No. 24-50712

In the United States Court of Appeals for the Fifth Circuit

INSTITUTE FOR FREE SPEECH, a nonprofit corporation and public interest law firm,

Plaintiff-Appellant,

v.

J.R. JOHNSON, in his official and individual capacities as Executive Director of the Texas Ethics Commission; MARY KENNEDY, Commissioner in her official capacity; CHRIS FLOOD, Commissioner in his official capacity; RICHARD SCHMIDT, in their official capacity as commissioner of the Texas Ethics Commission; RANDALL ERBEN, Commissioner in his individual and official capacities; CHAD CRAYCRAFT, Commissioner in his individual and official capacities; PATRICK MIZELL, Commissioner in his individual and official capacities; JOSEPH SLOVACEK, Commissioner in his individual and official capacities; STEVE WOLENS, in their individual and official capacities as commissioner of the Texas Ethics Commission,

Defendants-Appellees.

Appeal from Orders of the United States District Court for the Western Dist. of Texas, The Hon. David A. Ezra (Dist. Ct. No. 1:23-cv-01370-DAE)

PLAINTIFF-APPELLANT'S OPENING BRIEF

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November 3, 2024

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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Respectfully submitted,

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STATEMENT REGARDING ORAL ARGUMENT

Oral argument would aid the Court, because the case raises important questions regarding the First Amendment rights to associate, speak, and petition for the purpose of pro bono litigation against the government and the standing required to assert those rights.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Treatises

JURISDICTIONAL STATEMENT

(a) The district court had subject matter jurisdiction over this case pursuant to 28 U.S.C. § 1331, as the dispute arises under the United States Constitution and 42 U.S.C. § 1983.

(b) Plaintiff Institute for Free Speech ("IFS") appeals from the district court's final order granting without prejudice Defendants' motion to dismiss and its text order mooting IFS's motion for summary judgment. ROA.788-816; ROA.8. This Court has jurisdiction over the appeal pursuant to 28 U.S.C. § 1291; *see also United States v. Wallace & Tiernan Co.,* 336 U.S. 793, 794 n.1 (1949) (dismissal without prejudice appealable); *19 Moore's Federal Practice - Civil § 202.11* (2024) (involuntary dismissal without prejudice is appealable if it ends action in district court).

(c) The orders appealed from were entered on August 30, 2024 and September 3, 2024. ROA.8, 788-816. Plaintiff filed its notice of appeal from those orders on September 9, 2024. ROA.8, 817-818. The appeal is timely pursuant to Fed. R. App. P. 4(a)(1)(A).

STATEMENT OF ISSUES

1. Does a nonprofit corporation have standing to bring an as-applied and facial pre-enforcement challenge to the legal regime banning the provision of pro-bono legal services to Texas candidates or political committees for the purposes of civil-rights litigation against

government speech restrictions, where the corporation has a mission and history of challenging government speech restrictions, declares a future intent to do so, and doing so would subject the corporation and its anticipated clients to criminal and civil liability?

2. Do government officials enjoy qualified immunity from nominal damages when they knowingly vote in favor of an advisory opinion that criminalizes the provision of pro bono legal services by IFS, or any nonprofit corporation, to a Texas candidate or political committee, contrary to *NAACP v. Button*, 371 U.S. 415 (1963) and its progeny?

3. Did the district court err when it denied as moot IFS's motion for summary judgment alleging that Defendant state officials' regulatory regime violates the First Amendment rights to associate, speak, and petition, by criminalizing pro bono litigation against state officials if the lawyers work for a corporation and when the TEC failed to defend its regime on the merits?

STATEMENT OF THE CASE

A. Texas prohibits corporations from providing in-kind contributions to candidates and political committees

The Texas Ethics Commission ("TEC"), acting through its Executive Director and Commissioners, is the state agency responsible for enforcing the Texas Election Code, including the provisions concerning political contributions and expenditures, and political advertising. TEX. GOV. CODE §§ 571.061, 571.171.

TEX. ELEC. CODE § 253.094 prohibits corporations from making political contributions to candidates and political committees. The code defines "contribution" as any "transfer of money, goods, services, or any other thing of value." TEX. ELEC. CODE § 251.001(2). "In-kind contribution[s]," meaning goods or services or any other thing of value that is not money, are also prohibited. *Id.* § 251.001(21). Violation of these provisions is a felony offense of the third degree. *Id.* § 253.094(c). The state may also collect civil damages "in the amount of triple the value of the unlawful contribution or expenditure." *Id.* § 253.133. Other candidates may also sue the corporations and donation recipients for damages and fees. *Id.* § 253.131.

B. Texas candidates and political committees require pro bono legal services to vindicate their constitutional rights

Chris Woolsey is an elected member of the Corsicana, Texas city council. ROA.18, 189.[1] Woolsey is a "candidate" under TEX. ELECTION CODE, § 251.001(1). ROA.19, 190, as he intends to run for re-election for his current seat and intends to begin soliciting money for that purpose in the near future.[2] ROA.18, 190. When he runs for re-election, as he

[1] The record includes both IFS's complaint and IFS's Appendix in Support of Plaintiff's Motion for Summary Judgment. Where applicable, IFS provides parallel cites.

[2] Woolsey's term expires in May 2025, making his next election imminent. *See* CITY OF CORSICANA, *City Council,* https://www.cityofcorsicana.com/258/City-Council (last visited Oct. 29, 2024).

currently intends, or if he chooses to run for a different elected office in Texas, Woolsey intends to print and post political advertising signs in support of his current and future candidacies. ROA.19, 190. But when doing so, Woolsey would be required to print a government message on his election advertising and signs. *Id.*

TEX. ELEC. CODE § 259.001(a) requires that any political advertising sign designed to be seen from a road, other than a bumper sticker, must bear the government's warning message:

> NOTICE: IT IS A VIOLATION OF STATE LAW (CHAPTERS 392 AND 393, TRANSPORTATION CODE), TO PLACE THIS SIGN IN THE RIGHT-OF-WAY OF A HIGHWAY.

ROA.19, 190.

Failing to speak the government's required message on his signs, or even entering into a contract to print or make such signs, would subject Woolsey to criminal prosecution for a Class C misdemeanor offense. *Id.*; TEX. ELEC. CODE § 259.001.

The Texas Anti-Communist League PAC is a Fort Worth-based political action committee, registered as a General Purpose Committee (GPAC) in Texas since May 6, 2022. ROA.20, 193. The League is a "political committee" pursuant to TEX. ELEC. CODE § 251.001(12), and a "general-purpose committee" as defined by TEX. ELEC. CODE § 251.001(14). *Id.* It has not yet made any "political contribution," "campaign expenditure," "direct campaign expenditure" or "political expenditure" as defined by TEX. ELEC. CODE § 251.001(5), (7), (8), or

(10), but it intends to support candidates and measures in Texas elections that promote its mission of opposing the spread of communism, Marxism, or affiliated ideologies in Texas institutions. *Id.*

In promoting its mission, the League would like to produce and distribute political advertising signs. And like Woolsey, the League objects to speaking the state's message on its signs, as required by TEX. ELEC. CODE § 259.001(a). ROA.20, 194.

Woolsey and the League would challenge TEX. ELEC. CODE § 259.001(a)'s compulsion of their speech, in violation of the First Amendment, but they lack the financial means to hire attorneys for such litigation. ROA.19, 190.

C. IFS provides pro bono legal services to vindicate political speech rights and would like to represent Texas candidates and political committees

IFS is a non-profit corporation with tax-exempt status. ROA.13, 196. It promotes and defends the political rights to free speech, press, assembly, and petition, guaranteed by the First Amendment, through strategic litigation, communication, activism, training, research, and education. *Id.* IFS takes on political speech cases, nationwide, including in Texas, on a pro bono basis. *Id.* IFS usually files its cases in federal court, arising under 42 U.S.C. § 1983. *Id.*

Challenging compelled speech, especially restrictions related to political speech, fits with IFS's mission and history of challenging

political speech restrictions. ROA.21, 201. IFS would represent Chris Woolsey and the Texas Anti-Communist League in a pro bono legal challenge to TEX. ELEC. CODE § 259.001(a), as compelled speech in violation of the First Amendment. ROA.21, 202. If IFS offered Woolsey and the League pro bono legal representation to challenge TEX. ELEC. CODE § 259.001(a) on First Amendment grounds, they would gladly accept such representation. ROA.19, 191; ROA.21, 194.

IFS would also like to represent other Texans, including other candidates or political committees, on a pro bono basis, in order to challenge other state-law restrictions on the rights to speak or associate for political purposes, if such a lawsuit fits with IFS's mission. *Id.*

D. IFS requests an advisory opinion

Concerned that Section 253.094's corporate contribution ban might criminalize IFS's pro bono mission, IFS asked the Commission for an advisory opinion resolving whether the provision of pro bono legal services to candidates or political committees for the purpose of challenging the interpretation or constitutionality of laws violates the provision. ROA.15-16, 204-211. IFS argued that: (1) such pro bono legal services are not an in-kind contribution because the usual and normal practice of nonprofits that offer pro bono legal services is to provide these services without charge;" (2) the described pro bono legal services are not a "campaign contribution;" and (3) an interpretation of the

statute that would bar provision of such pro bono legal services would render the prohibition unconstitutional. *Id.* Other nonprofit corporations, including the ACLU-Texas and the Institute for Justice also asked the TEC to limit the application of its regime. ROA.34-47, 216-229.

On May 12, 2022, the Commission issued Draft Advisory Opinion No. AOR-660 ("AOR-660"). ROA.16, 212-215. The draft opinion interpreted pro bono legal services as an "in-kind contribution" subject to the Texas Election Code because such services would be used in connection with a campaign. Under that interpretation, Section 253.094 prohibits pro bono legal services. *Id.*

At its December 14, 2022 meeting, the Commission adopted and published a revised version of AOR-660 by a 5-3 vote, titled Ethics Advisory Opinion No. 580 ("Opinion 580"). ROA.18, 200, 234-237, 240. Chair Kennedy and Commissioners Flood and Schmidt voted "no." ROA.18, 200, 240. All other commissioners voted for the Opinion. *Id.*

The opinion determined that "[l]egal services provided without charge to candidates or political committees are in-kind contributions. When those services are given with the intent that they be used in connection with a campaign, they are in-kind campaign contributions." ROA.18, 234. IFS's proposed legal services "would be used in connection with a campaign because the requestor's standing to pursue such a challenge would depend on its client's status as a candidate or

political committee subject to the laws administered and enforced by the Commission." *Id.*

E. The regulatory impact on IFS

On multiple occasions, IFS has foregone legally representing a candidate or political committee in Texas, fearing prosecution under the Texas Election Code for providing an in-kind contribution in the form of pro bono legal services. ROA.15, 197-210. Considering the Commission's regulatory regime, TEX. ELEC. CODE § 253.094, and Opinion 580, IFS refrains from offering or providing any pro bono legal services to Woolsey and the League, because the provision of such services would expose IFS, and its attorneys, to criminal and civil liability under the Texas Election Code. ROA.22, 201-203. Other corporations that offer legal services are similarly prevented from offering their services on a pro bono basis to Texas state and local candidates and political committees. ROA.202-203, 216-229, 243-245.

F. Procedural history

On August 3, 2023, IFS filed this lawsuit in the U.S. District Court for the Northern District of Texas-Fort Worth Division, challenging the constitutionality of the corporate contribution ban's application to the provision of pro bono legal services. ROA.4, 410-413. Defendants moved to dismiss the case, while IFS moved for summary judgment. ROA.120, 414; ROA.145, 414-15.

On October 26, 2023, the district court sua sponte questioned IFS's choice of venue and ordered the parties to brief the issue. ROA.371. On November 8, 2023, over IFS's objections, the district court transferred the lawsuit to the Western District of Texas-Austin Division. ROA.403-409. The case was assigned to the nameless "Judge Docket II-Austin." ROA.7, 417.

IFS petitioned this Court for a writ of mandamus requesting that the case be returned to the Northern District of Texas. *In re IFS*, Fifth Cir. No. 23-50849 (filed Nov. 27, 2023); ROA.8, 418-472. On December 6, 2023, this Court denied IFS's petition. ROA.782.

The following day, the lawsuit was reassigned from Judge Docket II-Austin to Judge Ezra. ROA.781. The case sat inactive for nearly nine months, until August 30, 2024, when the district court, without holding a hearing, granted Defendants' motion to dismiss without prejudice for lack of standing. ROA.788. On September 3, 2024, the court denied IFS's motion for summary judgment as moot in light of the dismissal. ROA.8. IFS timely appealed on September 9, 2024. ROA.817-818.

SUMMARY OF ARGUMENT

IFS's standing is at least as robust as that of the successful plaintiffs in the seminal case *Susan B. Anthony List v. Driehaus*, 573 U.S. 149 (2014). Both this case and *Driehaus* involve pre-enforcement challenges to state restrictions on political speech, where violators face civil and criminal liability. And both cases involve no more than *intended* speech activity that is proscribed by the regime in question. The district court erred in holding that IFS must take some unspecified additional step toward violating Texas law.

The district court also erred by holding that the individual capacity defendants enjoyed qualified immunity for refusing to narrow the TEC regime's application so as to avoid restricting First Amendment-protected litigation.

The district court further erred by failing to grant IFS's motion for summary judgment. Since *NAACP v. Button*, 371 U.S. 415 (1963), the Supreme Court has recognized that the provision of pro bono litigation services, such as IFS's intended litigation challenging the TEC's speech restrictions, is a form of First Amendment protected expression. Defendants made no showing that application of the corporate contribution ban to such litigation meets strict scrutiny.

ARGUMENT

I. STANDARD OF REVIEW

De novo review applies to all legal issues raised by IFS. *Texas v. Yellen*, 105 F.4th 755, 763 (5th Cir. 2024) (standing reviewed de novo); *Ramirez v. Guadarrama*, 3 F.4th 129, 133 (5th Cir. 2021) (qualified immunity reviewed de novo); *Aspan v. Carrington Mortg. Servs., L.L.C.*, No. 23-20545, 2024 U.S. App. LEXIS 22633, at *3 (5th Cir. Sep. 5, 2024) (summary judgment review de novo).

II. IFS HAS PRE-ENFORCEMENT STANDING TO CHALLENGE THE TEC'S BAN ON CORPORATIONS' PROVISION OF PRO BONO LEGAL SERVICES TO TEXAS CANDIDATES AND POLITICAL COMMITTEES

In evaluating a Rule 12(b)(1) motion, a district court may consider (1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts. *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001); *see also Kling v. Hebert,* 60 F.4th 281, 284 (5th Cir. 2023). It bears noting that at the time the district court decided Defendants' motion to dismiss, it also had before it IFS's fully briefed motion for summary judgment, supported with multiple declarations and exhibits, as well as a reply brief. ROA.145-308, 372-383. While the supporting declarations largely track the complaint's allegations, to the extent that they supply additional evidence related to standing, they were properly before the

district court and undisputed. *See Lugo v. City of Troy,* 114 F.4th 80, 88-89 (2d Cir. 2024) (in determining standing at summary judgment stage, district court failed to consider whether other evidence outside the pleadings might suffice to establish standing).

A. IFS established an injury-in-fact when it declared an intent to engage in conduct that Defendants admit would violate its regulatory regime

A plaintiff has met the injury-in-fact requirement for standing under a pre-enforcement theory where (1) it has an intention to engage in a course of conduct arguably affected with a constitutional interest; (2) its intended future conduct is arguably proscribed by the challenged law; and (3) the threat of future enforcement of the challenged law is substantial. *Yellen*, 105 F.4th at 764-65 (citing *Speech First, Inc. v. Fenves*, 979 F.3d 319, 330 (5th Cir. 2020), *as revised* (Oct. 30, 2020)); *Ostrewich v. Tatum*, 72 F.4th 94, 102 (5th Cir. 2023) (also citing *Speech First).*

Everyone agrees that Texas law prevents IFS from representing a Texas candidate or political committee on a pro bono basis because the TEC considers that to be an illegal in-kind contribution. ROA.802. The central thrust of the district court's analysis denying standing is that it is not enough for IFS to allege that it intends to violate the TEC's corporate contribution ban, it must demonstrate its sincerity by taking *some steps* toward representing a Texas candidate or political

committee. ROA.798-801, 803-804. What additional steps are needed the district court never says.

Defendants suggest that IFS must do enough so that the TEC would initiate an enforcement action or receive a sworn complaint about IFS, for standing to exist. ROA.143. But IFS need not violate a law to challenge it. That is the whole point of bringing a pre-enforcement challenge.

1. This case falls squarely within the reasoning of the Driehaus line of cases

Like the plaintiffs in the seminal pre-enforcement standing case, *Driehaus*, 573 U.S. at 167-68 (citations omitted), IFS brought a challenge that is "purely legal, and will not be further clarified by factual development." In *Driehaus,* the plaintiffs challenged an Ohio false-statements statute that threatened criminal penalties, and the Supreme Court found standing where the plaintiffs "have alleged an intent to make statements concerning the voting record of a candidate or public official and to disseminate statements concerning a candidate to promote the election, nomination, or defeat of the candidate." *Id.* at 162 (cleaned up). The court was unconcerned with whether any particular candidate (such as, for example, the eponymous Driehaus) would ever run again, so long as the plaintiffs intended to engage in "comparable electoral speech" regarding some candidate that conduct is arguably proscribed by the challenged statute. *Id.* at 163.

Similarly, in *Speech First,* this Court easily found standing for an association of students who wanted to challenge the University of Texas at Austin's on-campus speech policies. 979 F.3d 319, 326. Those students wanted to engage in campus political speech that could be roughly characterized as right-coded, including: pro-Israel, pro-colorblindness, pro-life, pro-Second Amendment, pro-border wall, pro-Tea Party, and skeptical of the me-too movement and the Blasey-Ford allegations against then-nominee Brett Kavanaugh. *Id.* The students were concerned that some of their proposed speech could violate UT speech policies that prohibited "harassment," "intimidation," "rude[eness] [sic]," "incivility," and "bias," because those terms were ill-defined and failed to cabin officials' discretion. *Id.* at 334.

This Court found the students' intended speech to be "arguably proscribed" by UT's policies even though no sanctions had yet been imposed under the policies and UT officials disclaimed any intention of violating any student's First Amendment Rights. *Id.* at 334-37. This Court held that the threat of enforcement was latent in the policies' existence. *Id.* at 336.[3]

[3] The students sought only facial relief, whereas IFS seeks *both* as-applied and facial relief. 24-5071.22-25. So did the plaintiff in *Ostrewich*, 72 F.4th at 102, 104 (litigant brought "both facial and as-applied challenges"), where this Court relied on *Speech First* and found pre-enforcement standing due to chilled speech. The district court appears to have misread *Ostrewich*, which did not limit its standing

Here, IFS has proposed a course of conduct that is at least as "arguably affected by a constitutional interest" as the plaintiffs who were found to have standing in *Driehaus* and *Speech First*. *See also Turtle Island Foods, S.P.C. v. Strain*, 65 F.4th 211, 217-18 (5th Cir. 2023) ("intended action" arguably proscribed if arguable reading of statute prohibits intended action, even if "*best* interpretation" does not). It is beyond cavil that associating for the purpose of pro bono litigation against the government—and specifically to challenge restrictions on political speech—is affected by a constitutional interest. Moreover, IFS's intended constitutional activities are in some ways even more concrete than those found sufficient in *Driehaus* and *Speech First*.

For example, IFS not only declared a generalized future intent to represent Texas candidates and political committees in pro bono litigation against the TEC's regulations, it identified both a specific candidate and committee for whom it would bring specific proposed litigation. *Compare* 24-50712.21, 201-202 *with Driehaus,* 573 U.S. at 163 ("identifying other elected officials *who plan to seek reelection* as potential objects of SBA's criticisms") (emphasis added). And no one disputes that the TEC considers IFS's proposed intended course of action to violate Texas law within its enforcement authority.

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analysis to facial challenges. *Compare* 24-50712.802 *with Ostrewich,* 72 F.4th at 102. Even if it had, IFS is part of the class restricted by TEC's corporate contribution ban. *Ostrewich* thus supports IFS's standing.

Similarly, IFS's proposed litigation activity is more specific than the list of generalized political viewpoints that the students proposed to express in *Speech First*. *See* 979 F.3d at 326. Unlike UT officials, the TEC has been open about its intention to enforce the corporate contribution ban. ROA.49. And unlike the UT students, IFS faces both civil and criminal sanctions. TEX. ELEC. CODE § 253.094(c), 133. If the intended speech activity of the *Driehaus* and *Speech First* plaintiffs was good enough to establish an injury-in-fact, then IFS's proposed activity is at least as sufficient, if not more so.

2. IFS need not take further concrete steps that could subject it to criminal or civil penalties in order to challenge the TEC's speech restrictions

The district court's cryptic holding that IFS has not demonstrated that it has taken steps toward a forbidden representation and that "there are other facts IFS may plead to demonstrate it has taken steps to represent the identified clients other than 'filing a complaint or appearing for a client at a hearing'" (ROA.801) misstates the law. The district court did not explain what it meant or provide even a single example. But IFS need not form—or skirt close to—a now-illegal attorney-client relationship; nor must it allow the TEC to begin enforcement proceedings against it, before it could sue. Beyond inviting

legal risk, such recklessness would almost certainly be met with a call for *Younger* abstention from the TEC.[4]

"[C]ourts typically do not require a regulated party to 'bet the farm' by violating a regulation before allowing it to test its validity." *Nat'l Horsemen's Benevolent & Protective Ass'n v. Black*, 107 F.4th 415, 427 (5th Cir. 2024). The Supreme Court has long recognized that pre-enforcement standing does not require plaintiffs to violate the law before challenging it. "[A]n actual arrest, prosecution, or other enforcement action is not a prerequisite to challenging the law." *Driehaus*, 573 U.S. at 158. When "the plaintiff had eliminated the imminent threat of harm by simply not doing what he claimed the right to do . . . [t]hat did not preclude subject-matter jurisdiction because the threat-eliminating behavior was effectively coerced." *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 129 (2007); *see also, e.g.*, *Virginia* v. *American Booksellers Assn., Inc.*, 484 U. S. 383, 386 (1988) (booksellers fearing prosecution for displaying material harmful to juveniles); *Babbitt v. UFW Nat'l Union*, 442 U.S. 289, 302 (1979) (union facing criminal penalty for "consumer publicity" under state farm-labor

[4] *See New Orleans Pub. Serv., Inc. v. Council of New Orleans,* 491 U.S. 350, 367-68 (1989) (surveying scope of *Younger* abstention). In fact, that scenario played out in *Driehaus,* 573 U.S. at 154-55, with a *Younger*-based stay delaying the lawsuit until after the election that Driehaus lost. The TEC understandably prefers this approach, because it would raise impediments to challenging its regulations in federal court.

statute); *Steffel v. Thompson,* 415 U. S. 452, 459 (1974) (anti-war mall leaf-letter facing possible arrest). Like the state actors in those cases, the TEC has not disavowed enforcement of its corporate contribution ban against IFS or any other pro bono legal-service provider in corporate form—in fact, quite the opposite.

The district court's cryptic "substantial step" add-on requirement has no place in assessing standing for a pre-enforcement challenge to a speech restriction that carries civil and criminal penalties. IFS need not "attempt" the crime of violating Texas election law in order to challenge it. *See* FIFTH CIR. PATTERN CRIM. JURY INSTR. 1.34, *Attempt* (2024) at 53 (including the element that "the defendant did an act that constitutes a substantial step towards the commission of that crime and that strongly corroborates the defendant's criminal intent…"). Indeed, this Court has previously found standing for a pre-enforcement suit against a law prohibiting pro bono solicitation, even though the lawyer had not been threatened with prosecution and had no plans to solicit such legal work in the future. *Willey v. Harris Cnty. DA*, 27 F.4th 1125, 1128 & n.3 (5th Cir. 2022).

Nor must IFS enter into some sort of unspecified, quasi-formal arrangement with its putative clients for standing to exist. That suggestion is particularly risky for IFS because all that Texas law requires to create an attorney-client relationship is conduct that impliedly manifests an intent to enter such a relationship. *Target*

Strike, Inc. v. Strasburger & Price, L.L.P., No. 05-18-00434-CV, 2018 Tex. App. LEXIS 9435, at *12-13, *21 (Tex. App. Nov. 19, 2018). Courts assess implied relationships on an objective standard and do not consider the attorney's subjective beliefs. *In re Baytown Nissan Inc.*, 451 S.W.3d 140, 146-47 (Tex. App. 2014). Were even the perception of such an implied relationship to exist, IFS would be risking legal liability.

IFS, Chris Woolsey, and the Texas Anti-Communist League would like to associate, speak, and petition in the form of litigation against the compelled government language required by TEX. ELEC. CODE § 259.001(a), but refrain from doing so because of Defendants' application of the corporate contribution ban. ROA.19-22. IFS has declared that, but for the TEC's ban, it would offer its service to both Woolsey and the League, and they both indicated that they would accept such services. ROA.21, 190-191, 193-194, 201-202. Under *Driehaus* and related cases like *Speech First, Steffel, Am. Booksellers,* and *Babbit,* nothing further is required. Indeed, if one were to apply the district court's heightened standard retroactively to those cases, those pre-enforcement challenges against speech restrictions likely would have been found to lack standing.

B. IFS's claims are ripe because its own inaction in failing to violate Texas law eliminates the imminent threat of prosecution

Ripeness and standing are related Article III doctrines. *Driehaus*, 573 U.S. at 157 n.5; *see also 15 Moore's Federal Practice - Civil § 101.71* (2023) ("Whereas ripeness addresses *when* the suit should be brought . . . courts may employ a mixed standing/ripeness analysis . . . In some cases, the issues of standing and ripeness will completely overlap"). In a pre-enforcement case such as this, the two "boil down to the same question." *Driehaus,* 573 U.S. at 157 n.5 (quoting *MedImmune,* 549 U.S. at 128 n. 8). "The plaintiff's own action (or inaction) in failing to violate the law eliminates the imminent threat of prosecution, but nonetheless does not eliminate Article III jurisdiction." *Id.* at 129. That same posture applies here—IFS is avoiding the TEC's enforcement action by refraining from representing a Texas candidate or political committee, unless and until it can obtain legal relief. Thus, it was error for the district court to rely on a pre-*Driehaus,* industrial-era Regional Railroad Reorganization Act decision[5] that factors in "the likelihood that the complainant will disobey the law[.]" ROA.805-806. The likelihood that IFS will disobey the law is effectively zero, because IFS is wisely self-censoring.

[5] *Regional Rail Reorganization Act Cases,* 419 U.S. 102, 143 & n.29 (1974).

In addition, the district court's application of *Renne v. Geary*, 501 U.S. 312 (1991), conflicts with both *Driehaus* and *Speech First,* both of which present a closer fit and more modern standing analysis. *Renne* involved voters who sought to assert both their own rights and those of party committees to endorse unspecified candidates. *Id.* at 319-21. It was not clear if the intended endorsement violated any criminal statute or if the challenged provision even applied to the voters. *See id.* at 322-23. Nor was there any record of prior enforcement of the speech restriction in *Renne*. *Id.* at 322; *see also Project Veritas Action Fund v. Rollins,* 982 F.3d 813, 830 (1st Cir. 2020) (distinguishing *Renne* on account of a record of past enforcement); *Saint Paul Area Chamber of Commerce v. Gaertner*, 439 F.3d 481, 487-88 (8th Cir. 2006) (distinguishing *Renne* where the appellants "intend to use their resources to support candidates for the United States Senate and United States House of Representatives . . . including [expending funds,] inviting candidates to speak at member events and sending letters to members informing them of candidates endorsed by [appellants.]"); *Nat. Law Party of the United States v. FEC*, 111 F. Supp. 2d 33, 44 (D.D.C. 2000) (noting that in *Renne,* the "provision at issue had never been enforced against their illegal conduct").

Unlike *Renne,* IFS has alleged an intent to pursue a course of action that everyone agrees would violate current Texas law, as construed and

enforced by the TEC. *Renne* is best understood as limited to its facts, especially in light of more recent cases.

Ripeness doctrine does not require that IFS skirt dangerously close to violating state law before it has standing to challenge a law that restricts its speech activities. Nor does it require that it has a filing-ready lawsuit prepared and primed to go. Future *intended* speech activity is enough, just as it was in *Driehaus* and *Speech First.*

The district court also erred in its analysis of Chris Woolsey and the League's status under Texas law and how they both fit into IFS's proposed future litigation.

1. There is at least a colorable argument that the Texas Anti-Communist League is a "political committee" because of its undisputed registration status and purpose

The district Court based its ripeness analysis in part on its conclusion that there were "insufficient facts to show the committee has acted with the purposes 'accepting political contributions or making political expenditures.'" ROA.807-808; *see also* TEX. ELEC. CODE § 251.001(12) (defining "political committee" as a group "acting in concert with a principal purpose of accepting political contributions or making political expenditures"). But it is undisputed that (1) the League is registered as a General Purpose Political Action Committee (GPAC) with the TEC; and (2) that "it would like to be active in future primary or general elections in Texas in order to support candidates or measures

that promote its mission of opposing the spread of communism, Marxism, or affiliated ideologies in Texas institutions." ROA.20, 193.

The TEC has historically taken a broad view of what types of organizations can be a political committee under Texas's Election Code, inviting caution. *See, e.g.,* Texas Ethics Advisory Opinion No. 65 (holding that an out-of-state employee group that intends to register as a political action committee in that other state is a "general-purpose committee" under the Texas Election Code);[6] Texas Ethics Advisory Opinion No. 270 (holding that a fund to finance a lawsuit against the state prison system brought by legislators in their official capacities is a political committee); Texas Ethics Advisory Opinion No. 394 (holding that an unincorporated political club that accepts dues from members and makes endorsements is a political committee).

The League holds itself out as a GPAC, is registered as a GPAC, is known to the TEC as a GPAC, and has an undisputed declared "principal purpose" of being active in future Texas primary or general elections, consistent with its mission. Moreover, even if the League has not yet raised or spent any money, the very act of registering as a GPAC with the TEC is arguably a purposeful "acting" under TEX. ELEC. CODE § 251.001(12). Under the circumstances, a prudent lawyer employed by a

[6] The TEC's advisory opinions are available from its website: https://www.ethics.state.tx.us/opinions/.

corporation would understandably hesitate before representing the League in Texas.

It is also telling that the TEC has not argued that it would be perfectly legal for IFS to represent the League in a challenge to the sign-disclosure required by TEX. ELEC. CODE § 259.001(a). Any ambiguity here serves the TEC's interest, because it need not defend its laws in federal court.

2. There is at least a colorable argument Chris Woolsey is a candidate under state law because he has publicly declared his intent to run for re-election and accept what the TEC considers an in-kind contribution from IFS

The district court also based its ripeness analysis in part on its conclusion that Chris Woolsey was not yet a "candidate" under TEX. ELEC. CODE § 251.001(1) (defining "candidate" as "a person who knowingly and willingly takes affirmative action for the purpose of gaining nomination or election to public office ...") and might never become a candidate. ROA.806-807. Among the non-exclusive list of "examples" provided by Texas law of what qualifies one as a candidate are "making a public announcement of a definite intent to run for public office" or "soliciting or accepting a campaign expenditure." TEX. ELEC. CODE § 251.001(1)(A), (E), (G).

It is undisputed that Woolsey signed, and allowed IFS to file, a publicly available declaration that he intends "to run for re-election and

intend to start raising money for that purpose in the near future." ROA.18, 190. He has also declared that, if offered, he would accept pro bono legal services from IFS, which is something the TEC has termed an illegal in-kind contribution. ROA.19, 191; *see also* ROA.235 ("Pro-bono legal services provided to a candidate or political committee are in-kind contributions"); 18 (quoting opinion summary in complaint).

State courts have also noted the Texas's Election Code's "broad definition of candidate" and how it differs from the more limited term "candidate in an election." *See Jefferson v. Bazaldua*, No. 05-23-00938-CV, 2024 Tex. App. LEXIS 6250, at *5-7 (Tex. App. Aug. 26, 2024) (distinguishing between Title 15's definition and the definition in Title 14, which governs standing for those candidates eligible to bring an election contest). The TEC has similarly taken a broad view of what actions would cause a person to be considered a "candidate." *See, e.g.,* Texas Ethics Advisory Opinion No. 566 (holding that a person seeking a federal judicial appointment qualifies as a candidate).

Thus, there is at least a colorable argument that the TEC could consider Woolsey to have already taken an "affirmative action" under TEX. ELEC. CODE § 251.001(1). At a minimum, it is understandable why

IFS would refrain from representing Woolsey and the TEC has not provided IFS with a dispensation to represent him.[7]

3. Even if the League and Woolsey do not yet meet the technical definitions of a Texas candidate or political committee, their future intentions suffice to provide standing to IFS

Even if reasonable people can disagree about whether Woolsey definitively was a "candidate" at the precise moment in time that IFS filed this lawsuit or the League was a "political committee" at that same moment, such absolute certainty is not required to demonstrate standing, because future intentions suffice.

In *Driehaus,* it did not matter to the Supreme Court whether any specific target of the plaintiffs' proposed speech was an active candidate when the action was filed—what mattered were the plaintiff's future intentions to speak in a way that could subject them to liability. 573 U.S. at 161-62. "Both petitioners have pleaded specific statements they *intend to make in future* election cycles." *Id.* (emphasis added).

[7] As the TEC itself pointed out, a "campaign contribution" is broadly defined. "The Supreme Court of Texas has determined that phrase 'in connection with' is and expansive term that is satisfied even by indirect, tenuous, or remote, relationships." ROA.213 (cleaned up) (citing *Cavin v. Abbott,* 545 S.W.3d 47, 70 (Tex. App.—Austin 2017, no pet.). Moreover, "[w]hether a contribution is made before, during, or after an election does not affect its status as a campaign contribution." TEX. ELEC. CODE § 251.001(3).

The Supreme Court rejected the Sixth Circuit's reasoning that it was speculative anyone would file a complaint against the Plaintiffs because Driehaus might never run again, having lost and decamped to a stint in the Peace Corps. *Id.* at 156-57. Accordingly, the Supreme Court was unconcerned with whether any specific candidate would certainly run again or was in the process of running at the time of the lawsuit's filing; finding it sufficient to reference "other elected officials *who plan to seek reelection* as potential objects of SBA's criticism." *Id.* at 163 (emphasis added); *see also Wolfson v. Brammer,* 616 F.3d 1045, 1059 (9th Cir. 2010) (Finding standing where: "Wolfson has expressed an intention to run for office in the future, and a desire to engage in two kinds of campaign-related conduct that is likely to be prohibited by the Code"). And that was entirely compatible with the pre-enforcement nature of the relief sought.

The collective intentions of IFS, Woolsey, and the League are no less plausible, or sufficient for standing, than those of the *Driehaus* plaintiffs. Moreover, it is also reasonable that IFS and its putative clients would want the legality of their proposed conduct resolved in advance of initiating litigation.

As a practical matter, civil litigation in the Western District of Texas, Austin Division is a rather slow affair. Setting aside the serial delays in this lawsuit, civil cases that resolve during or after pretrial take on average 15.3 months in the Western District. Statistical Tables for the

Federal Judiciary, Admin. Office of the U.S. Courts, June 2024 Report, Table C-5 (2024), available at: https://www.uscourts.gov/statistics-reports/statistical-tables-federal-judiciary-june-2024.

The Austin Division, moreover, is even more congested, as its sole active judge has over 900 active civil cases, and many new cases are assigned to a vacant docket. *Anonymous Media Rsch. Holdings, LLC v. Roku*, Inc., No. 1:23-CV-1143-DII, 2024 U.S. Dist. LEXIS 166872, at *19 (W.D. Tex. July 10, 2024). The WDTX-Austin is perhaps the busiest division in the country. Maggie Thompson, *Austin's Sole Federal District Judge May Be the Most Overburdened in America*, THE AUSTIN CHRONICLE (Sept. 29, 2023), https://perma.cc/E4EW-VETZ.

As a result, even if IFS re-filed this case at a time that Woolsey was actively campaigning or the League was expending funds for a campaign, the litigation itself might still be ongoing, long after the election in question was already over. The TEC would then assert mootness and argue that it is speculative whether such active campaigning would ever re-occur in the future.

Presently IFS stands accused of bringing its case too early, but if it waits, it risks being accused of having filed suit too late. It does not make sense that it should be this difficult to obtain a merits decision on whether a state-law based speech restriction is constitutional. There is plainly an active legal controversy *today* between IFS and the TEC

about the extent of Texas's ban on corporate contributions. The federal courts exist to resolve such controversies, not avoid them.

III. THE DISTRICT COURT ERRED IN HOLDING THAT THE INDIVIDUAL CAPACITY DEFENDANTS ENJOYED QUALIFIED IMMUNITY FROM NOMINAL DAMAGES

Evaluating a qualified immunity claim is a two-step process: (1) did the official violate a constitutional right; and (2) was that right sufficiently established for the official to have had fair warning. *Crittindon v. LeBlanc*, 37 F.4th 177, 185-86 (5th Cir. 2022). The second step is sometimes framed as asking whether the official's actions were "objectively reasonable." *Davis v. McKinney*, 518 F.3d 304, 317 (5th Cir. 2008). To determine whether an official had "fair warning," this Court looks first to Supreme Court precedent and then its own, and may also consider a robust consensus in other circuits. *Crittindon,* 37 F.4th at 186. "The law can be clearly established 'despite notable factual distinctions between the precedents relied on and the cases then before the Court, so long as the prior decisions gave reasonable warning that the conduct then at issue violated constitutional rights.'" *Id.* (citations omitted).

The rights to associate, speak, and petition for the purpose of pro-bono litigation in the government, without state regulatory interference, have been well-established nationwide, since the Jim Crow era—and with good reason. Otherwise, state officials could concoct all

sorts of impediments to protect themselves from inconvenient civil rights lawsuits. Moreover, the individual-capacity defendants received fair warning from IFS (and other affected nonprofit corporations), and should have availed themselves of the objectively more reasonable option to provide a limiting construction on TEX. ELEC. CODE § 253.094.

A. The right of nonprofit corporations to associate, speak, and petition in the form of pro bono litigation against the government has been well established for over sixty years

Suing state officials to prevent the enforcement of unconstitutional laws implicates the right of lawyers to associate with potential and actual clients, and also the right to speak and petition on behalf of those clients and advocate against unjust laws. For six decades, courts have understood the First Amendment to cover those activities and take precedence over state regulatory regimes that interfere with those rights.

The First Amendment accords heightened free speech guarantees to the Institute for Free Speech, and similarly situated persons who "advocat[e] [for] lawful means of vindicating legal rights." *NAACP v. Button,* 371 U.S. 415, 437 (1963). In *Button,* the Supreme Court upheld the NAACP's right to provide nonprofit legal services—as IFS does here—as "a form of political expression" by vindicating civil rights in the form of desegregation lawsuits. *Id.* at 429, 431 (invalidating anti-

solicitation law prohibiting attorneys from advising others about their legal rights).

Recognizing that this form of legal representation constitutes protected expression, the court noted that the First Amendment "protects vigorous advocacy, certainly of lawful ends, against governmental intrusion." *Id.* at 429, 437. Thus, it found that Virginia officials could not, "under the guise of prohibiting professional misconduct, ignore constitutional rights." *Id.* at 439. The court expressed particular concern that Virginia's vague and broad statute lent itself to "selective enforcement against unpopular causes." *Id.* at 435-36.

Since *Button,* the Supreme Court has repeatedly accorded broad First Amendment protections to nonprofit lawyers who vindicate legal rights. Indeed, it has noted the important First Amendment role of nonprofits who litigate in defense of the unpopular, including political dissenters. *In re Primus*, 436 U.S. 412, 427-28 (1978). "The ACLU engages in litigation as a vehicle for effective political *expression and association,* as well as a means of communicating useful information to the public." *Id.* at 431 (emphasis added); *see also Bernard v. Gulf Oil Co.*, 619 F.2d 459, 472-73, 477-78 (5th Cir. 1980) (following *Button* and vacating district court order restricting communications with actual and potential class members); *Porter v. Califano*, 592 F.2d 770, 780 (5th Cir. 1979) ("Especially where the government is one of the parties in the

related litigation, courts must most carefully scrutinize government action which attempts to chill private speech designed to raise funds for the legal fees of the private party litigating, and especially defending himself, against the government").

In *Primus*, the court affirmed that South Carolina could "not abridge unnecessarily the associational freedom of nonprofit organizations, or their members," through broad lawyer disciplinary rules. *Primus,* 436 U.S. at 439 (striking down discipline of ACLU lawyer who had offered pro bono representation to a woman who had been sterilized as a condition of continued receipt of Medicaid benefits); *see also United Mine Workers of Am., Dist. 12 v. Ill. State Bar Ass'n,* 389 U.S. 217, 221-23 (1967) (*Button* covers non-political cases too, including a union staff attorney handling workers' compensation claims for union members).

Similarly, the court affirmed that the government cannot "prohibit the analysis of certain legal issues" without violating the First Amendment. *Legal Servs. Corp. v. Velazquez,* 531 U.S. 533, 545, 547-8 (2001) *("LSC")* (where Congress funds legal representation for benefits recipients, it may not hamstring the representation). "The attempted restriction is designed to insulate the Government's interpretation of the Constitution from judicial challenge. The Constitution does not permit the Government to confine litigants and their attorneys in this manner." *Id.* at 548.

These Supreme Court holdings all support the proposition IFS advances: that TEC officials may not use Texas's corporate contribution ban as a vehicle to vitiate IFS's (and others') rights to associate, speak, and petition for the purposes of pro bono litigation against the government, and in particular for the purpose of legally challenging the TEC's own regulatory regime, which targets political speech.

All of the individual-capacity defendants either voted to apply the TEC's contribution ban to IFS's proposed conduct or advocated for that outcome, despite being warned by IFS (and other corporate legal-service providers such as the ACLU and Institute for Justice) that doing so would illegally restrict First Amendment rights. ROA.17-18, 197-200, 204-211, 216-229. By advocating for, or voting for, the adoption of Ethics Advisory Opinion No. 580 (ROA.18, 234-237, 240), the individual-capacity defendants participated directly in violating a clearly established set of constitutional rights, forcing IFS to file this lawsuit.

B. The errant TEC commissioners and executive director acted unreasonably where they could have adopted a limiting construction that allowed for corporations who wanted to provide pro bono legal services

It is well-established that state enforcement officials have the ability to impose limiting constructions. *Ward v. Rock Against Racism*, 491 U.S. 781, 795-96 (1989) (noting that administrative interpretation and

implementation are highly relevant to constitutional analysis and finding that any inadequacies on the face of the guidelines was remedied by the city's narrowing construction); *Yamada v. Snipes*, 786 F.3d 1182, 1188 (9th Cir. 2015) ("In evaluating A-1's challenges, we must consider 'any limiting construction that a state court or enforcement agency has proffered'"). It is undisputed that IFS requested[8] a limiting construction of the corporate contribution ban, and the TEC not only declined to provide that, but pronounced that it interpreted the ban broadly, to prohibit IFS intended course of action. ROA.49-50, 235-236.

Thus, focusing on whether bans on corporate contributions might be legal in other circumstances is a different question. IFS (and others) proposed an easy fix to a legal impediment that burdens constitutional rights. Instead of embracing that easy fix, the individual-capacity defendants knowingly opted to do the opposite. As a result, they should not enjoy qualified immunity from nominal damages.

IV. THE DISTRICT COURT ERRED IN EFFECTIVELY DENYING IFS'S MOTION FOR SUMMARY JUDGMENT

Summary judgment is appropriate if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to

[8] "Since Texas law can be interpreted in such a way as to permit the provision of pro bono legal services in the public interest as described in this request, the Commission should avoid an interpretation that would like render the statute unconstitutional." ROA.211.

judgment as a matter of law. Fed. R. Civ. P. 56(a); *Aspan,* No. 23-20545, 2024 U.S. App. LEXIS 22633, at *3. "Where the non-movant bears the burden of proof at trial, the movant may merely point to an absence of evidence, which shifts to the non-movant the burden of demonstrating by competent summary judgment proof that there is an issue of material fact warranting trial." *Wynn ex rel. K.Y. v. Harris County*, No. 23-20502, 2024 U.S. App. LEXIS 20674, at *7-8 (5th Cir. Aug. 15, 2024) (quoting *Lindsey v. Sears Roebuck & Co.*, 16 F.3d 616, 618 (5th Cir. 1994)) (cleaned up). "The nonmovant cannot satisfy this burden merely by denying the allegations in the opponent's pleadings but can do so by tendering depositions, affidavits, and other competent evidence to buttress its claim." *Wynn,* 2024 U.S. App. LEXIS 20674, at *7-8 (quoting *Donaghey v. Ocean Drilling & Expl. Co.*, 974 F.2d 646, 649 (5th Cir. 1992)).

Here IFS moved for summary judgment early in the case, within about seven weeks after filing suit and before discovery commenced. ROA. 24-50712.6, 149-186. Defendants did not respond to the merits of IFS's summary judgment motion, but filed only a motion for deferral under Fed. R. Civ. P. 56(d) and requested an opportunity to conduct discovery into jurisdictional issues. ROA.343-355. IFS replied, requesting that the district court consider its motion for summary judgment concurrently with the TEC's motion to dismiss, argued that the TEC had failed to identify material evidence it hoped to uncover in

discovery, and that it had implicitly conceded that its regime is unconstitutional. ROA.372-382.

A. The TEC failed to properly address IFS's motion for summary judgment

"When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions." *McCutcheon v. FEC*, 572 U.S. 185, 210 (2014) (quoting *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 816 (2000)); *Watchtower Bible & Tract Soc'y of New York City v. Vill. of Stratton*, 536 U.S. 150, 170 (2002) (Breyer, J., concurring) (same); *Catholic Leadership Coal. of Tex. v. Reisman*, 764 F.3d 409, 425 (5th Cir. 2014) ("Under each of the tests, the government has the burden of demonstrating the constitutionality of its actions"). In this case, the TEC failed to put forward any evidence, much less a legal argument, that its corporate contribution ban passes strict scrutiny as applied to pro bono litigation services for the purpose of challenging the TEC's speech restrictions. *See United States v. Juarez-Martinez*, 738 F. App'x 823, 825 (5th Cir. 2018) (government's failure to dispute opponent's interpretation of state law made that interpretation operative even if court did not consider it "the best or only interpretation"); *United States ex rel. Bias v. Tangipahoa Par. Sch. Bd.*, 816 F.3d 315, 321 (5th Cir. 2016) (failure to address argument in § 1983 suit concedes argument's truth). No discovery is necessary for the TEC to justify its own regulatory regime, those arguments and

evidence being fully available to its officials. That the TEC would rather talk about standing only is telling.

As a result, this Court should render a judgment on IFS's motion for summary judgment, or, in the alternative, vacate the district court's order "mooting" IFS's motion for summary judgment, and remand this matter to the district court with instructions that it deny the TEC's Rule 56(d) motion, order the TEC to respond to the merits of IFS's motion, and resolve the motion on its merits. *See Glass v. Paxton*, 900 F.3d 233, 243 (5th Cir. 2018) (resolving a dispositive motion not addressed below "to avoid a waste of judicial resources" because "the only remaining issues are purely legal questions"); *see also Green Valley Special Util. Dist. v. City of Schertz*, 969 F.3d 460, 474 (5th Cir. 2020) (similar); *Halbert v. City of Sherman*, 33 F.3d 526, 530 (5th Cir. 1994) (similar).

B. The TEC's regime does not meet strict scrutiny as applied to IFS or similar entities

Restrictions on core First Amendment rights—such as the rights to associate, speak, and petition for redress in the form of pro bono litigation against the government—are subject to strict scrutiny; that is, the TEC defendants must prove that their regulatory regime furthers a compelling state interest that is narrowly tailored to achieve that interest. *Willey*, 27 F.4th at 1129 (applying strict scrutiny to anti-barratry law where plaintiff wanted to solicit indigent clients who were

already represented by appointed counsel and noting that the "Supreme Court has twice applied strict scrutiny to state attempts to restrict non-commercial attorney solicitation"); *see also* Richard H. Fallon, Jr., *Strict Judicial Scrutiny,* 54 UCLA L. Rev. 1267, 1279 (2007) (tracing the development of the strict-scrutiny test in the 1960s and noting that *Button* applied a compelling interest test and "also prefigured the modern narrow tailoring requirement[.]"). Specifically, the Fifth Circuit reasoned that *Button* and *Primus* established three principles: (1) the work that the plaintiff wished to do was constitutionally protected speech and association; (2) restrictions on that conduct are strictly scrutinized; and (3) those restrictions are only permissible where narrowly tailored to the substantive evils that the state proves is present in a particular case. *Willey,* 27 F.4th at 1130.

Here the TEC defendants' regulatory regime similarly burdens core First Amendment rights and is not supported by a compelling state interest. Advisory Opinion 580 asserts that the TEC does not begrudge anyone pro bono legal representation, just pro bono legal representation provided by a corporation. But what could be even a rational interest, let alone a compelling one as required by *Willey*, in only barring attorneys who organize their practices in a corporate form from providing their services on a pro bono basis? Attorneys and law firms who practice in the corporate form are subject to the same rules of professional conduct, and are equally liable for malpractice claims, as

are attorneys who practice as individuals, in partnerships, or as limited liability companies. Indeed, it is not for the TEC to regulate the practice of law, an area of responsibility wisely left to the courts, directly or through their bars.

Nor could the TEC assert that its regulation barring corporations (and only corporations) from providing pro bono legal services somehow advances a compelling state interest in fighting corruption. The Supreme Court has "spelled out how to draw the constitutional line between the permissible goal of avoiding corruption in the political process and the impermissible desire simply to limit political speech." *McCutcheon,* 572 U.S. at 192. "Any regulation must instead target what we have called '*quid pro quo*' corruption or its appearance." *Id.* (citing *Citizens United v. FEC*, 558 U.S. 310, 359 (2010)); *see also FEC v. Ted Cruz for Senate*, 142 S. Ct. 1638, 1652 (2022).

"The hallmark of corruption is the financial *quid pro quo*: dollars for political favors." *McCutcheon*, 572 U.S. at 192. But whatever the justification may be for barring corporations, generally, from donating money to political campaigns as a means of averting quid pro quo corruption or its appearance, it is not readily apparent that the provision of pro bono legal services by law firms that happen to operate as corporations is a perfect substitute for money as a corruption agent.

That Defendants might be pursuing a valid anti-quid pro quo corruption interest makes even less sense in the as-applied context

raised here. An obvious difference exists between a for-profit corporation (a petroleum company, a tech giant, a foreign state-owned enterprise, etc.) that may have use for political favors, and a nonprofit legal-services provider which exists to provide those services in alignment with its pre-formed ideological mission. How, exactly, does a nonprofit's provision of pro bono legal services raise the specter of corruption? IFS will not represent political committees because it might secretly wish to obtain some legislative favor. But there is no mystery why IFS seeks to file these lawsuits. IFS will file pro bono First Amendment lawsuits because that has been its raison d'être since its inception almost twenty years ago. IFS seeks merely to pursue its constitutionally protected mission.

Indeed, the Supreme Court adopted its narrow view of what counts—and does not count—as a valid anti-corruption interest in the campaign-finance context when applying a review standard lower than strict scrutiny. That is, if the state is not addressing quid pro quo corruption, it does not have even an "important" governmental interest that might satisfy intermediate scrutiny, never mind the compelling interest needed to regulate the First Amendment right to litigate as a form of political association and expression. Laws that fail lesser scrutiny cannot pass strict scrutiny. *See Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 571 (2011); *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 184 (1999). "After all, if you can't ski a blue run successfully,

you obviously can't tackle a double black diamond." *Recht v. Morrisey*, 32 F.4th 398, 410 (4th Cir. 2022).

And even if the TEC could assert a compelling (or even merely important) interest here, it could not show that its regulation is narrowly tailored to advancing its interests. The TEC's regime is an indiscriminate, blanket prohibition on corporate-legal-service providers, untethered to any specific showing of harm. For example, how would the integrity of Texas's system of representative democracy be furthered by preventing IFS from representing Chris Woolsey or the Anti-Communist League in a civil rights lawsuit against the message requirements on political signs? By definition, a blanket ban is indiscriminate and not narrowly tailored.

Yet the corporate pro bono ban is also fatally underinclusive. That a "regulation is wildly underinclusive when judged against its asserted justification," that "is alone enough to defeat it." *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 802 (2011). "Underinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint." *Id.* (citations omitted). "Underinclusivity creates a First Amendment concern when the State regulates one aspect of a problem while declining to regulate a different aspect of the problem that affects its stated interest in a comparable way." *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 451 (2015) (citation and emphasis omitted).

Notably, the TEC does not ban *all* pro bono legal services. Advisory Opinion 580 explicitly states that its rule "is not as dramatic as some critics have suggested," because candidates "may accept pro bono representation to challenge the law." ROA.51. They just cannot get pro bono legal services from corporations, including nonprofit ones. Attorneys and law firms who operate as sole proprietors, partnerships, and professional limited liability companies, and indeed "professional corporations"[9]—some of which have many political wants, on their own behalf or on behalf of their corporate or share-holder clients—are free to donate their services to candidates and political committees. These may include the most powerful and well-connected big-law partnerships. If the TEC were concerned about the corrupting influence of pro bono legal services, it would start by aiming its prohibitions at other members of our profession, not at nonprofit organizations.

CONCLUSION

IFS respectfully requests that this Court reverse the district court's orders, and remand the case with instructions to grant IFS's motion for summary judgment or, in the alternative, with instructions to deny the TEC's Rule 56(d) motion and to order the TEC to file a response on the merits of IFS's claims.

[9] 1 T.A.C. § 20.1(4): "Corporation--The term does not include professional corporations or professional associations."

Respectfully submitted,

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[10] Not a D.C. Bar Member but providing legal services in the District of Columbia exclusively before federal courts, as authorized by D.C. Ct. App. R. 49(c)(3).

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with FED. R. APP. P. 32 and 5TH CIR. R. 32.3, that this brief is set in 14-point Century Schoolbook, a proportionately spaced serif font, and as calculated by Microsoft Word (from a continuously updated Office 365 subscription), considering the appropriate exclusions, contains 9,452 words.

Dated: November 3, 2024

s/Endel Kolde