No. 22-50110

In the United States Court of Appeals for the Fifth Circuit

ISABEL LONGORIA; CATHY MORGAN
Plaintiffs-Appellees,

v.

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

On Appeal from the United States District Court
for the Western District of Texas, San Antonio Division

BRIEF FOR DEFENDANT-APPELLANT THE ATTORNEY GENERAL OF TEXAS

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Certificate of Interested Persons

No. 22-50110

Isabel Longoria; Cathy Morgan

Plaintiffs-Appellees,

v.

Warren K. Paxton, in His Official Capacity as Attorney General of Texas; Shawn Dick, in his Official Capacity as Williamson County District Attorney

Defendants-Appellants.

Under the fourth sentence of Fifth Circuit Rule 28.2.1, appellee, as a governmental party, need not furnish a certificate of interested persons.

/s/ Benjamin D. Wilson
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STATEMENT REGARDING ORAL ARGUMENT

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

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Introduction

"The Elections Clause gives States authority 'to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved.'" *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 834 (1995) (quoting *Smiley v. Holm*, 285 U.S. 355, 366 (1932)). And the State has a fundamental interest "in protecting the integrity, fairness, and efficiency of [its] ballots and election processes as means for electing public officials," *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 364 (1997). Last September, to further those interests, Texas Legislature passed the Election Integrity Protection Act of 2021, 87th Leg., 2d C.S. (2021), often referred to as "SB1."

Perhaps recognizing, as this Court has, that "the potential and reality of fraud is much greater in the mail-in ballot context than with in-person voting," *Veasey v. Abbott*, 830 F.3d 216, 239 (5th Cir. 2016) (en banc), the Legislature prohibited public officials and election officials from soliciting applications to vote by mail when acting in their official capacity as part of SB1. *See* Tex. Elec. Code § 276.016.(a)(1) Though it contains several limitations, section 276.016 provides that a "public official or election official" may not "while acting in an official capacity, knowingly" "solicit[] the submission of an application to vote by mail from a person who did not request an application." *Id.* § 276.016(a)(1).

This provision is consistent with the First Amendment because it regulates only speech that public or election officials make in their official capacity—that is, government speech. "The Free Speech Clause . . . does not regulate government speech." *Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009). Even if that were

not true, the Attorney General is entitled to sovereign immunity because *Ex Parte Young's* exception does not apply to the only claim against the Attorney General. For the same reasons, Longoria—the only plaintiff to bring a claim against the Attorney General—lacks standing. The same analysis holds for the claims against the district attorneys in this case. And remaining factors do not favor the entry of a preliminary injunction.

The district court's erroneous grant of a preliminary injunction should be reversed.

Statement of Jurisdiction

Plaintiffs invoked the district court's jurisdiction under 28 U.S.C. sections 1331 and 1343. ROA.38 ¶ 1. The district court entered a preliminary injunction on February 11, 2022. ROA.626-65. The Attorney General timely filed a notice of appeal on February 14, 2022. ROA.722-23. This Court has jurisdiction to review the district court's preliminary injunction under 28 U.S.C. section 1292(a)(1).

Issues Presented

The issues presented are:

1. Whether the district court erred in concluding that sovereign immunity does not bar Plaintiffs' claims.
2. Whether the district court erred in concluding that Plaintiffs have standing to pursue their claims against the Attorney General and the district attorneys.
3. Whether Plaintiffs failed to show a likelihood of success on the merits of their First Amendment claims because SB1—which regulates only the speech of "[a] public official or election official . . . while acting in an official capacity," Tex. Elec. Code § 276.016(a)—only regulates government speech.
4. Whether the district court erred in concluding that the remaining factors for a preliminary injunction were satisfied.
5. Whether the district court's injunction at a minimum requires narrowing.

STATEMENT OF THE CASE

I. SB1 and Section 276.016(a)(1)

In September 2021, the Texas Legislature passed SB1. SB1 contains many provisions addressing a variety of election issues, including increasing the availability of early voting. *See* SB1 §§ 3.09, .10 (codified at Tex. Elec. Code §§ 85.005(c), .006(e)). In this case, Plaintiffs challenge only one provision of SB1: the portion of section 7.04 that added section 276.016(a)(1) to the Election Code. *See* ROA.47-50.

Under section 276.016(a)(1), "[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." Tex. Elec. Code § 276.016(a)(1).

Section 276.016(a)(1) has a number of important limitations. First, it applies only to "[a] public official or election official." *Id.* § 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.* By contrast, 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 a public elective office." *Id.* § 276.016(e)(2). Third, section 276.016(a)(1) 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)(1). 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).

II. Longoria's First Challenge to Section 276.016(a)(1)

Plaintiff Isabel Longoria, the Elections Administrator for Harris County, originally challenged section 276.016(a)(1) on September 3, 2021. *See* Complaint at 55, 63-69, *La Unión Del Pueblo Entero v. Abbott*, No. 5:21-cv-00844-XR, (W.D. Tex. Sept. 3, 2021), ECF No. 1. 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 that would have concluded before the November general election. *See* ROA.142-43 ("On behalf of LUPE plaintiffs, it is correct that we are not planning to pursue preliminary injunctive relief prior to the March primary."). Perhaps regretting this concession, Longoria voluntarily dismissed her first lawsuit. *See* Notice of Voluntary Dismissal, *La Unión Del Pueblo Entero v. Abbott*, No. 5:21-cv-00844 (W.D. Tex. Dec. 1, 2021), ECF No. 138.

III. Longoria's Second Challenge to Section 276.016(a)(1)

Longoria and Plaintiff Cathy Morgan, a volunteer deputy registrar in Travis and Williamson Counties, filed this lawsuit against the Attorney General once again raising a First Amendment challenge to section 276.016(a)(1) on December 10, 2021, ROA.14-26—less than three months before the March 2022 primary election date, *see* Tex. Elec. Code § 41.007(a), and less than a month before voters could first submit an application for a mail-in ballot, *see id.* § 84.007. Before Plaintiffs served their original complaint, Plaintiffs amended their complaint on December 27, 2021, to add three district attorneys as defendants and alter the claim against the Attorney General. *See* ROA.37-52.

Plaintiffs' first amended complaint includes two counts. In Count I, Longoria and Morgan seek to prevent three district attorneys from criminally prosecuting them for violations of section 276.016(a)(1). ROA.47-49. In Count II, Longoria (but not Morgan) seeks to prevent the Attorney General (and only the Attorney General) from bringing a civil enforcement action against her for violations of section 276.016(a)(1). ROA.49-50; Tex. Elec. Code § 31.129(b)-(c) (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").

Notwithstanding Longoria's previous agreement not to seek preliminary injunctive relief, Plaintiffs moved for a preliminary injunction on both counts of their amended complaint on December 28, 2021. ROA.65-88. Although Plaintiffs' requested preliminary relief during the March 2022 primary, *see* ROA.85, they did not serve the Attorney General with the First Amended Complaint and the preliminary-injunction motion until January 3, 2022, ROA.172—less than two months before the March 2022 primary election date, *see* Tex. Elec. Code § 41.007(a), and two days after voters could first submit an application for a mail-in ballot, *see id.* § 84.007.

The Attorney General moved to dismiss Plaintiffs' amended complaint or, in the alternative, abstain on January 24, 2022. ROA.208-25. That motion is still pending and briefing on that motion will conclude by March 2, 2022. ROA.243-44.

The district court held an evidentiary hearing on Plaintiffs' motion for a preliminary injunction on February 11, 2022. ROA.750, 756-940 That night, the district

court granted Plaintiffs' motion. ROA.626-65.[1] The district court concluded that Plaintiffs caried their burden of showing that the court had subject matter jurisdiction and had established that there was "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." ROA.664. The district court also concluded "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." ROA.664.

Based on those conclusions, the district court enjoined the district attorney defendants from enforcing section 276.016(a)(1) against Longoria and Morgan. ROA.664. The district court also enjoined all defendants from enforcing section 276.016(a)(1) against both Longoria and Morgan using section 31.129—even though only Longoria brought a claim based on section 31.129, and even though the only defendant Longoria named in that claim was the Attorney General. ROA.664. The district court specified that defendants were enjoining from enforcing those sections only "pending final resolution of this case." ROA.664. But the district court further

[1] The district court's order granting Plaintiffs' motion for a preliminary injunction appears in two separate but apparently identical docket entries. *Compare* ROA.626-65, *with* ROA.682-721. For simplicity's sake, the Attorney General cites to only the first of those two docket entries in this brief, and the Attorney General included only the first of those two docket entries in his record excerpts.

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," ROA.665—effectively entering a permanent injunction.

During the evidentiary hearing, the Attorney General moved to stay any preliminary injunction the court was contemplating pending appeal or for at least seven days to allow the Attorney General to seek a stay from this Court. ROA.938-39. The seven-day stay the Attorney General requested in the alternative would have been enough to delay the effective date of any such injunction until after the deadline for county election officials to receive applications for mail-in ballots for the March 2022 primary. But the district court denied the motion to stay and ordered that the injunction take effect immediately, ROA.664-65—changing the status quo barely two weeks before the primary and only a week before the deadline for county election officials to receive applications for mail-in ballots.

The Attorney General timely filed a notice of appeal of the district court's preliminary injunction on February 14, 2022. ROA.722-23. (Defendant Shawn Dick later filed a separate timely notice of appeal of the district court's preliminary injunction. ROA.754-55.) The Attorney General also filed an emergency motion in this Court for a stay of the district court's injunction pending appeal, for an administrative stay, and to expedite this appeal. This court granted the motion for an administrative stay, granted the motion to expedite this appeal, and carried the motion for a stay pending appeal with the case. ROA.752.

Summary of the Argument

The district court erred in granting a preliminary injunction first because Longoria's claim against the Attorney General fails for lack of subject matter jurisdiction and standing. The district court erred again when it concluded that Plaintiffs were likely to succeed on their First Amendment claims; and it erred once again by concluding that Plaintiffs satisfied the remaining preliminary-injunction requirements. Each error independently requires reversal of the injunction, and the district court's jurisdictional errors require dismissal of Longoria's claim against the Attorney General.

The district court lacked jurisdiction over the Attorney General due to sovereign immunity and because Longoria does not have standing to bring her claim against the Attorney General. While *Ex parte Young* sometimes provides plaintiffs a vehicle to enjoin some state officials from enforcing some state statutes, immunity notwithstanding, it does so only where a plaintiff sues a defendant who has a sufficient connection to the enforcement of the statute at issue. *Tex. Democratic Party v. Abbott*, 978 F.3d 168, 179 (5th Cir. 2020). Longoria pointed to no state-law authority charging the Attorney General with the "particular duty to enforce" that statute, and Plaintiffs have failed to show that the Attorney General has "a demonstrated willingness" to enforce that particular statute. *Id.* Without *Ex parte Young*, Plaintiffs are back to the traditional default: that officials acting in their official capacity, such as the Attorney General, enjoy sovereign immunity. *Id.* Longoria's failure to show the requisite connection between the Attorney General and the enforcement of section 276.016(a)(1) through section 31.129 means that she has also failed to "demonstrate

that there is 'a significant possibility' that the Attorney General will inflict 'future harm' by acting to enforce" section 276.016(a)(1) through section 31.129. *City of Austin v. Paxton*, 943 F.3d 993, 1003 (5th Cir. 2019). Longoria thus does not have standing to bring her claim to enjoin the Attorney General from enforcing section 276.016(a)(1) through section 31.129. The same is true of the claims against the District Attorneys, for mostly the same reasons.

The district court further erred by concluding that Plaintiffs were likely to prevail on their First Amendment Claims. "The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech." *Summum*, 555 U.S. at 467. "When government speaks, it is not barred by the Free Speech Clause from determining the content of what it says." *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 207 (2015) (citing *Summum*, 555 U.S. 467-68). SB1 regulates only government speech—because section 276.016(a) applies solely when an official "knowingly . . . solicits the submission of an application to vote by mail from a person who did not request an application" "while acting in an official capacity." Tex. Elec. Code § 276.016(a).

Section 276.016(a) thus directly corresponds to precedent from this Court and the Supreme Court concerning public employees engaging in government speech. "[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*" cannot qualify as private speech protected by the First Amendment. *Anderson v. Valdez*, 845 F.3d 580, 593 (5th Cir. 2016). The district court erred by concluding otherwise.

The district court also erred by concluding that the alleged harm to Plaintiffs outweighed the threatened harm to the Attorney General and, by extension, the State. The State has compelling interests in the enforcement of its duly passed laws, *e.g.*, *E.T. v. Paxton*, 19 F.4th 760, 770 (5th Cir. 2021), especially laws intended to further the State's "important interest[s] in preventing voter confusion," *MacBride v. Askew*, 541 F.2d 465, 468 (5th Cir. 1976), and "in protecting the integrity, fairness, and efficiency of [its] ballots and election processes as means for electing public officials," *Timmons*, 520 U.S. at 364. The district court's preliminary injunction would impinge upon each of those interests and thus threatens to irreparably harm the Attorney General and the State. The district court wrongly discounted those interests and threatened harms, and Plaintiffs failed to carry their burden of showing that the alleged harm they claim is greater than the threatened harms to the Attorney General and the State. The district court similarly erred by finding that its injunction would not disserve the public interest because in this situation, the State's "interest and harm merge with that of the public." *E.g.*, *Richardson v. Tex. Sec'y of State*, 978 F.3d 220, 243 (5th Cir. 2020) (citation omitted).

At a minimum, this Court should narrow the district court's injunction for several reasons: first, it should stay the effect of the injunction until after the primary election runoff date under the *Purcell* principle; second, the district court improperly entered effective permanent injunctive relief absent any final judgment applying only the preliminary injunction factors; and third, the district court improperly granted Plaintiffs relief they failed to seek in their operative complaint.

STANDARD OF REVIEW

This Court "review[s] the district court's jurisdictional determination of sovereign immunity de novo." *City of Austin*, 943 F.3d at 997. This Court also reviews a district court's standing ruling de novo. *In re Dean*, 18 F.4th 842, 844 (5th Cir. 2021).

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

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) (per curiam). "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) (citation omitted).

"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 marks omitted). "A preliminary injunction . . . is never awarded as of right." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008).

ARGUMENT

I. The District Court Lacked Jurisdiction Over the Plaintiffs' Claims.

The sole claim against the Attorney General in Plaintiffs' amended complaint is a claim by only Longoria against only the Attorney General to enjoin him from civilly prosecuting her for a violation of section 276.016(a)(1) through section 31.129. ROA.49-50. But Longoria cannot establish Article III jurisdiction for that claim both because it is barred by sovereign immunity and because she lacks standing to bring it. Plaintiffs' claims against the district attorneys are barred for similar reasons.

A. Sovereign immunity bars Plaintiffs' claims.

1. As a general rule, official-capacity suits are barred by sovereign immunity. *See, e.g.*, *City of Austin*, 943 F.3d at 997. *Ex parte Young*, 209 U.S. 123 (1908), is the exception, allowing plaintiffs to seek an injunction only in "th[e] precise situation" where "a federal court commands a state official to do nothing more than refrain from violating federal law." *Va. Off. for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 255 (2011). *Ex parte Young* therefore permits official-capacity suits against state officials only when the sued official has a "sufficient connection to enforcing an allegedly unconstitutional law. Otherwise, the suit is effectively against the state itself and thus barred by . . . sovereign immunity." *In re Abbott*, 956 F.3d 696, 708 (5th Cir. 2020) (quotation marks and citations omitted), *cert. granted, judgment vacated on other grounds sub nom.*, *Planned Parenthood Center for Choice v. Abbott*, 141 S. Ct. 1261 (2021). "[T]he required connection is not merely the general duty to see that the laws of the state are implemented." *Tex. Democratic Party*, 978 F.3d at 181 (citation omitted); *see also id.* ("A general duty to enforce the law is insufficient for *Ex parte*

Young."). Instead, a "plaintiff at least must show the defendant has" (1) "the particular duty to enforce the statute in question and" (2) "a demonstrated willingness to exercise that duty." *Id.* at 179.

Plaintiffs have not made either showing. First, they have not shown that the Attorney General has a duty to enforce violations of section 276.016(a)(1) through section 31.129, so he is not a proper defendant for a suit challenging the enforcement of those statutes. As the district court acknowledged, Texas law "does not specify whether the Attorney General may enforce Section 31.129." ROA. 649. Although 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" the Texas Election Code, Tex. Elec. Code 31.129(b), section 31.129 does not indicate who may bring a lawsuit under that section. The district court erred in concluding that Plaintiffs had demonstrated that Section 31.129—which does not mention the Attorney General—gives him "the particular duty to enforce" the law. *Tex. Democratic Party*, 978 F.3d at 179 (citation omitted).

Second, even assuming the Attorney General has the authority to enforce section 276.016(a)(1) through section 31.129, there is no record evidence that the Attorney General has "a demonstrated willingness," *id.*, to do so. Instead, Plaintiffs and the district court pointed to a mandamus petition the Attorney General filed in 2020 to enjoin the Harris County Clerk from sending out millions of unsolicited applications to vote by mail. ROA.607, 648. But Longoria has not sought to enjoin the

Attorney General from filing a mandamus petition, nor has she argued that the relief available from a mandamus petition would chill her speech.

Moreover, that lawsuit pre-dated both section 31.129 and section 276.016(a)(1), which was enacted as a part of SB1 in 2021. That lawsuit thus fails to show that the Attorney General "ha[s] the requisite connection to the enforcement" of section 276.016(a)(1) through 31.129—"the particular statutory provision[s] that [are] the subject of th[is] litigation." *Tex. Democratic Party*, 978 F.3d at 179; *see id.* ("A 'case-by-case approach to the *Young* doctrine has been evident from the start.'" (quoting *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 280 (1997)). As this Court recognized in *City of Austin*, 943 F.3d 993, that the Attorney General has enforced "*different* statutes under *different* circumstances does not show that he is likely to do the same here," *id.* at 1001-02.

The district court attempted to distinguish *City of Austin* on the grounds that the Attorney General has "demonstrated a willingness to enforce civil provisions of the Election Code regulating applications to vote by mail against election officials." ROA.649-50. But analysis at that level of generality simply violates *City of Austin*: the civil actions the district court pointed to, ROA.649-50, involved different statutes addressing different aspects of voting by mail—in other words, different circumstances than pursuing civil prosecution under section 31.129 for soliciting the submission of applications to vote by mail in violation of section 276.016(a)(1). *See City of Austin*, 943 F.3d at 1002; *cf. id.* at 1003 ("The City fails to show how the Attorney General's past interventions in suits involving municipal ordinances demonstrate that there is 'a significant possibility' that the Attorney General will

inflict 'future harm' by acting to enforce 'the supremacy of [§ 250.007]' over the Ordinance."). That is especially true here, where the previous lawsuit involved only prospective relief and did not even arguably affect anyone's speech rights.

The district court also pointed to statutory provisions giving the Attorney General the authority to investigate potential criminal conduct relating to elections. ROA.647-48 (citing Tex. Elec. Code § 273.001(a)-(d)). But as the district court acknowledged, the Attorney General does not have authority under current Texas precedent to criminally prosecute violations of the Texas Election Code—including section 276.016(a)(1). ROA.647; *see State v. Stephens*, No. PD-1032-20, 2021 WL 5917198 (Tex. Crim. App. Dec. 15, 2021). And even if those statutory provisions confer investigatory duties upon the Attorney General, Plaintiffs still have not shown that the Attorney General has "a demonstrated willingness to exercise that duty" with respect to violations of section 276.016(a)(1), much less that he will pursue civil prosecutions under section 31.129 based on any investigations of violations of section 276.016(a)(1). *Tex. Democratic Party*, 978 F.3d at 179 (citation omitted).

Finally, Plaintiffs have argued that the Attorney General's public statements about election integrity make it "more likely" that the Attorney General will attempt to enforce section 276.016(a)(1) through section 31.129. ROA.607 n.5; Resp. to Stay Mot. 21-22 & nn.6-7. But this Court has flatly rejected "the proposition that an official's public statement alone establishes authority to enforce a law, or the likelihood of his doing so, for *Young* purposes." *In re Abbott*, 956 F.3d at 709 (citing *City of Austin*, 943 F.3d at 1001).

Because Longoria has failed to show the requisite connection between the Attorney General and the enforcement of section 276.016(a)(1) through section 31.129, Longoria's claim against the Attorney General does not fit the *Ex parte Young* exception and thus is barred by sovereign immunity.

2. For similar reasons, the district court erred in concluding that Plaintiffs' claims against the district attorneys satisfied the *Ex parte Young* exception.[2] The court below ended its analysis after concluding that Texas law makes district attorneys "responsible for investigating and prosecuting violations of the Election Code." ROA.647. It did not analyze the second half of the inquiry: whether Plaintiffs proved "a demonstrated willingness to exercise that duty" with respect to violations of section 276.016(a)(1). *Tex. Democratic Party*, 978 F.3d at 179; *accord id.* at 181. That limited analysis was inconsistent with this Court's "recent cases," which "have consistently required the plaintiff to show that the defendant has . . . a demonstrated willingness to exercise that duty." *Daves v. Dallas County*, 984 F.3d 381, 400 (5th Cir. 2020), *vacated en banc*, 988 F.3d 834 (5th Cir. 2021); *see, e.g.*, *Morris v. Livingston*, 739 F.3d 740, 746 (5th Cir. 2014) (requiring "a demonstrated willingness").

[2] At least with respect to prosecutions, this Court has concluded that district attorneys may assert a sovereign immunity defense because "district attorneys in Texas are agents of the state when acting in their prosecutorial capacities." *Quinn v. Roach*, 326 F. App'x 280, 292 (5th Cir. 2009) (collecting authority).

B. Plaintiffs Lack Standing.

1. Because this Court's "Article III standing analysis and *Ex parte Young* analysis 'significantly overlap,'" *City of Austin*, 943 F.3d at 1002 (citation omitted), Longoria's failure to show the requisite connection between the Attorney General and the enforcement of section 276.016(a)(1) through section 31.129 also means that she lacks standing to bring her claim to enjoin the Attorney General from enforcing section 276.016(a)(1) through section 31.129.

"Generally, to have standing to sue under Article III, a plaintiff must allege: (i) an injury-in-fact that is (ii) fairly traceable to the defendant's challenged action and (iii) redressable by a favorable outcome." *Id.* "A plaintiff 'can meet the standing requirements . . . by establishing actual present harm or *a significant possibility of future harm*.'" *Id.* (quoting *Roark & Hardee LP v. City of Austin*, 522 F.3d 533, 542 (5th Cir. 2008) (emphasis added)). "Even if Article III standing's requirement of a 'significant possibility of future harm' and the 'connection to [ ] enforcement' requirement under our precedent are not identical, there are certainly notable similarities between the two." *Id.* (citation omitted) (alteration in original).

So just as Longoria has failed to satisfy the connection-to-enforcement requirement to fit the *Ex parte Young* exception to sovereign immunity, *supra* section I.A, Longoria "fails to show how the Attorney General's past" lawsuits involving different provisions of the Texas Election Code and his public statements about election integrity "demonstrate that there is 'a significant possibility' that the Attorney General will inflict 'future harm' by acting to enforce" section 276.016(a)(1) through section 31.129. *Id.* at 1003. As a result, Longoria lacks standing to bring her claim to

enjoin the Attorney General from enforcing section 276.016(a)(1) through section 31.129.

Because Longoria's only claim against the Attorney General is barred by sovereign immunity and because Longoria does not have standing to bring that claim, the district court lacked jurisdiction over that claim. The district court thus erred by granting preliminary injunctive relief on that claim. And because Longoria is the only plaintiff with a claim against the Attorney General in this case, the district court's entry of a preliminary injunction against the Attorney General must be reversed on this basis alone.

2. For similar reasons, Longoria lacks standing to sue District Attorney Ogg, and Morgan lacks standing to sue District Attorneys Garza and Dick. Plaintiffs introduced no evidence that any district attorney was likely to criminally prosecute them. On the contrary, two district attorneys went out of their way to stipulate that they would not enforce Section 276.016(a)(1) during this litigation. ROA.271-73 (Ogg stipulation); ROA.274-276 (Garza stipulation).

II. Plaintiffs Have Not Shown a Substantial Likelihood That They Will Prevail On the Merits.

Plaintiffs failed to carry their burden of showing that they have a substantial likelihood of success on the merits because section 276.016(a)(1) does not implicate Plaintiffs' free-speech rights. Instead, section 276.016(a)(1) regulates only government speech, not speech delivered in a personal capacity. As a result, section 276.016(a)(1) is not subject to First Amendment scrutiny.

A. Government speech is not regulated by the First Amendment.

"The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech." *Summum*, 555 U.S. at 467. Thus, "[w]hen government speaks, it is not barred by the Free Speech Clause from determining the content of what it says." *Walker*, 576 U.S. at 207 (citing *Summum*, 555 U.S. 467-68). "[G]overnment statements (and government actions and programs that take the form of speech) do not normally trigger the First Amendment rules designed to protect the marketplace of ideas." *Id.* "'It is the very business of government to favor and disfavor points of view." *Summum*, 555 U.S. at 468 (quoting *Nat'l Endowment for Arts v. Finley*, 524 U.S. 569, 598 (1998) (Scalia, J., concurring in the judgment)).

"Were the Free Speech Clause interpreted otherwise, government would not work." *Walker*, 576 U.S. at 207. "'[I]t is not easy to imagine how government could function if it lacked th[e] freedom' to select the messages it wishes to convey." *Id.* at 208 (quoting *Summum*, 555 U.S. at 468). When government speaks, therefore, it may "speak for itself" and just as surely may "in advancing [its] goals necessarily discourage[] alternative goals." *Id.* That is, once the government has decided to speak, "it is entitled to promote a program, to espouse a policy, or to take a position." *Id.* As this Court has explained, "[t]he government undoubtedly has the authority to control its own message when it speaks or advocates a position it believes is in the public interest." *Chiras v. Miller*, 432 F.3d 606, 612 (5th Cir. 2005).

Governments are entities that can speak only through their agents; 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*, 547 U.S. at 421. Any "speech *made pursuant to a public employee's official duties*" thus cannot qualify as private speech protected by the First Amendment. *Anderson*, 845 F.3d at 593.

This is consistent with both this Court's and the Supreme Court's holdings in employee discipline cases. "Employees who make public statements outside the course of performing their official duties retain some possibility of First Amendment protection because that is the kind of activity engaged in by citizens who do not work for the government." *Garcetti*, 547 U.S. at 423-24. But "[w]hen a public employee speaks pursuant to employment responsibilities, . . . there is no relevant analogue to speech by citizens who are not government employees." *Id.*; *see also Anderson*, 845 F.3d at 594 ("*Garcetti* merely allows the public employer to control an employee's speech if made pursuant to the employee's official duties.").

Thus, 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) (citing *Garcetti*, 547 U.S. at 421). Again, 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 (emphasis 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. Dall. Indep. Sch. Dist.*, 480 F.3d 689, 694 (5th Cir. 2007) (per curiam).

B. Section 276.016(a) regulates only government speech.

Because section 276.016(a) applies only when a public official or election official is "acting in an official capacity," Tex. Elec. Code § 276.016(a), section 276.016(a)(1) regulates only government speech. This tracks the Supreme Court's government speech cases related to public employees precisely. As the Supreme Court has explained: "Whereas speech as a citizen may trigger protection, . . . '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 . . . . '" *Lane v. Franks*, 573 U.S. 228, 237 (2014) (quoting *Garcetti*, 547 U.S. at 421).

Indeed, both Longoria and Morgan recognized that section 276.016(a) regulates only conduct in their official capacities; that is, it applies only to government speech, not private speech. Morgan recognized this in her deposition and her declaration. *See* ROA.544; ROA.100. 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* ROA.519 (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." ROA.93. But Plaintiffs' disagreement with Texas law as to how they should conduct their official job duties does not transform speech performed in their official capacity into speech protected by the First Amendment.

After all, government could not function "if it lacked th[e] freedom to select the messages it wishes to convey." *Walker*, 576 U.S. at 207.

Plaintiffs of course remain free to speak however they wish when not "acting in an official capacity" Tex. Elec. Code § 276.016(a), and they remain free to "provide[] general information about voting by mail, the vote by mail process, or the timelines associated with voting to a person or the public," *id.* § 276.016(e), even while acting in an official capacity. What they cannot do is "solicit[] the submission of an application to vote by mail from a person who did not request an application" while "acting in an official capacity." *Id.* at 276.016(a)-(a)(1). Because section 276.016(a) only regulates government speech, Plaintiffs cannot assert a First Amendment right in that speech. *See City of El Cenizo*, 890 F.3d at 185 ("In the context of *government* speech, a state may endorse a specific viewpoint and require government agents to do the same.").

C. The district court erred when it disregarded these straightforward principles.

The district court erroneously rejected this interpretation of section 276.016(a). The district court recognized that "[i]t 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." ROA.654. It nonetheless concluded that Plaintiffs were likely to succeed on the merits for two reasons.

First, it concluded that "the State's assertion that it is entitled to regulate Longoria and Morgan's official communications as their employer is wholly unavailing"

because "Longoria and Morgan are not employed by the State; Longoria is employed by Harris County, and Morgan is a volunteer for Travis and Williamson Counties." ROA.654. Second, the district court concluded that because SB1 allows for the possibility of criminal penalties for soliciting submission of an application to vote by mail from someone who did not request an application, the "State was . . . acting as a sovereign" and "[t]he full force of the First Amendment applies again against a government acting in its sovereign capacity." ROA.654-55. Both are wrong.

First, that Plaintiffs work or volunteer for local governments rather than the state government, ROA.654 & n.4, 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). 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 (citing *Tyra v. City of Houston*, 822 S.W.2d 626, 628 (Tex. 1991) ("The Texas Constitution prohibits a city from acting in a manner inconsistent with the general laws of the state.")).

This rule is straightforward, as it must be. States, including Texas, routinely require local officials to effectuate state policies by implementing state statutes,

including concerning elections. *See, e.g.*, *Tex. Democratic Party v. Hughs*, 997 F.3d 288, 291 (5th Cir. 2021) (explaining that "local officials are responsible for administering and enforcing" various election statutes). Indeed, any other rule would vitiate numerous provisions of the Texas Election Code—because Texas law provides that many of the duties associated with conducting an election will be performed by local officials. *E.g.*, Tex. Elec. Code §§ 31.043-045 (describing duties of county election administrators). If local officials need not comply with State law they disagree with simply because they are local rather than State officials, State government cannot effectively function.

The district court's conclusion, ROA.654-55, that the possibility of criminal sanctions under SB1 transforms government speech into constitutionally protected speech is likewise flawed. In the first instance, it ignores that the relevant inquiry is the nature of the speech itself—here only speech where certain officials are "acting in an official capacity." Tex. Elec. Code § 276.016. Although the Supreme Court considered "employer discipline" in *Garcetti*, 547 U.S. at 421, the government-speech rationale is not so limited.

Indeed, this Court has confirmed that official-capacity speech is "unprotected." *Anderson*, 845 F.3d at 593; *see also Williams*, 480 F.3d at 694. This is not a balancing test in which the severity of the penalty might enter the calculus. When the First Amendment provides no protection because the speech at issue is government speech—it provides no protection. The First Amendment thus provides government speech the same amount of protection against criminal prosecution as it does against termination: that is to say, none. *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."); *see also Ceballos v. Garcetti*, 361 F.3d 1168, 1189 (9th Cir. 2004) (O'Scannlain, J., specially concurring) ("[W]hen public employees speak in the course of carrying out their routine, required employment obligations, they have no *personal* interest in the content of that speech that gives rise to a First Amendment right. Instead, their speech is, in actuality, the State's.").

That is why both the Supreme Court and this Court 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). And it is congruent with the general rule that the First Amendment does not regulate government speech. *Summum*, 555 U.S. at 467.

The district court relied on the Third Circuit's opinion in *In re Kendall*, 712 F.3d 814, 826-27 (3d Cir. 2013) and the Court of Criminal Appeals' opinion in *Ex parte Perry*, 483 S.W.3d 884, 911-12 (Tex. Crim. App. 2016), for the proposition that the nature of the sanction may transform unprotected government speech into speech protected by the First Amendment. Of course, these opinions are only of persuasive value. In any event they are distinguishable.

In *Ex parte Perry*, the Texas Court of Criminal Appeals rejected an argument that "[t]he State Prosecuting Attorney" had not made before it—but rather had conceded—and concluded that "[w]hen government seeks criminal punishment, it indeed acts as sovereign and not as employer or speaker." 483 S.W.3d at 911. In addition to their being no live dispute on this point before the Court of Criminal Appeals, *Ex parte Perry* involved an attempted prosecution of an elected official. *Id.* at 888. The principle that strict scrutiny applies to regulations of the speech of an elected official like the Governor of Texas is uncontroversial. "The state cannot regulate the substance of *elected* officials' speech under the First Amendment without passing the strict scrutiny test." *City of El Cenizo*, 890 F.3d at 184 (emphasis added) (citing *Williams-Yulee v. The Fla. Bar*, 575 U.S. 433, 444-45 (2015). That "does not, however, insulate non-elected officials and employees." *Id.* at 185. That is why section 276.016(e)(2) explains that the prohibitions set out in section 276.016(a) "do[] not apply" where "the public official or election official" is "acting in the official's capacity as a candidate for a public or elective office." Tex. Elec. Code 276.016(e)(2).

In *Kendall*, the Third Circuit offered only a perfunctory analysis of whether government speech could be regulated by criminal penalties, *In re Kendall*, 712 F.3d at 737-38—probably because the Virgin Islands briefed the issue in two conclusory sentences before the that court. *See* Brief in Opposition at 15-16, *In re Kendall*, No. 11-4471 (3d Cir. August 3, 2012). There, the Third Circuit explained that a judge could not be prosecuted for criminal contempt because of a judicial opinion and held that "the First Amendment protects a judge's opinion from criminal punishment unless his speech poses a clear and present danger to the administration of justice."

Kendall, 712 F.3d at 826. The Virgin Islands Supreme Court was unable to impose judicial discipline on the judge because "the statute authorizing the Virgin Islands Commission on Judicial Discipline to investigate and remove Superior Court judges" had previously been "struck down . . . as unconstitutional, and the Virgin Islands Supreme Court had not "issued new disciplinary rules applicable to judges." *Id.* at 820. So the Virgin Islands Supreme Court "ordered Kendall to show cause why he should not be held in criminal contempt," *id.*, and ultimately tried and convicted him "of indirect criminal contempt for obstructing the administration of justice by publishing inflammatory remarks about the Virgin Islands Supreme Court." *Id.* at 822.

The question the Third Circuit answered on appeal was whether "the government's broader authority to *discipline* attorney speech about ongoing proceedings also permit[s] the government to hold a judge in criminal contempt for his speech about ongoing proceedings." *Id.* at 826. The court held that the answer was no. As relevant here, the court tersely rejected an analogy to the "government's broad authority as public employer to discipline an employee for speech made pursuant to his official duties," concluding that the analogy "f[e]ll flat" because "the Virgin Islands Supreme Court acted as sovereign, not as public employer, by criminally punishing Kendall's speech." *Id.* at 827.

But the Third Circuit did not explain how its conclusion was consistent with its earlier observation that "[w]hen acting as sovereign, the government is empowered to . . . decide what viewpoints to espouse in its own speech or speech that might be attributed to it, and categorically restrict unprotected speech." *Id.* at 825 (citing

Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 560 (2005)). The implication, however, is that the viewpoints expressed by a judge in a judicial opinion (the speech at issue in *In re Kendall*, *id.* at 816) are not necessarily attributable to the government. In any event, whatever relevance convicting a judge of criminal contempt based on general attorney discipline rules for issuing an opinion has here, it does not change the conclusion that section 276.016(a) only regulates government speech—which is "unprotected," *Anderson*, 845 F.3d at 593; *see also Williams*, 480 F.3d at 694, and thus can be "categorically restrict[ed]" by the government, *In re Kendall*, 712 F.3d at 835.

But even if unimplicated government speech could transform into First Amendment protected speech merely by virtue of the severity or nature of the sanction, it would not help Longoria's claim against the Attorney General. The two forms of relief expressly mentioned in section 31.129 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). Termination and loss of employment benefits are classic forms of employer discipline, and as such could not have been properly enjoined simply because section 276.016(b) allows for the possibility of criminal punishment. Thus, Longoria's claim against the Attorney General stills fails insofar as she seeks to prevent a civil enforcement action terminating her employment or employment benefits.

III. Plaintiffs Cannot Satisfy the Remaining Factors.

A. Any threatened injury to Plaintiffs is outweighed by the harm the district court's injunction would inflict on the State.

Plaintiffs also did not satisfy the third prerequisite for a preliminary injunction because they failed to show that any threatened harm to Plaintiffs from the enforcement of section 276.016(A)(1) would outweigh the harm the district court's injunction would inflict upon the Attorney General. Rather than grapple with the threatened harm to the Attorney General, Plaintiffs asserted that "Defendants will suffer no harm from the issuance of an injunction." ROA.84; ROA.73 ("Defendants cannot articulate, let alone prove, harm to their interests . . . "). Not so.

As this Court has observed, "[w]hen 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) (citing *Maryland v. King*, 567 U.S. 1301 (2012) (Roberts, C.J., in chambers); *see also Walters v. Nat'l Ass'n of Radiation Survivors*, 468 U.S. 1323, 1324 (1984) (Rehnquist, J., in chambers)). And because "Texas's public officials are charged with carrying out Texas's public policy, . . . enjoining those officials and that policy injures the state." *E.T.*, 19 F.4th at 770. Plaintiffs failed to acknowledge these harms in their district court briefing, *see* ROA.73, 84, 602, 617, much less carry their burden of showing that these harms are outweighed by the threatened harms Plaintiffs allegedly face.

Plaintiffs have since tried to discount these harms as "abstract" and asserted that the Attorney General cannot claim "any concrete interest" in enforcing section 276.016(a)(1). Resp. to Stay Mot. 14. But section 276.016(a)(1) serves the State's

"interest in protecting the integrity, fairness, and efficiency of [its] ballots and election processes as means for electing public officials." *Timmons*, 520 U.S. at 364; *see also Buckley v. Am. Const. L. Found., Inc.*, 525 U.S. 182, 187 (1999) ("[T]here must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.") (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)).

Section 276.016(a)(1) serves this important interest by helping to minimize the number of voters eligible to vote by mail who choose that option instead of voting in person. As this Court has previously observed, "the potential and reality of fraud is much greater in the mail-in ballot context than with in-person voting," *Veasey v. Abbott*, 830 F.3d 216, 239 (5th Cir. 2016) (en banc), and "[a]bsentee ballots remain the largest source of potential voter fraud . . . ." *Richardson*, 978 F.3d at 224 (citation omitted).

Section 276.016(a)(1) also serves the State's "important interest in preventing voter confusion." *MacBride*, 541 F.2d at 468. As the Director of the Elections Division at the Secretary of State's Office explained, voters would likely interpret government officials soliciting applications for mail in ballots as "an implicit assurance that they are qualified to do so," even if they are not. ROA.561; *see also* ROA.856, 858. That could potentially "mislead unqualified voters into thinking that they were eligible to vote by mail, thereby inducing them to commit a felony." ROA.561; *see also* ROA.851.

The Supreme Court has repeatedly emphasized the importance of avoiding such voter confusion when it has applied the *Purcell* principle. Indeed, in *Purcell v.*

Gonzalez, 549 U.S. 1 (2006) (per curiam), the Court warned of the risk of "voter confusion and consequent incentive to remain away from the polls." *Id.* at 4-5; *see also Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020) (per curiam) (noting that the purpose of the *Purcell* principle is "to avoid . . . judicially created confusion"); *Democratic Nat'l Comm. v. Wis. State Legislature.*, 141 S. Ct. 28, 30 (2020) (Gorsuch, J., concurring) ("Last-minute changes to longstanding election rules risk other problems too, inviting confusion and chaos and eroding public confidence in electoral outcomes.").

The district court dismissed the importance of the State's interest in avoiding voter confusion because "the Attorney General does not allege that this 'confusion' about election officials' speech would disenfranchise anyone." ROA.663. But the Supreme Court has observed that "[l]egislatures . . . should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively, provided that the response is reasonable and does not significantly impinge on constitutionally protected rights." *Munro v. Socialist Workers Party*, 479 U.S. 189, 195–96 (1986). And as Justice Kavanaugh explained, preventing voter confusion "protects the State's interest in running an orderly, efficient election and in giving citizens (including the losing candidates and their supporters) confidence in the fairness of the election." *Democratic Nat'l Comm*, 141 S. Ct. at 31 (Kavanaugh, J., concurring).

The district court further attempted to discredit the State's interest in enforcing section 276.016(a)(1) because, in the district court's view, the deterrent effect of potential enforcement "is the very feature that likely renders the provisions

constitutionally infirm." ROA.663; *see also* Resp. to Stay Mot. 15 ("Because Section 276.016(a)(1) is likely unconstitutional, [the Attorney General's] interest 'can weigh only weakly in [his] favor.'" (second alteration in original) (citations omitted)). Similarly, Plaintiffs seemed to assume that the irreparable injury they claimed from the alleged violation of their First Amendment rights necessarily outweighed any interest the Attorney General can assert. ROA.72, 84, 617. But as explained above, *supra* section II, the speech at issue is not protected by the First Amendment because it is government speech.

More fundamentally, "[f]irst amendment values . . . are not the only interests of constitutional dimension in this litigation." *Dallas Cowboys Cheerleaders, Inc. v. Scoreboard Posters, Inc.*, 600 F.2d 1184, 1187 (5th Cir. 1979). "The Elections Clause gives States authority 'to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved.'" *Thornton*, 514 U.S. at 834 (1995) (quoting *Smiley*, 285 U.S. at 366). Section 276.016(a)(1) is just such a safeguard because it serves the State's "important interest[s] in avoiding voter confusion, *MacBride*, 541 F.2d at 468, and "in protecting the integrity, fairness, and efficiency of [its] ballots and election processes as means for electing public officials," *Timmons*, 520 U.S. at 364; *see also Buckley*, 525 U.S. at 187.

Finally, Plaintiffs have also asserted that the Attorney General's "claim of irreparable harm from being unable to enforce" section 276.016(a)(1) through section 31.129 "is undercut by his simultaneous assertion that 'it is far from clear' that he has the authority to enforce" section 276.016(a)(1). Resp. to Stay Mot. 14. But

Plaintiffs cannot have it both ways on the Attorney General's connection to the enforcement of section 276.016(a): either he has a sufficient connection, or he does not. If he does not, then Longoria's claim against him does not fit the *Ex parte Young* exception to sovereign immunity. *Supra* section I. But if he does have a sufficient connection to the enforcement of section 276.016(a)(1), then he faces irreparable harm if he is enjoined from enforcing that section. *See E.T.*, 19 F.4th at 770.

In short, Plaintiffs have failed to grapple with the harm the district court's preliminary injunction of the enforcement of section 276.016(a)(1) inflicts on the Attorney General, and the district court wrongly downplayed that harm. As a result, the district court abused its discretion by concluding that Plaintiffs carried their burden of showing that the harm they allegedly faced from the enforcement of section 276.016(a)(1) outweighed the harm enjoining such enforcement inflicts on the district Attorney General. That too is alone sufficient to warrant reversal of the district court's preliminary injunction.

B. The district court's preliminary injunction disserves the public interest.

Plaintiffs also failed to carry their burden of showing that enjoining the enforcement of section 276.016(a)(1) would not disserve the public interest. The only argument Plaintiffs offered to satisfy this requirement is that "injunctions protecting First Amendment freedoms are always in the public interest." ROA.84 (alteration omitted) (quoting *Texans for Free Enter. v. Tex. Ethics Comm'n*, 732 F.3d 535, 539 (5th Cir. 2013) (citation and internal quotation marks omitted)); *accord* ROA.19. But

section 276.016(a)(1) does not regulate speech that is protected by the First Amendment, *supra* section II, so Plaintiffs' public interest argument fails.

Moreover, "[w]hen a statute is enjoined, the State necessarily suffers the irreparable harm of denying the public interest in the enforcement of its laws." *Veasey*, 870 F.3d at 391 (citing *Maryland*, 567 U.S. 1301 (Roberts, C.J., in chambers); *see also Walters*, 468 U.S. at 1324 (Rehnquist, J., in chambers)). And as this Court has repeatedly concluded when addressing "where the public interest lies" in the context of motions for a stay pending appeal, "when 'the State is the appealing party, its interest and harm merge with that of the public." *Richardson*, 978 F.3d at 243 (citation omitted); *accord Tex. All. for Retired Ams. v. Hughs*, 976 F.3d 564, 569 (5th Cir. 2020); *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 412 (5th Cir. 2020); *Veasey*, 870 F.3d at 391; *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 734 F.3d 406, 419 (5th Cir. 2013). The district court thus erred as a matter of law by concluding that its preliminary injunction would not disserve the public interest.

IV. At the Very Least, the District Court's Injunction Should Be Narrowed.

At a minimum, the district court's injunction should be narrowed in at least three ways. First, *Purcell* requires staying the injunction during the primary and any run-off election. Second, the district court erred in effectively granting a permanent injunction without entering a final judgment. And third, the district court wrongly granted an injunction on claims that Plaintiffs failed to plead.

A. *Purcell* requires staying the injunction during the primary and any run-off elections.

Even if this Court concludes that Plaintiffs carried their burden of establishing each of the four prerequisites for preliminary injunctive relief, this Court should stay the effect of the district court's injunction until after the 2022 runoff primary election date under the *Purcell* principle. If necessary, the 2022 runoff primary election date will be May 24, 2022. *See* Tex. Elec. Code § 41.007(b).

Under the *Purcell* principle, "federal district courts ordinarily should not enjoin state election laws in the period close to an election." *Merrill v. Milligan*, 142 S.Ct. 879, 879 (2022) (Kavanaugh, J. concurring) (citing *Purcell*, 549 U.S. 1). And "federal appellate courts should stay injunctions when, as here, lower federal courts contravene that principle," known as the *Purcell* principle. *Id.* As the Supreme Court explained in *Purcell*, "[c]ourt orders affecting elections . . . 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. at 4-5. These risks apply not only to broad relief, but also to "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." *Democratic Nat'l Comm.*, 141 S. Ct. at 31 (Kavanaugh, J., concurring). To account for those risks, a federal court considering a request to enjoin state election laws must consider potential conflicts with the timing of elections and appellate proceedings. *See Purcell*, 549 U.S. at 4-5.

The district court violated the *Purcell* principle by issuing its preliminary injunction during the March 2022 primary election and only a week before the receipt deadline for applications to vote by mail. Although the district court acknowledged the *Purcell* principle, the court refused to apply it. ROA661-64. According to the district court, "the *Purcell* principle's logic extends only to injunctions that affect the mechanics and procedures of election law applicable to voting." ROA662. The district court also suggested that voter confusion and distrust were not enough to justify invoking the *Purcell* principle unless a state can show that an eleventh-hour injunction would actually disenfranchise voters. ROA.663. But the stay the Supreme Court recently entered in *Merrill*, 142 S.Ct. 879, indicates that the *Purcell* principle is not so narrowly confined. Indeed, *Purcell* itself warns of the risk of "voter confusion," *Purcell*, 549 U.S. at 4-5, and the Supreme Court has since reiterated that the purpose of the *Purcell* principle is "to avoid . . . judicially created confusion," *Republican Nat'l Comm.*, 140 S. Ct. at 1207.

More fundamentally, the point of the *Purcell* principle is to avoid "[l]ate judicial tinkering with election laws," which "can lead to disruption and to unanticipated and unfair consequences for candidates, political parties, and voters, among others." *Merrill*, 142 S.Ct. at 881 (Kavanaugh, J., concurring); *cf. Democratic Nat'l Comm.*, 141 S. Ct. at 30 (Gorsuch, J., concurring) ("Last-minute changes to longstanding election rules risk other problems too, inviting confusion and chaos and eroding public confidence in electoral outcomes."); *id.* at 31 (Kavanaugh, J., concurring) (describing the *Purcell* principle as "an important principle of judicial restraint" that "not only prevents voter confusion but also prevents election administrator

confusion—and thereby protects the State's interest in running an orderly, efficient election and in giving citizens (including the losing candidates and their supporters) confidence in the fairness of the election.").

Plaintiffs have also attempted to cabin the *Purcell* principle by pointing to a snippet of Justice Kavanaugh's opinion concurring in the denial of an application to vacate a stay in *Democratic National Committee v. Wisconsin State Legislature*, 141 S. Ct. 28. According to Plaintiffs, Justice Kavanaugh explained that "*Purcell* is implicated when an injunction alters the 'how, when, and where' of a state's election procedures." Resp. to Stay Mot. 2-3 (quoting *Democratic Nat'l Comm.*, 141 S. Ct. at 31 (Kavanaugh, J., concurring). But Plaintiffs take that quotation out of context—specifically the context of the rest of that sentence. In explaining the purpose of the *Purcell* principle, Justice Kavanaugh emphasized that "at every step [of the election process], *state and local officials must communicate to voters* how, when, and where they may cast their ballots through in-person voting on election day, absentee voting, or early voting." *Democratic Nat'l Comm.*, 141 S. Ct. at 31 (Kavanaugh, J., concurring) (emphasis added); *see also id.* ("When an election is close at hand, the rules of the road should be *clear* and settled." (emphasis added)); ROA.854:2-3 ("[W]hen we get close to an election the rules need to stay the same throughout at least that election."). He further explained that "[i]f a court alters election laws near an election, election administrators must first understand the court's injunction, then devise plans to implement that late-breaking injunction, *and then determine as necessary how best to inform voters, as well as state and local election officials and volunteers, about those last-minute changes*." *Id.* (emphasis added).

In short, the *Purcell* principle is designed to avoid the kind of confusion, unfairness, and loss of voter confidence risked by the district court's injunction—which purported to change the permissible government communications about applying to vote by mail only a week before such applications had to be received by election officials. Some of the Supreme Court's decisions suggest that the *Purcell* principle "is absolute and that a district court may *never* enjoin a State's election laws in the period close to an election." *Merrill*, 142 S.Ct. at 881 (Kavanaugh, J., concurring). But at the very least, the *Purcell* principle means that Plaintiffs must show that "the underlying merits are entirely clearcut" in their favor "to overcome the State's extraordinarily strong interest in avoiding late, judicially imposed changes to its election laws and procedures." *Id.* As explained above, *supra* section II, Plaintiffs made no such showing here.

Government communications to voters close to an election are thus in the heartland of the *Purcell* principle. As a result, the district court's injunction—which directly impacts government communications to voters during an election—violated the *Purcell* principle.

Plaintiffs have suggested that the *Purcell* principle would cease to apply to this litigation after February 18 (the deadline for election officials to receive applications to vote by mail from voters for the March 2022 primary election). Resp. to Stay Mot. 12. But the risk of voter confusion about this election and the possibility of "disruption and . . . unanticipated and unfair consequences for candidates, political parties, and voters, among others," *Merrill*, 142 S.Ct. 881, will persist until the primary election has concluded. And conducting a primary election and a primary run-off under

different election rules because of the district court's preliminary injunction would necessarily cause confusion and disruption for both voters and election officials.

If a runoff election is required for any given office, *see* Tex. Elec. Code § 2.021, then the runoff election date would be May 24, 2022, *see id.* § 41.007(b). The deadline for election officials to receive applications for mail-in ballots for the runoff would be May 13, 2022. *See id.* §§ 84.001(e), .007(c). This Court is scheduled to hear oral argument just over two months before that deadline, and this Court will issue its decision even closer to that deadline. So even if this Court affirms the district court's preliminary injunction, it should stay the effect of that injunction until after May 24, 2022, under the *Purcell* principle.

B. The district court wrongly granted a permanent injunction absent final judgment.

The district court not only erred by enjoining a provision of Texas election law during an election, but also erred by "affording relief that the plaintiffs themselves did not ask for in their preliminary injunction motion[]." *Republican Nat'l Comm.*, 140 S. Ct. at 1207. Specifically, the district court 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." ROA.665. But as the proposed order Plaintiffs attached to their motion for a preliminary injunction shows, Plaintiffs sought to enjoin the enforcement of sections 276.016(a)(1) and 31.129 only "pending final resolution of this case." ROA.104. The district court thus effectively entered a permanent injunction Plaintiffs did not ask for when the

case was before the court at the preliminary injunction stage. Entering such relief without summary judgment or a trial, while applying only the preliminary injunction factors rather than the permanent injunction factors, was fundamental legal error.

C. The district court wrongly granted preliminary injunctive relief on claims not plead.

The district court also enjoined "all Defendants . . . from enforcing Section 31.129 of the Texas Election Code, as applied to a violation of Section 276.016(a)(1), against Plaintiffs." ROA.664-65. But only Longoria, not Morgan, challenged the enforcement of section 31.129, and the only defendant Longoria named in that claim was the Attorney General. ROA.49-50. Because Morgan failed to challenge this provision, the district court erred in entering injunctive relief as to her on this claim. Moreover, because neither of the Plaintiffs sued the district attorneys as to section 31.129, ROA.47-50, the district attorneys should not have been enjoined as to these claims. The district court erred by providing Plaintiffs relief they neither asked for nor sought to prove their entitlement to receive.

The same is true for Plaintiffs' challenges to section 276.016(a)(1). Morgan did not bring claims against District Attorney Ogg, ROA.47-50, so injunctive relief against Ogg as to Morgan was inappropriate. Likewise, Longoria brought claims against neither District Attorney Garza nor Dick, ROA.47-50, and so they should not be subject to an injunction as against her. Each of these defects requires at a minimum a narrowing of the district court's preliminary injunction.

Conclusion

The Court should reverse the district court's preliminary injunction.

Respectfully submitted.

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Certificate of Service

On February 23, 2022, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

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Certificate of Compliance

This brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 10,763 words, excluding the parts of the brief exempted by Rule 32(f); and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Equity) using Microsoft Word (the same program used to calculate the word count).

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