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I. INTRODUCTION

This case is about whether Texas's barratry statute, Tex. Penal Code Ann. § 38.12(d)(2)(B), is unconstitutional as applied to attorneys who solicit clients for purposes other than pecuniary gain. Plaintiff Andrew Willey filed this suit because he is an attorney who, in his private, individual practice solicited clients for purposes other than pecuniary gain and who avers an intent to do so in the future. Defendant Harris County District Attorney concedes, as she must, that Willey meets the irreparable-harm standard for a preliminary injunction, that he has standing to sue, and that Section 38.12(d)(2)(B) is unconstitutional as applied to attorneys soliciting for non-pecuniary purposes unless it survives strict scrutiny. The only question before the Court is, therefore, whether that statute survives strict scrutiny.

At an initial pretrial conference and hearing on Willey's motion for a preliminary injunction, U.S. District Judge Lynn N. Hughes did not address that question. Instead, he questioned Willey's counsel about the tax compliance of a third-party nonprofit, Restoring Justice, of which Willey is founder and C.E.O. Judge Hughes had evidently researched whether Willey's nonprofit had problems with the Internal Revenue Service; found himself on the website of a different non-profit, *Restore* Justice, which has a similar name and indeed had problems with the IRS; confronted Willey's counsel about those problems; and indicated that he was "a little troubled [that] Mr. Willey . . . is also CEO of a defunct charity." (Transcript at 19.)¹ After Willey's counsel explained that Judge Hughes had visited the website of the wrong nonprofit, Judge Hughes nonetheless indicated that he *still* had concerns about Willey's nonprofit's tax status. That status has no relevance to the issues before the court.

¹ Restoring Justice is currently an active, compliant, tax-deductible public charity. See IRS, *Tax-Exempt Organization Search*, <https://apps.irs.gov/app/eos/> (search: EIN 81-3279488) (listing Restoring Justice, of Houston, Texas, as public charity currently eligible for tax-deductible contributions) (last accessed August 6, 2020, 11:02 AM Central Time).

Willey respectfully moves for the recusal of Judge Hughes because his extrajudicial internet search for negative information on Willey’s tax status—and his continued suspicion that Willey ran afoul of the IRS even after learning that this information came from the website of an entirely different organization—is such that “his impartiality might reasonably be questioned.” 28 U.S.C. § 455.² Regardless of whether Judge Hughes is in fact biased against Willey—which Willey cannot know, and does not allege—an objective observer would conclude that an appearance of bias exists. Judge Hughes could have found this faulty information only if he directly searched for it outside of the record prior to the hearing. Appellate courts have specifically held that where a district judge seeks extraneous information about a party and relies on that information to the party’s apparent detriment he must be removed from the proceedings. *United States v. Microsoft Corp.*, 56 F.3d 1448, 1463 (D.C. Cir. 1995). Because a reasonable observer would question the impartiality of a judge who affirmatively seeks out irrelevant, potentially prejudicial information about parties before the court, and because that information itself is an extrajudicial source of bias that appears to continue to influence Judge Hughes’s consideration of this case, Judge Hughes should recuse himself from further participation in this matter.

II. BACKGROUND

On August 3, 2020, undersigned counsel, Charles Gerstein, appeared before Judge Hughes on behalf of Willey. The first question that Judge Hughes asked Gerstein at the August 3 hearing was “[w]hy is the suit brought in Willey’s name rather than the name of the charity that he purports to run?” (Transcript at 3.) Gerstein responded that Willey was acting in his private capacity when the events in the Complaint occurred and that this is why Willey, and Willey alone, filed suit. *Id.* at 3–4. Nonetheless, Judge Hughes asked Gerstein, “[w]ould it surprise you to learn that the charity

² Defendant opposes this Motion.

has lost its standing with the IRS?” *Id.* at 4. “According to the charity’s own website,” Judge Hughes said, “it says they lost in, I think it’s 2018, and they are in negotiations with the IRS to resume. Perhaps that’s why Mr. Willey is bringing it in his own name.” *Id.* Judge Hughes asked whether the charity had anything to do with this case and Gerstein confirmed that it did not. *Id.*

Roughly five minutes later, Judge Hughes raised the IRS issue again. After Gerstein again clarified that Restoring Justice, Willey’s organization, was not a party to this suit, Judge Hughes said, “[s]o you understand the charity says, the IRS automatically revokes tax exempt status for any nonprofit organizations missing three consecutive years of tax filings. So the problem apparently was not they didn’t have any charity. It was they didn’t have any reports. You know how understanding the IRS is.” *Id.* at 7–8. Gerstein explained that he knew of no such IRS issues related to Willey’s organization. In a further attempt to clarify that Willey was the only plaintiff before the court, Judge Hughes asked Gerstein: “there’s Restore Justice Foundation, Precious Blood Ministry of Reconciliation, Restore Justice Illinois. None of those is here, right? We just—we just have Mr. Willey?” *Id.* at 8.³ Gerstein confirmed that “[t]he only parties before the Court are Mr. Willey and [the] District Attorney” *Id.*

At the end of the roughly forty-minute hearing, Judge Hughes raised the IRS issue a third time: “I am a little troubled by Mr. Willey, being a lone wolf now, is also CEO of a defunct charity . . . shall I just assume that any cases he gets while he’s acting alone will be handled through the charity?” *Id.* at 19. Gerstein responded that, to his knowledge, Willey’s organization was not defunct in any way. *Id.* To this Judge Hughes replied “counsel, just go on their website and there is a long explanation about their tax problems. They lost their standing with the IRS, which is not

³ None of these organizations has any relationship with or connection to Restoring Justice, Willey’s organization.

important, perhaps, to the people doing the work, but it is to the people funding it.” *Id.* at 19. Gerstein explained that there was no such notice on Restoring Justice’s website and spelled out the name of the correct website for Judge Hughes. *Id.* at 20. After clarifying that he “didn’t submit any of this in the record, and do[es] not believe it is relevant to the case,” Gerstein read from the Restoring Justice website: “Restoring Justice is a 501(c)(3) nonprofit organization. All donations are tax deductible to the extent allowed by law.” *Id.* Judge Hughes responded, “Well there is a Restorejustice.org,” which is the website of the Illinois-based organization. *See* Restore Justice, <https://restorejustice.org/> (last accessed August 7, 2020, at 12:01 PM Central Time). Gerstein explained “that might be the issue I think that is a different organization.” (Transcript at 20.)

This clarification did not extinguish Judge Hughes’s suspicion that Willey was in trouble with the IRS. “Well,” Judge Hughes said, “the statement that they are fully deductible to the extent of the law doesn’t answer the question of are they deductible under the extent of the law which includes an IRS requirement that you file these annual reports?” *Id.*

The notice of *Restore* Justice’s tax problems, which was published on Restore Justice’s blog more than two years ago, is not easy to find. *See* Restore Justice, *Non-profit status information*, <https://restorejustice.org/restore-justice-foundation-non-profit-status-information/> (September 19, 2018). To the best of undersigned counsel’s knowledge, there are only two ordinary ways for someone to find the blog post in which Restore Justice announced its troubles with the IRS. The first way is to navigate to Restore Justice’s website, restorejustice.com; click the “Commentary” tab in the top banner, which has no indication that the commentary would relate to IRS compliance; click through four pages of old blog posts, none of which contain information about IRS compliance, and many of which discuss criminal-justice reform in Illinois; and, finally,

States v. Bremers, 195 F.3d 221, 226 (5th Cir. 1999) (“[R]ecusal may well be required even where no actual partiality exists.”). Plaintiffs seeking recusal under §455 “must (1) demonstrate that the alleged comment, action, or circumstance was of ‘extrajudicial’ origin, (2) place the offending event into the context of the entire trial, and (3) do so by an ‘objective’ observer’s standard.” *Andrade*, 338 F.3d at 455.

Judge Hughes’s search for and use of information about Restore Justice’s troubles with the IRS satisfies each of these three prongs. First, the fact that Judge Hughes engaged in an extrajudicial search for potentially damaging information about a third party with a relationship to a party is evidence of extrajudicial bias against that party; and the information itself is both extrajudicial and has created the appearance of bias. Second, in the context of the proceedings before the court, the issue of Restoring Justice’s tax compliance subsumed the questions properly before the court. And, finally, an objective observer would conclude that the appearance of bias exists. Judge Hughes should recuse himself from this case.

A. Judge Hughes’s Search Was Evidence of Extrajudicial Bias and Was Itself Extrajudicial

Parties seeking recusal must ordinarily show that “the alleged comment, action, or circumstance was of ‘extrajudicial’ origin.” *Andrade*, 338 F.3d at 455. Here, there are two independently sufficient sources of apparent bias and both are of extrajudicial origin.

First, Judge Hughes’s in-depth search for information about Restoring Justice or his specific search for negative information about Restoring Justice would appear, to an objective observer, as evidence of an unknown source of bias. From an objective perspective, Judge Hughes could have acquired this information only by scrolling through two years’ worth of irrelevant blog posts on an Illinois non-profit’s website or by searching specifically for that non-profit’s IRS status. Either course would appear, to an objective observer, as evidence of extraneous bias.

Although Restoring Justice is not a party to this case, Willey—as explained in the Complaint, ¶ 3—was the non-profit’s founder and is currently its CEO. And so, a reasonable observer would conclude, Judge Hughes was specifically searching for information that may call into question Willey’s compliance with unrelated legal obligations. This is evidence of the appearance of an extrajudicial source of bias.

Second, the information Judge Hughes acquired in this search is itself an extrajudicial source of apparent bias. In *United States v. Microsoft Corp.*, 56 F.3d 1448, 1463 (D.C. Cir. 1995), the D.C. Circuit concluded that a district judge manifested evidence of apparent bias when he made comments on the record inquiring about facts outside of the complaint that he evidently acquired from a book. *Id.* “We are deeply troubled by several aspects of the proceedings in district court,” the Circuit wrote. *Id.*

[A] review of the transcripts in this case makes it patently obvious that the reason for the judge’s broad-ranging inquiries was his acceptance of the accusations in the book After reviewing the transcripts and the district judge’s opinion, an objective observer is left with the overall impression that the district judge had formed an opinion about [a party]’s practices based on [the book], and therefore [made decisions adverse to a party].

Id. As a result, the circuit court concluded, the fact that the district judge investigated allegations beyond the complaint and relied on them in court proceedings required his recusal. *Id.*

Judges Hughes evidenced skepticism at the hearing that Restoring Justice was a legitimate nonprofit; explained that his skepticism derived from an extrajudicial source (“counsel, just go on their website,” Transcript at 19); and made specific comments, *after* Gerstein explained that Judge Hughes had investigated the wrong nonprofit’s website, that would cause a reasonable observer to conclude that he *remained* skeptical (“the statement that they are fully deductible to the extent of the law doesn’t answer the question of are they deductible under the extent of the law which includes an IRS requirement that you file these annual reports? So that’s one of those universal

phrases,” *id.* at 20). As in *Microsoft*, Judge Hughes’s views were formed from an independent investigation conducted beyond the record in the case and resulted in him appearing to “form[] an opinion about . . . practices based” on extraneous sources. *Microsoft*, 56 F.3d at 1463. Because a reasonable observer would conclude that Judge Hughes had viewed extrajudicial information that was not relevant to any issue before the Court, and that the information had influenced his decision of the matter at bar, he should recuse himself from this matter.

B. Judge Hughes’s Mistaken Concerns About Restoring Justice’s Tax Status Dominated the August 3 Hearing

Parties seeking recusal must next “place the offending event into the context of the entire trial.” *Andrade*, 338 F.3d at 455. The Fifth Circuit has elsewhere noted that a court’s analysis of claims brought under §455 “should entail a careful consideration of context, that is, the entire course of judicial proceedings, rather than isolated incidents.” *Patterson v. Mobil Oil Corp.*, 335 F.3d 476, 484 (5th Cir. 2003). Judge Hughes’s mistaken invocation of Restoring Justice’s tax troubles was not an isolated incident and, compared to the straightforward issue of law before the court, completely dominated the proceedings. The short August 3 hearing—which was scheduled as an initial pretrial conference and a hearing on Willey’s motion for a preliminary injunction, Docs. 7, 16—began and ended with pointed questioning about Restoring Justice’s supposed infractions and their effect on Willey’s behavior; in between these exchanges, Judge Hughes engaged Gerstein in an additional colloquy about Restoring Justice and the IRS. Because Judge Hughes allowed mistaken concerns about Restoring Justice’s tax status to dominate the August 3 hearing, concerns about apparent bias do not stem from an isolated incident, and thus the second prong of the *Andrade* test is satisfied.

C. An Objective Observer Would Perceive Bias

Finally, parties seeking recusal must demonstrate bias as it would be perceived by an

“‘objective’ observer’s standard.” *Andrade*, 338 F.3d at 455. Both possible explanations for how Judge Hughes found Restore Justice’s blog post (via a thorough comb of Restore Justice’s website or via a direct search for “Restore Justice IRS”) appear to explain searches for information that reflects negatively on Drew Willey and Restoring Justice. And even if Judge Hughes acquired the information in question through some other, entirely coincidental means—which Willey need not, and does not, argue is impossible—an objective observer would question whether he was in fact searching specifically for that information, and either possible search would disturb an objective observer. This faulty information was itself prejudicial, extrajudicial material that created a bias evidenced in court, and the fact that Judge Hughes was actively looking for this information in the first place is evidence of apparent bias that predates his actual reading of the blog post from Restore Justice’s website.

An objective observer would also be troubled by Judge Hughes’s apparent reaction to the fact that his information about Restoring Justice was incorrect. In *Liteky*, the Supreme Court established that judicial remarks in court “*will*” establish grounds for recusal if “they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible.” *Liteky*, 510 U.S. at 555 (emphasis in original). Judge Hughes, confronted with the fact that his information about Restoring Justice’s tax status came from the website of an entirely different and unrelated organization, and with the unrebutted argument that tax status was irrelevant to the questions before the court, still questioned Restoring Justice’s compliance. Judge Hughes said that evidence of Restoring Justice’s actual tax status, taken from its actual website, “doesn’t answer the question” of whether Restoring Justice had filed its annual tax reports as required by the IRS. (Transcript at 20.) Regardless of whether Judge Hughes is in fact biased against Willey—which Willey cannot know, and does not allege—an objective observer would conclude that an appearance of bias

exists, and Judge Hughes should accordingly recuse himself from further proceedings in this case.

IV. CONCLUSION

For the foregoing reasons, Plaintiff Andrew Willey respectfully requests that United States District Judge Lynn N. Hughes recuse himself from this matter.

Respectfully submitted,

/s/ Charles Gerstein

Charles Gerstein

Attorney in Charge

(S.D. Tex. Bar No. 2998395)

Civil Rights Corps

1601 Connecticut Ave. NW, Suite 800

Washington, DC 20009

charlie@civilrightscorps.org

(202) 894-6128

/s/ Nathan Fennell

Nathan Fennell

(S.D. Tex. Bar No. 3547280)

Texas Fair Defense Project

314 E Highland Mall Blvd, Suite 204

Austin, TX 78752

nfennell@fairdefense.org

(512) 637-5220

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**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

ANDREW WILLEY)	NO. 4:20-CV-1736
)	
VS.)	Houston, Texas
)	3:53 p.m.
)	
HARRIS COUNTY DISTRICT ATTORNEY)	AUGUST 3, 2020

HEARING

BEFORE THE HONORABLE LYNN N. HUGHES

UNITED STATES DISTRICT JUDGE

VOLUME 1 OF 1

APPEARANCES:

FOR THE PLAINTIFF:

Mr. Charles Lewis Gerstein
 Civil Rights Corps
 1601 Connecticut Avenue NW
 Suite 800
 Washington, DC 20009
 Tel: 202-894-6142
 Email: Charlie@civilrights.org
 (TELEPHONIC APPEARANCE)

Mr. Nathan Alexander Fennell
 Texas Fair Defense Project
 314 E. Highland Mall Blvd.
 Suite 204
 Austin, Texas 78752
 Tel: 512-637-5220
 Email: Nfennell@fairdefense.org
 (TELEPHONIC APPEARANCE)

1 APPEARANCES: (CONTINUED)

2 FOR THE DEFENDANT:

3 Mr. Scott Anthony Durfee
4 Ms. Elizabeth Stevens
5 Harris County District Attorney's Office
6 1201 Franklin
7 6th Floor
Houston, Texas 77002
Tel: 713-368-9275
Email: Durfee_scott@dao.hctx.net

8 COURT REPORTER:

9 Ms. Kathleen K. Miller, CSR, RMR, CRR
10 515 Rusk, Room 8004
Houston, Texas 77002
Tel: 713-250-5087

11 Proceedings recorded by mechanical stenography.
12 Transcript produced by computer-assisted transcription.

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P R O C E E D I N G S

AUGUST 3, 2020

* * * * *

THE COURT: Thank you. Be seated.

03:53:08

All right. Mr. Gerstein.

MR. GERSTEIN: Yes, this is Mr. Gerstein.

THE COURT: Okay. I have Mr. Fennell on a different phone, and a couple of live bodies.

Who wants to take the lead for Mr. Willey?

03:53:23

MR. GERSTEIN: That will be me, Your Honor.

This is Mr. Gerstein.

THE COURT: All right. Mr. Gerstein, why is the suit brought in his name rather than the name of his charity?

03:53:36

MR. GERSTEIN: I'm sorry. Your Honor, I did not hear that.

THE COURT: Why is the suit brought in Willey's name rather than the name of the charity that he purports to run?

03:53:51

MR. GERSTEIN: Thank you, Your Honor.

Mr. Willey at the time that he did the acts complained of in the complaint was doing so in his private capacity. He is an employee of the nonprofit organization, but he also maintains a private practice, so this suit seeks to vindicate his individual rights.

03:54:03

1 THE COURT: All right. So the charity has
2 nothing to do with this case, then? We're talking about --

3 MR. GERSTEIN: That is correct.

03:54:15

4 THE COURT: -- his opportunity. Would it
5 surprise you to learn that the charity has lost its
6 standing with the IRS?

03:54:30

7 MR. GERSTEIN: My understanding, Your Honor, is
8 that the charity is currently engaged in similar conduct,
9 if that was the question. I did have a little trouble
10 hearing you. I'm sorry.

03:54:55

11 THE COURT: All right. According to the
12 charity's own website, it says they lost in, I think it's
13 2018, and they are in negotiations with the IRS to resume.
14 Perhaps that's why Mr. Willey is bringing it in his own
15 name.

03:55:10

16 MR. GERSTEIN: I can represent to the Court
17 that since the filing of this suit, Mr. Willey has become
18 chief executive officer of the nonprofit organization, and
19 it has experienced a significant increase in fundraising
20 over the last four or five months. But at the time he
21 brought this suit, he was practicing as a private criminal
22 defense attorney, and that was the purpose of bringing it
23 in his own name.

03:55:35

24 THE COURT: What -- so we can eliminate
25 everything in the complaint that alludes to charity and the

1 downtrodden, and just he's a lawyer who is sending letters
2 about the quality of representation by existing counsel.
3 Those are the facts now?

03:56:04

4 THE CASE MANAGER: Are you going to use the
5 cell phone?

6 THE COURT: She couldn't make it work. So --

7 THE CASE MANAGER: Okay.

8 THE COURT: We are still trying to improve the
9 phone situation.

03:56:13

10 MR. GERSTEIN: That sounds much better, Your
11 Honor. If you would like, I can clarify.

12 I mean, in his private capacity he was
13 working entirely on a volunteer basis for the downtrodden.
14 So I don't think we would want to eliminate those

03:56:27

15 components of the complaint, but the suit is brought in his
16 own individual name.

17 To update the Court on subsequent
18 developments, though, and to be completely candid, just so
19 there is no misunderstanding, the nonprofit organization
03:56:39 20 engages or at least prior to the this lawsuit engaged in
21 similar conduct and would, if Mr. Willey prevails in this
22 suit, intend to engage in similar conduct in the future,
23 but --

24 (Phone call placed over Court's system.)

03:57:03

25 MR. GERSTEIN: Hello, this is Charles Gerstein.

1 THE COURT: All right. Can you hear me now?

2 MR. GERSTEIN: Yes, I can. Thank you.

3 THE COURT: All right. You're coming over the
4 main section. Now we have got to get Mr. Fennell.

03:57:19 5 MR. GERSTEIN: Thank you.

6 THE COURT: All right. You still there?

7 MR. GERSTEIN: I am. Thank you, Your Honor.

8 THE COURT: Okay. Now we're going to work
9 on --

03:57:27 10 THE CASE MANAGER: I can't join more than one
11 person.

12 THE COURT: Oh, Mr. Fennell --

13 MR. FENNEL: Yes, Your Honor.

14 THE COURT: -- the computer doesn't want you,
03:57:41 15 so, I'm sorry, you will have to stay on the phone, but
16 Mr. Gerstein is now on the speaker phone.

17 All right. Mr. Gerstein, you were going
18 to explain some more.

19 Mr. Gerstein?

03:58:01 20 MR. GERSTEIN: Yes, Your Honor.

21 THE COURT: You were explaining something.

22 MR. GERSTEIN: Sure. So to clarify it for the
23 Court, and I hope I am not repeating something already in
24 the record, since the filing of this lawsuit Mr. Willey has
03:58:15 25 accepted a position as full-time CEO for the charity. And

1 in full candor to the Court, so there is no
2 misunderstanding, although the suit is filed in his
3 individual capacity, Mr. Willey's charity would intend to
4 engage in similar conduct if he prevails in this suit. So,
03:58:33 5 although the charity is not a party, it is not that it has
6 no interest in this litigation either.

7 THE COURT: All right. But it can't have its
8 interests represented here.

9 MR. GERSTEIN: That's correct, Your Honor.

03:58:54 10 Currently it does not. I'm not sure if it made it into
11 the record and clarify the question the Court asked, when
12 Mr. Willey was practicing in his private capacity, he was
13 doing so in a fully volunteer basis on the behalf of those
14 who could not afford an attorney. So to the extent Your
03:59:11 15 Honor is interested in the distinction between his
16 charitable private practice, I think for purposes of the
17 First Amendment case, they are securely similarly situated.

18 THE COURT: Well, theoretically, there would be
19 a lot of people who might like to do what Mr. Willey is
03:59:31 20 doing but aren't because of the statute.

21 MR. GERSTEIN: That is correct, Your Honor.

22 THE COURT: So you understand the charity says,
23 the IRS automatically revokes tax exempt status for any
24 nonprofit organizations missing three consecutive years of
04:00:02 25 tax filings.

1 So the problem apparently was not they
2 didn't have any charity. It was they didn't have any
3 reports. You know how understanding the IRS is.

04:00:20 4 MR. GERSTEIN: Yes, Your Honor. I am not aware
5 of any issues with the tax filing for the charity. I can
6 look into that and submit further briefing, but this is the
7 first I have heard of it, Your Honor.

8 THE COURT: So, apparently there are several --
9 there's Restore Justice Foundation, Pressure Blood Ministry
04:01:11 10 of Reconciliation, Restore Justice Illinois. None of those
11 is here, right? We just -- we just have Mr. Willey?

12 MR. GERSTEIN: That is correct. The only
13 parties before the Court are Mr. Willey and District
14 Attorney Ogg, Your Honor.

04:01:34 15 THE COURT: How does Mr. Willey report --
16 support himself?

17 MR. GERSTEIN: At the time of the filing of
18 this lawsuit, he maintained private practice of criminal
19 defense law in Houston and Galveston. Since then, about
04:01:48 20 six weeks ago he became full-time CEO of Restoring Justice,
21 and I believe that he is going to focus primarily on that
22 going forward.

23 THE COURT: Well, I don't understand why I
24 should enjoin a judge or the District Attorney in the
04:02:48 25 absence of blood on the floor. I don't have the complete

1 history memorized, but if there is a need to stop the
2 practice, that can be addressed in short order; but another
3 month or two or three of delay with that statute having
4 been in force for some time doesn't seem to me to be
04:03:38 5 irreparable harm. And he is not representing the poor and
6 downtrodden. He wants to represent them by sending
7 communications to them about their existing lawyer; is that
8 correct, Mr. Gerstein?

9 MR. GERSTEIN: That is correct, Your Honor.

04:04:03 10 And in terms of -- if this is an appropriate time to
11 respond, please let me know.

12 THE COURT: No. That's why we gather.

13 MR. GERSTEIN: Thank you, Your Honor.

14 So, under *Elrod v. Burns*, a delay in -- in
04:04:17 15 the attempt to vindicate his First Amendment right is
16 treated as irreparable, the same with *Oppulant Life Church*.
17 And just as a factual matter, I'll tell the Court, he is
18 eagerly trying to set up his law practice now in a way that
19 complies with the law but also vindicates his
04:04:34 20 constitutional rights, and so he did not file a motion for
21 preliminary injunction just as a matter of course.

22 He does seek relief from the Court as
23 quickly as possible, notwithstanding that the statute has
24 been in force for a while, and that's because he is -- his
04:04:48 25 project is of recent vintage, and cannot continue without a

1 definitive statement is correct.

2 THE COURT: Well, I have actually read the
3 Constitution. While it is not true that I threw a copy of
4 it at a prosecutor, I did throw it to him. His poor
04:05:19 5 catching may have made it a "to."

6 There are different kinds of irreparable
7 harm, and this needs a thoughtful approach. The -- many of
8 the State Bar's practices that clearly trenched on the
9 First Amendment have been prudent over the years. In my
04:06:02 10 case, many, many years.

11 But there is a difference from a
12 competitive disruption of trying the state, really, but in
13 this case the county's effort to find representation for
14 the indigent is not intrinsically repressive. And, of
04:06:43 15 course, barratry has applied to people making ten figures
16 income. It's not a question of whether Mr. Willey wants to
17 do it for charity or not. Having been in private practice
18 myself, I did a whole lot of pro bono work that I had not
19 intended to be pro bono.

04:07:10 20 And so we need to have some time, briefly,
21 to make sure we understand the facts, and that is, in part,
22 the practice under the barratry statute.

23 Mr. Durfee, do you want to give us an idea
24 of what the actual practice is, like how many -- how many
04:08:02 25 barratry cases does Harris County have on its docket?

1 MR. DURFEE: Your Honor, at the present time I
2 don't have that statistic. I can tell you from having been
3 a prosecutor for almost 32 years, that barratry is rare,
4 but it is -- the barratry prosecutions are rare, but they
04:08:22 5 are enforced. We have had barratry prosecutions in various
6 contexts. And we have raised this specific issue with the
7 District Attorney as to whether she wants to waive her
8 prosecutorial discretion to prosecute these matters, and
9 she wants to reserve that right as is accorded to her under
04:08:45 10 the Texas Constitution and state law.

11 THE COURT: Give me an idea of one you
12 prosecuted in the past, if you have the situation involved
13 to mind. If you don't, I understand.

14 MR. DURFEE: I don't have -- I don't have a --
04:09:01 15 I cannot in recent history recall a nonprofit entity
16 engaged in this particular fact pattern, and that was what
17 made this case unique was that we don't contest the idea
18 that a nonprofit can go out and solicit clients to pursue a
19 mode of expression like the *Button* case did.

04:09:24 20 Our concern, obviously, is on the much
21 narrower issue of can a nonprofit go to somebody who is
22 currently represented by counsel, and make a run at that
23 client without doing the courtesy of informing that
24 client's lawyer that they are doing it?

04:09:43 25 And that seems to be Mr. Willey's practice

1 in this situation.

2 THE COURT: Well, there's indirect competition
3 for existing clients all the time, as you drive down the
4 freeway, and say, "Hurt? Guaranteed results." I think
04:10:01 5 they just guarantee you get a result, not any particular
6 result.

7 So, you can't remember a charity. So
8 we're dealing with routine competition.

9 MR. DURFEE: No, Your Honor.

04:10:24 10 THE COURT: Mr. Gerstein, has any state
11 abolished barratry that you know of?

12 MR. GERSTEIN: I do not know, but I will
13 represent to the Court that there are only three states
14 that prohibit the solicitation of represented parties for
04:10:50 15 nonpecuniary gain. They are Alabama, Arkansas, and Rhode
16 Island. And Texas is the only state that criminalizes
17 soliciting represented parties for nonpecuniary gain.

18 THE COURT: What's the difference between doing
19 it for nothing, and doing it for half price of what the --

04:11:17 20 MR. GERSTEIN: So, according to the Supreme
21 Court's decision in *Ohralik* and *Primus*, the distinction is
22 between engaging in commercial speech and engaging in core
23 political speech. At the same time the state's interest in
24 regulating the practice of barratry for money is far
04:11:35 25 greater than the state's interest in regulating the

1 practice of barratry for ideological purposes because, you
2 know, as I am in nonprofit practice myself, and so when I
3 speak to clients, it's only for the purpose of fulfilling
4 our mission. But I can see how it would be much more
04:11:50 5 difficult to set aside the client's concerns and various
6 rules of decorum and practice when, you know, one's own
7 salary depends on it. I think that's the notion underlying
8 the Supreme Court's distinction, Your Honor.

9 THE COURT: The Supreme Court has made several
04:12:12 10 phenomenally erroneous decisions about commercial speech.
11 There is nothing in my Constitution that says no law except
12 ones involving business. And so it should be broader --
13 broadly construed. By the time you list all of the
14 exceptions that have been allowed, it gets to be a crippled
04:12:40 15 principle, but it's not -- it's not for Mr. Willey, or his
16 charity, or -- to decide that not doing it for money makes
17 them special because, obviously, they are -- they're
18 billing the caring public by advertising and collecting
19 gifts.

04:13:28 20 Somebody has to pay for the office, and
21 the stationery that says "CEO" on it, and all that sort of
22 thing. And so to draw a distinction between somebody who
23 is ideologically stirring up trouble between clients and
24 their counsel, and commercially doing it, seems like a
04:13:54 25 false distinction.

1 MR. GERSTEIN: Your Honor, two responses to
2 that. The first is to the extent that Your Honor's view is
3 that this would be unconstitutional as applied to people
4 engaging in commercial speech -- (audio interrupted due to
04:14:13 5 technical problems, speech indiscernible.)

6 THE COURT REPORTER: I can't understand him,
7 Judge.

8 MR. GERSTEIN: And under *Shapero v. Kentucky*
9 *Bar Association*, I think it is true that the statute would
04:14:24 10 be unconstitutional as applied to someone doing exactly
11 what Mr. Willey did for money but in writing. At the same
12 time, though, the distinction is a matter of existing
13 Supreme Court law is what it is, and from my perspective,
14 and Mr. Willey, particularly, wants to fall on the correct
04:14:46 15 side of existing law.

16 THE COURT: Mr. Fennell, do you have anything
17 you would like to add?

18 MR. FENNEL: No, Your Honor. I will -- I
19 defer to Mr. Gerstein's argument. Thank you.

04:15:04 20 THE COURT: Are you all at the same place?

21 MR. GERSTEIN: We are not, Your Honor. I am
22 in --

23 THE COURT: You're in the high rent district.

24 MR. GERSTEIN: Yes, Your Honor.

04:15:16 25 THE COURT: Although Austin is trying.

1 MR. FENNELL: They sure are. They sure think
2 they're in competition.

3 THE COURT: Ms. Stevens, you want to add
4 anything?

04:15:33 5 MS. STEVENS: No, Your Honor.

6 THE COURT: All right. The first thing I need
7 from Mr. Willey is more precise factual data about what he
8 is doing, how he's doing it, and then I need to know some
9 cases he's done in this system.

04:16:08 10 Why doesn't Mr. Willey go over -- I'm not
11 sure how it works in the state system -- and ask one of the
12 state judges to appoint him at no cost?

13 MR. GERSTEIN: Your Honor, Mr. Willey is, in
14 fact, eligible for appointments on the appointed counsel
04:16:30 15 list. And the issue is that people who are already
16 represented by attorneys carrying caseloads many multiples
17 in excess of what state standards recommend, the people
18 whom those people represent don't know that they have a
19 right to anything other than what they they're receiving.
04:16:49 20 So I think from Mr. Willey's perspective, it wouldn't solve
21 the problem he is seeking to address.

22 But just perhaps at one higher level, it
23 is not Mr. Willey's burden to show that his political
24 speech is the best or the most efficient way of addressing
04:17:04 25 a social problem, but rather the state's burden to show

1 that its restriction on his speech is narrowly tailored to
2 foreign and compelling interests. So from his perspective,
3 he has chosen this course of action and he has the right to
4 engage in it, and would like to avoid being prosecuted for
5 doing so.

04:17:23

6 THE COURT: Well, at the moment, this seems
7 like the antisodomy law, and I believe it was in Georgia,
8 where a deputy sheriff was serving papers on somebody in
9 the apartment, and happened to see some people doing things

04:17:54

10 that apparently looked like they were violating the law,
11 and he said nothing then or later. But the people who were
12 observed filed a peremptory action, and contrary to my
13 expectations, the Supreme Court took it after the district
14 judge in Atlanta and the circuit court both said there is

04:18:23

15 no case or controversy here. The DA filed an affidavit
16 that he had been DA 20 years, and never prosecuted a single
17 case under the statute, and didn't intend to start now.

18 Mr. Willey has not been threatened with
19 prosecution, other than it is the policy of the Harris
20 County District Attorney to follow the law, and she has
21 enough business from the six million people or so to not
22 give her any motive to go look for business.

04:18:48

23 MR. GERSTEIN: Your Honor, it --

24 THE COURT: Yes, sir.

04:19:13

25 MR. GERSTEIN: Oh, I'm sorry. Is it --

1 (Audio interruption.)

2 THE COURT: It's going crazy, but it's not your
3 fault.

4 MR. GERSTEIN: Glad to hear that. So, if -- if
04:19:25 5 the District Attorney represents that she does not intend
6 to prosecute conduct as described in the complaint, in the
7 motion for preliminary injunction, this case would be moot,
8 and we would be two happy people because Mr. Willey would
9 not fear prosecution.

04:19:38 10 Unfortunately, unlike the Georgia case
11 Your Honor was discussing, the District Attorney, as
12 Mr. Durfee helpfully pointed out, explicitly has not
13 disclaimed an intention to do that. If she would like to
14 represent that she did not intend to prosecute Mr. Willey,
04:19:55 15 then, I agree that there is no threat of irreparable harm.

16 THE COURT: Well, the problem with that is I
17 don't think it's binding on the District Attorney, and I
18 don't know that you know, but the district attorneys have
19 districts by county, but the district attorney is, in fact,
04:20:25 20 a state official, not a county official.

21 Apparently, a number of Texas founding
22 fathers had unfortunate experiences with prosecutors
23 somewhere in their past, and decided to keep them under
24 close watch. They also didn't give our Attorney
04:20:50 25 General any prosecutorial authority. They have changed it

1 for child support and something else.

2 Well, get him to do a very precise, brief,
3 nonlegalistic statement of what he's done, how many cases
4 he has gotten, how many letters he sent, copies of the
04:21:23 5 letter, or two. I am not doing it off of charity's press
6 release. I want to know the facts of what he has done, and
7 did somebody threaten him with prosecution?

8 MR. GERSTEIN: Your Honor, so two things to
9 address.

04:21:43 10 First, in the complaint, we detail exactly
11 how many people he has contacted on how many occasions. I
12 am pulling up the paragraph numbers. But he has
13 communicated with 22 people represented by Mr. Jerome
14 Godinich. That is Paragraph Number 30 in the complaint.
04:22:00 15 So I think Your Honor's question is addressed by the
16 complaint. We didn't submit anything from the charity or
17 press release from the charity.

18 So I don't know if that addresses the
19 concern, but...

04:22:24 20 I would also ask, Your Honor, if you would
21 like further briefing, to help me understand what the
22 relevance of more specific description of conduct would be.
23 As our understanding of the law is, he has the First
24 Amendment right, or he doesn't, but from our argument he
04:22:39 25 has the First Amendment right to speak to people under

1 these circumstances, and there appears to be no dispute
2 about what those circumstances are. So I think he has
3 already satisfied the Court's concern for a specific record
4 on that question.

04:23:07

5 THE COURT: I am a little troubled by
6 Mr. Willey, being a lone wolf now, is also CEO of a defunct
7 charity. Not sure it matters except if he is CEO, and he's
8 -- I'll just -- shall I just assume that any cases he gets
9 while he's acting alone will be handled through the

04:23:41

10 charity?

11 MR. GERSTEIN: I don't -- I can't be certain of
12 that, Your Honor, but I don't know why there would be a
13 distinction. To my knowledge, the charity is not defunct.
14 I'm not sure why Your Honor thinks it is, but I can address
15 that in further briefing.

04:23:57

16 I am --

17 THE COURT: Counsel -- counsel, just go on
18 their website and there is a long explanation about their
19 tax problems. They lost their standing with the IRS, which
20 is not important, perhaps, to the people doing the work,
21 but it is to the people funding it.

04:24:12

22 MR. GERSTEIN: Your Honor, if that's
23 Restoringjustice.org, I don't see any such notice. There
24 might be another charity named "Restoring Justice," but to
25 my knowledge the charity where Mr. Willey is CEO is a

04:24:32

1 Houston based nonprofit serving indigent people with
2 holistic criminal defense, and it remains in good standing
3 with the IRS. I am looking at the website right now.

4 THE COURT: What's the name of it?

04:24:50

5 MR. GERSTEIN: Restoring, R-E-S-T-O-R-I-N-G,
6 Justice, J-U-S-T-I-C-E dot O-R-G, the website.

7 And it appears to be fully tax deductible.

8 But just to make clear for the record, so the court

9 reporter gets this, we didn't submit any of this in the

04:25:10

10 record, and do not believe it is relevant to the case, but
11 I'll read from the website now.

12 It reads, "Restoring Justice is a
13 501(c) (3) nonprofit organization. All donations are tax
14 deductible to the extent allowed by the law."

04:25:43

15 THE COURT: Well, there is a
16 Restorejustice.org.

17 MR. GERSTEIN: Oh, that might be the issue,
18 Your Honor. I think that is a different organization.

19 THE COURT: Well, the statement that they are

04:26:01

20 fully deductible to the extent of the law doesn't answer
21 the question of are they deductible under the extent of the
22 law which includes an IRS requirement that you file these
23 annual reports?

24 So that's one of those universal phrases.

04:26:27

25 MR. GERSTEIN: Uh-huh. I'll represent to the

1 Court now I have no reason to think there is any issue with
2 Restoring Justice's tax filing status, and I don't think it
3 would be relevant to the issues before the Court if there
4 was.

04:26:50

5 THE COURT: Well, the things charities do are
6 not entirely different from what people do, that for-profit
7 people do. They may be funded slightly differently. And
8 churches raise their money by donations, too.

04:27:35

9 MR. GERSTEIN: That is right, Your Honor, but,
10 again, Restoring Justice is not a party before the Court.
11 I am looking right now at its 2018 990 report, Form 990 to
12 the IRS. To my knowledge it appears to be in compliance,
13 just to make sure that is clear for the record. But I
14 don't -- I can't see what the relevance of that would be.

04:27:51

15 Mr. Willey is before the Court in his
16 individual capacity. He has inferred that he intends to
17 engage in conduct prohibited by the statute but protected
18 by the First Amendment in the future under existing Supreme
19 Court law that is quite clear gives Article III
20 jurisdiction to this Court, as defendant concedes.

04:28:07

21 I am -- I can speak to Mr. Willey about
22 whether to supplement to the record, but I can't represent
23 to the Court right now that Mr. Willey would be willing to
24 do that.

04:28:36

25 THE COURT: Mr. Durfee, anything?

1 MR. DURFEE: No, Your Honor. Thank you.

2 THE COURT: All right. Well, I am going to

3 take this up. I may have some questions. And, Mr.

4 Fennell, we will try to get the phones fixed. We have been

04:29:00

5 working on them for three months.

6 MR. FENNEL: Yes, Your Honor.

7 THE COURT: Ms. Stevens?

8 MS. STEVENS: Nothing, Your Honor. Thank you.

9 THE COURT: All right. Thank you, Counsel.

04:29:17

10 MR. GERSTEIN: Thank you, Your Honor.

11 THE COURT: You may be excused, too.

12 MR. DURFEE: Thank you, Judge.

13 (Concluded at 4:29 p.m.)

14 COURT REPORTER'S CERTIFICATE

15

16 I, Kathleen K. Miller, certify that the foregoing is a
17 correct transcript from the record of proceedings in the
18 above-entitled matter.

19

20 DATE: Aug. 5, 2020

/s/ Kathleen K Miller

21

Kathleen K Miller, RPR, RMR, CRR

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