No. ____

In The
Supreme Court of the United States

JILLIAN OSTREWICH,

Petitioner,

v.

TENESHIA HUDSPETH, in her official capacity as Harris County Clerk; JANE NELSON, in her official capacity as Secretary of State of Texas; KEN PAXTON, in his official capacity as Attorney General of Texas, and KIM OGG, in her official capacity as Harris County District Attorney.

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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Questions Presented

The First Amendment requires that electioneering statutes that ban certain voter apparel in polling places contain "objective, workable standards" that are "capable of reasoned application" and do not rely on election workers' "mental index of platforms and positions" of every candidate, political party, and measure on the ballot. *Minnesota Voters Alliance v. Mansky*, 138 S.Ct. 1876, 1888, 1892 (2018). When considering polling place censorship, the decision below omitted the "capable of reasoned application" factor and its corollary that the government cannot rely on election workers' background knowledge or media consumption to determine "what may come in [and] what must stay out." *Id.* at 1891–92. The questions presented are:

1. Does a state violate the First Amendment when it censors voters' t-shirts with a union logo in a polling place because the union took a position on a ballot measure?

2. On a fully developed record of heavy-handed and haphazard censorship, including arresting, detaining, and turning away voters, does a state's censorship of voters wearing apparel without reference to anything on the ballot violate the First Amendment?

3. Is the Texas Secretary of State, the chief elections officer in the state, immune from suit seeking injunctive relief from unconstitutional elections statutes because she does not personally enforce them?

Parties to the Proceedings and Rule 29.6

Petitioner Jillian Ostrewich was plaintiff, appellant, and cross-appellee in the lower courts.

Respondent Teneshia Hudspeth is named in her official capacity as Harris County Clerk. She and her predecessors, including Harris County Elections Administrators, Clifford Tatum, Isabel Longoria, and Chris Hollins, were defendants, appellees, and cross-appellants below.

Jane Nelson is named in her official capacity as Secretary of State of Texas. She and her predecessors, David Whitley, Ruth R. Hughs, and John B. Scott, were defendants, appellees, and cross-appellants below.

Ken Paxton is named in his official capacity as the Attorney General of Texas. He and interim attorneys general, John B. Scott and Angela Colmenero, were defendants, appellees, and cross-appellants below.

Kim Ogg is named in her official capacity as Harris County District Attorney. She was a defendant and appellee below.

None of the parties are corporate entities.

Related Proceedings

Ostrewich v. Hudspeth, No. 4:19-cv-00715, 2021 WL 4170135 (S.D. Tex. Sept. 14, 2021) (magistrate's report and recommendation).

Ostrewich v. Hudspeth, No. 4:19-cv-00715, 2021 WL 4480750 (S.D. Tex. Sept. 30, 2021) (district court order adopting magistrate's report in full).

Ostrewich v. Tatum, No. 21-20577, 72 F.4th 94 (5th Cir. June 28, 2023).

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Petition for a Writ of Certiorari

Jillian Ostrewich respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Fifth Circuit.

Opinions Below

The decision of the Fifth Circuit Court of Appeals is published at 72 F.4th 94 (5th Cir. 2023) and reprinted at App.1a. The order of the district court for the Southern District of Texas is unpublished and reprinted at App.24a. The magistrate's recommendation that was adopted in full by the district court is unpublished and reprinted at App.27a. The Fifth Circuit's order denying rehearing en banc is unpublished and reprinted at App.74a.

Statement of Jurisdiction

The lower courts had jurisdiction over this case under the First Amendment to the United States Constitution, 42 U.S.C. § 1983, 28 U.S.C. § 1331 (district court), and 28 U.S.C. § 1291 (Fifth Circuit). The Fifth Circuit entered final judgment on June 28, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1). Justice Alito granted an extension of time to file a Petition for Writ of Certiorari up to and including November 17, 2023.

Constitutional Provision and Statutes at Issue

The First Amendment provides in relevant part, "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I.

Tex. Elec. Code § 61.003, entitled "Electioneering and Loitering Near Polling Place," states in relevant part:

> (a) A person commits an offense if, during the voting period and within 100 feet of an outside door through which a voter may enter the building in which a polling place is located, the person:
>
> * * * * *
>
> (2) electioneers for or against any candidate, measure, or political party.
>
> * * * * *
>
> (b) In this section:
>
> (1) "Electioneering" includes the posting, use, or distribution of political signs or literature.
>
> * * * * *
>
> (c) An offense under this section is a Class C misdemeanor.

Tex. Elec. Code § 85.036, entitled "Electioneering," provides in relevant part:

> (a) During the time an early voting polling place is open for the conduct of early voting, a person may not electioneer for or against any candidate, measure, or political party in or within 100 feet of an outside door through which a voter may enter the building or structure in which the early voting polling place is located.
>
> * * * * *
>
> (d) A person commits an offense if the person electioneers in violation of Subsection (a).

(e) An offense under this section is a Class C misdemeanor.

(f) In this section:

* * * * *

(2) "Electioneering" includes the posting, use, or distribution of political signs or literature.

Tex. Elec. Code § 61.010, entitled "Wearing Name Tag or Badge in Polling Place," provides:

(a) Except as provided by Subsection (b), 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 100 feet of any outside door through which a voter may enter the building in which the polling place is located.

(b) An election judge, an election clerk, a state or federal election inspector, a certified peace officer, or a special peace officer appointed for the polling place by the presiding judge shall wear while on duty in the area described by Subsection (a) a tag or official badge that indicates the person's name and title or position.

(c) A person commits an offense if the person violates Subsection (a). An offense under this subsection is a Class C misdemeanor.

Introduction and Summary of Reasons to Grant the Petition

The First Amendment requires that electioneering statutes that authorize election workers to censor certain voter apparel in polling places contain "objective, workable standards" that are "capable of reasoned application" and do not rely on election workers' "mental index of platforms and positions" of every candidate, political party, and measure on the ballot. *Minnesota Voters Alliance (MVA) v. Mansky*, 138 S.Ct. 1876, 1888, 1892 (2018). This substantive rule of law applies to both facial and as-applied challenges. *Bucklew v. Precythe*, 139 S.Ct. 1112, 1127 (2019). The decision below omits the "capable of reasoned application" factor and its corollary that the government cannot rely on election workers' background knowledge or media consumption to determine "what may come in [and] what must stay out." *MVA*, 138 S.Ct. at 1891–92.

This foundational error resulted in the court's failure to consider *any* of the copious, uncontradicted evidence proving that (1) the statutes were *not* capable of reasoned application, and (2) election workers *do* rely on their own personal, subjective background knowledge and media consumption to censor voter apparel, rendering the statutes "per se unreasonable." *Id.* at 1889, 1892. The First Amendment does not require perfect clarity, but an "indeterminate" policy carries "[t]he opportunity for abuse, especially where [it] has received a virtually open-ended interpretation." *Id.* at 1891 (citation omitted). The Fifth Circuit's failures place it in conflict with other Circuits that analyze speech restrictions using all the *MVA* factors. *See, e.g.*, *Center for*

Investigative Reporting (*CIR*) *v. Southeastern Pennsylvania Transp. Auth.*, 975 F.3d 300, 316–17 (3d Cir. 2020) (policy banning certain ads on buses violated First Amendment where scope of disagreement among those tasked with enforcing the statutes shows "the extent to which the [restriction is] susceptible to erratic application") (citation omitted); *White Coat Waste Project v. Greater Richmond Transit Company*, 35 F.4th 179, 201 (4th Cir. 2022) (city's policy violated First Amendment where even "after years of litigation trying to define [the] policy, it is difficult to say for sure" what it prohibits, which "is the crux of the *Mansky* problem").

The Fifth Circuit further conflicts with *MVA* and multiple circuits by failing to place the burden on the state to prove that its censorship is capable of reasoned application. *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") (emphasis added); *CIR*, 975 F.3d at 314; *Dodge v. Evergreen Sch. Dist. #114*, 56 F.4th 767, 781–82 (9th Cir. 2022); *Cambridge Christian Sch., Inc. v. Florida High Sch. Athletic Ass'n, Inc.*, 942 F.3d 1215, 1245 (11th Cir. 2019). A law capable of reasoned application prevents elections workers from undermining the state's interests through inconsistent application. *MVA*, 138 S.Ct. at 1891. The Fifth Circuit failed to assess whether the Texas statutes undermine rather than further the asserted state interests (they do), placing it in conflict both with *MVA* and the Third, Sixth, and D.C. Circuits that apply the full *MVA* analysis to speech restrictions in nonpublic fora. *See CIR*, 975 F.3d at 314; *Am. Freedom Defense Initiative v. Suburban Mobility Auth. for Regional Transp.*, 978 F.3d 481, 494 (6th Cir. 2020);

Zukerman v. United States Postal Service, 961 F.3d 431, 447 (D.C. Cir. 2020).

Finally, the Fifth Circuit decision improperly dismissed the Texas Secretary of State, the State's chief elections officer, holding that voters may sue only county officials to challenge the constitutionality of state electioneering statutes. This holding conflicts with this Court's decisions, multiple circuits, and uncontradicted evidence that the Secretary's office was deeply involved in the interpretation and application of the electioneering statutes applied to voter apparel both generally and specifically to the union shirt at issue. *See MVA*; *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 564 U.S. 721 (2011); *Meyer v. Grant*, 486 U.S. 414 (1988); *Frank v. Lee*, Nos. 21-8058, 21-8059, and 21-8060, 2023 WL 6966156, at *6–*7 (10th Cir. Oct. 23, 2023); *Mazo v. New Jersey Secretary of State*, 54 F.4th 124 (3d Cir. 2022); *Rideout v. Gardner*, 838 F.3d 65 (1st Cir. 2016); *McArthur v. Firestone*, 817 F.2d 1548 (11th Cir. 1987).

Haphazard and heavy-handed enforcement of electioneering statutes against voters passively wearing apparel remains a problem of nationwide scope. Countless voters are temporarily or permanently deprived of their right to vote by overzealous election workers applying their subjective views as to what t-shirts "relate" to candidates and ballot measures. The standards of nineteenth century voting, when (only) men cast their ballots on a single high-spirited and sometimes rowdy day, bear little resemblance to modern elections conducted in multiple locations over a month's time and often by mail. States must not be permitted to censor voter apparel when the censorship itself causes precisely

the disruption that electioneering statutes are designed to prevent.

Statement of the Case

A. Ostrewich's Union Shirt

In 2017, Houston firefighter Mark Ostrewich brought home a yellow International Association of Fire Fighters "Houston Fire Fighters" t-shirt for his wife, Jillian.

App.30a. She routinely wore it, ROA.590–91; ROA.601; ROA.608, to support her husband, the Houston Fire Department, and the firefighters' union. ROA.32–33; ROA.590–91; ROA.1814.

More than a year later, Houston's Proposition B, an initiative measure concerning firefighter pay, qualified for the November 2018 ballot and the union created new yellow shirts bearing the union logo and "Vote Yes on Prop B." ROA.1774. When Ostrewich went to early voting at the Houston Metropolitan Multi-Service Center on October 24, 2018, she wore her shirt exhibiting *only* the union logo. ROA.611; *see*

also App.81a–82a. An election worker accosted her in the hallway, informing her that she couldn't wear her shirt into the polls because they were "voting on that." ROA.596–97. Consistent with the policy established by Presiding Election Judge Kathryn Gray, ROA.635, the election worker instructed Ostrewich to go to the restroom and turn her shirt inside-out before she would be allowed to vote. ROA.592; ROA.635 (Gray: "Nobody was allowed to vote without first having turned her Houston firefighter's shirt inside out."). "Baffled" and feeling "violated," Ostrewich retreated to the bathroom, turned her shirt inside-out, returned to the line, and voted. ROA.597–98; ROA.600.

B. Texas's Enforcement of Electioneering Statutes

Texas Election Code Sections 61.003, 61.010, and 85.036 are interrelated electioneering statutes that Texas interprets to prohibit voters from wearing certain apparel at the polling place and within a 100-foot buffer zone. Sections 61.003 (applicable on Election Day) and 85.036 (applicable during early voting) prohibit voter apparel if any election worker enforcing the statute deems it "electioneering for or against any candidate, measure, or political party." These laws prohibit apparel related to any candidate, party, or ballot measure from the past, present, or future. ROA.774 ("Vote for Abraham Lincoln" and "Reagan/Bush '84" t-shirts prohibited); ROA.701 (potential future candidates prohibited). Section 61.010 provides 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" within the polling place or buffer zone. The

State did not enact Section 61.010 to duplicate the prohibitions established in Section 61.003, but to prevent poll watchers from skirting the general electioneering statutes by wearing name badges identifying them as representing particular candidates. *See* §§ 61.001(a-1), 33.061(f), 62.003(c) (poll watchers required to wear name tags); ROA.916 (legislative history of Section 61.010 to address poll watcher name badges); ROA.1468 (Handbook for Election Judges and Clerks explaining name tag and badge requirements); App.87a.[1]

The government interprets the statutes broadly to encompass passive forms of electioneering, including voters wearing or displaying hats, t-shirts, buttons, bumper stickers, and so on. ROA.787. A separate statute, Tex. Elec. Code § 61.008, covers "verbal electioneering, . . . a much more serious crime." ROA.786.

1. Thousands of Election Workers Enforce the Statutes

The Secretary of State's Elections Division interprets the meaning of the electioneering statutes in guidance documents and advice provided to county election administrators, election workers, and voters.

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[1] In *MVA*, this Court described Section 61.010 as a "more lucid" example of an electioneering statute, *MVA*, 138 S.Ct. at 1891, mistakenly assuming that Section 61.010 was Texas's general electioneering statute, rather than Sections 61.003 and 85.036, which explicitly govern electioneering yet are never cited. Regardless, the full record developed in this case controls over *MVA*'s *dicta*. *McDaniel v. Sanchez*, 452 U.S. 130, 141 (1981) (*dicta* is not controlling in subsequent case where matter is placed directly in issue).

ROA.769.[2] This guidance aims to "obtain and maintain uniformity in the application, operation, and interpretation" of election laws. ROA.876; ROA.769. But when election workers and voters ask Elections Divisions staff how to apply the electioneering statutes to specific apparel, they usually decline to state what may come in to the polling place and what must stay out. *See* ROA.944–45 (refusal to state whether firefighters can vote in uniform with Houston's Proposition B on the ballot); ROA.923–31 (refusal to state whether Black Lives Matter sign at a polling location is electioneering); ROA.933–34 (refusal to state whether "Vote the Bible," "vote atheist," or "vote to save Big Bird" t-shirts could be banned); ROA.936–37 (refusal to state whether election workers could wear "patriotic" red, white, and blue). There are a few exceptions. The Elections Division directly instructed 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," ROA.939–42; ROA.772, 774–75; and advised one inquiring poll worker that a Black Lives Matter shirt and "perhaps an NRA [National Rifle Association] shirt" are permitted inside polling places. ROA.986. Yet these individual communications are neither publicly available nor shared with other election officials, and the Elections Division disclaims that its advice is "official or binding." ROA.864–66.

Rather than offering an authoritative interpretation of the laws, the Elections Division

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[2] Keith Ingram, the Elections Division Director and the State's 30(b)(6) witness, testified as to the state's policies and practices in implementing and enforcing the electioneering statutes.

directs local election officials to exercise their own discretion. ROA.781; ROA.884 ("[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."); ROA.879; ROA.783 (Ingram: "[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."). The Elections Division relies on local election officials statewide to interpret and enforce the statutes, particularly regarding local measures and candidates. ROA.783–84; ROA.785 (Ingram: "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").

This reliance is misplaced. Election workers with 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—rely on the State's training to know how to enforce the electioneering statutes. Morris is "plugged in to federal issues," but she "really do[es]n't care about the Houston city issues." ROA.680; ROA.649 ("Sometimes I don't even know what's on the ballot because I'm so busy . . ., so I don't know what T-shirts to kick out."); ROA.630 (Morris "is only informed . . . through training."). Gray doesn't watch much television or keep up on the news; she relies on the State's training rather than her personal knowledge. ROA.631; *see also* App.88a–89a. Barker relies on the sample ballot included in training. ROA.693. And Harris County "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. ROA.885.

Any election judge or election clerk may confront voters about their apparel, deem it illegal electioneering, and force the voter to change or cover the apparel before being permitted to vote. ROA.858–62. Election judges rely on election clerks who are designated "greeters" to patrol the voter line and enforce the electioneering statutes. ROA.663, 662, 720. *See also* ROA.623 (Gray: "I told [the greeters] that nothing political, T-shirts, pens, hats . . . cannot be in the voting place."); ROA.603 (Ostrewich presumed 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.").

The sheer quantity of election workers tasked with monitoring voter apparel combined with the vague dictates of the statutory text and minimal state guidance result in wildly inconsistent enforcement. ROA.679 (Morris: "You're going to get a different answer from different judges."). Some election judges are lenient in their enforcement of the electioneering statutes. ROA.662 (Morris). Others are strict. ROA.630 (Gray); ROA.698–700 (Barker). State and local officials censor apparel "related to" any candidate, measure, or political party which could be on a present ballot. ROA.790; ROA.640–41 (Ingram and Gray: ban union shirts because they are "associated with" a ballot measure); ROA.783 (Ingram: electioneering statutes target voter apparel "associated with" ballot measures); ROA.726 (ban anything with a logo for an "organization that endorses a candidate, political party or a measure"). Election workers also censor logoed apparel if they

perceive the group to be "political." ROA.655; ROA.671–72; ROA.700 (Black Lives Matter); ROA.666 (Morris: "Save the Whales" could be prohibited if they "are pushing a certain agenda."). Election workers censor:

- the name, logo, or slogan of organizations that endorse or support a candidate or issue. ROA.726 ("If someone is wearing a t-shirt, button, bumper sticker, etc. from an organization that endorses a candidate, political party or a measure, it needs to be covered up."); ROA.710 (ban "ACLU" and "NRA" if "actively supporting candidates or propositions"); ROA.643 (ban "NRA" and union logos if organizations endorsed candidate).

- slogans associated with a candidate or party. ROA.654; ROA.672–73, 718, 698 ("Build the Wall"); ROA.678 ("Medicare for All"); ROA.699 (same).

- language that parodies a candidate's slogan. ROA.658–59 ("Make Bitcoin Great Again" in the same colors and font as MAGA).

- the name of political parties that are not recognized in Texas. ROA.965–66 (Tea Party apparel;[3] Socialism USA shirt).

Secretary of State Elections Division Chief Keith Ingram, former Harris County Administrator of Elections Sonya Aston (who held office when Ostrewich's shirt was censored), and election judges Gray, Morris, and Barker offered conflicting

[3] The State permits election judges to censor Tea Party apparel as referencing a "political party" because it contains the word "Party," even though it is not an actual political party. ROA.1582–83.

interpretations of the extent of censorship authorized by the electioneering statutes. Ingram would allow NRA shirts; Aston and Barker would censor them; and Gray and Morris would censor them if there were a gun-related measure on the ballot.[4] Ingram and Gray would allow Black Lives Matter shirts, but Morris and Barker would censor them and Aston might censor them.[5] Aston and Morris would allow a firefighter to vote in uniform; Gray would not.[6]

2. Enforcement Against Union Shirts

On October 24, 2018, an election worker censored Ostrewich's shirt because it was "associated" with support for Proposition B. ROA.2891.

Advised of a growing controversy over censorship of the union shirts, Harris County Elections Administrator Sonya Aston acknowledged that "bright minds may disagree" whether the shirt constitutes electioneering. ROA.728. The day after Ostrewich voted, on October 25, 2018, Aston instructed Harris County election workers to allow voters to wear union shirts that lacked reference to Proposition B. ROA.710; ROA.728 (Aston: People wearing plain union t-shirts may vote without confrontation. "Only those wearing the proposition t-shirts need to cover up."); ROA.1774. While acknowledging that election judges have discretion, Aston believed Ostrewich "should not have been stopped." ROA.709. For the remainder of the early voting period and on Election Day, there is *no*

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[4] ROA.776 (Ingram); ROA.673–74, 676 (Morris); ROA.637, 643 (Gray); ROA.710, 718 (Aston); ROA.700 (Barker).

[5] ROA.792 (Ingram); ROA.655, 671–72 (Morris); ROA.626 (Gray); ROA.717 (Aston); ROA.699 (Barker).

[6] ROA.680 (Morris); ROA.642 (Gray); ROA.710–11 (Aston).

evidence of *any* disturbance in *any* polling place involving voters wearing union shirts (or any other apparel).

3. Enforcement Results in Disruption and Deprivation of the Right to Vote

The Secretary of State advises local election officials to let voters vote even if the voters refuse to remove or cover their apparel. ROA.778 (Ingram: "if they refuse to comply . . . they are supposed to be moved to the front of the line, voted [sic], and get out of the polling place.").[7] Yet election workers frequently disregard this admonition in favor of training that emphasizes censorship of voter apparel, including encouragement to summon law enforcement when a voter balks. Election workers also prevented voters from casting their ballots when they refused to remove their hats or cover their shirts. *See, e.g.*, ROA.624 (Gray: if a voter refuses to cover a shirt, "[t]he voter cannot come in and vote."); ROA.695 (Barker recounts twice that a voter left rather than comply with the election worker's demands regarding apparel); ROA.947–49 (election worker turned away voter who wore a shirt with a capital H similar, but not identical, to Hillary Clinton's logo); ROA.916–21 (voter ordered to remove his MAGA cap left without voting). Election officials do not document these confrontations.

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[7] This policy is found nowhere in the electioneering statutes and undercuts the State's interest. *See MVA*, Tr. of Oral Arg. at 59–60 (Feb. 28, 2018) (Chief Justice Roberts: Governmental interests "might not be terribly strong if someone's about to break the law and you say, okay, go ahead . . . ."), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/16-1435_2co3.pdf.

ROA.697. Thus, there is no way to calculate how many voters are deprived of their right to vote during each election solely because election workers deemed a shirt or hat to be electioneering.

Even when election workers allow voters to cast their ballots, Keith Ingram explained that these confrontations over apparel cause disruption: "[W]hen 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." ROA.782; *see also* ROA.652–53 (Election judge confronted a voter over 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, when an election worker confronts a voter who asserts the right to wear expressive apparel, it "absolutely" holds up the line or causes delays. ROA.668; ROA.696–97.

C. Procedural History

Ostrewich filed her complaint challenging the three electioneering statutes on February 28, 2019. ROA.17–30. The State and County Defendants filed motions to dismiss contending that the case was not justiciable and that Ostrewich failed to state a claim. The district court denied all three motions. ROA.421–26. After extensive discovery, the parties filed cross-motions for summary judgment that were referred to a Magistrate Judge for decision. ROA.2847. The Magistrate's Memorandum and Recommendation concluded that Sections 61.003 and 85.036 are facially unconstitutional under the First Amendment but rejected Ostrewich's facial and as-applied challenges

to Section 61.010 and her request for nominal damages. App.27a–74a. Both sides filed objections. ROA.2900–49; App.76a–89a. Two days later, without addressing the objections, the district court adopted the Magistrate's Recommendation in full. App.24a–25a.[8]

The district court held that the general electioneering statutes, Sections 61.003 and 85.036, were facially unconstitutional as to voter apparel under the First Amendment because they lacked sufficient boundaries. App.25a, 71a–72a ("Sections 61.003 and 85.036 do not give Texas voters notice of what is expected of them in the polling place, and they do not provide election judges with objective, workable standards to reign in their discretion."). The court interpreted Section 61.010 as a narrower subset of the general electioneering statutes because it contains an "on the ballot" limitation. App.60a. The court upheld the constitutionality of Section 61.010 both facially and as-applied to Ostrewich's union shirt because the t-shirt could be "associated" with support for Proposition B. App.62a. It dismissed Ostrewich's evidence of inconsistent and haphazard front-line enforcement as showing only that "individual judges either do not understand the statute or that they have been improperly trained in its application." App.64a. The court characterized election officials' bowing to public pressure to alter enforcement of the electioneering statutes as beneficial "checks and balances." App.62a.

Both sides appealed. The Fifth Circuit first concluded that the Secretary of State and Attorney

[8] For this reason, the description of the district court's holding cites to the Magistrate's Recommendation.

General held sovereign immunity under the Eleventh Amendment and could not be sued because "[o]ffering advice, guidance, or interpretive assistance" lacks a "sufficient connection with enforcing the electioneering laws." App.8a–9a. The court held that the county defendants were properly sued because local officials exercised discretion in enforcing the statutes. App.7a, 9a.

On the merits, the court affirmed the district court's conclusion that Section 61.010 passed constitutional muster both facially and as-applied. In doing so, the Fifth Circuit reduced the multi-factor *MVA* test to a single question: "whether a presiding judge, by enforcing section 61.010, could reasonably restrict Ostrewich from wearing her firefighter t-shirt in order to maintain a polling place free of partisan influence." App.16a–17a. Without citing the record, the court avers that "undisputed evidence" showed that "Ostrewich's firefighter t-shirt expressed support for Prop B" and the election worker had "clear authority" to censor it. App.17a. As to Ostrewich's facial challenge to Section 61.010, the court again truncated the *MVA* test simply to require "objective, workable standards." App.18a. Even while acknowledging that "[t]he record offers many examples of Texas officials inconsistently applying section 61.010," the court held that the "on the ballot" language was sufficiently clear. App.19a. It rejected evidence of disruption caused by enforcement of the statutes in a single sentence, holding that "states may properly respond to potential deficiencies in the electoral process with foresight, rather than react reactively, as long as the response is reasonable." App.20a (citation and internal quotes omitted).

The court then held that Sections 61.003 and 85.036 presented no First Amendment problems. App.20a–21a. Although lacking the "on the ballot" limitation of Section 61.010, the court held that it was more limited than Minnesota's censorship of anything "political" and that this limitation was "clear enough." App.22a. Again failing to cite the record, the court posited that "[w]e certainly do not foresee" that the statutes could be "unconstitutional in 'a substantial number' of their applications." App.22a. Having upheld all three statutes, the court denied Ostrewich's claim for nominal damages. App.23a.

The Fifth Circuit denied Ostrewich's petition for rehearing en banc. This petition follows.

Reasons to Grant the Petition

I. The Decision Below Conflicts with *MVA* and Other Circuits Applying the "Capable of Reasoned Application" Standard

A. The Fifth Circuit Approved Unbridled Censorship of Voter Apparel By Ignoring the Constitutional Standards Established by This Court

Speech restrictions inside of a polling place are invalid when they are unreasonable in light of the purpose served by the forum. *MVA*, 138 S.Ct. at 1886. Minnesota's law prohibiting voters from wearing a "political badge, political button, or other political insignia" into polling places was unreasonable because it did not provide election judges with "objective, workable" standards. *Id*. at 1891. The unmoored use of the word "political," combined with Minnesota's "haphazard" interpretation in official guidance, invited erratic enforcement by election

workers. *Id*. at 1888. A restriction is unreasonable if it is not "capable of reasoned application" and lacks a "sensible basis for distinguishing" speech that is allowed and speech that is prohibited, *id*. at 1888, 1892. Under *MVA*, a state's reliance on election workers' individual knowledge is *per se* unreasonable: "A rule whose fair enforcement requires an election judge to maintain a mental index of the platforms and positions of every candidate and party on the ballot is not reasonable." *Id*. at 1889.

The decision below doesn't acknowledge or address the "capable of reasoned application" element, a plain error[9] that conflicts with Circuit and state supreme court cases that correctly apply *MVA*. The "capable of reasoned application" factor was dispositive in *MVA*. The *MVA* plaintiffs proved the law was incapable of reasoned application with evidence showing how it was applied to them, and how it would be applied in realistic hypothetical situations. 138 S.Ct. at 1891. Ostrewich similarly submitted ample uncontradicted evidence to prove this element of her claim. The Fifth Circuit ignored it all, lacking a single citation to a record spanning over 3,000 pages. The record cannot be so easily cast aside. *See NLRB v. Columbian Enameling & Stamping Co.*, 306 U.S. 292, 303 (1939) (courts must not "ignore the record and . . . shut our eyes to the realities"); *Scott v. Harris*, 550 U.S. 372, 380 (2007) ("When opposing parties tell two different

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[9] *See Romano v. Howarth*, 998 F.2d 101, 104–07 (2d Cir. 1993) (plain error to use wrong legal test to determine liability for excessive force); *Ivey v. Wilson*, 832 F.2d 950, 954–55 (6th Cir. 1987) (plain error to use wrong legal test to determine liability for cruel and unusual punishment); *United States v. Nkome*, 987 F.3d 1262, 1269 (10th Cir. 2021) (legal error when court applied the wrong test).

stories, one of which is blatantly contradicted by the record, . . . a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment."); *Dobbs v. Zant*, 506 U.S. 357, 358 (1993) (record is an important "safeguard against arbitrariness and caprice"); *Will v United States*, 389 U.S. 90, 105 (1967) (Court relies on record evidence to reveal patterns and practices).

A circuit court may not rewrite this Court's formulation of a constitutionally based test. *See Sullivan v. Louisiana*, 508 U.S. 275, 277 (1993) (constitutional error to use wrong definition of reasonable doubt). For example, in *Pakdel v. City and County of San Francisco*, 141 S.Ct. 2226, 2228 (2021), this Court summarily vacated and remanded a Ninth Circuit decision that applied a ripeness test "at odds with 'the settled rule'" set forth in *Knick v. Township of Scott*, 139 S.Ct. 2162, 2167 (2019). In *CNH Industries N.V. v. Reese*, 138 S.Ct. 761, 763, 765–66 (2018), the Court vacated and remanded because the Sixth Circuit's decision "cannot be squared" with controlling precedent decided three years before. *See also Marmet Health Care Center, Inc. v. Brown*, 565 U.S. 530, 532 (2012) (vacating and remanding where lower court "was both incorrect and inconsistent with clear instruction in the precedents of this Court"); *DL v. Dist. of Columbia*, 924 F.3d 585, 593 (D.C. Cir. 2019) (district court abused discretion with its "clear misapplication of legal principles" and "disregard [of] record evidence.").

The Fifth Circuit's disregard of *MVA*'s protection of First Amendment rights extended to its failure to assign the burden of proof to the state. *See 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") (emphasis added). This deepens the conflict with other circuits. *See CIR*, 975 F.3d at 314 ("[T]he *government* actor bears the burden of 'tying the limitation on speech to the forum's purpose.'") (citation omitted); *Dodge*, 56 F.4th at 781–82 (*government* must prove that speech in a nonpublic forum is disruptive to justify censoring it); *Cambridge Christian School*, 942 F.3d at 1245 (*state* had burden to produce a "reasoned explanation" or "other support" for content-based restriction in a nonpublic forum that was applied arbitrarily and haphazardly); *People for the Ethical Treatment of Animals v. Tabak*, No. 21-cv-2380, 2023 WL 2809867, at *10 (D.D.C. Mar. 31, 2023) (*government* must show that its statute passes all three *MVA* factors), *appeal filed* 2023 WL 2809867 (D.C. Cir. May 16, 2023). When courts consider challenges to regulations directed at "intangible 'influence,'" states must produce "specific findings" to support their interests. *Burson v. Freeman*, 504 U.S. 191, 209 n.11 (1992). This burden is *not* lessened unless the speech restriction threatens physical interference with the act of voting or interferes with the act of voting itself (such as preventing overcrowded ballots). *Id.*; *Frank*, 2023 WL 6966156, at *13 (If the restricted right does not threaten to interfere with the act of voting itself, and is directed solely to intangible "influence" or similar election-related conduct, "[s]tates must come forward with more specific findings to support [the] regulation[].") (citing *Burson*). Neither circumstance modifying the burden of proof exists here. And the State produced no such evidence.

B. The Fifth Circuit's Misapplication of *MVA* Conflicts with the Third, Fourth, Sixth, Eleventh, and D.C. Circuits

All other circuits applying *MVA* consider evidence of on-site enforcement, including reasonable hypotheticals, to support their holdings. For example, the Third Circuit invalidated a restriction on bus advertisements that "contain political messages" by considering responses to hypotheticals that highlighted "the extent to which the [restriction was] susceptible to erratic application." *CIR*, 975 F.3d at 316. The D.C. Circuit relied on the government's counsel's difficulties distinguishing between stamp designs that were "politically oriented" and those that were not, in holding that the U.S. Postal Service's prohibition on customized "politically oriented" stamp designs was facially unconstitutional under the First Amendment. *Zukerman*, 961 F.3d at 450 (relying on responses to hypothetical applications because, "if a regulation on speech does not provide government decision-makers with objective, workable standards, the risk of unfair or inconsistent enforcement, and even abuse is self-evident") (citing *MVA*, 138 S.Ct. at 1891; cleaned up). Although statutes might survive "one or two" inconsistencies, a vast scope of disagreement among those tasked with enforcing them shows "the extent to which the [restriction is] susceptible to erratic application." *CIR*, 975 F.3d at 316–17.

The decision below conflicts with the Sixth Circuit's application of *MVA* in *American Freedom Defense Initiative v. Suburban Mobility Authority for Regional Transportation (SMART)*, 978 F.3d 481 (6th Cir. 2020), holding that SMART's ban on "political"

advertisements on buses failed *MVA*'s requirement of workable standards. Like the Elections Division in this case, SMART declined to offer guidelines for enforcement, depending on officials' "common sense." *Id.* at 495. The court considered evidence that officials "had to apply the ban on the fly on a 'case-by-case basis'" and concluded "that [*MVA*'s] reasonableness requirement for nonpublic forums has greater teeth and compels states to adopt "a more discernible approach." *Id*. at 497 (citations omitted). *See also Ison v. Madison Local Sch. Dist. Bd. of Educ.*, 3 F.4th 887, 895 (6th Cir. 2021) (evidence contradicting government's characterization of speaker's comments and clarifying government's interpretation of policy prohibiting "antagonistic," "abusive," and "personally directed" speech supported holding that policy violated First Amendment).

Other circuits similarly rely on record evidence to determine whether state actors exercise unfettered discretion that results in viewpoint discrimination. *See St. Michael's Media, Inc. v. Mayor and City of Council of Baltimore*, 566 F.Supp.3d 327, 371, 375 n.30 (D. Md. 2021), *aff'd* No. 21-2158, 2021 WL 6502219 (4th Cir. Nov. 3, 2021) (court sought facts as to any existing standards governing city's discretion to permit use of its performance venue, but the city "provided no such facts or standards" and its "ad hoc, standard-free approach" therefore likely violates the First Amendment); *League of Women Voters of Florida Inc. v. Florida Secretary of State*, 66 F.4th 905, 946 (11th Cir. 2023) (law prohibiting people from conduct that has the "effect of influencing" a voter is unconstitutionally vague when election supervisors testified that "they and their staff would struggle to

make the requisite judgment call, which could lead to arbitrary enforcement").

The district court viewed Texas election officials being swayed by public pressure in the exercise of their discretion to censor voter apparel as beneficial "checks and balances." App.62a–63a. Unsurprisingly, election officials reacted differently depending on their sympathies with the pressure brought to bear. Election officials acceded to public pressure to stop censoring the union shirts in this case, ROA.728; ROA.1954, and at the same time, they firmly resisted public pressure to stop censoring MAGA hats when Donald Trump was not on the ballot. ROA.940; ROA.772, 774–75; ROA.1930 (voter not allowed to vote and threatened with arrest for wearing a MAGA hat in 2018 polling place); ROA.1948 (election workers called police and detained a voter for two hours because of MAGA hat in 2018). Inconsistent enforcement inevitably results in viewpoint discrimination, *MVA*, 138 S.Ct. at 1888, which is unconstitutional in any forum. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985); *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 763–64 (1988) (The danger of "viewpoint censorship" is "at its zenith when the determination of who may speak and who may not is left to the unbridled discretion of a government official."); *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 133 (1992) (Where a state actor has unreviewable discretion and "[n]othing in the law or its application prevents the official from encouraging some views and discouraging others through [] arbitrary application," the speech restriction violates the First Amendment.). All the evidence points to such viewpoint

discrimination here, which should "end the matter." *Iancu v. Brunetti*, 139 S.Ct. 2294, 2302 (2019).

Even a modest amount of evidence can be constitutionally determinative. *Gooding v. Wilson*, 405 U.S. 518, 521, 528 (1972) (citation omitted) (state statute forbidding "opprobrious" and "abusive" language was unconstitutionally vague because its lack of standards was "easily susceptible to improper application") (citation omitted); *id.* at 529 (Burger, C.J., dissenting) (majority's decision rested on statute's application "in a few isolated cases"). *Cf. Chalifoux v. New Caney Indep. Sch. Dist.*, 976 F.Supp. 659, 668–69 (S.D. Tex. 1997) (to avoid vagueness, a school policy prohibiting "gang-related" apparel must specifically identify prohibited items to avoid giving enforcement officers unbridled discretion to decide what is "gang-related"); *InterVarsity Christian Fellowship/USA v. Bd. of Governors of Wayne State Univ.*, 534 F.Supp.3d 785, 820 (E.D. Mich. 2021) (striking down collegiate "non-discrimination" policy based on an "uncontested record [that] shows that Defendants have applied a policy that lacks objectivity and is enforced on an inconsistent basis"); *People for the Ethical Treatment of Animals (PETA) v. Gittens*, 215 F.Supp.2d 120, 131 (D.D.C. 2002) (arts commission's exclusion of PETA's art show submission was "inherently unreasonable" in the limited public forum because the only standard was whether submissions were "art"—a standard inconsistently applied). Here, the government offered *no* evidence to rebut the comprehensive record of arbitrary and erratic censorship. The Fifth Circuit's unquestioning deference to the unbridled discretion of thousands of election workers permits continued censorship in violation of the First Amendment.

II. The Decision Below Conflicts with *MVA* and Other Circuit Decisions Requiring That Censorship Serve, Rather than Undermine, a Legitimate Purpose

States may enact carefully delineated statutes to prevent electioneering within a polling place to "ensure that partisan discord does not follow the voter up to the voting booth, and distract from a sense of shared civic obligation at the moment it counts the most." *MVA*, 138 S.Ct. at 1888. However, "if voters experience or witness episodes of unfair or inconsistent enforcement of the ban, the State's interest in maintaining a polling place free of distraction and disruption would be undermined by the very measure intended to further it." *Id*. at 1891. Jillian Ostrewich was a voter, not a candidate or campaign worker. The Texas electioneering statutes must be considered as enforced *against voters* to assess whether they reasonably further the government's interests. *See United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 473 (1995) (banning honoraria for judges or high-ranking officials furthers an interest in preventing the appearance of improper influence but banning honoraria for workers "with negligible power to confer favors" does not); *Guffey v. Mauskopf*, 45 F.4th 442, 445–46, 448 (D.C. Cir. 2022) (restrictions on court administrators' off-duty political speech—including "wearing or displaying partisan badges, signs, or buttons"—violated First Amendment by relying on "novel, implausible, and unsubstantiated" assumptions that *administrators'* speech could "tarnish[] the reputation of the judiciary").

Here, the only disruption was caused by election workers confronting voters about their apparel. There is *no* evidence that plain union shirts caused any distraction or disruption in polling places when they were censored or when they were permitted and *no* evidence of voter-on-voter disruption with regard to *any* apparel. ROA.728; ROA.1954. With almost 30 years' combined experience, election judges Morris, Gray, and Barker have *never* seen voters get into an altercation over apparel. ROA.1593; ROA.1608–09; ROA.651; ROA.1604. The Fifth Circuit ignored this record that the censorship served no purpose whatsoever, conflicting with this Court and others.

When the government fails to show that speech restrictions address an existing problem, the restrictions violate the First Amendment. In *FEC v. Ted Cruz for Senate*, 142 S.Ct. 1638, 1653 (2022), the government violated the First Amendment when it was "unable to identify a single case" of the problem the speech restriction ostensibly remedied. In *Mahanoy Area School District v. B. L. ex rel. Levy*, 141 S.Ct. 2038, 2047 (2021), a school violated a student's First Amendment rights when there was no evidence of likely disruption to classroom activities by the student's social media posts and a school employee testified that she had "[no] reason to think that this particular incident would disrupt class or school activities." *See also Northeastern Pa. Freethought Society v. County of Lackawanna Transit Sys.*, 938 F.3d 424, 439, 442 (3d Cir. 2019) (ban on religious advertisement in public transit buses was unreasonable where government "failed to cite a single debate [among passengers] caused by an ad on one of its buses"); *Eagle Point Educ. Ass'n/SOBC/OEA v. Jackson Cnty. Sch. Dist.*, 880

F.3d 1097, 1105–06 (9th Cir. 2018) (under reasonableness review, speech-restrictive policy violated First Amendment because government produced no evidence that "policies were actually needed to prevent disruption").

Ignoring the record in this case, the Fifth Circuit relied instead on nineteenth century voting irregularities and disruptions. App.2a. Such historical events cannot supplant uncontradicted evidence that election officials' enforcement of the electioneering statutes creates precisely those distractions and disruptions that undermine the State's interests. *See* ROA.782; ROA.653; ROA.668; ROA.696; ROA.799 (Voters accused of wearing illicit apparel can "create a scene that may be even more disruptive to the voters at that location."). The only documented disruptions are caused by *election workers*, not voters, and cannot justify censorship of voter apparel. *See Watters v. City of Philadelphia*, 55 F.3d 886, 897 (3d Cir. 1995) ("Disruption caused by actions independent of the speech at issue cannot be equated with disruption caused by the speech itself.").

Worse, some voters are disenfranchised because of their apparel. The State trains election judges to call law enforcement "for potential breach of peace" if voters resist an order to remove or cover apparel. ROA.1915. Election judges do so. ROA.1877 (Morris: "[W]e're given authority and we are judges. We can call the cops on them and have them removed."); ROA.1925 (Secretary of State circulated newspaper article noting that sheriff's deputies can be called on voters who wear "clothing with political ties"); ROA.1929–30 (voter complaint in 2018 that an election judge threatened to prevent him from voting

and to have him arrested if he did not cover "Trump" on his hat); ROA.1846–47 (viral news coverage of a Texas voter *jailed* for wearing a "Basket of Deplorables" t-shirt in a polling place).

When core First Amendment rights are at stake, courts must not assume factually-provable state justifications such as "disruption." The Fifth Circuit made no effort to assess whether the state proved that its censorship addressed, much less accomplished, any legitimate goal.

III. The Decision Below Conflicts with Cases Holding That Plaintiffs May Sue a State's Chief Elections Officer in Constitutional Challenges to Elections Statutes

Under *Ex parte Young*, 209 U.S. 123, 157 (1908), "state officers c[an] be sued in federal court despite the Eleventh Amendment . . . [if] the officers have 'some connection with the enforcement of the act' in question or [are] 'specially charged with the duty to enforce the statute' and [are] threatening to exercise that duty." Last year, the Fifth Circuit adopted a highly restrictive view of *Ex parte Young*. *See Tex. Alliance for Retired Americans v. Scott*, 28 F.4th 669, 672–73 (5th Cir. 2022) (plaintiff may not sue Secretary of State to challenge repeal of straight-ticket voting); *Lewis v. Scott*, 28 F.4th 659, 662 (5th Cir. 2022) (sovereign immunity barred lawsuit against Secretary of State in challenge to mail-in balloting); *Richardson v. Flores*, 28 F.4th 649, 655 (5th Cir. 2022) ("offering advice, guidance, or interpretive assistance" is not enough to invoke *Ex parte Young*).

The Fifth Circuit's refusal to allow plaintiffs to sue a state's chief elections officer in a constitutional

challenge to state election laws conflicts with decisions of this Court and the Sixth, Eighth, Tenth, and Eleventh Circuits. Minnesota Secretary of State Steve Simon was a named defendant/respondent in *MVA* throughout the federal court proceedings. *See Minnesota Voters Alliance v. Mansky*, docket no. 16-1435. The Arizona Secretary of State defended the constitutionality of a state campaign finance statute in federal court, *Arizona Free Enterprise Club's Freedom Club PAC*, 564 U.S. 721, and the Colorado Secretary of State defended the constitutionality of a state statute prohibiting paid initiative circulators in federal court. *Meyer*, 486 U.S. 414. Other circuits routinely resolve First Amendment challenges to election-related state statutes with state officials named as defendants. "[A] controversy exists not because the state official is himself a source of injury but because the official represents the state whose statute is being challenged as the source of injury." *Wilson*, 819 F.2d at 947 (county district attorney and state Attorney General defended statute prohibiting anonymous distribution of campaign literature).

The Texas Secretary of State is obligated to "obtain and maintain uniformity in the application, operation, and interpretation of the Texas Election Code and other election laws." ROA.876; ROA.769. She "assist[s] and advis[es] election officials by answering . . . questions from voters," ROA.769, and "provides training and answers inquiries for informational purposes regarding the Anti-Electioneering Statutes [that] may from time to time relate to the Anti-Electioneering Statutes' application to communicative content displayed on t-shirts and hats," ROA.474, including "direct training through an online poll worker training platform." ROA.1735.

In other circuits, these functions establish the Secretary of State as a proper defendant. In *League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 466 (6th Cir. 2008), plaintiffs brought multiple constitutional challenges to Ohio's election processes and voting system, naming, among others, the Ohio Secretary of State as a defendant. The Secretary argued she was improperly named because county officials committed the alleged constitutional violations. *Id.* at 475 n.16. The Sixth Circuit held that the Secretary was a proper defendant under *Young* because, as the state's chief election officer, she had authority to control the local officials. *Id. See also Russell v. Lundergan-Grimes*, 784 F.3d 1037, 1043–44, 1048 (6th Cir. 2015) (Kentucky Secretary of State properly named in elections litigation because, despite not administering the challenged statute on a day-to-day basis, she was "empowered with expansive authority 'to administer the election laws of the state'"). The Eighth Circuit agrees. *Missouri Protection and Advocacy Services, Inc. v. Carnahan*, 499 F.3d 803, 807 (8th Cir. 2007) ("Though broad authority to register voters and to administer voting and elections [was] delegated to local 'election authorities,'" the Missouri Secretary of State was the "chief state election official responsible for overseeing of the voter registration process" and a proper defendant.).

In *League of Women Voters of Florida Inc. v. Florida Secretary of State*, 66 F.4th 905, 944 (11th Cir. 2023), an association sued the Florida Secretary of State to challenge an election statute that prohibited soliciting voters who are waiting in line to cast their votes. When the association prevailed in the district court, it argued that the Secretary of State lacked

standing to appeal because he would not personally be walking down the line, talking to voters. Rejecting this argument, the Eleventh Circuit explained that the Secretary need not "bear the primary responsibility for enforcing the solicitation provision to enjoy the requisite interest. The Secretary is not merely a 'concerned bystander' without a 'personal stake in defending [the law's] enforcement.' He has a statutory obligation to uniformly administer elections according to the election code adopted by the Legislature." *Id.* at 945 (citation omitted). *See also Mazo*, 54 F.4th 124 (New Jersey Secretary of State defended statute regulating ballot slogans); *Rideout*, 838 F.3d 65 (New Hampshire Secretary of State defended statute prohibiting ballot selfies); *McArthur*, 817 F.2d 1548 (Florida Secretary of State defended campaign disclosure laws).

In *Frank v. Lee*, the Tenth Circuit held that the Wyoming Secretary of State was properly named in a campaign worker's challenge to a state electioneering statute that bans certain activities and bumper stickers within a buffer zone. The court held that the Secretary of State was the correct defendant because she "has statutory duties and obligations to maintain uniformity in elections, ensure orderly voting, and refer election code violations for prosecution," and therefore "certainly has 'some connection with the enforcement' of Wyoming's prohibition on electioneering too close to a polling place." 2023 WL 6966156, at *6. Moreover, echoing the circumstances of Ostrewich's case, and in clear conflict with the Fifth Circuit decision, the Tenth Circuit noted that in addition to the Secretary of State's statutory duties, "there is evidence that the Secretary of State's office

has specifically fielded calls for advice related to enforcement of the statute." *Id.* at *7.

In Texas, the Secretary of State's Elections Division is the primary source of county election officials' training. ROA.631; ROA.1781–82. These county officials in turn train their poll workers. ROA.779–80; ROA.1446. The Secretary's office provided "written directives, instructions, and opinions relating to the election laws," ROA.1409; ROA.719; ROA.770, plus legal support[10] and resources to election judges through county officials. ROA.1453. The Elections Division requires county officials and front line election workers to conduct their polling places as the State instructs. ROA.1081 (Ingram: "Election judges take an oath to uphold the Election Code" and "if we tell them that the Election Code requires something, we would expect them to be bound by their oath."); ROA.1247 (election judge cannot disregard state's instructions even if she disagreed).

The Secretary of State's Elections Division was deeply involved in the decision-making process by which the union shirts were first censored, then permitted. Elections Division attorneys participated in "multiple phone calls" with county election officials specifically about enforcement against the union t-shirts. ROA.1774. With this guidance, Harris County election administrator Aston trained election judges to conduct the elections in compliance with the state's instructions. ROA.706; ROA.709.

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[10] The Secretary of State assumed the lead role for all defendants in this litigation. ROA.1452; ROA.1455; ROA.1458; ROA.1404; ROA.1409.

Certiorari is warranted to ensure that chief elections officers serving states within the Fifth Circuit are able to defend election laws against constitutional challenges in federal court.

IV. The Issues Are of National Importance

This Court should not stand by when a lower court dismantles constitutional safeguards. The Fifth Circuit decision, ignoring key components of *MVA*, censors vast amounts of voter expression in one of our most populous states. Such censorship is unnecessary. For example, California forbids apparel displaying a candidate's name, likeness, or logo, or a ballot measure's number, title, subject, or logo; but permits apparel bearing campaign slogans and political movement slogans. Memorandum from Jana M. Lean, Chief, California Secretary of State Elections Div., to All Cnty. Clerks/Registrars of Voters (Sept. 28, 2020),[11] *quoted in* Rebecca M. Fitz, *Peering into Passive Electioneering: Preserving the Sanctity of Our Polling Places*, 58 Idaho L. Rev. 270, 284 (2022) ("Examples of campaign slogans or political movement slogans include but are not limited to: Make America Great Again (MAGA), Black Lives Matter (BLM), Keep America Great (KAG), Vote for Science, and Build Back Better. . . . [T]he display of slogans on clothing, face coverings, and/or buttons is not prohibited."). This approach makes sense, because totally silent expression rarely attracts attention. *Hodge v. Talkin*, 799 F.3d 1145, 1169 (D.C. Cir. 2015) ("The passive bearing of [such] a logo or name on a t-shirt, without more, normally would not cause the public to pause and take notice . . . ."); *MVA*, 138 S.Ct.

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[11] https://elections.cdn.sos.ca.gov/ccrov/pdf/2020/september/20222jl.pdf.

at 1887–88 (in general, passive speech is "nondisruptive").

"It is fundamental to our free speech rights that the government cannot pick and choose between speakers, not when regulating and not when enforcing the laws." *Frederick Douglass Found., Inc. v. District of Columbia*, 82 F.4th 1122, 1141 (D.C. Cir. 2023). Texas's enforcement of its electioneering statutes varies widely based on the subjective knowledge of thousands of enforcers contemplating an endless array of passive, visual expression. A voter's union shirt was censored, and she was temporarily deprived of the right to vote, solely because the union supported a ballot measure. This cannot stand.

Conclusion

This Court should grant the petition.

DATED: November 2023.

Respectfully submitted,

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**United States Court of Appeals
for the Fifth Circuit**

No. 21-20577

JILLIAN OSTREWICH,

Plaintiff—Appellant / Cross-Appellee,

versus

CLIFFORD TATUM, *in his official capacity as Harris County Elections Administrator*; JANE NELSON, *in her official capacity as Secretary of State of Texas*; JOHN SCOTT, *in his official capacity as the Attorney General of Texas*,

Defendants—Appellees / Cross-Appellants,

KIM OGG, *in her official capacity as Harris County District Attorney*,

Defendant—Appellee.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:19-CV-715

Before CLEMENT, DUNCAN, and WILSON, *Circuit Judges*.

CORY T. WILSON, *Circuit Judge*:

America's "early elections were not a very pleasant spectacle" for voters. *Burson v. Freeman*, 504 U.S.

191, 202 (1992) (plurality opinion) (quotation omitted). Indeed, in the nineteenth century, polling places were often a place of bedlam: "Sham battles were frequently engaged in to keep away elderly and timid voters," *id.* at 202, "[c]rowds would gather to heckle and harass voters who appeared to be supporting the other side," and "[e]lectioneering of all kinds was permitted," *Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1882–83 (2018). To facilitate more orderly voting, states came to institute a number of reforms, including restrictions on "election-day speech in the immediate vicinity of the polls." *Id.* at 1883 (quotation omitted). "Today, all 50 states and the District of Columbia have laws curbing various forms of speech in and around polling places on Election Day." *Id.*

At issue in this case are three such Texas laws: Texas Election Code sections 61.003, 61.010, and 85.036 (collectively, the "electioneering laws"). Jillian Ostrewich filed this action, alleging that she was unconstitutionally censored under the electioneering laws when she voted in 2018 and that the statutes unconstitutionally "chilled" her right to free speech by criminalizing political expression within polling places. The district court, adopting the magistrate judge's report and recommendation, upheld section 61.010 as constitutional, but concluded that sections 61.003 and 85.036 are facially unconstitutional under the First Amendment. Both sides appealed, contesting jurisdictional issues as well as the merits. Following *Mansky*, we hold that all three electioneering laws pass constitutional muster.

I.

A.

Sections 61.003 and 85.036—which are near duplicates—prohibit "electioneering" near polling places. Section 61.003 states, in relevant part:

> (a) A person commits [a misdemeanor] offense if, during the voting period and within 100 feet of an outside door through which a voter may enter the building in which a polling place is located, the person:
>
> (1) loiters; or
>
> (2) electioneers for or against any candidate, measure, or political party.
>
> . . .
>
> (b) In this section:
>
> (1) "Electioneering" includes the posting, use, or distribution of political signs or literature.

TEX. ELEC. CODE § 61.003. Section 85.036 is substantively the same but applies during the early voting period instead of on Election Day itself. TEX. ELEC. CODE § 85.036. Section 61.010, entitled "Wearing Name Tag or Badge in Polling Place," complements the first two statutes, restricting what a person may wear in a polling place. Section 61.010 reads:

> (a) . . . [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 100 feet of any outside door through which a voter may enter the building in which the polling place is located.
>
> . . .
>
> (c) A person commits an offense if the person violates Subsection (a). An offense under this subsection is a Class C misdemeanor.

TEX. ELEC. CODE § 61.010.

B.

Houston's 2018 election ballot included a proposition ("Prop B") to amend the City Charter to guarantee Houston's firefighters pay parity with the City's police officers. Prop B supporters actively campaigned for the initiative, including through street demonstrations. Many supporters wore distinctive yellow t-shirts that contained a union logo and the words "Houston Fire Fighters." Prop B supporters also wore the shirts while advocating around polling locations.

Jillian Ostrewich, a self-proclaimed "fire wife," and her firefighter husband wore these shirts when they headed to the polls to vote during Houston's early voting period. When Ostrewich reached the front of the voting line, an unidentified election worker pointed at her shirt and told her that "[y]ou are not going to be allowed to vote," because voters were "voting on that." This was consistent with the policy established by the polling location's presiding judge, the official who manages polling locations in Texas. *See* TEX. ELEC. CODE § 32.075(a).[1] For Ostrewich to be

[1] Under section 32.075(a), the presiding judge "shall preserve order and prevent breaches of the peace and violations of this

permitted to vote, the election worker instructed her to go to the restroom to turn her shirt inside-out.[2] Ostrewich complied, then returned to the line and voted. The next day, the Harris County Administrator of Elections advised election workers that only yellow firefighter t-shirts explicitly promoting Prop B needed to be covered up; union-logoed, yellow firefighter t-shirts—like the one Ostrewich had worn—were permissible.

After the election, Ostrewich filed suit, alleging that she was unconstitutionally censored and that Texas's electioneering laws unconstitutionally chilled her right to free speech. She sued both local and state defendants in their official capacities, including the Texas Secretary of State, Texas Attorney General, Harris County Clerk, and Harris County Attorney, (collectively, the "State").[3] After discovery, both Ostrewich and the State moved for summary judgment. The case was assigned to a magistrate

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code in the polling place and in the area within which electioneering and loitering are prohibited . . . ." *See also* TEX. ELEC. CODE § 32.071 ("The presiding judge is in charge of and responsible for the management and conduct of the election at the polling place of the election precinct that the judge serves.").

[2] While the election worker was who instructed Ostrewich to change her shirt, the policy originated from the presiding judge. Our analysis therefore refers to the presiding judge as the relevant actor.

[3] Various officeholders have changed during the pendency of this appeal. We have previously granted unopposed motions to substitute and refer to each officer using his or her official title for consistency.

We recognize that the defendants encompass both state and local government officials. However, because the defendants are represented by a single brief, we refer to them collectively as "the State" for simplicity.

judge, who recommended rejecting the State's assertions that Ostrewich's claims were barred by sovereign immunity and, alternatively, that she lacked Article III standing. Addressing the merits, the magistrate judge recommended upholding section 61.010 as constitutional because it was sufficiently limited to apparel "relating to a candidate, measure, or political party appearing on the ballot," but concluded that sections 61.003 and 85.036 were facially unconstitutional under the First Amendment because they contained no such limiting language. The district court adopted the recommendation in full. Both sides timely appealed the ruling.

On appeal, Ostrewich asserts the district court erred in upholding section 61.010 as constitutional, both facially and as applied. The State disagrees, asserting that the district court should not have ruled on Ostrewich's constitutional claims because she lacks standing and the Eleventh Amendment bars her claims against Texas's Attorney General and Secretary of State. On the merits, the State contends all three sections pass constitutional muster.

II.

We review a "district court's judgment on cross motions for summary judgment de novo, addressing each party's motion independently, viewing the evidence and inferences in the light most favorable to the nonmoving party." *CANarchy Craft Brewery Collective, LLC v. Tex. Alcoholic Beverage Comm'n*, 37 F.4th 1069, 1074 (5th Cir. 2022) (quotation omitted). Summary judgment is appropriate if "the evidence shows that there is no genuine issue as to any material fact, and that the moving party is entitled to

judgment as a matter of law." *High v. E-Sys. Inc.*, 459 F.3d 573, 576 (5th Cir. 2006); FED R. CIV. P. 56.

When interpreting Texas statutes, this court employs "the same methods of statutory interpretation used by the Texas Supreme Court." *Camacho v. Ford Motor Co.*, 993 F.3d 308, 311 (5th Cir. 2021). That court instructs that "text is the alpha and the omega of the interpretive process." *Id.* (quoting *BankDirect Cap. Fin., LLC v. Plasma Fab, LLC*, 519 S.W.3d 76, 86 (Tex. 2017)).

III.

Before addressing the merits, we must traverse a couple of threshold issues: the proper parties to this action, and Ostrewich's standing. Both implicate the court's jurisdiction to consider the case. We conclude that Texas's Attorney General and Secretary of State enjoy sovereign immunity, but that Ostrewich has standing to bring her claims against the remaining defendants.

A.

The district court found that the *Ex parte Young*[4] exception to Eleventh Amendment sovereign immunity permitted Ostrewich to bring her claims against Texas's Attorney General and Secretary of State. This was incorrect; the exception only applies if the state officials have a sufficient connection with enforcing the electioneering laws. Per our precedent, they do not.

Eleventh Amendment sovereign immunity "prohibits suits against state officials or agencies that are effectively suits against a state." *City of Austin v.*

[4] 209 U.S. 123, 155–56 (1908).

Paxton, 943 F.3d 993, 997 (5th Cir. 2019). The *Young* exception to this rule "allows private parties to bring suits for injunctive or declaratory relief against individual state officials," but only if those officials have "some connection with the enforcement of the challenged act." *Id.* (cleaned up). To show this required "connection," a state officer must have a "particular duty to enforce the statute in question and a demonstrated willingness to exercise that duty." *Tex. Democratic Party v. Abbott*, 978 F.3d 168, 181 (5th Cir. 2020) (quoting *Morris v. Livingston*, 739 F.3d 740, 746 (5th Cir. 2014)). It is insufficient for a party to show only that a state officer has "a general duty to enforce the law." *Id.* In the *Young* context, "enforcement" means "compulsion or constraint." *Richardson v. Flores*, 28 F.4th 649, 655 (5th Cir. 2022) (quoting *City of Austin*, 943 F.3d at 1000); *see also Tex. All. for Retired Ams. v. Scott*, 28 F.4th 669, 672 (5th Cir. 2022) ("If the official does not compel or constrain anyone to obey the challenged law, enjoining that official could not stop any ongoing constitutional violation.").

We first address the Secretary of State. To overcome her sovereign immunity via *Young*, Ostrewich must show that the Secretary has "some connection with the enforcement" of the "specific election code provisions" at issue. *Richardson*, 28 F.4th at 653–54 (quotation and citation omitted). She may not rely simply on the Secretary's "broad duties to oversee administration of Texas's election laws." *Id.* at 654. The Secretary's "[o]ffering advice, guidance, or interpretive assistance" to local officials does not constitute enforcement. *Id.* at 655.

The district court concluded that the Secretary had a sufficient connection to the enforcement of Texas's electioneer ring laws because she is responsible for training presiding judges to enforce elections law, and she issues election advisories interpreting the electioneering laws, which guide presiding judges' discretionary decisions "under threat of removal." *See* TEX. ELEC. CODE § 32.111 ("The [S]ecretary of [S]tate shall adopt standards of training in election law and procedure[s] for presiding and alternate judges."). But the Secretary's training and advisory duties fall short of the showing required for her to face suit under *Young*.

In Texas, presiding judges are exclusively entrusted with enforcing the electioneering laws at polling locations. *See* TEX. ELEC. CODE § 32.075; *see also supra* n.1. Both parties agree that a presiding judge has absolute discretion in exercising that enforcement power. *See* § 32.075 ("[A] presiding judge has the power of a [state] district judge to enforce order and preserve the peace[.]"). The Secretary, thus, does not directly enforce the electioneering laws, but only provides interpretive guidance. And, because "[o]ffering advice, guidance, or interpretive assistance does not compel or constrain" presiding judges in fulfilling their duties, *Young* does not operate to strip the Secretary of her sovereign immunity. *See Richardson*, 28 F.4th at 655.

The same goes for the Attorney General. Ostrewich must show that he has a particular duty to enforce the electioneering laws and has demonstrated willingness to do so. *See City of Austin*, 943 F.3d at 1000–02. The district court determined that Ostrewich met this burden because there was no evidence that "the

Attorney General will not prosecute violators in the future." The court further determined that the Attorney General had two specific statutory duties that require him to enforce the electioneering laws: Texas Election Code sections 273.001 (triggering an obligatory investigation by local authorities upon receipt of two or more complaints and permitting the Secretary to refer a complaint to the Attorney General for criminal investigation), and 273.021(a) (permitting the Attorney General to prosecute election law offenses).

A recent opinion from the Texas Court of Criminal Appeals is dispositive of this question. In *State v. Stephens*, the Court of Criminal Appeals held that section 273.021(a) violated Texas's Constitution because the Attorney General has no independent authority to prosecute election-related criminal offenses. 663 S.W.3d 45, 47 (Tex. Crim. App. 2021), *reh'g denied*, 664 S.W.3d 293 (Tex. Crim. App. 2022). According to the Court of Criminal Appeals, section 273.021(a)'s plain language merely allows the Attorney General to "prosecute with the permission of the local prosecutor" but, critically, "[he] cannot initiate prosecution unilaterally." *Id.* at 55. Indeed, the section does not require the Attorney General to prosecute election law violations at all—rather, it uses the permissive term "may" instead of a mandatory term like "shall." *Id.* at 54–55. As such, "nothing in [the] statute 'requires' the Attorney General to prosecute election cases." *Id.* at 55. The Attorney General's power related to election laws is therefore limited—he does not have the ability to "compel or constrain local officials" to enforce the electioneering laws, nor can he bring his own proceedings to prosecute election-law violators. *Cf. City of Austin*,

943 F.3d at 1001 (finding application of *Young* warranted when the Attorney General prohibited payments, set rates, and sent letters threatening formal enforcement actions).

This holds true irrespective of section 273.001. As with section 273.021(a), the Attorney General lacks the power to prosecute election-related criminal offenses directly under section 273.001. Instead, section 273.001 simply empowers the Attorney General to *investigate* criminal conduct upon a triggering event—namely, referral by the Secretary. Nothing in this section gives the Attorney General the ability to prosecute, as that power would come from section 273.021(a) if it did not contravene the Texas Constitution. Ultimately, as with the Secretary, the *Young* exception does not strip the Attorney General of his sovereign immunity. *Richardson*, 28 F.4th at 655. The district court erred in holding otherwise. Accordingly, we reverse the district court's holding regarding sovereign immunity and dismiss Ostrewich's claims against the Secretary of State and Attorney General for lack of jurisdiction.

B.

To have standing against the remaining two defendants, Ostrewich must (1) have suffered an injury in fact (2) that is fairly traceable to the challenged action of one of the remaining defendants and (3) that will likely be redressed by a favorable decision. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992). Ostrewich alleges two injuries: First, an election worker—while enforcing the electioneering laws—unconstitutionally censored her speech by instructing her to turn her firefighter t-shirt inside-out; second, the electioneering laws

unconstitutionally chilled her speech. The State argues neither injury is sufficient to confer standing, maintaining that the first is not traceable to a named defendant, and the second is not an injury-in-fact. We disagree; Ostrewich's allegation that Texas's electioneering laws unconstitutionally chilled her speech establishes standing.

In the pre-enforcement context, this court has repeatedly held that chilling a plaintiff's speech is a constitutional harm adequate to satisfy the injury-in-fact requirement. *E.g.*, *Speech First, Inc. v. Fenves*, 979 F.3d 319, 330–31 (5th Cir. 2020) (collecting cases). A plaintiff sufficiently pleads such an injury when she "(1) has an 'intention to engage in a course of conduct arguably affected with a constitutional interest,' (2) [her] intended future conduct is 'arguably proscribed by the policy in question,' and (3) 'the threat of future enforcement of the challenged policies is substantial.'" *Id.* at 330 (cleaned up) (quoting *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 161–64 (2014)).

The State argues that Ostrewich fails to "show a threat of future enforcement" because she provides no evidence that she—or any Texas voter—has or will ever face a credible threat of prosecution for violating the electioneering laws. But the State's argument is refuted by *Speech First*, where we explained that for pre-enforcement challenges to newly enacted or "non-moribund" statutes restricting speech, this court "assume[s] a credible threat of prosecution in the absence of compelling contrary evidence." *Id.* at 335; *see also id.* at 331 ("It is not hard to sustain standing for a pre-enforcement challenge in the highly sensitive area of public regulations governing bedrock political

speech.").[5] Ostrewich has standing because her "claim is that the [non-moribund] policy causes self-censorship among those who are subject to it, and [her] speech is arguably regulated by the policy[.]" *Id.* at 336–37.

IV.

We now turn to the merits of Ostrewich's appeal. The First Amendment prohibits laws "abridging the freedom of speech." U.S. CONST. amend. I. Texas's electioneering laws, forbidding certain forms of electioneering and political apparel, plainly restrict a form of expression within the First Amendment's ambit. But such laws do not always run afoul of the First Amendment. Indeed, states are often faced "with [this] particularly difficult reconciliation: the accommodation of the right to engage in political

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[5] The State tries to circumvent this analysis by arguing that *Speech First* is inapplicable because the electioneering laws are not new. Yet the State completely ignores that *Speech First* also applies to "non-moribund" statutes. 979 F.3d at 335. Moreover, the electioneering laws at issue are routinely invoked by Texas and enforced by election judges. *See, e.g.*, Election Advisory No. 2020-06, https://www.sos.state.tx.us/elections/laws/advisory 2020-06.shtml.

Similarly, the State asserts that it presented "compelling contrary evidence" that Ostrewich does not face a threat of prosecution, as no voter has been prosecuted for violating the law for at least a decade. But "a lack of past enforcement does not alone doom a claim of standing"—more evidence is needed. *Speech First*, 979 F.3d at 336; *see also Ctr. for Individual Freedom v. Carmouche*, 449 F.3d 655, 660 (5th Cir. 2006) ("Controlling precedent . . . establishes that a chilling of speech because of the mere existence of an allegedly vague or overbroad [law] can be sufficient injury to support standing.").

discourse with the right to vote." *Mansky*, 138 S. Ct. at 1892 (quoting *Burson*, 504 U.S. at 198).

The Supreme Court has articulated a "reasonableness" test for dealing with such situations. In *Mansky*, a group of voters, like Ostrewich, challenged a Minnesota electioneering law that prohibited voters from wearing a "political badge, political button, or other political insignia . . . at or about the polling place." *Id.* at 1883. Recognizing that a polling place is a "nonpublic forum," as polling locations have not traditionally been "a forum for public communication[,]" the Court held that Minnesota could reasonably restrict speech—based on content—to further the state's interest "in maintaining a polling place free of distraction and disruption." *Id.* at 1885, 1891 (quotation omitted). Under this flexible standard, states are required only to draw a reasonable line that "articulate[s] some sensible basis for distinguishing what [speech] may come in from what must stay out." *Id.* at 1888. States may entrust election workers, like Texas's presiding judges, with discretion to enforce these restrictions at the polls, so long as the law guides that discretion by "objective, workable standards." *Id*. at 1891.

Here, as in *Mansky*, the electioneering laws regulate conduct within polling places—which, as noted, are nonpublic forums. TEX. ELEC. CODE §§ 61.003 (limiting the restriction to "within 100 feet" of a polling place); 61.010(a) (similar); 85.036(a) (similar). The district court, heavily relying on *Mansky*, determined that section 61.010 is a constitutional restriction on speech because it is limited to specific political apparel "relating to a candidate, measure, or political party appearing on

the ballot," but held sections 61.003 and 85.036 facially unconstitutional because they contain no such limiting principle.

On appeal, Ostrewich contends the district court erred in holding section 61.010 constitutional, and she challenges the constitutionality of all three sections. She contends the electioneering laws were unreasonably applied to her and that they are incapable of reasonable application because they are facially overbroad or vague. The State disagrees, arguing that all three sections pass constitutional muster, both facially and as applied. We agree with the State. We first address section 61.010, which the district court upheld, before turning to sections 61.003 and 85.036, which the court struck down. Last, we address Ostrewich's claim for nominal damages deriving from her alleged constitutional injuries.

A.

Ostrewich contends that section 61.010 violates the First Amendment's Free Speech Clause, both facially and as applied to her wearing the firefighter t-shirt.[6] The district court rejected these arguments and, correctly, held the section constitutional.

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[6] Ostrewich also asserts that the district court erroneously interpreted section 61.010 to apply to Texas voters, rather than poll watchers. but her interpretation does not comport with the statute's unambiguous text: It prohibits, "except as provided by Subsection (b), a person" from wearing a "badge, insignia, emblem, or other similar communicative device." Subsection (b) exempts presiding judges, clerks, and peace officers, which shows that if the Texas Legislature wanted to exempt voters or otherwise limit section 61.010(a) only to poll workers, it knew how to do so. Moreover, other Texas election provisions—

1.

When a litigant brings both facial and as-applied challenges, we generally decide the as-applied challenge first because it is the narrower question. *Buchanan v. Alexander*, 919 F.3d 847, 852 (5th Cir. 2019). So we begin with Ostrewich's contention that the State's enforcement of section 61.010 violates the First Amendment as applied to her sporting her firefighter t-shirt at the polling location. We agree with the district court's conclusion that section 61.010 provided a reasonable and constitutional basis for restricting Ostrewich from doing so.

"Casting a vote . . . is a time for choosing, not campaigning. The State may reasonably decide that the interior of the polling place should reflect that distinction." *Mansky*, 138 S. Ct. at 1887. Thus, to prevent partisan discord, Texas may restrict voter apparel in a polling place during the voting period "as

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including section 61.003, which Ostrewich agrees applies to voters—use "person" without further defining the term.

Ostrewich further argues that the district court's interpretation renders section 61.010 superfluous because sections 61.003 and 85.036 already prohibit persons from electioneering at the polling place and include apparel restrictions. But the three laws can be read congruently. Sections 61.003 and 85.036 broadly prohibit electioneering for any candidate, measure, or political parties, while section 61.010 more narrowly prohibits expression relating to a candidate, measure or political party appearing on the ballot.

Finally, Ostrewich posits that section 61.010's prohibition does not apply to apparel. But the Supreme Court has previously held that laws prohibiting political badges, buttons, or other insignia apply to apparel. *Mansky*, 138 S. Ct. at 1883. As the State argues, "apparel," can certainly contain an "emblem" or "insignia."

long as the regulation on speech is reasonable." *Id.* at 1885. The question is whether a presiding judge, by enforcing section 61.010, could reasonably restrict Ostrewich from wearing her firefighter t-shirt in order to maintain a polling place free of partisan influence.

The district court concluded that Ostrewich's firefighter t-shirt was synonymous with the campaign in favor of Prop B. Moreover, Ostrewich herself testified that she wore the shirt to the polls because she was excited to vote on the measure. From these facts, the district court concluded that Ostrewich's firefighter t-shirt related to a measure appearing on the ballot, so that the presiding judge permissibly censored her to further Texas's interest in ensuring a campaign-free polling place.

Ostrewich argues the district court erred because section 61.010 can only constitutionally proscribe "express advocacy." And wearing her generic firefighter t-shirt did not constitute express advocacy because it did not contain any explicit message supporting Prop B. But a shirt, even one lacking words, can constitute advocacy for a political issue. *See Tinker v. Des Moines Indep. Comm'y Sch. Dist.*, 393 U.S. 503, 504 (1969) (voters donning black armbands to express disapproval of Vietnam war). As explained by the district court, "the State's interest in preventing partisan discord at the voting booth 'may be thwarted by displays that do not raise significant concerns in other situations.'" Based on the undisputed evidence, the district court correctly concluded that Ostrewich's firefighter t-shirt expressed support for Prop B and the presiding judge properly had "clear authority" under section 61.010 to

order Ostrewich to change her shirt. Ostrewich's as-applied challenge to section 61.010 fails.

2.

We move to her facial challenge. *See Buchanan*, 919 F.3d at 854 ("Generally, we proceed to an overbreadth issue only if it is determined that the statute would be valid as applied." (quotation omitted)). In the First Amendment context, litigants can challenge a statute "because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973). Ostrewich lodges such a claim against section 61.010, asserting that the statute does not pass constitutional muster under *Mansky* and is overbroad or vague.

Ostrewich's theories for facial unconstitutionality collapse into each other—essentially, Ostrewich contends that section 61.010 flunks *Mansky*'s reasonableness standard because it does not provide "objective, workable standards" to guide presiding judges' discretion, rendering it overbroad or vague. According to her, because section 61.010 prohibits content "related to" ballot measures, the statute impermissibly relies on presiding judges' discernment of whether speech is sufficiently "related to" ballot issues. Without additional guidance, presiding judges are left to guess at what may "come in from what must stay out," *Mansky*, 138 S. Ct. at 1888, leading to inconsistent and haphazard enforcement. Section 61.010, in Ostrewich's telling, thus fails to provide a sufficient limiting construction, permitting presiding judges to censor arbitrarily any type of apparel they

deem to be related to a candidate, measure, or political party on the ballot.

The State disagrees, asserting that the statute's "related to" proviso constitutes a workable standard. Rather than requiring presiding judges to retain a mental index of various political issues and positions, section 61.010's standard is clear and simple to apply: When a "candidate, measure, or political party" is on the ballot, its "badge, insignia, [or] emblem" is prohibited.

"Clear and simple" may be a bit of an overstatement. The record offers many examples of Texas officials inconsistently applying section 61.010. Nonetheless, while there may be room for interpretation, "[p]erfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." *Mansky*, 138 S. Ct. at 1891 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989)).

In *Mansky*, the Supreme Court was particularly concerned that Minnesota's law lacked *any* limiting principle. By Minnesota's own admission, its statute could apply to ban content promoting any "recognizable political view." *Id.* at 1890. In contrast, section 61.010 only prohibits Texans from wearing apparel related to a candidate, measure, or political party "appearing on the ballot," thereby remedying the *Mansky* Court's concerns about overbroad or vague electioneering restrictions. Indeed, this may explain why the Court explicitly referred to section 61.010 as a law that "proscribes displays (including apparel) in more lucid terms" than the Minnesota statute at issue in *Mansky*. *Id.* at 1891.

As the district court succinctly explained,

> [Section 61.010] targets people who have gathered at a government-designated spot at a government-designated time to perform a civic task—vote. Its restrictions extend no further . . . . By limiting its reach to issues appearing on the ballot, the Texas law provides fair notice of what is expected of people gathered in and around the polling place on election day and during early voting.

Section 61.010 draws the requisite line between permitted and prohibited content to meet *Mansky*'s "reasonableness requirement."

Ostrewich also argues section 61.010 is unconstitutional because the law undermines Texas's interest in ensuring a distraction-free polling place. According to her, section 61.010 counterintuitively fosters polling place distractions by requiring presiding judges to confront voters. But this belies the brash history of electioneering that led every state to adopt some sort of electioneering and secret ballot protections. *See Mansky*, 138 S. Ct. at 1883; *Burson*, 504 U.S. at 202. And even disregarding that history, states may properly "respond to potential deficiencies in the electoral process with foresight, rather than react reactively," as long as "the response is reasonable." *Munro v. Socialist Workers Party*, 479 U.S. 189, 195–96 (1986). We agree with the district court that section 61.010 is constitutional.

B.

Ostrewich next challenges the facial constitutionality of sections 61.003 and 85.036. We agree with the State that the district court erred in

holding the statutes unconstitutional because the court ignored their limiting language.[7] The statutes prohibit "electioneering," which is generally defined to include "political signs and literature." TEX. ELEC. CODE §§ 61.003, 85.036. The district court concluded that the word "political" is unmoored from any limiting language, thus allowing presiding judges broadly, and impermissibly, to ban voters from wearing "political apparel." As the State contends, however, the district court misconstrued the statutes. Indeed, both sections state "a person may not electioneer for or against any candidate, measure, or political party." TEX. ELEC. CODE § 85.036; *see also* § 61.003 (same). The sections then define "electioneering" to include the "posting, use, or distribution of political signs or literature." When read together, these electioneering laws prohibit people from deploying political signs or literature "for or against any candidate, measure, or political party" "within 100 feet of . . . [a] building in which a polling place is located." *Id.* § 85.036. Thus, contrary to the district court's conclusion, sections 85.036 and 61.003 are in fact cabined by a limiting principle that meets *Mansky*'s standard. *See* 138 S. Ct. at 1888.

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[7] The State also asserts that the district court did not need to address these constitutional claims once the court concluded that section 61.010 properly prohibited Ostrewich's firefighter t-shirt in the polling location. But this construes Ostrewich's claims too narrowly, as only related to her firefighter t-shirt. She asserts a broader claim, that all three statutes unconstitutionally chill her right to free expression at polling locations. She may assert such a pre-enforcement challenge as to sections 61.003 and 85.036 because these laws arguably restrain her from wearing expressive apparel unrelated to measures on the ballot. *See Speech First*, 979 F.3d at 336 (holding plaintiffs suffer an injury-in-fact when a censoring regulation chills speech).

The district court also erred in holding that sections 61.003 and 85.036 lack an objective, workable standard. Unlike section 61.010, these two sections are not limited to candidates, measures, or political parties appearing "on the ballot." Without the "on the ballot" limitation, the district court reasoned, sections 61.003 and 85.036 leave presiding judges with impermissible discretion. But in *Mansky*, the Supreme Court endorsed, albeit in dicta, similar prohibitions on "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'" as "clear enough." 138 S. Ct. at 1889. By contrast, the Minnesota law at issue there instructed election workers to restrict *any* political-issue or political-group content. The electioneering laws at issue in today's case are narrower—Texas's presiding judges are limited to excluding content that would constitute electioneering "for or against" candidates, measures, and political parties.

We reach this conclusion mindful that the standard for holding these sections facially unconstitutional is "daunting" and requires us to find that "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Voting for Am., Inc. v. Steen*, 732 F.3d 382, 387 (5th Cir. 2013) (quotation omitted). The Supreme Court has never suggested that electioneering restrictions could only proscribe content related to issues appearing on the ballot, and the district court failed to explain how these two statutes would otherwise be unconstitutional in "a substantial number" of their applications. We certainly do not foresee that they would be. The

district court therefore erred in holding sections 61.003 and 85.036 unconstitutional.

C.

Based on our conclusion that all three electioneering laws pass constitutional muster, such that Texas elections workers had a constitutional basis for prohibiting Ostrewich from wearing her firefighter t-shirt at the polling place, her claim for nominal damages fails as a matter of law. *See Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 802 n.* (2021) ("Nominal damages go only to redressability and are unavailable where a plaintiff has failed to establish a past, completed injury."). We therefore affirm the district court's denial of nominal damages.

V.

In sum: We REVERSE the district court's holding denying Texas's Secretary of State and Attorney General sovereign immunity under the Eleventh Amendment and DISMISS those defendants for lack of jurisdiction. We AFFIRM that Ostrewich has standing to bring her claims against the remaining two defendants. We also AFFIRM the district court's holding that section 61.010 is constitutional. However, we REVERSE and RENDER the district court's holding that sections 61.003 and 85.036 are unconstitutional and instead uphold all three electioneering laws. Finally, we AFFIRM the district court's denial of nominal damages.

Case 4:19-cv-00715 Document 121
Filed on 09/30/21 in TXSD

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JILLIAN OSTREWICH, *et al.*,	§	
	§	
Plaintiffs.	§	CIVIL ACTION
VS.	§	NO. 4:19-CV-00715
TENESHIA HUDSPETH, *et al.*,	§	
	§	
Defendants.	§	

ORDER ADOPTING MAGISTRATE JUDGE'S MEMORANDUM AND RECOMMENDATION

On April 17, 2021, the parties' competing motions for summary judgment (Dkts. 74, 76) were referred to United States Magistrate Judge Andrew M. Edison under 28 U.S.C. § 636(b)(1)(B). Dkt. 111. Judge Edison filed a Memorandum and Recommendation on September 14, 2021, recommending that Plaintiff's Motion for Summary Judgment (Dkt. 74) be granted in part and denied in part, and that Defendants' Motion for Summary Judgment (Dkt. 76) be granted in part and denied in part. *See* Dkt. 118.

On September 28, 2021, all parties filed their Objections. In accordance with 28 U.S.C. § 636(b)(1)(C), this Court is required to "make a de novo determination of those portions of the

[magistrate judge's] report or specified proposed findings or recommendations to which objection [has been] made." After conducting this de novo review, the Court may "accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." *Id.*; *see also* FED. R. CIV. P. 72(b)(3).

The Court has carefully considered the Objections; the Memorandum and Recommendation; the pleadings; and the record. The Court **ACCEPTS** Judge Edison's Memorandum and Recommendation and **ADOPTS** it as the opinion of the Court. It is therefore **ORDERED** that:

(1) Judge Edison's Memorandum and Recommendation (Dkt. 118) is **APPROVED AND ADOPTED** in its entirety as the holding of the Court; and

(2) Defendants' Motion for Summary Judgment (Dkt. 76) is **GRANTED** in part and **DENIED** in part; and

(3) Plaintiff's Motion for Summary Judgment (Dkt 74) is **GRANTED** in part and **DENIED** in part.

Specifically, Ostrewich's challenge to section 61.010 of the Texas Election Code is denied, and her request for nominal damages is denied. Moreover, sections 61.003 and 85.036 are struck down as unconstitutional infringements on the First Amendment right to free speech.

It is so **ORDERED**.

SIGNED at Houston, Texas, this 30th day of September, 2021.

s/ George C. Hanks Jr.
GEORGE C. HANKS, JR.
UNITED STATES DISTRICT JUDGE

Case 4:19-cv-00715 Document 118
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JILLIAN OSTREWICH, *et al.*,	§	
	§	
Plaintiffs.	§	
	§	CIVIL ACTION
VS.	§	NO. 4:19-CV-00715
	§	
TENESHIA HUDSPETH, *et al.*,	§	
	§	
Defendants.	§	
	§	

MEMORANDUM AND RECOMMENDATION

Pending before me are competing motions for summary judgment. Having reviewed the briefing, the record, and the applicable law, I recommend that Plaintiff's Motion for Summary Judgment (Dkt. 74) be **GRANTED** in part and **DENIED** in part, and that Defendants' Motion for Summary Judgment (Dkt. 76) be **GRANTED** in part and **DENIED** in part.

BACKGROUND

Jillian Ostrewich ("Ostrewich") filed this lawsuit alleging that she was unconstitutionally censored under Texas law when she went to vote wearing a Houston firefighter T-shirt during the 2018 election.[1]

[1] At the outset of this lawsuit, there were two plaintiffs: Ostrewich and Anthony Ortiz. On July 9, 2020, Ortiz filed a

She also alleges that Texas law unconstitutionally "chills" her right to free speech by criminalizing political expression within polling places. Both state and local officials are defendants to this lawsuit, including: Texas Secretary of State, Ruth R. Hughs; Texas Attorney General, Ken Paxton; Harris County Clerk, Teneshia Hudspeth; and Harris County District Attorney, Kim Ogg.

A. THE FACTS

Until the early 2000s, Houston firefighters had pay parity with Houston police officers, but that ended when the police agreed to pension and benefit cuts in exchange for raises. Under that agreement, police salaries increased over time while firefighter salaries remained the same. By 2018, senior Houston firefighters earned 25 percent less than senior Houston police officers. After years of negotiation with Houston Mayor Sylvester Turner, the firefighters turned down a 9.5 percent salary increase and decided to take the issue to the voters. Having collected enough signatures on a citizen's initiative, Proposition B was placed on the ballot for the 2018 election. The proposal was to amend Houston's City Charter to read: "The City of Houston shall compensate firefighters in a manner and amount that is at least equal and comparable by rank and seniority with the compensation provided by City Police Officers." Mayor Turner campaigned against the proposition as an unsustainable drain on the City's financial resources. Not to be deterred, Houston firefighters organized around Proposition B and led "block walks" wearing

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Stipulation of Dismissal, and Judge George C. Hanks, Jr., dismissed Ortiz's claims with prejudice the next day. *See* Dkt. 64.

yellow shirts provided by the AFL-CIO affiliated International Association of Firefighters:

Dkt. 76-1 at 164.

Id. at 165.

Ostrewich's husband, Mark, has served as a Houston firefighter for around two decades, and

Ostrewich is a self-proclaimed "fire-wife." Approximately 12–18 months before the November 2018 election, Mark Ostrewich received two of the same yellow T-shirts from his union hall and gave one to his wife. Here is Ostrewich wearing her shirt:

Dkt. 1 at 16–17.

On October 24, 2018, Ostrewich and her husband went to vote during the early voting period at the Metropolitan Multi-Service Center located at 1475 West Gray Street (the "Polling Place"). *See id.* at 7–8. They were wearing their yellow T-shirts. Others stood outside the main entrance to the Polling Place, advocating support for Proposition B while wearing the same yellow T-shirts. The setting looked something like this:

Dkt. 76-5 at 4. This scene was common throughout the City of Houston during the 2018 election.

Dkt. 76-1 at 166.

Inside the Polling Place, voting booths were stationed in various activity rooms, and a line formed along the North Hallway. Ostrewich entered the glass doors at the main entrance of the building and patiently waited in line for her turn to vote. The parties have stipulated that when Ostrewich reached the front of the line, "an election worker told

[Ostrewich] she could not wear the yellow firefighter T-shirt in the polling place." Dkt. 114 at 1. She was then directed to the women's restroom to turn her shirt inside out.

The parties have been unable to identify or otherwise locate the election worker that ordered Ostrewich to turn her shirt inside out, so Ostrewich's testimony is the only summary judgment evidence regarding what transpired there in the North Hallway. At deposition, Ostrewich testified that when she "got to the front of the line, and it was [her] turn to go in" to the rooms containing the voting booths, an election worker pointed to Ostrewich's shirt and said: "You are not going to be allowed to vote until you [flip your shirt inside out] because we're 'voting on that.'" Dkt. 76-1 at 72. Ostrewich requested no further explanation. Instead, she complied with the order, changed her shirt, returned to the line, and voted 10–15 minutes later.

On February 28, 2019, Ostrewich filed suit against state and local authorities alleging that three sections of the Texas Election Code violate the First Amendment to the United States Constitution. In the alternative, she alleges that those three provisions run afoul of the Fourteenth Amendment's due process clause because they are impermissibly vague. Ostrewich seeks a judicial declaration that those three provisions are unconstitutional and an injunction prohibiting Defendants from enforcing them. She also requests nominal damages.

B. TEXAS ELECTION LAW

The three statutory provisions at issue in this case are Texas Election Code §§ 61.003, 61.010, and 85.036.[2]

Section 61.003, titled "Electioneering and Loitering Near Polling Place," provides, in relevant part:

> (a) A person commits an offense if, during the voting period and within 100 feet of an outside door through which a voter may enter the building in which a polling place is located, the person:
>
> (1) loiters; or
>
> (2) electioneers for or against any candidate, measure, or political party.
>
> * * *
>
> (b) In this section:
>
> (1) "Electioneering" includes the posting, use, or distribution of political signs or literature. The term does not include the distribution of a notice of a party convention authorized under Section 172.1114.
>
> (2) "Voting period" means the period beginning when the polls open for voting and ending when the polls close or the last voter has voted, whichever is later.

[2] I will collectively refer to these provisions as the "Electioneering Statutes."

(c) An offense under this section is a Class C misdemeanor.

TEX. ELEC. CODE § 61.003.

Section 61.010, titled "Wearing Name Tag or Badge in Polling Place," provides, in relevant part:

(a) Except as provided in Subsection (b), 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 100 feet of any outside door through which a voter may enter the building in which the polling place is located.

(b) An election judge, an election clerk, a state or federal election inspector, a certified peace officer, or a special peace officer appointed for the polling place by the presiding judge shall wear while on duty in the area described by Subsection (a) a tag or official badge that indicates the person's name and title or position.

(c) A person commits an offense if the person violates Subsection (a). An offense under this subsection is a Class C misdemeanor.

Id. § 61.010.

Section 85.036, titled simply "Electioneering," provides, in relevant part:

(a) During the time an early voting polling place is open for the conduct of early voting, a person may not electioneer for or against any candidate, measure, or political party in or

> within 100 feet of an outside door through which a voter may enter the building or structure in which the early voting polling place is located.
>
> * * *
>
> (d) A person commits an offense if the person electioneers in violation of Subsection (a).
>
> (e) An offense under this section is a Class C misdemeanor.
>
> (f) In this section:
>
> (1) "Early voting period" means the period prescribed by Section 85.001.
>
> (2) "Electioneering" includes the posting, use, or distribution of political signs or literature.

Id. § 85.036. Sections 61.003 and 85.036 are almost verbatim copies of each other. The only difference is that section 61.003 applies on election day and section 85.036 applies during the early voting period.

People who violate any of these provisions may be charged with a Class C misdemeanor by the Attorney General or local prosecutors. *See id.* §§ 273.021–273.022. Criminal investigations into alleged violations can be initiated in several ways. First, receipt of two or more affidavits by registered voters alleging violations of the Election Code triggers an obligatory investigation by local authorities. *See id.* § 273.001(a). Second, the Secretary of State can refer complaints to the Attorney General for criminal investigation. *See id.* § 273.001(d) (citing *id.* § 31.006). Finally, the Attorney General and local prosecutors have authority to initiate criminal investigations at

their discretion. *See id.* § 273.001(b). Although criminal prosecution is authorized, no one has been charged with a criminal violation of the Electioneering Statutes in at least a decade. *See* Dkt. 76 at 14 (citing interrogatory answers provided by Paxton and Ogg).

Beyond criminal prosecution, these statutes are also enforced at the ground level by election judges monitoring the polling places. *See* TEX. ELEC. CODE § 32.075(a) ("The presiding judge shall preserve order and prevent . . . violations of this code in the polling place and in the area within which electioneering and loitering are prohibited."). Election judges have "the power of a district judge to enforce order and preserve the peace, including the power to issue an arrest warrant." *Id.* § 32.075(b). But their discretion is guided by the Secretary of State and local election officials, like the Harris County Clerk. *See id.* § 32.111(a) (directing the Secretary of State to develop a standardized training curriculum for election judges and clerks); § 32.114 (directing local election officials to provide training sessions using the Secretary of State's programs and materials). An election judge who "causes a disruption in a polling location or willfully disobeys the provisions of" the Texas Election Code can be removed, replaced, or reassigned. *Id.* § 32.002(g).

C. *MINNESOTA VOTERS ALLIANCE V. MANSKY*, 138 S. CT. 1876 (2018)

This section explores in detail the Supreme Court's recent decision in *Mansky*, a case in which the high court struck down a Minnesota statute similar to the Texas statutes at issue here. Among other prohibitions, the Minnesota statute forbid people from

wearing a "political badge, political button, or other political insignia . . . at or about the polling place on primary or election day." MINN. STAT. ANN. § 211B.11. Election judges working at polling places throughout Minnesota were responsible for determining whether a particular item was "political" and, therefore, banned by the statute.

During the 2010 election, election workers in Minnesota turned away several Minnesota voters because they were wearing buttons that said "Please I.D. Me" and T-shirts "with the words 'Don't Tread on Me' and the Tea Party Patriots logo." *Mansky*, 138 S. Ct. at 1884. Those voters filed a lawsuit alleging that the Minnesota statute violated the Free Speech Clause of the First Amendment to the United States Constitution. The Supreme Court considered the merits of the case in two parts.

The Supreme Court first recognized that "[a] polling place in Minnesota qualifies as a nonpublic forum." *Id.* at 1886. Because the provision at issue did not "discriminate[] on the basis of viewpoint on its face," the Court then considered whether the ban on political apparel was "reasonable in light of the purpose served by the forum: voting." *Id.* (quotation omitted). The Court held that the statute was unreasonable because it did not provide "objective, workable standards" to guide the discretion of election judges who were responsible for determining whether a particular item should be banned as "political." *Id.* at 1891. In other words, the State failed to "articulate some sensible basis for distinguishing what may come in from what must stay out." *Id.* at 1888. Central to this conclusion was the statute's "unmoored use of the term 'political'" and the "haphazard interpretations"

of the law supplied by Minnesota officials in its 2010 Election Day Policy. *Id.* Minnesota's 2010 Election Day Policy provided five examples of apparel that qualified as sufficiently "political" under the law to justify enforcement by an election judge. The first three explained that election judges could prohibit "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." *Id.* at 1889 (quotation omitted). The Court found these three examples "clear enough," but the next two were troubling. *Id.*

The fourth example was problematic because it advised election judges to prohibit apparel commenting on "any subject on which a political candidate or party has taken a stance." *Id.* This example was unreasonable, the Court explained, because it "require[d] an election judge to maintain a mental index of the platforms and positions of every candidate and party on the ballot." *Id.* The second problematic example allowed election judges to ban "any item promoting a group with recognizable political views." *Id.* at 1890 (quotation omitted). The Court found this example unreasonable because "[a]ny number of associations, educational institutions, businesses, and religious organizations could have an opinion on an 'issue[ ] confronting voters in a given election.'" *Id.* (explaining that whether particular apparel was prohibited under the apparel ban for promoting a group with recognizable political views "turn[ed] in significant part on the background knowledge and media consumption of the particular election judge applying it").

In short, while recognizing that it was necessary to afford election judges "some degree of discretion," the Court held that the Minnesota law was unreasonable because it was not "capable of reasoned application"—i.e., it failed to reign in the discretion of election judges by reference to meaningful standards. *Id.* at 1891–92.

SUBJECT-MATTER JURISDICTION

Defendants first challenge the jurisdiction of this Court. Before addressing that argument, I merely note that the Supreme Court in *Mansky* proceeded to the case's merits without addressing subject-matter jurisdiction. Given the similarity between this case and *Manksy*, it is unlikely that subject-matter jurisdiction is lacking here. *See Int'l Soc. for Krishna Consciousness of Atlanta v. Eaves*, 601 F.2d 809, 820 n.9 (5th Cir. 1979) (citing *Hynes v. Mayor of Oradell*, 425 U.S. 610 (1976) as reinforcing the conclusion that the district court had jurisdiction over the claims because the Supreme Court issued a ruling on the merits). Nonetheless, out of an abundance of caution, I address subject-matter jurisdiction at length here.

"Federal courts are courts of limited jurisdiction." *La. Real Est. Appraisers Bd. v. Fed. Trade Comm'n*, 917 F.3d 389, 391 (5th Cir. 2019) (quotation omitted). To determine the limits of that jurisdiction, "federal courts must look to the sources of their power, Article III of the United States Constitution and congressional statutory grants of jurisdiction." *Tercero v. Tex. Southmost Coll. Dist.*, 989 F.3d 291, 298 (5th Cir. 2021). Article III of the Constitution empowers federal courts to hear "cases" or "controversies" arising under the Constitution. U.S. CONST. art. III, § 2. Defendants argue that jurisdiction is lacking here and ask me to consider: (1) whether

Ostrewich has standing to sue; (2) whether her claim is moot; and (3) whether her claim is ripe for adjudication. *See Choice Inc. of Tex. v. Greenstein*, 691 F.3d 710, 715 (5th Cir. 2012) ("The justiciability doctrines of standing, mootness, . . . and ripeness all originate in Article III's case or controversy language." (quotation omitted)). Paxton and Hughs further argue that, at a minimum, they should be dismissed from this suit under the Eleventh Amendment's sovereign-immunity doctrine.

A. STANDING

There is no case or controversy if the plaintiff does not have standing to sue. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). To establish Article III standing, an individual bears the burden of "satisfy[ing] the trifecta of standing: injury in fact, causation, and redressability." *Voting for Am., Inc. v. Andrade*, 888 F. Supp. 2d 816, 827 (S.D. Tex. 2012). An injury in fact is "an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560 (cleaned up). "[C]ausation and redressability will exist when a defendant has 'definite responsibilities relating to the application of' the challenged law." *Voting for Am.*, 888 F. Supp. 2d at 831 (quoting *K.P. v. LeBlanc*, 627 F.3d 115, 124 (5th Cir. 2010)).

1. Ostrewich has standing to sue Hughs and Hudspeth.

In the First Amendment context, a plaintiff can establish an injury in fact by showing that she was subjected to an enforcement action under the

allegedly unlawful statute. *See Speech First, Inc. v. Killeen*, 968 F.3d 628, 638 (7th Cir. 2020).

It is undisputed that an election worker told Ostrewich to turn her yellow firefighter T-shirt inside out. Defendants argue that this is not an injury in fact because enforcement of the statute does not occur unless a voter is prevented from voting, arrested by the police, or prosecuted by state or local authorities. For example, Defendants contend that "the sole consequence for violating these statutes is that such conduct constitutes a Class C misdemeanor." Dkt. 94 at 10. I reject this position because it diminishes the significance of an election judge's legal authority to unilaterally order an individual voter to remove or cover up articles of expressive clothing within 100 feet of a polling place—as was done here. Because Ostrewich was ordered to refrain from self-expression by an election worker acting under color of state law, she has unquestionably suffered an injury in fact for purposes of Article III standing.

Ostrewich's injury is fairly traceable to Hughs and Hudspeth because they have "definite responsibilities relating to the application of the challenged law." *LeBlanc*, 627 F.3d at 124. For example, as Secretary of State, Hughs is responsible for "adopt[ing] standards of training in election law and procedure for presiding or alternate election judges" and "develop[ing] materials for a standardized curriculum for that training." TEX. ELEC. CODE § 32.111(a)(1)–(2). Moreover, Keith Ingram, the Secretary of State's Election Division Director, testified that election judges have a duty to enforce the Election Code as interpreted by the Secretary of State's office. *See* Dkt. 74-6 at 16. Beyond developing a training regime for

election judges, Hughs also "assist[s] and advise[s] all election authorities with regard to the application, operation, and interpretation of the [Texas Election Code]," including the provisions at issue in this case. TEX. ELEC. CODE § 31.004(a); *see also id.* § 31.003 (mandating that the Secretary of State maintain a uniform application of the Election Code and requiring the Secretary of State to "prepare detailed and comprehensive written directives and instructions" and "distribute these materials to the appropriate state and local authorities" responsible for their administration).

As the Chief Deputy of the Harris County Clerk's Office, Hudspeth "plays a role in the selection and appointment of election judges." Dkt. 74-8 at 27. *See also* TEX. ELEC. CODE § 32.002(c-1)–(e). Accordingly, Hudspeth has authority to "remove, replace, or reassign an election judge who causes a disruption in a polling location or wil[l]fully disobeys" the Election Code's provisions. *Id.* § 32.002(g). Hudspeth is also responsible for training election judges "using the standardized training program and materials developed by" the Secretary of State. *Id.* § 32.114(a).

Ostrewich suffered an injury when an election worker enforcing the Electioneering Statutes ordered her to turn her shirt inside out. This injury is traceable to Hughs and Hudspeth because they are responsible for training the election judges, keeping them informed, and overseeing their enforcement of the Election Code. An order enjoining Hughs and Hudspeth from enforcing the Electioneering Statutes would redress Ostrewich's injury. Ostrewich has standing to sue Hughs and Hudspeth.

2. Ostrewich has standing to sue Paxton and Ogg.

A person who violates the Electioneering Statutes commits a Class C misdemeanor. *See id.* §§ 61.003(c), 61.010(c), and 85.036(e). Although Ostrewich was never investigated for criminal conduct or charged with a criminal violation, the Supreme Court has held that the threat of enforcing a law that infringes on the right to free speech can satisfy the injury-in-fact requirement. *See Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979). That's because "[c]hilling a plaintiff's speech is a constitutional harm adequate to satisfy the injury-in-fact requirement." *Houston Chron. Pub. Co. v. City of League City*, 488 F.3d 613, 618 (5th Cir. 2007). In this pre-enforcement posture, the Fifth Circuit has explained:

> A plaintiff has suffered an injury in fact if he (1) has an intention to engage in a course of conduct arguably affected with a constitutional interest, (2) his intended future conduct is arguably proscribed by the policy in question, and (3) the threat of future enforcement of the challenged policies is substantial.

Speech First, Inc. v. Fenves, 979 F.3d 319, 330 (5th Cir. 2020) (cleaned up).

Intention to engage in a course of conduct arguably affected with a constitutional interest: At her deposition, Ostrewich testified that she would like to wear the yellow firefighter T-shirt to the polls again but is afraid to do so for fear of criminal prosecution. *See* Dkt. 74-1 at 16. Ostrewich's intended future conduct to wear expressive apparel to the polls

clearly implicates a constitutional interest in freedom of speech and association. *See Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 162 (2014) ("Because petitioners' intended future conduct concerns political speech, it is certainly affected with a constitutional interest." (quotation omitted)).

Intended future conduct is arguably proscribed by the policy in question: Defendants contend that even if Ostrewich did wear the shirt, "there is no evidence to suggest that her yellow shirt will constitute electioneering in any future elections." Dkt. 76 at 23. In other words, Defendants take issue with whether Ostrewich can show that her intended future conduct will violate the Electioneering Statutes. This argument misses the mark because "a plaintiff who wishes to challenge the constitutionality of a law [does not have] to confess that he will in fact violate the law." *Driehaus*, 573 U.S. at 164. Indeed, Ostrewich had no intention of violating Texas' political-apparel ban in 2018 when she wore her yellow T-shirt—which expressed only general support for "Houston Fire Fighters" and did not mention Proposition B—and yet her shirt did violate the law. It is arguable that her apparel may do so again. Ostrewich has satisfied the first two elements.

The threat of future enforcement of the challenged policies is substantial: The third element is tricky. Nothing in the summary judgment record shows that people have been charged with violating the Electioneering Statutes in the past. *Cf. Ctr. for Individual Freedom v. Carmouche*, 449 F.3d 655, 660–61 (5th Cir. 2006) (finding a credible threat of future enforcement based on a history of prior enforcement). For example, the record does not

contain an opinion from the Office of the Attorney General that demonstrates the State's intention to charge or prosecute apparel-ban violators in the future. There is also nothing in the summary judgment record showing that Ostrewich was threatened with arrest or prosecution. *Cf. Steffel v. Thompson*, 415 U.S. 452, 459 (1974) (finding credible threat of prosecution where "specific provisions of state law which have provided the basis for threats of criminal prosecution"); *Houston Chron. Pub. Co.*, 488 F.3d at 618 (same). Still, the Supreme Court in *Mansky* proceeded to the merits even though no one had ever been prosecuted for violating Minnesota's electioneering statute. *See Manksy*, 138 S. Ct. at 1887 (Sotomayor, J., dissenting). I believe it is proper to address the argument in full.

The Supreme Court in *Driehaus* found a substantial threat of prosecution where the plaintiff had been found to have already violated a criminal statute, where other violations had been prosecuted before, and where the statute allowed "any person with knowledge of the purported violation to file a complaint" with the Ohio Election Commission. *Driehaus*, 573 U.S. at 164 (quotation omitted). The Court explained that "[b]ecause the universe of potential complainants is not restricted to state officials who are constrained by explicit guidelines or ethical obligations, there is a real risk of complaints from, for example, political opponents." *Id.*

Although there is no summary judgment evidence showing that people have been prosecuted for violating the Electioneering Statutes, there is evidence in the record showing that people have been *arrested* for violating the political-apparel ban and

refusing to comply with an election judge's order. *See* Dkt. 86 at 6. Texas law also requires local authorities to investigate any claimed violation of the Election Code supported by the affidavits of two registered voters. *See* TEX. ELEC. CODE § 273.001(a). In other words, there is a credible threat that Ostrewich could: (1) be arrested at a polling place for violating the apparel ban; or (2) be criminally investigated based on complaints by third parties who are not "constrained by explicit guidelines or ethical obligations." *Driehaus*, 573 U.S. at 164. Additionally, as the Fifth Circuit explained just a few days ago, a district court "may assume a substantial threat of future enforcement absent compelling contrary evidence." *Barilla v. City of Houston*, --- 4th ---, 2021 WL 4128835, at *4 (5th Cir. Sept. 10, 2021). Finally, I must note that, although Paxton and Ogg have not prosecuted any violations of the Texas Election Code, they have never disavowed their authority to do so nor otherwise affirmatively represented that they will not prosecute violations going forward. *See id.* at *5 (finding a substantial threat of enforcement where the City of Houston did not disclaim its intent to enforce the Ordinances in dispute, "and instead stressed the Ordinances' legitimacy and necessity"); *McKay v. Federspiel*, 823 F.3d 862, 869 (6th Cir. 2016) ("We have also taken into consideration a defendant's refusal to disavow enforcement of the challenged statute against a particular plaintiff."). For these reasons, I find a credible threat that Ostrewich may face criminal sanctions under the political-apparel bans. Ostrewich has standing to sue Paxton and Ogg for her pre-enforcement "chilling" injury.

B. MOOTNESS

A federal court has no jurisdiction to resolve a moot claim because a moot claim "presents no Article III case or controversy." *Goldin v. Bartholow*, 166 F.3d 710, 717 (5th Cir. 1999). The Supreme Court has described mootness as "the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." *Arizonans for Off. Eng. v. Arizona*, 520 U.S. 43, 68 n.22 (1997) (quotation omitted). Simply stated, "a case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell v. McCormack*, 395 U.S. 486, 496 (1969). *See also Ctr. for Individual Freedom*, 449 F.3d at 661 ("Generally, any set of circumstances that eliminates actual controversy after the commencement of a lawsuit renders that action moot.").

Although mootness is a bar to federal jurisdiction, the Supreme Court has recognized an exception for "attacks on practices that no longer directly affect the attacking party, but are 'capable of repetition' while 'evading review.'" *Alvarez v. Smith*, 558 U.S. 87, 93 (2009). Ostrewich argues that the "capable of repetition while evading review" exception applies here. To successfully invoke the exception, Ostrewich must show: "(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." *Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 462 (2007) (quotation omitted). As discussed below, Ostrewich's claim

evades review and is capable of repetition. Therefore, her claim, although possibly moot in the traditional sense, is still justiciable.

1. Enforcement of Texas's political apparel ban evades review.

In analyzing the first element—whether the challenged conduct evades review—the Fifth Circuit has explained that "[c]laims need to be judged on how quickly relief can be achieved in relation to the specific claim." *Empower Texans, Inc. v. Geren*, 977 F.3d 367, 370 (5th Cir. 2020). The challenged action here is an election worker's enforcement of allegedly unconstitutional Texas statutes that ban political apparel at polling places.

Ostrewich alleges that an authorized election worker enforced the statutes against her and presented Ostrewich with a choice: either turn her yellow T-shirt inside out or forfeit her right to vote. According to Defendants, Ostrewich's claim became moot as soon as she complied with the order, changed her shirt, and cast her vote. Under this view, the challenged conduct is too short in duration to be fully litigated prior to the cessation of the challenged conduct. Nonetheless, Defendants argue that the challenged conduct is not too short in duration to obtain review because Ostrewich could have obtained relief by (1) requesting an official ruling from the presiding election judge and (2) appealing that decision to a Texas appellate court. *See* Dkt. 94 at 17 (citing TEX. ELEC. CODE § 32.075(c)). But Ostrewich's claim is that the election worker had no constitutional authority to enforce the statute to begin with. Ostrewich isn't challenging the election worker's order; she's challenging the statute that authorizes

election workers to enforce a political-apparel ban that she alleges runs afoul of the First and Fourteenth Amendments. Ostrewich is asking for a district court order declaring the Electioneering Statutes unconstitutional. Nothing in the briefing suggests that the presiding election judge had any authority or discretion to offer that kind of relief. *Cf.* TEX. ELEC. CODE § 32.002(g) ("[T]he county clerk may remove, replace, or reassign an election judge who . . . willfully disobeys the provisions of this code."); Dkt. 74-6 at 16 (Texas Secretary of State Election Division Director explaining that election judges "take an oath to uphold the Election Code," and must comply when the Secretary of State "tell[s] them that the Election Code requires something."). Even if an election judge could have officially ruled on the constitutionality of the Electioneering Statutes, Ostrewich could not have exercised her right to appeal that decision before casting her ballot. Ostrewich's claim evades review.[3] The first element is satisfied.

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[3] Defendants argue that *Empower Texans* supports their position, but I disagree. The challenged conduct at issue in *Empower Texans* was that the Chairman of the Committee on House Administration of the Texas House of Representatives, Charlie Geren, had delayed in ruling on Empower Texans' media-pass applications, which effectively denied its reporters access to the House Floor. *See Empower Texans*, 977 F.3d at 369. The district court dismissed the complaint four days before the end of the regular legislative session. *See id.* at 372. The Fifth Circuit declined to rule on the merits and dismissed the case as moot because the regular legislative session had ended while the appeal was pending and "the possibility of a special session ha[d] all but vanished." *Id.* at 370. The Fifth Circuit noted that Empower Texans could have obtained review of the challenged conduct if it had used those four days to file an expedited notice of appeal. *See id.* (citing FED. R. APP. P. 2; 5th CIR. R. 27.5). But

2. Ostrewich's alleged injury is capable of repetition.

To invoke the "capable of repetition while evading review" exception, Ostrewich must also show that "there is a reasonable expectation" that she "will be subject to the same action again." *Wis. Right to Life*, 551 U.S. at 462 (quotation omitted). The Fifth Circuit has explained that it is "unwilling to dismiss a case as moot when the issues properly presented, and their effects will persist as the restrictions are applied in future elections." *Moore v. Hosemann*, 591 F.3d 741, 745 (5th Cir. 2009) (cleaned up). So, even if Defendants are correct that Ostrewich "has no specific plans to wear her yellow shirt to vote ever again" or that she has no plans to engage in electioneering in the future, Dkt. 76 at 22, Ostrewich's claim is still not moot. *See Moore*, 591 F.3d at 744 (holding "the case was not moot because other individuals certainly would be affected by the continuing existence of the statute" (cleaned up)).

Ostrewich alleges that Texas' political-apparel ban is unconstitutional. She alleges that she suffered a constitutional injury when an election worker enforced the statute against her. Defendants do not dispute that election workers will continue to enforce the Electioneering Statutes in the future. Thus, there is a reasonable expectation that the alleged constitutional violation will happen again. Because Ostrewich has successfully invoked the "capable or repetition, yet evading review" exception to the

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Empower Texans failed to do so. It waited nearly 30 days before filing a notice of appeal, the legislative session ended, and Empower Texans' claim became moot. That's not the case here.

mootness doctrine, her claim is justiciable under Article III.

C. RIPENESS

"[T]o be a case or controversy for Article III jurisdictional purposes, the litigation must be ripe for decision, meaning that it must not be premature or speculative." *Lower Colo. River Auth. v. Papalote Creek II, L.L.C.*, 858 F.3d 916, 922 (5th Cir. 2017) (quotation omitted). The Fifth Circuit has explained:

> A court should dismiss a case for lack of 'ripeness' when the case is abstract or hypothetical. The key considerations are the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration. A case is generally ripe if any remaining questions are purely legal ones; conversely, a case is not ripe if further factual development is required. However, even where an issue presents purely legal questions, the plaintiff must show some hardship in order to establish ripeness.

Choice Inc. of Tex., 691 F.3d at 715 (cleaned up).

Defendants argue that Ostrewich's claims are not ripe for adjudication because she "has no specific plans to wear a yellow shirt to vote again,"[4] and "there is no evidence to suggest that her yellow shirt will constitute electioneering in any future election." Dkt. 76 at 23. But that is of no moment. The issues presented in this case are purely legal questions:

[4] Ostrewich testified at her deposition that she would like to wear the T-shirt to the polling place in future elections but has no specific plans to do so because she does not "know if it's legal to wear that T-shirt into a voting location." Dkt. 76-1 at 82.

(1) whether the political-apparel ban was constitutionally applied to Ostrewich's yellow T-shirt; and (2) whether the political-apparel ban is unconstitutional on its face. No further factual development is required to pass judgment. As discussed above, Ostrewich suffered an injury both when an election worker enforced the political-apparel ban against her and from the overall chilling of her right to free speech and association. As Ostrewich points out, "Texas voters will continue to wear expressive apparel to polling places," and "[e]lection judges will continue to enforce the electioneering statutes against them." Dkt. 92 at 18. There is no speculation required to see that the statute bans political speech. The risk that the Electioneering Statutes unconstitutionally abridge the First Amendment rights of Texans is not hypothetical. This case is ripe.

D. SOVEREIGN IMMUNITY

Paxton and Hughs argue that Ostrewich's claims against them should be dismissed under the doctrine of sovereign immunity. The Eleventh Amendment presupposes "that each State is a sovereign entity in our federal system" and "that it is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent." *Alden v. Maine*, 527 U.S. 706, 729 (1999) (cleaned up). Eleventh Amendment sovereign immunity also "prohibits suits against state officials or agencies that are effectively suits against a state." *City of Austin v. Paxton*, 943 F.3d 993, 997 (5th Cir. 2019). Aside from obtaining the sovereign's consent to litigate, a state's sovereign immunity can be abrogated by the United States Congress under Section V of the Fourteenth

Amendment. *See Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976). The State of Texas has not consented to this suit, and Congress has not abrogated the State's immunity on this issue. To overcome sovereign immunity then, Ostrewich must fit her claim into an exception to the doctrine.

One exception dates back over 100 years. *See Ex Parte Young*, 209 U.S. 123, 157 (1908). "The *Young* exception is a legal fiction that allows private parties to bring suits for injunctive or declaratory relief against individual state officials acting in violation of federal law." *City of Austin*, 943 F.3d at 997 (quotation omitted). To determine whether the *Ex Parte Young* exception applies, courts must consider: (1) whether the named defendants are proper; (2) "whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective"; and (3) "whether the official in question has a sufficient connection to the enforcement of the challenged act." *Id.* at 998 (quotations omitted). The parties devote their briefing to whether the third element has been satisfied.[5]

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[5] Paxton and Hughs are proper defendants because they have the authority to enforce the Texas Election Code. *See City of Austin*, 943 F.3d at 998. Paxton has the authority to criminally charge and prosecute people who violate the Election Code. Hughs has the authority to interpret the Election Code, train election judges on how to enforce the Election Code, and refer complaints to the Attorney General for criminal investigation. *See* TEX. ELEC. CODE §§ 273.001(b), 273.001(d), and 273.021–273.022.

It is also clear that Ostrewich's complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective. *See* Dkt. 1 at 10–14 (alleging constitutional violations and seeking declaratory relief, injunctive relief, and nominal damages); *LeBlanc*, 729 F.3d at 439 ("A suit is not

The third element is a source of confusion throughout the Fifth Circuit and even among the Circuit's panels. *See, e.g.*, *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 400 n.21 (5th Cir. 2020) ("Our decisions are not a model of clarity on what 'constitutes a sufficient connection to enforcement.'" (quoting *City of Austin*, 943 F.3d at 999)). The parties offer *City of Austin* as a case that might shed light on the issue, but I'm not so sure. The problem with *City of Austin* is that it seems to conflate elements one and three. *Compare* 943 F.3d at 998 ("Attorney General has the authority to enforce" the challenged statute), *with id.* at 1000 n.1 (noting that "this is an odd type of enforcement authority"), *id.* at 1001 (explaining that Attorney General's ability to intervene in a lawsuit and enforce state law has no"overlapping facts with this case [and is not] even remotely related to the ordinance"), *and id.* at 1002 (finding not even a "scintilla of enforcement" by the Attorney General). Indeed, the Fifth Circuit held "that Attorney General Paxton is not subject to the *Ex Parte Young* exception because our *Young* caselaw requires a higher showing of 'enforcement' than the City has proffered here." *Id.* at 1000. If that's right, *City of Austin* has more to do with an inquiry into whether the first element has been satisfied, not the third.

Different panels writing for the Fifth Circuit have recognized at least three ways in which the third element's sufficient-connection requirement can be established. First, Ostrewich can put forth some

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'against' a state" for purposes of sovereign immunity "when it seeks prospective, injunctive relief from a state actor, in her official capacity, based on an alleged ongoing violation of the federal constitution.").

evidence showing that Paxton and Hughs have some authority to compel compliance with the law or constrain a person's ability to violate the law. *See Tex. Democratic Party*, 961 F.3d at 401. Ostrewich could also provide some evidence showing that Paxton and Hughs have a duty to enforce the statute in question and a "demonstrated willingness" to enforce the statutes. *Id.* (quotation omitted). Finally, Ostrewich can demonstrate a sufficient connection by putting forth evidence showing "some scintilla of affirmative action by the state official." *Id.* (quotation omitted). Put another way, if an "official can act, and there's a significant possibility that he or she will, the official has engaged in enough compulsion or restraint to apply the *Young* exception." *Id.* (cleaned up).

Both Paxton and Hughs can act to enforce the ban on wearing political apparel to polling places during early voting and on election day. *See* TEX. ELEC CODE §§ 273.001(b), (d), and 273.021–273.022. But that's not enough. Ostrewich must put forward some evidence showing at least a "scintilla of affirmative action by" Paxton and Hughs. *Tex. Democratic Party*, 961 F.3d at 401 (quotation omitted). As Chief Election Officer for the State, Hughs is responsible for training election judges to enforce the law as interpreted by the Election Division. *See* Dkt. 76-1 at 23 (explaining that election judges are duty-bound to enforce the law as interpreted by the Secretary of State). The summary judgment record shows that Hughs issued an Election Advisory on June 18, 2020,[6] in which Hughs advised

[6] Although this Election Advisory was issued two years after Ostrewich filed this lawsuit, it demonstrates that the Secretary of State has the authority to instruct election judges on how to

"County Clerks/Elections Administrators and County Chairs," Dkt. 85-1 at 99, that they should instruct election judges to enforce the Electioneering Statutes against voters "wearing a face mask that qualifies as electioneering for or against any candidate, measure, or political party." *Id.* at 105. This is a sufficient connection to enforcement for purposes of piercing the State's sovereign immunity with respect to Hughs. *See Tex. Alliance for Retired Americans v. Hughs*, 489 F. Supp. 3d 667, 684 (S.D. Tex. 2020). Defendants argue that the Secretary of State has no role in enforcing the Electioneering Statutes because the presiding election judge has "the exclusive authority . . . to enforce the Texas Electioneering Laws." Dkt. 94 at 18. That may be true, but their discretionary decision making is guided by interpretations issued by the Secretary of State under threat of removal.

The Texas Election Code authorizes Paxton to enforce the challenged statutes. *See* TEX. ELEC. CODE § 273.001, 273.021(a). The question is whether Paxton has a "demonstrated willingness" to exercise his discretion in enforcing the Election Code or whether there is a "significant possibility" that he will exercise that discretion. *Tex. Democratic Party*, 961 F.3d at 401. In response to interrogatories, Paxton answered that his office "has not prosecuted any alleged violations [of the Electioneering Statutes] within the past ten years." Dkt. 76-6 at 15. But "a history of enforcement is [not] required to establish a sufficient connection," *Langan v. Abbott*, 518 F. Supp. 3d 948, 953 (W.D. Tex. 2021), and there is nothing in the summary judgment record suggesting that Paxton

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enforce the Electioneering Statutes and is willing to exercise that authority.

will not prosecute violators in the future. I am unwilling to look at an absence of past enforcement activity and conclude that there is no threat of future enforcement activity, especially where the threat of future enforcement poses a serious risk of chilling political speech. Paxton is authorized to enforce statutes that Ostrewich alleges are unconstitutional, and the threat of prosecution chills political speech. Paxton's ability to directly enforce the statutes is a sufficient connection to invoke the *Ex Parte Young* exception to the sovereign immunity doctrine.[7]

SUMMARY JUDGMENT

Having determined that I have jurisdiction to hear this case, I can now turn to the ultimate merits of the dispute. A party should prevail on a motion for summary judgment when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). A genuine dispute of material fact exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

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[7] Ostrewich's complaint seeks both an injunction and nominal damages. However, her claim for nominal damages against Paxton and Hughs is clearly impermissible under the *Ex Parte Young* exception and should be dismissed. *See Arizonans for Official English*, 520 U.S. at 69 n.24 (The *Ex Parte Young* "doctrine, however, permits only prospective relief, not retrospective monetary awards."); *Connolly v. Roche*, No. 2:14-cv-00024 JWS, 2014 WL 12550553, at *3 (D. Ariz. July 30, 2014) ("The doctrine of *Ex Parte Young* permits claims against state officials in federal courts for prospective relief such as a declaratory judgment or an injunction. It does not apply to retroactive relief such as a claim for damages.").

"[A] facial challenge to the constitutionality of a statute presents a pure question of law," so summary judgment will be appropriate one way or another because there are no facts that need to be resolved. *Ctr. for Individual Freedom v. Carmouche*, 449 F.3d 655, 662 (5th Cir. 2006). As for Ostrewich's as-applied challenge to the statutes, the material facts are not in dispute, so summary judgment is appropriate.

The First Amendment's prohibition against laws "abridging the freedom of speech" has been incorporated against the states under the Fourteenth Amendment. *See Planned Parenthood Ass'n of Hidalgo Cnty. Tex., Inc. v. Suehs*, 692 F.3d 343, 348 (5th Cir. 2012). The Electioneering Statutes plainly restrict an individual's speech, but the ban applies only to the interior of a polling place and "within 100 feet of any outside door through which a voter may enter the building in which the polling place is located." TEX. ELEC. CODE §§ 61.003, 61.010(a), and 85.036(a). This type of provision triggers the "forum based approach for assessing restrictions that the government seeks to place on the use of its property." *Int'l Soc. for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992) (quotation omitted).

As discussed, the parties have stipulated that Ostrewich was inside a polling place when an election worker stopped her and ordered her to turn her shirt inside out. The Supreme Court has held that a polling place is a nonpublic forum, where the government may regulate speech "as long as the regulation on speech is reasonable." *Mansky*, 138 S. Ct. at 1885 (quotation omitted). Ostrewich argues that the Electioneering Statutes were unreasonably applied to her and that they are incapable of reasonable

application in any circumstance because they are overbroad or vague. In other words, she challenges the Electioneering Statutes as applied and on their face. I must analyze the Electioneering Statutes individually to determine whether they pass constitutional muster.

A. SECTION 61.010

1. Ostrewich's as-applied challenge to section 61.010 fails.

I address Ostrewich's as-applied challenge first "because it is the narrower consideration." *Buchanan v. Alexander*, 919 F.3d 847, 852 (2019). A constitutional statute may be "invalid as applied when it operates to deprive an individual of a protected right." *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971). The "standard for an as-applied challenge is no different than the standard for a facial challenge." *Jornales de las Palmas v. City of League City*, 945 F. Supp. 2d 779, 798 (S.D. Tex. 2013). States may regulate speech in a polling place during the voting period "as long as the regulation on speech is reasonable." *Mansky*, 138 S. Ct. at 1885 (quotation omitted). Thus, the question is whether section 61.010 provided a reasonable basis for an election judge to prohibit Ostrewich from wearing her yellow T-shirt inside the polling place during the 2018 mid-term election.

As noted, section 61.010 prohibits voters from "wear[ing] 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 a polling place or

within 100 feet of one. TEX. ELEC. CODE § 61.010(a).[8] This provision is broad enough to permit election judges to prohibit T-shirts and other apparel, *see Mansky* 138 S. Ct. at 1883 (construing prohibition on wearing a "political badge, political button, or other political insignia" as applying to political apparel), but it is narrower than the Minnesota law challenged in *Mansky* because it prohibits apparel only if it "relat[es] to a candidate, measure, or political party *appearing on the ballot*." TEX. ELEC. CODE § 61.010(a) (emphasis added). *Cf. Mansky*, 138 S. Ct. at 1888 ("[T]he unmoored use of the term 'political' in the Minnesota law, combined with haphazard interpretations the State has provided in official guidance and representations to this Court" is incapable of reasonable application.").

Defendants argue that the election judge had a reasonable basis for prohibiting Ostrewich's shirt because it was part of a massive grassroots campaign to encourage Houston-area residents to vote in favor of Proposition B—a measure that appeared on the 2018 ballot. As discussed earlier, advocates wore the same yellow T-shirt to campaign for Proposition B in neighborhoods and at polling places throughout the City of Houston. *See* Dkt. 76-1 at 99–101 (Ostrewich testifying that Proposition B supporters campaigned in the same yellow T-shirts at the Polling Place on the day she voted.). Ostrewich testified that she and her husband wore the T-shirt to the Polling Place to vote

[8] Although Ostrewich voted during the early voting period, which is governed by Title 7 of the Texas Election Code (§§ 81.001–114.008), section 61.010 also applies during the early voting period. *See* TEX. ELEC. CODE § 81.002 ("The other titles of this code apply to early voting except provisions that are inconsistent with this title or that cannot feasibly be applied to early voting.").

because she was excited that "[they] were finally getting to vote on Proposition B," and that it was the only Houston fire department T-shirt she owned. Dkt. 76-1 at 57–58. *See also id.* at 84. According to Ostrewich, she had made it to the front of the line in the North Hallway and was about to enter the room containing the voting booths when an election worker pointed to Ostrewich's shirt and told her "[y]ou are not going to be allowed to vote until you [flip your shirt inside out] because we're 'voting on that.'" *Id.* at 72. Ostrewich testified that she believed the worker was referring to the "fact that there was a firefighter measure on the ballot, Proposition B." *Id.* at 74. She did not ask for further explanation or otherwise challenge the election worker's request. Instead, Ostrewich proceeded to the restroom and turned her shirt inside out before voting 10 to 15 minutes later.

It is undisputed that the shirt was used by advocates throughout the City of Houston to campaign in favor of Proposition B in the months leading up to the 2018 election, and it is undisputed that campaigners wore the shirts at Houston-area polling places to campaign in favor of Proposition B. The fact that Ostrewich was not actively campaigning inside the polling place while wearing the yellow shirt is irrelevant. *See Mansky*, 138 S. Ct. at 1887 (rejecting this exact argument and distinguishing "the unique context of a polling place on Election Day" from other cases where the Court's "decisions have noted the 'nondisruptive' nature of expressive apparel in more mundane settings." (citing *Bd. of Airport Comm'rs of L.A. v. Jews for Jesus, Inc.*, 482 U.S. 569, 567 (1987) (T-shirt in an airport); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508 (1969) (black armbands at school to protest Vietnam War)). The

same can be said of the fact that the shirt does not explicitly say "Vote for Proposition B." As the Court noted in *Mansky*, the State's interest in preventing partisan discord at the voting booth "may be thwarted by displays that do not raise significant concerns in other situations." *Id.* at 1888.

Ostrewich argues that section 61.010 was not reasonably applied to her because of an email from the Harris County Administrator of Elections, Sonya Aston, sent the day after Ostrewich voted. *See* Dkt. 74 at 9. In that email, Aston advised local authorities that election judges should "allow people wearing non-proposition supporting/opposing t-shirts to come in without covering up their t-shirts." Dkt. 74-4 at 39. According to Ostrewich, it was unreasonable to ban her shirt one day but allow the shirt another day. I disagree. The question in an as-applied challenge is whether haphazard enforcement of a statute prejudiced the plaintiff raising the claim. Section 61.010 clearly authorized the election judge to prohibit Ostrewich from wearing her yellow T-shirt in the polling place during early voting. The shirts contained an insignia relating to a measure appearing on the ballot and were clearly associated with a political campaign encouraging Houston residents to vote in favor of Proposition B. The email Ostrewich brings forth was sent in response to complaints lodged by citizens throughout the City of Houston. This suggests that many election judges agreed that the shirts were prohibited under the statute. It also indicates that voters were complaining and that people in positions of power were listening. Where Ostrewich sees evidence of haphazard enforcement, I see evidence that the discretion of election judges is

constantly monitored and reined in by a system of checks and balances.

The election judge had clear authority to order Ostrewich to change her shirt under section 61.010. That provision is constitutional under *Mansky* because it limits the election judge's authority to prohibit only those "badge[s], insignia[s], emblem[s], or other similar communicative device[s]" that relate "to a candidate, measure, or political party appearing on the ballot." TEX. ELEC. CODE § 61.010(a). This provision was reasonably applied to Ostrewich.

2. Ostrewich's facial challenge to section 61.010 fails.

Generally, "one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional." *U.S. v. Raines*, 362 U.S. 17, 21 (1960). However, where a regulation infringes on the right to free speech, it may be challenged "by showing that it substantially abridges the First Amendment rights of other parties not before the court." *Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 634 (1980). First Amendment rights may be threatened by overly broad or impermissibly vague laws. *See Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

a. Section 61.010 is not overbroad.

Although section 61.010 was constitutional as applied to Ostrewich, she may still lodge a facial attack under the First Amendment overbreadth doctrine. *See Bd. of Airport Comm'rs*, 482 U.S. at 574. *See also Grayned*, 408 U.S. at 114 ("Because

overbroad laws, like vague ones, deter privileged activity, our cases firmly establish appellant's standing to raise an overbreadth challenge."). A statute is overbroad "if it prohibits a substantial amount of protected speech . . . relative to the statute's plainly legitimate sweep." *U.S. v. Williams*, 553 U.S. 285, 292 (2008).

Section 61.010 is not overbroad because it contains language limiting its scope to political apparel "relating to a candidate, measure, or political party appearing on the ballot." TEX. ELEC. CODE § 61.010(a). To repeat, section 61.010 only prohibits Texans from wearing expressive apparel within a polling place if the sentiment being expressed relates to a candidate, measure, or political party appearing *on the ballot*. This is an important limitation. Ostrewich points to the deposition testimony of several election judges who stated that the statute prohibits apparel discussing past candidates for president and apparel expressing support for organizations such as the National Rifle Association and Black Lives Matter. According to Ostrewich, this testimony demonstrates that the statute's application sweeps far too broadly and captures too much protected speech. I disagree. At best, this testimony establishes that the individual election judges either do not understand the statute or that they have been improperly trained on its application. This does not establish that the statute's plain language is too broad. *See Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973) (To declare a statute overbroad, "the overbreadth of [the] statute must not only be real, but substantial as well."); *Grayned*, 408 U.S. at 110 ("Condemned to the use of words, we can never expect mathematical certainty from our language. The words of the Rockford

ordinance are marked by 'flexibility and reasonable breadth, rather than meticulous specificity.'" (quotation omitted)). The language of section 61.010 does not sweep too broadly because it is limited to expressions related to candidates, measures, or political parties appearing on the ballot.

b. Section 61.010 is not vague.

The Fourteenth Amendment prohibits states from "depriv[ing] any person of life, liberty, or property, without due process of law." U.S. CONST. art. XIV, § 1. The Supreme Court has held that "the Due Process Clause prohibits the Government from 'taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement.'" *Beckles v. United States*, 137 S. Ct. 886, 892 (2017) (quoting *Johnson v. United States*, 576 U.S. 591, 595 (2015)). In contexts such as the one presented here, where "behavior as a general rule is not mapped out in advance on the basis of statutory language[,] . . . perhaps the most meaningful aspect of the vagueness doctrine is . . . the requirement that a legislature establish minimal guidelines to govern law enforcement." *Smith v. Goguen*, 415 U.S. 566, 574 (1974). The Fifth Circuit has "held that a state's legislative enactment is void for vagueness under the due process clause of the Fourteenth Amendment if it is inherently standardless, enforceable only on the exercise of an unlimited, and hence arbitrary, discretion vested in the state." *Women's Med. Ctr. of*

Nw. Houston v. Bell, 248 F.3d 411, 421 (5th Cir. 2001) (cleaned up).

Section 61.010 is directed at people "in the polling place or within 100 feet of any outside door through which a voter may enter the building in which the polling place is located." TEX. ELEC. CODE § 61.010(a). It targets people who have gathered at a government-designated spot at a government-designated time to perform a civic task—vote. Its restrictions extend no further. Section 61.010 is further limited to prohibit only the wearing of "a badge, insignia, emblem, or other similar communicative device relating to a candidate, measure, or political party appearing on the ballot." *Id.* By limiting its reach to issues appearing on the ballot, the Texas law provides fair notice of what is expected of people gathered in and around the polling place on election day and during early voting. *See Grayned*, 408 U.S. at 112 (noting that an ordinance written for a specific context "gives fair notice to those to whom it is directed" (cleaned up)). Local residents gathering at a polling place to vote are likely more informed about what appears on their ballots than even state-level authorities, like the Secretary of State. In fact, Ostrewich herself testified she understood that she was being asked to cover her yellow firefighter T-shirt because "there was a firefighter measure on the ballot, Proposition B." Dkt. 74-1 at 13.

For the same reason, section 61.010 is also capable of reasonable enforcement. Election judges generally serve in the precincts where they reside. This means that they will be more familiar with what candidates, measures, and political parties are appearing on a local ballot. All the election judges deposed in this case

were familiar with the yellow firefighter T-shirt and its connection to a campaign by firefighters to obtain pay parity with police officers.

In her briefing to this Court, Ostrewich charted responses gathered during the depositions of several election judges that she contends demonstrate confusion and a lack of clarity about how to enforce section 61.010. *See* Dkt. 74 at 20. Ostrewich contends that this chart demonstrates the inability to apply section 61.010 reasonably. The question before me, however, is not whether this or that individual election judge understands the law they are supposed to enforce. The question before me is whether the statute is capable of being reasonably applied, *see Mansky*, 138 S. Ct. at 1891, and the answer to that question is yes.

Under *Mansky*, a statute is capable of reasonable application and enforcement if it provides objective and workable standards to reign in the discretion of the individuals responsible for enforcing the statute. *See id.* The statute here does just that. It is objective because it narrows the scope of prohibited content to an objectively verifiable question—what candidates, measures, and political parties are appearing on the ballot? It then authorizes election judges to exercise their discretion in determining whether a piece of apparel "relates" to that candidate, measure, or political party. The fact that some amount of discretion is involved is not unreasonable in and of itself. *See id.* (acknowledging that "some degree of discretion in this setting is necessary").

Section 61.010 provides the outer limits of an election judge's discretion. For apparel to be banned within the designated area, it must (1) relate to a

candidate, measure, or political party, and (2) that candidate, measure, or political party must appear on the ballot. This is a workable standard. The Supreme Court has warned against "expect[ing] mathematical certainty from our language" and recognized that laws "marked by flexibility and reasonable breadth, rather than meticulous specificity" can still pass constitutional muster. *Grayned*, 408 U.S. at 110 (quotation omitted). Election judges are trained on how to enforce this statute by both state and local authorities, and state and local authorities continue to issue guidance on enforcement during election season. The discretion of election judges does not go unchecked. Complaints are fielded by county clerks and the Secretary of State who issue informal advisories to the boots on the ground. *See* Dkt. 74-4 at 39 (Sonya Aston email).

As I mentioned, the question is not whether a couple of election judges answered hypothetical questions differently during depositions. The two questions before me are (1) whether the people to whom the statute applies have fair notice of what the statute prohibits and (2) whether the statute provides objective and workable standards to guide the discretion of election judges. The answer to both questions is yes. Section 61.010 is not impermissibly vague on its face. This conclusion is buttressed by *Mansky* where the Supreme Court directly cited section 61.010 as "proscribing displays (including apparel) in more lucid terms" than the Minnesota

statute. *Mansky*, 138 S. Ct. at 1891 (alteration in original).[9]

B. SECTIONS 61.003 AND 85.036

Because the election judge had some constitutional basis for prohibiting Ostrewich from wearing her shirt under section 61.010, I need not address whether the election judge could have also banned her shirt under sections 61.003 and 85.036. *See Bowen v. United States*, 422 U.S. 916, 920–21 (1975) (admonishing district courts and courts of appeals to avoid reaching constitutional questions unnecessarily); *Faulk v. Union Pac. R. Co.*, 449 F. App'x 357, 363 (5th Cir. 2011) ("It is a basic tenet of American jurisprudence that courts avoid reaching constitutional questions in advance of the necessity of deciding them." (quotation omitted)). However, Ostrewich's chilling injury remains—an election worker might ban Ostrewich's firefighter T-shirt in the future, or she might be criminally investigated and charged during a future election even if no firefighter measure is on the ballot. *See* TEX. ELEC. CODE §§ 61.003, 85.036.

As noted earlier, § 85.036 provides:

> (a) During the time an early voting polling place is open for the conduct of early voting, a person may not electioneer for or against any candidate, measure, or political party in or

[9] Because I have determined that there was a constitutional basis for prohibiting Ostrewich from wearing her T-shirt at the polling place during the 2018 election, Ostrewich's claim for nominal damages against Hudspeth and Ogg fails as matter of law. *See Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 802 (2021) (nominal damages are unavailable where a plaintiff has failed to establish a past, completed injury).

> within 100 feet of an outside door through which a voter may enter the building or structure in which the voting polling place is located.
>
> * * *
>
> (f) In this section:
>
> * * *
>
> (2) "Electioneering" includes the posting, use, or distribution of political signs or literature.

Id. § 85.036.[10] To determine whether Ostrewich's T-shirt might be subject to sections 61.003 and 85.036 in the future, I must first ensure that "Electioneering" also includes political apparel.

No Texas court has construed sections 61.003 and 85.036, and there is no official administrative guidance on how to interpret and apply these provisions. *Cf. Mansky*, 138 S. Ct. at 1889 (using Minnesota's Election Day Policy from 2010 as the "authoritative guidance" on how to construe the state statute at issue there). I am also unable to certify the question to the Texas Supreme Court. *See* TEX. CONST. art. V, § 3-c (limiting jurisdiction to questions certified by federal appellate courts). I must, therefore, make an *Erie*-guess as to how a Texas court might construe the statutes at issue here. *See Doe I v. Roman Catholic*

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[10] Sections 61.003 and 85.036 are, essentially, carbon copies of each other. Section 61.003 applies only on election day. Section 85.036 applies during the early voting period. The operative wording in both statutes is identical. Any ruling I make with respect to section 85.036 applies with equal force to section 61.003.

Diocese of Galveston-Houston, No. H-05-1047, 2006 WL 8446968, at *4 (S.D. Tex. Mar. 27, 2006).

The parties agree that sections 61.003 and 85.036 apply to apparel, like Ostrewich's T-shirt. *See* Dkt. 76 at 10 (explaining that sections 61.003 and 85.036 "cover any form of electioneering, including any electioneering communicated via apparel"); Dkt. 87 at 22–23 ("Section 61.003(a)(2) prohibits electioneering of any kind, including the kind of electioneering at issue in this case *and* 'the posting, use, or distribution of political signs or literature.'" (emphasis added)). The Secretary of State's Election Advisory No. 2020-19 takes the position that the prohibition against electioneering in sections 61.003 and 85.036 "applies to clothing and accessories worn by the voter." Dkt. 85-1 at 105. I see no reason to reach a different conclusion.

Sections 61.003 and 85.036 prohibit voters from "electioneer[ing] for or against any candidate, measure, or political party." TEX. ELEC. CODE §§ 61.003(a)(2), 85.036(a). The statutes then define electioneering to include "the posting, use, or distribution of political signs or literature." *Id.* §§ 61.003(b)(2), 85.036(f)(2). But electioneering is not limited just to the posting, use, or distribution of political signs or literature; it also includes apparel that stumps "for or against any candidate, measure, or political party." *Id.* §§ 61.003(a)(2), 85.036(a). Unlike section 61.010, these provisions are not limited to candidates, measures, or political parties appearing *on the ballot*. Moreover, sections 61.003(b)(2), 85.036(f)(2) provide that electioneering includes political signs and literature, which suggests that

these statutes allow election judges to ban voters from wearing "political" apparel. This is problematic.

Like the Minnesota statute at issue in *Mansky*, sections 61.003 and 85.036's use of the term "political" is unmoored from any objective, workable standard that an election judge could use to reasonably apply the statute. And unlike section 61.010, sections 61.003 and 85.036 do not have language limiting their application to those candidates, measures, or political parties appearing *on the ballot*. This means that an election judge could prohibit Ostrewich from wearing her yellow firefighter T-shirt in future elections under sections 61.003 and 85.036, even if there is no firefighter issue on the ballot. Ostrewich has no way of knowing whether the election judge at her polling place would consider the shirt to be political. She also does not know if the shirt would be banned as electioneering for a measure, even though the specific measure (Proposition B) is not on the hypothetical ballot. Sections 61.003 and 85.036 do not give Texas voters notice of what is expected of them in the polling place, and they do not provide election judges with objective, workable standards to reign in their discretion. This is impermissible under the First Amendment and these statutory provisions should be struck down as unconstitutional.

CONCLUSION

For the reasons provided above, Defendants' Motion for Summary Judgment is **GRANTED** in part and **DENIED** in part, and Plaintiff's Motion for Summary Judgment **GRANTED** in part and **DENIED** in part. Specifically, I recommend that Ostrewich's challenge to section 61.010 of the Texas Election Code be denied, and that her request for

nominal damages be denied. However, I recommend that sections 61.003 and 85.036 be struck down as unconstitutional infringements on the First Amendment right to free speech.

The Clerk shall provide copies of this Memorandum and Recommendation to the respective parties who have 14 days from receipt to file written objections under Federal Rule of Civil Procedure 72(b) and General Order 2002–13. Failure to file written objections within the time period mentioned shall bar an aggrieved party from attacking the factual findings and legal conclusions on appeal.

SIGNED this 14th day of September 2021.

s/ Andrew M. Edison
ANDREW M. EDISON
UNITED STATES MAGISTRATE JUDGE

Case 21-20577 Document 130-2
Date Filed: 07/31/2023

**United States Court of Appeals
for the Fifth Circuit**

No. 21-20577

JILLIAN OSTREWICH,

Plaintiff—Appellant / Cross-Appellee,

versus

CLIFFORD TATUM, *in his official capacity as Harris County Elections Administrator*; JANE NELSON, *in her official capacity as Secretary of State of Texas*; JOHN SCOTT, *in his official capacity as the Attorney General of Texas*,

Defendants—Appellees / Cross-Appellants,

KIM OGG, *in her official capacity as Harris County District Attorney*,

Defendant—Appellee.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:19-CV-715

ON PETITION FOR REHEARING EN BANC

Before CLEMENT, DUNCAN, and WILSON, *Circuit Judges*.

PER CURIAM:

Treating the petition for rehearing en banc as a petition for panel rehearing (5TH CIR. R. 35 I.O.P.), the petition for panel rehearing is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc (FED. R. APP. P. 35 AND 5TH CIR. R. 35), the petition for rehearing en banc is DENIED.

Case 4:19-cv-00715 Document 119
Filed on 09/28/21 in TXSD

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JILLIAN OSTREWICH, Plaintiff, v. TENESHIA HUDSPETH, in her 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 OBJECTIONS TO MAGISTRATE'S RECOMMENDATION

* * * * *

INTRODUCTION

Pursuant to 28 U.S.C. § 636, Fed. R. Civ. Proc. 72(b)(2), and Local Rule 72, Plaintiff Jillian Ostrewich files these objections to the September 14, 2021, Memorandum and Recommendation of the United States Magistrate Judge in this matter (Recommendation). The Recommendation correctly holds that Ms. Ostrewich's case is justiciable, and that Texas Election Code Sections 61.003 and 85.036 are facially unconstitutional under the First Amendment. However, the Recommendation contained factual and legal errors on the constitutionality of Section 61.010 and Ms. Ostrewich's as-applied claim. This Court should correct those errors.

LEGAL STANDARD

A. De Novo Review of Magistrate Recommendation

Objections to a magistrate's recommendation are reviewed under "a de novo determination of those portions of the . . . unspecified findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1)(C). De novo review entails an independent review of the record, including reviewing the testimony of witnesses related to contested portions of the magistrate's findings. *Calderon v. Waco Lighthouse for the Blind*, 630 F.2d 352, 355–56 (5th Cir. 1980). *See also Hernandez v. Estelle*, 711 F.2d 619, 620 (5th Cir. 1983) ("[T]he statutory obligation of the district court to arrive at its own, independent conclusion about those portions of the magistrate's report to which objection is made is not satisfied by a mere review of the magistrate's report itself.").

B. The Defendants Have the Burden of Proving That Speech Restrictions Further Legitimate Goals

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*). 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. *Id.* 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); *see Center for Inv. Reporting v. Southeastern Pennsylvania Transp. Auth.*, 975 F.3d 300, 314 (3d Cir. 2020) (*CIR*) (To determine the reasonableness of a policy banning political ads on public transit, "*the government actor* bears the burden of 'tying the limitation on speech to the forum's purpose.'") (quoting *NAACP v. City of Philadelphia*, 834 F.3d 435, 445 (3d Cir. 2016) (emphasis added)); *Cambridge Christian School, Inc. v. Florida High School Athletic Ass'n, Inc.*, 942 F.3d 1215, 1245–46 (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). Here, the Government Defendants introduced no factual evidence to contradict or even cast doubt on Ms. Ostrewich's evidence of haphazard, inconsistent enforcement. Instead Defendants asked the Magistrate to simply ignore the evidence produced by

Ms. Ostrewich, Dkt. 87 at 24, and, improperly, the Recommendation does so. Dkt. 118 at 30.

Defendants provided no factual evidence to support their asserted interests, Dkt. 74-9 at 7 (Hughs Interrog. Resp. 5), and declined to "speculate" as to the statutes' effectiveness in furthering those interests, *id.* (Hughs Interrog. Resp. 6).* Counsel's litigation-driven justifications cannot suffice. Competent summary judgment evidence to support factual assertions consists of "affidavits, depositions or interrogatory responses contained in the party's appendix," but "the briefs themselves . . . are not evidence." *Tucker v. SAS Inst., Inc.*, 462 F. Supp. 2d 715, 723 (N.D. Tex. 2006). *See also Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986) ("[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.").

In *Burson v. Freeman*, the Supreme Court explained that "burden of proof" cannot be relaxed in "all cases in which there is a conflict between First Amendment rights and a State's election process—instead, it applies *only* when the First Amendment

* Defendants contend that their subsequent document production cures this deficiency. Dkt. 76 at 28 n.9. But they have never identified which, of the over 80,000 pages in documents produced, supports their contention. This omission deprived Plaintiff of the opportunity to question the State's 30(b)(6) deponent on how those documents support the interests that Defendants assert. And the omission is fatal where, as here, Plaintiff has demonstrated that many of those documents undercut the State's interests.

right threatens to interfere with the act of voting itself." 504 U.S. 191, 209 n.11 (1992) (emphasis added). That is, the Court offers greater deference to concrete evidence regarding "voter confusion from overcrowded ballots" or cases such as *Burson* itself where "the challenged activity *physically interferes* with electors attempting to cast their ballots." *Id.* (emphasis added); *see also id.* at 194 (plaintiff was a campaign worker who was actively soliciting votes). But when courts consider a challenge to regulations directed at "intangible 'influence,' such as the ban on election-day editorials struck down in *Mills v. Alabama*," 384 U.S. 214 (1966), "[s]tates must come forward with more specific findings" to support their interests. *Burson*, 504 U.S. at 209 n.11.* Here, the State and County Defendants—with easier and earlier access to all of the inspector reports and unredacted communications—provided no factual evidence to demonstrate that their speech restrictions on voters' apparel have any effect on maintaining calm in the polling place or the integrity of the vote.†

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* *See Wisconsin Right to Life, Inc. v. Barland*, 751 F.3d 804, 833 (7th Cir. 2014) (holding that "influence an election" is the kind of "broad and imprecise language" that "risk[s] chilling" protected speech and is therefore "persistently" overbroad in violation of the First Amendment); *Picray v. Secretary of State*, 140 Or. App. 592, 600 (1996), *aff'd by an equally divided court*, 325 Or. 279 (1997) (striking down political-apparel ban because the passive display of political apparel in a polling place constitutes "the silent expression of political opinion" and does not coerce or constitute "undue" influence).

† Defendants previously argued that they provided evidence through the expert reports and testimony by election workers. Dkt. 76 at 27–29. The Recommendation correctly disregarded the expert testimony, however, and the election worker testimony highlighted by Defendants does not counter the overwhelming evidence of inconsistent, haphazard application of the statutes or

The Recommendation erred in crediting Defendants' unproven assertions.

I. OBJECTIONS AS TO THE RECOMMENDATION'S FACTUAL FINDINGS

A. The Recommendation Contained Factual Misstatements About the Setting at the Polling Place At Which Ms. Ostrewich Voted in October 2018

In considering Ms. Ostrewich's as-applied First Amendment claim, the Recommendation asserts that "[o]thers stood outside the main entrance to the Polling Place, advocating support for Proposition B while wearing the same yellow T-shirts." Dkt. 118 at 4. But the Recommendation supports this assertion with photographs featuring groups of campaigners taken on *other days* and at *other polling places*. *See* Dkt. 76-5 at 4 (photograph taken on Election Day, Nov. 6, 2018); Dkt. 76-1 at 166 (photograph taken on Oct. 31, 2018, at the Beall Street polling location). The Recommendation's extrapolation of that evidence to the setting of Ms. Ostrewich's polling place is unnecessary and improper. That is because the uncontroverted evidence as to Proposition B campaigning at the Metropolitan Multi Service Center on October 24, 2018, when and where Ms. Ostrewich voted, is that there were only two individuals, standing more than 100 feet away from the polling place, wearing yellow shirts that may or

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the disruption caused by election workers confronting voters or that some voters were deprived of their right to vote because an election worker had the discretion to bar them because of their apparel.

may not have been the same as Ms. Ostrewich's, and who were identifiable as Proposition B boosters because they were standing with a sign in favor of Proposition B. Dkt. 92-1 at 18 (Jillian Ostrewich testimony); *see also* Dkt. 92-1 at 13 (Mark Ostrewich had no recollection of seeing any Proposition B campaigners at all at the polling location).

The Recommendation also relies on "block walk" photos, Dkt. 118 at 3, citing Dkt. 76-1 at 164–65, showing people wearing a variety of mostly yellow and some orange t-shirts, prior to the election. Many appear to have a design on the front of the shirt similar or identical to Ms. Ostrewich's shirt; others feature only an inconspicuous union logo on the shirt's pocket. Dkt. 76-1 at 165. None of the "block walk" pictures show the back of the shirt, a material omission because it is undisputed that while some yellow shirts reference Proposition B explicitly; others feature only the logo of the Houston Fire Fighters union.* Dkt. 74-4 at 39 (Aston Dep.) (some shirts specifically mentioned Proposition B, others did not). Ms. Ostrewich's shirt was of the latter type—it made no reference whatsoever to Proposition B. Dkt. 118 at 4 (photographs of Ms. Ostrewich's shirt, front and back). The Recommendation acknowledges that Ms. Ostrewich "had no intention of violating Texas' political-apparel ban in 2018 when she wore her yellow T-shirt—which expressed only general support for 'Houston Fire Fighters' and did not mention Proposition B." Dkt. 118 at 15.

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* The Election Day photograph, Dkt. 76-5 at 4, reprinted at Dkt. 118 at 5, shows the back of one individual wearing a shirt that makes no mention of Proposition B.

In short, Defendants, who have the burden of proof, offered no evidence to counter the evidence that only two Proposition B supporters campaigned outside the boundary at the Metropolitan Multi Service Center at the time that Ms. Ostrewich voted. Beyond this, Defendants offered no evidence as to how many Proposition B campaigners there were relative to campaigners for other candidates and ballot measures (that is, whether voters would pick them out of the crowd); whether voters talked to them to learn their stance on issues; or what any observers may have assumed about the apparel of voters who were not standing with or otherwise interacting with the campaigners. The Recommendation errs in replacing Plaintiff's uncontradicted testimony with speculation based on occurrences at other times and polling places.

* * * * *

2. The Recommendation Improperly Focuses Solely on Training.

The Recommendation improperly disregarded Plaintiff's evidence of inconsistent and haphazard front-line enforcement, suggesting that it was unrepresentative and that it showed, at most, that election officials were improperly trained. Dkt. 118 at 30. No doubt election workers *are* improperly trained as to the electioneering statutes, but this is by design. *See* Dkt. 85-1 at 120–21 (Secretary of State Elections Division attorney circulated advice to entire department that "in terms of training, I would let the election judges know that this is their responsibility . . . If a voter disagrees . . . it would ultimately be up to the courts to decide what is and what is not electioneering.").

Consequently, Harris County's training is devoid of any helpful guidance to election workers, *see* Dkt. 74-5 at 3–33. Moreover, given the limited time for training and the greater importance of other issues, election workers *always* will be minimally trained. *See* Dkt. 74-3 at 12 (Morris described the difficulty of recruiting election workers and considered the three hour training as a maximum because "nobody wants to sit through four hours of training"); *id.* at 16 (explaining that training focuses on the "most important" topics, such as type of voter ID required and issues with databases and equipment, rather than "what kind of T-shirts people wear"); Dkt. 74-5 at 13 (Harris County training slideshow devotes a single slide to electioneering, says nothing about apparel, and contains only one specific instruction: "Talking politics, even during a Primary, is electioneering."). The training advises on-site election officials to use their judgment; that is, their mental indices—formed by media consumption and personal interest in following politics. Dkt. 74-3 at 11–15 (Morris testimony that because election judges are "not given that much training," they are forced to use "their own [ ] judgment" to decide which voters to confront).

Moreover, the Secretary of State's Office routinely refuses to provide any guidance to election judges or to voters as to how the electioneering statutes would apply to specific apparel, leaving it to the discretion of on-site enforcers even when the apparel makes no reference to any local issue. *See, e.g.*, Dkt. 74-9 at 24–25 (election judge has discretion to ban t-shirt stating "vote the Bible"); *see id.* (although Ingram believes that Harris County election judge was too stringent in banning a shirt featuring the names of Justices

O'Connor, Ginsburg, Kagan, and Sotomayor, it was the judge's call to make); Dkt. 74-10 at 10–18 (refusing to answer whether a posted Black Lives Matter sign is electioneering; election judge has discretion); *id.* at 20–21 (refusing to answer whether a voter must cover up "Vote the Bible," "vote atheist," or "vote to save Big Bird" shirts); *id.* at 23–24 (refusing to answer whether election workers could wear "patriotic" red, white, and blue apparel); *see also id.* at 31–32 (refusing to answer questions on firefighter uniforms or shirts with Houston Fire Fighters insignia). In all, when prompted with questions that ask for a "yes" or "no," the Secretary of State's response routinely reflects its belief that it "is not [an] answer [the office] can give or one that should be provided to election judges." Dkt. 85-1 at 120–21. The lack of training cannot excuse the election workers' unconstitutional infringement on voters' First Amendment rights.

3. Officials Catering to Public Pressure Leads to Inconsistent Enforcement

The Recommendation characterizes public pressure to alter election officials' enforcement as beneficial "checks and balances." Dkt. 118 at 29 ("Where Ostrewich sees evidence of haphazard enforcement, I see evidence that the discretion of election judges is constantly monitored and reined in by a system of checks and balances."). In so stating, the Recommendation abdicates its duty to respond to the evidence presented. The evidence of election officials' haphazard interpretation is not "checks and balances"—it's just confusion reflective of an army of election workers making individual, largely

unreviewable decisions.* And even the officials' response to public pressure is inconsistent. Many members of the public complained about enforcement against Make America Great Again hats when Donald Trump was not on the ballot in 2018, but election officials, including Keith Ingram, held firm that the electioneering statutes ban MAGA apparel whenever it is worn. Dkt. 74-10 at 27 (voter complaint to Ingram); Dkt. 74-6 at 7, 9–10; Dkt. 86, Appendix 13 to Plf.'s Opp. to Defs' MSJ (Sealed), Exh. 60, 62; Dkt. 92-1 at 58 (voter not allowed to vote and threatened with arrest if he did not cover his MAGA hat in 2018 election); Dkt. 92-1 at 76 (Secretary of State circulated news report of police called and voter detained for two hours because of MAGA hat in 2018).

* * * * *

1. The Scope of Section 61.010

Section 61.010, titled "Wearing Name Tag or Badge in Polling Place," prohibits a person from "wear[ing] 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 a polling place or within 100 feet of "an outside door through which a voter may enter the building in which a polling place is located."

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* Harris 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. Dkt. 74-4 at 18 (Aston Dep.). The State's Election Divisions Chief observed that there are over 9,000 precincts around the State, and each is supposed to have a polling location. Dkt. 85-1 at 5 (Ingram Dep.).

The Recommendation incorrectly treats section 61.010 as a general electioneering statute with a more narrow scope than sections 61.003 and 85.036. Dkt. 118 at 27; *see also MVA*, 138 S. Ct. at 1891. Although the *MVA* Court cited section 61.010 in its opinion, it expressly refused to "pass on the constitutionality of laws that are not before [it]." 138 S. Ct. at 1891. And this Court has the benefit of uncontested evidence that the Supreme Court lacked, which demonstrates that 61.010 was *not* intended to replicate section 61.003's and section 85.036's ban on electioneering by voters. Instead, section 61.010 was enacted later to supplement those statutes by targeting electioneering by *poll workers*. Dkt. 74-10 at 26 (Keith Ingram email stating "61.003 and 85.036 deal with electioneering generally. 61.010 deals with poll workers and poll watchers and their nametags being used to electioneer."). As the record demonstrates, state and local election officials never interpreted section 61.010 as a narrower duplicate of the general electioneering bans in 61.003 and 85.036. *See, e.g.*, Dkt. 74-6 at 10 (Ingram Dep.) (testimony by State's 30(b)(6) deponent that "61.010 is a more specific prohibition relating to what persons who are in the polling place can wear on a badge"); Dkt. 85-1 at 105 (Secretary of State's Election Advisory noting that section 61.003 prohibits electioneering, which applies to "clothing" and "face coverings"). The Recommendation erred in construing section 61.010 as a narrower general prohibition on electioneering where the evidence shows that the State has not adopted such a limited construction of the statute. *See City of El Cenizo, Texas v. Texas*, 890 F.3d 164, 182 (5th Cir. 2018) (court may not offer a limiting construction not advanced by the government "for doing so would constitute a 'serious invasion of

the legislative domain'" (quoting *United States v. Stevens*, 559 U.S. 460, 481 (2010)).*

* * * * *

Whether section 61.010's prohibition encompasses t-shirts featuring the logo of specific organizations depends on whether they communicated their support or opposition to candidates or ballot measures well enough to have come to the attention of election judges, clerks, and greeters. Yet on-site enforcers of the statutes often are unaware of the contents of the ballot, much less the associations that support or oppose those candidates and measures. Dkt. 74-2 at 14–15 (Gray unfamiliar with Texas Organizing Project, Workers Defense in Action PAC, and Communication Workers of America PAC); *id.* at 24 (unfamiliar with "Me too" and the Gadsden flag); Dkt.

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* Legislative intent should be determined from the entire act and not simply from isolated portions. *Jones v. Fowler*, 969 S.W.2d 429, 432 (Tex. 1998). Courts must interpret statutes to avoid surplusage, *In re VC PalmsWestheimer, LLC*, 615 S.W.3d 655, 661 n.10 (Tex. Ct. App. 2020), and, as interpreted, 61.010's prohibitions of electioneering for candidates, political parties, and measures on the ballot would be entirely within the prohibitions of the broader 61.003, which prohibits electioneering for candidates, political parties, and measures on the ballot in the past, present, and future. Under the Recommendation's construction, 61.010 need not exist at all. Courts must presume that the legislature chose the statute's language with care, including that words were chosen or omitted for a purpose, and courts must construe statutes so that no part is surplusage, but so that each word has meaning. *Pedernal Energy, LLC v. Bruington Eng'g, Ltd.*, 536 S.W.3d 487, 491–92 (Tex. 2017); *Columbia Med. Ctr. of Las Colinas, Inc. v. Hogue*, 271 S.W.3d 238, 256 (Tex. 2008) ("The Court must not interpret the statute in a manner that renders any part of the statute meaningless or superfluous.").

74-3 at 21 (Morris Dep.) ("Save the Whales" could be prohibited if it "refer[s] to organizations that are pushing a certain agenda."); Dkt. 85-1 at 9 (Ingram Dep.) ("A slogan has to be well enough known that the election judge recognizes it as a slogan.").

* * * * *

DATED: September 28, 2021.

Respectfully submitted:

s/ Wencong Fa

WENCONG FA (*Attorney in Charge*)

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Counsel for Plaintiff Jillian Ostrewich