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SUPREME COURT OF TEXAS
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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

REPLY BRIEF OF APPELLANT SHAWN DICK

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SUMMARY OF THE ARGUMENT

In their brief, Plaintiffs/Appellees Isabel Longoria and Cathy Morgan agree that Volunteer Deputy Registrars (VDRs) are not "public officials" for the purposes of §276.016(a)(1). All parties agree that this is the case, and that the answer to Question 1 is thus "no." Moreover, because she is neither a "public official" nor an "election official" subject to this statute and otherwise lacks standing to maintain suit, Morgan never had standing to sue and there was never a justiciable case or controversy against or involving District Attorney Dick.

Because Morgan lacks standing and no subject matter jurisdiction exists over her claims, this Court should refrain from issuing an advisory opinion regarding the Fifth Circuit's "solicitation" question (Question 2) as it would apply to Morgan if she did have standing. But, even if the Court elects to address this question in the context of Morgan's alleged intended speech, it is clear that her intended speech (mentioning vote-by-mail "as an option" to certain voters) does not constitute "solicitation" under any common or generally understood meaning of the word and instead is "general information" regarding voting by mail that is specifically exempted under the §276.016(e)(1) safe harbor provision.

ARGUMENT

A. All parties agree that VDRs are not "public officials" and thus not subject to §276.016(a)(1). As such, Morgan lacks standing to sue.

Although Morgan and her attorneys originally argued in the federal district court that Morgan, as a VDR, is or may be a "public official" for the purposes of §276.016(a)(1)[1], they now (correctly) agree that she is not. *See* APPELLEES' BRIEF at 19-22. As such, all parties to this litigation now agree that Morgan is not subject to §276.016(a)(1) in any respect – whether in her role as a VDR (she is by consensus not a "public official" and by statutory definition not an "election official") or as a private citizen. All parties thus agree that the answer to the Fifth Circuit's Question 1 is "no."

This Court's answer to Question 1 should be "no" for the myriad of reasons detailed in the parties' briefings, including:

- The Texas Legislature did not include VDRs in the definition of "election officials" in the Election Code and S.B.1 when it easily could have done so (DICK BRIEF at 26-27; APPELLEES' BRIEF at 20-21);
- The plain meaning and ordinary usage of the term "public official" do not encompass VDRs, who are volunteers (DICK BRIEF at 28-29; AG BRIEF at 16-17; APPELLEES' BRIEF at 19-21);
- The relevant dictionary definitions do not square with a conclusion that VDRs are "public officials" (DICK BRIEF at 29-30; AG BRIEF at 17-18; APPELLEES' BRIEF at 19-20);

[1] *See, e.g.*, ROA.69 (Plaintiffs' motion for preliminary injunction).

- VDRs are not public employees and do not have the hallmarks of a "public official" (DICK BRIEF at 29-30; AG BRIEF at 14-15; *see* APPELLEES' BRIEF at 20-21), including:
    - they are unpaid volunteers;
    - they are not elected to any office;
    - their appointment is ministerial and their duty is temporary;
    - they are not required to take an oath of office
    - they do not exercise sovereign power; and
    - they do not perform discretionary duties;

- Calling VDRs public "officials" makes no sense when they are not even defined as election "officials" or election "officers" in the Election Code (DICK BRIEF at 28);

- Other Texas statutes that do define "public official" do not support a conclusion that VDRs are public officials (DICK BRIEF at 30-32; AG BRIEF at 21-23);

- Texas caselaw does not support a conclusion that VDRs are "public officials" (DICK BRIEF at 33-35; AG BRIEF at 23-26); and

- The context of the passage of S.B.1 also does not support a conclusion that VDRs are "public officials" (AG BRIEF at 19-20).

Morgan asserts in her brief that a clarification by this Court "that VDRs do not constitute 'public officials'" for the purposes of §276.016(a)(1) "would provide Plaintiff Morgan complete relief in this action." *See* APPELLEES' BRIEF at 22. But, if this Court holds that VDRs are not "public officials" subject to §276.016(a)(1) – which it *should* do for all the reasons set forth above and in the parties' briefings –

her claims must be dismissed[2] because she lacks standing to sue and, indeed, she has never had standing to sue District Attorney Dick or anyone else in this litigation. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (discussing and applying federal standing requirements); *see also Garcia v. City of Willis*, 593 S.W.3d 201, 206 (Tex. 2019) ("Standing consists of some interest peculiar to the person individually and not just as a member of the public."). There has *never* been a justiciable case or controversy involving Morgan and her claims, and thus there is no federal or state subject matter jurisdiction over them. *See Kitty Hawk Aircargo, Inc. v. Chao*, 418 F.3d 453 (5th Cir. 2005) (holding that standing to maintain a federal suit is determined as of the time the federal complaint was first filed, and dismissing case for want of standing and subject matter jurisdiction)*; see also Meyers v. JDC/Firethorne, Ltd.*, 548 S.W.3d 477, 484-85 (Tex. 2018) (noting that standing is a component of subject matter jurisdiction that can be raised at any time, even on appeal, and is a constitutional prerequisite to maintaining suit); *Tex. Dep't of Transp. v. Sunset Valley*, 146 S.W.3d 637, 646 (Tex. 2003) (same).

B. Because Morgan lacks standing, this Court should refrain from issuing a purely advisory opinion whether her alleged intended speech constitutes "solicitation" under §276.016(a)(1).

[2] District Attorney Dick raised this standing issue in the Rule 12(b)(1) and 12(b)(6) motion to dismiss that he filed as his first pleading in the federal court proceeding. *See* ROA.259-61. That motion has never been ruled upon and is still pending before the district court.

Since Morgan lacks standing (and has since the inception of the federal lawsuit), this Court should refrain from ruling on any aspect of Morgan's claims regarding what constitutes "solicitation" under §276.016(a)(1) because any such ruling would be an impermissible advisory opinion:

> Subject matter jurisdiction is essential to the authority of a court to decide a case. Standing is implicit in the concept of subject matter jurisdiction. The standing requirement stems from two limitations on subject matter jurisdiction: the separation of powers doctrine and, in Texas, the open courts provision. Subject matter jurisdiction is never presumed and cannot be waived.
>
> . . .
>
> The distinctive feature of an advisory opinion is that it decides an abstract question of law without binding the parties. **An opinion issued in a case brought by a party without standing is advisory because rather than remedying an actual or imminent harm, the judgment only addresses only a hypothetical injury. Texas courts, like federal courts, have no jurisdiction to render such opinions.**

Tex. Ass'n of Business v. Tex. Air Control Bd., 852 S.W.2d 440, 443-44 (Tex. 1993) (internal cites omitted) (emphasis added); *see also City of Willis*, *supra*, at 206-07 (citing and quoting *Tex. Air Control Bd.* and holding that the plaintiff lacked standing such that any ruling on his claims for prospective relief would be advisory).

Yet, if for any reason this Court elects to address Morgan's alleged intended speech in its decision on these certified questions[3], it should hold that such speech

[3] District Attorney Dick recognizes that this Court has recently addressed the issue whether opinions on certified questions from federal courts constitute advisory opinions in *Richards v.*

is not prohibited "solicitation" under the statute. As District Attorney Dick has previously briefed, "solicit" and "solicitation" are not vague terms and are routinely used in Texas criminal statutes without statute-specific definitions. *See* DISTRICT ATTORNEY DICK'S APPELLANT'S BRIEF at 35-43. Moreover, Morgan's intended speech is, by her own admission[4], "general information" regarding vote-by-mail that clearly falls within the safe harbor provisions of §276.016(e)(1). TEX. ELEC. CODE §276.016(e)(1).

Indeed, the only intended speech of Morgan that the plaintiffs can point to in their brief as arguably within the so-called anti-solicitation provisions of §276.016(a)(1) is her desire to "proactively raise vote by mail *as an option* for college students who indicate they cannot travel to the county in which they are registered for an election."[5] *See* APPELLEES' BRIEF at 29 (italics added); *see*

State Farm Lloyds, 597 S.W.3d 492, 497 n.6 (Tex. 2020). *Richards* involved a single certified question with no standing or subject matter jurisdiction implications. *See id.* at 494. However, this case differs materially in posture from *Richards.* Here, there are multiple questions certified and the consensus answer to the first question posed (whether VDRs like Morgan are "public officials") means that Morgan lacks standing to sue in the case and thus there is no subject matter jurisdiction over her claims (*i.e.,* Question 2 is rendered moot with respect to Morgan by virtue of the consensus answer to Question 1). *Richards* is thus distinguishable because it involved only one certified question and there were no resulting standing or jurisdictional issues raised by the answer to that single question.

[4] *See* ROA.460-63 (Morgan deposition testimony).

[5] Even Morgan's attorneys in their brief characterize this speech as "closer to the line." *See* APPELLEES' BRIEF at 30, n.2.

ROA.101. Morgan testified as follows at the preliminary injunction hearing (italics added)[6]:

> **Q. And in the past when doing that [voter information booth] work have you ever recommended to someone that you interacted with that they should vote by mail?**
>
> A. Well, one person comes to mind, but this happened more than once at that voter information booth.
>
> A young woman walked up and she said, "Well, I would vote but I can't get home." I said, "Where is home?" And she said, "Harlingen."
>
> "Well, that is a long way away." And she said, "Yeah. I just can't get away. I've got too much school." *And I said, "Well, have you considered voting by mail?"*
>
> Now, this is October. And she said, "Oh, that would be fabulous. Can I do that?" And I said, "Well, you can fill out an application for it, you see."
>
> So she did so.
>
> **Q. Can you think of any other examples when you have encouraged someone to vote by mail?**
>
> A. Yes. There's a woman in my neighborhood who is now deceased, but at the time I was walking door to door and knocked on her door …
>
> *And I said, "Have you considered voting by mail?"* And she said, "That would be wonderful. How do I do that?" So I said, "Well, I'll be back tomorrow with two applications for you from Georgetown."

That speech does not constitute "solicitation" of mail-in ballot applications under any existing or commonly understood interpretation of the word.

[6] ROA.765-66.

This Court should refrain from issuing an advisory opinion regarding Morgan's intended speech because she lacks standing and there is no federal or state subject matter jurisdiction over her claims. If the Court does rule on such matters, however, it should hold that her alleged intended speech does not constitute speech prohibited by the statute.

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) Any decision regarding the speech that Morgan alleges that she intends to engage as it pertains to the "solicitation" provision of Texas Election Code §276.016(a)(1) would be an advisory opinion because Morgan lacks standing to sue.

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

Dated: April 27, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 27, 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
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CERTIFICATE OF COMPLIANCE

Based on a word count run in Microsoft Word 2016, this brief contains 1,612words, excluding the portions of the brief exempt from the word count under Texas Rule of Appellate Procedure 9.4(i)(1).

s/ Sean Breen
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