UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JILLIAN OSTREWICH, Plaintiff, v. CHRISTOPHER HOLLINS, in his official capacity as Harris County Clerk; RUTH R. HUGHS, in her official capacity as Secretary of State of Texas; KIM OGG, in her official capacity as Harris County District Attorney; KEN PAXTON, in his official capacity as the Attorney General of Texas, Defendants.	§	Civil Action No. 4:19-CV-715

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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Plaintiff Jillian Ostrewich moves for summary judgment on all claims alleged in her complaint against all Defendants pursuant to Fed. R. Civ. P. 56.

STATEMENT OF THE NATURE AND STAGE OF PROCEEDINGS

This is a civil rights case brought pursuant to 42 U.S.C. § 1983. Plaintiff Jillian Ostrewich is a Houston voter who was confronted by an election worker enforcing Texas's ban on certain apparel at polling places. *See* Tex. Elec. Code §§ 61.003, 61.010, and 85.036 (the "electioneering statutes"). On February 28, 2019, Ostrewich filed her lawsuit in this Court, alleging violations of her First Amendment and Fourteenth Amendment rights, and seeking injunctive relief, declaratory relief, and nominal damages.[1] Defendants filed three separate motions to dismiss, which the Court denied on April 3, 2020. ECF No. 56. Discovery has been completed, and Ostrewich respectfully moves for summary judgment on all her claims.

ISSUES PRESENTED AND STANDARDS OF REVIEW

The issues presented and standard of review for each issue are:

(1) Whether this Court has standing to hear the case. A plaintiff has standing when she has been injured, the defendant caused the injury, and the requested relief will redress the injury. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

[1] Ostrewich was joined on the initial complaint by another plaintiff, Anthony Ortiz, a resident of Dallas County. Ortiz's circumstances have changed since filing, and the parties filed a stipulation of dismissal of Ortiz and the two Dallas County Defendants, ECF No. 63, which this Court granted the following day. ECF No. 64.

(2) Whether the electioneering statutes are facially unconstitutional under the Free Speech Clause of the First Amendment.[2] Speech restrictions inside of a polling place are invalid when they are unreasonable in light of the purpose served by the forum. *Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876, 1886 (2018) (*MVA*). A restriction is unreasonable if there is no "sensible basis for distinguishing" speech that is allowed and speech that is prohibited. *Id*. at 1888. Speech restrictions in the 100-foot buffer zone are invalid unless they are narrowly tailored to serve a compelling governmental interest. *Burson v. Freeman*, 504 U.S. 191, 196 (1992) (plurality opinion) (100-foot buffer zone examined under strict scrutiny); *id.* at 271 (Stevens, J., dissenting) (same).

(3) Whether the electioneering statutes are unconstitutional as applied to Ostrewich's speech under the Free Speech Clause of the First Amendment. The substantive rule of law is the same for facial and as-applied challenges. *Edwards v. District of Columbia*, 755 F.3d 996, 1001 (D.C. Cir. 2014).

(4) Whether the electioneering statutes are facially overbroad in violation of the First Amendment. A law is facially overbroad when "a substantial number of its applications are unconstitutional" in "relation to the statute's plainly legitimate sweep," and the law is not readily susceptible to a limiting construction. *Broadrick v. Oklahoma*, 413 U.S. 601, 613, 615 (1973).

[2] The First Amendment's Free Speech Clause is incorporated against state and local entities through the Fourteenth Amendment's Due Process Clause. *See 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 489 (1996).

(5) Whether the electioneering statutes are void for vagueness under the Fourteenth Amendment. A law is void for vagueness when it "fails to provide those targeted by the statute a reasonable opportunity to know what conduct is prohibited," or "is so indefinite that it allows arbitrary and discriminatory enforcement." *Women's Medical Center of Northwest Houston v. Bell*, 248 F.3d 411, 421 (5th Cir. 2001).

SUMMARY OF ARGUMENT

Plaintiff Jillian Ostrewich attempted to vote in her "Houston Fire Fighters" union t-shirt in October 2018. *See* Complaint, ECF No. 1, Exhibit A. An election worker enforcing Texas's ban on "electioneering," Tex. Elec. Code §§ 61.003, 61.010, and 85.036, prevented her from entering the polling place and instructed her to turn her shirt inside-out before allowing her to vote. Ostrewich felt "violated" by the election worker's confrontation and "baffled" by her decision. Exh. 1 (Ostrewich Dep. 45:2, 46:25 (July 31, 2020)).[3] She seeks a court order to enjoin the statutes and vindicate her constitutional rights under the First and Fourteenth Amendments.

This Court held that Ostrewich had standing to press her claims at the pleading stage. ECF No. 56 (memorandum opinion and order denying Defendants' motions to dismiss). Since then, Ostrewich confirmed the facts about the encounter at the polls under oath, and these facts are not disputed by any defendant. Ostrewich thus has standing to seek summary judgment.

[3] Exhibits 1 through 44 are attached to this Motion in the Appendices to Plaintiff's Motion for Summary Judgment, and are described in the Declaration of Erin E. Wilcox in Support of Plaintiff's Motion for Summary Judgment.

On the merits, the electioneering statutes violate the Free Speech Clause of the First Amendment. First, the statutes are facially unconstitutional under *MVA* because they do not provide to the tens of thousands of election workers that enforce them any "objective, workable standards" about "what may come in [and] what must stay out," resulting in "erratic application" of the law. *MVA*, 138 S. Ct. at 1888, 1890-91. The evidence shows that election workers disagree not just amongst themselves, but also with top state and county election officials. *See infra* at 7-15, 21-25.

The electioneering statutes are unconstitutional as-applied to Ostrewich's speech, because Ostrewich's t-shirt did not mention any candidate, measure, or political party, much less take a position. Indeed, although some election judges maintained that her union "Houston Fire Fighters" t-shirt should be construed as advocating in favor of Proposition B because the union supported the measure, Exh. 3 (Kathryn Gray Dep. 94:12-95:4 (May 28, 2020)), the county's administrator of elections advised election judges not to enforce the electioneering statutes against voters wearing the same t-shirts the day after Ostrewich voted. Exh. 6 (Sonya Aston Dep. exh. 3 (June 23, 2020)).

Further, the electioneering statutes are facially overbroad because they apply to apparel featuring the names of past—even deceased—candidates, individuals who are not candidates in Texas, slogans, and apparel that any individual election worker deems associated with or related to a candidate, measure, or political party. Finally, because voters cannot be expected to determine the scope of a ban on which even election officials and election workers disagree, the electioneering statutes are impermissibly vague under the Fourteenth Amendment.

STATEMENT OF UNDISPUTED FACTS

Plaintiff Jillian Ostrewich. Jillian Ostrewich is a self-described "fire wife" married to a fireman who serves in the Houston Fire Department and is a member of the AFL-CIO affiliated International Association of Fire Fighters. *See* Exh. 2 (excerpts of Ostrewich Dep. exh. 6). On the November 2018 ballot, Houston voters were presented with Proposition B, an initiative measure concerning firefighter pay. During the early voting period, Ostrewich went to vote at the Metropolitan Multi-Service Center in Houston while wearing a yellow IAFF/AFL-CIO union "Houston Fire Fighters" t-shirt. *See id.*; Complaint, ECF No. 1, Exh. A (photo of the shirt). Ostrewich's husband gave her the t-shirt between 12-18 months before the November 2018 election, Exh. 1 (Ostrewich Dep. 27:24-25), and she has worn the shirt frequently to many places, including "walking the dog, riding [her] bike, and using the weed whacker." *Id*. at 28:11-14; 54:4-11.

Although the shirt made no reference to Proposition B or firefighter pay, an election clerk confronted Ostrewich as she tried to enter the polling place and told her she could not wear her shirt inside because they were "voting on that."[4] Exh. 1 (Ostrewich Dep. 44:23-45:5). Consistent with the policy at the Multi-Service Center polling location, the election clerk instructed Ostrewich to go to the restroom and turn her shirt inside-out before she would be allowed to vote. Exh. 1 (Ostrewich Dep. 35:17-23); Exh. 3 (Gray Dep. 88:8-11)

[4] Neither Plaintiff nor Defendants have been able to identify the election clerk who confronted Ostrewich. Exh. 1 (Ostrewich Dep. 38:4-10). The presiding Election Judge for early voting at the Multi-Service Center, Kathryn Gray, has no recollection or knowledge of the incident. Exh. 3 (Gray Dep. 6:25-7:4 (not present at incident); 78:1-7 (did not see any Houston Fire Fighter shirts in the polling place)).

(Nobody was allowed to vote without first having turned her Houston firefighter's shirt inside out). Ostrewich was "baffled" and felt "violated" by the election clerk's demands. Exh. 1 (Ostrewich Dep. 45:2, 46:25). But not wanting to be disrespectful, *id.* at 48:7-8, Ostrewich complied, returned to the back of the line, voted, and left immediately. *Id.* at 36:2-21, 64:13. She did not speak to anyone inside or outside the polling place other than her husband and the election workers. *Id.* at 61:18-24.

Electioneering Statutes. Ostrewich challenges three interrelated Texas statutes that govern what people can wear in polling places and within 100-foot buffers marked around polling places: Tex. Elec. Code §§ 61.003, 61.010, and 85.036.[5] Sections 61.003 (on Election Days) and 85.036 (during early voting periods) make it unlawful for a person to "electioneer[] for or against any candidate, measure or political party" within 100 feet of "an outside door through which a voter may enter the building in which a polling place is located" during the voting period. *Id.* §§ 61.003(a)(2); 85.036(a).

Electioneering expressly includes "the posting, use, or distribution of political signs or literature." Tex. Elec. Code §§ 61.003(b)(1), 85.036(f)(2). The State's 30(b)(6) deponent, Secretary of State Elections Division Director Keith Ingram, testified that the statutes also prohibit passive forms of "electioneering," such as hats, t-shirts, buttons, bumper stickers, and the like. Exh. 11 (Keith Ingram Dep. 63:9-14 (June 9, 2020)). Tex.

[5] Ostrewich and Defendants refer to the first electioneering statute as Tex. Elec. Code § 61.003, and Ostrewich will use the shorthand in referring to that statute. To be precise, Ostrewich is challenging the apparel ban contained in Tex. Elec. Code § 61.003(2), and does not challenge the prohibition on loitering at the polling place. § 61.003(1).

Elec. Code § 61.008, which is not challenged in this case, "would deal with verbal electioneering," which is "a much more serious crime." *Id.* at 62:25-63:8.

The later-enacted Section 61.010(a) is intended to govern name badges worn by poll watchers, providing that "a person may not wear a badge, insignia, emblem, or other similar communicative device relating to a candidate, measure, or political party appearing on the ballot, or to the conduct of the election," in the polling place or within the 100-foot buffer. Tex. Elec. Code § 61.010; *see also* Exh. 28 (explaining legislative history of Section 61.010 to address poll watcher name badges); Exh. 11 (Ingram Dep. 27:18-23) ("badge limitations are related to that particular election").[6]

None of the statutes contain a requirement that a voter intends to "electioneer" for a candidate, measure or political party. Instead, an election judge or one of her election clerks typically make on-the-spot calls about whether a voter's apparel constitutes impermissible electioneering under Texas law. A voter who violates any of the electioneering statutes may be charged with a class C misdemeanor, Tex. Elec. Code §§ 61.003(c), 61.010(c), 85.036(d), a "criminal offense." Exh. 11 (Ingram Dep. 66:1-4).

Official Interpretation. The Secretary of State Elections Division provides general guidance as to the meaning of the electioneering statutes to county election administrators, election workers, and voters. Exh. 11 (Ingram Dep. 11:9-21). The local election workers

[6] The Supreme Court decision in *MVA* noted that the Texas name badge statute (Tex. Elec. Code § 61.010) offered more clarity than the unconstitutional Minnesota statute. But *MVA* did not cite to or opine on Texas's general electioneering statutes, which are the primary statutes governing apparel at polling places. *See* Tex. Elec. Code §§ 61.003, 85.036. The State views all three statutes as interrelated bans on apparel that the State considers "electioneering," and thus all three are challenged in this lawsuit. Exh. 22.

are expected to apply this guidance, *id.* at 39:10-13, as well as exercise their own discretion at individual polling locations, *id.* at 39:18-24; Exh. 21 (Hollins[7] Interrog. Resp. 7) ("a duly appointed and commissioned presiding election judge is the entity that interprets and enforces Tex. Elec. Code §§ 61.003, 61.010, and 85.036 at their respective polling location."). The object of the Secretary of State's guidance is to "obtain and maintain uniformity in the application, operation, and interpretation of the Texas Election Code and [other] election laws." Exh. 20 (Hughs Interrog. Resp. 4); Exh. 11 (Ingram Dep. 11:6-10). Yet as a matter of standard practice, the Secretary of State's office routinely declines to issue definitive answers as to what apparel is permitted and what is prohibited. *See, e.g.*, Exh. 33 (SOS0020794-95) (refusing to answer question on whether firefighters can vote in uniform with Houston's Proposition B on the ballot); Exh. 29 (SOS0017903-11) (refusing to answer whether a posted Black Lives Matter sign is electioneering); Exh. 30 (SOS0019048) (refusing to answer whether a voter must cover up "Vote the Bible," "vote atheist," or "vote to save Big Bird" shirts); Exh. 31 (SOS0019326-27) (refusing to answer whether election workers could wear "patriotic" red, white, and blue). Only on rare occasions has the Secretary of State's office provided a direct answer to voters and poll workers regarding electioneering. For example, the Secretary of State advised the Harris County Democratic Party that "A MAGA [Make America Great Again] hat is associated with a particular candidate and is electioneering under 61.003," Exh. 32 (SOS0020790-

[7] At the time the response was propounded, Defendant Diane Trautman was sued in her official capacity as Harris County Clerk. Defendant Trautman subsequently stepped down and her successor, Chris Hollins, was substituted in this case. For ease of reference, Plaintiff refers to the Harris County Clerk as "Hollins."

93); Exh. 11 (Ingram Dep. 24:3-6; 26:25-27:2), and told a concerned poll worker that a Black Lives Matter shirt and "perhaps a NRA shirt" are permitted to be worn inside polling places. Exh. 43 (SOS0081011). But even these communications are not publicly available and the Secretary of State denies that messages sent from the Elections Division "necessarily constitute[] an official or binding statement of Defendant's position or interpretation of any matter." *See* Exh. 18 (Hughs RFA Resp. 18-23).

Instead, the office relies on local election officials—"the presiding judge or deputy early voting clerk of the specific polling place"—to interpret and apply the statutes, because they are "in the best position to determine whether a person is engaged in electioneering." Exh. 20 (Hughs Interrog. Resp. 13); Exh. 11 (Ingram Dep. 49:25-50:3) ("[T]he presiding judge in a local election is the one who will know what measures are on the ballot and what apparel might be associated with that measure"); *id.* at 52:5-9 ("Generally the folks who do this kind of work who are election judges or deputy early voting clerks are political people that are tuned in, and we expect them to rely on their experience, as well as their training, in making those determinations."). Conversely, the Harris County Clerk, the individual responsible for administering the county's elections and training election judges, "defers to the Texas Legislature and the Texas Secretary of State as the Chief Elections Officer" to determine how to enforce the electioneering statutes against hats and t-shirts. Exh. 21 (Hollins Interrog. Resp. 13).[8]

[8] Plaintiff deposed three election workers who have many years' experience serving as both election clerks and election judges: Kathryn Gray and Ruthie Morris in Harris County, and Terry Barker in Dallas County. Plaintiff also deposed former Harris County Administrator of Elections Sonya Aston.

Although election officials disagree on the precise scope of the electioneering statutes, it is clear that that the statutes target apparel well beyond that which expressly advocates for or against candidates, measures, or political parties. State and local officials charged with implementing and enforcing the statutes testified that they would prohibit apparel featuring:

- the name of or reference to a candidate, measure, or political party that is not on the ballot. Exh. 11 (Ingram Dep. 25:9-11).[9]
- the name, logo, or slogan of a candidate on the ballot in previous, completed elections, even if that candidate will not be on the ballot in the future. *Id.* at 25:17-20 (§ 61.003 applies to any past candidate); 26:4-5 (Reagan/Bush '84 banned), 71:17-21 (Obama; Clinton/Gore banned), 26:25-27:2 (MAGA hats will be banned in 2024); Exh. 5 (Terry Barker Dep. 51:25-52:3 (June 17, 2020)) (past candidates and parties banned); Exh. 6 (Aston Dep. 35:6-9) (Reagan/Bush '84 banned).
- the name, logo, or slogan of a candidate who could be on the ballot in the future. Exh. 5 (Barker Dep. 52:11-14); Exh. 40 (email from Sec. of State's Office, OST 457-60, Sept. 30, 2010).[10]
- the name, logo, or slogan of an organization "related to" a candidate or issue. Exh. 7 (Aston Dep. exh. 1) ("If someone is wearing a t-shirt, button, bumper sticker, etc.

[9] Tex. Elec. Code § 61.010 prohibits apparel that electioneering for a candidate, measure, or political party that is "on the ballot." Tex. Elec. Code §§ 61.003 and § 85.036 contain no such limit.

[10] Because the State believes that *MVA* did not change Texas law, interpretative materials predating the *MVA* decision in June 2018 remain relevant to understanding how the State enforces the statutes. Exh. 9 (Aston Dep. exh. 4).

from *an organization that endorses* a candidate, political party or a measure, it needs to be covered up when within the 100' area."); Exh. 6 (Aston Dep. 28:18-22) (ban "ACLU" and "NRA" if "actively supporting candidates or propositions"); Exh. 3 (Gray Dep. 106:15-22) (ban "NRA" and union logo if either organization endorsed candidate).

- slogans associated with a candidate or party. Exh. 4 (Ruthie Morris Dep. 58:9-14, 109:10-110:9 (June 21, 2020)) ("Build the Wall"); Exh. 6 (Aston Dep. 37:5-8) (same); Exh. 5 (Barker Dep. 49:23-24) (same); Exh. 4 (Morris Dep. 115:14-15) ("Medicare for All"); Exh. 5 (Barker Dep. 50:19-24) (same).
- parody language that inferentially refers to a candidate. Exh. 4 (Morris Dep. 63:17-64:1) ("Make Bitcoin Great Again" hat in the same colors and font as MAGA).
- language relating to a candidate in another jurisdiction. Exh. 6 (Aston Dep. 37:21-38:8) (banned if recognizable); Exh. 4 (Morris Dep. 113:23-114:12) (ban reference to Alexandra Ocasio-Cortez because she is famous and influential); Exh. 3 (Gray Dep. 84:21-85:2) (Andrew Cuomo shirt might be banned).
- the name of political parties that are not recognized in Texas. Exh. 39 (Tea Party apparel, and Socialism USA shirt).[11]

[11] The Secretary of State's website shows only four recognized political parties in Texas: Republican, Democratic, Libertarian, and Green. https://www.sos.state.tx.us/elections/candidates/index.shtml. Ostrewich respectfully requests judicial notice of information found on this and other government websites cited in this motion. *In re Katrina Canal Breaches Consol. Lit.*, 533 F. Supp. 2d. 615, 632 (E.D. La. 2008) ("[t]he Fifth Circuit has determined that courts may take judicial notice of governmental websites").

While both the state and county defendants assign enforcement authority only to the presiding judge or deputy early voting clerk at each location, there are many other election workers involved. Officially denominated "election clerks," greeters at polling places walk along the voter line, ensure order, and enforce the electioneering statutes.[12] *See, e.g.*, Exh. 44 (Harris County Election Day Law & Operations Manual (Fall, 2015) "Greeter" – "To monitor for electioneering. *If you see anyone wearing political ads, stickers, shirts, or any other thing of a political nature, tell the person that it is illegal to wear campaign ads in the poll and ask them to please remove it. If they refuse, contact the Presiding Judge to advise them of the issue.*"). Election judges rely on greeters and other election clerks to enforce the electioneering statutes so that the judges themselves can focus on issues directly related to a voter's ability to cast a ballot. Exh. 4 (Morris Dep. 73:1-2) ("usually the greeters catch them first"); 80:8-11 ("The greeter is able to get them to cooperate so the people in the building never have to deal with it or we don't even know it happened."); Exh. 3 (Gray Dep. 43:11-13) ("the purpose of the greeter is to catch all the electioneering before they get into the voting place."); *id.* at 44:19-25 ("I told [the greeters] that nothing political, T-shirts, pens, hats . . . cannot be in the voting place."); Exh. 1 (Ostrewich Dep. 79:4-8) (she assumed election workers posted at the door were "in charge" because "they were the ones in charge of who got to go in and who did not.").

[12] Greeters are election clerks and receive the same training as other election clerks. Some clerks work inside the polling location staffing the tables and handing out ballots; others are designated greeters to patrol the line, assist voters into the polling place, and monitor for violations of the electioneering statutes. Exh. 6 (Aston Dep. 54:2-23).

Enforcement. Any election judge or election clerk may confront a voter about his or her apparel and declare it to be illegal electioneering. *See* Exh. 44 (Harris County Election Manual); Exh. 18 (Hughs RFA Resp. 5-9). The Secretary of State Elections Division relies on these local officials, particularly regarding local measures and candidates. Exh. 11 (Ingram Dep. 49:25-50:19, 52:5-9) ("election judges or deputy early voting clerks are political people that are tuned in, and we expect them to rely on their experience, as well as their training").

Conversely, local officials rely on the training provided by the Secretary of State via the counties, Exh. 11 (Ingram Dep. 19:12-17), to know how to enforce the electioneering statutes. One election judge, for instance, acknowledged that she "[has] to be informed," and testified that she "is only informed . . . through training." Exh. 3 (Gray Dep. 79:2-17); *see also* Exh. 5 (Barker Dep. 34:21-35:5) (relies on sample ballot included in training).

Local officials may be ignorant of local issues and candidates. One election judge testified that although she's "plugged in to federal issues," she "really [doesn't] care about the Houston city issues." Exh. 4 (Morris Dep. 164:14-16). *See also id.* at 22:23-23:3 ("Sometimes I don't even know what's on the ballot because I'm so busy. It's like a plumber who can't fix their own plumbing, and it's like I don't even know what's on the ballot, so I don't know what T-shirts to kick out."); *id.* at 64:3-10 ("I've seen political statements that I really didn't even understand. There's so much going on with different groups, different people, different things, different, you know, logos, like I don't know what every logo is. So I might accidentally let someone in with a logo that I shouldn't, but

it's just because I don't even know what the logo is."). Another election judge testified that she is "not a big TV person," and "not a big news person," so it "mostly likely [] doesn't happen" that she would be "informed basically on [her] own." Exh. 3 (Gray Dep. 80:7-9).

Given the sheer quantity of election workers tasked with monitoring voter apparel and confronting voters when they determine that the apparel is improper electioneering,[13] it is unsurprising that the statutes are applied inconsistently. *See* Exh. 4 (Morris Dep. 131:9-10) ("You're going to get a different answer from different judges."). Election judges at some polling places are lenient in their enforcement of the electioneering statutes. *See id*. 69:13-16 ("I'm the kind of person when it comes to the gray area, I tend to not care. I just—I don't think it's that important."). Election judges at other polling locations are strict. Exh. 3 (Gray Dep. 79:9-11) ("I believe that no political anything—shirts, hats, pins—should be beyond the 100-foot marker"); Exh. 5 (Barker Dep. 49:8-51:5) (would prohibit shirts featuring "Tea Party," "Build the Wall," "Medicare for all," "Black Lives Matter," and "NRA.").

The following chart reveals the varying interpretations of Secretary of State Elections Division Chief Keith Ingram, Harris County Administrator of Elections Sonya Aston, and election judges Kathryn Gray, Ruthie Morris, and Terry Barker when asked how the electioneering statutes apply to certain apparel.

[13] In Harris County alone, there are 46 early voting locations and "anywhere from 750-800 polling locations on Election Day." Exh. 6 (Aston Dep. 13:15-17). The county hires approximately 380 people to staff the polls during early voting and up to 6,000 on Election Day for a Presidential election year. *Id*. at 15:12-21.

Apparel	Ingram	Aston	Gray	Morris	Barker
NRA[14]	Allowed	Banned	Maybe[15]	Maybe	Banned
2nd Amend.[16]	Not Asked	Allowed	Maybe	Maybe	Allowed
BLM[17]	Allowed	Maybe	Allowed	Banned	Banned
Texas Org. Proj.[18]	Allowed	Banned	No knowledge[19]	Not Asked	Not Asked
Ostrewich's shirt[20]	Banned	Allowed	Banned	Unsure	Not Asked
Firefighter uniform[21]	Not Asked	Allowed	Banned	Allowed	Not Asked

[14] Testimony regarding National Rifle Association from Ingram Dep. 31:11-13; Morris Dep. 110:23-111:1, 15-23, 113:7-13; Gray Dep. 91:2-5, 106:11-18; Aston Dep. 28:18-22, 37:9-11; Barker Dep. 51:3-5.

[15] "Maybe" answers mean that the official would allow the apparel unless there was a related issue on the ballot or unless the organization endorsed a candidate. *See e.g.*, Morris Dep. 110:23-111:1, 15-23, 113:7-13 (NRA allowed unless gun issue on ballot); Gray Dep. 91:2-5, 106:15-18 (NRA allowed unless ballot proposition "in regards to that" or unless NRA endorsed a political candidate).

[16] Testimony regarding the text of the Second Amendment from Morris Dep. 112:24-25, 113:7-10; Gray Dep. 91:23-92:5; Aston Dep. 37:12-15; Barker Dep. 51:9-11.

[17] Testimony regarding Black Lives Matter from Ingram Dep. 76:20-21; Morris Dep. 59:18-25, 108:7-109:9; Gray Dep. 75:16-19; Aston Dep. 36:1-7; Barker Dep. 50:2-7.

[18] Testimony regarding the Texas Organizing Project from Ingram Dep. 82:7-9, 82:21-83:6; Aston Dep. 32:5-17, 32:24-33:1. Election Judge Kathryn Gray had no knowledge of the Texas Organizing Project, Workers Defense in Action, or the Communication Workers of America, Gray Dep. 76:20-77:6, although these groups were specifically singled out in Harris County communications regarding electioneering. Ingram Dep. Exh. 4.

[19] Despite 17 years' experience as an election clerk and judge, Gray Dep. 18:15, Ms. Gray testified that she "had no experience" with many of the issues related to electioneering or didn't know whether particular names or slogans should be banned or not. *See, e.g.*, 83:15-21 ("Never Socialism"); 85:2 (Andrew Cuomo); 85:7-8 ("Medicare for All"); 90:10-13 ("Me too" and Gadsden flag). Similarly, Ms. Morris, who has seven years' experience as a clerk and judge (Morris 27:24), considers many names and slogans to be within a "gray area," unclear whether they should be banned or not. Morris Dep. 58:9-16 ("Build the Wall"); 59:18-25 ("Black Lives Matter"); 86:14-87:1 ("Save the Whales"); 105:4-16 ("Reagan-Bush '84").

[20] Testimony from Ingram Dep. 72:16-23, 73:2-7; Morris Dep. 167:12-168:14, 170:23-24; Gray Dep. 78:1-7, 88:8-11, 94:12-95:4; Aston Dep. 25:15-24, 30:20-31:5.

[21] Testimony from Morris Dep. 164:9-10; Gray Dep. 97:3-7; Aston Dep. 28:23-29:2.

As for Ostrewich's yellow union t-shirt, then-Harris County Administrator of Elections Sonya Aston acknowledged that "bright minds may disagree" whether the shirt constitutes electioneering. Exh. 8 (Aston Dep. exh. 3). On October 25, 2018 (the day after Ostrewich voted), Aston instructed Harris County election judges to "allow people wearing non-proposition supporting/opposing t-shirts to come in without covering up their t-shirts."[22] Exh. 6 (Aston Dep. 73:17-21); *id.* at 24:6-20 (message "went out over our system to the different polls," election judges "would have received it"); 70:2-6 (it would have gone out to every polling place during early voting). While acknowledging that election judges have discretion in how they run their polling locations, Aston testified that Ostrewich "should not have been stopped." *Id.* 25:24.

Disruption and Effect on the Right to Vote. The Secretary of State's training advises local election officials to let voters vote even if they refuse to comply with the electioneering statutes—as the law requires. Exh. 11 (Ingram Dep. 33:22-24) ("if they refuse to comply . . . they are supposed to be moved to the front of the line, voted, and get out of the polling place."). Yet election workers have deprived voters of their ability to cast a ballot if they refuse to remove their hats or cover their shirts. Exh. 3 (Gray Dep. 48:23) (if a voter refuses to cover a shirt, "[t]he voter cannot come in and vote."); Exh. 5 (Barker Dep. 44:10-11) (recalls two times that a voter left rather than comply with the election worker's demands regarding apparel); Exh. 34 (voter denied right to vote because wearing a shirt with a capital H similar, but not identical, to Hillary Clinton's logo; Oct. 26, 2016);

[22] Aston testified that she sent this communication after consulting with attorneys in the Secretary of State's elections division. Exh. 6 (Aston Dep. 73:17-21).

Exh. 28 (voter ordered to remove his MAGA cap when President Trump was not on the ballot left without voting; Oct. 22, 2018).[23]

Short of depriving some voters of their right to vote, election workers' confrontations with voters over apparel causes disruption in the polling place. Exh. 11 (Ingram Dep. 44:19-23) ("when somebody refuses to comply with the election judge's requirement that they remove the electioneering material, then, yeah, that breaches the peace and interrupts the zone of contemplation at the polling place, you bet."); Exh. 4 (Morris Dep. 50:25-51:10) (election judge asked voter to remove a MAGA hat, resulting in "a pretty big argument" that "went outside. The judge almost said he was going to unplug the machine and not let him vote."). At a minimum, it can "hold up the line or cause delays" when an election worker confronts a voter who asserts the right to wear expressive apparel. *Id.* at 96:7-12. *See also* Exh. 5 (Barker Dep. 45:19-46:1) (same).

LAW AND ARGUMENT

I. PLAINTIFF HAS STANDING

When this Court denied Defendants' motions to dismiss, it found that Ostrewich pled sufficient facts that, if true, established standing to pursue her claim. ECF 56 at 5. The record at this juncture, including Ostrewich's undisputed testimony and Defendants' admissions, establishes Ostrewich's standing to pursue her claims. *See Lujan*, 504 U.S. at 560 (plaintiff has standing when she has been injured, the defendant caused the injury, and

[23] Because election judges do not typically track enforcement, *see* Exh. 5 (Barker Dep. 46:11-18), there is no way to get a full count of how many voters are deprived of their right to vote during each election simply because an election worker deemed a shirt or hat to be electioneering.

the requested relief will redress the injury); *Ass'n of Cmty. Orgs. for Reform Now (ACORN) v. Fowler*, 178 F.3d 350, 356 (5th Cir. 1999).[24]

First, Ostrewich's injury is concrete, particularized, and actual, rather than conjectural or hypothetical. *See Fowler*, 178 F.3d at 358. There is no dispute that a Harris County election worker confronted Ostrewich and prevented her from entering the polling place in her t-shirt when she voted during early voting in October 2018. Exh. 1 (Ostrewich Dep. 35:17-23); Exh. 3 (Gray Dep. 88:8-11). The electioneering statutes, which Defendants continue to enforce, impose a "constitutional harm adequate to satisfy the injury-in-fact requirement" by chilling Ostrewich's speech. *Justice*, 771 F.3d at 291 (quotations omitted)). Ostrewich votes in "every election that [she] can," and intends to vote in future elections for which she is eligible. Exh. 1 (Ostrewich Dep. 20:5-12; 53:21-54:21). Yet, although Ostrewich considers her t-shirt to be "just another shirt in [her] closet," *id.* at 54:4-5, she is intentionally not wearing her shirt to the polling place, and will not do so until she "get[s] the results of this lawsuit." *Id*. 54:14-16; 98:24-99:2 ("Q: But you haven't tried to wear [the yellow t-shirt] to the polls since October of 2018, correct? A: No, I have not. I'm waiting to see the outcome of this [lawsuit]."). Ostrewich's intention to wear her Houston Fire Fighters t-shirt or similar apparel to vote in future elections, coupled with enforcement

[24] While Ostrewich meets the usual criteria for Article III standing, "standing rules are relaxed for First Amendment cases so that citizens whose speech might otherwise be chilled by fear of sanction can prospectively seek relief." *Justice v. Hosemann*, 771 F.3d 285, 294 (5th Cir. 2014).

by election workers when she previously engaged in that conduct, suffice to establish a concrete injury under Article III. *See Justice*, 771 F.3d at 291.[25]

Second, Ostrewich's injuries are "fairly traceable" to Defendants because they result from Defendants' actions in "enacting and enforcing" the law. *Energy Management Corp. v. City of Shreveport*, 397 F.3d 297, 302 (5th Cir. 2005). As Harris County Clerk, Defendant Hollins "plays a role in the selection and appointment of election judges," Exh. 19 (Hollins RFA Resp. 1-2), and trains election judges and election clerks in Harris County. Exh. 19 (Hollins RFA Resp. 23-24). Defendant Hughs, as Secretary of State and the State's chief election officer, "assist[s] and advis[es] election officials by answering . . . questions from voters." Exh. 11 (Ingram Dep. 11:9-21). Defendant Ogg, the Harris County District Attorney, is authorized to prosecute criminal violations of the Texas Election Code in Harris County. Texas. Ogg Ans., ECF No. 62, ¶ 10. Defendant Paxton, as Attorney General of Texas, "may or must investigate alleged criminal conduct that occurred in connection with an election, and may prosecute criminal offenses prescribed by the election laws" of Texas. Paxton Ans., ECF No. 59, ¶ 14 (citing Tex. Elec. Code §§ 273.001, 273.021(a)).

[25] Ostrewich was not arrested when she wore her t-shirt to the polling place in October 2018. As the Supreme Court explained, "it is not necessary that [a plaintiff] first expose [herself] to actual arrest or prosecution to be entitled to challenge a statute that [s]he claims deters the exercise of [her] constitutional rights." *Steffel v. Thompson*, 415 U.S. 452, 459 (1974); *see also MVA*, 138 S. Ct. at 1896 (Sotomayor, J., dissenting) (noting that no one ever was prosecuted under the Minnesota law). In addition, there are no mootness concerns with this case because Ostrewich properly pled a claim of nominal damages. ECF No. 56, at 5 (citing *Duarte ex rel. Duarte v. City of Lewisville, Tex.*, 759 F.3d 514, 521 (5th Cir. 2014)).

Finally, a court decision granting Ostrewich her requested relief will fully redress her injury. Because Ms. Ostrewich was forced to change her expressive apparel that she wore to the polling place in the past, "there is every reason to think that similar speech in the future will result in similar proceedings." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 163-64 (2014). And although no one can predict which candidates, measures, or perhaps even political parties will appear in the future, another election worker may again "baffle[]" Ostrewich by applying the electioneering statutes in a surprising—and unconstitutional—way. Exh. 1 (Ostrewich Dep. 45:2). In the context of Ostrewich's union Fire Fighters t-shirt, there may well appear another proposition involving firefighters, and other measures or candidates on which the firefighter union and its umbrella organization, AFL-CIO, takes a position. Thus, a favorable ruling from this Court is necessary to redress Ostrewich's injuries, and allow her to vote wearing the apparel of her choice without fear of harassment or prosecution, and without delaying or discouraging her right to vote.

II. THE ELECTIONEERING STATUTES VIOLATE THE FREE SPEECH CLAUSE OF THE FIRST AMENDMENT

A. The Electioneering Statutes Are Facially Unconstitutional under the First Amendment

1. The Electioneering Statutes' Restrictions on Speech Inside the Polling Place Fail Reasonableness Review Because They Lack Objective, Workable Standards

In *MVA*, the Supreme Court struck down a Minnesota law that prohibited voters from wearing a "political badge, political button, or other political insignia" into the interior of the polling place as a facially unconstitutional restriction on speech. 138 S. Ct. at 1883, 1888. The Court held that the law failed reasonableness review because it did not provide

election judges with "objective, workable" standards for determining "what may come in [and] what must stay out" of the polling place. *Id.* at 1891. The unmoored use of the word "political," combined with Minnesota's haphazard interpretation in official guidance, invited erratic enforcement on the part of numerous election judges who enforced the law throughout Minnesota. *Id.* at 1888. Given the threat that voters may witness "unfair and inconsistent enforcement," Minnesota's interest in maintaining a polling place free of distraction and disruption was "undermined by the very measure intended to further it." *Id.* at 1891. The electioneering statutes here suffer from the same fatal defects, and thus impose unreasonable and unconstitutional restrictions on speech.

The electioneering statutes do not provide any objective, workable standards for determining whether a voter's apparel is "electioneering" for or against a candidate, measure, or political party. Tex. Elec. Code §§ 61.003, 85.036. The statutes provide no definition of "electioneering" other than that it includes "the posting, use, or distribution of political signs or literature," *id.* § 61.003(b)(1), and the State's interpretation of the word is unmoored from its ordinary meaning. For instance, Merriam-Webster defines "electioneering" as taking "an active part in an election" or "work[ing] for the election of a candidate or party."[26] Yet to avoid redundancy with Texas Election Code section 61.008, which prohibits active, verbal electioneering, the State interprets sections 61.003 and 85.036 to prohibit passive forms of speech such as messages on shirts, buttons, t-shirts, and the like. Exh. 11 (Ingram Dep. 62:25-63:14). *See In re Crist*, 632 F.2d 1226, 1233 n.11

[26]https://www.merriamwebster.com/dictionary/electioneer?utm_campaign=sd&utm_medium=serp&utm_source=jsonld#examples.

(5th Cir. 1980) (courts should give effect, whenever possible, "to all parts of a statute and avoid an interpretation which makes a part redundant or superfluous.").

The State's interpretation of the electioneering statutes is both broad and "haphazard." *MVA*, 138 S. Ct. at 1888. The State insists the statutes prohibit messages that bear the name of former candidates whose future in Texas politics is an impossibility because they are dead (Reagan/Bush; Exh. 11 [Ingram Dep. 25:25-26:5]), or constitutionally prohibited from running (Obama; Exh. 11 [Ingram Dep. 71:17-21]). Beyond that, the State rarely issues any guidance or limitation as to the statutes' scope, and instead expressly relies on the discretion of local election judges and other poll workers to enforce the statutes' prohibitions. *Supra* at 7-15.[27] These election workers use their discretion to enforce the electioneering statutes against voters wearing t-shirts featuring the names of politicians who have never run for office in Texas, (Alexandria Ocasio-Cortez, Exh. 4 [Morris Dep. 113:23-114:12]); apparel that is merely "associated" with measures on the ballot (designs featuring "Houston Fire Fighters," Texas Rangers, or Dallas Cowboys), *see* Exh. 11 [Ingram Dep. 72:11-23, 49:19-50:19]; and slogans on issues not on the ballot at all, such as "Build the Wall" or "Medicare for All," Exh. 5 (Barker Dep. 49:23-24). All told, the electioneering statutes are unreasonable because, under the State's

[27] In their response to Plaintiff's request for a pre-motion conference with the Court, ECF No. 70, Defendants argued that the testimony of election workers do not speak for Defendants. The State's 30(b)(6) witness, however, concurred with some of the election workers' conclusions. In addition, the frequent *differences* in opinions among the election officials and workers—regardless of what those opinions are—show that vague statutes like those challenged in this case beget uneven enforcement.

interpretation, their "fair enforcement requires an election judge to maintain a mental index of platforms and positions of every candidate on the ballot. . . ." *MVA*, 138 S. Ct. at 1889.[28]

The record reveals that the electioneering statutes are not "capable of reasoned application." *Id.* at 1892. State and county election officials delegate enforcement of the electioneering statutes to an enormous number of election judges and clerks in thousands of precincts throughout Texas. State and county officials provide minimal training to these workers on what constitutes electioneering and what does not, consisting almost entirely of a recitation or paraphrase of the language of the statutes. The State provides a Qualifying Voters Handbook to election workers, *see* Exh. 11 (Ingram Dep. 35:1-6),[29] which is an 83-page document that devotes a single page to electioneering and is devoid of any examples that distinguish between permissible and impermissible apparel at the polling place. The Harris County training is similarly devoid of any helpful guidance to election workers, *see* Exh. 10 (Aston Dep. exh. 6), and the person who created the training could not recall that it contained anything specific about electioneering. Exh. 6 (Aston Dep. 39:5-10). Because election judges are "not given that much training," they are forced to use "their own [ ] judgment" on which voters to confront. Exh. 4 (Morris Dep. 61:1-66:15).

[28] Given the wide array of issues present in any election year, requiring election workers to keep a "mental index" of slogans that advocate on behalf of candidates, measures, or political parties is particularly untenable. In addition to elections to fill federal and state offices, Texas ballots include elections related to counties, municipalities, water districts, school districts, hospital districts, library districts, and emergency service districts. Exh. 37. A single Dallas County election in May 2019 had elections related to 20 municipalities, 12 school districts, and a community college district. Exh. 38.

[29] https://www.sos.state.tx.us/elections/forms/judges-clerks-handbook.pdf.

Further, although the Secretary of State's Office routinely fields inquiries from both election workers and voters, including "many questions after *MVA*," Exh. 23, it routinely refuses to provide specific guidance about what voters may wear to the polling place. Instead, the State typically responds with boilerplate recitations of the statutory language and advises interested parties that "electioneering" determinations are left to the discretion of the election judge. Exh. 24. *See supra* at 7-8. Even in those few instances in which the Secretary of State's Office provided an answer, those answers have no binding effect. Exh. 18 (Hughs RFA Resp. 18-23). And there is no guarantee that an election judge will make the same decisions from one election to the next. For instance, although an attorney within the Secretary of State Elections Division informed one local elections administrator that an election judge "did the right thing" by asking a voter to remove a red "Kavanaugh" shirt, Exh. 12 (Ingram Dep. exh. 3), the State's Elections Director subsequently testified that he disagreed with that conclusion. Exh. 11 (Ingram Dep. 66:6-69:4). If Ingram communicates his assessment to the administrator, he will expect her to conform to his opinion in the future. *Id.* 39:10-24.

As the record clearly demonstrates, the electioneering statutes are not capable of reasoned application by the multitude of election judges and clerks who enforce the statutes. In addition to the examples above, the State's Director of Elections stated that an NRA t-shirt would be allowed, but the Harris County Administrator of Elections and an election judge in Dallas County maintained that the shirt constituted impermissible electioneering. Exh. 11 (Ingram Dep. 31:11-13), Exh. 6 (Aston Dep. 28:18-22, 37:9-1); Exh. 5 (Barker Dep. 51:3-5). One election judge in Harris County would allow a "Black

Lives Matter" t-shirt. Exh. 3 (Gray Dep. 75:16-19). Yet her election clerk, who has also served as an election judge at another precinct in the same county, insisted that the same t-shirt would be banned. Exh. 4 (Morris Dep. 59:18-25, 108:7-109:9). Defendants' top election officials could not agree on the application of the law to t-shirts featuring the Texas Organizing Project, which the State's official would allow and the County's official would ban, Exh. 11 (Ingram Dep. 82:7-9); Exh. 6 (Aston Dep. 32-5-17, 32:24-33:1), or Ostrewich's Houston Fire Fighters t-shirt which, conversely, the State's official would ban, and the County's official would allow, Exh. 11 (Ingram Dep. 72:16-23); Exh. 6 (Aston Dep. 25:15-24).[30] This record of inconsistency is unsurprising given the number of people tasked with enforcing a vague law, but it is nonetheless "a serious matter when the whole point of the exercise is to prohibit the expression of political views." *MVA*, 138 S. Ct. at 1891.

2. The Electioneering Statutes Undermine the State's Asserted Interests

The State asserts various interests in support of the speech restrictions in the electioneering statutes: the right to "vote in an election conducted with integrity and reliability;" ensuring that the right to vote is not "undermined by fraud in the election

[30] The examples on which these officials disagree "go beyond close calls on borderline or fanciful cases." *MVA*, 138 S. Ct. at 1891. Confused voters, election workers, and other Texas residents have sought clarification on episodes of enforcement that they have witnessed at polling places throughout the State. For instance, the applicability of the electioneering statutes to NRA apparel, Exh. 36, and "Black Lives Matter" has been the topic of discussion on numerous occasions. Exh. 25. In Harris County during the November 2018 general election, apparel featuring the logos of the Texas Organizing Project, and of course, Houston Fire Fighters, were both subjects of numerous discussions between voters and the State.

process," and avoiding "voter intimidation, confusion, and general disorder." Exh. 20 (Hughs Interrog. Resp. 4). The State has the burden of proof, even in a nonpublic or limited public forum, to prove that its speech restrictions further its asserted interests. *MVA*, 138 S. Ct. at 1888 ("*the State must be able to articulate* some sensible basis for distinguishing what may come in from what must stay out" and it failed to do so) (emphasis added); *Northeastern Pa. Freethought Society v. County of Lackawanna Transit Sys*., 938 F.3d 424, 439, 442 (3d Cir. 2019) (state bears the burden to show that banning religious speech from its nonpublic forum was reasonable and it "failed to cite a single debate [among passengers] caused by an ad on one of its buses"); *Cambridge Christian School, Inc. v. Florida High School Athletic Ass'n, Inc*., 942 F.3d 1215, 1245 (11th Cir. 2019) (State had burden to produce a "reasoned explanation" or "other support" for its content-based restriction in a nonpublic forum that was applied arbitrarily and haphazardly).

The State here did not provide *any* factual evidence to support its asserted interests, Exh. 20 (Hughs Interrog. Resp. 5), and declined to "speculate" as to the statutes' effectiveness in furthering those interests, *id.* (Hughs Interrog. Resp. 6). The State's subsequent document production included many thousands of pages of inspector reports from counties across Texas, across many elections. Yet those reports do not show voter-on-voter altercations as a result of a voter wearing a t-shirt or hat.[31] In the absence of

[31] There are a few, scattered instances of voters, unhappy at viewing apparel they believed should have been banned under the statute, submitting complaints to election officials. In no case do they allege any disruption in the polling place beyond their own, unexpressed (at the time) annoyance. "Many are those who must endure speech they do not like, but that is a necessary cost of freedom." *Sorrell v. I.M.S. Health*, 564 U.S. 552, 575 (2011). "Our tradition assumes that adult citizens, firm in their own beliefs, can tolerate and

corroborating evidence, speculative fear of voter-on-voter disruptions is insufficient to justify speech restrictions. Courts do not accept "mere conjecture as adequate to carry a First Amendment burden." *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 392 (2000).

In all events, unchallenged portions of the Texas Election Code already provide the State with adequate tools to maintain a calm voting environment. People cannot loiter, Tex. Elec. Code § 61.003(a), use sound amplifying devices, *id.* § 61.004, or "indicate[] to a voter in a polling place by word, sign, or gesture how the person desires the voter to vote or not vote," *id.* § 61.008. The State need not punish passive expression on apparel "in order to keep the peace." *Texas v. Johnson*, 491 U.S. 397, 410 (1989) (citation omitted).

Worse, the record reveals that voters have "experience[d] or witness[ed] unfair or inconsistent enforcement of the ban." *MVA*, 138 S. Ct. at 1891 (explaining that unfair enforcement undermines the State's interest in maintaining a polling place "free of distraction and disruption."). For instance, Ostrewich was prevented from voting in her Houston Fire Fighters union t-shirt on October 24, 2018. On the very next day, the Harris County Administrator of Elections instructed polling places to allow those same t-shirts. Exh. 8 (Aston Dep. exh. 3). And although "Make America Great Again" hats are prohibited at polling places even when President Trump is not on the ballot, Exh. 11 (Ingram Dep. 23:9-25:11; 26:25-27:2), election workers at some polling places allow voters to wear similar hats while voting. Exh. 42. A report from another polling place stated that "[n]o one said anything" to a woman who "came in and voted while wearing a campaign t-shirt."

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perhaps appreciate [speech] delivered by a person of a different [belief]." *Town of Greece v. Galloway*, 572 U.S. 565, 584 (2014).

Exh. 27. Harris County voters wearing t-shirts featuring the "Texas Organizing Project" were initially found to be in violation of the electioneering statutes, until the Secretary of State's Office asked the county to reverse course. Exh. 11 (Ingram Dep. 80:5-82:9), Exh. 13 (Ingram Dep. exh. 4). A Harris County election judge testified that while "a Democrat judge would probably not allow an 'NRA' shirt or an 'NRA' hat," she "would probably let the 'NRA' hat in because [she] view[s] them differently." Exh. 4 (Morris Dep. 110:17-112:20). As a result, many voters believe that the electioneering statutes are applied in a discriminatory manner. One voter complained that a "no" group on a ballot measure was able to put up signs while a "yes" group was not. Exh. 26 (Hatch email to Sec. of State, dated Nov. 4, 2014). Another said that those who enforced the statutes were doing so to further partisan purposes, and "conducting [the] election to the exclusion of the" other party. Exh. 41. Ostrewich herself felt unfairly targeted based on the content of her shirt. Exh. 1 (Ostrewich Dep. 94:4-8).[32]

In sum, Texas has failed to offer "a more discernable approach" than that rejected in *MVA*, and the State's proffered expert testimony cannot cure that deficiency. The State's expert, Dr. James Pennebaker, opined that "if an orchestrated number of prospective voters agreed to wear similar t-shirts, hats, or other apparel, they could easily sway a not insignificant percentage of low-information voters." Exh. 15 (Pennebaker Report at 10).[33]

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[32] Beyond inconsistent and unfair enforcement, the electioneering statutes also undercut the government's asserted interests because they have led to disruptions and delays at the polling place. *See supra* at 16. *See also* Exh. 8 (Aston Dep. exh. 3).

[33] But the State's 30(b)(6) deponent, when asked whether someone wearing a Reagan/Bush t-shirt in 2020 could influence other voters, stated that "whether or not it influences other

Such orchestration would be difficult to achieve in Texas, which offers an extended early voting period and, in some counties, multiple locations for voting. For example, voters in Harris County are not assigned to specific polling locations and may choose from hundreds of polling locations.[34] Pennebaker did not address whether his premise reflected the practicalities of voting in Texas.

Pennebaker offers only "mere supposition" that the State needs to censor apparel in an effort to further its interests. *See Ne. Pa. Freethought Society*, 938 F.3d at 439 ("But if [government] wants to censor topics it deems 'controversial,' to avoid disruption, it needs more than mere supposition."). Pennebaker did not conduct any independent studies and simply extrapolated his conclusions based on studies about the influence of polling locations on voter preferences that did not examine the effect of t-shirts or any other apparel at polling places. Exh. 14 (James Pennebaker Dep. 126:6-13, 134:5-7 (Aug. 2, 2020)). The studies he relied on posit that holding an election in a church or school can sway the outcome of an election by subconsciously influencing the choices of voters. Yet Defendants cannot believe there is anything improper about that, because Texas elections are routinely held in both churches and schools. *See* Exh. 18 (Hughs RFA Resp. 9-14). The electioneering statutes prohibit voters from wearing apparel featuring the names of former presidents, yet voters can vote in polling location bearing those same names.[35]

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voters is not the question" and that "[i]nfluencing voters is prohibited by 61.008." Exh. 11 (Ingram Dep. 71:14-72:4).

[34] https://www.harrisvotes.com/PollLocations.

[35] https://www.dallascountyvotes.org/wp-content/uploads/WEB-Election-Day-Polling-Locations-8.pdf (list of polling locations in Dallas County in 2017, including schools named for Presidents Reagan and Truman).

More importantly, "the fear that speech might persuade provides no lawful basis for quieting it." *Sorrell*, 564 U.S. at 576, *citing Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). This includes Election Day. *Mills v. Alabama*, 384 U.S. 214, 219 (1966) (overturning conviction of newspaper editor who violated ban on election day editorial endorsements). Not all influence is undue influence. Even if a voter was influenced by a message she saw on a t-shirt, the voter would not have been said to have suffered from "undue influence *such as intimidation*." *MVA*, 138 S. Ct. at 1894 (emphasis added); *see also NLRB v. Alamo Exp., Inc.*, 430 F.2d 1032, 1034 (5th Cir. 1970) (no "undue influence" in union election where "whatever influence [a coworker] might have had on other employees was not coercive").

Finally, as Plaintiff's rebuttal expert Dr. David Primo explained, Pennebaker mistakenly focused "on a single heuristic in isolation." Exh. 16 (Report of Rebuttal Expert Dr. David Primo (July 20, 2020) at 6). In reality, a "piece of information may be more or less useful to a voter depending on the other information already at their disposal." *Id.* Social scientists should thus assess not the mass of information available to a voter in isolation, but "the *marginal* informational impact of cues," which Pennebaker failed to do. *Id.* Voters walk or drive past endless campaign signs (and sometimes demonstrations) on their way to their polling location, even as close as 100 feet away from the polls; what is the marginal influence of a t-shirt within that last 100 feet? Pennebaker cannot say.

In sum, the electioneering statutes ban "speech regarding a public election [that] lies at the core of matters of public concern protected by the First Amendment." *Wiggins v. Lowndes Cty., Miss.*, 363 F.3d 387, 390 (5th Cir. 2004). The State's asserted interests may

be able to justify a tightly written and enforced statute barring items "displaying *the name* of a political party, items displaying *the name* of a candidate, and items demonstrating '*support of or opposition to* a ballot question.'" *MVA*, 138 S. Ct. at 1889 (emphasis added). The Texas electioneering statutes extend well beyond this and therefore unreasonably restrict free expression.

3. The Electioneering Statutes Fail Strict Scrutiny Insofar as They Apply in the 100-Foot Buffer Zone

The electioneering statutes' speech restrictions extend to 100 feet outside of any doors of the building in which a polling place is located. Tex. Elec. Code § 61.003. Speech restrictions within this 100-foot buffer zone are subject to strict scrutiny. *Burson*, 504 U.S. at 196 (plurality opinion); *id.* at 217 (Stevens, J., dissenting) (same).[36] Because the electioneering statutes fail under reasonableness review, they necessarily fail under strict scrutiny as well. In all events, the State has failed to advance sufficient evidence showing a compelling interest in maintaining the law and has not attempted any less restrictive means that would further those interests. *See McCullen v. Coakley*, 573 U.S. 464, 474 (2014) (to establish a speech-free buffer zone around an abortion clinic, government must show "that it seriously undertook to address the problem with less intrusive tools readily available to it"). As a result, the electioneering statutes also fail strict scrutiny.

[36] An election worker instructed Ostrewich to turn her shirt inside-out before she went inside the polling place and granted her entry to the lobby only to use the restroom to comply with the instruction. Exh. 1 (Ostrewich Dep. 35:8-37:4). The electioneering statutes do not distinguish between apparel allowed inside a polling place and apparel allowed within the 100-foot buffer zone. Here, because the statutes are unconstitutional under either reasonableness or strict scrutiny, the Court need not consider this distinction to resolve this claim.

B. The Electioneering Statutes Violate the First Amendment as Applied to Plaintiff

The electioneering statutes violate the First Amendment as applied to Ostrewich's "own expressive activities." *Jornaleros de Las Palmos v. City of League City*, 945 F. Supp. 2d 779, 798 (S.D. Tex. 2013) (citations omitted). The yellow union t-shirt that Ostrewich wore when she voted in October 2018 did not even mention any candidate, measure, or political party. The State offered only a recitation of the statute when asked about these union t-shirts during the November 2018 general election period and left the matter to the discretion of local election officials (as was its general practice). Exh. 33. When asked in the context of this lawsuit, however, the State's Director of Elections testified (as a 30(b)(6) deponent) that it was correct for election workers to prohibit voters from wearing this t-shirt because it "had been associated with a particular position on a measure at all the rallies held with regard to that measure," Exh. 11 (Ingram Dep. 72:5-73:7). Just as Minnesota's representation that its ban is "limited to apparel promoting groups with 'well-known' political positions" exacerbated the potential for erratic application, *MVA*, 138 S. Ct. at 1890, so too does Texas's representation that it can ban t-shirts election workers believe to be "associated with a particular position." Exh. 11 (Ingram Dep. 72:16-18). In either case, "enforcement may turn in significant part on the background knowledge and media consumption of the particular election judge applying" the law. *MVA*, 138 S. Ct. at 1890.

This case is illustrative. When Ostrewich voted in October 2018, there were ongoing problems with inconsistent enforcement at early voting locations, which caused disruptions at the polls. Exh. 8 (Aston Dep. exh. 3). Recognizing these problems, then-Harris County

Administrator of Elections Sonya Aston instructed election workers on October 25 to allow the same t-shirt that an election worker prevented Ostrewich from wearing the day before. *Id.* If the statute should not have been enforced against Ostrewich on October 25, then the statute violated her First Amendment right to wear the shirt on October 24. Fair enforcement of generally applicable laws, particularly those restricting speech, cannot depend on when a voter voted.

C. The Electioneering Statutes are Facially Overbroad in Violation of the First Amendment

The First Amendment's overbreadth doctrine guards against far-reaching laws that threaten the free speech rights of large segments of society. *See Bd. of Airport Comm'rs of Los Angeles v. Jews for Jesus, Inc*., 482 U.S. 569, 574 (1987). A plaintiff invoking the overbreadth doctrine "may challenge a statute that infringes protected speech even if the statute constitutionally might be applied to him." *Bd. of Trustees v. Fox*, 492 U.S. 469, 482-83 (1989) (internal quotation marks omitted).[37] The electioneering statutes pose heightened overbreadth concerns because they "delegate[] overly broad discretion" to tens of thousands of election workers. *Forsyth Cty., Ga. v. Nationalist Movement*, 505 U.S. 123, 129 (1992). The statutes thus raise "a concern [] that the legislature . . . has created an excessively capacious cloak of administrative or prosecutorial discretion, under which

[37] For a First Amendment overbreadth claim, it does not matter whether the yellow union t-shirt falls within a legitimate, narrow reading of the statute; the overbreadth doctrine permits a form of third-party standing in this circumstance. *Secretary of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 956-58 (1984).

discriminatory enforcement may be hidden." Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 Yale L.J. 853, 884 (1991).

The electioneering statutes are substantially overbroad because (1) "a substantial number of [their] applications are unconstitutional" in relation to "the statutes' plainly legitimate sweep," and (2) the laws are not readily susceptible to a limiting construction. *Broadrick*, 413 U.S. at 613, 615. When the intrusion is extensive and plain, and legitimate applications of the law are not, the Court may resolve the case based on the law's overreach, without engaging in a searching analysis designed to map out the statute's legitimate scope. *United States v. Stevens*, 559 U.S. 460, 472-73 (2010). Here, the State acknowledges that the statutes prohibit apparel that feature the names of past candidates, *see* Exh. 11 (Ingram Dep. at 25:25-26:5) (Reagan/Bush t-shirts), broad political movements such as the Tea Party, *id.* at 76:22-77:4, and apparel that is "associated" with a position on a candidate or measure. *Id.* at 49:25-50:3. Because these examples require election workers to keep a "mental index" of candidates and positions, *MVA*, 138 S. Ct. at 1889, they illustrate that the electioneering statutes foster a substantial number of unconstitutional applications.

Nor are the statutes susceptible to a limiting construction. Vagueness problems, which are inherent in overbroad statutes, can be ameliorated by "binding limits" placed on a challenged law by the government body that enforces it. Defendants have never proffered a limiting construction, asserting instead that "a limiting construction is not needed." State Defs.' Reply in Support of Mot. to Dismiss, ECF No. 37, at 12-13 n.6. The State has also opined that a limiting construction would be inconsistent with the legislative purpose to "create a politics-free zone" around the polling place. Exh. 35. In the absence of a limiting

construction, the statute sweeps in far too much protected expression, and are facially overbroad.

III. THE ELECTIONEERING STATUTES ARE UNCONSTITUTIONALLY VAGUE

The electioneering statutes are also unconstitutionally vague under the Fourteenth Amendment. The vagueness doctrine applies with special force in this case for two reasons. First, vagueness is a particular concern in free speech cases to ensure that "ambiguity does not chill protected speech." *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253-54 (2012); *see also Int'l Soc'y for Krishna Consciousness of Atlanta v. Eaves*, 601 F.2d 809, 830 (5th Cir. 1979) ("Measures affecting [F]irst [A]mendment rights must be drafted with an even 'greater degree of specificity.'"). Second, the electioneering statutes impose criminal sanctions. *See* Hollins Ans., ECF No. 61, ¶ 20; Tex. Elec. Code § 61.003(c). The prohibition of vagueness in criminal statutes "is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law,' and a statute that flouts it violates the first essential of due process." *Johnson v. United States*, 576 U.S. 591, 595-96 (2015) (citation omitted).

A law is void for vagueness when it "(1) fails to provide those targeted by the statute a reasonable opportunity to know what conduct is prohibited, or (2) is so indefinite that it allows arbitrary and discriminatory enforcement." *Women's Medical Center*, 248 F.3d at 421; *see also Smith v. Goguen*, 415 U.S. 566, 572-73 (1974) (vagueness doctrine incorporates "notions of fair notice or warning," and requires legislatures to set "reasonably

clear guidelines" to prevent "arbitrary and discriminatory enforcement."). The electioneering statutes fail on both scores.

First, the electioneering statutes are unconstitutionally vague because they "force individuals to 'guess at [their] contours.'" *In re Murphy-Brown, LLC*, 907 F.3d 788, 800 (4th Cir. 2018) (citing *MVA*). Viewed from the standpoint of a person of ordinary intelligence, *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972), the record shows that the interpretation and application of the statutes "baffle[d]" not just voters, but also election officials and election workers themselves. *See supra* at 7-15, 21-25 (underscoring various methods of interpretation from election judges and election officials).

If election officials with years of experience cannot predict how the law applies, *e.g.*, Exh. 3 (Gray Dep. 13:2-15:1), there is no reason to expect that ordinary voters like Ostrewich can or should. And there was no reason for Ostrewich to infer that her t-shirt was "electioneering" when the shirt "didn't say anything about the proposition we were voting for" or "have any specific verbiage about what we were voting on." Exh. 1 (Ostrewich Dep. 99:11-20). The chilling effect of the State's contrary view is plain. *See Reno v. American Civil Liberties Union*, 521 U.S. 844, 871-72 (1997) (vague speech restrictions impose "obvious chilling effect on free speech."). Ostrewich testified that she felt "violated" by the election worker's demand, Exh. 1 (Ostrewich Dep. 46:25), and will not wear her Houston Fire Fighters t-shirt or similar apparel to the polls again until she receives a favorable decision from this Court, precisely because she cannot reasonably tell what apparel is permitted under the electioneering statutes and what is forbidden, *id*. at 54:14-16, 98:24-99:2. *See FCC*, 567 U.S. at 253-54. Finally, the statutes engender arbitrary

and discriminatory enforcement. *See City of Chicago v. Morales*, 527 U.S. 41, 52-60 (1999) (law vaguely barring loitering for "no apparent purpose" held unconstitutional in part due to the discretion it gave police to apply the prohibition). They enable tens of thousands of "low-level administrative officials to act as censors, deciding for themselves which expressive activities to permit." *Eaves*, 601 F.2d at 822. There is "no authority lying in a federal court to conduct a narrowing of a vague state regulation." *Service Employees Int'l Union, Local 5 v. City of Houston*, 595 F.3d 588, 597 (5th Cir. 2010). The electioneering statutes are unconstitutionally vague.

CONCLUSION

This Court should grant summary judgment in favor of Plaintiff Jillian Ostrewich. The Court should issue a declaration that Tex. Elec. Code §§ 61.003, 61.010, and 85.036 are facially unconstitutional under the First Amendment, unconstitutional under the First Amendment as applied to Plaintiff, substantially overbroad, and void for vagueness in violation of the Fourteenth Amendment. The Court should enjoin Defendants from enforcing Tex. Elec. Code §§ 61.003, 61.010, and 85.036, award Plaintiff nominal damages in the amount of $1.00, and grant other relief as is just and proper.

DATED: September 9, 2020.

Respectfully submitted:

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CERTIFICATE OF SERVICE

On September 9, 2020, I electronically submitted the foregoing document with the clerk of the court for the U.S. District Court, Southern District of Texas, using the electronic case filing system of the court. I hereby certify that I have served all counsel of record electronically.

/s/ Wencong Fa
WENCONG FA

CERTIFICATE OF CONFERENCE

I hereby certify that counsel for all parties conferred by telephone on August 19, 2020, and could not reach an agreement about the disposition of this motion. Defendants oppose the relief requested in the motion.

/s/ Wencong Fa
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