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

REPLY BRIEF FOR APPELLANT THE ATTORNEY GENERAL OF TEXAS

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-1700
Fax: (512) 474-2697

JUDD E. STONE II
Solicitor General

LANORA C. PETTIT
Principal Deputy Solicitor General
State Bar No. 24115221
Lanora.Pettit@oag.texas.gov

BETH KLUSMANN
Assistant Solicitor General

CODY C. COLL
Assistant Attorney General

Counsel for the Attorney General of Texas

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The parties agree on two of the three certified questions: volunteer deputy registrars are not "public officials" who may be prosecuted under Texas Election Code section 276.016, and the Attorney General may not seek to enforce the civil penalties in Texas Election Code section 31.129.[1]

The parties disagree on the second certified question concerning how to interpret "solicits" in Texas Election Code section 276.016(a)(1). The Attorney General has offered a narrower definition of "solicit" than Plaintiffs do that still gives effect to the text of the statute—importuning or strongly urging someone to fill out a mail-in ballot application. Rather than adopt that definition, Plaintiffs first argue that "solicits" includes any form of "request" or "encouragement," and then ask this Court to adopt one of two atextual limitations—soliciting only *unlawful* mail-in ballot applications or soliciting on a person-by-person basis. But the text of the statute, its surrounding provisions, and the plain meaning of "solicits" do not support either additional requirement. Beyond that, Plaintiffs nitpick some of the Attorney General's language as too vague—notwithstanding that the definition the Attorney General advocates appears in the very definitions quoted by Plaintiffs (at 24-26).

The true problem is that Plaintiffs have brought a pre-enforcement, facial challenge to a statute that clearly has many constitutional applications, yet Plaintiffs do not specify what they wish to say. Contrary to Plaintiffs' implication (at 36-42), that

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[1] Plaintiffs also do not seem to contest the Attorney General's view that he may enforce the anti-solicitation provision through other means under limited circumstances.

does not render the statute impermissibly vague; it makes Plaintiffs' challenge premature. Thus, while the Court can provide a definition that answers whether some of Plaintiffs' speech is unlawful solicitation, it cannot definitively resolve all of those questions on this record.

ARGUMENT

I. The Parties Agree That the First and Third Certified Questions Should Be Answered "No."

A. All parties to this appeal agree that volunteer deputy registrars like Cathy Morgan are not "public officials" subject to prosecution under Texas Election Code section 276.016. OAG Br. 13-27; Dick Br. 23-35; Appellees' Br. 19-22. They do not exercise sovereign power, perform any discretionary duties, or have any of the other hallmarks of a public official. While their service is valuable, the Court should hold that they are not "public officials" and answer the first certified question "no."

B. The Attorney General and Plaintiffs also agree that the Attorney General cannot seek civil penalties under Texas Election Code section 31.129 because the Legislature did not explicitly authorize him to do so. OAG Br. 37-44; Appellees' Br. 43-45.[2] While Plaintiffs suggest the possibility that *no* public official can enforce section 31.129, Appellees' Br. 44, the Court should refrain from opining on that issue. None of the parties have thoroughly briefed it, and resolving that issue is unnecessary to answer the Fifth Circuit's third certified question "no."

[2] Because the third certified question did not implicate any claim against District Attorney Dick, he did not take a position on it. Dick Br. 43-44.

Regardless, while some questions remain about the scope of the authority of county and district attorneys to represent the State, *see, e.g.*, *State ex rel. Durden v. Shahan*, No. 04-19-00714-CV, 2021 WL 1894904, at *5 (Tex. App.—San Antonio May 12, 2021, pet. filed), the Constitution gives them general authority to represent the State in trial courts, Tex. Const. art. V, § 21. Because courts "do not lightly presume that the Legislature may have done a useless act," the Court should likely conclude in an appropriate case that the Legislature did not enact an unenforceable set of civil penalties. *JCB, Inc. v. Horsburgh & Scott Co.*, 597 S.W.3d 481, 488 (Tex. 2019). The Attorney General suggests, however, that this is not an appropriate case to resolve that important question.

II. Plaintiffs' Efforts to Limit the Definition of "Solicits" Are Not Supported by the Statutory Text, and Their Complaints About the Attorney General's Definition Are Premature.

The one issue that the Court does need to address is the second certified question: whether the speech Plaintiffs wish to make is "solicitation" prohibited by Texas Election Code section 276.016(a)(1). *Longoria v. Paxton*, No. 22-50110, 2022 WL 832239, at *6 (5th Cir. Mar. 21, 2022) (per curiam). While the parties cite similar dictionary, statutory, and case-based resources, they reach different conclusions about what the answer should be.

The Attorney General would define "solicit" narrowly to include only instances where a public or election official (acting in her official capacity) importunes or strongly urges a voter to submit a mail-in ballot application that he did not request. OAG Br. 27-45. Plaintiffs would have the Court instead define "solicits" broadly to

include any form of encouragement, request, or invitation, but then impose narrowing constructions that limit the statute's application to (1) the solicitation of only unlawful mail-in ballot applications, and (2) solicitation done on an individual-by-individual basis. Plaintiffs' view is inconsistent with the statutory text and is unnecessary to preserve the constitutionality of section 276.016(a)(1). Plaintiffs' remaining quibbles about the Attorney General's proposed definition are a reflection not of any definitional vagueness, but of the lack of clarity in Plaintiffs' evidence in this pre-enforcement, facial challenge to a law that has never been used. The Court cannot determine whether Plaintiffs' speech is covered when it is unclear what Plaintiffs wish to say.

A. The Court should reject Plaintiffs' atextual reading of section 276.016.

In an effort to exempt most of their speech from regulation, Plaintiffs ask this Court to impose an atextual limitation on the definition of "solicits," arguing it should apply only to the solicitation of *unlawful* mail-in ballot applications, that is, soliciting applications from individuals ineligible to vote by mail. Appellees' Br. 30-34. But the text of section 276.016(a)(1) is explicit about whom may not be solicited: anyone "who did not request an application." Tex. Elec. Code § 276.016(a)(1). The statute contains no additional requirement that those individuals also be ineligible to vote by mail. The Court "cannot rewrite the statute" by adding words or replacing words absent "extraordinary circumstances" or "unmistakable textual guidance." *Whole Woman's Health v. Jackson*, No. 22-0033, 2022 WL 726990, at *5 (Tex. Mar. 11, 2022). Those circumstances and unmistakable guidance are not present here.

And Plaintiffs' resort to the constitutional-avoidance doctrine is unnecessary and premature. The Court should reject this atextual interpretation.

1. As the Attorney General has explained (at 28-29), dictionaries in common use define the operative verb in section 276.016 "solicit" as to "importune" or "strongly urge." Though Plaintiffs describe this definition (at 36) as "hopelessly vague," all three of the non-legal dictionaries they cite use the term "importune" as a definition of "solicit." Appellees' Br. 24-25 (quoting definitions from Webster's New International Dictionary of the English Language (2d ed. 1950); Webster's Third New International (2002 ed.); Oxford English Dictionary (2d ed. 1989), all of which use the term "importune"). Even Black's Law Dictionary—upon which Plaintiffs rely—specifies that "solicit" includes only a "serious request." Appellees' Br. 25 (quoting Black's Law Dictionary (6th ed. 1990)).

Plaintiffs complain (at 38 n.3) that the Attorney General refers to Webster's Third Dictionary while they prefer to use Webster's Second and a thirty-year old edition of Black's Law Dictionary, Appellees' Br. 24, 27-28. Leaving aside that the Attorney General relied (at 28) on three editions of Webster's, one edition of Black's and an edition of American Heritage, this quibble misses the point. None of these dictionaries are definitive: the purpose of surveying them is to determine the plain and ordinary meaning of "solicits" from all relevant resources. *See Jaster v. Comet II Constr., Inc.*, 438 S.W.3d 556, 563 (Tex. 2014) (plurality op.). Those resources support the Attorney General's view that the 87th Legislature saw the term "solicit" to mean something more than implied encouragement. OAG Br. 28-31.

This view is also consistent with the very canons of construction that Plaintiffs affirmatively invoke (at 34). Indeed, Plaintiffs' own authority demonstrates that this Court treads lightly in areas where a statute potentially implicates constitutional rights, particularly in areas where "statutory construction questions . . . require[] a fully-developed factual record." *Brady v. Fourteenth Ct. of Appeals*, 795 S.W.2d 712, 715 (Tex. 1990) (orig. proceeding). The canon that "[s]tatutes are given a construction consistent with constitutional requirements" supports the narrower view of "solicit" advocated by the Attorney General. *Id.* But even under the somewhat broader view requiring a "serious request," Black's, *supra*, the statute would not extend to forms of implied encouragement that might fall within Plaintiffs' vague descriptions of the speech in which they wish to engage.

2. Instead of proposing a narrow definition of the term "solicit," Plaintiffs seek (at 30-36) to import a separate limitation that was never included by the drafters of SB 1: that section 276.016(a)(1) bans solicitation of mail-in ballot applications only from those who are not eligible to vote by mail. But as reflected in nearly every dictionary cited, "solicitation" or "solicit" can be used in circumstances other than the solicitation of criminal activity. *See, e.g.*, *Solicitation*, Black's Law Dictionary (11th ed. 2019) ("[t]he act or an instance of requesting or seeking to obtain something; a request or petition"); *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").

Standing alone, "solicit" does not include an implied limitation that the object solicited is illegal.

Texas statutes are similar. While solicitation can include soliciting someone to commit a crime, Tex. Penal Code § 15.03, there are multiple statutes that regulate the solicitation of an otherwise lawful action. For example, the Legislature regulates the solicitation of votes and campaign donations by certain individuals. Tex. Loc. Gov't Code § 150.002. It regulates telephone solicitation for certain charities. Tex. Bus. & Com. Code §§ 303.001-.154. And it limits the solicitation of employment by attorneys and doctors in certain circumstances. Tex. Penal Code §§ 38.01(11), 38.12. As a general matter, then, "solicits" can be used to with respect to activities that are lawful or unlawful.

Unable to avoid this point, Plaintiffs assert that, because section 276.016 is a criminal statute, the action being solicited must also be criminal. Appellees' Br. 31-32. But they cite nothing other than an example of when the solicitation of a criminal act is also a crime. Appellees' Br. 32 (citing Tex. Gov't Code § 432.127). There is no support in precedent for Plaintiffs' novel rule that if soliciting something is a crime, then the thing solicited must also be a crime. The Texas Legislature uses "solicits" in a variety of circumstances. It is the text of each statute that determines what specific solicitation is being regulated. And here, it is the solicitation of an application for a mail-in ballot from any person who has not requested one, regardless of whether they are eligible to vote by mail. Tex. Elec. Code § 276.016(a)(1).

3. Limiting "solicits" to only unlawful mail-in ballot applications also makes little sense when considering section 276.016 as a whole. *Greater Hous. P'ship v.*

Paxton, 468 S.W.3d 51, 58 (Tex. 2015) ("[W]e will not give an undefined term a meaning that is out of harmony or inconsistent with other terms in the statute."). For example, section 276.016 contains a carve-out for speech made in an official's capacity as a candidate for public elective office. Tex. Elec. Code § 276.016(e)(2). But it is illogical to think that the Legislature would have intended to permit candidates for public office—the individuals who would most clearly benefit from such a practice—to solicit unlawful mail-in ballot applications.

Moreover, the unlawful solicitation must be done "knowingly." *Id.* § 276.016(a). A speaker may often not know whether an individual is eligible for mail-in voting—for example, whether they are over 65, disabled, or will be out of town. *Id.* §§ 82.001-.004, .007. So the speaker would be free to solicit mail-in ballot applications from anyone, as long as he did not *know* that they were ineligible for mail-in voting, rendering the statute largely useless.

Plaintiffs also attempt to invoke the likely impetus behind the statute—the Harris County clerk's decision to send mail-in ballot applications to people who were ineligible to vote by mail. Appellees' Br. 32-34 (citing *State v. Hollins*, 620 S.W.3d 400, 403 (Tex. 2020) (per curiam)). But the reason the Legislature enacted section 276.016 does not control over its explicit terms. The Legislature has not limited that section's reach to only those applications that would be unlawful. *See In re Hotze*, No. 21-0893, 2022 WL 815827, at *1 (Tex. Mar. 18, 2022) (orig. proceeding) (Blacklock, J., concurring in denial of mandamus) (recognizing that, in enacting section 276.016, "the Legislature went further than this Court could ever go toward ensuring

compliance with *State v. Hollins*"). This Court should not limit section 276.016(a)(1) contrary to its text, either.[3]

3. Plaintiffs also invoke (at 34-36) the doctrine of constitutional avoidance to support adopting their atextual definition of "solicits." Under that doctrine, the Court, "if possible, interpret[s] the statute in a manner that avoids constitutional infirmity." *Quick v. City of Austin*, 7 S.W.3d 109, 115 (Tex. 1998). Plaintiffs claim that limiting "solicits" only to unlawful mail-in ballot applications would avoid any First Amendment infirmity because "speech integral to criminal conduct" is not protected by the First Amendment. Appellees' Br. 35 (quoting *United States v. Alvarez*, 567 U.S. 709, 717 (2012)). This argument suffers from several defects.

First, this misunderstands the doctrine, which, as described above (at 6), requires courts to adopt a narrower view of the words that the Legislature chose—not insert words that the Legislature did not choose.

Second, it is not "possible" to construe "solicits" to refer only to the solicitation of unlawful mail-in ballot applications because that language is missing from the statute. The doctrine of constitutional avoidance applies only when the statute is ambiguous. *Iancu v. Brunetti*, 139 S. Ct. 2294, 2301 (2019). But this is not a situation in which the statute is ambiguous: section 276.016(a)(1) is explicit that the individuals

[3] Indeed, Plaintiffs do not even explain how their rule would account for the conduct in *Hollins*, in which the Clerk sought to distribute mail-in ballots without regard to whether a particular individual was eligible to vote by mail. 620 S.W.3d at 403. Purpose can never trump text, but courts do not lightly read statutes to negate their purpose. Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 63-65 (2012).

from whom a mail-in ballot application may not be solicited are those who have not requested an application. There is no additional requirement that the individual also be ineligible for mail-in voting.

Third, Plaintiffs' argument is premature and improperly asks this Court to weigh in on the constitutional merits of section 276.016(a)(1). The question of constitutional avoidance in this instance is best understood as a question of severability: SB 1 has a severability clause that includes any application of its provisions. Election Integrity Protection Act of 2021, 87th Leg., 2d C.S., ch. 1, § 10.02, 2021 Tex. Sess. Law Serv. 3783, 3812. Though they couch it in interpretive terms, Plaintiffs ask this Court to conclude that application of section 276.016 to the solicitation of lawful applications would be unconstitutional. Appellees' Br. 34-36. Severability is a question of interpretation decided under state law. *Leavitt v. Jane L.*, 518 U.S. 137, 139 (1996) (per curiam) ("Severability is of course a matter of state law."). But it is properly adjudicated at the remedy stage of litigation once the scope of the constitutional infirmity has been determined. *See, e.g.*, *Murphy v. NCAA*, 138 S. Ct. 1461, 1482-84 (2018) (deciding severability after determining constitutionality of statute); *see also* Election Integrity Protection Act of 2021, 87th Leg., 2d C.S., ch. 1, § 10.02, 2021 Tex. Sess. Law Serv. 3783, 3812 (severability provision applies only if any part of the Act is held invalid).

Severability and remedy are outside the scope of the second certified question. Certification is appropriate when the question certified is a "determinative question[] of *Texas law* having no controlling Supreme Court precedent." Tex. R. App. P. 58.1 (emphasis added). To conclude that there is a First Amendment issue to be

avoided would require the Court to opine on the merits of the underlying constitutional arguments, which are reserved for the federal courts where Plaintiffs chose to litigate.

Though this Court is certainly empowered—and in relevant cases required—to adjudicate constitutional claims, Plaintiffs chose to bring this pre-enforcement challenge in federal court. As a result, the litigation is bifurcated in a way that places issues relevant to whether the constitutional-avoidance doctrine should be applied outside the scope of the certified question. For example, the federal court has been asked whether section 276.016, which applies only to speech made in a public or election official's "official capacity," involves only government speech that is unprotected by the First Amendment. *See Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 207 (2015) ("When government speaks, it is not barred by the Free Speech Clause from determining the content of what it says."); *Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009) ("The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech."). If the speech of a public or election official under section 276.016(a)(1) is government speech, there is no constitutional issue to avoid by narrowly defining "solicits" to exclude all of Plaintiffs' preferred speech as a matter of law.

And while the issue is not before this Court, Plaintiffs are wrong (at 34) to assert that it is "essentially undisputed" that section 276.016 is unconstitutional as applied to elected officials. In *City of El Cenizo v. Texas*, the Fifth Circuit concluded that "[i]n the context of *government* speech, a state may endorse a specific viewpoint and require government agents to do the same." 890 F.3d 164, 185 (5th Cir. 2018). That is

what the Legislature chose to do here for certain public officials acting in their official capacity. The Attorney General has additional arguments responding to the ones Plaintiffs include in their brief, but this is not the forum to resolve them.

Plaintiffs, of course, have arguments to the contrary that the Fifth Circuit will decide when this case returns to it. But for the Court to conclude that "solicits" must be narrowly construed to avoid the First Amendment question, it would have to first conclude that Plaintiffs' speech is protected by the First Amendment—that section 276.016 does not concern only government speech. That question has not been decided by the Fifth Circuit and is not before this Court.

* * *

Plaintiffs' proposal to limit "solicits" only to unlawful mail-in ballot applications appears designed to allow them to continue making any speech they want regarding applications for mail-in ballots. But the Court's role is to determine legislative intent as expressed in the text of the statute. *Tex. Workforce Comm'n v. Wichita County*, 548 S.W.3d 489, 492 (Tex. 2018). The Court should not add to the plain text of section 276.016 to reach a conclusion that is at odds with what the Legislature intended.

B. The Court should also reject Plaintiffs' efforts to limit the statute to solicitation on an individual-by-individual basis.

In addition to their primary atextual limitation, Plaintiffs also ask the Court to narrow the definition of "solicits" by relying on a single definition from Black's Law Dictionary that describes the term as a "'personal petition' addressed 'to a particular individual.'" Appellees' Br. 27-28 (quoting *Solicit*, Black's Law Dictionary (6th ed. 1990)). While the Attorney General agrees with Plaintiffs' conclusions that

"providing generalized information about voting" and "asking a question, without urging, recommending, requesting, pleading, commanding, enticing, or importuning a person to vote by mail" are permissible speech under section 276.016(a)(1), Appellees' Br. 28, he cannot agree that all "generalized speech directed to the public at large (including on social media)" is categorically excluded from section 276.016(a)(1)'s coverage, Appellees' Br. 27.

Section 276.016(a)(1) says nothing about the means of the solicitation—whether it is in-person, by phone, or through online social media. And it makes no mention of how many people can be solicited at one time. Thus, soliciting applications from a group—as was the case in *Hollins*—is just as unlawful as soliciting applications from an individual. Mailing the general public, as both Longoria and her predecessor intended to do, ROA.813, would be impermissible if the content of the mailer constituted solicitation. The Court should, therefore, recognize that the safe-harbor provision permits providing information about mail-in voting to any person, Tex. Elec. Code § 276.016(e)(1), but it should stop short of declaring all speech to the general public or on social media is necessarily permissible.

C. The Court should reject Plaintiffs' complaints that the Attorney General's definition is unconstitutionally vague.

Finally, Plaintiffs urge the Court to reject the Attorney General's proposed definition as too vague. But (1) Plaintiffs have conceded that they have not brought a vagueness or overbreadth challenge, ROA.873; (2) the Attorney General's definition is no more vague than Plaintiffs' list of synonyms; and (3) the real barrier to deciding this issue is the vagueness of Plaintiffs' evidence, not the vagueness of any definition.

1. Again, the specific question certified here is whether the speech Plaintiffs wish to make constitutes "solicitation" under Texas Election Code section 276.016(a)(1). *Longoria*, 2022 WL 832239, at *6. Thus, the Court does not need to interpret "solicits" in every possible context—only those contexts raised by the evidence in this case. As shown in the Attorney General's opening brief, many of the statements Plaintiffs wish to make fall within the statutory safe harbor of providing "general information about voting by mail, the vote by mail process, or the timelines associated with voting." Tex. Elec. Code § 276.016(e)(1); OAG Br. 33-35. The fifth and sixth scenarios Plaintiffs describe in their brief, for example, fall within this provision. Appellees' Br. 29 (describing the benefits of mail-in voting and raising voting by mail as an option for out-of-town voters). Thus, the Court need not say anything additional about "solicits" in those circumstances.

2. The remainder of the confusion comes from the fact that Plaintiffs have brought a facial, pre-enforcement challenge to a statute that even they concede has many constitutional applications—for example, to the solicitation of unlawful mail-in ballot applications. Moreover, Plaintiffs are far from precise on what they wish to say. Longoria frequently refers to her desire to "encourage" or "recommend" mail-in voting. Appellees' Br 28-29. But she cites only a single criminal law treatise that uses "encourage" and no resource that uses "recommend" when defining "solicits." Appellees' Br. 24-27 (citing 2 Wayne R. LaFave, Substantive Criminal Law § 11.1 (3d ed. 2021)). And Texas statutes distinguish between "encourages" and "solicits." *See, e.g.*, Tex. Educ. Code § 37.152(a)(2); Tex. Gov't Code § 305.004; Tex. Penal Code §§ 7.02(a)(2), 71.022(a). Although the Attorney General agrees the

terms are similar, they are not synonymous. The Court must consider the specific speech at issue.

Plaintiffs attempt (at 41) to cast the blame on the Attorney General for the inability to definitively determine whether Plaintiffs' speech is prohibited solicitation. But it is Plaintiffs' burden to demonstrate that their speech falls within section 276.016(a)(1) if they wish to challenge that statute's constitutionality. As the Attorney General demonstrated in his opening brief, Morgan's speech appears to be permissible under the safe harbor of providing general information. OAG Br. 34. But much of what Longoria wishes to say when "encouraging" mail-in voting is unclear. If she simply states that "voting by mail is a great option if you can't get to the polls," that would not qualify as solicitation, even if she might construe it as encouragement to submit an unsolicited application to vote by mail. But if she "encourages" individuals to fill out applications by stating "please fill out this application to vote by mail," then she has solicited a mail-in ballot application.

The problem with answering question two, then, lies largely with the absence of evidence regarding what Longoria wishes to say, not with any vagueness attributed to the statute or any of the proposed definitions. While the Court may be unable to resolve all of the issues concerning Plaintiffs' speech, it can, if it chooses, provide a definition to assist the federal courts moving forward.

3. Finally, regarding the Attorney General's proposed definition, Plaintiffs take issue with the Attorney General's use of the phrase "strongly urge" and his suggestion that the speech be considered from the view of a reasonable listener. The Attorney General's definition is permissible.

As noted above (at 6), the "strongly urge" language comes from multiple dictionary definitions. *Solicit*, Webster's Third New International Dictionary (2002 ed.) ("strongly urge"); *Solicit*, Merriam-Webster's Collegiate Dictionary, *supra* ("to urge . . . strongly"). It is also consistent with language in others. *Solicit*, Webster's New World College Dictionary, *supra* ("to ask or seek earnestly or pleadingly"); *Solicit*, The American Heritage Dictionary of the English Language (5th ed. 2016) ("[t]o petition persistently"). It also gives effect to the rule of lenity, which requires any doubt about a statute's meaning to be construed in favor of the accused. *Diruzzo v. State*, 581 S.W.3d 788, 802 n.22 (Tex. Crim. App. 2019).

This definition easily satisfies any constitutional vagueness standard (were Plaintiffs to bring a vagueness challenge). Texas courts generally interpret the due-course-of-law provision in the same way as its federal counterpart. *Patel v. Tex. Dep't of Licensing & Regulation*, 469 S.W.3d 69, 86 (Tex. 2015); *Univ. of Tex. Med. Sch. at Hous. v. Than*, 901 S.W.2d 926, 929 (Tex. 1995); *accord Fleming v. State*, 341 S.W.3d 415, 416 (Tex. Crim. App. 2011) (Keasler, J., concurring). The vagueness doctrine does not require "perfect clarity and precise guidance" in statutory text. *Ex parte Ellis*, 309 S.W.3d 71, 86 (Tex. Crim. App. 2010). "Many perfectly constitutional statutes use imprecise terms," *Sessions v. Dimaya*, 138 S. Ct. 1204, 1214 (2018), and "due process does not require 'impossible standards' of clarity," *Kolender v. Lawson*, 461 U.S. 352, 361 (1983).

Plaintiffs cannot show that the Attorney General's definition of "solicit" is unconstitutionally vague, because the term "solicit" is itself not unconstitutionally vague. There is no such thing as an as-applied void-for-vagueness challenge;

Plaintiffs had to plead facts affirmatively demonstrating that SB 1's anti-solicitation provision as defined by the Attorney General would be "impermissibly vague in all of [their] applications." *Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 495 (1982). But Plaintiffs do not contend that the term "solicit" is vague as applied to the solicitation of unlawful applications to vote by mail—regardless of how the term "solicit" is defined.

As for considering the speech from the perspective of the reasonable listener, Plaintiffs' reliance (at 39-40) on *Elonis v. United States*, 575 U.S. 723 (2015), is misplaced. There, a statute criminalizing the making of a threat contained no mens rea element. *Id.* at 726 (citing 18 U.S.C. § 875(c)). The Supreme Court concluded that it would be improper to judge whether the speech was a "threat" solely from the position of the listener—the speaker must also be aware of the illegality of his speech in order to be found guilty. *Id.* at 737-38. That concern is not present here because section 276.016 contains a mens rea element: the offense must be committed "knowingly." Such a scienter requirement typically saves a statute from a vagueness challenge. *McFadden v. United States*, 576 U.S. 186, 197 (2015). The speaker's intent is therefore accounted for in the statute, and the actus reus—that is, whether the speech "solicits" the submission of a mail-in ballot application—can be judged with an eye toward the perspective of a reasonable listener.

Regardless, Plaintiffs have not identified a substantial number of cases in which there would be any discernible difference between the perspective of a reasonable speaker and the perspective of the reasonable listener. The goal is an objective evaluation of the speech in the circumstances in which it is made. And for the reasons

described in the Attorney General's opening brief (at 27-35), the Court should conclude importuning or strongly urging someone to fill out a mail-in ballot application is improper solicitation, but merely providing information is not.

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.

Ken Paxton
Attorney General of Texas

Brent Webster
First Assistant Attorney General

Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-1700
Fax: (512) 474-2697

Judd E. Stone II
Solicitor General

/s/ Lanora C. Pettit
Lanora C. Pettit
Principal Deputy Solicitor General
State Bar No. 24115221
Lanora.Pettit@oag.texas.gov

Beth Klusmann
Assistant Solicitor General

Cody C. Coll
Assistant Attorney General

Counsel for the Attorney General
of Texas

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Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Benjamin Wilson	24084105	benjamin.wilson@oag.texas.gov	4/27/2022 4:50:48 PM	SENT
Paul Richard Genender	790758	paul.genender@weil.com	4/27/2022 4:50:48 PM	SENT
Sean Edward Breen	783715	sbreen@howrybreen.com	4/27/2022 4:50:48 PM	SENT
Beth Ellen Klusmann	24036918	Beth.Klusmann@oag.texas.gov	4/27/2022 4:50:48 PM	SENT
Christian Menefee	24088049	christian.menefee@cao.hctx.net	4/27/2022 4:50:48 PM	SENT
Randy Tom Leavitt	12098300	randy@randyleavitt.com	4/27/2022 4:50:48 PM	SENT
Jonathan Fombonne	24102702	jonathan.fombonne@cao.hctx.net	4/27/2022 4:50:48 PM	SENT
Hollis Duncan		hollis.duncan@oag.texas.gov	4/27/2022 4:50:48 PM	SENT
Maria Williamson		maria.williamson@oag.texas.gov	4/27/2022 4:50:48 PM	SENT
Cody Rutowski	24119291	cody.rutowski@oag.texas.gov	4/27/2022 4:50:48 PM	SENT
Lanora Pettit		lanora.pettit@oag.texas.gov	4/27/2022 4:50:48 PM	SENT
Elizabeth Ryan		liz.ryan@weil.com	4/27/2022 4:50:48 PM	SENT
DA Docket		da.docket@weil.com	4/27/2022 4:50:48 PM	SENT
Managing Attorney's Office		mco.ecf@weil.com	4/27/2022 4:50:48 PM	SENT
Megan Cloud		megan.cloud@weil.com	4/27/2022 4:50:48 PM	SENT
Aaron Curtis		aaron.curtis@weil.com	4/27/2022 4:50:48 PM	SENT
Zack Tripp		zack.tripp@weil.com	4/27/2022 4:50:48 PM	SENT
Sean Morales-Doyle		morales-doyles@brennan.law.nyu.edu	4/27/2022 4:50:48 PM	SENT