No. 22-50110

In the United States Court of Appeals for the Fifth Circuit

ISABEL LONGORIA, ET AL.,
Plaintiffs-Appellees,
v.
WARREN K. PAXTON, IN HIS OFFICIAL CAPACITY AS THE ATTORNEY GENERAL OF TEXAS,
Defendant-Appellant.

On Appeal from the United States District Court
for the Western District of Texas, Austin Division
No. 5:21-cv-01223-XR

APPENDIX: DEFENDANT-APPELLANT ATTORNEY GENERAL PAXTON'S TEXAS OPPOSED EMERGENCY MOTION FOR STAY PENDING APPEAL AND ADMINISTRATIVE STAY

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EXHIBIT 1:
ORDER (ECF NO. 53)

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

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

ORDER

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

BACKGROUND

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

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

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

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

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

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

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

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

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

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

II. Voting by Mail in Texas

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

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

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

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

III. The Challenged Provisions and Impact on Plaintiffs' Speech

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

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

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

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

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

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

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

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

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

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

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

IV. Procedural History

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

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

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

DISCUSSION

I. Subject Matter Jurisdiction

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

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

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

A. Standing

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

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

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

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

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

1. Injury in fact

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

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

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

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

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

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

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

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

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

a. Plaintiff Longoria

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

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

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

Id. ¶¶ 16–17.

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

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

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

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

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

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

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

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

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

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

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

b. Plaintiff Morgan

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

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

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

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

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

2. Causation and redressability

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

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

B. Sovereign Immunity

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

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

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

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

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

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

1. Local district attorneys have a sufficient connection to enforcement

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

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

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

2. The Attorney General has a sufficient connection to enforcement

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

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

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

TEX. ELEC. CODE § 273.021.

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

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

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

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

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

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

C. *Pullman* Abstention

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

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

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

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

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

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

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

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

D. *Younger* Abstention

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

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

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

II. Preliminary Injunction Standard

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

A. Likelihood of Success on the Merits

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

1. Plaintiffs' speech is protected by the First Amendment

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. Irreparable Harm

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

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

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

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

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

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

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

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

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

C. Balance of the Equities and Public Interest

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

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

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

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

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

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

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

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

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

CONCLUSION

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

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

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

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

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

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

It is so **ORDERED**.

SIGNED this February 11, 2022.

XAVIER RODRIGUEZ
UNITED STATES DISTRICT JUDGE

EXHIBIT 2:
PLAINTIFFS' OPPOSED MOTION FOR PRELIMINARY INJUNCTION AND EXHIBITS (ECF NO. 7)

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

ISABEL LONGORIA and CATHY MORGAN, Plaintiffs, v. WARREN K. PAXTON, in his official capacity as Attorney General of Texas, KIM OGG, in her official capacity as Harris County District Attorney, SHAWN DICK, in his official capacity as Williamson County District Attorney, and JOSÉ GARZA, in his official capacity as Travis County District Attorney, Defendants.	§	Case No. 5:21-CV-1223-FB

OPPOSED MOTION FOR PRELIMINARY INJUNCTION

This Court should grant a preliminary injunction to vindicate rights that are most vital to a thriving democracy: the right to free speech and the right to vote. 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 Texas voters to exercise their fundamental right to vote and to inform them about the lawful methods for doing so. Among other things, they want to encourage, suggest, and request that voters who are or may be eligible to vote by mail submit a timely application to do so. But new Texas laws, Sections 276.016(a)(1) and 31.129 of the Election Code, now make it both a crime and civil infraction—punishable by a mandatory minimum of six months of imprisonment, up to $10,000 in fines, and other potential civil penalties—to "solicit" such vote-by-mail applications.

Section 276.016(a)(1) and Section 31.129, as applied to violations of Section 276.016(a)(1), collide with the First Amendment because Section 276.016(a)(1) is a content- and viewpoint-based restriction on speech, as its application turns on the topic being discussed and the viewpoint expressed by the speaker. Specifically, it prevents Longoria and Morgan from discussing applications to vote by mail in their official capacity if they are soliciting (*i.e.*, among other things, eliciting, requesting, promoting, directing, or encouraging) a person to apply for a mail-in ballot. But it does not prevent expressing the opposite viewpoint and discouraging an eligible voter from requesting an application to vote by mail. Such a one-sided restriction on speech is *per se* unconstitutional. *Iancu v. Brunetti*, 139 S. Ct. 2294, 2299 (2019). At a minimum, as a content-based restriction, Section 276.016(a)(1) triggers strict scrutiny, which the State cannot satisfy. The law is not narrowly tailored to any legitimate, much less compelling, government interest. There is no legitimate purpose in suppressing speech in order to suppress the lawful exercise of the right to vote.

Sections 276.016(a)(1) and 31.129 apply now, in the weeks and months leading up to the primary election on March 1, 2022. Voters may request applications to vote by mail beginning on January 1, 2022, and must do so by February 18, 2022. Plaintiffs therefore already have and will continue to suffer irreparable harm, and they accordingly request a preliminary injunction by no later than February 14, 2022, to prevent enforcement of Sections 276.016(a)(1) and 31.129.

STATEMENT OF FACTS

A. Relevant Texas election law

Texas conducts elections in its 254 counties and more than 1,200 cities pursuant to the Texas Election Code. The county tax assessor-collector and county clerk manage voter registration and election administration, respectively, by default under the Elections Code. *See, e.g.*, TEX. ELEC. CODE §§ 12.001, 67.007, 83.002. The Election Code, however, alternatively permits counties to appoint a "county elections administrator" and to transfer all voter registration and election administration duties to that individual. *Id.* §§ 31.031, 31.043.

To that end, in November 2020, Harris County established the office of the Harris County Elections Administrator. Plaintiff Isabel Longoria was appointed to that position by the Harris County Election Commission. *See id.* § 31.037. As Elections Administrator, Longoria is responsible for carrying out statutory functions outlined by state and federal law, including overseeing the conduct of elections, providing information concerning early voting to individual voters, and distributing official applications to vote by mail to eligible voters. *See, e.g.*, *id.* §§ 31.043–31.045, 83.002, 85.007. To the extent she has an employer, Longoria is a public employee of the county, not the State. *See Krier v. Navarro*, 952 S.W.2d 25, 29 (Tex. App.—San Antonio 1997, pet. denied) (elections administrator is an "agent or employee of the county"). As a result, Longoria is subject to certain forms of discipline and/or termination only upon action by the Harris County Elections Commission, which may remove her for good cause and with approval by a majority vote of the Harris County Commissioners Court. *See* TEX. ELEC. CODE § 31.037. In this way, the Election Code "shield[s] the position of elections administrator from

removal except upon compliance with the statutory safeguards established in the Election Code." *Krier*, 952 S.W.2d at 30.

Counties may also appoint volunteer deputy registrars (each, a "VDR") to encourage and facilitate voter registration. *See* TEX. ELEC. CODE §§ 13.031, 13.033, 13.041. Plaintiff Cathy Morgan is among the thousands of individuals across Texas appointed to serve as a VDR.

Beyond in-person voting at designated polling locations, Texas law provides for early voting by mail in certain circumstances. For example, any voter who is at least 65 years old, sick or disabled, confined due to childbirth, out of the country on election day, or, in certain cases, confined in jail is eligible for early voting by mail. *Id.* §§ 82.001–82.008. So long as such voters timely request applications to vote by mail, the elections administrator or county clerk "shall" provide an application and, if the applicant is deemed eligible, a mail-in ballot. *Id.* §§ 84.001, 84.012, 86.001(b). Millions of Texans are eligible and entitled to vote by mail, and approximately 980,000 did so in the 2020 presidential election. *See* United States Election Assistance Commission, *Election Administration and Voting Survey 2020 Comprehensive Report* at 34 (Aug. 16, 2021), available at https://www.eac.gov/sites/default/files/document_library/files/2020_EAVS_Report_Final_508c.pdf.

Texas does not maintain a permanent list of voters eligible to vote by mail. Instead, many voters must apply to vote by mail at least annually, beginning on the first day of the calendar year and at least eleven days before an election. TEX. ELEC. CODE

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

B. Sections 276.016(a)(1) and 31.129 impose criminal and civil liability for speech encouraging eligible or potentially eligible voters to exercise their right to vote by mail.

On September 7, 2021, Texas enacted Senate Bill 1 ("SB 1"). Among other things, Section 7.04 of SB 1, codified at Section 276.016 of the Texas Election Code, makes it a crime for a public official or election official to solicit an application to vote by mail from anyone, even if a voter is eligible to do so. 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 . . . solicits the submission of an application to vote by mail from a person who did not request an application." An elections administrator is an "election official" as defined in the Election Code. TEX. ELEC. CODE § 1.005(4-a)(C). A VDR is a public official because he or she is "appointed" as an agent of the county. *See* TEX. GOV'T CODE § 22.304 (a "public official" is anyone that is "elected, selected, appointed, employed, or otherwise designated as an officer, employee, or agent of this state . . . [or] political subdivision").

Subject to two narrow exceptions (the "general information" and "candidate for office" exceptions, each discussed below), any form of solicitation by a public official or election official is a crime, regardless of whether the solicited individual is eligible to vote by mail. *See id.* § 276.016(e). Under Section 276.016(a)(1), that crime is punishable as a state jail felony, which carries a mandatory minimum of six months of imprisonment and a fine of up to $10,000. TEX. ELEC. CODE § 276.016(b); TEX. PENAL CODE § 12.35(a)–(b). By contrast, it is not a crime for a public official or elections official to *discourage* an

eligible voter to vote by mail. In addition to criminal penalties for violating Section 276.016(a)(1), SB 1 subjects election officials who violate provisions of the Election Code, including Section 276.016(a)(1), to potential liability to the State for civil penalties, which can include termination of employment and loss of employment benefits. TEX. ELEC. CODE § 31.129; TEX. CONST. art. XI § 1 (counties are legal subdivisions of the State). Sections 276.016(a)(1) and 31.129 (and the rest of SB 1) went into effect on December 2, 2021.

C. SB 1 chills Plaintiffs' protected speech.

Plaintiff Isabel Longoria strongly believes in encouraging and enabling all eligible Harris County voters to exercise their right to cast a lawful ballot. Accordingly, Longoria routinely encourages those who are (or who may be) eligible to vote by mail to request an application to do so. Declaration of Harris County Elections Administrator Isabel Longoria in Support of Motion for Preliminary Injunction, attached hereto as Exhibit A, ¶ 5. She engages in a wide manner of public education and awareness efforts, as well as interactions with individual voters to ensure that those voters have the information needed to vote by mail, if so desired. Ex. A ¶¶ 9–10. Indeed, for many voters, including elderly voters, voters with disabilities, and voters confined due to childbirth, voting by mail may reduce significant real-world barriers to casting a ballot. Ex. A ¶¶ 6–7. And for many of these voters—including many of those eligible due to sickness, disability, and incarceration[1]—voting by mail is the *only* way to exercise the right to vote.

[1] A voter confined in jail who is eligible to vote by mail may be permitted to vote by personal appearance at the discretion of the authority in charge of the jail. TEX. ELEC. CODE § 82.004(b).

Longoria seeks to exercise her First Amendment right to encourage eligible voters to lawfully request applications to vote by mail. Due to the chilling effect of Section 276.016(a)(1), Longoria cannot give truthful advice regarding applications to vote by mail because doing so could subject her to prosecution or civil penalties for encouraging, counseling, directing, or otherwise soliciting such applications. Ex. A ¶¶ 14–15, 18.

Since Section 276.016(a)(1) became effective on December 2, 2021, Longoria has planned to engage in speeches and hold voter-outreach events but has been unable to do so for fear of criminal prosecution and civil penalties. Ex. A ¶ 16. Longoria would like to engage in community outreach, education, and know-your-rights events (and bring mail-in voting applications to these events) in advance of the February 18, 2022, deadline to request a mail-in voting application but cannot for fear that her communications will be construed as soliciting mail-in voting applications. Ex. A ¶¶ 17, 20. She also would like to utilize her communications budget to promote mail-in voting, including through flyers and social media. Ex. A ¶ 19. But, as it stands, Longoria cannot do so due to the threat of prosecution and civil penalties. Ex. A ¶¶ 14–16, 18–21.

Plaintiff Cathy Morgan faces the same concerns, and her speech is likewise chilled for fear of criminal prosecution. Declaration of Cathy Morgan in Support of Motion for Preliminary Injunction, attached hereto as <u>Exhibit B</u>, ¶¶ 18–21. As a VDR, Morgan has engaged in door-to-door outreach to registered voters and has staffed a voter registration booth near the University of Texas at Austin campus. Ex. B ¶ 10. In the course of her work as a VDR, Morgan has routinely communicated with voters about the option and

benefits of voting by mail, including providing eligible voters with information and encouraging them to utilize mail-in voting when appropriate. Ex. B ¶¶ 14–15. Specifically, Morgan desires to inform college students who cannot travel to their home county that they can potentially vote by mail, as she has done in the past. Ex. B ¶¶ 14, 20. Although the "general information" exception will permit her to continue providing general information to eligible voters, she can no longer proactively suggest that eligible but unaware voters request an application to vote by mail (to which they are legally entitled) as she has in the past and desires to do presently. Ex. B ¶¶ 14–15, 18–22.

Though Plaintiffs Longoria and Morgan are currently being deprived of their First Amendment rights, which in and of itself justifies preliminary injunctive relief, the proximity of the primary election on March 1, 2022, and the upcoming mail-in ballot request period between January 1 and February 18, 2022, increases the urgency of this Motion and the relief requested herein.[2]

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343(a).

ARGUMENT

A preliminary injunction is warranted when plaintiffs demonstrate that "(1) they are 'likely to succeed on the merits,' (2) they are 'likely to suffer irreparable harm in the absence of preliminary relief,' (3) 'the balance of equities tips in [their] favor,' and (4) 'an injunction is in the public interest.'" *McDonald v. Longley*, 4 F.4th 229, 255 (5th Cir.

[2] In addition to the factual background provided here, Plaintiffs incorporate and adopt by reference each and every allegation in their First Amended Complaint.

2021) (quoting *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)).

All four factors weigh heavily in favor of granting a preliminary injunction here. Plaintiffs Longoria and Morgan are likely to succeed on the merits of their claim, because Section 276.016(a)(1) is both a viewpoint- and content-based restriction and such suppression of speech cannot be justified. Absent an injunction, Longoria and Morgan will also suffer irreparable harm. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."); *Opulent Life Church v. City of Holly Springs*, 697 F.3d 279, 295 (5th Cir. 2012) (citations omitted); *Deerfield Med. Ctr. v. City of Deerfield Beach*, 661 F.2d 328, 338 (5th Cir. Unit B 1981) (explaining that when a court finds constitutional rights being "either threatened or in fact being impaired," "a finding of irreparable injury" is mandated). Indeed, as the next election approaches, and in advance of each subsequent election, such irreparable harm will only compound.

The balance of equities and public interest also strongly support preliminary relief. "[I]njunctions protecting First Amendment freedoms are always in the public interest." *Opulent Life Church*, 697 F.3d at 298 (citation and internal quotation marks omitted). To overcome the irreparable injury arising from the State's infringement on Plaintiffs' First Amendment rights, Defendants must produce "powerful evidence of harm to its interests" to tip the equities in their favor. *Id.* at 297. They cannot. Defendants cannot articulate, let alone prove, harm to their interests caused by Plaintiffs' exercise of their First Amendment rights by encouraging eligible voters to vote by means to which they are legally entitled. As a result, Plaintiffs satisfy each of the

preliminary injunction requirements and are entitled to the requested relief.

A. Plaintiffs are likely to succeed on the merits because Section 276.016(a)(1) is content- and viewpoint-based and cannot satisfy First Amendment scrutiny.

Applicable to states through the Fourteenth Amendment, the First Amendment prohibits enactment of laws "abridging the freedom of speech." U.S. CONST. amend. I. 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) (citation and internal quotation marks omitted). Content-based restrictions thus are presumptively invalid and trigger strict judicial scrutiny. *See Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995) ("Discrimination against speech because of its message is presumed to be unconstitutional."). Laws subject to strict scrutiny will not stand unless the government proves that they are "narrowly tailored to serve compelling state interests." *Reed*, 576 U.S. 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.* A law is content based if, on its face, it "defin[es] regulated speech by particular subject matter," or "by its function or purpose." *Id.* A law is also content-based if it is facially neutral but "cannot be justified without reference to the content of the regulated speech," or was adopted "because of disagreement with the message [the speech] conveys." *Id.* at 164 (internal quotation marks omitted); *see also Holder v. Humanitarian Law Project*, 561 U.S. 1, 27 (2010) (explaining that a statute "regulates speech on the basis of its content"

where a person's ability to speak "depends on what they say"). Even if its enactment is based on a "benign motive, content-neutral justification, or lack of animus towards the ideas contained in the regulated speech," any law that "target[s] speech based on its communicative content" will be subject to strict scrutiny. *Reed*, 576 U.S. at 163.

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; *Rosenberger*, 515 U.S. at 829 ("The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction."). Put differently, the government has no authority to "license one side of a debate to fight freestyle, while requiring the other [side] to follow Marquis of Queensberry rules.'" *R.A.V. v. City of St. Paul*, 505 U.S. 377, 392 (1992). But that is exactly what the State has done in enacting Section 276.016(a)(1).

1. Section 276.016(a)(1) triggers the most stringent First Amendment scrutiny.

a. Section 276.016(a)(1) is a content- and viewpoint-based restriction on speech.

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

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

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

Texas courts interpreting statutes based on solicitation confirm the point that "solicitation" encompasses speech, including speech requesting the conduct at issue. *See, e.g.*, *Smith v. State*, 959 S.W.2d 1, 22 (Tex. App.—Waco 1997, pet. ref'd) ("[W]e determine 'solicit' to mean the taking of some action 'which the relation of the parties justifies in construing into a serious request'" (citations omitted)); *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.

Not only does Section 276.016(a)(1) regulate speech on the basis of its content, but it is also a viewpoint-based rule. As it stands, speech encouraging or requesting the submission of an application to vote by mail is a crime. Discouraging the submission of an application to vote by mail, on the other hand, is not. Indeed, while Plaintiffs could face at least six months of imprisonment for encouraging an eligible voter who faces difficulties appearing at a polling place on election day to request an application to vote by mail, they would face no consequence for telling eligible voters that they should never consider voting by mail and instead should only vote in person. Even worse, it would be a crime under Section 276.016(a)(1) for Plaintiffs to tell an eligible voter confined to a nursing home or jail cell that he or she should apply to vote by mail in order to avoid being disenfranchised, but it would not be a crime to encourage the same person not to fill out an application and thus forfeit the right to vote. Because the restriction in

Section 276.016(a)(1) emanates from the content of the official's speech and their views on voting by mail, it is a presumptively unconstitutional viewpoint- and content-based restriction on speech. *See Reed*, 576 U.S. at 163; *Rosenberger*, 515 U.S. at 828. Section 31.129 of the Election Code, as applied to violations of Section 267.016(a)(1), is unconstitutional for the same reasons.

b. No First Amendment exception applies.

Section 276.016(a)(1) does not fit within any established exception to the First Amendment. *See United States v. Alvarez*, 567 U.S. 709, 717–18 (2012) (collecting exceptions). There is a well-settled exception for "speech integral to criminal conduct," which usually justifies prohibitions on solicitation of a crime. *Id.*; *see, e.g.*, *United States v. Stevens*, 559 U.S. 460, 468–69 (2010); *United States v. Williams*, 553 U.S. 285, 298 (2008); *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498, 502 (1949). But that exception does not apply to the ban on "solicitation" of requests for applications to vote by mail because it is perfectly lawful for Texans to engage in the conduct being solicited—*i.e.*, to request an application to vote by mail.

In fact, requesting an application to vote by mail is a prerequisite to a statutory entitlement for those who qualify—and a prerequisite to exercising a fundamental constitutional right for those who are unable to vote in person. Far from being "speech integral to criminal conduct," the solicitation of mail ballot applications is actually integral to lawful, constitutionally protected conduct.

c. Defendants are acting as a sovereign, not as an employer.

Section 276.016(a)(1) also is subject to the full force of the First Amendment, and

not lesser scrutiny under the Supreme Court's public-employee speech cases. *See, e.g.*, *Garcetti v. Ceballos*, 547 U.S. 410 (2006); *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. As *Garcetti* and *Pickering* emphasize, the government has leeway to impose "employer discipline" in ways that are typical of a private employer because of an employer-employee relationship. *See Garcetti*, 547 U.S. at 418 ("A government entity has broader discretion to restrict speech *when it acts in its role as employer*, but the restrictions it imposes must be directed at speech that has some potential to affect the entity's operations." (emphasis added)). But when the government acts as a sovereign, rather than as an employer, as is the case under Section 276.016(a)(1), a restriction on speech is subject to the full First Amendment protections.

As both Texas and federal courts have explained, the State acts as a sovereign, not an employer, when it imposes criminal penalties because a state's ability to impose criminal punishment derives from its sovereign status. *See In re Kendall*, 712 F.3d 814, 826–27 (3d Cir. 2013) ("[T]he Virgin Islands Supreme Court acted as sovereign, not as public employer, by criminally punishing Kendall's speech."); *Ex parte Perry*, 483 S.W.3d 884, 911–12 (Tex. Crim. App. 2016) ("When government seeks criminal punishment, it indeed acts as sovereign and not as employer or speaker."); *see also Healy v. James*, 408 U.S. 169, 202 (1972 (Rehnquist, J., concurring) ("Cases such as *United Public Workers v.*

Mitchell, 330 U.S. 75 (1947), and [*Pickering*] make it equally clear that the government in its capacity as employer also differs constitutionally from the government in its capacity as the sovereign executing criminal laws."); *Oregon v. Ice*, 555 U.S. 160, 170 (2009) ("Beyond question, the authority of States over the administration of their criminal justice systems lies at the core of their sovereign status."). Put another way, criminal punishment is not "employer discipline." Private employers sometimes fire their employees for their speech, but they cannot send them to jail.

At the outset, it bears noting that, if the Court finds that Section 276.016(a)(1) is unconstitutional, the civil penalties provision in Section 31.129 becomes inapplicable as against the anti-solicitation provision of Section 276.016(a)(1) because there would be no underlying criminal violation to which Section 31.129 could apply. This result would hold regardless of the Court's decision on Count II of the First Amended Complaint.

Regardless, however, the imposition of fines and other civil penalties against Plaintiff Longoria[3] by the State under Section 31.129 is independently infirm under the First Amendment because *Pickering* and its progeny do not apply to curtail First Amendment protections here. The civil penalties in Section 31.129, when predicated on a violation of Section 267.016(a)(1), also involve the exercise of sovereign power as opposed to traditional "employer discipline" like demotion or termination. Like criminal punishments, the power to impose fines or other civil punishments derives from a state's power as sovereign and is beyond the scope of any "managerial discipline" a private

[3] Section 31.129 applies only to "election officials" and is thus inapplicable to Plaintiff Morgan.

employer could impose. *Garcetti*, 547 U.S. at 424; *see also Pickering*, 391 U.S. at 547 (distinguishing "criminal penalties and damage awards" from mere threat of "dismissal from employment"); *see also HUD 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." (emphasis added)). In other words, *Pickering* and its progeny are about the government's ability to "leverage the employment relationship" to restrict employee speech through "employer discipline" in the same ways that private employers can restrict their employee's speech. But just as employers do not jail their employees, they also do not heap fines or civil penalties on them.

Further confirming the point, Defendants, who are charged with enforcing Sections 276.016(a)(1) and 31.129, do not employ Plaintiff Longoria and lack the power to remove her absent the exercise of sovereign power. Longoria is a public employee who is appointed, removable, and subject to certain forms of discipline by the Harris County Election Commission for good cause and upon approval of the Harris County Commissioners Court. *See* TEX. ELEC. CODE §§ 31.032, 31.036, 31.037. She is an employee of and subject to termination by a county entity, not the State. The imposition of criminal or civil penalties on Longoria by Defendants, including termination or loss of benefits, thus would involve the exercise of sovereign power rather than the power of the State as an employer. Accordingly, Defendants cannot rely on public-employee First Amendment jurisprudence to justify their restrictions on Longoria's speech. Rather, the First Amendment applies with full force here.

2. Section 276.016(a)(1) fails strict scrutiny because it is not narrowly tailored to serve a compelling state interest.

Section 276.016(a)(1) and Section 31.129, as applied to violations of Section 267.016(a)(1), are manifestly unconstitutional because Section 267.016(a)(1) is viewpoint-based. The test for such restrictions is simple: If a restriction "is viewpoint-based, it is unconstitutional." *Iancu*, 139 S.Ct. at 2299. The inquiry ends there.

Even if it were analyzed as merely a content-based restriction, Section 276.016(a)(1) would still be unconstitutional because it cannot satisfy strict scrutiny. *See Nat'l Inst. of Family & Life Advoc. v. Becerra*, 138 S.Ct. 2361, 2371 (citing *Reed*, 576 U.S. at 163) (explaining that under strict scrutiny, such restrictions "are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests"). Here, the State has no interest at all, much less a compelling one, in preventing public or election officials from soliciting lawful applications to vote by mail. There is no legitimate justification for restricting speech that encourages Texans to lawfully request an application to vote by mail. This critical point should be the beginning and end of the analysis.

If anything, public and election officials have a compelling interest to *engage* in such speech because voting itself is a fundamental right and voting by mail is a perfectly lawful way for millions of Texans to exercise that fundamental right. For some Texans, it is the only way they can exercise that fundamental right. *See* 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.

Even if the State could articulate a compelling governmental interest, Sections 276.016(a)(1) and 31.129 are not narrowly tailored to further that interest because there are alternative channels to address the concern. For example, the Election Code independently prohibits public and election officials from affirmatively sending an application to vote by mail to a voter who did not request one. TEX. ELEC. CODE § 276.016(a)(2). That prohibition is conduct-based, not content-based, and thus does not implicate the First Amendment. It underscores that the State has alternatives to censorship of speech. In short, there is no justification for the State to punish a public or election official for speech promoting a lawful means of voting. Plaintiffs are accordingly likely to succeed on the merits.

B. Plaintiffs will suffer irreparable harm in the absence of an injunction because even the momentary loss of First Amendment rights constitutes irreparable injury.

Absent a preliminary injunction, Plaintiffs Longoria and Morgan 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 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.

A preliminary injunction is also critical to vindicate these First Amendment freedoms before the upcoming primary election in March. In particular, the need for the protected speech is most pressing by February 14, 2022, given the time needed for requesting, obtaining, and then submitting a mail-in ballot. Ex. A ¶ 21. And without an injunction, Plaintiffs would suffer similar irreparable harm again and again as Texas continues to hold elections in the future. Ex. A ¶ 21.

C. The balance of equities favors an injunction because the State can demonstrate no "powerful harm to its interests."

The threatened and ongoing injury to Plaintiffs outweighs any potential harm that an injunction might cause Defendants. *See Deerfield Med. Ctr.*, 661 F.2d at 332. Without a preliminary injunction, Plaintiffs will suffer irreparable injury to their constitutional rights as described above. On the other side, Defendants will suffer no harm from the issuance of an injunction. Defendants are not harmed by public officials encouraging citizens to use a lawful method to exercise their fundamental right to vote.

Because Defendants cannot show that a countervailing interest exists, much less a "powerful" harm to one, the balance of equities favors Plaintiffs.

D. A preliminary injunction barring enforcement of Section 276.016(a)(1) furthers the public interest.

Finally, a preliminary injunction that prevents Defendants from violating fundamental constitutional rights serves the public interest. "[I]njunctions 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."). Worse, Section 276.016(a)(1)'s 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 for those eligible to apply to vote by mail in advance of the March 1, 2022 election dwindles. As a result, a preliminary injunction barring enforcement of Section 276.016(a)(1) and Section 31.129, as applied to a violation of Section 267.016(a)(1), is firmly in the public interest and justifies preliminary relief.

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that this Court enter a preliminary injunction by February 14, 2022, to enjoin Defendants from enforcing Section 276.016(a)(1) and Section 31.129 of the Texas Election Code, as applied to a violation of Section 276.016(a)(1), until final resolution of this matter.

Dated: December 28, 2021

Respectfully submitted,

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CERTIFICATE OF CONFERENCE

On December 22, 2021, the undersigned counsel attempted to confer with Defendants' counsel concerning the relief sought in this Opposed Motion for Preliminary Injunction and regarding a proposed modified briefing schedule. The undersigned did not receive a response from counsel for the State or the Williamson County District Attorney on their position regarding the Motion and proposed modified briefing schedule prior to filing this Motion on December 28, 2021. Counsel for the Travis County District Attorney takes no position on the Motion or the proposed modified briefing schedule. The Harris County District Attorney agrees to abate prosecution during the pendency of the lawsuit.

/s/ Sean Morales-Doyle
Sean Morales-Doyle

CERTIFICATE OF SERVICE

The undersigned certifies that on December 28, 2021, the foregoing document was filed electronically with the United States District Court for the Western District of Texas via CM/ECF. As such, this Opposed Motion for Preliminary Injunction was served on all counsel who have consented to electronic service. This Opposed Motion for Preliminary Injunction will also be served via personal service.

/s/ Elizabeth Y. Ryan
Elizabeth Y. Ryan

Exhibit A

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

ISABEL LONGORIA and CATHY MORGAN, Plaintiffs, v. WARREN K. PAXTON, in his official capacity as Attorney General of Texas, KIM OGG, in her official capacity as Harris County District Attorney, SHAWN DICK, in his official capacity as Williamson County District Attorney, and JOSÉ GARZA, in his official capacity as Travis County District Attorney, Defendants.	§	Case No. 5:21-CV-1223-FB

DECLARATION OF HARRIS COUNTY ELECTIONS ADMINISTRATOR ISABEL LONGORIA IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

I, Isabel Longoria, declare, pursuant to 28 U.S.C. § 1746, that:

1. I am a Plaintiff in this case.
2. I was sworn in as Harris County Elections Administrator on November 18, 2020. Prior to my current role, I was a special adviser on voting rights to then-Harris County Clerk Chris Hollins.
3. Harris County is the most populous county in Texas and has over 2.5 million registered voters.
4. As the Harris County Elections Administrator, I serve as the voter registrar for Harris County, and I also administer federal, state, and local elections held in Harris County. In my role, I aim to run safe, accessible, fair, and transparent elections.
5. I am a strong proponent of encouraging and enabling all registered voters in Harris County to exercise their rights to cast a lawful ballot. In particular, I encourage eligible voters to

request mail-in voting applications so that they can lawfully vote by mail and educate them about the mail-in voting process. Although many voters in Harris County are eligible to vote by mail, they are not all aware of the process required to obtain and submit a mail-in ballot, which is cumbersome and not immediately obvious.

6. Under Texas law, voters are eligible to cast a mail-in ballot for several reasons, including if they are 65 or older, sick or disabled, within three weeks of giving birth, or will be absent from the county and cannot access the polls. To vote by mail, a voter must request an application, if eligible, a ballot will be mailed to them to complete and submit.

7. Mail-in voting increases voter participation. It allows eligible voters who face obstacles to casting a ballot in person to nonetheless engage in the democratic process by instead casting a ballot by mail.

8. Mail-in voting is not only lawful but also highly successful and a key part of running smooth, efficient, and accessible elections in Harris County. Mail-in voting has proven particularly useful during the COVID-19 pandemic, allowing vulnerable populations to avoid in-person contact and potential exposure to the coronavirus while still exercising their right to vote. Mail-in voting is also popular. In the November 2020 election, over 170,000 persons voted by mail in Harris County. In the November 2021 election, mail-in ballots constituted almost a quarter of all votes cast in Harris County.

9. In the past, I have engaged in communications to encourage eligible voters to vote by mail. For example, I have conducted outreach events at senior citizen homes and residential facilities, where I spoke with numerous voters about their rights to vote by mail, talked about the benefits of voting by mail, encouraged voters eligible to vote by mail to do so,

and brought mail-in voting applications to make the application process easier. I have conducted similar outreach events for disabled voters and voters in jail.

10. I have also given speeches at events about increasing voter participation, including by mail-in voting, and have distributed applications to vote by mail in connection with those events. My efforts to encourage mail-in voting involve public outreach and in-person communications with individual voters and encouraging them to request a mail-in ballot. I often bring mail-in ballot applications to these events.

11. I understand that Senate Bill 1 ("SB 1") became effective on December 2, 2021. SB 1 makes it a crime for an election official to "solicit" mail-in voting applications while acting in my official capacity, among other things. I am an election official. SB 1 has an exception for speech by a candidate for a public elective office, but I do not engage in such speech because my position is appointed rather than elective.

12. I understand that this offense is a state jail felony that carries a mandatory minimum prison sentence of six months, with a maximum term of two years.

13. I understand that SB 1 also subjects me to potential civil penalties for soliciting mail-in voting applications. For example, SB 1 allows the Attorney General to bring a lawsuit to terminate my employment and my benefits, even though the State is not my employer. It is not clear what additional civil penalties the Attorney General could also seek, but I understand these could include monetary penalties.

14. I understand that SB 1 contains an exception for the provision of "general information about voting by mail, the vote by mail, process, or the timelines associated with voting to a person or the public." Many of my communications, however, go beyond merely providing general information, and instead involve affirmatively encouraging individual

voters to request an application to vote by mail, while handing out applications so that the voter can do so. I am also unclear about the line between providing "general information" about mail-in voting and soliciting requests for applications to vote by mail. Given the prospect of criminal prosecution, I have no choice but to refrain from communications that could come close the line.

15. As a result, SB 1 actively prevents me from speaking freely about mail-in voting and will continue to do so. In particular, SB 1 is deterring me from engaging in communications that would encourage voters to consider all of their voting options, engaging in outreach to voters regarding the benefits of the vote-by-mail process, educating voters about their rights, and helping voters to submit their respective applications. I am unwilling to risk engaging in communications with voters regarding mail-in voting if it means I could be subject to imprisonment or other penalties, even though I believe those communications are a central part of my duties as an elections administrator to increase voter participation and education.

16. I had plans to engage in several forms of voter outreach relating to the mail-in voting process, similar to outreach I have conducted in the past. But I am now refraining from engaging in those outreach efforts, out of fear that those communications and conversations with voters regarding mail-in voting could subject me to criminal or civil penalties under SB 1. Accordingly, absent relief from this Court, I will not engage in those communications, even though I believe they would be beneficial to the voters of Harris County and would increase participation by eligible voters in the electoral process.
17. Specifically, were it not for SB 1's prohibition on soliciting mail-in voting applications, I would work with non-profit groups, civic organizations, and other governmental entities to

encourage eligible voters to vote by mail, particularly those unable to vote in person. These activities would include community outreach, education, and know-your-rights events where my staff and I planned to encourage eligible voters to apply for a mail-in ballot application and answer voters' specific questions about mail-in voting.

18. SB 1 will also chill my communications by causing me to bite my tongue or alter the content of my speech in response to voter inquiries, out of concern that my answers could be construed as going beyond providing mere general information and instead involving solicitation. Instead of explaining to a potentially eligible mail-in voter that mail-in voting is as safe and reliable as in-person voting and easier than going to the polls (especially for those who are elderly, sick, or disabled), I will now refrain from highlighting these and other benefits of mail-in voting in response to questions from voters. As a result, some voters will not be fully informed about their mail-in-voting options under Texas law.

19. In addition, were it not for SB 1's prohibition on soliciting mail-in voting applications, I would also use my communications budget to promote voting by mail. Specifically, I would print and mail flyers with information about eligibility to vote by mail and how to request an application to vote by mail, in order to encourage eligible voters to do so. I would also use electronic communications to encourage eligible voters to vote by mail. I would also provide information on the harrisvotes.com website and on social media encouraging eligible voters to apply for a mail-in ballot.

20. Further, were it not for SB 1, I would bring vote-by-mail applications to events. But I will refrain from doing because I worry that a prosecutor could argue bringing such applications to a voting event itself conveys a message that encourages voters to submit such an application. I am also concerned that the presence of mail-in voting applications would

make it easier for a prosecutor to construe other speech or expressive conduct as crossing the line between providing "general information" to actually soliciting a request for a mail-in-ballot.

21. As a result of SB 1's anti-solicitation provision, I will not engage in these efforts to promote voting by mail. If relief is not granted by February 14, 2022, I will be unable to engage in my desired speech in time to impact mail-in voting applications in advance of the March 1, 2022 primary. Without relief, my speech will continue to be altered and restrained in advance of each and every subsequent election.

22. SB 1's anti-solicitation provision will impair my ability to properly convey to voters all of the ways Texas laws permits them to vote. This will inevitably decrease voter participation, which I believe is essential to a healthy democracy. I accepted the position of Harris County Elections Administrator to ensure that Harris County residents could fully exercise their right to vote. That mission is now in jeopardy because of SB 1's prohibition on my speech.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on the 23rd day of December, 2021.

Respectfully submitted,

Declarant – Isabel Longoria

Exhibit B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

ISABEL LONGORIA and CATHY MORGAN, **Plaintiffs,** **v.** **WARREN K. PAXTON, in his official capacity as Attorney General of Texas, KIM OGG, in her official capacity as Harris County District Attorney, SHAWN DICK, in his official capacity as Williamson County District Attorney, and JOSÉ GARZA, in his official capacity as Travis County District Attorney.** **Defendants.**	**Civil Action No. 5:21-cv-1223 (FB)**

DECLARATION OF CATHY MORGAN

Pursuant to 28 U.S.C. § 1746, I, Cathy Morgan, declare as follows:

1. My name is Cathy Morgan and I am a Plaintiff in this case.
2. I reside in Austin, Texas. While most of Austin is located in Travis County, portions of the city are in Williamson County and Hays County. I live in Williamson County.
3. I have served as a Volunteer Deputy Registrar ("VDR") since 2014 and intend to continue serving in the future. I have served, and intend to continue serving, as a VDR in Travis and Williamson Counties.
4. VDR work does not only happen during elections but throughout the year.
5. VDRs are appointed by the county voter registrar "to encourage voter registration." I sign up for training in January of each odd year to announce my interest in serving as a VDR.
6. As a VDR, my statutory responsibilities are to distribute voter registration applications and receive back those same forms directly from voters. When I receive a completed

application, the voter is considered registered as of that day and I am obligated to return the application to the country registrar within five days.

7. VDRs are required to take trainings conducted by the county voter registrar. These trainings review the procedures for voter registration and prepare prospective VDRs to both answer questions from potential voters and verify that registration materials are properly completed.

8. VDRs are not paid. I serve as a VDR because I want to help every eligible voter in my community receive correct information about how to vote.

9. I have also served as an election judge or alternate judge in Williamson County since 2016. I have submitted my name to be an alternate judge during the 2022 elections in Williamson County.

10. Two of the main components of my work are 1) staffing tables at non-partisan voter drives and 2) going door-to-door to help voters register and provide them with information on how to vote. These functions result in frequent interactions with the public, including with people who ask open-ended questions about how to vote.

11. When I go door-to-door, I enquire with community members whether they are registered to vote. If they are not, I offer to help them register and explain where and how to vote. I raise vote by mail as an option if I believe a voter may be eligible for it, although the ultimate determination of eligibility is not mine to make. If no one is at a house, I will leave a "take away" voter registration card, which the person can mail to the county election office, and a note on the door. The note provides the voter registration deadline for any upcoming elections, dates of early voting, the election day, the website for getting

a vote by mail application, and my email address so the voter can reach out with any questions.

12. When a person fills out a voter registration form and hands it to me directly, I review it to make sure it is correctly filled out. When it is correctly filled out, I tear off the bottom part of the registration and hand it back to the voter as proof of registration. The voter is automatically registered and I deliver the registration form to the county voter registrar within five days.

13. As a VDR, my role is not to judge whether someone is eligible to vote or eligible to vote by mail. Rather, my job is to explain options to voters and help fill out forms.

14. In the past, I frequently mentioned vote by mail to potentially eligible voters. I generally mentioned it when I learned that a voter had a reason to prefer voting by mail, such as being an older voter, being immunocompromised, or being out of the county on election day. In particular, I found while staffing voting booths near the University of Texas at Austin that large numbers of students wanted to vote but were unable to travel to the county in which they were registered for election day.

15. Many voters are not sure of their rights and options for voting. Proactively providing information on vote by mail can be the difference between a voter casting a ballot or not.

16. I understand that Senate Bill 1 created Texas Election Code § 276.016(a)(1), which prohibits public officials from "solicit[ing]" a vote by mail application from a person who did not request one while the official is "acting in an official capacity." As an appointee of the county voter registrar, I understand that I am a public official.

17. I understand that Section 276.016(a)(1) creates a state jail felony that carries a minimum prison sentence of six months and a maximum sentence of two years.

18. Absent Section 276.016(a)(1), I would continue to encourage eligible or potentially eligible voters to vote by mail. It is a lawful way to cast a ballot and the best option for eligible voters who have difficulties with or concerns about traveling to an in-person polling place.

19. With the passage of Section 276.016(a)(1), however, I will cease informing voters about vote by mail ballots altogether because I am not sure when and how the law could be used against me.

20. It is not clear to me what constitutes "solicit[ing]" a vote by mail ballot, and so I will no longer encourage voters to vote by mail. For example, I will no longer proactively raise vote by mail as an option for college students who indicate they cannot travel to the county in which they are registered for an election.

21. My fear extends beyond when I am staffing tables or going door-to-door because I do not know what "while acting in an official capacity" means. My role working for the public does not start and stop at defined times. Personal interactions I have when I am not actively working as a VDR may implicate this law and expose me to potential prosecution.

22. I volunteer as a VDR because I believe the ability for all eligible voters to exercise the right to vote is essential to democracy. I am non-partisan and do it as a community service, not for payment. The threat of prosecution deters me from providing complete, accurate information to the people I serve and I am frightened my state wants to send me to jail just for my efforts to make it a better place.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: December 22, 2021

Respectfully submitted,

Cathy Morgan

Cathy Morgan
Volunteer Deputy Registrar

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

ISABEL LONGORIA and CATHY MORGAN, Plaintiffs, v. WARREN K. PAXTON, in his official capacity as Attorney General of Texas, KIM OGG, in her official capacity as Harris County District Attorney, SHAWN DICK, in his official capacity as Williamson County District Attorney, and JOSÉ GARZA, in his official capacity as Travis County District Attorney, Defendants.	§	Case No. 5:21-CV-1223-FB

PROPOSED ORDER GRANTING OPPOSED MOTION FOR PRELIMINARY INJUNCTION

Pending before the Court is Plaintiffs Isabel Longoria and Cathy Morgan's Opposed Motion for Preliminary Injunction (the "Motion"). The Court has jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343(a) because these claims arise under federal law and seek to redress the deprivation of federal civil rights. The Court, having considered the Motion, briefing, record, arguments of counsel, and the applicable law, hereby finds that the Motion should be **GRANTED**.

It is therefore **ORDERED** that Plaintiffs' Motion for Preliminary Injunction is hereby **GRANTED**. Section 276.016(a)(1) of the Texas Election Code is **ENJOINED and UNENFORCEABLE**. No officer, agent, servant, employee, or other person in

active concert with the State of Texas or political subdivision thereof may enforce Section 276.016(a)(1) against any public official or election official pending final resolution of this case.

It is further **ORDERED** that Section 31.129 of the Election Code, as applied to a violation of Section 276.016(a)(1) is **ENJOINED and UNENFORCEABLE**. No officer, agent, servant, employee, or other person in active concert with the State of Texas may enforce Section 31.129 against any election official pending final resolution of this case.

HON. FRED BIERY
UNITED STATES DISTRICT JUDGE

EXHIBIT 3:
ATTORNEY GENERAL PAXTON'S RESPONSE TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION (ECF NO. 48)

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 RESPONSE TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

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INTRODUCTION

The Court should deny Plaintiffs' motion for a preliminary injunction. Section 276.016(a)(1) is a lawful regulation of government speech, and it does not affect any private speech protected by the First Amendment. The Texas Legislature reasonably prohibited official government solicitations of applications to vote by mail. Such solicitations would nudge voters from in-person voting to mail-in voting, decreasing election security and increasing logistical challenges. They also run the risk of convincing voters who are not qualified to vote by mail to attempt voting by mail, which potentially leads to criminal liability for voters.

But the Court need not reach these merits issues because Plaintiffs have not established federal jurisdiction. Neither Plaintiff has been threatened with prosecution or a suit for civil penalties. They have introduced no evidence that any of the Defendants will imminently file an enforcement action against them for their proposed conduct. They have not shown the "substantial threat" of enforcement required for standing or the "demonstrated willingness" to enforce required to overcome sovereign immunity. By extension, Plaintiffs have not shown they face a sufficiently serious threat of enforcement during the limited time before a trial could be held. Indeed, two Defendants have stipulated not to enforce the challenged provision while the case is pending.

In any event, a preliminary injunction would not redress Plaintiffs' alleged injuries. They say they are chilled by the possibility of future enforcement actions. But a preliminary injunction would not eliminate that possibility. Plaintiffs' deposition testimony confirms that they will remain chilled regardless of whether the court grants their motion. That is reason enough to deny it.

If the Court grants the motion, however, it should significantly narrow the injunctions that Plaintiffs propose. Regardless of what it decides on the merits, the Court cannot enjoin non-parties who are not represented in this litigation, such as district attorneys in other counties. Nor can the Court enjoin the enforcement of Section 276.016(a)(1) against anyone other than the two Plaintiffs

who brought this suit.

BACKGROUND

In September 2021, the Texas Legislature passed An Act Relating to Election Integrity and Security, S.B.1, 87th Leg., 2d C.S. (2021), often known as "SB1." SB1 contains many provisions addressing a variety of election issues, including increasing the availability of early voting. *See* SB1 §§ 3.09, 3.10, (codified at Tex. Elec. Code §§ 85.005(c), 85.006(e)). In this case, Plaintiffs challenge only one provision of SB1: the small portion of Section 7.04 that added Section 276.016(a)(1) to the Election Code.

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). SB1 also regulates the 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.

Thus, the only provision that Plaintiffs challenge has a number of important limitations. First, it applies only to "[a] public official or election official." Tex. Elec. Code § 276.016(a). Second, it applies only when the official is "acting in an official capacity," not when the official is acting in a personal or individual capacity. *Id.* Thus, if an official stands for election, Section 276.016(a)(1) does not apply when the official is "acting in the official's capacity as a candidate for public elective office." *Id.* § 276.016(e)(2). Third, the provision applies only when the official "solicits the submission of an application," not when the official merely explains a voter's options. *Id.* § 276.016(a). As a result, it does not apply when the official "provide[s] general information about voting by mail, the vote by mail process, or the timelines associated with voting to a person or the public." *Id.* § 276.016(e)(1).

Longoria originally challenged Section 276.016(a)(1) on September 3, 2021. *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). Recognizing that she did not need preliminary injunctive relief, Longoria negotiated away her right to seek preliminary injunctive relief before the March primary election in exchange for an expedited trial schedule to conclude before the November general election. *See* 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."). Longoria, however, voluntarily dismissed her first lawsuit. *See* Notice of Voluntary Dismissal, *La Unión Del Pueblo Entero v. Abbott*, No. 5:21-cv-844-XR, ECF 138 (W.D. Tex. Dec. 1, 2021).

Longoria and Cathy Morgan (a volunteer deputy registrar in Travis and Williamson Counties) later filed a new lawsuit against the Attorney General 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 district attorneys as defendants and altering the claim against the Attorney General. *See* ECF 5. Plaintiffs now seek a preliminary injunction.

Plaintiffs' operative complaint includes two counts. In Count I, both Longoria and Morgan seek to prevent three local district attorneys ("DAs") from criminally prosecuting them for violations of Section 276.016(a)(1). *See* ECF 5 ¶¶ 37–43. In Count II, Longoria (but not Morgan) seeks to prevent the Attorney General from bringing a civil enforcement action against her for violations of Section 276.016(a)(1). *See id.* ¶¶ 44–46; Tex. Elec. Code § 31.129 (providing that certain election officials "may be liable to this state for a civil penalty," including "termination of the person's employment and loss of the person's employment benefits," "if the official . . . violates a provision of this code").

Plaintiffs request preliminary relief before the March primary. *See* ECF 7 at 8. Plaintiffs served the Attorney General with both the First Amended Complaint and the preliminary-injunction motion on January 3, 2021. *See* ECF 15.

Since Plaintiffs moved for a preliminary injunction, two significant developments have

occurred. First, Plaintiffs have given deposition testimony that undercuts their factual contentions. Second, the district attorneys for Harris and Travis Counties have "agree[d] not to enforce Section 276.016(a)(1) of the Texas Election Code . . . until such time as a final, non-appealable decision has been issued in this matter." ECF 35 ¶ 2 (Harris County); ECF 36 ¶ 3 (Travis County).

STANDARD

A motion for a preliminary injunction must satisfy four "prerequisites":

> (1) a substantial likelihood that plaintiff will prevail on the merits, (2) a substantial threat that plaintiff will suffer irreparable injury if the injunction is not granted, (3) that the threatened injury to plaintiff outweighs the threatened harm the injunction may do to defendant, and (4) that granting the preliminary injunction will not disserve the public interest.

Libertarian Party of Tex. v. Fainter, 741 F.2d 728, 729 (5th Cir. 1984).

"The burden of persuasion on all of the four requirements for a preliminary injunction is at all times upon the plaintiff." *Canal Auth. of State of Fla. v. Callaway*, 489 F.2d 567, 573 (5th Cir. 1974). That burden is heavy. It requires "*a clear showing*." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam). "A preliminary injunction is an extraordinary remedy and should only be granted if the plaintiffs have clearly carried the burden of persuasion on all four requirements." *Nichols v. Alcatel USA, Inc.*, 532 F.3d 364, 372 (5th Cir. 2008) (quotation omitted). It is "never awarded as of right" and is instead left to a district court's "sound discretion." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008).

ARGUMENT

The Court should deny preliminary injunctive relief because Plaintiffs have not made a clear showing on any of the four requirements.

I. Plaintiffs Have Not Clearly Established a Likelihood of Success on the Merits

Plaintiffs are not likely to succeed on the merits. First, they have not presented evidence establishing a sufficiently substantial threat of enforcement to allow federal jurisdiction. Second,

Plaintiffs' concerns about ambiguities in a brand-new Texas law support abstention in favor of Texas courts, which can provide clarity. As Morgan testified, such clarity would be "[v]ery helpful." Ex. B at 74. Third, their claims are unlikely to succeed on the merits. Section 276.016(a)(1) is constitutional. Any effects on unprotected government speech are more than justified by the State's interests in making elections more secure and easier to administer. SB1 does not restrict any private speech protected by the First Amendment.

A. Plaintiffs Have Not Made a Clear Showing of Jurisdiction

As the parties invoking federal jurisdiction, Plaintiffs bear the burden of establishing jurisdiction. As the Attorney General explained in his motion to dismiss, Plaintiffs' First Amended Complaint does not plausibly allege facts establishing standing or the applicability of *Ex parte Young*. *See* ECF 24 at 3–9. Bur regardless of whether Plaintiffs satisfied their pleading burden, they face a higher burden in seeking a preliminary injunction. *See Tex. All. for Retired Ams. v. Hughs*, 976 F.3d 564, 568 n.1 (5th Cir. 2020) (per curiam).

Absent evidence that Defendants will imminently enforce Section 276.016(a)(1) against Plaintiffs, a preliminary injunction would be improper. At the preliminary-injunction stage, Plaintiffs "must make a 'clear showing' that they have standing to maintain the preliminary injunction." *Barber v. Bryant*, 860 F.3d 345, 352 (5th Cir. 2017); *accord Daves v. Dallas County*, 22 F.4th 522, 542 (5th Cir. 2022). Because Plaintiffs' theory of injury depends on future criminal or civil enforcement actions, Plaintiffs "must show that the likelihood of future enforcement is 'substantial.'" *California v. Texas*, 141 S. Ct. 2104, 2114 (2021). For Longoria's claim against the Attorney General, she must also satisfy the requirements of the *Ex parte Young* exception to sovereign immunity. Longoria "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 v. Abbott*, 978 F.3d 168, 179 (5th Cir. 2020) (quotation omitted).

Despite this burden, Plaintiffs' motion for a preliminary injunction does not address standing or sovereign immunity. It mentions jurisdiction only once, and that assertion is limited to statutory subject-matter jurisdiction under 28 U.S.C. §§ 1331, 1343(a). *See* ECF 7 at 8. The only evidence Plaintiffs have submitted—their own declarations—do not establish a substantial likelihood of enforcement or a demonstrated willingness to enforce in circumstances like these. Considering each claim, one at a time, reveals that Plaintiffs have not carried their burden.

Longoria: As an initial matter, Plaintiffs have not established that Longoria wants to violate Section 276.016(a)(1). Her declaration, for example, describes her proposed speech as "encourag[ing] voters to consider all of their options, engaging in outreach to voters regarding the benefits of the vote-by-mail process, educating voters about their rights, and helping voters to submit their respective applications." ECF 7-1 ¶ 15. On its face, that description does not seem to encompass "solicit[ing] the submission of an application to vote by mail from a person who did not request an application." Tex. Elec. Code § 276.016(a)(1). In any event, even if Longoria did intend to violate Section 276.016(a)(1), she has produced no evidence that she would imminently face an enforcement action.

Longoria's Claim against Ogg: District Attorney Ogg has agreed not to enforce Section 276.016(a)(1) while this case is pending. *See* ECF 35 ¶ 2. The stipulation gives no hint that she is inclined to enforce Section 276.016(a)(1) at all, much less against Longoria for the conduct issue in this case. *Cf. id.* ¶ 3 (discussing "conserving prosecutorial resources"). Longoria has never spoken with District Attorney Ogg, or anyone else at the Harris County District Attorney's Office, about SB1 generally or potential prosecution for violating SB1 in particular. *See* Ex. A at 54–55. Nor does Longoria otherwise "have any knowledge of anyone attempting to bring criminal charges against [her] for violating Section 276.016(a)(1)." *Id.* at 64.

Longoria's Claim against Paxton: Longoria similarly has given no reason to think the Attorney General is planning to bring a civil enforcement action against her. Plaintiffs have not

presented any evidence regarding the Attorney General's authority or inclination to enforce Section 276.016(a)(1) through Section 31.129. *See* ECF 24 at 4–8. Longoria has never spoken with the Attorney General or, until her deposition, anyone from the Office of the Attorney General about SB1. *See* Ex. A at 55. There is no evidence that she has been threatened with a suit for a civil penalty.

Even if Longoria faced a civil enforcement action, it is unlikely that she would face any personal monetary liability. Longoria admits "[i]t is not clear" as a matter of state law whether the Attorney General could seek "monetary penalties" under Section 31.129. ECF 7-1 ¶ 13. Even assuming he could, the suit would presumably be against Longoria in her official capacity. "An 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. But "[a] judgment against a public servant 'in his official capacity' imposes liability on the entity that he represents,"*City of El Paso v. Heinrich*, 284 S.W.3d 366, 373 (Tex. 2009) (quoting *Brandon v. Holt*, 469 U.S. 464, 471–72 (1985)), not the individual officer sued. As a result, Longoria would not be personally liable on the judgment. Because Longoria brought this suit "in her personal capacity," ECF 5 ¶ 3, she has not established an injury in fact flowing from the risk of a monetary civil penalty.

Morgan also has not established a substantial threat of criminal prosecution under Section 276.016(a)(1). First, Morgan does not want to take any actions that would constitute solicitation under Section 276.016(a)(1). According to Morgan, her job as a VDR has two parts: (1) helping individuals fill out forms registering them to vote, and (2) explaining the voters' options, sometimes including an option to vote by mail. Ex. B at 26; *see also* ECF 7-2 ¶ 13.

Helping fill out voter-registration forms cannot constitute solicitation under Section 276.016(a)(1) because it has nothing to do with "the submission of an application to vote by mail." Tex. Elec. Code § 276.016(a)(1); *see* Ex. B at 26–27 ("forms to register to vote").

Explaining voters' options also does not constitute solicitation. Morgan provides "factual information" and does not "tell[] voters what they should do." Ex. B at 29. Whenever Morgan has "explained the vote-by-mail option," her intent was "always" "to provide factual information that would help a voter do what the voter otherwise wanted to do." *Id.* at 31. If she were not "deterred by the threat of criminal prosecution," she would "have the same intent" "going forward in explaining the vote-by-mail option." *Id.* at 32. Morgan's "personal practice . . . isn't to try to get somebody to vote in a certain way; it's to give them information." *Id.* at 114. "[A]ll" Morgan "want[s] to" do as a VDR as "give people . . . information about voting by mail." *Id.* at 116.

Morgan fears prosecution under Section 276.016(a)(1) because she interprets the statute more broadly than its text will support. She defines "soliciting" as "asking a voter if they would like information about voting by mail." Ex. B at 33. But merely asking a voter if the voter would like more information is not "solicit[ing] the submission of an application to vote by mail from a person who did not request an application." Tex. Elec. Code § 276.016(a)(1). Before her deposition, Morgan was not aware of the statutory exception for officials "provid[ing] general information about voting by mail, the vote by mail process, or the timelines associated with voting to a person or the public." Tex. Elec. Code § 276.016(e)(1); *see* Ex. B at 114–16.

Morgan is not even "trying to persuade" a voter to vote by mail; she is merely "offering them options." Ex. B at 38. Neither the Secretary of State nor any county officials have told her that such explanations would violate Section 276.016(a)(1). *See id.* at 38–39.

Second, Morgan does not have any firm plans to work as a VDR going forward. Her past VDR work has consisted of (1) a voter information booth at her church, (2) a voter information booth at a farmer's market, and (3) leaving voter information cards at her neighbors' doors. *See* Ex. B at 55. She has not established that any such work is imminent, much less that it is imminent enough to justify preliminary injunctive relief. She also "do[es]n't have any firm plans to do anything other than [those]

three things." *Id.* at 56.

1. In the past, Morgan has worked as a VDR at a voter information booth outside her church near the UT campus in Austin. *See* Morgan Depo Tr. 39, 41–42. The church would generally host the booth a month before each election, but the COVID-19 pandemic and the weather have left those plans uncertain. *See id.* at 40. The church is not hosting a voter information booth for the March primary election, and Morgan "do[es]n't know if [they] would try to do something" for the runoff election. *Id.* at 41. The church "might have a voter information booth in September of 2022," but Morgan emphasized that "the word is 'might.'" *Id.*

Even if Morgan did work as a VDR at the voter information booth, she gives vote-by-mail information to only a small percentage of the people who stop by the booth. Based on the production at the time of her deposition, the number was only about 7%. *See* Ex. B at 45–53; Ex. F (sum of "Vote by mail info" row divided by sum of "stopped by booth" row). But when considering Morgan's post-deposition production, the number falls to about 4.5%. *See* Ex. G (same calculation).

2. Morgan has not worked at the farmer's market booth since early 2020 due to the pandemic. *See* Ex. B at 54. She intends to return to the farmer's market "someday," but she is "not sure when, in light of the circumstances," including COVID and the weather. *Id.* at 55. When she did work at the farmer's market booth, she offered "factual information about options," as she did at the church booth, not solicitations. *Id.* at 54.

3. Morgan testified that she has worked as a VDR twice in the three months since SB1 took effect. When Morgan's sister's family moved to Morgan's neighborhood, she left them voter-registration cards (which one does not need to be a VDR to do, *see* Ex. H at 7). *See* Ex. B at 56–58. The only thing she was deterred from saying was "Have you considered voting by mail?," *id.* at 57, which SB1 does not prohibit. Next, a member of Morgan's church asked her how to fill out the application to vote by mail, but she was not deterred and "felt confident to reply to him." *Id.* at 58.

Morgan could not recall any other examples of wanting to say something but being deterred by Section 276.016(a)(1). *Id.* at 61–62.

Morgan has no "concrete plans" to work as a VDR going forward, much less to violate Section 276.016(a)(1). *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 564 (1992). Her assertions of "'some day' intentions" to work as a VDR are "simply not enough" to support jurisdiction. *Id.*

Even if Morgan established that she plans to work as a VDR and wants to violate Section 276.016(a)(1), she would also have to show that she faces a substantial threat of criminal prosecution by a Defendant. She has not done so.

Morgan's Claim against Garza: District Attorney Garza has agreed not to enforce Section 276.016(a)(1) while this case is pending. *See* ECF 36 ¶ 3. In his stipulation, District Attorney Garza went so far as to assert that SB1 "place[s] significant practical burdens on Travis County voters, pose[s] significant challenges to successful prosecution, and raise[s] significant constitutional issues." ECF 36 ¶ 2. One need not agree with District Attorney Garza's assertions to see that they undermine any claim that he is substantially likely to prosecute Morgan for a violation of Section 276.016(a)(1). Morgan has not "ever communicated with anyone from a District Attorney's Office," and no one has "ever threatened to criminally prosecute [her] for violating Section 276.016(a)(1)' or "any other law." Ex. B at 74–75. Morgan o not "have an opinion about what the chance of prosecution is in [her] case if [she] were to engage in the explanation of vote-by-mail option that" she described in her deposition. *Id.* at 76. She is deterred even if the "chance of prosecution" is "very small" and "[p]robably" would be deterred even by a "[o]ne-in-a-thousand chance." *Id.*

Morgan's Claim against Dick: District Attorney Dick has provided no reason to think he would imminently prosecute Morgan either. Plaintiffs have introduced no evidence concerning District Attorney Dick's intentions. Indeed, Morgan has never spoken with anyone in the Williamson County District Attorney's Office, *see* Ex. B at 74, much less been threatened with prosecution, *see id.*

at 99–100. And going forward, Morgan is unlikely to conduct her VDR work in Williamson County. "[I]n the next year or two," she will be moving to a retirement center in Travis County. Ex. B at 87. She "do[es]n't know" whether she will continue her "door to door" VDR work in either Travis County or Williamson County after she moves. *Id.* at 88. And as discussed above, she does not have concrete plans to work as a VDR in the meantime.

B. Abstention

A preliminary injunction is also improper because this Court should abstain under *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941). As Defendants explained in their motion to dismiss, there are multiple unsettled questions of state law that justify abstention. *See* ECF 24 at 9–11. This reasoning applies equally here, both because the motion to dismiss remains pending and because abstention is a reason to deny preliminary injunctive relief. *See, e.g.*, *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 397 n.13 (5th Cir. 2020); *id.* at 417–19 (Costa, J., concurring).

In support of abstention, the Attorney General cited Plaintiffs' own declarations, which asserted that the meaning of SB1 is not clear. *See* ECF 24 at 10–11. Morgan's deposition testimony confirms the propriety of abstention. When asked whether she contends she is a public official subject to Section 276.016(a)(1), Morgan explained that she "think[s] it enough to . . . not bring up the subject of vote by mail." Ex. B at 62. But, far from sure about that, *see id.* at 63, Morgan was "hoping the Courts will clarify that issue." *Id.* at 62.

Morgan acknowledged that Section 276.016(a)(1) applies only when a covered official is acting in an official capacity, *see id.* at 71–72; ECF 7-2 ¶ 16, but she does not "have any opinion about what 'while acting in an official capacity' means." Ex. B at 72. She believes that provision is "ambiguous" and "would find it helpful" "if a Texas Court clarified that ambiguity for" her. *Id.* at 86–87; *see also id.* at 71 ("I would like the Courts to clarify what it means to be deputy in this instance with the bill -- with Senate Bill 1.").

Morgan also believes that the meaning of "soliciting" in Section 276.016(a)(1) "is ambiguous." *Id.* at 86; *see also id.* at 113. According to Morgan, "[i]t would be helpful" if "a Texas Court clarified that ambiguity for [her]." *Id.* at 86.

All together, Morgan believes that "Texas law is ambiguous as to whether VDRs are permitted to assist individuals to apply for ballots by mail." Ex. B at 74; *see* Ex. I at MORGAN_00015. Morgan would consider it "[v]ery helpful" if "a Texas Court clarified that ambiguity." *Id.* Longoria agrees that the scope of activity prohibited by Section 276.016(a)(1) is "unclear" and that the way the statute is enforced is "not clear." ECF 7-1 ¶¶ 13–14.

According to their own testimony, what Plaintiffs need is clarity about Texas law, but only the Texas courts can provide such clarity. "[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. There is more than "a possibility that" such clarity "will moot or present in a different posture the federal constitutional questions raised." *Palmer v. Jackson*, 617 F.2d 424, 428 (5th Cir. 1980). As a result, this Court should abstain.

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

Plaintiffs have not made a clear showing that Section 276.016(a)(1) is unconstitutional. First, Plaintiffs' free-speech claims fail because Section 276.016(a)(1) regulates only unprotected official-capacity speech, not protected personal-capacity speech. Second, even if Section 276.016(a)(1) were subject to First Amendment scrutiny, it would pass. Section 276.016(a)(1) ensures that the government's official imprimatur is not used to nudge voters from in-person voting to mail-in voting. Government officials nudging voters toward mail-in voting would cause multiple problems, including leading voters who do not qualify to vote by mail to submit applications claiming that they do (a felony) and increasing logistical and security burdens.

As the Attorney General explained in his motion to dismiss, Section 276.016(a)(1) does not limit any speech protected by the First Amendment. *See* ECF 24 at 11–14. Section 276.016(a)(1) applies only when an official is "acting in an official capacity" rather than a private capacity. Tex. Elec. Code § 276.016(a); *see also id.* § 276.016((2). Morgan recognized this in her deposition and her declaration. *See* Ex. B at 71–72; ECF 7-2 ¶ 16. Longoria likewise confirmed that she is concerned with the effect that SB1 has on how she performs her official job functions rather than her private speech. *See* Ex. A at 76 (confirming her testimony that she is "unable to fulfill [her] sworn duty of Elections Administrator" and listing "portions of [her] job as Elections Administrator" she is "unable to fulfill"). According to Longoria, she is deterred "from engaging in communications" that "are a central part of [her] duties as an elections administrator." ECF 7-1 ¶ 15.

The limited scope of Section 276.016(a)(1) is fatal to Plaintiffs' free-speech claims because "public 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). SB1 affects "activities undertaken in the course of performing one's job" as a government employee, not "the kind of activity engaged in by citizens who do not work for the government," so any speech it affects "is not protected by the First Amendment." *Williams v. Dallas Indep. Sch. Dist.*, 480 F.3d 689, 693–94 (5th Cir. 2007) (per curiam).

Even if Section 276.016(a)(1) affected protected speech, it would pass any level of scrutiny. Texas has a compelling interest in ensuring that official government resources are not used to shift voters from in-person voting to mail-in voting.

First, official solicitations to submit applications to vote by mail can confuse voters into believing they are qualified to vote by mail even when they are not. As Senator Hughes explained to

his colleagues, "official documents coming from the county" can be "confusing to voters."[1] Director of Elections Keith Ingram has confirmed this concern. "Some voters are confused by official mailings and do not carefully review the instructions." Ex. C ¶ 5. Some voters will improperly submit an application to vote by mail if they receive one "sent by a government official" "because of their belief that receipt . . . indicates the official's certification that the voter is eligible to vote by mail." *Id.* ¶ 6. "[A]ny official government communication that voters [are] likely to interpret as an official recommendation to vote by mail and an implicit assurance that they are qualified to do so" would raise "similar concerns." *Id.* ¶ 7.

Second, casting a vote by mail is less secure than casting a vote in person is. Representative Murr explained the difference on the floor. "[W]hen you vote in person and you go in person and you vote, your ballot never leaves the voting location." But "[w]hen you vote by mail," both an application and a ballot are sent through the mail. A mail-in "ballot is unaccompanied, compared to a scenario where you go to a polling location and your ballot is, there is a potential, as we've heard input from folks, that there could be a likelihood of fraud."[2] The Commission on Federal Election Reform—co-chaired by former President Carter and former Secretary of State James A. Baker III—likewise warned that voting by mail "increases the risk of fraud." Ex. J at 35. In some states, mail-in voting "has been one of the major sources of fraud." *Id.*

Moreover, "citizens voting at home may come under pressure to vote for certain candidates." *Id.* In-person "polling locations offer voters guaranteed privacy while casting their ballot," and "poll waters can intervene if a voter is being pressured or coerced to vote a certain way." Ex. E ¶ 18. "That security does not exist when a voter votes by mail." *Id.* As a result, there is "a serious concern that

[1] Senate Journal, 87th Leg., R.S., Sat., May 29, 2021 (Add.) at A93, https://journals.senate.texas.gov/SJRNL/87R/PDF/87RSJ05-29-FA.PDF.
[2] House Journal, 87th Leg., 2d C.S., Thurs., Aug. 26, 2021 (Supp.) at S18, https://journals.house.texas.gov/HJRNL/872/PDF/87C2DAY03CSUPPLEMENT.PDF.

voters who vote by mail may be targeted by other seeking to influence their vote." *Id.*

Third, mail-in ballots pose additional burdens on election administration that in-person ballots do not. The Medina County Elections Administrator explained that "shifting voters form in-person to mail-in voting would, on average, increase the expense and complexity of election administration." Ex. D ¶ 13. "[V]oting by mail . . . is more time-consuming for both voters and the county" than "voting by personal appearance is. *Id.* ¶ 4. While in-person voting is accomplished "all in a single transaction," *id.* ¶ 5, mail-in voting requires a multi-step process. A voter must submit an application for a mail-in ballot. *See id.* ¶ 6. The county then must process the application, send and track a mail-in ballot, and process a returned mail-in ballot, including through the signature-match process. *See id.* ¶¶ 6–9. The Election Administrator for Parker County agrees. "[V]oting by mail poses a significant administrative burden on the county (as well as the voter), as there are multiple steps int eh process, each of which consumes time, manpower, and resources." Ex. E ¶ 17.

To be sure, the Legislature has not sought to abolish voting by mail. Voting by mail remains a lawful option for those who qualify. But not everything that is permitted should be solicited, much less solicited with the imprimatur of the government at taxpayer expense. "The history of absentee voting legislation in Texas shows that the Legislature has been both engaged and cautious in allowing voting by mail." *In re State*, 602 S.W.3d 549, 558 (Tex. 2020). The First Amendment provides no reason to upset the careful balance that the Legislature struck in SB1.

II. Plaintiffs Have Not Made a Clear Showing a Preliminary Injunction Would Redress Irreparable Harm

A. Plaintiffs Have Not Made a Clear Showing of Irreparable Harm

To justify a preliminary injunction, Plaintiffs need to establish not only irreparable harm but also irreparable harm that will occur before this case could go to trial. Plaintiffs have introduced no evidence of any imminent enforcement plans from any Defendant. *See supra* Part I.A. A preliminary injunction against District Attorneys Ogg and Garza would be especially inappropriate because it

would not accomplish anything. Both district attorneys have already agreed not to enforce Section 276.016(a)(1) "until such time as a final, non-appealable decision has been issued in this matter." ECF 35 ¶ 2; ECF 36 ¶ 3. A preliminary injunction against Ogg and Garza could not give Plaintiffs any greater relief.

More generally, however, Plaintiffs' delay in seeking a preliminary injunction demonstrates a lack of irreparable harm. Longoria first heard about SB1 and the provision she is challenging in "the summer of 2021," Ex. A at 20, and she originally filed suit on September 3, 2021. *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). Morgan also heard about SB1 in the summer of 2021, probably August. *See* Ex. B at 14–15. Yet neither Plaintiff served their motion for preliminary injunction under January 3, 2022. *See* ECF 15.

Such delay weighs heavily against a finding of irreparable harm because it "demonstrat[es] that there is no apparent urgency to the request." *Wireless Agents, LLC v. T Mobile USA, Inc.*, 2006 WL 1540587, *3 (N.D. Tex. June 6, 2006)); *see also Tough Traveler, Ltd. v. Outbound Prods.*, 60 F.3d 964, 968 (2d Cir. 1995) (delay "standing alone" may "preclude the granting of preliminary injunctive relief, because the 'failure to act sooner undercuts the sense of urgency that ordinarily accompanies a motion for preliminary relief and suggests that there is, in fact, no irreparable injury").

It is true that courts have found irreparable harm based on "[t]he loss of First Amendment freedoms[] for even minimal periods of time." *Opulent Life Church v. City of Holly Springs*, 697 F.3d 279, 295 (5th Cir. 2012). But those cases do not involve delays of months due to a plaintiff's own dilatory conduct. *Id.* at 297 (argument based on delay was "unconvincing *on . . . these facts*" where the "majority of [plaintiff's] four-month delay was caused by [defendant's] refusal to produce" necessary documents (emphasis added)). Here, Plaintiffs delayed longer than four months. None of that delay is attributable to Defendants.

B. Even If Plaintiffs Faced Irreparable Harm, a Preliminary Injunction Would Not Help

In this case, Plaintiffs identify only one allegedly irreparable harm: "the chilling effect that arises from the threat of imprisonment and civil penalties." ECF 7 at 19. On these facts, no preliminary injunction from a federal district court could remedy that alleged harm. Any threat of future enforcement would remain given the significant possibility that a preliminary injunction would be stayed, reversed, or not turned into a permanent injunction (including on procedural grounds). Plaintiffs would still face the possibility of criminal prosecution (or civil enforcement) for solicitation committed during the pendency of the injunction if the injunction were set aside. They have introduced no evidence that a preliminary injunction would eliminate the alleged "chill" about which they complain. As the requested relief would not prevent the alleged irreparable harm, it should be denied.

A preliminary injunction ceases to be binding if "it is reversed by orderly and proper proceedings." *United States v. United Mine Workers of Am.*, 330 U.S. 258, 293 (1947). And if that were to happen, the preliminary injunction would not be a defense to a subsequent enforcement action. A preliminary injunction cannot serve as "a grant of total immunity from future [enforcement]." *Edgar v. MITE Corp.*, 457 U.S. 624, 649 (1982) (Stevens, J., concurring in part and concurring in the judgment). "[F]ederal judges have no power to grant such blanket dispensation from the requirements of valid legislative enactments." *Id.* The most a preliminary injunction could do is pause any enforcement actions while it is in effect. Even if one were to think that the preliminary injunction somehow might prohibit heartbeat suits for abortions performed before it was set aside on appeal, Plaintiffs *cannot know now that courts will later so hold.*

In her deposition, Longoria confirmed that a "pause" in the threat of prosecution would not give her meaningful relief: "[W]hether there is a pause in [District Attorney Oggs] actions or not because of this lawsuit does nothing to abate my overall fears and concerns . . . ." Ex. A at 60. A

preliminary injunction that "only delayed, not permanently stopped" "imprisonment and other penalties" would leave Longoria "just as concerned." *Id.* at 99.

The same is true for Morgan. She testified that she would "still be deterred from providing the information that" she "want[s] to provide" if the district attorney "agreed not to prosecute [her] for a time period, but he could prosecute [her] down the road for things [she] did while the case was pending." Ex. B at 82. But a preliminary injunction could accomplish no more than such an agreement would. A preliminary injunction therefore would not remove the "chill" that Morgan claims as her irreparable injury. *See id.* at 83–84.

At her deposition, Morgan could think of only two things that would alleviate the alleged chill of Section 276.016(a)(1): first, "if the Legislature repealed that provision," and second, a court order saying she is "allowed to" engage in her proposed conduct and "will never be prosecuted for it." *Id.* at 85. A preliminary injunction cannot accomplish either of those things.

"An indispensable prerequisite to issuance of a preliminary injunction is *prevention* of irreparable injury." *Tate v. Am. Tugs, Inc.*, 634 F.2d 869, 870 (5th Cir. 1981) (emphasis added). "[I]t is a necessary corollary to the idea of irreparable injury without a preliminary injunction that the injury complained of will in fact be prevented by the injunction." *Viands Concerted, Inc. v. Reser's Fine Foods, Inc.*, No. 2:08-cv-914, 2008 WL 4823053, at *11 (S.D. Ohio Oct. 31, 2008), *report and recommendation adopted*, 2009 WL 1728289, at *13 (S.D. Ohio June 16, 2009) ("An injunction would not, as a matter of law, prevent the irreparable injury Viands asserts it will endure.").

When a proposed preliminary injunction "would not likely prevent the kind of irreparable injury Plaintiff seeks to prevent," it cannot issue. *Coleman v. United States*, No. 5:16-cv-817-DAE, 2017 WL 1278734, at *2 (W.D. Tex. Jan. 3, 2017); *see also Foy v. Univ. of Tex. at Dall.*, No. 3:96-cv-3406, 1997 WL 279879, at *3 n.1 (N.D. Tex. May 13, 1997), *aff'd*, 146 F.3d 867 (5th Cir. 1998) (per curiam) (denying an injunction because the plaintiff had not shown it would "remedy the irreparable injury of

which he complains").

Applying this rule, the Second Circuit reversed a preliminary injunction in *American Postal Workers Union, AFL-CIO v. U.S. Postal Service*, 766 F.2d 715 (2d Cir. 1985). There, the alleged "chilling of protected speech and union activities stem[med] not from the interim discharge, but from the threat of permanent discharge" by an employer. *Id.* at 722. But "the threat of permanent discharge . . . is not vitiated by an interim injunction," so there was no way the "chilling of the right to speak or associate could logically be thawed by the entry of an interim injunction." *Id.*; *see also Buckingham Corp. v. Karp*, 762 F.2d 257, 262 (2d Cir. 1985).

Similarly, in *Chiafalo v. Inslee*, the plaintiffs argued "that the mere potential of a monetary penalty has a chilling impact on [their] ability to exercise their First Amendment rights." 224 F. Supp. 3d 1140, 1147 (W.D. Wash. 2016). The court denied a preliminary injunction because such "relief would have no impact on Plaintiffs' decisionmaking calculus." *Id.* at 1148. "Whether or not the court preliminarily enjoins the State from enforcing the $1,000.00 civil penalty," the plaintiffs' decision-making would occur in light of the prospect of eventually having to pay the penalty because a preliminary injunction does not guarantee permanent relief. *Id.* In the end, "preliminary injunctive relief would not mitigate the chilling effect of the discretionary statutory penalty." *Id.*

More recently, a federal court denied a motion for preliminary injunction against the federal government on this same theory. In *Ohio v. Yellen*, the State of Ohio sought a preliminary injunction preventing the Secretary of the Treasury from attempting to recoup federal funding from it. No. 1:21-cv-181, 2021 WL 1903908, at *14 (S.D. Ohio May 12, 2021). Ohio argued that a preliminary injunction "would provide clarity about the legal consequences of its decisions." *Id.* at *15. The court denied relief because a preliminary injunction effective "while this case is pending does not—indeed cannot—provide the clarity that Ohio seeks." *Id.* Regardless of whether the court issued injunctive relief, Ohio would face the same lack of clarity about the defendant's power to recoup federal funds. With a

preliminary injunction, Ohio would face "possible recoupment . . . once the Court issues a merits decision, *i.e.*, if the Court . . . were to decline to convert the preliminary injunction into a permanent injunction." *Id.* Similarly, without a preliminary injunction, "the funds possibly could be recouped down the road . . . once again depending on the outcome of this case." *Id.*

The same rationale applies here. Because no preliminary injunction can guarantee that Longoria and Morgan will not face future enforcement actions, it cannot alleviate the chill they allegedly feel.

III. Plaintiffs Have Not Clearly Shown that the Balance of the Equities and Public Interest Favor Relief

The balance of the equities and the public interest weigh against an injunction here, particularly because an injunction would interfere with the orderly administration of Texas elections.

Challenges to the enforcement of state law always implicate these factors. "When a statute is enjoined, the State necessarily suffers the irreparable harm of denying the public interest in the enforcement of its laws." *Veasey v. Abbott*, 870 F.3d 387, 391 (5th Cir. 2017) (per curiam). In such cases, the State's "interest and harm merge with that of the public." *Id.* (citing *Nken v. Holder*, 556 U.S. 418, 435 (2009)). As a result, "a court should be particularly cautious when contemplating relief" like that sought here. *Salazar v. Buono*, 559 U.S. 700, 714 (2010) (noting that "[e]quitable relief is not granted as a matter of course," especially when the requested relief "implicates public interests").

These factors apply with special force in election-law cases. Binding "precedents recognize a basic tenet of election law: When an election is close at hand, the rules of the road should be clear and settled." *DNC. v. Wis. State Leg.*, 141 S. Ct. 28, 31 (2020) (Kavanaugh, J., concurring). Even well-intentioned injunctions often cause more problems than they solve. As the Supreme Court has recognized, "[c]ourt orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase." *Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006) (per curiam). These concerns apply

to not only broad relief but also "seemingly innocuous late-in-the-day judicial alterations to state election laws" because even those "can interfere with administration of an election and cause unanticipated consequences." *DNC*, 141 S. Ct. at 31 (Kavanaugh, J., concurring).

To avoid these dangers, the Supreme Court "has repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election." *RNC v. DNC*, 140 S. Ct. 1205, 1207 (2020) (per curiam). The Fifth Circuit takes this precedent very seriously. In the 2020 election cycle, that Court repeatedly stayed injunctions that would have interfered with Texas elections. *See, e.g.*, *Mi Familia Vota v. Abbott*, 834 F. App'x 860, 863 (5th Cir. 2020) (per curiam); *Richardson v. Tex. Sec'y of State*, 978 F.3d 220, 244 (5th Cir. 2020) (Higginbotham, J., concurring); *Tex. Alliance for Retired Ams. v. Hughs*, 976 F.3d 564, 566–67 (5th Cir. 2020) (per curiam); *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 411–12 (5th Cir. 2020).

In this case, the Director of Elections has explained that "changing the election procedures in the middle of an election cycle can create considerable confusion and frustration among voters and local election officials." Ex. C ¶ 10. Drawing on past experience in which last-minute injunctions confused, scared, and angered voters, *see id.* ¶¶ 10–11, Mr. Ingram has explained what is at stake in this case: "If, in the middle of an election, election officials began soliciting the submission of applications to vote by mail from people who did not request applications, despite a high-profile law prohibiting that practice, I would expect at least some voters to be confused and lose trust in the election process." *Id.* ¶ 12.

Losing voter trust is always a problem, but it is a particularly big problem today. "Voter trust is considerably lower today than it has been in the past." *Id.* "Further eroding voter trust could have serious consequences." *Id.*

IV. Plaintiffs' Proposed Injunction Is Overbroad

If the Court concludes that preliminary injunctive relief is warranted, it should nevertheless

refuse to enter Plaintiffs' proposed order. Plaintiffs propose a universal injunction beyond the power of any court. Plaintiffs would have this Court enjoin literally every state and local government official in Texas (including countless non-parties) from enforcing Section 276.016(a)(1) against literally anyone (including countless non-parties). That is not how federal adjudication works, much less is it how federal courts apply an equitable remedy like a preliminary injunction. *See, e.g.*, *Lewis v. Casey*, 518 U.S. 343, 360 (1996) ("[G]ranting a remedy beyond what was necessary to provide relief to [two plaintiffs] was therefore improper.").

Plaintiffs' proposed order suffers from two fundamental defects. First, it aims to protect non-plaintiffs. *See* ECF 7-3. "[N]either declaratory nor injunctive relief can directly interfere with enforcement of contested statutes or ordinances except with respect to the particular federal plaintiffs, and the State is free to prosecute others who may violate the statute." *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931 (1975). A "district court lack[s] authority to enjoin enforcement of [a challenged law] as to anyone other than the named plaintiffs." *In re Abbott*, 954 F.3d 772, 786 n.19 (5th Cir. 2020), *vacated as moot*, 141 S. Ct. 1261 (2021); *accord McKenzie v. City of Chicago*, 118 F.3d 552, 555 (7th Cir. 1997) ("[P]laintiffs lack standing to seek—and the district court therefore lacks authority to grant—relief that benefits third parties."). When a court finds "actual injury on the part of only one named plaintiff," "the proper scope of [an] injunction" cannot include the "population at large." *Lewis v. Casey*, 518 U.S. 343, 358 (1996). Plaintiffs' proposed order, on the other hand, "assumes an affirmative answer to the question at issue: whether a court may grant relief to non-parties. The right answer is no." *McKenzie*, 118 F.3d at 555.

Second, Plaintiffs' proposed order is improper because it would purport to enjoin the statute itself and numerous non-Defendants. *See* ECF 7-3. Federal courts do not enjoin statutes. "Remedies . . . ordinarily operate with respect to specific parties. In the absence of any specific party, they do not simply operate on legal rules in the abstract." *California v. Texas*, 141 S. Ct. 2104, 2115

(2021) (quotations and citations omitted). On the contrary, courts, in appropriate circumstances, enjoin particular defendants. Even in those circumstances, they enjoin "not the execution of the statute, but the acts of the official, the statute notwithstanding." *Commonwealth of Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923).

Plaintiffs could have moved to certify either a plaintiff-side class or a defendant-side class. *See* Fed. R. Civ. P. 23. They did not. As a result, this litigation involves only the named parties, and any relief must be limited to those parties. *See In re Abbott*, 954 F.3d at 786 n.19; *McKenzie*, 118 F.3d at 555.

CONCLUSION

The Attorney General respectfully requests that the Court deny Plaintiffs' motion for a preliminary injunction.

Date: February 8, 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 February 8, 2022, and that all counsel of record were served by CM/ECF.

/s/ William T. Thompson
WILLIAM T. THOMPSON

EXHIBIT 4:
APPENDIX TO DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION (ECF NO. 49)

IN THE 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 Attorney General of Texas, KIM OGG, in her official capacity as Harris County District Attorney, SHAWN DICK, in his official capacity as Williamson County District Attorney, and JOSÉ GARZA, in his official capacity as Travis County District Attorney, *Defendants*.	§	Case No. 5:21-cv-1223-XR

APPENDIX IN SUPPORT OF DEFENDANT TEXAS ATTORNEY GENERAL WARREN KENNETH PAXTON'S RESPONSE TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Exhibit	Description
A	Isabel Longoria's Deposition Transcript
B	Cathy Morgan's Deposition Transcript
C	Declaration of Brian Keith Ingram
D	Declaration of Lupe Torres
E	Declaration of Jenise "Crickett" Miller
F	Voter Information Booth Statistical Chart
G	Updated Voter Information Booth Statistical Chart
H	Texas Volunteer Deputy Registrar Guide

I	Texas Impact Guide for Congregational Voter Information Booths
J	Commission on Federal Election Reform: Building Confidence in U.S. Elections (Sept. 2005)

Date: February 8, 2022

Respectfully submitted.

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CERTIFICATE OF SERVICE

I hereby certify that on February 8, 2022, I electronically filed the foregoing document through the Court's ECF system, which automatically serves notification of the filing on counsel for all parties.

/s/ William T. Thompson
WILLIAM T. THOMPSON

IN THE 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 Attorney General of Texas, KIM OGG, in her official capacity as Harris County District Attorney, SHAWN DICK, in his official capacity as Williamson County District Attorney, and JOSÉ GARZA, in his official capacity as Travis County District Attorney, *Defendants*.	§	Case No. 5:21-cv-1223-XR

APPENDIX IN SUPPORT OF DEFENDANT TEXAS ATTORNEY GENERAL WARREN KENNETH PAXTON'S RESPONSE TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Exhibit A

Deposition Transcript of Isabel Longoria

February 4, 2022

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

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

VIDEOTAPED ORAL DEPOSITION OF

ISABEL LONGORIA

Friday, February 4, 2022

(REMOTELY REPORTED)

VIDEOTAPED ORAL DEPOSITION OF ISABEL LONGORIA, produced as a witness at the instance of the Defendants, and duly sworn, was taken in the above-styled and numbered cause on Friday, February 4, 2022, from 1:34 p.m. to 4:38 p.m., before Debbie D. Cunningham, CSR, in and for the State of Texas, remotely reported via Machine Shorthand pursuant to the Federal Rules of Civil Procedure.

--ooOoo--

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--ooOoo--

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(Friday, February 4, 2022, 1:34 p.m.)
P R O C E E D I N G S
THE REPORTER: Today's date in February 4, 2022. The time is 1:34 p.m. Central Standard Time. This is the videotaped oral deposition of Isabel Longoria, and it is being conducted remotely. The witness is located in Houston, Texas.
My name is Debbie Cunningham, CSR Number 2065. I am administering the oath and reporting the deposition remotely by stenographic means from Austin, Texas.
Would Counsel please state their appearances and locations for the record, beginning with Plaintiffs' Counsel?
MR. FOMBONNE: This is Jonathan Fombonne from the Harris County Attorney's Office. I'm located in Houston, Texas, representing the Defendant, Isabel Longoria -- the Plaintiff, Isabel Longoria. I'm sorry.
MR. LEAVITT: And I'm Randy Leavitt, representing Williamson County District Attorney, Shawn Dick.
MR. HUDSON: This is Eric Hudson on behalf of Ken Paxton, in his capacity as the Attorney General of Texas. I believe that my colleague, Will Thompson, is also on here, although not on video or on

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speaker.
THE REPORTER: Are those all the announcements?
MR. MORALES-DOYLE: For purposes of the record, I'll say I'm Sean Morales-Doyle from the Brennan Center for Justice, along with my colleague, Ethan Herenstein, representing the Plaintiff; and I believe Megan Cloud is on from Weil, Gotshal, as well; but none of us will be speaking or appearing in the deposition in any way other than our presence on the Zoom.
MR. FOMBONNE: And just for full completeness, I'm joined by my colleagues from the Harris County Attorney's Office Tiffany Bingham, Christina Beeler, Susannah Mitcham.
ISABEL LONGORIA,
having been duly sworn, testified as follows:
EXAMINATION
BY MR. HUDSON:
Q. Good afternoon, Ms. Longoria. My name's Eric Hudson. I'm with the Office of the Attorney General. Have we ever met before?
A. No.
Q. Have you ever been deposed before?
A. No.
Q. Okay. Well, let's go over a few ground rules

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before we get going. So the first thing I want to talk to you about today is we are on Zoom. Have you used the Zoom application before?
A. Yes.
Q. Are you familiar with how to pull documents off of the chat function?
A. Yes.
Q. Okay. Well, before we get too far down the road, I'm going to go ahead and drop out of here; and let me see if I can put the depo notice on because I want to make sure we're on the same page about gathering documents.
Let's see. Let me drop this in there. I'm dropping in what I'm marking as State Defendant -- or -- well, we'll call it OAG Exhibit 1. It's a copy of the Deposition Notice.
(Exhibit 1 marked.)
Q. (BY MR. HUDSON) Are you able to open that up?
A. Give me one second here.
I've got it.
Q. All right. So you're able to use that. So if I give you any exhibits today, it will be through the chat function. I believe that also goes out to all counsel who are on the record here with us today. So they should be able to pull that off as well.

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MR. HUDSON: I'll just state for the record right now: Any counsel having any difficulty pulling down exhibits from the chat function, just let me know; and we'll see if we can't find an alternative means to get the exhibits to you.
Q. (BY MR. HUDSON) If any of your counsel need a moment to take a look at an exhibit before I start asking you questions, please let me know; and I'll slow down and let that happen as well.
All right. So are you able to hear me clearly?
A. Yes.
Q. Do you have enough equipment so that you can see me and hear me and you're not concerned about not being able to do that today?
A. I'm not concerned.
Q. All right. So if at any time during the deposition today you're unable to hear me or if there's any issue with being able the hear me, I need you to let me know because I need you to be able to understand the questions that I'm asking. Can you agree to do that today?
A. Yes.
Q. All right. Let's see. Now, during the course of the deposition, I'll be asking you a series of

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questions. When I'm asking you a question, I'll ask that you allow me to complete the question; and I'll extend you the same courtesy when you're answering. Can we agree to do that today?
A. Yes.
Q. All right. And, now, you've been doing a fine job of this so far; but I want to remind you, even though we're on Zoom and this is being -- a video is being recorded, our court reporter can't annotate head nods, shakes, physical gestures, and so forth. So during the course of the deposition today, can you agree that you'll answer verbally each one of my questions?
A. Yes.
Q. Now, you've already been sworn in. Would you mind introducing yourself to the judge?
A. Isabel Longoria, Harris County Elections Administrator.
Q. How long have you held that position?
A. Since November 2020 -- November 2020.
Q. How did you come about that position?
A. I was appointed by the Harris County Commissioners Court.
Q. Tell me what that process is like.
A. The Harris County Commissioners Court created the office in 2020. The Elections Commission, I believe

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it's called, interviewed me and made a recommendation to Commissioners Court; and then Commissioners Court appointed me to the position.
Q. Who held your position before you held it?
A. No one. I am the first Harris County Elections Administrator.
Q. So prior to your tenure in office, there was never a Harris County Elections Administrator?
A. No.
Q. How long did the interview process take?
A. I believe it happened over the course of several weeks.
Q. Take me through your background just with regard to elections. So prior to becoming the elections administrator for Harris County, did you hold any other positions that involved conducting elections?
A. Yes. Prior to becoming the Harris County Elections Administrator, I was a special adviser under the county clerk's office.
Q. Which county is that?
A. Sorry. Special Adviser for Voting Rights and Access under the Harris County Clerk's Office.
Q. And I presume that the Harris County Clerk's Office is the office for Harris County that operated elections prior to the creation of your current position

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of Elections Administrator; is that right?
A. Yes.
Q. What does a special adviser do for Harris County?
A. Advises. My duties were to advise on projects related to voting and voting rights in Harris County.
Q. Let me see if I can ask it a different way. What were your day-to-day duties when you held the role of Special Adviser for Voting Rights for Harris County?
A. My duties, I can't remember how they were specifically outlined in the job description; but more or less project management related to different functions of the elections in 2020.
Q. How long did you hold the position of Special Adviser for Voting Rights?
A. I believe I started that position in June of 2020.
Q. Prior to holding the position of special adviser, where did you work?
A. Can you specify the timeframe prior to that?
Q. Sure. Immediately preceding your time as special adviser, where were you employed?
A. I was unemployed immediately preceding that. My previous position to that, I guess, AARP.
Q. What did you do for AARP?

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A. I believe my title at AARP was Associate State Director of Outreach and Advocacy.
Q. How long did you hold that position?
A. I think close to four years.
Q. Prior to June of 2020, how long were you unemployed after you departed from AARP?
A. One year.
Q. Why did you leave AARP?
A. I left AARP to run for Houston City Council District H.
Q. Did you, in fact, run?
A. Yes.
Q. Is that a partisan election?
A. No.
Q. I presume you didn't win, which is why you're currently holding the position of Elections Administrator, right?
A. Well, I didn't win, unrelated to me holding this position; but yes.
Q. Sure. Let me see if I can clarify my question. You ran for the position of Houston City Council District H, but you were not successful in that election; is that right?
A. Yes.
Q. All right. So I'm trying to get my timing

right here. So prior to June of 2020, you were unemployed; but you were running for a city council position, right?
A. Yes.
Q. And did that election take you from June of '19 through June of 2020?
MR. FOMBONNE: Objection.
You can answer, Isabel.
THE WITNESS: Okay. Sorry.
A. I was -- I ran for office, and my campaign lasted from July 2019 through December 2019.
Q. (BY MR. HUDSON) So June '19, going back four years, that would be June of '15, right?
A. Yeah, I can't remember the exact start time of that job.
Q. Sure. I'm just trying to get a rough outline here. So my real question is: I understood you to testify that you worked for AARP for roughly four years; is that right?
A. Yes.
Q. And having worked for them for roughly four years, if I'm understanding the timeline correctly, it was sometime from the summer of '15 through at least June of '19, right?
MR. FOMBONNE: Objection.

A. Again, I can't remember the exact dates; but that is the general timeline.
Q. (BY MR. HUDSON) Now, when you worked for AARP as the Associate State Director, did you hold any other titles at the AARP?
A. No.
Q. So you were hired in as the Associate State Director?
A. Yes.
Q. And preceding your employment with AARP, where did you work?
A. Before that I was employed by -- in the Office of Senator Sylvia R. Garcia.
Q. What did you do for Senator Garcia?
A. I was a policy analyst for Senator Garcia.
Q. Could you explain to the judge what that means?
A. My duties were related to providing inside analysis to different legislative policies and district community work to -- you know, as a representative of the Office of Sylvia R. Garcia.
Q. How long did you hold that position?
A. Ooh, we're starting to dig really far in the past. I can't remember the exact timeline, two and a half years.

Q. Do you know what party Sylvia Garcia represents?
A. At that time she represented herself as a Democrat.
Q. To your knowledge, has Senator Sylvia Garcia ever presented herself as anything other than a Democrat?
A. Not to my knowledge.
Q. All right. I think that takes us back far enough. Let me ask you: Have you worked for any other politicians in any capacity during your adult work life?
A. Yes.
Q. Which other politicians?
A. Can you define "politician" in this respect?
Q. Sure. Anyone who has held an elected office while you were working for them?
A. Understood.
MR. FOMBONNE: Objection.
Go ahead.
A. In their capacity as an election official -- or elected official, I've worked for Representative Jessica Farrar.
Q. (BY MR. HUDSON) I'm sorry. I didn't catch that last name.
A. Representative Jessica Farrar, F-A-R-R-A-R.

Q. What party does Ms. Farrar represent?
A. Representative Farrar was a Democrat.
Q. Is she still?
A. Is she still a Representative or a Democrat?
Q. A Democrat.
A. Yes.
Q. Let me go briefly through your educational background. I presume you've -- I'm not going to go through high school, but where did you matriculate for college?
A. So which degree?
Q. Well, let's start with the first one.
A. A bachelor's from Trinity University.
Q. That's in San Antonio?
A. Correct.
Q. And after -- you graduated with a, I presume, bachelor's degree?
A. Correct.
Q. Okay. What was your bachelor's degree in?
A. Sociology.
Q. Where did you attend after you graduated from Trinity?
A. The University of Texas in Austin LBJ School of Public Affairs.
Q. And what degree did you study for at UT?

A. A Master's in Public Affairs.
Q. And did you, in fact, graduate with a Master's in Public Affairs?
A. I did.
Q. What year was that?
A. 2012.
Q. After you graduated, did you attend any other higher education?
A. No.
Q. When did you first learn about Senate Bill 1, the law that you're challenging?
A. Over the summer of 2021.
Q. And during the course of the deposition today, I'm going to be referring to Senate Bill 1. Now, having worked in the legislature as an analyst for a senator and also for a representative, I presume you know that there are probably more than one Senate Bill 1 that I could be referring to; but I want to clarify for the record and get your agreement that when I refer to Senate Bill 1, the bill that I'm referring to is the bill that contained the provision of Chapter 276 that you are challenging through your lawsuit. Can we agree that that's what I'm referring to today?
MR. FOMBONNE: Object to the form.
MR. HUDSON: Sure. I guess before we go

on then, what's the objection, Counsel? I want to make sure that we're all clear on the terminology.
MR. FOMBONNE: Yeah, I was kind of not following your train of thought, also. If you could, just make it a little clearer.
MR. HUDSON: Sure. I guess I don't understand the objection, but let me see if I can go back at it.
MR. FOMBONNE: You don't have to speak about the objections. I'll just say, "Objection."
MR. HUDSON: Well, under Federal Rules, you've got to let me know what the objection is and that you didn't follow my train of thought is not an objection.
MR. FOMBONNE: It was vague to me, Counsel.
MR. HUDSON: Okay.
Q. (BY MR. HUDSON) All right. Well, let's see if we can make it a little bit more clear. So we're talking about the Senate Bill 1. Senate Bill 1 contains the provision of 276 that you're challenging in your lawsuit; is that right?
A. If you could, clarify which legislative session for the senate bill you are referring to that you'd like us to agree on.

Q. Sure, the 87th Legislature.
A. I believe the one that I am challenging was part of the Third Special Session of the Legislative 87th Session.
Q. That's my understanding as well --
A. Okay.
Q. -- and I just want to make sure you understand when I'm referring to Senate Bill 1, I'm referring to the Senate Bill 1 that you're challenging. Can we agree that we're both talking about the Senate Bill 1 from the Third Special Legislative Session passed during the 87th Legislature and signed by the governor in 2022 -- 2021?
A. On that, we can agree, yes.
Q. Gotcha. Okay.
All right. So when did you first hear about Senate Bill 1?
A. Sometime the summer of 2021.
Q. When did you first hear about the provision that you're challenging?
A. Frankly, I don't remember the exact date; but the summer of 2021.
Q. Did you reach out to anybody in the legislature to discuss the senate bill provision that you're challenging in this lawsuit while the legislation was pending?

A. Yes.
Q. Who did you talk to?
A. I can't remember every single conversation with each representative; but in the course of my work, it's my duty on behalf of Harris County to inform and educate representatives as to the bills that might affect Harris County and the elections department.
Q. So when you say it's your job to inform and educate, how did you go about informing and educating legislators during the Third Special Session of the 87th Legislature about the provision of Senate Bill 1 that you're currently challenging?
A. My office drafted a letter that we sent to all representatives in the Harris County region detailing the provisions of the law that we thought would negatively impact voters and the conduct of elections in Harris County.
Q. And did the draft letter that you're referring to also include Chapter 276.016(a)(1)?
A. I can't remember if it was specifically referenced in that manner.
Q. Aside from sending a letter, what else did you do to inform and education legislators about your concerns over Senate Bill 1?
A. I visited Austin to speak to different

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legislators, and I testified in front of both the House and Senate committees that this bill was referred to.
Q. When did you visit Austin?
A. I can't remember the exact dates right now.
Q. Was it in the summer?
A. Yes, it was over the summer of 2021.
Q. Was it during the Third Special Session?
A. Yes.
Q. You'd agree with me the Third Special Session ran from, I believe, September 20 through October 20?
A. I don't remember the exact dates. To that point, I visited the legislature multiple times that summer of multiple special sessions.
Q. Did you talk to any legislators specifically about your concerns with 276.016(a)(1), the provision you're challenging for this lawsuit?
A. Yes. Among other topics, I would have covered the solicitation provision regarding mail ballots.
Q. All right. So who do you specifically recall talking to about Chapter 276.016(a)(1)?
A. I can't remember right now everyone who I spoke to specifically.
Q. Can you remember anybody?
A. Vice Chair Jessica Gonzales, representatives of the Mexican American Legislative Caucus,

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Senator Carol Alvarado.
Q. Anyone else?
A. Representative Chris Turner. What's his name, starts with P?
Representative Jarvis Johnson. Those are the top names coming to my head.
Q. You mentioned the Mexican American Legislative Caucus. Is that a group also known by the acronym MALC?
A. Yes.
Q. Do you recall whom from MALC you spoke with?
A. I briefed members of the Mexican American Legislative Caucus several times, and so there were a number of people who would have been in that briefing.
Q. You said you briefed MALC. What does that mean?
A. I was invited by the staff of MALC to brief their members on the impacts that Senate Bill 1 and related election bills would have on the conduct of elections in Texas.
Q. Which staff members?
A. Jaclyn Uresti. I'm blanking on the names. Jaclyn Uresti's the main staffer.
Q. Do you recall any specific members of MALC that you briefed upon invitation by Jaclyn Uresti?
A. Representative Armando Walle,

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Representative Rafael Anchía are the two top names that come to mind.
Q. And I'm looking at my notes here. I know we talked a moment ago about when SB 1 was passed, the SB 1 we're referring to. Going back over my notes, it appears to me that the SB 1 we're referring to was passed in the Second Special Session. Is that accurate based on your understanding?
A. Yes.
Q. Okay. I know we talked about the Third Special Session; but you would agree with me that we're talking about the SB 1 from the Second Special Session, right?
A. Yes.
Q. Does that change any of your -- any of the answers that you've given since we first tried to establish that a few minutes ago?
A. No.
Q. When did you first consider filing a lawsuit in this case?
A. Over the summer of 2021.
Q. Why didn't you?
A. Why didn't I --
Q. In the summer of 2021?
MR. FOMBONNE: Objection. I'll instruct

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the witness not to answer to the extent her response would reveal any privileged communications with her counsel.
MR. HUDSON: Sure.
Q. (BY MR. HUDSON) Do you understand your attorney's advice?
A. Yes.
Q. Are you going to follow that advice?
A. Yes.
Q. Is there anything you can tell me about the decision not to file a lawsuit sooner that is outside the attorney-client relationship?
A. No.
Q. Have you talked to anybody other than your attorneys about your decision on the timing of your lawsuit?
A. No.
Q. Now, I believe you prepared a Declaration with regard to your testimony in this litigation; is that right?
A. Yes.
Q. I'll put this up for you.
All right. I dropped into the chat function what I'm going to mark as OAG 2. Go ahead and pull that up and take a look at it, and let me know

after you've finished.
(Exhibit 2 marked.)
THE WITNESS: Just confirming I've successfully downloaded the document, and I'm reading it now.
MR. HUDSON: Okay.
THE WITNESS: I'm ready for your questions.
Q. (BY MR. HUDSON) Well, let me go ahead and throw this up on the screen here. Do you see my screen?
A. Yes.
Q. Do you see where it says Exhibit A there?
A. Yes.
Q. So I'll represent to you that this was filed along with Preliminary Injunction Motion as Exhibit A. For purposes of identification, this is OAG 2; but it's also Document Number 7-1, filed in 21-cv-1223. Down here on the first page, do you see there at the top it says In the United States District Court for the Western District of Texas, San Antonio Division?
A. Yes.
Q. And in the middle of the page it says Declaration of Harris County Elections Administrator Isabel Longoria in Support of Motion for Preliminary Injunction. Did I read that correctly?

A. Yes.
Q. Having had a chance to review this document, did you prepare this Declaration yourself?
A. No.
Q. Who prepared it for you?
A. The County Attorney's Office, my counsel prepared it.
Q. Did you have any hand in writing it?
A. Yes, I reviewed drafts and made edits.
Q. Down at the bottom of the page -- or the last page -- this is page 8 of 8 of that same document -- do you see where I'm highlighting here? It says, "Respectfully submitted," and underneath that there's a line. It says, "Declarant - Isabel Longoria." Did I read that correctly?
A. Yes.
Q. And is that your signature?
A. Yes.
Q. All right. So this is effectively your testimony; is that right?
A. Yes.
MR. FOMBONNE: Objection.
Q (BY MR. HUDSON) So let's go ahead and talk about this. Paragraph 5, follow along with me. It says, "I am a strong proponent of encouraging and

enabling all registered voters in Harris County to exercise their rights to cast a lawful ballot." Did I read that correctly?
A. Give me one second here.
My bad. Can you read that again?
Q. Sure. "I am a strong proponent of encouraging and enabling all registered voters in Harris County to exercise their rights to cast a lawful ballot." Did I read that correctly?
A. Yes.
Q. The next sentence reads, "In particular, I encourage eligible voters to request mail-in voting applications so that they can lawfully vote by mail and educate them about the mail-in voting process." Did I read that correctly?
A. Yes.
Q. In regard to encouraging eligible voters, let me ask you: As the Elections Administrator for Harris County, you don't offer money in exchange for someone voting by mail, do you?
A. No.
Q. And you don't accept money in exchange for encouraging someone to vote by mail, do you?
A. No.
Q. The next line on your Declaration reads,

"Although many voters in Harris County are eligible to vote by mail, they are not all aware of the process required to obtain and submit a mail-in ballot, which is cumbersome and not immediately obvious." Did I read that correctly?
A. Yes.
Q. Let's talk about that for a moment. So can you tell me what the process is for obtaining and submitting a mail-in ballot?
A. An individual submits an application to my office to vote by mail. My office reviews that application to determine their eligibility. If accepted, we send them a mail ballot for the election that they selected. If flagged for rejection, we notify the voter that their mail ballot application was flagged for rejection, so forth and so on. The voter votes by mail, returns it to us. The Signature Verification Committee accepts it. Then it is tallied appropriately by my office, and that result is conveyed to the canvassing entities.
Q. Is that the complete process?
A. That's a good summation of the process.
Q. What steps of the process are missing from your summation?
A. I could provide more detail into the actual

verification process within my office in more detail if you'd like.
Q. Well, I just want to make sure that there's not a step of the process that I'm missing. So you said it was a summation. I'm just asking: With regard to all of the steps you just outlined, are there any steps that you've left out?
A. No.
Q. Are any of the steps that you just identified, in your mind, solicitation of mail-in ballots?
A. What I described for you was the process of processing a mail ballot application. If you could, clarify the question.
Q. Sure. You've identified steps in processing a mail ballot application. My question is: To your mind, are any of those steps in that process that you just outlined solicitation?
A. No.
Q. So it would be fair to say that you can perform all of those steps without soliciting a mail-in ballot. Is that fair?
A. Yes.
Q. Are there any other considerations that a person seeking to vote by mail in Harris County -- well, let me rephrase that.

Are there any other steps other than the steps that you've just described to the Court that a person seeking to vote by mail would need to take to vote by mail in Harris County?
A. Yes.
Q. What other steps would a voter need to take that you haven't outlined in your process?
A. They would have to acquire the mail ballot application itself.
Q. How would a voter go about doing that?
A. Currently in Texas with the SB 1 implemented, they can download the form from harrisvotes.com -- sorry. They can download the mail ballot application from harrisvotes.com, print it out, and mail it to our office; or they can call our office or fax our office, I believe even e-mail our office, to request a mail ballot application.
Q. Of those four ways I've understood you to say they can be downloaded by the applicant. An applicant can e-mail. An applicant can fax. An applicant can call. Is that right?
A. Yes.
Q. Can an applicant also send a letter to request a mail-in ballot?
A. Yes.

Q. Does responding to any of those methods from a voter, to your mind, amount to solicitation of a vote-by-mail ballot?
A. No.
Q. Give me one second. I need to turn off Teams because apparently people can't stop.
All right. I'm going to take you back to the top of 5. You mentioned in your Declaration in Paragraph 5, "I am a strong proponent of encouraging and enabling all registered voters in Harris County to exercise their rights." What do you do to encourage voters in Harris County to vote by mail?
A. Can you clarify if that question is post SB 1?
Q. Sure. Let's actually start before SB 1. So prior to the passage and enactment of Senate Bill 1, what did you do to encourage and enable all registered voters in Harris County to vote by mail?
A. I sent mail ballot applications to eligible voters over 65. I ran social media campaigns to encourage and recommend that voters vote by mail in a pandemic if there were health concerns and, again, if they were eligible. I met with nonprofit organizations locally to confer on the best ways to educate, recommend, and encourage people in Harris County who were eligible to vote by mail. And I attended, you

know, public events or spoke at public events and in those comments, among other things, encouraged people to vote by mail if they were eligible to do so.
Q. Since Senate Bill 1 was enacted, what do you do to encourage Harris County voters to vote by mail?
A. Since the enactment of Senate Bill 1, I'm by law not allowed to encourage anyone to vote by mail any longer.
Q. Understood. My question is: What have you done to encourage people to vote by mail in Harris County since the enactment of Senate Bill 1?
A. Since the enactment of Senate Bill 1, I have not done anything to encourage anyone to vote by mail.
Q. Have you read Senate Bill 1?
A. Yes.
Q. In particular, have you read the provision that you're challenging through your lawsuit?
A. Yes.
Q. See my screen?
A. Yes.
Q. So this is Section 276.016 of the Texas Election Code. Do you see that?
A. Yes.
Q. It says Unlawful Soliciting and Distribution of Application to Vote By Mail. Did I read that

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correctly?
A. Yes.
Q. "(a) A public official or election official commits an offense if the official, while acting in an official capacity, knowingly: (1) solicits the submission of an application to vote by mail from a person who did not request an application." Did I read that correctly?
A. Yes.
Q. Now, that's the provision you're challenging through you lawsuit, isn't it?
A. I don't know specifically what was cited. I can't remember specifically what was cited in the lawsuit.
Q. Okay. So do you think that there are other provisions of the Texas Election Code that you're challenging in your lawsuit?
A. To clarify, I do believe I am challenging this solicitation of mail ballot applications. I don't know if any other Texas Election Code provisions are specifically cited in my lawsuit.
Q. Okay. In the highlighted portion, which is 276.016(a)(1), do you see the word "encourage" in there anywhere?
A. I do not.

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Q. Do you see any affirmative prohibition against encouraging vote by mail?
A. I don't see the word "encourage" in what you've highlighted on the screen.
Q. Okay. But, to your mind, do you think the word "solicit" incorporates the word "encourage"?
A. Yes.
Q. Okay. Why do you think that?
A. I understand the words "solicit" and "encourage" to be synonyms in taking an active role in doing just that, in eliciting, soliciting someone's mail ballot application.
Q. So is that the only basis for your belief that encouragement is banned by Section 276.016(a)1?
A. Can you clarify the question?
Q. Sure. I understood you to just say that the reason you think you're not allowed to encourage vote-by-mail applications is because you believe that the word "solicit" is synonymous with the word "encourage." Is that right?
A. I think it's more accurate to say that you asked me if I encouraged mail ballot applications since SB 1; and I consider, yes, "encourage" and "solicit" to be synonymous enough that I have solicited mail ballot applications since the implication of -- or since the

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enactment of Senate Bill 1.
Q. Okay. That wasn't my question.
MR. HUDSON: So I'm going to object to nonresponsive.
Q (BY MR. HUDSON) My question is simply: Is there any basis other than your interpretation that Chapter 276.016(a)1 makes the word "solicit" synonymous with the word "encourage" as the basis for you belief that you're not allowed to encourage vote by mail?
MR. FOMBONNE: And I'm just going to object and instruct the witness not to answer the question to the extent it would reveal any privileged conversation with counsel.
Q. (BY MR. HUDSON) Okay. And to be clear on the record, I'm not asking for conversations with your counsel. I'm just asking you: What is your basis for determining that Chapter 276.016(a)1, which you've testified does not include the word "encourage," incorporates encouragement as part of solicitation?
(Simultaneous speakers.)
THE WITNESS: I'm going to have to take a break and confer with my counsel --
MR. HUDSON: Sure.
THE WITNESS: -- on what would be considered privileged information.

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MR. HUDSON: Sure. We can go off the record.
THE REPORTER: We're going off the record at 2:20 p.m.
(Off the record from 2:20 to 2:35 p.m.)
THE REPORTER: We're back on the record at 2:35 p.m.
Q (BY MR. HUDSON) We took a break there for a little over ten minutes, Ms. Longoria. Were you able to confer with your counsel?
A. Yes.
Q. Okay. After having conferred with them, are you able to answer my question?
A. Would you do me the grace of repeating it, please?
Q. Certainly. So my question is: Aside from, I believe your testimony was the fact that you believe the word "solicit" and "encourage" are synonymous, are there any other reasons why you think you're not allowed to encourage vote by mail for Harris County voters?
A. Outside of conversations with my counsel, just my general understanding of those words, that's what I was basing it off of.
Q. All right. So the record's clear: So there's nothing outside of conversations with counsel, your

general understanding of the terms "solicit" and "encourage" and your understanding of what you believe is the synonymous relationship between "solicit" and "encourage." Is that right?

A. Yes.

Q. Let's talk a little bit about the, I believe, four things that you identified that you did before Senate Bill 1 was enacted. I believe the first was you ran campaigns about vote by mail; is that right?

A. I believe I said I ran social media campaigns related to voting by mail.

Q. Right, and I agree with that clarification. I was just saying "campaigns" in a loose sense; but to be clear, are you referring to social media campaigns?

A. Yes.

Q. Can you describe for the judge what a social media campaign encouraging, in your words, vote by mail looked like?

A. Information and messaging in the form of Facebook, Twitter, and in some instances Instagram relating to, you know, advising, encouraging eligible voters to vote by mail because of the pandemic or because of other extenuating circumstances they might have.

Q. So I'm going to drop in what I'm going to mark

as OAG 3. Pull that document up when you get a chance.

(Exhibit 3 marked.)

A. I have pulled up the document.

Q (BY MR. HUDSON) Now, I'm showing you on my share screen what's been marked as OAG 3. Do you see that document?

A. Yes.

Q. And for identification purposes, you can look in the bottom right-hand corner. It reads Longoria_000002. Do you see that?

A. Yes.

Q. And I'll represent to you that this is a document that was produced by your counsel in response to a discovery request that I sent in advance of this deposition. Do you understand that?

A. Yes.

Q. Have you ever seen this document before?

A. Can you clarify what you mean by "document" in this sense?

Q. Sure. What I'm trying to get at is: You would agree with me that this is a tweet, right?

A. Yes.

Q. Have you ever seen a -- have you ever seen this particular tweet before?

A. I can't remember if I've seen this particular

tweet.

Q. Well, let's take a look at the top left-hand corner. Do you see where it says Harris County Elections?

A. Yes.

Q. And right next to Harris County Elections, there's a blue checkmark. Do you see that?

A. Yes.

Q. First off, do you -- are you aware of whether Harris County has a Harris County Elections Twitter feed?

A. Yes.

Q. Can you describe to the Court what a Twitter feed is?

A. A Twitter feed is a collection of tweets from a Twitter account.

Q. Are you familiar with who at Harris County operates the Harris County Elections Twitter feed?

A. Yes.

Q. Who is that?

A. Can you specify the timeframe?

Q. Sure. Do you see on the tweet where it says March 5 of 2021?

A. Yes.

Q. On March 5, 2021 are you familiar with who

operated the Harris County Elections Twitter feed?

A. On that exact date, I don't remember.

Q. Is the Harris County -- who operates the Harris County Elections Twitter feed right now?

A. A Mr. Joseph Brown.

Q. Does Mr. Joseph Brown work for you?

A. Yes.

Q. Did the person who sent the tweet on March 5, 2021 under the Harris County Elections Twitter feed also work for you?

A. Yes.

Q. Has there ever been a time when the Harris County Elections Twitter feed was operated by somebody who did not report to you, either directly or in your chain of command?

A. No.

Q. Are you familiar with what the blue checkmark means?

A. Yes.

Q. Can you explain to the Court what the blue checkmark means?

A. I understand the blue checkmark on a Twitter account to mean that it is a certified Twitter account.

Q. What does that mean?

A. I believe it means that Twitter has gone

through steps to verify that that account is exactly who that account says they are or represents to be.
Q. Do you know if there's a difference between accounts with blue checkmarks and accounts without blue checkmarks?
A. Yes.
Q. What's your understanding of the difference?
A. A blue checkmark means that Twitter has verified that the account is who they say they are, who they represent; and a Twitter account without a blue checkmark could mean that Twitter has not verified who runs that account or who they speak.
Q. With regard to the Harris County Elections Twitter feed, were you involved in the process to verify the account to get a blue checkmark?
A. No.
Q. Who at Harris County operated or coordinated with Twitter to complete the verification to get the blue checkmark?
A. I don't know who would have done that.
Q. Would you agree with me that the Harris County Elections Twitter feed is a verified account that is operated solely by the Harris County Elections section?
A. Yes.
Q. All right. Let's look at the tweet itself.

Do you see where it says, "Do you qualify to vote by mail"?
A. Yes.
Q. Now, I presume that this is a picture of some flyer that was issued by the Harris County Elections section. Is that a fair -- is that fair to say?
A. No.
Q. Okay. Have you ever seen the Do You Qualify to Vote by Mail picture that's represented here in the tweet?
A. Yes.
Q. When did you see it?
A. To clarify, I believe that this is a picture of an application to vote by mail and not a flyer regarding voting by mail.
Q. Okay. So it's a terminology issue.
So you would agree that this is a picture of an application to vote by mail?
A. Yes.
Q. And so you've seen this, an application to vote by mail, before, right?
A. Yes.
Q. And is this a true and accurate depiction of an application to vote by mail as of March 5, 2021?
A. I assume so.

Q. Well, you see here in the top left-hand corner this seal next to Harris County Elections?
A. Yes.
Q. What is that seal?
A. It is the current seal of the Harris County Elections Administration Office.
Q. It's attached to the verified --
A. I apologize. Sorry, Counsel. If you wouldn't mind me clarifying, it is the logo of the Harris County Elections Administration Department.
Q. And that logo's next to the Harris County Elections verified Twitter handle, right?
A. Yes.
Q. Now, if we go down to the application for ballot by mail, we see the same symbol, right?
A. Yes.
Q. Do you know who would have printed an application to vote by mail with the Harris County Elections logo on it?
A. Would you mind clarifying the question, please?
Q. Sure. Were you the Elections Administrator in March of 2021?
A. Yes.
Q. Did you direct the production of vote-by-mail

applications bearing the logo of the Harris County Elections division?
A. Yes.
Q. So would it be fair to say that you're the one who organized the production of these applications as depicted in this tweet?
A. Yes.
Q. Is this a true and accurate copy of what you directed to be created and delivered to voters as vote-by-mail applications?
A. Yes.
Q. Now, underneath that picture of an application for ballot by mail, there's a U.S. Postal Service tweet; and it reads, "Tell us you love mail without telling us you love mail." Did I read that correctly?
A. Yes.
Q. And right above that sentence, it's a symbol of the U.S. Postal Service, the word "U.S. Postal Service," and then another blue verification checkmark; is that right?
A. Yes.
Q. Now, do you understand that blue verification checkmark to mean that that tweet was sent by the United States Postal Service?
A. Yes.

Q. And in response to U.S. Postal Service's tweet, someone from Harris County Elections tweeted out a copy of your vote-by-mail application; is that right?
A. It would appear so.
Q. Based on your read and understanding of the provisions of SB 1 that you are challenging in this lawsuit, do you think this tweet qualifies as solicitation?
A. Can you scroll up on that tweet, please -- no, sorry. Scroll down.
(Witness silently reading on-screen exhibit.)
A. Yes.
Q. How does this qualify as solicitation, in your mind?
A. Can you scroll -- the beginning paragraphs educate voters on who is available [sic] and then contains the comments regarding COVID-19.
I'm going -- this is a technical question: Am I allowed to pull this up on my own screen, since it's really blurry, to see if I can read that better?
Q. Sure.
A. To put me back on the map, would you mind repeating that last question?

Q. Sure. Do you think that this tweet qualifies as solicitation in violation of the Texas Election Code provision that you are challenging in your lawsuit?
A. Yes.
Q. Why?
A. This tweet contains an application but also the information in the description here that we sent to voters over 65. So this was, I believe, a copy of the application we sent to voters over 65; and it gets into these provisions, "Please complete the attached application and return it to the Harris County Elections Office." That, to me, signifies an action that I am requesting a voter take; therefore, I would consider that solicitation.
Q. Have you created applications to vote by mail for the upcoming March primary in 2022?
A. Yes.
Q. Did they include a similar instruction on the application to vote by mail?
A. I can't remember. We'd have to pull up the application itself.
Q. Okay. So as you sit here right now, you don't know whether there's an instruction to fill out and return the application by mail on the application by mail?

A. I can't remember what the specific terms or words used on that application we have now are.
Q. Would it be fair to say that, as you sit here, you have not sent out an application similar to the application in this March 5, 2021 tweet in 2022?
A. Correct.
Q. Well, I mean, let me ask you: Part of your lawsuit is premised on your allegation that you are chilled in your activities by SB 1; is that right?
A. Yes.
Q. But your testimony today is that you don't know whether you sit here -- as you sit here, whether the current application to vote by mail contains language that you believe is a solicitation akin to one that was sent out in March of 2021?
A. Can you repeat the question, please?
Q. Sure. Your testimony today is that you don't know whether the applications that you've sent out for vote by mail match the instructions from the application that is included in this March 5, 2021 tweet?
A. I cannot remember without looking at the specific application that we have today what the exact wording is on it, but I know that we are not soliciting applications from voters post SB 1.
Q. So your testimony is, as you sit here, there's

no instruction in the application to vote by mail that directs applicants to fill out the application and return it to you?
A. I can't remember the specific wording on the application right now.
Q. So I'll get the PDF document with this web address on here; but for purposes of this conversation and for the record, I'm dropping in a link to the Harris County website that contains the application to vote by mail; and I'm going to mark this as OAG 4.
(Exhibit 4 marked.)
Q (BY MR. HUDSON) Go ahead and click on that link, if you would, and take a look at that document.
A. Sure.
Q. Have you ever seen that document before?
A. Yes.
Q. What is that document?
A. I believe it to be the most current mail ballot application offered on our website, the Harris County Elections website.
Q. Is it a true and accurate copy of the application?
A. Yes.
Q. And do you see up at the top here -- this may be difficult because you might see a black bar at the

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top. Do you see the web address at the top?
A. Yes.
Q. All right. Is that an accurate representation of the website where I can find the application that's currently on your screen?
A. Yes.
Q. Let's scroll down to the bottom. I'm going to highlight How to Return. Do you see that?
A. Yes.
Q. Follow along with me. It says, "Return this application by mail or drop off in person at any Harris County Elections branch location." Did I read that correctly?
A. Yes.
Q. And, to your mind, the language requiring the return of the application is not the same as the language requiring the return in the tweet that was sent in March of 2021?
A. It is not the exact same wording.
Q. What's different about those two directions that you believe changes one from solicitation to not solicitation?
A. The difference is not the wording itself but the form that it is in. This is an application that voters must know about and seek on their own to

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download. The other was a copy of the actual application in, essentially, a letter or notice that we sent to voters soliciting their mail ballot application. So an -- essentially, an active or passive way of receiving this application.
Q. Okay. So if I understand your testimony correctly, the problem that you have is you would like to send out applications akin to the ones you sent out via Twitter; but under current law, you have to just simply put up the application and allow the voter to find it. Is that right?
A. That is one of the -- one of the methods that I would otherwise like access to in soliciting mail ballot applications from voters.
Q. Okay. So your testimony is that you believe you are prevented from sending out unsolicited applications for people to vote by mail; is that right?
A. No.
Q. Okay. Can you explain to me, then, what you mean because I don't think I follow when you say that's one of the ways you'd like to access vote by mail?
A. Soliciting can happen in multiple ways, like, speech happens in multiple ways, which is the core of this case. It can be sending letters, sending applications, going to events, and others encouraging,

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recommending, and soliciting mail ballot applications from voters.
Q. And, again, you would agree with me, the word "encourage" doesn't appear in the provision of SB 1 that you're challenging, right?
A. The word itself does not appear.
Q. The word "recommending" also does not appear; isn't that true?
A. We'd have to go back and look at it again.
Q. Go ahead and take a look at the language from 276.016 that I've currently shared on your screen. Let me know if you see the word "recommend" in there.
A. I do not see the word "recommend."
Q. Okay. So you would agree with me that the law that you're challenging doesn't include the word "recommend," right?
A. This provision you have highlighted does not include the word "recommend."
Q. Well, is there another provision that I'm missing that you're also challenging that includes the word "recommend"?
A. I apologize. When you said that "the law," I didn't know if that was a global term or a specific term, so making sure, to be specific, that what you have highlighted here doesn't have the word "recommend." But

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outside of what you have highlighted here...
Q. Well, for the benefit of the record, I've highlighted Chapter 276.016(a)(1), which I understand to be the provision that you're challenging in this preliminary injunction; is that right?
A. Understood. Yes.
Q. And in that section, the word "recommend" doesn't appear; is that right?
A. Correct.
Q. Nor does the word "encourage," right?
A. Correct.
Q. In fact, the only word that appears is the word "solicits," right?
A. Not to be obtuse, multiple words appear; but the one you had the cursor over was the word "solicits."
Q. All right. So the tweet that you -- that your Section sent out on March 5, 2021, you say you'd like to be able to use that now; but you're not allowed to, all because of 276.016(a)(1). Is that right?
A. Yes.
Q. And you're concerned that you're going to get prosecuted if you send out an application that looks like the one that your Section sent out on March 5 of 2021; is that right?
A. Yes.

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Q. Do you know who Kim Ogg is?
A. Yes.
Q. Who is Kim Ogg?
A. The District Attorney of Harris County.
Q. Are you friends with Kim Ogg?
A. No.
Q. Have you ever met her before?
A. Yes.
Q. Have you met her since SB 1 has gone into effect?
A. I met her before SB 1 went into effect.
Q. All right. Let me ask it a different way because that was kind of clunky. So have you talked to Kim Ogg about SB 1 since SB 1 has gone into effect?
A. No.
Q. Did you talk to Kim Ogg before SB 1 went into effect about SB 1?
A. No.
Q. Have you talked to anybody at the Harris County Attorney's Office -- actually, let me clarify. Have you talked to anybody at the Harris County District Attorney's Office about SB 1 since SB 1 has gone into effect?
A. No.
Q. Have you talked to anyone at the Harris County

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District Attorney's Office about SB 1 before SB 1 went into effect?
A. No.
Q. So it'd be fair to say that no one from the prosecutorial agency responsible for prosecuting you for violating SB 1 has talked to you about what SB 1 means, right?
MR. FOMBONNE: Object to the form.
A. Can you repeat the question, again?
Q (BY MR. HUDSON) Sure. You would agree with me that you have not talked to anyone from the prosecuting agency, the Harris County District Attorney's Office, about potential prosecution for violating SB 1 either before or since SB 1 has gone into effect?
A. I don't believe I've spoken to anyone personally, huh-uh.
Q. Have you spoken to anyone at the Office of the Attorney General about SB 1, either before or after it went into effect?
A. Just you today.
Q. Have you spoken to Ken Paxton about SB 1, either before or after SB 1 has gone into effect?
A. No.
Q. Have you spoken to anyone at the Texas

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Secretary of State's Office about SB 1, either before or after it's gone into effect?
A. Yes.
Q. Have you talked to anyone at the Secretary of State's Office about Section 276.016(a)(1) about SB 1, either before or after it's gone into effect?
A. No.
Q. Why not?
A. Can you clarify the question? "Why not" what?
Q. Why have you not talked to anybody at the Secretary of State's Office about what Section 276.016(a)(1) means, either before or after SB 1's gone into effect?
A. In regards to my concerns about being convicted of a crime or what I am allowed to do or not do under the law, it's my understanding that it's the job of the County Attorney's Office to advise me on what actions I can take.
Q. Okay. And have you, in fact, talked to the Harris County Attorney's Office about SB 1, Section 276.016(a)(1)?
MR. FOMBONNE: Objection.
I'll instruct the witness not to answer about the substance of the discussions, but you can answer as to whether or not you did speak to us about

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it.
A. Yes, I've talked to the County Attorneys as they are my counsel in this matter.
Q. (BY MR. HUDSON) Okay. How many attorneys have you talked to with the Harris County Attorney's Office about 276.016(a)(1)?
A. Oh, boy. At least six attorneys.
Q. They are pretty well staffed over there, right?
A. I don't know how well or not well they are staffed according to other offices.
MR. FOMBONNE: Can I answer that question? It's misleading, Eric. You should see our budget for next year.
MR. HUDSON: Fair enough.
Q (BY MR. HUDSON) You would agree with me that the Harris County Attorney's Office does, in fact, have a legal department, right?
A. Yes.
Q. And they have provided legal advice -- and, again, I'm not asking you what that advice is -- but they have provided legal advice to you about complying with Senate Bill 1, right?
A. Yes.
Q. And, in particular, I understand that you have

talked to at least six attorneys about complying with Section 276.016(a)(1); is that right?
A. Yes.
Q. During the course of preparing for your deposition, did you look at any of the pleadings in the case?
A. Can you clarify what --
Q. Let me ask you this --
A. Yeah --
Q. I was about to say --
A. -- I'm not a lawyer.
Q. Yeah. Do you know what a pleading is?
A. I don't know the legal definition of a pleading, but I know generally what a pleading is.
Q. Okay. So here's kind of a rough-out of a pleading: It's anything that's filed in -- any of the papers filed in the case. Does that make sense?
A. Yes.
Q. Now, whether I'm right or wrong, can we agree that that's what I'm referring to when I'm talking about a pleading?
A. Apologies. Yes.
Q. Okay. Now, have you seen any of the pleadings that have been filed by Kim Ogg in this case?
A. No.

Q. Are you aware that Kim Ogg filed what's called a Stipulation with the trial court?
A. Yes.
Q. What's your understanding of the Stipulation that was filed by Kim Ogg?
A. Again, having not seen the specific wording but understanding broadly and not being a lawyer, I understand it to mean that, at least while this is, essentially, an active, recurrent lawsuit, that she will be refraining from bringing charges against me.
Q. So I'm not going to bring up the document, but I guess I'll ask you: You know, I understand that you're not taking actions because you're concerned about being prosecuted. Does the fact that the Harris County District Attorney's Office has represented that they don't intend to bring any prosecution until a final, non-appealable order is entered by a Court put you at ease about what you can and cannot do under Senate Bill 1?
A. No.
Q. Why not?
A. It's the duty of the District Attorney or it's my understanding the AG can bring charges against me, so -- or there's other entities who could bring charges against me. She's got an election task force dedicated

specifically to election issues like this; and so whether there is a pause in her actions or not because of this lawsuit does nothing to abate my overall fears and concerns in the core principle of why I'm bringing this case forward.
Q. But you would agree with me that Kim Ogg has represented to the Court, at least, that she does not intend to bring any criminal prosecution until a final, non-appealable order has been entered in this litigation, right?
A. I'll say not having seen the document and not knowing all legal terms, I can at least say that if that means she's not bringing charges against me while this lawsuit or question is active, then, yes. I'm not a lawyer. So forgive me if I don't know those exact terms.
Q. Understood. It'd probably be easier just to show it to you. So just one second.
(Exhibit 5 marked.)
Q. (BY MR. HUDSON) I put into the chat function what I'm going to mark as Defendant -- or OAG 5. Go ahead and download that and tell me when you've had a chance to take a look.
A. I've read that document now.
Q. Now, do you see the document I just put on the

screen?
A. Yes.
Q. I'll represent that this is a copy of a document that I just showed you. For purposes of citing it, this is Document Number 35, in 21-cv-1223. This is Longoria v. Paxton, and this is the Agreed Stipulation filed by Kim Ogg. Do you see that?
A. Yes.
Q. I'll take you down to Paragraph 2. Do you see Paragraph 2?
A. Yes.
Q. Follow along with me. It says, "Ogg stipulates and agrees not to enforce Section 276.016(a)(1) of the Texas Election Code challenged in the above-styled and numbered cause until such time as a final, non-appealable decision has been issued in this matter." Did I read that correctly?
A. Yes.
Q. Do you have any idea what a final, non-appealable decision is?
A. No.
Q. Do you know whether the preliminary injunction, if you're successful, is a final, non-appealable decision?
A. No.

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Q. Are you aware whether this case will continue if a preliminary injunction is or is not entered?
A. Can you repeat that question, please?
Q. Sure. Well, I'll just represent to you a preliminary injunction is exactly what it sounds like. It's preliminary. It's not final. Can we at least agree that "preliminary" means that it is not a final decision?
A. Yes.
Q. So what you're seeking in this case is a preliminary injunction at this time; is that right?
A. Yes.
Q. So, presumably, you'll want a permanent injunction down the line, fair?
A. I don't know kind of on the legal strategy or what the legal terms mean on this. Again, I'm not trying to be obtuse. It sounds like some legalese.
Q. Well, let me see if I can make it a little bit simpler. You at some point want a final ruling from the judge in this case that resolves the litigation; is that right?
A. Yes.
Q. And you understand that a preliminary injunction does not fully and finally resolve this litigation, don't you?

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A. Yeah, I can accept at a general level that's what you're representing to me. How about that?
Q. Do you have any reason to dispute that?
A. I'm not a lawyer; but other than that, I've got no reason other than not knowing specific legal terms.
Q. Okay. Well, based on that understanding, would you agree with me that, regardless of the outcome of the preliminary injunction next week, Kim Ogg is not going to prosecute you, at least until such time as a final non-appealable decision has been made?
A. That's what she seems to represent in this document.
Q. Okay. Does that change your mind about whether you're concerned about prosecution under Section 276.016(a)(1)?
A. No.
Q. Why not?
A. I understand that -- I believe, if I understand correctly, the Attorney General's Office, your office, can bring charges against me; and regardless of whether Kim Ogg can bring charges against me or not, it could still be against the law. Again, not understanding the legal terms; but, essentially, a crime is a crime.

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Q. So you're concerned both because of prosecutorial ability of the Harris County District Attorney's Office and because you perceive that the Office of the Attorney General also has some way to prosecute you under 276.016(a)(1); is that right?
A. That is my understanding.
Q. And, again, you haven't spoken with anybody at the Attorney General's Office about any intent to bring charges against you; is that fair?
A. Correct.
Q. And the same way with Ms. Ogg, aside from this stipulation, which says what it says, you haven't spoken with anybody at the Harris County District Attorney's Office about whether the Harris County District Attorney's Office intends to bring charges against you; is that fair?
A. Correct.
Q. You don't have any knowledge of anyone attempting to bring criminal charges against you for violating Section 276.016(a)(1); is that right?
A. That is correct.
Q. Now, let's go back to the documents.
Now, I understand, again, that you want to send out mail-in applications; and was that -- let me ask you this: Was that part of the social media

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strategy that you'd like to run is sending out unsolicited mail-in applications via Twitter?
MR. FOMBONNE: Object to the form.
A. I haven't contemplated, because SB 1 does not allow me to, the specific messaging or content of any messages that we would put out on social media.
Q. (BY MR. HUDSON) So your testimony today is that you haven't even contemplated what kind of social media campaign you would run because of SB 1?
A. I haven't been able to compliment -- sorry -- contemplate or come up with exact wording and the exact tweets and the exact messages I would put out because of -- the campaign because SB 1 already prohibits me from doing that.
Q. So your testimony today is that SB 1 prohibits you from even contemplating a social media campaign?
A. I don't believe that SB 1 prohibits me from contemplating such a campaign.
Q. Do you think SB 1 prohibits you from conducting any form of social media campaign?
A. No.
Q. So you would agree that SB 1 doesn't prohibit you from conducting social media campaigns?
A. Correct.
Q. And your testimony today is that you have not

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contemplated what a social media campaign would look like because you're unsure about SB 1; is that fair?
A. I'll clarify to say that I can't represent to you what any specific tweet, post, et cetera, might be for such a campaign; but I have, like, the intent. If I was allowed to under the law, I would otherwise do a social media campaign specifically regarding the solicitation of mail ballot applications.
Q. Well, so I thought I just understood you to testify just a moment ago that SB 1 doesn't prohibit you from conducting a social media campaign.
A. SB 1 does not prohibit me from conducting a social media campaign, but it would prohibit me -- or it does prohibit me from conducting one as it relates to the solicitation of mail ballot applications.
Q. And as you sit here right now, you have not undertaken any effort to figure out what kind of social media campaign you could run in compliance with SB 1; is that fair?
A. Yeah, so the law currently prohibits me from running a social media campaign soliciting mail ballot applications.
Q. Understood. My question's a little bit different than the one you're answering. My question is specifically: You agree with me that social -- that

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SB 1 does not prohibit you from operating social media campaigns, fair?
A. Broadly speaking, yes.
Q. And SB 1 doesn't prohibit you from sending out tweets about mail-in ballots; you would agree with that, wouldn't you?
A. Correct.
Q. Your concern is you want to solicit people by Twitter or some other social media mechanism, and your contention is that SB 1 prohibits that; is that fair?
A. That in prohibiting solicitation, yes, that it would prohibit, you know, a social media campaign as one of my forms of speech.
Q. And your testimony today is that you have not attempted to figure out where the line is on solicitation to operate a social media campaign concerning mail-in balloting; is that right?
A. No.
Q. Okay. What is your testimony today?
A. That --
MR. FOMBONNE: Hang on, Isabel.
Object to the form.
THE WITNESS: Sorry.
A. I understood your initial question to ask specifically had I considered, you know, specific

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messaging that I would include in a social media campaign and I have not included because it's illegal for me to just even conduct a social media campaign regarding solicitation. So if your original question -- please restate it if I got it wrong -- I can't speak to an exact tweet or the exact content of every item I would put in a social media campaign.
Q. (BY MR. HUDSON) Well, we have identified at least one tweet today that was a mail-in application delivered on March 5, 2021, right?
A. Correct.
Q. And your contention today is that you wouldn't be allowed to send out that particular tweet with that particular mail-in application because you believe that that would violate SB 1, specifically, 276.016(a)(1); is that right?
A. Yes.
Q. Are there any other tweets that you've sent out previously you believe you would not be allowed to send out under SB 1?
A. I honestly can't remember every tweet that our account has sent out, so we would have to review those specifically.
Q. Sure. Are you aware that your Counsel sent screenshots of your Twitter feed at Harris County

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Elections as part of your discovery responses?
A. Yes.
Q. I'll put into the chat function what I'm going to mark as -- I believe we're up to OAG 6.
(Exhibit 6 marked.)
Q (BY MR. HUDSON) Go ahead and take a look at that, and tell me when you're finished.
A. I have now seen that tweet.
Q. Again, we see the logo that we talked about earlier with Harris County Elections, and then "Harris County Elections" with a blue checkmark next to it; is that right?
A. Yes.
Q. And, again, that signifies to you that this is the verified Harris County Elections Twitter feed; is that right?
A. Yes, it is the Harris County Elections Twitter feed; but in that time, it was not run by the current Harris County Elections Administration Office.
Q. Who was operating the Harris County Elections Administration Office on November 23 of 2020?
A. Oh, gotcha. Sorry. You're right. By 2023 [sic] we did have an EA office. Please let me correct that. I apologize.
Q. All right. So this tweet, then, is from the

verified Harris County Elections Office, which would be your section, right?
A. Correct, yes.
Q. All right. Do you think you could send this tweet out today without violating SB 1?
A. Yes.
Q. In the bottom right-hand corner it says Longoria 00001 for purposes of identification, and I'll represent to you that we received this from your Counsel. So you would be able to send out this tweet today as part of a social media campaign without violating 276.016(a)(1); is that right?
A. Yes.
Q. And this tweet was part of a social media campaign that you ran in November of 2020, right?
A. Just to clarify, this was several days after the newly office -- the new office was created. So, yes, it was sent as the new office was created.
Q. Sure. My question was different. I'm asking: You agree you'd be able to send this tweet out today as part of a social media campaign without violating SB 1, right?
A. Yes.
Q. I'll drop in what I'm going to mark as OAG 7.
(Exhibit 7 marked.)

Q (BY MR. HUDSON) Take a look at that, and let me know once you've been able to download it.
A. I have been able to download it.
Q. What is this document?
A. It would appear to be a tweet.
Q. For the purpose of identification, down in the bottom right-hand corner it says Longoria_000023. Do you see that?
A. Yes.
Q. And, again, this is a tweet sent from the verified Harris County Elections Twitter feed; is that right?
A. It would appear to be so.
Q. And this tweet was sent on May 17, 2021; is that right?
A. It would appear on this document to be so.
Q. Based on your understanding, is this a true and accurate copy of the tweet that was sent on May 17, 2021?
A. I don't remember, you know, all tweets that were exactly sent on May 17th; but it appears that this was a document from my staff from the election office.
Q. This tweet reads, "Our eight new branch offices will be available to the public to distribute and receive voter registration forms and applications to

vote by mail, as well as assisting with other election related services." Did I read that correctly?
A. Yes.
Q. Do you think this tweet would violate SB 1 if you sent it out today?
A. I honestly don't know. This one's on the edge for me.
Q. Why is it on the edge for you?
A. I'm just trying to decide on the overall messaging since it contains the words "applications to vote by mail."
I'm waiting on you. Did you have another question?
Q. Yeah, sure. I was waiting on you to tell me if there's anything else that you think would mean that this tweet violates SB 1.
A. That's all I've got on my mind right now.
Q. Let me ask you this: Because of SB 1, is it your testimony today that you would not send this tweet out for fear that you would be prosecuted for having sent it out?
A. It's my testimony that because of SB 1, I would even have to question a tweet like this.
MR. HUDSON: Objection, nonresponsive.
Q. (BY MR. HUDSON) My question's a little bit

different. I'm asking: Would you not send this tweet out today because you're concerned about being prosecuted under Section 276.016(a)(1)?
A. Yes.
Q. And, again, that's because it uses the phrase "applications to vote by mail"?
MR. FOMBONNE: Objection, mischaracterizes the witness' testimony.
A. I can't say it's only those exact words, but any tweet relating to applications to vote by mail now gives me pause because of SB 1.
Q. (BY MR. HUDSON) Well, I mean, the judge needs to understand what your actual concern is; and so do I. So, I mean, can you please explain to me, aside from the words "applications to vote by mail," what about this tweet gives you pause?
A. Anytime now in my speeches, in social media, anytime I'm contemplating writing information regarding voting by mail just gives me pause. If you're asking me to, you know, rule on this exact tweet, just hearing that, that's now what gives me pause and concern is because of the criminal charges that could be in place if my decision on tweeting this is wrong.
Q. So your testimony today is you don't know whether you would send this tweet, but you have -- it

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gives you pause; is that fair?
A. Yes.
MR. FOMBONNE: Hey, we've been going almost another hour. I don't know if -- Isabel, do you want to take a break?
Counsel, are you -- I don't know if you're in the middle of, like, a line of questioning; but it'd probably be a good time.
(Simultaneous speakers.)
MR. HUDSON: Yeah, we can take a minute.
THE REPORTER: We're going off the record at 3:28 p.m.
(Off the record from 3:28 to 3:45 p.m.)
THE REPORTER: We're back on the record at 3:45 p.m.
Q (BY MR. HUDSON) Make sure I have the right one here. I've dropped in what I'm going to mark as OAG 8.
(Exhibit 8 marked.)
Q (BY MR. HUDSON) Yell when you're able to download that and take a look.
A. Ready.
Q. Have you ever seen that document before?
A. I have not -- I don't recall seeing that exact tweet.

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Q. Okay. For identification purposes, in the bottom right-hand corner, Longoria_000093, do you see that?
A. Yes.
Q. Now, this tweet, again, comes with the logo and the blue verified checkmark of the Harris County Elections Office. Would you agree with that?
A. Yes.
Q. All right. So this was a tweet that was issued by people under your command?
A. Yes.
Q. And it says, "Today the Governor signed SB 1 which creates barriers for seniors and disabled voters. Attached is Administrator Longoria's statement on advocating for equitable access for seniors and disabled voters in Harris County." Did I read that correctly?
A. Yes.
Q. And it goes on to quote you. "Voting by mail is not simply another method to vote - for many senior voters and voters with disabilities, it's their only option to vote. SB 1 makes it a crime for me to encourage those who are eligible to vote by mail to do so, effectively making it impossible to fulfill my sworn duty as Elections Administrator." Did I read that correctly?

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A. Yes.
Q. All right. Your testimony today is that you're not able to fulfill your oath as the Elections Administrator because of SB 1?
A. Can you repeat that question, please?
Q. Sure. Your testimony today is that you're unable to fulfill your sworn duty of Elections Administrator because of SB 1?
A. Yes.
Q. What portions of your job as Elections Administrator are you unable to fulfill because of Senate Bill 1, specifically, Chapter 276.016(a)(1)?
A. I am unable to encourage, advise, recommend, and otherwise help voters in Harris County in making the best decisions for voting and in some instances, as this tweet says, for voters who their only ability to vote is to vote by mail.
Q. Now, in regard to advocating for equitable access, let me ask you this: You were appointed as Elections Administrator, right?
A. Yes.
Q. And that's a nonpartisan position?
A. Yes.
Q. All right. So you're not a Democratic Elections Administrator, right?

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A. Correct.
Q. You're not a Republican Elections Administrator, right?
A. Correct.
Q. Okay. You would agree with me that language about SB 1 being anti-voter is not something that's nonpartisan, is it?
A. Can you restate the question?
MR. FOMBONNE: Object to the form.
Q. (BY MR. HUDSON) Sure. Do you see at the top of this statement where it says, "Elections Administrator Joins Lawsuit Over Anti-Voter Legislation"?
A. Yes.
Q. Do you think calling SB 1 anti-voter legislation is nonpartisan?
A. Yes.
Q. Why do you think it's nonpartisan?
A. It has no allusions to being either Democratic, Republican, or affiliated with any other party.
Q. So your position is that everyone calls SB 1 anti-voter legislation?
A. No.
MR. FOMBONNE: Objection -- hold on.

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Mischaracterizes the witness' prior testimony.
Q. (BY MR. HUDSON) Have you heard Republicans refer to Senate Bill 1 as anti-voter legislation?
A. No.
Q. Have you heard Democrats refer to SB 1 as anti-voter legislation?
A. Yes.
Q. Have you heard members of MALC refer to SB 1 as anti-voter legislation?
A. Yes.
Q. You met with Jessica Gonzales about SB 1; is that right?
A. Yes.
Q. Ms. Gonzales is a Democrat, right?
A. Yes.
Q. Did you hear Ms. Gonzales refer to Senate Bill 1 as anti-voter legislation?
A. I can't remember specifically.
Q. Did you meet with Sylvia Garcia about Senate Bill 1?
A. No.
Q. Did you meet with Chris Turner about Senate Bill 1?
A. Yes.
Q. And did you hear Mr. Turner refer to Senate

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Bill 1 as anti-voter legislation?
A. I can't remember specifically.
Q. Have you talked to any Republicans about Senate Bill 1?
A. Yes.
Q. Have you heard any Republican refer to Senate Bill 1 as anti-voter legislation?
A. Can you be more specific as to the Republicans you're referring to?
Q. Sure. Have you met with any Republican who currently holds an elected office about Senate Bill 1?
A. Yes.
Q. Have any of the elected Republicans that you've met with about Senate Bill 1 referred to Senate Bill 1 as anti-voter legislation?
A. No.
Q. So you would agree with me that, really, only one party is referring to Senate Bill 1 as anti-voter legislation?
A. No.
Q. Can you identify any Republican by name that has identified SB 1 as anti-voter legislation?
A. I would say just because I can't identify any one Republican that I've spoken to, I can't speak for the overall Republican Party's platform and how they

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characterize this bill.
Q. Okay. Fair enough. Let me ask it to you like this: I think we've gone through the people that you've identified that you spoke with about Senate Bill 1, which is Jessica Gonzales, MALC -- I didn't ask about Carol Alvarado. Did you meet with Carol Alvarado about Senate Bill 1?
A. Yes.
Q. She's a Democrat, right?
A. Yes.
Q. Did Ms. Alvarado refer to Senate Bill 1 as anti-voter legislation?
A. Yes.
Q. You met with Jarvis Johnson?
A. Yes.
Q. Jarvis Johnson --
A. Oh, sorry. To clarify, I met with Jarvis Johnson's staff, not him specifically.
Q. You met with Jarvis Johnson's staff, right?
A. Yes.
Q. And did Jarvis Johnson's staff refer to Senate Bill 1 as anti-voter legislation?
A. Yes.
Q. And Jarvis Johnson's a Democrat, right?
A. Yes.

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Q. You met with Jaclyn Uresti, right?
A. Yes.
Q. And did Jaclyn Uresti refer to Senate Bill 1 as anti-voter legislation?
A. Yes.
Q. You met with Representative Anchía; is that right?
A. Yes.
Q. And did Representative Anchía refer to Senate Bill 1 as anti-voter legislation?
A. I can't remember specifically.
Q. So those are the people that you've identified that you talked about SB 1 with at the Texas Capitol; is that fair?
A. I believe I said it was a subset of people that I could remember meeting with.
Q. Now, you would agree with me that the testimony that you've just given is that, in your personal experience, the Republicans that you have spoken with do not refer to Senate Bill 1 as anti-voter legislation; is that right?
A. No.
Q. You disagree that that's what you just testified to?
A. I believe you asked me what Republican elected

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officials and if they referred to it. I do know other Republicans who are not elected officials who have referred to it as anti-voter legislation.
Q. Okay. Who are those people?
A. Personal friends and acquaintances.
Q. Can you identify any of them?
A. Not off of the top of my head. I could give you a list. I don't have it right now.
Q. So, as you sit here, you can't think of any of your Republican acquaintances who refer to Senate Bill 1 as anti-voter legislation?
A. What I'm offering is that I believe your initial question was about the Republican elected officials that I met with and whether or not they have used the terms "anti-voter legislation" or not.
MR. HUDSON: Objection, nonresponsive.
Q. (BY MR. HUDSON) My question's a little bit different than the one you're answering. I'm asking: As you sit here, can you think of any of your Republican acquaintances who have referred to Senate Bill 1 as anti-voter legislation?
A. The ones that come to mind are Lance Gilliam, Sr.
Q. Who is Mr. Gilliam?
A. A developer in the area.

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Q. The area of what?
A. Sorry. A developer in Harris County and a friend of mine.
Q. Anybody else?
A. I can't remember specific names right now.
Q. Okay. Do you think because SB 1 passed, you would not send out the tweet that's currently in front of you again?
A. Can you repeat the question?
Q. Sure. I'm trying to figure out how you've been chilled by SB 1. Do you think that this tweet could go out today from your office without violating SB 1's prohibition against solicitation of mail-in ballots?
A. Yes.
Q. Aside from Twitter, what goes into social media campaigns that you'd like to run?
A. Facebook and Instagram are the other social media campaigns -- or -- sorry -- other social media accounts that my office has access to.
Q. Of those social media accounts, would what gets posted on those accounts, either Instagram or Facebook, be substantially similar to what is posted on Twitter?
A. That's a fair classification.

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Q. Are there any other forms of social media campaign aside from Facebook, Twitter, and Instagram that your office wants to run but doesn't because of SB 1?
A. Not because of SB 1, no.
Q. Why don't you run the other kind of -- well, I guess what are the other kinds of social media campaigns that you want to run?
A. Other social media platforms out there that I am aware of are TikTok, LinkedIn. We don't access those accounts just because generally we are not on those platforms or haven't, you know, engaged in those platforms yet.
Q. You don't want to do an election dance on TikTok?
A. Not yet.
Q. Fair enough.
Okay. So in addition to social media campaigns, you mentioned vote by mail for 65 plus as something that you want to encourage; is that right?
A. Can you repeat that again? What's that term?
Q. Sure. At the beginning of the deposition I asked you: What did you do prior to SB 1 related to vote by mail, and you mentioned four things. You ran social media campaigns. You solicited votes from -- by

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mail for seniors 65 plus. You met with groups. And you attended public events, right?
A. Correct. I believe that's what I represented.
Q. Okay. So we've talked about the social media campaigns. I'm asking you now about what you did before with regard to vote by mail for 65 plus prior to the enactment of SB 1.
A. On social media, you're saying?
Q. No. I understood you to have given those as two distinct examples. And did I misunderstand? Did you have a social media campaign for 65 plus?
A. Bear with me one more time and repeat that question all as one.
Q. Sure. I understood you to say that there were four separate things that you did prior to the enactment of SB 1 that you believe you now cannot do because of SB 1. One of those was running social media campaigns, right; and I think we've exhausted what your social media campaigns are, right? I've shown you tweets. We've talked about Facebook, Instagram, and Twitter and how you would like to use those things to encourage vote by mail; and I understand that you said you don't do that now because of SB 1. Is that right?
A. We don't use social media to encourage voting by mail or to solicit mail ballot applications.

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Q. And I understood the second thing that you told me this morning was you encouraged people 65 plus to vote by mail, and I understood that to be something separate from a social media campaign. Did I misunderstand that earlier?
A. Understood. Yes, we do have social media campaigns that are geared to different demographic groups, seniors being one of those.
Q. All right. So the social media campaign that you're unable to do is you cannot engage with voters 65 plus about vote by mail; is that your contention?
A. My contention is that I cannot encourage or solicit mail ballot applications from those voters over 65.
Q. So, for instance, the tweets that we've looked at today, you cannot send those, in your estimation, to people 65 plus because of 276.016(a)(1); is that right?
A. I can't -- I can't send out tweets that I would consider solicitation, encouragement, recommendation. I do believe I'm allowed to send out tweets, you know, regarding broad issues of the election office.
Q. The third thing that you identified this morning, I believe, was you met with groups; and you

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believe you can't meet with groups now because of 276.016(a)(1). Is that right?
A. I can't meet with groups and discuss the solicitation of mail ballot applications.
Q. Let me ask you this: Do you think you're allowed to talk about 276.016(a)(1) at all?
A. I can speak about the Texas Election Code broadly, yes.
Q. Okay. So you don't have any problem talking about that provision of the code; in other words, you don't think that there's some bar against you talking about 276.016(a)(1), right?
A. I think I am allowed to speak generally about the Texas Election Code, including that provision.
Q. But you're allowed to meet with groups despite 276.016(a)(1), right?
A. Yes.
Q. And you're allowed to talk about 276.016(a)(1) as such, right?
A. Yes.
Q. And do you think you're allowed to talk about problems that you perceive with 276.016(a)(1)?
A. I think that is dependent on what the subject matter of the discussion is.
Q. Let me see if I can do it like this. You

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mentioned earlier in your testimony that you're worried about being prosecuted by the Office of the Attorney General; is that right?
A. Yes.
Q. And you're worried about being prosecuted by the Harris County District Attorney's Office, right?
A. Yes.
Q. Because violating 276.016(a)(1) would be a felony, right?
A. Yeah, I can't believe or -- sorry -- I can't remember if it's -- what kind of felony; but, yes, there is a charge or crime related to it.
Q. How concerned are you?
A. Very.
Q. All right. And are you equally concerned about getting prosecuted by both the District Attorney's Office and the Office of the Attorney General?
A. Yes.
Q. And what you're looking for through this lawsuit is a promise from the Court or a guarantee from the Court that you'll never be prosecuted, right?
A. No.
Q. No, that's not what you're looking for?
A. I don't believe this Court could ever promise me that I would never be prosecuted on any claims.

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Q. Under 276.016(a)(1)?
A. I am looking from the Court for direction on that provision as it applies to me and my ability in speeches.
Q. I guess, can you explain to me what you're expecting the Court to do for you?
A. Sorry. I don't expect the Court to ever -- I don't expect that a Court can promise me that I'll never be prosecuted of a claim, right, or a crime. If you're narrowing it to this claim, yes, I am seeking, right, an opinion or something -- whatever the legal term is -- from the Court on my ability in free speech as it relates to the solicitation of mail ballot applications.
Q. Okay. So what you're looking for is a guarantee from the Court that you're not going to be prosecuted for violating 276.016(a)(1), fair?
A. Yes.
Q. And you understand that if -- the Court, whether it grants a preliminary injunction next week or it doesn't, that preliminary injunction's not final. You understand that, right?
A. I believe we covered that earlier, yes.
Q. Okay. So do you also understand that if the Office of the Attorney General and the other Defendants prevail and you lose your lawsuit, even if there is an

injunction, you can be prosecuted for things that you do between now and a final trial, right?
A. Yes.
Q. Okay. And, really, what you're looking for out of this lawsuit is, assuming you win, a guarantee from the Court that you won't be prosecuted, ever, under 276.016(a)(1), right?
A. Can you repeat that question? How is it different from your earlier question?
Q. Well, it's not -- I don't think it's necessarily different. I'm just trying to understand where you're going with the train of thought.
So let me ask it again. What you're looking for from the Court is a guarantee that you're not going to be prosecuted, ever, under 276.016(a)(1), right?
A. I think generally, yes, that my freedom of speech is protected.
Q. Okay. Now, are you concerned that if you get a temporary ruling from the Court through a preliminary injunction, that if the Defendants prevail, you can be prosecuted in 2023 for things that you do while the Temporary Injunction's pending?
A. It seems to be getting in a legal question past my capacity; but, yes, I am always scared, right,

of being convicted of this crime. That is why I brought this suit.
Q. Okay. So, I mean, the Temporary Injunction wouldn't resolve your fear, right?
A. Again, I am getting lost in temporary versus final versus what the legal line is. My concern, period, is being convicted of a crime under 276.016(a)(1) -- (1)(a) [sic.]
Q. And you would agree with me that until -- until and unless a final injunction is entered by the Court that's final and non-appealable, you're always going to have that concern, right?
A. I don't know. I'm getting lost in your question here.
Q. Sure. Let me see if I can ask it to you like this: Unless and until a Court resolves in your favor a guarantee that says you can't be prosecuted under 276.016(a)(1), you're always going to be concerned about prosecution, fair?
A. If I understand a Preliminary or Temporary Injunction, that means that there would be a pause on a conviction or me being -- crimes brought against me, right? That's what I'm trying to get at.
Q. Sure. Let me see if I can back it up like this: There is a pause if a preliminary injunction's

entered, right? You understand that?
A. Yes.
Q. But that pause only gets us to the trial of your case. Do you understand that?
A. Yes.
Q. Okay. Now, you understand if the Defendants win, you could be prosecuted for things that occur after the preliminary injunction but before the final trial, assuming the Defendants win. Are you with me so far?
A. I'll have to take your word that that's how the law works.
Q. Okay. So let's assume we live in a world where the Defendants win. You could be prosecuted; and so you would still be concerned about prosecution, right?
A. Yes.
Q. And unless there's a final judgment that guarantees from the Court that you will never be prosecuted, you will always be concerned about being prosecuted under 276.016(a)(1), fair?
A. No.
Q. Okay. So under what circumstances can a Court rule against you and you will no longer be concerned about 276.016(a)(1) and a subsequent prosecution?
A. Again, I understand the pause to mean that

it's there because it is an unanswered question that I could reconsider the risk I am willing to take regarding certain actions in my duty to educate voters.
Q. Could you elaborate on what that means?
A. I think we're -- I understand the law to be that that pause, right, allows me to take certain answers because the Court would say that that is a question that has been contemplated. Now, what the legal definition of a final versus a temporary versus a preliminary, I think that's more of a legal question past my capacity.
Q. Okay. Let me see if I can unknot this a little bit. Do you think if you get a preliminary injunction next week that you can never be prosecuted under 276.016(a)(1)?
A. I think a preliminary injunction next week would allow me to take certain actions regarding the solicitation of mail ballot applications.
Q. Okay. So you would take those actions despite the fact that if the Defendants are successful and it turns out that what you did was solicitation, you could still be prosecuted for it?
A. As I understand it, in that moment it wouldn't be a crime; and so that changes the calculous, then, of my fears.

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Q. Okay. How does it change it?
A. Well, whether something is, you know, actively prosecutable, if that's a legal term, versus a final verdict. I think you seem to be hinging on this word, a final verdict; and, again, it's a legal term beyond my capacity.
Q. Well, you know what the word "final" means, right?
A. I think we've teased this out. I understand what the word "final" means. I don't know what it means specifically in this context or in a legal context.
Q. Okay. Well, let's take it out of the legal context; and let's just talk in plain language. You understand that regardless of the outcome next Friday, your lawsuit's not over, right?
A. Yes.
Q. Okay. And you understand that at some point down the line, there'll be a final trial in which the District Court will enter a final judgment. Do you understand that?
A. Yes, yes.
Q. So there is some period of time between next Friday and that trial in which, depending on what the Court does, you could or could not have a preliminary injunction entered preventing prosecution against

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276.016(a)(1). Are you with me so far?
A. More or less.
Q. Okay. Now, let's assume we live in a world where your lawsuit's unsuccessful. So at the end, the Judge enters a final judgment and says: Ms. Longoria was incorrect, and I'm going to enter judgment in favor of the Defendants.
Now, are you concerned at all that that result may happen?
A. That I could lose this case?
Q. Yes.
A. Sure, I'm concerned I could lose this case.
Q. Okay. So you understand that if you take actions based on next Friday, assuming you get a preliminary injunction, and then you ultimately lose the trial, you could be prosecuted for things that happen between next Friday and whenever the final trial is if you lose. Do you follow me?
A. I don't understand that.
Q. Okay. So, as you sit here today, your understanding of what happens next Friday is that anything you do after a preliminary injunction means you can't be prosecuted under 276.016(a)(1)?
MR. FOMBONNE: Objection, mischaracterizes the testimony.

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A. Yeah, I would have to -- I would have to consult with my legal counsel on what happens after next Friday, depending on what happens after next Friday.
Q (BY MR. HUDSON) So, as you sit here right now, you don't know one way or another whether a preliminary injunction would actually give you the relief that you want?
A. I would have to seek counsel from my counsel about what happens after next Friday.
Q. In your capacity as the Elections Administrator, have you ever requested a legal opinion from the Office of the Attorney General?
A. In my capacity, no.
Q. Are you aware that that option exists?
A. Yes.
Q. Why have you not requested a legal opinion about the scope of 276.016(a)(1) from the Office of the Attorney General?
A. I consult with the County Attorney as my representation on legal matters, and they then seek those opinions from the Attorney General in cases in which they find it relevant to do so.
Q. And, to your knowledge, and without going into what's been discussed with Counsel -- and I'm not asking for anything you discussed with Counsel -- to your

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knowledge, nobody from the Harris County Attorney's Office has requested a legal opinion on the scope of 276.016(a)(1); is that right?
A. I can't remember at this time specifically.
MR. HUDSON: If we can go off the record for about ten minutes, I'm going to take a look at my notes. I might be close on getting finished here.
MR. FOMBONNE: That's fine.
THE REPORTER: We're going off the record --
MR. HUDSON: Let's come back at -- go ahead.
THE REPORTER: Going off the record at 4:17 p.m.
(Off the record from 4:17 to 4:31 p.m.)
THE REPORTER: We're back on the record at 4:31 p.m.
Q (BY MR. HUDSON) I pulled back up what I believe is OAG 2. I think that's where we were with your Declaration. Do you see that on the screen?
A. Yeah, which document is this, again?
Q. I believe this is OAG 2. This is your Declaration.
A. Okay. Got it.
Q. Do you see there Paragraph 15 on your screen?

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A. Yes.
Q. It says, "SB 1 actively prevents me from speaking freely about mail-in voting and will continue to do so." Did I read that correctly?
A. Yes.
Q. It says, "In particular, SB 1 is deterring me from engaging in communications that would encourage voters to consider all of their voting options, engaging in outreach to voters regarding the benefits of the vote-by-mail process, educating voters about their rights, and helping voters to submit their respective applications." Did I read that correctly?
A. Yes.
Q. All right. You go on to write, "I am unwilling to risk engaging in communications with voters regarding mail-in voting if it means I could be subject to imprisonment or other penalties, even though I believe these communications are a central part of my duties as an elections administrator to increase voter participation and education." Did I read that correctly?
A. Yes.
Q. All right. Now, today you're concerned about potentially being imprisoned or subject to other penalties, right?

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A. Correct.
Q. And you would agree with me that the outcome of this case is uncertain, right?
A. It has not been decided, correct.
Q. Okay. So if imprisonment and other penalties that you describe in Paragraph 15 are only delayed, not permanently stopped, are you going to be -- continue to be just as concerned today as you would in the future?
A. Yes.
MR. HUDSON: All right. If you guys can give me just two minutes, I've got -- I think I'm about ready to wrap up; but I want to take one last look at my notes.
THE REPORTER: Do you want to go off the record?
MR. HUDSON: If opposing counsel's fine with it, two minutes.
MR. FOMBONNE: Yeah, that's fine.
THE REPORTER: We're going off the record at 4:33 p.m.
(Off the record from 4:33 to 4:36 p.m.)
THE REPORTER: Back on the record at 4:36 p.m.
Q. (BY MR. HUDSON) Ms. Longoria, anything I haven't asked you today you think I should have?

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A. No, sir.
Q. Okay.
MR. HUDSON: We'll reserve.
MR. FOMBONNE: I don't know if other Counsel has questions.
MR. LEAVITT: Yeah, Jonathan, I've just got a couple.
MR. FOMBONNE: Okay.
EXAMINATION
BY MR. LEAVITT:
Q. Ms. Longoria, hi. My name's Randy Leavitt; and I represent Shawn Dick, the Williamson County District Attorney.
A. Good to meet you.
Q. Nice to meet you.
MR. LEAVITT: I'm sorry, guys. I lost Wi-Fi. So if it's delayed or something, it's because I don't have Wi-Fi. We're doing it just on cellular data.
Q. (BY MR. LEAVITT) Ms. Longoria, just a couple of questions. As I read your lawsuit, you're not bringing any kind of a lawsuit against Shawn Dick of the Williamson County Attorney's Office, are you?
A. I don't believe so, no.
Q. Okay. And you're not seeking any attorney's fees against him?

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A. No.
Q. Nor are you seeking any relief from the Court against the Williamson County District Attorney?
A. No.
Q. All right. That's all I have.
MR. LEAVITT: I'll pass the witness.
MR. FOMBONNE: I have no questions.
MR. HUDSON: One last thing on the record: Can we get a read and sign?
THE REPORTER: Yes, and --
MR. FOMBONNE: What did you do for the transcript order this morning, Eric?
MR. HUDSON: I didn't handle it.
MR. FOMBONNE: Oh, that's right.
MR. HUDSON: Yeah, you'll forgive me. I'm -- well, we can go off the record and talk about that.
MR. FOMBONNE: Sure, that's fine.
THE REPORTER: Before we go off the record, Mr. Fombonne and Mr. Leavitt, do you need a copy of the transcript?
MR. FOMBONNE: Yes, that's what I was trying to clarify with Mr. Hudson. We have a hearing next week for which this might be relevant, so we'd request an expedited transcript if possible.

THE REPORTER: Okay. Mr. Leavitt, do you need a copy?

MR. LEAVITT: We'd like the transcript as well, but we don't need a [computer glitch.]

THE REPORTER: I'm sorry. Your last word cut out.

MR. LEAVITT: I said we don't need a video on this one, just the transcript.

MR. FOMBONNE: We don't need a video, either.

THE REPORTER: This concludes the deposition at 4:38 p.m.

(Deposition adjourned at 4:38 p.m.)

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CHANGES AND SIGNATURE

WITNESS NAME: ISABEL LONGORIA DATE OF DEPOSITION: February 4, 2022

PAGE/LINE CHANGE REASON

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I, ISABEL LONGORIA, have read the foregoing deposition and hereby affix my signature that same is true and correct, except as noted herein.

_____

ISABEL LONGORIA

THE STATE OF _____)

Before me, _____, on this day personally appeared ISABEL LONGORIA, known to me (or proved to me under oath or through _____) (description of identity card or other document) to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that they executed same for the purposes and consideration therein expressed.

Given under my hand and seal of office on this _____ day of _____, _____.

_____

NOTARY PUBLIC IN AND FOR

THE STATE OF _____

My Commission Expires:_____

STATE OF TEXAS)

REPORTER'S CERTIFICATION

I, DEBBIE D. CUNNINGHAM, CSR, hereby certify that the witness was duly sworn and that this transcript is a true record of the testimony given by the witness.

I further certify that I am neither counsel for, related to, nor employed by any of the parties or attorneys in the action in which this proceeding was taken. Further, I am not a relative or employee of any attorney of record in this cause, nor am I financially or otherwise interested in the outcome of the action.

I further certify that pursuant to FRCP Rule 30(f)(1) that the signature of the deponent was requested by the deponent or a party before the completion of the deposition and that the signature is to be before any notary public and returned within 30 days from date receipt of the transcript. If returned, the attached Changes and Signature Page contains any changes and the reasons therefore.

Subscribed and sworn to by me this day, February 7, 2022.

_____

Debbie D. Cunningham, CSR

IN THE 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 Attorney General of Texas, KIM OGG, in her official capacity as Harris County District Attorney, SHAWN DICK, in his official capacity as Williamson County District Attorney, and JOSÉ GARZA, in his official capacity as Travis County District Attorney, *Defendants*.	§	Case No. 5:21-cv-1223-XR

APPENDIX IN SUPPORT OF DEFENDANT TEXAS ATTORNEY GENERAL WARREN KENNETH PAXTON'S RESPONSE TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Exhibit B

Deposition Transcript of Cathy Morgan

February 4, 2022

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

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

VIDEOTAPED ORAL DEPOSITION OF

CATHY MORGAN

Friday, February 4, 2022

(REMOTELY REPORTED)

VIDEOTAPED ORAL DEPOSITION OF CATHY MORGAN, produced as a witness at the instance of the Defendants, and duly sworn, was taken in the above-styled and numbered cause on Friday, February 4, 2022, from 9:32 a.m. to 12:18 p.m., before Debbie D. Cunningham, CSR, in and for the State of Texas, remotely reported via Machine Shorthand pursuant to the Federal Rules of Civil Procedure.

--ooOoo--

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(Friday, February 4, 2022, 9:32 a.m.)
P R O C E E D I N G S
THE REPORTER: Today's date in February 4, 2022. The time is 9:32 a.m. Central Standard Time. This is the videotaped oral deposition of Cathy Morgan, and it is being conducted remotely. The witness is located in Austin, Texas.
My name is Debbie Cunningham, CSR Number 2065. I am administering the oath and reporting the deposition remotely by stenographic means from Austin, Texas.
Would Counsel please state their appearances and locations for the record, beginning with Plaintiffs' Counsel?
(No audible response.)
THE REPORTER: Do we have Plaintiffs' Counsel present?
MR. GARBER: Excuse me. I was thinking Deponent's Counsel. Andrew Garber for Plaintiff at the Brennan Center for Justice.
MR. MORALES-DOYLE: This is Sean Morales-Doyle also for Plaintiffs from the Brennan Center for Justice.
MR. THOMPSON: It sounds like no more Plaintiffs' Counsel to be announced. My name is Will

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Thompson. I'm from the Office of the Attorney General for the Attorney General.
MR. BREEN: Good morning. Sean Breen and Randy Leavitt. Subject to the Motions to Dismiss, we're appearing on behalf of Shawn Dick, the District Attorney of Williamson County.
THE REPORTER: Do we have any more announcements?
(No audible response.)
THE REPORTER: Then, Ms. Morgan, may I swear you in, please? Will you raise your right hand?
CATHY MORGAN,
having been duly sworn, testified as follows:
EXAMINATION
BY MR. THOMPSON:
Q. Good morning, Ms. Morgan. As you may have heard, my name is Will Thompson. I'm a lawyer representing the Attorney General.
Have you ever been deposed before?
A. No, sir.
Q. All right. Well, let's just discuss some of kind of the ground rules for a deposition, especially a deposition over Zoom. So I'd like to confirm right now that the technology is working properly. Are you able to hear me okay?

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A. Yes, I can.
Q. Okay. And I can hear you, but it's a little bit faint. And so I might ask the court reporter if she can hear you all right.
THE REPORTER: It's a bit faint for me, too.
THE WITNESS: Okay. I'll try to speak louder.
Q. (BY MR. THOMPSON) Thank you. And, Ms. Morgan, are you familiar with the audio settings on Zoom?
A. In terms of on my keyboard I am.
Q. So if it would be easier for you compared to speaking up, there is an option to kind of make the microphone more sensitive on your computer. Would you like me to talk to you about how to do that?
A. Certainly.
Q. Okay. So in the bottom left-hand corner of your screen, there's a button that looks like a microphone; and it says "mute."
A. Yes.
Q. And there's a little arrow in the right-hand corner of that button. Do you see that?
A. Yes.
Q. Okay. Click that arrow, and then click the

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bottom option that says "audio setting."
A. All right. And volume?
Q. And about halfway down the dialogue box there's a bold thing that says "microphone," and there's kind of a slide bar where you can adjust how sensitive the microphone is. Do you see that?
A. Yes.
Q. Feel free to just move that over towards the right so you don't have to speak up as loudly.
A. How does that sound?
Q. I think that's a little bit better.
MR. THOMPSON: But, Ms. Cunningham, do you have an opinion on that?
THE REPORTER: It seems better to me, too.
THE WITNESS: How about this?
MR. BREEN: There we go.
MR. THOMPSON: I think that's even better, still.
THE WITNESS: All right.
THE ZOOM TECH: I will also add, if you don't mind, make sure to deselect the "automatic adjust microphone volume" so that it doesn't readjust it lower.
THE WITNESS: It's not -- "automatically adjust microphone volume" is not selected.

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THE ZOOM TECH: You sound much better. Thank you.
THE WITNESS: All right. Thank you.
MR. THOMPSON: All right. So thank you for doing that. I'm sorry for the technological difficulties there.
Q (BY MR. THOMPSON) So if at any time during the deposition you're not able to hear me clearly, will you please tell me that?
A. Uh-huh, yes.
Q. Now, I'm going to show you exhibits today -- not very many of them -- but I will send them to you electronically using the chat function; and I think it makes sense to just test that right now.
A. All right.
Q. Is that okay with you?
A. Certainly.
Q. Okay. So I'm going to send you what I'll mark as Exhibit 1, and it will just be the Deposition Notice for this deposition.
(Exhibit 1 marked.)
Q. (BY MR. THOMPSON) And I just put it in the chat feature. So it should arrive --
A. Yes.
Q. -- on your screen and to your counsel as well

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and anyone else who's on the deposition. Do you see it?
A. Yes.
Q. And are you able to open that document and look at it?
A. Yes.
Q. Okay. So can you just read the bold title on the first page to confirm?
A. United State District Court, Western District of Texas, San Antonio Division.
Q. That's true that is on the page. I should have been more clear --
(Simultaneous speakers.)
A. Isabel Longoria --
Q. -- about halfway down --
A. Isable Longoria and Cathy Morgan, Plaintiffs, versus Warren K. Paxton, in his official capacity as the Attorney General of Texas, et al.
Q. Okay. Thank you.
And then about -- a little farther down, it says Paxton's Notice of Intent to Take Deposition of Cathy Morgan. Do you see that?
A. Yes, I do.
Q. Okay. Great. Then our test has been successful.
MR. THOMPSON: Counsel, I assume if you

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did not receive it, you'll let me know before we get too much further.
MR. GARBER: That's correct, I have it. Thank you.
Q. (BY MR. THOMPSON) Okay. So this deposition is an opportunity for us to discuss the case and I'll be asking you questions and you'll, of course, be providing answers; but it's important for the court reporter that I get all the way through my question before you start an answer and that you get all the way through your answer before I start another question. Does that make sense to you?
A. Yes, it does.
Q. It's also important that even though we're on video, that we give verbal questions and answers rather than shaking our heads or pointing or something because we have a court reporter. Does that make sense?
A. Yes.
Q. Now, we talked about you being able to hear my questions. It's also important that you understand my questions. So if you don't understand a question, will you please tell me that you don't understand it before you try to answer that question?
A. Yes.
Q. Okay. And if you do under- -- I'm sorry -- if

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you do answer a question, I'm going to assume that you understood the question. Is that fair?
A. Yes.
Q. All right. So now that we're through some of those kind of technical preliminaries, could you just state your name and introduce yourself?
A. I'm Cathy Morgan. I live in Austin, Texas.
Q. And is that your full legal name?
A. My full legal name, depending how many you want, Catherine Elise Eldridge Morgan.
Q. All right. What do you do for a living, Ms. Morgan?
A. I'm a retired teacher.
Q. I may use acronyms or initialisms for some longer phrases during the deposition today. Are you familiar with the phrase "volunteer deputy registrar"?
A. Yes, I am.
Q. And what does that phrase mean to you?
A. That is a person who has been through training through the county and is deputized to register people to vote.
Q. Okay. So if I use the term "VDR" during the deposition, we'll both understand that I'm referring to a volunteer deputy registrar, right?
A. Yes.

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Q. I'm hopeful that this will be a short deposition; but if you need a break at any time, that's completely fine. We try to get through whatever question is pending on the table at that moment, but then we'll be able to take a break. Does that work for you?
A. Yes.
Q. And are you aware of anything that would affect your ability to testify truthfully today?
A. No.
Q. And I know it's early in the morning, but you haven't consumed any alcohol or taken any drugs or anything like that?
A. No.
Q. Okay. Have you heard of Senate Bill 1?
A. Yes.
Q. And if I refer to Senate Bill 1 as "SB 1," will that make sense to you?
A. Yes.
Q. All right. What is SB 1?
A. SB 1 is a bill through the Senate of the state legislature that has to do with voting.
Q. When did you first hear about SB 1?
A. I don't remember exactly.
Q. Do you have an estimate?

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A. An estimate was probably in the late summer.
Q. So something like August?
A. Probably.
Q. Are you challenging a provision of SB 1 in this case?
A. Yes.
Q. Which provision or provisions is that you're challenging?
A. I can't give you the number. It has --
Q. Can you describe it some other way?
A. Yes. It has to do with ability to offer a person an application to vote by mail.
Q. So I've read your Declaration, and we'll put it up here on the screen in a second. I believe it refers to Section 276.016(a)(1). Does that sound right to you?
A. I think so -- yes.
Q. Okay. If I refer to Section 276.016(a)(1) during this deposition, will you know that I'm referring to the provision you're challenging?
A. Yes, yes.
Q. Okay. When did you first consider filing this lawsuit?
MR. GARBER: Objection.
Cathy, I'll just advise you to be careful not to divulge any privileged information in answering that question.
A. I really can't quite remember.
Q (BY MR. THOMPSON) Sure. And just like before, even if you don't have the exact date at hand, an estimate is fine. Was it, for example, in that late summer time period when you heard about SB 1?
MR. GARBER: Objection.
A. No -- well, I'm going to back up, please. Please rephrase the question --
Q. (BY MR. THOMPSON) Understood.
A. -- completely.
Q. I want to know when you first considered filing the lawsuit that you have now filed. And what I was asking was: Did you first consider filing the lawsuit in August when I believe you said you had heard about SB 1 for the first time?
A. It was not in August. It was late September would be my first memory of being alarmed at understanding what that part of that bill said.
Q. What caused you to have that alarm you referred to?
A. I have always felt that my impetus for serving as a VDR and as serving in voting booths, information booths, was to give every person who is eligible to vote

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a method to vote.
Q. Sure. I can appreciate that and we'll get into some of your beliefs a little bit later in the deposition, but I meant to ask a slightly different question.
A. Okay.
Q. What changed to cause you to become alarmed when previously you had not been alarmed? For example, you might say, "My neighbor told me that this was going to affect me in some way," or something like that?
MR. GARBER: Objection.
A. I honestly don't know the moment.
Q (BY MR. THOMPSON) Do you know what the change in circumstance was, even if you don't know when it occurred?
A. Let me think about this for a minute.
Q. Sure.
A. Because I want to be honest and clear.
I don't remember the date. I don't remember the time. I just know that when the opportunity came up, it seemed to me to be the right thing for me to do. That probably -- I can't guess. I'm not going to guess. I'd have to look back at some notes and maybe on my cell phone, but it was in the fall.

Q. I understand. So I understand you don't remember when the opportunity arose. Can you tell me how the opportunity arose?
A. Yes. Through Bee Morehead, I believe -- I know, I was put in contact with some lawyers who were interested in talking with me and I with them.
Q. Who is Bee Morehead?
A. She is the director of Texas Impact.
Q. What is Texas Impact?
A. It is a large group in the state of Texas made up of a little over 5 million people who are people of faith and who work for -- working through the legislature for areas of common concern, as in voting rights, as in healthcare, as in education and health -- things like that.
Q. Who are the lawyers that Bee Morehead put you in touch with?
A. The Brennan Center lawyers.
Q. All right. Ms. Morgan, I'm going to mark Exhibit 2, your Declaration. I'm going to send that in the same way that I sent Exhibit 1 --
A. All right.
Q. -- through the chat feature.
(Exhibit 2 marked.)
Q (BY MR. THOMPSON) You should have just

received it.
A. Uh-huh.
Q. Do you see Exhibit 2 on your computer?
A. Just one moment. Is it 7-2, Exhibit B?
Q. Yes. This, Ms. Morgan, was attached to a filing that your lawyers made in this case; and the markings at the top indicate the case number and the docket number.
A. Uh-huh.
Q. And the first page says Exhibit B because it's Exhibit B to a Preliminary Injunction Motion. So why don't we skip past the first page and look at the second page. Do you see in the center it says Declaration of Cathy Morgan?
A. Yes.
Q. Do you recognize this document?
A. Yes.
Q. Can you tell me what it is?
A. I cannot tell you what exactly the document does except states information about me and what I declare.
Q. Sure. Let's look at the last page of the document, which is marked as 6 of 6 at the top.
A. Yes.
Q. Do you see a signature on that page?

A. Yes.
Q. Is it your signature?
A. Yes.
Q. Is this a Declaration that you signed and submitted in this case?
A. Yes.
Q. Did you write this Declaration?
A. I -- I read it and approved it.
Q. Do you know who wrote the Declaration?
A. I had input into it. I don't know exactly who, but the Brennan Center was advising me at that point.
Q. How long did you spend reviewing this Declaration before you signed it?
A. At the time I spent time.
Q. Sure. How much time was that?
A. Probably 10 or 15 minutes.
Q. And did you make any edits to the document after you received it but before signing it?
MR. GARBER: Objection.
Again, Cathy, I'll just advise you to be careful not to divulge anything you talked about with your lawyers, talking about this document.
A. Honestly, I don't remember.
Q (BY MR. THOMPSON) I'm looking at Paragraph 9

of your Declaration. Can you see that?
A. Yes.
Q. It says, "I have submitted my name to be an alternate judge during the 2022 elections in Williamson County." Do you see that?
A. Yes.
Q. Who decides whether you will be an alternate judge?
A. The person handling the volunteers here in Williamson County that are willing to be an alternate. I, after that -- after this Declaration, in the last month and a half, made a decision to be a clerk instead of an alternate judge.
Q. If I understand correctly --
(Simultaneous speakers.)
A. I'm sorry.
Q. I'm sorry. Please, go ahead.
A. No, I just made that decision on my own in terms of it being a little less pressure; and I have another -- I have a lot of other pressures going on in my life, moving, for instance. So I wanted to alleviate some of that.
Q. Sure. And I'm not -- certainly not criticizing you for your choice. I just want to make sure I understand exactly what you chose. So is it fair

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to say you're not going to be an alternate judge during the 2022 election?
A. I will not be an alternate judge in the March 1st primary.
Q. Okay. Have you submitted your name to be an alternate judge in any other future election?
A. That would come up later.
Q. So "no"?
A. Not right now, no.
Q. Okay. And you said something about you might be a clerk. Did I hear that correctly?
A. Yes, sir.
Q. What do you mean by "clerk"?
A. A clerk is a person who sits for Williamson County behind a plexiglass screen, with a mask on; and when people come in and they hand you their driver's license, for instance -- that's most of the time the ID that's given -- then I'm the one who scans it. And the computer pops up with their name and tells me information about whether they're eligible to vote and then gives me their -- the number for their ballot, the ballot style. It's just a style according to exactly where they live, and so that ballot contains all the people that they are eligible to vote for or against.
And then, after checking all that out and

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looking at them and it's the -- it's the person on the picture, then I print the ballot, which is a ballot that has -- at the top of it, it has the ballot style on it. It does not have any name on it. It's rectangular in terms of being more narrow and very long, maybe sometimes 16 inches long or so, depending on -- well, that usually is the way it is; and that ballot, then, they take to the voting machine.
Q. I appreciate that explanation.
Is it fair to say that your work as a clerk is a volunteer position during which you interact with voters who are voting in person?
A. While I do volunteer to do it, I am paid some money for it at the same time.
Q. Okay. I've heard of county clerks who are elected in Texas. You're not talking about being that kind of clerk, are you?
A. No, I'm not.
Q. And is -- your clerk position, will that take place just on election day; or does it extend beyond that?
A. I'm choosing to only work on election day, that day.
Q. Okay. Thank you very much.
A. Uh-huh.

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Q. What made you decide to become a VDR?
A. I think I did look that up, and now I really can't remember. The year 2014 comes up -- comes to mind, but I'm not absolutely certain.
Q. I may not have spoken clearly. I didn't mean to say when.
A. Oh.
Q. I meant to say: What made you decide to become a VDR?
A. Because I wanted to help people do the process that they need to do in order to vote.
Q. What was the process for you to apply to become a VDR?
A. I signed up for training, went through training and then was assigned a number and given a piece of paper that says I'm now a VDR for two years.
Q. Was that training provided by the Secretary of State's Office?
A. No.
Q. Who provided the training?
A. One year -- this is every other year that we go through training. You have to re-up every other year on the odd years. One year I went to Travis County for it. Another year I went to Williamson County for it.
Q. Was the training substantively different

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between the two counties?
A. No.
Q. Are you working as a VDR this year?
A. Yes.
Q. When was the last time that you acted as a VDR?
MR. GARBER: Objection.
A. I can state a time period when I was active as a VDR. The virus that we're living with has limited my work substantially. I'm over 75 a little bit and so I'm very careful, but I was working a voter information booth in October.
Q (BY MR. THOMPSON) So if I understand you correctly, you haven't worked as a VDR since that time in October; is that right?
MR. GARBER: Objection.
A. I'm not sure. I do give out the "take away" cards, which is a card -- a registration card that a person can fill out on their own and mail on their own. It's not one that they fill out and give to me and I tear off a receipt and then I take their card to the county office. So I -- I'm fairly certain when -- when people move in my neighborhood anywhere, I generally take them two "take away" cards and also have my own cards with me in case they want to sign up with me; and

I can just take their registration cards in, uh-huh.
Q. (BY MR. THOMPSON) So are you saying you've handed out the "take away" cards since October?
A. I believe I did to a neighbor that moved in.
Q. All right. I think this might be easier if we go through Paragraph 13 of your Declaration. Do you still have your Declaration in front of you?
A. Yes, I do.
Q. It says in Paragraph 13, "As a VDR, my role is not to judge whether someone is eligible to vote or eligible to vote by mail. Rather, my job is to explain options to voters and help fill out forms." Do you see that?
A. Yes.
Q. Is it fair to say that your job as a VDR has two parts?
A. Would you talk about "two parts"?
Q. Sure. I'm just looking at Paragraph 13 of your Declaration; and it says, "My job is to explain options to voters and help fill out forms." So I'm thinking that your job might have two parts: One, explaining options to voters and, two, helping fill out forms. Is that fair?
A. That would be fair.
Q. And when you say, "help fill out forms," are

you referring to forms to register to vote?
A. Yes.
Q. Has anybody ever complained about how you perform those tasks as a VDR?
MR. GARBER: Objection.
A. Would you repeat the question? I didn't hear the first part.
Q. (BY MR. THOMPSON) To the best of your knowledge, has anyone ever complained about how you perform those tasks as a VDR?
A. No.
Q. And when you help a voter fill out a form, are you just kind of explaining the instructions of the form to the voter?
A. I'm essentially making sure that they fill in all of the spaces that they're required to fill in. They'll fail -- they'll sometimes fail to check a box saying they're a U.S. citizen. So I watch for that and just head them up to that question to answer that question.
Q. So when you're helping them fill out forms, your role is to make sure the form is complete; is that correct?
A. Yes.
Q. When you explain options to voters, have you

explained a vote-by-mail option?
A. The answer is yes, before December 1st of last year.
Q. So before December 1st of last year, how did you explain the vote-by-mail option when you did?
A. If the situation -- I can give you an example. It's easier for me to give you an example. I was staffing a voter information booth outside of our church -- strictly nonpartisan -- and a student walked by and said, "Oh, I'm registered."
And I said, "Great. Are you going to vote? Here's the ballot." And I had a list of the propositions. There was no comment on them. It was just a list of the propositions we were voting on last November.
And a student would say, "Oh, I'm registered in Harlingen; and I just can't get back home to vote."
And I would say -- at that point, when there was still time, I would say, "You can sign up for ballot by mail since you're out of the county for this particular election."
And one young woman said, "Oh, that's fabulous."
That's an example.

Q. I appreciate that example.
So is it fair to say that when you were explaining options, including vote by mail, you were providing factual information?
A. Yes.
Q. You weren't telling voters what they should do; you were just telling them what they could do --
A. Yes.
Q. -- is that right?
A. Yes.
Q. You weren't saying, "You should vote by mail rather than go back to Harlingen," in that example, right?
MR. GARBER: Objection.
A. Honestly, I can't remember my exact words. My -- I can speak to my intent, and that was to offer them a possibility.
Q (BY MR. THOMPSON) That's fair. And was that the same intent that you had in all of your interactions where you explained the vote-by-mail option?
MR. GARBER: Objection.
A. I'll have to go back a few years with my sweet Mrs. Banks, who lives two blocks over. I knocked on her door -- this was probably five years ago -- don't hold me to five; but it's been a while. I knocked on her

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door. She took a while. She came to the door. We talked for a minute; and she said, "Please come in. I would love to just sit."

"Okay." And I did.

And she said, "I'm registered to vote. I'm not sure I'm going to be able to get to the polling places, and my husband is bedridden. His mind is clear."

I stayed there for 45 minutes just because we enjoyed chatting about the furniture in her living room and the history of it and her situation and listening to what was going on. And I said, "There's -- there is ballot by mail."

She said, "That would be wonderful. Can you help me with that?"

And I said, "Yes."

So I got her -- I went to Williamson County and got an application and took it to her for her and for her husband.

Q. So in that example, your neighbor wanted to vote by mail and asked you for help; is that right?

A. Yes. I'm certain she said -- no, I'm not certain. I'm not certain. I'm going to back off on it.

My vague recollection from that long ago is that we were having a very congenial conversation --

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she was just delightful -- and she said she really wanted to vote; and I said, "You can vote by mail."

And she said, "Yes, I would like to do that."

Q. Okay. So I think that the question I had asked when you gave that very helpful example was: In your interactions when you have explained the vote-by-mail option, was it always your intent to provide factual information that would help a voter do what the voter otherwise wanted to do?

MR. GARBER: Objection.

A. Yes. To provide factual information, yes.

MR. GARBER: Will, I'll just mention -- it seems like you might be a little between questions -- Cathy, are you doing well? Do you want a break? Do you want to keep going?

THE WITNESS: Maybe a three-minute break to get a drink of water.

MR. THOMPSON: Not a problem at all.

MR. GARBER: All right. Thank you.

THE REPORTER: We're going off the record at 10:07 a.m.

(Off the record from 10:07 to 10:11 a.m.)

THE REPORTER: We're back on the record at 10:11 a.m.

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Q (BY MR. THOMPSON) All right. Ms. Morgan, welcome back.

Before the break we were talking about your intent when you had previously explained the vote-by-mail option. Do you remember that?

A. I remember we were talking about that.

Q. Now, shifting from kind of the past to the future, with regard to what you would like to do going forward in explaining the vote-by-mail option, would you have the same intent that you just explained to me?

A. If I felt it safe for me personally, yes.

Q. And when you say, "If I felt it safe," do you mean if you weren't deterred by the threat of criminal prosecution for explaining the vote-by-mail option?

A. Yes.

Q. Do you contend that explaining the vote-by-mail option, as you've just discussed it, qualifies as soliciting the submission of an application to vote by mail under Section 276.016(a)(1)?

MR. GARBER: Objection.

A. Yes.

Q (BY MR. THOMPSON) Why do you contend that?

MR. GARBER: Objection.

A. Define "solicit."

Q. (BY MR. THOMPSON) Well, actually, Ms. Morgan,

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that's kind of part of the question I'm asking you is I was asking whether you contend that explaining the vote-by-mail option, as you've described it, qualifies as soliciting the submission of an application to vote by mail under Section 276.016(a)(1).

MR. GARBER: Objection.

A. My understanding is soliciting is my asking a voter if they would like information about voting by mail, not answering a question if a voter asks me about voting by mail.

Q (BY MR. THOMPSON) All right. Are there any other reasons you contend that explaining the vote-by-mail option, as you've discussed it, constitutes soliciting under 276.016(a)(1)?

MR. GARBER: Objection.

A. I might have to go to a dictionary to look up "soliciting" again.

Q. (BY MR. THOMPSON) Sure. And I understand there may be things you know while you're sitting here today in the deposition and there may be things you don't know, but I'm honestly just asking about the things you do know. So has anyone told you that explaining the vote-by-mail option constitutes soliciting under SB 1?

MR. GARBER: Objection.

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And, Cathy, just a warning on privilege, again. If you feel you can answer the question, go ahead.
A. I was part of a Zoom meeting and that part of SB 1 was being explained and the definition of "soliciting" then, at that moment, from that person, was that soliciting was asking a person if they wanted information on ballot by mail and --
Q. Do you know --
A. Go ahead.
Q. Do you know if the Zoom meeting you're referring to is the video that your lawyers linked in the discovery responses they sent?
A. Yes.
Q. And is it the same?
A. Yes -- yes.
Q. So this was a Zoom meeting with a lawyer from a group called Texas Impact; is that right?
A. Yes.
Q. Didn't that lawyer tell the audience that the meaning of "soliciting" was unclear?
A. He suggested that that being unclear meant that we should caution -- we -- use caution.
Q. So he didn't tell you that explaining the vote-by-mail option was soliciting. He told you it

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might be soliciting; is that correct?
A. He said that the Courts were going to have to decide this issue.
Q. If a Texas Court clarified whether explaining the vote-by-mail option constituted soliciting under SB 1, would that be helpful to you?
MR. GARBER: Objection.
A. I need to know how it applies to VDRs.
Q. (BY MR. THOMPSON) And so if a Texas Court explained how that provision applies to VDRs, would that be helpful to you?
MR. GARBER: Objection.
A. I'm not sure I can answer that. I feel very strongly that all eligible citizens should have every right to vote in a way that is most encouraging to them to vote.
When I was walking some of the blocks in my area and I came upon a man and I said, "Sir" -- he had two maybe nine- and twelve-year-old kids with him. I said, "Sir, are you registered to vote?"
He said, "I don't believe in voting. It doesn't do any good. People with money are always going to decide what to do."
And I could not talk him off that ledge, and I thought: He is giving up his voice.

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MR. BREEN: Object as nonresponsive.
MR. THOMPSON: Same objection.
Q. (BY MR. THOMPSON) Ms. Morgan, I want to make sure I understand what's going on here. You say that the meaning of "solicit" under SB 1 is unclear, right?
A. My understanding of "soliciting" is asking someone if they want something.
Q. And did --
A. I may have to pull out a dictionary.
Q. And did you get that understanding of the word "solicit" from the lawyer in the Zoom meeting we just discussed?
A. I think that I had a lot of questions before that discussion -- no, I don't want to say "I think." I did have questions before that discussion.
Q. To whom did you pose those questions?
A. To a friend who works for a state legislator.
Q. Who is that?
A. Allison Heinrich.
Q. And who does Allison Heinrich work for?
A. John Bucy.
Q. I'm afraid I don't know John Bucy. Is he a Democrat or a Republican?
A. He's a Democrat.
Q. Do you know what --

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A. He's a Representative.
(Simultaneous speakers.)
A. I'm sorry?
Q. Do you know what part of the state he represents?
A. Yes, Williamson County -- well, it's changed now; but...
Q. Is he your Representative?
A. Yes.
Q. And so Mr. Bucy's staffer explained to you the meaning of "solicit" in SB 1?
A. She looked it -- looked up that part of the bill and sent that to me. That's my best recollection of that interchange. I wanted to see the actual part of the bill, and she sent that to me.
Q. All right. So aside from the Zoom meeting with the lawyer from Texas Impact and your conversation with a staffer for Representative Bucy, what other sources of information do you have that support your contention that explaining the vote-by-mail option to voters qualifies as soliciting the submission of an application to vote by mail under Section 276.016(a)(1)?
A. I don't remember if I looked up the definition. It is likely that I did, but I cannot say for sure that I did.

Q. So if I told you that the definition of "solicit" in the American Heritage Dictionary of the English Language is "to seek to obtain by persuasion, entreaty, or formal application," would you have any reason to disagree with me?

MR. GARBER: Objection.

A. I'd have to pull out my dictionary. I don't have any reason to not believe you.

Q (BY MR. THOMPSON) When you explained the vote-by-mail option with the intent you previously described of providing factual information, are you trying to persuade that person to vote by mail; or are you trying to explain the option of voting by mail?

MR. GARBER: Objection.

A. I'm explaining an option.

Q. (BY MR. THOMPSON) So not persuading, right?

A. They have to make their own decision.

Q. It sounds like you're saying "not persuading," but I need a clear answer on the record. "Yes" or "no," are you trying to --

A. No, I'm not --

Q. -- persuade them to vote by mail?

A. -- trying to persuade them. I'm offering them options.

Q. Have you ever communicated with anyone from

the Texas Secretary of State's Office?

A. No, no.

Q. Did any county officials tell you that explaining the vote-by-mail option would constitute soliciting under SB 1?

A. No.

Q. Sorry. I'm just skipping a few things, now that I think we've covered them.

I went through some of the documents your lawyers produced. Are you familiar with the documents that your lawyers produced in this case?

A. Yes.

Q. And we can put them in front of you if that would be helpful, but you may recall that a lot of them related to University Presbyterian Church. Do you remember that?

A. Yes.

Q. You work as a VDR at a booth located by University Presbyterian Church; is that right?

A. Yes.

Q. Can you tell me --

A. That was for a short duration.

Q. What was the duration of that?

A. During the month of October, Tuesday, Wednesday, Thursday from 1:00 to 3:00 each of those

days; and I worked either five or six of those shifts.

Q. Do you have any plans to continue working at a booth by University Presbyterian Church?

A. Yes. We had hoped to do it in January; but between omicron and the weather and having people who are around my age all working the booth, we decided against it.

Q. I can certainly understand that. Do you have any plans to do it going forward?

A. Yes.

Q. When?

A. It will depend on the weather and omicron. We -- generally, we would do it in the month preceding an election. We've only done it once. We've done it once, and I was the coordinator for it. But I don't -- I'm not so sure if we're doing it again this spring. We haven't -- the group that I work with has not decided.

Q. All right. So there's a March primary this year, right?

A. Yes.

Q. And we're now in February, which is a month before the primary, right?

A. Yes.

Q. Will there be a booth outside University Presbyterian Church this month?

A. No.

Q. Well, when is the next election --

A. We're at Stage 5 in Austin for omicron.

Q. Is Stage 5 a local designation relating to COVID risk?

A. Yes, it's the highest risk.

Q. When is the next election when you might have a booth outside University Presbyterian Church?

A. Well, there will be a runoff. I can't peg the date right now, right at this moment; and I don't know if we would try to do something with that. I don't know.

Q. Okay. How about the next election after that?

A. For the fall, yes, probably we would start the voter information booth in September.

Q. All right. So you might have a voter information booth in September of 2022; is that right?

A. Yes, and the word is "might."

Q. All right. You're not sure because you don't know about omicron and the weather and things like that?

A. Uh-huh, yes.

Q. Where is University Presbyterian Church?

A. It is located, nicely enough, very close to the university. It's half a block off of Guadalupe, which is a road that goes by one side of the university,

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and we are on the backside of those buildings that front Guadalupe. So we -- and we're on a corner. So we get a lot of student traffic.

The amount of students -- student housing going up in what we call that west campus area is just immense. They're everywhere. The last time I drove down -- and it's been a while now because we're not in -- in worship in person right now, but there's another huge building going up. They're all -- we're surrounded by tall buildings.

Q. And so I can appreciate that answer, but the person reading this may not be from Austin. Is it fair to say that the church is in downtown Austin?

A. I would not call it downtown. "Downtown" --

Q. Call it north of downtown Austin?

A. "Downtown" indicates the Capitol area and all of the businesses around the Capitol and down to the river, and then it's kind of spread out from there. UT is north of there by several blocks, and it's kind of like its own area. So if you say "the UT area," then people will know where you're talking about. If you say "downtown," they'll go: Oh, downtown on Congress.

Q. Understood. And we're talking about Travis County, right?

A. Yes.

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Q. All right. I'm going to send you in the chat feature again what I'll mark as Exhibit 3.

MR. THOMPSON: It is, for the benefit of Counsel, Bates stamped Morgan 8 through Morgan 11.

(Exhibit 3 marked.)

Q (BY MR. THOMPSON) Ms. Morgan, have you received Exhibit 3?

A. Yes, I've just clicked on it; and there it is. Yes.

Q. Okay. Can you see a table that in the upper left-hand corner says, "How many people"?

A. Yes.

Q. Now, it looks to me like this is a table for Tuesday, October 5th, through Thursday, October 7th; is that right?

A. Yes, that was our first week.

Q. And so this kind of captures some statistics about your first week of having the voter information booth outside your church; is that right?

A. Yes.

Q. Okay. So towards the top it has a row that says, "Stopped by booth." Do you see that?

A. Yes.

Q. Does that refer to the total number of people with whom you spoke as part of your VDR activities that

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day?

A. Yes. Many more went by. Only a few wanted to stop because of our candy. We had a big bowl of candy out.

Q. And then I see a highlighted cell down in what's marked as Row 12. It says, "Vote by mail info." Do you see that?

A. Yes.

Q. Does that refer to the total number of people to whom you offered information about voting by mail?

A. I believe so, yes -- I don't want to say "I believe." To the best of my recollection.

Q. Did you prepare this table?

A. Yes. It was -- it went through several iterations before we ended the four weeks, only slightly -- slightly adjusted.

Q. Sure. I guess, do you have personal knowledge that the numbers in this table are correct?

A. I have personal knowledge of October 5th and October 7th. I was not there on October 6th.

Q. Okay. Who prepared the numbers for October 6th if it wasn't you?

A. I'd have to go back and look at the schedule of who worked that day.

Q. Would it be someone else from University

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Presbyterian Church?

A. Absolutely.

Q. So I'll just go through these quickly. So on Tuesday, October 5th, it looks like 22 people stopped by your booth --

A. Yes.

Q. -- is that right?

A. Yes.

Q. And six of them received information about voting by mail --

A. Yes.

Q. -- is that right?

A. Yes.

Q. Now, on Wednesday, October 11th [sic], at least according to this form, it looks like 11 people stopped by the booth; is that right?

A. Let me see. October the 11th?

Q. Oh, I'm sorry. I meant to say Wednesday, October 6th.

A. Oh, okay. And you asked if 11 people stopped?

Q. Yes.

A. That's -- I'm going to explain that if I may.

Q. Please.

A. I'm a retired school teacher. I'm a grandma. And these are young people passing by. So I quickly

learned that students, when they realized we were there and it was obvious from signs that they could register to vote, they'd go -- they'd wave and go, "I'm registered."

And so I learned to pick up my page that had all the ballot propositions on it and hold it up and say, "Do you know what's on your ballot?"

And they'd whip around and go, "What?"

And so then they would read it. And I would say, "If these don't make sense to you" -- and some of them really were hard -- were difficult to interpret -- I would say, "Go to the League of Women Voters." And I would give them the website to go and see people who were speaking for both sides of each proposition. Then I would give a page that had some information about voting, like what you can take in the booth and things like that, child -- your own child, yes; guns, no, things like that.

The -- that process then had more people stopping by than if you were just sitting at the table without beginning to have a discussion with students. So I think that's why those numbers were higher on Tuesday and Thursday if you wondered.

Q. That's perfectly fine; but no, I don't particularly need to know why the numbers were higher or

lower.

A. Okay.

Q. I just wanted to go through the numbers with you.

A. Okay.

Q. And I'm going to keep doing that. And if there's something you feel is important, that's fine; but I'm not -- I promise, if I need to know, I'll ask you.

A. All right.

Q. So on Wednesday, October 6th, it looks like 11 people stopped by the booth; is that right?

A. Uh-huh, yes.

Q. And no one is listed as having received vote-by-mail information for Wednesday, October 6th; is that right?

A. Correct.

Q. For Thursday, October 7th, it looks like 35 people stopped by the booth; is that right?

A. Correct.

Q. But for Thursday, October 7th, no one received vote-by-mail information, right?

A. Correct.

Q. All right. Now, it looks like there's a total in the last column for this week; and it shows 68 people

stopping by the booth and 6 people receiving vote-by-mail info; is that right?

A. Yes.

Q. Ms. Morgan, if you can turn to the next page of the exhibit, which is marked Morgan 9, it --

A. I don't know --

Q. -- is a similar table.

A. -- why that's there. There's no numbers there, but there should be.

Q. Well, that was going to be my question. Do you have a table that has numbers in it for that week?

A. I will have to go search for it, but I'm quite sure --

Q. All right. Do you know -- I'm sorry. Go ahead.

A. That is very strange. I don't know.

Q. Do you think there should be numbers for this week?

A. Yes, and there are at some place in my files.

Q. All right.

MR. THOMPSON: And, Counsel, obviously, we'll hope to get that document from you --

THE WITNESS: Yes.

MR. THOMPSON: -- if you have it.

MR. GARBER: Yes. Please follow up with

any request; and we'll, of course, look into it.

Q (BY MR. THOMPSON) Ms. Morgan, let's turn past Page Morgan 9 and look at Page Morgan 10. Do you see that page?

A. Uh-huh, 10, yes.

Q. Is this table like the first table we talked about, just for a different week?

A. Yes.

Q. And the week it shows is Tuesday, October 12th, through Thursday, October 14th?

A. Correct.

Q. Were you working at the table during that week?

A. I know I was, but I cannot tell you which days. I would have to go look at my schedule.

Q. Do you know how many days of the three?

A. It's possible there were two days. I went one day to help a person who was uncertain of what they were doing, so I didn't want the VDR on site at that point to be left with everything.

Q. So for Tuesday, October 12th, it looks like 48 people stopped by the booth; is that right?

A. Yes.

Q. And two people received vote-by-mail information; is that right?

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A. Yes.
Q. For Wednesday, October 13th, 27 people stopped by the booth, correct?
A. Yes.
Q. And zero people received vote-by-mail information?
A. Correct.
Q. For Thursday, October 14th, 35 people stopped by the booth, right?
A. Yes.
Q. And five people received vote-by-mail information, correct?
A. Yes.
Q. Ms. Morgan, if you turn to the next page, which is marked Morgan 11, you'll see another blank table --
A. Yeah.
Q. -- for this same week. Do you see that?
A. Yes.
Q. There's no reason to doubt the numbers on the previous page, is there --
A. No.
Q. -- on Morgan 10?
A. No.
Q. Do you have any other tables that would

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provide these types of numbers for your voter information booth?
A. Yes. I do apologize. I thought that I had put in the table that has the cumulative numbers for the four weeks. So I'll have to look that up and send it to Andrew.
Q. Okay. So you think you have kind of a table that has the totals; is that right?
A. Yes.
Q. That's great.
And with regard to both the tables that we've just looked at in your production and the table that you're referring to, are those tables all accurate?
A. I would say they're probably an undercount for stopped by the booth and for people taking materials, like UKirk, which is our college student program at church. There's several things that -- let me explain.
I was there in a VDR role when I was there. We always had one VDR and one person who was not. The person who was not the VDR was in charge of keeping up with this count; but as we older women tend to do, we like to talk with students, especially those of us who are former teachers. And so the person working with me might often go, "Oh, how many people just stopped by?" And so we would have to estimate, and

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I seem to remember that we didn't overestimate. We probably underestimated slightly, but the numbers would not be vastly different at all.
Q. Do you think this is the best source of information we have for figuring out how many people stopped by the booth and received vote-by-mail information?
MR. GARBER: Objection.
A. Yes.
Q. (BY MR. THOMPSON) Were these table prepared in the ordinary course of the task of having a voter information booth at the church?
A. Yes.
Q. Are the people who prepared these tables trustworthy and honest?
MR. GARBER: Objection.
A. My perception is that they're totally trustworthy and honest.
Q. (BY MR. THOMPSON) So I did some math -- and one might be suspicious of lawyer math -- but I totalled up, according to the production, how many people stopped by the booth; and it was 178. Does that sound about right to you?
A. All -- all I can honestly tell you -- yeah; but, honestly, I have a memory of around 260 total that

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stopped by for the four weeks. That's the only total I really have in my head.
Q. And, again, according to my math, it appears that about 7 percent of the people who stopped by received vote-by-mail information. Does that sound about right to you?
A. Being a former math teacher, I would have to go check you out.
Q. If the --
A. It's not unreasonable.
Q. Sure. If you did check my math and you got 7 percent or 7.3 percent, based on the production and the tables therein, would you have any reason to doubt that number?
A. No.
Q. So I think you've mentioned kind of two components of your work as a VDR, one being this booth outside your church and the other being leaving cards at people's doors when you go door to door; is that right?
A. Yes, and other booths.
Q. And other booths. Okay. So, yeah, I want to get a complete list of the activities that you include in your work as a VDR. So we've got the University Presbyterian Church booth, leaving the cards door to door; and now, you've mentioned other booths. Can you

tell me about those?
A. I worked at a booth at our farmers market that is a voter registration booth.
Q. Was it similar to the booth outside your church?
A. It didn't have additional information on -- I'm going to back up. The booth was not centered around when the next election was. It's just an ongoing booth whenever the farmers market is open that is there to register people to vote. Oftentimes those people will come up and say, "I've moved. Do I need to update my registration?"
I'll say, "Are you in the same county? Have you changed counties," that kind of thing about what to do with their voter registration card.
Q. When you were working at this farmers market booth, were you providing factual information about options like we discussed before?
A. Yes.
Q. When was the last time you worked at the farmers market booth?
A. Oh, I haven't worked since we've been inside for COVID. It's been a long time.
Q. Would that be since early 2020?
A. Yes.

Q. Do you have any plans to work at the farmers market booth in the future?
A. I have plans. We'll see what works out.
Q. When is your next planned time to work at the farmers market booth?
MR. GARBER: Objection.
A. I don't have a plan in mind. I just know that that's an option for me to go work, and I do not like to work in bad whether.
Q. (BY MR. THOMPSON) I understand. Would you say that you intend to do it someday, but you're not sure when, in light of the circumstances?
MR. GARBER: Objection.
A. Yes.
Q. (BY MR. THOMPSON) Okay. So we've gone through those three options, the University Presbyterian Church booth, the farmers market booth, and leaving the cards when you go door to door.
A. Uh-huh.
Q. Is there anything I'm missing from that list?
A. I'm not going to rule out something else. Nothing else is coming to mind right at the moment; but there -- there are people, say, at my church or people in my larger neighborhood that will write me or call me and ask me questions about their voter registration.

Q. Is it fair to say that you don't have any -- is it fair to say that you don't have any firm plans to do anything other than the three things we talked about on the list, but that they might happen some day, depending on the circumstances?
MR. GARBER: Objection.
A. Correct.
Q (BY MR. THOMPSON) So earlier I think you talked about the effective date of SB 1. Do you remember that?
A. I believe it was December 1st.
Q. Since SB 1 took effect, have you worked as a VDR?
A. Only in my neighborhood when the new people moved in.
Q. Are you referring to leaving the cards door to door in your neighborhood?
A. I offered to either have them fill out at the time or leave them for them. And they said, "We'll just take the cards, but you can leave." So that was fine.
Q. I mean, is that the only -- sorry. When you say the new people moved in, was that one family that moved into your neighborhood or multiple --
A. Yes, it was one. Although, typically my -- people will say, "Oh, you've just moved in. Go see

Cathy for voting, for registration."
Q. So is it fair to say that you've worked as a VDR one time since SB 1 took effect?
MR. GARBER: Objection.
A. I'm not sure I can really safely quantify that, to be honest.
Q. (BY MR. THOMPSON) Is one your best estimate?
A. At this moment.
Q. At this moment, yes?
A. Yes.
Q. During that time you worked as a VDR after SB 1 took effect, were you deterred from saying something you wanted to say by the threat of criminal prosecution for violation of Section 276.016(a)(1)?
MR. GARBER: Objection.
A. Yes.
Q. (BY MR. THOMPSON) I didn't hear your answer. I'm sorry.
A. Yes.
Q. You were deterred?
A. Yes.
Q. What were you deterred from saying?
A. I was deterred from saying, "Have you considered voting by mail?"
Q. Were you deterred from saying anything --

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(Simultaneous speakers.)
Q. I'm sorry. Please go ahead.
A. My sister. My sister's severely immunocompromised, severely.
Q. The person you were deterred from saying that to was your sister? Is that what you're saying?
A. Uh-huh, uh-huh.
Q. May I get a verbal answer?
A. Yes. Sorry.
Q. Was there anything else you were deterred from saying?
A. There was a man who wrote me. He's a member of the church, but he does not have e-mail. So he wrote me a snail mail and asked about voting by mail. Because he had asked me, then I felt confident to reply to him.
Q. What did he ask you?
A. He was asking about how to fill out the form or why were so many applications being rejected in Travis County.
Q. And what did you reply?
A. I replied that people were failing to put their license -- driver's license number or their last four digits, and I suggested putting both and putting his phone number on the card where there's an option to do that.

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Q. Is it fair to characterize what you told him as factual information about how to go through the process?
MR. GARBER: Objection.
A. It is not required; but because of the 50-percent-rejection rate at one time in Travis County, it is commonly viewed by many people as the safest thing to do.
MR. BREEN: Object as --
Q. (BY MR. THOMPSON) Is it fair to say that --
(Simultaneous speakers.)
MR. THOMPSON: I'm sorry. Did you say something, Mr. Garber?
MR. BREEN: I did. Breen did. I just objected to nonresponsive. She didn't answer your question.
MR. THOMPSON: Thank you.
Same objection.
Q (BY MR. THOMPSON) Ms. Morgan, is it fair to say that you provided that member of your church with factual information about the best way to submit an application?
MR. GARBER: Objection.
A. It is fair to say that I gave them factual information from what I understood.

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Q. (BY MR. THOMPSON) So other than the examples we've talked about, is there anything else that you want to say that you have been deterred from saying because of the threat of criminal prosecution under Section 276.016(a)(1)?
MR. GARBER: Objection.
A. I don't remember.
Q (BY MR. THOMPSON) How about, sitting here today, can you think of anything else that you want to say that you were deterred from saying because of threat of criminal prosecution under Section 276.016(a)(1)?
A. Would you restate that question?
Q. Sure. Before I do, was it that you didn't hear me or that you didn't understand the words I was using?
A. I want to make sure I understand the words you're using.
Q. Sure. Is there anything else besides what we've just talked about that you want to say going forward but you have been or will be deterred from saying because of the threat of criminal prosecution under Section 276.016(a)(1)?
A. I don't have anything to say to this group of people with fear of that section. I would like to live in a world where it's okay to say to people, "Have you

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considered ballot by mail?"
MR. BREEN: Object to the nonresponsive portion of the answer.
Q (BY MR. THOMPSON) Is it fair to characterize the things you want to say but may be deterred from saying as summed up in that phrase you just gave me, "Have you considered voting by mail"?
MR. GARBER: Objection.
A. I think I've said what I can say.
Q. (BY MR. THOMPSON) That's fine. I'm not trying to make you give more examples. I just want to know if there are any other examples. I don't want to hear about them later for the first time. Does that make sense?
A. Yes. My -- I will say that, as with a lot of people, things will come to mind later sometimes that I wish I had said at the time or thought of -- thought of, actually, at the time. At this moment, I -- I'm sorry. I'm not comfortable -- say it one more time. I'm going to really try this time, really try.
Q. Are there any other examples of things you want to say but have been or will be deterred from saying because you're concerned about criminal prosecution under SB 1?
MR. GARBER: Objection.

A. I can't give you a "yes" or "no." I can only say: At this moment, no.
MR. THOMPSON: Thank you very much.
Q. (BY MR. THOMPSON) Do you still have your Declaration in front of you? I believe it is Exhibit 2 to this deposition.
A. Just one moment. Yes.
Q. Let's look at Paragraph 16. Can you see that?
A. Yes.
Q. The last sentence says, "As an appointee of the county voter registrar, I understand that I am a public official." Do you see that?
A. Yes.
Q. Do you contend that you're a public official for purposes of Section 276.016(a)(1)?
MR. GARBER: Objection.
A. I think it enough to not talk with people -- not -- not bring up the subject of vote by mail.
Q (BY MR. THOMPSON) When you say you think it enough, do you mean you're not sure whether you're a public official?
A. My best understanding is that I am.
Q. But you're not sure?
A. I'm hoping that the Courts will clarify that issue, but I'm going on the basis that I am a public

official.
Q. What is the basis for your understanding that you are a public official?
MR. GARBER: Objection.
Cathy, just please don't discuss anything privileged.
A. I think it has to do with the word "deputy."
Q (BY MR. THOMPSON) So you're saying that you think you might be a public official because your title, Volunteer Deputy Registrar, includes the word "deputy." Is that right?
A. Yes.
Q. Any other basis for your contention?
A. No.
Q. Do you remember that Zoom meeting you referred to earlier with the lawyer from Texas Impact?
A. Yes.
Q. Do you remember that during that meeting, he said it wasn't clear whether VDRs are public officials?
A. Yes.
Q. Do you have any reason to disagree with him?
A. No.
MR. MORALES-DOYLE: Will, sorry to interrupt. I'm just wondering if you have a sense of about how much longer you have. I'm not trying to press

you. I'm just trying to get a sense for my other things I've got going on today.
MR. THOMPSON: No, that's perfectly fair. And, I'll be honest, this has taken longer than I expected; but I don't think we have a ton more. I would expect less than an hour.
MR. MORALES-DOYLE: Okay. Thank you.
MR. GARBER: And, Will, just on that point, does it make sense now or in the near future to just give Cathy a few more minutes' break if she wants one?
MR. THOMPSON: Whenever she wants it as far as I'm concerned.
MR. GARBER: Okay.
THE WITNESS: That would be helpful.
MR. BREEN: I'm going to have a few --
MR. THOMPSON: Go ahead.
MR. BREEN: I'm going to have a few, but not as many as Will.
MR. MORALES-DOYLE: Okay. Thank you.
MR. BREEN: We decided to take a break, is that what we did? Looks like it. Okay.
MR. THOMPSON: Yeah. Ms. Cunningham, I think we can go off the record.
THE REPORTER: We're going off the record

at 10:57 a.m.
(Off the record from 10:57 to 11:04 a.m.)
THE REPORTER: We're back on the record at 11:04 a.m.
Q (BY MR. THOMPSON) All right. Ms. Morgan, welcome back. Before the break we talked about two things that informed your --
THE WITNESS: Your sound -- your sound is garbled.
MR. GARBER: Will, I apologize. We're getting some feedback from you.
MR. THOMPSON: Oh.
THE ZOOM TECH: Mr. Thompson, if you just toggle your microphone, that will clear it up. It's a nuance with those Dell computers.
MR. THOMPSON: Can you hear me any better now?
THE WITNESS: No.
MR. BREEN: No, it's still bad.
MR. THOMPSON: Let's try leaving the meeting and coming back, I think.
MR. GARBER: Let's go off the record again.
THE REPORTER: Going off the record at 11:05 a.m.

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(Off the record from 11:05 to 11:06 a.m.)
THE REPORTER: We're going back on the record at 11:06 a.m.
Q (BY MR. THOMPSON) All right. Ms. Morgan, can you hear me again?
A. Yes.
Q. Great. I'm sorry about that.
So before that interruption, we were talking about two things that informed your contention that you're a public official: One was the word "deputy" in your title of Deputy Voter -- I'm sorry -- Volunteer Deputy Registrar, and the other was the lawyer from Texas Impact saying that the term "public official" was not clear; is that right?
A. Correct.
Q. Is there any other basis besides those two that informs your contention that you are a public official?
MR. GARBER: Objection.
Cathy, just be careful of privilege, please.
A. I can't think of one at this moment.
Q. (BY MR. THOMPSON) So the Secretary of State's Office has not told you you're a public official, correct?

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A. I have not called them.
Q. And they haven't otherwise told you you're a public official, right?
A. No.
Q. And no county official has told you you're a public official, correct?
A. Correct.
Q. I'm going to send you what I'll mark as Exhibit 4. It is the Texas Volunteer Deputy Registrar Guide.
(Exhibit 4 marked.)
Q (BY MR. THOMPSON) Let me know when you've received that.
A. Okay.
Q. Are you able to open and see the document?
A. Okay. Here it is.
Q. Do you know what this document is?
A. I think it's what it says it is, Texas Volunteer Deputy Registrar Guide.
Q. Have you ever seen the Deputy -- the Volunteer Deputy Registrar Guide before?
A. I really can't remember.
Q. Do you see up at the top it says, "Texas Secretary of State"?
A. Yes.

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Q. And can you see at the bottom of the page that it came from the Texas Secretary of State's website?
A. Yes.
Q. So let's flip back to page 7 of 9 in the document, and I want to look at the second-to-last question. Follow along with me while I read the question, and then I'll ask you to read the answer.
A. All right.
Q. I just -- excuse me. "QUESTION: I just want to hand out blank voter registration application forms and encourage people to register to vote. Can I do that without being appointed as a volunteer deputy registrar?"
What is the answer printed there?
A. "Yes."
Q. And the answer goes on. I'm happy to read it if you'll just confirm that I'm reading it correctly. "ANSWER: Yes. Anyone can hand out blank application forms to voters for the voters to fill out and mail in themselves. If this is all you want to do, you do not have to be a volunteer deputy registrar. Also, if you are already a volunteer deputy registrar in one county, you can hand out blank forms in other counties where you are not a volunteer deputy. It is the voter's handing the application back to you to review and to deliver to

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the registrar that triggers the requirement to be an authorized volunteer deputy registrar."
Did I read that correctly?
A. Yes.
Q. Do you have any reason to disagree with the answer that we just read from the Texas Volunteer Deputy Registrar Guide?
MR. GARBER: Objection.
A. That -- you read what's there.
Q (BY MR. THOMPSON) I appreciate that. I mean in substance. There was a question, and there was an answer provided. Do you have any reason to disagree that the answer provided in the document is the correct answer to the question that was asked?
A. I understand what is there.
Q. I think you said you understand what's on the document. Do you agree with the answer provided in the document?
MR. GARBER: Objection.
A. I can only say I agree with what you read that that's what's on that document that's from the Secretary of State.
Q. (BY MR. THOMPSON) Do you disagree with what the Secretary of State said in that document?
MR. GARBER: Objection.

A. Can you tell me what the date is on this document?
Q (BY MR. THOMPSON) Yes. If you look at the last page, do you see on the last page there's something that says "Rev"?
A. Yes.
Q. I would interpret that to mean "revision," 9/11/17.
A. Yes.
Q. And --
A. That was several years ago.
Q. -- if you look at the top of each page, you'll see a date that says, "2/3/22, 4:58 PM." Do you see that?
A. I see.
Q. And that's the date that the document was printed to PDF from the Texas Secretary of State's website. Does that look right to you?
A. That's what I'm reading, yes.
Q. Does that provide whatever information you wanted about the date?
A. It provides to me the information on the date that it was printed.
Q. Okay. So it's not a trick question.
A. Okay.

Q. I want to know whether you agree, disagree, or have no opinion about whether the Secretary of State's answer to the question we read is correct.
MR. GARBER: Objection.
A. I'm going to have no opinion on it. I need to see more information.
Q (BY MR. THOMPSON) What additional information would you like to see in order to form an opinion?
A. I would like -- I would like the Courts to clarify what it means to be deputy in this instance with the bill -- with Senate Bill 1.
Q. Anything else, any other information you need to form an opinion?
A. I can't -- I don't know at this time.
Q. Okay. Let's turn back to your Declaration. Do you still have that? I believe it's Exhibit 2.
A. Let me pull it up. Yes, I have it.
Q. In Paragraph 16 your Declaration mentions the "acting in an official capacity" requirement of Section 276.016(a)(1). Do you see that?
A. Yes.
Q. Do you agree that Section 276.016(a)(1) applies only when an official is acting in an official capacity?
MR. GARBER: Objection.

A. Yes, but I also then add on my -- the sentence, the next sentence.
Q. (BY MR. THOMPSON) Exactly. I wanted to ask you about that, too. I'm trying to go in order.
Now, in Paragraph 21 you say, "I do not know what 'while acting in an official capacity' means." Do you see that?
A. Yes.
Q. Sitting here today, do you have any opinion about what "while acting in an official capacity" means?
A. For me, I do not.
Q. Okay. I'm going to send you another document, which I believe we're up to Exhibit 5; and it will be Bates stamped Morgan 12 through Morgan 15.
(Exhibit 5 marked.)
Q (BY MR. THOMPSON) Have you received that document?
A. Yes, I have.
Q. Do you recognize this document?
A. It's loading right now.
Yes, I do recognize it.
Q. What is this document?
A. This is a document from Texas Impact that describes what we did at our church in terms of a voter information booth. That's me on the right in that first

picture.
Q. If you scroll to the last page of Exhibit 5, which is marked Morgan 15, there's an italicized note at the bottom of the page. Do you see it?
A. Yes.
Q. Would you read that note for the record, please?
A. Are you meaning, "What training might your volunteers needs"?
Q. No. I'm sorry. The italics at the very bottom of the page.
A. Oh, the italics. "This project..."?
Q. "This project..."
A. Yes. "This project was developed in partnership with University Presbyterian Church of Austin, Texas. Special thanks to Cathy Morgan of University Presbyterian Church for creating and compiling the information in this handout."
Q. The Cathy Morgan referred to in that note is you, right?
A. Yes, it is.
Q. Did you write the document?
A. I -- I wrote large sections of it, and the staff at Texas Impact filled in some of it. They -- they took what I -- the bones that I had given them and

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gave it a little more flesh.
Q. So on that same page, Morgan 15, the second-to-last paragraph says, in the last sentence, "Texas law is ambiguous as to whether VDRs are permitted to assist individuals to apply for ballots by mail." Do you see that?
A. Yes.
Q. Do you agree with that statement?
A. Yes, I do.
Q. If a Texas Court clarified that ambiguity that you identified, would you consider it helpful?
A. Very helpful.
Q. Have you ever communicated with the Attorney General?
A. No, I have not.
Q. Have you ever communicated before this deposition with anyone from the Office of the Attorney General?
A. No, I have not.
Q. Have you ever communicated with the District Attorney?
A. No, I have not.
Q. Have you ever communicated with anyone from a District Attorney's Office?
A. No, I have not.

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Q. Has anyone ever threatened to criminally prosecute you for violating Section 276.016(a)(1)?
A. No.
Q. Has anyone ever threatened to criminally prosecute you for violating any other law?
A. No.
Q. Has anyone ever threatened to seek a civil penalty against you under Texas Election Code Section 31.129?
MR. GARBER: Objection.
A. No.
Q (BY MR. THOMPSON) Has anyone ever threatened to seek a civil penalty against you under any other provision of law?
MR. GARBER: Objection.
A. No.
THE WITNESS: I'm sorry.
Q. (BY MR. THOMPSON) In your Declaration -- I believe it's Exhibit 2 -- there's a Paragraph 22.
A. Yes.
Q. And the third sentence begins, "The threat of prosecution deters me..." Do you see that?
A. Yes.
Q. I'd like to know how big a chance of prosecution it has to be for you to be deterred. So if

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there's any chance at all of prosecution, is that enough to deter you from saying things that you think might violate Section 276.016(a)(1)?
MR. GARBER: Objection.
A. I find the thought of being put in jail and paying a large fine to be reason enough to hold back on offering assistance -- not offering assistance, but inquiring if people would like to vote by mail.
Q (BY MR. THOMPSON) And I'm not trying to disagree with you, Ms. Morgan. I just want to understand kind of how you're thinking about it. So if it's a very small chance of prosecution but the chance of prosecution is still there, is that enough to deter you?
A. Yes.
Q. One-in-thousand chance, you wouldn't take the risk; is that fair?
MR. GARBER: Objection.
A. Probably not.
Q. (BY MR. THOMPSON) Do you have an opinion about what the chance of prosecution is in your case if you were to engage in the explanation of vote-by-mail option that we've discussed today?
MR. GARBER: Objection.
A. No, I don't.

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Q (BY MR. THOMPSON) In some past cases plaintiffs have said that the existence of a statute deters them from violating the statute, even if they wouldn't be prosecuted. Does that make sense to you as a concept?
A. No.
Q. It's a little bit complicated. I'm going to try and explain it. You could imagine, for example, that a law says you shouldn't do something; but a prosecutor -- the only relevant prosecutor tells you he won't prosecute you even in you violate that law. Does that situation make sense to you?
A. No.
Q. Let me ask it this way: Would you violate Section 276.016(a)(1) if the law still existed on the books but you knew beyond a shadow of a doubt no one would prosecute you for it?
MR. GARBER: Objection.
A. I don't know. I don't know.
Q (BY MR. THOMPSON) Did the question make sense?
A. Yes.
Q. You're just not sure whether you would violate a statute even if you knew there was no threat of criminal prosecution?

A. I can't imagine having a statute saying that everyone considers not applicable, so why care.
Q. I'm not sure I understand that answer. Could you explain it a little more to me?
A. If something is a statute, then -- if a statute said -- statute said, "People who run a red light are going to be arrested," but you know that no one's going to arrest you, so you go ahead and run a red light, that just does not make sense to me.
Q. It doesn't make sense in the sense that you wouldn't do it? Is that what you mean?
A. Well, either a law is a law or it's not.
Q. Do you think that Section 276.016(a)(1) could still be a law even if all of the relevant prosecutors weren't going to prosecute any violations of it?
MR. GARBER: Objection.
A. I think I've answered that.
Q (BY MR. THOMPSON) Perhaps you have, but I didn't understand the answer. Would you mind trying one more time?
A. I'm going to answer you with a little story. My father was one of the most honest men I have ever met. He was an employee of the City of Austin at a high level. He had a City car. The rule was that only City employees could ride in the City car. So as I walked to

school six blocks with it, unbelievably here, freezing and snowing at that time -- I remember well -- he drove by and waved; and I was pretty mad. But my father was being honest. And that's kind of drilled into me.
So if there is a law that essentially stops me from doing something, I'm not going to break that law just because, oh, well, maybe no one will find out.
MR. BREEN: Objection, nonresponsive.
Q (BY MR. THOMPSON) Do you know who Jose Garza is?
A. I believe he's with Travis County.
Q. Do you know that you've sued Jose Garza?
A. I'm sorry?
Q. Do you know that you've sued Jose Garza?
A. Yes.
Q. Do you know that he's the District Attorney for Travis County?
A. Yes.
Q. Are you aware that you and he have agreed to a stipulation in this case?
A. Tell me about that.
Q. Well, I can put it in front of you as --
A. All right.
Q. -- our next exhibit, 6, I believe.

(Exhibit 6 marked.)
Q (BY MR. THOMPSON) You should be receiving it now. Can you see Exhibit 6 on your screen?
A. Oh, here it is. Yes.
Q. And does it say Agreed Stipulation in bold, underlined text?
A. Yes.
Q. Have you seen this document before?
A. I'm not sure.
Q. Okay. Well, I want to go through just a small part of it. So I'm going to read, and you can follow along with me. I'm going to start right under the words Agreed Stipulation; and when I get to the colon, I'm going to go to Paragraph 3. Okay?
A. All right.
Q. "Plaintiffs and Defendant Jose Garza in his official capacity as Travis County District Attorney ("DA Garza") stipulates as follows: Paragraph 3, DA Garza agrees not to enforce Section 276.016(a)(1) of the Texas Election Code challenged in the above-styled and numbered cause until such time as a final, non-appealable decision has been issued in this matter." Do you see that?
A. Yes, I see it.
Q. Do you know what that means?

A. It would seem to me to mean that DA Garza would not -- would not enforce that law until a final, non-appealable decision has been issued in the matter.
Q. Right. So in light of that stipulation, are you worried that if you violate Section 276.016(a)(1) in Travis County, that District Attorney Garza will prosecute you while this case is still pending?
MR. GARBER: Objection.
A. I'm going to check with my lawyers to make sure of my answer on that.
Q. (BY MR. THOMPSON) Sitting here today, before you check with your lawyers, are you worried or not worried about that situation?
A. It causes me to think about it, but I don't think I have a decision at this moment.
Q. Is the reason that you don't have a decision is you're not sure what the stipulation means?
MR. GARBER: Objection.
A. No, I just -- no. That's not it.
Q (BY MR. THOMPSON) What is the reason you don't have a decision?
MR. GARBER: Objection.
A. Oh, I want to make sure I understand the full ramification before I would proceed to offer people ballot by mail without being requested.

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Q (BY MR. THOMPSON) The time limit on the agreement is interesting to me. Do you still have the stipulation in front of you?
A. Yes.
Q. So looking at Paragraph 3, it says that District Attorney Garza's agreement not to prosecute applies only, quote, "until such time as a final, non-appealable decision has been issued in this matter." Do you see that?
A. Yes.
Q. If you violate Section 276.016(a)(1) during 2022, for example, and the Court issues a final, non-appealable decision at the end of 2022, then District Attorney Garza could prosecute you in 2023 for violating the statute during 2022; is that your understanding?
MR. GARBER: Objection.
A. I don't know.
Q (BY MR. THOMPSON) That's fair you don't know.
If that were true, if it were true that DA Garza has agreed not to prosecute you for a time period, but he could prosecute you down the road for things you did while the case was pending, would you still be deterred from providing the information that you say you want to provide?

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MR. GARBER: Objection.
A. I believe so, yes.
Q (BY MR. THOMPSON) So in order to be not deterred, would you need a guarantee that you would never be prosecuted for that conduct?
MR. GARBER: Objection.
A. I would need to see a Court Order concerning that.
Q (BY MR. THOMPSON) I want to make sure I understand the scope of the Court Order you want to see. In order to be not deterred, would you need a Court Order saying that you would never be prosecuted for that conduct?
MR. GARBER: Objection.
A. I would want a Court Order saying that I could -- that I could give people information without their asking about ballot by mail.
Q. (BY MR. THOMPSON) I think I understand the type of Court Order you're asking for. So if you got a Court Order that didn't say that and, instead, said, "District Attorney Garza isn't allowed to prosecute Ms. Morgan for the next year, but he could bring a prosecution later in time," you would still be deterred, wouldn't you?
MR. GARBER: Objection.

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A. I would be deterred.
Q (BY MR. THOMPSON) In Paragraph 18 of your Declaration, which is Exhibit 2 to the deposition --
A. Just one moment. Yes.
Q. Are you there?
A. Yes.
Q. The first sentence in Paragraph 18 says, "Absent Section 276.016(a)(1), I would continue to encourage eligible or potentially eligible voters to vote by mail." My question is: When you say "Absent Section 276.016(a)(1)," do you mean if the Legislature repealed that provision?
MR. GARBER: Objection.
A. If that provision is not considered valid, if the Court says it's not valid. I don't know how else to answer that one.
Q. (BY MR. THOMPSON) Sure, and it may sound like an odd question.
If you're -- when you say, "Absent Section 276.016(a)(1)," the condition you're trying to set up is either that provision is no longer the law or a Court has said that you are allowed to engage in that conduct and will never be prosecuted for it; is that right?
A. So those are two things?

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Q. Yes.
A. So break them apart, please.
Q. Sure. Based on your testimony so far, I think there might be two things that you're describing when you say, "Absent Section 276.016(a)(1)," in Paragraph 18. The first thing I think you might be referring to is if the Legislature repealed that provision. Is that something you intend to include in that condition?
A. That would be one way, yes.
Q. And the second thing I think you might be including is if you got the type of Court Order you referred to early that said, "You are allowed to do this, and you will never been prosecuted for it." Is that correct?
A. If it was a Court Order, yes.
Q. Is there any other thing besides those two that you're referring to with that phrase "Absent Section 276.016(a)(1)" in Paragraph 18?
MR. GARBER: Objection.
A. I don't know.
Q (BY MR. THOMPSON) Sitting here today, can you think of anything else that's included in that phrase?
A. Sitting here today, no.
Q. If we scroll down to Paragraph 20 of your

Declaration it says, "It is not clear to me what constitutes 'solicit[ing]' a vote by mail ballot." Do you see that?
A. Yes, I do.
Q. You believe that part of SB 1 is ambiguous, right?
MR. GARBER: Objection.
A. Yes, I do.
Q. (BY MR. THOMPSON) If a Texas Court clarified that ambiguity for you, you'd consider it helpful, wouldn't you?
MR. GARBER: Objection.
A. It would be helpful.
Q (BY MR. THOMPSON) A similar question for Paragraph 21. It says, "I do not know what 'while acting in an official capacity' means." Do you see that?
A. Yes, I do.
Q. You believe that provision is similarly ambiguous?
MR. GARBER: Objection.
A. Yes, I do.
Q. (BY MR. THOMPSON) And if a Texas Court clarified that ambiguity for you, you would consider it helpful, wouldn't you?

MR. GARBER: Objection.
A. I would find it helpful.
Q (BY MR. THOMPSON) I think earlier today you mentioned that you were moving. Do you remember that?
A. I'm moving from this house to another abode in Travis County.
Q. So if I recall correctly, you currently live in Williamson County; is that right?
A. I do, barely.
Q. Barely. And you're moving from Williamson County to Travis County; is that right?
A. Yes. I don't know when it will be. It will be in the next year or two.
Q. Okay. Do you know where, more precisely than Travis County, you're moving?
A. Yes, I'll be living in a retirement center off of MoPac, near 35th Street --
Q. Okay.
A. -- called Westminster Manor.
Q. What's the name of the center if you remember it?
A. Westminster Manor.
Q. When you move to the retirement center, do you intend to continue working as a VDR?
A. Yes.

Q. We've talked about how you sometimes go door to door, or at least have in the past. Would you do that in or near your retirement center after the move?
MR. GARBER: Objection.
A. I don't know.
Q (BY MR. THOMPSON) Do you have any plans after you move to go back to Williamson County to go door to door?
MR. GARBER: Objection.
A. I don't know on that, either.
Q (BY MR. THOMPSON) The last exhibit I want to send you, which is Exhibit 7, I believe, is Bates stamped Morgan 41. Let me know when you have it.
(Exhibit 7 marked.)
A. I have it.
Q (BY MR. THOMPSON) Do you recognize this document?
A. I do.
Q. Does it include an e-mail from you on January 7th, 2022?
A. It does.
Q. In this e-mail you refer to yourself as a precinct chair in the paragraph labeled Number 1. Do you see that?
A. Yes.

Q. What is a precinct chair?
A. A precinct chair is a -- I'm going to rearrange my -- just a second. Re arrange my... Okay. Is a part of a political party that is more grassroots, that's on the ground in neighborhoods and... Yeah, yeah.
Q. How did you get selected to be a precinct chair?
A. A person -- "selected" is interesting. A person begged me to apply.
Q. And correct me if I'm wrong. I seem to remember that to be a precinct chair, you have to be elected; is that right?
A. You have to be elected if it's the season in which elections would occur. For instance, I just filled out -- not recently -- I filled out a form to be reelected; and the elections will take place during the runoff election. I don't have anyone running against me, which is typical; but other times, if it's not around a voting time, then the precinct chairs of Williamson County, in their monthly meeting, would vote on whether a new person could be a precinct -- a new precinct chair.
MR. BREEN: Pardon me. What exhibit is this?

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THE WITNESS: I'm sorry?
MR. BREEN: I was just talking to Will to tell me what exhibit this was.
MR. THOMPSON: I believe it is Exhibit 7, and it is Bates stamped Morgan 41.
MR. BREEN: Okay. Thank you.
Q (BY MR. THOMPSON) You're a Democrat, right?
A. Yes, I am.
Q. So when running for reelection as a Democratic precinct chair, you'll be running on a ballot during the Democratic primary runoff; is that right?
A. Yes, sir.
Q. So the people voting for you will all be Democrats, right?
A. Yes.
Q. You think SB 1 was a Republican bill, don't you?
MR. GARBER: Objection.
A. It was a bill that came out of the Senate.
Q. (BY MR. THOMPSON) Do you know whether it was supported by Republicans or Democrats or both?
MR. GARBER: Objection.
A. I don't have a strict lineage, but fewer Democrats for sure.
Q (BY MR. THOMPSON) Do you remember when the

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Democrats in the Texas House of Representatives left the state and broke quorum?
MR. GARBER: Objection.
A. Yes.
Q. (BY MR. THOMPSON) Was that related to SB 1?
MR. GARBER: Objection.
A. Honestly, I don't remember.
Q (BY MR. THOMPSON) Did you want the Legislature to vote down SB 1?
MR. GARBER: Objection.
A. I haven't read all of SB 1.
Q (BY MR. THOMPSON) Did you want the Legislature to vote for or vote against SB 1?
MR. GARBER: Objection.
A. All I can say is that this provision is problematic for me, and I would want it removed.
Q. (BY MR. THOMPSON) You wanted the Legislature to vote against this provision, at least, right?
A. At least that, yes.
MR. THOMPSON: All right. I think we're probably about finished here. If we could just take a three-minute break, then I'll confirm and then come back on the record. Does that work for everybody?
MR. BREEN: Yeah. I'm going to -- I'm going to have a few questions, so.

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MR. THOMPSON: Yeah. I'm sorry. I didn't mean to say that you couldn't have questions, obviously.
MR. BREEN: Got it.
THE REPORTER: We're going off the record at 11:42 a.m.
(Off the record from 11:42 to 11:45 a.m.)
THE REPORTER: We're going back on the record at 11:45 a.m.
MR. THOMPSON: Ms. Morgan, I just want to thank you for your time. I know that spending your morning in a deposition is probably not the most fun way you could spend that morning, but we do appreciate you being here.
THE WITNESS: Thank you.
MR. THOMPSON: I don't have any further questions for you.
THE WITNESS: Thank you.
EXAMINATION
BY MR. BREEN:
Q. Hi, Ms. Morgan. My name is Sean Breen. How are you doing this morning?
A. I'm doing as well as can be expected.
Q. Good. Thank you for being here.
I represent Williamson County District

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Attorney Shawn Dick in his official capacity. Okay?
A. Okay.
Q. Do you understand who I am and who I represent?
A. I do.
Q. I have some questions for you. I'm going to try to be very courteous and very respectful. If I'm not, using your school teacher skills, will you let me know at that time?
A. Definitely.
Q. I don't think that's going to happen, but feel free. All right?
A. All right.
Q. And if you don't understand one of my questions, will you let me know at that time?
A. Yes.
Q. Because I want to make sure that the answer you give isn't caused by a bad question or me misbehaving. All right?
A. All right.
Q. And you've been asked a lot of questions and I'll try not to duplicate and I'm going to be a lot less time consuming, not because I'm any better, just that we've already covered most of it. All right?
A. Yes.

Q. Now, you are an individual who resides in Williamson County; but it's in the Austin city limits. Is that true?
A. Correct.
Q. And you've been appointed to serve as a volunteer deputy registrar or a VDR, as that term is used under the Texas Elections Code?
A. Yes.
Q. And you've been appointed to serve as a VDR in both Williamson and Travis counties since 2014, right?
A. Yes.
Q. And the "volunteer" means you don't get paid to do that, true?
A. Correct.
Q. And you're currently not appointed to serve as an alternate election judge in either Williamson or Travis counties; is that right?
A. Not for the March 1st elections, correct.
Q. So as we sit here now, you would not be an alternate election judge?
A. No, I would not be.
Q. And you've applied to serve as one for the 2022 election cycle in Williamson County, but that hasn't been appointed yet; is that true?
A. That's correct, at my request.

Q. Now, you're not an employee, either full time or part time, of the State of Texas or any State agency, true?
A. True.
Q. And you're not an employee, whether full time or part time, of any political subdivision of the state, including Williamson County or Travis County, true?
A. True.
Q. You don't hold any elected public office in the state of Texas, true?
A. No, unless you consider precinct chair; but that's not what you usually put under that description.
Q. Right. So you wouldn't be considering yourself as holding any kind of elected public office in the state or even in Williamson or Travis counties, true?
MR. GARBER: Objection.
A. Except as precinct chair.
Q. (BY MR. BREEN) Which you said you don't consider to be an elected official, right?
A. I stand for election. I could have an opponent. I don't at this point.
Q. Do you have any legal basis to consider that an elected official of the state of Texas?
MR. GARBER: Objection.

A. I don't consider being a precinct chair having certain guidelines and restrictions other than through the political party.
Q. (BY MR. BREEN) And my understanding of the lawsuit you've brought against my client and others isn't based on you being a precinct chair; it's based on you being a VDR, correct?
A. Right, correct.
Q. Now, you're not the appointed member of any board or commission in the state of Texas or in Williamson County or Travis County, right?
A. Correct.
Q. And you don't serve in any of the roles listed in Subsection 1.005 of the Texas Election Code, do you, for instance, like, County Clerk, Deputy County Clerk, Elections Administer, et cetera?
A. No.
MR. GARBER: Objection.
Q (BY MR. BREEN) You understand that my client, Shawn Dick, is the elected District Attorney of Williamson County, Texas?
A. I do.
Q. Do you know when he was elected and began serving?
A. I don't remember, actually.

Q. And do you vote for elected officials, like he, in Williamson County?
A. Yes, I do.
Q. If the record shows he's served as District Attorney since 2016, do you have any reason to dispute that?
A. No.
Q. Do you understand that you've sued him in his official capacity as the District Attorney of Williamson County, not as Shawn Dick, private citizen?
A. Yes.
Q. You understand that in your lawsuit you're asserting claims and causes of action against him, as the official District Attorney, and also Mr. Garza, in his official capacity as the District Attorney, among other people you're suing?
MR. GARBER: Objection.
A. Yes.
Q. (BY MR. BREEN) Have you ever been convicted of any criminal offense established by the Texas Elections Code?
MR. GARBER: Objection.
A. No.
Q. (BY MR. BREEN) Have you ever been prosecuted or are you currently being prosecuted by District

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Attorney Dick or anybody in his office for any alleged criminal violation of the Texas Election Code, whether it's Section 276.016(a)(1), or any other section?

MR. GARBER: Objection.

A. I've forgotten the first part of the question --

(Simultaneous speakers.)

Q. (BY MR. BREEN) Sure. I'll rephrase it.

MR. BREEN: And just for curiosity, what is the basis for that objection?

MR. GARBER: It's a multipart question.

MR. BREEN: Oh, no problem.

Q. (BY MR. BREEN) Here's -- I'll break it down for you. Are you currently being prosecuted by District Attorney Dick or anybody in his office?

A. No.

Q. Are you being prosecuted for any alleged criminal violation of the Texas Election Code by Attorney Dick or anybody else?

A. No.

Q. Are you being prosecuted for any criminal offense whatsoever in the state of Texas currently?

A. No.

Q. Have you ever been prosecuted by District Attorney Dick or anybody in his office for an alleged

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criminal violation of the election code?

A. No.

Q. Have you -- strike that.

Are you currently charged or indicted by District Attorney Dick or his office for any alleged criminal violation of the Texas Election Code?

A. No.

Q. Have you ever been charged or indicted by District Attorney Dick or his office for any alleged criminal violation of the Election Code?

A. No.

Q. Have you ever been or are you currently under threat with prosecution or indictment by District Attorney Dick or his office in connection with any alleged criminal violation of the election code?

A. Repeat the first part of that question.

Q. Sure. Has Attorney -- District Attorney Dick or anybody in his office ever threatened you with prosecution under any alleged violation of the election code?

A. Not that I know of.

Q. You'd -- I'm pretty sure you'd know that if you'd been threatened, right, "yes"?

A. Well, if it was a verbal threat or a written threat.

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Q. What other kind of threat is there?

A. I wouldn't know.

Q. Well, any kind of threat, including verbal, nonverbal, written, unwritten, any kind of threat whatsoever, do you have any information to indicate District Attorney Dick has ever threatened you with criminal prosecution?

A. No.

Q. Do you -- have you been made aware by anybody or any means that you're somehow under investigation by District Attorney Dick for alleged violation of an election code?

A. No.

Q. Has anybody from District Attorney Dick's office ever threatened you with an investigation or threatened you in any way about an election code violation?

A. No.

Q. Have you ever been contacted by any law enforcement officer of the State of Texas or the County of Williamson regarding or in connection with any alleged election code violation?

A. No.

Q. Are you personally aware, Ms. Morgan, of any person at all, ever, who has been prosecuted by District

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Attorney Dick or his office for an alleged violation of the Texas Election Code?

A. No.

Q. Are you aware of any threat of prosecution by District Attorney Dick or anybody in his office in connection with an alleged violation of the election code?

A. No.

Q. Are you aware of any person at all who's ever been charged by District Attorney Dick for an alleged violation of the very code we're here talking about today?

A. No.

Q. Now, have you ever personally spoken with District Attorney Dick or anybody in his office about Section 276 of the election code, its contents, or enforcement of the statute?

A. No.

Q. Did you ever seek any type of clarification, advice, input from District Attorney Dick or anybody in his office about Section 276 of the election code?

A. No.

Q. Have you ever sought such advice, clarification, or input from any official in the state of Texas about Section 276 of the election code?

A. Not personally, no.
Q. When you say "not personally," what do you mean?
A. I had talked with someone who had talked with someone.
Q. And who is that?
A. Her name is -- I hate to say her name. I mean, she's just a person. She's Marla Garza-Friel.
Q. Marlo Garza-Friel?
A. Marla. Marla.
Q. And in what context did you visit with Marla?
A. We both work on voter registration.
Q. In what county?
A. Williamson.
Q. And who had she spoken with?
MR. GARBER: Objection.
A. I'm really not sure, absolutely. I'm not sure.
Q. (BY MR. BREEN) Well, you said you spoke with someone who spoke with someone. So that would be you spoke with Marla, and she had spoken with someone, right?
A. Someone, yes.
Q. But you don't --
A. She felt very strongly about what the law was

saying.
Q. And when you say "felt very strongly," you mean her interpretation of the law was something that she felt strongly about?
A. Yes. I think at the time -- I'm going to be fair to her. I think at the time I wasn't so sure about it; and later, when I began to read what it said, I thought: Oh, I think I need to be careful and not --
Q. Okay. Well, who had Marla spoken with? Was it some type of --
A. I don't know.
Q. -- public official?
A. I don't know.
Q. All right. Well, then, to be fair, it wasn't as if Marla gave you any information to indicate there was any threat of prosecution to you that was credible; isn't that accurate?
MR. GARBER: Objection.
A. I think that's probably correct.
Q. (BY MR. BREEN) Now, did you call and seek clarification from the Texas Secretary of State's Office about this statute?
A. No.
Q. Did you call and seek clarification or input from the County Voter Registrar of Travis or Williamson

County about the statute at issue?
A. No.
Q. Did you call and seek input or clarification from the Williamson County District Attorney's Office about the statute at issue?
A. No.
Q. Did you call and seek clarification or input from the Travis County District Attorney's Office?
A. No.
Q. Did you call any legislator, your legislator, or anybody else to ask for any type of input, advice, et cetera, about the statute at issue?
A. I had a text with a person in John Bucy's office, who is my State Representative.
Q. And what was that text? What did the text say?
A. And she sent me the exact part of the law that I was asking about --
(Simultaneous speakers.)
A. -- a copy.
Q. Okay. She sent you Section 276.016?
A. If that's the part we're talking about, yes.
Q. Yes, ma'am, that's the part you filed the lawsuit about.
A. Right.

Q. And she just sent you the law. Did she send you any type of commentary?
A. Not that I recall.
Q. She certainly never indicated to you that you would be prosecuted for anything you were doing, did she?
A. She did not say either way.
Q. Well, my question to you isn't whether she said either way; it was whether she said to you, "Hey, there's a threat of prosecution" or "You may be prosecuted."
A. Not that I remember.
Q. She was just sphinxlike; she just sent the statute to you, and that was it?
A. That was my -- that was my request of her.
Q. Did you have any follow-up with her or with Senator -- or Representative Bucy about any questions you had?
A. No, I did not.
Q. Now, was this before you went to the Zoom -- or saw the Zoom video meeting that you testified about or after the Texas Impact Zoom lawyer meeting?
A. I think -- I'm not -- I'm not remembering very clearly, but I think it was after.
Q. Okay. So you had already become alarmed by

the Zoom Texas Impact meeting at that time and sent the text to the legislator to get the exact copy of the law?
A. Yes.
Q. And do you remember when that was? Was that approximately late September or October of 2021?
A. I don't remember. It was after the date of the Zoom meeting.
Q. Okay. And I take it you never contacted the Williamson County Elections Administrator to get any kind of clarification or interpretation about the statute; is that right?
A. That's correct.
Q. So if I understand your testimony, the only real clarification and/or opinion you've received about the statute you're suing about, setting aside your own attorneys, would be the Zoom lawyer from Texas Impact; is that right?
MR. GARBER: Objection.
A. I have probably read something in newspapers, but I cannot be specific on that.
Q (BY MR. BREEN) You don't recall if you did; is that true?
A. No, I can't recall.
Q. And what you read or may have read didn't indicate that you were going to be prosecuted in any

way, did it, in the newspaper?
A. It raised a question.
Q. Well, when was that, after the Zoom lawyer Texas Impact meeting?
A. I'm sure it was.
Q. So by the time you read whatever you read in the newspaper, you had already gotten the opinion from the Texas Impact lawyer about the statute; is that right?
A. Yes, that there was a question.
Q. And the opinion by the Texas Impact lawyer that there may be a question or ambiguities in the statute, that person and that lawyer, other than your own, is actually the only opinion you ever got or sought before you filed a lawsuit; isn't that true?
MR. GARBER: Objection.
A. I really actually don't remember.
Q (BY MR. BREEN) You can't remember any others besides that one; is that accurate?
A. I don't remember at this moment.
Q. When you say you don't remember, what you mean is you don't remember any opinion other than that Zoom Texas Watch lawyer that you can point me to now?
A. It's Texas Impact.
Q. Texas Impact.

A. Yes.
Q. Is that true?
A. In substance. I really -- if I remember something later, I will try to tell you that.
Q. Sure. As far as we sit here now, though, you've told me any other opinion you received, which is none, other than the one from the Texas Impact lawyer before your lawsuit, right?
A. At this moment that's my answer.
Q. Now, have you ever heard District Attorney Shawn Dick speak or anybody in his office speak about Section 276 of the election code, its contents, or enforcement of the statute?
A. No.
Q. Have you ever read or seen anything authored by District Attorney Dick or anyone in his office regarding Section 276 of the election code or its contents?
A. No.
Q. Have you ever seen or read anything that was attributed to District Attorney Dick or anybody in his office about Section 276 of the Texas Elections Code?
A. No.
Q. Have you ever seen any social media posts or tweets or Instagrams or DMs or anything like that from

District Attorney Dick or anyone in his office about Section 276 of the election code and enforcement of it?
A. No.
Q. Has anybody from District Attorney Dick's Office ever contacted you regarding any aspect or your role or responsibilities as a VDR in Williamson County?
A. No.
Q. Is it true, then, from your personal knowledge, District Attorney Dick, until you sued him, had never heard of you, never threatened you, never accused you of violating the law, and never, to your knowledge, even publicly mentioned Section 276; isn't that true?
MR. GARBER: Objection.
A. That is correct.
Q (BY MR. BREEN) And that Attorney -- District Attorney Dick never intimated or said, that you heard, formal enforcement of Section 276 was on the horizon for you or anybody else in Williamson County; isn't that true?
A. That is true.
Q. Now, if I understood your testimony earlier, it's clear to you that the training you've received over the years as a VDR does not call for you to go solicit or lobby somebody to vote by mail; is that right?

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MR. GARBER: Objection.
A. That training, I don't recall ever -- that ballot by mail was ever mentioned.
Q (BY MR. BREEN) Well, of course, in your VDR training, they train you to provide all voter information to voters, right?
A. They train us to register people to vote.
Q. And do they also train you to provide voting information, such as websites or handouts, et cetera?
A. I would have to go back to that training, but my recollection is that it only has to do with how to correctly fill out the information on the cards and what to do with them and what's -- that it is not our job to decide whether or not the person is able to vote; that our job is just to take the registration for someone else to make that decision.
Q. So there was nothing in your VDR training that trained you: Hey, Ms. Morgan, you need to solicit people to vote in a certain way, true?
MR. GARBER: Objection.
A. Not that I recall.
Q (BY MR. BREEN) That's not part of your role as a VDR, to solicit people to vote in a certain way; isn't that accurate?
MR. GARBER: Objection.

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A. Define "vote in a certain way."
Q. (BY MR. BREEN) Well, to vote by mail, to vote in person, to absentee vote, et cetera. Your job as a VDR isn't to solicit people to vote in a certain way; isn't that true?
A. That's the training.
Q. That's the training and that's the job description as a VDR and it doesn't include soliciting people to vote in a certain way, does it?
MR. GARBER: Objection.
A. When you're speaking of voting and being a VDR and taking that seriously, I believe that it is my responsibility to assist people in making sure they can vote whatever -- whatever way they choose and however they choose.
Q. (BY MR. BREEN) Right. The key there is for them to vote how they choose, not how you want them to vote, the manner in which you want them to vote, true?
A. What I care about is people voting.
Q. Exactly.
A. How they vote is their decision.
Q. The manner in which the person votes is not your care, is it, as a VDR; that is, absentee, vote by mail, vote in person? You don't care the manner; you just want them to vote, right?

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A. I care that they have the ability to vote in whichever way meets their circumstances and needs best.
Q. And they're the person that decides which way meets their circumstances the best, true?
A. True.
Q. You're not, as a VDR, there to try to get them to vote in one manner or another, are you; that is, vote by mail versus vote in person? You just want them to vote?
A. I would like them to vote in whichever way enables them to vote most easily.
Q. Exactly, like, for instance, I think it was Mrs. Banks; that was an example you used, correct?
A. Yes.
Q. And as a VDR, what your job was with Mrs. Banks was get her information; and that information happened to include that she could vote by mail, right?
A. I went to her house being a VDR, also a caring neighbor. So as she told me her circumstances and how difficult it was for her to get to the polling places and since she was well over 65, then, I made the suggestion at that point, several years ago, that she consider ballot by mail. And she said, "That would be wonderful. Can you help me do that?"
Q. Exactly. You said, I believe, before, you

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told her, "You can vote by mail," right?
A. Yes.
Q. You didn't tell her, "You should vote by mail," did you?
A. No. "You can."
Q. You didn't say, "Would you vote by mail," did you?
A. No.
Q. You didn't say, "I'd like you to vote by mail," did you?
A. No.
Q. That would all be soliciting her to vote by mail, wouldn't it?
MR. GARBER: Objection.
A. I think what we're ask- -- what I'm asking the Court to decide is exactly what "soliciting" means.
Q. (BY MR. BREEN) Right. Well, have you looked up the definition of "solicit"?
A. I did at one time. It was unclear to me.
Q. The definition was unclear to you?
A. Unclear in this circumstance.
Q. Now, back to Ms. Banks, though, what was clear was you were providing her information about voting by mail, right?
A. Yes, I did.

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Q. But you weren't asking her to vote by mail?
A. No.
Q. You weren't trying to get her to vote by mail?
A. No.
Q. That wouldn't be proper as a VDR, would it?
A. It wouldn't be proper as a VDR or not.
Q. It wouldn't be proper as a VDR, per your training, to try to get somebody to vote in a certain way, true?
A. I don't think the training ever addressed that.
Q. Well, your personal practice, then --
A. Yes.
Q. -- isn't to try to get somebody to vote in a certain way; it's to give them information, isn't it?
A. Yes, yes.
Q. Do you know that the statute itself says it's okay to provide information, general information about voting by mail, voting-by-mail process, and the timelines to a person?
A. I don't remember that in the statute.
Q. That's important, isn't it?
MR. GARBER: Objection.
A. It is important.
Q. (BY MR. BREEN) That's exactly what you do as

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a VDR when you provide information about voting by mail, like you did to Mrs. Banks. You give her general information about voting by mail. You give her information about the mail process, and you give her the timelines; isn't that right?
MR. GARBER: Objection.
A. I did that.
Q. (BY MR. BREEN) And did you not realize currently, as we sit here now, that 276.016 has a specific section that, even if you were somehow acting in your official capacity, you can provide that information to people?
A. No.
Q. You didn't know that?
A. No.
Q. That's important. And now that you know it, do you understand that you can provide that information to people?
MR. GARBER: Objection.
A. I want that clarified. I need to go read it.
Q (BY MR. BREEN) Okay. Is there anything unclear to you about the ability to provide general information about voting by mail; you understand what that means, right?
A. Yes.

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Q. And how about providing information about the vote-by-mail process, you understand what that means, right?
A. Yes.
Q. And the timelines associated with voting to a person or the public, you understand what that means, don't you?
A. Yes.
Q. And that's all, really, as a VDR you want to give people when you are giving them the information about voting by mail; isn't that true?
MR. GARBER: Objection.
A. That's what I want to do for people.
Q. (BY MR. BREEN) But until I just read that in the statute, you didn't realize that was in the statute; is that accurate?
A. That's accurate.
Q. Now, you're seeking attorney fees in this case. Did you understand that?
MR. GARBER: Objection.
A. I -- I don't remember.
Q. (BY MR. BREEN) Okay. Well, I'll represent to you that the pleadings I've seen in the case that have been filed on your behalf are seeking attorney fees from different individuals in the case, including my client.

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Did you know that?
A. No.
Q. Are you paying for attorneys to represent you in this lawsuit?
A. No.
Q. Who's paying for those attorneys?
MR. GARBER: Objection.
A. I don't know.
Q. (BY MR. BREEN) But it's not you?
A. No.
Q. Did somebody connect you with the attorneys that are suing on your behalf in this lawsuit?
A. Yes.
Q. Who?
A. Bee Morehead, Director of Texas Impact.
Q. Did you know that the judge in this case has the discretion to award fees, attorney fees, to the prevailing party?
MR. GARBER: Objection.
A. No.
Q. (BY MR. BREEN) And that the prevailing party may not be you; did you know that?
MR. GARBER: Objection.
A. No.
Q. (BY MR. BREEN) Ms. Morgan, have you

understood the questions that I asked you here today?
A. I think so.
Q. Have I been courteous to you?
A. Yes, you have been.
Q. Through my demeanor have I caused you to answer questions in any way other than you wanted to answer?
A. Not by your demeanor, no.
Q. Okay. By anything that you alerted me to, like we had a deal at the beginning of the deposition that I started, is there anything I did that caused you to answer other than you wanted to?
A. No.
MR. BREEN: Thank you so much for your time, ma'am.
I'm going to reserve the rest of my questions.
Anybody else?
MR. THOMPSON: No more questions from me. I think -- Mr. Garber, I didn't hear your answer.
MR. GARBER: I'm not going to ask any questions at this time, but I wanted to give you or any other defense counsel the opportunity first.
MR. BREEN: Thanks, Andrew.
MR. GARBER: Thank you, Mr. Breen.

MR. BREEN: Okay. I think this concludes the depo, then.
THE REPORTER: Excuse me. Before we go off the record, Counsel, can you state if you need a copy of the transcript?
MR. GARBER: Yes, please.
MR. BREEN: Sean Breen, yes, I need a copy.
THE REPORTER: And how about the video?
MR. BREEN: Yes.
THE REPORTER: Mr. Garber, do you need the video?
MR. GARBER: I think we're all right with just the transcript.
THE REPORTER: All right. This concludes the deposition at 12:18 p.m.
(Deposition adjourned at 12:18 p.m.)
(Signature not requested.)
--ooOoo--

STATE OF TEXAS)
REPORTER'S CERTIFICATION
I, DEBBIE D. CUNNINGHAM, CSR, hereby certify that the witness was duly sworn and that this transcript is a true record of the testimony given by the witness.
I further certify that I am neither counsel for, related to, nor employed by any of the parties or attorneys in the action in which this proceeding was taken. Further, I am not a relative or employee of any attorney of record in this cause, nor am I financially or otherwise interested in the outcome of the action.
I further certify that pursuant to FRCP Rule 30(f)(1) that the signature of the deponent was not requested by the deponent or a party before the completion of the deposition.
Subscribed and sworn to by me this day, February 7, 2022.

_____
Debbie D. Cunningham, CSR

IN THE 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 Attorney General of Texas, KIM OGG, in her official capacity as Harris County District Attorney, SHAWN DICK, in his official capacity as Williamson County District Attorney, and JOSÉ GARZA, in his official capacity as Travis County District Attorney, *Defendants*.	§	Case No. 5:21-cv-1223-XR

APPENDIX IN SUPPORT OF DEFENDANT TEXAS ATTORNEY GENERAL WARREN KENNETH PAXTON'S RESPONSE TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Exhibit C

Declaration of Brian Keith Ingram

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

DECLARATION OF BRIAN KEITH INGRAM

I, Brian Keith Ingram, declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the following testimony is true and correct to the best of my knowledge and belief.

1. My name is Brian Keith Ingram. I am over 18 years old and competent to make this declaration. I currently serve as the Director of the Elections Division at the Texas Secretary of State's Office and have done so since January 5, 2012.

2. The Texas Secretary of State is the chief election officer for Texas. As the State's chief election officer, the Secretary, through the Elections Division, prepares and distributes guidance to appropriate state and local authorities in the administration of elections in Texas, and provides certain administrative support.

3. In my tenure as Director of the Elections Division, I have become familiar with the administration and operations of Texas elections, including the tasks, practices, and responsibilities that local Texas election authorities must fulfill; the deadlines local election authorities must meet; the time, money, and manpower it takes; and the laws and regulations with which local election authorities must comply to plan, coordinate, manage, and execute a successful election. This includes how those authorities handle an application for ballot by mail ("ABBM"), sometimes called a vote-by-mail application.

4. To my knowledge, before the 2020 general election, no county in Texas sent unsolicited ABBMs to all voters regardless of age. In 2020, Harris County attempted to do so. The Elections Division had advised Harris County that doing so would likely violate Election

Code § 84.0041, which prohibits providing false information on an ABBM and intentionally causing false information to be put on an ABBM.

5. The Elections Division had advised Harris County that sending unsolicited ABBMs to every registered voter could mislead unqualified voters into thinking that they were eligible to vote by mail, thereby inducing them to commit a felony. This is based on the Elections Division's experience and my personal experience operating that Division. Some voters are confused by official mailings and do not carefully review the instructions. For instance, the Elections Division receives calls from individuals who receive mail from our office indicating that they may not be registered to vote; these individuals often ask questions that are answered by our office's mailing or which otherwise indicate that they did not understand the mailing they received.

6. Some voters simply fill out a form and return it because of their belief that receipt of an ABBM sent by a government official indicates the official's certification that the voter is eligible to vote by mail. While the ABBM includes instructions on who is eligible to vote by mail, this appearance of official sanction—combined with many voters' disinclination to completely read a mailing's instructions—will lead to unqualified voters applying for a ballot by mail.

7. Government officials sending unsolicited ABBMs was a problem because some voters interpreted them as an official recommendation to vote by mail and an implicit assurance that they were qualified to do so. I would have similar concerns about any official government communication that voters were likely to interpret as an official recommendation to vote by mail and an implicit assurance that they are qualified to do so.

8. While counties, to my knowledge, had never conducted mass mailings of unsolicited ABBMs before the 2020 general election, third parties may—and often do—send unsolicited ABBMs to voters. The Elections Division is sometimes asked by third parties to review their mass mailings to ensure that they comply with the law. We have never approved such a mass mailing that went to voters who are not over the age of 65 and are automatically eligible for a ballot by mail.

9. On one occasion, the Secretary of State's office received information that a campaign sent a mass mailing of unsolicited ABBMs to voters of all ages. When our office heard of the mailing, we instructed that campaign to retract the mailing, contact the affected voters, and inform them of the eligibility requirements for voting by mail. We gave that instruction so that campaign did not cause a voter to inadvertently commit a felony and to ensure that voters are not confused about their eligibility to vote by mail.

10. Based on my experience as Director of Elections, changing the election procedures in the middle of an election cycle can create considerable confusion and frustration among voters and local election officials. For example, the U.S. District Court for the Western District of Texas ordered that the date of the primary election be changed in 2012. Until the COVID-19 pandemic, that was the most chaotic and demanding primary during my tenure as Director of Elections. I received many phone calls from voters of both political parties, independents, county administrators, and elected officials that complained about the disruptions and confusion caused by that change. Many communicated their anger and frustration that changes to the primary were being made behind closed doors without public scrutiny or accountability. Many callers expressed fear that the changes were being made to benefit one party or one candidate over another.

11. Similarly, last-minute changes to the rules governing election administration can cause voter confusion and mistrust. In June 2020, our office issued guidance about masks in the polling place in Election Advisory No. 2020-19. During the last week of early voting for the November election, a part of Governor Greg Abbott's Executive Order GA-29, which related to the use of face coverings during COVID-19, was invalidated by a district court. This ruling—which was stayed by an appellate court a day later—is just one example of last minute rule changes that confused and angered voters and poll workers.

12. If, in the middle of an election, election officials began soliciting the submission of applications to vote by mail from people who did not request applications, despite a high-profile law prohibiting that practice, I would expect at least some voters to be confused and lose trust in the election process. Voter trust is considerably lower today than it has been in the past. Further eroding voter trust could have serious consequences.

Executed on February 8, 2022.

Brian Keith Ingram

IN THE 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 Attorney General of Texas, KIM OGG, in her official capacity as Harris County District Attorney, SHAWN DICK, in his official capacity as Williamson County District Attorney, and JOSÉ GARZA, in his official capacity as Travis County District Attorney, *Defendants*.	§	Case No. 5:21-cv-1223-XR

APPENDIX IN SUPPORT OF DEFENDANT TEXAS ATTORNEY GENERAL WARREN KENNETH PAXTON'S RESPONSE TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Exhibit D

Declaration of Lupe Torres

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

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

DECLARATION OF LUPE TORRES

I, Lupe Torres, declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the following testimony is true and correct to the best of my knowledge and belief:

1. My name is Lupe Torres, and I currently serve as the Elections Administrator in Medina County, Texas. As a part of my duties as Elections Administrator, I serve as the early voting clerk for Medina County in any general election for state and county officers, primary election, or special election ordered by the governor. *See* Tex. Elec. Code §§ 31.043, 83.002. I am therefore the election officer in Medina County primarily responsible for conducting and overseeing in-person voting as well as voting by mail. *See*, *e.g.*, §§ 85.062 et seq., § 86.001 et seq.

2. My experience gives me substantial insight into the procedures, administration, and various complexities of conducting elections in Texas.

3. I understand that the above-captioned lawsuit challenges a specific provision in the Texas Election Code pertaining to the unlawful solicitation and distribution of applications to vote by mail. I do not have any opinion regarding the specifics of that provision or the merits of Plaintiffs' claims. Instead, I am offering this declaration to provide the Court with information about the logistics of Texas's vote-by-mail program and how these logistics differ from in person voting.

4. In my experience, a key distinction between voting by mail and voting by personal appearance is that former is more time-consuming for both voters and the county.

5. In the case of voting by personal appearance, the voter arrives at the designated polling location on Election Day or during the early voting period. The voter then signs in,

commandeers a voting machine, uses the machine to mark the ballot, reviews his or her choices, and casts the ballot—all in a single transaction.

6. In the case of mail-in voting, the voting process occurs in stages, the entirety of which can take days to complete. As per the Texas Election Code, a person who qualifies to vote by mail under §§ 82.001–004 must first submit an application to the early voting clerk that is signed and in writing. §§ 84.001. The early voting clerk must then review and process the application and send that voter balloting materials once the balloting materials are finalized and available.

7. To help prevent fraud and inadvertent mistakes, each ballot is assigned a tracking number. The early voting clerk inputs that number into the Texas Election Administration Management (TEAM) system under the voter's registration file. Should the voter return their ballot, cancel their ballot, or request a new ballot, the early voting clerk will document that in TEAM as well.

8. Once the balloting materials are sent, the voter has to wait several days for U.S. Postal Service to deliver the ballot materials to the voter's address. The voter then will have the opportunity to review, fill in, and return their ballot to be counted by the statutory deadline. In Texas, a marked ballot will be counted so long as it arrives at the address on the carrier envelope not later than 5 p.m. on the day after election day and is postmarked no later than 7 p.m. on election day. *Id.* at § 86.007.

9. Assuming the ballot is timely, the early voting clerk will transport the carrier envelope, which contains the ballot, to either a Signature Verification Committee or the Early Voting Ballot Board, depending on the county, to determine whether the ballot was cast by the voter who requested the ballot. Medina County does not utilize a Signature Verification Committee and instead relies on the Early Voting Ballot Board to process, qualify, and count mail-in ballots.

10. It is standard practice for Medina County to mail absentee ballots to voters weeks in advance of an election. But because Medina County has a population under 100,000, the Early Voting Ballot Board cannot convene until after the end of the early voting period to make its determination that a mail-in ballot complied with all statutory requirements and therefore should be accepted. *Id.* at § 87.024. The Election Code, in fact, does not require the early voting clerk to deliver the ballots to the Early Voting Ballot Board until the closing of the polls on Election Day, or as soon after closing as practicable, at a time specified by the presiding judge of the board. *Id.*

11. As a consequence, Medina County begins receiving mail-in ballots well before the Early Voting Ballot Board is statutorily allowed to accept or reject the ballots, much less count them towards the candidates' total. *See id.* at §§ 87.024, 87.0241.

12. Because ballots arrive before the Early Voting Ballot Board meets, the early voting clerk must safely store and secure the ballots during the election so as to preserve the chain of custody and foreclose the possibility of tampering. In addition, the Texas

Election Code requires each local election authority to preserve and store precinct election records, including mail-in ballots, for a minimum of 22 months after Election Day. *Id.* at § 66.058. Storing these materials can take up significant space. Medina County provides my office with a storage unit for the purpose.

13. In light of the foregoing, shifting voters from in-person to mail-in voting would, on average, increase the expense and complexity of election administration.

Executed on this 8th day of February, 2022.

Lupe Torres
Medina County Elections Administrator

IN THE 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 Attorney General of Texas, KIM OGG, in her official capacity as Harris County District Attorney, SHAWN DICK, in his official capacity as Williamson County District Attorney, and JOSÉ GARZA, in his official capacity as Travis County District Attorney, *Defendants*.	§	Case No. 5:21-cv-1223-XR

APPENDIX IN SUPPORT OF DEFENDANT TEXAS ATTORNEY GENERAL WARREN KENNETH PAXTON'S RESPONSE TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Exhibit E

Declaration of Jenise "Cricket" Miller

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

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

DECLARATION OF JENISE "CRICKETT" MILLER

I, Jenise "Crickett" Miller, declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the following testimony is true and correct to the best of my knowledge and belief.

1. My name is Jenise "Crickett" Miller. I am over 18 years old and competent to make this declaration. I currently serve as the Election Administrator for Parker County, Texas and have occupied this position since August 2020. Prior to my appointment, I was the Elections Administrator in Hood County, Texas for nearly seven years. All told I have nearly a decade's worth of experience in the field of elections.

2. In my role as Elections Administrator, I am responsible for the operations of the Elections Department in Parker County. I also serve as the early voting clerk for most elections in Parker County, including any general election for state and county officers, other county-wide election, primary election, or special election ordered by the governor. *See* Tex. Elec. Code §§ 31.043, 83.002. I am therefore the election officer in Parker County that is primarily responsible for conducting and overseeing in-person voting as well as voting by mail. *See*, *e.g.*, §§ 85.002 et seq., § 86.001 et seq.

3. I have become familiar with the administration and operations of Texas elections during my tenure as the Election Administrator for both Hood County and Parker County. This includes the tasks, practices, and responsibilities that local election authorities must fulfill; the time, money, and manpower it takes to meet these obligations; and the laws and regulations with which local election authorities must comply to plan, coordinate, manage, and execute a successful election. As such, I have substantial insight into the logistics of Texas's vote-by-mail program and how these logistics differ from in-person voting.

4. I offer no opinions regarding the specific provision of the Texas Election Code challenged

in this lawsuit; nor do I offer an opinion regarding the merits of Plaintiffs' claims. My testimony is limited to providing this Court with information about how Texas elections, particularly Texas's vote-by-mail program, operate in practice.

5. The chief difference between voting by mail and voting in person is that to vote by mail the voter must relinquish custody of the ballot before it is counted. In the case of voting in person, the voter retains control of the ballot until the voter receives confirmation that the ballot was accepted and added to the candidates' total. This distinction has serious implications for voters and counties since the additional steps needed to process the ballot not only impose logistical burdens, but also introduce greater possibility of error and therefore demand a greater number of safeguards to protect against disenfranchisement or fraud.

6. Voting by personal appearance reduces the chance of ballot errors. Since 2019, Parker County has utilized the Hart InterCivic Verity Voting System in its elections. This voting system employs a hybrid model that provides voters with the convenience of electronic voting, but also the added security and redundancy of having a paper trail. Voters make their selection on a digital terminal, but unlike the traditional DRE machine, the terminals do not record the voters' selections. Instead, those choices are printed on a paper ballot for voters to review and confirm. Then, once the voters are satisfied, their ballots are inserted into an optical scanner that counts the ballots and then deposits them in the ballot box. There is no doubt that the voters' ballots have been accepted.

7. The two-step process enabled by the Hart InterCivic Verity Voting System gives voters an opportunity to review their ballots and identify any mistakes. If a mistake was made, then the voter can return to the terminal, make the correction, reprint the ballot, and submit a corrected ballot to be counted. Similarly, the voting system eliminates the risk of overvoting, which is when a voter selects more candidates for office than there are seats available. The system accomplishes this two ways: first, the digital terminals prevent the voter from choosing too many candidates for a given office, and second, the optical scanners notify the voter of an error, which the voter can then cure.

8. Mail-in voting does not offer voters the same opportunities to cure problems with their ballot. If, after receiving a mail-in ballot, a voter commits a mistake, such as choosing the wrong candidate, overvoting, or creating some type of mark or blemish on the ballot, Texas law permits the voter to cancel the ballot and request a new one. However, some voters find the process inconvenient, while others do not have time for a second ballot to arrive before the receipt deadline. It is therefore commonplace for voters to submit ballots with candidate selections crossed out, ambiguous markings, or notes jotted on the side.

9. When this type of mistake occurs, the optical scanners read the marks as an overvote and will not count the voter's choice for that particular office. In such cases, the Early Voting Ballot Board will "make every effort to correctly reflect the voter's intent." *Id.* at § 87.006(a). However, there is no guarantee that the Early Voting Ballot Board will come to the right conclusion or even recognize that an error occurred, no matter how hard the Early Voting Ballot Board works.

10. Voting by personal appearance also makes it easier for the county to confirm a voter's identity than voting by mail. When a voter appears in person to vote, an election worker will request that the voter provide one form of photo identification listed in Texas Election Code § 63.0101(a), or one form of identification listed in Section 63.0101(b) accompanied by a declaration. *See id.* at § 63.001. On presentation of this documentation, an election officer shall determine whether the voter's name is on the list of registered voters for the precinct. The election officer shall also verify whether the person poised to vote is the same person that appears on the photo identification. If the voter meets these requirements, then the voter shall be accepted. *Id.* In an alternative scenario, where the voter is unable to provide the requisite identification, the voter may cast a provisional ballot and is informed of the procedures that the voter must follow to have the ballot accepted. *Id.*

11. In the case of mail-in voting, the voter is not present to tender their photo identification for election workers to review. Accordingly, the State prescribes an alternative process for verifying the voter's identity, which can impose a significant burden on the county. As per the Texas Election Code, a person who qualifies to vote by mail must first submit an application to the early voting clerk that is signed and in writing. *Id.* at § 84.001. The early voting clerk then reviews the application and confirms the information on the application by consulting the voter's registration file in the Texas Election Administrative Management (TEAM) system. *Id.* at § 86.001. The early voting clerk will then send the balloting materials to the voter, including the carrier envelope and ballot.

12. If the voter returns a marked ballot, the early voting clerk will transport the carrier envelope, unopened, to either a Signature Verification Committee or the Early Voting Ballot Board, depending on the county, to process, qualify, and count the ballot as well as verify the voter's identity. Parker County has opted to appoint a Signature Verification Committee for the March Primary Election since the Texas Election Code allows the Signature Verification Committee to begin operating a full twenty days before Election Day, whereas the Early Voting Ballot Board may only start meeting after the close of the early voting period (or four days before Election Day). *Id.* at §§ 87.024(a), 87.0241(b)(2), 87.027(f).

13. The Signature Verification Committee compares the signature on each carrier envelope with the signature on the voter's ballot application, or if needed, any known signature of the voter on file with the county, to determine whether the signatures are those of the voter. *Id.* at § 87.027(i). Then, if the committee determines that the signatures match, the committee will deliver the carrier envelope to the Early Voting Ballot Board to open and count the ballot by placing it through an optical scanner. In the event the Signature Verification Committee determines, by majority vote, that the signature is not that of the voter, the Early Voting Ballot Board will conduct a second review of the signature abiding by the same procedures. *Id.* at § 87.027(j). The Signature Verification Committee or Early Voting Ballot Board will also make sure that the identification number supplied by the voter matches the information in the TEAM database.

14. For added security, the early voting clerk will update the voter's registration file to reflect each step of the process, including whether an application to vote by mail was received by the Elections Department and approved; whether a ballot was dispatched to the voter;

whether the voter returned, canceled, or discarded the ballot; and if a marked ballot was returned, whether the Early Voting Ballot Board accepted or rejected the ballot.

15. As with in-person voting, the Texas Election Code provides a mechanism by which the voter may cure a disqualifying defect. Specifically, the Texas Election Code charges the Signature Verification Committee and the Early Voting Ballot Board with contacting the voter and giving the voter the option of: (1) correcting the defect and returning the carrier envelope, (2) canceling the mail-in ballot and voting in person, or (3) appearing in person before the early voting clerk's office not later than the sixth day after election day to correct the defect. *See id.* at §§ 87.0271, 87.0411. The Texas Election Code demands that the Election Signature Verification Committee and the Early Voting Ballot Board act within two days of discovering the defect.

16. There is also the matter of storing the ballots. If a ballot arrives before the Texas Election Code permits either the Signature Verification Committee or the Early Voting Ballot Board to convene, the early voting clerk will store the ballots in a locked area until the appropriate time. In Parker County, the Elections Department also utilizes surveillance cameras to ensure that the ballots remain secure. In addition, the Texas Election Code requires each local election authority to preserve and store mail-in ballots for a minimum of 22 months after Election Day so that they are available for audit. *Id.* at § 66.058. Storing these ballots can constitute a significant expense. Parker County rents a climate control storage facility for this purpose at $1,200 a year.

17. All of this is to say that voting by mail poses a significant administrative burden on the county (as well as the voter), as there are multiple steps in the process, each of which consumes time, manpower, and resources.

18. Finally, there are more vulnerabilities with respect to voting by mail than voting by personal appearance. As an example, polling locations offer voters guaranteed privacy while casting their ballot. Not only is each voting booth sectioned off and surrounded by privacy screens, but poll watchers can intervene if a voter is being pressured or coerced to vote a certain way. That security does not exist when a voter votes by mail. Instead, the voter is casting his or her ballot in semi-public area such as a home or an assisted living facility, where the voter's choices may be scrutinized by others. Texas has enacted numerous laws to protect voters from this type of intimidation, but laws cannot eliminate the risk entirely. As such, there remains a serious concern that voters who vote by mail may be targeted by others seeking to influence their vote.

Executed on this 8th day of February, 2022.

Crickett Miller
Parker County Election Administrator

IN THE 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 Attorney General of Texas, KIM OGG, in her official capacity as Harris County District Attorney, SHAWN DICK, in his official capacity as Williamson County District Attorney, and JOSÉ GARZA, in his official capacity as Travis County District Attorney, *Defendants*.	§	Case No. 5:21-cv-1223-XR

APPENDIX IN SUPPORT OF DEFENDANT TEXAS ATTORNEY GENERAL WARREN KENNETH PAXTON'S RESPONSE TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Exhibit F

Voter Information Booth Statistical Chart

	A	B	C	D	E
1	**How many people….**	**Tues, Oct 5**	**Wed, Oct 6**	**Thurs, Oct 7**	**Total**
2	**stopped by booth**	22	11	35	**68**
3	**not sure registered**	3	1	1	**5**
4	**thought registered but not**	1			**1**
5	**thought registered in Travis but not**			1	**1**
6	**need ride to polls, etc**				
7	**didn't know election is in Nov**				
8	**don't understand "constitutional election???"**				
9	**asked about UPC**			2	**2**
10	**took Ukirk materials**	14	14	2	**30**
11	**Took copy of Clerk jobs at UT polls**	2			**2**
12	**Vote by mail info**	6			**6**
13	**Ballot Info**	20		30	**50**
14	**Took Voter Assistance Pg**	8		25	**33**
15	**Registered to vote**	8		1	**9**
16			"I have heard great things about your church"		

How many people….	Tues, Oct 19	Wed, Oct 20	Thurs, Oct 21
stopped by booth			
not sure registered			
thought registered but not			
thought registered in Travis but not			
need ride to polls, etc			
didn't know election is in Nov			
don't understand "constitutional election???"			
asked about UPC			
took Ukirk materials			
Took copy of Clerk jobs at UT polls			
Vote by mail info			
Took Props Page			
Took Voter Assistance Page			
we Registered to vote			

How many people….	Tues, Oct 12	Wed, Oct 13	Thurs, Oct 14
stopped by booth	48	27	35
not sure registered			4
thought registered but not			
thought registered in Travis but not			2
need ride to polls, etc			
didn't know election is in Nov			
don't understand "constitutional election???"			5
asked about UPC			
took Ukirk materials	16		6
Took copy of Clerk jobs at UT polls			
Vote by mail info	2		5
Ballot Info - list of props	28	27	27
Took Voter Assistance Page	22	27	22
we Registered to vote			3
Travis Voter Reg take away		7	3

How many people….	Tues, Oct 12	Wed, Oct 13	Thurs, Oct 14
stopped by booth			
not sure registered			
thought registered but not			
thought registered in Travis but not			
need ride to polls, etc			
didn't know election is in Nov			
don't understand "constitutional election???"			
asked about UPC			
took Ukirk materials			
Took copy of Clerk jobs at UT polls			
Vote by mail info			
Ballot Info - list of props			
Took Voter Assistance Page			
we Registered to vote			

IN THE 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 Attorney General of Texas, KIM OGG, in her official capacity as Harris County District Attorney, SHAWN DICK, in his official capacity as Williamson County District Attorney, and JOSÉ GARZA, in his official capacity as Travis County District Attorney, *Defendants*.	§	Case No. 5:21-cv-1223-XR

APPENDIX IN SUPPORT OF DEFENDANT TEXAS ATTORNEY GENERAL WARREN KENNETH PAXTON'S RESPONSE TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Exhibit G

Updated Voter Information Booth Statistical Chart

	A	B	C	D
1	**How many people….**	**Tues, Oct 5**	**Wed, Oct 6**	**Thurs, Oct 7**
2	**stopped by booth**	22	11	35
3	**not sure registered**	3	1	1
4	**thought registered but not**	1		
5	**thought registered in Travis but not**			1
6	**need ride to polls, etc**			
7	**didn't know election is in Nov**			
8	**don't understand "constitutional election???"**			
9	**asked about UPC**			2
10	**took Ukirk materials**	14	14	2
11	**Took copy of Clerk jobs at UT polls**	2		
12	**Vote by mail info**	6		
13	**Ballot Info**	20		30
14	**Took Voter Assistance Pg**	8		25
15	**Registered to vote**	8		1
16			"I have heard great things about your church"	
17				
18				

How many people….	Tues, Oct 12	Wed, Oct 13	Thurs, Oct 14	Total
stopped by booth	48	27	35	110
not sure registered			4	
thought registered but not				
thought registered in Travis but not			2	
need ride to polls, etc				
didn't know election is in Nov				
don't understand "constitutional election???"			5	5
asked about UPC				
took Ukirk materials	16		6	22
Took copy of Clerk jobs at UT polls				
Vote by mail info	1		5	6
Ballot Info - list of props	28	27	27	82
Took Voter Assistance Page	22	27	22	71
we Registered to vote			3	3
Travis Voter Reg take away		7	3	10

How many people….	Tues, Oct 19	Wed, Oct 20	Thurs, Oct 21		
stopped by booth	16	20	9		45
Took Props Page	7	18	6		31
Took Voter Assistance Page	4	16	2		22
Vote by mail info					
Where to vote			3		3
took Ukirk materials	1	4	1		6
not sure registered	1		1		2
we registered to vote		3	1		4
thought registered but not					
thought registered in Travis but not					
didn't know election is in Nov			1		1
don't understand "constitutional election???"					
asked about UPC			1		1
Took copy of Clerk jobs at UT polls					
Address change info			1		1
Plans to vote at home	1				1

How many people….	Tues, Oct 26	Wed, Oct 27	Thurs, Oct 28	
stopped by booth	18	20		38
Took Props Page	12	18		30
Took Voter Assistance Page	7	18		25
Vote by mail info				
Where to vote		2		2
took Ukirk materials	1	9		10
not sure registered				
we registered to vote	1	2		3
thought registered but not thought registered in Travis but not				
didn't know election is in Nov				
don't understand "constitutional election???"				
asked about UPC Took copy of Clerk jobs at UT polls		2	1	3
Address change info		3	1	4
Plans to vote at home				

heard good things about our church

Another student asked about UPC, upbringing strict faith

A student asked about the college goup. When Frank took showed him the north courtyard, they met the choir director. The student will rehearse with the choir tonight!!

IN THE 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 Attorney General of Texas, KIM OGG, in her official capacity as Harris County District Attorney, SHAWN DICK, in his official capacity as Williamson County District Attorney, and JOSÉ GARZA, in his official capacity as Travis County District Attorney, *Defendants*.	§	Case No. 5:21-cv-1223-XR

APPENDIX IN SUPPORT OF DEFENDANT TEXAS ATTORNEY GENERAL WARREN KENNETH PAXTON'S RESPONSE TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Exhibit H

Texas Volunteer Deputy Registrar Guide

Texas Secretary of State
John B. Scott

INCLEMENT WEATHER NOTICE: Due to impending inclement weather, the Texas Secretary of State's offices will be closed on Thursday, February 3rd, 2022. Staff remain available by phone and e-mail, and electronic filing and searching are available on SOSDirect 24/7. Electronic filing is also available via SOSUpload 24/7.

Texas Volunteer Deputy Registrar Guide

Office of the Secretary of State
www.sos.state.tx.us
Elections Division
1.800.252.VOTE (8683)

Dear Volunteer Deputy Registrar:

In 2017, the 85th Texas Legislature enacted, and the Governor signed, House Bill 2324 effective September 1, 2017. To be eligible to vote, a person must be registered 30 days before Election Day. House Bill 2324 amended Section 13.042(c) of the Texas Election Code (the "Code") to provide that when you receive a completed application after the 34th day before the date of an election and on or before the last day for a person to timely submit a registration application for that election as provided by Section 13.143 of the Code, you must deliver the application to the county voter registrar no later than 5 p.m. of the next regular business day after the date to timely submit a registration application for that election as provided by Section 13.143 of the Code.

As a reminder, Senate Bill 142, which took effect June 20, 2015, provides an optional training method for the appointment of volunteer deputy registrars. Instead of holding in-person training sessions, a county **may** adopt a procedure that allows a person to review training materials (PDF) and examination (PDF) questions on the Secretary of State's website. After the person reviews the training materials and examination questions, the person must appear in person at the voter registrar's office, during regular business hours, to take the examination. Upon satisfactory completion of the examination, the voter registrar must appoint the person as a volunteer deputy registrar, and advise them of any county-specific procedures for completing the duties of a volunteer deputy registrar. Finally, the voter registrar must advise the newly appointed volunteer deputy registrar that the only requirements for voter registration are those prescribed by state law or by the Secretary of State.

Also as a reminder, House Bill 621, which became effective September 1, 2015, provides voter registrars the authority to terminate the appointment of a volunteer deputy registrar who has been determined to have intentionally destroyed or physically altered a voter registration application, or has engaged in any other activity that conflicts with their responsibilities as a volunteer deputy registrar.

The acceptance of the duties of volunteer deputy registrar places you in a position of trust and responsibility to the citizens you will register to vote.

Please become familiar with this guide and carry it with you while you perform your duties. If, in the course of your service, a question should arise which you are unable to answer, please contact your county voter registrar or the Elections Division for assistance.

Thank you for your service to the State of Texas.

Office of the Secretary of State
Elections Division

VOLUNTEER DEPUTY REGISTRAR GUIDE

Volunteer Deputy Registrars are entrusted with the responsibility of officially registering voters in the State of Texas. They are appointed by county voter registrars and charged with helping increase voter registration in the state.

Qualifications

To be appointed a volunteer deputy registrar, a person must:

- be at least 18 years old;
- be a United States citizen;
- not have been determined by a final judgment of a court exercising probate jurisdiction to be
    1. totally mentally incapacitated, or
    2. partially mentally incapacitated without the right to vote;
- never have been convicted of failing to deliver a voter application to a voter registrar;
- not have been finally convicted of a felony, or, if convicted, must have
    1. fully discharged the sentence, including any term of incarceration, parole, or supervision, or completed a period of probation ordered by any court, or
    2. been pardoned or otherwise released from the resulting disability to vote;
- not have been finally convicted of identity theft under Section 32.51 of the Penal Code; and
- be a resident of the State of Texas.

How to Become a Volunteer Deputy Registrar

- Contact the voter registrar in your county.
- The voter registrar will provide you with information about how training will be offered and completed.
- Upon satisfactorily completing training and examination, if required, the voter registrar will appoint you as a volunteer deputy registrar and advise you of any county-specific procedures for processing voter

registration applications and that the only requirements for voter registration are those prescribed by state law or by the Secretary of State.
- The voter registrar will issue you a certificate of appointment and give you a receipt book or voter registration applications with a tear off receipt.
- You may not receive another person's voter registration application until you have completed the training developed or approved by the Secretary of State.

Length of Appointment

You may be appointed a volunteer deputy registrar at any time. However, your term expires on December 31 of the even-numbered year.
Your appointment as a volunteer deputy registrar **may** be terminated by the appointing authority if it is determined that you:

- failed to properly review a voter registration application;
- intentionally destroyed or physically altered a registration application; or
- engaged in any other activity that conflicts with your responsibilities as a volunteer deputy registrar.

Your appointment as a volunteer deputy registrar **will** be terminated by the appointing authority if:

- you are finally convicted of an offense under the law relating to delivery of completed voter registration applications to the registrar; or
- you are finally convicted of an offense under the law relating to performance-based compensation for voter registrations.

All election materials issued to a volunteer deputy registrar, including the certificate of appointment, receipt books, receipts, VR applications and other forms in the volunteer deputy registrar's possession, must be returned or accounted for upon termination of appointment.

Role of a Volunteer Deputy Registrar

Checklist

Before you get started, be sure you have the following:

- A certificate of appointment;
- Plenty of voter registration applications;
- A pen;
- A receipt book; and
- This guide

Distributing and Accepting Applications

You may distribute and accept a voter registration application from any resident of the county who:

- is a citizen of the United States;
- is at least 17 years and 10 months old to register, and must be 18 years of age by Election Day;
- has not been finally convicted of a felony, or if a felon, must have completed all of the punishment, including any term of incarceration, parole, supervision, period of probation, or must have received a pardon; and
- must not have been determined by a final judgment of a court exercising probate jurisdiction to be totally mentally incapacitated or partially mentally incapacitated without the right to vote.

You may also distribute and accept applications from current registered voters who wish to change or correct information on their voter registration certificate (such as name or address) by checking the “change” box on the application.

Your county voter registrar should provide you with applications containing the county return address. If your county voter registrar does not have enough applications to provide to you, you may print blank applications for volunteer deputy registrars from the Secretary of State’s website. These applications should only be distributed to applicants residing in the county. Should you receive generic applications containing the Secretary of State’s return address, you can distribute to anyone residing in any county; however, you can only accept applications from those registering within the county in which you were appointed.

Assisting Applicants

- You may help a person fill out the application if he/she cannot read, or has a physical disability.
- If an applicant cannot sign his/her name on the application, the applicant may make a mark on the signature line. Print the name of the applicant beside the mark. Sign your name and address as the witness and state the reason the applicant is unable to sign.
- You may allow another registered voter (or anyone who has submitted a registration application) to fill out and sign an application for his/her spouse, parent or child. That person must sign the application as "agent" and state the relationship to the applicant on the application. The "agent" must have the permission of the applicant to do this.

Reviewing the Applications

While the applicant is still in your presence, you must review the application for completeness. The following sections of the voter registration application must be completed:

- Section 1: Applicant must select why they are submitting the application (new application, change to current information or request for replacement). Applicant must also answer citizenship and age question;
- Section 2: Full name, including any middle, maiden, or former name;

- Section 3: Residence address must be a street address or a description of the location of the residence;
- Section 4: Valid mailing address, if mail can't be delivered to the residence address;
- Section 5: City and County of Former Residence in Texas;
- Section 6: Date of birth, including month, day, and year;
- Section 9: Texas Driver's License No., Texas Personal I.D. No. or last 4 digits of social security number. If the applicant hasn't been issued any of these items, he or she must check the box in this section affirming this statement; and
- Section 10: Signature of applicant and date of signing. Be sure the applicant has read the statements that he/she is signing regarding qualifications to register and if an agent is registering for an applicant, be sure the agent provides his/her relationship to the applicant.

You CANNOT:

- determine if the applicant is actually qualified to register to vote or
- make the applicant provide his/her gender or telephone number.

Registration Receipt

For each completed voter registration application, fill out a receipt in duplicate and give each applicant the original receipt. The duplicate receipts must be delivered to the voter registrar along with the applications. You may wish to keep copies or stubs for your records. **You should not keep copies of the completed voter registration applications because these documents contain information that is confidential by law**

Delivery of Applications and Receipts

You must deliver completed registration applications and receipts in person to the voter registrar no later than 5 p.m. on the 5th day after the date you receive them. FAILURE TO DELIVER AN APPLICATION IN A TIMELY MANNER IS A CRIMINAL OFFENSE.

SPECIAL NOTE: To be eligible to vote, a person must be registered 30 days before Election Day. House Bill 2324 (85th Legislature, RS, 2017), effective September 1, 2017, amended Section 13.042(c) of the Texas Election Code (the "Code") to provide that when you receive a completed application after the 34th day before the date of an election and on or before the last day for a person to timely submit a registration application for that election as provided by Section 13.143 of the Code, you must deliver the application to the county voter registrar no later than 5 p.m. of the next regular business day after the date to timely submit a registration application for that election as provided by Section 13.143 of the Code.

When is the Registration Effective?

- Tell the applicant that he/she can vote as soon as the 30th day after submitting the application. This 30-day waiting period starts when the volunteer deputy registrar receives the application form.

- If the applicant is under the age of 18, the registration will become effective on the 30th day after the voter registrar gets the application or on the applicant's 18th birthday, whichever comes later.

How long is the Registration Effective?

Tell the applicant that the registration will be automatically renewed every even-numbered year unless:

- the voter moves to another address; or
- the voter receives a final felony conviction and has not completed the sentence, probation or parole or been otherwise pardoned or released from the resulting disability to vote. Note: “deferred adjudication” does not constitute a “final felony conviction.”

Address Changes

If the voter moves within the county, he/she must update the address on the registration by:

- making the change on the back of the voter registration certificate and mailing it to the county voter registrar;
- submitting a new application to the voter registrar and check the box for "change"; or
- writing a letter to the voter registrar explaining the change of address.

If the voter moves to another county, he/she must register to vote in the new county of residence.

Name Changes

Voters can make necessary name changes by:

- providing the name change on the back of his/her voter registration certificate and mailing it to the county voter registrar;
- submitting a new application to the voter registrar and check the box for "change"; or
- writing a letter to the voter registrar explaining the name change.

Frequently Asked Questions

Q: Must I personally be registered to vote in order to serve as a volunteer deputy registrar?

A: No. Pursuant to Section 13.031(d)(3) of the Code to be eligible for appointment as a volunteer deputy registrar, a person must meet the requirements to be a qualified voter under Section 11.002 of the Code, except that the person is not required to be a registered voter.

Q: I have been designated a deputy registrar from County X. I will be at an event that will have attendees from County X along with County Y and County Z. May I register people from County Y and County Z?

A: No. Volunteer deputy registrar status is conferred on a county-by-county basis. To accept applications for Y or Z counties, you would have to become a volunteer deputy registrar for those counties. You could certainly give applications to the attendees from County Y and County Z and direct them to mail the

application to the appropriate county voter registrar's office. Under Section 13.044 of the Code, a person commits a Class C misdemeanor by acting as a volunteer deputy registrar when he or she does not have an effective appointment as a deputy registrar.

Q: May I photocopy a completed application before turning it in to the county voter registrar?

A: No. Section 13.004(c-1) of the Code requires the county voter registrar to ensure that certain information, such as the telephone number, on a registration application is redacted from photocopies of voter registration applications from her office. In our opinion, this means that a photocopy of an application must come directly from the county voter registrar's office, so that he or she may ensure the required information has been blacked out or otherwise obscured. With that said, we believe that a volunteer deputy registrar may photocopy the receipt. You may also copy the relevant information from the application in writing just as you would be able to do if you went to the registrar's office and pulled a copy of the original application.

Q: I am a candidate and/or working for a campaign. May I serve as a volunteer deputy registrar?

A: Yes. There is no prohibition against a candidate or a campaign worker serving as a deputy registrar, as long as they otherwise meet the "Qualifications" described above and have been officially appointed as a volunteer deputy registrar. Similarly, there is no prohibition against a volunteer deputy registrar registering voters at a campaign rally or event. While working a rally or public event, a volunteer deputy registrar must offer registration to anyone who requests it.

Q: Is there any way for me to become a statewide volunteer deputy registrar?

A: No. Volunteer deputy registrar appointments are made on a county-by-county basis. Section 13.032 of the Code provides that a county may not refuse to appoint a resident of the county as a volunteer deputy registrar. A voter registrar may not refuse to appoint a volunteer deputy registrar on the basis of sex, race, color, creed, or national origin or ancestry.

Q: Is there a minimum age to become a volunteer deputy registrar?

A: Yes. A person must be at least 18 years of age to become a volunteer deputy registrar.

Q: I just want to hand out blank voter registration application forms and encourage people to register to vote. Can I do that without being appointed as a volunteer deputy registrar?

A: Yes. Anyone can hand out blank application forms to voters for the voters to fill out and mail in themselves. If this is all you want to do, you do not have to be a volunteer deputy registrar. Also, if you are already a volunteer deputy registrar in one county, you can hand out blank forms in other counties where you are not a volunteer deputy. It is the voter's handing the application back to you to review and to deliver to the registrar that triggers the requirement to be an authorized volunteer deputy registrar.

Q: What if someone says he or she is already registered?

A: You may wish to advise the person that the new application form will be treated as an update if the old registration is in the same county and the voter is providing new information. If the person moved to a new county, he or she will need to register to vote in the new county.

Q: As a volunteer deputy registrar, may I appoint others to assist me in registering voters?

A: No. Each volunteer deputy registrar must be appointed directly by the county voter registrar or that registrar's deputy in the voter registrar's office.

Q: May a volunteer deputy registrar bundle completed applications and submit them to the voter registrar by mail?

A: No. There are two methods for a volunteer deputy registrar to submit applications to the county voter registrar. First, the applications may be submitted by personal delivery by the volunteer deputy registrar. Second, the volunteer deputy registrar may give his or her applications to another volunteer deputy registrar for personal delivery to the county voter registrar.

Q: I failed to submit the applications to the county voter registrar within the allotted period. What should I do now?

A: Submit them to the county voter registrar as soon as possible. Under the law, the voter's registration is not impacted by your late delivery to the voter registrar. However, you should deliver them as soon as possible. Further delay will create problems in getting the lists ready in time for early voting and election day. **The registration process cannot be completed until you deliver the application**. The registration is still effective and the voter still receives the effective date of submission to you.

Q: How long do I have to keep my receipt books?

A: It is not addressed in the Code, but we would suggest that you should retain the receipt books for 22 months following the election closest to the effective date of the applications. Please communicate with your county voter registrar, who may have their own timeline of retaining the receipt books.

Q: What if I was appointed but still have not gone through the training?

A: Until you have completed the training, you may not receive any person's voter registration application. For more information, contact the Secretary of State's office or the Voter Registrar (who may be the County Clerk, Elections Administrator, or Tax Assessor-Collector) in your county.

Q: If I have previously taken the volunteer deputy registrar examination and have received a certificate of appointment in one county, but would like to be appointed as a volunteer deputy registrar in another county, am I required to take the examination again in the new county?

A: No, you are not required to retake the examination in the new county if you previously took the exam and received a certificate of appointment in another county. You should complete and submit a Request for

Appointment as a Volunteer Deputy Registrar with the new county. The voter registrar in the new county will appoint you as a volunteer deputy registrar and advise you of any county-specific procedures for completing the duties of a volunteer deputy registrar.

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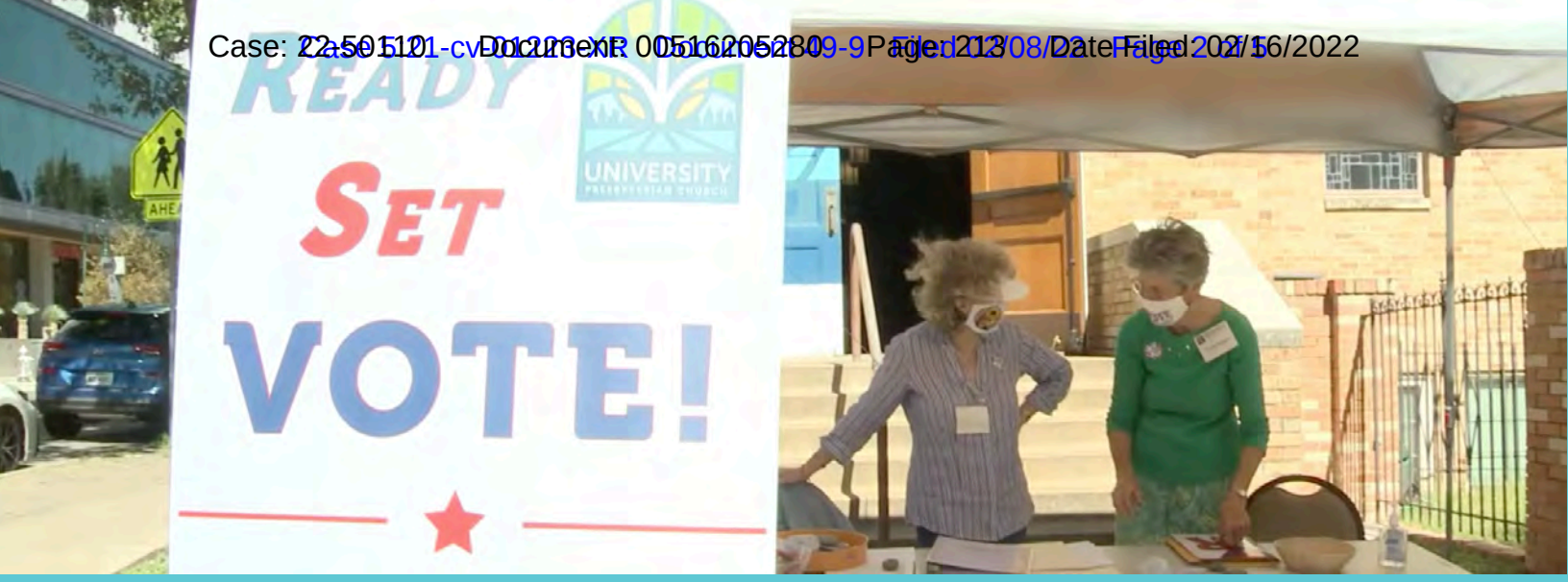
IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

ISABEL LONGORIA and CATHY MORGAN, *Plaintiffs*, v. WARREN K. PAXTON, in his official capacity as Attorney General of Texas, KIM OGG, in her official capacity as Harris County District Attorney, SHAWN DICK, in his official capacity as Williamson County District Attorney, and JOSÉ GARZA, in his official capacity as Travis County District Attorney, *Defendants*.	§	Case No. 5:21-cv-1223-XR

APPENDIX IN SUPPORT OF DEFENDANT TEXAS ATTORNEY GENERAL WARREN KENNETH PAXTON'S RESPONSE TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Exhibit I

Texas Impact Guide for Congregational Voter Information Booths



Living Our Faith Through Voter Outreach

a how-to guide for congregational voter information booths

TEXAS ★ IMPACT

Texas Faith Votes

equipping Texans for faithful election leadership

HOW-TO: Voter Information Booth

Project At-a-Glance

Volunteers from the congregation staff a table or booth that provides voter information to members of the community in the weeks leading up to an election.

Timeline

Three to four weeks in advance

- Identify the particular community or neighborhood your booth will serve
- Choose where to locate your booth
- Assess how many volunteers/volunteer hours you can count on, and scope your hours of operation accordingly
- Create a checklist of supplies and materials needs
- Decide what information and services you will offer
- Identify any volunteer training needs and make a plan to address them

Two to three weeks in advance

- Launch volunteer recruitment
- Assemble printed materials like handouts
- Arrange for volunteers to get trained if necessary

One to two weeks in advance

- Create a staging area where you can keep your materials and supplies
- Purchase snacks, water, or other items you want to hand out
- Nail down volunteer shifts and responsibilities for tasks, including record-keeping

After the election

- Organize your planning notes and lists so you'll have a head start for next time
- Have volunteers complete an evaluation form
- Write an article for your church newsletter about your outcomes
- Tell Texas Impact about your great work!

Before you proceed with this or any other project, be sure you understand your congregation's process for deciding to undertake projects, especially projects that involve outreach to people outside the congregation.

Questions to Guide Your Planning

What are our congregation's goals for this project?

Some possible goals might be:

- Register new voters
- Provide information to help folks who are already registered to understand what's on the ballot
- Provide information to help voters navigate the process, such as information on what materials are allowed in the voting booth
- Help eligible voters understand how to vote by mail
- Highlight your congregation's presence in the community
- Learn more about your congregation's neighborhood context
- Provide nonpartisan civic leadership

What community or population will your booth serve?

If your house of worship is near a high-traffic area, like a university campus; transit stop; medical center; or supermarket, you probably will want to set up your booth on your own grounds. If your house of worship is not near a high-traffic area, you might consider working with local election officials and advocates like League of Women Voters to identify areas in your community that could benefit from voter information.

Where will you locate your booth?

You will want to locate your booth where it is visible and accessible. You probably will need to request permission if you want to locate your booth anywhere other than on your congregation's grounds.

What will your hours of operation be and how many volunteers will you need?

Your hours of operation will depend a lot on what community you are serving. For example, if you intend to serve shift workers or college students, it's important to know when the shift changes or breaks occur, when the majority of your target audience will be walking past your booth.

What supplies and materials will you need?

In addition to chairs for volunteers and a table, you'll probably want signage and handouts. You may also choose to use a pop-up canopy—if you do, be sure you also have sandbags or weights to secure it.

You may want to provide water, snacks, or other items that require a cooler. You may want items like banners or a tablecloth. Depending where your booth is located, you might need a way to transport

your materials and supplies from a car to the location, and you might need to make provision for parking while you load and unload.

If you intend to offer "check your voter registration" services, you will need a phone, tablet, or laptop computer that is able to get online reliably.

What information and services will you offer?

Common types of information you could offer include:

- Checking voter registration status using the Secretary of State's database
- Registering new voters, and helping registered voters change their county of residence
- Providing applications for mail-in ballots—note that if you provide the applications, it's helpful to provide stamped envelopes as well, along with a list of county election office addresses that applicants can use to send their application to their county of record
- "What's on the ballot?" handouts
- Information about the voting process like a list of polling locations; hours and dates of early voting in your county; what to bring with you when you go vote (like your ID); and what to leave at home (like your phone)
- How to sign up to work elections in the future
- How to sign up to help voters who need assistance with transportation, translation, or other services
- How to sign up to serve as a poll watcher or poll monitor
- How to report a problem at a polling location
- How to get involved with your congregation

What training might your volunteers need?

The more information your volunteers have, the more comfortable they will feel talking with folks at your booth, so it's a good idea to hold a volunteer training session and to make sure that every shift has at least one volunteer who feels like a "pro."

There are a couple of tasks that volunteers MUST be trained for. If you intend to register voters, at least one volunteer at each shift must be trained as a Volunteer Deputy Registrar (VDR) in your county. If you will be helping individuals look up their voter registration status, your volunteers must be trained to look up voters using the Secretary of State's website. If you intend to provide applications for ballot by mail, it is advisable that at least one volunteer at each shift NOT be a VDR. Texas law is ambiguous as to whether VDRs are permitted to assist individuals to apply for ballots by mail.

Finally, it's important to keep good records, including how many people visit your booth, how many of various handouts you distribute, and who your volunteers are. You should be sure all volunteers understand the record-keeping system.

This project was developed in partnership with University Presbyterian Church of Austin, Texas. Special thanks to Cathy Morgan of University Presbyterian Church for creating and compiling the information in this handout.

IN THE 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 Attorney General of Texas, KIM OGG, in her official capacity as Harris County District Attorney, SHAWN DICK, in his official capacity as Williamson County District Attorney, and JOSÉ GARZA, in his official capacity as Travis County District Attorney, *Defendants*.	§	Case No. 5:21-cv-1223-XR

APPENDIX IN SUPPORT OF DEFENDANT TEXAS ATTORNEY GENERAL WARREN KENNETH PAXTON'S RESPONSE TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Exhibit J

Commission on Federal Election Reform: Building Confidence in U.S. Elections

Due to a technical error, I was unable to upload a pdf of Exhibit J through CM/ECF. Exhibit J—the report of the Commission on Federal Election Reform: Building Confidence in U.S. Elections—can be downloaded from https://www.legislationline.org/download/id/1472/file/3b50795b2d0374cbef5c29766256.pdf.

/s/ William T. Thompson
WILLIAM T. THOMPSON

EXHIBIT 5:
PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION AND EXHIBIT (ECF NO. 50)

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

ISABEL LONGORIA and CATHY MORGAN, Plaintiffs, v. WARREN K. PAXTON, in his official capacity as Attorney General of Texas, KIM OGG, in her official capacity as Harris County District Attorney, SHAWN DICK, in his official capacity as Williamson County District Attorney, and JOSÉ GARZA, in his official capacity as Travis County District Attorney, Defendants.	§	Case No. 5:21-CV-1223-XR

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

Plaintiffs Isabel Longoria and Cathy Morgan ask the Court to preliminarily enjoin the enforcement of Texas Election Code §§ 276.016(a)(1) and 31.129 (together, the "challenged provisions") to enable them to speak freely about applications for mail-in ballots in advance of the March primary election. The challenged provisions, passed as part of Senate Bill 1 ("SB1") during the second special legislative session in 2021, punish election officials and public officials who "solicit" mail-in application ballots with jail time or civil penalties—a content- and viewpoint-based restriction that violates the First Amendment.

Instead of seriously defending the challenged provisions on the merits, Defendant Paxton raises a bevy of collateral objections to Plaintiffs' motion for a preliminary injunction. He contests the motion on grounds such as standing, sovereign immunity, and the Court's power to grant effective relief. He argues that the definition of "solicit" is clear enough to assuage Plaintiffs' fears of criminal prosecution and limitless civil penalties and yet ambiguous enough to warrant abstention. He even argues that the fear of criminal prosecution of speech is not the sort of irreparable harm that can be remedied by a preliminary injunction. These arguments are all unavailing.

Defendant Dick, meanwhile, insists that he is immune from suit because he is not actively prosecuting Plaintiff Morgan.[1] His arguments misunderstand and misapply standing, sovereign immunity, and abstention principles.

[1] Defendants Ogg and Garza did not file oppositions to the Plaintiffs' motion for preliminary injunction pursuant to non-enforcement stipulations. *See* Dkt. Nos. 35 & 36.

Defendants' approach is unsurprising, as no state interest could justify the challenged provisions. Not only do the provisions impose criminal and severe civil punishment on speech on the basis of its viewpoint, content, and the identity of the speaker, they set out an irrational policy. They allow any person (including political parties) to solicit mail ballot applications except election officials and public officials, *i.e.*, the people most knowledgeable about the requirements for mail ballot applications and most likely to provide a trusted source of information for voters. The challenged provisions multiply the already substantial public confusion about mail-in voting while silencing election and public officials.

The Court should grant a preliminary injunction to alleviate the harm to Plaintiffs' free speech rights, as well as to the public interest.

ARGUMENT

I. The Court Has Jurisdiction and Should Exercise It

A. Plaintiffs Have Standing to Challenge Section 276.016(a)(1) and Sovereign Immunity Does Not Preclude Them From Doing So

Standing. Defendant Paxton and Defendant Dick suggest that Plaintiffs have failed to establish an injury in fact. *See* Defendant Paxton's Response to Plaintiffs' Motion for a Preliminary Injunction ("AG Br."), Dkt. No. 48, at 8; Defendant Shawn Dick's Response in Opposition to Plaintiffs' Motion for Preliminary Injunction ("Dick Br."), Dkt. No. 47, at 10. In the pre-enforcement context, a plaintiff "suffer[s] an injury in fact if [s]he (1) has an intention to engage in a course of conduct arguably affected with a constitutional interest, (2) [her] intended future conduct . . . is arguably proscribed by

[the policy in question], and (3) the threat of future enforcement of the [challenged policies] is substantial." *Speech First, Inc. v. Fenves*, 979 F.3d 319, 330 (5th Cir. 2020).

Where, as here, Plaintiffs bring a "pre-enforcement challenge[] to [a] recently enacted . . . statute[] that facially restrict[s] expressive activity by the class to which the plaintiff belongs, courts will assume a credible threat of prosecution in the absence of compelling contrary evidence." *Id.* In the face of this presumption, Defendants argue that Plaintiffs have failed to present evidence that the district attorney defendants (the "DAs") have threatened to prosecute them. *See* AG Br. 6-11; Dick Br. 13. But Plaintiffs "need not show that the authorities have threatened to prosecute [them]." *Speech First,* 979 F.3d at 336. "[T]he threat is latent in the existence of the statute." *Id.* If a plaintiff "plainly belong[s] to a class arguably facially restricted by the [law]," that is enough to "establish[] a threat of enforcement." *Id.*

Plaintiffs each meet this requirement. First, Plaintiff Longoria is the Harris County Elections Administrator and qualifies as an election official whose speech is facially restricted by Section 276.016(a)(1). *See* Tex. Elec. Code § 1.005(4-a) (defining "election official" to include "an elections administrator"). Likewise, Plaintiff Morgan is a volunteer deputy registrar ("VDR") and therefore belongs to a class whose speech is facially restricted by the statute's application to "public officials." Although the term "public official" is not defined in the Election Code, it is defined elsewhere in SB1 to mean "any person elected, selected, appointed, employed, or otherwise designated as an officer, employee, or agent of this state, a government agency, a political subdivision, or any other public body established by state law." SB1 § 8.05, 2021 87th Leg. 2d Spec. Sess.

(Tex. 2021) (codified at Tex. Gov't Code § 22.304). Because VDRs are appointed to their position by a county official and "assume a role carefully regulated by the state to serve the citizens who register to vote as well as the public interest in the integrity of the electoral body," *Voting for Am., Inc. v. Steen*, 732 F.3d 382, 393 (5th Cir. 2013), they qualify as public officials under Section 276.016(a)(1). That establishes a threat of enforcement sufficient to confer Article III standing.

Second, Plaintiffs' intended speech is proscribed by Section 276.016(a)(1). *See Speech First*, 979 F.3d at 335. Plaintiffs each intend to solicit mail-in ballot applications, which they believe includes encouraging eligible voters to request them. *See, e.g.*, Longoria Dep., Dkt. No. 49-1, at 85:24-25 (explaining that she does not "use social media to encourage voting by mail or to solicit mail ballot applications" because of the threat of criminal prosecution under Section 276.016(a)(1)); Morgan Dep., Dkt. No. 49-2, at 57:23-24 (explaining that she will not ask voters "[h]ave you considered ballot by mail?" because of the threat of criminal prosecution under Section 276.016(a)(1)). Longoria has also encouraged and intends to further encourage eligible persons who are incarcerated to vote. As they can generally only vote by mail, that action is tantamount to soliciting their mail-in ballot applications. As explained in Plaintiffs' motion, they believe Section 276.016(a)(1) prohibits giving this encouragement if not first asked. *See* Plaintiffs' Motion for Preliminary Injunction ("Motion"), Dkt. No. 7, at 12. That Defendant Paxton advances a narrower view of "solicit" that requires Plaintiffs to try to "persuade" voters to apply for a mail ballot does not alleviate their reasonable fear. AG Br. at 8. By

prohibiting Plaintiffs' speech, the provision chills—worse yet, criminalizes—their protected speech. Plaintiffs therefore have standing to challenge Section 276.016(a)(1).

Arguing otherwise, Defendant Paxton points to numerous parts of Section 276.016(a)(1) that he contends are somehow unclear. But the vagueness of Section 276.016(a)(1) itself has a chilling effect on Plaintiffs' protected speech and is "sufficient injury to ensure that [Plaintiffs have] a personal stake in the outcome of the controversy." *Speech First*, 979 F.3d at 322 (internal quotation marks omitted).[2]

Sovereign Immunity. Likewise unavailing is Defendant Dick's argument that sovereign immunity precludes Plaintiff Morgan from challenging Section 276.016(a)(1).[3] For the *Ex Parte Young* exception to sovereign immunity to apply, a "state official, 'by virtue of his office,' must have 'some connection with the enforcement of the [challenged] act.'" *City of Austin v. Paxton*, 943 F.3d 993, 997 (5th Cir. 2019) (quoting *Ex Parte Young*, 209 U.S. 123, 157 (1908)). 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*." *Id.* at 1002.

Here, Defendant Dick (along with Defendants Ogg and Garza) has a sufficient connection with the enforcement of Section 276.016(a)(1). DAs are expressly tasked with

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[2] Defendant Dick also briefly contests that Plaintiff Morgan has established the causation and redressability requirements of standing. *See* Dick Br. at 13-14. These arguments mistakenly assume that Plaintiff Morgan must establish that Dick has enforced, or is actively intending to enforce, Section 276.016(a)(1). As discussed, that is not required for facial First Amendment challenges.

[3] Defendant Paxton does not dispute that *Ex Parte Young* permits Plaintiffs to challenge Section 276.016(a)(1) against the DAs.

prosecuting violations of the Election Code—including Section 276.016(a)(1)—in their respective jurisdictions. *See State v. Stephens*, --- S.W.3d ---, 2021 WL 5917198, at *9 (Tex. Crim. App. Dec. 15, 2021) ("Each district attorney shall represent the State in all criminal cases in the district courts of his district . . . ." (quoting Tex. Code Crim. Proc. art. 2.01)). The fact that Defendant Dick has never met Plaintiff Morgan, *see* Dick Br. at 12, is irrelevant to the *Ex Parte Young* question. Because Plaintiffs have established a threat of enforcement of Section 276.016(a)(1) sufficient to satisfy Article III standing, they have also established a sufficient connection between the DAs and the enforcement of the statute for *Ex Parte Young* purposes.

B. Plaintiff Longoria Has Standing to Challenge Section 31.129 and Sovereign Immunity Does Not Preclude Her From Doing So

For all the same reasons the Court has subject matter jurisdiction over Plaintiffs' challenge to Section 276.016(a)(1), it has jurisdiction over Plaintiff Longoria's challenge to Section 31.129, which simply bootstraps civil penalties to the facial restriction on speech in Section 276.016(a)(1).[4] Plaintiff Longoria is an "election official" and therefore "plainly belong[s] to a class arguably facially restricted by the [law]," which is enough to "establish[] a threat of enforcement" for purposes of Article III standing. *Speech First,* 979 F.3d at 336.

Nevertheless, Defendant Paxton seeks to prevent Plaintiff Longoria from obtaining relief by suggesting that he *might* not have the authority to enforce Section

[4] Section 31.129 provides that "[a]n election official may be liable to this state for a civil penalty if the official: (1) is employed by or is an officer of this state or a political subdivision of this state; and (2) violates a provision of this code."

31.129 against her. *See* AG Br. at 6-7. If Defendant Paxton lacked the authority to enforce Section 31.129, he could simply say so. But Defendant Paxton has insisted that he is unable to "admit or deny" whether he is "authorized" to enforce Section 31.129. *See* Ex. A at 3 (Defendant Paxton's Objections and Responses to Plaintiffs' First Set of Requests for Admission). In the absence of such an admission, Plaintiff Longoria's protected speech will be unconstitutionally chilled.

In any event, Defendant Paxton's recent behavior confirms that he is likely to enforce Section 31.129 against Plaintiff Longoria. He recently filed a civil lawsuit related to mail-in ballot applications against the former Harris County Clerk, invoking the State's "intrinsic right to enact, interpret, and enforce its own laws." *See* Plaintiff's Original Verified Petition and Application for Temporary Restraining Order, Temporary Injunction, and Permanent Injunction at 2, *State v. Hollins*, 607 S.W.3d 923 (Tex. App.—Houston [14th Dist.] 2020, pet. granted) (No. 2020-52383) (quoting *State v. Naylor*, 466 S.W.3d 783, 790 (Tex. 2015)). Defendant Paxton may well invoke that same authority to enforce Section 31.129 against Plaintiff Longoria.[5]

[5] Such a lawsuit is made more likely by Defendant Paxton's public focus on "election integrity." *Election Integrity*, ATTORNEY GENERAL OF TEXAS, https://www.texasattorneygeneral.gov/initiatives/election-integrity (last visited Feb. 10, 2022); Attorney General Ken Paxton (@KenPaxtonTX), TWITTER (Nov. 5, 2021, 6:25 PM), https://twitter.com/KenPaxtonTX/status/1456749654104756225 ("I will never back down to make sure Texas has safe and secure elections. Election integrity is my number one priority."). It is also made more likely in light of Defendant Paxton's recent public campaign to reverse the Texas Court of Criminal Appeals' ruling in *State v. Stephens* that the Attorney General (*i.e.*, Defendant Paxton) is not authorized to unilaterally prosecute election cases. *See Stephens*, 2021 WL 5917198, at *9; *see also* Patrick Svitek, *Texas Republicans Pressure Court to Reverse Decision Blocking Attorney General from Prosecuting Election Cases*, TEXAS TRIBUNE (Jan. 26, 2022, 1:00 PM),

Defendant Paxton also contends that Plaintiff Longoria cannot establish a threat of enforcement because, even if Defendant Paxton enforced Section 31.129 against Plaintiff Longoria, "the suit would presumably be against Plaintiff Longoria in her official capacity," rather than in her personal capacity. *See* AG Br. at 7 (citing Tex. Elec. Code. § 31.130). While Section 31.130 purportedly limits suits under Section 31.129 in this way, Section 31.129 provides for penalties such as "termination of the person's employment and loss of the person's employment benefits,"[6] that by definition can only be imposed against officials in their personal capacity. Despite any potential tension between Sections 31.129 and 31.130, Plaintiff Longoria is in a class facially restricted by the challenged provisions and subject to consequences that will run to her in her personal capacity.[7] She has therefore established a threat of enforcement.

Because Plaintiff Longoria has established a threat of enforcement by Defendant Paxton of Section 31.129 sufficient to confer Article III standing, she has also established

https://www.texastribune.org/2022/01/26/texas-ken-paxton-court-election-prosecution (last visited Feb. 10, 2022) (publicly calling on supporters to call, mail, and email justices at the Texas Court of Criminal Appeals "that voted the wrong way").

[6] Section 31.129 also provides that election officials "may be liable to this state" for civil penalties. The mention of liability "to the state" suggests a suit against an election official in their personal capacity, not their official capacity.

[7] No matter how the tension is resolved, the result is the same: Defendant Paxton cannot enforce Section 31.129 against Plaintiff Longoria. If Section 31.129 controls over Section 31.130, then Plaintiff Longoria plainly has standing to challenge the unconstitutional provision, as she is threatened with losing her job and paying a fine. If Section 31.130 controls over Section 31.129, then Defendant Paxton cannot impose those penalties against Plaintiff Longoria.

a sufficient connection between Defendant Paxton and the enforcement of Section 31.129 for purposes of *Ex Parte Young*. *See City of Austin*, 943 F.3d at 1002.

C. *Pullman* Abstention is Inappropriate

Defendant Paxton contends that, even if the Court has jurisdiction, it should abstain from hearing the case under *R.R. Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941). AG Br. at 11.[8] He fails to demonstrate why the Court should forego the "virtually unflagging obligation" it has to "exercise the jurisdiction given to [it]." *See Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976). *Pullman* abstention is an "extraordinary" exception, *id.* at 813, that excuses the exercise of jurisdiction "only when there is an issue of uncertain state law that is fairly subject to an interpretation [by a state court] which will render unnecessary or substantially modify the federal constitutional question," *Moore v. Hosemann*, 591 F.3d 741, 745 (citing *Baran v. Port of Beaumont Nav. Dist.*, 57 F.3d 436, 442 (5th Cir. 1995)) (alteration in original). "[A]bstention is the exception, not the rule." *La. Debating & Literary Ass'n v. City of New Orleans*, 42 F.3d 1483, 1491 (5th Cir.1995).

The narrow exception does not apply in this case. The Supreme Court has made clear that district courts should be "particularly reluctant to abstain in cases involving facial challenges based on the First Amendment." *City of Houston v. Hill*, 482 U.S. 451, 467 (1987). To force Plaintiffs "to suffer the delay of state-court proceedings might itself

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[8] Defendant Dick suggests the Court should abstain under *Younger v. Harris*, 401 U.S. 37 (1971). Dick Br. at 15. *Younger* abstention plainly does not apply here because "there [was] no prosecution pending in state courts at the time the federal proceeding [was] begun." *See Younger*, 401 U.S. at 41.

effect the impermissible chilling of the very constitutional right [they] seek[] to protect." *Id.* at 467-68.

II. Plaintiffs Are Likely to Succeed on the Merits

To win a preliminary injunction, Plaintiffs must prove likely success on the merits—"not certainty." *Whole Woman's Health v. Paxton*, 264 F. Supp. 3d 813, 823 (W.D. Tex. 2017). Plaintiffs easily clear that bar and Defendant Paxton's arguments to the contrary are meritless.

A. Section 276.016(a)(1) Violates the First Amendment

As laid out in Plaintiffs' motion, Section 276.016(a)(1) is presumptively unconstitutional because it restricts speech based on its viewpoint and content while serving no state interest at all, much less a compelling one. Motion at 10-19.

Defendant Paxton contends Section 276.016(a)(1) is nevertheless constitutional because it only regulates employee speech. *See* AG Br. at 13. While it is true that the First Amendment does not typically regulate speech "undertaken in the course of performing one's job" as a government employee, *Williams v. Dallas Indep. Sch. Dist.*, 480 F.3d 689, 693–94 (5th Cir. 2007) (per curiam) (citing *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006)), that limitation does not apply where the government acts as a sovereign as opposed to an employer. Defendant Paxton's response does not address the sovereign exception, positing instead that "any speech" made "pursuant to [one's] official duties . . . . is not protected by the First Amendment." AG Br. at 13 (cleaned up).

Laws that criminalize the speech of public employees are an established exception to the *Garcetti* doctrine. *See*, *e.g.*, *In re Kendall*, 712 F.3d 814, 826-27 (3d Cir. 2013) ("As we have already explained, contempt is not discipline: the Virgin Islands Supreme Court

acted as sovereign, not as public employer, by criminally punishing Kendall's speech."). The rationale for this exception is obvious: employers sometimes fire their employees for their speech as employees. But they never send them to jail. *See Ex parte Perry*, 483 S.W.3d 884, 911 (Tex. Crim. App. 2016) (rejecting the argument that *Garcetti* extends to criminal punishment of public officials after the State conceded that it knew of "no cases applying the government speech theory [from *Garcetti*] to criminal prosecutions" and holding that "[w]hen government seeks criminal punishment, it indeed acts as sovereign and not as employer or speaker"). Section 276.016(a)(1) unquestionably draws on the State's power as a sovereign, not its discretion as an employer, and is thus subject to First Amendment scrutiny. And, as discussed below, the State is not Plaintiffs' employer.

Defendant Paxton alternatively argues that if Section 276.016(a)(1) encompasses protected speech, it passes "any level of scrutiny." AG Br. at 13. As an initial matter, the anti-solicitation provision is a viewpoint-based restriction and therefore *per se* unconstitutional. This ends the inquiry: if a restriction "is viewpoint-based, it is unconstitutional." *Iancu v. Brunetti*, 139 S. Ct. 2294, 2299 (2019).

Even assuming the law is merely a content-based restriction and therefore subject to strict scrutiny, Defendant Paxton's justifications for the law are neither compelling nor narrowly tailored. First, he contends that voters may become confused when officials solicit mail ballot applications. AG Br. at 13-14. Defendant Paxton's only "evidence" of voter confusion comes from the Declaration of Brian Keith Ingram, Dkt. No. 49-3, but Ingram discusses not *soliciting* mail-in ballot applications but *sending* them, which is addressed in another provision of SB1 not at issue here. *See* Tex. Elec. Code

§ 276.016(a)(2). Moreover, Defendant Paxton's invocation of voter confusion is upside-down. Non-partisan election officials and public officials are in the best position to provide voters with the opportunity to vote by mail—and to know which voters are eligible. Indeed, Plaintiff Longoria's office is responsible for processing the mail-in ballot applications. Silencing these officials while allowing everyone else to continue to solicit mail ballot applications is likely to lead to more confusion. In any event, the First Amendment rejects Defendant Paxton's highly paternalistic theory that the response to potential confusion is to send people to jail for speaking. The proper remedy is "more speech, not enforced silence." *Texas v. Johnson*, 491 U.S. 397, 419 (1989) (quoting *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring)) (internal quotation marks omitted); *see also Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 361 (2010) ("[I]t is our law and our tradition that more speech, not less, is the governing rule.").

Second, he asserts that casting a mail ballot is "less secure" than voting in person. Even if this were true, the anti-solicitation provision does nothing to address that purported issue. Voters can still apply for mail ballots and eligible voters may cast them, while all but a narrow class of individuals may continue to solicit mail-in ballot applications. The anti-solicitation provision has no connection to this rationale.

Finally, Defendant Paxton claims that mail-in ballot applications impose additional burdens on election administration. Again, even if this were true, the anti-solicitation provision does nothing to address that issue. The election administrator of each county is best situated to determine if soliciting mail-in ballot applications will

cause an administrative hurdle and adjust her speech accordingly. The State's prohibition on solicitation of mail-in ballot applications does not eliminate any burden. It certainly does not do so in the narrowest fashion, as the legislature instead could have sought ways to streamline the mail voting process without restricting protected speech.[9] *See also Vote America v. Schwab*, --- F. Supp. 3d. ---, 2021 WL 5918918, at *18-22 (D. Kan. Nov. 15, 2021) (rejecting the same three purported justifications under strict scrutiny and granting preliminary injunction).

B. Section 31.129 Violates the First Amendment[10]

Section 31.129 violates the First Amendment for the same reasons. When a state imposes fines or other civil punishments, it acts as a sovereign, not an employer. In any event, Plaintiff Longoria is not employed by the State. Rather, she is appointed by, removable by, and accountable to the Harris County Election Commission, in conjunction with the Harris County Commissioners Court. *See* Motion at 16-17.

[9] To the contrary, 276.016(a)(1) operates in conjunction with other provisions in SB1 to amplify any burdens mail balloting puts on election administrators. For example, SB1 also limits early voting hours, Tex. Elec. Code § 85.005, and prohibits a polling place from being in a "moveable structure," Tex. Elec. Code. § 43.031(b).

[10] Notably, Section 31.129 is triggered only when an election official "violates a provision of [the Election Code]." Tex. Elec. Code Sec. 31.129(b)(2). If Plaintiffs prevail on their First Amendment challenge to Section 276.016(a)(1), the solicitation of mail-in ballot applications will no longer qualify as a violation of the Election Code for purposes of Section 31.129(b)(2).

III. A Preliminary Injunction Would Redress Plaintiffs' Irreparable Harm

A. Plaintiffs Have Established Irreparable Harm

Defendant Paxton concedes that "[t]he loss of First Amendment freedoms[] for even minimal periods of time" generally constitutes irreparable harm. AG Br. at 16 (quoting *Opulent Life Church v. City of Holly Springs*, 697 F.3d 279, 295 (5th Cir. 2012)). Indeed, it is axiomatic that when constitutional rights are "either threatened or in fact being impaired," a finding of irreparable injury is "mandate[d]." *Deerfield Md. Ctr. v. City of Deerfield Beach*, 661 F.2d 328, 338 (5th Cir. Unit B 1981); *see also* Motion at 9, 19-20. And the law is clear that, even without an active or imminent prosecution, the operation of the challenged provisions against Plaintiffs' freedom of speech rights causes irreparable harm. *See* Motion at 19-20.

Defendant Paxton instead argues that the timing of Plaintiffs' motion undermines their claim of irreparable harm. But SB1 went into effect on December 2, 2021, and Plaintiffs acted swiftly to protect their rights by filing this suit just eight days later. The purported delays that Defendant Paxton points to were both short and beyond Plaintiffs' control. *See* Plaintiffs' Status Report Concerning their Motion for a Preliminary Injunction, Dkt. No. 23, at 2-3.

Defendant Paxton's argument that a preliminary injunction against Defendants Ogg and Garza "would not accomplish anything" is also misguided. AG Br. at 15-16. The stipulations entered in this case only cover the pendency of this lawsuit; without a preliminary injunction, Plaintiffs could be subject to prosecution after the conclusion of this case for actions taken during the case. A preliminary injunction would relieve such

a threat and enable Plaintiffs to immediately resume their protected speech in advance of the coming primary election.

B. Defendant Paxton's Troubling Theory of Preliminary Injunctions is Baseless

Finally, Defendant Paxton contends that this Court is powerless to provide effective preliminary relief. According to Defendant Paxton, even if this Court granted a preliminary injunction preventing Defendant Paxton and the DAs from enforcing the challenged provisions, "Plaintiffs would still face the possibility of criminal prosecution (or civil enforcement) for solicitation committed during the pendency of the injunction if the injunction were set aside." AG Br. at 17. The theory is as baseless as it is troubling.[11]

The Supreme Court unanimously rejected this theory over a century ago in *Oklahoma Operating Co. v. Love*, 252 U.S. 331 (1920). In that case, the Court, in an opinion by Justice Brandeis, affirmed the award of preliminary injunctive relief against enforcement of a state law. *Id.* at 337. In doing so, the Court squarely held that even if the challenged law should ultimately be upheld, "a permanent injunction should, nevertheless, issue to restrain the enforcement of penalties accrued pendente lite" (that is, during the litigation). *Id.* at 337-38; *see also Bd. of Trade of City of Chicago v. Clyne*, 260 U.S. 704 (1922) (issuing preliminary injunction not only barring enforcement of the law pending appeal but also for actions taken by the plaintiffs in violation of the law while the preliminary injunction was in effect).

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[11] It is also such a poor fit for this case that it appears to be copied and pasted from another brief without removing all references to that brief's subject matter. *See* AG Br. at 17 (discussing "heartbeat suits for abortions").

Subjecting someone to civil or criminal liability based on actions or speech made in reliance on a preliminary injunction would raise serious due process concerns. *Cf. Marks v. United States*, 430 U.S. 188, 197 (1977) (overturning a conviction for transporting obscene materials, where the materials were not obscene at the time of transportation but were rendered obscene at the time of trial by an intervening Supreme Court decision). It would also mean that plaintiffs could never obtain preliminary injunctions against the enforcement of laws that unconstitutionally impose criminal or civil liability. And it would make a permanent injunction worth only as much as one's faith that it would be upheld on appeal.

Defendant Paxton ignores the controlling case law foreclosing his theory and the catastrophic consequences the theory would generate. His citation to Justice Stevens' concurring opinion in *Edgar v. MITE Corp.*, 457 U.S. 624 (1982) cannot displace the Court's decades-old controlling precedent. To the extent *MITE* is relevant, the two other members of the Court who reached the issue strongly disagreed with Justice Stevens' approach. *See id.* at 656 (Marshall, J., dissenting) (explaining that federal courts "have the power to issue a preliminary injunction that offers permanent protection from penalties for violations of the statute that occurred during the period the injunction was in effect").

Like the Supreme Court in *Clyne*, the Court could craft a preliminary injunction that would prohibit Defendant Paxton and the DAs not only from enforcing the challenged provisions against Plaintiffs during this litigation but also from enforcing them for speech in violation of the challenged provisions made while a preliminary

injunction is in effect. And, regardless of the wording of a preliminary injunction, the Due Process Clause would independently protect Plaintiffs from any attempt to enforce the challenged provisions for speech made in violation of those provisions in reliance on a preliminary injunction. Accordingly, a preliminary injunction would redress Plaintiffs' irreparable harm.

IV. The Balance of Equities and Public Interest Favor Relief

The threatened and ongoing injury to Plaintiffs outweighs any potential harm that an injunction might cause Defendants. Without a preliminary injunction, Plaintiffs will suffer irreparable injury to their constitutional rights. And preventing even "minimal" First Amendment violations is "always in the public interest." *Texans for Free Enter. v. Tex. Ethics Comm'n*, 732 F.3d 535, 539 (5th Cir. 2013) (internal quotation marks omitted).

Defendant Paxton's invocation of the so-called *Purcell* principle is misplaced. The challenged provisions do not implicate *Purcell* because they do not govern election procedures. *Purcell* stands for proposition that "federal courts ordinarily should not alter state election laws in the period close to an election." *DNC. v. Wis. State Leg.*, 141 S. Ct. 28, 31 (2020) (Kavanaugh, J., concurring in denial of application to vacate stay) (citing *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam)). The procedures governing the election itself will be unchanged by this suit. This lawsuit does not seek to change who can apply for a mail-in ballot or how a person could do so. It simply seeks to lift a gag order making it a crime for officials to encourage voters to exercise their right to vote by

mail. Nothing in *Purcell* suggests that censorship is acceptable so long as there is a looming election.

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that this Court grant Plaintiffs' motion for a preliminary injunction.

Dated: February 10, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on February 10, 2022, the foregoing document was filed electronically with the United States District Court for the Western District of Texas via CM/ECF. As such, this Reply in Support of Motion for Preliminary Injunction was served on all counsel who have consented to electronic service.

/s/ Ethan J. Herenstein
Ethan J. Herenstein

Exhibit A

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 OBJECTIONS AND RESPONSES TO PLAINTIFFS' FIRST SET OF REQUESTS FOR ADMISSION

TO: Plaintiffs Isabel Longoria and Kathy Morgan, by and through their attorneys of record Sameer S. Birring, Christian D. Menefee, Jonathan Fombonne, Tiffany Bingham, Christina Beeler, Susannah Mitcham, Office of the Harris County Attorney, 1019 Congress Plaza, 15th Floor, Houston, Texas 77002; Sean Morales-Doyle, Andrew B. Garber, Ethan J. Herenstein, Brennan Center for Justice at NYU School of Law, 120 Broadway, Suite 1750, New York, NY 10271; Paul R. Genender, Elizabeth Y. Ryan, Matthew Berde, Megan Cloud, Weil, Gotshal & Manges LLP, 200 Crescent Court, Suite 300, Dallas, Texas 75201; Alexander P. Cohen, Weil, Gotshal & Manges LLP, 767 Fifth Avenue, New York, New York 10153

Warren K. Paxton, in his official capacity as Attorney General of Texas, hereby serves Objections and Responses to Plaintiffs' Fist Set of Requests for Admission pursuant to the Federal Rules of Civil Procedure.

Date: February 4, 2022

Respectfully submitted.

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Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

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COUNSEL FOR THE ATTORNEY GENERAL

CERTIFICATE OF SERVICE

I certify that on February 4, 2022, a true and accurate copy of the attached Objections and Responses to Plaintiffs' Fist Set of Requests for Admission was served on opposing counsel via electronic mail.

/s/ William T. Thompson
WILLIAM T. THOMPSON

OBJECTIONS AND RESPONSES

Request for Admission No. 1: Admit that you, as Attorney General of Texas, are authorized to seek civil penalties from an election official pursuant to Texas Election Code § 31.129 for a violation of any provision of the Election Code.

Response: The Attorney General objects that Request for Admission No. 1 improperly calls for an admission regarding a conclusion of law. "Requests for admissions cannot be used to compel an admission of a conclusion of law." *Playboy Enterprises, Inc. v. Welles*, 60 F. Supp. 2d 1050, 1057 (S.D. Cal. 1999).

The Attorney General objects that Plaintiffs are attempting to force him to respond to Request for Admission No. 1 in only two days. The Attorney General did not agree to answer discovery requests on that schedule, and the Court has not ordered the Attorney General to answer discovery requests on that schedule. Nonetheless, the Attorney General has provided these objections and responses, based on the information available to him at this time and on such short notice, in an effort to help this litigation proceed smoothly.

Without waiving his objections, the Attorney General notes that he cannot truthfully admit or deny Request for Admission No. 1 because it asks for a legal conclusion on an issue that the Texas courts have not definitively resolved. As explained in the Attorney General's motion to dismiss (ECF 24), it is not clear how Texas courts will resolve the issue.

Request for Admission No. 2: Admit that you, as Attorney General of Texas, are not authorized to seek civil penalties from an election official pursuant to Texas Election Code § 31.129 for a violation of any provision of the Election Code.

Response: The Attorney General objects that Request for Admission No. 2 improperly calls for an admission regarding a conclusion of law. "Requests for admissions cannot be used to compel an admission of a conclusion of law." *Playboy Enterprises, Inc. v. Welles*, 60 F. Supp. 2d 1050, 1057 (S.D. Cal. 1999).

The Attorney General objects that Plaintiffs are attempting to force him to respond to Request for Admission No. 2 in only two days. The Attorney General did not agree to answer discovery requests on that schedule, and the Court has not ordered the Attorney General to answer discovery requests on that schedule. Nonetheless, the Attorney General has provided these objections and responses, based on the information available to him at this time and on such short notice, in an effort to help this litigation proceed smoothly.

Without waiving his objections, the Attorney General notes that he cannot truthfully admit or deny Request for Admission No. 2 because it asks for a legal conclusion on an issue that the Texas courts have not definitively resolved. As explained in the Attorney General's motion to dismiss (ECF 24), it is not clear how Texas courts will resolve the issue.

EXHIBIT 6:
PLAINTIFFS FIRST AMENDED COMPLAINT (ECF NO. 5)

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

ISABEL LONGORIA and CATHY MORGAN,

Plaintiffs,

v.

WARREN K. PAXTON, in his official capacity as Attorney General of Texas, KIM OGG, in her official capacity as Harris County District Attorney, SHAWN DICK, in his official capacity as Williamson County District Attorney, and JOSÉ GARZA, in his official capacity as Travis County District Attorney,

Defendants.

Case No. 5:21-cv-1223-FB

FIRST AMENDED COMPLAINT

Texas's recently enacted Senate Bill 1 ("SB1") added a new provision to the Texas Election Code, § 276.016(a)(1), which makes it a crime for election officials and public officials to exercise their First Amendment right to encourage voters to lawfully vote by mail and imposes severe penalties and harsh fines as punishment for that speech. Election officials also face civil penalties for violating § 276.016(a)(1) because SB1 provides for civil liability for election officials who violate a provision of the Election Code. TEX. ELEC. CODE § 31.129. Remarkably, these new laws make it illegal to *encourage* an eligible voter to request a mail-in ballot, but not to *discourage* an eligible voter from requesting a mail-in ballot. That one-sided restriction on speech is manifestly unconstitutional.

Plaintiffs are the Harris County Elections Administrator, Isabel Longoria, and a volunteer deputy registrar, Cathy Morgan, who would engage in such speech but are currently chilled from

doing so because of the risk of criminal and civil liability. They together bring this action to vindicate their First Amendment rights violated by SB1 and seek to have Section 276.016(a)(1) declared invalid and its enforcement enjoined and to have Section 31.129 declared invalid and its enforcement enjoined as applied to violations of Section 276.016(a)(1).

I. JURISDICTION AND VENUE

1. This Court has jurisdiction under 28 U.S.C. §§ 1331 and 1343(a)(3) and (4) because the claims in this action arise under federal law and seek to redress the deprivation of federal civil rights, including the right of freedom of speech.

2. Venue is proper in this district under 28 U.S.C. § 1391(b) because Defendant Paxton resides in Texas and performs his official duties in this district, and all Defendants are residents of Texas.

II. PARTIES

3. Plaintiff ISABEL LONGORIA is the Harris County Elections Administrator, an election official serving in Harris County, Texas. She sues in her personal capacity.

4. The Harris County Elections Administrator is appointed by the Harris County Elections Commission and is an election official under the Election Code.[1] As the Elections Administrator, Ms. Longoria is responsible for carrying out the statutory electoral functions outlined by state and federal law, including overseeing the conduct of elections, providing information concerning early voting to individual voters, and distributing official applications to vote by mail to eligible voters.[2]

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[1] TEX. ELEC. CODE § 1.005(4-a)(C).

[2] TEX. ELEC. CODE § 31.043 (assigning the duties and functions of the county clerk under the Election Code to the county elections administrator); *id.* § 83.002 (naming the county clerk as the early voting clerk in many elections).

5. Plaintiff CATHY MORGAN is a Texas voter residing in Austin, Texas. Ms. Morgan has served as a volunteer deputy registrar ("VDR") in Texas since 2014 and currently serves as a VDR in both Williamson and Travis counties. Ms. Morgan decided to serve as a VDR to ensure that all eligible voters are provided correct information and guidance so that they are easily able to register to vote and therefore participate in our democracy. She sues in her personal capacity.

6. VDRs are appointed by the county registrar to encourage voter registration. As a VDR, Ms. Morgan is responsible for carrying out the statutory registration functions outlined by state law, including distributing voter registration application forms and receiving registration applications.[3]

7. Defendant WARREN K. ("Ken") PAXTON is the Attorney General of Texas, the state's chief law enforcement officer. He is sued in his official capacity.

8. As Texas's chief law enforcement officer, Defendant Paxton represents that he has a "freestanding sovereign interest" in enforcing Texas law.[4] He is charged with enforcing the civil provisions of the Texas Election Code, including the new Section 31.129. Although the Texas Court of Criminal Appeals recently held that Defendant Paxton lacks constitutional authority to unilaterally prosecute criminal offenses created by the Election Code, *see State v. Stephens*, --- S.W.3d ----, 2021 WL 5917198, (Tex. Crim. App. Dec. 15, 2021), Defendant Paxton may still assist the prosecuting district or county attorney upon request, *see id.* (citing *Saldano v. State*, 70 S.W.3d 873, 880 (Tex. Crim. App. 2002)); *see also* TEX. GOV'T CODE § 41.102.

[3] TEX. ELEC. CODE § 13.038.

[4] *City of Austin v. Abbott*, 385 F. Supp. 3d 537, 545 (W.D. Tex. 2019).

9. Defendant Paxton has also recently filed suit on behalf of the State of Texas 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.[5]

10. Defendant KIM OGG is the Harris County District Attorney. She is authorized to investigate and prosecute violations of the Texas Election Code in Harris County. She is sued in her official capacity.

11. Defendant SHAWN DICK is the Williamson County District Attorney. He is authorized to investigate and prosecute violations of the Texas Election Code in Williamson County. He is sued in his official capacity.

12. Defendant JOSÉ GARZA is the Travis County District Attorney. He is authorized to investigate and prosecute violations of the Texas Election Code in Travis County. He is sued in his official capacity.

III. FACTS

13. Elections in Texas's 254 counties and more than 1,200 cities are conducted pursuant to the Texas Election Code.

14. The default rule in the Election Code splits voter registration duties and election administration duties between two officials elected at the county level: voter registration is handled by the county tax assessor-collector, while the administration of elections—in all races on the ballot, from President down to Justice of the Peace—is handled by the county clerk.[6] Both tax

[5] *State v. Hollins*, 620 S.W.3d 400, 405 (Tex. 2020).

[6] *See, e.g.*, TEX. ELEC. CODE §§ 12.001, 67.007, 83.002.

assessor-collector and clerk are duly elected by the county's voters on a partisan ballot every four years.

15. Chapter 31 of the Election Code allows counties to establish an alternate approach to administer elections by appointing a "county elections administrator," and to transfer to that person all of the voter registration and election administration duties that would otherwise lie with the tax assessor-collector and the clerk.[7]

16. In November 2020, Harris County established the office of the Harris County Elections Administrator. The Harris County Election Commission appointed Ms. Longoria as Harris County Elections Administrator.[8]

17. Under Texas law, any voter may request an application to vote by mail and the elections administrator "shall" send such an application form to a voter upon request.[9] If an applicant submits a form and the elections administrator determines that they are eligible to vote by mail, the elections administrator "shall" provide a mail-in ballot to the applicant.[10] A voter in Texas is eligible to vote by mail if they are 65 years or older, sick or disabled, out of the county during the election, or confined in jail.[11] It is thus perfectly lawful for an eligible voter to request an application to vote by mail.

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[7] *Id.* § 31.031 ("The commissioners court by written order may create the position of county elections administrator for the county"); *id.* § 31.043 ("The county elections administrator shall perform: (1) the duties and functions of the voter registrar; (2) the duties and functions placed on the county clerk by this code; (3) the duties and functions relating to elections that are placed on the county clerk by statutes outside this code, subject to Section 31.044; and (4) the duties and functions placed on the administrator under Sections 31.044 and 31.045.").

[8] *See* TEX. ELEC. CODE § 31.032.

[9] *Id.* § 84.012.

[10] *Id.* § 86.001(b).

[11] *See id.* §§ 82.001–82.008.

18. Many Texas voters are eligible (and thus entitled) to vote by mail. For example, the 2020 Census determined that more than three million residents of Texas are 65 or older. All three million of those Texans are eligible to vote by mail if they are otherwise eligible to vote. Many voters are also eligible to vote by mail for other reasons, such as a person with a qualifying disability or confined due to childbirth.

19. Nevertheless, on September 7, 2021, Texas enacted SB1, a new law that, among other things, makes it a crime for a public official or election official to solicit an application to vote by mail, even from voters who are (or are potentially) eligible to vote by mail.

20. Section 7.04 of SB1 adds a new provision to the Texas Election Code, codified at Section 276.016 of the Election Code, entitled "Unlawful solicitation and distribution of application to vote by mail." Subsection (a)(1) of that provision states that a "public official or election official commits an offense if the official, while acting in an official capacity, knowingly . . . solicits the submission of an application to vote by mail from a person who did not request an application."[12]

21. That offense is a state jail felony that carries a mandatory minimum of six months of imprisonment and a fine of up to $10,000.[13]

22. Section 276.016(e) sets forth two narrow exceptions. The general prohibition on solicitation in Section 276.016(a)(1) does not apply "if the public official or election official . . . provide[s] general information about voting by mail, the vote by mail process, or the timelines associated with voting to a person or the public" or engages in the solicitation "while acting in the

[12] S.B. 1 § 7.04, 2021 87th Leg., 2d Spec. Sess. (Tex. 2021) (codified at TEX. ELEC. CODE § 276.016(a)(1)).

[13] TEX. ELEC. CODE § 276.016(b); TEX. PENAL CODE § 12.35(a)–(b).

official's capacity as a candidate for a public elective office."[14] Otherwise, any form of solicitation by an official of an application to vote by mail is a crime, whether or not the person is eligible to vote by mail.

23. Section 8.01 of SB1 adds another new provision to the Election Code, codified at Tex. Elec. Code § 31.129, entitled "Civil Penalty." Subsection (b) of that provision states that "[a]n election official may be liable to this state for a civil penalty if the official: (1) is employed by or is an officer of this state or a political subdivision of this state; and (2) violates a provision of this code." TEX. ELEC. CODE § 31.129(b). Subsection (a) clarifies that the term "election official," as used in the section, "does not include a chair of a county political party holding a primary election or a runoff primary election." TEX. ELEC. CODE § 31.129(a) (incorporating the definition of "election official" found in TEX. ELEC. CODE § 31.128). And Subsection (c) specifies that a "civil penalty imposed under this section may include termination of the person's employment and loss of the person's employment benefits." TEX. ELEC. CODE § 31.129(c).

24. It is not a crime for a public official or election official to discourage an eligible voter from submitting an application to vote by mail, even if that voter qualifies due to age, disability, childbirth, or another reason.

25. Ms. Longoria strongly believes in encouraging and enabling all registered voters in Harris County to exercise their rights to cast a lawful ballot. Accordingly, Ms. Longoria routinely encourages those who are (or may be) eligible to vote by mail to request an application to vote by mail, both through public statements and in interactions with individual voters. Ms. Longoria wishes to continue those efforts to encourage lawful voting by mail.

[14] TEX. ELEC. CODE § 276.016(e).

26. Indeed, for many voters, including elderly voters, voters with disabilities, and voters confined due to childbirth, voting by mail reduces significant real-world barriers to casting a ballot. As Elections Administrator, Ms. Longoria also implements and carries out the S.A.F.E. Initiatives, introduced in 2020 to ensure voter safety in light of the COVID-19 pandemic, which include a commitment to promote and maximize lawful vote-by-mail options.

27. It is lawful for a voter to request an application to vote by mail[15] and for that person to vote by mail if their application is approved.[16] Ms. Longoria accordingly seeks to exercise her First Amendment right to encourage eligible voters to lawfully request mail-in voting applications so that they can lawfully vote by mail. Ms. Longoria has no interest in encouraging (and does not plan to encourage) voters to request mail-in voting applications unless they are eligible or potentially eligible to vote by mail.

28. The new anti-solicitation provision in Section 276.016(a)(1), however, makes it a crime for Ms. Longoria to engage in such speech. Specifically, the anti-solicitation provision makes it a crime for a "public official or election official" to "knowingly . . . solicit[] the submission of an application to vote by mail from a person who did not request an application."[17] Section 276.016(a)(1) applies to Ms. Longoria because she is an "election official," which is defined in the Election Code to include, among other positions, an elections administrator.[18] It is well-settled that speech that encourages or induces another person to do something can qualify as

[15] TEX. ELEC. CODE § 84.012.

[16] *Id.* § 86.001(b).

[17] *Id.* § 276.016(a)(1).

[18] *Id.* § 1.005(4-a)(C).

solicitation under Texas law.[19] Thus, Ms. Longoria's efforts to encourage applications to vote by mail—conduct that is purely expressive—may qualify as solicitation for the "submission of an application to vote by mail," which the anti-solicitation provision makes a crime.

29. Such encouragement would also not fit within the statute's two narrow exceptions. Affirmatively encouraging a voter or voters to request an application is not limited to merely providing "general information," and such speech in her capacity as Elections Administrator would not be in any capacity as a candidate for elective office.

30. Section 276.016(a)(1) accordingly subjects Ms. Longoria to criminal penalties for encouraging eligible and potentially eligible voters to submit applications to vote by mail. In addition, Ms. Longoria will be unable to even give mere truthful advice in response to questions from individual voters without risk of criminal prosecution, because such truthful advice could subject her to possible prosecution for encouraging, inducing, counseling, directing, or otherwise soliciting the person to request an application, outside the scope of the narrow "general information" exception.

31. The chilling effect is particularly acute for Ms. Longoria because her public, vocal support for voting by mail makes her a target for retaliatory or discriminatory prosecution. Given the State's history with respect to Harris County's efforts to encourage mail-in voting, and Defendant Paxton's threats and history of prosecution of alleged election-related crimes, Ms. Longoria is especially concerned that she will face criminal prosecution from the Defendants—with a six-month mandatory minimum sentence—for encouraging eligible voters to request an application to vote by mail even when they are or may be eligible to do so.

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[19] *See Medrano v. State*, 421 S.W.3d 869, 884 (Tex. App.—Dallas 2014, pet. ref'd); *see also* TEX. PENAL CODE §§ 7.02(a)(2); 15.03(a).

32. Because encouraging eligible and potentially eligible voters to submit applications to vote by mail would violate Section 276.016(a)(1)—a provision of the Election Code—the civil penalty provision in Section 31.129 would subject Ms. Longoria to civil liability for that same speech. Section 31.129 applies to Ms. Longoria because she is an "election official," is "employed by or is an officer of this state or a political subdivision" of Texas, and is not "a chair of a county political party holding a primary election or a runoff primary election."[20]

33. Ms. Morgan currently serves as a VDR. Chapter 13 of the Texas Elections Code allows county registrars to appoint VDRs to encourage voter registration.[21] VDRs must complete training conducted by the county registrar prior to receiving a voter's registration.[22] Once training is completed, the VDR receives a certificate of appointment.[23] Voter registration is immediately effective when done with a VDR.[24] VDRs must deliver voter registration applications to the county registrar within five days of completion.[25]

34. Ms. Morgan is among the thousands of individuals who volunteer to serve as VDRs each year across Texas. She first volunteered to become a VDR in 2014. Since then, she has served as a VDR in both Williamson and Travis counties. As a VDR, Ms. Morgan has engaged in door-to-door outreach to register voters and, in October 2021, staffed a voter registration booth near the University of Texas at Austin campus. In the course of her work as a VDR, Ms. Morgan has

[20] TEX. ELEC. CODE §§ 31.128–29.

[21] *Id.* at § 13.031.

[22] *Id.*

[23] *Id.* at § 13.033.

[24] *Id.* at § 13.041.

[25] *Id.* at § 13.042(b).

routinely communicated with voters about the option and benefits of voting by mail, and otherwise shares information about voting by mail with eligible voters, including to encourage them to do so if appropriate.

35. When serving in her official capacity as a VDR, Ms. Morgan would continue to share vote-by-mail information, but for her fear of criminal prosecution for encouraging eligible voters to request an application to vote by mail even when they are or may be eligible to do so. As mentioned, Section 7.04's anti-solicitation provision applies to "public officials" and "election officials." Although VDRs are not included in the Election Code's definition of "election officials," Ms. Morgan fears that she will be prosecuted in her capacity as a "public official." The possibility of criminal prosecution by the Defendants under Section 276.016(a)(1) therefore chills Ms. Morgan from encouraging voters to request mail-in ballot applications.

36. Far from serving any state interest, prohibiting the solicitation of mail-in ballot applications harms Texas voters, depriving them of truthful advice from their election officials and public officials about mail voting options.

COUNT I
Isabel Longoria Against Defendant Ogg

Cathy Morgan Against Defendants Dick and Garza

Tex. Elec. Code § 276.016(a)(1) violates the First and Fourteenth Amendments to the U.S. Constitution.

37. Plaintiffs re-allege and incorporate by reference the allegations contained in the previous paragraphs of this Complaint as though fully set forth here.

38. The anti-solicitation provision in Section 276.016(a)(1) violates the First and Fourteenth Amendments both on its face and as applied to truthful speech encouraging people who are or may be eligible to vote by mail to request applications for such mail ballots.

39. The anti-solicitation provision in Section 276.016(a)(1) is unlawfully viewpoint based in that it specifically criminalizes and punishes the speech of public officials or election officials who support or encourage voters to request an application to vote by mail. Public officials and election officials whose speech opposes or discourages requests for applications to vote by mail are not subject to the anti-solicitation provision's penalties. Punishment thus depends not just on the content of the speech, but also its viewpoint on the question of whether voting by mail should be encouraged or discouraged. Such viewpoint discrimination is a paradigmatic violation of the First Amendment.

40. The anti-solicitation provision is also content-based because it imposes harsh criminal penalties and steep fines on public officials and election officials depending on the topic discussed and the message they express: if their communications convey a message that encourages or induces eligible voters to request mail ballot applications, then they are liable notwithstanding that requesting a mail ballot application is perfectly lawful and it is perfectly lawful for many Texas voters to vote by mail.

41. The anti-solicitation provision in Section 276.016(a)(1) cannot survive First Amendment scrutiny. The ban on soliciting mail-in ballot applications does not promote any legitimate, much less compelling, governmental interest. If anything, public officials and election officials have a compelling interest to *engage* in such speech because voting is itself a fundamental right and voting by mail is a lawful way for millions of Texans to exercise that fundamental right.

42. Nor is the anti-solicitation provision tailored—much less narrowly so—to further any compelling governmental interest by the least restrictive means. Defendants have ample alternative channels to achieve any alleged legitimate interest without the anti-solicitation provision's content- and viewpoint-based restrictions on Plaintiffs' speech. For example, the

Election Code independently prohibits public officials and election officials from affirmatively sending an application to vote by mail to a voter who did not request it.[26] Although Plaintiffs do not concede that there is any legitimate state interest in restricting mail voting in this way, that conduct-based prohibition would amply address any concerns the State may have. Censorship of protected speech is thus entirely unjustified.

43. Quite simply, Texas cannot make it a crime for a public official or election official to exercise her First Amendment right to encourage voters to lawfully exercise their own constitutionally protected right to vote, particularly when Texas allows public officials and election officials to exercise their First Amendments rights to discourage the very same lawful conduct. Plaintiffs are accordingly entitled under 42 U.S.C. § 1983 to the relief requested below.

COUNT II
Plaintiff Longoria Against Defendant Paxton

Tex. Elec. Code § 31.129, as applied to violations of Tex. Elec. Code § 276(a)(1), violates the First and Fourteenth Amendments to the U.S. Constitution.

44. Plaintiffs re-allege and incorporate by reference the allegations contained in the previous paragraphs of this Complaint as though fully set forth here.

45. As discussed, the anti-solicitation provision in Section 276.016(a)(1) violates the First and Fourteenth Amendments both on its face and as applied to truthful speech encouraging people who are or may be eligible to vote by mail to request applications for such mail ballots.

46. Because the anti-solicitation provision in Section 276.016(a)(1) is unconstitutional, any civil penalty imposed under Section 31.129 that is predicated on a violation of

[26] S.B. 1 § 7.04, 2021 87th Leg., 2d Spec. Sess. (Tex. 2021) (codified at TEX. ELEC. CODE § 276.016(a)(2)).

Section 276.016(a)(1) would likewise run afoul of the First and Fourteenth Amendments. Plaintiff Longoria is accordingly entitled under 42 U.S.C. § 1983 to the relief requested below.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request the following relief:

A. A declaratory judgment that Section 276.016(a)(1) of the Texas Election Code violates the First and Fourteenth Amendments;

B. A declaratory judgment that Section 31.129 of the Texas Election Code, as applied to violations of Section 276.016(a)(1) of the Texas Election Code, violates the First and Fourteenth Amendments;

C. An injunction prohibiting Defendants, their agents, officers, employees, and successors, and all persons acting in concert with each or any of them, from enforcing Section 276.016(a)(1) of the Texas Election Code;

D. An injunction prohibiting Defendant Paxton, his agents, officers, employees, and successors, and all persons acting in concert with each or any of them, from enforcing Section 31.129 of the Texas Election Code, as applied to a violation of Section 276.016(a)(1) of the Texas Election Code.

E. An order awarding Plaintiffs their costs, expenses, and reasonable attorneys' fees pursuant to, *inter alia*, 52 U.S.C. § 20510(c), 42 U.S.C. § 1988 and other applicable laws; and

F. Granting any such other and further relief as this Court deems just and proper.

Dated: December 27, 2021

Respectfully submitted,

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EXHIBIT 7:
DEFENDANTS' MOTION TO DISMISS (ECF NO. 24)

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

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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.

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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
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