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

REPLY BRIEF FOR DEFENDANT-APPELLANT THE ATTORNEY GENERAL OF TEXAS

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-1700
Fax: (512) 474-2697

JUDD E. STONE II
Solicitor General

BENJAMIN D. WILSON
Deputy Solicitor General
Benjamin.Wilson@oag.texas.gov

CODY RUTOWSKI
Assistant Solicitor General
Cody.Rutowski@oag.texas.gov

Counsel for Appellant Warren K. Paxton, in His Official Capacity as the Attorney General of Texas

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Introduction

The district court erred when it enjoined the Attorney General and the district attorney defendants from enforcing section 276.016 and section 31.129 of the Texas Election Code.

First, the district court erred because the Attorney General is entitled to sovereign immunity. The Attorney General lacks "the particular duty to enforce the statute in question" and has not shown "a demonstrated willingness to exercise that duty." *Tex. Democratic Party v. Abbott*, 978 F.3d 168, 179 (5th Cir. 2020), *cert. denied,* 141 S. Ct. 1124 (2021). And Longoria and Morgan have failed to show that the Attorney General has "taken some step to enforce" the law. *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 401 (5th Cir. 2020). Longoria and Morgan cannot make a showing to the contrary. They lack standing for essentially the same reasons.

Second the district court erred when it concluded that Longoria and Morgan were likely to succeed on the merits—because section 276.016(a) only regulates speech that they make knowingly and in an official capacity. Tex. Elec. Code § 276.016(a). As this Court has explained numerous times, such speech is "unprotected" by the First Amendment. *E.g.*, *Anderson v. Valdez*, 845 F.3d 580, 593 (5th Cir. 2016). But even if this Court were to conclude that some applications of section 276.016 are not constitutional as applied to Longoria and Morgan, the civil penalties portion of section 31.129 explicitly allows classic employee discipline like "termination of the person's employment and loss of the person's employment benefits," Tex. Elec. Code § 31.129, and is unaffected even on Longoria and Morgan's telling. In addition, the remaining factors do not favor an injunction.

Finally, even if this Court finds jurisdiction and a likelihood of success on the merits, the district court's injunction should nonetheless be narrowed (1) under the *Purcell* principle, and (2) because it is overbroad.

This Court should reverse the district court's grant of a preliminary injunction.

ARGUMENT

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

Ex parte Young permits official-capacity suits against state officials only when the defendant 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).

A plaintiff invoking *Ex parte Young* must show the defendant has (1) "the particular duty to enforce the statute in question," and (2) "a demonstrated willingness to exercise that duty." *Tex. Democratic Party*, 978 F.3d at 179. "Moreover, a mere connection to a law's enforcement is not sufficient—the state officials must have taken some step to enforce." *Tex. Democratic Party*, 961 F.3d at 401. "Determining whether *Ex parte Young* applies to a state official requires a provision-by-provision analysis, *i.e.*, the official must have the requisite connection to the enforcement of the particular statutory provision that is the subject of the litigation." *Tex. Democratic Party*, 978 F.3d at 179.

A. Plaintiffs have not satisfied *Ex parte Young*'s exception to sovereign immunity.

Longoria and Morgan do not satisfy the *Ex parte Young* exception to sovereign immunity. Longoria and Morgan have not shown and cannot show that the Attorney General has taken any steps to enforce section 276.016(a)(1) by way of section 31.129. The only "affirmative action," *id.*, Plaintiffs identify (at 31) is 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.[1] *See* ROA.607, 648. But as the Attorney General explained in his opening brief (at 15-16), that mandamus petition had nothing to do with sections 276.016(a)(1) and 31.129, as it predated both of those sections, which were enacted in 2021. Further, the conduct the Attorney General sought to enjoin is now regulated not by section 276.016(a)(1)—"the particular statutory provision that is the subject of th[is] litigation," *Tex. Democratic Party*, 978 F.3d at 179—but by section 276.016(a)(2), which Longoria and Morgan explain (at 38) they "do not challenge." And the enforcement mechanism the Attorney General invoked was not an action for civil penalties like those contemplated by section 31.129, but for injunctive relief by way of mandamus.

Longoria and Morgan also assert (at 26-27) that the Attorney General has the requisite connection to the enforcement of section 276.016(a)(1) through section

[1] Plaintiffs have apparently abandoned their argument that the Attorney General's public statements are relevant to the *Ex parte Young* inquiry. *See In re Abbott*, 956 F.3d at 709 ("[O]ur cases do not support 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.").

31.129—because the Texas Constitution gives the Attorney General the authority to investigate potential criminal conduct relating to elections as well as the duty to "represent the State in all suits and pleas *in the Supreme Court of the State* in which the State may be a party . . . . " *See* Tex. Const. art. IV, § 22. Longoria and Morgan similarly assert (at 25, 31) that the district attorney defendants have the requisite enforcement connection "because they are tasked with investigating and prosecuting criminal violations of the Election Code, and county and district attorneys have authority to compel or constrain a person's ability to violate the law." But that shows only that the Attorney General and district attorneys have "[a] general duty to enforce the law," which "is insufficient for *Ex parte Young*." *Tex. Democratic Party*, 978 F.3d at 181. In any event, that the Attorney General is required to represent the State "in all suits and pleas in the Supreme Court of the State in which the State may be a party," Tex. Const. art. IV, § 22, says nothing about proceedings in the lower state courts.

Longoria and Morgan have thus failed to show even a "'scintilla' of affirmative action," *Tex. Democratic Party*, 961 F.3d at 401, by the Attorney General to enforce section 276.016(a)(1) through section 31.129, so Longoria's claim against him is barred by sovereign immunity. Similarly, Plaintiffs have failed to show any such affirmative enforcement action by the district attorney defendants to enforce section 276.016(a)(1), so Plaintiffs' claims against them are also barred by sovereign immunity.

B. The Court should reject Plaintiffs' request to abandon its *Ex parte Young* precedent.

Rather than seriously grapple with this Court's precedent regarding *Ex parte Young*'s connection requirement, Plaintiffs ask this Court to jettison it. They first suggest (at 28-29) that the Supreme Court abrogated this Court's decisions requiring a plaintiff to show some "affirmative action" to enforce a challenged law in *Whole Woman's Health v. Jackson*, 142 S. Ct. 522 (2021), because the Supreme Court "did not mention [a] 'demonstrated willingness'" to enforce SB 8 "in holding that *Ex parte Young* was satisfied against the state licensing officials at issue." None of the opinions on that question in *Whole Woman's Health* garnered the support of a majority of the Court. *Whole Woman's Health v. Jackson*, 23 F.4th 380, 385 (5th Cir. 2022), ("The Court's conclusion was supported by two four-member opinions, with Justice Thomas dissenting, leading to no majority rationale."). "Under these circumstances, there is no controlling rationale for the Supreme Court's interpretation of state law." *Id.* at 386. The Supreme Court's decision in *Whole Woman's Health* thus did not abrogate this Court's *Ex parte Young* jurisprudence. At worst, that decision offers nothing more than a "mere 'hint' of how the [Supreme] Court might rule in the future," which is well short of the type of "unequivocal" change required to abrogate this Court's *Ex parte Young* jurisprudence. *Stokes v. Sw. Airlines*, 887 F.3d 199, 204 (5th Cir. 2018) (alteration in original) (citation omitted).

Next, Plaintiffs invoke (at 28-29) decisions from several other circuits. A panel of this Court, however, cannot disregard this Court's prior decisions based only on opinions from other circuits. *See Stokes*, 887 F.3d at 204 ("This circuit abides by the

rule of orderliness, under which a panel of the court cannot overturn a prior panel decision 'absent an intervening change in the law, such as by a statutory amendment, or the Supreme Court or by our *en banc* court.'" (citation omitted)).

Insofar as Longoria and Morgan rely (at 28) on First Amendment cases evaluating standing to show that they satisfy *Ex Parte Young* that is incorrect. The chilling effect they allege might satisfy "the injury-in-fact requirement." *Speech First, Inc. v. Fenves*, 979 F.3d 319, 331 (5th Cir. 2020) (citation omitted). But the portions of the *Ex Parte Young* analysis that overlap with standing principally are traceability and redressability. *City of Austin*, 943 F.3d at 1002-03. So Morgan and Longoria cannot short circuit this Court's sovereign immunity analysis simply by relying on a chilling effect that they allege establishes injury in fact.

Finally, Plaintiffs attempt (at 30-31) to distinguish this Court's decision in *City of Austin*, mostly by trying to limit it to its facts. The Attorney General pointed (at 16) to this Court's conclusion in *City of Austin* to show that the Attorney General enforcing "*different* statutes under *different* circumstances does not show that he is likely to do the same here." That proposition is not limited to the facts of *City of Austin*, and this Court has invoked that proposition in cases that did not involve the "odd type of enforcement authority" at issue in *City of Austin*, 943 F.3d at 1000 n.1. *See Tex. Democratic Party*, 978 F.3d at 179; *In re Abbott*, 956 F.3d at 709. Indeed, that proposition merely reflects the Supreme Court's observation that a "case-by-case approach to the *Young* doctrine has been evident from the start." *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 280 (1997).

In short, Longoria's claim against the Attorney General—and Longoria and Morgan's claims against the district attorneys—are barred by sovereign immunity because they have failed to show the connection to enforcement required to trigger the *Ex parte Young* exception. Plaintiffs try (at 25, 27-29) to short circuit the *Ex parte Young* analysis by invoking their standing arguments. But as the Attorney General has explained in his opening brief (at 19-20), any similarities between the *Ex parte Young* analysis and the standing analysis demonstrates that Plaintiffs likely lack standing. And however similar those analyses may be, they are not identical. *See City of Austin*, 943 F.3d at 1002. Even if Longoria and Morgan have standing—and they do not—they nonetheless do not satisfy the *Ex parte Young* exception. The district court therefore was without jurisdiction to enter a preliminary injunction.

II. Plaintiffs Have Not Shown That They Are Likely to Succeed on the Merits.

A. When Plaintiffs Speak in an official capacity, that speech is government speech.

Section 276.016(a) regulates only speech that Longoria and Morgan make "knowingly" while "acting in an official capacity." Tex. Elec. Code § 276.016(a). Because section 276.016(a) regulates only official capacity speech, this speech is definitionally government speech. And it is therefore not protected by the First Amendment. *Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009); *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 207 (2015).

As this Court has held time and again, "speech made pursuant to a public employee's official duties" is "unprotected." *Anderson*, 845 F.3d at 593 (emphasis

omitted); *Williams v. Dall. Indep. Sch. Dist.*, 480 F.3d 689, 694 (5th Cir. 2007) (per curiam) (when a public employee's speech is delivered "in the course of performing his job," that speech "is not protected by the First Amendment"). "[T]he Supreme Court has directed lower courts to determine whether a public employee has made a statement 'pursuant to [his or her] official duties.' If the employee has done so, the speech is not protected under the First Amendment." *Bevill v. Fletcher*, 26 F.4th 270 (5th Cir. 2022). "Activities undertaken in the course of performing one's job are activities pursuant to official duties and not entitled to First Amendment protection." *Davis v. McKinney*, 518 F.3d 304, 313 (5th Cir. 2008).[2]

Other circuits agree. As the Ninth Circuit recently explained, "'[w]hen public employees make statements pursuant to their official duties, the employees are not

[2] *See also Powers v. Northside Indep. Sch. Dist.*, 951 F.3d 298, 307–08 (5th Cir. 2020) ("When public employees speak pursuant to their official duties, they are not speaking as citizens for First Amendment purposes, and their speech is not protected."); *Johnson v. Halstead*, 916 F.3d 410, 422 (5th Cir. 2019) ("A public employee's speech is not protected when he speaks 'pursuant to [his] official duties.'") (quoting *Andersen*, 845 F.3d at 592); *Howell v. Town of Ball*, 827 F.3d 515, 523 (5th Cir. 2016) ("[T]he First Amendment does not protect speech made in furtherance of a public employee's official duties . . . ."); *Culbertson v. Lykos*, 790 F.3d 608, 617–18 (5th Cir. 2015) ("[T]here is no First Amendment protection for the speech at all when public employees make statements as part of their official duties."); *Graziosi v. City of Greenville*, 775 F.3d 731, 736 (5th Cir. 2015) ("For an employee's speech to be entitled to First Amendment protection, she must be speaking as a citizen on a matter of public concern."); *Hurst v. Lee County*, 764 F.3d 480, 485 (5th Cir. 2014) (when plaintiff's speech was "ordinarily within the scope of his duties" it was "not citizen speech protected by the First Amendment"); *Nixon v. City of Houston*, 511 F.3d 494, 497 (5th Cir. 2007) ("[I]t is clear that" plaintiff's speech "is not protected by the First Amendment because it was made pursuant to his official duties and during the course of performing his job.").

speaking as citizens for First Amendment purposes,' and therefore restrictions on such speech do not implicate the employees' individual constitutional rights." *Barke v. Banks*, 25 F.4th 714 (9th Cir. 2022) (quoting *Garcetti v. Ceballos*, 547 U.S. 410, 421-22 (2006)); *see also Boyce v. Andrew*, 510 F.3d 1333, 1343 (11th Cir. 2007) ("If the government employee . . . was speaking as an employee, then there can be no First Amendment issue, and the constitutional inquiry ends."); *Johnson v. Poway Unified Sch. Dist.*, 658 F.3d 954, 970 (9th Cir. 2011) ("Because the speech at issue owes its existence to Johnson's position. . . Poway acted well within constitutional limits in ordering Johnson not to speak in a manner it did not desire.").

As the Attorney General explained in his opening brief (at 24) both Longoria and Morgan remain free to speak however they want in their personally capacity. It is only when they are speaking while acting in an official capacity—that is, speaking as the government—that section 276.016(a)'s limitations apply.

Longoria and Morgan contend (at 45) that this is not a government speech case because they do not seek to "force the government . . . to espouse (or not espouse) a particular message" but "instead [bring] a challenge to a statute that threatens Plaintiffs . . . for engaging in speech and expressing a viewpoint that the state disfavors." But just the opposite is true—because Longoria and Morgan insist on expressing their views rather than the government's in their official capacity. *E.g.*, ROA.519 (Longoria asserting 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" because of SB 1); ROA.93 (similar); ROA.807-09 (similar).

And the effect of Plaintiffs' argument is to prevent government from speaking in the way that the Legislature has directed. That runs afoul of this Court's admonition that "[i]n the context of *government* speech, a state may endorse a specific viewpoint and require government agents to do the same." *City of El Cenizo v. Texas*, 890 F.3d 164, 185 (5th Cir. 2018); *see also Chiras v. Miller*, 432 F.3d 606, 612 (5th Cir. 2005) ("The government undoubtedly has the authority to control its own message when it speaks or advocates a position it believes is in the public interest."). Their argument likewise runs afoul of the Supreme Court's repeated instruction that "[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).

B. Plaintiffs cannot escape this conclusion.

Longoria and Morgan raise two objections to this analysis, both adopted by the district court—and both incorrect. ROA.653-55. First, (at 39-42, 51) Longoria and Morgan assert that employee speech cases are categorically inapplicable to criminal punishment and civil penalties. Second, they assert (at 43-44, 51-53) that because Longoria and Morgan are not employed directly by the State, the Legislature may not regulate their official capacity speech.

1. *Garcetti* and its progeny confirm that official capacity speech is unprotected by the First Amendment.

Garcetti and cases interpreting it look to the nature of the speech at issue, not to the consequences of that speech, in determining whether that speech was government speech or speech as a private citizen. The latter may be protected by the First

Amendment after a balancing test is performed, but the former is not—because the speaker is speaking as the government and thus has no personal interest in the speech.

In *Garcetti*, the Supreme Court "identif[ied] two inquiries to guide interpretation of the constitutional protections accorded to public employee speech." *Garcetti*, 547 U.S. at 418. "The first requires determining whether the employee spoke as a citizen on a matter of public concern." *Id.* And "[i]f the answer is no, the employee has no First Amendment cause of action based on his or her employer's reaction to the speech." *Id.* "When a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom" because "[g]overnment employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services." *Id.* at 418-19.

Thus, the "controlling factor" in *Garcetti* was that the plaintiff's "expressions were made pursuant to his duties." *Id.* at 421; *see also id.* ("The significant point is that the memo was written pursuant to Ceballos' official duties."). "Ceballos did not act as a citizen when he went about conducting his daily professional activities." *Id.* at 422. "Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe on any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created." *Id.* at 421-22. The focus in *Garcetti* was on the nature of the speech and whether it was part of the plaintiff's

official job duties—*i.e.*, done in an official capacity—not on the nature of the sanction at issue.

The same is true of the Supreme Court's later decision in *Lane v. Franks*, 573 U.S. 228 (2014). There the Court emphasized that "*Garcetti* distinguished between employee speech and citizen speech." *Id.* at 239. Focusing on the nature of the speech at issue, the Court concluded that "[t]ruthful testimony under oath by a public employee outside the scope of his ordinary job duties is speech as a citizen for First Amendment purposes." *Id.* "The critical question under *Garcetti*" the Court explained, "is whether the speech at issue is itself ordinarily within the scope of an employee's duties." *Id.* at 240. Here, the speech at issue—soliciting unrequested mail-in ballot applications *while acting in an official capacity*—is necessarily within Longoria and Morgan's duties.

This Court's cases also look to the nature of the speech at issue in determining whether an employee is entitled to protection—and conclude that when an employer speaks pursuant to official duties the First Amendment does not protect that speech. *Supra* II.A & n.2. This makes sense because speaking as a citizen on a matter of public concern is the gateway under *Garcetti* to a First Amendment balancing test. Once a public employee establishes that much "then the possibility of a First Amendment claim arises." *Garcetti*, 547 U.S. at 418. But if the "public employee has made a statement pursuant to [his or her] official duties" then "the speech is not protected under the First Amendment." *Bevill*, 26 F.4th at 270. In that case, "there is no First Amendment protection for the speech at all." *Culbertson*, 790 F.3d at 617–18. The

First Amendment is not implicated because it is the government's speech, not the employee's as a citizen.

The nature of sanction does not transform government speech into citizen speech protected by the First Amendment, as Longoria and Morgan assert. To assert that it does is to say that the First Amendment protects an agent of the government, speaking as the government, from sanction by the government. That is not the law; the First Amendment does not protect government speech from government regulation. Rather, "[t]he Free Speech Clause restricts government regulation of private speech; it does not regulate government speech." *Summum*, 555 U.S. at 467. Longoria and Morgan's official capacity speech is thus unprotected by the First Amendment, including potential criminal sanction, because "they have no *personal* interest in the content of that speech that gives rise to a First Amendment right." *Ceballos v. Garcetti*, 361 F.3d 1168, 1189 (9th Cir. 2004) (O'Scannlain, J., specially concurring).

Longoria and Morgan contend (at 40) that this Court's decision in *Rangra v. Brown,* 566 F.3d 515, 522-23 (5th Cir. 2009)*, dismissed as moot en banc*, 584 F.3d 206 (5th Cir. 2009) leads to a different result. But the judgment in that case was vacated when this Court voted for rehearing en banc. *Rangra v. Brown*, 576 F.3d 531, 532 (5th Cir. 2009). Of course, "'the granting of a rehearing en banc vacates the panel opinion and judgment of the court.'" *Comer v. Murphy Oil USA, Inc.*, 718 F.3d 460, 468 (5th Cir. 2013) (quoting 5th Cir. R. 41.3). It is therefore "of no precedential value." *Id.* (quoting *United States v. Pineda-Ortuno*, 952 F.2d 98, 102 (5th Cir. 1992)). But even if that were not so, *Rangra* dealt with "speech of elected state and local government officials," 566 F.3d at 517, and section 276.016(e)(2) expressly prohibits the

application of section 276.016(a) to officials acting in their "capacity as a candidate for public elective office." Tex. Elec. Code § 276.016(a), (e).[3]

2. Even if this Court disagrees, the injunction is still flawed.

Even if this Court concludes that government speech could be transformed into citizen speech protected by the First Amendment by the possibility of criminal penalties, the district court nonetheless erred by enjoining the Attorney General and the district attorneys 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. That is because section 31.129 does not allow for criminal proceedings—but only the imposition of civil penalties. Insofar as this Court holds that some applications of section 276.016(a) or section 31.129 are constitutionally infirm as applied to Longoria and Morgan, the Court should sever those applications from the applications that are constitutional.[4] *See Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 140 S. Ct. 2335, 2349 (2020) ("When Congress includes an express severability or nonseverability clause in the relevant statute, the judicial inquiry is straightforward. At least absent

[3] Longoria and Morgan fault "the State" for its alleged "shift in position" from *Ex parte Perry*, 483 S.W.3d 884, 911 (Tex. Crim. App. 2016). But they have not sued the State. Instead, they sued the Attorney General and three district attorneys. And in *Ex parte Perry* the State was represented not by the Attorney General but by "[t]he State Prosecuting Attorney." *Id.*

[4] Senate Bill 1's severability provision states that "[i]f any provision of this Act or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this Act that can be given effect without the invalid provision or application, and to this end the provisions of this Act are declared to be severable." Election Integrity Protection Act of 2021, 87th Leg., 2d C.S., ch 1., § 10.02, 2021 Tex. Sess. Law Serv. 3812.

extraordinary circumstances, the Court should adhere to the text of the severability or nonseverability clause.").

In *United States v. National Treasury Employees Union*, the Supreme Court addressed a civil penalty provision that could be enforced against federal employees who received honoraria for publications or speeches "not more than the larger of $10,000 or the amount of the honorarium." 513 U.S. 454, 460 (1995). While the Court held that the law was unconstitutional as applied, it also held that "relief should be limited to the parties before the Court" because "the Government conceivably might advance different justifications for an honoraria ban limited to more senior officials." *Id.* at 478. If a civil penalties provision violated the First Amendment in every application, the Supreme Court could have said as much.

Longoria and Morgan seek (at 51) to explain *National Treasury* based on a footnote responding to the dissent that explains a portion of the *Pickering* balancing test. But the Court needed reach that test only because "[r]espondents' expressive activities in this case fall within the category of citizen comment on matters of public concern rather than employee comment on matters related to personal status in the workplace" and "involved content largely unrelated to their government employment." *Id.* at 466. That Longoria and Morgan fail that portion of the test—because the speech at issue must be in an official capacity—does not make *National Treasury* inapplicable. To the contrary, it makes this case more straightforward because they would not survive that initial inquiry.

And even if this Court were to conclude that both criminal penalties and some civil penalties offend the First Amendment, the district court's injunction should

still be reversed in part. That is because section 31.129 specifically provides for civil penalties that include "termination of the person's employment and loss of the person's employment benefits." Tex. Elec. Code § 31.129(c). Longoria and Morgan concede (at 39-40) that "employee discipline, like demotion or termination" is appropriate because it is discipline "that a private employer could similarly impose." So too here; section 31.129 allows for precisely those sanctions. Because the district court's injunction prohibited classic employee discipline just as much as it prohibited criminal sanction or other types of civil penalties, it is at a minimum overbroad. Neither the Attorney General nor the district attorneys may be properly enjoined as to concededly constitutional applications of section 31.129.

C. The district court erred when it concluded that the State could not regulate Plaintiffs' conduct because they do not work for the State.

The Attorney General explained (at 24-26) in his opening brief why the Texas Legislature may regulate Longoria and Morgan's conduct. In Texas, local officials are charged by the Legislature with conducting much of election administration in compliance with the Legislature's instructions. *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). And "[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), that "Texas can 'commandeer.'" *City of El Cenizo*, 890 F.3d at 191.

Longoria makes much (at 43-44) of the fact that she is employed by Harris County. But that remains a distinction without a difference—because her conduct is

nonetheless regulated by Texas law. That Texas law provides other procedures by which she may be removed (at 44) is also of no moment. There is no reason that any given removal procedure must be exclusive, and through section 31.129 the Legislature has created another means of removal.[5] The only reason that Longoria's position exists in the first instance is that the Legislature authorized its creation. *See* Tex. Elec. Code § 31.031 (authorizing creation of "the position of county elections administrator for the county"). The Legislature can regulate her official capacity conduct through the same portion of the election code.

Longoria and Morgan further assert (at 51-52) that *Ysura* and *El Cenizo* are inapplicable because "those cases do not address *Pickering*, much less hold that it is immaterial under *Pickering* and *Garcetti* whether the State actually employs the person who it seeks to punish." But the Attorney General offers these cases for the proposition that neither local governments nor local officials have autonomy from the Texas Legislature, except perhaps insofar as some other source of law grants it to them. It is unsurprising—but irrelevant—that these cases do not address *Garcetti* directly.

Longoria and Morgan contend (at 43) that "[a] private employer cannot fire a worker who works for someone else." Setting aside whether the State and local

[5] Morgan asserts (at 43) that she is a public official not an election official and therefore not subject to section 31.129 at all. But this argument concedes that neither the Attorney General nor the district attorneys should be enjoined as to enforcing section 31.129 against Morgan—because Morgan herself contends she is not subject to the statute.

governments that it has created bear the same relationship as two private employers (they do not), Longoria and Morgan are nonetheless incorrect. This Court has recognized that "[c]laims by governmental contractors that their speech caused retaliation against them by the government are analyzed using the same framework as that for claims by public employees." *Culbertson*, 790 F.3d at 618 (citing *Bd. of Cnty. Comm'rs v. Umbehr*, 518 U.S. 668, 684–85 (1996)). If there is any analogy to be had at all between the State and a local government and two private businesses, it is as a contractor.

Just like a business or government might employ a contractor, Texas has created "subordinate unit[s] of government . . . to carry out delegated governmental functions." *Ysura*, 555 U.S. at 363. That the same *Garcetti* framework applies to contractors as government employees suggests that it applies to local governments and their officials in the same way—at least where the Texas Legislature has expressly provided as much, as here. Longoria and Morgan cannot evade the Legislature's commands simply because they work or volunteer for a subordinate unit of Texas government.

III. The Remaining Factors Do Not Justify the Injunction.

The Attorney General explained (at 31-35) why the district court erred in concluding that Longoria and Morgan satisfied the remaining factors in his opening brief. Their counterarguments are without merit. At the outset, because Longoria and Morgan's arguments (at 53-58) are all tied to their likelihood of success on the merits, those arguments fail for the same reasons that they have failed to show a likelihood of success on them.

First, Longoria and Morgan (at 53-54) assert that loss of First Amendment freedoms for even minimal periods of time constitutes irreparable injury. That is true insofar as it goes. But the speech that they wish to engage in only highlights that it is the government's speech, not theirs. For example, Longoria says she cannot "provide the information about voting by mail that she wanted to at an AARP meeting," provide "voters with letters, email, and texts about mail-in voting applications," and "discuss[] mail-in ballot voting." ROA.807-809. Because this is speech in her official capacity it is government speech, as shown above. But Longoria also ignores that section 276.016(e) expressly limits the scope of section 276.016(a), explaining that "[s]ubsection (a) does not apply if the public official or election official" "provide[s] general information about voting by mail, the vote by mail process, or the timelines associated with voting to a person or the public." Tex. Elec. Code § 276.016(e)(1). At least some of the speech she wishes to engage in may not be covered by section 276.016(a) at all.

Second, this Court has explained that "[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)). Longoria and Morgan's contention (at 56) that the State does not suffer harm when its laws are enjoined is incorrect.

Moreover, section 276.016(a) serves several concrete State interests. The State has a straightforward interest in minimizing the number of voters eligible to vote by mail who choose that option instead of voting in person because "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 v. Tex. Sec'y of State*, 978 F.3d 220, 224 (5th Cir. 2008) (citation omitted). Likewise, section 276.016 serves the State's "important interest in preventing voter confusion." *MacBride v. Askew*, 541 F.2d 465, 468 (5th Cir. 1976). Longoria and Morgan's arguments to the contrary (at 56) are reductive of the merits.

Third, that Texas law "makes voting by mail *lawful*" as Longoria and Morgan contend (at 57) is beside the point. The Legislature has decided who is eligible to vote by mail and under what circumstances. *See* Tex. Elec. Code §§ 82.001-.004. It has not made voting by mail legal under all circumstances and is not obliged to do so. *Tex. Democratic Party*, 978 F.3d at 188, 191. The Attorney General does not assert an interest in ensuring that eligible voters do not vote at all, as Longoria and Morgan accuse (at 57). But the State nonetheless has a strong interest—as expressed by the Legislature—"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).

Finally, for many of the same reasons, the district court's injunction disserves the public interest. Longoria and Morgan's arguments to the contrary (at 58) again simply restate their arguments on the merits.

IV. The Injunction Should At Least Be Narrowed.

In his opening brief (at 36-42), the Attorney General explained that the district court's injunction should at a minimum be narrowed in several respects: (1) The

district court should have stayed the injunction at least through any run-off election under the *Purcell* principle so that those elections are not conducted under different rules; (2) the district court should not have effectively provided permanent relief to Longoria and Morgan; and (3) the district court should not have granted injunctive relief to Longoria and Morgan on claims that they had not even plead.

Morgan and Longoria take issue only with the application of the *Purcell* principle, claiming (at 59-60) primarily that it is simply not applicable, pointing to campaign-finance cases. They are wrong.

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 v. Gonzalez*, 549 U.S. 1 (2006) (per curiam)). And "federal appellate courts should stay injunctions when, as here, lower federal courts contravene that 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.

Longoria and Morgan would limit (at 59) *Purcell* to cases involving how, when, and where a voter may cast a ballot. But *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. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020) (per curiam). *Purcell* avoids "[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).

The campaign-finance cases that Longoria and Morgan point to are inapplicable. Those cases address campaign-finance laws that regulate purely private speech. But section 276.016(a) regulates the conduct only of a "public official" or "election official" "while acting in an official capacity." Tex. Elec. Code § 276.016(a). The government regulating its own mechanisms for conducting an election is simply different in kind than the government regulating private speech in the run-up to an election. In short, *Purcell* applies here, and requires at a minimum the district court's injunction be temporally narrowed.

Conclusion

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

Respectfully submitted.

Ken Paxton
Attorney General of Texas

Brent Webster
First Assistant Attorney General

Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-1700
Fax: (512) 474-2697

Judd E. Stone II
Solicitor General

/s/ Benjamin D. Wilson
Benjamin D. Wilson
Deputy Solicitor General
Benjamin.Wilson@oag.texas.gov

Cody Rutowski
Assistant Solicitor General
Cody.Rutowski@oag.texas.gov

Counsel for Appellant Warren K. Paxton, in His Official Capacity as the Attorney General of Texas

Certificate of Service

On March 2, 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.

/s/ Benjamin D. Wilson
Benjamin D. Wilson

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 6,121 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).

/s/ Benjamin D. Wilson
Benjamin D. Wilson