NO. 24-50712

In the United States Court of Appeals for the Fifth Circuit

INSTITUTE FOR FREE SPEECH,

Plaintiff–Appellant,

v.

J.R. JOHNSON, IN HIS OFFICIAL AND INDIVIDUAL CAPACITIES AS EXECUTIVE DIRECTOR OF THE TEXAS ETHICS COMMISSION; MARY KENNEDY, CHRIS FLOOD, AND RICHARD SCHMIDT, IN THEIR OFFICIAL CAPACITIES AS COMMISSIONERS OF THE TEXAS ETHICS COMMISSION; AND RANDALL ERBEN, CHAD CRAYCRAFT, PATRICK MIZELL, JOSEPH SLOVACEK, AND STEVEN WOLENS, IN THEIR INDIVIDUAL AND OFFICIAL CAPACITIES AS COMMISSIONERS OF THE TEXAS ETHICS COMMISSION,

Defendants–Appellees.

On Appeal from the United States District Court
for the Western District of Texas, Austin Division
1:23-cv-1370

BRIEF FOR DEFENDANTS-APPELLEES

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Fifth Circuit Rule 28.2.1, the undersigned counsel certifies that the following listed persons and entities have an interest in the outcome of this case. These representations are made so that this Court may evaluate possible disqualification or recusal.

1. Plaintiff-Appellant, Institute for Free Speech (Endel Kolde, Courtney Corbello, and Nathan Ristuccia);

2. Law Offices of Tony McDonald, counsel for Plaintiff-Petitioner (Tony McDonald and Connor Ellington);

3. Defendant-Appellee J.R. Johnson, in his official and individual capacities as Executive Director of the Texas Ethics Commission;

4. Defendants-Appellees Mary Kennedy, Chris Flood, and Richard Schmidt, in their official capacities as commissioners of the Texas Ethics Commission;

5. Defendants-Appellees Randall Erben, Chad Craycraft, Patrick Mizell, Joseph Slovacek, and Steven Wolens, in their individual and official capacities as commissioners of the Texas Ethics Commission;

6. Butler Snow LLP, counsel for Defendants-Appellees (Eric J.R. Nichols, Cory R. Liu, Jose M. Luzarraga);

7. Texas Anti-Communist League PAC; and

8. Chris Woolsey, Corsicana City Council Member.

/s/ Cory R. Liu
Cory R. Liu
Counsel for Defendants-Appellees

STATEMENT REGARDING ORAL ARGUMENT

The orders below that are the subject of the appeal were rendered without a hearing, based on the parties' written pleadings. Defendants-Appellees respectfully take the position that this Court can effectively review the issues on appeal without oral argument.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Constitutional Provisions

Other Authorities

JURISDICTIONAL STATEMENT

The district court correctly dismissed this case for lack of subject-matter jurisdiction. This Court has appellate jurisdiction to hear IFS's appeal from the dismissal of its claims at the motion-to-dismiss stage. But it lacks appellate jurisdiction to hear IFS's appeal of the district court's denial of its motion for summary judgment.

ISSUES PRESENTED

1. Does IFS's complaint fail to allege facts that demonstrate standing to bring its claims and a ripe controversy?

2. Are IFS's individual-capacity claims barred by qualified immunity?

3. Are IFS's individual-capacity claims barred by quasi-judicial immunity?

4. Are IFS's official-capacity claims barred by sovereign immunity?

5. Does this Court have jurisdiction to hear an appeal from the denial of IFS's motion for summary judgment as moot after the district court dismissed this case?

STATEMENT OF THE CASE

I. Statutory Background

A. The Texas Ethics Commission enforces ethics laws and has a statutory duty to issue advisory opinions.

The Texas Ethics Commission (the "TEC" or the "Commission") is a Texas state agency charged with enforcing various laws designed to promote government transparency, prevent corruption, and ensure the integrity of elections. *See* TEX. GOV'T CODE § 571.001. The TEC is governed by eight part-time Commissioners, four of whom are appointed by the Governor, two of whom are appointed by the Speaker of the House, and two of whom are appointed by the Lieutenant Governor. TEX. CONST. art. 3, § 24a(a). The Commission's Executive Director is its highest-ranking full-time employee.

The TEC has statutory authority to investigate violations of laws within its jurisdiction, and such investigations are typically initiated not by the Commission itself but instead upon the filing of a sworn written complaint of a Texas resident that meets threshold requirements. TEX. GOV'T CODE § 571.121 *et seq.* Six votes are needed to initiate a civil enforcement proceeding that can result in the finding of a violation of state law and penalty. *Id.* § 571.171. Six votes are also needed to refer a

matter to a criminal prosecutor with authority to enforce an applicable Texas criminal statute. *Id.*

The TEC is also statutorily required to "prepare a written advisory opinion" upon the written request of a person subject to a list of Texas ethics and election laws "for an opinion about the application of any of these laws to the person in regard to a specified existing or hypothetical factual scenario." TEX. GOV'T CODE § 571.091. In such a circumstance, the Commission "shall issue an advisory opinion not later than the 60th day after the date the commission receives the request," though the TEC may vote to authorize two 30-day extensions. *Id.* § 571.092. The only specified use of a TEC advisory opinion for litigation is as a defense in an enforcement proceeding. *Id.* § 571.097.

As the TEC has long held, TEC advisory "opinions do not make a specified action illegal." Ethics Advisory Opinion No. 147 (1993), https://www.ethics.state.tx.us/opinions/partI/147.html (EAO-147). The "authority of the commission to issue an advisory opinion does not affect the authority of the attorney general to issue an opinion as authorized by law." TEX. GOV'T CODE § 571.096. And it does not prevent subsequent Commissioners from withdrawing or amending the interpretation

contained in the advisory opinion. Indeed, the TEC website contains a page dedicated to compiling a list of advisory opinions that have been "overruled, modified, clarified, or superseded" by a subsequent advisory opinion, TEC rulemaking, legislation, or court decision. *See* Advisory Opinion History, TEX. ETHICS COMM'N, https://www.ethics.state.tx.us/opinions/opinions_history.php (last visited Dec. 3, 2024).

B. In a manner consistent with United States Supreme Court precedent, Texas law places certain limits on political contributions.

Texas campaign-finance laws define a "contribution" as "a direct or indirect transfer of money, goods, services, or any other thing of value and includes an agreement made or other obligation incurred, whether legally enforceable or not, to make a transfer." TEX. ELEC. CODE § 251.001(2). A "campaign contribution" is "a contribution to a candidate or political committee that is offered or given with the intent that it be used in connection with a campaign for elective office or on a measure." *Id.* § 251.001(3). An "officeholder contribution" is "a contribution to an officeholder or political committee that is offered or given with the intent that it be used to defray expenses that: (A) are incurred by the officeholder in performing a duty or engaging in an activity in connection

with the office; and (B) are not reimbursable with public money." *Id.* § 251.001(4). And a "political contribution" is "a campaign contribution or an officeholder contribution." *Id.* § 251.001(5).

In *FEC v. Beaumont*, 539 U.S. 146 (2003), the Supreme Court held that Congress could constitutionally prohibit corporations and unions from making political contributions. As the Court noted, federal law still allows corporations and unions to participate in the electoral process by "allowing them to establish and pay the administrative expenses of [political action committees, *i.e.*, PACs]." *Id.* at 162–63 (quoting *FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197, 201 (1982)).

Texas law follows the Supreme Court's precedent in *Beaumont* by providing that a "corporation or labor organization may not make a political contribution that is not authorized by this subchapter." TEX. ELEC. CODE § 253.094. Texas law does allow for the creation of "political committees," which serve functions similar to those of federal political action committees and are also commonly abbreviated as "PACs." A "political committee" is defined as "two or more persons acting in concert with a principal purpose of accepting political contributions or making political expenditures." TEX. ELEC. CODE § 251.001(12).

> A "general-purpose committee" is
>
> a political committee that has among its principal purposes: (A) supporting or opposing (i) two or more candidates who are unidentified or are seeking offices that are unknown or (ii) one or more measures that are unidentified; or (B) assisting two or more officeholders who are unidentified.

TEX. ELEC. CODE § 251.001(14).

> A "specific-purpose committee" is
>
> a political committee that does not have among its principal purposes those of a general-purpose committee but does have among its principal purposes: (A) supporting or opposing one or more (i) candidates, all of whom are identified and are seeking offices that are known or (ii) measures, all of which are identified; (B) assisting one or more officeholders, all of whom are identified; or (C) supporting or opposing only one candidate who is unidentified or who is seeking an office that is unknown.

TEX. ELEC. CODE § 251.001(13).

Political committees must appoint a campaign treasurer and file certain disclosures of the contributions they receive and expenditures they make. TEX. ELEC. CODE §§ 254.031, 121, .151. Political committees are often established for the purpose of engaging in political activities that are prohibited for corporations. *See, e.g.*, *Catholic Leadership Coal. of Tex. v. Reisman*, 764 F.3d 409, 418 (5th Cir. 2014) (establishing Catholic Leadership Coalition "Institute for Public Advocacy"). Applying

the Supreme Court's precedent in *Beaumont*, this Court held in *Reisman* that Texas's ban on corporate political contributions is consistent with the First Amendment. *Id.* at 441–45.

II. Factual and Procedural Background

A. IFS requests a TEC advisory opinion interpreting how Texas law defines various "contributions."

On January 18, 2022, Plaintiff-Appellant the Institute for Free Speech ("IFS") sent a letter to TEC Executive Director J.R. Johnson requesting an advisory opinion "to resolve uncertainty regarding the application of Texas law to the provision of pro bono legal services to Texas candidates or political committees." ROA.204.

The letter noted that under the Internal Revenue Code, "Section 501(c)(3) bars IFS from 'interven[ing] in (including the publishing or distributing of statements) any political campaign on behalf of (or in opposition to) any candidate for public office.'" *Id.* It also stated that IFS does not charge its clients legal fees but does "seek and recover attorney fees from defendants who have violated our clients' constitutional rights, as allowed under various civil rights statutes and fee-shifting provisions." *Id.* The letter also asserted that IFS's "legal services are offered on a

nonpartisan and nonideological basis," without any evidence of measures IFS had taken to ensure that its legal services were so offered. *Id.*

Against this backdrop, IFS identified the "Question Presented" in its request for an advisory opinion as:

> Would IFS's proposed provision of pro bono legal services, as described above, to candidates or political committees constitute a "political contribution," "contribution," "campaign contribution," or "officeholder contribution" as those terms are defined in the laws or regulations, and thus be barred by Section 253.094 of the Texas Government Code?

ROA.205. Notably, this question focused on the meaning of state-law statutory terms and did not identify any specific potential clients of IFS or specific proposed contractual arrangements with any potential clients, including on the allocation of any civil-rights attorneys' fees recovery.

As previously discussed, the TEC was statutorily required to respond to IFS's request for an advisory opinion. TEX. GOV'T CODE § 571.091. Given the scope of IFS's request, the TEC focused on interpreting the text of the state statutory terms IFS identified when it issued Ethics Advisory Opinion No. 580 (EAO-580) on December 14, 2022. EAO-580 concluded that:

1. Pro-bono legal services provided to a candidate or political committee are in-kind contributions.

2. Pro-bono legal services provided to a candidate or political committee are in-kind *campaign* contributions if they are given with the intent that they be used "in connection with" a campaign.

3. The Commission's prior opinions on the personal use of political contributions are relevant to this request.

4. Lawsuits that depend on a plaintiff's status as a candidate or political committee are connected to a campaign.

5. The advisory opinion does not prohibit candidates from filing any claim, including to challenge the laws under the TEC's jurisdiction. Candidates may accept pro bono representation not provided by a corporation and may even accept representation provided by a corporation if it is for a fair market rate.

ROA.48–51.

B. IFS files a First Amendment challenge to the TEC's advisory opinion interpreting state law, the allegations of which fail to make out a justiciable dispute.

IFS filed this federal lawsuit challenging the Commission's issuance of EAO-580 on the ground that the interpretation of Texas statutes as set forth in the advisory opinion violated the First Amendment. IFS sued Executive Director Johnson and the five TEC Commissioners who voted for EAO-580 in both their individual and

official capacities and sued the remaining three TEC Commissioners in their official capacities only. ROA.10.

Paragraphs 5 and 7 of the IFS complaint, which purport to identify the factual bases for the individual-capacity claims against Executive Director Johnson and the five Commissioners who voted for the issuance of EAO-580, claim that "Ethics Advisory Opinion No. 580 . . . burdens IFS's free speech rights." ROA.13–14. The complaint does not contain any additional factual allegations to support a claim that any of the individual-capacity defendants actually took steps to violate anyone's First Amendment rights. ROA.48–51.

IFS's federal complaint identifies as potential clients a political candidate, Chris Woolsey, and a purported political committee, the Texas Anti-Communist League ("TACL"). ROA.18–20.[1] IFS alleges that these potential clients would like to bring First Amendment challenges to the requirement in the Texas Election Code that political road signs contain

[1]The complaint does not allege facts that if true would establish that TACL actually qualifies as a political committee under Texas law. Applicable law for a political committee requires "two or more persons acting in concert with a principal purpose of accepting political contributions or making political expenditures." TEX. ELEC. CODE § 251.001(12).

a warning stating that the sign may not be placed in the right-of-way of a highway. *See* TEX. ELEC. CODE § 259.001.

Defendants-Appellees moved to dismiss the case and the district court granted that motion based on (1) lack of standing, (2) lack of ripeness, and (3) qualified immunity. ROA.788. Although the district court held open the possibility that IFS could attempt to replead its claims, ROA.796, IFS instead chose to appeal to this Court.

SUMMARY OF THE ARGUMENT

This lawsuit indisputably emanates from IFS's request for an advisory opinion interpreting the text of various Texas campaign-finance laws. The TEC was statutorily obligated to answer IFS's request, which it did when it issued EAO-580. Although the advisory opinion did nothing more than interpret the plain words of existing Texas statutes, IFS sued the TEC's Executive Director and Commissioners in their individual and official capacities, generally alleging that EAO-580 violated the First Amendment.

This Court should affirm the district court's dismissal of the case for the following reasons.

First, IFS failed to plead any certainly impending injury and facts that if true would lead to a ripe federal-court claim. In addition, IFS did not plausibly allege that any potential clients would have legitimate claims over Texas's right-of-way disclosure requirement for political road signs that IFS would be not only willing but also able to litigate. IFS also did not allege a perceptible impairment of its organizational mission, and its conclusory claims about invasion of a legally protected interest due to the issuance of EAO-580 are foreclosed by Supreme Court precedent. Finally, IFS did not allege and could never allege a redressable harm because as a claimed 501(c)(3) organization, it is independently barred by the Internal Revenue Code from supporting political campaigns.

Second, IFS's over-the-top and unnecessary individual-capacity claims are barred by qualified immunity. IFS did not and could never allege a violation of its constitutional rights by Executive Director Johnson and the Commissioners whom IFS sued individually, let alone one that was so clearly established that every reasonable official would have been aware that a constitutional violation occurred.

Third, IFS's individual-capacity claims are barred by quasi-judicial immunity, because Defendants-Appellees were performing a law-interpreting function when they issued EAO-580.

Fourth, IFS's official-capacity claims are barred by sovereign immunity. IFS has not met the requirements of *Ex parte Young*, 209 U.S. 123 (1907), because it has not alleged facts showing that Defendants-Appellees demonstrated a willingness to enforce Texas's ban on corporate and union political contributions against IFS. Allegations over the TEC's issuance of an advisory opinion—the only purpose of which is to solicit the Commission's interpretation of Texas statutes in a manner that could potentially serve as a defense to an enforcement action—cannot meet the requirements of *Ex parte Young* as applied by the United States Supreme Court and this Court.

Finally, this Court lacks appellate jurisdiction to hear IFS's appeal of the denial of its motion for summary judgment because that decision is not a final order within the meaning of 28 U.S.C. § 1291.

ARGUMENT

A plaintiff who invokes federal jurisdiction bears the burden of establishing the requirements of standing and ripeness. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). These jurisdictional requirements "are an indispensable part of the plaintiff's case," and "each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.,* with the manner and degree of evidence required at the successive stages of the litigation." *Id.*

Standard of Review. This Court reviews *de novo* the grant of a motion to dismiss. *Lutostanski v. Brown*, 88 F.4th 582, 585 (5th Cir. 2023). A motion to dismiss should be granted if the complaint fails to state a "plausible" claim for relief on its face. *Ashcroft v. Iqbal*, 556 U.S. 662, 663–64 (2009). Determining "whether a complaint states a plausible claim is context specific, requiring the reviewing court to draw on its experience and common sense." *Id.*

The Court may affirm the district court's order dismissing this case on grounds other than those relied upon in the district court's opinion. *Britt v. Grocers Supply Co.*, 978 F.2d 1441, 1449 (5th Cir. 1992).

I. IFS Lacks Standing.

It is "well settled" that the "federal courts established pursuant to Article III of the Constitution do not render advisory opinions." *Am. Stewards of Liberty v. Dep't of Interior*, 960 F.3d 223, 228 (5th Cir. 2020) (quoting *Golden v. Zwickler*, 394 U.S. 103, 108 (1969)). "To satisfy the Article III case-or-controversy requirement, plaintiffs must have standing to sue" at the time the suit is commenced. *A & R Eng'g & Testing Inc. v. Scott*, 72 F.4th 685, 689 (5th Cir. 2023). Standing is established by alleging an injury in fact that is "concrete, particularized, and actual or imminent; fairly traceable to the [defendant's] challenged action; and redressable by a favorable ruling." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013).

A. This case is premature, as there is no certainly impending injury, and IFS's claims are unripe.

In *Clapper*, the Supreme Court explained that an alleged injury in fact must be "actual or imminent" and "*certainly* impending," as opposed to "speculative." *Id.* A "theory of standing, which relies on a highly attenuated chain of possibilities, does not satisfy the requirement that the threatened injury must be certainly impending." *Id.* at 410.

Relatedly, a case is not ripe for adjudication if "[f]urther factual development . . . would enhance the case's fitness for judicial review." *Miss. State Democratic Party v. Barbour*, 529 F.3d 538, 547 (5th Cir. 2009); *see also Monk v. Huston*, 340 F.3d 279, 282 (5th Cir. 2003) (holding that a court should dismiss a case for lack of ripeness when the case is "abstract or hypothetical"). "A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed, may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998). "Postponing consideration of the questions presented, until a more concrete controversy arises . . . has the advantage of permitting the state courts further opportunity to construe" the statute. *Renne v. Geary*, 501 U.S. 312, 323 (1991).

It is undisputed that Defendants-Appellees have not taken any enforcement action against IFS. Nor is there any allegation that there is any administrative complaint pending against IFS. The only conduct Defendants-Appellees are alleged to have undertaken relevant to IFS's claims is the issuance of EAO-580 at IFS's request. ROA.18. Allegations regarding the issuance of that advisory opinion do not meet IFS's burden

to demonstrate a certainly impending harm to IFS or a ripe controversy for the following reasons.

First, EAO-580 on its face interprets only the text of state-law statutory terms and concludes, among other things, that the definition of a "contribution" under various provisions of Texas campaign-finance law includes the provision of free legal services. ROA.48–51. That interpretation follows from a straightforward reading of Texas law's definition of a "contribution" as "a direct or indirect transfer of money, goods, services, or any other thing of value." TEX. ELEC. CODE § 251.001(2). Under Texas Supreme Court precedent, when a statute's "text is clear," that "text is determinative of intent." *Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 437 (Tex. 2009).

EAO-580 did not purport to apply the law to any of the specific facts alleged in this lawsuit. Nor could it have, because IFS's request for the TEC advisory opinion did not identify any potential clients. Furthermore, although IFS's advisory opinion request stated that IFS typically pursues civil-rights attorneys' fees, its complaint in this case does not allege facts concerning the extent to which it would be entitled to collect attorneys' fees as compensation for representing its potential clients.

In essence, IFS's complaint asks a federal court to overrule an advisory opinion of a Texas state agency. But "federal courts do not adjudicate hypothetical or abstract disputes," "do not possess a roving commission to publicly opine on every legal question," and "do not issue advisory opinions." *TransUnion LLC v. Ramirez*, 594 U.S. 413, 423–24 (2021).

Second, the TEC issued EAO-580 only because (1) IFS requested an opinion and (2) the Commission was statutorily obligated to issue an advisory opinion in response, which as previously discussed, does not have the legal effect of rendering any hypothetical conduct by IFS illegal. *See supra*, at 4–5. The issuance of a TEC advisory opinion does not provide a basis on which a federal-court litigant can meet its burden of demonstrating certainly impending harm.

This Court has recognized that the issuance of a state agency advisory opinion on its own without a history of enforcement is insufficient to establish an injury in fact. A credible threat of enforcement exists if an agency not only issues an advisory opinion, but also "intended enforcement, and recently enforced the statute against another party." *Joint Heirs Fellowship Church v. Akin*, 629 F. App'x 627,

631 (5th Cir. 2015) (per curiam) (citing *Ctr. for Individual Freedom v. Carmouche*, 449 F.3d 655, 660–61 (5th Cir. 2006)). In *Carmouche*, the threat of enforcement was established by a $20,000 fine that the Louisiana Board of Ethics had recently imposed on the Republican State Leadership Committee. 449 F.3d at 660–61. By contrast, in *Akin*, plaintiffs seeking to challenge the same law at issue in this case, Texas Election Code § 253.094, had "not shown any similar [enforcement] actions by the Commission," resulting in the dismissal of their claims for lack of standing. 629 F. App'x at 631. This case is like *Akin* because no TEC enforcement actions are alleged to have occurred.

Third, the allegations that IFS does make cut against any demonstration of certainly impending harm. As IFS has pleaded, only five Commissioners voted to adopt EAO-580. ROA.18. Even if there were a hypothetical future TEC investigation into IFS for providing pro bono legal services that culminated in a vote on whether a violation of state law occurred, a vote of six Commissioners would be needed to initiate a civil enforcement proceeding or refer a matter to a criminal prosecutor. TEX. GOV'T CODE § 571.171. These layers of hypothetical events further reinforce that the issuance of EAO-580 does not demonstrate an

imminent and certainly impending harm to IFS. In addition, future Commissioners could potentially withdraw or amend the interpretation contained in EAO-580 for any number of reasons. *See supra*, at 5.

The district court correctly concluded that IFS did not meet its burden of pleading an imminent and certainly impending injury sufficient to confer standing and that IFS's claims are not ripe.

B. IFS has not plausibly alleged that its hypothetical clients have legitimate claims that IFS would actually litigate.

IFS has also failed to allege a "serious intention" to engage in conduct proscribed by law because it has not plausibly alleged that its hypothetical clients have legitimate claims that IFS would actually litigate. *Zimmerman v. City of Austin*, 881 F.3d 378, 389 (5th Cir. 2018) ("[B]y choosing not to solicit funds, Zimmerman did not take steps towards reaching or exceeding the aggregate limit of the kind that would demonstrate a serious intent to violate the statute."); *see also Miss. State Democratic Party*, 529 F.3d at 545 ("[S]tanding is not created by a declaration in court pleadings.")

The manner in which IFS sought to establish standing to challenge Texas's ban on corporate and union political contributions was and is, to

put it charitably, convoluted. IFS alleged that it—as the hypothetical law firm, not the client or clients—wishes to file lawsuits on behalf of two potential clients, a political candidate (Woolsey) and a purported political committee (TACL). ROA.19–22. IFS then alleges that its potential clients wish to "enter into a contract to print or make" political road signs that do not bear the disclaimer required by Texas Election Code § 259.001 stating that it is a violation of state law to place the sign in the right-of-way of a highway. ROA.19–20.

The specific statutory provision at issue in the hypothetical court challenge alleged by IFS states that a person acts unlawfully if he "knowingly enters into a contract to print or make a political advertising sign that does not contain the notice." TEX. ELEC. CODE § 259.001(b)(1). That provision regulates only the making of contracts to print or make political advertising signs. It does not directly infringe on the speech rights of IFS's hypothetical clients, who would be free (again, hypothetically) to otherwise make signs outside of a commercial contract that do not contain the notice.

IFS's allegations about potential litigation also presume incorrectly that a state-mandated disclaimer about putting political signs in

highway rights-of-way violates the First Amendment. In the limited circumstances in which the Texas statute does apply to political signage, those applications are plainly permitted by the First Amendment under this Court's precedents. *See R.J. Reynolds Tobacco Co. v. FDA*, 96 F.4th 863 (5th Cir. 2024) (holding that mandatory disclosures that are factual, uncontroversial, serve a legitimate state interest, and are not unduly burdensome are consistent with the First Amendment).

In addition, IFS's complaint does not allege the existence of vendors who would be willing to enter into legally non-compliant contracts with its potential clients. ROA.19–20. A mere subjective desire to enter into a particular contract (which is all that IFS has alleged) without another person who is actually willing to agree to the terms of that contract does not establish a plausible factual basis of an injury caused by Texas Election Code § 259.001(b)(1). *See Hollywood Fantasy Corp. v. Gabor*, 151 F.3d 203, 208 (5th Cir. 1998) (recognizing that a contract is formed only when there is an acceptance of an offer). As the district court rightly noted, the complaint lacks "factual allegations that demonstrate Woolsey or the TACL have the proper status to bring forth constitutional challenges." ROA.808–809.

The pleading defects are only greater with respect to those referencing the potential IFS client TACL. IFS's complaint does not set forth sufficient factual allegations to plausibly show that TACL actually meets the legal definition of a political committee. Under Texas law, a political committee requires "two or more persons acting in concert with a principal purpose of accepting political contributions or making political expenditures." TEX. ELEC. CODE § 251.001(12). The only person alleged in the complaint to be involved with TACL is Cary Cheshire. ROA.20–21.

Because IFS failed to plead a "serious intention" to litigate legitimate, justiciable claims on behalf of its potential clients, it has not established a risk of injury sufficient to confer standing. *Zimmerman*, 881 F.3d at 389.

C. IFS has not alleged a perceptible impairment of its organizational mission.

This Court recently explained that for a non-profit organization to allege an injury in fact to itself, it must allege a "perceptible impairment to its ability to achieve its mission." *La. Fair Hous. Action Ctr., Inc. v. Azalea Garden Properties, L.L.C.*, 82 F.4th 345, 355 (5th Cir. 2023). A diversion of resources "from one core mission activity to another, i.e.,

prioritizing which 'on-mission' projects, out of many potential activities, an entity chooses to pursue, does not suffice" to establish an injury in fact. *Id.*

IFS alleges that it is a "nonprofit, tax-exempt organization under Section 501(c)(3) of the Internal Revenue Code" whose "mission is to promote and defend the political right to free speech, press, assembly, and petition guaranteed by the First Amendment through strategic litigation, communication, activism, training, research, and education." ROA.13. IFS does not allege, nor could it, that it has suffered an injury in fact sufficient to provide it with standing based on its need to pursue different organizational priorities that comply with the law. That IFS might need to devote its resources to challenging different laws or might need to represent other potential clients who are not political candidates or political committees to comply with Texas law does not establish an injury in fact sufficient to confer standing.

As the Supreme Court has explained, "an organization may not establish standing simply based on the 'intensity of the litigant's interest' or because of strong opposition to the government's conduct." *FDA v. Alliance for Hippocratic Medicine*, 602 U.S. 367, 394 (2024) (quoting *Valley*

Forge Christian Coll. v. Am. United for Separation of Church & State, Inc., 454 U.S. 464, 486 (1982)). "A plaintiff must show 'far more than simply a setback to the organization's abstract social interests.'" *Id.* (quoting *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982)). In that case, organizations claimed that a federal agency's actions "impaired" their "ability to provide services and achieve their organizational missions," but those claims failed to establish standing. *Id.* at 369.

Furthermore, non-profits that wish to engage in political advocacy can do so by creating a related but independent political committee. For example, in *Catholic Leadership Coalition of Texas v. Reisman*, the Catholic Leadership Coalition of Texas, a 501(c)(4) nonprofit corporation, on "the advice of election lawyers," "decided to form a general-purpose committee" to engage in certain political activities. 764 F.3d 409, 418 (5th Cir. 2014). IFS's complaint does not allege any such effort to achieve its political objectives in a manner that complies with Texas law.

The bottom line is that IFS could never allege an inability to pursue its organizational mission through methods other than those alleged in its complaint, and instead it alleges a situation in which it requested a TEC advisory opinion in order to create a self-inflicted claimed injury for

purposes of this lawsuit. Precedent forbids this. *See Clapper*, 568 U.S. at 416 (stating that plaintiffs "cannot manufacture standing merely by inflicting harm on themselves"); *Zimmerman*, 881 F.3d at 389 (stating that "standing cannot be conferred by a self-inflicted injury"). IFS has not alleged a perceptible impairment of its organizational mission sufficient to establish an injury in fact. *See Hippocratic Medicine*, 602 U.S. at 394; *La. Fair Hous. Action Ctr.*, 82 F.4th at 355. Accordingly, its complaint fails to establish standing.

D. IFS has not alleged a violation of a legally protected interest.

To establish an "injury in fact" sufficient to confer standing, a plaintiff must show "an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent" rather than "conjectural" or "hypothetical." *Lujan*, 504 U.S. at 560; *see also, e.g.*, *E.T. v. Paxton*, 41 F.4th 709, 714–18 (5th Cir. 2022) (dismissing a case for lack of standing because the plaintiffs did not have a legally protected interest under the Americans with Disabilities Act or Section 504 of the Rehabilitation Act); *Ass'n for Retarded Citizens of Dallas v. Dallas Cnty. Mental Health & Mental Retardation Ctr. Bd. of Trustees*, 19 F.3d 241,

244 (5th Cir. 1994) (dismissing a case for lack of standing because the plaintiffs "have no legally-protected interest").

IFS seeks to challenge Texas's ban on corporate and union political contributions under the First Amendment. ROA.28 (requesting an injunction preventing "any part of Tex. Elec. Code § 253.094" from being enforced). Yet the principal First Amendment authorities it cites, *NAACP v. Button*, 371 U.S. 415 (1963), and *In re Primus*, 436 U.S. 412 (1978), concerned only occupational-licensing laws that prohibited lawyers from soliciting clients and did not address the state's interest in banning corporate political contributions. IFS's brief completely fails to mention that its constitutional argument is foreclosed by *FEC v. Beaumont*, 539 U.S. 146 (2003), in which the Supreme Court held that the federal ban on corporate political contributions, as applied to a non-profit corporation, did not violate the First Amendment.

The *Beaumont* Court explained that any "attack on the federal prohibition of direct corporate political contributions goes against the current of a century of congressional efforts to curb corporations' potentially 'deleterious influences on federal elections.'" *Id.* at 151. "President Theodore Roosevelt made banning corporate political

contributions a legislative priority," and in 1907, "Congress acted on the President's call for an outright ban," passing the Tillman Act, the "first federal campaign finance law" in our country's history. *Id.* at 152. The Tillman Act banned "any corporation whatever" from making "a money contribution in connection with" federal elections. *Id.* at 153.

The Tillman Act focused on addressing the "special characteristics of the corporate structure" that threaten the integrity of the electoral process. *Id.* (quoting *FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197, 209 (1982)). After noting the special advantages that corporations enjoy, such as limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets (including tax-exempt status for 501(c)(3) non-profits such as IFS), the Court also noted that corporations could be used as conduits for circumventing campaign-finance laws. *Id.* at 155. For example, the entire scheme of regulation and disclosure for federal political action committees (PACs) would be circumvented and rendered pointless if corporations could directly make political contributions to candidates. *Id.* at 163 ("The PAC option allows corporate political participation . . . and it lets the Government regulate campaign activity through registration and disclosure.").

For these reasons, the Court held that the federal ban on corporate political contributions, which has existed since 1907, when applied to "nonprofit advocacy corporations," is "consistent with the First Amendment." *Id.* at 149. The Court's holding in *Beaumont* is consistent with its longstanding distinction between contributions and expenditures, which traces back to *Buckley v. Valeo*, 424 U.S. 1 (1976). In *Citizens United v. FEC*, 558 U.S. 310 (2010), the Court recognized a right for corporations and unions to make "independent expenditures" because they "do not give rise to corruption or the appearance of corruption," *id.* at 357, but at the same time, it affirmed *Buckley*'s recognition that "direct contributions," unlike "independent expenditures," give rise to "the potential for *quid pro quo* corruption," *id.* at 345. *Citizens United* recognized a right for corporations and unions to speak on their own behalf, but it affirmed the government's interest in and ability to restrict contributions. *Id.* at 359 (noting that *Citizens United* did not present the question of whether the Court "should reconsider whether contribution limits should be subjected to rigorous First Amendment scrutiny"); *see also King St. Patriots v. Tex. Democratic Party*, 521 S.W.3d 729, 732 (Tex. 2017) (upholding Texas's ban after *Citizens United*).

This Court has also affirmed the constitutionality of the specific provision challenged in this case, Texas Election Code § 253.094. In *Catholic Leadership Coalition of Texas v. Reisman*, the Court stated that "Texas has decided, as the Supreme Court's campaign-finance jurisprudence permits, to entirely ban corporate contributions to candidates." 764 F.3d 409, 442 (5th Cir. 2014). Furthermore, "Texas's ban on corporate contributions to political committees engaging in political contributions serves as an anticircumvention measure to prevent corporations from using a political committee to do an end-run around Texas's direct contribution ban." *Id.* at 443. Hence, the Court held that the Texas "restriction on corporate contributions to a general-purpose committee is constitutional as-applied to the in-kind contribution of an email mailing list from Texas Leadership Coalition to the Texas Leadership Coalition-Institute for Public Advocacy." *Id.* at 445.

Because IFS's complaint fails to allege an invasion of a "legally protected interest" sufficient to establish an injury in fact, it lacks standing to sue. *Lujan*, 504 U.S. at 560.

E. IFS has not alleged a redressable harm because as a claimed 501(c)(3) organization, it is independently barred by the Internal Revenue Code from supporting political campaigns.

To establish standing, a plaintiff must also plead an alleged injury caused by the defendant that is "redressable by a favorable ruling." *Clapper*, 568 U.S. at 409 (quoting *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 149 (2010)). The plaintiff must "show that it's likely—as opposed to merely possible" that granting the relief requested will redress the alleged injury. *Inclusive Cmtys. Project, Inc. v. Dep't of Treasury*, 946 F.3d 649, 660 (5th Cir. 2019). When a legal provision other than the one challenged in the lawsuit independently prohibits the plaintiff's conduct, the plaintiff has failed to establish standing. *See California v. Texas*, 593 U.S. 659, 679 (2021) ("The problem with these claims, however, is that other provisions of the Act, not the minimum essential coverage provision, impose these other requirements.").

As this Court has explained, plaintiffs "fail to satisfy the traceability and redressability" requirements of standing when their alleged harm is caused by multiple laws, some of which are not challenged in the lawsuit. *Tex. State LULAC v. Elfant*, 52 F.4th 248, 254 (5th Cir. 2022) (noting that the injury was alleged to have been caused

by multiple laws and not "SB 1111 specifically"); *see also, e.g., Maverick Media Grp., Inc. v. Hillsborough Cnty.*, 528 F.3d 817, 820–21 (11th Cir. 2008) (per curiam) (compiling numerous published opinions across different circuits); *Leal v. Becerra*, No. 21-10302, 2022 WL 2981427, at *2 (5th Cir. July 27, 2022) ("Redressability is also a problem when declaring one law unenforceable may not provide relief because a different law independently causes the same injury."); *Reagan Nat'l Advert. of Austin, Inc. v. City of Cedar Park*, No. 20-50125, 2021 WL 3484698, at *1 (5th Cir. Aug. 6, 2021) (stating that "courts have uniformly held that redressability is lacking when other unchallenged local regulatory provisions" prohibit the plaintiff's conduct).

IFS states that it is a "nonprofit, tax-exempt organization under Section 501(c)(3) of the Internal Revenue Code." ROA.13. IFS alleges that it wishes to help a political candidate and a political committee in hypothetical future political campaigns. ROA.21. A ruling from this Court would not enable IFS to do this, however, because IFS—like other 501(c)(3) tax-exempt organizations—is legally barred under the Internal Revenue Code from supporting political campaigns.

Again, the state law IFS alleges that it wishes to challenge on behalf of potential clients is Texas Election Code § 259.001, which states that a "political advertising sign" must contain a disclaimer stating that it is unlawful to place the sign in the right-of-way of a highway. ROA.21. A tax-exempt 501(c)(3) organization may not have a "substantial part of [its] activities" consist of "carrying on propaganda, or otherwise attempting, to influence legislation" and may "not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office." 26 U.S.C. § 501(c)(3). Even in a world in which a lower federal court could ever hold unconstitutional under existing precedent the Texas ban on corporate and union political contributions—a world that does not exist—IFS would not be able to offer, as a claimed 501(c)(3), pro bono legal services to advance a political campaign, including by supporting the dissemination of political advertising. *See, e.g.*, *Branch Ministries v. Rossotti*, 211 F.3d 137 (D.C. Cir. 2000) (affirming a revocation of a church's tax-exempt status for intervening in a political campaign).

EAO-580, which interprets Texas's ban on corporate and union political contributions, sets out an interpretation of Texas law that the

provision of free legal services to political candidates or political committees constitutes an in-kind political contribution (*i.e.*, a contribution of goods or services rather than cash). ROA.48. IFS has not demonstrated that it could make such in-kind political contributions to political candidates, given its claimed non-profit status. Congress reasonably and constitutionally made a judgment that the benefits of tax-exempt status—namely, the ability to operate without paying certain taxes and the ability to offer tax deductions to donors—should not be used to subsidize political activities. *See Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 548 (1983) (affirming the constitutionality of § 501(c)(3) because "Congress has not violated TWR's First Amendment rights by declining to subsidize its First Amendment activities"). The federal tax code clearly forbids using tax-exempt organizations for such political ends. IFS's pleading therefore fails to set out facts that would allow it to demonstrate the standing requirement of redressability. *See Tex. State LULAC*, 52 F.4th at 254.

II. IFS's Individual-Capacity Claims Are Barred By Qualified Immunity.

In "determining qualified immunity, courts engage in a two-step analysis: (1) was a statutory or constitutional right violated on the facts

alleged; and (2) did the defendant's actions violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Tucker v. City of Shreveport*, 998 F.3d 165, 172 (5th Cir. 2021). "The two steps of the qualified immunity inquiry may be performed in any order." *Id.* In this case, the district court correctly held at step two that the Executive Director and five Commissioners who voted for EAO-580 acted objectively reasonably. ROA.816. This Court can resolve the qualified-immunity issue at either step.

At step one, the Court can hold that no constitutional violation has been alleged because merely approving an advisory opinion—which as previously discussed, merely interprets state-law statutory terms such as the definition of a "contribution" under Texas law, *see supra* Argument, Part I.A—does not cause any First Amendment injury to IFS. IFS describes its standing theory as a "pre-enforcement" challenge only, along the lines of *Susan B. Anthony List v. Driehaus*, 573 U.S. 149 (2014), and *Speech First, Inc. v. Fenves*, 979 F.3d 319 (5th Cir. 2020), Appellant's Br. 11–16, but both of those cases were properly pleaded as involving only official-capacity claims out of recognition of the fact that no injury to the plaintiff had actually occurred that could warrant retrospective relief

through an individual-capacity claim. Unlike *Uzuegbunam v. Preczewski*, 592 U.S. 279, 282 (2021), in which a claim for nominal damages was allowed after a police officer stopped the plaintiff from distributing written religious materials, here no enforcement action has been pleaded.

Furthermore, as set out above, IFS's claims over Texas's corporate-contribution ban are squarely foreclosed by the Supreme Court's precedent in *FEC v. Beaumont* and this Court's precedent in *Catholic Leadership Coalition of Texas v. Reisman*. *See supra* Argument, Part I.D. *Beaumont* held that bans on corporate political contributions do not violate the First Amendment, 539 U.S. at 149, and *Reisman* specifically upheld the Texas law challenged in this case, 764 F.3d at 441–45. Though IFS's complaint purports to raise a Supremacy Clause claim as well, that claim merely restates its First Amendment theory, resting on IFS's asserted right to provide pro bono legal services. ROA.26–27.

At step two, this Court can also hold that IFS's individual-capacity claims fail because Defendants-Appellees acted based on a reasonable interpretation of the law. The United States Supreme Court's decision in *Beaumont*, this Court's decision in *Reisman*, and the Texas Supreme Court's decision applying *Beaumont* in *King St. Patriots v. Texas*

Democratic Party, 521 S.W.3d 729 (Tex. 2017), undeniably existed before the Commission ever considered EAO-580. Given that IFS is seeking to overturn or substantially modify Supreme Court precedent, IFS is as far away from alleging a violation of clearly established law as a plaintiff could possibly be. *See Mullenix v. Luna*, 577 U.S. 7, 12 (2015) (per curiam) (cleaned up) ("Put simply, qualified immunity protects all but the plainly incompetent or those who knowingly violate the law."); *Tucker*, 998 F.3d at 172 ("If officers of reasonable competence could disagree as to whether the plaintiff's rights were violated, the officer's qualified immunity remains intact.").

A claim that is dismissed based on qualified immunity because it is "futile" should be dismissed with prejudice. *Tuttle v. Sepolio*, 68 F.4th 969, 975 (5th Cir. 2023) (per curiam) ("The claims will be dismissed with prejudice because they are futile."); *see also, e.g.*, *Chaney-Snell v. Young*, 98 F.4th 699, 710 (6th Cir. 2024) ("When qualified immunity bars a § 1983 claim, the court should dismiss the claim *with prejudice* to any later refiling."); *Johnson v. Rogers*, 944 F.3d 966, 968 (7th Cir. 2019) (stating that a "claim barred by the doctrine of qualified immunity fails on the merits and must be dismissed with prejudice"); *Lybrook v.*

Members of Farmington Mun. Sch. Bd. of Educ., 232 F.3d 1334, 1342 (10th Cir. 2000) (rejecting argument that "when a defendant asserts a qualified immunity defense, dismissal without prejudice is ordinarily warranted").[2]

III. IFS's Individual-Capacity Claims Are Barred By Quasi-Judicial Immunity.

"It is well established that judges are absolutely immune from liability for all judicial acts that are not performed in the clear absence of jurisdiction, however erroneous the act and however evil the motive." *Johnson v. Kegans*, 870 F.2d 992, 995 (5th Cir. 1989). Officials outside of the judicial branch whose responsibilities are "functionally comparable" to those of a judge are also absolutely immune from liability, such as "federal hearing examiners and administrative law judges," "arbitrators," "bar association disciplinary committee members, and "members of pardon and parole boards." *Id.* (compiling cases). "These officials are sometimes

[2]To the extent that the district court's order did not dismiss the individual-capacity claims with prejudice, that can be remedied by this Court in its affirmance of the district court's dismissal of these claims. *E.g., Ass'n of Am. Physicians & Surgeons Educ. Found. v. Am. Bd. of Internal Med.*, 103 F.4th 383, 388 (5th Cir. 2024) (exercising discretion to modify whether a district court's order was with or without prejudice); *Fitch v. Adams*, 228 F. App'x 435, 436 (5th Cir. 2007) (per curiam) ("Accordingly, we modify the judgment to reflect that the complaint is dismissed with prejudice and we affirm as modified.").

labeled 'quasi-judicial' officials and, as most of the above examples indicate, need not be members of the judiciary." *Id.* at 996.

Quasi-judicial immunity serves to "protect participants" in government decision making and helps to "guarantee an independent, disinterested decision-making process." *Id.* The immunity helps to "prevent the harassment and intimidation that could otherwise result if disgruntled litigants . . . could vent their anger by suing . . . the person or persons who rendered the adverse decision." *Id.* at 997. Quasi-judicial immunity is "to be broadly construed to effectuate these policies." *Id.*

The only action Defendants-Appellees are alleged to have taken was their issuance of the advisory opinion EAO-580. ROA.18. In issuing that advisory opinion, Defendants-Appellees were indisputably and by IFS's own allegations performing a law-interpreting function similar to that performed by other executive-branch officials (*e.g.*, administrative law judges), who have received quasi-judicial immunity. Accordingly, the Court should hold that IFS's individual-capacity claims for damages are barred by quasi-judicial immunity and dismiss them with prejudice. *See Boyd v. Biggers*, 31 F.3d 279, 285 (5th Cir. 1994) (holding that a dismissal based on judicial immunity is "properly dismissed with prejudice");

Hunter v. Rodriguez, 73 F. App'x 768, 770 (5th Cir. 2003) (per curiam) (same).

IV. IFS's Official-Capacity Claims Are Barred By Sovereign Immunity.

A suit against an officer in his official capacity is barred by sovereign immunity unless the requirements of *Ex parte Young*, 209 U.S. 123 (1908), are met. *See Ostrewich v. Tatum*, 72 F.4th 94, 100 (5th Cir. 2023). For *Ex parte Young* to apply, the plaintiff must show that the defendant has a "particular duty to enforce the statute in question and a demonstrated willingness to exercise that duty." *Id.* (quoting *Tex. Democratic Party v. Abbott*, 978 F.3d 168, 181 (5th Cir. 2020)); *see also, e.g.*, *Mi Familia Vota v. Ogg*, 105 F.4th 313, 325 (5th Cir. 2024). This Court has noted that the Article III pre-enforcement standing analysis, which requires an imminent threat of enforcement, and the *Ex parte Young* analysis "significantly overlap." *City of Austin v. Paxton*, 943 F.3d 993, 1002 (5th Cir. 2019) (quoting *Air Evac EMS, Inc. v. Tex. Dep't of Ins., Div. of Workers' Comp.*, 851 F.3d 507, 520 (5th Cir. 2017)).

In *City of Austin v. Paxton*, this Court considered a lawsuit brought by the City of Austin against the Texas Attorney General seeking to enjoin a state law that preempted a municipal ordinance. 943 F.3d at

996. Because the City failed "to show how the Attorney General's past interventions in suits involving municipal ordinances demonstrate that there is 'a significant possibility' that the Attorney General will inflict 'future harm' by acting to enforce 'the supremacy of [the state law] over the Ordinance," the City's suit was barred by sovereign immunity. *Id.* at 1003–04.

For essentially the same reasons IFS has failed to show an imminent threat of enforcement, *see supra* Argument, Parts I.A–B, IFS has also failed to show a "demonstrated willingness" to enforce the Texas ban on corporate political contributions against IFS for the particular hypothetical acts alleged in IFS's complaint, which IFS did not present to the Commission in its request for an advisory opinion. *Ostrewich*, 72 F.4th at 1000. Accordingly, *Ex parte Young* does not apply, and IFS's official-capacity claims are barred by sovereign immunity.

V. This Court Lacks Jurisdiction to Entertain IFS's Request for Review of the Order Denying a Motion for Summary Judgment that the District Court Determined Was Mooted by the Dismissal of This Case.

This Court does "not have appellate jurisdiction to review a district court's denial of a motion for summary judgment because such a motion is not a final one within the meaning of 28 U.S.C. § 1291." *Lemoine v.*

New Horizons Ranch & Ctr., Inc., 174 F.3d 629, 633 (5th Cir. 1999); *see also Skelton v. Camp*, 234 F.3d 292, 295 (5th Cir. 2000) ("A denial of summary judgment is not a final order within the meaning of 28 U.S.C. § 1291."). Accordingly, this Court lacks jurisdiction to entertain IFS's request for review by this Court of the district court's denial of the summary judgment motion that the district court determined was moot in light of this case's dismissal. Even if this Court were to determine that any part of IFS's claims should not have been dismissed—which it should not, for the reasons set out above—IFS would need to pursue any motion for summary judgment on any surviving claim in the district court.

CONCLUSION

The Court should affirm the district court's dismissal of IFS's claims and for the reasons set forth above should do so with prejudice to the refiling of the individual-capacity claims brought by IFS.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On December 3, 2024, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of Microsoft Defender and is free of viruses.

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CERTIFICATE OF COMPLIANCE

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