

No. 23-20165

***In the United States Court of Appeals
for the Fifth Circuit***

*Bay Area Unitarian Universalist Church; Drink Houston Better, L.L.C.,
doing business as Antidote Coffee; Perk You Later,
L.L.C.,*

Plaintiffs - Appellants

v.

*Harris County District Attorney Kim Ogg; County Sheriff Ed Gonzalez;
Webster Acting Chief Pete Bacon; Chief of Houston Police Department
Troy Finner; City of Webster,*

Defendants - Appellees.

On Appeal from the United States District Court for the
Southern District of Texas Houston Division
(Case Nos. 4:20-cv-3081)
The Honorable Ewing Werlein, Jr., Presiding.

**REPLY IN SUPPORT OF APPELLEE WEBSTER ACTING
POLICE CHIEF PETE BACON'S PETITION FOR REHEARING
EN BANC**

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CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit 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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Plaintiffs/Appellants: Bay Area Unitarian Universalist Church

Drink Houston Better, L.L.C., doing
business as Antidote Coffee

Perk You Later, L.L.C.

Defendant/Appellee: Harris County District Attorney Kim Ogg

County Sheriff Ed González

Webster Police Chief Pete Bacon

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DATED: JULY 31, 2025

/s/ Sean M. Higgins
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INTRODUCTION

The majority’s opinion departs from U.S. Supreme Court and Fifth Circuit precedent in two significant ways and, by doing so, dilutes the requirements a party must meet to establish standing. First, the majority erred in holding the Church has a cognizable legal interest in the criminal prosecution of other citizens, which is the sole purpose of the challenged statute. Second, the majority erred in holding the Church has a traceable and redressable injury. Left uncorrected, the majority’s errors will invite a flood of lawsuits by citizens who disagree with legislative enactments.

ARGUMENT

- A. The majority opinion conflicts with Fifth Circuit and Supreme Court precedent holding that citizens do not have a cognizable legal interest in prosecuting other citizens.**

U.S. Supreme Court and Fifth Circuit precedent holds that private citizens, such as the Church, “lack[] a judicially cognizable interest in the prosecution or non-prosecution of another.” *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973); *Lefebure v. D’Aquila*, 15 F.4th 650, (5th Cir. 2021). Directly contrary to this precedent, the majority found the Church has a legally cognizable right to see that the State arrests and

prosecutes members of the public for criminal trespass: “If Plaintiffs do not post compliant signs, their right to exclude is limited because property rights are protected by the deterrent value of the criminal laws.” *Bay Area Unitarian Universalist Church v. Ogg*, 2025 WL 1066187 *4 (5th Cir. May 27, 2025).

The Church tacitly concedes this error, suggesting instead that the majority correctly decided this case because the Church has other free speech, monetary, property, and associational injuries, which the Church did not plead, and the majority did not identify or address. Doc. 154 at 11-13. The Church’s argument is wrong. The criminal trespass statute cannot cause any injury to the Church because the statute does not require the Church to post the statutory signage in order to exclude firearms from Church property. With or without the signage, the Church remains free and unimpeded by the criminal trespass statute to exclude firearms from Church property using any means at its disposal. Hence, the Church’s only possible argument for a free speech, financial, property or associational injury would stem from the State’s ability to prosecute hypothetical trespassers, which brings the argument right back to the majority’s error.

The Church's ability as a landowner to exclude firearms from Church property does not depend on the ability of the State to charge a crime or secure a criminal conviction for criminal trespass. Indeed, if the Legislature chose to repeal the criminal trespass statutes altogether, property owners would still have the right to exclude members of the public from their property.

The majority's holding that the Church has a cognizable legal interest in the criminal prosecution of other citizens is a sharp departure from Supreme Court and Fifth Circuit precedent—a departure only the *en banc* court may adopt under the rule of orderliness. *See, e.g., Buehler v. City of Austin*, 824 F.3d 548, 554 (5th Cir. 2016). Left in place, the majority's opinion will invite a flood of lawsuits by citizens who disagree with the Legislature's decisions about what conduct should be criminalized. The *en banc* Court should grant reconsideration and set aside the majority's opinion in order to avoid this result.

B. The panel’s finding that the Church has a traceable and redressable injury conflicts with Supreme Court and Fifth Circuit precedent.

While “causation and redressability are usually ‘flip sides of the same coin,’” “redressability ‘can still pose an independent bar in some cases.” *Diamond Alternative Energy, LLC v Environmental Protection Agency*, 145 S.Ct. 2121, 2133 (2025) (quoting *FDA v. Alliance for Hippocratic Medicine*, 602 U.S. 367, 379 (2024)). “The additional redressability requirement generally serves to ensure that there is a sufficient ‘relationship between ‘the judicial relief requested’ and the injury suffered.” *Id.* (quoting *California v. Texas*, 593 U.S. 659, 671 (2024) (quoting *Allen v. Wright*, 468 U.S. 737, 753 n. 19 (1984))). In this case, there is no relationship between the relief requested by the Church and the injury allegedly suffered by the Church. Traceability and redressability are absent for three independent reasons.

First, the principles of due process, separation of powers and federalism forbid courts from expanding “a criminal statute to penalize conduct [the statute] does not clearly proscribe.” *United States v. Davis*, 588 U.S. 445, 464 (2019). Yet, expansion of the conduct proscribed by the criminal trespass statute is precisely what the Church would accomplish

were a court to grant its request to enjoin “enforcement” of the statutory signage provisions in Sections 30.06 and 30.07 and declare the affirmative defenses under 30.06(g) and 30.07(h) unconstitutionally vague.

Second, traceability and redressability are both absent because Chief Bacon, by definition, does not and cannot enforce the criminal trespass statute against the Church or other property owners. Hence, the Church fails to demonstrate an injury that is “directly traceable to any actual or possible” conduct by Chief Bacon. *California*, 593 U.S. at 674. The Church “cannot enjoin [Chief Bacon] because he has no power to enforce [the trespass statute] against [the Church].” *Id.* at 673. And, because Chief Bacon may not enforce the trespass statute against the Church, any judgment against Chief Bacon “would amount to ‘an advisory opinion without the possibility of judicial relief.’” *Id.* (quoting *Los Angeles v Lyons*, 461 U.S. 95, 129 (1983) (Marshall J., dissenting)).

Third, neither the majority nor Plaintiffs articulate how the declaratory and injunctive relief sought by the Church will redress the Church’s complaint—contrary to the undisputed evidence cited by the dissent—that police “sit on their hands in the absence of compliant

signage.” *Bay Area*, 2025 WL 1066187 at *4 n.4. Assuming, *arguendo*, there is *any* evidence the Webster police “sit on their hands”—and there is no such evidence—there is still no evidence the Webster Police would act any differently in the absence of the signage specifications and affirmative defenses in Sections 30.06 and 30.07. The majority’s opinion eschews the requirement that a lawsuit seek to remedy “specifically identifiable Government violations of law,” in favor of a “programmatic approach” that poses “obvious difficulties insofar as proof of causation or redressability is concerned.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 568 (1992) (citing *Allen v. Wright*, 468 U.S. 737, 659-60 (1984)).

The relief sought by the Church would require a federal court to rewrite and expand the conduct forbidden by a state criminal statute. The majority’s holding that the Church has standing to pursue this relief is inconsistent with governing Supreme Court and Fifth Circuit precedent. Left uncorrected, the majority’s opinion stands to significantly dilute the requirements a party must satisfy to establish standing. The Court should grant *en banc* reconsideration to correct this error.

CONCLUSION

Webster Acting Police Chief Pete Bacon requests the Court to grant his petition for *en banc* review, set aside the panel's opinion and, upon reconsideration, affirm the district court's judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

In compliance with Federal Rule of Appellate Procedure 25(d)(3) and Fifth Circuit Rule 25.2.5, I hereby certify that on July 31, 2025, I electronically filed and served the foregoing document to all counsel of record through the Court's CM/ECF system.

/s/ Sean M. Higgins

Sean M. Higgins

CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies this motion complies with the type-volume limitations in Fed. R. App. P. 35(b)(2)(a) and Fifth Circuit Local Rule 35.5, exclusive of the portions exempted by Rule 32(f) and 5th Cir. R. 32.2.7(b)(3), but including the statement required under Fed. R. App. P. 35.5. This motion brief contains 1,151 words. This motion complies with the typeface requirements of Rule 32(a)(5) and 5th Cir. R. 32.1, and the type-style requirements of Rule 32(a)(6) because this motion was prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point font size in Century Schoolbook type-style.

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