentially engage in “intimidation” and be subjected to prosecution of a class E  
26 felony.

27 There is a presumption that where the express or implied government policy “allows a  
28 government agent to exercise discretion, it must be presumed that the agent’s acts are

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<sup>3</sup> This includes public observers entitled to observe the postelection certification audit [VVPAT- voter verified paper audit trail] who shall not interfere with the conduct of the audit. NAC 293.255.

1 grounded in policy when exercising that discretion." *United States v Gaubert*, 499 U.S. 315,  
2 324 (1991)

3 That exception provides that the Government is not liable for "[a]ny claim based upon  
4 an act or omission of an employee of the Government, exercising due care, in the execution of  
5 a statute or regulation, whether or not such statute or regulation be valid, or based upon the  
6 exercise or performance or the failure to exercise or perform a discretionary function or duty  
7 on the part of a federal agency or an employee of the Government, whether or not the  
8 discretion involved be abused." [*Emphasis added*] The exception covers only acts that are  
9 discretionary in nature, acts that "involv[e] an element of judgment or choice," *Berkovitz v.*  
10 *United States*, 486 U.S. 531, 536 (1988); *see also Dalehite v. United States*, 346 U. S. 15, 346  
11 U. S. 34 (1953); and "it is the nature of the conduct, rather than the status of the actor," that  
12 governs whether the exception applies. *Varig Airlines, supra*, at 467 U. S. 813.

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15 Here SB 406 can potentially subject government employees, to wit; elections officials,  
16 to criminal liability for performing their supervisory duties as elections officials. Yet, there is  
17 no exception, ergo, any affirmative defense delineated, that precludes prosecution of any  
18 supervisors who may "intimidate" election officials.

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20 **(c) SB406(5) Fails to Identify Prohibited Conduct That May Result in**  
21 **Prosecution of a Category E Felony**

22 The section that should be the most concise in SB 406 is subsection 5, which should  
23 allow Plaintiffs adequate notice of what is lawful and what is unlawful behavior in an attempt  
24 to comply with the regulation. Subsection 5 lists a variety of acts which are not limited by the  
25 criminalization noted in subsections, 1 and 3. This list includes:

26  
27 (a) *The applicability of the provisions of law relating to:*  
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1 Congress intends to require a defendant to possess a culpable mental state.” *Rehaif v. United*  
2 *States*, 588 U. S. \_\_\_\_ (2019). This culpable mental state, known as scienter, refers to the  
3 degree of knowledge necessary to make a person criminally responsible for his or her acts. *See*  
4 *Xiulu Ruan v. United States*, 142 S. Ct. 2370, 2380 (2022), (slip op., at 5).

5 Criminal law seeks to punish the “vicious will.” *Morissette v. United States*, 342 U. S.  
6 246, 251 (1952); *see also id.*, at 250, n. 4 (quoting *F. Sayre, Cases on Criminal Law*, p. xxxvi  
7 (*R. Pound ed. 1927*)). With few exceptions, “wrongdoing must be conscious to be criminal.”  
8 *Elonis v. United States*, 575 U. S. 723, 734 (2015) (quoting *Morissette*, 342 U. S., at 252).

9 Intent is generally a required element of a criminal offense, and consequently there is a  
10 presumption in favor of a scienter or *mens rea* requirement in a criminal statute. The  
11 presumption applies “to each of the statutory elements which criminalize otherwise innocent  
12 conduct.”<sup>6</sup> The Court may read an express scienter requirement more broadly than syntax  
13 would require or normally permit,<sup>7</sup> and may read into a criminal prohibition a scienter  
14 requirement that is not expressed.<sup>8</sup>

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17 The Court recognizes some “strict liability” exceptions, especially for “public welfare”  
18 statutes regulating conduct that is inherently harmful or injurious and therefore unlikely to be  
19 perceived as lawful and innocent.<sup>9</sup> Determining whether such an exception applies can be  
20 difficult.<sup>10</sup> However, if the statute does not preclude a holding that scienter is required, and if  
21 the public welfare exception is deemed inapplicable, “far more than the simple omission of the  
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26 <sup>6</sup> *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72 (1994). *See also Flores-Figueroa v. United States*, 556  
27 U.S. 646 (2009).

<sup>7</sup> *Liparota v. United States*, 471 U.S. 419 (1985)

<sup>8</sup> *Posters 'N' Things, Ltd. v. United States*, 511 U.S. 513 (1994)

<sup>9</sup> *See, e.g., United States v. Dotterweich*, 320 U.S. 277 (1943)

<sup>10</sup> *United States v. Freed*, 401 U.S. 601 (1971)

1 appropriate phrase from the statutory definition is necessary to justify dispensing with an  
2 intent requirement."<sup>11</sup> On the other hand, while "it is fair to begin with a general presumption  
3 that the specified *mens rea* applies to all elements of an offense, ... it must be recognized that  
4 there are instances in which context may well rebut that presumption."<sup>12</sup>

5 The presumption of scienter applies even when a statute does not include a scienter  
6 provision, and when a statute does "includ[e] a general scienter provision," "the presumption  
7 applies with equal or greater force" to the scope of that provision. *See ibid.*

8 Here, SB 406's provides that anyone charged under the statutory provisions must  
9 *intend to intimidate for the purposes of interfering with the election process*. Whether  
10 Plaintiffs or potential defendant acts in the usual course of his practice must be evaluated  
11 based on an objective standard, not a subjective standard.'" *Id.*, at 1166 (quoting *United States*  
12 *v. Joseph*, 709 F. 3d 1082, 1097 (CA11 2013); *emphasis added; alteration in original*).

13 A severe penalty is a further factor tending to suggest that . . . the usual presumption  
14 that a defendant must know the facts that make his conduct illegal should apply"); *United*  
15 *States Gypsum*, 438 U. S., at 442, n. 18.

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18 **(e) SB 406 shifts the burden of proving scienter on a Defendant**

19 The Due Process Clause of the United States Constitution requires the government to  
20 prove every element of a charged offense beyond a reasonable doubt. *See In re Winship*, 397  
21 U.S. 358, 364, 90 S.Ct. 1068, 1072-73, 25 L.Ed.2d 368 (1970). The defendant is presumed to  
22 be innocent until the contrary is proved. This presumption places upon the State the burden  
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28 <sup>11</sup> *United States v. United States Gypsum Co.*, 438 U.S. 422, 438 (1978)

<sup>12</sup> *Flores-Figueroa v. United States*, No. 08-108, 546 U.S. 646, 660 (2009)



1 of proving beyond a reasonable doubt<sup>13</sup> **every material element of the crime charged** and that  
2 the defendant is the person who committed the offense. [*Emphasis added*] *Ramirez v Hatcher*,  
3 *136 F.3d 1209 (9th Cir. 1998)*.

4 Intent can rarely be proven by direct evidence of a defendant's state of mind, but  
5 instead is inferred [by the jury] from the individualized, external circumstances of the crime,  
6 which are capable of proof at trial. *See Sharma v. State, 118 Nev. 648, 659, 56 P.3d 868,*  
7 *874 (2002)*.

9 Here, SB 406, not only affords a subjective interpretation of “intimidation”, but also  
10 couples the subjectivity with “intent to interfere”, which is wholly subjective on a perception  
11 of a purported victim. Notwithstanding same, because SB 406 provides for no affirmative  
12 defenses to supervisors or elections observers, the notion of “intent to interfere” precludes any  
13 oversight by supervisory election officials or observer sat all. There are simply to many  
14 subjective variables to determine was a potential defendants state of mind is regarding the  
15 external circumstance of election oversight.

17  
18 **C. DEFENDANTS MUST DEMONSTRATE THAT SB406 WAS PASSED TO**  
19 **FURTHER A COMPELLING GOVERNMENT INTEREST AND MUST BE**  
20 **NARROWLY TAILORED TO ACHIEVE THAT INTEREST**

21 The Due Process Clause of the Fourteenth Amendment provides that no State shall  
22 “deprive any person of life, liberty, or property, without due process of law.” *U.S. CONST.*  
23 *amend. XIV, § 1*. The Supreme Court has interpreted this guarantee “to include a substantive  
24 component, which forbids the government to infringe certain ‘fundamental’ liberty interests at

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28 <sup>13</sup> A reasonable doubt is one based on reason. It is not mere possible doubt but is such a doubt as would govern or control a person in the more weighty affairs of life. *See Ramirez 136 F.3d at 1211.*

1 all, no matter what process is provided, unless the infringement is narrowly tailored to serve a  
2 compelling state interest.” *Reno v. Flores*, 507 U.S. 292, 301–02 (1993).

3 To survive strict scrutiny, the government must show that “the restriction ‘furthers a  
4 compelling interest and is narrowly tailored to achieve that interest.’” *Citizens United v. Fed.*  
5 *Election Comm’n*, 558 U.S. 310, 340, 130 S.Ct. 876, 175 L.Ed.2d 753 (2010).

6 To satisfy strict scrutiny, Defendants must show that their infringement of the  
7 Plaintiffs’ rights is “narrowly tailored” to advance a “compelling” state interest. *Church of the*  
8 *Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993).

9 When plaintiffs challenge a content-based speech restriction, the Government has the  
10 burden to prove that the proposed alternatives will not be as effective as the challenged  
11 statute. *Reno v. American Civil Liberties Union*, 521 U. S. 844, (1997). The purpose of the test  
12 is to ensure that speech is restricted no further than is necessary to accomplish Congress’  
13 goal. *Id.*

14 Here Defendants fail to provide any standard for what would qualify as legitimate oral  
15 dissent to an election official’s action which may or may not be viewed as intimidating to said  
16 election worker or with the intent to interfere with elections operations. Notwithstanding  
17 same, the identical analysis can be provided for an election observers and poll workers alike.

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21 **D. THIS COURT CAN ENJOIN ENFORCEMENT OF SECTIONS 1 AND 2 OF  
22 SB406 IMMEDIATELY**

23 Importantly and most recently, *Whole Woman’s Health Et Al v. Austin Reeve Jackson,*  
24 *Judge Et Al* 594 U. S. \_\_\_\_ (2021) demonstrates that this Court has the authority to enjoin the  
25 SB406 under the jurisprudence cited above.

26 Normally, where a legal right is “invaded,” the law provides “a legal remedy by suit  
27 or action at law.” *Marbury v. Madison*, 1 Cranch 137, 163 (1803) (quoting 3 W. Blackstone  
28

1 *Commentaries* \*23). Here, these Plaintiffs bring action to this Court as a facial challenge to  
2 the legislation before violation of any SB406 by Plaintiffs or anyone similarly situated.

3 **E. PLAINTIFFS ARE LIKELY TO SUFFER IRREPERABLE HARM**

4 To obtain a TRO, Plaintiffs must show they will suffer irreparable harm in the absence  
5 of the order. *Winter, 555 U.S. at 20*. Notwithstanding same, Plaintiffs' Procedural and  
6 Substantive Due Process rights have been violated without any justification for same.  
7 Plaintiffs First Amendment right to free speech is not only violated, that violation is  
8 compounded by criminal prosecution of a vague and overbroad legislation.  
9

10 **F. BALANCE OF EQUITIES FAVORS PLAINTIFFS**

11 **1. Defendants Have Not Demonstrated That the Law Provides a Clear**  
12 **Understanding of what Conduct Would be Considered a Violation of**  
13 **Same Subjecting Plaintiffs to a Class E Felony.**

14 Evaluating whether a government measure is narrowly tailored is not simply a matter  
15 of ordinary fact-finding, however. Narrow tailoring is viewed as a mixed question of fact and  
16 law that requires a delicate balancing of legal principles as applied to specific circumstances.  
17 *See Gilbrook v. City of Westminster, 177 F.3d 839, 861 (9th Cir. 1999); Gerritsen v. City of*  
18 *Los Angeles, 994 F.2d 570, 575 (9th Cir. 1993).*

19 Plaintiffs must also show that the balance of equities tips in their favor. *Winter, 555*  
20 *U.S. at 20*. The overbreadth of SB 406 and vagueness of the Legislation, demonstrates that not  
21 only does it fail to provide what conduct it criminalized, but also who the purported victims or  
22 protected class it aims to serve.  
23

24 **G. AN INJUNCTION IS IN THE PUBLIC INTEREST**

25 Lastly, to obtain a TRO, Plaintiffs must show that the granting of a TRO is in the public  
26 interest., *555 U.S. at 20*. The public interest is furthered by preventing the violation of a  
27 party's constitutional rights. *Free the Nipple v, City of Ft. Collins, Colo, 916 F.3d 792 (2019)*.  
28

1 “[I]t is always in the public interest to prevent the violation of a party’s constitutional rights.”  
2 *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1145 (10th Cir. 2013), *aff’d* sub nom.  
3 *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014) (*quotations omitted*). Because the  
4 requested injunction will accomplish this, the public interest also favors an order protecting  
5 Plaintiffs making the grant of an injunction in this case a matter of overwhelming public  
6 interest.  
7

8 **CONCLUSION**

9 Accordingly, Plaintiffs respectfully demand an injunction be issued as follows:

- 10 1. Permanently enjoin Defendants and all persons and entities in active concert or  
11 participation with Defendants from prosecution of any offense under SB 406.  
12  
13 2. Declare that sections 1 and 2 of SB 406 are unconstitutional as they are vague,  
14 overbroad and criminal lawful behavior, whereby there is no compelling  
15 government interest in its passage nor is it narrowly tailored to meet those  
16 interests.

17 DATED this 27th day of July 2023.

18 **CHATTAH LAW GROUP**

19  
20 /s/ Sigal Chattah  
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26 *Attorney for Plaintiffs*  
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**CERTIFICATE OF SERVICE**

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I hereby certify that the foregoing MOTION FOR PRELIMINARY INJUNCTION was served this 27<sup>th</sup> day of July, 2023 via the Court’s CMECF E-service system to all registered Parties.

*/s/ Sigal Chattah*

\_\_\_\_\_  
An Employee of Chattah Law Group