No. 22-0224

In the Supreme Court of Texas

WARREN K. PAXTON, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF TEXAS; SHAWN DICK, IN HIS OFFICIAL CAPACITY AS WILLIAMSON COUNTY DISTRICT ATTORNEY,
Defendants-Appellants,

v.

ISABEL LONGORIA; CATHY MORGAN,
Plaintiffs-Appellees.

On Certified Questions
from the United States Court of Appeals for the Fifth Circuit

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Statement of the Case

Nature of the Case: Plaintiffs are the current Elections Administrator of Harris County and a volunteer deputy registrar for Travis and Williamson Counties. ROA.15. Relying on the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), they brought a pre-enforcement First Amendment challenge to two newly enacted provisions of the Texas Election Code, which criminalize soliciting mail-in ballot applications from those who have not requested them (section 276.016(a)(1)) and create civil penalties for violating the Election Code (section 31.129). ROA.37-52.

Federal Trial Court: The Honorable Xavier Rodriguez
United States District Judge for the Western District of Texas, San Antonio Division

Disposition in the Trial Court: The district court determined the challenged provisions violated the First Amendment and preliminarily enjoined Defendants from enforcing Texas Election Code section 276.016(a)(1) and using section 31.129 to enforce section 276.016(a)(1) against Plaintiffs. ROA.626-65 (App. A).

Parties in the United States Court of Appeals for the Fifth Circuit: Appellants: Warren K. Paxton and Shawn Dick
Appellees: Isabel Longoria and Cathy Morgan

Disposition in the Court of Appeals: After expedited briefing and argument, the Fifth Circuit sua sponte certified to this Court three questions of state law, which will inform whether preliminary relief was appropriate and whether this suit may be pursued under *Ex parte Young*'s limited exception to sovereign immunity. *Longoria v. Paxton*, No. 22-50110, 2022 WL 832239 (5th Cir. Mar. 21, 2022) (per curiam) (unpublished) (Southwick, Haynes, and Higginson, JJ.) (App. B).

Statement of Jurisdiction

The Court has jurisdiction under article V, section 3-c(a) of the Texas Constitution.

Issues Presented

The questions certified by the Fifth Circuit are:

1. Whether volunteer deputy registrars are "public officials" under the Texas Election Code;

2. Whether the speech Plaintiffs allege that they intend to engage in constitutes "solicitation" within the context of Texas Election Code section 276.016(a)(1). In particular, the Fifth Circuit asked whether the definition:
   a. is limited to seeking applications from individuals who do not qualify to vote by mail; and
   b. is limited to demanding submission of an application for mail-in ballots (whether or not the applicant qualifies) or reaches more broadly to cover comments telling voters that they may have the opportunity to apply for mail-in ballots; and
3. Whether the Texas Attorney General is a proper official to enforce the civil penalties authorized by Texas Election Code section 31.129.

To the Honorable Supreme Court of Texas:

During the 2020 election, a number of local election officials adopted idiosyncratic voting rules relating to the pandemic that (however well meaning) were not contemplated by Texas law—thereby eliminating the uniformity of Texas election procedures and spawning numerous pieces of litigation, many of which ended up before this Court.[1] To address a number of these practices, as well as to ensure fair and secure elections more generally, the 87th Legislature passed an omnibus election bill commonly referred to as Senate Bill 1 or S.B. 1, which added or amended a number of provisions of the Election Code.[2] As part of that effort, the Legislature prohibited public officials and election officials, "while acting in an official capacity," from "knowingly" "solicit[ing] the submission of an application to vote by mail from a person who did not request an application." Tex. Elec. Code § 276.016(a)(1). That is, though those officials remain free to inform voters of their option to vote by mail, *id.* § 276.016(e)(1), the decision to request a mail-in ballot application is left to the voter.

The Elections Administrator for Harris County and a volunteer deputy registrar from Travis and Williamson Counties filed this suit asserting the belief that their speech about mail-in voting might run afoul of this new law and thus that the law

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[1] *See, e.g.*, *State v. Hollins*, 620 S.W.3d 400, 409 (Tex. 2020) (per curiam); *Abbott v. Anti-Defamation League Austin, Sw., & Texoma Regions*, 610 S.W.3d 911, 923 (Tex. 2020) (per curiam); *In re Hotze*, 610 S.W.3d 909 (Tex. 2020) (orig. proceeding).

[2] Election Integrity Protection Act of 2021, 87th Leg., 2d C.S., ch. 1, 2021 Tex. Sess. Law Serv. 3783. This brief uses the designator "S.B. 1."

violates the First Amendment. ROA.37-52. Plaintiffs sought and obtained a preliminary injunction prohibiting the enforcement of this aspect of S.B. 1 both during the pendency of this litigation and with respect to any action taken while that injunction is in effect. ROA.626-65. On appeal, the Fifth Circuit recognized that numerous open questions of state law made it difficult to resolve the issues between the parties. The court therefore sua sponte certified three questions of state law to this Court.

Because the statutes at issue are new, there has been no opportunity for any state court to interpret them. But applying this Court's ordinary rules of statutory construction, the Court should conclude: (1) volunteer deputy registrars are not "public officials" subject to prosecution under Texas Election Code section 276.016; (2) "solicits" does not include merely providing information but instead requires importuning or strongly urging the voter to fill out an application that was never requested; and (3) that while the Attorney General may represent the State in other types of actions to enforce the Election Code, he is not a proper official to seek the civil penalties provided in Texas Election Code section 31.129.

STATEMENT OF FACTS

I. S.B. 1's Modifications to the Texas Election Code

As this Court is well aware, the 2020 election was marked with an unusually high amount of litigation regarding the content and constitutionality of both the Election Code and responses adopted by local officials to the COVID-19 pandemic. *Supra* n.1. In his 2021 State of the State address, Governor Abbott announced that "Election Integrity [would] be an emergency item" during that year's legislative session. Press

Release, Office of the Tex. Gov., *Governor Abbott Delivers 2021 State of The State Address* (Feb. 1, 2021), https://tinyurl.com/abbott2021address. The next month, Governor Abbott "held a press conference in Houston on the importance of election integrity legislation," during which he noted that "[i]n the 2020 election, we witnessed actions throughout our state that could risk the integrity of our elections and enable voter fraud." Press Release, Office of the Tex. Gov., *Governor Abbott Holds Press Conference on Election Integrity Legislation* (Mar. 15, 2021), https://tinyurl.com/abbottelectionconference. In keeping with the Governor's statements, election integrity was a priority item for the 87th Legislature—both during the regular session and two subsequent called sessions.[3]

The two provisions at issue in this case were added to the Texas Election Code as part of S.B. 1, which was enacted by the Legislature during its second called session and signed by the Governor late last summer. Election Integrity Protection Act of 2021, 87th Leg., 2d C.S., ch. 1, §§ 7.04, 8.01, 2021 Tex. Sess. Law Serv. 3783, 3807-08.

A. Texas Election Code section 276.016 concerns the unlawful solicitation and distribution of mail-in ballot applications absent a request, which came to a head after Harris County proposed to unlawfully distribute unsolicited mail-in ballot applications to all registered voters in the County. *Hollins*, 620 S.W.3d at 409. As explained

[3] *See, e.g.*, Tex. S.B. 7, 87th Leg., R.S. (2021), https://tinyurl.com/sb7introduced; S.J. of Tex., 87th Leg., R.S. 2914 (2021); Tex. Gov. Proclamation No. 41-3848, 87th Leg., 1st C.S., 46 Tex. Reg. 4238 (2021); Tex. Gov. Proclamation No. 41-3852, 87th Leg., 2d C.S., 46 Tex. Reg. 5115-16 (2021).

by the witness from the Secretary of State's office, voters can be confused when they receive an unsolicited mail-in ballot application from a public official. ROA.561. They may fill it out and return it even if they are not eligible for mail-in voting, committing a felony in the process. ROA.561.

Section 276.016 takes a number of steps to ensure that voters decide whether to apply to vote by mail. Most relevant here, section 276.016(a)(1) makes it an offense for a "public official or election official . . . while acting in an official capacity, [to] knowingly . . . solicit[] the submission of an application to vote by mail from a person who did not request an application." Tex. Elec. Code § 276.016(a)(1) (the anti-solicitation provision). The Legislature also prohibited "distribut[ing] an application" that was not requested, *id.* § 276.016(a)(2), authorizing the payment of public funds for such distribution, *id.* § 276.016(a)(3), or completing any portion of the form before such distribution, *id.* § 276.016(a)(4).

Violating the anti-solicitation provision is a state jail felony. *Id.* § 276.016(b). Such a remedy "is cumulative, and does not restrict any other remedies provided by this code or by law." *Id.* § 276.016(f). The Legislature expressly provided that "[a] violation of this section is subject to injunctive relief or mandamus as provided by this code." *Id.*

Section 276.016, however, also creates a number of safe harbors. For example, it is not a violation to "provid[e] access to an application to vote by mail from a publicly accessible Internet website," *id.* § 276.016(c), or to lawfully assist a voter with completing an application in accordance with Texas Election Code section 84.003, *id.* § 276.016(d). Nor does an official violate the anti-solicitation provision if he

(1) "provided general information about voting by mail, the vote by mail process, or the timelines associated with voting to a person or the public," or (2) "engaged in the conduct . . . while acting in the official's capacity as a candidate for a public office." *Id.* § 276.016(e).

B. Texas Election Code section 31.129, the second provision Plaintiffs challenge, creates civil penalties for violating election laws including section 276.016. It states, in relevant part, that

> (b) An election official may be liable to this state for a civil penalty if the official:
>
> > (1) is employed by or is an officer of this state or a political subdivision of this state; and
> >
> > (2) violates a provision of this code.
>
> (c) A civil penalty imposed under this section may include termination of the person's employment and loss of the person's employment benefits.

Id. § 31.129(b)-(c). Section 31.129 could be used to obtain civil penalties from an election official who violates the anti-solicitation provision in section 276.016 and is employed by the State or a political subdivision. Such a claim can, however, only be brought for conduct done in that employee's official capacity, *id.* § 276.016(a)(1), and *against* the employee in his official capacity, *id.* § 31.130. The statute is silent, however, regarding who is charged with seeking those civil penalties.

II. Federal-Court Proceedings

A. Plaintiffs' challenge to S.B. 1

In December 2021, two individuals filed suit to challenge these provisions—Isabel Longoria, the present Elections Administrator for Harris County,[4] and Cathy Morgan, a volunteer deputy registrar ("VDR") in Travis and Williamson Counties. ROA.14-26. Their live complaint names as defendants Attorney General Ken Paxton and the District Attorneys from Harris, Travis, and Williamson Counties. ROA.39-40. In Count I, both Plaintiffs allege that the anti-solicitation provision in Texas Election Code section 276.016(a)(1) violates the First and Fourteenth Amendments, but they brought that claim against only the District Attorneys. ROA.47-49. In Count II, Longoria alone sued the Attorney General, alleging that using the civil-penalty provision in Texas Election Code section 31.129 to enforce the anti-solicitation provision in section 276.016(a)(1) would violate the First and Fourteenth Amendments. ROA.49-50.

Both Plaintiffs provided testimony in the form of declarations, depositions, and in person at the preliminary-injunction hearing. Longoria stated that she would like to engage in "community outreach, education, and know-your-rights events" (and bring mail in voting applications to those events). ROA.93-94. In her testimony, Longoria explained that, as an elections administrator, she describes the benefits of

[4] Since the trial court issued its order, Longoria has announced that she will resign effective July 1 following reports that her office failed to include 10,000 mail-in ballots in initial results from the March 1 primary election. *Harris Co. elections administrator submits resignation after issues with primary*, KHOU 11 (Mar. 9, 2022), https://tinyurl.com/longoriaresigns.

voting by mail, educates voters about their rights, and helps them submit applications. ROA.93. She also stated that she "recommends" voting by mail and "encourages" it, but she did not describe specifically what she says to recommend or encourage mail-in voting. ROA.90-91, 92-93, 508. Longoria mentioned concerns about tweeting that new branch offices could receive applications to vote by mail. ROA.518. As another example, she described sessions "dedicated to helping seniors" to answer questions on voting which were "geared towards mail ballot voting." ROA.802. In particular, Longoria stated that she was asked "Who should vote by mail. Who can vote by mail. Under what circumstances would you recommend someone votes by mail. How do I get an application." ROA.802.

Morgan testified that, as a VDR, she desires to provide individuals with factual information about the option to vote by mail. ROA.775. As an example, she spoke of a conversation with a person who wanted to vote but could not take the time to return to her hometown to vote. ROA.765. Morgan asked her "have you considered voting by mail?" ROA.765. She described a similar interaction when speaking with a caregiver whose husband was bedridden. ROA.766. She also mentioned a desire to call a neighbor to remind the neighbor to submit an application to vote by mail. ROA.770. When asked whether she "w[as] providing factual information," Morgan confirmed she was. ROA.775. And when asked to clarify whether she was "trying to persuade that person to vote by mail" or "trying to explain the option of voting by mail" when

she was "providing factual information," Morgan responded "I'm explaining an option." ROA.538.[5]

B. The district court's injunction

After a hearing, the district court granted a preliminary injunction. ROA.626-65. The court first determined that Plaintiffs were injured—and thus had standing to challenge sections 276.016 and 31.129—because the speech in which they wished to engage was "arguably regulated" by the anti-solicitation law. ROA.636-44. In reaching that decision, the court concluded that Morgan was a "public official" who was subject to prosecution under section 276.016 because VDRs are "appointed to their position by a county official and 'assume a role carefully regulated by the state to serve the citizens who register to vote as well as the public interest in the integrity of the electoral body.'" ROA.643 (quoting *Voting for Am., Inc. v. Steen*, 732 F.3d 382, 393 (5th Cir. 2013)).

The court next determined that Plaintiffs' claims fell within the exception to sovereign immunity found in *Ex parte Young* because each Defendant had a sufficient connection to enforcement. *First*, the District Attorneys possessed the authority to prosecute violations of section 276.016. ROA.646-47. *Second*, though it did not definitively decide whether the Attorney General could seek civil penalties under section 31.129, ROA.649-50, the district court nonetheless concluded that the Attorney

[5] *See also* ROA.538 ("Q. It sounds like you're saying 'not persuading' but I need a clear answer on the record. 'Yes' or 'no,' are you trying to—A. No I'm not—Q. – persuade them to vote by mail? A. trying to persuade them. I'm offering them options.").

General had the necessary enforcement authority because he could investigate possible election-law crimes and had shown a willingness to bring civil suits to stop election-law violations. ROA.647-50.

On the merits, the court rejected Defendants' argument that section 276.016, which applies only to speech made in an individual's official capacity, impacted only government speech and thus did not infringe any First Amendment rights. ROA.653-55. Concluding that section 276.016(a)(1) represented viewpoint discrimination, the court then determined that it failed strict scrutiny. ROA.655-58.

Consequently, the district court enjoined the three District Attorneys from enforcing section 276.016(a)(1) against Plaintiffs. ROA.664. The district court also enjoined all Defendants from enforcing section 276.016(a)(1) via civil penalties under section 31.129 against either Plaintiff, ROA.664, even though the only claim regarding section 31.129 was by Longoria against the Attorney General, ROA.49-50. The court then purported to enjoin all Defendants from ever criminally or civilly prosecuting Plaintiffs for any violations of section 276.016(a)(1) committed during the pendency of the lawsuit, even if the law was subsequently upheld. ROA.665. Finally, the court denied the Attorney General's motion to stay pending appeal. ROA.665.

C. Proceedings in the Fifth Circuit

The Attorney General and Williamson County District Attorney Shawn Dick appealed. ROA.722-23, 754-55. The Fifth Circuit issued an administrative stay of the preliminary injunction that remains in effect. ROA.752. That court ordered expedited briefing and held argument on March 8. It then sua sponte certified three

questions to this Court. *Longoria v. Paxton*, No. 22-50110, 2022 WL 832239 (5th Cir. Mar. 21, 2022) (per curiam).

The first question—whether VDRs are "public officials" under section 276.016—concerns whether Morgan could be prosecuted by a district attorney for allegedly violating the anti-solicitation provision. Section 276.016 applies to "[a] public official or election official." Tex. Elec. Code § 276.016(a). There is no dispute that Morgan is not an "election official," as defined by Texas law. *Id.* § 1.005(4-a). If she is not a "public official" either, then she faces no possibility of prosecution, and the preliminary injunction must be reversed as to her.[6]

The second question—what constitutes "solicitation" under section 276.016(a)(1)—asks whether the speech that Longoria and Morgan wish to make would subject them to prosecution or civil penalties. Again, if their speech is not covered by the anti-solicitation provision, the preliminary injunction should be reversed, as neither Plaintiff will face prosecution or civil penalties.

The third question—whether the Attorney General can seek civil penalties under section 31.129—implicates whether the Attorney General is immune from suit under *Ex parte Young*. Though there is a motion for rehearing pending, the Court of Criminal Appeals has held that the Attorney General cannot criminally prosecute violations of section 276.016. *See State v. Stephens*, Nos. PD-1032-20, PD-1033-20,

[6] The Harris County District Attorney did not appeal the preliminary injunction but has instead agreed not to enforce section 276.016(a)(1) until this case is over. ROA.271-72. Thus, the question of criminally prosecuting Longoria, who is an election official in Harris County, is not before the Court.

2021 WL 5917198, *1 (Tex. Crim. App. 2021) (reh'g pending). If he also cannot enforce section 276.016 civilly—through civil penalties under section 31.129—then Plaintiffs conclusively have not pleaded that he has the connection to enforcement of section 276.016 required to satisfy the *Ex parte Young* exception to sovereign immunity. *See, e.g.*, *Tex. Democratic Party v. Abbott*, 978 F.3d 168, 181 (5th Cir. 2020), *cert. denied*, 141 S. Ct. 1124 (2021).

Summary of the Argument

I. The Court should answer the first certified question in the negative: VDRs are not "public officials" subject to prosecution under section 276.016. Although S.B. 1 does not define "public officials," other sources, such as dictionaries, statutes, and precedent, show that the common and ordinary meaning of "public official" does not include a VDR. VDRs are not employees of any state officer acting under the Election Code. They do not exercise sovereign power or discretion. Their appointment is mechanical. And their duties are limited: handing out, receiving, reviewing, and delivering voter-registration forms. They do not fall within any common definition of a "public official."

II. Beyond establishing a standard for "solicitation" of an application to vote by mail, the second certified question cannot be definitely answered on this record. Like "public official," there is no S.B. 1-specific definition of "solicit." But in the larger context of the statute—as well as its history—"solicits" is best understood to "imp[ly] personal petition and importunity addressed to a particular individual to do some particular thing." *Steger & Bizzell, Inc. v. Vandewater Constr., Inc.*, 811 S.W.2d 687, 693 (Tex. App.—Austin 1991, writ denied) (quoting *Solicit*, Black's Law

Dictionary (5th ed. 1979), emphasis omitted); *accord Solicitation*, Black's Law Dictionary (11th ed. 2019) (defining solicitation in a criminal context to include "urging, advising, commanding, or otherwise inciting" an unlawful act). When combined with the safe-harbor provision in section 276.016(e)(1) that permits officials to provide information about mail-in voting, much of Plaintiffs' speech is not prohibited. They may continue to inform voters of the opportunity to vote by mail and explain or even assist in the process. But some of what Longoria wishes to say is unclear—recommending and encouraging people to vote by mail. While the record does not permit the Court to fully resolve all questions regarding her speech, it should draw a clear line that considers the speech from the perspective of an ordinary listener: would an ordinary person believe the official is trying to importune or strongly urge them to submit an application for a mail-in ballot that the voter did not request?

III. Finally, the Court should answer the third certified question in the negative, though the Attorney General could use *other* remedies available under the Election Code to enforce S.B. 1's prohibition on solicitation. This Court has long interpreted article IV, section 22 of the Texas Constitution to require the Legislature to expressly empower the Attorney General to represent the State in district courts in this State. *Smith v. State*, 328 S.W.2d 294, 295 (Tex. 1959) (per curiam). Absent such a statutory command, constitutional provision, or a request for assistance by local officials, only county or district attorneys are empowered to represent the State in trial courts. Section 31.129 does not include such an express grant of such authority for the Attorney General.

That said, the Attorney General may still enforce the anti-solicitation provision through *other* means. For example, S.B. 1 says nothing about the availability of an *ultra vires* action and expressly maintains the remedy of an action for mandamus directly in this Court. Tex. Elec. Code § 276.016(f); *id.* § 31.130 (same). This Court has allowed the Attorney General to represent the State in an *ultra vires* action against a county official to enforce the limits placed by the Legislature on county power, *Hollins*, 620 S.W.3d at 405-06, and the Constitution specifies that the Attorney General shall represent the State in this Court, Tex. Const. art. IV, § 22. Thus, though the answer to the Fifth Circuit's specific question about whether the Attorney General is empowered to use this particular means of enforcing the challenged statute is "no," the answer to its larger question of whether the Attorney General has *any* means to enforce the statute is "yes"—albeit through extraordinary remedies that have rarely been invoked and that Plaintiffs have made no showing would be invoked here.

ARGUMENT

I. Volunteer Deputy Registrars Are Not "Public Officials" Subject to Prosecution Under Texas Election Code Section 276.016.

The first question certified to the Court is whether VDRs are "public officials" who can be prosecuted for violating the anti-solicitation provision in section 276.016. *Longoria*, 2022 WL 832239, at *6. They are not. While VDRs fill a useful role in the voter-registration process, they are not employed by the State or any political subdivision, they do not exercise any sovereign power or authority, their appointment is mechanical, and their duties are not discretionary. They lack the hallmarks of a true

"public official" who acts on behalf of the government and in whom the public has a significant interest. The Court should therefore answer the first certified question in the negative.

A. VDRs are neither public employees nor imbued with the power to make discretionary decisions on behalf of the public.

Across legal contexts, "the definition of 'public official' . . . is keyed" to (among other things) how the official is selected, "the [a]pparent importance of the official position," and "the [p]ublic interest in such position." *Foster v. Laredo Newspapers, Inc.*, 541 S.W.2d 809, 814 (Tex. 1976) (examining the definition in a defamation context); *see also, e.g.*, *Thompson v. City of Austin*, 979 S.W.2d 676, 684-85 (Tex. App.—Austin 1998, no pet.) (Texas Commission on Human Rights Act). While their tasks are important and their service is honorable, VDRs lack the indicia of public officials: as currently designed by the Legislature, they are selected based on statutory criteria, typically serve without pay, and have no discretion in how they perform their assigned duties.

The Legislature created the VDR position "[t]o encourage voter registration." Tex. Elec. Code § 13.031(a). As provided by statute, a "registrar shall appoint as deputy registrars persons who volunteer to serve," *id.*, and they typically do not receive any form of compensation for that service, *id.* § 13.037. Once appointed and trained, a VDR may distribute voter-registration forms and receive forms in person within the county of his appointment.[7] *Id.* § 13.038. Upon receipt of a form, the VDR

[7] An individual who wishes only to distribute voter-registration forms does not need to be a VDR. ROA.589.

reviews it for completeness in the applicant's presence and returns it if incomplete. *Id.* § 13.039. The VDR also prepares a receipt for the applicant. *Id.* § 13.040. The VDR must then deliver the completed forms to the registrar in person or via another designated volunteer deputy "not later than 5 p.m. of the fifth day after the date the application" is received. *Id.* § 13.042. Failure to submit the registration to the registrar on time, whether inadvertent or intentional, is a crime. *Id.* § 13.043. Nevertheless, it is up to the registrar—*not* the VDR—to approve the voter-registration application. *Id.* § 13.072. In short, a VDR hands out, receives, and delivers voter-registration forms according to delineated rules. ROA.585-87.

To be eligible to serve as a VDR, a person must (1) be 18 years of age or older; (2) not have been finally convicted of a felony or, if convicted, have been fully discharged, pardoned, or otherwise released from the disability to vote; (3) meet the requirements to register to vote (even if not registered); and (4) not have been finally convicted of the crime of fraudulent use or possession of identifying information. Tex. Elec. Code § 13.031(d). Appointment is not discretionary: if a person satisfies the eligibility requirements, "a registrar may not to refuse to appoint" him. *Id.* § 13.032.

A registrar's ability to terminate the appointment of a VDR is similarly limited, permitted only on the final conviction of certain crimes or the commission of specific misconduct—failing to adequately review applications, intentionally destroying or altering applications, or engaging in any other activity that conflicts with a VDR's responsibilities. *Id.* § 13.036.

B. The plain and common meaning of "public official" does not include VDRs.

VDRs are not "public officials" within the meaning of Texas Election Code section 276.016(a)(1), which makes it an offense for a "public official or election official," while acting in their official capacity, knowingly to "solicit[] the submission of an application to vote by mail from a person who did not request an application." The Texas Election Code provides a definition for "election official," which includes "an elections administrator" such as Longoria, but which does not include VDRs such as Morgan. *See* Tex. Elec. Code § 1.005(4-a). Neither the Code nor S.B. 1 defines "public official."

Where, as here, there is no statutory definition for a term, the Court's "primary objective" is to "give effect to the Legislature's intent." *Galbraith Eng'g Consultants, Inc. v. Pochucha*, 290 S.W.3d 863, 867 (Tex. 2009). If the words of a statute are clear and unambiguous, the Court applies them according to their plain and common meaning. *City of Rockwall v. Hughes*, 246 S.W.3d 621, 625-26 (Tex. 2008). "The plain meaning of the text is the best expression of legislative intent unless a different meaning is apparent from the context or the plain meaning leads to absurd or nonsensical results." *Molinet v. Kimbrell*, 356 S.W.3d 407, 411 (Tex. 2011).

To determine a word's "common, ordinary meaning," the Court looks to a "wide variety of sources, including dictionary definitions, treatises and commentaries, [its] own prior constructions of the word in other contexts, the use and definitions of the word in other statutes and ordinances, and the use of the words in [the] rules of evidence and procedure." *Jaster v. Comet II Constr., Inc.*, 438 S.W.3d 556,

563 (Tex. 2014) (plurality op.); *see also id.* at 563 n.10 (citing cases using different sources to interpret statutory text); *Morton v. Nguyen*, 412 S.W.3d 506, 510 (Tex. 2013) (citing treatises, dictionaries, and precedent); *Evanston Ins. Co. v. Legacy of Life, Inc.*, 370 S.W.3d 377, 383 (Tex. 2012) (citing precedent, other statutes, and treatises). Here, these sources demonstrate that the common understanding of "public official" does not include a volunteer whose service *must* be accepted and who lacks any discretion in the performance of that service.

1. Dictionary definitions

When defining an undefined term, the Court "typically look[s] first to dictionary definitions and then consider[s] the term's usage in other statutes, court decisions, and similar authorities." *Powell v. City of Houston*, 628 S.W.3d 838, 844 (Tex. 2021); *see also, e.g.*, *In re State*, 602 S.W.3d 549, 569 n.13 (Tex. 2020) (orig. proceeding) (Bland, J. concurring) ("The Court analyzes undefined words by reviewing dictionary definitions.") (citing *Jaster*, 438 S.W.3d at 563); *City of Fort Worth v. Rylie*, 602 S.W.3d 459, 467 n.19 (Tex. 2020) ("When, as here, a statute does not define a term, we typically apply the term's common, ordinary meaning, derived first from applicable dictionary definitions, unless a contrary meaning is apparent from the statute's language."). Here, commonly employed dictionaries reflect that the term "official" is typically used to refer to someone with either discretionary duties or a supervisory role. VDRs have neither.

Black's Law Dictionary defines "official" as "[s]omeone who holds or is invested with a public office; a person elected or appointed to carry out some portion of a government's sovereign powers." *Official*, Black's Law Dictionary (11th ed.

2019). And a "public office" is a "position whose occupant has legal authority to exercise a government's sovereign powers for a fixed period." *Public Office*, Black's Law Dictionary (11th ed. 2019). This understanding is further confirmed by other commonly used dictionaries, which define an "official" as someone who is "authorized to act for a government," albeit one who works "in administering or directing in a subordinate capacity" to an officer. *Official*, Webster's Third New International Dictionary (2002 ed.) (Webster's Third); *Official*, The American Heritage Dictionary of the English Language (5th ed. 2016) (defining "official" as "[o]ne who holds an office or position, especially one who acts in a subordinate capacity"). These dictionary definitions suggest that a public official is someone who exercises the government's sovereign powers, albeit in a much narrower sphere than the officer who appointed him.

The actions of a VDR do not rise to the level of exercising a sovereign power. A voter registrar, for example, exercises a sovereign power by acting on completed voter-registration applications and deciding whether the applicant will be eligible to vote. Tex. Elec. Code § 13.072. But accepting voter-registration applications, determining whether they are complete, and delivering them are merely the mechanics leading up to the exercise of sovereign power. Indeed, given that a voter may also submit a voter-registration application through the mail or by fax, *id.* § 13.002(a), the action of accepting and delivering applications to the registrar is not a sovereign function. Dictionary definitions do not support holding that VDRs are "public officials."

2. Context of S.B. 1

This understanding of "official" as excluding individuals—like VDRs—whose duties involve solely the performance of ministerial tasks is further confirmed by other ways in which S.B. 1 sought to preserve voters' ability to decide whether to apply to vote by mail. This Court has repeatedly stated that it "cannot construe the Legislature's chosen words and phrases in isolation" but must instead "consider the context and framework of the entire statute and construe it as a whole." *Worsdale v. City of Killeen*, 578 S.W.3d 57, 69 (Tex. 2019) (quoting *Cadena Com. USA Corp. v. Tex. Alcoholic Beverage Comm'n*, 518 S.W.3d 318, 326 (Tex. 2017)).

Both the historical context and structure of section 276.016's ban clearly involve the exercise of a sovereign power. As discussed above (at 3-4), this provision was enacted following efforts by Harris County officials to blanket the county's four million registered voters with unsolicited applications to vote by mail, which resulted in this Court's decision in *Hollins*. As Longoria's predecessor in that case explained, the only way that process could have worked was to have the applications "each have a bar code unique to each registered voter," so to "enable [the county's staff] to avoid having to manually input all of the voter's personal information, as must occur if the voter returns any other application." Resp.'s Br. on the Merits, *State v. Hollins*, No. 20-0729, 2020 WL 6037681, at *18-19. Each section of 276.016(a)'s ban is aimed at preventing such behavior. In addition to banning solicitation by public officials, the provision also bans the distribution of such applications, Tex. Elec. Code § 276.016(a)(2), and the expenditure public funds for the distribution of unsolicited applications, *id.* § 276.016(a)(3). VDRs were not involved in the situation that led to

the passage of section 276.016, and they cannot perform the sovereign functions at which it was aimed. Though such historical context can never trump text, it does help to understand the meaning of undefined terms. Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 33 (2012).[8]

Perhaps even more telling is the second section Plaintiffs challenge: section 31.129 applies its civil penalties only to an "election official" who "is employed by or is an officer of this state or a political subdivision of this state." Though this phrase uses the adjective "election" rather than "public," it does make clear that the Legislature is using the noun "official" within its ordinary meaning—namely, as someone who serves a public role as a subordinate to an officer. *Official*, Webster's Third, *supra*; *Official*, American Heritage, *supra*. Moreover, it would be distinctly odd for the Legislature responding to the actions of county officers and employees to subject VDRs, who typically volunteer their time without compensation, to a state jail felony, Tex. Elec. Code § 276.016(b), but exclude them from a less restrictive civil-penalties regime, *id.* § 31.129. Again, such a quirk would not justify a departure from the plain language of the statute if that is what the Legislature required, but it does suggest that is not what the Legislature required in the first place. Scalia, *supra*, at 65.

[8] A number of the statutory safe harbors also do not make sense outside the traditional meaning of "official." For example, volunteers typically do not control the content of state websites and thus would not have the authority in their official capacity to "provid[e] access to an application to vote by mail from a publicly accessible Internet website." Tex. Elec. Code § 276.016(c).

3. Other Texas statutes

a. This understanding of official to exclude VDRs is consistent with several other Texas statutes, which do define "public official." For example, in a chapter dealing with nepotism, the Government Code defines "public official" "[i]n this chapter" as

> (A) an officer of this state or of a district, county, municipality, precinct, school district, or other political subdivision of this state;
>
> (B) an officer or member of a board of this state or of a district, county, municipality, school district, or other political subdivision of this state; or
>
> (C) a judge of a court created by or under a statute of this state.

Tex. Gov't Code § 573.001(3). A VDR is not an "officer" or "member" of any political subdivision or board, nor is a VDR a judge. So under this definition, VDRs would fall outside of section 276.016.

The Fifth Circuit and district court pointed to Texas Government Code section 22.304(a), which defines "public official" "[in] this section" as "any person elected, selected, appointed, employed, or otherwise designated as an officer, employee, or agent of this state, a government agency, a political subdivision, or any other public body established by state law." *Longoria*, 2022 WL 832239, at *4; ROA.603-04. The definition is limited to that section of the Government Code, and it is also not clear that VDRs fall within it. Although one could argue that a VDR is "appointed" as an "agent" of a "political subdivision," the appointment of a VDR is mandatory, not discretionary. If an eligible person applies, the registrar must "appoint" him. Tex. Elec. Code § 13.032; *Longoria*, 2022 WL 832239, at *5 (noting "the

process of becoming a VDR is mechanical in nature"). VDRs are not chosen or selected by an authority within the political subdivision.

Further, as the Fifth Circuit noted, it is also questionable whether VDRs can be considered "agents" of the political subdivision. *Longoria*, 2022 WL 832239, at *5. Their role is limited to accepting voter-registration applications, reviewing them for completion, and delivering them to the registrar. Tex. Elec. Code §§ 13.038, .039, .042. In this regard, they are just as much agents of the voters—delivering their voter-registration forms—as they are of the political subdivision. Given the limited scope of Texas Government Code section 22.304 and the rule of lenity, *see infra* at p. 26, there is no reason for this Court to expand the reach of section 22.304 to make VDRs "public officials" under section 276.016.[9]

b. Other statutes that use but do not define the term "public official" also indicate that it does not include VDRs. For example, the composition of a county emergency board includes the county judge, sheriff, and tax assessor-collector. Tex. Gov't Code § 431.072. But if one of those officers is unable to act, the Governor designates another "public official" to serve. *Id.* It would make little sense to include all VDRs—whose only qualifications are adulthood, eligibility to vote, and lack of certain felony convictions—as potential candidates for service on county emergency boards. Similarly, section 1704.304(b) of the Occupations Code prohibits a "public official" from recommending "a particular bail bond surety" to another person.

[9] Similar reasoning would apply to the definition of "public official" found in the Texas Civil Practice and Remedies Code section 110.001(a)(4).

There is no reason to apply that provision to VDRs. And under Texas Civil Practice and Remedies Code section 110.0031, a "public official" may not issue an order closing a place of worship. No one would suggest a VDR had that authority in the first place. VDRs therefore do not naturally fall within the term "public official" as it is used throughout Texas law.

c. Narrowing the focus only to the Election Code does not change that result. Texas Election Code section 1.003(a-1) charges "[e]lection officials and other public officials" with "strictly construing the provisions of this code to effect the intent of the legislature." But VDRs are not charged with construing *any* portion of the Election Code—only with accepting registration forms, reviewing them for completeness, and delivering them on time to the registrar. *Supra* at pp. 14-15. Likewise, and in the same chapter as section 276.016, section 276.019 provides that "[a] public official or election official may not create, alter, modify, waive, or suspend any election standard, practice, or procedure mandated by law or rule in a manner not expressly authorized by this code." Again, nothing about the duties given to VDRs suggests that they could modify election law by way of law or rule. They check voter-registration forms for completion and hand them in to the registrar. Texas statutes do not make them "public officials."

4. This Court's precedent

This Court's precedent across various contexts also strongly suggests that VDRs are not "public officials." Two examples demonstrate the bitter and the sweet that come with holding a position of public authority and trust: defamation liability and sovereign immunity. The first recognizes that to have a functional democracy,

citizens *must* be able to criticize those who exercise power on their behalf without fear of legal reprisal. *Bentley v. Buton*, 94 S.W.3d 561, 590 (Tex. 2002) (discussing *New York Times v. Sullivan*, 376 U.S. 254 (1964)). The second, however, recognizes that for government to function, a public official cannot be haled into court any time a citizen is displeased with that official's actions. In both instances, courts hold that status as a public official depends on the official's ability to exercise discretion in carrying out the will of the sovereign.

First, courts routinely consider who is a "public official" in the context of defamation, where a plaintiff must prove actual malice if the person defamed is a public official. *Greer v. Abraham*, 489 S.W.3d 440, 443 (Tex. 2016). This Court has previously explained that the "public official" designation applies "(w)here a position in government has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees." *Foster*, 541 S.W.2d at 812-13 (quoting *Rosenblatt v. Baer*, 383 U.S. 75, 86 (1966)). This adopts the United States Supreme Court's view that "the 'public official' designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs." *Rosenblatt*, 383 U.S. at 85.

While their service is undoubtedly valuable, there is no "independent public interest" in the qualifications and performance of VDRs. Indeed, their qualifications are set by statute, Tex. Elec. Code § 13.031(d); the registrar may not refuse to appoint them if they are qualified, *id.* § 13.032; and they are not answerable to anyone

except upon the commission of certain specified misdeeds, *id.* § 13.036. Nor do VDRs have "substantial responsibility for or control over the conduct of government affairs." Their duties are mechanical and, indeed, a voter can register without using a VDR by submitting his application via mail or fax. *Id.* § 13.002(a). VDRs thus are not public officials as used in the context of defamation.

Second, VDR's are also not public officials as defined by this Court's official-immunity jurisprudence. Public officials are entitled to official immunity for their discretionary actions performed in good faith. *Ballantyne v. Champion Builders, Inc.*, 144 S.W.3d 417, 422 (Tex. 2004). The purpose of that immunity is to enable public officials "to act in the public interest with confidence and without the hesitation that could arise from having their judgment continually questioned by extended litigation." *Id.* at 424. Thus, public officials "who must exercise judgment and discretion in their jobs" are protected from lawsuits to second-guess their decisions. *Id.* (citing *Kassen v. Hatley*, 887 S.W.2d 4, 8 (Tex. 1994)).

Under this reasoning, VDRs are not public officials entitled to official immunity. They do not exercise discretion but perform the ministerial acts of (1) ensuring a voter-registration application is complete, and (2) delivering that application to the registrar within five days of receiving it. Tex. Elec. Code §§ 13.038, .039, .042. They do not exercise the type of judgment that requires protection from judicial second-guessing and are therefore not public officials for immunity purposes.[10]

[10] As District Attorney Dick's brief notes, there is additional precedent construing "county officers" under article V, section 24 of the Texas Constitution that is

5. Court of Criminal Appeals precedent

This understanding is further confirmed by the rules of construction that the Court of Criminal Appeals uses when construing penal statutes such as section 276.016. In particular, because section 276.016 is a penal statute, the rule of lenity applies. *State v. Johnson*, 219 S.W.3d 386, 388 (Tex. Crim. App. 2007). Consequently, if there is "insoluble doubt" about the meaning of section 276.016, that doubt must be resolved in favor of the (potential) accused. *Diruzzo v. State*, 581 S.W.3d 788, 802 n.22 (Tex. Crim. App. 2019); *see also Murray v. State*, 2 S.W. 757, 761 (Tex. Ct. App. 1886) ("[B]efore a man can be punished, his case must be plainly and unmistakably within the statute, and, if there be any fair doubt whether the statute embraces it, that doubt is to be resolved in favor of the accused."). As a result, to the extent that there is any doubt about whether VDRs are "public officials," it should be resolved against finding them to be public officials subject to prosecution under section 276.016.

* * *

In sum, VDRs are not public officials: under the plain and common meaning of the term as used in commonly available dictionaries, any statutory definition of "public official" in Texas law of which the Attorney General is aware, or this

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similar. *Aldine Indep. Sch. Dist. v. Standley*, 280 S.W.2d 578, 583 (Tex. 1955) (quoting *Dunbar v. Brazoria County*, 224 S.W.2d 738, 740-41 (Tex. App.—Galveston 1949, writ ref'd)) ("[T]he determining factor which distinguishes a public officer from an employee is whether any sovereign function of the government is conferred upon the individual to be exercised by him for the benefit of the public largely independent of the control of others.").

Court's precedent. They do not exercise discretion or have substantial control over government affairs. Instead, they provide a valuable, but ultimately ministerial task—handing out, accepting, reviewing for completeness, and delivering voter-registration forms. The Court should answer the first certified question in the negative.

II. "Solicits" Requires Importuning or Strongly Urging an Individual to Submit an Application and Does Not Include Merely Providing Information.

On this record, the Court can only partially answer the second question certified by the Fifth Circuit—which concerns the term "solicits" in section 276.016(a)(1) as applied to Plaintiffs' proposed speech. *Longoria*, 2022 WL 832239, at *6. Plaintiffs have not brought a vagueness or overbreadth challenge, but instead a facial and as-applied challenge based on allegations of viewpoint discrimination. ROA.47-50. As a result, a definitive answer requires the Court to look at the speech Plaintiffs wish to make. Under the proper view of "solicits," many of Plaintiffs' statements are permissible. Some, however, are too vague to permit a definitive ruling. The Court should therefore provide a rule that asks whether an official's statement importunes a voter to fill out an application he did not request or merely provides information about the availability of such an application.

A. "Solicits" generally requires someone to ask, request, or petition for something.

As with the term "public official," section 276.016 does not define the word "solicits." Tex. Elec. Code § 276.016(a)(1). Thus, the goal of the Court is to determine the plain and common meaning of the word. *City of Rockwall*, 246 S.W.3d at 625-26; *see also supra* at pp. 16-17. And as with the earlier analysis, because this is a

penal statute, the rule of lenity applies, and any doubts are resolved in favor of the accused. *Diruzzo*, 581 S.W.3d at 802 n.22.

1. Black's Law Dictionary defines "solicitation" as "[t]he act or an instance of requesting or seeking to obtain something; a request or petition." *Solicitation*, Black's Law Dictionary (11th ed. 2019). It further defines the term as the "criminal offense of urging, advising, commanding, or otherwise inciting another to commit a crime." *Id.* Multiple editions of Webster's are similar: to "entreat, importune," "to strongly urge (as one's cause or point): insist upon," to "demand as a requisite." *Solicit*, Webster's Third, *supra*; *see also Solicit*, Merriam-Webster's Collegiate Dictionary (11th ed. 2003) (defining "solicit" as to "make petition," "entreat," "approach with a request or plea," and "to urge . . . strongly"); *Solicit*, Webster's New World College Dictionary (5th ed. 2016) ("to ask or seek earnestly or pleadingly; appeal to or for"). American Heritage is the same: "[t]o petition persistently; importune." *Solicit*, American Heritage, *supra*. Thus, dictionary definitions demonstrate that "solicits" requires more than providing information but instead requires a specific request or a strong urging.

2. This definition of "solicit" is consistent with the statutory context: as discussed above (at 3-4), section 276.016 was passed after Harris County announced a plan to mass-mail applications to vote by mail to all registered voters regardless of whether they were eligible to vote by mail. This can cause confusion, ROA.561, because receipt of such an official mailer strongly suggests that voters who are not eligible for mail-in voting should nonetheless fill out the application and return it, committing a felony in the process. ROA.561. Indeed, Longoria seems to have admitted

as much in her testimony. ROA.804 (reflecting that she had received questions from voters "[i]f they got an application from us, you know, was it good"). Though "solicitation" is not limited to this type of distribution, which is separately prohibited in section 276.016(a)(2), what constitutes solicitation is informed by neighboring provisions. *Greater Hous. P'ship v. Paxton*, 468 S.W.3d 51, 61 (Tex. 2015).

3. This definition is consistent with the few instances when solicitation is defined in Texas law. Although many Texas statutes use the term "solicits," very few define it. *See, e.g.*, Tex. Gov't Code § 432.127 (making it an offense to "solicit" someone to desert, mutiny, or commit an act of sedition); Tex. Health & Safety Code § 173.007 (making it an offense to "solicit" tissue from a fetus gestated solely for research purposes); Tex. Loc. Gov't Code § 150.002 (prohibiting employees of police and fire departments from "solicit[ing] votes for a candidate" while in uniform); Tex. Penal Code § 36.08 (referring to a public servant soliciting a gift from a regulated person).

The rare instances when the Legislature *does* define "solicitation" strongly support that Plaintiffs are wrong to suggest that the mere provision of factual information that could implicitly be understood as encouragement is unlawful. For example, Texas Penal Code section 15.03(a) is titled "Criminal Solicitation" and describes the offense as "request[ing], command[ing], or attempt[ing] to induce another" to commit a crime. "Solicit" as used in a child-labor statute includes "request[ing] donations." Tex. Lab. Code § 51.0145(a)(2)(B). In neither of these instances did the Legislature define "solicitation" so broadly as to include any form of mild "encouragement."

To the contrary, in multiple instances, the Legislature has used both "solicits" and "encourages" in the same statute. *See, e.g.*, Tex. Educ. Code § 37.0152(a)(2); Tex. Gov't Code § 305.004; Tex. Penal Code §§ 7.02(a)(2), 71.022(a). The fact that the Legislature listed *both* terms implies that they mean separate things. *See Greater Hous. P'ship*, 468 S.W.3d at 61 ("We rely on this principle to avoid ascribing to one word a meaning so broad that it is incommensurate with the statutory context."). That the Legislature included solicitation but *not* encouragement in section 276.016(a)(1) is presumptively intentional. *E.g.*, *Tex. Mut. Ins. Co. v. Ruttiger*, 381 S.W.3d 430, 452 (Tex. 2012) ("[T]his Court presumes the Legislature deliberately and purposefully selects words and phrases it enacts, as well as deliberately and purposefully omits words and phrases it does not enact.").

4. Precedent similarly follows the pattern of defining "solicits" as requiring more than impliedly encouraging through the provision of factual information but instead strongly urging, importuning, or ordering the voter to fill out a form he had not requested. The Court of Criminal Appeals has explained that "[t]he word 'solicit' is one of common usage and its meaning is simple." *Coutlakis v. State*, 268 S.W.2d 192, 198 (Tex. Crim. App. 1954) (denying motion for reh'g). And, as used with respect to a conviction concerning soliciting union membership, that Court defined it as "to entice, to request, to incite." *Id.*

Lower courts have also followed Black's Law Dictionary when describing the term as "impl[ying] personal petition and importunity addressed to a particular individual to do some particular thing." *Steger & Bizzell, Inc*, 811 S.W.2d at 693 (emphasis omitted); *see also, e.g.*, *Smith v. State*, 959 S.W.2d 1, 21-22 (Tex. App.—Waco

1997, pet. ref'd) (relying on Black's and concluding "solicits" includes actions the parties are justified in "construing into a serious request"). Others turn to Webster's but have come to the same conclusion: the commonly understood meaning of "solicit" includes "more than merely to ask"—let alone impliedly encourage through the provision of factual information. *In re Athans*, 478 S.W.3d 128, 134-35 (Tex. App—Houston [14th Dist.] 2015, orig. proceeding); *see also, e.g.*, *Ex parte Victorick*, 453 S.W.3d 5, 15 (Tex. App.—Beaumont 2014, pet. ref'd) (Webster's Third New International Dictionary: "to approach with a request or plea," "to endeavor to obtain by asking or pleading").

* * *

Taking all of the sources into account, "solicits" generally requires importuning the subject of the solicitation to do something they might not otherwise do. Thus, in context here, a public official or an election official may provide factual information regarding the availability of an application to vote by mail, but he may not direct or strongly urge a voter to submit a mail-in ballot application who has not requested an application.

B. Many of Plaintiffs statements are permissible under the common definition of "solicits."

Using the common definition of "solicits" described above as well as the safe-harbor provision in Texas Election Code section 276.016(e)(1) allows the Court to resolve most of the Fifth Circuit's specific questions, but not its general inquiry. In particular, the record does *not* permit the Court to fully assess all of Plaintiffs' proposed communications as it does not adequately describe all of the speech Plaintiffs

wish to make. The Court can, however, respond to the Fifth Circuit's more specific questions. *First*, section 276.016 is not limited to soliciting unlawful applications. Its text applies to all solicitation—regardless of the legality of any subsequently submitted application. *Second*, section 276.016 does not bar the provision of factual information regarding the option of mail-in voting, but specifically permits the provision of such information. Tex. Elec. Code § 276.016(e)(1).

1. "Solicits" is not limited to asking individuals who are ineligible for mail-in voting to submit applications.

In addition to asking generally whether the speech Plaintiffs wish to make is "solicitation" for purposes of prosecution under section 276.016(a)(1), the Fifth Circuit also asked some narrower questions to assist in its analysis. *Longoria*, 2022 WL 832239, at *6. The first sub-question it asked is whether "solicits" is "narrowly limited to seeking application for violative mail-in ballots." *Id.* As a matter of plain text, the answer is "no": section 276.016's anti-solicitation provision is not limited to soliciting applications only for "violative mail-in ballots," that is, mail-in ballots from individuals who are ineligible for mail-in voting.[11]

Section 276.016 speaks generally when it says from whom an official may not solicit the submission of a mail-in ballot application: "a person who did not request

[11] Texas offers the option of voting by mail only to (1) those absent from their county of residence on election day and during early voting, (2) those who have a sickness or physical condition that prevents them from voting in person on election day, (3) those over 65 on election day, (4) those confined in jail under certain conditions, and (5) certain victims of family violence and sexual assault. Tex. Elec. Code §§ 82.001-.004, .007.

an application." Tex. Elec. Code § 276.016(a)(1). The text does not contain any other limit on who may not be solicited to submit a mail-in ballot application, and the Court should not add those words. "A court may not judicially amend a statute by adding words that are not contained in the language of the statute. Instead, it must apply the statute as written." *Odyssey 2020 Acad., Inc. v. Galveston Cent. Appraisal Dist.*, 624 S.W.3d 535, 543 (Tex. 2021) (quoting *Lippincott v. Whisenhunt*, 462 S.W.3d 507, 508 (Tex. 2015) (per curiam)).

That section 276.016(a)(1) is intended to apply broadly is also supported by the statute's historical context. As discussed above, section 276.016 is (at least in part) a response to the facts underlying *Hollins*, where officials proposed mass-mailing applications to all registered voters regardless of their eligibility to vote by mail. *Hollins*, 620 S.W.3d at 404; *see also In re Hotze*, No. 21-0893, 2022 WL 815827, at *1 (Tex. Mar. 18, 2022) (orig. proceeding) (Blacklock, J., concurring in denial of mandamus) ("After the mandamus petition was filed, however, the Legislature went further than this Court could ever go toward ensuring compliance with *State v. Hollins.*"). In the presence of this history and the absence of an express textual limitation, "solicits" in section 276.016(a)(1) includes soliciting the submission of a mail-in ballot application from anyone—eligible or ineligible—who has not requested one. The answer to the Fifth Circuit's first sub-question is "no."

2. "Solicits" does not include providing factual information about mail-in voting.

The answer to the Fifth Circuit's second sub-question is that "solicits" does not "broadly cover the kinds of comments Plaintiffs stated that they wish to make: telling

those who are elderly or disabled, for example, that they have the opportunity to apply for mail-in ballots[.]" *Longoria*, 2022 WL 832239, at *6. Because the ordinary understanding of "solicits" is limited to importuning or strongly urging a voter to submit an application to vote by mail that the voter did not seek, it does *not* cover many of the statements Plaintiffs wish to make, such as informing voters of the opportunity to apply for mail-in ballots.

This answer comes both from the definitions cited above and from the safe-harbor provision in section 276.016(e)(1). Under subsection (e)(1), it is not an offense to "provide[] general information about voting by mail, the vote by mail process, or the timelines associated with voting to a person or the public." Tex. Elec. Code § 276.016(e)(1). Thus, informing voters of the opportunity to vote by mail, the application process, and the deadlines is not impermissible solicitation.

The speech Morgan wishes to make should be permissible under the anti-solicitation provision. Her questions to out-of-town individuals or her neighbor along the lines of "Have you considered voting by mail?" do not request—let alone importune—that the individual fill out a mail-in ballot application. ROA.765-66. Even her reminder to her neighbor about the deadline to apply to vote by mail is the provision of information about the timelines associated with voting. ROA.769-70.[12]

[12] It is also unlikely that Morgan would be acting in her official capacity as a VDR when calling her neighbor, as VDRs have no obligations regarding mail-in ballots—only the timely delivery of voter-registration forms. *Supra* at pp. 13-14. Being a VDR does not transform every vote-related conversation into speech in an official capacity.

Many of Longoria's statements also fall within the safe harbor. Though Longoria suggested otherwise in the trial court, a Twitter post about the ability of certain locations to accept mail-in ballot applications is merely providing information, ROA.518, which falls within the safe harbor for "general information about voting by mail," Tex. Elec. Code § 276.016(e)(1), and is also arguably covered by the specific statutory safe harbor for "providing access to an application to vote by mail from a publicly accessible Internet website," *id.* § 276.016(c). And the record reflects that many of the other communications she seeks to make—including responding to questions that she receives at various publicly speaking engagements—are also providing information. ROA.802-03 ("[W]hat are the provisions around mail ballot voting," "Who can vote by mail," "How do I get an application.").

The Legislature was clear that it is permissible for officials to provide voters with the information necessary to make an informed choice about voting by mail. Tex. Elec. Code. § 276.016(e)(1). The Court should be equally clear in holding that such speech does not fall within the scope of impermissible solicitation.

3. The Court may provide a rule for analyzing speech that is not clear in the record.

There remain, however, some allegations that are not clearly answered by the above analysis. Although neither Morgan nor Longoria expressed a desire to state anything to the effect of "I am asking you to submit a mail-in ballot application," Longoria testified more generally of "recommend[ing]" or "encouraging" individuals to vote by mail. ROA.90-92, 508, 807. It is unclear, however, exactly what

Longoria means by recommending or encouraging, as that can include a wide spectrum of conduct, some, but not all, of which may constitute soliciting.

Both Texas law and common usage recognize that "encourage" and "solicit" are not synonymous, but there may be some overlap. As discussed above, Texas Penal Code section 7.02(a)(2) lists "solicits" and "encourages" separately, but they are both instances when one may be culpable for the conduct of another. *See also* Tex. Penal Code § 71.022. Dictionary definitions similarly reveal that the term "encourage" can mean either "to give help or patronage to" or "to spur on." *Encourage*, Webster's Third, *supra*; *Encourage*, American Heritage, *supra* (substantively similar). The former likely would *not* constitute solicitation—particularly if the help provided came in the form of factual information or fell within a separate safe harbor for "lawfully assisting" a voter, *see* Tex. Elec. Code § 276.016(d). The latter likely would.

Based on the above sources and purpose of the statute, the Court should adopt a rule that distinguishes whether—from the perspective of the ordinary listener—a public official is providing information about options or applying significant pressure on an individual to submit an application. For example, urging everyone at a senior center that "you should vote by mail, and I've brought some applications for you to fill out while I wait" would be impermissible solicitation, but explaining the benefits of mail-in voting without pressuring anyone to fill out an application would not. Drawing this line may not resolve all of the questions Longoria has regarding her

speech, but it prevents the Court from prematurely resolving the question based on the record before it.[13]

III. The Attorney General Cannot Seek Civil Penalties Under Texas Election Code Section 31.129.

The last question certified by the Fifth Circuit is whether the Attorney General can bring a suit for civil penalties under Texas Election Code section 31.129. *Longoria*, 2022 WL 832239, at *7. That answer will inform but not determine whether Plaintiffs' suit against the Attorney General is barred by sovereign immunity, as he must have "some connection" to enforcement in order to avoid dismissal under *Ex parte Young*.[14] Because the Legislature did not explicitly grant the Attorney General the authority to seek these particular penalties on behalf of the State, the answer to the third certified question is "no"—though that does not mean that the Attorney General entirely lacks means to enforce section 276.016.

[13] As a practical matter, Longoria's claims will also soon be moot. This Court has set the case for argument on May 11, two days before applications to vote by mail are due for the May 2022 primary runoff—the last election before her resignation will be effective. *Compare* KHOU 11, *supra* n.4, *with* Texas Secretary of State, *Important Election Dates 2021-2022*, https://www.sos.state.tx.us/elections/voter/important-election-dates.shtml (visited April 5, 2022).

[14] *Ex parte Young* also requires Plaintiffs to show that the Attorney General has demonstrated the willingness to exercise any enforcement authority he may possess. *City of Austin v. Paxton*, 943 F.3d 993, 1001-02 (5th Cir. 2019). They have not done so; their allegations show merely that Paxton "has chosen to intervene to defend *different* statutes under *different* circumstances," which is insufficient under federal law. *Id.* at 1002.

A. Under the Texas Constitution, the Attorney General requires legislative authorization to represent the State in a state trial court.

The Texas Constitution generally splits the duty of representing the State between the Attorney General and the district and county attorneys based on the court in which an action will be pursued. Tex. Const. art. IV, § 22; *id.* art. V, § 21. District and county attorneys "shall represent the State in all cases in the District and inferior courts in their respective counties." *Id.* art. V, § 21. The Attorney General's constitutional duties include representing the State in this Court and in certain trial-court actions involving corporations and charters. *Id.* art. IV, § 22. He may also "perform such other duties as may be required by law." *Id.*

Under this Court's jurisprudence, the "other duties" clause permits the Legislature to assign other duties to the Attorney General that may include representing the State in trial court, notwithstanding the general assignment of that duty to the district and county attorneys. *El Paso Elec. Co. v. Tex. Dep't of Ins.*, 937 S.W.2d 432, 438 (Tex. 1996); *see also, e.g.*, *Brady v. Brooks*, 89 S.W. 1052, 1055 (Tex. 1905) (noting the district and county attorneys' constitutional duties do not deprive the Legislature of "the authority to empower the Attorney General to bring suits on behalf of the state"). Giving the example of Texas Civil Practice and Remedies Code section 101.103, the Court has explained that "[w]hile there is no general statute authorizing the Attorney General to represent the State and its agencies in district court, the

Legislature has provided for such representation in particular types of cases." *El Paso Elec. Co.*, 937 S.W.2d at 438-39.[15]

Under this precedent, when the Legislature wants the Attorney General to be able bring a cause of action on behalf of the State, it typically must explicitly authorize the Attorney General to do so. "[I]t is clear that when the Legislature creates a new or additional cause of action in favor of the State it *may* also constitutionally authorize the Attorney General to prosecute such cause of action in both the trial and appellate courts of the State." *Smith*, 328 S.W.2d at 295 (emphasis added). But this Court has generally required a clear statement that "expressly authorized the Attorney General, as well as any District or County Attorney, to institute and prosecute the statutory suit thus created." *Id.* at 294-95; *Brady*, 89 S.W. at 1053 (examining a statute stating that "[t]he Attorney General is authorized and required upon request by the Comptroller, to bring suit in the name of the state").

Because "magic words" rules are disfavored, it may be possible that the overall statutory context will permit the Attorney General to bring suit without express authorization. For example, in an unrelated context, this Court has found that while sovereign immunity can typically be waived only by extremely clear language, it can also be waived "on rare occasions" based on a larger statutory framework

[15] The Texas Court of Criminal Appeals recently rejected this Court's reasoning on this important constitutional question. *Stephens*, 2021 WL 5917198, at *8 (stating that this Court "erroneously" interpreted the "other duties" clause). Because that holding is limited to criminal proceedings, it does not impact the application of this Court's precedent on civil penalties such as those at issue here.

demonstrating that "the Legislature has clearly and unambiguously waived sovereign immunity." *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 697 (Tex. 2003). But the Court made clear that the standard for showing such a waiver absent "magic words" is quite high.

The Attorney General is unaware of any cases where this Court has explained when (if ever) statutory context can authorize the Attorney General to bring suit in state trial court absent an express grant of authority. But the Austin Court of Appeals has applied not dissimilar factors to those set out in *Taylor* to find authorization for the Attorney General to pursue a cause of action for civil penalties under section 242.065 of the Texas Health and Safety Code. *State v. Evangelical Lutheran Good Samaritan Soc'y*, 981 S.W.2d 509, 511 (Tex. App.—Austin 1998, no pet.). In particular, the court found authorization from the overall role of the Attorney General in the statutory scheme as well as a provision that required the Attorney General "to cooperate in any legal proceeding requested by" the defendant department. *Id.* at 511-14 (citing Tex. Health & Safety Code § 242.073) (emphasis omitted).

Absent such clear evidence of legislative authorization, this Court has typically found that such authorization was lacking. For example, in *Day Land & Cattle Co. v. State*, neither the Attorney General nor the district attorney had authority to bring suit for the cancellation of land patents at the time the Attorney General filed such a suit. 4 S.W. 865, 867 (Tex. 1887). The Court stated that "it would be difficult to hold that either of them had the implied power resulting from the general grants of power or imposition of duties" and that "no power ought to be exercised for which warrant is not there found." *Id.* The Legislature, however, subsequently passed a law

retroactively approving such suits by the Attorney General, and the Court concluded that "the suit must stand as though the attorney general and district attorney had express authority to institute and maintain it." *Id.* at 867-68.

More recently, the San Antonio Civil Court of Appeals considered a statute that did not explicitly give the Attorney General the authority to seek removal of a county officer in a nepotism case. *State ex rel. Downs v. Harney*, 164 S.W.2d 55, 57-58 (Tex. Civ. App.—San Antonio 1942, writ ref'd w.o.m.). It concluded that, because the statute did not mention that the Attorney General could bring such actions, he was prohibited from doing so—even though he was permitted to seek similar relief in quo warranto proceedings. *Id.* at 58. This Court later approved that decision, stating that "had such holding been incorrect we could not have failed to have granted the writ on such an important law question." *Garcia v. Laughlin*, 285 S.W.2d 191, 194 (Tex. 1955).

B. The Legislature has not clearly authorized the Attorney General to represent the State in seeking civil penalties under section 31.129 in trial courts.

While the Attorney General is involved in various capacities in Texas's elections, the Legislature has not clearly authorized him to bring a claim in a trial court for civil penalties under section 31.129. Section 31.129 itself is silent on who may enforce its substantive requirements. More generally, the Election Code "delineates between the authority of the Secretary of State and local officials" and leaves relatively little role for the Attorney General in directly enforcing its terms. *Tex. Democratic Party*, 978 F.3d at 179. Although the Attorney General frequently represents

the Secretary of State in election-related litigation, and the Secretary can refer a violation to the Attorney General for enforcement, Tex. Elec. Code § 31.005(c), there is no provision in the Election Code similar to that in *Evangelical Lutheran*, which requires the Secretary "work in close cooperation" with the Attorney General "throughout any legal proceedings requested by the department." Tex. Health & Safety Code § 242.073(a); *see also Evangelical Lutheran*, 981 S.W.2d at 512 (discussing Tex. Health & Safety Code §§ 242.073, .320).

This silence is telling as the Legislature has demonstrated that it is well aware of how to assign a duty to the Attorney General. Indeed, elsewhere in S.B. 1 itself, the Legislature assigned the Attorney General the duty to collect a different civil penalty. *See* Tex. Elec. Code § 18.065(f). That language would have been unnecessary if the Attorney General had the inherent or implicit authority to bring suit on behalf of the State. Because section 31.129 does not expressly permit the Attorney General to sue for civil penalties, it is unlikely that this is an "other duty" given to the Attorney General by the Legislature. The answer to the third certified question, therefore, is "no"—at least so far as it applies to initiating a claim for civil penalties under section 31.129 in trial court.

C. The Attorney General retains authority to enforce Texas election laws by other means and in other circumstances.

The lack of authority to bring civil penalties under section 31.129 does not, however, mean the Attorney General is without any authority to enforce provisions of the Election Code. In specifying the remedies available for violation of the anti-solicitation provision, S.B. 1 preserved pre-existing remedies not once but twice. *See* S.B.

1 § 7.04 (codified at Tex. Elec. Code § 276.016(f) (noting that the criminal remedy is "cumulative" and that a violation "is subject to injunctive relief or mandamus as provided by this code")); *id.* § 8.01 (codified at Tex. Elec. Code § 31.130 (specifying that an official-capacity action "including an action for a writ of mandamus" be brought against the officer in his official capacity)). This preservation of remedies was made in the context of this Court's decision in *Hollins*, which allowed the Attorney General to use an *ultra vires* action to rein in election officials who intended to violate the law. *See generally* 620 S.W.3d 400. Moreover, the Election Code has long provided for proceedings to "compel the performance of any duty imposed by law in connection with the holding of an election or a political party convention" directly in this Court under Texas Election Code section 273.061(a). By preserving that as an available remedy, the Legislature presumptively intended the Attorney General to retain some enforcement role—albeit in a highly discretionary context—because the Attorney General is the government actor empowered to represent the State in this Court. Tex. Const. art. IV, § 22.[16]

With respect to criminal violations, the Attorney General retains the authority to investigate violations of election laws, Tex. Elec. Code §§ 31.006(b), 273.001(a), and may assist a local prosecutor or be deputized by one to bring criminal charges,

[16] That authority would also presumptively require the Attorney General to represent the State on appeal from a suit brought by a county or district attorney for civil penalties under section 31.129. But the Attorney General does not understand that to be the thrust of the Fifth Circuit's question since it would not allow him to *initiate* enforcement actions as required under *Ex parte Young. See, e.g.*, *Tex. All. for Retired Ams. v. Scott*, 28 F.4th 669 (5th Cir. 2022).

Stephens, 2021 WL 5917198, at *10. He can also seek an injunction or mandamus at the request of the Secretary of State if a person refuses to abide by an order of the Secretary and is impeding the right to vote. Tex. Elec. Code § 31.005. And there remain specific provisions of the Election Code that identify the Attorney General as having authority to bring suit. *E.g.*, *Id.* §§ 18.065(f), 34.005(a), 122.0911(c). But because that language is not present in section 31.129, it does not grant him the authority to seek the civil penalties that section provides.

Prayer

The Court should answer the Fifth Circuit's questions as follows:

1. No, VDRs are not "public officials" under Texas Election Code section 276.016.

2. "Solicits" requires importuning or strongly urging someone to submit an application for a mail-in ballot and does not include merely providing information.

3. No, the Attorney General is not a proper official to seek the specific penalties authorized by Texas Election Code section 31.129, but he may enforce the anti-solicitation provision through other means.

Respectfully submitted.

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Certificate of Service

On April 7, 2022, this document was served on Sean Breen, lead counsel for Appellant Shawn Dick, via sbreen@howrybreen.com, and Sean Morales-Doyle, lead counsel for Appellees, via morales-doyles@brennan.law.nyu.edu.

/s/ Lanora C. Pettit
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Microsoft Word reports that this document contains 11,875 words, excluding exempted text.

/s/ Lanora C. Pettit
Lanora C. Pettit

No. 22-0224

In the Supreme Court of Texas

WARREN K. PAXTON, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF TEXAS; SHAWN DICK, IN HIS OFFICIAL CAPACITY AS WILLIAMSON COUNTY DISTRICT ATTORNEY,
Defendants-Appellants,

v.

ISABEL LONGORIA; CATHY MORGAN,
Plaintiffs-Appellees.

On Certified Question
from the United States Court of Appeals for the Fifth Circuit

APPENDIX

Tab A: District Court Order (Feb. 11, 2022)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

ISABEL LONGORIA, CATHY MORGAN, *Plaintiffs,*	§	
v.	§	CASE NO. SA:21-CV-1223-XR
WARREN K. PAXTON, in his official capacity as Attorney General of Texas; KIM OGG, in her official capacity as Harris County District Attorney; SHAWN DICK, in his official capacity as Williamson County District Attorney; and JOSE GARZA, in his official capacity as Travis County District Attorney, *Defendants.*	§	

ORDER

On this date, the Court considered Plaintiffs' motion for a preliminary injunction (ECF No. 7), Defendant Warren Paxton's response (ECF No. 48), Defendant Shawn Dick's response (ECF No. 47), and Plaintiffs' reply (ECF No. 50). After careful consideration, the Court issues the following order.

BACKGROUND

This action arises out of an omnibus voting bill, Senate Bill ("SB1"), the State of Texas enacted on August 31, 2021. SB1 adds two new provisions, among others, to the Texas Election Code ("Election Code"): Sections 276.016(a)(1) ("anti-solicitation provision") and 31.129 ("civil enforcement provision"). Section 276.016(a)(1) provides, "A public official or election official commits an offense if the official, while acting in an official capacity, knowingly: (1) solicits the submission of an application to vote by mail from a person who did not request an application[.]" TEX. ELEC. CODE § 276.016(a)(1). Under Section 31.129, an election official may be liable to the

State of Texas for a civil penalty if (1) the election official is employed by or is an officer of the state or a political subdivision of the state, and (2) violates a provision of the Election Code. *Id.* § 31.129(b)(1)–(2). Section 31.129 makes clear that "[a] civil penalty . . . may include termination of the person's employment and loss of the person's employment benefits." *Id.* § 31.129(c). Together, the anti-solicitation and civil enforcement provisions impose civil and criminal liability—punishable by a mandatory minimum of six months' imprisonment, fines of up to $10,000, and other civil penalties—on "public officials" and "election officials" who "solicit" a vote-by-mail application from an individual who has not requested one, regardless of the individual's eligibility to vote by mail. *See id.* §§ 2746.016(a)(1), 31.129.

Plaintiff Isabel Longoria ("Longoria"), the Elections Administrator for Harris County, and Plaintiff Cathy Morgan ("Morgan"), a volunteer deputy registrar ("VDR") in Williamson and Travis Counties, want to engage in speech that encourages eligible voters to submit timely vote-by-mail applications. ECF No. 5 at 1–2. Plaintiffs fear to engage in such speech, however, because the anti-solicitation and civil enforcement provisions may subject them to criminal prosecution and civil liability. *See id.*; ECF No. 7 at 1–2. Plaintiffs therefore ask the Court to enjoin the defendants in this case from enforcing these provisions. *See* ECF Nos. 5, 7. They argue that, together, these provisions constitute unlawful viewpoint discrimination in violation of the First and Fourteenth Amendments, both facially and as applied to their speech. *Id.*

I. Appointment of Elections Administrators and VDRs under the Texas Election Code

Texas conducts elections in its 254 counties and more than 1,200 cities pursuant to the Election Code. By default, the Election Code provides that the county tax assessor-collector and county clerk manage voter registration and election administration. *See, e.g.*, TEX. ELEC. CODE §§ 12.001, 67.007, 83.002. The Election Code alternatively permits counties to appoint a "county

elections administrator" and transfer all voter registration and election administration duties to the appointed individual. *Id.* §§ 31.031, 31.043. These duties include overseeing the conduct of elections, providing information on early voting to individual voters, and distributing official vote-by-mail applications to eligible voters. *See, e.g.*, *id.* §§ 31.043–31.045, 83.002, 85.007.

A majority vote of the county election commission—a body that comprises the county judge, the county clerk, the county tax assessor-collector, and the county chairs of qualifying political parties—appoints a county elections administrator. *Id.* § 31.032. To be eligible for appointment, a candidate must be a qualified Texas voter, *id.* § 31.034, and, as an "election official," cannot have been "finally convicted of an offense" under the Election Code, *see id.* § 1.005(4-a)(C) (including "an elections administrator" in the definition of "election official"); *id.* § 31.128 (describing restrictions on eligibility of election officers). Once appointed, a county elections administrator is an employee of the county in which she serves and may only be removed from office "for good and sufficient cause on the four-fifths vote of the county election commission and approval of that action by a majority vote of the commissioners court." *Id.* § 31.037; *Krier v. Navarro*, 952 S.W.2d 25, 30 (Tex. App.—San Antonio 1997, writ denied) ("[T]he Legislature intended to shield the position of elections administrator from removal except upon compliance with the statutory safeguards established in the Election Code.").

The Election Code also provides for the appointment of volunteer deputy registrars ("VDRs"). VDRs are appointed by the voter registrar—the county tax assessor-collector, the county clerk, or the county elections administrator, as designated by the county—to encourage and facilitate voter registration. *See* TEX. ELEC. CODE §§ 13.031, 13.033, 13.041. An appointment as a VDR is terminated on the expiration of her appointed term or after a final conviction for certain Election Code violations. *Id.* § 13.036. The voting registrar may also terminate the appointment of

a VDR after determining that the VDR (1) failed to adequately review a registration application, (2) intentionally destroyed or physically altered a registration application, or (3) engaged in "any other activity that conflicts with the responsibilities of a volunteer deputy registrar" under the Election Code. *Id.* VDRs are unpaid volunteers; nonetheless, they are subject to the provisions of the Election Code and can face criminal penalties for violations. *See* TEX. ELEC. CODE §§ 13.008, 13.043.

Plaintiff Longoria was sworn in as the Harris County Elections Administrator on November 18, 2020. ECF No. 7-1 ("Longoria Decl.) ¶ 2. Plaintiff Morgan has served as a VDR in Austin, Texas, since 2014, in both Williamson and Travis Counties. ECF No. 7-2 ("Morgan Decl.") ¶¶ 1–2.

II. Voting by Mail in Texas

Texas law provides for early voting by mail in certain circumstances. Specifically, any voter who is at least 65 years old, sick or disabled, confined due to childbirth, out of the county on election day, or, in some cases, confined in jail is eligible to vote early by mail. TEX. ELEC. CODE §§ 82.001–82.008. So long as an applicant timely request an application to vote by mail, the county elections administrator or county clerk "shall" provide an application and, if the applicant is deemed eligible, a mail-in ballot. *Id.* §§ 84.001, 84.012, 86.001(b).

Millions of Texans are eligible to vote by mail, and approximately 980,000 did so in the 2020 presidential election.[1] Texas does not maintain a permanent list of voters eligible to vote by mail, and voters must apply to vote by mail at least annually, beginning on the first day of the calendar year and at least eleven days before an election. *Id.* §§ 86.0015 (a), (b-1). To vote by mail

[1] United States Election Assistance Commission, Election Administration and Voting Survey 2020 Comprehensive Report at 34 (Aug. 16, 2021), available at https://www.eac.gov/sites/default/files/document_library/files/2020_EAVS_Report_Final_508c.pdf.

in the primary on March 1, 2022, voters must return a vote-by-mail application between January 1 and February 18, 2022. *Id.* § 86.0015(b-1).

III. The Challenged Provisions and Impact on Plaintiffs' Speech

Plaintiffs' operative complaint includes two counts. *See* ECF No. 5. In Count I, Longoria and Morgan seek to prevent their local district attorneys from criminally prosecuting them under Section 276.016(a)(1). *See id.* ¶¶ 37–43. In Count II, Longoria seeks to prevent the Attorney General from bringing a civil enforcement action against her under Section 31.129 for violating Section 276.016(a)(1). *See id.* ¶¶ 44–46.

Section 276.016(a) provides that "[a] public official or election official commits an offense if the official, while acting in an official capacity, knowingly, (1) solicits the submission of an application to vote by mail from a person who did not request an application." TEX. ELEC. CODE § 276.016(a)(1). Section 276.0016(e) sets forth two exceptions to the general prohibition on solicitation. Section 276.016(a)(1) does not apply if the public official or election official (1) "provide[s] general information about voting by mail, the vote by mail process, or the timelines associated with voting to a person or the public" (the "general information" exception) or (2) engages in solicitation "while acting in the official's capacity as a candidate for a public elective office" (the "candidate for office" exception). *Id.* § 276.016(e).

An offense under Section 276.016 is a state jail felony, *id.* § 276.016(b), which is punishable by confinement in a state jail for a term of at least 180 days, not to exceed two years, and a fine of up to $10,000. TEX. PENAL CODE § 12.35. Section 276.016(f) clarifies that criminal liability is not the only available enforcement mechanism: "The remedy provided under this chapter is cumulative, and does not restrict any other remedies provided by this code or by law."

TEX. ELEC. CODE § 276.016(f). Section 276.016(f) also provides that "a violation of this section is subject to injunctive relief or mandamus as provided by this code." *Id.*

Section 31.129 sets forth the civil penalties for violations of the Election Code, including Section 276.016. Section 31.129 provides:

> (b) An election official may be liable to this state for a civil penalty if the official:
>
> (1) is employed by or is an officer of this state or a political subdivision of this state; and
>
> (2) violates a provision of this code.
>
> (c) A civil penalty imposed under this section may include termination of the person's employment and loss of the person's employment benefits.

Id. § 31.129(b)–(c). Further, "[any] action, including an action for a writ of mandamus, alleging that an election officer violated a provision of [the Election Code] while acting in the officer's official capacity may only be brought against the officer in the officer's *official capacity*." *Id.* § 31.130 (emphasis added).

Longoria asserts that, before Texas enacted the anti-solicitation and civil enforcement provisions, she engaged in public outreach and in-person communications to encourage eligible voters to vote by mail. Longoria Decl. ¶¶ 9–10. During outreach events at senior citizen homes and residential facilities, for example, she spoke with numerous voters about their right to vote by mail; talked about the benefits of voting by mail; encouraged voters eligible to vote by mail to do so; and brought mail-in voting applications to make the application process easier. *Id.* Longoria has also delivered speeches at events about increasing voter participation, including through mail-in voting, and has distributed vote-by-mail applications at such events. *Id.* ¶ 10.

This election cycle, Longoria wants to engage in similar voter outreach efforts and wants to work with non-profit and civic organizations, as well as governmental entities, to encourage

eligible voters to vote by mail. *Id.* ¶ 17. However, Longoria asserts that the anti-solicitation and civil enforcement provisions chill her voter-outreach activities and speech by causing her to alter the content of her speech out of concern that the communications could be construed as solicitation prohibited under Section 276.016(a)(1). *Id.* ¶ 18. Specifically, Longoria alleges that she is chilled from using print and electronic communications with information about eligibility to vote by mail, bringing vote-by-mail applications to voter-outreach events, and highlighting the benefits of voting by mail in her communications with voters. *Id.* ¶¶ 19–20.

Morgan, in her role as a VDR, staffs tables at non-partisan voter drives and conducts door-to-door outreach to register and provide voters with information on how to vote. Morgan Decl. ¶ 10. When Morgan encounters a voter she believes may be eligible to vote by mail, she informs the voter of the option to vote by mail. *Id.* ¶ 11. Morgan no longer educates voters about mail-in ballots because she is unsure if doing so will subject her to prosecution under the anti-solicitation provision. *Id.* ¶ 19. Furthermore, because her role as a VDR does not start or stop at defined times, Morgan worries that certain personal interactions could be construed as acting in her official capacity, putting her at risk of prosecution under the anti-solicitation provision. *Id.* ¶ 21.

IV. Procedural History

Plaintiffs originally filed suit on December 10, 2021, asserting claims against Texas Attorney General Kenneth Paxton only. ECF No. 1. On December 27, 2021, they filed their first amended complaint, which, among other things, amended their challenge to Section 276.016(a)(1) by adding three county district attorneys—Kim Ogg of Harris County, Shawn Dick of Williamson County, and Jose Garza of Travis County—as defendants in light of the decision recently issued

by the Texas Court of Criminal Appeals in *State v. Stephens*, No. PD-1032-20, 2021 WL 5917198, at *10 (Tex. Crim. App. Dec. 15, 2021) (not released for publication).[2] ECF No. 5.

Plaintiffs filed a motion for preliminary injunction on December 28, 2021, seeking to enjoin Defendants Paxton, Ogg, Dick, and Garza from enforcing Section 276.016(a)(1) and Section 31.129 of the Election Code, as applied to a violation of Section 276.016(a)(1), until final resolution of this case. *See* ECF No. 7. On January 31, 2022, Defendants Ogg and Garza filed stipulations indicating that, in the interest of conserving prosecutorial resources, they would not enforce Section 276.016(a)(1) "until such time as a final, non-appealable decision has been issued in this matter." ECF No. 35 ¶ 2; ECF No. 36 ¶ 3. Defendants Paxton and Dick ("Defendants") filed responses in opposition, and Plaintiffs filed a reply. ECF Nos. 48, 47, 50. The Court held a hearing on February 11, 2022. *See* ECF No. 52.

DISCUSSION

I. Subject Matter Jurisdiction

Defendants assert that the Court does not have subject matter jurisdiction over Plaintiffs' claims for two reasons. First, Defendants contend that Plaintiffs have failed to establish Article III standing to challenge the anti-solicitation and civil enforcement provisions. *See* ECF No. 48, at 11–17; ECF No. 47, at 12–14. Second, Defendants argue that Plaintiffs have failed to satisfy the *Ex Parte Young* exception to sovereign immunity under the Eleventh Amendment because Plaintiffs have not established a credible threat of enforcement. *See* ECF No. 48, at 11–17; ECF No. 47, at 11–12. Alternatively, Defendants ask the Court to exercise its discretion to abstain from

[2] In *Stephens*, the Texas Court of Criminal Appeals concluded that the Election Code's delegation of prosecutorial authority to the Attorney General under Section 273.021 violated the separation-of-powers clause of the Texas Constitution. 2021 WL 5917198, at *9. Thus, "[t]he Attorney General lacks constitutional authority to independently prosecute [an election] crime in a district or inferior court without the consent of the appropriate local county or district attorney by a deputization order." *Id. Stephens* did not comment on the Attorney General's authority to pursue civil enforcement under the Election Code, and the amended complaint seeks to enjoin him from enforcing Section 276.016(a)(1) against Longoria through the civil penalties available under Section 31.129. ECF No. 5 at 13.

exercising its jurisdiction over this case pursuant to the *Pullman* and *Younger* abstention doctrines. *See* ECF No. 48, at 17–18; ECF No. 47, at 15–16.

A. Standing

Article III of the United States Constitution limits the jurisdiction of federal courts to "Cases" and "Controversies." U.S. CONST., Art. III, § 2. The doctrine of standing gives meaning to these constitutional limits by "identify[ing] those disputes which are appropriately resolved through the judicial process." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149 (2014) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)).

To establish Article III standing, a plaintiff must demonstrate that she has "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Lujan*, 504 U.S. at 560–61. The party seeking to invoke federal jurisdiction bears the burden of establishing all three elements. *Id.* at 561. "[P]laintiffs seeking injunctive and declaratory relief can satisfy the redressability requirement only by demonstrating a continuing injury or threatened future injury" for the self-evident reason that "injunctive and declaratory relief 'cannot conceivably remedy any past wrong.'" *Stringer v. Whitley*, 942 F.3d 715, 720 (5th Cir. 2019) (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 108 (1998)).

To constitute an injury in fact, a threatened future injury must be (1) potentially suffered by the plaintiff, not someone else; (2) "concrete and particularized," not abstract; and (3) "actual or imminent, not 'conjectural' or 'hypothetical.'" *Id.* at 720–21 (citations omitted). The injury must be "imminent . . . to ensure that the alleged injury is not too speculative for Article III purposes." *Id.* at 721 (quoting *Lujan*, 504 U.S. at 564 n.2). For a threatened future injury to satisfy the imminence requirement, there must be at least a "substantial risk" that the injury will occur.

Stringer, 942 F.3d at 721 (quoting *Susan B. Anthony List*, 573 U.S. at 158). Nonetheless, "[t]he injury alleged as an Article III injury-in-fact need not be substantial; it need not measure more than an identifiable trifle." *OCA-Greater Hous. v. Texas*, 867 F.3d 604, 612 (5th Cir. 2017) (quotations omitted). This is because the injury in fact requirement under Article III is qualitative, not quantitative, in nature." *Id.*. Indeed, in the pre-enforcement context, a plaintiff need only allege "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and . . . a credible threat of prosecution thereunder." *Susan B. Anthony List*, 573 U.S. at 161–64.

These requirements ensure that plaintiffs have "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination." *Massachusetts v. EPA*, 549 U.S. 497 (2007) (quoting *Baker v. Carr*, 369 U.S. 186 (1962)) (internal quotation marks removed). However, the manner and degree of evidence required to show standing at earlier stages of litigation is less than at later stages. *Speech First, Inc. v. Fenves*, 979 F.3d 319, 329–30 (5th Cir. 2020), *as revised* (Oct. 30, 2020) (citing *Lujan*, 504 U.S. at 561) ("each element [of standing] must be supported . . . with the manner and degree of evidence required at the successive stages of the litigation"). At the preliminary injunction stage, the movant need only clearly show that each element of standing is "likely to obtain in the case at hand." *Id.* Moreover, "in the context of injunctive relief, one plaintiff's successful demonstration of standing 'is sufficient to satisfy Article III's case-or-controversy requirement.'" *Tex. Democratic Party v. Abbott*, 978 F.3d 168, 178 (5th Cir. 2020), *cert. denied*, 141 S. Ct. 1124 (2021) (quoting *Texas v. United States*, 945 F.3d 355, 377–78 (5th Cir. 2019)).

1. Injury in fact

The Fifth Circuit has "repeatedly held, in the pre-enforcement context, that '[c]hilling a plaintiff's speech is a constitutional harm adequate to satisfy the injury-in-fact requirement.'" *Fenves*, 979 F.3d at 330–31 (quoting *Houston Chronicle v. City of League City*, 488 F.3d 613, 618 (5th Cir. 2007)). To satisfy standing requirements, this type of self-censorship must arise from a fear of prosecution that is not "imaginary or wholly speculative." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 302 (1979). A fear of prosecution is "imaginary or wholly speculative" where plaintiffs "do not claim that they have ever been threatened with prosecution, that a prosecution is likely, or even that a prosecution is remotely possible.'" *Id.* (quoting *Younger v. Harris*, 401 U.S. 37, 42 (1971)).

The Fifth Circuit recently clarified in *Fenves* that, "when dealing with pre-enforcement challenges to recently enacted (or, at least, non-moribund) statutes that facially restrict expressive activity by the class to which the plaintiff belongs, courts will *assume* a credible threat of prosecution in the absence of compelling contrary evidence." *Fenves*, 979 F.3d at 335 (emphasis added) (quoting *N.H. Right to Life PAC v. Gardner*, 99 F.3d 8, 15 (1st Cir. 1996)). To establish a credible fear of enforcement, then, a plaintiff may, but need not, rely on a history of past enforcement of similar policies or direct threats to enforce the challenged policies: "Past enforcement of speech-related policies can assure standing," but "a lack of past enforcement does not alone doom a claim of standing." *Fenves*, 979 F.3d at 336 (citing *Ctr. for Individual Freedom v. Carmouche*, 449 F.3d 655, 660 (5th Cir. 2006). Rather, a plaintiff may also establish a substantial threat of enforcement simply by showing that she is "either presently or prospectively subject to the regulations, proscriptions, or compulsions [being challenged]." *Id.* at 335 (citing *Laird v. Tatum*, 408 U.S. 1, 11 (1972)).

A plaintiff whose speech is subject to the challenged restriction can establish standing even where the defendant disavows any intention to enforce the policy. *Id.* at 337. As the Fifth Circuit put it:

> [I]f there is no history of inappropriate or unconstitutional past enforcement, and no intention to pursue discipline [up to and including criminal referral] under these policies for speech that is protected by the First Amendment, then why maintain the policies at all? At least, why maintain the plethora of potential sanctions?

Id. "Where the policy remains non-moribund, the claim is that the policy causes self-censorship among those who are subject to it, and the [plaintiffs'] speech is arguably regulated by the policy, there is standing." *Id.* at 336–37 (citing *Speech First, Inc. v. Schlissel*, 939 F.3d 756, 767–70 (6th Cir. 2019) (fact that "there is no evidence in the record" of past enforcement "misses the point")). In the pre-enforcement context, "the threat is latent in the existence of the statute." *Id.* at 336. If a plaintiff "plainly belong[s] to a class arguably facially restricted by the [law]," that is enough to "establish[] a threat of enforcement." *Id.*

The Fifth Circuit's reasoning in *Fenves* is entirely consistent with Supreme Court standing precedent in the context of First Amendment challenges to statutes imposing criminal penalties. *See, e.g.*, *Babbitt*, 442 U.S. at 302. In *Babbitt*, a farmworker's union challenged a provision in Arizona's farm labor statute that prohibited certain forms of consumer publicity as a restriction of its protected speech. *Id.* The union asserted that it had curtailed its consumer appeals because it feared prosecution under a second provision that imposed criminal penalties on "[a]ny person . . . who violates any provision" of the farm labor statute. *Id.* The Court concluded that the union had standing to challenge the consumer publicity provision even though "the criminal penalty provision ha[d] not yet been applied and [might] never be applied" to a union for engaging in prohibited consumer publicity. *Id.* The Court reasoned that the union was "not without some reason in fearing prosecution" because the criminal penalty provision applied to the union's speech, and

"[m]oreover, the State ha[d] not disavowed any intention of invoking the criminal penalty provision against unions" that violated the consumer publicity provisions *Id.* In taking this practical approach to standing, the Court returned to the purpose of the inquiry:

> [A]s we have noted, when fear of criminal prosecution under an allegedly unconstitutional statute is not imaginary or wholly speculative[,] **a plaintiff need not first expose himself to actual arrest or prosecution to be entitled to challenge the statute**. . . . In our view, the positions of the parties are sufficiently adverse with respect to the consumer publicity provision proscribing misrepresentations to present a case or controversy within the jurisdiction of the District Court.

Id. (emphasis added) (citations and quotations omitted).

a. Plaintiff Longoria

Longoria easily satisfies the injury-in-fact requirement for the purposes of challenging both Section 276.016(a) and Section 31.129 by alleging that her speech has been and continues to be chilled by the "risk of criminal and civil liability." ECF No. 5 at 1–2.

In her complaint, Longoria asserts that many of her communications as a county elections administrator "go beyond merely providing general information, and instead involve affirmatively encouraging individual voters to request an application to vote by mail, while handing out applications so that the voter can do so." Longoria Decl. ¶ 14. Longoria wants to engage in several forms of voter outreach relating to the mail-in voting process, as she has done in the past. These include community events, conversations with individual voters, and print and electronic communications, in which Longoria would promote mail-in voting, explain its benefits—that it is "as safe and reliable as in-person voting and easier than going to the polls"—and encourage voters to submit applications. *See id.* ¶¶ 16–19. The anti-solicitation and civil enforcement provision have deterred Longoria from following through with her plans, however:

> I am unwilling to risk engaging in communications with voters regarding mail-in voting if it means I could be subject to imprisonment or other penalties, even though I believe those communications are a central part of my duties as an elections administrator . . . . I am now refraining from engaging in those outreach efforts, out of fear that those communications and conversations with voters regarding mail-in voting could subject me to criminal or civil penalties under SB 1. Accordingly, absent relief from this Court, I will not engage in those communications, even though I believe they would be beneficial to the voters of Harris County and would increase participation by eligible voters in the electoral process.

Id. ¶¶ 16–17.

At the hearing, Longoria similarly testified that, because of the anti-solicitation and civil enforcement provisions, she believes she cannot "advise, recommend, urge, counsel people to submit a mail-in application ultimately to vote by mail even if it's the only way they can vote[.]" Hearing Tr. 40:23–41:1. She further testified that criminal and civil penalties may arise if she engages in speech that violations the anti-solicitation provision: "If I remember correctly, there's a minimum six-month jail penalty that can be imposed. I could lose my job. I could be levied a fine, pretty hefty fine in the high thousands or so and ultimately be convicted of a […] crime in Texas." *Id.* 41:4–7.

Further, as a county elections administrator, Longoria is an "election official" as defined in the Election Code and is an employee of Harris County. *See* TEX. ELEC. CODE § 1.005(4-a)(C) (including "an elections administrator" in the definition of "election official"). Thus, with respect to both provisions, Longoria clearly falls within the class of persons whose speech is restricted. *See id.* § 276.016(a) (proscribing "solicitation" of mail-in voting applications by "[a] public official or election official"); *id.* § 31.129(b) (imposing civil penalties for violations of the Election Code by an "election official" who is "employed by. . . a political subdivision of this state").

Likewise, the speech in which Longoria wants to engage is "arguably regulated" by Section 276.016(a)(1). *Fenves*, 979 F.3d at 336–37. The Attorney General contends that Longoria has not established that she wants to violate Section 276.016(a)(1) because the speech she wants to engage in "does not seem to encompass 'soliciting the submission of an application to vote by mail from a person who did not request such an application.'" ECF No. 48 at 6 (citing Tex. Elec. Code § 276.016(a)(1)). The Court disagrees. Promoting mail-in voting, explaining its benefits, and encouraging voters to submit applications to vote by mail—whether individually, at a community event, or through print or electronic communications—are all "arguably regulated" by the anti-solicitation provision. *Fenves*, 979 F.3d at 336. Nothing more is required. Indeed, the Attorney General's own uncertainty about whether Longoria's proposed speech would violate the anti-solicitation provision indicates that Plaintiffs' fear of enforcement is *not* "imaginary or wholly speculative." *Babbitt*, 442 U.S. at 302; *see also* ECF No. 48, at 12 ("On its face, that description does not *seem* to encompass 'solicit[ing] the submission of an application to vote by mail from a person who did not request an application.'") (emphasis added); Hearing Tr. 111:18–20 ("Judge, if what the hypothetical is if Miss Longoria violated 276.016(a)(1), could she be prosecuted, the answer is I don't know.").

The Attorney General also argues that Longoria cannot establish standing in light of Defendant Ogg's agreement not to enforce Section 276.016(a)(1) while this case is pending. ECF No. 48 at 6 (citing ECF No. 35 ¶ 2). Even if this stipulation obviated the need for a preliminarily injunction—though, as discussed herein, it does not—the agreement does not vitiate Longoria's standing to challenge the anti-solicitation and civil enforcement provisions. In arguing that it does, the Attorney General has conflated the jurisdictional question with the merits question. Ogg's temporary agreement not to enforce Section 276.016(a)(1) is just that—temporary. Ogg has not

affirmatively represented that she *never* intends to enforce the anti-solicitation provision (regardless of their constitutionality) or that she intends to comply with any future court order enjoining such enforcement. *See* ECF No. 35. In the "absence of compelling contrary evidence," the Court will "assume a credible threat of prosecution" where, as here, the challenged statute facially restricts expressive activity by the class to which the plaintiff belongs. *Fenves*, 979 F.3d at 335. Put differently, should the Court determine that Section 276.016(a)(1) is unconstitutional, the appropriate relief for Longoria would be to issue an order permanently enjoining Ogg from enforcing the provision against Longoria. Thus, to conclude that Longoria lacks standing to challenge Section 276.016(a)(1) based on Ogg's representation that she will not enforce the law *for now*, would improperly and permanently deprive Longoria of much-needed relief *later*. Moreover, Ogg has not agreed to stay enforcement of the provision through a *civil* action.[3]

With respect to his own office, the Attorney General argues that Longoria has not established a credible threat of enforcement or offered any evidence "regarding the Attorney General's authority or inclination to enforce Section 276.016(a)(1) through Section 31.129." ECF No. 48 at 6. For the reasons set forth below in the analysis of the Attorney General's sovereign immunity as an officer of the State of Texas, the Court disagrees. For standing purposes, however, it is sufficient to point out that Longoria's speech is regulated by the anti-solicitation and civil enforcement provisions, and that the Attorney General has not introduced compelling evidence that it does not intend to enforce Section 276.016(a)(1). *Fenves*, 979 F.3d at 335.

Finally, the Attorney General asserts that, even if Longoria could show that she faced a substantial threat of civil enforcement, Longoria would not have standing to challenge the anti-solicitation provision in her personal capacity. ECF No. 48 at 13. This position is based on Section

[3] Counsel for the Attorney General made clear at the hearing that there is no "official position" on who has the authority to bring an action under the civil enforcement provision. Hearing Tr. 129:8–9.

31.130 of the Election Code, which provides that "[any] action, including an action for a writ of mandamus, alleging that an election officer violated a provision of [the Election Code] while acting in the officer's official capacity may only be brought against the officer in the officer's *official capacity*." *Id.* § 31.130 (emphasis added). Thus, the Attorney General notes, any "monetary penalties" under the Election Code would be imposed on the entity she represents—Harris County—rather than Longoria in her personal capacity. ECF No. 48 at 13.

Setting aside the question of whether the State has authority to impose such sanctions on a political subdivision in the first place, the Attorney General disregards the fact that, to the extent monetary penalties are available under Section 31.129, those are not the only possible penalties. Indeed, with respect to two of the civil penalties enumerated under Section 31.129(c)—termination of employment and loss of benefits—the notion that an enforcement action could not establish an injury to Longoria in her personal capacity is nonsensical. *See Elrod v. Burns*, 427 U.S. 347, 96 (1976) (stating that the government may not condition public employment upon compliance with unconstitutional conditions). Any subsequent challenge to her termination, for example, would need to be brought in her personal capacity because, after being terminated, she would no longer exist in an "official capacity."

In sum, Longoria has clearly shown that the injury-in-fact requirement is "likely to obtain in the case at hand," with respect to her claims against both the Attorney General and Defendant Ogg. *Fenves*, 979 F.3d at 329–30.

b. Plaintiff Morgan

Plaintiff Morgan alleges that she has been chilled from encouraging voters to request a mail-in ballot because of her fear of criminal prosecution under Section 276.016(a)(1) for her activities as a VDR. ECF No. 5. The Court is satisfied that Morgan's speech has been chilled and

that her proposed speech—"encouraging voters to request a mail-in ballot"—arguably falls within the scope of the speech that Section 276.016(a)(1) prohibits. Moreover, despite Defendant Dick's arguments to the contrary, *see* ECF No. 47 at 5–9, Morgan need not prove that someone has specifically threatened to criminally prosecute her for violating the anti-solicitation provision to establish that her fear is "not imaginary or wholly speculative." *Babbitt*, 442 U.S. at 302. Neither Defendant Dick's failure to initiate proceedings at the moment nor Defendant Garza's stipulation to stay enforcement temporarily represents "compelling contrary evidence" that the anti-solicitation provision will not be enforced against her. *Fenves*, 979 F.3d at 335.

Nonetheless, it is not immediately clear that Morgan belongs to the class of persons whose speech is regulated under Section 276.016(a)—public officials and election officials. Section 1.005(4-a) of the Election Code defines "election official" with a list of qualifying positions that does not include Morgan's title—volunteer deputy registrar. Tex. Elec. Code § 1.005(4-a). The Election Code itself does not define "public official." However, the term is defined elsewhere in SB1 to mean "any person elected, selected, appointed, employed, or otherwise designated as an officer, employee, or agent of this state, a government agency, a political subdivision, or any other public body established by state law." SB1 § 8.05, 2021 87th Leg. 2d Spec. Sess. (Tex. 2021) (codified at Tex. Gov't Code § 22.304). Because VDRs are appointed to their position by a county official and "assume a role carefully regulated by the state to serve the citizens who register to vote as well as the public interest in the integrity of the electoral body," *Voting for Am., Inc. v. Steen*, 732 F.3d 382, 393 (5th Cir. 2013), they likely qualify as public officials under Section 276.016(a)(1).

Because the challenged provision facially restricts Morgan's expressive activity, and without compelling evidence that criminal prosecution is unlikely, the Court assumes a substantial

threat of enforcement. *Fenves*, 979 F.3d at 335. Thus, Morgan has established that the injury-in-fact requirement is "likely to obtain in the case at hand," as to her claims against Defendants Garza and Dick. *Fenves*, 979 F.3d at 329–30.

2. Causation and redressability

Given the foregoing analysis, the causation and redressability prongs of the standing inquiry are easily satisfied here. Potential criminal and civil enforcement of the anti-solicitation provision has chilled and continues to chill Plaintiffs' speech, and the chilling effect could be redressed by an order enjoining enforcement of those provisions. *See Carmouche*, 449 F.3d at 661 ("The causation and redressability prongs of the standing inquiry are easily satisfied here. Potential enforcement of the statute caused the [plaintiff]'s self-censorship, and the injury could be redressed by enjoining enforcement of the [statute]. The [plaintiff] therefore has standing to mount its facial challenge.").

Accordingly, the Court finds that Plaintiffs have made a clear showing that *Lujan*'s requirements for standing are met at this stage in the litigation. Plaintiffs have plausibly alleged an injury in fact (a chilling of their protected speech based on their credible fear of enforcement), which is fairly traceable to the Defendants, and a favorable order from this Court (enjoining the enforcement of the anti-solicitation provision) would redress the future threatened injuries to Plaintiffs' protected speech. In short, the positions of the parties are "sufficiently adverse" with respect to the anti-solicitation provision to present a case or controversy within this Court's jurisdiction. *Babbitt*, 442 U.S. at 302.

B. Sovereign Immunity

Generally, state sovereign immunity under the Eleventh Amendment precludes suits against state officials in their official capacities. *See City of Austin v. Paxton*, 943 F.3d 993, 997

(5th Cir. 2019). The *Ex parte Young* exception to state sovereign immunity allows private parties to bring "suits for injunctive or declaratory relief against individual state officials acting in violation of federal law." *Raj v. La. State Univ.*, 714 F.3d 322, 328 (5th Cir. 2013). The Supreme Court has counseled that, "[i]n determining whether the *Ex parte Young* doctrine avoids an Eleventh Amendment bar to suit, a court need only conduct a 'straightforward inquiry' into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'" *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002) (quoting *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 296 (1997) (O'Connor, J., joined by Scalia and Thomas, JJ., concurring in part and concurring in judgment)). For the exception to apply, the state official, "by virtue of his office," must have "some connection with the enforcement of the [challenged] act, or else [the suit] is merely making him a party as a representative of the state, and thereby attempting to make the state a party." *Young*, 209 U.S. at 157. The text of the challenged law need not actually state the official's duty to enforce it, although such a statement may make that duty clearer. *Id.*

Despite the "straightforward inquiry" envisioned by the Supreme Court, the Fifth Circuit has acknowledged the tortured nature of its *Ex parte Young* precedent. *See, e.g.*, *Tex. Democratic Party*, 961 F.3d at 400 n.21 ("Our decisions are not a model of clarity on what 'constitutes a sufficient connection to enforcement.'") (quoting *City of Austin*, 943 F.3d at 999). While "[t]he precise scope of the 'some connection' requirement is still unsettled," the Fifth Circuit has stated that "it is not enough that the official have a '*general* duty to see that the laws of the state are implemented.'" *Id.* at 400–01 (quoting *Morris v. Livingston*, 739 F.3d 740, 746 (5th Cir. 2014)).

First, a plaintiff can put forth some evidence showing that the defendant has some authority to compel compliance with the law or constrain a person's ability to violate the law. *See Tex.*

Democratic Party, 961 F.3d at 401. Alternatively, a plaintiff could provide some evidence showing that the defendant has a duty to enforce the statute in question and a "demonstrated willingness" to enforce the statutes. *Id.* (quotation omitted). Finally, a plaintiff can demonstrate a sufficient connection by putting forth evidence showing "some scintilla" of affirmative action by the state official. *Id.* (quotation omitted). In other words, if an "official *can* act, and there's a significant possibility that he or she *will*, the official has engaged in enough compulsion or restraint to apply the *Young* exception." *Id.* (alteration marks omitted).

Here, both Plaintiffs have alleged an ongoing violation of their right to free speech under the First Amendment, as incorporated by the Fourteenth Amendment, and seek relief that is properly characterized as prospective—a declaratory judgment and an injunction. ECF No. 5, at Thus, to demonstrate that the exception to sovereign immunity here, Plaintiffs need only establish that Defendants, "by virtue of their office," have "some connection" with the enforcement of the challenged law

1. Local district attorneys have a sufficient connection to enforcement

With respect to criminal enforcement of the anti-solicitation provision, the Election Code originally authorized the Attorney General to prosecute offenses prescribed under the election laws of the State. TEX. ELEC. CODE § 273.021. The Court of Criminal Appeals ruled in *Stephens* that this delegation of authority violated the separation-of-powers clause of the Texas Constitution, and that only local district attorneys have independent authority to prosecute election crimes. Even before *Stephens*, however, the Election Code explicitly contemplated that county and district attorneys would play an enforcement role. For example, Section 273.022 provides that the attorney general "may direct the county or district attorney . . . to prosecute an offense that the attorney

general is authorized to prosecute under Section 273.021 or to assist the attorney general in the prosecution." TEX. ELEC. CODE § 273.021.

Plaintiffs have alleged that the district attorneys are responsible for investigating and prosecuting violations of the Election Code. ECF No. 5 at 4. Together, the language of the Election Code and *Stephens* confirm that county and district attorneys have authority to compel or constrain a person's ability to violate the law. *See Tex. Democratic Party*, 961 F.3d at 401. This is sufficient to establish that county and district attorneys, by virtue of their office, have "some connection" with enforcement of the Election Code beyond a "general duty to see that the laws of the state are implemented." *Morris v. Livingston*, 739 F.3d at 746; *see also Nat'l Press Photographers Ass'n v. McCraw*, 504 F. Supp. 3d 568, 583 (W.D. Tex. 2020) ("Because [p]laintiffs have pled that [the district attorney] is responsible for representing the state in criminal matters, including prosecuting violations of the [challenged] provisions, plaintiffs have met their burden of demonstrating a scintilla of enforcement to fall within the *Ex parte Young* exception."). Accordingly, the Court concludes that Plaintiffs have met their burden of demonstrating that their claims against Defendants Ogg, Garza, and Dick fall within the *Ex parte Young* exception to sovereign immunity.

2. The Attorney General has a sufficient connection to enforcement

With respect to the Attorney General, the Court observes that the delegation of prosecutorial authority in Section 273.021 can no longer satisfy *Ex parte Young*'s "sufficient connection" requirement in light of *Stephens*. Even absent the delegation of authority to independently prosecute election crimes, however, the surviving provisions of the Election Code still envision, and likely *require*, the Attorney General's participation in enforcement activities. For example, Section 273.001 provides:

> (a) If two or more registered voters in an election covering multiple counties present affidavits alleging criminal conduct in connection

> with the election to the attorney general, **the attorney general *shall* investigate the allegations**.
>
> (b) **[T]he attorney general *may* conduct an investigation on the officer's own initiative** to determine if criminal conduct occurred in connection with an election.
>
> (c) On receipt of an affidavit [from a registrar], the county or district attorney having jurisdiction and, if applicable, **the attorney general *shall* investigate the matter**.
>
> (d) On referral of a complaint from the secretary of state under Section 31.006, **the attorney general *may* investigate the allegations**.

TEX. ELEC. CODE § 273.021.

Even before the Court of Criminal Appeals issued its decision in *Stephens*—when the Attorney General was still operating under the mantle of authority to pursue criminal prosecutions for violations of election laws—the Attorney General demonstrated a clear willingness to employ civil enforcement mechanisms available under the Election Code to challenge election officials' speech concerning applications to vote by mail. In 2020, for example, the State of Texas, through the Attorney General, brought a mandamus action alleging that election officials were encouraging voters to apply to vote by mail by claiming that fear of contracting COVID at a polling place constituted a "disability" under the Election Code. *In re State*, 602 S.W.3d 549 (Tex. 2020). Nonetheless, the Attorney General suggests that the Court may not consider these statutory provisions or his history of enforcing provisions of the Election Code governing official's speech as to applications to vote by mail based on the Fifth Circuit's reasoning in *City of Austin v. Paxton*.

In *City of Austin*, the Fifth Circuit considered whether the *Ex parte Young* exception was established as to the Attorney General. 943 F.3d at 998. There, the City had passed a municipal ordinance prohibiting landlords from discriminating against tenants paying their rent with federal housing vouchers. *Id.* at 996. Texas subsequently passed a state law barring municipalities or

counties from adopting such ordinances. *Id.* The state statute empowered the Attorney General to enforce the law by intervening in any enforcement suit the City might bring against a landlord for violating the municipal ordinance. *Id.* at 1000 n.1. The City sued the Attorney General, alleging that federal housing law preempted the state legislation. *Id.* at 997. It argued that the *Ex parte Young* exception to sovereign immunity applied because the Attorney General had the authority to enforce the state law and had a "habit" of intervening in lawsuits involving municipal ordinances to "enforce the supremacy of state law." *Id.* at 1001. This, the Fifth Circuit held, was not sufficient to demonstrate "some scintilla of 'enforcement,'" as the Attorney General's authority to enforce the statute alone did not constrain the City's ability to enforce its ordinance. *Id.* at 1001–02. Simply because the Attorney General had "chosen to intervene to defend *different* statutes under *different* circumstances does not show that he is likely to do the same here." *Id.* at 1002 (emphasis in original). Further, the Fifth Circuit noted, "the City face[d] no consequences" if it enforced its ordinance. *Id.*

This case differs from *City of Austin* in many respects. Most notably, under the civil enforcement provision, Plaintiff Longoria would face significant consequences if the Attorney General were to civilly prosecute her: She would risk losing her employment and employment benefits. Furthermore, under SB1, the Attorney General has broad investigatory powers, and though SB1 does not specify whether the Attorney General may enforce Section 31.129, he has filed civil lawsuits against election officials, invoking the State's "intrinsic right to enact, interpret, and enforce its own laws." Appellant's Emergency Motion for Relief Under Rule 29.3, *State v. Hollins*, 607 S.W.3d 923 (Tex. App.—Houston [14th Dist.] 2020, pet. granted) (No. 14-20-00627-CV), 2020 WL 5509152, at *9 (quoting *State v. Naylor*, 466 S.W.3d 783, 790 (Tex. 2015)). Far from different statutes under different circumstances, the Attorney General has demonstrated a

willingness to enforce civil provisions of the Election Code regulating applications to vote by mail against election officials. This is sufficient to demonstrate "some scintilla of 'enforcement.'" *Cf. City of Austin*, 943 F.3d at 1002.

Defendants further argue that mandamus relief under the anti-solicitation provision does not injure Plaintiffs. However, Defendants again misconstrue Plaintiffs' alleged injury—the chilling effect the anti-solicitation provision has on Plaintiffs' speech. Whether a mandamus action would result in some fine or penalty to Plaintiffs, it nonetheless chills Plaintiffs' speech.

C. *Pullman* Abstention

The Attorney General contends that the Court should exercise its discretion to abstain from ruling on the merits of Plaintiffs' claims "until Texas courts have authoritatively interpreted SB1," pursuant to doctrine set forth in *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941). ECF No. 48, at 11–12. The Supreme Court's decision in *Pullman* established that "a federal court may, and ordinarily should, refrain from deciding a case in which state action is challenged in federal court as contrary to the federal constitution if there are unsettled questions of state law that may be dispositive of the case and avoid the need for deciding the constitutional question." *United Home Rentals, Inc. v. Tex. Real Estate Com.*, 716 F.2d 324, 331 (5th Cir. 1983) (citation omitted).

There are two prerequisites for abstention under *Pullman*: (1) the case must present an unsettled question of state law, and (2) the question of state law must be dispositive of the case or would materially alter the constitutional question presented. *Harman v. Forssenius*, 380 U.S. 528, 534 (1965). The purpose of *Pullman* abstention is to "avoid unnecessary friction in federal-state functions, interference with important state functions, tentative decisions on questions of state law, and premature constitutional adjudication." *Id.* Still, *Pullman* abstention is not "an automatic rule

applied whenever a federal court is faced with a doubtful issue of state law; it rather involves a discretionary exercise of a court's equity powers" that must be considered on "a case-by-case basis." *Baggett v. Bullitt*, 377 U.S. 360, 376 (1964).

In assessing whether to exercise its discretion, the Court must "take into consideration the nature of the controversy and the particular right sought to be enforced." *Edwards v. Sammons,* 437 F.2d 1240, 1243 (5th Cir. 1971). In *Harman*, the Supreme Court upheld the district court's decision not to abstain from ruling on the constitutionality of a voting law pending the resolution of state law questions in the state courts given "the nature of the constitutional deprivation alleged and the probable consequences of abstaining." 380 U.S. at 537. The Supreme Court similarly declined to exercise its discretion to abstain in *Baggett*, where abstention would "delay[ ] ultimate adjudication on the merits" in such a way as to "inhibit the exercise of First Amendment freedoms." 377 U.S. at 379–80.

Here, the alleged violations and irreparable harm that may result from a delay in resolution militate against exercising the Court's discretion to abstain under the *Pullman* doctrine. Although Defendants point to several unsettled questions of state law that would purportedly moot or alter the presentation of the federal questions raised in this action, *see* ECF No. 48, at 11–12, they fail to identify any pending state court action that might resolve these questions. Defendants apparently believe that federalism demands that federal courts wait indefinitely for the piecemeal adjudication of state law questions by state courts, regardless of the consequences to the parties in the federal case of such a delay. They are mistaken.

Where constitutionally protected rights of free speech are concerned, the Supreme Court has recognized that "[forcing a plaintiff] who has commenced a federal action to suffer the delay

of state court proceedings might itself effect the impermissible chilling of the very constitutional right he seeks to protect." *Zwickler v. Koota*, 389 U.S. 241, 252 (1967).

The need for adjudication of Plaintiffs' claims is immediate. The February 18th deadline by which voters must request applications to vote by mail in the March 2022 primary is only days away, and any injunctive relief awarded after that date will come too late and irreparably violate Plaintiffs' constitutional rights. The Court concludes that *Pullman* abstention is inappropriate in this case.

D. *Younger* Abstention

Williamson County District Attorney Shawn Dick contends that the Court should abstain from ruling on this matter pursuant to *Younger v. Harris*, 401 U.S. 37 (1971). ECF Nos. 31, 47. "In general, the *Younger* doctrine requires that federal courts decline to exercise jurisdiction over lawsuits when three conditions are met: (1) the federal proceeding would interfere with an 'ongoing state judicial proceeding'; (2) the state has an important interest in regulating the subject matter of the claim; and (3) the plaintiff has 'an adequate opportunity in the state proceedings to raise constitutional challenges.'" *Bice v. La. Pub. Def. Bd.*, 677 F.3d 712, 716 (5th Cir. 2012) (quoting *Middlesex Cnty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982)). "State judicial proceedings" generally include criminal, civil, and "administrative proceedings that are judicial in nature." *Tex. Ass'n of Bus. v. Earle*, 388 F.3d 515, 520 (5th Cir. 2004).

Defendant Dick fails to identify a single ongoing state judicial proceeding—in his county or any other—that implicates the anti-solicitation provision. As the first condition is not met, *Younger* does not apply. Dick's assertion that *Younger* requires the Court to refrain from enjoining any matters involving prosecutorial decisions concerning "state laws by state officials" is divorced from both the substantive requirements that govern the *Younger* doctrine and the principles of

federalism that inform it. ECF No. 47 at 16. Indeed, "[r]equiring the federal courts totally to step aside when no state criminal prosecution is pending against the federal plaintiff would turn federalism on its head." *Steffel v. Thompson*, 415 U.S. 452, 472 (1974).

II. Preliminary Injunction Standard

A preliminary injunction will only be granted if the movant demonstrates: "(1) a substantial likelihood that they will prevail on the merits; (2) a substantial threat that they will suffer irreparable injury if the injunction is not granted; (3) their substantial injury outweighs the threatened harm to the party to be enjoined; and (4) granting the preliminary injunction will not disserve the public interest." *Voting for Am., Inc. v. Steen*, 732 F.3d 382, 386 (5th Cir. 2013). The "extraordinary remedy" of a preliminary injunction should not be granted "unless the party seeking it has 'clearly carried the burden of persuasion on all four requirements,'" *id.*, and "unequivocally show[n] the need for its issuance." *Valley v. Rapides Par. Sch. Bd.*, 118 F.3d 1047, 1050 (5th Cir. 1997).

A. Likelihood of Success on the Merits

The Court's findings of fact, together with its analysis of the parties' submissions, lead it to conclude that Plaintiffs are substantially likely to succeed on the merits of their claims. It is substantially likely that the anti-solicitation provision violates the First Amendment, as incorporated by the Fourteenth Amendment, as unconstitutional viewpoint discrimination.

1. Plaintiffs' speech is protected by the First Amendment

The Attorney General contends that because anti-solicitation provision applies only to government officials working in their official capacity, Plaintiffs' speech is not protected by the First Amendment. ECF No. 48 at 13. Specifically, the State argues that *Garcetti* and its progeny

permit the State to regulate public employees' speech in the course of performing their official duties. *Id.*

It is true that a government employee's official communications may be regulated by her employer, and the First Amendment does not protect expressions made pursuant to the employee's official duties. *Garcetti v. Ceballos*, 547 U.S. 410, 420–23 (2006); Pickering v. Bd. of Education, 391 U.S. 563 (1968). However, the heightened interest in controlling a government employee's official speech belongs to the government in its capacity as her *employer*. *Garcetti*, 547 U.S. at 418 ("A government entity has broader discretion to restrict speech when it acts in its role as *employer*[.]") (emphasis added). Both of the cases the Attorney General cites for the proposition that Plaintiff's official speech is unprotected involve aggrieved employees challenging disciplinary actions by the governmental entities that employed them. *See id.* at 413; *Williams v. Dallas Indep. Sch. Dist.*, 480 F.3d 689, 690 (5th Cir. 2007). Longoria and Morgan are not employed by the State; Longoria is employed by Harris County, and Morgan is a volunteer for Travis and Williamson counties. *See* TEX. ELEC. CODE § 31.037; *Dillard*, 883 S.W.2d at 167; *see also* Morgan Dep. 90:15–22; Longoria Dep. 10:20–11:3. Thus, the State's assertion that it is entitled to regulate Longoria and Morgan's official communications as their employer is wholly unavailing.[4]

Moreover, in imposing criminal penalties for violations of the anti-solicitation provision, the State was—far from acting in its capacity as an employer—acting as a sovereign. *See In re*

[4] In his motion to dismiss the operative complaint, the Attorney General suggests that Plaintiffs' status as local government employees, rather than state employees is immaterial because "[s]tates routinely require local officials to effectuate state policies by implementing state statutes, including with regard to elections." ECF No. 24 at 17 (citing *Tex. Democratic Party v. Hughes*, 997 F.3d 353, 363). While Defendants dismiss the distinction between employees of the state and employees of local government, Texas law does not. Indeed, Section 31.037 of the Election Code specifically limits the procedures by which an elections administrator can be removed from office and does not provide for removal a state government official. TEX. ELEC. CODE § 31.037 ("The employment of the county elections administrator may be suspended, with or without pay, or terminated at any time for good and sufficient cause on the four-fifths vote of the county election commission and approval of that action by a majority vote of the commissioners court."). To the extent that Section 31.129 permits the State to terminate Plaintiffs' employment or benefits, it does so pursuant to a statute that it enacted as a sovereign, not as her employer.

Kendall, 712 F.3d 814, 826–27 (3d Cir. 2013) ("[T]he Virgin Islands Supreme Court acted as sovereign, not as public employer, by criminally punishing Kendall's speech."); *Ex parte Perry*, 483 S.W.3d 884, 911–12 (Tex. Crim. App. 2016) ("When government seeks criminal punishment, it indeed acts as sovereign and not as employer or speaker."); *see also Healy v. James*, 408 U.S. 169, 202 (1972) (Rehnquist, J., concurring) ("[T]he government in its capacity as employer . . . differs constitutionally from the government in its capacity as the sovereign executing criminal laws."). The full force of the First Amendment applies against a government acting in its sovereign capacity. Because Plaintiffs' speech does not fall within the scope of the "public employee" exception, it is protected to the same degree as that of a private citizen.

Not only is Plaintiffs' proposed speech—encouraging voters to submit applications to vote by mail—armored with the protections that the First Amendment affords to private speech, the Fifth Circuit has recognized that "[s]*oliciting*, urging and persuading the citizen to vote" represent "core protected speech." *Steen*, 732 F.3d 382, 390 (emphasis added); *see also id.* at 392 (disaggregating the activities involved in a voter registration drive based on their expressive character: "one must concede that supporting voter registration is the [VDR]'s speech, while actually completing the forms is the voter's speech, and collecting and delivering the forms are merely conduct.").

2. Section 276.016(a)(1) constitutes impermissible viewpoint discrimination

The Attorney General's entire defense rests on his mistaken understanding of the anti-solicitation provision as a restriction on government speech. Given the Court's conclusion that Plaintiffs' speech is entitled to the protections of the First Amendment, however, the next step is to determine the standard by which the Court should assess the constitutionality of the anti-solicitation provision.

The First Amendment, as applied to the States through the Fourteenth Amendment, prohibits the enactment of laws "abridging the freedom of speech." U.S. CONST., amend. 1 The State of Texas "has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015). "Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Reed*, 576 U.S. at 156. A law is content based if, on its face, it "defin[es] regulated speech by particular subject matter," or "by its function or purpose." *Id.* Laws restricting speech that are content based "are presumptively unconstitutional" and subject to strict scrutiny—that is, they "may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Id.* Viewpoint-based restrictions are subject to an even more demanding standard, as they face a virtually *per se* rule of invalidity. *Iancu v. Brunetti*, 139 S. Ct. 2294, 2299 (2019); *Rosenberger*, 515 U.S. at 829 ("The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.").

The anti-solicitation provision is both content- and viewpoint-based restrictions on Plaintiffs' speech. Section 276.016(a)(1) restricts and criminalizes the solicitation of the submission of an application to vote by mail from a person who did not request an application—even if that person is statutorily eligible to vote by mail. Specifically, it provides that a "public official or election official commits an offense" when she "knowingly . . . solicits the submission of an application to vote by mail from a person who did not request an application." TEX. ELEC. CODE § 276.016(a)(1). Section 276.0016(e) sets forth two exceptions to the general prohibition on solicitation. Section 276.016(a)(1) does not apply if the public official or election official (1) "provide[s] general information about voting by mail, the vote by mail process, or the timelines

associated with voting to a person or the public" or (2) engages in solicitation "while acting in the official's capacity as a candidate for a public elective office." *Id.* § 276.016(e).

The term "solicit," as it is used in Section 276.016(a)(1), plainly includes speech. *See, e.g.*, TEX. PENAL CODE § 15.03(a) (defining the offense of criminal solicitation as "request[ing], command[ing], or attempt[ing] to induce another" to commit a felony); *see also Ex Parte Victorick*, 453 S.W.3d 5, 15 (Tex. App.—Beaumont 2014, pet. ref'd) (citing WEBSTER'S THIRD NEW INT'L DICTIONARY 2169 (2002)) ("'Solicit' is not defined in section 33.021 of the Texas Penal Code, and could be understood by the jury by its commonly defined terms, which include, 'to approach with a request or plea' and 'to endeavor to obtain by asking or pleading[.]'"); *Coutlakis v. State*, 268 S.W.2d 192, 258 (Tex. Crim. App. 1954) ("The word 'solicit' is one of common usage and its meaning is simple and not subject to any peculiar usage. As here used, it means 'to entice, to request, to incite' . . . ."); *see also Steen*, 732 F.3d 382, 390 ("*Soliciting*, urging and persuading the citizen to vote" represents "core protected speech."). Section 276.016(a)(1) accordingly prohibits encouraging others to request an application to vote by mail. Typically accomplished through speech.

Section 276.016(a)(1) is accordingly a content-based restriction on speech because its prohibition depends on the content of a person's speech: If a person's speech encourages another person to request an application to vote by mail, then criminal and civil penalties attach. *See Reed*, 576 U.S. at 163. If the speech is about a different topic, they do not. *See id.* Here, the speech Plaintiffs wish to engage in falls within this definition and neither exception applies. Although Plaintiffs want to share general information about applying to vote by mail, they also, more importantly, want to encourage eligible voters to use that information to request a timely application to vote by mail.

Not only does Section 276.016(a)(1) regulate speech on the basis of its content, it is also a viewpoint-based rule. The Attorney General admits as much, asserting that Texas has a "compelling interest in ensuring that official government resources are not used to shift voters from in-person voting to mail-in voting." ECF No. 48 at 13. As it stands, speech encouraging or requesting the submission of an application to vote by mail is a crime. Discouraging the submission of an application to vote by mail, on the other hand, is not. The Attorney General offers several "compelling interests" that is purportedly served by the anti-solicitation provision. He contends that voters may become confused when officials solicit mail ballot applications. ECF No. 48 at 13–14. He further asserts that casting a mail ballot is "less secure" than voting in person and that mail-in ballots impose burdens on election administrability. The Court need not examine whether the anti-solicitation provision is narrowly tailored to these interests, however.

Because the anti-solicitation provision is a viewpoint-based restriction on speech, it is therefore *per se* unconstitutional, and the Government's interests cannot save it. *Iancu*, 139 S. Ct. at 2301 ("Of course, all these decisions are understandable. The rejected marks express opinions that are, at the least, offensive to many Americans. But . . . a law disfavoring 'ideas that offend' discriminates based on viewpoint, in violation of the First Amendment."). Section 276.016(a)(1) emanates from the content of the official's speech and their views on voting by mail, it is a presumptively unconstitutional viewpoint- and content-based restriction on speech. *See Reed*, 576 U.S. at 163; *Rosenberger*, 515 U.S. at 828. Section 31.129 of the Election Code, as applied to violations of Section 267.016(a)(1), is unconstitutional for the same reasons.

B. Irreparable Harm

The Attorney General argues that Plaintiffs cannot establish that they will suffer irreparable harm absent a preliminary injunction because they have "introduced no evidence of any imminent

enforcement plans from any Defendant." ECF No. 48 at 15. To be clear, the irreparable harm alleged in this case is not *actual* enforcement of the anti-solicitation provision; the harm is the chilling effect on Plaintiffs' speech that arises from the credible *threat* of enforcement. *See also Babbitt*, 442 U.S. at 302 ("a plaintiff need not first expose himself to actual arrest or prosecution" to establish a cognizable harm).

The Supreme Court has long recognized that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). The Attorney General concedes as much in his response briefing.[5] ECF No. 48 at 16. Still, Defendants assert that the alleged irreparable harm, "the chilling effect that arises from the threat of imprisonment and civil penalties," cannot be remedied by a preliminary injunction. *See* ECF No. 48 at 17–20. This is because, they assert, "Plaintiffs would still face the possibility of criminal prosecution (or civil enforcement) for solicitation committed during the pendency of the injunction if the injunction were set aside." *Id.* at 17.

Notably, Defendants cite no controlling authority in support of this proposition. There is, though, substantial authority supporting the opposite—that enforcement of activity undertaken during the pendency of a preliminary injunction will not result. For example, in *Oklahoma Operating Co. v. Love*, 252 U.S. 331 (1920), the Supreme Court upheld the trial court's issuance of a preliminary injunction against the enforcement of a state law. In doing so, the Court stated

[5] The Attorney General contends that Plaintiffs cannot establish irreparable harm because they did not file a motion for a preliminary injunction until January 3, 2022, "over four months" after learning about SB1 "in the summer of 2021, probably August." ECF No. 48 at 16. Regardless of when Plaintiffs first heard about the prospect of SB1, the original complaint was filed on December 10, 2021—approximately one week after SB1's effective date, and several weeks before voters could begin submitting applications to vote by mail. Five days later, the Court of Criminal Appeals issued its decision in *Stephens*, concluding that the Attorney General did not have the authority to independently prosecute criminal offenses under the Election Code—thus requiring Longoria to file an amended complaint. 2021 WL 5917198, at *10. The amended complaint was filed on December 27, 2021, and the motion for preliminary injunction was filed the next day. *See* ECF Nos. 5, 7. In examining this timeline, the Court cannot locate any evidence that these short "delays" were the result of "dilatory conduct."

that should the challenged law be ultimately upheld, "a permanent injunction should, nevertheless, issue to restrain enforcement of penalties accrued pendente lite . . . ." *Id.* at 337–38. In another case, *Board of Trade City of Chicago v. Clyne*, 260 U.S. 704, the Court similarly enjoined the enforcement of a law pending appeal, and further barred enforcing the law for "any violation . . . of any provision of said act committed during the pendency of this cause in this court." *Id.*

Furthermore, Defendant's position poses due process concerns. *Cf. Marks v. United States*, 430 U.S. 188, 192 (1977). In *Marks*, the defendants were prosecuted for the transportation of obscene materials. Id. at The alleged conduct occurred prior to the Court's decision in *Miller v. California*. *Id.* at 189–90. However, the trial court used the standard provided in *Miller* in its jury instructions. The Court then considered whether the defendants were entitled to more favorable jury instructions under *Memoirs v. Massachusetts*, the standard prior to the Court's decision in *Miller*. *Id.* at 190–91. The Court concluded that the defendants were entitled to jury instructions pursuant to *Memoirs*. While the Ex Post Facto Clause does not apply to the judiciary, the Court reasoned that the concept that "persons have a right to fair warning of that conduct which will give rise to criminal penalties is fundamental to our concept of constitutional liberty." *Id.* at 192–93. Similarly here, if Plaintiffs could face prosecution for conduct undertaken during the pendency of the preliminary injunction, then they could be penalized for acting in reliance on the injunction and judicial pronouncements. *Cf. Id.* at 191–93; *Edgar v. MITE Corp.*, 457 U.S. 624, 660 (Marshall, J., dissenting). In effect, accepting Defendants' argument would render preliminary injunctive relief meaningless.

Defendants further cite caselaw suggesting that, where a preliminary injunction would not "prevent the kind of irreparable injury Plaintiff seeks to prevent," it is not an appropriate remedy. *See* ECF No. 48 at 18 (citing *Coleman v. United States*, No. 5:16-CV-817-DAE, 2017 WL

1278734, at *2 (W.D. Tex. Jan. 3, 2017); *Foy v. Univ. of Tex. at Dall.*, No. 3:96-CV-3406, 1997 WL 279879, at *3 n.1 (N.D. Tex. May 13, 1997). However, Plaintiffs have provided ample evidence that they would encourage voters to vote by mail if there was no threat of criminal or civil prosecution. *E.g.*, Longoria Decl. at 5–8; Hearing Tr. 20:8–17. A preliminary injunction, as discussed, would remove such a threat. Thus, it is an appropriate remedy in this case.

C. Balance of the Equities and Public Interest

The threatened and ongoing injury to Plaintiffs outweighs any potential harm that an injunction might cause Defendants. Without a preliminary injunction, Plaintiffs will suffer irreparable injury to their constitutional rights. As a general matter, "injunctions protecting First Amendment freedoms are always in the public interest." *Opulent Life Church*, 697 F.3d at 298 (citation and quotation marks omitted); *see also RTM Media, L.L.C. v. City of Houston*, 518 F. Supp. 2d 866, 875 (S.D. Tex. 2007) ("It is clearly in the public interest to enjoin an ordinance that restricts the public's constitutional right to freedom of speech."). To overcome the irreparable injury arising from this infringement on Plaintiffs' rights, Defendants must produce "powerful evidence of harm to its interests" to tip the equities in their favor. *Opulent Life Church*, 697 F.3d at 297.

The Attorney General's argues that the public interest weighs against injunctive relief because it "would interfere with the orderly administration of Texas elections." ECF No. 48 at 20. Here, the Attorney General draws on the *Purcell* principle, which stands for the proposition that "federal courts ordinarily should not alter state election laws in the period close to an election." *DNC. v. Wis. State Leg.*, 141 S. Ct. 28, 31 (2020) (Kavanaugh, J., concurring) (citing *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam)). The Supreme Court has recognized that "[c]ourt orders affecting elections, especially conflicting orders, can themselves result in voter confusion and

consequent incentive to remain away from the polls. As an election draws closer, that risk will increase." *Purcell*, 549 U.S. 4–5. In *Purcell*, the Supreme Court reversed a lower court's order enjoining the implementation of a proposition, passed by ballot initiative two years earlier, that required voters to present identification when they voted on election day. In reversing the lower court, the Court emphasized that the injunction was likely to cause judicially-created voter confusion in the face of an imminent election. *Purcell*, 549 U.S. at 2, 6.

As the cases cited by the Attorney General clearly establish, however, the *Purcell* principle's logic extends only to injunctions that affect the mechanics and procedures of election law applicable to voting. *See, e.g.*, *RNC v. DNC*, 140 S. Ct. 1205, 1207 (2020) (extension of absentee ballot deadline); *Mi Familia Vota v. Abbott*, 834 F. App'x 860, 863 (5th Cir. 2020) (mask mandate exemption for voters); *Richardson v. Tex. Sec'y of State*, 978 F.3d 220, 244 (procedures for authenticating mail-in ballot signatures); *Tex. Alliance for Retired Ams. v. Hughs*, 976 F.3d 564, 566–67 (5th Cir. 2020) (new ballot type eliminating straight-ticket voting); *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 411–12 (5th Cir. 2020) (absentee ballot eligibility requirements); *DNC v. Wis. State Leg.*, 141 S. Ct. at 31 (extension of absentee ballot deadline).

Plaintiffs' requested injunction does not affect any voting procedures. It does not ask the court to change the process for applying to vote by mail or the deadline or eligibility requirements for doing so. Nor does it *require* that election officials start soliciting applications to vote by mail—it simply prevents the imposition of criminal and civil penalties against officials for encouraging people to vote by mail if they are eligible to do so. Accordingly, it is unlikely that the proposed preliminary injunction would lead to the kind of voter confusion envisioned by *Purcell*. The Attorney General raises the possibility that "at least some" voters would be confused by the fact that elections officials were soliciting applications to vote by mail "despite a high-profile law

prohibiting that practice," causing them to "lose trust in the election process." ECF No. 48 at 21. But the Attorney General does not allege that this "confusion" about election officials' speech would disenfranchise anyone, like misunderstandings about voting procedures—deadlines, eligibility, voter identification requirements, polling locations, etc.—are wont to do. Thus, those voters' potential, subjective confusion is clearly outweighed by the irreparable harm that Plaintiffs will suffer absent injunctive relief.

Moreover, unlike an order requiring affirmative changes to the election process before it occurs, an injunction against enforcement proceedings is removed in space and time from the mechanics and procedures of voting. Prosecutions simply do not occur at the polls—they require investigation, evidence, and due process. Because criminal prosecutions and civil penalties necessarily follow the offending conduct in time, the only prospective interest that Defendants can plausibly allege would be impaired by injunctive relief is the deterrent effect of the anti-solicitation provision. Given that their chilling effect on speech is the very feature that likely renders the provisions constitutionally infirm, however, deterring violations is unlikely to serve the public interest. *See Ingebretsen on behalf of Ingebretsen v. Jackson Public Sch. Dist.*, 88 F.3d 274, 280 (5th Cir. 1996) (where an enactment is unconstitutional, "the public interest [is] not disserved by an injunction preventing its implementation"); *G & V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071 (6th Cir. 1994) ("[I]t is always in the public interest to prevent the violation of a party's constitutional rights.").

Here, the public interest is not served by Texas's enforcement—whether through civil or criminal penalties—of a restriction on speech that Plaintiffs have shown likely violates their fundamental rights under the First Amendment. Their speech has been and continues to be chilled, and the need for relief is urgent, given the fast-approaching deadline for requesting applications

for mail-in ballots. Accordingly, the balance of the equities and the public interest weigh in favor of a preliminary injunction.

CONCLUSION

For the foregoing reasons, the Court concludes that Plaintiffs have satisfied their burden of establishing the Court's subject matter jurisdiction over this case and a substantial likelihood that they will succeed on the merits of their claims that the anti-solicitation provision set forth in Section 276.016(a)(1), and as enforced through Section 31.129, constitutes unlawful viewpoint discrimination in violation of the First and Fourteenth Amendments, both facially and as applied to Plaintiffs' speech. The Court further concludes that the irreparable injury Plaintiffs will suffer absent injunctive relief substantially outweighs any harm potentially suffered by Defendants, and that a preliminary injunction will serve the public interest.

It is therefore **ORDERED** that Plaintiffs' Motion for Preliminary Injunction (ECF No. 7) is hereby **GRANTED**.

Defendants Ogg, Garza, and Dick are **ENJOINED** from enforcing Section 276.016(a)(1) of the Texas Election Code against Plaintiffs. No officer, agent, servant, employee, or other person in active concert with Defendants Ogg, Garza, and Dick may enforce Section 276.016(a)(1) against Plaintiffs Longoria and Morgan pending final resolution of this case.

It is further **ORDERED** that all Defendants are **ENJOINED** from enforcing Section 31.129 of the Texas Election Code, as applied to a violation of Section 276.016(a)(1), against Plaintiffs. No officer, agent, servant, employee, or other person in active concert with Defendants may enforce Section 31.129 against Plaintiffs Longoria and Morgan pending the final resolution of this case.

It is further **ORDERED** that Defendants may not criminally or civilly prosecute Plaintiffs for any violations of Sections 276.016(a)(1) and 31.129 of the Election Code committed during the pendency of this lawsuit, even if Sections 276.016(a)(1) and 31.129 are later found to be constitutional.

The Attorney General's oral motion to stay this injunction pending appeal is **DENIED**.

It is so **ORDERED**.

SIGNED this February 11, 2022.

XAVIER RODRIGUEZ
UNITED STATES DISTRICT JUDGE

Tab B: Fifth Circuit Opinion (Mar. 21, 2022)

2022 WL 832239
Only the Westlaw citation is currently available.
United States Court of Appeals, Fifth Circuit.

Isabel LONGORIA; Cathy Morgan, Plaintiffs—Appellees,

v.

Warren K. PAXTON, in his official capacity as Attorney General of Texas; Shawn Dick, in his official capacity as Williamson County District Attorney, Defendants—Appellants.

No. 22-50110
|
FILED March 21, 2022

Appeal from the United States District Court for the Western District of Texas, USDC No. 5:21-CV-1223, Xavier Rodriguez, U.S. District Judge

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Sean Breen, Howry Breen & Herman, L.L.P., Randy Tom Leavitt, Law Office of Randy T. Leavitt, Austin, TX, for Defendant—Appellant Shawn Dick, in His Official Capacity as Williamson County District Attorney.

Before Southwick, Haynes, and Higginson, Circuit Judges.

Opinion

Per Curiam: *

* Pursuant to 5th Circuit Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Circuit Rule 47.5.4.

***1** Plaintiffs Isabel Longoria and Cathy Morgan allege that two recently enacted provisions of the Texas Election Code violate the First and Fourteenth Amendments. The district court granted Plaintiffs' request for a preliminary injunction, enjoining enforcement of the challenged provisions. Two defendants—Ken Paxton, the Texas Attorney General, and Shawn Dick, the Williamson County District Attorney—appealed.

There are two threshold issues on appeal: whether Plaintiffs have standing to pursue their claims and whether Longoria's claim against Paxton is barred by sovereign immunity. The outcome of these issues depends, in part, on core state law issues: (1) the interpretation of the term "public official" under the Texas Election Code; (2) the scope of "solicitation" within the challenged provision; and (3) the identity of the state officer tasked with enforcing the civil liability provision. Because we lack clear guidance from Texas courts on these issues and the outcome may be dispositive of the entire appeal, we respectfully CERTIFY questions to the Supreme Court of Texas.

CERTIFICATION FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT TO THE SUPREME COURT OF TEXAS, PURSUANT TO TEXAS CONSTITUTION ART. V, § 3-C AND RULE 58 OF THE TEXAS RULES OF APPELLATE PROCEDURE.

TO THE SUPREME COURT OF TEXAS AND THE HONORABLE JUSTICES THEREOF:

I. Style of the Case

The style of the case in which this certification is made is *Longoria v. Paxton*, No. 22-50110, in the United States Court of Appeals for the Fifth Circuit. The case is on appeal from the United States District Court for the Western District of Texas. Federal jurisdiction is based on a federal question presented. The Fifth Circuit, on its own motion, has decided to certify these questions to the Justices of the Texas Supreme Court.

II. Background

This suit is a pre-enforcement challenge to two sections of the Texas Election Code: § 276.016(a)(1) (the "anti-solicitation provision") and § 31.129 (the "civil liability provision") as applied to the anti-solicitation provision. The anti-solicitation provision makes it unlawful for "[a] public official or election official" while "acting in an official capacity" to "knowingly ... solicit[ ] the submission of an application to vote by mail from a person who did not request an application." TEX. ELEC. CODE § 276.016(a)(1).[1] The civil liability provision creates a civil penalty for election officials who are employed by the state (or one of its political subdivisions) and violate a provision of the election code. *Id.* § 31.129. Together, these provisions provide for civil and criminal liability, punishable by a mandatory minimum of six month's imprisonment, fines up to $10,000, and other civil penalties, including termination of employment and loss of employment benefits. *See id.* §§ 276.016(b), 31.129; TEX. PENAL CODE § 12.35(a)–(b).

1 The anti-solicitation provision provides two exceptions. *See* TEX. ELEC. CODE § 276.016(e). The provision does not apply: (1) if the individual "provide[s] general information about voting by mail, the vote by mail process, or the timeliness associated with voting to a person or the public"; or (2) if the individual engages in solicitation "while acting in the official's capacity as a candidate for a public elective office." *Id.*

***2** Plaintiff Isabel Longoria is the Harris County Elections Administrator, and Plaintiff Cathy Morgan is a Volunteer Deputy Registrar ("VDR") serving in Williamson and Travis Counties. Together, they filed the present suit against the Texas Attorney General, Ken Paxton, and three District Attorneys, Kim Ogg, Shawn Dick, and Jose Garza, in their official capacities. Longoria sued Paxton to enjoin enforcement of the civil liability provision, as applied to the anti-solicitation provision. Additionally, as a result of the determination by the Texas Court of Criminal Appeals that the Texas Attorney General has no independent authority to prosecute criminal offenses created by the Texas Election Code, *see State v. Stephens*, No. PD-1032-20, 2021 WL 5917198 (Tex. Crim. App. Dec. 15, 2021) (not released for publication), Longoria and Morgan also brought suit against the District Attorneys in their respective counties to challenge the criminal penalties imposed by the anti-solicitation provision.

Longoria and Morgan allege that they "routinely encourage[ ] those who are (or may be) eligible to vote by mail to request an application to vote by mail, both through public statements and in interactions with individual voters," while carrying out their duties as Elections Administrator and VDR. Plaintiffs maintain that they would engage in speech that "encourage[s] voters to lawfully vote by mail," but "are currently chilled from doing so because of the risk of criminal and civil liability" imposed by the anti-solicitation and civil liability provisions. As such, they seek (1) a declaratory judgment that the provisions violate the First and Fourteenth Amendments and (2) an injunction prohibiting Defendants from enforcing the provisions.

After filing suit, Plaintiffs moved for a preliminary injunction seeking to enjoin enforcement of the anti-solicitation and civil liability provisions pending final resolution of the case. After an evidentiary hearing, the district court granted Plaintiffs' motion, enjoining the District Attorney Defendants from criminally prosecuting under the anti-solicitation provision and enjoining all Defendants from enforcing the anti-solicitation provision via the civil liability provision. Defendants Paxton and Dick timely appealed. [2] As a result, only Longoria's challenge to the civil penalty permitted by the civil liability provision and Morgan's challenge to the criminal liability imposed under the anti-solicitation provision are before us.

[2] Defendants Ogg and Garza filed stipulations indicating that they would not enforce the provisions during the pendency of this litigation. As such, they did not join in the appeal. Therefore, Longoria's potential criminal liability is not before us on appeal, and the preliminary injunction remains in place as to that portion of the lawsuit.

III. Jurisdiction & Legal Standards

Our court has jurisdiction over interlocutory appeals of preliminary injunctions under 28 U.S.C. § 1292(a)(1). Plaintiffs contend that the district court had jurisdiction under 28 U.S.C. § 1331. However, two of the issues that we must address—whether Plaintiffs have standing and whether sovereign immunity bars Longoria's claim—are threshold jurisdictional questions. *See Air Evac EMS, Inc. v. Tex. Dep't of Ins.*, 851 F.3d 507, 520 (5th Cir. 2017) (standing); *Texas v. Caremark, Inc.*, 584 F.3d 655, 658 (5th Cir. 2009) (sovereign immunity). Therefore, before we can reach the ultimate issue on appeal of whether the district court correctly granted Plaintiffs' request for preliminary relief, we must first determine whether the district court had jurisdiction.

We conclude that certifying three questions to the Texas Supreme Court will significantly aid us in resolving those jurisdictional issues. [3] To determine whether certification is appropriate, we weigh three factors: (1) "the closeness of the question[s]"; (2) federal-state comity; and (3) "practical limitations," such as the possibility of delay or difficulty of framing the issue. *Swindol v. Aurora Flight Scis. Corp.*, 805 F.3d 516, 522 (5th Cir. 2015) (quotation omitted). Those factors have supported our decision to certify important questions of Texas statutory interpretation in the past. *See, e.g., JCB, Inc. v. The Horsburgh & Scott Co.*, 912 F.3d 238, 241 (5th Cir. 2018), *certified question answered*, 597 S.W.3d 481 (Tex. 2019).

[3] The Texas Constitution grants the Supreme Court of Texas the power to answer questions of state law certified by a federal appellate court. Tex. Const. art. V, § 3-c(a). Texas rules provide that we may certify "determinative questions of Texas law" that have "no controlling Supreme Court [of Texas] precedent." TEX. R. APP. P. 58.1.
Although neither party requested certification in this case, we can certify questions to the Supreme Court of Texas on our own motion, and that court has graciously accepted our request to do so in the past. *See, e.g., Norris v. Thomas (In re Norris)*, 413 F.3d 526, 527 (5th Cir. 2005) (per curiam), *certified question answered*, 215 S.W.3d 851 (Tex. 2007).

IV. Discussion

***3** The threshold issues in this case relate to whether the district court had jurisdiction. Among other things, Defendants argue that jurisdiction was lacking because (1) Plaintiffs do not have standing to pursue their claims, and (2) Longoria's claim is barred by sovereign immunity.

With regard to standing, [4] the primary issue is whether Plaintiffs can establish that they have suffered an injury in fact. To prove injury in fact in the First Amendment context, Plaintiffs must demonstrate that (1) they intend "to engage in a course of conduct arguably affected with a constitutional interest," (2) their "intended future conduct is arguably ... proscribed by" the provision in question, and (3) "the threat of future enforcement of the [challenged provision] is substantial." *Speech First, Inc. v. Fenves*, 979 F.3d 319, 330 (5th Cir. 2020) (alterations in original) (quoting *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 161–64, 134 S.Ct. 2334, 189 L.Ed.2d 246 (2014)).

[4] To satisfy the Article III standing requirement, Plaintiffs must show: (1) "an injury in fact"; (2) caused by Defendants; and (3) "likely to be redressed by [Plaintiffs'] requested relief." *Stringer v. Whitley*, 942 F.3d 715, 720 (5th Cir. 2019) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)).

Resolution of whether Plaintiffs have satisfied the injury-in-fact requirement depends on the answer to two questions: (1) whether VDRs are considered "public officials" under the anti-solicitation provision of the Texas Election Code, and (2) whether the speech Plaintiffs allege that they intend to engage in constitutes "solicitation" under the anti-solicitation provision.

If VDRs are not "public officials," then Morgan cannot be prosecuted under the statute, and if Longoria and Morgan's desired speech is not considered "solicitation," then the speech they wish to engage in is not proscribed—therefore, they cannot prove that there is a threat of civil liability or criminal prosecution. As such, a definitive answer to the aforementioned questions will aid us in determining whether Plaintiffs have suffered an injury in fact sufficient to confer standing in this case. [5]

[5] We are in receipt of Longoria's Rule 28(j) letter notifying the court of Longoria's resignation from her position as Harris County Elections Administrator, effective July 1, 2022. Our decision to certify questions here has no bearing on the issue of whether Longoria ultimately will have standing to pursue her claims in this case once she leaves office. Our decision here only discusses whether the speech Longoria intends to engage in while still in office constitutes solicitation, sufficient to establish an injury in fact.

Similarly, resolution of the sovereign immunity issue depends upon an interpretation of the relevant provisions. Under the doctrine of sovereign immunity, states and their officers are generally immune from private suits unless they consent or unless Congress validly strips their immunity. *City of Austin v. Paxton*, 943 F.3d 993, 997 (5th Cir. 2019). However, *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), permits a plaintiff to sue a state officer in his or her official capacity for an injunction to stop ongoing violations of federal law. *Id.* at 155–56, 28 S.Ct. 441. But the officer sued must have "some connection with the enforcement of the [challenged] act." *Id.* at 157, 28 S.Ct. 441. We have recognized that to satisfy this requirement, the officer must have "the particular duty to enforce the statute in question and a demonstrated willingness to exercise that duty." *Tex. Democratic Party v. Abbott*, 978 F.3d 168, 179 (5th Cir. 2020) (quotation omitted).

***4** Our court continues to address these sovereign immunity questions of "some connection" in Texas Election Code cases, even as recently as last week. *See Richardson v. Scott*, No. 20-50774 (5th Cir. Mar. 16, 2022); *Lewis v. Scott*, No. 20-50654 (5th Cir. Mar. 16, 2022); *Tex. All. for Ret. Ams. v. Scott*, No. 20-40643 (5th Cir. Mar. 16, 2022). Thus, the question of whether a sued state official is the proper official to enforce "the particular statutory provision that is the subject of the litigation" continues to be an issue before us. *See Tex. All. for Ret. Ams.*, —— F.4th —— (quotation omitted).

In this case, Paxton maintains that sovereign immunity bars Longoria's claim against him because he is not the state officer with the duty to enforce the civil liability provision. [6] Therefore, he claims that he lacks the requisite connection for *Ex parte Young* application. As noted above, our precedent requires us to conduct a provision-by-provision analysis. *See id.*; *Tex. Democratic Party*, 978 F.3d at 179. However, such an analysis here provides little clarity on Paxton's role in enforcement. The anti-solicitation is silent as to the enforcement official. *See* TEX. ELEC. CODE § 276.016(a)(1). Based upon the recent decision from the Texas Court of Criminal Appeals in *Stephens*, the parties agree that Paxton does not have the authority to seek criminal prosecution. But the civil liability provision is similarly silent as to who may enforce it—the provision only indicates that "[a]n election official may be liable to th[e] state." *Id.* § 31.129. Because the civil liability provision provides little insight on who may enforce it, we are left without a definitive answer as to whether Paxton has the requisite connection for *Ex parte Young* application.

[6] We recognize that Paxton has the obligation to represent the state in litigation. TEX. CONST. art. IV, § 22 (notes and commentary) ("The attorney general is the chief law officer of the state" and one of his or her "two principal functions" is "representing the state in civil litigation."). However, having an obligation to *represent* a party in litigation is not the same thing as having enforcement authority. *See, e.g., Cameron v. EMW Women's Surgical Ctr., P.S.C.*, —— U.S. ——,

142 S. Ct. 1002, 1012 n.5, —— L.Ed.2d —— (2022). Thus, it appears this section of the Texas Constitution does not answer our question.

Because each of the aforementioned questions necessarily invoke overarching issues regarding newly enacted provisions of state law and the answers to each will affect future proceedings in this federal suit, we conclude that certification to the Texas Supreme Court is necessary and valuable. *See McKesson v. Doe*, —— U.S. ——, 141 S. Ct. 48, 51, 208 L.Ed.2d 158 (2020) (per curiam) ("In exceptional instances ... certification is advisable before addressing a constitutional issue.").

Consideration of the factors cited in *Swindol* likewise demonstrates that certification is appropriate in this case. First, each question presents close issues, and there is limited state law authority to guide our analysis. *Swindol*, 805 F.3d at 522. With regard to question one, the anti-solicitation provision applies only to the conduct of "public official[s]" and "election official[s]." TEX. ELEC. CODE § 276.016(a). "Election official" is statutorily defined but does not include VDRs. *See id.* § 1.005(4–a). Conversely, the Election Code leaves "public official" undefined. *See generally id.*

Another separate Texas statute addressing the judicial branch of Texas provides a definition of "public official" as follows: "*In this section*, a 'public official' means any person selected, appointed, employed, or otherwise designated as an officer, employee, or agent...." TEX. GOV'T CODE § 22.304(a) (emphasis added). However, there are several reasons why we question whether the Government Code definition should control here. First, that definition appears in an entirely different title of Texas statutory law: a chapter on Appellate Courts, expressly stating that the definition applies "in this section." *Id.* It then details a specific criminal offense but does not say anything about the applicability of that definition elsewhere. Indeed, there is no incorporation by reference or text in the statute indicating that the Government Code's definition of "public official" applies outside this narrow scope. Conversely, this statute addresses a very specific matter of the crime of improper communications to clerks of court for the construction of appellate panels to hear prioritized appeals of injunctive relief or writs of mandamus under Chapter 273 of the Election Code—it does not apply to the provisions relevant here and does not apply to all appeals. [7] Second, applying a broad interpretation of this phrase elsewhere could create a number of wide-ranging ramifications without indication that the Texas legislature so intended. Without guidance from a Texas court or the Texas legislature, we are hesitant to permit such broad and automatic application.

7 Indeed, the point is to add public officials, not limit public officials. The full text demonstrates as much:

> (a) In this section, "public official" means any person elected, selected, appointed, employed, or otherwise designated as an officer, employee, or agent of this state, a government agency, a political subdivision, or any other public body established by state law.
>
> (b) Notwithstanding any other law or rule, a court proceeding entitled to priority under Section 22.305 and filed in a court of appeals shall be docketed by the clerk of the court and assigned to a panel of three justices determined using an automated assignment system.
>
> (c) A person, including a public official, commits an offense if the person communicates with a court clerk with the intention of influencing or attempting to influence the composition of a three-justice panel assigned a specific proceeding under this section.
>
> (d) An offense under this section is a Class A misdemeanor.

TEX. GOV'T. CODE § 22.304

***5** Moreover, even if we applied the Government Code's definition of public official here, it is difficult to conclude that VDRs fit within that definition. We question, first, whether VDRs are truly "appointed" to their positions, beyond a mere technical sense. The state provides no discretion to the person who "appoints" the VDRs for their county. Instead, the process of becoming a VDR is mechanical in nature—an individual simply contacts the voter registrar, completes a training, passes an examination, and then receives a certificate "appointing" them to this role. [8] As such, it's not entirely clear whether that process is sufficient to qualify an individual as an appointed "public official" of the state. Second, we question whether VDRs are truly "agents" of the state. One could assume that VDRs are, in essence, merely couriers of forms and completed ballots—they are tasked with handing out voter registration applications and reviewing applications for completeness. *See* TEX. ELEC. CODE §§ 13.042(a), 13.039(a). Based on our interpretation, it appears that the only "power" that a VDR has is the ability

to "distribute voter registration application forms throughout the county and receive registration applications submitted to the deputy in person." *Id.* § 13.038. If they receive a completed ballot, they must immediately deliver it to the county registrar. *Id.* § 13.042. Conversely, it appears that it is the *county registrar* "[who] review[s] each submitted application ... to determine whether it complies with" all eligibility requirements, *id.* § 13.071(a), "approve[s] the application," *id.* § 13.072(a), "indicates that the applicant is eligible for registration," *id.* § 13.072(a)(1), and "prepares [the] voter registration certificates," *id.* § 13.142(a)(1). So, while *county registrars* are undoubtedly "agents," one could determine that VDRs' duties in the voting registration process are more in the realm of a delivery person than an "agent." [9] Of course, no one contends that these volunteers are "employees" or "officers" of Texas. But, at bottom, it's unclear whether a volunteer may (or should) be considered an agent of the state simply because they hand out voter registration forms and courier those forms to a county registrar.

8 *See* TEX. ELEC. CODE §§ 13.001, 13.002, 13.033.

9 We certainly respect the volunteer work of the VDRs; we just question whether that makes them a Texas "public official" within this provision.

It furthermore does not appear that any Texas court has opined on whether VDRs are considered public officials, and even the district court was unsure. In the absence of a statutory definition or Texas court interpretation, we are left without clear guidance as to who qualifies as a "public official." With these considerations in mind, we conclude that whether or not VDRs are "public officials" under the Election Code is an open question. [10]

10 No one disputes that, while she is still in office, Longoria is an "election official." However, we must determine Morgan's standing because she is the only one before us as to whom the preliminary injunction regarding criminal prosecution is at issue.

The second question—the scope of "solicitation"—is similarly open. Plaintiffs contend that they would like to "encourage[ ] those who are (or may be) eligible to vote by mail to request an application to vote by mail, both through public statements and in interactions with individual voters." Specifically, Plaintiffs testified to some examples of speech that they wish to engage in: going door-to-door in their neighborhood, recommending that people vote early if they are going to be out of town on election day, and answering phone calls about mail-in voting. In so doing, they would, for example, like to "give mere truthful advice in response to questions from individual voters," such as specifically giving advice on mail-in ballots in response to questions about voting. Plaintiffs contend that they are chilled from doing so, however, due to fear of violating the anti-solicitation provision. But it's not entirely clear whether any of the aforementioned examples of speech about mail-in voting would be considered "solicitation" under the anti-solicitation provision. Indeed, Morgan testified that she wasn't sure whether her interactions would count as solicitation under the law, but she was "scared that [they] would." Similarly, Longoria testified that she had "not seen anything that define[d] solicitation from the Secretary of State's office," and she was concerned by the "vague, gray, nebulous" line between permitted and proscribed speech.

Plaintiffs are not the only ones confused about what constitutes "solicitation." In fact, *no one* at the preliminary injunction hearing could articulate what speech was proscribed by the provision. The Director of the Elections Division of the Texas Secretary of State's office testified that his office had not given definitions to the election workers about what constituted solicitation, [11] and beyond a "general dictionary definition," the office internally did not know what the word "solicit" meant under the provision. Similarly, when questioned by the district court and our court, defense counsel did not contend that Plaintiffs' proposed speech constituted solicitation. Defense counsel intimated that "solicitation as used in criminal statutes often includes a more formal requirement" than the speech that Plaintiffs described, but likewise could not provide a clear standard. Defense counsel urged the district court to consider the text of the statute, dictionaries, and legislative history to determine the statute's scope, but also conceded that an analysis of the word "solicit" would require "an *Erie* question of state law." Near the conclusion of the hearing, the district court voiced its concern that none "of the government's lawyers [could] tell [the court] what solicit mean[t]."

11 Indeed, the term "solicitation" has, as a key definition, a criminal definition. *See, e.g., Solicitation*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("The criminal offense of urging, advising, commanding, or otherwise inciting another to commit a crime."). Importantly, neither Plaintiff is requesting to advise people who are not eligible to vote by mail to do so, only those who are permitted to do so under existing Texas law.

***6** At bottom, in the absence of state court authority interpreting the anti-solicitation provision and given the uncertainty among all familiar parties as to what speech falls under the provision's umbrella, the scope of solicitation is unclear—does "solicitation" mean only requesting criminal conduct, i.e., submitting an application to vote by mail illegally? Does it mean recommending voting by mail? Does it mean directing or telling someone to do so? In the absence of state law authority, this question also presents a close call weighing in favor of certification.

The third question is likewise open. We are aware of no authority from Texas courts determining who is statutorily tasked with enforcement of the civil liability provision. Thus, without clear guidance, this question presents a close call.

The second factor cited in *Swindol*, federal-state comity, also weighs heavily in favor of certification. *See* 805 F.3d at 522. If we affirm the preliminary injunction, we would effectively invalidate a new state law on constitutional grounds, at least for now. As the Supreme Court has noted, certification is particularly "appropriate where an unconstrued state statute is susceptible of a construction by the state judiciary which might avoid in whole or in part the necessity for federal constitutional adjudication." *Bellotti v. Baird*, 428 U.S. 132, 146–47, 96 S.Ct. 2857, 49 L.Ed.2d 844 (1976) (internal quotation marks and citation omitted). Here, a federal court has questioned the constitutionality of the anti-solicitation provision recently passed by the Texas legislature and, presumably, important to them, making consideration of the actual meaning of the statute highly important. *See id.*

Additionally, we recognize that the definition and scope of a Texas statute recently enacted by the Texas legislature and directly impacting Texas elections presents a "matter of particular importance to the State of Texas." *Garofolo v. Ocwen Loan Serv., L.L.C.*, 626 F. App'x 59, 64 (5th Cir. 2015) (per curiam). Because the resolution of these questions implicates important Texas interests, we are hesitant to undertake these issues in the first instance. Rather, federal-state comity weighs heavily in favor of certification.

Third, and finally, practical considerations do not disfavor certification; while we recognize the time sensitivity of the issues at hand, there is no reason to think that certification would cause undue delay—to the contrary, the Texas Supreme Court is known for its "speedy, organized docket." *Degan v. Bd. of Trs. of Dall. Police & Fire Pension Sys.*, 766 F. App'x 16, 19–20 (5th Cir. 2019) (per curiam), *certified questions answered*, 594 S.W.3d 309 (Tex. 2020). Indeed, in the past, the Texas Supreme Court graciously accepted certification of cases that required prompt timing. We recognize that the Texas Supreme Court is a busy court with numerous pressing and important items on its docket. We defer to that court as to when to decide this matter, though we respect that they are aware of the impending run-off elections and the time sensitivity of the issues here, given that this is an election year. We know that if the court decides to accept this certification, it will conduct its timing appropriately.

We therefore conclude that certification is warranted.

V. Questions Certified

We respectfully request that the Texas Supreme Court address and answer the following questions.

(1) Whether Volunteer Deputy Registrars are "public officials" under the Texas Election Code;

(2) Whether the speech Plaintiffs allege that they intend to engage in constitutes "solicitation" within the context of Texas Election Code § 276.016(a)(1). For example, is the definition narrowly limited to seeking application for violative mail-in ballots? Is it limited to demanding submission of an application for mail-in ballots (whether or not the applicant qualifies) or

does it broadly cover the kinds of comments Plaintiffs stated that they wish to make: telling those who are elderly or disabled, for example, that they have the opportunity to apply for mail-in ballots?; and

***7** (3) Whether the Texas Attorney General is a proper official to enforce Texas Election Code § 31.129.

VI. Conclusion

We disclaim any intent that the Texas Supreme Court confine its reply to the precise form or scope of the questions certified. More generally, if the Texas Supreme Court determines a more effective expression of the meaning of these terms than answering the precise questions we have asked, we defer to the court to take that course. We transfer to the Texas Supreme Court the record and appellate briefs in this case with our certification. We retain this appeal pending the Texas Supreme Court's response.

QUESTIONS CERTIFIED TO THE SUPREME COURT OF TEXAS.

All Citations

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End of Document

Tab C: Texas Election Code section 31.129

TEXAS ELECTION CODE

Title 3. Election Officers and Observers

Chapter 31. Officers to Administer Elections

Subchapter E. Miscellaneous Provisions

Sec. 31.129. Civil Penalty.

(a) In this section, "election official" has the meaning assigned by Section 31.128.

(b) An election official may be liable to this state for a civil penalty if the official:

(1) is employed by or is an officer of this state or a political subdivision of this state; and

(2) violates a provision of this code.

(c) A civil penalty imposed under this section may include termination of the person's employment and loss of the person's employment benefits.

Tab D: Texas Election Code section 276.016

TEXAS ELECTION CODE

Title 16. Miscellaneous Provisions

Chapter 276. Miscellaneous Offenses and Other Provisions

Sec. 276.016. Unlawful Solicitation and Distribution of Application to Vote by Mail.

(a) A public official or election official commits an offense if the official, while acting in an official capacity, knowingly:

(1) solicits the submission of an application to vote by mail from a person who did not request an application;

(2) distributes an application to vote by mail to a person who did not request the application unless the distribution is expressly authorized by another provision of this code;

(3) authorizes or approves the expenditure of public funds to facilitate third-party distribution of an application to vote by mail to a person who did not request the application; or

(4) completes any portion of an application to vote by mail and distributes the application to an applicant.

(b) An offense under this section is a state jail felony.

(c) Subsection (a)(2) does not apply if the public official or election official engaged in the conduct described by Subsection (a)(2) by providing access to an application to vote by mail from a publicly accessible Internet website.

(d) Subsection (a)(4) does not apply if the public official or election official engaged in the conduct described by Subsection (a)(4) while lawfully assisting the applicant under Section 84.003.

(e) Subsection (a) does not apply if the public official or election official:

(1) provided general information about voting by mail, the vote by mail process, or the timelines associated with voting to a person or the public; or

(2) engaged in the conduct described by Subsection (a) while acting in the official's capacity as a candidate for a public elective office.

(f) The remedy provided under this chapter is cumulative, and does not restrict any other remedies provided by this code or by law. A violation of this section is subject to injunctive relief or mandamus as provided by this code.

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