No. 21-20577

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Jillian Ostrewich,

Plaintiff–Appellant/Cross-Appellee

v.

Isabel Longoria, in her official capacity as Harris County Elections Administrator; John Scott, in his official capacity as Secretary of State of Texas; Ken Paxton, 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

On Appeal from the United States District Court
for the Southern District of Texas, Houston Division
No: 4-19-CV-00715, Hon. George Hanks, Judge

Plaintiff-Appellant-Cross-Appellee Jillian Ostrewich's Response and Reply Brief

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW ON CROSS-APPEAL

1. Whether a civil rights plaintiff alleging that state statutes governing all elections in Texas may sue the Secretary of State, who had overriding responsibility for administering and implementing election statutes, and the Attorney General, who has statewide authority to enforce election statutes.

2. Whether a voter forced to refrain from speech at the command of an election worker enforcing state election statutes has standing to challenge those election statutes under the First and Fourteenth Amendments.

3. Whether the interrelated state statutes governing electioneering at the polls violate the First and Fourteenth Amendment rights of voters wearing apparel "related to" but not expressly advocating for or against any candidate, political party, or measure on a past, present, or future ballot.

4. Whether a voter forced to refrain from speech at the command of an election worker enforcing state election statutes is entitled to nominal damages to vindicate her constitutional injury.

INTRODUCTION

Jillian Ostrewich challenges three interrelated state statutes in the Texas Election Code that govern what voters may wear in polling places. Section 61.003[1] is "the primary electioneering restriction on Election Day" while "Section 85.036 provides the same restriction for early voting" ROA.1014. Section 61.010 targets specific communicative items during the present election only. *Id.*

On cross-motions for summary judgment, Ostrewich developed an extensive record of uncontroverted evidence showing:

- haphazard, arbitrary, and inconsistent enforcement of the statutes based almost entirely on individual election workers' personal knowledge and biases;
- that election workers deprive Texans of their right to vote based solely on their apparel;
- that the *only* disturbances in polling places related to voter apparel come from election workers confronting voters;

[1] Unless otherwise noted, code sections refer to the Texas Election Code, "the State" refers to all of the government defendants in this case, and "the State's brief" refers to the defendants' principal brief in this Court.

- that the State consistently declines to issue guidance to front-line election workers or voters as to how the statutes should be interpreted and applied.

The State offers *no* evidence to contradict these established facts. Instead, the State ignores the record, convinced the district court to do likewise, and urges this Court to do so as well. *See, e.g.*, State's Br. at 32–34. The record cannot be so easily cast aside. *Scott v. Harris*, 550 U.S. 372, 380 (2007) ("When opposing parties tell two different 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."); *Orr v. Copeland*, 844 F.3d 484, 491 (5th Cir. 2016) (district court erred in disregarding uncontradicted and unimpeached testimony of unbiased witnesses); *Moore v. Willis Indep. Sch. Dist.*, 233 F.3d 871, 874 (5th Cir. 2000) (on summary judgment, court should "give credence . . . to the evidence supporting the moving party that is uncontradicted and unimpeached.") (citation omitted).

The record establishes that the electioneering statutes are not and cannot be enforced in compliance with the rule announced in *Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876 (2018). Speech restrictions in

nonpublic forums must have "objective, workable standards" that provide "a sensible basis for distinguishing what may come in from what must stay out." *Id.* at 1888, 1891. But the undisputed record reveals that the Texas electioneering statutes imbue election workers with unbridled and largely unreviewable discretion to enforce them. The electioneering statutes are thus unconstitutional under a straightforward application of the Supreme Court's decision in *MVA*.

SUMMARY OF ARGUMENT

1. The district court correctly held that Ostrewich—a voter censored at the polling place pursuant to electioneering statutes administered by the defendants—has standing to raise her constitutional claims in federal court. ROA.2874–79; Tr. of Oral Arg. at 9:12–13 (viewing the State's standing arguments as seeing "what [it] can throw at the wall and hop[ing] something sticks."). The State acknowledges that Ostrewich suffered a concrete injury when election workers enforced the electioneering statutes against her, yet incorrectly asks this Court to ignore the statutes' chilling effect on speech. State's Br. 18–22. These injuries are fairly traceable to the defendants, which are state- and county-level officials tasked with administering and enforcing the

electioneering statutes. The injury is also redressable by a favorable court decision, which would remove the threat of censorship and criminal sanction for Ostrewich and other Texans who may wear apparel that an election worker deems "electioneering" to the polling place. ROA.2874–78.

2. The Secretary of State and Attorney General are both proper defendants under *Ex parte Young*, 209 U.S. 123 (1908). The Secretary plays multiple roles in the enforcement of the electioneering statutes, including issuing election advisories, speaking with county officials, providing training, and answering inquiries from interested Texans. Although the Attorney General has not recently prosecuted violations of the electioneering statutes, he has never disavowed his authority nor disclaimed any intention to do so.

3. Sections 61.003 and 85.036 violate the First and Fourteenth Amendments to the United States Constitution. These statutes authorize thousands of individual election workers to exercise discretion—based on their personal understanding of the local, state, and national political scene—to censor voter apparel, including Ostrewich's union shirt that did not mention, much less advocate for or against, any candidate, political

party, or measure. Under the test announced in *MVA*, the State must provide some sensible basis for what may come in and what must stay out of the polling place. *MVA*, 138 S. Ct. at 1888. The electioneering statutes provide none. Instead, the statutes' open-ended prohibition predictably leads election workers, county officials, and state officials to reach vastly different conclusions about what voters can wear at the polling place. Beyond that, the First Amendment places the onus on the government to produce evidence that its speech restrictions further its interests. But the record reveals that the electioneering statutes actually *undermine* the government's interest by causing more discord than they prevent.

4. Section 61.010 also violates the First Amendment because it suffers from many of the same problems that plague Sections 61.003 and 85.036. The State's newfound limitation on its scope—raised for the first time in this appeal—finds no support in the record, and raises more questions than it answers. Further, the State does not dispute that it has frequently asserted that Section 61.010 applies to poll workers' badges and name tags instead of voter apparel. This provides an alternative basis to reverse the district court's judgment upholding Section 61.010.

5. Ostrewich plainly suffered a violation of her constitutional rights when she was censored for wearing her yellow union shirt in 2018. That completed injury entitles her to nominal damages—payable by the Harris County Defendants.

ARGUMENT

I. OSTREWICH HAS STANDING TO PRESS HER CONSTITUTIONAL CLAIMS

Standing requires (1) an "injury in fact" that (2) is fairly traceable to the defendant's actions and (3) is likely to be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). As detailed in Ostrewich's Principal Brief at 5–7, 18, an election worker confronted Ostrewich in the North Hallway of the Houston Multi-Service Center polling place on October 24, 2018, during the early voting period. ROA.2850. The election worker directed Ostrewich to go to the restroom and turn her shirt inside-out before she would be allowed to vote. ROA.592; ROA.635. Feeling "baffled" and "violated" by the election clerk's demands, ROA.597–98, Ostrewich complied so that she could cast her vote.

Ostrewich has standing. As the district court noted, the Supreme Court in *MVA* proceeded to the merits after a similar confrontation.

ROA.2873. Given the independent obligation of a federal court to "ensure that [its jurisdiction] exists," *Parents Involved in Community Schools v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 719 (2007), and "the similarity between this case and" *MVA*, ROA.2783, the Supreme Court's decision reinforces the conclusion that the court had jurisdiction in this case. *See Int'l Soc. for Krishna Consciousness of Atlanta v. Eaves*, 601 F.2d 809, 820 n.9 (5th Cir. 1979) (noting that the Supreme Court's "decision on the merits indicates that the requirements of Article III were met").

Courts in *MVA* and similar cases considered challenges in which plaintiffs named government officials, rather than election workers, as defendants. *See MVA*, 138 S. Ct. at 1882 (naming county officials as defendants); *Burson v. Freeman*, 504 U.S. 191, 192 (1992) (naming the Tennessee Attorney General as the sole defendant); *Veasey v. Abbott*, 888 F.3d 792 (5th Cir. 2018) (constitutional challenge to Texas voter identification law named state officials as defendants); *Schirmer v. Edwards*, 2 F.3d 117, 119 (5th Cir. 1993) (defendants were Louisiana Governor, Attorney General, and Secretary of State; the person who barred plaintiff from electioneering was not identified).[2]

[2] All defendants are identified in *Schirmer v. Edwards*, Original Brief of

As shown below, Ostrewich has standing because she has suffered multiple injuries-in-fact that are fairly traceable to each defendant and redressable by a favorable court decision.

A. Injury

1. There is No Dispute That Enforcement of the Electioneering Statutes Against Ostrewich Constitutes an Injury-in-Fact

Past chilled speech alone causes a First Amendment injury and justifies a plaintiff's objective belief of future censorship. *See Howard Gault Co. v. Texas Rural Legal Aid, Inc.*, 848 F.2d 544, 558 (5th Cir. 1988) (plaintiff had standing to challenge statute where she suffered a direct injury "as a result of the operation of the challenged statutes"). Here, Ostrewich suffered an injury-in-fact when she was ordered to censor her expressive apparel when she went to vote in October 2018.

Although the State acknowledges that the "district court concluded that Ostrewich was injured when she was asked to turn her shirt inside out," State's Br. at 18, it fails to advance any argument against this conclusion on appeal. *See id.* at 18–19 (arguing instead that the injury was not fairly traceable to Defendants). The State is correct in

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Appellants, No. 92-3900, 1992 WL 12144853, at *3 (Dec. 28, 1992).

"assuming" that a voter who is forced to "cover up a logo on a t-shirt" has suffered an injury-in-fact. *Id.* at 18. A plaintiff raising a First Amendment claim is injured where a law prevents her from speaking. *See, e.g.*, *MVA*, 138 S. Ct. at 1886 (the right to wear expressive apparel at the polling place); *Matal v. Tam*, 137 S. Ct. 1744, 1751 (2017) (the right to register a trademark).

2. The Continued Enforcement of the Electioneering Statutes Injures Ostrewich and Other Texas Voters Alike by Chilling Their Speech

A First Amendment plaintiff is injured when a law causes her to forgo expression. *Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383, 393 (1988) (the danger of "self-censorship" is "a harm that can be realized even without an actual prosecution."); *see also N.H. Right to Life Political Action Comm. v. Gardner*, 99 F.3d 8, 14 (1st Cir. 1996) ("the vice of the statute is its pull toward self-censorship."). "Neither formal punishment nor the formal power to impose it is strictly necessary to exert an impermissible chill on First Amendment rights—indirect pressure may suffice." *Speech First, Inc. v. Cartwright*, 32 F.4th 1110, 1123 (11th Cir. 2022).

In *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 301–02 (1979), the plaintiffs challenged a statute that criminalized certain deceptive statements. Although no criminal penalties had ever been levied, there was a credible threat of prosecution because the plaintiffs previously engaged in targeted speech activities and intended to do so in the future. *Id.* In *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 164 (2014), the Supreme Court noted that the "threat of future enforcement" is bolstered by the fact that "any person" could file a complaint about the plaintiff's speech.

Texas also invites anyone to submit complaints to state and county election officials about perceived violations of the electioneering statutes. ROA.786 (Secretary of State's Elections Division Director Keith Ingram gets complaints about "some form[s] of apparel" or "a badge that a poll worker has on."); ROA.979–84 (sample complaint). Indeed, Texas law requires the district or county attorney to investigate potential violations of the electioneering statutes if two or more registered voters "present affidavits alleging criminal conduct in connection with the election." Tex. Elec. Code § 273.001(a).

The electioneering statutes imposed an objective chill on Ostrewich's speech. Ostrewich felt "violated" when an election worker enforced the statutes against her in a past election, ROA.597–98, and testified that she will not wear her union shirt or similar apparel to the polls again until she receives a favorable decision from this Court because she cannot know what apparel is permitted under the electioneering statutes. ROA.601, 608–09. *See Center for Individual Freedom v. Carmouche*, 449 F.3d 655, 658 (5th Cir. 2006) (First Amendment plaintiff had standing where it feared "its advertisements would be deemed as intended to influence an election," and "refrain[ed] from running any ads until the constitutionality of the relevant provisions of the statute could be determined.").

The State is wrong in suggesting that a presumption of a credible risk of prosecution is limited to a "pre-enforcement challenge of a new law." State's Br. at 21. Indeed, in the very case the State cites for this proposition, this Court explained that the presumption applies to pre-enforcement challenges to recently enacted *or* non-moribund statutes. *Speech First, Inc. v. Fenves*, 979 F.3d 319, 335 (5th Cir. 2020). This Court's cases clarify that a "pre-enforcement challenge" is one that seeks

prospective relief. In *Barilla v. City of Houston*, 13 F.4th 427, 429 (5th Cir. 2021), for instance, the Court considered a pre-enforcement challenge to decades-old provisions of Houston law. *See id.* at 430. This Court held that the plaintiff faced a substantial risk of enforcement given that "the [government] did not disclaim its intent to enforce the [challenged laws] to the district court, in its appellate briefing, or during oral argument, and instead stressed the [laws'] legitimacy and necessity." *Id.* at 433. So too here.

3. Ostrewich Has Standing Under the *Speech First* Factors

Ostrewich also has standing to pursue prospective injunctive relief because she (1) intends to engage in a course of conduct arguably affected with a constitutional interest, (2) that is arguably proscribed by the law, and (3) there is a credible threat of future enforcement. *Speech First*, 979 F.3d at 330 (citations omitted). All three factors are met here.

First, Ostrewich intends to engage in a course of conduct arguably affected with a constitutional interest. Ostrewich testified that, although she would like to wear her yellow union shirt, she is refraining from doing so until after a decision in this case. ROA.601, 608–09. Second, the course of conduct is arguably proscribed by the law. Under a plain reading of

Sections 61.003 and 85.036, t-shirts that an election worker believes to be "electioneering" for even off-the-ballot measures are proscribed by law. In any event, haphazard interpretation of the electioneering statutes makes her shirt "arguably proscribed."

Third, there is a credible threat of future enforcement. Courts assume a credible threat of prosecution exists in the absence of compelling contrary evidence, such as publicly disavowing the statute. *Speech First*, 979 F.3d at 335; *Babbitt*, 442 U.S. at 30 (where "the State has not disavowed any intention of invoking" the challenged law, plaintiffs are "not without some reason in fearing prosecution"). In *Pool v. City of Houston*, 978 F.3d 307, 312–13 (5th Cir. 2020), the plaintiff could challenge an unenforced "zombie" statute because the state had not publicly disavowed it.

A credible threat of enforcement is present here. Election workers across Texas enforce the statutes and the State refuses to disavow them. *See Barilla*, 13 F.4th at 433–34. Instead, the State's vigorous defense of the statutes suggests continued enforcement absent a decision enjoining defendants from doing so. *See Parents Involved*, 551 U.S. at 719. Enforcement of the statutes also manifests itself in ways other than

criminal prosecution. *See 281 Care Committee v. Arneson*, 638 F.3d 621, 628, 631 (8th Cir. 2011) (reasonableness of chilled speech shown by threatened, non-criminal consequences). The State instructs election workers to enforce the electioneering statutes by confronting voters and censoring the speech on their apparel. *See* ROA.1950–51 (election judges enforce electioneering statutes to face coverings); Election Advisory No. 2022-13 (Feb. 14, 2022) (advising election workers of ruling below and continued enforcement of Section 61.010).[3] It is cold comfort to a voter who has been pulled out of line, embarrassed, and potentially arrested or investigated, that the State ultimately may decline to prosecute.

As the district court noted, "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." ROA.2878 (emphasis in original). And although the State asserts that arrest is "unlikely," it

[3] https://www.sos.state.tx.us/elections/laws/advisory2022-13.shtml. Meanwhile, Harris County *still* warns voters using the broader language of Sections 61.003 and 85.036. Harris County Election Division Knowledgebase, Frequently Asked Questions, Voting Process: *Is Electioneering Allowed Within the Polling Location?*, https://www.harrisvotes.com/FAQ#VotingProcessFAQ (visited May 29, 2022)

does not dispute that police may arrest voters who refuse to follow an election worker's orders to remove or cover up their apparel. ROA.1015; State's Br. at 6, 19; ROA.502 ("District Attorney Ogg admits that a person who commits a Class C misdemeanor in the State of Texas may be arrested."). Indeed, the State trains election judges to call the police when voters refuse to comply. ROA.1915; ROA.1603 (Election Judge Morris: "[T]hey have to do what I say or I call the cops on them" and "that's the way that they're telling us to run it.").

Therefore, the fact that Ostrewich followed the election worker's instructions is not "voluntary compliance." State's Br. at 19. Instead, it stems from the election worker's apparent authority over the polling place, ROA.603, and Ostrewich's fear that she would be threatened with arrest unless she "did what [the election worker] told [her] to do." ROA.1164. In any event, "an injury resulting from the application or threatened application of an unlawful enactment remains fairly traceable to such application, even if the injury could be described in some sense as willingly incurred." *FEC v. Ted Cruz for Senate*, 142 S. Ct. 1638, 1647 (2022). Ostrewich need not risk arrest before challenging "a statute that [s]he claims deters the exercise of [her] constitutional

rights." *Justice v. Hosemann*, 771 F.3d 285, 291 (5th Cir. 2014) (citation omitted). "Instead, once a plaintiff has shown more than a subjective chill—that is, that [s]he is seriously interested in disobeying, and the defendant seriously intent on enforcing, the challenged measure—the case presents a viable case or controversy under Article III." *Id*. (cleaned up).

The State's contention that no one is injured because the State has not prosecuted violations of the electioneering statutes in the past decade is impossible to square with the Supreme Court's decision in *MVA*. State's Br. at 21. The *MVA* voters were not prosecuted and apparently no-one was *ever* prosecuted in the law's hundred-year history. *MVA*, 138 S. Ct. at 1896–97 (Sotomayor, J., dissenting). The plaintiffs had standing because in that case, as in this one, election workers confronted voters at the polls and prevented them from voting until they complied with the statute. *Id*. at 1884.[4]

Finally, in considering Ostrewich's overbreadth challenge, this Court may "dispense with the same-party requirement" and "focus[]

[4] Tex. Elec. Code § 32.075(d), which permits voters *arrested* at polling places to vote before the police take them away, by its terms does not apply to anyone who is not under arrest.

instead upon the great likelihood that the issue will recur between the defendant[s] and the other members of the public at large." *Catholic Leadership Coal. of Tex. v. Reisman*, 764 F.3d 409, 423 (5th Cir. 2014) (citation omitted). Here, every voter in Texas faces confrontation by election workers for wearing apparel deemed "electioneering." ROA.569 (citing record). Given the State's Election Advisories, Texas election workers clearly intend to enforce these statutes against voters in upcoming elections. Where speech statewide is repeatedly chilled, case-by-case adjudication is "intolerable." *Bd. of Airport Comm'rs of City of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569, 576 (1987). Thus, Ostrewich has standing to vindicate the First Amendment rights of herself and other Texas voters. *See Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 140 S. Ct. 2335, 2351 n.8 (2020) (plurality op.) (when "a provision is declared invalid . . . [it] cannot be lawfully enforced against others.").

B. Traceability

Ostrewich's injuries are "fairly traceable" to Defendants because they result from Defendants' actions in "enacting and enforcing" the law. *Energy Management Corp. v. City of Shreveport*, 397 F.3d 297, 302 (5th Cir. 2005).

The **Harris County Clerk** (now Elections Administrator) "plays a role in the selection and appointment of election judges." ROA.869; Section 32.002(c-1)–(e). The Elections Administrator trains election judges and election clerks "using the standardized training program and materials developed by" the Secretary of State, ROA.870; Section 32.114(a), and 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. Section 32.002(g). The Harris County Administrator of Elections "personally did the training for the [election] judges." ROA.706.

The **Secretary of State**, as the State's chief election officer, seeks to "obtain and maintain uniformity in the application, operation, and interpretation of the Texas Election Code and other election laws." ROA.876; ROA.769. He "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. Kathryn Gray testified that the information she needs to enforce the electioneering statutes comes *solely* from the "election department and by my training." ROA.631. State-trained county election officials in turn train their poll workers. *Id.*, citing ROA.1781–82 (training includes webinars and annual three-day intensive seminars for county election officials); ROA.779–80 (election judges are trained in person by county and other local officials using materials provided by the Secretary of State); ROA.1446 (post-*MVA* email from the Secretary of State to local election officials noted, "We understand if you wish to apprise your local county or district attorney, and to caution your judges against being overly broad in their applying our law.").

Ostrewich's injury is also fairly traceable to the defendants entrusted with investigating and prosecuting violations of the electioneering statutes. In *National Press Photographers Ass'n v. McCraw (NPPA)*, a district court held that plaintiffs' injuries were traceable to three law enforcement officer defendants even though none of the plaintiffs had been prosecuted and one of the defendants "never threatened or used his authority against [them]." *NPPA*, 1:19-CV-946-

RP, __ F. Supp. 3d __, 2022 WL 939517, at *5 (W.D. Tex. Mar. 28, 2022). The defendants "have the power and the duty under state law to enforce" the law, "leading Plaintiffs to fear enforcement and refrain from constitutionally protected activities." *Id.*

Here, the **Harris County District Attorney** is authorized to prosecute criminal violations of the Texas Election Code in Harris County. ROA.496. She is authorized to interpret and enforce Texas criminal laws. Tex. Const. art. V, § 21; Tex. Gov. Code § 43.180(b)(c). *See also* Gov. Code § 41.103; ROA.1406 (Harris County assistant prosecuting attorney may perform all duties imposed by law on the District Attorney, under the District Attorney's supervision.).[5]

The **Texas Attorney General** "may or must investigate alleged criminal conduct that occurred in connection with an election, and may prosecute criminal offenses prescribed by the election laws" of Texas. Paxton Ans., ROA.452 (citing Tex. Elec. Code §§ 273.001, 273.021(a)).[6]

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[5] The District Attorney does not track or communicate its decisions or prosecutions under the electioneering statutes. ROA.1413.

[6] The State argues elsewhere that the Attorney General has had authority to prosecute election law violations for 70 years and that the split decision of the Court of Criminal Appeals holding otherwise erred as a matter of textual analysis and constitutional interpretation. *Stephens v. State of Texas*, Nos. PD-1032-20 & PD-1033-20, The State of

Against all this, the State suggests Ostrewich should have instead sued the presiding election judge at her polling place. State's Br. at 19. But the record is clear that, despite the State's willingness to throw its election judges and clerks under the bus,[7] the county and state defendants jointly bear responsibility for the administration and implementation of the electioneering statutes and Ostrewich injury is fairly traceable to them.[8]

Texas's Motion for Rehearing, https://www.texasattorneygeneral.gov/sites/default/files/images/executive-management/Stephens_Rehearing%20final_0.pdf (visited May 28, 2022).

[7] The State argues that the election worker who confronted Ostrewich should personally be liable for any damages. State's Br. at 48. But if voters must sue precinct-level election workers to challenge election statutes, Texas will be hard-pressed to find people willing to serve in those roles, causing significant harm to the State's ability to conduct elections. Reese Oxner and Uriel J. Garcia, *Many voting locations throughout Texas did not open because of staff shortages*, Texas Tribune (Mar. 1, 2022) (suggesting that a recent law's new penalties on election workers for certain violations deterred some election judges from showing up), https://www.texastribune.org/2022/03/01/texas-primary-election-voting-location-closures/.

[8] Contrary to the State's Brief at 40, Ostrewich's injury is traceable to defendants' enforcement of all of the electioneering statutes, because each statute may be enforced to censor her from wearing her expressive apparel in an election.

C. Redressability

"[A] plaintiff satisfies the redressability requirement when he shows that a favorable decision will relieve a discrete injury to himself. He need not show that a favorable decision will relieve his every injury." *Larson v. Valente*, 456 U.S. 228, 243 n.15 (1982); *see also K.P. v. LeBlanc*, 627 F.3d 115, 123 (5th Cir. 2010) (injury redressable by favorable court decision against state agency although it was not "the sole participant in the application of the challenged statute"). Ostrewich's injury is redressable by a favorable court decision enjoining enforcement of the electioneering statutes. *Speech First*, 979 F.3d at 338; *Barilla*, 13 F.4th at 431 n.1.

The State advances the novel argument that Ostrewich's injury is not "redressable by a judgment declaring [Sections 61.003 and 85.036] unconstitutional." State's Br. at 40. But Ostrewich is seeking a court order enjoining defendants from enforcing all three of the electioneering statutes. Besides, an order enjoining Sections 61.003 and 85.036 will plainly "relieve a discrete injury" for Ostrewich, *Larson*, 456 U.S. at 243 n.15, because she will be able to wear apparel that an election worker

considers "electioneering" for a candidate, measure, or political party that is not on the ballot.

II. THE STATE DEFENDANTS ARE PROPER DEFENDANTS UNDER *EX PARTE YOUNG*

Under *Ex parte Young*, 209 U.S. at 157, "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."[9] *Morris v. Livingston*, 739 F.3d 740, 746 (5th Cir. 2014) (citations omitted). A plaintiff can establish this connection by showing that a defendant had a "particular duty to enforce the statute in question and a demonstrated willingness to exercise that duty.'" *Id.* "At the minimum, . . . a finding of standing tends toward a finding that the *Young* exception applies to the state official(s) in question." *City of Austin v. Paxton*, 943 F.3d 993, 1002 (5th Cir. 2019). Neither a specific grant of enforcement authority nor a history of enforcement is required to establish a sufficient connection. *NPPA*, 2022

[9] The Texas Supreme Court accepted this Court's certified question to identify the state official tasked with enforcing the civil liability provisions of Texas's "anti-solicitation" law for voting by mail. *Longoria v. Paxton*, No. 22-50110, 2022 WL 832239 (5th Cir. Mar. 21, 2022).

WL 939517 at *7, citing *City of Austin*, 943 F.3d at 1001; *Air Evac EMS, Inc. v. Tex., Dep't of Ins., Div. of Workers' Comp.*, 851 F.3d 507, 519 (5th Cir. 2017). There need be only a "scintilla of enforcement by the relevant state official" for *Ex parte Young* to apply. *City of Austin*, 943 F.3d at 1002 (quotations omitted); *Tex. Democratic Party v. Abbott*, 978 F.3d 168, 180 (5th Cir. 2020).

A. Secretary of State Scott Is a Proper Defendant Under *Ex parte Young*

The record belies the State's contention that the Secretary of State "has never assumed a role" in enforcing the electioneering statutes. State's Br. at 15. On the contrary, the Secretary has consistently played a part in enforcing the electioneering statutes, by providing "written directives, instructions, and opinions relating to the election laws," ROA.1409, legal support and resources to election judges through county officials, ROA.1453, and in this case in particular, engaging in "multiple phone calls" with county-level election officials about enforcement against the yellow union t-shirts. ROA.1774; *see also* Tex. Elec. Code § 31.005 (The Secretary may order local election officials to desist from impeding a citizen's exercise of voting rights and may seek judicial process to enforce the order).

The State's trio of cases do not lend support for its attempt to insulate the Secretary of State from this lawsuit. *See* State's Br. at 15–17. In *Tex. Alliance for Retired Americans v. Scott*, 28 F.4th 669 (5th Cir. 2022), this Court held that the Secretary of State is not a proper party to challenge the repeal of straight-ticket voting because the task of printing ballots resides exclusively in the purview of local officials and the Secretary has neither power nor authority to "compel or constrain" those local officials. *Id.* at 672–73. Here, however, the Secretary of State's Office testified that "[e]lection 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. . . . [T]hey have a certain amount of discretion. But if they ask us a particular question and we tell them what the answer is, they have taken an oath to follow the law." ROA.1081; *see also* ROA.1247 (election judge could not disregard instructions even if she disagreed).[10]

[10] *Lewis v. Scott*, 28 F.4th 659, 662 (5th Cir. 2022), holding that sovereign immunity barred a lawsuit against the Secretary because he lacked enforcement authority with regard to mail-in balloting, is distinguishable on the same basis.

Similarly, while *Richardson v. Flores*, 28 F.4th 649, 655 (5th Cir. 2022), holds that "offering advice, guidance, or interpretive assistance" is not enough to invoke *Ex parte Young*, the record here demonstrates far greater hands-on activity by the Secretary to interpret and implement the electioneering statutes. The Secretary of State regularly responds to inquiries from voters[11] and election workers, initiates and responds to contacts from election judges and officials, and expects such officials to follow the state's guidance.[12] Former Harris County Administrator of Elections Sonya Aston described the two-and-a-half day training for elections administrators conducted by the Secretary of State's Office, put together by Ingram and his staff and featuring a presentation by the Secretary himself. ROA.719; *see also* ROA.770 (Ingram's description of "fairly intensive training"). With the knowledge obtained from the Secretary of State's office, Aston trained county election judges, expecting

[11] Tex. Elec. Code § 31.0055 requires "the secretary of state [to] establish a toll-free telephone number to allow a person to report an existing or potential abuse of voting rights." The telephone number must be posted at each polling location pursuant to Tex. Elec. Code § 62.0112.

[12] The Secretary of State regularly publishes advisories about the State's election laws, including laws related to the conduct of voters at polling places, made publicly available on the Secretary of State's website. ROA.1386–87.

them to conduct the elections in compliance with the instructions. ROA.706; ROA.709. These multiple points of contact demonstrate that the Secretary is a proper defendant under *Ex parte Young*.[13]

B. Attorney General Paxton Is a Proper Defendant Under *Ex parte Young*

The district court was also correct in holding that Attorney General Paxton is a proper defendant under *Ex Parte Young*. Sections 273.001 and 273.021 authorize and require the Attorney General to investigate and prosecute violations of election laws of this State, and he does so via the Office's Election Fraud Section. ROA.1383; ROA.1395. Complaints may be submitted by anyone.[14] If two or more registered voters present affidavits alleging criminal conduct in connection with an election to the Attorney General, the Attorney General *shall* investigate the allegations.

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[13] The Harris County District Attorney defers to the Texas Legislature and the Texas Secretary of State as the Chief Elections Officer with respect to the governmental interests advanced by Sections 61.003, 61.010, and 85.036, and the manner in which these statutes are tailored to achieve these interests, ROA.1404, ROA.1409; as does the Harris County Elections Administrator. ROA.1452, ROA.1455, ROA.1458. The County Defendants joined the State's motion for summary judgment. ROA.1494.

[14] Texas Secretary of State, Election Complaint, https://www.sos.state.tx.us/elections/forms/complaintform-sos.pdf (visited June 1, 2022). The "Important Information" section explains that complaints may be referred to the Attorney General. *Id.* at 6.

Section 273.001(a). Authorized individuals also may ask the Attorney General to issue a written legal opinion under certain specified circumstances, which could implicate provisions of the Texas Election Code. ROA.1396, citing Tex. Gov't Code §§ 402.041–045.

III. SECTIONS 61.003 AND 85.036 VIOLATE THE FIRST AND FOURTEENTH AMENDMENTS

A. The District Court Properly Considered Ostrewich's Challenge to Sections 61.003 and 85.036

The district court properly ruled on the constitutionality of Texas's primary electioneering statutes: Sections 61.003 and 85.036. The State improperly relies on cases that allow courts to cut short analysis of multiple claims *after the plaintiff prevails* on one claim. *See Muniz v. City of San Antonio, Texas*, 476 F. Supp. 3d 545, 561–62 (W.D. Tex. 2020) (plaintiff who obtains all relief sought on one claim eliminates need for court to review additional claims). This case is analogous to *Pruett v. Harris County Bail Bond Bd.*, 499 F.3d 403, 414–16 (5th Cir. 2007), which declared a 24-hour ban on solicitation to be an overbroad violation of the First Amendment while upholding a nighttime ban. The ruling upholding the shorter ban did not preclude ruling on the broader ban.

The parties and court below consistently treated the three electioneering statutes together and used the same record evidence for

all claims and defenses. The election worker who confronted Ostrewich never told her which statute she allegedly violated. Although the most likely source of the election worker's authority was Section 85.036, the State now asserts that the election worker could have prohibited the same t-shirt under Section 61.010. Further, although Ostrewich was censored when she voted during the early voting period, there is no dispute that the same prohibition on apparel applies on Election Day—nor is there any dispute that Ostrewich may vote during either early voting or on Election Day in future elections. ROA.1246 (Ostrewich has voted on Election Day and during early voting). Indeed, a ruling on both Sections 61.003 and 85.036 is necessary to fully resolve the dispute in this case—because, unlike Section 61.010, those provisions impose additional restrictions on apparel that, in an election worker's view, could be deemed "electioneering" for any candidate, party, or measure in any election. *See* Election Advisory No. 2022-13 (Feb. 14, 2022) (noting that "[b]ased on the district court's ruling, a person may not wear apparel or a similar communicative device relating to a candidate, measure, or political party appearing on the ballot in the current election under Section 61.010, but a person may wear such apparel relating to a

candidate, measure, or political party that does not appear on the ballot in the current election.") (emphasis deleted). The district court properly ruled on the constitutionality of each of the electioneering statutes.[15]

B. Sections 61.003 and 85.036 Are Facially Unconstitutional Under the First Amendment

Sections 61.003 and 85.036 are facially unconstitutional under the First Amendment. So far as the statutes restrict speech within the polling place, they are subject to—and fail—reasonableness review. *MVA*, 138 S. Ct. at 1886. *First*, Sections 61.003 and 85.036 suffer from the same defects as the Minnesota law in *MVA*. The statutes contain no "objective, workable standards" for enforcement nor any "sensible basis for distinguishing" between speech that is permitted and speech that is prohibited. *Id.* at 1888, 1891. *Second*, reasonableness review places the burden on the State to prove that its speech restrictions further its asserted interests. Ostrewich's Principal Br. at 26–27 (citing cases). But the State relies on "mere conjecture," rather than concrete evidence of

[15] Caselaw on attorneys' fees lends additional support. Courts routinely award fees to civil rights plaintiffs who prevail on one of several constitutional claims based on related facts or legal theories. *E.g. Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983). This would be an odd occurrence if a ruling for the government on some claims prevented the Court from reaching others.

actual disruptions that it supposedly needs the statutes to prevent. *Ted Cruz for Senate*, 142 S. Ct. at 1653 (First Amendment violation where the "Government is unable to identify a single case" of the problem the speech restriction was ostensibly to remedy); *Northeastern Pa. Freethought Society v. County of Lackawanna Transit Sys.*, 938 F.3d 424, 439, 442 (3d Cir. 2019) (state failed to show the ban on religious advertisement in public transit was reasonable where it "failed to cite a single debate [among passengers] caused by an ad on one of its buses"). Here, the evidence shows that the electioneering statutes undermine the State's asserted interests. *Third*, the electioneering statutes flunk strict scrutiny insofar as they restrict speech in the 100-foot buffer zone. The statutes are unsupported by any compelling interest and the State concedes that it has not attempted any less restrictive means for furthering any interest it may have. ROA.878.

1. Sections 61.003 and 85.036 Are Unconstitutional Because They Lack Objective, Workable Standards for Enforcement

As the district court observed, the fact that Sections 61.003 and 85.036 define "electioneering" to include "political signs and literature" suggests "that these statutes allow election judges to ban voters from

wearing 'political' apparel." ROA.2898. Although the State now disputes that interpretation, it previously construed the statutes to reflect the fact that it "is simply the law that polling places must be free of politics." ROA.933.

In all events, although election officials at the state, county, and local level all disagree on the precise scope of the electioneering statutes, there is no dispute that the electioneering statutes censor apparel well beyond that which expressly advocates for or against candidates, measures, or political parties. *See* Ostrewich's Principal Br. at 15–17 (noting categories of banned apparel). There is similarly no dispute that Sections 61.003 and 85.036 reaches apparel that "electioneers" for candidates, measures, or political parties that are not on the ballot. State and local officials construe the statutes to prohibit apparel featuring:

- the name or reference to a candidate, measure, or political party that is not on the ballot. ROA.773; ROA.895 (Ingram: "[A] MAGA hat would always be inappropriate for a polling place. A Hillary shirt would likewise be a no go no matter what is on the ballot.").
- the name, logo, or slogan of a candidate on the ballot in previous elections, even if that candidate will not be on the ballot in the

future. ROA.773 (Section 61.003 applies to any past candidate); ROA.716, 774–75 (Reagan/Bush '84 banned; "MAGA" banned when Trump not on the ballot; "Vote for Abraham Lincoln" banned), ROA.789 (Obama; Clinton/Gore banned), ROA.700–01 (past candidates and parties banned).

- the name, logo, or slogan of a candidate who might run for office in a future election. ROA.969 ("[T]he election judge can reasonably apply the rule to future potential candidates, even though they are not yet certified to the ballot."); ROA.701; ROA.968–71.
- language relating to candidates in other jurisdictions. ROA.718 (banned if recognizable); ROA.676–77 (ban apparel mentioning Alexandra Ocasio-Cortez); ROA.633–34 (might ban Andrew Cuomo shirt).

The uncontradicted evidence of inconsistent and haphazard enforcement also dooms the electioneering statutes. *See* Ostrewich's Principal Br. at 17. County election officials, state election officials, and election judges with years of experiences could not agree on whether the statutes prohibit shirts featuring the "NRA," "Second Amendment," or

"BLM." *Id.* Nor could they agree on whether the statutes prohibit Ostrewich's yellow union t-shirt or a firefighter uniform. *Id.*

The district court was not free to disregard the uncontradicted evidence of inconsistent and haphazard enforcement.[16] One person's difficulties in applying Minnesota's law was proof enough of its vague and open-ended prohibitions, *MVA*, 138 S. Ct. at 1891. That every one of the five election officials disagreed on virtually every one of the questions posed to them about the scope of the electioneering statutes is fatal to the statute here—particularly where the State has not come forth with its own evidence of any consistent understanding of what the statutes prohibit. Instead, the Secretary routinely declines to answer questions from Texans about whether apparel such as an NRA shirt is allowed at the polling place. ROA.955–56 (leaving it to the discretion of local election workers). A Harris County election judge testified that "a Democrat judge would probably not allow an 'NRA' shirt or an 'NRA' hat," but she "would probably let the 'NRA' hat in because [she] view[s] them differently."

[16] The interpretation and enforcement of the electioneering statutes by election officials and election workers can guide this Court's interpretation. If it were otherwise, there would be no basis for applying the electioneering statutes to apparel, ROA.787, which is not mentioned in the statutes.

ROA.673–75. The Secretary's 30(b)(6) deponent testified that "different election judges recognize different slogans," ROA.1581. But the First Amendment does not leave "the determination of who may speak" to "the unbridled discretion of a government official." *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 763–64 (1988).

Although the First Amendment does not require perfect clarity, it is axiomatic that an "ill-defined" policy carries "[t]he opportunity for abuse, especially where [it] has received a virtually open-ended interpretation." *Center for Investigative Reporting v. Southeastern Pennsylvania Transp. Auth.*, 975 F.3d 300, 316–17 (3d Cir. 2020) (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*, Nos. 20-1710 & 20-1740, 2022 WL 1592591, at *12 (4th Cir. May 20, 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).

The State relies on *Schirmer v. Edwards*, 2 F.3d 117 (5th Cir. 1993), and *DeRosier v. Czarny*, No. 5:18-CV-0919, 2019 WL 4697504 (N.D.N.Y.

May 24, 2019), report and recommendation adopted, 2019 WL 4691251 (N.D.N.Y. Sept. 26, 2019), as upholding electioneering statutes that do not include the "on the ballot" qualifier. State's Br. at 45. Neither case helps the State here. The government's principal interest in *Schirmer* was preventing active campaigning at the polling place. The plaintiffs there sought to station themselves near the polling place to "circulate petitions, obtain signatures, wear buttons, display paraphernalia, and pass out other materials to support" a recall petition. *Schirmer v. Edwards*, 2 F.3d at 118–19; *see also id.* at 122 (contrasting previous buffer zone that inadequately deterred *poll workers* from intimidating and harassing voters from exit-pollers who did not "create these problems"). *Schirmer* never suggests that voter apparel, which is the focus of the electioneering statutes here, presented *any* problems in polling places. Beyond that, the *Schirmer* court opined that the State's total ban was its "most defensible position," *id.* at 123[17]—a remark that squarely conflicts with *MVA*'s holding that the State must provide some

[17] The Louisiana Supreme Court, analyzing the same statutes applied to the same campaigner, held that the law's total ban within 600 feet was unconstitutionally overbroad under the First Amendment. *State v. Schirmer*, 646 So.2d 890, 902 (La. 1994).

sensible basis for distinguishing between permissible and prohibited expression. 138 S. Ct. at 1891.

In *DeRosier v. Czarny*, the New York State Board of Elections, responsible for administering and enforcing election laws, issued authoritative guidance that the challenged statute did not prohibit "clothing" or "buttons that include political viewpoints . . . unless the issue itself is *unambiguously on the ballot* in the form of a ballot proposal." 2019 WL 4697504 at *11 (emphasis added).[18] Texas has issued no authoritative guidance, ROA.864–66, and the record evidence overwhelmingly demonstrates that the electioneering statutes restrict a far broader range of speech than the names of candidates or measures "unambiguously on the ballot."

The Sixth Circuit's decision in *Anderson v. Spear*, 356 F.3d 651, 662–63 (6th Cir. 2004), is more instructive in this case. The court held that Kentucky's 500-foot barrier "designed to prevent voters from having

[18] Even as to Section 61.010, *DeRosier* is unpersuasive because the New York guidance limited censorship to apparel depicting measures "unambiguously on the ballot" while Texas permits censorship of anything an election worker deems "related to" candidates, political parties, or measures on the ballot. ROA.640 (election judge would censor union shirt because union supported ballot proposition).

contact with any speech whatsoever immediately prior to voting" was an overbroad restriction that significantly impinged on protected speech. Like the Texas statutes in this case, the Kentucky law extended to "issue advocacy—that is, protected speech which does not directly seek to elect or oppose specific candidates" and was unconstitutional "unless the state demonstrates that the limitation was necessary to prevent intimidation and election fraud." *Id.* at 665. The government "failed to provide evidence to support a finding either that a regulation so broad is necessary to prevent corruption and voter intimidation;" the statute could survive only if it "appl[ied] only to speech which expressly advocates the election or defeat of a clearly identified candidate or ballot measure." *Id*. The fact that the electioneering statutes here go far beyond that is further proof that they violate the First Amendment.

2. Enforcement of the Electioneering Statutes undercuts the State's asserted interests

The government asserts several interests to justify censoring voter apparel under the electioneering statutes, although none specific to Texas elections: to establish a "campaign-free zone" that "protects the right of [a State's] citizens to vote freely for the candidates of their choice . . . in an election conducted with integrity and reliability" and without

"confusion and undue influence." State's Br. at 27–28 (adopting interests accepted as compelling in *Burson*, 504 U.S. at 198–99). The Secretary of State previously described the statutes as creating a "politics free zone," ROA.951, and "a quiet place" for voters "to contemplate their choices free from interference." ROA.1083 (cleaned up); State's Br. at 45.

The electioneering statutes as they are enforced against voters do not reasonably further these interests. A state's interests are undermined when voters "experience or witness unfair or inconsistent enforcement." *MVA*, 138 S. Ct. at 1891. The record contains many examples of voters who perceive that the electioneering statutes are applied in a discriminatory manner. Some voters were allowed to wear a MAGA hat into the polling place. ROA.978. Others were not. ROA.1930. One voter complained that a "no" group on a ballot measure was able to put up signs while a "yes" group was not. ROA.907. Another complained that those who enforced the statutes were doing so to further partisan purposes, and "conducting [the] election to the exclusion of the" other party. ROA.973–75. Ostrewich herself felt unfairly targeted based on the content of her shirt. ROA.1180. This is "neither reasonable nor viewpoint neutral." *Eagle Point Educ. Ass'n/SOBC/OEA v. Jackson County Sch.*

Dist. No. 9, 880 F.3d 1097, 1107 (9th Cir. 2018) (invalidating anti-picketing policy).

a. The only evidence of disruption involves enforcement of the Electioneering Statutes

Ostrewich challenges the electioneering statutes because they are enforced against voters (including herself). The State produced *no evidence* that voters—as opposed to campaign workers or candidates[19]—ever generated disruption to the "island of calm" in the polling place. The State produced *no evidence* of disturbances involving voters wearing union shirts after Aston instructed the county's election workers that they did not constitute prohibited electioneering. *See Greenberg v. Goodrich*, No. 20-03822, __ F.3d __, 2022 WL 874953, at *29 (E.D. Pa.

[19] *See* ROA.2048; ROA.2051 (Election Inspector Reports show multiple instances of campaign workers and candidates electioneering within the 100-foot buffer zone); ROA.2051 (Inspector observed campaign workers electioneering in four different polling locations); ROA.1707 (election judge's car within the 100-foot markers had a sign promoting Ted Cruz). Lacking evidence to support their argument, the State relies on a bill analysis that shows legislative intent to *expand* speech rights near polling places. House Comm. on Elections, Bill Analysis at 2, Tex. H.B. 259, 83rd Leg., R.S. (2013), https://hro.house.texas.gov/pdf/ba83R/HB0259.pdf (visited June 1, 2022). This bill was considered five years before *MVA* and cannot aid the application of that decision to the Texas statutes. In addition, the fact that the bill's *opponents* were concerned with "[a]ggressive electioneering" suggests that they were not referring to apparel at all.

Mar. 24, 2022) (court rejects broad speech regulation given government's lack of evidence supporting its asserted interest).

Here, the State speculates without any evidence of past altercations between voters. The uncontradicted evidence shows disruption only when election workers confront voters about their apparel. *See, e.g.*, ROA.978 (many reports of altercations when election workers asked voters to remove MAGA hats). The State's sole evidence regarding disruption are comments by a Harris County election worker testifying "that in her on-the-ground experience, political messages, buttons, and shirts can aggravate a tense environment. She has witnessed people rip hats off others and fights break out at polling places." State's Br. at 29, citing ROA.1236, ROA.1234–35. This witness, election judge Ruthie Morris, offered no evidence that the physical altercations she witnessed had anything to do with political apparel. In fact, she speculated that "they may be on drugs that day." ROA.1235. And she based her suppositions on her experiences working as a bartender, *id.*, and at a Mötley Crüe concert, ROA.1249. As for her experience *as a poll worker*, she testified that "this is literally not an issue that has ever come up and I don't ever see it coming up." ROA.1237; *see also* ROA.1247 ("my neighborhood

doesn't have problems [with] electioneering . . . it's just not an issue where I work."). She doesn't recall anyone "starting a fight," ROA.1239, and has never seen violence inside a polling place. ROA.1249. This is consistent with other election judges' testimony. ROA.1593 (Gray has never seen a fight or arguments break out as a result of someone wearing a political t-shirt); ROA.1609–10 (Barker has never seen a confrontation or argument happen between voters over what one of the voters was wearing and is not aware of it ever happening in the past).

The State instructs election workers to usher voters who refuse to remove or cover their illicit apparel to the front of the line.[20] ROA.778. It does this for fear that the voters, when confronted by an election worker for apparel, would "be throwing fits" which is "worse," a "breach of the peace [t]hat very much disturbs the zone of quiet contemplation." ROA.1796. For example, a Secretary of State elections attorney praised an election judge who confronted a voter wearing a "Kavanaugh" shirt and for "letting him vote and getting him out of the polling place quickly"

[20] Violating the law thus gains a voter a pass to jump the line and get home quicker, a valuable perk. *Cf.* Six Flags Over Texas, THE FLASH Pass (prices range from $50-$120 to reduce line waiting times), https://www.sixflags.com/overtexas/store/one-day-add-ons.

when he refused to remove or cover his shirt. ROA.799 (noting that voters accused of wearing illicit apparel can "create a scene that may be even more disruptive to the voters at that location.").[21] *See also* ROA.965 (If a voter will not remove or conceal a shirt at the command of an election worker, "they can be moved to the front to vote and then removed from the polling location, or a peace officer may be called.").

b. The Electioneering Statutes do not serve an interest in preventing undue influence

The State offers no evidence that the wide array of apparel censored by the electioneering statutes unduly influences voters at the polls. *See* ROA.790 (Ingram: testifying that whether apparel "influences other voters is not the question" and that another provision of the Texas Election Code, Section 61.008, deals with influencing other voters). "[T]he fear that speech might persuade provides no lawful basis for quieting it." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 576 (2011). This includes Election Day. *Mills v. Alabama*, 384 U.S. 214, 219 (1966) (overturning conviction of newspaper editor who violated ban on election day editorial

[21] Election judges allow passers-by in polling places conducting other activities (e.g. schools) to wear campaign buttons if "it is not worth the disruption to attempt to ask" them to remove them. ROA.968.

endorsements). Not all influence is *undue* influence. Even voters influenced by a message seen on a t-shirt would not be said to have suffered from "undue influence *such as intimidation*." *MVA*, 138 S. Ct. at 1894 (Sotomayor, J., dissenting) (emphasis added); *see also NLRB v. Alamo Exp., Inc.*, 430 F.2d 1032, 1034 (5th Cir. 1970) (no "undue influence" in union election where "whatever influence [a coworker] might have had on other employees was not coercive").

The state and county defendants—with easier and earlier access to inspector reports and unredacted communications—provided *no* factual evidence to demonstrate that speech restrictions on voters' apparel have any effect on maintaining calm in the polling place or the integrity of the vote. *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).[22]

[22] *See 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 . . . ."). States may constitutionally prohibit some forms of passive speech at the polling place but *MVA* recognized the distinction between active and passive speech, noting that, in general, passive speech is "nondisruptive." 138 S. Ct. at 1887–88.

Yet, under the First Amendment, the "government's asserted interest must be tethered to the speech and to the speaker it is restricting." *See U.S. v. Nat'l Treasury Employees Union*, 513 U.S. 454, 473 (1995) (contrasting a ban on honoraria for judges or high-ranking officials that furthers an interest in preventing the appearance of improper influence with a ban on honoraria for workers "with negligible power to confer favors" that does not).

c. Texas deprives voters of the right to vote based on their apparel

Neither the state nor counties track election workers' enforcement of electioneering statutes. ROA.1459. Nonetheless, the evidence shows that election workers have deprived multiple voters of their franchise solely because of their apparel. *See* Ostrewich's Principal Br. at 21–22 (citing the record); ROA.1929–30 (2018 voter attested that "the Election Judge threatened me by stating that I would not be allowed to vote wearing my hat without covering up 'Trump' with tape on the back of my hat. They did not cover up the MAGA front of the hat. They also told me they would call the police and have me arrested if I did not comply."). How many voters were turned away and never returned remains a troubling question.

3. Sections 61.003 and 85.036 are subject to, and flunk, strict scrutiny review for restricting speech within the 100-foot buffer zone

The electioneering statutes restrict speech "within 100 feet of an outside door through which a voter may enter the building in which a polling place is located." Tex. Elec. Code § 61.003(a). Speech restrictions within the 100-foot "buffer zone" are subject to strict scrutiny. *Burson*, 504 U.S. at 196 (plurality opinion); *id.* at 217 (Stevens, J., dissenting) (same). Because the statutes cannot survive reasonableness review, they necessarily fail strict scrutiny as well. Namely, the State has failed to advance sufficient evidence showing that its speech restrictions further a compelling interest and has not attempted any less restrictive means that would further those interests. ROA.878. The electioneering statutes thus falter under strict scrutiny. *See McCullen v. Coakley*, 573 U.S. 464, 494 (2014) (to establish a speech-free buffer zone around an abortion clinic, government must show "that it seriously undertook to address the problem with less intrusive tools readily available to it").

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Under *MVA*, the State's asserted interests may justify a tightly written and enforced statute barring items "displaying *the name* of a

political party, items displaying *the name* of a candidate, and items demonstrating '*support of or opposition to* a ballot question.'" *MVA*, 138 S. Ct. at 1889 (emphasis added). The Texas electioneering statutes goes far beyond this and unconstitutionally restricts the free speech rights of voters across the state.

C. Sections 61.003 and 85.036 Violate the First Amendment as Applied to Ostrewich

The electioneering statutes violate the First Amendment as applied to Ostrewich's "own expressive activities." *Jornaleros de Las Palmos v. City of League City*, 945 F. Supp. 2d 779, 798 (S.D. Tex. 2013) (citations omitted). Ostrewich's yellow union t-shirt did not constitute express advocacy as it did not even mention any candidate, measure, or political party.[23] The State offered only a recitation of Sections 61.003 and 85.036 when asked about these union t-shirts during the November 2018 general election period and left the matter to the discretion of local election officials (as was its general practice). ROA.944–45. The State's 30(b)(6)

[23] Ostrewich's shirt contrasts with *different* yellow union shirts "that said 'Proposition B' with a big checkmark." ROA.640. The State refers to supporters of Proposition B wearing "the" yellow union shirt, State's Br. at 8, but the accompanying photograph plainly depicts multiple different t-shirts with different styles.

deponent Keith Ingram believed that it was a "good discretionary call" to censor the t-shirt because it "had been associated with a particular position on a measure at all the rallies held with regard to that measure." ROA.790.

Just as Minnesota's representation that its ban is "limited to apparel promoting groups with 'well-known' political positions" exacerbated the potential for erratic application, *MVA*, 138 S. Ct. at 1890, so too does Texas's representation that election workers should ban apparel they believe to be "associated with a particular position." In both cases, "enforcement may turn in significant part on the background knowledge and media consumption of the particular election judge applying" the law. *Id*. This case is illustrative. When Ostrewich voted in October 2018, there were ongoing problems with inconsistent enforcement at early voting locations, causing disruptions at the polls. ROA.728. Recognizing these problems, Aston instructed election workers on October 25 to allow the same t-shirt that an election worker prevented Ostrewich from wearing the day before. *Id*. If the statute should not have been enforced against Ostrewich on October 25, then the statute violated

her First Amendment rights when she was censored on October 24.[24] Fair enforcement of speech restrictions cannot depend on when a voter voted.

The State paints Ostrewich as an active campaigner for Proposition B, a picture that is both inaccurate and irrelevant. It is inaccurate because the extent of Ostrewich's campaigning was posting a couple yard signs, using a Proposition B sunshield in her car, getting her parents' signature on a petition and giving them a sign, and sharing information on Facebook. ROA.1110–12; ROA.1161–62. It is irrelevant because the election worker who confronted Ostrewich neither knew nor cared about any of that. *See Dean v. United States*, 556 U.S. 568, 572 (2009) (in the absence of an intent requirement in a statute, "[i]t is whether something happened—not why or how it happened—that matters."). The election worker perceived a yellow union shirt to be "electioneering" and barred Ostrewich from voting until she turned her shirt inside out. ROA.1121–22; ROA.1130–33. This censorship violated Ostrewich's First Amendment rights.

[24] The district court viewed Aston's reversal as reflecting a system of "checks and balances." ROA.2891. In that view, the State's interest in enforcing the electioneering statutes is so fickle that it can evaporate after a handful of calls or emails to a county official.

D. Sections 61.003 and 85.036 Are Unconstitutionally Overbroad

The First Amendment's overbreadth doctrine guards against far-reaching laws that threaten the free speech rights of large segments of society. *See Jews for Jesus,* 482 U.S. at 574. A plaintiff invoking the overbreadth doctrine "may challenge a statute that infringes protected speech even if the statute constitutionally might be applied to him." *Bd. of Trustees of S.U.N.Y. v. Fox*, 492 U.S. 469, 482–83 (1989) (internal quotation marks omitted). The electioneering statutes pose heightened overbreadth concerns because they "delegate[] overly broad discretion" to tens of thousands of election workers. *Forsyth Cnty., Ga. v. Nationalist Movement,* 505 U.S. 123, 129 (1992). They raise "a concern [] that the legislature . . . has created an excessively capacious cloak of administrative or prosecutorial discretion, under which discriminatory enforcement may be hidden." Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 Yale L.J. 853, 884 (1991).

The electioneering statutes are substantially overbroad because (1) "a substantial number of [their] applications are unconstitutional" in relation to "the statutes' plainly legitimate sweep," and (2) the laws are not readily susceptible to a limiting construction. *Broadrick v. Oklahoma*,

413 U.S. 601, 613, 615 (1973). When the intrusion is extensive and plain, and legitimate applications of the law are not, the Court may resolve the case based on the law's overreach, without mapping out the statute's legitimate scope. *United States v. Stevens*, 559 U.S. 460, 472–73 (2010). As noted *supra* at 33–34, the State acknowledges that the statutes prohibit apparel that feature the names of past candidates, apparel "associated" with a position on a candidate or measure, and give election judges the discretion to censor apparel of broad political movements. Election workers must keep a "mental index" of candidates and positions, *MVA*, 138 S. Ct. at 1889, inevitably fostering a substantial number of unconstitutional applications. Because overbreadth doctrine considers *hypothetical* applications of the challenged statutes, *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 801 (1984), proof of *actual* applications of enforcement by election judges interpreting the electioneering statutes should be decisive.

Nor are the statutes susceptible to a limiting construction, which must be defined by a state court or relevant enforcement agency. *Doe I v. Landry*, 909 F.3d 99, 118 (5th Cir. 2018); *see also Service Employees Int'l Union, Local 5 v. City of Houston*, 595 F.3d 588, 597 (5th Cir. 2010)

(finding "no authority lying in a federal court to conduct a narrowing of a vague state regulation"). Here, the State has repeatedly asserted that a limiting construction is unnecessary, ROA.346, ROA.1747, and still refuses to offer one. Any limiting construction would also be inconsistent with the State's position that the electioneering statutes exist to "create a politics-free zone" around the polling place. ROA.951; ROA.971 (county forbids voters from wearing anything "political"). The statutes are facially overbroad.

E. Sections 61.003 and 85.036 Are Void for Vagueness Under the Fourteenth Amendment

The electioneering statutes are also unconstitutionally vague under the Fourteenth Amendment. Vagueness is a particular concern in free speech cases to ensure that "ambiguity does not chill protected speech." *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253–54 (2012); *Eaves*, 601 F.2d at 830 ("Measures affecting [F]irst [A]mendment rights must be drafted with an even 'greater degree of specificity.'"). Moreover, concerns with vagueness are especially heightened when considering statutes, like this one, that threaten criminal sanctions. *See Johnson v. United States*, 576 U.S. 591, 595–96 (2015).

A law is void for vagueness when it "(1) fails to provide those targeted by the statute a reasonable opportunity to know what conduct is prohibited, or (2) is so indefinite that it allows arbitrary and discriminatory enforcement." *Women's Medical Center of Nw. Houston v. Bell*, 248 F.3d 411, 421 (5th Cir. 2001). The electioneering statutes fail on both scores.

First, the electioneering statutes are unconstitutionally vague because they "force[ ] individuals to 'guess at [their] contours.'" *In re Murphy-Brown, LLC*, 907 F.3d 788, 800 (4th Cir. 2018) (citing *MVA*). Viewed from the standpoint of a person of ordinary intelligence, *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972), the interpretation and application of the statutes "baffle[d]" not just voters, but also election officials and election workers themselves. Ostrewich's Principal Br. at 15–17. If election personnel with years of experience cannot predict how the law applies, *e.g.*, ROA.618–20, there is no reason to expect that ordinary voters like Ostrewich can or should.

Second, the chilling effect of the State's contrary view is plain. *See Reno v. American Civil Liberties Union*, 521 U.S. 844, 871–72 (1997) (vague speech restrictions impose "obvious chilling effect on free

speech."); *Cartwright*, 32 F.4th at 1121 (state's discretion to impose speech restrictions based on "totality-of-known-circumstances" has chilling effect). Ostrewich felt "violated" by the election worker's demands, ROA.598, and will not wear her union shirt or similar apparel to the polls again until she receives a favorable decision from this Court, precisely because she cannot reasonably tell what apparel is permitted under the electioneering statutes and what is forbidden. ROA.601, ROA.608.

Finally, the statutes engender arbitrary and discriminatory enforcement. *See City of Chicago v. Morales*, 527 U.S. 41, 52–60 (1999). They enable thousands of "low-level administrative officials to act as censors, deciding for themselves which expressive activities to permit." *Eaves*, 601 F.2d at 822; *Greenberg*, 2022 WL 874953, at *36 (insufficient guidance to implement speech restricting rule allows government to "subjectively determine[e] 'what counts' as a violation" and is void for vagueness). The electioneering statutes are unconstitutionally vague.

IV. THE DISTRICT COURT ERRED IN UPHOLDING SECTION 61.010

Section 61.010—to the extent it applies to voter apparel at all—suffers from many of the same infirmities as Sections 61.003 and 85.036.

Section 61.010 thus violates the First Amendment both on its face and as applied to Ostrewich. Further, the State fails to explain why the Legislature enacted Section 61.010 at all—if it were only meant to prohibit a subset of activities already covered by Sections 61.003 and 85.036. State officials, however, have provided such an explanation for years: Section 61.010 does not govern voter apparel, but was intended to restrict what poll watchers can wear on name tags and badges. *See* Ostrewich's Principal Br. at 9–10, 32–40. This provides an alternative basis to reverse the district court's judgment. Ostrewich rests on the arguments made in her opening brief, with the following additions in response to new arguments advanced by the State.

A. Section 61.010 Is Facially Unconstitutional

1. The State's Reliance on Supreme Court Dicta is Misplaced

The State relies on the Supreme Court's description of Section 61.010 as "more lucid" than the unconstitutional Minnesota statute, *MVA*, 138 S. Ct. at 1891, arguing that this brief descriptor represents "recent and detailed" dicta that this Court should view as controlling. State's Br. at 30, citing *Hollis v. Lynch*, 827 F.3d 436, 448 (5th Cir. 2016),

and *Gearlds v. Entergy Servs., Inc.*, 709 F.3d 448, 452 (5th Cir. 2013). The State's assertion runs into two problems.

First, the Court's fleeting comment in *MVA* is recent, but not "detailed." The State's own cases provide the contrast. *Hollis* relied on the detailed historical recounting of firearms in *Dist. of Columbia v. Heller*, 554 U.S. 570 (2008), such that a contrary view would be "tantamount" to overruling the Supreme Court. *Hollis*, 827 F.3d at 448. *Gearlds* relied on the "depth of the Court's treatment of the issue [that was arguably dicta]." 709 F.3d 448 at 452. By contrast, the Supreme Court in *MVA*, without the benefit of the extensive record in this case and under the misapprehension that Section 61.010 was Texas's primary electioneering statute, only mentioned that provision once.

Second, the Supreme Court's invocation of Section 61.010 in *MVA* does not help the State. Although the Supreme Court observed that Section 61.010 appeared to prohibit speech in "more lucid terms," it expressly refused to "pass on the constitutionality of laws that are not before" it. *Id.* at 1891. If it had done so with the benefit of the record in this case, it would have had no difficulty in declaring Section 61.010

unconstitutional—as that provision suffers from the same faults as the Minnesota law in *MVA*.

2. The State's Newly Proposed Limitation Contradicts the Record and Raises More Questions than it Answers

The State argues that Section 61.010's application does not depend on whether an organization supports a ballot measure, only whether the organization itself appears on the ballot. State's Br. at 34. But this proposed limitation—raised for the first time in the State's opening brief on appeal—has never been how Section 61.010 has been interpreted or enforced. ROA.790, ROA.640–41 (Ingram and Gray: union shirts banned because they were "associated with" a ballot measure); ROA.783 (Ingram: electioneering statutes target apparel "associated with" ballot measures); 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 when within the 100' area."); ROA.710 (ban ACLU and NRA if "actively supporting candidates or propositions"); ROA.643 (ban NRA and union logos if either organization endorsed candidate). Election workers also censor apparel if they perceive the group to be "political." ROA.655; ROA.671–72; ROA.700 (Black Lives

Matter). Consistent with officials' general enforcement practices, the district court held that Ostrewich's shirt was censored because it was "associated" with support for Proposition B. ROA.2891. Censorship based on associations violates the First Amendment. *MVA*, 138 S. Ct. at 1890. Regardless, the State supplies no standard by which to determine when an organization is considered to be on the ballot. Indeed, the State has consistently declined to provide answers to Texans seeking guidance on whether apparel—including Ostrewich's yellow union t-shirt—should be allowed or prohibited using this "simple to apply" standard. State's Br. at 34. *See* Ostrewich's Principal Br. at 47–48.

B. Section 61.010 Is Unconstitutional as Applied to Ostrewich

The State argues that Ostrewich's yellow union shirt, with no mention whatsoever of Proposition B, nonetheless was "an unambiguous act urging support for a specific ballot measure" and therefore rightfully censored. State's Br. at 36. The State's argument both misstates the record evidence and offers alternative factual assessments that lack any evidentiary support. First, the record *does not* show that Proposition B advocates were campaigning in a shirt identical to Ostrewich's on the day she voted. State's Br. at 37. At most, it shows that *two* advocates wore

similar shirts. ROA.1890; ROA.1884–85. Second, the record *does not* show that voter apparel can exacerbate tensions. State's Br. at 37. To the contrary, election workers testified that they have *never* seen any tensions arise among voters based on apparel. They have, however, seen multiple instances of disruption caused by enforcement of the statutes. *See* Ostrewich's Principal Br. at 54–55 (citing record); *supra*, at 41–44.

Third, the State offered no evidence—in the form of testimony, affidavits, or anything else—supporting its claim about what a reasonable person would assume upon seeing Ostrewich's union shirt. Fourth, the State argues that allowing Ostrewich's shirt would create disruptions or voter intimidation when a "potentially large swath of voters" arrived to polling places in matching shirts. State's Br. at 37. There is no need to speculate because voters wearing union shirts *were permitted into polling places* from October 25, 2018, through Election Day. ROA.728; ROA.1954. If there were *any* evidence of disruptions or intimidation, surely the State would have produced it. *See Texas v. Biden*, 20 F.4th 928, 974 (5th Cir. 2021) (rejecting the "Government's 'parade of horribles'" as "purely speculative."). The State's post-hoc rationalizations and horror stories characterizing the link between the union shirt and

electioneering for Proposition B as "so obvious," State's Br. at 37, cannot suffice given the uncontradicted evidence in the record to the contrary. *See Dep't of Homeland Security v. Regents of the University of California*, 140 S. Ct. 1891, 1909 (2020) (rejecting justifications belatedly advanced by advocates).

C. The State's Consistent Practice of Limiting Section 61.010 to Poll Worker Identification Rather than Voter Apparel Provides an Alternative Basis for Reversing the District Court

Prior to this litigation, the State routinely informed interested Texans of distinctions between the electioneering statutes. *See* Ostrewich's Principal Br. at 9–10, 32–40 (citing record evidence). In its words, Sections "61.003 and 85.036 deal with electioneering generally. [Section] 61.010 deals with poll workers and poll watchers and their nametags being used to electioneer." ROA.939–41; *see also* ROA.1679 (advising election judges that voters' face masks may run afoul of Sections 61.003 and 85.036 and omitting any mention of 61.010). Even in the district court, the State insisted that "[Section] 61.010, which is tailored specifically to name tags or badges[,] has nothing to do with Plaintiff." ROA.1727. The State should be bound by its prior construction of Section 61.010.

After the district court upheld Section 61.010, the State switched gears to argue that the plain language of Section 61.010 applies to voter apparel. State's Br. at 35–36. The State's new construction clashes not just with its prior interpretation but also with settled rules of statutory construction. Courts presume that Legislatures enact statutes with complete knowledge of existing law, *see Acker v. Texas Water Comm'n*, 790 S.W.2d 299, 301 (Tex. 1990), but the State offers no explanation as to why Section 61.010 would only duplicate the prohibitions in Sections 61.003 and 85.036. *See* Ostrewich's Principal Br. at 14–15.

Section 61.010 does not define "badge," "insignia," and "emblem." The dictionary defines each with reference to the others. A "badge" is a "device or emblem worn as an insignia of rank, office, or membership in an organization." Am. Heritage Dict. of the English Language 136 (3d ed. 1992). An "insignia" is "[a] badge of office, rank, membership, or nationality; an emblem; a distinguishing sign." *Id.* at 934.[25] And an "emblem" is an "object or a representation that functions as a symbol; A

[25] *See also Fallin v. State*, 93 S.W.3d 394, 396–97 (Tex. App. 2002) (adopting this definition); Tex. Gov't Code § 411.017(b) ("department insignia" means an insignia or design prescribed by the director for use by officers and employees of the department in connection with their official activities).

distinctive badge, design, or device." *Id*. at 601. *Cf*. Tex. Penal Code § 42.11(b) (defining "flag" to mean an "an emblem, banner, or other standard" and *excluding* "a representation of a flag on a written or printed document, a periodical, stationery, a painting or photograph, or *an article of clothing* or jewelry.") (emphasis added).

The State contends that even if not an emblem or insignia, Ostrewich's t-shirt is a "communicative device." State's Br. at 36. But ordinary rules of statutory construction and the statute's prohibition of "*similar* communicative device[s]" mean that the term must be "read in context and limited to matters similar in type to" a badge, insignia, and emblem. *University of Texas at Arlington v. Williams*, 459 S.W.3d 48, 53–54 (Tex. 2015).

Badges, insignia, emblems, and similar communicative devices are all accessories either temporarily or permanently attached to apparel to convey the wearer's identity or position. *See Mouille v. City of Live Oak, Tex.*, 977 F.2d 924, 925 (5th Cir. 1992) (police uniform contains "a salient badge, silver name tag, and police department emblems"). Name tags are a "similar communicative device," as demonstrated by Section 61.010(b), which requires election workers to wear name tags to identify themselves

by name and title or position. By contrast, outwardly focused apparel, such as a shirt that says, "Vote Yes on Proposition B," is covered by the general electioneering statutes, Sections 61.003 and 85.036, not Section 61.010. Thus, in the alternative, this Court should vacate the district court's judgment with respect to Section 61.010 by construing it not to apply to voter apparel.

V. OSTREWICH IS ENTITLED TO NOMINAL DAMAGES

Ostrewich is entitled to nominal damages because the electioneering statutes at issue violated her constitutional rights. *See Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 802 (2021). In response, the government unleashes a school of red herrings. *See* State's Br. at 46–48. The government's ***first*** argument that the Secretary of State and Attorney General are immune from nominal damages is beside the point. That argument all but concedes that Ostrewich's claim of nominal damages is proper because it can be paid by the Harris County Defendants. *See Familias Unidas v. Briscoe*, 619 F.2d 391, 405 (5th Cir. 1980). The government's ***second*** argument that Ostrewich is not entitled to nominal damages because she has not suffered a past injury rests on a false premise. As explained above, Ostrewich has suffered past injury

by the enforcement of the electioneering statutes, which continue to produce a chilling effect on speech. This entitles her to nominal damages. *See Uzuegbunam*, 141 S. Ct. at 802. The government's ***third*** argument that Ostrewich cannot obtain nominal damages against any defendant also fails because her injury is fairly traceable to defendants' enforcement of the electioneering statutes. Defendants maintain that the statutes must remain in effect and are vigorously defending it in this Court. That state and county officials "were not present" when Ostrewich voted does not absolve them of liability. State's Br. at 48.

CONCLUSION

This Court should hold that Texas Election Code Sections 61.003, 61.010, and 85.036 violate the First and Fourteenth Amendments insofar as they censor voter apparel.

Dated: June 1, 2022.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of June, 2022, an electronic copy of the foregoing brief was filed with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit using the appellate CM/ECF system, and that service will be accomplished by the appellate CM/ECF system.

/s/ Wencong Fa
WENCONG FA

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limits of Fed. R. of App. P. 32(a)(7)(B) because it contains 12,994 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Fifth Circuit Rule 32.2

2. This brief complies with typeface and type style requirements of Fed. R. of App. P. 32(a)(5) and the type style requirements under Fed. R. of App. P. 32(a)(6) because it has been prepared in proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook.

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