No. 22-0224

In the Supreme Court of Texas

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 Certified Questions from the
United States Court of Appeals for the Fifth Circuit
No. 22-50110

BRIEF AND APPENDIX OF APPELLANT SHAWN DICK

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TABLE OF CONTENTS

TABLE OF CONTENTS .... **Error! Bookmark not defined.**

INDEX OF AUTHORITIES 8

STATEMENT OF THE CASE 8

STATEMENT OF JURISDICTION 13

ISSUES PRESENTED 14

STATEMENT OF FACTS 15

SUMMARY OF THE ARGUMENT 20

ARGUMENT 23

A. A VDR is not a "public official" or even an "official." 23

1. Applicable Rules of Statutory Construction 23
2. The context and plain language of the Election Code do not support a conclusion that VDRs are considered to be "public officials" or even "officials." 25

   a) The Legislature could have included VDRs in the definition of "election official" but did not do so. *26*

   b) Calling VDRs public "officials" makes no sense when they are not even defined as election "officials" or election "officers" in the Election Code. *28*

   c) The plain meaning and common usage of the terms "public official" and "public officer" also do not encompass or include VDRs. *28*

3. Other Texas statutes that do define the term "public official" do not support a conclusion that VDRs are public officials. 30
4. Texas caselaw interpreting provisions that contain the term "public official" but do not define it also do not support a conclusion that VDRs are public officials. 33

B. Morgan's intended speech and activities as a VDR do not constitute "solicitation" under the statute. 35

1. Rules of Statutory Construction 35

2. The ordinary meaning of "solicit" and the context in the Election Code do not support a conclusion that the speech Morgan intends to engage in constitutes prohibited speech or conduct under Section 276.016(a)(1).......37

a) "Solicit" and "solicitation" are commonly-used words with dictionary definitions and ordinary meanings. 38

b) "Encouraging" potentially eligible mail-in voters to register and "promoting" voter access are not prohibited speech or conduct for VDRs. Indeed, they are perfectly consistent with the expressed legislative intent in the Election Code itself. 39

c) Providing general information about mail-in voting is expressly allowed under the statute..42

C. The Fifth Circuit's third question does not apply to Morgan or her claims. 43

INDEX OF AUTHORITIES

Cases

Aldine Independent School Dist. v. Standley, 280 S.W.3d 578 (Tex. 1955)...........33

Chastain v. Koonce, 700 S.W.2d 579 (Tex. 1985)...23

City of Rockwall v. Hughes, 246 S.W.3d 621 (Tex. 2008).....................................23

Coutlakis v. State, 268 S.W.2d 192, (Tex.Crim.App. 1954) 38

Dunbar v. Brazoria County, 224 S.W.2d 738 (Tex.Civ.App. 1949),......................33

Ex parte Paxton, 493 S.W.3d 292 (Tex.App.—Dallas 2016) 35, 37, 38

Galbraith Eng'g Consultants, Inc. v. Pochucha, 290 S.W.3d 863 (Tex. 2009) 22

HBO v. Harrison, 983 S.W.2d 31 (Tex.App.–Houston [14th Dist.] 1998).............33

Helena Cham. Co. v. Wilkins, 47 S.W.3d 486, 493-94 (Tex. 2001) 23

Hoskins v. Fuchs, 517 S.W.3d 834, 842 (Tex.App.–Fort Worth 2016) 33

In re Caballero, 272 S.W.3d 595 (Tex. 2008)...23

In re Hall, 286 S.W.3d 925 (Tex. 2009)...36

Nguyen v. Watts, 605 S.W.3d 761 (Tex.App.—Houston [1st Dist.] 2020)...... 35, 36

Page v. State, 492 S.W.2d 573 (Tex.Crim.App. 1972) 38

State v. $1,760.00 in U.S. Currency, 406 S.W.3d 177 (Tex. 2013) 36

Tex. Lottery Comm'n v. First State Bank of Dequeen,
325 S.W.3d 628 (Tex. 2020) 22, 23

Tex. Mut. Ins. Co. v. Ruttinger, 381 S.W.3d 430 (Tex. 2012)...............................26

Watson v. State, 369 S.W.3d 865 (Tex.Crim.App. 2012)......................................35

Statutes

TEXAS CIVIL PRACTICE & REMEDIES CODE §27.001 32

TEXAS ELECTION CODE §1.0015 .... 24, 40

TEXAS ELECTION CODE §1.003 23

TEXAS ELECTION CODE §1.005 .... 19, 22, 25, 26

TEXAS ELECTION CODE §13.031 .... 21, 40

TEXAS ELECTION CODE §13.032 30

TEXAS ELECTION CODE §13.038 31

TEXAS ELECTION CODE §31.001 27

TEXAS ELECTION CODE §31.129 .... 13, 14, 42

TEXAS GOVERNMENT CODE §82.0651..35

TEXAS GOVERNMENT CODE §22.304.. 20, 30, 29

TEXAS GOVERNMENT CODE §311.001..23

TEXAS GOVERNMENT CODE §311.011..23

TEXAS GOVERNMENT CODE §311.021.. 24, 36

TEXAS GOVERNMENT CODE §311.023..24

TEXAS GOVERNMENT CODE §311.035.. 24, 36, 40

TEXAS GOVERNMENT CODE §573.001..20

TEXAS ELECTION CODE §276.016 .... passim

TEXAS HEALTH & SAFETY CODE §173.007..37

TEXAS LOCAL GOVERNMENT CODE §150.002..37

TEXAS RULES OF APPELLATE PROCEDURE 58.1 12

Texas Senate Bill 1 .... 10, 14, 21, 24

Other Authorities

BLACK'S LAW DICTIONARY (11th ed. 2019) 38

Merriam-Webster 29, 39

STATEMENT OF THE CASE

Plaintiffs-Appellees Isabel Longoria and Cathy Morgan filed suit in federal district court in December 2021, in a suit numbered and styled Case No. 5:21-cv-1223; *Longoria v. Paxton*; In the United States District Court for the Western District of Texas, San Antonio Division (Hon. Xavier Rodriguez presiding). In the suit (which is still pending), Longoria and Morgan are seeking declaratory and injunctive relief in connection with certain "anti-solicitation" provisions of the recently-enacted Texas Senate Bill 1 (S.B.1) election legislation now codified at TEX. ELEC. CODE §276.016(a)(1). ROA.37-52. Texas Attorney General Ken Paxton and three district attorneys, including Williamson County District Attorney Shawn Dick, have been named as defendants in the suit. *Id.*

After a half-day evidentiary hearing on plaintiffs' motion for preliminary injunction, Judge Rodriguez issued a memorandum opinion and order on February 11, 2021, in which he concluded that Longoria and Morgan had satisfied their threshold burden of establishing federal subject matter jurisdiction and that the plaintiffs were likely to prevail on their constitutional attacks on the statute. *See* District Court Order, Appx. Tab B. The district court then enjoined all of the defendants from enforcing §276.016(a)(1) against the plaintiffs "pending final resolution of this case." Attorney General Paxton and District Attorney Dick filed interlocutory appeals of the federal district court's injunction order to the Fifth

Circuit, in a case numbered and styled No. 22-50110; *Longoria v. Paxton*; In the United States Court of Appeals for the Fifth Circuit. On March 21, 2022, after expedited appellate briefing and oral argument, the Fifth Circuit panel (comprising Justices Leslie Southwick, Catharina Haynes and Stephen Higginson) issued a *per curiam* unpublished order certifying three questions of "open" Texas law to the Supreme Court of Texas for consideration. *See* Fifth Circuit Order, Appx. Tab A.

STATEMENT OF JURISDICTION

On its own motion, the Fifth Circuit Court of Appeals has certified three questions of law to this Court in connection with the pending federal appeal in No. 22-50110; *Longoria v. Paxton*; In the United States Court of Appeals for the Fifth Circuit. The Texas Constitution grants the Supreme Court of Texas the power to answer questions of state law certified by a federal appellate court. TEX. CONST. art. V, §3-c(a). Further, the Texas Rules of Appellate Procedure provide that federal appellate courts may certify "determinative questions of Texas law" that have "no controlling Supreme Court [of Texas] precedent." TEX. R. APP. P. 58.1.

ISSUES PRESENTED

Per the Fifth Circuit Court of Appeals:

(1) Whether Voluntary Deputy Registrars (VDRs) are "public officials" under the Texas Election Code;

(2) Whether the speech Plaintiffs allege that they intend to engage in constitutes "solicitation" within the context of Texas Election Code §276.016(a)(1). For example, is the definition narrowly limited to seeking application for violative mail-in ballots? Is it limited to demanding submission of an application for mail-in ballots (whether or not the applicant qualifies) or does it broadly cover the kinds of comments Plaintiffs stated that they wish to make: telling those who are elderly or disabled, for example, that they have the opportunity to apply for mail-in ballots?; and

(3) Whether the Texas Attorney General is a proper official to enforce Texas Election Code §31.129.

RECORD REFERENCES

The Fifth Circuit record on appeal is cited as "ROA.[page number(s)]" in this brief. Cites to documents in Shawn Dick's Appendix are "Appx. Tab [tab letter]."

STATEMENT OF FACTS

This case comes to the Texas Supreme Court on three certified questions from the Fifth Circuit in connection with a pending federal interlocutory appeal.

In the underlying federal lawsuit, plaintiffs Isabel Longoria and Cathy Morgan are seeking declaratory and injunctive relief in connection with the recently-enacted Texas Senate Bill 1 (S.B.1) election legislation. ROA.37-52. They are seeking a declaration from the federal district court that certain "anti-solicitation provisions" pertaining to mail-in voting applications now codified at §276.016(a)(1) of the Texas Election Code violate the First and Fourteenth Amendments of the U.S. Constitution, and seek to enjoin certain public officials – Texas Attorney General Ken Paxton and the district attorneys of Harris, Travis and Williamson Counties – from enforcing this provision. Longoria alone also seeks to enjoin Attorney General Paxton from enforcing a civil liability provision codified at §31.129 of the Election Code; Morgan is not party to that claim. ROA.37-52.

Longoria and Morgan filed their original complaint on December 10, 2021, naming Attorney General Paxton as the sole defendant. ROA.14-27. They filed their first amended complaint (their live complaint) on December 27, 2021, adding the three district attorneys as defendants. ROA.37-52. Longoria, who serves as the Harris County Elections Administrator, is asserting claims only against the Attorney General and the Harris County District Attorney in their official capacities. *Id.* at

¶¶37-46. Central Texas resident Morgan, who serves as a "Volunteer Deputy Registrar" (VDR) as that term is defined in the Election Code, is asserting her claims only against the Travis and Williamson County District Attorneys in their official capacities. *Id.* at ¶¶37-43.

In the federal complaint, Morgan does not allege that she intends to "solicit" mail-in ballot applications from potential voters. Instead, she alleges that she "would continue to share vote-by-mail information, but for her fear of criminal prosecution for encouraging eligible voters to request an application to vote by mail even when they are or may be eligible to do so." *Id.* at ¶35. This fear of prosecution under §276.016(a)(1), she asserts, "therefore chills [her] from encouraging voters to request mail-in ballot applications." *Id.*

On December 28th, Plaintiffs filed their motion for entry of a preliminary injunction, attaching declarations of Longoria and Morgan to that motion. ROA.65-104. In her declaration, Morgan avers that two of the main components of her work as a VDR are "1) staffing tables at non-partisan voter drives and 2) going door-to-door to help voters register and provide them with information on how to vote." ROA.98-102 at ¶10. She further avers that when she does door-to-door work:

> "I enquire with community members whether they are registered to vote. If they are not, I offer to help them register and explain where and how to vote. *I raise vote by mail as an option* if I believe a voter may be eligible for it, *although the ultimate determination of eligibility is not mine to make*."

Id. (emphasis added). If no one is at home, she leaves a "take away" voter registration card, as well as information about upcoming deadlines and election dates. *Id.* at ¶11. In the past, she avers, she frequently "mentioned" vote-by-mail to potentially eligible voters – generally when she learned that a voter had a reason to prefer voting by mail, such as being an older voter, being immunocompromised, or voters who might be out of the county on election day. *Id.* at ¶14. If §276.016(a)(1) had not been enacted, she says, she would continue to "encourage" eligible or potentially eligible voters to vote by mail. *Id.* at ¶18. Since its passage, however, she avers that she "will cease informing voters about vote by mail ballots altogether because I am not sure when and how the law could be used against me." *Id.* at ¶19.

In late January of 2022, after being served with suit, District Attorney Dick filed a motion to dismiss pursuant Federal Rules 12(b)(1) and 12(b)(6) as his first responsive pleading. ROA.249-64. In that motion, which remains pending before the federal district court, he seeks dismissal on the grounds (among others) that *(i)* sovereign immunity bars these claims, Morgan lacks standing, and thus there is no federal subject matter jurisdiction over the matter, and *(ii)* Morgan has failed to assert a claim upon which relief can be granted for essentially the same reasons. ROA.249-64.

The district court set the plaintiffs' motion for preliminary injunction for hearing to be held on February 11, 2022. *See* ROA.244. Longoria and Morgan were

each deposed a week before the hearing. *See* ROA.351-466 & ROA.500-26. In her deposition, Morgan testified that as a VDR she doesn't care *how* people vote but instead cares *that* they vote: "How they vote is their decision." ROA.458. She didn't tell people that they "should" vote by mail or ask them to vote by mail; instead, her practice was to tell someone that they might "consider vote by mail" and would provide them with "general information" regarding mail-in voting if they expressed interest. ROA.456-62. She also testified that she had never been prosecuted, threatened with prosecution, or even investigated by District Attorney Dick (or anyone else) for any criminal offense, much less any election-related offense – and that she was unaware of any enforcement of §276.016(a)(1) that was even "on the horizon" for herself or anyone else in Williamson County. ROA.444-48 & 456.

The preliminary injunction evidentiary hearing was held on February 11th. *See* ROA.756-940. Longoria and Morgan both gave testimony at the hearing. Morgan's testimony at the hearing echoed the averments in her declaration and her deposition testimony. *See* ROA.762-90. Later that day, the federal district court issued its memorandum opinion and order granting the motion for preliminary injunction. ROA.626-65. In its order, the district court concluded that the plaintiffs had each satisfied their burden of showing that the court had subject matter jurisdiction over the case and their respective claims, and had also 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) … 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 enjoined all of the defendants from enforcing §276.016(a)(1) against the plaintiffs "pending final resolution of this case." *Id.*

Attorney General Paxton filed his notice of interlocutory appeal of the preliminary injunction in the Fifth Circuit on February 14th, ROA.722-23, and shortly thereafter moved for an emergency stay and for an expedited appeal (which was granted). ROA.752. District Attorney Dick filed his notice of appeal on February 21st. ROA.754-55. Among the issues raised on appeal are whether each plaintiff has standing to assert her claims, and whether the plaintiffs' respective claims are each barred by state sovereign immunity. *See* Fifth Circuit Order, Appx. Tab A, at p.2.

Oral argument was held on March 8th after an expedited appellate briefing schedule. On March 21st, the Fifth Circuit panel issued its *per curiam* order certifying the three questions of Texas law presented for consideration by this Court. *See* Fifth Circuit Order, Appx. Tab A.

Summary of the Argument

Cathy Morgan, a VDR, is the only plaintiff asserting claims against District Attorney Dick. The VDR position is strictly a creature of the Election Code, which creates and defines the role. VDRs are, by definition, *volunteers* whose role only exists in the context of elections.

The challenged anti-solicitation provisions of §276.016(a) apply only to "public officials" and "election officials." The term "election official" is specifically defined in the Election Code, and VDRs are not included in the list of 22 categories of persons defined as election officials. The Fifth Circuit has queried whether VDRs are "public officials" subject to the provision, however, as that term is not defined in the Code. The short answer is that they are not.

In applying the rules of statutory construction, including the Texas Code Construction Act, this Court's primary objective is to give effect to the Legislature's intent. Here, the context and plain language of the Election Code do not support a conclusion that VDRs are intended to be considered public officials – for multiple reasons. First, the Legislature could easily have included VDRs in its very specific definition of the term "election official" (TEX. ELEC. CODE 1.005(4-a)), but did not do so – even though VDRs' *only* role is election-related. Second, VDRs are also not defined as "election officers" in the Election Code. Calling VDRs public "officials" makes no sense – indeed, would be absurd – when they are not even defined as either

election "officials" or election "officers" in the Code. They are not even "officials," much less "public officials." Third, dictionary definitions, the plain meaning, and common usage of the terms "public official" and "public officer" also do not support a construction that includes VDRs. Fourth, definitions of "public official" that are contained in other Texas titles and statutes such as the Texas anti-nepotism statute (TEX. GOV'T CODE §573.001(3)) tilt in favor of excluding VDRs; the Fifth Circuit was properly hesitant to employ the definition of public official contained in TEX. GOV'T CODE §22.304(a) for the reasons it has discussed. And finally, Texas caselaw interpreting statutes that contain the term "public official" but do not define it, such as the Texas Citizen Participation Act, also do not support a conclusion that VDRs are public officials. VDRs have none of the hallmarks or indicia of a "public official" or "public officer" under this and other caselaw.

The Fifth Circuit also questions whether Morgan's intended speech constitutes "solicitation" in the context of §276.016(a)(1). The answer is it does not.

Once again, the rules of statutory construction guide this Court regarding this term that is not defined in the Election Code. But, "solicit" and "solicitation" are widely-used terms that are defined in dictionaries, including Merriam-Webster and Black's Law Dictionary. Texas appellate courts have specifically held that "solicit" and "solicitation" are not vague or indefinite, even when they have not been defined within the four corners of a criminal statute.

"Encouraging" potentially eligible mail-in voters to register and "promoting" voter access, as Morgan has testified she would like to do, are not prohibited speech or conduct for VDRs. Indeed, they are perfectly consistent with the expressed legislative intent in the Election Code itself: the stated purpose of the VDR role in the Code (at TEX. ELEC. CODE §13.031) is "encouraging voter registration," and "promoting voter access" is one of four expressed legislative intents of the Election Code (per S.B.1 as codified at TEX. ELEC. CODE §1.0015). "General information" regarding voting in general, and mail-in voting specifically, of the sort that Morgan has testified that she provides as a VDR is expressly allowed under §§276.016(a)(1) & (e)(1). Morgan's intended speech is not prohibited "solicitation" and would not subject her to criminal penalties even if she were in the class of persons subject to §276.016(a)(1) – which, as a VDR, she is not.

Finally, the Fifth Circuit's third question regarding who can enforce the civil liability provisions of §31.129 does not apply to Morgan or her claims.

ARGUMENT

A. A VDR is not a "public official" or even an "official."

Section 276.016(a)(1) establishes a criminal offense for "[a] public official or election official" who, "while acting in an official capacity," knowingly engages in certain conduct – including "solicit[ing] the submission of an application to vote by mail from a person who did not request an application." TEX. ELEC. CODE §276.016(a)(1). The term "election official" is expressly defined in the Election Code; the laundry list of 22 categories of persons who are defined as election officials does not include VDRs. *See id.* at §1.005(4-a). But, the term "public official" is not defined in the Election Code. The Fifth Circuit concluded that whether a VDR is a "public official" for the purposes of §276.016(a)(1) is an open question under Texas law, and certified the question to this Court. *See* Fifth Circuit Order, Appx. Tab A, at p. 12.

1. Applicable Rules of Statutory Construction

When construing statutes, this Court's primary objective is to give effect to the Legislature's intent. *Tex. Lottery Comm'n v. First State Bank of Dequeen*, 325 S.W.3d 628, 635 (Tex. 2020) (citing *Galbraith Eng'g Consultants, Inc. v. Pochucha*, 290 S.W.3d 863, 867 (Tex. 2009)). It relies on the plain meaning of the text as expressing legislative intent unless a different meaning is supplied by legislative definition or is apparent from the context, or the plain meaning leads to absurd

results. *Tex. Lottery Comm'n*, 325 S.W.3d at 635 (citing *City of Rockwall v. Hughes*, 246 S.W.3d 621, 625-26 (Tex. 2008)). The Court presumes that the Legislature selected language in a statute with care and that every word or phrase was used with a purpose in mind. *Tex. Lottery Comm'n*, 325 S.W.3d at 635 (citing *In re Caballero*, 272 S.W.3d 595, 599 (Tex. 2008); *Chastain v. Koonce*, 700 S.W.2d 579, 582 (Tex. 1985)).

The Texas Code Construction Act also instructs this Court in matters involving statutory construction. *See* TEX. GOV'T CODE §§311.001 *et seq.*; *see, e.g., Helena Cham. Co. v. Wilkins*, 47 S.W.3d 486, 493-94 (Tex. 2001) (citing and applying the Code Construction Act). Indeed, the Election Code expressly invokes the Code Construction Act as a tool for construction of "every provision of this code, except as otherwise expressly provided by this code." TEX. ELEC. CODE §1.003(a).

Under the Code Construction Act, words and phrases shall be read in context and construed according to the rules of grammar and common usage. TEX. GOV'T CODE §311.011(a). Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly. *Id.* at §311.011(b). When a statute is enacted it is presumed that *(1)* compliance with the Texas and United States constitutions is intended; *(2)* the entire statute is intended to be effective; *(3)* a just and reasonable result is intended; *(4)* a result feasible of execution is intended; and *(5)* public interest is favored over any

private interest. *Id.* at §311.021. Further, in construing a statute, whether or not the statute is considered ambiguous on its face, a court may consider among other matters the: *(1)* object sought to be attained; *(2)* circumstances under which the statute was enacted; *(3)* legislative history; *(4)* common law or former statutory provisions, including laws on the same or similar subjects; *(5)* consequences of a particular construction; *(6)* administrative construction of the statute; and *(7)* title (caption), preamble, and emergency provision. *Id.* at §311.023. And, as is the case here for construction of statutes involving criminal offenses or penalties, the statute shall be construed in favor of the actor if any part of the statute is ambiguous on its face or as applied to the case, including: *(1)* an element of the offense; or *(2)* the penalty to be imposed. *Id.* at §311.035(a).

2. <u>The context and plain language of the Election Code do not support a conclusion that VDRs are considered to be "public officials" or even "officials."</u>

The stated legislative intent of the Election Code, as recently amended by S.B.1, is that "the application of this code and the conduct of elections be uniform and consistent throughout this state to reduce the likelihood of fraud in the conduct of elections, protect the secrecy of the ballot, promote voter access, and ensure that all legally cast ballots are counted." TEX. ELEC. CODE §1.0015 (added by Acts 2021, 87th Leg., 2nd C.S., Ch. 1 (S.B.1), Sec. 1.04, *eff.* Dec. 2, 2021). Applying the rules of statutory construction to this expressed intent, it is clear that neither the context

nor the plain language of relevant provisions of the Election Code support a conclusion that VDRs are intended to be considered "public officials" for the purposes of §276.016(a) or any other provision of the Code.

a) The Legislature could have included VDRs in the definition of "election official" but did not do so.

The Legislature's definition of "election official" is a key contextual launching point for determining whether it intended that VDRs be potentially subject to the criminal offenses defined in §276.016(a). The Legislature has included 22 specific positions that fall within this defined term – county clerks, election administrators, election clerks, members of early voting ballot boards, tabulation supervisors, etc. *See* TEX. ELEC. CODE §1.005(4-a)(A)-(V). It even includes various "permanent and temporary" election-related positions, *see id.* at §§1.005(4-a)(B) & (D), as well as certain election-related "employees," "deput[ies]," "assistant[s]," and "alternate[s]." *See id.* at §§1.005(4-a)(B), (D), (F), (H), (K), (Q) & (U). Notably, there is no catch-all provision at the end of this very specific list such as "or other positions or roles defined in this code." The common thread is that <u>all</u> of these 22 positions are specifically election-related positions. And people holding or having these 22 varying positions, as "election officials," are clearly made subject to the provisions of §276.016(a).

While the position of VDR has been established by statute – indeed, VDRs would not exist but for the provisions of the Election Code – VDRs have not been

included in this definition of "election official." *See id.* at §1.005(4-a). The Legislature could easily have done so by simply adding a twenty-third position to the list: VDRs.[1] It chose not to, however, even though VDRs' role is only related to elections. Because it is presumed that the Legislature selected language in a statute with care and that every word or phrase was used with a purpose in mind, it must be presumed that the Legislature did not intend to include VDRs among the people specifically having or holding election-related positions or roles who are subject to the provisions and penalties of §276.016(a). *See Tex. Mut. Ins. Co. v. Ruttinger*, 381 S.W.3d 430, 452 (Tex. 2012) ("[T]his Court presumes the Legislature deliberately and purposefully selects words and phrases it enacts, as well as deliberately and purposefully omits words and phrases it does not enact."); *see also Tex. Lottery Comm'n, supra,* at 635; *In re Caballero, supra,* at 599.

If the Legislature had intended for VDRs to be subject to the provisions of §276.016(a), the obvious mechanism would have been to simply include them in the definition of "election officials." It did not; it omitted them. The context of the statute – specifically, the explicit list of "election officials" who *have been* identified as subject to the anti-solicitation offense – does not support a conclusion that the

[1] The definition of "election official" that includes these 22 specific categories of persons was added as part of S.B.1 – the same legislation that created the "anti-solicitation" offense in §276.016(a)(1). *See* Acts 2021, 87th Leg., 2nd C.S., Ch. 1 (S.B.1), Sec. 1.05, *eff.* Dec. 2, 2021. This underscores the notion that the Legislature could readily have included VDRs in this class of persons subject to §276.016(a)(1) but chose to exclude them.

Legislature intended to include VDRs, volunteer election workers who have not been listed, among those potentially criminally liable under the statute.

b) Calling VDRs public "officials" makes no sense when they are not even defined as election "officials" or election "officers" in the Election Code.

VDRs are not defined, categorized, or authorized as election "officers" under the Election Code. Chapter 31 of the Code ("Officers to Administer Elections") establishes several categories of election officers, including the secretary of state; county election administrators; county election commissioners; county tax assessor-collectors (through certain transfers of authority); joint elections administrators; and joint elections commissioners. *See* TEX. ELEC. CODE §§31.001 *et seq.* VDRs are not even mentioned in this chapter.

VDRs are thus not defined as either election "officials" or election "officers" under the Code. It makes no sense – indeed, it would be an absurd result that this Court strives to avoid when construing statutes – to deem a VDR as a public "official" when they are not even defined as an election official or officer and their only role or function pertains specifically to elections.

c) The plain meaning and common usage of the terms "public official" and "public officer" also do not encompass or include VDRs.

The Election Code does not define "public official," but neither the plain meaning nor the common usage of this term support including VDRs as "public officials" when they are not even statutorily included as "election officials."

There do not appear to be many dictionary definitions of the term "public official," but Merriam-Webster defines the term "public officer" as "a person who has been legally elected or appointed to office and who exercises governmental functions." *See Public Official*, Merriam-Webster, *http://www.merriam-webster.com/dictionary/public%20officer* (last visited, April 6, 2022). VDRs do not have any of the hallmarks of such a person. They are not elected. They hold no public or governmental office (such as county judge, county commissioner, county clerk, mayor, city councilmember, school board member, etc.) in any traditional or common-sense meaning of the word. They are not employed by any elected official; by any state agency, board, or commission; or by any political subdivision of the state. They are not required to take an oath of office. They do not exercise sovereign power or have discretion in their role; they do not exercise "governmental functions." Instead, they are unpaid *volunteers* and *private citizens*. While the work that VDRs do is certainly commendable and the time and effort that they contribute to elections and the electoral process are laudable, the role simply doesn't fall within

any commonly understood or traditional meaning of the terms "public official" or "public officer."[2]

3. Other Texas statutes that do define the term "public official" do not support a conclusion that VDRs are public officials.

Although the Election Code does not define the term "public official," some other Texas statutes do. On whole, to the extent that other definitions of the term in other titles assist and inform the Court in determining the legislative intent of the Election Code, these definitions do not support a conclusion that VDRs are public officials.

In its opinion and certification order, the Fifth Circuit cited and discussed §22.304 of the Texas Government Code, a statute upon which the federal district court relied in rendering its injunction order. *See* Fifth Circuit Order, Appx. Tab A, at pp. 9-10; *see* District Court Order, Appx. Tab B, at p. 18. Section 22.304 addresses the highly specific criminal offense of improper communications to clerks of courts to influence the composition of a three-justice panel to hear prioritized appeals under Chapter 273 of the Election Code. TEX. GOV'T CODE §22.304. Section 22.304(a) provides:

> *In this section*, "public official" means any person elected, selected, appointed, employed, or otherwise designated as an officer, employee,

[2] Indeed, it is likely that many if not most Texans who are not intimately involved in the election processes have even heard of "Volunteer Deputy Registrars" or know what they do.

> or agent of this state, a government agency, a political subdivision, or any other public body established by state law.

TEX. GOV'T CODE §22.304(a) (emphasis added). The Fifth Circuit properly hesitated to consider this definition particularly applicable or informative in this case, however, for several reasons. First, the court noted, the section is not in the Election Code but instead is in an entirely different title of Texas statutory law. *See* Fifth Circuit Order, Appx. Tab A, at pp. 9-10. Section 276.016(a) does not incorporate §22.304 by reference. Second, the section itself is expressly self-limiting ("In this section, "public official" means …".). *See id.* at pp. 9-10. Third, the point of this statute is to *add* public officials ("A person, including a public official, commits an offense …") and expand instead of limit the scope of persons potentially criminally liable for this distinct offense. *See id.* at p. 10, fn. 7. And fourth, the Fifth Circuit properly questioned whether VDRs are even "appointed" to serve in anything other than a purely technical sense. *See id.* at pp. 11-12. Under provisions of the Election Code, the court noted, the process of becoming a VDR is "mechanical in nature": the person contacts the voter registrar, completes training, and passes an exam, in which case the county registrar ***must*** issue a certificate "appointing" the VDR.[3] *Id.* at p. 11. The only "power" that VDRs have under the Code are *(i)* to distribute voter registration application forms throughout the county, and *(ii)* to receive the

---

[3] Indeed, "a registrar may not refuse to appoint" a person who satisfies the statutory eligibility requirements for VDRs. *See* TEX. ELEC. CODE §13.032.

registration applications in person and then turn them in to the registrar. *Id.* (citing TEX. ELEC. CODE §13.038). And, county registrars have the specific authority to terminate VDRs' appointments under the Code before the term of appointment expires, including termination of VDRs who *(i)* fail to adequately review registration applications as required under the Code; *(ii)* intentionally destroy or physically alter registration applications, or *(iii)* engage in "any other activity that conflicts with the responsibilities of a voluntary deputy registrar" under the Code. *See* TEX. ELEC. CODE §13.036(b).

District Attorney Dick submits that the Texas anti-nepotism statute, codified at Chapter 573 of the Government Code, is more informative insofar as the issues presented here are concerned, and raises fewer concerns than those raised by the Fifth Circuit regarding §22.304. Section 573.001(3) of the Government Code defines "public official," for the purposes of prohibitions on nepotism, as:

> (A) an officer of this state or of a district, county, municipality, precinct, or other political subdivision of this state;
> (B) an officer or member of a board of this state or of a district, county, municipality, school district, or other political subdivision of this state; or
> (C) a judge of a court created by or under a statute of this state.

TEX. GOV'T CODE §573.001(3). VDRs do not fall within any of these categories of persons. Under this definition, if it applied here, VDRs would fall outside the purview of the anti-solicitation provisions of §276.016(a).

4. Texas caselaw interpreting provisions that contain the term "public official" but do not define it also do not support a conclusion that VDRs are public officials.

Finally, it does not appear that any Texas courts have specifically addressed the issue of whether VDRs are considered to be "public officials." But, Texas courts have addressed the issue of who might be considered to be a public official in the context of other statutes or constitutional provisions that employ the term but do not define it. Those cases further support the conclusion that VDRs are not public officials.

The most fertile arena appears to be the caselaw addressing the Texas Citizen Participation Act (TCPA), which also uses the term "public official" but does not define it. *See* TEX. CIV. PRAC. & REM. CODE §27.001(7)(A). Absent a statutory definition, Texas appellate courts have construed the term in the defamation/TCPA context to be persons who have a ***substantial degree of responsibility or control*** for the conduct of governmental affairs:

> "[N]ot all governmental employees qualify as public officials, and there is no specific test for determining whether an individual is a public official for the purposes of a defamation action. However, public official status applies to governmental employees "at the very least … who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs. An employee holding an office of 'such apparent importance that the public has an independent interest in the qualifications and performance of a person who holds it, beyond the general public interest in the qualifications and performance of all government employees,' is a public official for defamation purposes."

Hoskins v. Fuchs, 517 S.W.3d 834, 842 (Tex.App.–Fort Worth 2016, pet. denied) (citing and quoting *HBO v. Harrison*, 983 S.W.2d 31, 36 (Tex.App.–Houston [14th Dist.] 1998, no pet.) (internal cites omitted)). As discussed above, VDRs do not share any of such indicia of "public official" status.

Another line of relevant cases stem from the decision and opinion in *Dunbar v. Brazoria County*, 224 S.W.2d 738 (Tex.Civ.App. 1949, writ ref'd), a case in which the court held that a county road engineer was not a county officer for the purposes of the provisions of the Texas Constitution requiring removal of a person by a district court. *Id.* at 740. *Aldine Independent School Dist. v. Standley*, 280 S.W.3d 578 (Tex. 1955), is perhaps the leading case in this line of cases discussing and describing the characteristics of a "public officer" as opposed to a "mere employee."

In *Standley*, the assessor-collector of taxes for the school district was discharged and sued, claiming that he was a public officer who could only be removed from office by a district court as required by article V, section 24 of the Texas Constitution. *Id.* at 579-80. The court held that "the determining factor which distinguishes a public officer from an employee is whether any sovereign function of the government is conferred upon the individual to be exercised by him for the benefit of the public *largely independent of the control of others*." *Id.* at 583 (quoting *Dunbar, supra*) (emphasis in original).

Once again, VDRs, whose sole defined power is to "distribute voter

registration application forms throughout the county and receive registration applications submitted to the deputy in person" – a responsibility that the Fifth Circuit has described as "mechanical in nature" – do not qualify as public officers under this "determining factor." *See id.*; *see* TEX. ELEC. CODE §13.038 (defining VDRs' "power"); *see* Fifth Circuit Order, Appx. Tab A, at p. 11.

B. Morgan's intended speech and activities as a VDR do not constitute "solicitation" under the statute.

The Fifth Circuit also considers the issue whether the Plaintiffs' intended speech constitutes prohibited "solicitation" in the context of §276.016(a)(1) to be an open question under Texas law. *See* Fifth Circuit Order, Appx. Tab A, at p. 14. Notwithstanding that VDRs are not even in the class of persons subject to potential criminal liability under the statute, Morgan's intended speech would not constitute prohibited "solicitation" under this provision even if as a VDR she was.

1. Rules of Statutory Construction

Like the term "public official," the word "solicit" is not defined in the Election Code. As with "public official," this Court's rules of statutory construction and the provisions of the Code Construction Act – discussed above – assist in the primary objective of giving effect to the Legislature's intent regarding the meaning and application of the anti-solicitation provisions of §276.016(a)(1).

At least two Texas appellate courts have recently tackled the issue of determining what "solicit" or "solicitation" were intended to mean in the context of criminal statutes that do not define the words.

The Dallas Court of Appeals addressed the issue in *Ex parte Paxton*, 493 S.W.3d 292 (Tex.App.–Dallas 2016, *pet. dism'd* 2016 Tex.Crim.App. Unpub. LEXIS 765, 2016 WL 4538623 (Tex.Crim.App., Aug. 31, 2016)). At issue in that case was whether the undefined word "solicit" was unconstitutionally vague as used in article 581-29(I) of the Texas Securities Act, which prohibits certain investment activities by persons not having proper registrations. *See id.* at 306. The court held that words such as "solicit" are not vague and indefinite "if they are defined in dictionaries and have meanings so well known as to be understood by a person of ordinary intelligence." *Id.* (citing *Watson v. State*, 369 S.W.3d 865, 870 (Tex.Crim.App. 2012)). The *Ex parte Paxton* court held that "solicit" was not vague even though it was not defined in the statute itself. *Id.*

The First Court of Appeals also addressed this issue in *Nguyen v. Watts*, 605 S.W.3d 761 (Tex.App.–Houston [1st Dist.] 2020, *pet. denied,* 2021 Tex. LEXIS (Tex., Sept. 3, 2021)). At issue in *Nguyen* was whether the defendant attorneys had *(i)* violated the civil barratry prohibitions of §82.0651(c) of the Texas Government Code, and/or *(ii)* violated Disciplinary Rule 7.3 prohibiting certain solicitations. *Id.* at 773-79. Neither the statute nor the disciplinary rule defined the terms "solicit" or

"solicitation." *Id.* at 777 & 779. The *Nguyen* court held that the undefined terms should be given their ordinary meaning unless that meaning is out of harmony or inconsistent with the terms of the statute:

> "When a statute contains a term that is undefined, as "solicit" is in this case, the term is typically given its ordinary meaning. *See State v. $1,760.00 in U.S. Currency*, 406 S.W.3d 177, 180 (Tex. 2013). However, we will not give an undefined term a meaning that is out of harmony or inconsistent with other terms in the statute. *Id*. "[I]f a different, more limited, or precise definition is apparent from the terms use in the context of the statute, we apply that meaning. *In re Hall*, 286 S.W.3d 925, 929 (Tex. 2009)."

Id. at 777-78.

Several provisions of the Code Construction Act should also be (re-) highlighted here. First, the Court presumes that compliance with the Texas and United States constitutions was intended when the statute was passed. TEX. GOV'T CODE §311.021(1). Second, the entire statute is intended to be effective. *Id.* at §311.021(2). Third, a just and reasonable result is intended. *Id.* at §311.021(3). And finally, statutes such as this that create criminal offenses must be construed in favor of the actor if any part of the statute is ambiguous on its face or as applied to the case, including: *(1)* an element of the offense; or *(2)* the penalty to be imposed. *Id.* at §311.035(a).

2. <u>The ordinary meaning of "solicit" and the context in the Election Code do not support a conclusion that the speech Morgan intends to engage in constitutes prohibited speech or conduct under Section 276.016(a)(1).</u>

a) "Solicit" and "solicitation" are commonly-used words with dictionary definitions and ordinary meanings.

The words "solicit" and "solicitation" are commonly used and there are many prohibitions concerning "soliciting" and "solicitation," whether in Texas criminal statutes or otherwise. The prohibition on certain solicitations contained in the Texas Securities Act and addressed in *Ex parte Paxton* is but one example.[4] In fact, many states and municipalities prohibit the "solicitation" of various things (*e.g.*, votes, signatures, campaign contributions) specifically in the context of elections.[5] The American Bar Association has rules limiting the "solicitation" of clients by or for attorneys.[6] And, the federal government prohibits its employees from engaging in certain forms of "solicitation."[7]

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[4] Section 150.002 of the Texas Local Government Code, which prohibits police and fire department employees from soliciting votes for a candidate while in uniform, and §173.007 of the Texas Health & Safety Code, which prohibits solicitation of tissue from a fetus gestated solely for research purposes, and are other examples. *See* TEX. LOC. GOV'T CODE §150.002; TEX. HEALTH & SAFETY CODE §173.007.

[5] *See* National Conference of State Legislatures website ("Electioneering Prohibitions"), *https://www.ncsl.org/research/elections-and-campaigns/electioneering.aspx*; City of San Diego Ethics Commission website ("Campaign Contribution Solicitation"), *https://www.sandiego.gov/ethics/faqs/solicitation*.

[6] *See* American Bar Association website (Professional Rule 7.3), *https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_7_3_direct_contact_with_prospective_clients/*.

[7] *See* U.S. Dept. of Justice website ("Misuse of Position and Government Resources"), *https://www.justice.gov/jmd/misuse-position-and-government-resources*.

Moreover, these words are defined in the dictionary. Merriam-Webster defines solicit as "to make petition to; to approach with a request or plea; to urge (as one's cause) strongly; to entice or lure especially into evil; to proposition (someone) especially as or in the character of a prostitute; to try to obtain by usually urgent request or pleas." *See Solicit*, Merriam-Webster, *http://www.merriam-webster.com/dictionary/solicit* (last visited, April 6, 2022). And as the Fifth Circuit has noted, Black's Law Dictionary has a criminal definition of the term solicitation: "The criminal offense of urging, advising, commanding, or otherwise inciting another to commit a crime." *See Solicitation*, BLACK'S LAW DICTIONARY (11th ed. 2019); *see* Fifth Circuit Order, Appx. Tab A, at p. 13, fn. 11.

As the court in *Ex parte Paxton* noted, there is nothing inherently vague, indefinite or uncertain regarding the word "solicit" – a word that is defined in the dictionary – and its import is understood by people of ordinary intelligence who understand the meaning of the English language. *Ex parte Paxton*, 493 S.W.3d at 306 (citing *Page v. State*, 492 S.W.2d 573, 575-76 (Tex.Crim.App. 1972); *Coutlakis v. State*, 268 S.W.2d 192, 198 (Tex.Crim.App. 1954 (op. on reh'g)).

b) "Encouraging" potentially eligible mail-in voters to register and "promoting" voter access are not prohibited speech or conduct for VDRs. Indeed, they are perfectly consistent with the expressed legislative intent in the Election Code itself.

In her original federal court complaint and in the declaration that she made in connection with her motion for preliminary injunction, Morgan does not assert that

she intends to "solicit" eligible voters to request mail ballots. She instead asserts that she fears potential prosecution for "encouraging" eligible voters to request mail-in ballot applications, and that this fear chills her speech. ROA.37-52 at ¶35; ROA.98-102 at ¶¶18 & 20. But, on its face §276.016(a)(1) does not prohibit Morgan or anyone else from simply "encouraging"[8] voters to request a mail-in ballot application. Instead, according to its plain text the statute prohibits "*solicit[ing]* the submission of an application to vote by mail from a person who did not request an application." TEX. ELEC. CODE §276.016(a)(1) (emphasis added).

The Fifth Circuit queries whether other past or future intended speech or conduct that Morgan has testified about in connection with her voting responsibilities as a VDR – including going door-to-door in her neighborhood, working campus-area voter registration booths, asking elderly or infirm neighbors if they have considered voting by mail, or recommending that people vote early if they are going to be out of town on election day – might subject Morgan to prosecution under §276.016(a)(1). The answer should be "no."

The legislative intent regarding whether such conduct might violate §276.016(a)(1) is in the Election Code itself. Indeed, the statutory provisions that

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[8] Merriam-Webster defines "encourage" as "to inspire with courage, spirit, or hope; to attempt to persuade; to spur on; to give help or patronage to." *See Encourage*, Merriam-Webster, *http://www.merriam-webster.com/dictionary/encourage* (last visited, April 6, 2022) Unlike for solicitation, there does not appear to be any "criminal" definition of "encouragement" in Black's Law Dictionary. Moreover, "encourage" is not included in the list of verbs employed in Black's criminal definition of "solicitation."

establish the VDR position specifically state that the *very purpose* of the role is to "encourage" voter registration:

> SUBCHAPTER B. VOLUNTARY DEPUTY REGISTRARS; HIGH SCHOOL DEPUTY REGISTRARS
>
> Sec. 13.031. APPOINTMENT; TERM. (a) ***To encourage voter registration***, the registrar shall appoint as deputy registrars persons who volunteer to serve.
> (b) In this code, "voluntary deputy registrar" means a deputy registrar appointed under this section. …

TEX. ELEC. CODE §13.031 (emphasis added). Moreover, one of the four expressed legislative intents of the Election Code – intent that was passed as part of the S.B. 1 legislation – is to "promote voter access." *Id.* at §1.0015 (Added by Acts 2021, 87th Leg., 2nd C.S., Ch. 1 (S.B.1), Sec. 1.04, *eff.* Dec. 2, 2021). These expressed legislative intents, coupled with other tools of statutory construction – most notably, *(i)* if §276.016(a)(1) is somehow deemed to be ambiguous or ambiguous as applied in any way, the provisions of §311.035(a) of the Code Construction Act concerning construction of criminal statutes in favor of the actor potentially subject to the statute, and *(ii)* the provision in the Code Construction Act presuming that statutes are meant to comply with the Texas and U.S. constitutions – can be readily harmonized to conclude that the speech and conduct Morgan has alleged or testified she intends to engage in does not run afoul of the anti-solicitation statute (even if the statute did apply to VDRs).

c) *Providing general information about mail-in voting is expressly allowed under the statute.*

The nature and type of speech that Morgan asserts that she intends to engage in but claims is chilled by her fear of prosecution under §276.016(a)(1) is also specifically addressed in that very section. After certain forms of prohibited solicitation, distribution, authorization or approval of public expenditures, or partial completion of mail-in voter applications are delineated in subsection (a), subsection (e)(1) of the statute specifically states that the provision of "general information" regarding voting by mail is completely legal:

> Sec. 276.016. UNLAWFUL SOLICITATION AND DISTRIBUTION OF APPLICATION TO VOTE BY MAIL. (a) A public official or election official commits an offense if the official, while acting in an official capacity, knowingly:
>
> (1) solicits the submission of an application to vote by mail from a person who did not request an application;
> (2) distributes an application to vote by mail to a person who did not request the application unless the distribution is expressly authorized by another provision of this code;
> (3) authorizes or approves the expenditure of public funds to facilitate third-party distribution of an application to vote by mail to a person who did not request the application; or
> (4) completes any portion of an application to vote by mail and distributes the application to an applicant.
>
> . . .
>
> (e) Subsection (a) does not apply if the public official or election official:
>
> (1) ***provided 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 (emphasis added). The Election Code, read as a whole and in context, can be readily harmonized and construed such that a VDR like Morgan can *(i)* provide potentially eligible voters with general information regarding voting by mail and the vote-by-mail process (including the requirement that a potential mail-in voter must fill out and submit an application in a timely manner), that are *(ii)* coupled with questions of the sort that Morgan has testified about *("Have you considered voting by mail?"; "Do you know if you are eligible to vote by mail in Texas?";* etc.) and would not make them subject to potential criminal liability under the statute. If, that is, VDRs were even in the class or categories of persons who are subject to the statute (they are not).

In sum, nothing in Morgan's complaint, declaration, deposition testimony, or hearing testimony suggests that any of the speech she intends to engage in as a VDR crosses into or even approaches criminal "solicitation" territory. She does not intend to solicit, urge, plea, strongly request, command or importune anyone to request or submit a mail-in voting application, much less have anyone do so in a manner that might be illegal. This Court should find and hold that Morgan's intended speech does not constitute "solicitation" for the purposes of §276.016(a)(1).

C. The Fifth Circuit's third question does not apply to Morgan or her claims.

Morgan, the only plaintiff who has sued District Attorney Dick, has not made any assertions or allegations regarding §31.129 of the Election Code (the civil

liability provision) and who can enforce this provision under the law. This question does not apply to Morgan or her claims.

PRAYER

For the foregoing reasons, District Attorney Dick prays that the Court render a decision in response to the Fifth Circuit's certified questions holding that:

(1) Voluntary Deputy Registrars (VDRs) are not "public officials" under the Texas Election Code (for the purposes of Texas Election Code §276.016(a)(1) or otherwise); and

(2) The speech that Morgan alleges that she intends to engage in does not constitute "solicitation" within the context of Texas Election Code §276.016(a)(1).

District Attorney Dick also prays for any and all other relief to which he is justly entitled.

Dated: April 7, 2022

Respectfully submitted,

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Counsel for Appellant Shawn Dick In His Official Capacity as Williamson County District Attorney

CERTIFICATE OF SERVICE

I hereby certify that on April 7, 2022 a true and correct copy of this reply is support of petition for review, including any and all attachments, is served via electronic service through eFile.TXCourts.gov on parties through all counsel of record.

s/ Sean Breen
Attorney of Record for Appellant Shawn Dick

CERTIFICATE OF COMPLIANCE

Based on a word count run in Microsoft Word 2016, this brief contains 7,465 words, excluding the portions of the brief exempt from the word count under Texas Rule of Appellate Procedure 9.4(i)(1).

s/ Sean Breen
Attorney of Record for Appellant Shawn Dick

Appendix 1

United States Court of Appeals

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No. 22-50110 Longoria v. Paxton
USDC No. 5:21-CV-1223

Dear Hon. Hawthorne,

The Fifth Circuit certified a question of law to the Supreme Court of Texas in connection with the referenced appeal.

If the electronic record is needed, please send an email request to: Clerk's_Opinions_-_USCA5_Mailbox@ca5.uscourts.gov

Sincerely,

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Enclosure(s)

cc and copy of opinion to:
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Mr. Jonathan Gabriel Chaim Fombonne
Ms. Kathleen R. Hartnett
Mr. Randy Tom Leavitt
Mr. Christian Menefee
Mr. Sean Morales-Doyle
Ms. Ranjana Natarajan
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Mr. Zachary Tripp
Mr. Benjamin D. Wilson

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
March 21, 2022
Lyle W. Cayce
Clerk

No. 22-50110

Isabel Longoria; Cathy Morgan,

Plaintiffs—Appellees,

versus

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.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 5:21-CV-1223

Before Southwick, Haynes, and Higginson, *Circuit Judges*.

Per Curiam:*

Plaintiffs Isabel Longoria and Cathy Morgan allege that two recently enacted provisions of the Texas Election Code violate the First and Fourteenth Amendments. The district court granted Plaintiffs' request for

* Pursuant to 5th Circuit Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Circuit Rule 47.5.4.

a preliminary injunction, enjoining enforcement of the challenged provisions. Two defendants—Ken Paxton, the Texas Attorney General, and Shawn Dick, the Williamson County District Attorney—appealed.

There are two threshold issues on appeal: whether Plaintiffs have standing to pursue their claims and whether Longoria's claim against Paxton is barred by sovereign immunity. The outcome of these issues depends, in part, on core state law issues: (1) the interpretation of the term "public official" under the Texas Election Code; (2) the scope of "solicitation" within the challenged provision; and (3) the identity of the state officer tasked with enforcing the civil liability provision. Because we lack clear guidance from Texas courts on these issues and the outcome may be dispositive of the entire appeal, we respectfully CERTIFY questions to the Supreme Court of Texas.

CERTIFICATION FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT TO THE SUPREME COURT OF TEXAS, PURSUANT TO TEXAS CONSTITUTION ART. V, § 3-C AND RULE 58 OF THE TEXAS RULES OF APPELLATE PROCEDURE.

TO THE SUPREME COURT OF TEXAS AND THE HONORABLE JUSTICES THEREOF:

I. Style of the Case

The style of the case in which this certification is made is *Longoria v. Paxton*, No. 22-50110, in the United States Court of Appeals for the Fifth Circuit. The case is on appeal from the United States District Court for the Western District of Texas. Federal jurisdiction is based on a federal question

presented. The Fifth Circuit, on its own motion, has decided to certify these questions to the Justices of the Texas Supreme Court.

II. Background

This suit is a pre-enforcement challenge to two sections of the Texas Election Code: § 276.016(a)(1) (the "anti-solicitation provision") and § 31.129 (the "civil liability provision") as applied to the anti-solicitation provision. The anti-solicitation provision makes it unlawful for "[a] public official or election official" while "acting in an official capacity" to "knowingly . . . solicit[] 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).[1] The civil liability provision creates a civil penalty for election officials who are employed by the state (or one of its political subdivisions) and violate a provision of the election code. *Id.* § 31.129. Together, these provisions provide for civil and criminal liability, punishable by a mandatory minimum of six month's imprisonment, fines up to $10,000, and other civil penalties, including termination of employment and loss of employment benefits. *See id.* §§ 276.016(b), 31.129; TEX. PENAL CODE § 12.35(a)–(b).

Plaintiff Isabel Longoria is the Harris County Elections Administrator, and Plaintiff Cathy Morgan is a Volunteer Deputy Registrar ("VDR") serving in Williamson and Travis Counties. Together, they filed the present suit against the Texas Attorney General, Ken Paxton, and three District Attorneys, Kim Ogg, Shawn Dick, and Jose Garza, in their official

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[1] The anti-solicitation provision provides two exceptions. *See* TEX. ELEC. CODE § 276.016(e). The provision does not apply: (1) if the individual "provide[s] general information about voting by mail, the vote by mail process, or the timeliness associated with voting to a person or the public"; or (2) if the individual engages in solicitation "while acting in the official's capacity as a candidate for a public elective office." *Id.*

capacities. Longoria sued Paxton to enjoin enforcement of the civil liability provision, as applied to the anti-solicitation provision. Additionally, as a result of the determination by the Texas Court of Criminal Appeals that the Texas Attorney General has no independent authority to prosecute criminal offenses created by the Texas Election Code, *see State v. Stephens*, No. PD-1032-20, 2021 WL 5917198 (Tex. Crim. App. Dec. 15, 2021) (not released for publication), Longoria and Morgan also brought suit against the District Attorneys in their respective counties to challenge the criminal penalties imposed by the anti-solicitation provision.

Longoria and Morgan allege that they "routinely encourage[] those who are (or may be) eligible to vote by mail to request an application to vote by mail, both through public statements and in interactions with individual voters," while carrying out their duties as Elections Administrator and VDR. Plaintiffs maintain that they would engage in speech that "encourage[s] voters to lawfully vote by mail," but "are currently chilled from doing so because of the risk of criminal and civil liability" imposed by the anti-solicitation and civil liability provisions. As such, they seek (1) a declaratory judgment that the provisions violate the First and Fourteenth Amendments and (2) an injunction prohibiting Defendants from enforcing the provisions.

After filing suit, Plaintiffs moved for a preliminary injunction seeking to enjoin enforcement of the anti-solicitation and civil liability provisions pending final resolution of the case. After an evidentiary hearing, the district court granted Plaintiffs' motion, enjoining the District Attorney Defendants from criminally prosecuting under the anti-solicitation provision and enjoining all Defendants from enforcing the anti-solicitation provision via the civil liability provision. Defendants Paxton and Dick timely appealed.[2] As a

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[2] Defendants Ogg and Garza filed stipulations indicating that they would not enforce the provisions during the pendency of this litigation. As such, they did not join in

result, only Longoria's challenge to the civil penalty permitted by the civil liability provision and Morgan's challenge to the criminal liability imposed under the anti-solicitation provision are before us.

III. Jurisdiction & Legal Standards

Our court has jurisdiction over interlocutory appeals of preliminary injunctions under 28 U.S.C. § 1292(a)(1). Plaintiffs contend that the district court had jurisdiction under 28 U.S.C. § 1331. However, two of the issues that we must address—whether Plaintiffs have standing and whether sovereign immunity bars Longoria's claim—are threshold jurisdictional questions. *See Air Evac EMS, Inc. v. Tex. Dep't of Ins.*, 851 F.3d 507, 520 (5th Cir. 2017) (standing); *Texas v. Caremark, Inc.*, 584 F.3d 655, 658 (5th Cir. 2009) (sovereign immunity). Therefore, before we can reach the ultimate issue on appeal of whether the district court correctly granted Plaintiffs' request for preliminary relief, we must first determine whether the district court had jurisdiction.

We conclude that certifying three questions to the Texas Supreme Court will significantly aid us in resolving those jurisdictional issues.[3] To determine whether certification is appropriate, we weigh three factors: (1) "the closeness of the question[s]"; (2) federal-state comity; and

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the appeal. Therefore, Longoria's potential criminal liability is not before us on appeal, and the preliminary injunction remains in place as to that portion of the lawsuit.

[3] The Texas Constitution grants the Supreme Court of Texas the power to answer questions of state law certified by a federal appellate court. TEX. CONST. art. V, § 3-c(a). Texas rules provide that we may certify "determinative questions of Texas law" that have "no controlling Supreme Court [of Texas] precedent." TEX. R. APP. P. 58.1.

Although neither party requested certification in this case, we can certify questions to the Supreme Court of Texas on our own motion, and that court has graciously accepted our request to do so in the past. *See, e.g.*, *Norris v. Thomas (In re Norris)*, 413 F.3d 526, 527 (5th Cir. 2005) (per curiam), *certified question answered*, 215 S.W.3d 851 (Tex. 2007).

(3) "practical limitations," such as the possibility of delay or difficulty of framing the issue. *Swindol v. Aurora Flight Scis. Corp.*, 805 F.3d 516, 522 (5th Cir. 2015) (quotation omitted). Those factors have supported our decision to certify important questions of Texas statutory interpretation in the past. *See, e.g.*, *JCB, Inc. v. The Horsburgh & Scott Co.*, 912 F.3d 238, 241 (5th Cir. 2018), *certified question answered*, 597 S.W.3d 481 (Tex. 2019).

IV. Discussion

The threshold issues in this case relate to whether the district court had jurisdiction. Among other things, Defendants argue that jurisdiction was lacking because (1) Plaintiffs do not have standing to pursue their claims, and (2) Longoria's claim is barred by sovereign immunity.

With regard to standing,[4] the primary issue is whether Plaintiffs can establish that they have suffered an injury in fact. To prove injury in fact in the First Amendment context, Plaintiffs must demonstrate that (1) they intend "to engage in a course of conduct arguably affected with a constitutional interest," (2) their "intended future conduct is arguably . . . proscribed by" the provision in question, and (3) "the threat of future enforcement of the [challenged provision] is substantial." *Speech First, Inc. v. Fenves*, 979 F.3d 319, 330 (5th Cir. 2020) (alterations in original) (quoting *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 161–64 (2014)).

Resolution of whether Plaintiffs have satisfied the injury-in-fact requirement depends on the answer to two questions: (1) whether VDRs are considered "public officials" under the anti-solicitation provision of the

[4] To satisfy the Article III standing requirement, Plaintiffs must show: (1) "an injury in fact"; (2) caused by Defendants; and (3) "likely to be redressed by [Plaintiffs'] requested relief." *Stringer v. Whitley*, 942 F.3d 715, 720 (5th Cir. 2019) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992)).

Texas Election Code, and (2) whether the speech Plaintiffs allege that they intend to engage in constitutes "solicitation" under the anti-solicitation provision.

If VDRs are not "public officials," then Morgan cannot be prosecuted under the statute, and if Longoria and Morgan's desired speech is not considered "solicitation," then the speech they wish to engage in is not proscribed—therefore, they cannot prove that there is a threat of civil liability or criminal prosecution. As such, a definitive answer to the aforementioned questions will aid us in determining whether Plaintiffs have suffered an injury in fact sufficient to confer standing in this case.[5]

Similarly, resolution of the sovereign immunity issue depends upon an interpretation of the relevant provisions. Under the doctrine of sovereign immunity, states and their officers are generally immune from private suits unless they consent or unless Congress validly strips their immunity. *City of Austin v. Paxton*, 943 F.3d 993, 997 (5th Cir. 2019). However, *Ex parte Young*, 209 U.S. 123 (1908), permits a plaintiff to sue a state officer in his or her official capacity for an injunction to stop ongoing violations of federal law. *Id.* at 155–56. But the officer sued must have "some connection with the enforcement of the [challenged] act." *Id.* at 157. We have recognized that to satisfy this requirement, the officer must have "the particular duty to enforce the statute in question and a demonstrated willingness to exercise that duty."

[5] We are in receipt of Longoria's Rule 28(j) letter notifying the court of Longoria's resignation from her position as Harris County Elections Administrator, effective July 1, 2022. Our decision to certify questions here has no bearing on the issue of whether Longoria ultimately will have standing to pursue her claims in this case once she leaves office. Our decision here only discusses whether the speech Longoria intends to engage in while still in office constitutes solicitation, sufficient to establish an injury in fact.

Tex. Democratic Party v. Abbott, 978 F.3d 168, 179 (5th Cir. 2020) (quotation omitted).

Our court continues to address these sovereign immunity questions of "some connection" in Texas Election Code cases, even as recently as last week. *See Richardson v. Scott*, No. 20-50774, — F.4th — (5th Cir. Mar. 16, 2022); *Lewis v. Scott*, No. 20-50654, — F.4th — (5th Cir. Mar. 16, 2022); *Tex. All. for Ret. Ams. v. Scott*, No. 20-40643, — F.4th — (5th Cir. Mar. 16, 2022). Thus, the question of whether a sued state official is the proper official to enforce "the particular statutory provision that is the subject of the litigation" continues to be an issue before us. *See Tex. All. for Ret. Ams.*, — F.4th — (quotation omitted).

In this case, Paxton maintains that sovereign immunity bars Longoria's claim against him because he is not the state officer with the duty to enforce the civil liability provision.[6] Therefore, he claims that he lacks the requisite connection for *Ex parte Young* application. As noted above, our precedent requires us to conduct a provision-by-provision analysis. *See id.*; *Tex. Democratic Party*, 978 F.3d at 179. However, such an analysis here provides little clarity on Paxton's role in enforcement. The anti-solicitation is silent as to the enforcement official. *See* TEX. ELEC. CODE § 276.016(a)(1). Based upon the recent decision from the Texas Court of Criminal Appeals in *Stephens*, the parties agree that Paxton does not have the authority to seek criminal prosecution. But the civil liability provision is

[6] We recognize that Paxton has the obligation to represent the state in litigation. TEX. CONST. art. IV, § 22 (notes and commentary) ("The attorney general is the chief law officer of the state" and one of his or her "two principal functions" is "representing the state in civil litigation."). However, having an obligation to *represent* a party in litigation is not the same thing as having enforcement authority. *See, e.g.*, *Cameron v. EMW Women's Surgical Ctr., P.S.C.*, 142 S. Ct. 1002, 1012 n.5 (2022). Thus, it appears this section of the Texas Constitution does not answer our question.

similarly silent as to who may enforce it—the provision only indicates that "[a]n election official may be liable to th[e] state." *Id.* § 31.129. Because the civil liability provision provides little insight on who may enforce it, we are left without a definitive answer as to whether Paxton has the requisite connection for *Ex parte Young* application.

Because each of the aforementioned questions necessarily invoke overarching issues regarding newly enacted provisions of state law and the answers to each will affect future proceedings in this federal suit, we conclude that certification to the Texas Supreme Court is necessary and valuable. *See McKesson v. Doe*, 141 S. Ct. 48, 51 (2020) (per curiam) ("In exceptional instances . . . certification is advisable before addressing a constitutional issue.").

Consideration of the factors cited in *Swindol* likewise demonstrates that certification is appropriate in this case. First, each question presents close issues, and there is limited state law authority to guide our analysis. *Swindol*, 805 F.3d at 522. With regard to question one, the anti-solicitation provision applies only to the conduct of "public official[s]" and "election official[s]." TEX. ELEC. CODE § 276.016(a). "Election official" is statutorily defined but does not include VDRs. *See id.* § 1.005(4–a). Conversely, the Election Code leaves "public official" undefined. *See generally id.*

Another separate Texas statute addressing the judicial branch of Texas provides a definition of "public official" as follows: "*In this section*, a 'public official' means any person selected, appointed, employed, or otherwise designated as an officer, employee, or agent . . . ." TEX. GOV'T CODE § 22.304(a) (emphasis added). However, there are several reasons why we question whether the Government Code definition should control here. First, that definition appears in an entirely different title of Texas

statutory law: a chapter on Appellate Courts, expressly stating that the definition applies "in this section." *Id.* It then details a specific criminal offense but does not say anything about the applicability of that definition elsewhere. Indeed, there is no incorporation by reference or text in the statute indicating that the Government Code's definition of "public official" applies outside this narrow scope. Conversely, this statute addresses a very specific matter of the crime of improper communications to clerks of court for the construction of appellate panels to hear prioritized appeals of injunctive relief or writs of mandamus under Chapter 273 of the Election Code—it does not apply to the provisions relevant here and does not apply to all appeals.[7] Second, applying a broad interpretation of this phrase elsewhere could create a number of wide-ranging ramifications without indication that the Texas legislature so intended. Without guidance from a Texas court or the Texas legislature, we are hesitant to permit such broad and automatic application.

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[7] Indeed, the point is to add public officials, not limit public officials. The full text demonstrates as much:

> (a) In this section, "public official" means any person elected, selected, appointed, employed, or otherwise designated as an officer, employee, or agent of this state, a government agency, a political subdivision, or any other public body established by state law.
>
> (b) Notwithstanding any other law or rule, a court proceeding entitled to priority under Section 22.305 and filed in a court of appeals shall be docketed by the clerk of the court and assigned to a panel of three justices determined using an automated assignment system.
>
> (c) A person, including a public official, commits an offense if the person communicates with a court clerk with the intention of influencing or attempting to influence the composition of a three-justice panel assigned a specific proceeding under this section.
>
> (d) An offense under this section is a Class A misdemeanor.

TEX. GOV'T. CODE § 22.304

Moreover, even if we applied the Government Code's definition of public official here, it is difficult to conclude that VDRs fit within that definition. We question, first, whether VDRs are truly "appointed" to their positions, beyond a mere technical sense. The state provides no discretion to the person who "appoints" the VDRs for their county. Instead, the process of becoming a VDR is mechanical in nature—an individual simply contacts the voter registrar, completes a training, passes an examination, and then receives a certificate "appointing" them to this role.[8] As such, it's not entirely clear whether that process is sufficient to qualify an individual as an appointed "public official" of the state. Second, we question whether VDRs are truly "agents" of the state. One could assume that VDRs are, in essence, merely couriers of forms and completed ballots—they are tasked with handing out voter registration applications and reviewing applications for completeness. *See* TEX. ELEC. CODE §§ 13.042(a), 13.039(a). Based on our interpretation, it appears that the only "power" that a VDR has is the ability to "distribute voter registration application forms throughout the county and receive registration applications submitted to the deputy in person." *Id.* § 13.038. If they receive a completed ballot, they must immediately deliver it to the county registrar. *Id.* § 13.042. Conversely, it appears that it is the *county registrar* "[who] review[s] each submitted application . . . to determine whether it complies with" all eligibility requirements, *id.* § 13.071(a), "approve[s] the application," *id.* § 13.072(a), "indicates that the applicant is eligible for registration," *id.* § 13.072(a)(1), and "prepares [the] voter registration certificates," *id.* § 13.142(a)(1). So, while *county registrars* are undoubtedly "agents," one could determine that VDRs' duties in the voting registration process are more in the realm of a

[8] *See* TEX. ELEC. CODE §§ 13.001, 13.002, 13.033.

delivery person than an "agent."[9] Of course, no one contends that these volunteers are "employees" or "officers" of Texas. But, at bottom, it's unclear whether a volunteer may (or should) be considered an agent of the state simply because they hand out voter registration forms and courier those forms to a county registrar.

It furthermore does not appear that any Texas court has opined on whether VDRs are considered public officials, and even the district court was unsure. In the absence of a statutory definition or Texas court interpretation, we are left without clear guidance as to who qualifies as a "public official." With these considerations in mind, we conclude that whether or not VDRs are "public officials" under the Election Code is an open question.[10]

The second question—the scope of "solicitation"—is similarly open. Plaintiffs contend that they would like to "encourage[] those who are (or may be) eligible to vote by mail to request an application to vote by mail, both through public statements and in interactions with individual voters." Specifically, Plaintiffs testified to some examples of speech that they wish to engage in: going door-to-door in their neighborhood, recommending that people vote early if they are going to be out of town on election day, and answering phone calls about mail-in voting. In so doing, they would, for example, like to "give mere truthful advice in response to questions from individual voters," such as specifically giving advice on mail-in ballots in response to questions about voting. Plaintiffs contend that they are chilled from doing so, however, due to fear of violating the anti-solicitation

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[9] We certainly respect the volunteer work of the VDRs; we just question whether that makes them a Texas "public official" within this provision.

[10] No one disputes that, while she is still in office, Longoria is an "election official." However, we must determine Morgan's standing because she is the only one before us as to whom the preliminary injunction regarding criminal prosecution is at issue.

provision. But it's not entirely clear whether any of the aforementioned examples of speech about mail-in voting would be considered "solicitation" under the anti-solicitation provision. Indeed, Morgan testified that she wasn't sure whether her interactions would count as solicitation under the law, but she was "scared that [they] would." Similarly, Longoria testified that she had "not seen anything that define[d] solicitation from the Secretary of State's office," and she was concerned by the "vague, gray, nebulous" line between permitted and proscribed speech.

Plaintiffs are not the only ones confused about what constitutes "solicitation." In fact, *no one* at the preliminary injunction hearing could articulate what speech was proscribed by the provision. The Director of the Elections Division of the Texas Secretary of State's office testified that his office had not given definitions to the election workers about what constituted solicitation,[11] and beyond a "general dictionary definition," the office internally did not know what the word "solicit" meant under the provision. Similarly, when questioned by the district court and our court, defense counsel did not contend that Plaintiffs' proposed speech constituted solicitation. Defense counsel intimated that "solicitation as used in criminal statutes often includes a more formal requirement" than the speech that Plaintiffs described, but likewise could not provide a clear standard. Defense counsel urged the district court to consider the text of the statute, dictionaries, and legislative history to determine the statute's scope, but also conceded that an analysis of the word "solicit" would require "an *Erie* question of state law." Near the conclusion of the hearing, the district court

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[11] Indeed, the term "solicitation" has, as a key definition, a criminal definition. *See, e.g.*, *Solicitation*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("The criminal offense of urging, advising, commanding, or otherwise inciting another to commit a crime."). Importantly, neither Plaintiff is requesting to advise people who are not eligible to vote by mail to do so, only those who are permitted to do so under existing Texas law.

voiced its concern that none "of the government's lawyers [could] tell [the court] what solicit mean[t]."

At bottom, in the absence of state court authority interpreting the anti-solicitation provision and given the uncertainty among all familiar parties as to what speech falls under the provision's umbrella, the scope of solicitation is unclear—does "solicitation" mean only requesting criminal conduct, i.e., submitting an application to vote by mail illegally? Does it mean recommending voting by mail? Does it mean directing or telling someone to do so? In the absence of state law authority, this question also presents a close call weighing in favor of certification.

The third question is likewise open. We are aware of no authority from Texas courts determining who is statutorily tasked with enforcement of the civil liability provision. Thus, without clear guidance, this question presents a close call.

The second factor cited in *Swindol*, federal-state comity, also weighs heavily in favor of certification. *See* 805 F.3d at 522. If we affirm the preliminary injunction, we would effectively invalidate a new state law on constitutional grounds, at least for now. As the Supreme Court has noted, certification is particularly "appropriate where an unconstrued state statute is susceptible of a construction by the state judiciary which might avoid in whole or in part the necessity for federal constitutional adjudication." *Bellotti v. Baird*, 428 U.S. 132, 146–47 (1976) (internal quotation marks and citation omitted). Here, a federal court has questioned the constitutionality of the anti-solicitation provision recently passed by the Texas legislature and, presumably, important to them, making consideration of the actual meaning of the statute highly important. *See id.*

Additionally, we recognize that the definition and scope of a Texas statute recently enacted by the Texas legislature and directly impacting

Texas elections presents a "matter of particular importance to the State of Texas." *Garofolo v. Ocwen Loan Serv., L.L.C.*, 626 F. App'x 59, 64 (5th Cir. 2015) (per curiam). Because the resolution of these questions implicates important Texas interests, we are hesitant to undertake these issues in the first instance. Rather, federal-state comity weighs heavily in favor of certification.

Third, and finally, practical considerations do not disfavor certification; while we recognize the time sensitivity of the issues at hand, there is no reason to think that certification would cause undue delay—to the contrary, the Texas Supreme Court is known for its "speedy, organized docket." *Degan v. Bd. of Trs. of Dall. Police & Fire Pension Sys.*, 766 F. App'x 16, 19–20 (5th Cir. 2019) (per curiam), *certified questions answered*, 594 S.W.3d 309 (Tex. 2020). Indeed, in the past, the Texas Supreme Court graciously accepted certification of cases that required prompt timing. We recognize that the Texas Supreme Court is a busy court with numerous pressing and important items on its docket. We defer to that court as to when to decide this matter, though we respect that they are aware of the impending run-off elections and the time sensitivity of the issues here, given that this is an election year. We know that if the court decides to accept this certification, it will conduct its timing appropriately.

We therefore conclude that certification is warranted.

V. Questions Certified

We respectfully request that the Texas Supreme Court address and answer the following questions.

> (1) Whether Volunteer Deputy Registrars are "public officials" under the Texas Election Code;
>
> (2) Whether the speech Plaintiffs allege that they intend to engage in constitutes "solicitation" within the context of

Texas Election Code § 276.016(a)(1). For example, is the definition narrowly limited to seeking application for violative mail-in ballots? Is it limited to demanding submission of an application for mail-in ballots (whether or not the applicant qualifies) or does it broadly cover the kinds of comments Plaintiffs stated that they wish to make: telling those who are elderly or disabled, for example, that they have the opportunity to apply for mail-in ballots?; and

(3) Whether the Texas Attorney General is a proper official to enforce Texas Election Code § 31.129.

VI. Conclusion

We disclaim any intent that the Texas Supreme Court confine its reply to the precise form or scope of the questions certified. More generally, if the Texas Supreme Court determines a more effective expression of the meaning of these terms than answering the precise questions we have asked, we defer to the court to take that course. We transfer to the Texas Supreme Court the record and appellate briefs in this case with our certification. We retain this appeal pending the Texas Supreme Court's response.

QUESTIONS CERTIFIED TO THE SUPREME COURT OF TEXAS.

Appendix 2

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

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

<u>ORDER</u>

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

BACKGROUND

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

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

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

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

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

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

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

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

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

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

II. Voting by Mail in Texas

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

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

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

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

III. The Challenged Provisions and Impact on Plaintiffs' Speech

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

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

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

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

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

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

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

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

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

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

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

IV. Procedural History

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

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

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

DISCUSSION

I. Subject Matter Jurisdiction

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

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

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

A. Standing

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

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

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

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

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

1. Injury in fact

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

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

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

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

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

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

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

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

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

a. Plaintiff Longoria

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

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

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

Id. ¶¶ 16–17.

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

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

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

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

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

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

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

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

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

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

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

b. Plaintiff Morgan

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

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

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

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

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

2. Causation and redressability

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

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

B. Sovereign Immunity

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

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

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

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

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

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

1. Local district attorneys have a sufficient connection to enforcement

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

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

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

2. The Attorney General has a sufficient connection to enforcement

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

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

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

TEX. ELEC. CODE § 273.021.

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

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

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

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

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

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

C. *Pullman* Abstention

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

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

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

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

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

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

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

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

D. *Younger* Abstention

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

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

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

II. Preliminary Injunction Standard

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

A. Likelihood of Success on the Merits

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

1. Plaintiffs' speech is protected by the First Amendment

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. Irreparable Harm

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

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

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

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

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

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

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

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

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

C. Balance of the Equities and Public Interest

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

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

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

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

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

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

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

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

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

CONCLUSION

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

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

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

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

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

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

It is so **ORDERED**.

SIGNED this February 11, 2022.

XAVIER RODRIGUEZ
UNITED STATES DISTRICT JUDGE