UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

ISABEL LONGORIA and CATHY MORGAN, *Plaintiffs*, v. WARREN K. PAXTON, in his official capacity as the Attorney General of Texas, *et al.*, *Defendants*.	§ § § § § § § § § §	Case No. 5:21-cv-1223-XR

ATTORNEY GENERAL PAXTON'S MOTION TO DISMISS OR ABSTAIN

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Statutes

Rules

Constitutional Provisions

INTRODUCTION

Plaintiffs' suit falters on a fundamental disconnect: Senate Bill 1 ("SB1") regulates, at most, *government* speech, which the First Amendment does not protect. But Plaintiffs' First Amendment claims are premised on their personal rights to speak as *citizens*, to which SB1 does not apply. SB1 is constitutional.

But the Court need not reach this constitutional issue because Plaintiffs have not established subject-matter jurisdiction. Plaintiffs do not plausibly allege that the defendants will bring enforcement actions against them for the conduct that they claim is protected. Absent that threat of enforcement, Plaintiffs cannot establish Article III standing or overcome sovereign immunity.

Alternatively, the Court should abstain so that Texas courts can authoritatively interpret SB1. Although Plaintiffs do not challenge SB1 as unconstitutionally vague, they argue that multiple ambiguities prevent them from knowing whether SB1 applies to their proposed conduct. State-court litigation is necessary to clarify what the statute covers and how it is enforced. State-court litigation is also more likely to provide the certainty that Plaintiffs allege they need.

The Court should dismiss for lack of subject-matter jurisdiction, abstain, or dismiss for failure to state a claim. *See* Fed. R. Civ. P. 12(b)(1), (6).

BACKGROUND

This case centers on Section 276.016(a)(1) of the Texas Election Code, which the Texas Legislature adopted during a special session in September 2021. *See* An Act Relating to Election Integrity and Security, S.B.1, 87th Leg., 2d C.S. (2021) ("SB1"). Section 276.016(a) regulates the official activities of government officials relating to mail-in voting: "A public official or election official commits an offense if the official, *while acting in an official capacity*, knowingly: (1) solicits the submission of an application to vote by mail from a person who did not request an application." Tex. Elec. Code § 276.016(a) (emphasis added). SB1 also regulates distribution of applications to vote by mail, *see id.*

§ 276.016(a)(2)–(4), but Plaintiffs do not challenge those provisions. *See* ECF 5 at 14.

This is the second time Longoria, the Election Administrator for Harris County, has challenged Section 276.016(a)(1). Her first lawsuit was filed in early September. *See* Complaint, *La Unión del Pueblo Entero v. Abbott*, No. 5:21-cv-844-XR, ECF 1 ¶¶ 185–87, 223–29 (W.D. Tex. Sept. 3, 2021) ("*LUPE*"). She originally concluded that she did not need preliminary injunctive relief before the March 1, 2022, primary election. ECF 9-1 at 32–33 ("On behalf of LUPE plaintiffs, it is correct that we are not planning to pursue preliminary injunctive relief prior to the March primary."). She voluntarily dropped those claims on December 1. *LUPE*, ECF 138. Nine days later, she and Cathy Morgan, a volunteer deputy registrar in Travis and Williamson Counties, filed this lawsuit, raising the same challenge to Section 276.016(a)(1). *See* ECF 1. A couple of weeks later, without having served the original complaint, Plaintiffs filed a first amended complaint adding three new defendants and altering the claim against the Attorney General. *See* ECF 5.

Plaintiffs' live complaint includes two counts. In Count I, both Longoria and Morgan seek to prevent three local district attorneys from criminally prosecuting them for violating Section 276.016(a)(1). *See id.* ¶¶ 37–43. In Count II, Longoria (but not Morgan) seeks to prevent the Attorney General from bringing a civil enforcement action against her for violating Section 276.016(a)(1). *See id.* ¶¶ 44–46; Tex. Elec. Code § 31.129 (certain election officials "may be liable to this state for a civil penalty," including termination of employment and loss of employment benefits, "if the official . . . violates a provision of this code").

Unlike the first time Longoria challenged the law, she asserted that she needed relief before the March 2022 election, she and Morgan moved for a preliminary injunction. *See* ECF 7 at 8. They served the Attorney General with both the First Amended Complaint and the preliminary-injunction motion on January 3, 2022. *See* ECF 15.

The Attorney General now moves to dismiss all of Plaintiffs' claims, including the claims

against the DAs. Even if the Attorney General were not a party, he would be entitled to intervene to defend the constitutionality of the state laws challenged by Plaintiffs in a suit against local officials. *See* Fed. R. Civ. P. 5.1. That is not necessary here because the Attorney General is already a party to this suit. When plaintiffs challenge the constitutionality of a state statute by suing both the Attorney General and local officials, the Attorney General may defend the claims against the local officials. *See, e.g.*, *Tex. Democratic Party v. Abbott*, 978 F.3d 168 (5th Cir. 2020) (vacating an injunction against both state and local defendants after the state officials appealed but the local officials did not).

ARGUMENT

The Court should dismiss for three reasons. First, Plaintiffs have not carried their jurisdictional burdens. Neither Plaintiff has plausibly alleged a sufficient threat of enforcement to establish standing, and Longoria has not satisfied the requirements of *Ex parte Young* for her claim against the Attorney General. Second, the Court should abstain because, as Plaintiffs concede, state-law questions crucial to their claims remain unsettled. Texas courts, not this Court, should resolve those questions. Third, Plaintiffs' claims fail as a matter of law because Section 276.016(a)(1) does not restrict private speech protected by the First Amendment; rather, it permissibly regulates government speech.

I. Plaintiffs Have Not Established Jurisdiction

Longoria and Morgan's claims fail for lack of subject-matter jurisdiction. At the pleading stage, "the plaintiffs' burden is to allege a plausible set of facts establishing jurisdiction." *Physician Hosps. of Am. v. Sebelius*, 691 F.3d 649, 652 (5th Cir. 2012) (citing *Davis v. United States*, 597 F.3d 646, 649–50 (5th Cir. 2009)). That burden extends to both Article III standing and *Ex parte Young*. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992) (standing); *City of Austin v. Paxton*, 943 F.3d 993, 1000 (5th Cir. 2019) (requiring, for the *Ex parte Young* exception to sovereign immunity, "a higher showing of 'enforcement' than the [plaintiff] has proffered here"). But Longoria has not established a credible threat that the Attorney General will sue her under Section 31.129 for her proposed conduct, and

neither Plaintiff has established a credible threat of criminal prosecution from the DAs under Section 276.016(a)(1).

A. The Court Lacks Jurisdiction over Longoria's Claim against the Attorney General

Sovereign immunity "prohibits suits against state officials or agencies that are effectively suits against a state." *City of Austin*, 943 F.3d at 997. "*Ex parte Young* allows injunctive or declaratory relief against a state official in her official capacity," but only when "the official has a sufficient 'connection' with the enforcement of the allegedly unconstitutional law." *Mi Familia Vota v. Abbott*, 977 F.3d 461, 467 (5th Cir. 2020). "Although the precise scope of the requirement for a connection has not been defined, the plaintiff at least must show the defendant has the particular duty to enforce the statute in question and a demonstrated willingness to exercise that duty." *Tex. Democratic Party*, 978 F.3d at 179 (quotation omitted).

Similarly, Article III standing requires plaintiffs to plausibly allege that the defendant can and will enforce the challenged law against them. Absent those allegations, a complaint would violate "the long-standing rule that a plaintiff may not sue a state official who is without any power to enforce the complained-of statute." *Okpalobi v. Foster*, 244 F.3d 405, 426 (5th Cir. 2001) (en banc); *see also California v. Texas*, 141 S. Ct. 2104, 2114 (2021). Even when a defendant has the power to enforce a challenged statute, the plaintiff must establish that the defendant is sufficiently likely to bring an enforcement action against the plaintiff for the conduct claimed to be protected. *See, e.g.*, *Golden v. Zwickler*, 394 U.S. 103, 109 (1969); *Int'l Tape Mfrs. Ass'n v. Gerstein*, 494 F.2d 25, 28–29 (5th Cir. 1974); *Osterweil v. Edmonson*, 424 F. App'x 342, 343–44 (5th Cir. 2011) (per curiam).

Here, Longoria has not shown any connection between the Attorney General and Section 31.129, much less that the Attorney General will imminently sue her for civil penalties if she engages in her proposed conduct. She therefore has not overcome sovereign immunity or established standing.

First, Longoria seems to assume that the Attorney General "is charged with enforcing the civil

provisions of the Texas Election Code, including the new Section 31.129," ECF 5 ¶ 8, but the statute does not expressly specify who is charged with enforcing it. *See* Tex. Elec. Code § 31.129(b) ("An election official may be liable to this state for a civil penalty . . . ."). Longoria cites no authority interpreting Section 31.129 as empowering the Attorney General. *Cf.* Tex. Const. art. V, § 21 ("The County Attorneys shall represent the State in all cases in the District and inferior courts in their respective counties . . . .").

Instead, Longoria relies on a district court opinion that addressed whether the Attorney General was a proper defendant in another context because he could assert the State's "freestanding sovereign interest in enforcing the Texas Constitution." *City of Austin v. Abbott*, 385 F. Supp. 3d 537, 545 (W.D. Tex. 2019) (italics omitted); *see* ECF 5 ¶ 8 & n.4. That citation is doubly flawed. The case not only says nothing about the Attorney General's role, if any, under Section 31.129, but is also inconsistent with the Fifth Circuit's later opinion in *City of Austin v. Paxton*. 943 F.3d at 1001–02. And the Fifth Circuit has since expressly held that the general powers to which Plaintiffs point do not make the Attorney General a proper defendant. *See Tex. Democratic Party*, 978 F.3d at 181 (holding that "[a] general duty to enforce the law is insufficient for *Ex parte Young*" and citing *City of Austin v. Abbott*).

Even assuming that the Attorney General can sue under Section 31.129, Longoria has not established that he can do so against her in her personal capacity. After all, the very next statutory section provides that "[a]n action . . . alleging that an election officer violated a provision of this code while acting in the officer's official capacity may only be brought against the officer in the officer's official capacity." Tex. Elec. Code § 31.130. When an official is sued in her official capacity, the government entity she represents pays any judgment. *See Kentucky v. Graham*, 473 U.S. 159, 166 (1985). Longoria, however, has brought this lawsuit only in her personal capacity. *See* ECF 5 ¶ 3. Thus, Longoria has not even established that she would be a party to any future action under Section 31.129,

much less that she would be injured by any monetary judgment entered.[1]

Even if the Attorney General *can* bring suit under Section 31.129 against an official in her personal capacity, Longoria does not plausibly allege that he *will* bring such a suit against her. Longoria alleges that she "is especially concerned that she will face *criminal* prosecution," ECF 5 ¶ 31 (emphasis added), but she does not allege a similar concern regarding civil enforcement. For Longoria's claim against the Attorney General (Count II), only civil enforcement, not criminal enforcement, is relevant. *See* ECF 5 ¶¶ 44–46.

In any event, Longoria's subjective fear would be insufficient. Plaintiffs must "allege[] a credible threat of enforcement" for standing, *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 161 (2014), and a "demonstrated willingness" for *Ex parte Young*, *Tex. Democratic Party*, 978 F.3d at 179. The closest Longoria comes to addressing this requirement is citing *State v. Hollins*, 620 S.W.3d 400, 405 (Tex. 2020), for the proposition that the Attorney General recently sued "to enforce provisions of the Texas Election Code and to restrict the actions of a local election official, including by preventing him from mailing out mail ballot applications to many eligible voters unless those voters first submitted a request." ECF 5 ¶ 9. *Hollins* does not establish a sufficient threat of enforcement here.

In *Hollins*, the Attorney General brought an *ultra vires* claim against a local official in his official capacity. *See* 620 S.W.3d at 405. He did not use Section 31.129, which had not been enacted yet, to impose penalties on a local official in her personal capacity. As the Fifth Circuit has recognized, that the Attorney General has enforced "different statutes under different circumstances does not show that he is likely to do the same here." *City of Austin*, 943 F.3d 1001–02. *Hollins* does not establish that the Attorney General brings every conceivable enforcement action. On the contrary, the defendant there claimed that the Attorney General had *not* brought similar enforcement actions regarding other

[1] Counsel is not aware of any state-court authority interpreting Sections 31.129 or 31.130. Nor is counsel aware of any official interpretation of those provisions by the Attorney General. Regardless of how state courts and the Attorney General eventually interpret those sections, Longoria has not carried her burden at this stage.

controversies, and the Attorney General claimed "the inherent authority to exercise his enforcement discretion." Pet. for Review and Br. on the Merits, *Hollins*, 2020 WL 5876836, at *31 (Tex. Sept. 22, 2020).

Even if Longoria's complaint established that the Attorney General is particularly likely to sue her (it does not), she has not plausibly alleged that she would be sued in her personal capacity under Section 31.129, rather than in her official capacity via an *ultra vires* suit. *See Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 412–13 (2013) (plaintiffs lacked standing to challenge a statute authorizing surveillance because "even if [they] could demonstrate that" surveillance was "imminent," they could "only speculate as to whether the Government will seek to use [the challenged statute] (rather than other methods) to do so").

It is not clear that Longoria intends to engage in conduct that would lead the Attorney General to sue her (assuming he can). Longoria alleges that she "seeks . . . to encourage eligible voters to lawfully request mail-in voting applications so that they can lawfully vote by mail." ECF 5 ¶ 27. But it is unclear whether encouraging voters to request an application would be "solicit[ing] the *submission* of an application," much less whether the Attorney General would decide to seek civil penalties in any given situation. Tex. Elec. Code § 276.016(a)(1) (emphasis added). Longoria does not disagree. She alleges only that her proposed conduct "may qualify as solicitation." ECF 5 ¶ 28.

To be sure, Longoria suggests that she will alter her own conduct due to SB1's "chilling effect," *id.* ¶ 31, but "[a]llegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm." *Laird v. Tatum*, 408 U.S. 1, 13–14 (1972). That a plaintiff "feel[s] inhibited" does not give her a sufficient injury to bring a free-speech claim. *Younger v. Harris*, 401 U.S. 37, 42 (1971).

Because Longoria could not establish standing based on a speculative threat of enforcement if she did engage in her proposed conduct, Longoria also cannot establish standing based on a self-

inflicted injury stemming from her decision not to engage in that conduct. After all, plaintiffs "cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending." *Clapper*, 568 U.S. at 416.

B. The Court Lacks Jurisdiction over Plaintiffs' Claims against the DAs

Neither Longoria nor Morgan has plausibly alleged standing to sue the DAs. Although Longoria claims to be "especially concerned that she will face criminal prosecution from the Defendants," ECF 5 ¶ 31, she alleges no facts plausibly supporting that concern. She mentions the Attorney General's alleged "threats and history of prosecution of alleged election-related crimes," *id.*, but she does not bring this claim (Count I) against the Attorney General. Longoria brings Count I against Defendant Ogg only. *See id.* at 11. Longoria's only allegations about Ogg are that she is (1) "the Harris County District Attorney," (2) "authorized to investigate and prosecute violations of the Texas Election Code in Harris County," and (3) "sued in her official capacity." ECF 5 ¶ 10. Mere authority to prosecute does not establish a sufficiently credible threat of prosecution in these circumstances.

Similarly, Morgan alleges no more than a "possibility of criminal prosecution," *id.* ¶ 35, but the Supreme Court has "repeatedly reiterated that threatened injury must be *certainly* impending to constitute injury in fact, and that allegations of *possible* future injury are not sufficient." *Clapper*, 568 U.S. at 409 (cleaned up); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (explaining that "[t]he plausibility standard . . . asks for more than a sheer possibility"). Morgan alleges that Defendants Dick and Garza are DAs and "authorized to investigate and prosecute violations of the Texas Election Code in" their respective counties, ECF 5 ¶¶ 11–12, but that does nothing to establish a sufficient likelihood that criminal prosecution will be forthcoming.

That is particularly true because it is not clear whether Texas courts (or even these DAs) would conclude Morgan is subject to Section 276.016(a)(1). That section applies only to "[a] public official or election official." Tex. Elec. Code § 276.016(a). Morgan alleges that she "has served as a volunteer

deputy registrar," but volunteer deputy registrars are not included in the statutory definition of "election official." *See id.* § 1.005(4-a). Morgan alleges no facts suggesting that she will be considered a "public official," a term not defined in the statute.

II. The Court Should Abstain

In the alternative, the Court should abstain under *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941). The viability of Plaintiffs' claims—both jurisdiction and the merits—turns on the resolution of multiple state-law questions that the state courts have not yet resolved. Far from disputing the unsettled nature of these state-law claims, Plaintiffs affirmatively argue that the law is unclear (though not unconstitutionally vague). As a result, this Court should avoid the federal constitutional question until Texas courts have authoritatively interpreted SB1. Abstention also allows this Court to avoid reaching jurisdictional issues that it would normally need to decide first. *See Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 584–85 (1999). Abstention would not prejudice Plaintiffs because the state courts are in a much better position to provide meaningful relief (if appropriate).

There are "two prerequisites for *Pullman* abstention: (1) there must be an unsettled issue of state law; and (2) there must be a possibility that the state law determination will moot or present in a different posture the federal constitutional questions raised." *Palmer v. Jackson*, 617 F.2d 424, 428 (5th Cir. 1980). Reaffirming the importance of *Pullman* abstention in another election-law case, the Fifth Circuit recently criticized a "district court's decision to forge ahead despite an intimately intertwined—and, at that time, unresolved—state-law issue." *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 397 n.13 (5th Cir. 2020); *see also id.* at 419 (Costa, J., concurring in the judgment).

In this case, multiple state-law issues satisfy those criteria. The first is whether SB1 prohibits the conduct in which Longoria and Morgan want to engage? Plaintiffs themselves argue that this question is unsettled. Longoria alleges that her "efforts to encourage applications to vote by mail . . . *may* qualify as solicitation" under Section 276.016(a)(1), not that they *do*. ECF 5 ¶ 28 (emphasis added).

Longoria is "unclear about the line between providing 'general information,'" which SB1 does not prohibit, and "soliciting requests," which it does. ECF 7-1 ¶ 14. Morgan similarly argues that "[i]t is not clear to [her] what constitutes 'solicit[ing]' a vote by mail ballot." ECF 7-2 ¶ 20. Morgan also "do[es] not know what 'while acting in an official capacity' means," but that is a threshold requirement before Section 276.016(a)(1) can apply. *Id.* ¶ 21. It is also unclear whether Texas courts will treat volunteer deputy registrars as public officials covered by Section 276.016(a)(1). *See supra* Part I.B. These unsettled state-law issues are case-dispositive here because, if SB1 does not prohibit Plaintiffs' proposed speech, then it cannot violate their rights, and they lack standing to challenge it. Even a narrower ruling that some subset of Plaintiffs' proposed conduct is not covered would present their claims "in a different posture." *Palmer*, 617 F.2d at 428; *see also Tex. Democratic Party*, 961 F.3d at 397 n.13.

The second unsettled state-law issue is whether the Attorney General can seek civil penalties against Longoria. As discussed above, Longoria has cited no authority interpreting Section 31.129 to allow such a suit, and it is not obvious how Texas courts would resolve that issue. *See supra* Part I.A. If Texas courts held that the Attorney General cannot seek civil penalties under Section 31.129, Longoria's claim against him would necessarily fail. A plaintiff cannot seek an injunction against a defendant's supposed future enforcement activity if the defendant would not be able to pursue that enforcement activity regardless. *See supra* Part I.A.

The third unsettled question is what penalties are available under Section 31.129. That section expressly authorizes termination of employment and employment benefits, but according to Longoria, "[i]t is not clear what additional civil penalties" would be authorized. ECF 7-1 ¶ 13. Longoria's claim depends, at least in part, on her argument that SB1 goes beyond "employer discipline." ECF 7 at 15. But if Texas courts conclude that Section 31.129 authorizes only penalties that a private employer could impose—such as termination of employment and employment benefits—then one of

Longoria's arguments falls by the wayside. *See infra* Part III.

Whether considered separately or together, these unsettled questions of state law create more than "a possibility that the state law determination will moot . . . the federal constitutional questions raised." *Palmer*, 617 F.2d at 428. At a minimum, *Pullman* abstention is appropriate because a state-court ruling "might 'at least materially change the nature of the problem.'" *Palmer*, 617 F.2d at 431 (quoting *Harrison v. NAACP*, 360 U.S. 167, 177 (1959)). As the Supreme Court has explained, "[i]f the state courts would be likely to construe the statute in a fashion that would avoid the need for a federal constitutional ruling or otherwise significantly modify the federal claim, the argument for abstention is strong." *Harris Cnty. Comm'rs Ct. v. Moore*, 420 U.S. 77, 84 (1975). "[N]o matter how seasoned the judgment of the district court may be, it cannot escape being a forecast rather than a determination" because "[t]he last word on the meaning of" Texas law belongs "to the supreme court of Texas." *Pullman*, 312 U.S. at 499–500; *see also City Pub. Serv. Bd. v. Gen. Elec. Co.*, 947 F.2d 747, 748 (5th Cir. 1991) (federal courts are "*Erie*-bound to apply state law as state courts would do").

Only Texas courts can give Plaintiffs the clarity they seek. Longoria, for example, alleges that her speech is chilled because she is "unclear" about what the law requires of her. ECF 7-1 ¶ 14. Morgan similarly says that she will change her behavior "because [she] is not sure when and how the law could be used against [her]." ECF 7-2 ¶ 19. Even a preliminary injunction from this Court could not provide the kind of clarity that Plaintiffs seek. Only a state court can provide authoritative and lasting clarity about the scope of Section 276.016(a)(1).

III. Section 276.016(a)(1) Does Not Violate the First Amendment

Plaintiffs' claims also fail on the merits as a matter of law. Section 276.016(a) does not threaten Plaintiffs' private free-speech rights because it affects only government speech, not speech delivered in a personal capacity. As a result, it is not subject to First Amendment scrutiny.

Courts distinguish between government speech and private speech because the Constitution

protects only the latter. "The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech." *Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009). Of course, governments are artificial entities that can speak only through their agents. Thus, whether a government employee engages in private speech or government speech depends on the capacity in which he speaks. "[P]ublic employees mak[ing] statements pursuant to their official duties . . . are not speaking as citizens for First Amendment purposes." *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006). Any "speech *made pursuant to a public employee's official duties*" triggers the *Garcetti* rule and cannot qualify as private speech. *Anderson v. Valdez*, 845 F.3d 580, 593 (5th Cir. 2016).

Section 276.016(a)(1) follows this rule precisely. It applies only when a public official or election official is "acting in an official capacity." Tex. Elec. Code § 276.016(a). Because of that limitation, it applies only to government speech, not private speech. Such regulations of government speech do not violate the Free Speech Clause. The Supreme Court has recognized that "[t]he involvement of public officials in advocacy may be limited by law, regulation, or practice." *Garcetti*, 547 U.S. at 468. The Fifth Circuit has explained that public employees "may well be obliged to follow the dictates of [state law] as 'government speech.'" *City of El Cenizo v. Texas*, 890 F.3d 164, 184 (5th Cir. 2018) (quoting *Garcetti*, 547 U.S. at 421). Even viewpoint-based rules on government speech are constitutional; "a state may endorse a specific viewpoint and require government agents to do the same." *Id.* at 185. That is because "speech made pursuant to a public employee's official duties" is simply "unprotected." *Anderson*, 845 F.3d at 593 (italics omitted). Whenever a public employee's speech is delivered "in the course of performing his job," that speech "is not protected by the First Amendment." *Williams v. Dallas Indep. Sch. Dist.*, 480 F.3d 689, 694 (5th Cir. 2007).

Neither of Plaintiffs' responses transforms unprotected government speech into protected private speech. First, that they are local, not state, employees, *see* ECF 7 at 17, is a distinction without a difference. "A political subdivision . . . is a subordinate unit of government created by the State to

carry out delegated governmental functions." *Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353, 363 (2009). States routinely require local officials to effectuate state policies by implementing state statutes, including with regard to elections. *See, e.g.*, *Tex. Democratic Party v. Hughs*, 997 F.3d 288, 291 (5th Cir. 2021). The federal Constitution does not give local governments or local officials autonomy from the state legislature. "[A] political subdivision, 'created by a state for the better ordering of government, has no privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator.'" *Pocatello Educ. Ass'n*, 555 U.S. at 363 (quoting *Williams v. Mayor of Baltimore*, 289 U.S. 36, 40 (1933)). While the federal government lacks power to commandeer state officials, "Texas can 'commandeer' its municipalities in this way." *City of El Cenizo*, 890 F.3d at 191.

Second, Plaintiffs argue that *Garcetti* authorizes only "employer discipline," such as terminating employment, not criminal prosecution. *See* ECF 7 at 16–17. Although the Supreme Court considered "employer discipline" in *Garcetti*, 547 U.S. at 421, the government-speech rationale is not so limited. The Fifth Circuit has confirmed that official-capacity speech is "unprotected." *Anderson*, 845 F.3d at 593; *accord Williams*, 480 F.3d at 694 ("not protected"). This is not a balancing test in which the severity of the penalty might enter into the calculus. When the Free Speech Clause provides no protection, it provides no protection. It offers the same amount of protection against criminal prosecution as it does against termination: zero. *See City of El Cenizo*, 890 F.3d at 181 n.11 ("When a state is allowed to substantively regulate conduct, it must be able to impose reasonable penalties to enforce those regulations."). That is why both the Supreme Court and the Fifth Circuit have invoked the employer-speech framework when considering laws subjecting government employees to civil penalties for unlawful speech. *See United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 460 (1995) (applying the *Pickering* balancing test to a statute that was enforced by "[t]he Attorney General" through "a civil action to recover a penalty"); *City of El Cenizo*, 890 F.3d at 184–85 (discussing *Garcetti* while analyzing a statute enforced through, among other options, monetary civil penalties).

Even if Plaintiffs were right that unprotected speech becomes protected in the context of a criminal prosecution (they are not), that would not help Longoria's claim against the Attorney General. Although it is not entirely clear what relief Texas courts will interpret Section 31.129 to authorize, *see supra* Part II, the two forms of relief expressly mentioned in the statute are consistent with employer discipline: "termination of the person's employment and loss of the person's employment benefits." Tex. Elec. Code § 31.129(c). Longoria's claim would therefore still fail insofar as she seeks to prevent a civil enforcement action terminating her employment or employment benefits.

CONCLUSION

The Attorney General respectfully requests that the Court dismiss this case. If the Court dismisses the claim against the Attorney General but does not dismiss all of the claims against the DAs, then it should leave the Attorney General as a party to defend the constitutionality of SB1 even though Plaintiffs would no longer have claims seeking relief against him.

Date: January 24, 2022

Respectfully submitted.

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CERTIFICATE OF SERVICE

I certify that a true and accurate copy of the foregoing document was filed electronically (via CM/ECF) on January 24, 2022, and that all counsel of record were served by CM/ECF.

/s/ William T. Thompson
WILLIAM T. THOMPSON

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

ISABEL LONGORIA and CATHY MORGAN, *Plaintiffs*, v. WARREN K. PAXTON, in his official capacity as the Attorney General of Texas, *et al.*, *Defendants*.	§ § § § § § § § § §	Case No. 5:21-cv-1223-XR

ORDER OF DISMISSAL

On the motion of Defendant Warren K. Paxton, this case is dismissed for lack of subject-matter jurisdiction and for failure to state a claim upon which relief can be granted.

Signed on _____, 2022, at San Antonio, Texas.

_____
Xavier Rodriguez
United States District Judge