No. ____

In The
Supreme Court of the United States

JILLIAN OSTREWICH,

Petitioner,

v.

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

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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Questions Presented

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

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

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

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

Parties to the Proceedings and Rule 29.6

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

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

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

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

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

None of the parties are corporate entities.

Related Proceedings

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

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

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

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Petition for a Writ of Certiorari

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

Opinions Below

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

Statement of Jurisdiction

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

Constitutional Provision and Statutes at Issue

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

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

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

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

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

> (e) An offense under this section is a Class C misdemeanor.
>
> (f) In this section:
>
> * * * * *
>
> (2) "Electioneering" includes the posting, use, or distribution of political signs or literature.

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

> (a) Except as provided by Subsection (b), a person may not wear a badge, insignia, emblem, or other similar communicative device relating to a candidate, measure, or political party appearing on the ballot, or to the conduct of the election, in the polling place or within 100 feet of any outside door through which a voter may enter the building in which the polling place is located.
>
> (b) An election judge, an election clerk, a state or federal election inspector, a certified peace officer, or a special peace officer appointed for the polling place by the presiding judge shall wear while on duty in the area described by Subsection (a) a tag or official badge that indicates the person's name and title or position.
>
> (c) A person commits an offense if the person violates Subsection (a). An offense under this subsection is a Class C misdemeanor.

Introduction and Summary of Reasons to Grant the Petition

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

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

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

The Fifth Circuit further conflicts with *MVA* and multiple circuits by failing to place the burden on the state to prove that its censorship is capable of reasoned application. *MVA*, 138 S.Ct. at 1888 ("*the State* must be able to articulate some sensible basis for distinguishing what may come in from what must stay out") (emphasis added); *CIR*, 975 F.3d at 314; *Dodge v. Evergreen Sch. Dist. #114*, 56 F.4th 767, 781–82 (9th Cir. 2022); *Cambridge Christian Sch., Inc. v. Florida High Sch. Athletic Ass'n, Inc.*, 942 F.3d 1215, 1245 (11th Cir. 2019). A law capable of reasoned application prevents elections workers from undermining the state's interests through inconsistent application. *MVA*, 138 S.Ct. at 1891. The Fifth Circuit failed to assess whether the Texas statutes undermine rather than further the asserted state interests (they do), placing it in conflict both with *MVA* and the Third, Sixth, and D.C. Circuits that apply the full *MVA* analysis to speech restrictions in nonpublic fora. *See CIR*, 975 F.3d at 314; *Am. Freedom Defense Initiative v. Suburban Mobility Auth. for Regional Transp.*, 978 F.3d 481, 494 (6th Cir. 2020);

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

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

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

the disruption that electioneering statutes are designed to prevent.

Statement of the Case

A. Ostrewich's Union Shirt

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

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

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

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

B. Texas's Enforcement of Electioneering Statutes

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

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

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

1. Thousands of Election Workers Enforce the Statutes

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

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

ROA.769.[2] This guidance aims to "obtain and maintain uniformity in the application, operation, and interpretation" of election laws. ROA.876; ROA.769. But when election workers and voters ask Elections Divisions staff how to apply the electioneering statutes to specific apparel, they usually decline to state what may come in to the polling place and what must stay out. *See* ROA.944–45 (refusal to state whether firefighters can vote in uniform with Houston's Proposition B on the ballot); ROA.923–31 (refusal to state whether Black Lives Matter sign at a polling location is electioneering); ROA.933–34 (refusal to state whether "Vote the Bible," "vote atheist," or "vote to save Big Bird" t-shirts could be banned); ROA.936–37 (refusal to state whether election workers could wear "patriotic" red, white, and blue). There are a few exceptions. The Elections Division directly instructed the Harris County Democratic Party that "[a] MAGA [Make America Great Again] hat is associated with a particular candidate and is electioneering under 61.003," ROA.939–42; ROA.772, 774–75; and advised one inquiring poll worker that a Black Lives Matter shirt and "perhaps an NRA [National Rifle Association] shirt" are permitted inside polling places. ROA.986. Yet these individual communications are neither publicly available nor shared with other election officials, and the Elections Division disclaims that its advice is "official or binding." ROA.864–66.

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

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

directs local election officials to exercise their own discretion. ROA.781; ROA.884 ("[A] duly appointed and commissioned presiding election judge is the entity that interprets and enforces Tex. Elec. Code §§ 61.003, 61.010, and 85.036 at their respective polling location."); ROA.879; ROA.783 (Ingram: "[T]he presiding judge in a local election is the one who will know what measures are on the ballot and what apparel might be associated with that measure."). The Elections Division relies on local election officials statewide to interpret and enforce the statutes, particularly regarding local measures and candidates. ROA.783–84; ROA.785 (Ingram: "election judges or deputy early voting clerks are political people that are tuned in, and we expect them to rely on their experience, as well as their training").

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

Officer" to determine how to enforce the electioneering statutes against hats and t-shirts. ROA.885.

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

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

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

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

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

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

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

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

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

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

2. Enforcement Against Union Shirts

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

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

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[4] ROA.776 (Ingram); ROA.673–74, 676 (Morris); ROA.637, 643 (Gray); ROA.710, 718 (Aston); ROA.700 (Barker).
[5] ROA.792 (Ingram); ROA.655, 671–72 (Morris); ROA.626 (Gray); ROA.717 (Aston); ROA.699 (Barker).
[6] ROA.680 (Morris); ROA.642 (Gray); ROA.710–11 (Aston).

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

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

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

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

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

Even when election workers allow voters to cast their ballots, Keith Ingram explained that these confrontations over apparel cause disruption: "[W]hen somebody refuses to comply with the election judge's requirement that they remove the electioneering material, then, yeah, that breaches the peace and interrupts the zone of contemplation at the polling place, you bet." ROA.782; *see also* ROA.652–53 (Election judge confronted a voter over a MAGA hat resulting in "a pretty big argument" that "went outside. The judge almost said he was going to unplug the machine and not let him vote."). At a minimum, when an election worker confronts a voter who asserts the right to wear expressive apparel, it "absolutely" holds up the line or causes delays. ROA.668; ROA.696–97.

C. Procedural History

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

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

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

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

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

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

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

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

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

Reasons to Grant the Petition

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

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

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

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

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

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

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

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

The Fifth Circuit's disregard of *MVA*'s protection of First Amendment rights extended to its failure to assign the burden of proof to the state. *See MVA*, 138 S.Ct. at 1888 ("*the State* must be able to articulate

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IV. The Issues Are of National Importance

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

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

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

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

Conclusion

This Court should grant the petition.

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Respectfully submitted,

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