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14
 15 **UNITED STATES DISTRICT COURT**
 16 **DISTRICT OF NEVADA**

17 SUSAN VANNESS, an individual,
 18 ALEXANDREA SLACK, an individual,
 MARTIN WALDMAN, an individual,
 ROBERT BEADLES, an individual,

19 Plaintiffs,

20 vs.

21 FRANCISCO V. AGUILAR, in his official
 22 capacity as Nevada Secretary of State,
 JOSEPH M. LOMBARDO, in his official
 23 capacity as Governor of the State of Nevada,
 DOES I-X, inclusive; ROE CORPORATIONS
 24 11-20, inclusive,

25 Defendants.

Case No. 2:23-cv-01009-CDS-VCF

**DEFENDANTS GOVERNOR
 LOMBARDO AND SECRETARY
 AGUILAR'S MOTION TO DISMISS
 SECOND AMENDED COMPLAINT**

26 Defendants Joseph M. Lombardo, in his official capacity as Governor of the State of
 27 Nevada ("Governor Lombardo"), and Francisco V. Aguilar, in his official capacity as Nevada
 28 Secretary of State ("Secretary Aguilar" and together with Governor Lombardo,

1 “Defendants”), move to dismiss Plaintiffs Susan Vanness, Alexandria Slack, Martin
2 Waldman, and Robert Beadles’ (“Plaintiffs”) Amended Complaint [Second] (“SAC”) (ECF
3 No. 22) pursuant to Federal Rule of Civil Procedure (“Rule”) 12(b)(1) for lack of subject-
4 matter jurisdiction and 12(b)(6) for failure to state a claim.

5 I. INTRODUCTION

6 This case concerns Senate Bill 406 of the 82nd Legislative Session (“SB 406”), which
7 was enacted in the wake of extreme turnover in elections officials across the state, due in
8 part to harassment and death threats. *Minutes of the Senate Committee on Legislative*
9 *Operations and Elections*, 82d Sess., 2–3, 12 (Nev. Apr. 11, 2023) (statements of Gabriel Di
10 Chiara and Amy Burgans), <https://tinyurl.com/SB406Mins> [hereinafter *Senate Committee*
11 *Minutes*]. Plaintiffs claim that portions of SB 406 are unconstitutional.

12 On October 20, 2023, the Court dismissed Plaintiffs’ Amended Complaint [First]
13 (“FAC”), ECF No. 9, based on Plaintiffs’ failure to demonstrate standing, Order Granting
14 Defendants’ Motion to Dismiss and Denying Plaintiffs’ Motion for Preliminary Injunction
15 (“Order”), ECF No. 21. The Court held that Plaintiffs did not allege that they intended to
16 engage in conduct proscribed by Senate Bill 406 of the 82nd Legislative Session (“SB 406”),
17 that there was a credible threat of prosecution, or that they would be dissuaded from
18 returning as poll workers in future elections. *Id.* The Court granted leave to amend, *id.*,
19 and on November 2, 2023, Plaintiffs filed their SAC.

20 The SAC does not correct the standing problems that the Court identified in its
21 Order. Plaintiffs have not identified conduct covered by SB 406 that they would have
22 engaged in but for its enactment or any credible threat of prosecution. Moreover, the SAC
23 does not remedy the additional defects Defendants identified in their prior motion to
24 dismiss, which defects the Court did not reach in its Order. Plaintiffs cannot overcome the
25 Eleventh Amendment’s bar precluding their claims against Defendants, and they have not
26 stated any claim. Plaintiffs’ first claim for overbreadth must be dismissed because
27 Plaintiffs have shown they are unable to articulate any protected speech that SB 406
28 prohibits. Plaintiffs’ second claim for vagueness fails because Plaintiffs have not—and

1 cannot—point to anything vague in SB 406. Plaintiffs’ third claim for vagueness based on
 2 the Nevada Constitution fails for the same reason. Even after an opportunity to correct
 3 the deficiencies in the FAC, Plaintiffs’ SAC is devoid of any factual substance that would
 4 entitle it to proceed, and it should be dismissed without leave to amend.

5 **II. BACKGROUND**

6 **A. Overview**

7 The Nevada Legislature enacted SB 406 to “provide additional protection for election
 8 workers” and reverse the “unbelievable turnover of election officials in elected and
 9 administrative positions over the last four years.” *Senate Committee Minutes, supra*, at 2–

10 3. Section 1 provides:

- 11 1. It is unlawful for any person to use or threaten or attempt to
 12 use any force, intimidation, coercion, violence, restraint or
 13 undue influence with the intent to:
 (a) Interfere with the performance of the duties of any
 14 elections official relating to an election; or
 (b) Retaliate against any elections official for performing
 duties relating to an election.

15 SB 406 § 1(1). The statute defines “elections official” as:

- 16 (1) The Secretary of State or any deputy or employee in the
 17 Elections Division of the Office of the Secretary of State who
 is charged with duties relating to an election;
- 18 (2) A registrar of voters, county clerk, city clerk or any deputy or
 employee in the elections division of a county or city who is
 19 charged with elections duties; or
- (3) An election board officer or counting board officer.

20 *Id.* § 1(6)(b). A person who violates section 1 is guilty of a category E felony. *Id.* § 1(4).

21 Plaintiffs initiated this action in this Court, and they allege that they are former poll
 22 observers, ballot runners, election intake specialists, or ballot counting room observers.
 23 SAC ¶¶ 66–70. Plaintiffs contend that SB 406 “obstruct[s] the purpose of election
 24 observers.” *Id.* ¶ 26. By statute, members of the public can “observe the conduct of voting
 25 at a polling place,” NRS 293.274(1), 293C.269(1), “the handling of ballots,”
 26 NRS 293B.330(4), 293C.630(4), “the counting of ballots at a central counting place,”
 27 NRS 293B.353(1), “the delivery, counting, handling and processing of ballots at a polling
 28 place, receiving center or central counting place,” NRS 293B.354(1), and “the counting area

1 where computers are located during the period when ballots are being processed,”
2 NRS 293B.380(2)(a).

3 However, the ability to observe is not without limitation. For instance, poll observers
4 cannot “[a]rgue for or against or challeng[e] any decisions of county or city election
5 personnel,” NAC 293.245(2)(a)(4); and persons observing the processing and counting of
6 ballots cannot “[t]alk[] to workers within the central counting place other than the county
7 or city clerk or a person designated by the county or city clerk to address questions from
8 observers,” NAC 293.356(2)(a)(1). Thus, while volunteer observers are permitted to observe
9 certain election processes, there is nothing that permits them to, for example, insist that
10 elections officials take corrective measures, as Plaintiffs appear to argue. *See* SAC ¶¶ 52–
11 54. SB 406 in no way contradicts the purposes of election observer statutes.

12 **B. The SAC**

13 Plaintiffs filed their SAC after the Court dismissed the FAC based on Plaintiffs’
14 failure to demonstrate standing. Plaintiffs’ SAC is highly similar to the FAC. Defendants
15 Governor Lombardo and Secretary Aguilar are named in their official capacities, FAC ¶¶
16 52–56; SAC ¶¶ 85–88, and Plaintiffs challenge SB 406 on three grounds: overbreadth
17 under the federal Constitution, vagueness under the federal Constitution, and vagueness
18 under the Nevada Constitution. FAC ¶¶ 41–45, 58, 75–77, 90–91; SAC ¶¶ 61–65, 92, 111–
19 15, 129–30.

20 The majority of the changes to the SAC relate to two things. First, Plaintiffs claim
21 that as a result of SB 406, they will no longer engage in poll or election observation. *See*
22 SAC ¶¶ 4, 8–9, 71–73. Second, Plaintiffs attempt to establish a credible threat of
23 prosecution based on (1) a September 29, 2020 tweet from Nevada Attorney General Aaron
24 Ford (a non-party to this litigation), which stated “Trump also told ‘his supporters’ to ‘go
25 into the polls and watch very carefully.’ But he wasn’t talking about poll watching. He
26 was talking about voter intimidation. FYI -- voter intimidation is illegal in Nevada.
27 Believe me when I say it: You do it, and you will be prosecuted,” *see id.* ¶¶ 6–7, 29, 36–39,
28 43–45, 50, 73, 78, 80–83, 91, 102, 113; and (2) a motion for sanctions pursuant to Nev. R.

1 Civ. P. 11 in an unrelated case brought by Plaintiff Beadles against Washoe County and
2 others (Motion for Sanctions, *Beadles v. Rodriguez*, Case No. CV23-01341 (Nev. Dist. Ct.
3 Sept, 11, 2023) (“Motion for Sanctions”)),¹ *see id.* ¶¶ 10–11, 76–77.

4 **III. LEGAL STANDARDS**

5 **A. Lack of Subject-Matter Jurisdiction**

6 Subject matter jurisdiction is “the court’s statutory or constitutional power to
7 adjudicate the case.” *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 89 (1998)
8 (emphasis omitted). “If the court determines at any time that it lacks subject-matter
9 jurisdiction, the court must dismiss the action.” Rule 12(h)(3). “[T]he subject matter
10 jurisdiction of the district court is not a waivable matter and may be raised at any[]time
11 by one of the parties, by motion or in the responsive pleadings, or *sua sponte* by the trial or
12 reviewing court.” *Emrich v. Touche Ross & Co.*, 846 F.2d 1190, 1194 n.2 (9th Cir. 1988).

13 **B. Failure to State a Claim**

14 Rule 12(b)(6) provides for dismissal of a complaint for failure to state a claim upon
15 which relief may be granted. “To survive a motion to dismiss, a complaint must contain
16 sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its
17 face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550
18 U.S. 544, 570 (2007)). It must also contain “more than labels and conclusions, and a
19 formulaic recitation of a cause of action’s elements.” *Twombly*, 550 U.S. at 555. “Factual
20 allegations must be enough to raise a right to relief above the speculative level” and
21 “nudge[] [plaintiffs] claims across the line from conceivable to plausible.” *Id.*, 550 U.S. at
22 555, 570. Courts will “discount[] conclusory statements, which are not entitled to the

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25 ¹ A copy of the Motion for Sanctions is attached as Exhibit 1. The Court may take judicial notice of
26 the Motion for Sanctions without converting this Motion to Dismiss into a motion for summary judgment.
27 *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 998 (9th Cir. 2018). Judicial notice is appropriate because
28 the contents of the Motion for Sanctions “can be accurately and readily determined from sources whose
accuracy cannot reasonably be questioned.” *Id.* at 999 (citing Fed. R. Civ. Evid. 201(b)(1)–(2)). Moreover, the
Court may consider the Motion for Sanctions in this Motion to Dismiss because Plaintiffs refer extensively to
it in their SAC and rely on it to support their claims, and the Motion for Sanctions is therefore incorporated
by reference into the SAC. *See id.* at 1002.

1 presumption of truth, before determining whether a claim is plausible.” *Chavez v. United*
2 *States*, 683 F.3d 1102, 1108 (9th Cir. 2012).

3 **IV. ARGUMENT**

4 **A. Plaintiffs Still Do Not Have Standing to Bring Their Claims**

5 Federal courts lack jurisdiction to consider claims where a plaintiff lacks standing.
6 *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1140 (9th Cir. 2003). “[A] plaintiff
7 must demonstrate standing separately for each form of relief sought.” *Mayfield v. United*
8 *States*, 599 F.3d 964, 969 (9th Cir. 2010) (citation omitted). To establish the irreducible
9 constitutional minimum of standing, “the plaintiff must have (1) suffered an injury in fact,
10 (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely
11 to be redressed by a favorable judicial decision.” *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338
12 (2016). Plaintiffs’ SAC does not address the failings that the Court identified in its Order.

13 **1. Plaintiffs Have Not Alleged an Injury-in-Fact**

14 To establish an injury-in-fact in this pre-enforcement action, Plaintiffs must allege
15 “an intention to engage in a course of conduct arguably affected with a constitutional
16 interest, but proscribed by a statute, and there exists a credible threat of prosecution
17 thereunder.” *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014). The Ninth
18 Circuit looks to three factors to determine whether there is a credible threat: “[1] whether
19 the plaintiffs have articulated a concrete plan to violate the law in question, [2] whether
20 the prosecuting authorities have communicated a specific warning or threat to initiate
21 proceedings, and [3] the history of past prosecution or enforcement under the challenged
22 statute.” *Unified Data Servs., LLC v. FTC*, 39 F.4th 1200, 1210 (9th Cir. 2022).

23 Plaintiffs claim that they will not participate as poll or election observers based on
24 SB 406. See SAC ¶¶ 4, 8–9, 71–73. They therefore are claiming as an injury that the
25 exercise of their constitutional rights has been chilled. See *id.* ¶¶ 91, 94. Self-censorship
26 can be an adequate injury for purposes of standing, but a plaintiff may not “challenge the
27 constitutionality of a statute on First Amendment grounds by nakedly asserting that his
28 or her speech was chilled by the statute. The self-censorship door to standing does not open

1 for every plaintiff.” *California Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1095 (9th
2 Cir. 2003); *see also Laird v. Tatum*, 408 U.S. 1, 13–14 (1972) (“Allegations of a subjective
3 ‘chill’ are not an adequate substitute for a claim of specific present objective harm or a
4 threat of specific future harm”). Instead, a “plaintiff must have an actual and well-
5 founded fear that the law will be enforced against him or her.” *Getman*, 328 F.3d at 1095.
6 (internal quotation marks and alterations omitted). If a statute does not cover a plaintiff’s
7 intended conduct, there is no standing. *See id.*

8 Plaintiffs have not identified any poll observer activity that they would have engaged
9 in but that would now subject them to criminal prosecution under SB 406. As with the
10 FAC, Plaintiffs in their SAC “at no point allege that they intend or plan to engage in
11 behavior for the purpose of intimidating or coercing poll workers.” Order at 7. This is fatal
12 to their claim of injury. *See Lopez v. Candaele*, 630 F.3d 775, 791 (9th Cir. 2010) (holding
13 that a plaintiff must allege an intent to engage in expressly forbidden conduct).

14 Plaintiffs cannot escape this by pointing to the Motion for Sanctions against Beadles
15 or Attorney General Ford’s September 2020 tweet. The Motion for Sanctions is a motion
16 made in the normal course of civil litigation, authorized pursuant to Nev. R. Civ. P. 11
17 when a party’s claims and legal contentions are frivolous and the factual contentions lack
18 evidentiary support, and when a complaint is presented for an improper purpose. *See Ex. 1.*
19 There is no threat of criminal prosecution in the Motion for Sanctions, and it is irrelevant.

20 Attorney General Ford’s tweet also does not establish any credible threat of
21 prosecution. As an initial matter, the tweet was entirely unrelated to SB 406. There are
22 no allegations of a threat to enforce SB 406. Further, Attorney General Ford distinguished
23 between poll watching and voter intimidation and explained that the latter was illegal and
24 would be prosecuted. *See SAC* ¶ 36. There was no threat that legal poll watching would
25 be prosecuted based on voter intimidation. And there was no statement that all poll
26 watchers automatically were in violation of voter intimidation statutes. “[G]eneral threats
27 by officials to enforce those laws which they are charged to administer do not create the
28 necessary injury in fact.” *Lopez*, 630 F.3d at 787 (internal quotation marks and alteration

1 omitted); *see also Rincon Band of Mission Indians v. San Diego County*, 495 F.2d 1, 4 (9th
2 Cir. 1974) (Sheriff's and sheriff's department's statements that all gambling was illegal and
3 all laws would be enforced insufficient to establish justiciable case or controversy).

4 Even if all of that were not true, Plaintiffs' own allegations belie their assertions that
5 the tweet constituted a credible threat of prosecution for legal observation activities. If
6 they truly feared prosecution based on the tweet, Plaintiffs would not have intended to
7 serve as poll observers after the tweet. But Plaintiffs state that they intended to work "as
8 poll observers, ballot runners, counting room observers or lawful election observers" prior
9 to the passage of SB 406, so the tweet was immaterial to their assessment of a credible
10 threat of prosecution. *Id.* ¶ 71. Indeed, Plaintiffs Beadles and Vanness allege that they
11 participated as an election intake specialist and a "ballot runner" respectively in 2022, after
12 the tweet, in addition to participating as public observers. *Id.* ¶¶ 67 & n.8, 69 & n.9. Even
13 more critically, Plaintiffs do not allege that any poll observer was criminally prosecuted
14 after the tweet.

15 2. Plaintiffs Also Have Not Alleged Traceability

16 Plaintiffs also fail to establish traceability. Plaintiffs bear the burden of establishing
17 "a causal connection between the injury and the conduct complained of—the injury has to
18 be fairly traceable to the challenged action of the defendant, and not the result of the
19 independent action of some third party not before the court." *Lujan v. Defenders of Wildlife*,
20 504 U.S. 555, 560 (1992) (alterations, internal quotation marks, and citation omitted). The
21 potential injury for a pre-enforcement challenge is directly tied to the threat of prosecution.
22 *See Driehaus*, 573 U.S. at 159. However, Plaintiffs have not alleged that Defendants have
23 any enforcement power and have therefore failed to show that any potential injury could
24 be fairly traceable to Defendants' actions.

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1 **B. The Eleventh Amendment Bars This Lawsuit against Defendants**

2 **1. Plaintiffs’ Federal Claims Must Be Dismissed Because**
 3 **Defendants Are Not Proper Parties**

4 The Eleventh Amendment bars lawsuits in federal court against states, unless they
 5 consent to suit or Congress has abrogated the immunity. *Green v. Mansour*, 474 U.S. 64,
 6 68 (1985). The immunity extends to state officials acting in their official capacity because
 7 a suit against them is considered a suit against the state itself. *Will v. Michigan Dept. of*
 8 *State Police*, 491 U.S. 58, 71 (1989). Nevada has not waived its Eleventh Amendment
 9 immunity. NRS 41.031(3).

10 Under *Ex parte Young*, 209 U.S. 123 (1908), an exception to Eleventh Amendment
 11 immunity exists that “allows citizens to sue state officers in their official capacities ‘for
 12 prospective declaratory or injunctive relief . . . for their alleged violations of federal law.’”
 13 *Ass’n des Eleveurs de Canards et d’Oies du Quebec v. Harris*, 729 F.3d 937, 943 (9th Cir.
 14 2013) (citation omitted).² To fall under this exception, the state officer defendant “must
 15 have some connection with the enforcement of the act, or else it is merely making him a
 16 party as a representative of the state, and thereby attempting to make the state a party.”
 17 *Ex parte Young*, 209 U.S. at 157. “That connection ‘must be fairly direct; a generalized duty
 18 to enforce state law or general supervisory power over the persons responsible for enforcing
 19 the challenged provision will not subject an official to suit.’” *Eleveurs*, 729 F.3d at 943
 20 (citation omitted). Notably, a Governor who only has a general duty to enforce a state’s
 21 laws is entitled to Eleventh Amendment immunity. *Id.*

22 The SAC lacks any allegation that shows that Defendants enforce SB 406. Plaintiffs
 23 have therefore failed to establish an exception to the Eleventh Amendment’s bar, and their
 24 first two claims brought pursuant to federal law must be dismissed. *See Nat’l Audubon*

25 ² This exception does not apply to claims for damages; “State officers sued for damages in their official
 26 capacity are not ‘persons’ for purposes of the suit because they assume the identity of the government that
 27 employs them.” *Hafer v. Melo*, 502 U.S. 21, 27, 30 (1991) (explaining that “the Eleventh Amendment bars
 28 suits in federal court ‘by private parties seeking to impose a liability which must be paid from public funds
 in the state treasury’”). While the SAC’s “Requested Relief” section does not include a request for damages,
 SAC at 25–26, the SAC does otherwise refer to seeking damages, *id.* at 2, ¶ 61. To the extent Plaintiffs seek
 damages, their claims are barred by the Eleventh Amendment.

1 *Soc’y v. Davis*, 307 F.3d 835, 847 (9th Cir. 2002) (barring suit against Governor and state
2 Secretary of Resources under the Eleventh Amendment because there had been no showing
3 they had requisite enforcement connection).

4 **2. Plaintiffs’ State-Law Claim Is Entirely Barred by the Eleventh**
5 **Amendment**

6 Plaintiffs’ third claim asserts a violation of the Nevada Constitution. SAC ¶¶ 125–
7 36. That claim must be dismissed as barred by the Eleventh Amendment. *Spoklie v.*
8 *Montana*, 411 F.3d 1051, 1060 (9th Cir. 2005) (holding that Eleventh Amendment barred
9 claim of violation of right under Montana Constitution). *Ex parte Young* does not save the
10 state claim; it “allows prospective relief against state officers only to vindicate rights under
11 federal law.” *Id.* 42 U.S.C. § 1983 similarly only applies to federal rights and cannot be
12 the basis for a claim based on a state constitution. *Iratcabal v. Nevada*, No. 3:12-cv-481,
13 2013 WL 5408864, at *4 (D. Nev. Sept. 25, 2013); see *Ybarra v. Bastian*, 647 F.2d 891, 892
14 (9th Cir. 1981).

15 **C. Even if Plaintiffs Had Standing, and Even if the Eleventh Amendment**
16 **Did Not Bar Plaintiffs’ Claims, Their Claims Fail to State a Claim**

17 **1. Plaintiffs’ First Claim Must Be Dismissed Because Plaintiffs Do**
18 **Not Identify Any Protected Speech that SB 406 Prohibits**

19 Plaintiffs’ first claim is a facial overbreadth challenge to SB 406 based on the First
20 Amendment. SAC ¶¶ 90–109. To succeed on their facial overbreadth challenge, Plaintiffs
21 must “demonstrate[] that the statute ‘prohibits a substantial amount of protected speech’
22 relative to its ‘plainly legitimate sweep.’” *United States v. Hansen*, 599 U.S. 762, 770 (2023)
23 (citation omitted). “[A] law’s unconstitutional applications must be realistic, not fanciful,
24 and their number must be substantially disproportionate to the statute’s lawful sweep.”
25 *Id.* Notably, “[a]ctivities that injure, threaten, or obstruct are not protected by the First
26 Amendment, whether or not such conduct communicates a message.” *United States v.*
27 *Grider*, 617 F. Supp. 3d 42, 52 (D.D.C. 2022); see *Hansen*, 599 U.S. at 783 (“Speech intended
28 to bring about a particular unlawful act has no social value; therefore, it is unprotected.”).

1 “Invalidation for overbreadth is strong medicine that is not to be casually employed.”
2 *United States v. Williams*, 553 U.S. 285, 293 (2008) (internal quotation marks and citation
3 omitted).

4 “The first step in overbreadth analysis is to construe the challenged statute”
5 *Id.* The challenged provisions of SB 406 prohibit individuals from taking specified actions
6 with an intent to either interfere with an elections official’s performance of duties or to
7 retaliate against an elections official for performing his or her elections duties. The plainly
8 legitimate sweep of SB 406 is therefore to prevent interruption of and interference with
9 important elections-related work.

10 SB 406’s application is sharply limited. First, SB 406 only applies when a person
11 takes action in connection with an “elections official,” as defined in section 1(6)(b) of SB 406.
12 While Plaintiffs contend that the definition is vague and overbroad, *see* SAC ¶¶ 16, 21, the
13 list in section 1(6)(b) is exclusive. *See State v. Javier C.*, 128 Nev. 536, 541, 289 P.3d 1194,
14 1197 (2012) (“Nevada follows the maxim ‘expressio unius est exclusion alterius,’ the
15 expression of one thing is the exclusion of another.”); *Silvers v. Sony Pictures Ent., Inc.*, 402
16 F.3d 881, 885 (9th Cir. 2005) (“The doctrine of *expressio unius est exclusion alterius* ‘as
17 applied to statutory interpretation creates a presumption that when a statute designates
18 certain persons, things, or manners of operation, all omissions should be understood as
19 exclusions.”).

20 Second, SB 406 requires a defendant to have the specific intent to either interfere
21 with an elections official’s performance of duties or retaliate against an elections official for
22 his or her performance of duties. A person who tries to unduly influence an elections official
23 with an intent to cause the elections official to change the contents of his will or sell her
24 business, for instance, would not be subject to criminal liability under SB 406.

25 Third, the Supreme Court recently addressed the *mens rea* requirement for true
26 threats of violence, which do not enjoy First Amendment protection. In *Counterman v.*
27 *Colorado*, 600 U.S. 66 (2023), the Court held that Colorado was required to show that a
28 defendant was reckless in making true threats, i.e., that the defendant was “aware ‘that

1 others could regard his statements as’ threatening violence and ‘deliver[ed] them anyway,’”
2 to criminally prosecute the defendant. *Id.* at 79, 82 (citation omitted). This holding
3 provides an additional limitation on SB 406’s application.

4 Fourth, Plaintiffs claim that other statutes cover activities proscribed by SB 406,
5 making SB 406 “duplicative and unconstitutional.” SAC ¶ 98. That has nothing to do with
6 overbreadth. And there is nothing impermissible about having criminal statutes that
7 overlap; criminal defendants can be found guilty of lesser-included offenses. *See, e.g.,*
8 NRS 175.501 (“The defendant may be found guilty . . . of an offense necessarily included in
9 the offense charged”); Fed. R. Crim. P. 31(c) (similar).

10 Finally, nothing in SB 406 shifts the burden of proving scienter to a defendant. *See*
11 SAC ¶¶ 28, 55, 104, 119. Specific intent is an element of the crime that the prosecution
12 must prove beyond a reasonable doubt. *United States v. Gilbert*, 813 F.2d 1523, 1530 (9th
13 Cir. 1987).

14 Plaintiffs’ inability to establish overbreadth is evident in the examples they cite in
15 their SAC purporting to show that protected speech is criminalized. In paragraph 30,
16 Plaintiffs posit that a “Rover” who confronts a ballot inspector over perceived wrongful
17 action, “with the intent to have that wrongful conduct corrected” would be subject to
18 criminal liability. In paragraph 31, Plaintiffs again posit a scenario inviting supposed
19 liability where an individual confronts another “with an intent to correct.” And in
20 paragraph 54, Plaintiffs yet again reference taking corrective actions opening the door to
21 liability. SB 406 requires an intent to interfere or retaliate, not to correct, and to support
22 their overbreadth challenge, Plaintiffs must allege specific examples of protected speech
23 filtered through these intents. *See Hansen*, 599 U.S. at 782. None of Plaintiffs’ examples
24 would meet the requirements for liability under SB 406. A calm and rational discussion
25 with an elections official to explain a perceived wrong is perfectly permissible. What
26 Plaintiffs may not do under SB 406 is, for example, threaten to injure an elections official
27 in order to cause the elections official to perform his or her duties differently.

28 ///

1 **2. Plaintiffs’ Second Claim Must Be Dismissed Because Plaintiffs**
2 **Do Not Identify Anything Vague in SB 406**

3 Plaintiffs’ second claim asserts a facial challenge of SB 406 based on vagueness
4 under the Due Process Clause of the Fourteenth Amendment.³ SAC ¶¶ 110–24. The void-
5 for-vagueness doctrine applies when a criminal law “fails to provide a person of ordinary
6 intelligence fair notice of what is prohibited, or is so standardless that it authorizes or
7 encourages seriously discriminatory enforcement.” *Williams*, 553 U.S. at 304. “When a
8 statute clearly implicates free speech rights, it will survive a facial challenge so long as it
9 is clear what the statute proscribes in the vast majority of its intended applications.”
10 *Humanitarian Law Project v. U.S. Treasury Dep’t*, 578 F.3d 1133, 1146 (9th Cir. 2009)
11 (internal quotation marks and citation omitted). In assessing whether a law is vague in
12 the First Amendment context, “perfect clarity and precise guidance have never been
13 required.” *Williams*, 553 U.S. at 304 (citation omitted). Nor does the ability to envision
14 close cases render a statute vague. *Id.* at 305. As with a facial overbreadth challenge,
15 facial invalidation based on vagueness “is, manifestly, strong medicine” and should be
16 employed “sparingly and only as a last resort.” *See Nat’l Endowment for the Arts v. Finley*,
17 524 U.S. 569, 580 (1998) (citations omitted).

18 Plaintiffs claim that SB 406 does not provide clear definitions. *See* SAC ¶ 117. They
19 appear to take issue with the terms “elections official,” “intimidation,” “undue influence,”
20 and “interfere.” *Id.* ¶¶ 16, 21, 26, 72, 134. None of those terms are unconstitutionally
21 vague.

22 Plaintiffs allege that they do not know who qualifies as an “elections official.” *Id.* ¶¶
23 16, 21. As previously discussed, “elections officials” are only those individuals specifically
24 identified in section 1(6)(b) of SB 406. Elections observers are not “elections officials,”
25 regardless of Plaintiffs’ attempts to equate them. *E.g., id.* ¶¶ 1, 23, 25. Relatedly, Plaintiffs
26 also appear to claim that the lack of identification of individuals exempt from SB 406

27 _____
28 ³ The heading for the second claim refers to the Fifth Amendment, but it has no application here.
SAC at 22. The Fifth Amendment’s Due Process clause only applies to the federal government. *Bingue v.*
Prunchak, 512 F.3d 1169, 1174 (9th Cir. 2008).

1 somehow renders the bill vague. *Id.* ¶ 21. It does not. No one is exempt. If a person takes
2 any of the actions specified in SB 406 to interfere with or retaliate against an elections
3 official, that person is in violation of SB 406, regardless of whether they themselves are an
4 elections official. There is nothing vague about it; if anything, the lack of exemption makes
5 the statute *less* vague.

6 Next, the Ninth Circuit has held that “intimidate” and “interfere” in criminal
7 statutes are not void for vagueness. *Gilbert*, 813 F.2d at 1530 (concluding “intimidate” in
8 a criminal statute did not render the unconstitutionally vague); *United States v. Gwyther*,
9 431 F.2d 1142, 1144 n.2 (9th Cir. 1970) (“[I]nterfere’ has such a clear, specific and well-
10 known meaning as not to require more than the use of the word [itself] in a criminal
11 statute.”). And it has held that “legislation which proscribes the use of force or the threat
12 of force,” like SB 406, “should not be found to be void for vagueness.” *Gilbert*, 813 F.2d at
13 1530. Even if the Ninth Circuit had not already spoken on these terms, the terms have
14 plain and ordinary meanings, i.e., dictionary definitions, that save them from any
15 vagueness challenge. *See Yates v. United States*, 574 U.S. 528, 535 (2015); *United States v.*
16 *Shill*, 740 F.3d 1347, 1351 (9th Cir. 2014). “Intimidation” and “interfere” have
17 straightforward dictionary definitions that are understandable by Nevadans of ordinary
18 intelligence. *See, e.g., Intimidation*, dictionary.com, <https://tinyurl.com/y9d74uxb> (“[T]he
19 act or process of attempting to force or deter an action by inducing fear.”); *Interference*,
20 *Black’s Law Dictionary* (11th ed. 2019) (“The act or process of obstructing normal
21 operations or intervening or meddling in the affairs of others.”).

22 Finally, with respect to “undue influence,” courts may look to “settled legal
23 meanings” in determining whether a term is vague. *Holder v. Humanitarian Law Project*,
24 561 U.S. 1, 20 (2010). Undue influence has a settled legal meaning. It is “[t]he improper
25 use of power or trust in a way that deprives a person of free will and substitutes another’s
26 objective; the exercise of enough control over another person that a questioned act by this
27 person would not have otherwise been performed, the person’s free agency having been
28 overmastered.” *Undue Influence*, *Black’s Law Dictionary* (11th ed. 2019); *see also In re*

1 *Estate of Bethurem*, 129 Nev. 869, 874, 313 P.3d 237, 241 (2013) (undue influence
2 established when “the influence . . . destroy[ed] the free agency” of another); *Peardon v.*
3 *Peardon*, 65 Nev. 717, 767, 201 P.2d 309, 333 (1948) (explaining that undue influence
4 applies “where influence is acquired and abused, or where confidence is reposed and
5 betrayed”).

6 Plaintiffs also take issue with the supposed burden-shifting of the proof of scienter.
7 SAC ¶ 119. But that has nothing to do with vagueness and, as discussed above, the burden
8 of proving all elements of a charged offense rests with the prosecution. Plaintiffs’ allegation
9 that other statutes overlap with SB 406 similarly has nothing to do with vagueness, and in
10 any event, as discussed above, is permissible. *Id.* ¶115. Plaintiffs further claim that
11 “SB 406’s potential to criminalize innocent conduct makes it vague in defining the conduct
12 it criminalizes.” SAC ¶ 35. This is not a proper basis for challenging a statute for
13 vagueness. Rather, Plaintiffs appear to be confusing overbreadth and vagueness; a
14 “vagueness challenge does not turn on whether a law applies to a substantial amount of
15 protected expression.” *Holder*, 561 U.S. at 20.

16 SB 406’s intent requirements further mitigate any remote possibility of vagueness.
17 *See United States v. Jae Gab Kim*, 449 F.3d 933, 943 (9th Cir. 2006). This is because
18 Plaintiffs can base their behavior on their own factual knowledge of the situation and avoid
19 violating the law. *Id.* Taken together, SB 406 is clear in what it “proscribes in the vast
20 majority of its intended applications.” *Humanitarian Law Project*, 578 F.3d at 1146
21 (internal quotation marks and citation omitted). Plaintiffs have not pointed to a single
22 example that suggests otherwise.⁴

23 Because Plaintiffs fail to support their request for the strong medicine of facial
24 invalidation, their second claim should be dismissed.

25 3. Plaintiffs Do Not Allege a Substantive Due Process Claim

26 While Plaintiffs refer to substantive due process in the heading of their second claim,
27 they all but ignore this supposed claim in the body of the SAC. *See* SAC at 22. The SAC

28 ⁴ As discussed above, the only examples Plaintiffs give would not establish liability under SB 406.

1 fails to offer “more than labels and conclusions, and a formulaic recitation of the elements
2 of [the] cause of action” and must be dismissed. *Twombly*, 550 U.S. at 555. Further, any
3 substantive due process claim is inapplicable. A constitutional claim “covered by a specific
4 constitutional provision” must “be analyzed under the standard appropriate to that specific
5 provision, not under the rubric of substantive due process.” *United States v. Lanier*, 520
6 U.S. 259, 272 n.7 (1997). Plaintiffs’ purported substantive due process claim is covered by
7 the First Amendment, so substantive due process analysis is improper.

8 Even construing Plaintiffs’ claim as based on the First Amendment (a claim not
9 asserted in the SAC), it fails. As Defendants have explained, “[a]ctivities that injure,
10 threaten, or obstruct are not protected by the First Amendment, whether or not such
11 conduct communicates a message.” *Grider*, 617 F. Supp. 3d at 52. And SB 406’s specific
12 intent requirement also “serves to insulate [it] from unconstitutional application to
13 protected speech.” *Gilbert*, 813 F.2d at 1529.

14 Because SB 406 does not regulate protected speech, it is constitutional as long as it
15 passes rational-basis review. *Ysura v. Pocatello Educ. Ass’n*, 555 U.S. 353, 359 (2009). It
16 does: SB 406 was enacted to “provide additional protection for election workers” and
17 reverse the “unbelievable turnover of election officials in elected and administrative
18 positions over the last four years.” *Senate Committee Minutes, supra*, at 2–3. Maintaining
19 elections officials with knowledge and experience and providing them with protection in a
20 politically charged environment are legitimate governmental interests that are rationally
21 related to SB 406.

22 **4. Plaintiffs’ Third Claim Must Be Dismissed for the Same Reasons**
23 **that the Second Claim Must Be Dismissed**

24 Plaintiffs’ third claim appears to be a vagueness challenge based on the Nevada
25 Constitution. SAC ¶¶ 125–36. As discussed above, this claim is absolutely barred by the
26 Eleventh Amendment. Even if were not, however, Nevada’s vagueness analysis is similar
27 to the federal vagueness analysis, and the third claim would fail for the same reasons

28 ///

1 Plaintiffs' second claim fails. *See Ford v. State*, 127 Nev. 608, 612, 262 P.3d 1123, 1125–26
2 (2011).

3 **V. CONCLUSION**

4 For the foregoing reasons, the Court should dismiss the SAC without leave to amend.

5 DATED this 16th day of November 2023.

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INDEX OF EXHIBITS

EXHIBIT No.	EXHIBIT DESCRIPTION	NUMBER OF PAGES
1.	Motion for Sanctions, <i>Beadles v. Rodriguez</i> , Case No. CV23-01341 (Nev. Dist. Ct. Sept. 11, 2023) (exhibits omitted)	23

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