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, No. 5:21-cv-01223-XR,
Honorable Xavier Rodriguez, Presiding

PLAINTIFFS–APPELLEES' OPPOSITION TO EMERGENCY MOTION FOR STAY PENDING APPEAL AND ADMINISTRATIVE STAY

Christian Menefee
Jonathan Fombonne
OFFICE OF HARRIS COUNTY ATTORNEY
1019 Congress Plaza, 15th Floor
Houston, Texas 77002
Telephone: (713) 274-5101

Counsel for Isabel Longoria

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
(646) 292-8310

Zachary D. Tripp
WEIL, GOTSHAL & MANGES LLP
2001 M Street NW Suite 600
Washington, D.C. 20036
(202) 682-7000

Paul R. Genender
Elizabeth Y. Ryan
Megan Cloud
WEIL, GOTSHAL & MANGES LLP
200 Crescent Court, Suite 300
Dallas, Texas 75201
(214) 746-7700

Counsel for Plaintiffs

CERTIFICATE OF INTERESTED PERSONS

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

1) Plaintiffs-Appellees:

Isabel Longoria

Cathy Morgan

2) Defendant-Appellant:

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

General of Texas

5) Counsel for Plaintiffs-Appellees:

Sean Morales-Doyle, Andrew B. Garber, Ethan J. Herenstein, Brennan Center for Justice at NYU Law School

Christian Menefee, Jonathan Fombonne, Tiffany Bingham, Sameer Birring, Susannah Mitchum, Christina Beeler, Office of the Harris County Attorney

Zachary D. Tripp, Paul R. Genender, Elizabeth Y. Ryan, Matthew Berde, Alexander P. Cohen, and Megan Cloud, Weil, Gotshal & Manges LLP

6) Counsel for Defendant-Appellant:

Judd E. Stone II
Benjamin D. Wilson
Cody Rutowski
Brent Webster

/s/ Jonathan Fombonne
Jonathan Fombonne
Counsel for Appellees

TABLE OF CONTENTS

Introduction 1
Background 5
Argument 8
I. The District Court's Preliminary Injunction Does Not Implicate the *Purcell* Principle 8
II. The Stay Factors Weigh Heavily Against a Stay 13
A. The Attorney General Will Not Suffer Any Irreparable Harm, Much Less on Any Emergency Basis Justifying the Stay 13
B. Plaintiffs Are Very Likely To Succeed on the Merits 15
C. The Remaining Stay Factors Favor Plaintiffs 23
Conclusion 24
Certificate of Service 26
Certificate of Compliance 27

INTRODUCTION

This case involves a First Amendment challenge to a novel Texas law that makes it a crime for election officials and public officials to engage in speech that the State disfavors: Under the new Texas Election Code Sections 276.016(a)(1) and 31.129 (together, the "challenged provisions"), enacted as part of Senate Bill 1 ("SB1"), it is a crime for such an official to "solicit" a person to request a mail-in ballot application, notwithstanding that it is perfectly lawful to request a mail-in ballot application and many Texas voters are indeed eligible to vote by mail. Remarkably, the law criminalizes such speech only when it *encourages* a person to request a mail-in ballot application, but it is perfectly lawful to *discourage* such a request. In addition, the new law enables the state to seek civil penalties against certain election officials who solicit a mail-in ballot application, even when the official is not employed by the state, and thus adds further viewpoint-based penalties. Those one-sided restrictions on speech are manifestly unconstitutional.

Plaintiffs brought this suit to challenge those content-based and viewpoint-based restrictions on speech, so that they can engage in truthful speech to encourage voters who are potentially eligible to vote by mail to

request mail-in ballot applications so that they can lawfully exercise their right to vote. On February 11, 2022, following discovery and an evidentiary hearing, the district court preliminarily enjoined the district attorney defendants from enforcing Section 276.016(a)(1) and enjoined the district attorney defendants and the Attorney General from enforcing Section 31.129 against the Plaintiffs. The preliminary injunction enables Plaintiffs to encourage voters to apply to vote by mail in advance of the February 18, 2022 mail-in ballot application deadline—and beyond. The Attorney General waited until yesterday afternoon to file an emergency motion to stay the preliminary injunction by today, February 17, 2022, at 5:00 p.m.

This Court should deny that request, as there is no sound basis to stay the district court's injunction, and much less to do so on an emergency basis. Notably, the Attorney General has failed to identify any concrete reason why he would suffer irreparable harm from being unable to censor Plaintiffs' speech over the course of the next day, or even for the next several months. The Attorney General instead asserts that the district court's order violates the *Purcell* principle. See Mot. 7. But *Purcell* is inapplicable. As Justice Kavanaugh recently explained in a concurring opinion, *Purcell* is implicated when an injunction alters the "how, when, and where" of a

state's election procedures. *DNC. v. Wis. State Leg.*, 141 S. Ct. 28, 31 (2020) (Kavanaugh, J., concurring in denial of application to vacate stay). But the injunction here does no such thing. It leaves Texas's election procedures entirely unchanged. The "how, when, and where" remain exactly the same. The injunction merely lifts a viewpoint-based restriction on speech and enables Plaintiffs to encourage voters to use election procedures that Texas law already permits. And *Purcell* has never been understood to prohibit a court from enjoining censorship in the runup to an election.

The Attorney General also cannot show a likelihood of success on the merits. The Attorney General has conceded that the statutes at issue are viewpoint-based restrictions on speech, which are subject to a virtually *per se* rule of invalidity. *E.g.*, *Iancu v. Brunetti*, 139 S. Ct. 2294, 2299 (2019). Such viewpoint discrimination is not only *per se* unconstitutional, but also illogical. There is no basis to believe that speech encouraging people to exercise their lawful rights is somehow uniquely dangerous and confusing, let alone such a serious problem that it would justify harsh criminal penalties. It makes even less sense to prohibit nonpartisan officials responsible for running elections from engaging in speech encouraging voters while allowing anyone else, including political candidates, to speak

freely—and allowing everyone, even Plaintiffs, to engage in speech *discouraging* mail voting even if it is the only realistic way for a person to cast a lawful ballot. Whatever concerns the State may have about confusion stemming from speech about mail-in ballot applications, the First Amendment stands for the principle that the proper response to such concerns would be "more speech, not enforced silence" of one viewpoint from a particular class of speakers. *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).

The Attorney General cannot evade First Amendment scrutiny under *Garcetti v. Ceballos*, 547 U.S. 410 (2006). *Garcetti* holds that, "when public employees make statements pursuant to their official duties . . . the Constitution does not insulate their communications from employer discipline." *Id.* at 421. But as numerous courts have recognized, sending people to jail is not a form of "employer discipline." Private employers do not send their workers to jail. Criminal punishment instead involves the exercise of sovereign power and accordingly triggers full First Amendment scrutiny, as courts have uniformly recognized when presented with the question. *See*, *e.g.*, *In re Kendall*, 712 F.3d 814, 826-27 (3d Cir. 2013); *Ex*

parte Perry, 483 S.W.3d 884, 911 (Tex. Crim. App. 2016). And the civil penalties here also involve the exercise of sovereign power, for the simple reason that the State is not the employer of any of the Plaintiffs so it cannot impose employer discipline on them. If it was their employer, the State simply could have fired the Plaintiffs rather than needing to pass a statute threatening them for engaging in disfavored speech.

Quite simply, the Attorney General cannot identify how he would suffer irreparable harm absent a stay, the challenged restrictions on speech involve unconstitutional viewpoint discrimination, and the public interest weighs powerfully in favor of allowing speech encouraging lawful voting. The Attorney General's motion should be denied.

BACKGROUND

The challenged provisions went into effect on December 2, 2021. 2021 Tex. Sess. Law Serv. 2nd Called Sess. Ch. 1 (S.B. 1) § 10.04. Plaintiffs filed this suit against the Attorney General on December 10, 2021. ECF No. 1; App. 35 n.5.[1] Five days later, the Texas Court of Criminal Appeals ruled

---

[1] The Attorney General suggests that Plaintiff Longoria "conce[ded]" that she would not and "agree[d]" not to seek an injunction when she originally filed her claims as part of a broader lawsuit challenging other provisions of SB1. Mot. at 3, 5. In fact, Plaintiff Longoria always reserved her rights to seek injunctive relief. In any event, that argument was

that the Attorney General did not have independent prosecutorial authority, *State v. Stephens*, No. PD-1032-20, 2021 WL 5917198, at *10 (Tex. Crim. App. Dec. 15, 2021) (not released for publication), requiring Plaintiffs to file an amended complaint adding the district attorneys defendants, who are expressly enjoy independent prosecutorial authority, App. 245 (ECF No. 5). Plaintiffs filed their amended complaint on December 27, 2021, and their motion for a preliminary injunction the next day. *Id.*; App. 43 (ECF No. 7).

The parties conducted written discovery, and the Attorney General deposed both Plaintiffs. The district court then held an evidentiary hearing on February 11, 2022, hearing testimony from both Plaintiffs and from Brian Keith Ingram, director of elections for the Texas Secretary of State's office, as well as argument. ECF No. 51. The parties have ordered, but do not yet have a copy of, the transcript from that hearing. The district court admitted a number of exhibits introduced by the parties into evidence. However, the court excluded a number of exhibits to the Attorney General's opposition to the preliminary injunction motion, which have been included

directed to the district court, which properly rejected it and found that Longoria timely sought a preliminary injunction. *See* App. 30. It is also irrelevant to Plaintiff Morgan's actions in this case.

in the Appendix before this Court. The Court entirely excluded Exhibits D and E, App. 181-189, and excluded Exhibit J, App. 215-16, to the extent it was offered for the truth of the matter asserted.

The district court granted Plaintiffs' motion later on February 11, preliminarily enjoining the district attorney defendants from enforcing Section 276.016(a)(1) and preliminary enjoining all defendants from enforcing Section 31.129 against the Plaintiffs. App. 40-41. Because the Attorney General argued that Plaintiffs might be subject to prosecution for any speech they engaged in during the pendency of the preliminary injunction if Plaintiffs were not ultimately able to secure a permanent injunction, the Court also ordered Defendants not to enforce the challenged provisions on the basis of violations committed during the pendency of the litigation should the challenged provisions later be found to be constitutional. App. 41. The Attorney General filed a notice of appeal on February 15, 2022, ECF No. 57, and the instant emergency motion on the afternoon of February 16, 2022, demanding relief by today, February 17, 2022, at 5pm. The deadline for submitting a mail-in ballot application for the upcoming primary election is tomorrow, February 18, 2022.

ARGUMENT

A stay pending appeal is an "extraordinary remedy" reserved for when a movant makes a "strong showing of likelihood to succeed on the merits," that it "will be irreparably harmed absent a stay," that the stay will not "substantially injure other interested parties," and that the public interest is in its favor. *Thomas v. Bryant*, 919 F.3d 298, 303 (5th Cir. 2019) (citing *Nken v. Holder*, 556 U.S. 418, 437 (2009)). Of these considerations, the first two are the most important. And "[a] stay is not a matter of right, even if irreparable injury might otherwise result to the appellant." *Texas v. United States*, 787 F.3d 733, 747 (5th Cir. 2015). The Attorney General cannot meet a single one of the requirements, and much less all of them, particularly on an emergency basis. There is no emergency here, but rather a proper exercise of preliminary relief to protect First Amendment rights against a viewpoint-based and content-based restriction on speech encouraging lawful activity.

I. The District Court's Preliminary Injunction Does Not Implicate the *Purcell* Principle

The Attorney General's motion for a stay pending appeal rests largely on its argument regarding *Purcell*, but *Purcell* is inapplicable. In a recent concurring opinion, Justice Kavanaugh described *Purcell* as

standing for the proposition that "federal courts ordinarily should not alter state election laws in the period close to an election." *Merrill v. Milligan*, Nos. 21-1086 & 21-1087, 2022 WL 354467, at *1 (U.S. Feb. 7, 2022) (Kavanaugh, J., concurring in grant of applications for stays); *see also Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam). But *Purcell* does not apply—and has never been applied—where, as here, "the injunction does not affect the state's election processes or machinery." *Feldman v. Ariz. Sec'y of State's Office*, 843 F.3d 366, 368 (9th Cir. 2016) (en banc); *see also DNC. v. Wis. State Leg.*, 141 S. Ct. 28, 31 (2020) (Kavanaugh, J., concurring in denial of application to vacate stay) (discussing the importance of clarity with respect to "how, when, and where [voters] may cast their ballots").

The preliminary injunction here does not affect who can apply for a mail-in ballot or when and how a person could do so. Texas's election procedures remain exactly the same. The preliminary injunction simply lifts a gag order making it a crime for officials to encourage voters to apply to vote by mail even if they are potentially eligible to do so. Nothing in *Purcell* suggests that censorship is acceptable so long as there is a looming election. To the contrary, a one-sided muzzle on election and

public officials that prohibits encouraging lawful voter activity (but not discouraging lawful voting activity) would distort the marketplace of ideas and produce exactly the confusion *Purcell* is supposed to avoid. As Plaintiff Longoria testified during the preliminary injunction hearing, Section 276.016(a)(1) has prevented her from fully addressing the voter confusion *created by other sections of SB1*, including certain new requirements for mail-in voting applications.[2]

The Attorney General provides no support for expanding *Purcell* to this novel context. *Purcell* itself involved voter identification procedures, 549 U.S. at 4, and the Supreme Court's recent decision in *Merrill* involved congressional redistricting, 2022 WL 354467, at *1. Likewise, as the district court observed, all of the cases cited by the Attorney General affect the state's election processes or machinery. *See Richardson v. Tex. Sec'y of State*, 978 F.3d 220, 244 (5th Cir. 2020) (procedures for authenticating mail-in ballot signatures); *Tex. Alliance for Retired Ams. v. Hughs*, 976 F.3d 564, 566–67 (5th Cir. 2020) (new ballot type

[2] *See* "Texas counties reject unprecedented numbers of mail ballots ahead of March 1 primary under restrictive new law," WASHINGTON POST (Feb. 11, 2022), *available at* https://www.washingtonpost.com/politics/2022/02/11/texas-voting-law-ballots-rejected-poll-watchers/ (last visited Feb. 17, 2022).

eliminating straight-ticket voting); *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 411-12 (5th Cir. 2020) (new ballot type eliminating straight-ticket voting); *Mi Familia Vota v. Abbott*, 834 F. App'x 860, 863 (5th Cir. 2020) (per curiam) (mask mandate exemption for voters). None of these cases remotely resembles the instant case, where the district court's injunction "require[s] only that Defendants not do something, *i.e.*, not do anything to enforce the [challenged provisions]." *Lichtenstein v. Hargett*, 489 F. Supp. 3d 742, 756 (M.D. Tenn. 2020) (holding that *Purcell* does not apply to an injunction barring the enforcement of a criminal prohibition against distribution of absentee-ballot applications). In particular, none of them involve an injunction that simply prohibits the state from prosecuting or penalizing officials for engaging in protected expression in support of lawful voting activity.

The reasons underlying *Purcell* weigh in favor of keeping the preliminary injunction, not staying it. As Justice Kavanaugh recently observed, *Purcell* has been justified by concerns about avoiding voter and election administrator confusion, as late changes to election procedures may burden election administrators who "must devise plans to implement late-breaking injunction[s]." *See DNC*, 141 S. Ct. at 31

(Kavanaugh, J., concurring in denial of application to vacate stay). But again, the injunction does cause any such problems. It does not require election administrators to do anything; Texas's election procedures remain exactly the same. The injunction simply gives officials the opportunity to engage in speech that would otherwise be criminalized, and thus to encourage mail-in ballot applications if they are so inclined. Indeed, an election administrator sought this preliminary injunction precisely to *avoid* the confusion created by the challenged provisions. And the district court's order serves that purpose because it lifts the unconstitutional chilling effect on the Plaintiffs' speech. By allowing Plaintiffs to provide information and advice to voters without fear of criminal or civil punishment, the preliminary injunction will reduce voter confusion, not create it.

Finally, even if *Purcell* could be extended to censorship, it could not justify a stay for longer than one day. The coming mail-in ballot application receipt deadline is tomorrow, February 18, 2022. At that point, the preliminary injunction would take effect as far "ahead of time, in the ordinary litigation process" as possible. *DNC*, 141 S. Ct. at 31 (Kavanaugh, J., concurring in denial of application to vacate stay). In any

event, *Purcell* applies to election procedures, not viewpoint-based censorship.

II. The Stay Factors Weigh Heavily Against a Stay

A. The Attorney General Will Not Suffer Any Irreparable Harm, Much Less on Any Emergency Basis Justifying the Stay

Attorney General Paxton fails to identify any concrete harm flowing from the injunction, let alone an emergency sufficient to justify disruption of the normal appellate process and to demand appellate relief within a matter of days. *See* 5th Cir. R. 27.3. The Attorney General primarily relies on *Purcell*, but as discussed above *Purcell* is inapplicable. Moreover, the last day for the early voting clerk to receive a mail-in ballot application is February 18, one day after the Attorney General's requested stay. For an application to be received in time, any solicitation of such an application would likely have occurred before the stay of the preliminary injunction. There accordingly would be no remaining urgency, even if the State could identify an irreparable harm.

In any event, the Attorney General cannot show irreparable harm of any kind. Notably, the Attorney General has presented no evidence whatsoever of any concrete harm he will face from the injunction, either during the preliminary injunction proceedings below or in his motion to

stay. His claim of irreparable harm from being unable to enforce Section 31.129 is undercut by his simultaneous assertion that "it is far from clear" that he has the authority to enforce it. Mot. at 16. Moreover, here and in the proceedings below, the Attorney General has failed to even articulate a valid state interest the law serves, much less a compelling interest that could satisfy First Amendment scrutiny.

The Attorney General points instead to the abstract harm to the State that flows from any injunction against the enforcement of its laws. *See* App. Mot. at 18. The cases the Attorney General relies upon, however, involved injunctions against enforcement of laws that themselves involved concrete harms, not just an undefined abstract interest. *Maryland v. King*, 567 U.S. 1301, 1304 (2012) (finding "ongoing and concrete harm" to Maryland's law enforcement and public safety interests because the challenged statute could have helped "remove violent offenders from the general population"); *Veasey v. Perry*, 769 F. 3d 890, 895-96 (5th Cir. 2014) (citing the state's "significant interest in ensuring the proper and consistent running of its election machinery"). Here, the State cannot articulate any concrete interest that the law here serves or why it will suffer irreparable harm absent censorship.

In any event, the State's abstract interest in enforcing its laws carries little or no weight because the statute at issue violates the First Amendment. *See Entertainment Software Ass'n v. Foti*, 451 F. Supp. 2d 823, 837 (M.D. La. 2006) ("There can be no irreparable harm to a [government] when it is prevented from enforcing an unconstitutional statute because it is always in the public interest to protect First Amendment liberties."); *Scott v. Roberts*, 612 F.3d 1279, 1297 (11th Cir. 2010) ("When the state is a party asserting harm, [the public] has no interest in enforcing an unconstitutional law."). And "[t]he government's interest in seeing its laws enforced does not, standing alone, outweigh the other factors" when determining whether to stay enforcement of an injunction. *Patino v. City of Pasadena*, 229 F. Supp. 3d 582, 589 (S.D. Tex. 2017) (citing *Planned Parenthood of Greater Texas Surgical Health Services*, 734 F.3d 406, 419 (5th Cir. 2013)). Because Section 276.016(a)(1) is likely unconstitutional, *see infra* 15-19, Appellant's interest "can weigh only weakly in [his] favor." *See id.* at 590-91.

B. Plaintiffs Are Very Likely To Succeed on the Merits

The Attorney General is further not entitled to a stay because he cannot make a strong showing that he is likely to succeed on the merits

regarding the First Amendment claim or regarding sovereign immunity. *See Thomas*, 919 F.3d at 303.

1. The Challenged Provisions Violate the First Amendment

Remarkably, the Attorney General concedes that Section 276.016(a)(1) is a viewpoint-based restriction on speech. *See* Mot. at 12-14; Order at 33. Such restrictions are *per se* unconstitutional. *Iancu v. Brunetti*, 139 S. Ct. 2294, 2299 (2019). Even if the restrictions were "merely" content-based restrictions and therefore subject to strict scrutiny, they would still be unconstitutional. The Attorney General has not pressed any argument on appeal that it can satisfy strict scrutiny. As noted above, the State's interest is incoherent, unsupported by any record evidence, and incompatible with basic First Amendment principles.

Instead, the Attorney General presses the sweeping argument that any "speech made pursuant to a public employee's official duties" is categorically unprotected. Mot. 12 (citation omitted). But *Garcetti* makes clear that the exception is limited to employer discipline: "The question presented by the instant case is whether the First Amendment *protects a government employee from discipline* based on speech made pursuant to the employee's official duties." *Garcetti*, 547 U.S. at 413. And the Court in

Garcetti went on to answer that question by again limiting the rule to employer discipline, holding that "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*." *Id.* at 421 (emphasis added). That limitation also makes sense given *Garcetti*'s grounding in the notion that a "government entity has broader discretion to restrict speech when it acts in its role as employer." *Id.* at 418. *Anderson*, like the other cases the Attorney General relies on, was therefore just another employer discipline case—not an extension of the *Garcetti* doctrine holding that all government employees' speech is unprotected.[3]

It is well-recognized that criminal punishment is not a form of "employer discipline" and therefore that criminal laws do not fit within the *Garcetti* exception. *See*, *e.g.*, *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*

[3] The Attorney General's reliance on *City of El Cenizo v. Texas*, 890 F.3d 164 (5th Cir. 2018) is similarly misplaced. In *El Cenizo*, this Court explicitly declined to apply *Garcetti* to non-elected employees of local governments, noting that "[s]uch issues are not properly before us because the appellees do not represent the public employees putatively covered by Garcetti and the government speech doctrine." *Id.* at 185.

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"). 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 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."); 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. The Attorney General identifies no case reaching a different result.

The civil penalties in Section 31.129—the only provision that the Attorney General is enjoined from enforcing—are unconstitutional for similar reasons: They involve the exercise of sovereign power, not employer discipline. In particular, the Plaintiffs are not employed by the State. For example, as the District Court observed, *see* App. 30, Plaintiff 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. The Attorney General's contention that the distinction between County and state employees is "a distinction without a difference" is thus fundamentally wrong, and unsupported by his cited case law. *Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353 (2009) simply notes that the state can regulate local governments, not that it acts as an employer of local government employees. 555 U.S. at 363.

Because she is not an employee of the State, it could only terminate her employment or employment benefits through an act of sovereign authority. Indeed, if Plaintiff Longoria were a State employee, the State simply could have fired her for engaging in speech of which the State disapproved. The State's enactment of SB1 is an attempt to use its sovereign power to exercise control over speech of an official the State does not employ.[4]

---

[4] To be sure, the State could, consistent the First Amendment, exercise its sovereign power to rearrange its government so that all public officials were state employees. Putting aside whether the State could do so under the Texas Constitution, it has not done so. Thus, it cannot subject public employees of local subdivisions to "employee discipline" under *Garcetti*.

2. *Ex Parte Young* Permits Plaintiffs to Challenge Section 31.129 Against the Attorney General[5]

The Attorney General is also unlikely to show that his connection with enforcement of Section 31.129 is so attenuated that the *Ex Parte Young* exception to sovereign immunity does not apply. 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)). To establish "some connection," a plaintiff may put forth evidence showing "some scintilla" of affirmative action by the state official. *Id.*

That standard is readily satisfied here, as the district court found. *See* App. 23-26. The Attorney General is the leading law enforcement agent at the state level. Section 31.129 makes an election official that violates the

---

[5] The District Court held—and the Attorney General has not disputed below or on appeal—that *Ex Parte Young* permitted Plaintiffs to challenge Section 276.016(a)(1) against the district attorney defendants. Therefore, if the Court concludes that *Ex Parte Young* does not permit Plaintiff Longoria to challenge Section 31.129 against the Attorney General, it should stay only the portion of the injunction that prohibits the Attorney General from enforcing Section 31.129. The Court should not disturb the portion of the injunction that prohibits the district attorney defendants from enforcing the Section 276.0126(a)(1) against Plaintiffs.

election code liable to the State. Nothing in SB1 prohibits the Attorney General from enforcing Section 31.129, and the Attorney General has, as recently as 2020, filed civil lawsuits against Harris County 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)).

The Attorney General has steadfastly refused to assert that he cannot enforce Section 31.129. Instead, he has declined to "admit or deny" whether he is "authorized" to enforce Section 31.129, *see* App. 243. Beyond his lawsuit in *State v. Hollins*, the likelihood of enforcement is enhanced in view of the Attorney General's public focus on "election integrity." [6] It is also made more likely in light of the Attorney General's recent public campaign to urge the Texas Court of Criminal Appeals to reverse its ruling in *State v.*

---

[6] *Election Integrity*, ATTORNEY GENERAL OF TEXAS, https://www.texasattorneygeneral.gov/initiatives/election-integrity (last visited Feb. 17, 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.").

Stephens that the Attorney General is not authorized to unilaterally prosecute election cases. *See State v. Stephens*, No. PD-1032-20, 2021 WL 5917198, at *10 (Tex. Crim. App. Dec. 15, 2021) (not released for publication).[7]

Moreover, the Attorney General does not dispute on appeal that Plaintiff Longoria has standing to challenge Section 31.129. As the District Court found, *see* App. 13-17, 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, Inc. v. Fenves*, 979 F.3d 319, 336 (5th Cir. 2020). Because Plaintiff Longoria has established 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*." *City of* Austin, 943 F.3d at 1002.

---

[7] Patrick Svitek, *Texas Republicans Pressure Court to Reverse Decision Blocking Attorney General from Prosecuting Election Cases*, TEXAS TRIBUNE (Jan. 26, 2022, 1:00 PM), https://www.texastribune.org/2022/01/26/texas-ken-paxton-court-election-prosecution (last visited Feb. 17, 2022) (publicly calling on supporters to call, mail, and email justices at the Texas Court of Criminal Appeals "that voted the wrong way").

C. The Remaining Stay Factors Favor Plaintiffs

The remaining stay factors—"whether issuance of the stay will substantially injure the other parties interested in the proceeding" and "where the public interest lies" also weigh heavily against a stay. *See Nken v. Holder*, 556 U.S. 418, 426, 129 S. Ct. 1749, 1756 (2009) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)).

The harm to Plaintiffs weighs heavily against a stay. Plaintiffs face potential prosecution and civil actions for exercising their First Amendment rights to speak. While the suppression of protected speech is always serious and irreparable, *Opulent Life Church v. City of Holly Springs*, 697 F.3d 279, 295 (5th Cir. 2012), the stakes here are even higher as the speech being suppressed in this case is speech aimed at helping and encouraging voters to lawfully exercise their fundamental right to vote. And the public in turn has a strong interest in the speech, because many registered voters who are eligible to vote by mail will have little or no practical ability to cast a ballot unless they can do so by mail. Without

encouragement to seek a mail-in application, many voters who are eligible to vote by mail will fail to cast a lawful ballot.[8]

CONCLUSION

For the foregoing reasons, the Court should deny the Attorney General's Emergency Motion For a Stay Pending Appeal and an Administrative Stay.

[8] In a recent opinion concurring in the grant of stay applications, Justice Kavanaugh proposed a set of factors that would warrant a preliminary injunction even when *Purcell* applies in advance of an election: "(i) the underlying merits are entirely clearcut in favor of the plaintiff; (ii) the plaintiff would suffer irreparable harm absent the injunction; (iii) the plaintiff has not unduly delayed bringing the complaint to court; and (iv) the changes in question are at least feasible before the election without significant cost, confusion, or hardship." *See Merrill*, 2022 WL 354467, at *2. A stay would not be warranted under these factors. The merits are entirely clearcut in Plaintiffs' favor, as this is a viewpoint-based restriction on speech; Plaintiffs would suffer irreparable harm through continued censorship absent the preliminary injunction; the district court found that the plaintiffs had not unduly delayed filing the complaint or seeking an injunction; and the changes are feasible because no changes are required.

February 17, 2022

Respectfully submitted,

By: /s/ *Jonathan Fombonne*
Zachary D. Tripp
WEIL, GOTSHAL & MANGES LLP
2001 M Street NW Suite 600
Washington, D.C. 20036
(202) 682-7000

Paul R. Genender
Elizabeth Y. Ryan
Megan Cloud
WEIL, GOTSHAL & MANGES LLP
200 Crescent Court, Suite 300
Dallas, Texas 75201
(214) 746-7700

Alexander P. Cohen
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, N.Y. 10153
(212) 310-8000

Sean Morales-Doyle
Andrew B. Garber
Ethan Herenstein
BRENNAN CENTER FOR JUSTICE AT
NYU SCHOOL OF LAW
120 Broadway, Suite 1750
New York, NY 10271
(646) 292-8310

Counsel for Appellees

Christian D. Menefee
Harris County Attorney

Jonathan Fombonne
First Assistant Harris County
Attorney

Tiffany Bingham
Managing Counsel

Sameer S. Birring
Assistant County Attorney

Christina Beeler
Assistant County Attorney

Susannah Mitcham
Assistant County Attorney

OFFICE OF THE HARRIS COUNTY
ATTORNEY
1019 Congress Plaza, 15th Floor
Houston, Texas 77002
Telephone: (713) 274-5101

Counsel for Isabel Longoria

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of February, 2022, the foregoing Brief of Appellee was electronically filed with the Clerk of the Court by using the CM/ECF system. I further certify that all parties are registered CM/ECF users and that service will be accomplished through the CM/ECF system.

/s/ *Jonathan Fombonne*
Jonathan Fombonne

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because it contains 5,035 words, excluding the parts of the brief exempted by FED R. APP. P. 32(f).

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

February 17, 2022

/s/ *Jonathan Fombonne*
Jonathan Fombonne
OFFICE OF THE HARRIS COUNTY ATTORNEY
1019 Congress Plaza, 15th Floor
Houston, Texas 77002

Counsel for Appellees