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Via Electronic Filing

June 18, 2026

Mr. Lyle W. Cayce
Clerk of Court
United States Court of Appeals, Fifth Circuit
600 S. Maestri Place, Suite 115
New Orleans, LA 70130

Re: *Evans v. Garza*
No. 23-50541; Dist. Ct. No. 1:23-CV-727
Response to Court Letter of June 16, 2026, Dkt. 109

Dear Mr. Cayce:

The panel asked "whether there is a live case or controversy as to each claim asserted by Michelle Evans." Dkt. 104 at 1. To moot the case, District Attorney Garza carries the "formidable burden" of making it "absolutely clear" that the challenged conduct "could not reasonably be expected to recur." *Netflix, Inc. v. Babin*, 88 F.4th 1080, 1089 (5th Cir. 2023) (quoting *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000)). What Garza offers is that "at present," the office "does not intend to prosecute" Evans. Dkt. 106 at 1. The letter notably does *not* concede that Evans's speech was lawful or offer any sort of binding promise that could be legally enforced. The threat to prosecute Evans remains live, the chilling of Evans's current desire to republish her speech continues, and the claims are not moot.

In First Amendment cases, this Court is particularly attentive to the risk that government defendants will invoke voluntary cessation to evade review of speech restrictions. *See Speech First, Inc. v. Fenves*, 979 F.3d 319, 328 (5th Cir. 2020). This Court considers three factors to determine whether voluntary cessation moots a case: "(1) [T]he absence of a controlling statement of future intention; (2) the suspicious timing of the change; and (3) the [government's] continued defense of the challenged

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policies." *Id.*[1] And as in *Speech First*, "[e]ven if … all three" factors are required, they are met here. *Id.* at 329.

Garza provides no controlling statement of future intention.

The first *Speech First* factor shows the case is not moot. Nothing in Garza's letter binds him in a way that would prevent prosecution of Evans. Unsworn litigation representations do not moot a case, especially when made by a person who cannot bind future officials. *Id.* at 328–29. Garza's letter appears to be "mere litigation posturing," without "formally announc[ing] changes to official governmental policy." *See Sossamon v. Lone Star State of Tex.*, 560 F.3d 316, 325 (5th Cir. 2009), *aff'd sub nom. Sossamon v. Texas*, 563 U.S. 277 (2011). A prosecutor cannot even meet his burden by "dismiss[ing] th[e] indictment" or "issu[ing] a policy precluding any … prosecution under" the statute at issue. *See Netflix*, 88 F.4th at 1089. Those actions leave future prosecution "a real possibility." *Id.*

Garza's letter does not even rise to the level *Netflix* holds is insufficient. Far short of issuing a formal, binding policy, it provides only qualified and temporary assurance, stating that "at present," Garza "does not intend to prosecute the matter involving Plaintiff-Appellant." Dkt. 106 at 1. The qualifier "at present" is a time-limited intention and not a permanent policy or binding commitment. The letter announces no policy change, no formal declination, no office-wide directive, and no commitment binding future officials. The assurance is limited to the specific "matter involving Plaintiff-Appellant," not the statute or future conduct. And its rationale—lost evidence and litigation abeyance—is a case-specific discretionary choice, not a categorical decision never to prosecute. The letter thus suggests revocability, leaving Evans exposed to renewed enforcement by Garza or his successors.

The timing of Garza's representations is suspicious.

The second *Speech First* factor also counsels against mootness. Garza's letter came only in response to this Court's prodding, and this Court has already noted its skepticism for changes "first announced only in" litigation. *Speech First*, 979 F.3d

[1] Although this Court once granted "government officials 'some solicitude' for their voluntary cessation," this practice is "falling out of favor with the Supreme Court" and one panel noted that "a future panel or en banc court" might need to revisit the practice. *Netflix*, 88 F.4th at 1089 n.12.

at 329. As the Supreme Court noted, "maneuvers designed to insulate a decision from review … must be viewed with a critical eye." *Knox v. SEIU*, 567 U.S. 298, 307 (2012). Even formal changes that come at the eleventh hour, such as amending a challenged law "the night before oral argument" do not necessarily moot a case. *See Opulent Life Church v. City of Holly Springs*, 697 F.3d 279, 284 (5th Cir. 2012). Garza's letter comes *after* oral argument and only when the *en banc* Court has shown its interest. Garza's representations, such as they are, should be read with a heavy dose of skepticism.

Garza has not abandoned his defense of the challenged policies.

The third *Speech First* factor also weighs against mootness. Garza's letter leaves the threat to Evans's speech alive. Garza does not concede the speech is lawful, constitutionally protected, or beyond the statute's reach. Instead, his letter relies on evidentiary and prudential concerns. Evans thus remains vulnerable to prosecution for future publications or related conduct. Garza's letter addresses only "the matter involving Plaintiff-Appellant." Dkt. 106 at 1. It says nothing about future publications of similar speech, republication of the censored speech from this case, or the chill on political speech caused by Garza's strategic ambiguity.

* * *

For these reasons, Garza's letter does nothing to alter or mitigate the ongoing constitutional harm to Evans: "[H]er First Amendment Rights [continue to] hang in 'limbo.'" Slip Op. 24 (Oldham, J., dissenting), Dkt. 56-1. Because Garza's letter lacks the absolute clarity required to render this case moot, the Court should proceed to the merits of Evans's *en banc* petition.

Respectfully submitted,

Gene C. Schaerr
Counsel for Appellant

cc's: All counsel of record (via CM/ECF)