No. 22-809

In The
Supreme Court of the United States

TEXAS STATE LULAC, ET AL.,
Petitioners,

vs.

LUPE C. TORRES, IN HIS OFFICIAL CAPACITY AS THE MEDINA COUNTY ELECTIONS ADMINISTRATOR, ET AL.,
Respondents.

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

REPLY IN SUPPORT OF CERTIORARI

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INTRODUCTION

This petition presents two important questions of Article III standing that have divided the courts of appeals. The first involves harms with more than one cause. At least four circuits have held that plaintiffs have standing to challenge just one of several factors contributing to their injuries. The Fifth Circuit held below that plaintiffs lack standing under those circumstances. The second involves the First Amendment injury that results when a plaintiff self-censors out of fear that an unconstitutional law will be enforced against it. The Eighth Circuit has recognized that plaintiffs might reasonably do so, and therefore may sue, even if the law contains a *mens rea* requirement that the plaintiffs do not say they will violate. The Fifth Circuit held the opposite.

Rather than respond, Respondents deflect. They ignore the Fifth Circuit's actual reasoning in favor of extended discussions of the record and of what they think the Fifth Circuit could have held regarding issues it did not reach. But the Fifth Circuit's reasoning is unmistakable: the court found no traceability and redressability because Petitioners showed injury "as a result of the challenged law and others like it," rather than from the challenged law alone. Pet. App. 9. And it found no self-censorship injury because Petitioners did not show they would knowingly and intentionally violate the law. Pet. App. 14–15. The Court need not dive into the record or resolve any other issues to see that each of those holdings was in direct conflict with

the holdings of other courts of appeals. And each presents a clean, jurisdictional question of law that may be resolved independently of any other dispute.

The Fifth Circuit's decision is extraordinarily consequential. It creates a roadmap for states to injure citizens while leaving them without judicial redress, by enacting interrelated statutes with harmful effects that cannot be disentangled. In complex areas of law, including election law, this often happens naturally. And Texas, in particular, has a penchant for intentionally crafting legislation to preclude federal judicial review. *See Whole Woman's Health v. Jackson*, 142 S. Ct. 522, 543 (2021) (Roberts, C.J., concurring in part and dissenting in part). If the Fifth Circuit's decision stands, it will keep many admittedly injured plaintiffs from obtaining relief in federal court.

The Court should grant certiorari and reverse.

ARGUMENT

I. The Fifth Circuit's holding that a challenged statute must be the sole cause of a plaintiff's injuries creates a circuit split.

By holding that Petitioners lacked standing because their injuries were caused by "the challenged law and others like it," and not the challenged law alone, the Fifth Circuit split from other circuits that allow plaintiffs to challenge state action that contributed to their injuries even where other acts contributed, too. Pet. 9–14; Pet. App. 9. Respondents try to

explain away the Fifth Circuit's holding and those of other circuits, but both efforts fail.

A. The Fifth Circuit applied a sole-cause standard.

The Fifth Circuit squarely held that Petitioners lack Article III standing because they diverted resources in response to both S.B. 1111 and other similar election laws instead of in response to S.B. 1111 alone: "An organizational plaintiff must show it diverted resources 'as a direct result of' the challenged law—not *as the result of the challenged law and others like it*. Plaintiffs have not done so here. *Therefore*, they fail to satisfy the traceability and redressability prongs of Article IIII standing." Pet. App. 9 (emphases added and citations omitted). The Fifth Circuit may not have used the words "sole cause," Resp. at 13, 15, but it unmistakably imposed a sole-cause requirement.

Respondents' discussion of the factual record confirms that the Fifth Circuit adopted a sole-cause requirement. Respondents concede that "the undisputed evidence is that the alleged diversions identified by petitioners were due to multiple laws"—specifically, "S.B. 1111 and S.B. 1 together." Resp. 16. A sole-cause standard is the only basis for rejecting such evidence as inadequate to satisfy the traceability requirement, as the Fifth Circuit did.

B. A sole-cause standard is irreconcilable with decisions from other circuits.

The Fifth Circuit's sole-cause standard is irreconcilable with decisions from other circuits. None of the three cases Respondents cite applied such a standard. Resp. 17–18. And other decisions have squarely rejected it.

1. The first two cases Respondents cite involve an entirely different issue—whether an organization's unreasonable diversion of resources constituted an *injury-in-fact*. *See City of S. Miami v. Governor*, 65 F.4th 631, 639 (11th Cir. 2023); *Shelby Advocates for Valid Elections v. Hargett*, 947 F.3d 977, 983 (6th Cir. 2020) (per curiam). *Shelby Advocates* held that a diversion of resources was not an injury-in-fact where it was motivated by "speculative fears of future harm" based on improbable claims that hackers would disrupt voting machines. 947 F.3d at 982–83. And *City of South Miami* held that a diversionary injury in response to a federal immigration cooperation law was not an injury-in-fact absent a non-speculative and imminent risk of profiling. 65 F.4th at 638–39.

The Fifth Circuit reached no such holding below. To the contrary, it "assum[ed]" that Petitioners "adequately show[ed] a diversionary injury under Article III" and thereby "show[ed] an injury-in-fact." Pet. App. 9, 12. The Fifth Circuit instead held that Petitioners had not shown traceability and redressability. *Id.* Respondents' argument that other circuits reject self-imposed, unreasonable diversion as inadequate to

show injury-in-fact therefore does nothing to reconcile the Fifth Circuit's actual holding with the decisions of other circuits.

Respondents' reliance on *Fair Housing Council of Suburban Philadelphia v. Montgomery Newspapers*, 141 F.3d 71, 77 (3d Cir. 1998), fares no better. There, the plaintiff "was unable to establish *any* connection between the allegedly discriminatory advertisements underlying th[e] suit and the need for or implementation of a remedial educational campaign." *Id.* (emphasis added). The issue was thus not *multiple* causes of injury but rather the lack of *any* causal connection between the challenged actions and the alleged injury. *Fair Housing Council* nowhere suggested that a showing of injury due to the combined effect of the challenged advertisements "and others like [them]" would not have sufficed. *See id.*; Pet. App. 9.

Fair Housing Council also held that the plaintiff failed to show it had in fact diverted any resources in the three years after the challenged advertisements. 141 F.3d at 73, 76–77. But that holding—like *City of South Miami* and *Shelby Advocates*—involved injury-in-fact, not traceability and redressability. The Fifth Circuit expressly did not rule that Petitioners lacked an injury-in-fact. Pet. App. 9, 12.

2. Far from being "consistent with how its sister circuits have addressed standing in similar" circumstances, Resp. 17, the Fifth Circuit's holding splits from at least the Second, Fourth, Sixth, and Ninth Circuits by requiring that a challenged act be the sole

cause of a plaintiff's injuries. Pet. 9–14. Respondents do not dispute that these other circuits found Article III satisfied even when there were multiple causes of a plaintiff's harm. To the contrary: Respondents concede that in the cited cases, it was sufficient for standing that the challenged act was one of several causes of the plaintiff's injuries. Resp. 18–20.

Respondents instead attempt to distinguish the Fifth Circuit's decision from these other decisions on factual grounds, arguing that unlike in those cases, Petitioners here "did not even attempt to" "explain how the challenged action caused or enhanced their injury, and how an injunction would eliminate that harm." Resp. 20. But that simply was not the basis for the Fifth Circuit's holding. The Fifth Circuit described the ample record evidence of Petitioners' specific diversions of resources in response to both S.B. 1111 and S.B. 1, and it rejected that evidence as inadequate for just one reason: "it fails to link any diversion of resources specifically to S.B. 1111" alone rather than to "the challenged law and others like it." Pet. App. 7–12.

The Fifth Circuit's actual reasoning is therefore directly contrary to the conclusion reached by the Sixth Circuit in *Northeast Ohio Coalition for the Homeless v. Husted*, 837 F.3d 612, 624 (6th Cir. 2016), where a plaintiff was held to have standing based on testimony that two new election laws caused the group to "alter their strategy," which "cost the organization and its volunteers more time and money." Resp. at 20. Essentially identical, and undisputed,

testimony exists in this case. Pet. App. 7–12. Respondents nowhere explain how traceability could be satisfied in *Husted*—a case also concerning an organization's diversion of resources in response to multiple new election laws—but not here. And while the other cases Petitioners cite arise from different factual contexts, they too directly reject the sole-cause requirement that the Fifth Circuit adopted here.[1]

The Court should therefore grant certiorari on the first question presented.

II. The Fifth Circuit's holding that a *mens rea* requirement makes self-censorship unreasonable creates a circuit split.

The Fifth Circuit also split from the Eighth Circuit in rejecting Petitioners' alternative, self-censorship theory of standing. The Fifth Circuit held that Petitioners' unrefuted evidence of chilled speech did not give them standing because they did not allege they would "knowingly or intentionally" encourage voters to violate S.B. 1111, as would be required for them to be convicted of violating Texas election law. Pet. App. 13–16. The Eighth Circuit has rejected that approach to standing, holding that plaintiffs have self-

[1] Respondents describe this issue as limited to organizational standing based on a diversion of resources under *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982). Resp. 13–14. But they nowhere explain how or why the issue could be cabined in that way. As the Petition explained, the standing analysis for organizations involves "the same inquiry as in the case of an individual." Pet. 14–18 (quoting *Havens*, 455 U.S. at 378–79).

censorship standing as long as they "wish to engage in conduct that could reasonably be interpreted as" violating the statute, even if they do not allege that they will actually have the prohibited *mens rea*. *281 Care Comm. v. Arneson*, 638 F.3d 621, 628 (8th Cir. 2011).

Contrary to Respondents' arguments, the Eighth Circuit's decision in *Zanders v. Swanson*, 573 F.3d 591 (8th Cir. 2009), does not reconcile the divergent holdings below and in *Arneson*. As the Eighth Circuit explained in *Arneson*, the holding in *Zanders* was the result of problems with the particular theory that the plaintiffs there advanced—a "speculative fear that police officers would engage in bad-faith conduct and wrongfully accuse citizens of making false reports when the officers knew the reports to be true." *Arneson*, 638 F.3d at 629. In contrast, the Eighth Circuit held that where "plaintiffs' fear of the statute does not rest upon such speculative notions of bad faith," plaintiffs did not need to allege that they would possess the prohibited *mens rea* for their self-censorship to be reasonable. *Id.*

Here as in *Arneson*, Petitioners' fear prompting their self-censorship does "not rest upon such speculative notions of [the] bad faith" of hypothetical third parties. *Id*. Rather, Petitioners self-censor because they fear that if they mistakenly help to register voters in violation of S.B. 1111's vague, confusing provisions, election officials and prosecutors may conclude that they did so intentionally and bring charges. In other words, they have a "reasonable worry that state officials and other complainants . . . will interpret

the[ir] actions as violating the statute," even though they do not intend to do so. *Arneson*, 638 F.3d at 630. The Fifth Circuit's holding that self-censorship injury is inadequate under such circumstances is therefore directly contrary to the Eighth Circuit's holding in *Arneson*.

The Court should therefore grant certiorari on the second question presented.

III. This is an ideal vehicle to resolve the questions presented.

None of the other issues Respondents raise will prevent the Court from cleanly resolving the questions presented.

1. Respondents' argument (Resp. 23–24) that Petitioners lack a statutory cause of action under 42 U.S.C. § 1983 "is a merits question . . . not a jurisdictional question[] affecting constitutional standing." *Blanchard 1986, Ltd. v. Park Plantation, LLC*, 553 F.3d 405, 409 (5th Cir. 2008); *see also Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 128 n.4 (2014). This argument therefore presents no possible obstacle to a clean resolution of the questions presented, which implicate subject matter jurisdiction and must therefore be resolved first. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89, 101–02 (1998). The Court routinely decides Article III standing questions without addressing whether Petitioners are likely to later prevail on the merits of their claims on remand. *E.g.*, *Spokeo, Inc. v. Robins*, 578 U.S. 330, 333

(2016); *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 152 (2014).

Respondents' argument is, in any event, meritless. Petitioners are among the "part[ies] injured," 42 U.S.C. § 1983, because they seek to remedy ongoing harms that S.B. 1111 inflicts on them as organizations. *See* Pet. 5–6; *see also* Pet. App. 34 (explaining LULAC and Voto Latino suffered "direct harms" both to their "pocketbooks" and their "First-Amendment right to advise voters without threat of prosecution").

2. Respondents' similar suggestions that Petitioners have not actually suffered any diversionary injury and that their injuries are self-inflicted likewise will not interfere with the Court's review of the questions presented. Resp. 21–23. The Fifth Circuit assumed Petitioners had "adequately show[n] an injury-in-fact" and addressed only traceability and redressability. Pet. App. 12. This Court could easily do the same: it has frequently addressed only a discrete aspect of Article III standing in prior cases. *See, e.g.*, *California v. Texas*, 141 S. Ct. 2104, 2113 (2021) (addressing only traceability and redressability); *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 797 (2021) (addressing only redressability); *Spokeo*, 578 U.S. at 340 (addressing only injury-in-fact).

Regardless, Petitioners showed an injury-in-fact. The Fifth Circuit described Petitioners' ample evidence of injury, including specific projects from which Petitioners diverted resources. Pet. App. 7–9. Voto Latino, for example, shuttered its Colorado program to

reroute funds to Texas. Pet. App. 7. This evidence uncontroversially demonstrates injury in fact and does not involve mere self-inflicted harm. *See Havens*, 455 U.S. at 379 (holding that perceptible impairment of programming shows injury); *NAACP. v. City of Kyle*, 626 F.3d 233, 238 (5th Cir. 2010) (similar). Questions about injury-in-fact therefore will not distract from the question presented.

3. Respondents' argument that Petitioners' injuries are not redressable by an injunction against the defendant election administrators also poses no barrier to review. Resp. 33. Here, too, there would be no need for the Court to address that entirely distinct issue if it grants the petition. And here, too, Petitioners meet the redressability standard. As Respondents acknowledge, any prosecution against Petitioners would almost certainly begin with an election administrator "discover[ing] the illegal voter or registration." *Id.* at 31. After all, they are the officials tasked by Texas law with reviewing registrations. Tex. Elec. Code § 13.071. Upon making such a discovery, election administrators "shall" submit an affidavit describing the violation "to the attorney general, the secretary of state, and the county or district attorney." *Id.* § 15.028. Enjoining the defendant election administrators from reporting such information to prosecutors and other state officials in the first place provides Petitioners real, if only partial, relief. Nothing more is required for standing. *Uzuegbunam*, 141 S. Ct. at 801.

4. Contrary to Respondents' argument, there was also no independent alternative basis for the Fifth

Circuit's rejection of self-censorship injury. Resp. 30–32. The Fifth Circuit's reason for finding no credible threat of prosecution was the same as its reason for concluding that Petitioners' conduct was not arguably proscribed—the fact that Petitioners did not show they would knowingly or intentionally violate the law. Pet. App. 15–16. If Petitioners' conduct is arguably proscribed, then under Fifth Circuit law a "credible threat of prosecution" is "*presume[d]*." Pet. App. 15 (citing *Barilla v. City of Houston*, 13 F.4th 427, 432 (5th Cir. 2021)) (emphasis added). The Fifth Circuit held that the "presumption [] d[id] not apply" only because S.B. 1111 did not "restrict Plaintiffs' ability to engage in their expressive conduct." Pet. App. 16. And that conclusion, in turn, was based entirely on the *mens rea* requirement. *See id.* The "alternative" conclusion reached by the Fifth Circuit is therefore based on the same, flawed conclusion about the *mens rea* requirement and provides no independent basis for rejecting Petitioners' self-censorship injury.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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