No. 22-50110

In the United States Court of Appeals for the 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.

On Appeal from the United States District Court
for the Western District of Texas, San Antonio Division, No. 5:21-cv-01223-XR,
Honorable Xavier Rodriguez, U.S. District Judge

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal:

1) **Plaintiffs-Appellees:**

Isabel Longoria

Cathy Morgan

2) **Defendants-Appellants:**

Warren K. Paxton, in his official capacity as the Attorney General of Texas

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STATEMENT REGARDING ORAL ARGUMENT

The Court has set this case for oral argument on March 8, 2022.

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PRELIMINARY STATEMENT

The district court below properly enjoined Defendants from enforcing a law that makes speech a crime depending on the content and viewpoint expressed. Specifically, Plaintiff Isabel Longoria, who serves as Elections Administrator for Harris County, and Plaintiff Cathy Morgan, who serves as a volunteer deputy registrar in Williamson and Travis Counties, want to encourage and recommend that voters who are or may be eligible to vote by mail to submit a timely application to do so. But new Texas laws, Sections 276.016(a)(1) and 31.129 of the Election Code, make it an offense—punishable by a mandatory minimum of six months of imprisonment, harsh fines, and other civil penalties—for any public official at any level of state or local government to "solicit" such vote-by-mail applications, notwithstanding that millions of Texans are eligible to vote by mail.

Remarkably, Defendants do not dispute that the new "solicitation" offense is viewpoint-based: It prevents Longoria and Morgan from eliciting, requesting, promoting, directing, or encouraging a person to apply for a mail-in ballot. But it does not prevent speech expressing the opposite viewpoint and discouraging voters from requesting a mail-in ballot application. Such a one-sided restriction raises "egregious" First

Amendment problems and is "presumptively unconstitutional." *Iancu v. Brunetti*, 139 S. Ct. 2294, 2299 (2019) (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829-30 (1995)).

Defendants also do not argue that the solicitation offense can satisfy First Amendment scrutiny. Even beyond its *per se* invalidity as a viewpoint-based rule, the offense is not narrowly tailored to any compelling interest, as the government lacks any legitimate purpose in suppressing speech in order to suppress the lawful exercise of the right to vote. Indeed, in the district court, the State's witness could not identify *any* purpose for the ban. See ROA.848 ("I don't know what the purpose of it was, sir."). Pointlessly jailing people for expressing a disfavored viewpoint is the essence of a First Amendment violation.

Faced with this glaring intrusion into the rights to free speech *and* the right to vote, the district court properly entered a preliminary injunction. First, Plaintiffs have standing and their demand for injunctive and declaratory relief fits squarely within *Ex parte Young*. The uncontroverted evidence showed that Plaintiffs are chilled from speaking because of the threat of enforcement by Defendants. Such a chilling effect "satisf[ies] the injury-in-fact requirement," *Speech First, Inc. v. Fenves*, 979

F.3d 319, 330-31 (5th Cir. 2020), and the threat arises from enforcement by the Defendants specifically. The district court found that the Attorney General "has demonstrated a willingness" to enforce civil violations of the Election provisions of the Election Code by bringing civil lawsuits against election officials. ROA.649-50. And the threat of *criminal* enforcement by the District Attorney Defendants is even more obvious. That threat readily satisfies both Article III and *Ex parte Young*. Indeed, pre-enforcement First Amendment challenges brought against state enforcement officials are a quintessential use of *Ex parte Young*.

Second, all of the preliminary injunction factors weigh in favor of an injunction. Most importantly, Plaintiffs are likely to succeed on the merits, as this viewpoint-based restriction does not fit within any exception to the First Amendment. In particular, it does not fit within the *Garcetti-Pickering* exception, which recognizes a government's authority to control the official speech of its employees: "[W]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006).

As the district court explained, this offense falls outside of *Garcetti* for two reasons. First, "Longoria and Morgan are not employed by the State." ROA.654. Because the State is not their employer, this offense cannot be justified by the State's power to regulate its employees' speech. Second, even if they were state employees, criminal penalties still would not be "employer discipline." Employers sometimes reprimand, demote, or fire employees for their speech. But they never send their workers to jail. *See* ROA.654-55. Indeed, every appellate court to have decided the question has agreed that criminal punishments fall outside *Garcetti* and trigger full First Amendment scrutiny. *See In re Kendall*, 712 F.3d 814, 826-27 (3d Cir. 2013); *Ex parte Perry*, 483 S.W.3d 884, 911-12 (Tex. Crim. App. 2016). Defendants seek to repackage this case as one about "government speech," but *Garcetti* establishes the limits of a state's authority to discipline workers for their speech. And under *Garcetti*, a State cannot send local officials to jail for expressing a disfavored viewpoint.

Finally, the remaining injunction factors readily favor preliminary relief. "The 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 public has no interest in enforcing an

unconstitutional law. And the balance of the equities weighs decisively in favor of an injunction, as the one-sided restriction on speech here distorts the political process and increases the likelihood of voter confusion. Quite simply, the district court properly entered interim relief to protect Plaintiffs' First Amendment rights from unconstitutional viewpoint-based censorship. This Court should affirm.

JURISDICTION

Plaintiffs invoked the federal district court's jurisdiction under 28 U.S.C. §§ 1331 and 1343. ROA.038. The district court entered a preliminary injunction on February 11, 2022. ROA.626-78. Appellants the Attorney General and District Attorney Dick timely filed notices of appeal on February 14, 2022, and February 21, 2022, respectively. ROA.722-23, 754-55. This Court has jurisdiction under 28 U.S.C. § 1292(a)(1).

ISSUE PRESENTED

1. Whether the district court abused its discretion entering a preliminary injunction enjoining District Attorney Dick and the Attorney General from enforcing Sections 276.016(a)(1) and 31.129, which Defendants admit are viewpoint-based and content-based restrictions on speech that subject Plaintiffs to criminal and civil penalties for encouraging voters to use a lawful means of voting.

STATEMENT OF THE CASE

A. Factual Background

Elections in Texas's 254 counties and more than 1,200 cities are conducted pursuant to the Texas Election Code. ROA.627. Under the Election Code, in addition to voting in-person, many Texas voters may vote by mail. Any voter who is at least 65 years old, sick or disabled, confined due to childbirth, out of the county, or, in some instances, confined to jail, is eligible to vote by mail. Tex. Elec. Code §§ 82.001-.008. If a person timely requests an application to vote by mail, the elections administrator or county clerk "shall" provide an application and, if the applicant is found to be eligible, he or she will receive a mail-in ballot which they can cast by mail until the eleventh day before an election. *Id.* §§ 86.0015(a), (b-1). "Millions of Texans are eligible to vote by mail, and approximately 980,000 did so in the 2020 presidential election." ROA.629.

Texas elections and voter registration are, by default, handled by the county clerk and tax assessor-collector, respectively, who are themselves elected in their respective counties by partisan ballot every four years. ROA.040-41; Tex. Elec. Code §§ 12.001, 67.007, 83.002. Counties also may appoint an elections administrator and transfer to that person all the voter

registration and election administration duties that would otherwise lie with the tax assessor-collector and clerk. Tex. Elec. Code §§ 31.031, 31.043.

In November 2020, Harris County established the Office of the Harris County Elections Administrator. ROA.090; ROA.798. The Harris County Elections Commission appointed Plaintiff Isabel Longoria as the first Harris County Elections Administrator, and she was sworn in on November 18, 2020. ROA.090; ROA.799 (Harris County Elections Commission nominates and appoints the elections administrator); *see also* Tex. Elec. Code § 31.038. Longoria is employed by Harris County, which pays her salary and benefits. *See id.* § 31.031(a), 31.048; *see also id.* § 31.039(d) (commissioners court provides elections administrator's office, equipment, and operating expenses); *Renfro v. Shropshire,* 566. S.W.2d 688, 690 (Tex. App.—Eastland 1978, writ ref'd n.r.e.) ("Commissioners Courts may exercise only such powers as the Constitution or the statutes have specifically conferred upon them."). She can be removed from her position only for good cause, based on a four-fifths' vote of the Elections Commission, which includes the county judge, county clerk, tax assessor-collector, and party chairs of the Democratic and Republican Party Selection Commission

and approval of that action by a majority vote of the Harris County Commissioners Court. *See* ROA.628, 798; Tex. Elec. Code § 31.037.

Longoria's duties are "to help people vote, to do so by getting them registered to vote, getting them to vote, and hosting the logistical functions of elections in Harris County." ROA.797. That includes reviewing mail-in ballot applications for registration and eligibility and then providing a mail-in ballot, if appropriate. ROA.799. Longoria is also involved in outreach, including speaking directly to voters about "who [is] eligible" and "who should apply to vote by mail given the laws and the context," as well as social media campaigns that "recommend[] people vote by mail" and "recommend[] people get our application." ROA.802-03.

Texas law permits each county's voter registrar to appoint volunteer deputy registrars ("VDR") to assist in the voter registration process. Tex. Elec. Code § 13.031 *et seq*. Plaintiff Cathy Morgan has been a volunteer deputy registrar in Travis and Williamson Counties since 2014. ROA.098. As a VDR, Morgan "register[s] people to vote." ROA.762. This includes setting up at booths near the University of Texas campus and at a farmers market, and walking her neighborhood to provide voter information and voter registration cards to those who need them. ROA.763-64. As a VDR,

Morgan actively encourages people to vote, including voting by mail. *See* ROA.765-67.

B. Texas Newly Criminalizes "Soliciting" Lawful Mail Ballot Applications

On September 7, 2021, Texas enacted Senate Bill 1 ("SB1"). ROA.069. SB1 went into effect on December 2, 2021. 2021 Tex. Sess. Law Serv. 2nd Called Sess. Ch. 1 (S.B. 1) § 10.04. SB1 is an omnibus elections bill that made a variety of changes to Texas law, including adding Election Code Sections 276.016(a)(1) and 31.129. Those provisions create a novel viewpoint-based offense that carries harsh criminal and civil penalties.

Section 276.016(a)(1) 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." An "offense" under Section 276.016(a)(1) is a state jail felony, which carries a mandatory minimum of six months imprisonment up to a maximum of two years. *Id.* § 276.016(b); Tex. Penal Code § 12.35. The law includes only two exceptions to the ban. It is not unlawful (1) for a public official or election official 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" or (2) for a person

to engage in such solicitation "while acting in the official's capacity as a candidate for a public elective office." Tex. Elec. Code § 276.016(e).

Section 31.129(b) establishes civil penalties for a violation of the Election Code by an election official, including commission of the new solicitation offense. Section 31.129(b) provides that "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 [the election] code." Section 31.129 does not define what civil penalties are available (or unavailable), other than to specify that "[a] civil penalty imposed under this section may include termination of the person's employment and loss of the person's employment benefits." *Id.* Section 31.130 notes that "an 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."

C. The Challenged Provisions Chill Plaintiffs' Speech

Longoria and Morgan both testified that their speech is chilled by the threat of enforcement by the Defendants under Sections 276.016(a)(1) and

31.129 (together, the "Challenged Provisions"). *See, e.g.*, ROA.769-70, 772 (Morgan); ROA.803-08, 814-16 (Longoria).

Longoria testified that she cannot "advise, recommend, urge, counsel people to submit a mail ballot application ultimately to vote by mail, even if it's the only way they can vote[.]" ROA.801. Longoria further testified that "I can talk about voter registration. I can talk about in-person voting. And then when it comes to voting by mail I have to stop. I have to be very careful about my words." ROA.807. Longoria explained that she has to "stop [her] nature to be proactive to help voters" and "can't even respond . . . appropriately to negative impacts" that she sees "from these laws in other areas of mail ballot voting." ROA.808. When pressed about mail-in voting, she has to "stop mid-sentence sometimes" and tell voters that "the law prevents me from saying much more. If you have a question, good luck, and call us, but I can't—I'm tentative to overreach in this moment." ROA.808 She testified that she fears both criminal punishment and civil penalties that could result, but that she would no longer be in fear and would resume her expression if the Defendants were enjoined from enforcing the Challenged Provisions. ROA.815-16.

Morgan likewise testified that the threat of enforcement under Section 276.016(a)(1) has chilled her speech. ROA.770. Morgan explained that, in the past, she would call an elderly neighbor to ask if she "turned in her application for ballot by mail," but that she no longer does so for fear of enforcement under Section 276.016(a)(1). Likewise, in the past, Morgan has asked homebound neighbors or college students living away from home if they have "considered voting by mail" when they express that in-person voting would be difficult. ROA.765-66. But Morgan fears that this too would subject her to prosecution, so has refrained from such recommendation or encouragement. ROA.766-67. Her fear would be lifted, and she would resume that expression, if the DA Defendants were enjoined from prosecuting her for her speech. *See* ROA.771-72.

D. Procedural History

On December 10, 2021, Plaintiffs filed this suit against the Attorney General to vindicate their First Amendment rights. ROA.025. Five days later, the Texas Court of Criminal Appeals ruled that the Attorney General did not have independent prosecutorial authority. *State v. Stephens*, No. PD-1032-20, 2021 WL 5917198, at *10 (Tex. Crim. App. Dec. 15, 2021) (not released for publication). On December 27, 2021, Plaintiffs filed an

amended complaint adding the DA Defendants, who have independent prosecutorial authority ROA.037, 040; TEX. CONST. art. V, § 21; Tex. Code Crim. Proc. art. 2.01. Plaintiffs filed a motion for a preliminary injunction the next day. ROA.088.

In Count I, Longoria seeks to enjoin Harris County District Attorney Kim Ogg and Plaintiff Morgan seeks to enjoin Travis County District Attorney Jose Garza and Williamson County District Attorney Dick (collectively with District Attorney Ogg, the "DA Defendants") from criminally prosecuting them under Section 276.016(a)(1). ROA.047-49. In Count II, Longoria seeks to enjoin the Attorney General from bringing a civil enforcement action against her under Section 31.129 for violations of Section 276.016(a)(1). ROA.049-50.

The parties conducted written discovery, and the Attorney General deposed both Plaintiffs. The district court held an evidentiary hearing on February 11, 2022, hearing testimony from both Plaintiffs and from Brian Keith Ingram, director of elections for the Texas Secretary of State's office, as well as argument. ROA.761, 797, 837.[1]

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[1] The district court admitted a number of exhibits introduced by the parties into evidence. However, the court excluded a number of exhibits to

Later that day, the district court entered a preliminary injunction against the DA Defendants from enforcing Section 276.016(a)(1) and all Defendants from enforcing Section 31.129 against Plaintiffs. ROA.720-21. First, the district court held that both Longoria and Morgan had standing because their "speech has been and continues to be chilled" by the Challenged Provisions, that chill would be redressed by an order enjoining the Challenged Provisions' enforcement, and there was no compelling evidence that enforcement was unlikely. ROA.638, 641-44.

The Court held that *Ex parte Young* applies because the Plaintiffs were seeking injunctive and declaratory relief, the DA Defendants are "responsible for investigating and prosecuting violations of the Election Code," and the Attorney General may, and is sometimes required to, participate in "enforcement activities." ROA.646-47. The Court also explained that neither *Pullman* nor *Younger* abstention applied in light

the Attorney General's opposition to the preliminary injunction motion. The Court excluded Exhibits D and E, ROA.563-71, and excluded Exhibit J, ROA.597, to the extent it was offered for the truth of the matter asserted.

of the irreparable harm to constitutional rights that would otherwise result and the lack of ongoing state judicial proceedings.[2] ROA.651-52.

On the preliminary injunction elements, the district court found that the Plaintiffs were "substantially" likely to succeed on the merits. It found that the Challenged Provisions represent content- and viewpoint-based discrimination that could not satisfy First Amendment scrutiny. Furthermore, the court determined that the *Garcetti* exception does not apply because, "far from acting in its capacity as an employer," the State was "acting as a sovereign." ROA.653-58. "Longoria and Morgan are not employed by the State," so the State could not discipline them in its capacity as an employer. ROA.654. The court further determined that criminal sanctions fell outside *Garcetti* because employers do not impose criminal punishment on their workers. ROA.654-55 (citing *In re Kendall,* 712 F.3d at 826-27 and *Ex parte Perry*, 483 S.W.3d at 911-12).

The district court determined that the remaining injunction factors all weighed in favor of an injunction. It found that Plaintiffs are suffering irreparable injury due to their "loss of First Amendment freedoms" and

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[2] The Attorney General asserted an argument in the district court that the case was subject to *Pullman* abstention but abandons that argument on appeal.

that "injunctions protecting First Amendment freedoms are always in the public interest." ROA.659 (quoting *Elrod,* 427 U.S. at 373); ROA.661 (quoting *Opulent Life Church v. City of Holly Springs*, 697 F.3d 279, 298 (5th Cir. 2012)). The district court also found that the State's interest in the "orderly administration of Texas elections" did not outweigh the irreparable harm that Plaintiffs would suffer without relief. ROA.661-64.

In response to the Attorney General's argument that Plaintiffs might be subject to prosecution for speech during the pendency of the preliminary injunction if they were not ultimately able to secure a permanent injunction, *see* ROA.489-92, the Court enjoined Defendants from enforcing the Challenged Provisions on the basis of violations committed during the pendency of the litigation should the Challenged Provisions later be found to be constitutional. ROA.660 (citing, *inter alia*, *Bd. of Trade City of Chicago v. Clyne*, 260 U.S. 704 (1922)) (enjoining the enforcement of a law not only pending appeal, but also for "any violation . . . of any provision of said act committed during the pendency of this cause in this court"); ROA.664-65.

On February 16, 2022, the Attorney General filed an emergency motion for a stay pending appeal, and, in the alternative, for a temporary

administrative stay, and to expedite the appeal. On February 17, 2022, this Court granted the motion for an administrative stay, granted the motion to expedite the appeal, and carried the motion for a stay pending appeal with the case. ROA.752.

SUMMARY OF ARGUMENT

The district court correctly determined that Plaintiffs have Article III standing and that their demand for injunctive and declaratory relief fits within *Ex parte Young*. The uncontroverted evidence shows that Plaintiffs are chilled from soliciting requests for applications to vote by mail because of the threat of enforcement by Defendants. Such a chilling effect "satisf[ies] the injury-in-fact requirement." *Speech First, Inc. v. Fenves*, 979 F.3d 319, 331 (5th Cir. 2020). And in a pre-enforcement First Amendment challenge like this one where the threat of enforcement is "latent in the existence of the statute," courts presume a credible threat "in the absence of compelling contrary evidence." *Id.* at 335. Because Defendants produced no compelling evidence that they would not enforce Sections 276.016(a)(1) and 31.129, Article III is satisfied.

The *Ex parte Young* exception is similarly satisfied. It applies so long as a defendant "state official, 'by virtue of his office,' . . . [has] 'some

connection with the enforcement of the [challenged] act.'" *City of Austin*, 943 F.3d at 1002 (quoting *Ex parte Young*, 209 U.S. at 157) (second alteration in original). The "connection to enforcement" requirement is satisfied for the same reasons that there is Article III standing. *Id.* Because the threat of enforcement by Defendants is causing an injury-in-fact to Plaintiffs, the claim for injunctive relief against those Defendants fits within *Ex parte Young*. *Id.*

The district court likewise did not abuse its discretion in entering a preliminary injunction. First, Plaintiffs are likely to succeed on the merits. It is undisputed that the solicitation offense is a viewpoint-based restriction on speech: It is unlawful for an election official or public official in their official capacity to encourage applications to vote by mail, but it is unlawful for such an official to discourage applications to vote by mail. Such a one-sided restriction on speech is presumptively unconstitutional. *See Iancu*, 139 S. Ct. at 2299. The Attorney General concedes as much and does not even attempt to identify a compelling interest to which the law is narrowly tailored.

The Attorney General instead contends that the First Amendment is categorically inapplicable. But the district court correctly rejected that

argument. First, Defendants' enforcement of the solicitation offense falls outside the *Garcetti-Pickering* exception that allows the government as an employer to use employer discipline to control the speech of its workers. Those cases do not apply where, as here, the State imposes *criminal* penalties, as that requires the exercise of sovereign power. *See In re Kendall*, 712 F.3d at 826-27; *Ex parte Perry*, 483 S.W.3d at 911-12. And although the State can impose employer discipline, such as demotion or termination, to control the speech of its own workers in their official capacities, that authority is inapplicable because the State is not the employer of either Plaintiff. They work for local counties, not the State. The State cannot rely on its leeway as an employer to control the speech of people who it does not employ.

Defendants attempt to circumvent the limitations on the *Garcetti-Pickering* framework by recharacterizing this case as one involving "government speech." But this case is not about government speech. No one is attempting to force the government defendants to espouse (or not espouse) a particular message. *Compare, e.g.*, *Walker v. Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 207 (2015); *Pleasant Grove City v. Summum*, 555 U.S.460, 467-68 (2009). The government is free to speak (or not speak)

on any topic and express any viewpoint it wishes. The question instead is whether Defendants can *jail, fine, or terminate* local employees because they express a viewpoint the State disfavors while they are on the job working for a locality. Jailing, fining, and terminating a person are not speech. They are forms of punishment or discipline, and the *Garcetti-Pickering* framework specifically addresses when and how a state can use its authority as an employer to discipline its employees. As noted above, the Challenged Provisions fall outside the scope of that exception and instead trigger full First Amendment scrutiny because Plaintiffs do not work for the State and private employers cannot imprison workers.

The remaining preliminary injunction factors also support affirming the district court's preliminary injunction. The loss of First Amendment freedoms for any period of time always results in irreparable harm. This harm vastly outweighs the State's shifting purported interests (where they can be identified) in enforcing its laws and preventing voter confusion surrounding mail-in voting. Under the First Amendment, the solution to any concerns about confusion is "more speech," not censorship. *Citizens United v. Fed. Elec. Comm'n*, 558 U.S. 310, 361 (2010). And enjoining

unconstitutional laws to protect First Amendment rights, especially when, as here, the right to vote is also implicated, is always in the public interest.

Finally, the district court correctly determined that the rule in *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam), was not implicated when it entered the preliminary injunction, nor is it implicated now. This is not a case about election procedure; the preliminary injunction does not affect the "how, when, and where" of the election. All it requires is that the State not prosecute or sue Plaintiffs for expressing a protected viewpoint by encouraging potentially eligible voters to submit an application to vote by mail. And it is particularly important for such expression to be protected sooner rather than later, to give Plaintiffs a "sufficient opportunity prior to the election date to communicate their views effectively." *Fed. Elec. Comm'n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 463 (2008) (quoting *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 774 (1978)). This Court should affirm.

STANDARD OF REVIEW

This Court reviews the district court's determination of sovereign immunity and standing de novo. *City of Austin v. Paxton*, 943 F.3d 993, 997 (5th Cir. 2019); *Ctr. for Individual Freedom v. Carmouche*, 449 F.3d 655, 659 (5th Cir. 2006). The district court's grant of a preliminary injunction is

reviewed for abuse of discretion. *Atchafalaya Basinkeeper v. U.S. Army Corps of Eng'rs*, 894 F.3d 692, 696 (5th Cir. 2018). "Factual determinations within the preliminary injunction analysis are reviewed for clear error, and legal conclusions within the analysis are reviewed de novo." *Id.*

ARGUMENT

I. The District Court Correctly Determined That It Has Jurisdiction

A. Plaintiffs Have Standing

To establish standing, a plaintiff must show (1) an injury-in-fact; (2) that is fairly traceable to the challenged conduct; and (3) that is redressable by a favorable judicial decision. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)). "[I]n the pre-enforcement context, '[c]hilling a plaintiff's speech is a constitutional harm adequate to satisfy the injury-in-fact requirement.'" *Speech First, Inc. v. Fenves*, 979 F.3d 319, 331 (5th Cir. 2020) (quoting *Houston Chronicle v. City of League City*, 488 F.3d 613, 618 (5th Cir. 2007)). And "when dealing with pre-enforcement challenges to recently enacted . . . statutes that facially restrict expressive activity by the class to which the plaintiff belongs," as here, "courts will assume a credible threat of prosecution in the absence of compelling contrary evidence." *Id.* at 335 (quoting *N.H. Right to Life PAC v. Gardner*, 99 F.3d 8, 15 (1st Cir. 1996));

see Ctr. for Individual Freedom, 449 F.3d at 660. Otherwise, the requisite threat "is latent in the existence of the statute." *Speech First*, 979 F.3d at 336 (quoting *Majors v. Abell*, 317 F.3d 719, 721 (7th Cir. 2003)).

The district court correctly found that "Plaintiffs have made a clear showing that *Lujan*'s requirements for standing are met at this stage in the litigation." ROA.644. "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." ROA.644. The district court correctly found that: (1) Plaintiffs Longoria and Morgan had introduced sufficient evidence to show that their speech was, in fact, chilled by the prospect of enforcement; (2) Longoria plainly qualifies as a "public official" or "election official" in her capacity as Harris County Elections Administrator, and Plaintiff Morgan likely qualifies as "a public official" in her capacity as a VDR; (3) "[p]romoting 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"; and (4) Defendants failed to introduce "compelling evidence" that they would not enforce the anti-solicitation provision against Plaintiffs. ROA.639-44.

On appeal, Defendants invoke standing but do not raise any independent argument why the district court committed a reversible error. Instead, Defendants assert that the "Article III standing analysis and *Ex parte Young* analysis 'significantly overlap,'" AG Br. at 19 (quoting *City of Austin*, 943 F.3d at 1002), Dick Br. at 28 (same), and contend that Plaintiffs lack standing for the same reasons Defendants enjoy sovereign immunity. For the reasons set forth below, the district court correctly rejected their assertion of sovereign immunity as well.

B. Defendants Lack Sovereign Immunity Under *Ex Parte Young*

The district court correctly determined that Defendants lack sovereign immunity under *Ex parte Young*, 209 U.S. 123 (1908). The *Ex parte Young* exception to sovereign immunity allows parties "to seek judicial orders in federal court preventing state executive officials from enforcing state laws that are contrary to federal law." *Whole Woman's Health v. Jackson*, 142 S. Ct. 522, 532 (2021); *see* ROA.645 (quoting *Raj v. La. State Univ.*, 714 F.3d 322, 328 (5th Cir. 2013)). It is undisputed that

Plaintiffs seek injunctive and declaratory relief against individual state officials to prevent enforcing state laws on the ground that they are contrary to the First Amendment.

Each of the Defendants has the requisite connection to enforcement. Each "is an executive . . . official who may or must take enforcement actions against the petitioners if they violate the terms of" the Election Code. *Whole Woman's Health*, 142 S. Ct. at 535; *see id.* at 536 ("*Ex parte Young* "permits equitable relief against only those officials who possess authority to enforce a challenged state law"). It is enough that the defendant official, "'by virtue of his office,' [has] 'some connection with the enforcement of the [challenged] act.'" *City of Austin*, 943 F.3d at 997 (quoting *Ex parte Young*, 209 U.S. at 157). This Court has suggested that "an official's 'connection to . . . enforcement' is satisfied when standing has been established." *Id.* at 1002 (quoting *Russell v. Lundergan-Grimes*, 784 F.3d 1037, 1047 (6th Cir. 2015)).

First, for the claims against the DA Defendants, the connection to enforcement is obvious: The DA Defendants are tasked with investigating and prosecuting criminal violations of the Election Code, and "county and district attorneys have authority to compel or constrain a person's ability to violate the law." ROA.647; *see* Tex. Code Crim. Proc. art. 2.01 ("Each district

attorney shall represent the State in all criminal cases in the district courts of his district and in appeals therefrom."); *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 401 (5th Cir. 2020). That is plainly a sufficient connection to the enforcement of Section 276.016(a)(1).

Second, the Attorney General has the requisite connection to enforcement of civil penalties under Section 31.129. Although SB1 "does not specify whether the Attorney General may enforce Section 31.129," ROA.649, the Election Code and its context make clear that the Attorney General may or must bring civil enforcement actions under the Election Code. Section 31.129(b) makes an election official "liable to th[e] state for a civil penalty" for violating Section 276.016(a)(1), and no provision of the law prevents the Attorney General from bringing such a civil enforcement action. To the contrary, it is likely that the Attorney General may seek penalties on behalf of "th[e] state," and indeed the State is the only entity with a concrete stake in obtaining the penalty. *See* TEX. CONST. art. IV § 22 ("The Attorney General *shall* represent the State *in all suits and pleas* in the Supreme Court of the State in which *the State* may be a party . . . ." (emphasis added)). The Election Code further supports the Attorney General's enforcement role by providing that "the attorney general shall

investigate" certain allegations of criminal conduct in an election; that the attorney general "may conduct an investigation on the officer's own initiative to determine if criminal conduct occurred in connection with an election"; and "may investigate" in response to a referral of the Secretary of State. Tex. Elec. Code § 273.001. The Attorney General accordingly has the requisite connection to enforcement of Section 31.129.

DA Dick does not deny that he has a duty to enforce the Election Code, including by bringing criminal prosecutions to enforce the solicitation ban under Section 276.016(a)(1). And the Attorney General conspicuously refuses to deny that he has the authority to bring a civil enforcement action under Section 31.129. Nor do the Defendants deny that they are willing to bring enforcement actions. The Defendants instead assert that "a demonstrated willingness" to enforce the new law is required under *Ex parte Young*, and contend that Plaintiffs have not made such a demonstration because Defendants have not yet brought an enforcement action under this new law. *See* AG Br. at 15-18; Dick Br. at 19-24.

That argument is doubly wrong. First, the Supreme Court and this Court have both made clear that a "demonstrated willingness" to enforce a law is not required under *Ex Parte Young*. Indeed, such an interpretation

of *Ex parte Young* would conflict with the well-settled rule that a person can bring a pre-enforcement facial challenge to vindicate First Amendment rights from a threat of future enforcement under a new state law without showing a willingness on the part of the defendant to enforce the law. *See supra* Section I.A. In such cases, "courts will assume a credible threat of prosecution in the absence of compelling contrary evidence." *Speech First*, 979 F.3d at 335. "[A]n absence of relevant past enforcement" is not "compelling"; in fact, it "misses the point." *Id.* at 336-37 (quoting *Speech First, Inc. v. Schlissel*, 939 F.3d 756, 766 (6th Cir. 2019)). As the Sixth Circuit explained, "[i]t would be a perverse reading of *Young* to say that, although [Plaintiffs] might have an Article III injury before the [Defendants] directly communicate[] their intent to prosecute [them], the Eleventh Amendment would nonetheless simultaneously bar [a court] from enjoining the [Defendants'] initiating a prosecution." *Russell*, 784 F.3d at 1047.

Even outside the First Amendment context, the Supreme Court has declined to apply a "demonstrated willingness" requirement in pre-enforcement challenges to new laws that give rise to chilling effects. For example, in *Whole Woman's Health*, the Supreme Court did not even

mention "demonstrated willingness" in holding that *Ex parte Young* was satisfied against the state licensing officials at issue. *See* 142 S. Ct. at 535-36. Their authority to enforce the new law through a licensing action was enough of a threat. *Id.*

This Court has similarly not required a "demonstrated willingness." As the Court explained in *Texas Democratic Party*, "[t]he precise scope of the 'some connection' requirement is still unsettled" in this circuit, but "[t]he bare minimum appears to be 'some scintilla' of affirmative action by the state official," and "[i]t may be the case that an official's connection to enforcement is satisfied when standing has been established." *Tex. Democratic Party*, 961 F.3d at 400-01 (quoting *City of Austin*, 943 F.3d at 1002). Indeed, in *City of Austin*, this Court suggested that once a plaintiff establishes a threat of enforcement sufficient "to confer Article III standing, that threat of enforcement also becomes sufficient to satisfy [the connection to the enforcement] element of *Ex parte Young*." 943 F.3d at 1002 (quoting *Russell*, 784 F.3d at 1047 (alteration in original)). Other circuits to have considered the issue have adopted the same rule.[3]

[3] *See Russell*, 784 F.3d at 1047 ("[A]t the point that a threatened injury becomes sufficiently imminent and particularized to confer Article III

Defendants rely on *City of Austin*, but that case did not involve a pre-enforcement challenge to a new statute to protect First Amendment rights from chilling effect. Rather, that was a preemption case and the Attorney General's authority at issue was "an odd type of enforcement authority." 943 F.3d at 1000 n.1. The Attorney General could only intervene in a "private suit brought by the City against a landlord refusing to abide by the Ordinance" and "enforce the supremacy of state law" by offering up the statute as a defense. *Id.* For that reason, "the City face[d] no consequences if it attempt[ed] to enforce its Ordinance." *Id.* at 1002. The court expressly distinguished threats of prosecution, explaining that "this is not a case akin to *Steffel v. Thompson* because the City faces no threat of criminal prosecution like the plaintiff there." *Id.* (citing *Steffel*, 415 U.S. 452, 475 (1974)). This case is like *Steffel*, not *City of Austin*, because the threat of

standing, that threat of enforcement also becomes sufficient to satisfy this element of *Ex parte Young*"); *Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908, 920 (9th Cir. 2004) (similar); *Hendrickson v. AFSCME Council 18*, 992 F.3d 950, 967 n.20 (10th Cir. 2021) (similar); *Jacobson v. Fla. Sec'y of State*, 974 F.3d 1236, 1256 (11th Cir. 2020) (noting that the "some connection" test is less demanding than standing); *see also Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 864 (8th Cir. 2006) (similar), *abrogated on other grounds by Obergefell v. Hodges*, 576 U.S. 644 (2015).

prosecution and civil enforcement by the Defendants is causing the harmful chilling effect to the Plaintiffs' expression.

In any event, the Defendants' argument would fail even under the standard they posit. The DA Defendants plainly have a demonstrated willingness to enforce criminal violations of Texas law, and indeed it is their *exclusive* duty to enforce criminal violations of the Election Code. *See Stephens,* 2021 WL 5917198, at *10. And the district court found that "the Attorney General *has demonstrated a willingness* to enforce civil provisions of the Election Code regulating applications to vote by mail against election officials." ROA.649-50 (emphasis added); *see id.* (finding a demonstrated "clear willingness"). The Attorney General cannot establish that the district court clearly erred in making that finding, as it is undisputed that the Attorney General brought a civil enforcement action in *Hollins* against a local election official for violating the Election Code in connection with distributing applications for mail-in ballots. *State v. Hollins*, 620 S.W.3d 400, 404-05 (Tex. 2020). The Attorney General's conduct thus shows that there is a substantial threat that he will bring an enforcement action here as well.

The district court accordingly properly found that Plaintiffs have standing and that *Ex parte Young* applies to both the DA Defendants and the Attorney General.

C. *Younger* Abstention Is Inapplicable

The district court also correctly determined that *Younger* abstention is inapplicable. *See* ROA.652-53. "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) (citation omitted).

The district court correctly rejected DA Dick's *Younger* argument because "Dick fail[ed] to identify a single ongoing state judicial proceeding—in his county or any other—that implicates the anti-solicitation provision." ROA.652. As a result, "the first condition is not met" and "*Younger* does not apply." ROA.652; *see Younger*, 401 U.S. at 41. Defendant Dick does not even mention the "ongoing proceeding"

requirement, and thus has provided no basis to disturb the district court's conclusion.

II. The District Court Acted Well Within Its Discretion In Entering A Preliminary Injunction

On the merits, the district court acted well within its discretion in entering the preliminary injunction here, as it correctly determined that (1) "[i]t is substantially likely that the anti-solicitation provision violates the First Amendment," as "unconstitutional viewpoint discrimination"; (2) Plaintiffs would suffer irreparable harm absent an injunction, as they "provided ample evidence that they would encourage voters to vote by mail if there was no threat of criminal or civil prosecution"; (3) "[t]he threatened and ongoing injury to Plaintiffs outweighs any potential harm that an injunction might cause Defendants; and (4) "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." ROA.653, 661, 663.

A. Plaintiffs Are Likely To Succeed on The Merits Because The "Solicitation" Ban Violates The First Amendment

Among "the most basic of [First Amendment] principles" is that the "government has no power to restrict expression because of its messages, its ideas, its subject matter, or its content." *Brown v. Entm't Merch. Ass'n*,

564 U.S. 786, 790-91 (2011) (cleaned up). Content-based restrictions are presumptively invalid and trigger strict scrutiny. *See Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). Laws subject to strict scrutiny will not stand unless the government proves that they are "narrowly tailored to serve compelling state interests." *Id.* at 163. "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." *Id.* Viewpoint-based restrictions are subject to an even more demanding standard, as they face a virtually *per se* rule of invalidity. *See Iancu*, 139 S. Ct. at 2299. "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." *Rosenberger*, 515 U.S. at 829. The solicitation offense is clearly unconstitutional under these principles.

1. The Novel "Solicitation" Offense Is A Viewpoint- And Content-Based Restriction On Speech

It is undisputed that the "solicitation" offense is both viewpoint-based and content-based. 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); *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' . . . .").

Section 276.016(a)(1) thus prohibits "enticing," "requesting," "commanding," "directing," or otherwise encouraging others to request an application to vote by mail. Texas courts interpreting statutes based on solicitation confirm the point that "solicitation" encompasses speech, including speech requesting the conduct at issue. *See, e.g.*, *Martinez v. State*, 696 S.W.2d 930, 932 (Tex. App.—Austin 1985, pet. ref'd) (finding solicitation where police officer "asked for" $150 from motorist in return for not issuing traffic citation).

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 entices, requests, commands, directs, or otherwise 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 entice and encourage eligible voters to use that information to request a timely application to vote by mail, and ultimately exercise their right to vote.

Section 276.016(a)(1) is also viewpoint-based. 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. It thus would be a crime under Section 276.016(a)(1) for Plaintiffs to tell an eligible voter confined to her home with an illness or disability that she should apply to vote by mail in order to avoid being disenfranchised, but it would not be a crime to discourage the same person from filling an application and in turn to forfeit her right to vote.

2. The "Solicitation" Offense Cannot Satisfy First Amendment Scrutiny

Defendants do not even attempt to argue that the solicitation offense can satisfy First Amendment scrutiny. First, the test for viewpoint-based restrictions is simple: If a restriction "is viewpoint-based, it is unconstitutional." *Iancu*, 139 S. Ct. at 2299.

Even as a content-based restriction, Section 276.016(a)(1) would still be unconstitutional because it cannot satisfy strict scrutiny. Under strict scrutiny, restrictions "are presumptively unconstitutional and may be

justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Nat'l Inst. of Family & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2371 (2018) (quoting *Reed*, 576 U.S. at 163). There is no compelling (or even legitimate) justification for suppressing speech that encourages Texans to lawfully request an application to vote by mail. In the district court, Defendants could not even identify a reason why the State made it a crime to encourage people to use a lawful means for exercising their constitutional rights. *See* ROA.848.

If anything, public and election officials have a compelling interest to *engage* in such speech voting by mail is a lawful way for millions of Texans to exercise their fundamental right to vote. For many Texans, it is the only way they can vote. *See, e.g.*, Tex. Elec. Code § 82.004 (permitting early voting by mail for certain incarcerated individuals who are, without express permission from authorities, forbidden from voting in person on election day); *see also O'Brien v. Skinner*, 414 U.S. 524, 531 (1974) (holding that New York violated the Fourteenth Amendment when it denied eligible voters access to absentee voting because they were in jail). For these voters, any encouragement to exercise their right to vote is necessarily encouragement to submit an application to vote by mail.

Section 276.016(a)(1) is also not narrowly tailored to further any legitimate (and much less compelling) interest because there are alternative channels to address the State's proffered concerns about "confusion." For example, the Election Code independently prohibits public officials and election officials from sending an application to vote by mail to a voter who did not request one. Tex. Elec. Code § 276.016(a)(2). Plaintiffs do not challenge that provision, which underscores that the State has alternatives to censorship of speech. The prohibition on "solicitation" is also under-inclusive, as it permits candidates for political office to solicit mail-in ballot applications. The new "solicitation" offense accordingly cannot withstand First Amendment scrutiny.

3. No First Amendment Exception Applies

The new "solicitation" offense also does not fit within any exception to the First Amendment. *See United States v. Alvarez*, 567 U.S. 709, 717-18 (2012) (collecting exceptions).

a. There is a well-settled exception for "speech integral to criminal conduct," which usually justifies prohibitions on solicitation of a crime. *Id.* at 717; *see, e.g.*, *United States v. Williams*, 553 U.S. 285, 298 (2008). But that exception does not apply because it is perfectly lawful for Texans to

engage in the conduct being solicited—*i.e.*, to request an application to vote by mail. Far from being "speech integral to criminal conduct," the solicitation of mail ballot applications is integral to lawful, constitutionally protected conduct.

b. Section 276.016(a)(1) also does not fit within the exception for public employee speech. *See, e.g.*, *Garcetti*, 547 U.S. 410; *Pickering v. Bd. of Education*, 391 U.S. 563 (1968). Under that line of cases, "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Garcetti*, 547 U.S. at 421.

Those cases give the government significant power to set and control its own message by disciplining its employees who engage in speech that departs from their employer's chosen message. *See id.* at 418 ("A government entity has broader discretion to restrict speech *when it acts in its employer role*, but the restrictions it imposes must be directed at speech that has some potential to affect its operations." (emphasis added)). The government's ability to police its employees' speech is correspondingly limited to employee discipline, like demotion or termination, that a private

employer could similarly impose. *See, e.g.*, *Lane v. Franks,* 573 U.S. 228, 234 (2014) (discharge); *Garcetti,* 547 U.S. at 415 (transfer and failure to promote); *Connick v. Myers*, 461 U.S. 138, 141 (1983) (termination); *Pickering,* 391 U.S. at 564 (termination). But as this Court has explained, "when the state acts as a sovereign, rather than as an employer, its power to limit First Amendment freedoms is much more attenuated." *Rangra v. Brown*, 566 F.3d 515, 522-23 (5th Cir. 2009), *dismissed as moot en banc*, 584 F.3d 206 (5th Cir. 2009).

Every appellate court to have addressed the question has determined that the *Garcetti* exception does not apply when a state imposes criminal penalties because it does so as a sovereign, not an employer. *In re Kendall*, 712 F.3d at 827 ("[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 at 911 ("When government seeks criminal punishment, it indeed acts as sovereign and not as employer or speaker." (footnotes omitted)). The Supreme Court has likewise suggested that *Garcetti* does not permit the government to impose criminal liability on public employees. *See Pickering*, 391 U.S. at 574 (distinguishing "criminal sanctions and damage awards" from mere threat of "dismissal from

employment"); *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 504 n.22 (1984) ("Statements made by public employees in their employment capacity and not touching on matters of public concern may be considered unprotected *in the sense that* employment-related sanctions may be imposed on the basis of such statements." (emphasis added)); *see also Dep't of Hous. & Urban Dev. v. Rucker*, 535 U.S. 125, 135 (2002) (explaining that the government acts in its capacity as a sovereign, rather than as a landlord of property, when it "attempt[s] to criminally punish or civilly regulate [tenants] as members of the general populace"). Lower courts have recognized the same. *See Schlarp v. Dern*, 610 F. Supp. 2d 450, 465 n.8 (W.D. Pa. 2009) ("The mere fact that a public employee's speech lacks constitutional protection from employment-related discipline (i.e., termination, reprimand, denial of promotion, etc.) does not mean that a government could use its sovereign authority to impose additional sanctions (i.e., imprisonment, probation, fine, professional censure or discipline, etc.) in retaliation for the same speech.").

Put simply, criminal punishment is not "employer discipline." Private employers sometimes reprimand, demote, or fire employees for speech. But they cannot send their workers to jail. Imprisoning a person requires

exercise of sovereign power, which triggers First Amendment scrutiny. And because Section 267.016(a)(1) criminalizes speech based on its viewpoint and content, it violates the First Amendment. The district court thus properly enjoined the DA Defendants from enforcing Section 276.016(a)(1) against Plaintiffs.

c. The imposition of civil penalties for such speech similarly falls outside any First Amendment exception. At the outset, Section 31.129 imposes civil penalties upon certain election officials who "violate[] a provision of [the Election] [C]ode." Tex. Elec. Code § 31.129(b). But as set forth above, Section 276.016(a)(1) is unconstitutional and therefore the solicitation of a mail-in ballot application cannot be treated as a violation of the Election Code.

In any event, the imposition of civil penalties is independently unconstitutional because, like imposition of criminal penalties, it does not involve employer discipline and instead involves the exercise of sovereign power. Crucially, "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." ROA.654. As a result, "the State's assertion that it is entitled to regulate Longoria and Morgan's official

communications as their employer is wholly unavailing." ROA.654. A private employer cannot fire a worker who works for somebody else.

The Attorney General does not contend that the district court clearly erred in determining that Longoria is employed by Harris County.[4] Indeed, Texas law makes those conclusions clear. The Election Code permits counties to appoint individual elections administrators to oversee the conduct of elections, provide early voting information, and distribute official vote-by-mail applications to eligible voters. Tex. Elec. Code §§ 31.031, 31.032, 31.043-.045, 83.002, 85.007. The Code further provides that Longoria is appointed, removable, and subject to certain forms of discipline by the Harris County Elections Commission for good cause and upon approval of the Harris County Commissioners Court. *See id.* §§ 31.032, 31.036, 31.037.

In unrebutted testimony, Longoria explained that she did not apply for a job with the State; she submitted an application to the "[Harris County] Election[s] Commission, [a] board of the county judge, the county clerk, the Texas asset [sic] collector, and the party chairs of the Democratic

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[4] Nor does the Attorney General claim that Morgan is a state employee. But that is irrelevant, as Morgan is a "public official," not an "election official," and therefore not subject to Section 31.129.

and Republican Party Selection Commission." ROA.798. To remove her, that Commission "would have to convene and make a recommendation to remove [her]," a decision that the Harris County Commissioners Court must ratify "by four-fifths' vote." ROA.798; *see also* ROA.654 ("[T]he Election Code specifically limits the procedures by which an elections administrator can be removed from office and does not provide for removal by a state government official." (citing Tex. Elec. Code § 31.037)); *see also* *Krier v. Navarro*, 952 S.W.2d 25, 29 (Tex. App.—San Antonio 1997, writ denied) (elections administrator is an "agent or employee of the county"). Defendants presented no contrary evidence. Instead, counsel for the Attorney General admitted that Longoria had never entered into any kind of employment contract with the State. ROA.892.

Quite simply, the *Garcetti-Pickering* exception for employee discipline based on speech is inapplicable, because the State is not the employer of either Longoria or Morgan and, in any event, an employer cannot not send its workers to jail (or impose punitive penalties) when it disagrees with their speech. The threatened penalties here accordingly cannot be justified as "employer discipline." Instead, they trigger full First Amendment scrutiny as viewpoint-based restrictions on speech.

B. The State's Counterarguments Lack Merit

1. Defendants primarily argue that this case fits within the First Amendment exception for "government speech." But that is fundamentally misguided. Under the "government speech" exception, "[w]hen government speaks, it is not barred by the Free Speech Clause from determining the content of what it says." *Walker*, 576 U.S. at 207; *see Summum*, 555 U.S. at 467-68. But this case is not about government speech. That is, it does not concern the speech of the regulating governmental officials or entities. The Attorney General and DA Defendants remain free to speak as they wish and to choose what message to convey. This case is accordingly fundamentally different from cases like *Walker* and *Summum*, where lawsuits were brought to force the government defendants to espouse (or not espouse) a particular message using their own speech, by putting particular words and symbols on a state-issued license plate or by erecting a particular monument in a state park. Plaintiffs seek no such thing. This case instead involves a challenge to a statute that threatens Plaintiffs with *imprisonment and civil fines* for engaging in speech and expressing a viewpoint that the State disfavors. Imprisoning a person, or fining her, is not speech. Rather, those are traditional forms of censorship.

The Attorney General asserts that "[g]overnments are entities that can speak only through their agents," and that the First Amendment provides no protection whatsoever for "[a]ny 'speech made pursuant to a public employee's official duties.'" AG Br. at 21-22 (quoting *Anderson v. Valdez*, 845 F.3d 580, 593 (5th Cir. 2016)) (emphasis omitted). But Plaintiffs are not the State's "agents" at all. They do not work for the State. In any event, the Supreme Court has established a well-settled framework for determining the circumstances and manner in which a state can control the speech of a public employee: the *Garcetti-Pickering* framework. As set forth above, public-employee speech cases vindicate the government's interest in controlling its employees' speech by providing that public employees who speak pursuant to their official duties are unprotected from "employer discipline." *Garcetti*, 547 U.S. at 422. Notably, when quoting *Garcetti* and *Anderson*, the Attorney General elides the key limitation to employer discipline. *Compare* AG Br. at 21-22 *with*, *e.g.*, *Garcetti*, 547 U.S. at 421 ("[T]he Constitution does not insulate their communications from *employer discipline*." (emphasis added)).

The enforcement that Plaintiffs seek to enjoin does not involve "employer discipline" for the reasons set forth above. "Longoria and Morgan

are not employed by the State." ROA.654. And the State acts as a sovereign, not an employer, when it imposes criminal or civil punishment or civil penalties. *See supra* Section II(A)(3). "[T]he Supreme Court has never held (nor has any other court, as far as we can tell) that the 'governmental speech' doctrine means that governments can freely criminalize the speech of their citizens (whether spoken in their official or individual capacities) free of any First Amendment constraints." *Ex parte Perry*, 471 S.W.3d 63, 109-11 (Tex. App.—Austin 2015), *rev'd in part on other grounds*, 483 S.W.3d 884 (Tex. Crim. App. 2016); *see also In re Kendall*, 712 F.3d at 826-27.

The Attorney General's position would mark a sharp departure from Supreme Court precedent. "Taking away free speech protection for public employees would mean overturning decades of landmark precedent." *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2469 (2018) (citing *Pickering*, 391 U.S. 563). "Nothing in the *Pickering* line of cases requires [courts] to uphold every speech restriction the government imposes as an employer." *Id.* Indeed, the Court in *Pickering* expressly acknowledged that "statements by public officials on matter of public concern must be accorded First Amendment protection despite the fact that the statements are directed at their nominal superiors." 391 U.S. at 574

(citing *Garrison v. Louisiana*, 379 U.S. 64 (1964) and *Wood v. Georgia*, 370 U.S. 375 (1962)). In *Garrison* and *Wood*, the Court overturned criminal convictions of public officials based on speech in their official capacity. *See also Connick*, 461 U.S. at 147 ("[A]n employee's false criticism of his employer on grounds not of public concern may be cause for his discharge *but would be entitled to the same protection in a libel action accorded an identical statement made by a man on the street*." (emphasis added)). Under the Attorney General's "government speech" theory, those cases could not stand. States could once again enforce criminal defamation laws against public officials without regard to the truth of their statements. Moreover, a state could make it a crime for employees at any position at any level of the state or local government to encourage citizens to apply for a concealed-carry license. Under the Attorney General's theory, such forms of censorship would not trigger any form of First Amendment scrutiny at all.

The Attorney General seeks to distinguish *Perry* and *Kendall*, but those distinctions are unavailing. The Attorney General asserts that the Texas Court of Criminal Appeals in *Perry* did not decide whether the government acts as a sovereign when it seeks criminal punishment, but

that is because the State *conceded* the issue.[5] The State squarely disputed that issue, however, in the Austin Court of Appeals below. And that court rejected the State's argument and held that *Garcetti* had no bearing in the context of a "criminal prosecution based on speech, as opposed to a claim or issue involving employee discipline." *Ex parte Perry*, 471 S.W.3d at 107.

The Attorney General also asserts that the Third Circuit's analysis in *Kendall* was "perfunctory." AG Br. at 28. But the court devoted much of its opinion to identifying the roots (and limits) of the government's authority to impose discipline for speech, and it rejected the argument that criminal punishments could be justified under *Garcetti* as a form of employer discipline. *See Kendall*, 712 F.3d at 826-27. The fundamental difference between the government's acts as a sovereign when it imposes criminal punishment and its acts pursuant to the authority that it gains when it acts in other capacities (*e.g.*, employer, prison administrator, or military commander) was thus plainly at issue in *Kendall*. *See* 712 F.3d at 825-26

[5] In *Ex parte Perry* the State acknowledged that "*Garcetti* was an employment law case, and arguably, when the State criminalizes speech, it is acting not as an employer, but as a sovereign." 483 S.W.3d at 911. The Court of Criminal Appeals noted that the State was "wise to back away from these earlier claims made by the attorney pro tem." *Id.* The State does not explain its shift in position here.

(collecting authority). And as the Third Circuit explained, the government "has no greater authority" to criminally punish when it acts pursuant to that "additional" authority "than it would to criminally punish *any* speech." *Id.* (emphasis added). In the context of a viewpoint-based restriction on speech, it has virtually none. *See Iancu*, 139 S. Ct. at 2299.

The Attorney General contends that *United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 460 (1995) (*NTEU*), and *City of El Cenizo v. Texas*, 890 F.3d 164, 185 (5th Cir. 2020), applied *Pickering* to provisions that authorized imposition of monetary civil penalties on employees. But those cases provide no support for *criminalizing* a disfavored viewpoint. And neither supports Defendants' position on civil penalties either. The court did not apply the *Garcetti-Pickering* framework in *City of El Cenizo* because the plaintiffs were exempt from *Garcetti* because they were elected officials—a separate limitation to that doctrine. 890 F.3d at 184-85. The Court put off for another day the question of whether subjecting the speech of "public employees *putatively* covered by *Garcetti*" to civil penalties was constitutional. *Id.* at 185. Nobody pressed the argument that the state was acting as a sovereign, not an employer, in *NTEU* either. In that case, unlike here, the plaintiffs were employed by the government regulating their

speech—the federal government. Even then, the Court noted that the "*Pickering* cases only permit the Government to take adverse action based on employee speech that has adverse *effects* on 'the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.'" *NTEU*, 513 U.S. at 467 n.11 (quoting *Pickering*, 391 U.S. at 568) (emphasis in original).[6] But speech by Longoria or Morgan has no impact on the "efficiency of the public services" the State performs "through its employees," because they do not work for the State and the State does not administer elections.

2. The Attorney General further relies on *Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353, 363 (2009), and *El Cenizo* to contend that it "is a distinction without a difference" that Longoria and Morgan are not employed by the State. *See* AG Br. at 25. But those cases do not address *Pickering*, much less hold that it is immaterial under *Pickering* and *Garcetti*

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[6] In *NTEU*, the Court struck down the law in question in part because "[u]nlike *Pickering* and its progeny," the case did not involve a government employer's *post hoc* discipline of an employee for speaking. 513 U.S. at 467. The Court held that *Pickering* operated quite differently "in the context of a sweeping statutory impediment to speech." *Id.* Thus, even though no one pressed the question of whether the government was acting as sovereign or employer, the Court relied on a similar distinction in the form of regulation to strike down the law in question.

whether the State actually employs the person who it seeks to punish. In *El Cenizo*, this Court noted that "[s]uch issues are not properly before us because the appellees do not represent the public employees putatively covered by *Garcetti* and the government speech doctrine." 890 F.3d at 185. Here, the district court specifically asked the Attorney General's counsel at the hearing below whether he could identify "any case on point here that says *Garcetti* applies outside the employer–employee relationship[.]" ROA.884. But counsel for the Attorney General failed to do so, and still in their brief on appeal have failed to identify such a case.

Perhaps the State could take over the administration of all elections, such that any election official would actually be a state employee and in turn be subject to employee discipline by the State if the person engages in disfavored speech. But that would involve a sea-change in Texas election law, *see* Tex. Elec. Code §§ 31.031, 31.032, 31.043-.045, 83.002, 85.007, and, more importantly, the Texas Legislature has not done so. As it stands, "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." ROA.654. Moreover, because it is not actually Longoria's employer, the State would have to take extraordinary steps to enforce the

civil penalty of termination: It would have to go to court and obtain a judgment against a third party (the Harris County Elections Commission) to force it to terminate Longoria, notwithstanding that she enjoys for-cause removal protections. That vividly illustrates that the State does not employ Longoria. And because the State does not employ her, it cannot subject her to employee discipline—and it certainly cannot jail her for her speech.

Simply put, the district court was correct to hold that Plaintiffs were likely to succeed on the merits of their First Amendment claims. The ban on "solicitation" of a lawful means of voting is a viewpoint-based restriction on speech that cannot satisfy First Amendment scrutiny, and does not fit within *Garcetti* or any exception to the First Amendment.

C. The District Court Did Not Abuse Its Discretion In Determining That The Remaining Factors Justify A Preliminary Injunction

1. Plaintiffs Will Suffer Irreparable Harm Absent An Injunction

The district court did not abuse its discretion in determining that, absent a preliminary injunction, Plaintiffs will suffer irreparable harm through the chilling effect that arises from the threat of imprisonment and civil penalties for encouraging others to lawfully seek an application to vote by mail. "The loss of First Amendment freedoms, for even minimal periods

of time, unquestionably constitutes irreparable injury." *Elrod*, 427 U.S. at 373; *see Texans for Free Enter. v. Tex. Ethics Comm'n*, 732 F.3d 535, 539 (5th Cir. 2013) (citing *Elrod* for same). The irreparable injury here is even more acute because of the collateral harm it does to Texans' fundamental right to vote. Each passing day in which Plaintiffs' speech is stifled by threat of criminal and civil consequences is another day that they cannot provide important information and education regarding applications to vote by mail, thus increasing the likelihood that certain individuals will be unable to vote at all.

As the district court explained regarding irreparable harm, "the harm is the chilling effect on Plaintiffs' speech that arises from the credible *threat* of enforcement" of the Challenged Provisions. ROA.659 (emphasis in original). Longoria testified how she could not provide the information about voting by mail that she wanted to at an AARP meeting, ROA.808-09, has "completely dropped off" from providing voters with letters, email, and texts about mail-in voting applications, ROA.807-08, and has to "stop mid-sentence" when discussing mail-in ballot voting because "[t]he law prevents [her] from saying much more," ROA.808. She cannot do so because she fears "jail time, loss of money, loss of job, and potentially impact that would have

on [her] future career." ROA.814-15.

Plaintiff Morgan, too, has refrained from reminding elderly or homebound voters to turn in their mail-in ballot applications and from informing students that are studying away from home at college that they could apply to vote by mail for fear that doing so would subject her to criminal punishment. ROA.765-70, 72. In both cases, without learning about and engaging in voting by mail, those voters are effectively disenfranchised because they cannot vote in person.

2. The Balance of Equities Favors An Injunction

The district court also did not abuse its discretion in weighing the balance of the equities. First, as the district court correctly determined, ROA.663, the threatened and ongoing injury to Plaintiffs' free speech rights outweighs any potential harm that an injunction might cause Defendants. *See Deerfield Med. Ctr. v. City of Deerfield Beach*, 661 F.2d 328, 332 (5th Cir. Unit B 1981). Without a preliminary injunction, Plaintiffs face potential prosecution and civil liability for expressing a viewpoint the State disfavors. The State can only overcome the interest in enjoining restrictions on speech by producing "powerful evidence" that an injunction will harm its interests. *Opulent Life Church,* 697 F.3d at 297. But the Attorney General

utterly failed to do so in the district court. Critically, the district court held an evidentiary hearing, but Defendants failed to introduce evidence showing any concrete way in which an injunction would harm their interests. The Attorney General could not even articulate a coherent reason why the State wanted to criminalize speech encouraging a lawful form of voting. *See* ROA.848 (when instructed by the court to "explain for me, what were you told [t]hat the purpose of (a) (1) was," Brian Ingram, Director of the Elections Division of the Texas Secretary of State's Office, testified "I don't know what the purpose of it was, sir.").

The Attorney General asserts that it suffers irreparable harm whenever its laws are enjoined. AG Br. at 31, 33-36. But that is not true of laws that are unconstitutional. *See Ingebretsen ex rel. Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274, 280 (5th Cir.1996) (holding that "the public interest was not disserved" by an injunction against a law that violated the First Amendment); *Entm't Software Ass'n v. Foti*, 451 F. Supp. 2d 823, 837 (M.D. La. 2006) ("There can be no irreparable harm to a [government] when it is prevented from enforcing an unconstitutional statute." (citation and internal quotation marks omitted)). At most, given Plaintiffs' likelihood of success, the State's generalized interest "can weigh

only weakly in [its] favor," *Patino v. City of Pasadena*, 229 F. Supp. 3d 582, 590-91 (S.D. Tex. 2017), and is readily outweighed by the harm caused by a one-sided criminal ban on encouraging people to use a lawful means to cast a ballot.

The Attorney General asserts that it has a "concrete interest" in the "integrity, fairness, and efficiency of [its] ballots and election processes," which is purportedly served by "minimiz[ing] the number of voters eligible to vote by mail who choose that option instead of voting in person." AG Br. at 32. But Texas law makes voting by mail *lawful*. And the Attorney General failed to introduce any evidence below to show that truthful speech encouraging eligible voters to request mail-in ballot applications would somehow cause an increase in election fraud or otherwise impede election integrity. Moreover, given the tight restrictions on who is eligible to vote by mail, the practical reality is that, for many voters, voting by mail is not a "choice." If they do not vote by mail, they will not vote *at all*. And the Attorney General has no legitimate interest in preventing eligible voters from lawfully casting a ballot.

3. A Preliminary Injunction Furthers The Public Interest

Finally, "injunctions protecting First Amendment freedoms are always in the public interest." *Texans for Free Enter.*, 732 F.3d at 539 (citation and internal quotation marks omitted); *see also, e.g.*, *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."); *Wexler v. City of New Orleans*, 267 F. Supp. 2d 559, 568–69 (E.D. La. 2003) ("The public interest is best served by enjoining the effect of any ordinance which limits potentially constitutionally protected expression until it can be conclusively determined that the ordinance withstands constitutional scrutiny.").

The public interest in enjoining Section 276.016(a)(1) is particularly strong because its one-sided prohibition on speech distorts the political process, where constitutional free-speech guarantees have their "fullest and most urgent application." *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971). These interests are made all the more urgent as time is irretrievably lost. As a result, a preliminary injunction barring enforcement of the Challenged Provisions is firmly in the public interest.

4. *Purcell* Is Inapplicable

The district court did not abuse its discretion in finding *Purcell* to be inapplicable. Justice Kavanaugh recently described *Purcell* as standing for the proposition that "federal courts ordinarily should not enjoin a state's election laws in the period close to an election[.]" *Merrill v. Milligan*, 142 S. Ct. 879, 879 (2022) (Kavanaugh, J., concurring in grant of applications for stays); *see also Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam). But as the district court observed, *Purcell* and its progeny "extend[] only to injunctions that affect the mechanics and procedures of election law applicable to voting." ROA.662; *see also Democratic Nat'l Comm. v. Wis. State Legislature*, 141 S. Ct. 28, 31 (2020) (Kavanaugh, J., concurring in denial of application to vacate stay) (discussing the importance of clarity with respect to "how, when, and where [voters] may cast their ballots").

Indeed, the Attorney General relies exclusively on cases relating to "how, when, and where" a voter may cast their ballot. *Purcell* itself involved voter identification procedures. 549 U.S. at 4. The others are similar. *See Richardson v. Tex. Sec'y of State*, 978 F.3d 220, 244 (5th Cir. 2020) (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*, 961 F.3d at 411-12 (5th Cir. 2020) (qualifications to vote by mail); *Mi Familia Vota v. Abbott*, 834 F. App'x 860, 863 (5th Cir. 2020) (per curiam) (mask mandate exemption for voters).

By contrast, courts routinely recognize that *Purcell* does not apply where, as here, an injunction would prevent the state from censoring election-related speech. *See, e.g.*, *Make Liberty Win v. Ziegler*, 499 F. Supp. 3d 635, 645 (W.D. Mo. 2020) ("*Purcell* and its progeny relate to the actual voting process (e.g., absentee voter laws, restoration of voting rights) and related election administration issues, not to campaign finance."); *Holland v. Williams*, 457 F. Supp. 3d 979, 996 (D. Colo. 2018) ("Colorado's campaign finance laws . . . are not election procedures or otherwise like the voter identification laws at issue in *Purcell*.").

The Supreme Court has emphasized that election-related speech claims should be resolved expeditiously to guarantee litigants "sufficient opportunity prior to the election date to communicate their views effectively." *Fed. Elec. Comm'n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 463 (2008) (quoting *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 774 (1978)). Allowing speakers to speak only after an election would be "an

empty gesture." *Id.* Courts are thus more inclined—not less—to lift gag orders in the run-up to elections. *See, e.g.*, *Villejo v. City of San Antonio*, 485 F. Supp. 2d 777, 785 (W.D. Tex. 2007).

Citizens United v. Federal Election Commission is illustrative. There, the Supreme Court held unconstitutional a federal law banning corporations from "electioneering communication" within 30 days of a primary or 60 days of a general election, reversing the court below that had upheld that law and denied injunctive relief. *See Citizens United*, 558 U.S. at 321. The Supreme Court issued its opinion just twelve days before the first congressional primary election, well within the 30-day period during which corporations had been subject to the gag order. *See* 10 ILCS 5/2A-1.1 (setting election schedule). The Court made no mention of *Purcell*.

Like the Supreme Court's ruling in *Citizens United*, the preliminary injunction here prohibits the state from penalizing election-related speech. The preliminary injunction leaves Texas's election procedures intact. It does not affect who can apply for a mail-in ballot or when and how a person could do so. Nor does it compel any action on the part of any election or public official. It simply gives officials the opportunity to express a viewpoint that would otherwise be criminalized, and thus to encourage

mail-in ballot applications if they are so inclined. The district court thus properly entered the preliminary injunction when it did and no circumstances warrant narrowing that injunction now.

Finally, the Attorney General previously sought a stay pending appeal, but he now seeks a stay through the end of any runoff election, which would happen on May 24, 2022. AG Br. at 37. *Purcell* has never been applied to stay an injunction beyond resolution of the appeal. It is critical that the Court not expand the reach of *Purcell* beyond the rules governing election mechanics to allow for the suspension of First Amendment freedoms in the lead-up to an election. But it would be especially inappropriate for the Court to do so after affirming the district court's decision that Plaintiffs are likely to succeed on the merits of their claims.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's order granting a preliminary injunction.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of February, 2022, the foregoing Brief of Plaintiffs-Appellees was electronically filed with the Clerk of the Court by using the CM/ECF system. I further certify that all parties are registered CM/ECF users and that service will be accomplished through the CM/ECF system.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because it contains 12,784 words, excluding the parts of the brief exempted by FED R. APP. P. 32(f).

2. This brief also complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type-style requirements of FED. R. APP. P. 32(A)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Century Schoolbook 14-point font.

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