No. 22-50110

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ISABEL LONGORIA, CATHY MORGAN,
Plaintiffs - Appellees,

v.

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

On Appeal from the United States District Court for the Western District of Texas, San Antonio Division;
No. 5:21-cv-1223-XR, Hon. Xavier Rodriguez

DEFENDANT/APPELLANT SHAWN DICK'S MOTION FOR REMAND WITH INSTRUCTIONS TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ISABELLA LONGORIA AND CATHY MORGAN, *Plaintiffs-Appellees*,	§	
vs.	§	NO. 22-50110
WARREN K. PAXTON, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF TEXAS, AND SHAWN DICK, IN HIS OFFICIAL CAPACITY AS WILLIAMSON COUNTY DISTRICT ATTORNEY, *Defendants-Appellants.*	§	

DEFENDANT/APPELLANT SHAWN DICK'S MOTION FOR REMAND WITH INSTRUCTIONS TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

Defendant/Appellant Shawn Dick, in his official capacity as District Attorney of Williamson County, Texas, files this motion to remand to the district court with instructions to dismiss for want of subject matter jurisdiction pursuant to F.R.A.P. 27, respectfully showing:

I. SUMMARY OF MOTION

This interlocutory appeal arises from a constitutional challenge to certain mail-in ballot provisions of the Texas Senate Bill 1 (SB1) election legislation now

codified at Section 276.016(a)(1) of the Texas Election Code. Plaintiffs/Appellants Cathy Morgan and Isabel Longoria filed their suit challenging these provisions in the Western District of Texas. Only Morgan, who had asserted her claims based on her status as a Voluntary Deputy Registrar (VDR), has sued District Attorney Dick. Dick and Texas Attorney General Ken Paxton filed this appeal after the district court issued its preliminary injunction enjoining Dick, Paxton, and two other named defendants from enforcing these provisions of SB1 against these plaintiffs.

The issues on appeal were briefed to this Court, and oral argument was held on March 8, 2022. The Court then issued its order *sua sponte* certifying three questions – including the threshold question (Question 1) whether VDRs are "public officials" for the purposes of Section 276.016(a)(1) and its enforcement – to the Texas Supreme Court. While Morgan had taken the position before both the district court and this Court that VDRs are "public officials" subject to the challenged provisions, she filed her brief with Texas Supreme Court unequivocally agreeing that VDRs are not public officials and thus are not subject to Section 276.016(a)(1)'s prohibitions. Her counsel maintained that position at the oral argument held before the Texas Supreme Court on May 11th.

All parties now agree that VDRs are not public officials, and there is thus no actual case or controversy involving Morgan and her claims against District Attorney Dick. As a result, the federal courts lack subject matter jurisdiction over

Morgan and her claims because she lacks standing to pursue them (and always has). As such, this Court should remand the case to the district court with instructions to: *(i)* dismiss Morgan's claims for lack of subject matter jurisdiction (subject to any considerations regarding assessment of fees and costs); and *(ii)* vacate the preliminary injunction and order insofar as it pertains in any respect to Morgan and/or District Attorney Dick.

II. PROCEDURAL BACKGROUND AND RECENT DEVELOPMENTS

District Court Proceedings

The procedural history of this case preceding this appeal is set forth in District Attorney Dick's original brief on the merits. *See* District Attorney Dick's Appellant's Brief (*filed,* Feb. 23, 2022) at pp. 11-13. Plaintiff/Appellee Cathy Morgan is the only plaintiff who has asserted claims against Dick in the suit. *See* ROA.37-52 at ¶¶37-46. In the district court proceedings, Morgan repeatedly took the position that she had standing to sue Dick because, as a VDR, she feared that she would be prosecuted under Section 276.016(a)(1) in her capacity as a "public official" subject to its provisions. *See, e.g.*, ROA.46-47 (Plaintiffs' First Amended Complaint at ¶¶34-35); ROA.71-72 (Plaintiffs' Opposed Motion for Preliminary Injunction at pp. 7-8); ROA.98 & 100-01(Cathy Morgan Declaration at ¶¶3 & 16-22); ROA.762 & 767-69 (Preliminary Injunction Hearing Transcript at pp. 7 & 12-

14). Her counsel took the same position before the district court in the preliminary injunction hearing. *See* ROA.873-74 (Preliminary Injunction Hearing Transcript).

District Attorney Dick had filed a motion to dismiss pursuant to Federal Rules 12(b)(1) and 12(b)(6) as his first responsive pleading in the district court proceeding. ROA.240-64. Among other things, Dick moved for dismissal on the ground that Morgan lacks standing because she failed to sufficiently establish that VDRs are "public officials" or "election officials" who are potentially subject to the challenged SB1 provisions. *See id.* at ROA.259-61(Dick's Motion to Dismiss at pp. 11-13). The district court has not yet expressly ruled on Dick's motion to dismiss.

The district court issued its order enjoining District Attorney Dick and the other defendants from enforcing the challenged provisions of SB1 as to these plaintiffs on February 11, 2022. ROA.626-65. While the district court expressed some hesitation regarding the issue whether Morgan, as a VDR, belongs to the class of persons whose speech is regulated under SB1 ("public officials" and "election officials"), it ultimately concluded that VDRs "likely qualify as public officials under Section 276.016(a)(1)" and thus Morgan had standing to pursue her claims against Dick. ROA.643 (Order at p. 18).

The Interlocutory Appeal

District Attorney Dick and Attorney General Paxton each appealed the district court's preliminary injunction to this Court. ROA.754-55 & 722-23. The parties all

filed briefs on an expedited briefing schedule. In her brief, Morgan asserted that the district court had correctly found that Morgan "likely qualifies as a 'public official' in her capacity as a VDR." *See* Brief of Plaintiffs-Appellees (*filed,* Feb. 23, 2022) at p. 23. Oral argument was held on March 8, 2022. Once again, Morgan's counsel argued that Morgan was a "public official."[1] On March 21, 2022, this Court issued its order certifying three questions of Texas law to the Texas Supreme Court that "will significantly aid us in resolving [standing and sovereign immunity] jurisdictional issues." Certification Order at p. 5. This included the Court's certified Question 1: Whether Volunteer Deputy Registrars are "public officials" under the Texas Election Code; …". *Id.* at p. 15.

Proceedings Before the Supreme Court of Texas

The Texas Supreme Court established an expedited briefing schedule on the certified questions. In their briefs, District Attorney Dick and Attorney General Paxton both asserted that VDRs are not "public officials" for the purposes of SB1 for a variety of reasons, and that the answer to Question 1 was thus "no." In their response brief, Morgan and Longoria unequivocally agreed with this conclusion:

[1] The audio of the oral argument is at https://www.ca5.uscourts.gov/OralArgRecordings/22/22-50110_3-8-2022.mp3

SUMMARY OF THE ARGUMENT

I. This Court should answer "no" to the first certified question. Although the statute is ambiguous, Plaintiff Morgan agrees with Defendants that VDRs do not qualify as "public officials" within the meaning of the solicitation ban. That is correct as a matter of ordinary meaning. And this reading provides full protection to the speech of VDRs by excluding them from the ambit of the statute and thus allowing them to freely exercise their First Amendment rights.

See Appellees' Response Brief (Texas Supreme Court) (*filed,* April 22, 2022), attached as Exhibit "A" hereto, at p.18; *see also id.* at p. 3 (asserting that the answer to Question 1 was "no" and that VDRs are not "public officials") & 19-22 (same). They took the same position in open court at the oral argument before the Texas Supreme Court on May 11, 2022.[2]

[2] Videos of recent Texas Supreme Court oral arguments can be found at https://www.texasbarcle.com/CLE/TSCSearchResults.asp?bRecent=1. The video of the May 11 oral argument has not been posted as of the date of this motion.

III. ARGUMENT

A. There is no subject matter jurisdiction over Morgan's claims and they must be dismissed.

Standing is a prerequisite to the exercise of federal jurisdiction. *See Cole v. Gen Motors Corp.*, 484 F.3d 171, 721 (5th Cir. 2007). Lack of standing is a defect in subject matter jurisdiction. *See Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541-42, 105 S. Ct. 1326 (1986)). Rule 12(h)(3) of the Federal Rules of Civil Procedure provides that "[i]f the court determines at any time that it lacks subject matter jurisdiction, the court must dismiss the action." FED. R. CIV. P. 12(h)(3).

Article III standing requires a plaintiff to establish that she has suffered an injury in fact traceable to the defendant's actions that will be redressed by a favorable ruling." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130 (1992). To have standing under Article III, the plaintiff must have "alleged such a personal stake in the outcome of the controversy as to warrant his [or her] invocation of federal-court jurisdiction." *Salazar v. Buono*, 559 U.S. 700, 711, 130 S. Ct. 1803 (2010) (quoting *Horne v. Flores*, 557 U.S. 433, 129 S. Ct. 2579)).

Here, Morgan has now admitted in both judicial pleadings and in open court that VDRs are not "public officials" for the purposes of §276.016(a)(1) and its enforcement. Because as a VDR she is neither a "public official" nor an "election official," the statute on its face does not apply to her and she cannot allege any cognizable injury arising from it or its existence – much less any alleged injury

traceable to District Attorney Dick or any injury that can be redressed by a court ruling. *See* TEX. ELEC. CODE §276.016(a) ("A public official or election official commits an offense if the official, while acting in an official capacity, knowingly …".); *see also* TEX. ELEC. CODE §1.005(4-a) (omitting VDRs from the list of persons defined as an "election official" under the code). She thus lacks Article III standing (and always has), and there is no federal subject matter jurisdiction over her claims and they must be dismissed.

For these reasons, this Court should remand the case to the district court with instructions to: *(i)* dismiss Morgan's claims for lack of subject matter jurisdiction (subject to any consideration regarding assessment of fees and costs); and *(ii)* vacate the preliminary injunction and order insofar as it pertains in any respect to Morgan and/or District Attorney Dick. *See Kenon v. City of S. Padre Island*, 452 Fed. Appx. 518, 519 (5th Cir. 1991) (*per curiam*); *see also Cooter & Gell v. Hartmax Corp.*, 406 U.S. 384, 395, 110 S. Ct. 2447 (1990) ("It is well established that a federal court may consider collateral issues after an action is no longer pending. For example, district courts may award costs after an action is dismissed for want of jurisdiction.")

IV. CONCLUSION AND PRAYER

District Attorney Dick respectfully requests that the Court remand the case to the district court with instructions to dismiss Morgan's claims for lack of subject

matter jurisdiction (subject to any consideration regarding assessment of fees and costs), and vacate the preliminary injunction and order insofar as it pertains in any respect to Morgan and/or Dick. District Attorney Dick also prays for any and all other relief to which he is entitled.

Dated: May 24, 2022

Respectfully submitted,

s/ Sean Breen
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Counsel for Appellant Shawn Dick In His Official Capacity as Williamson County District Attorney

CERTIFICATE OF CONFERENCE

I certify that I (or another attorney for Appellant Shawn Dick) conferred by email on May 23, 2022 with counsel for Cathy Morgan regarding the relief sought by this motion. Counsel for Ms. Morgan stated they oppose the relief sought. Therefore, this motion is presented as **OPPOSED.**

s/ Sean Breen
Attorney of Record for Appellant
Shawn Dick

CERTIFICATE OF SERVICE

I certify that on May 24, 2022, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. I further certify that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13, and that (2) the electronic submission is an exact copy of any paper documents in compliance with Fifth Circuit Rule 25.2.1

s/ Sean Breen
Attorney of Record for Appellant
Shawn Dick

CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limit of Rule 27(d)(2)(A) of the Federal Rules of Appellate Procedure because, excluding the parts of the document exempted by Rule 32(f) and 5th CIR. R. 32.1: this document contains **1,606** words.

2. This document complies with the typeface requirements of Rule 32(a)(5) and 5th CIR. R. 32.1 and the type-style requirements of Rule 32(a)(6) because: this document has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Times New Roman 14 point font.

s/ Sean Breen
Attorney of Record for Appellant
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Exhibit "A"

to Defendant/Appellant Shawn Dick's Motion to Dismiss

(Appellees' Apr. 22, 2022 Response Brief in No. 22-0224; *Paxton et al. v. Longoria et al.*; In the Supreme Court of Texas)

No. 22-0224

In the Supreme Court of Texas

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,

v.

ISABEL LONGORIA; CATHY MORGAN,

Plaintiffs-Appellees.

On Questions Certified from the
United States Court of Appeals for the Fifth Circuit

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RECORD REFERENCES

The Fifth Circuit record on appeal is cited as "ROA.[Page#]."

STATEMENT OF THE CASE

Nature of the Case: This case is a First Amendment challenge to the constitutionality of a discrete provision of Senate Bill 1, which is a viewpoint-based and content-based restriction on speech that subjects public officials and election officials to criminal penalties if they "solicit[]" applications to vote by mail. Tex. Elec. Code § 276.016(a)(1). Election officials who violate Section 276.016(a)(1) are also subject to civil penalties. *Id.* § 31.129. Plaintiff-Appellee Isabel Longoria is the Elections Administrator for Harris County, and Plaintiff-Appellee Cathy Morgan is a Volunteer Deputy Registrar in Williamson and Travis Counties. In federal court, they sued the District Attorneys for Harris, Travis, and Williamson Counties and the Texas Attorney General to enjoin enforcement of the law.

Federal Trial Court: The Honorable Xavier Rodriguez, United States District Court Judge for the Western District of Texas, San Antonio Division.

Disposition in the Trial Court: The district court granted Plaintiffs' motion for a preliminary injunction. ROA.626–65.

Parties in the United States Court of Appeals for the Fifth Circuit: Appellants are Warren K. Paxton, Attorney General of Texas; and Shawn Dick, District Attorney of Williamson County. The District Attorneys for Harris and Travis Counties did not appeal the preliminary injunction.

Appellees are Isabel Longoria and Cathy Morgan.

Disposition in the United States Court of Appeals for the Fifth Circuit:	The Attorney General appealed the preliminary injunction as to Section 31.129 and asked the Fifth Circuit to stay the preliminary injunction pending appeal, grant an administrative stay in the alternative, and expedite the briefing schedule. Shawn Dick appealed the preliminary injunction as to Section 276.016(a)(1). As a result, the preliminary injunction as to Section 276.016(a)(1) remains in effect against Defendants Kim Ogg and Jose Garza. The Fifth Circuit entered an administrative stay and carried the motion to stay with the case. Following expedited briefing and oral argument, the Fifth Circuit certified three questions of state law to this Court: (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); and (3) whether the Texas Attorney General is a proper official to enforce Texas Election Code § 31.129. *Longoria v. Paxton*, No. 22-50110, 2022 WL 832239, at *6–7 (5th Cir. Mar. 21, 2022) (per curiam) (unpublished) (Southwick, Haynes, and Higginson JJ.).

STATEMENT OF JURISDICTION

This Court has jurisdiction under article V, section 3-c(a) of the Texas Constitution.

ISSUES PRESENTED

The United States Court of Appeals for the Fifth Circuit certified the following questions to this Court:

(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.

TO THE HONORABLE SUPREME COURT OF TEXAS:

INTRODUCTION

Millions of Texas voters are eligible to vote by mail. Yet, in September 2021, the Texas legislature passed an unusual provision that makes it a felony for any "public official" or "election official" to "solicit[]" a mail-in ballot application while acting in an official capacity. Tex. Elec. Code § 276.016(a)(1). This new offense thus imposes criminal penalties that turn on the viewpoint expressed by the speaker: it is a crime to urge or encourage a registered voter to submit a lawful mail-in ballot application, even if the voter otherwise would be unable to vote, but it is not a crime to *discourage* such an application. The new viewpoint-based offense carries harsh criminal and civil penalties, including, among other things, a mandatory minimum of six months' imprisonment, fines up to $10,000, termination of employment, and loss of benefits. *Id.* §§ 276.016(b), 31.129; Tex. Penal Code § 12.35(a)–(b).

The threat of enforcement imposed a deep chilling effect on the speech of election workers in Texas, who reasonably feared that they could be prosecuted and punished for urging, recommending, or encouraging registered and potentially eligible voters to submit lawful vote-by-mail applications. To vindicate their First Amendment rights to recommend use

of a lawful means of voting, Harris County Election Administrator Isabel Longoria and Volunteer Deputy Registrar Cathy Morgan brought suit in federal court against the Texas Attorney General and three district attorneys. Plaintiffs asserted that they reasonably feared prosecution or punishment for their protected speech and that enforcement of the solicitation ban by those officials would violate the First Amendment. After an evidentiary hearing, the district court entered a preliminary injunction against enforcement, holding that the threat of enforcement was chilling Plaintiffs' protected speech and that the viewpoint-based restriction violated the First Amendment. Defendants appealed.

The United States Court of Appeals for the Fifth Circuit has now certified three questions to this Court: (1) whether Volunteer Deputy Registrars are "public officials" subject to the solicitation ban; (2) whether speech that Plaintiffs-Appellees intend to engage in qualifies as "solicitation"; and (3) whether the Attorney General is authorized to enforce the new law's civil penalties. This Court is accordingly presented with definitive questions of statutory construction under Texas law, whereas the federal First Amendment suit is predicated on Plaintiffs' reasonable fear of prosecution and the law's chilling effect on protected speech.

This Court should hold that the answers to the Fifth Circuit's questions are "no," "no," and "no." First, Plaintiffs agree with the Attorney General and District Attorney Dick that Volunteer Deputy Registrars are not "public officials" within the meaning of Tex. Elec. Code § 276.016(a)(1), and accordingly are not subject to its restrictions. Although that phrase is undefined and ambiguous and thus caused Plaintiff Morgan to reasonably fear she faced a threat of prosecution, the statute is best read to exclude Volunteer Deputy Registrars. A "public official" is a person who holds a public office or exercises sovereign power. Volunteer Deputy Registrars do neither. They hold no public office. And they perform duties—notably delivering voter-registration applications—that can be performed without state involvement at all, and thus do not involve the exercise of sovereign power. Voluntary Deputy Registrars thus are not public officials. This Court should clarify that the statute does not apply to Plaintiff Morgan, so she is able to speak freely about voting by mail.

Second, as a matter of ordinary meaning, the term "solicit" in the statute encompasses some speech in which Plaintiffs intend to engage. "Solicitation" ordinarily means "requesting or seeking to obtain something"; "a request or petition"; "[t]he criminal offense of urging, advising,

commanding, or otherwise inciting another to commit a crime." *Solicitation*, BLACK'S LAW DICTIONARY (11th ed. 2019). And it ordinarily carries a connotation of a "personal petition" addressed "to a particular individual." *Solicit*, BLACK'S LAW DICTIONARY (6th ed. 1990). The solicitation ban thus is ordinarily read to encompass recommending, urging, requesting, or advising particular voters (rather than the public at large) to submit an application to vote by mail.

Some of Plaintiffs' speech fits within that definition. They seek to affirmatively and proactively urge, advise, recommend, request, and encourage voters to request lawful mail-in ballot applications. They further seek to do so in speech to specific voters or groups of voters, including during in-person interactions in which applications are present so those individuals can readily submit applications. And on that reading, the statute is unconstitutional as a viewpoint-based criminal ban on protected speech. Indeed, Defendants do not dispute that the statute is viewpoint-based, and in the Fifth Circuit, they relied on case law under which that ban is unconstitutional as applied to the speech of elected officials. *See* Brief for Attorney General of Texas 23–24, 28, *Longoria v. Paxton*, No. 22-50110, 2022

WL 832239 (5th Cir. Mar. 21, 2022) (citing *City of El Cenizo v. Texas*, 890 F.3d 164, 185 (5th Cir. 2018)).

As a matter of constitutional avoidance, however, this Court should adopt a saving construction and hold that the solicitation ban is limited to knowingly soliciting *unlawful* mail-in ballots. In a statute carrying criminal penalties, the term "solicitation" strongly connotes encouraging another to engage in criminal activity. That construction finds support in legal dictionaries, other Texas statutes, and the broader legal context: virtually all statutes that criminalize solicitation involve encouraging another to commit a crime (or some other unlawful conduct). Limiting the law to knowingly soliciting illegal voting would also avoid grave First Amendment problems because, as narrowed, the statute would fit within the well-settled exception for speech incident to crime. *See, e.g.*, *United States v. Stevens*, 559 U.S. 460, 468–69 (2010); *United States v. Williams*, 553 U.S. 285, 298 (2008). Plaintiffs do not seek to knowingly encourage illegal ballots, and thus, under this appropriately narrowed interpretation, the solicitation ban would not apply to their proposed speech.

Third, as to whether the Attorney General is authorized to enforce its civil penalties, Section 31.129 of the Texas Election Code provides that an

election official may be "liable to this state" for civil penalties for a violation of the Election Code, which includes the solicitation ban. Longoria thus reasonably feared that the Attorney General could bring a civil action against her for soliciting lawful mail-in ballot applications. She nonetheless agrees with the Attorney General that, properly construed, he lacks the power to enforce the civil penalties found in Section 31.129. The Legislature did not explicitly grant the Attorney General that authority, and accordingly, he does not possess it. *See* Br. for Attorney General 37–44 [hereinafter AG Br.]. Indeed, for similar reasons, no state official possesses the authority to seek civil penalties under that provision.

STATEMENT OF FACTS

A. The Novel Solicitation Ban

"Millions of Texans are eligible to vote by mail, and approximately 980,000 did so in the 2020 presidential election." ROA.629. Under the Election Code, Texas voters are eligible to vote by mail if they are at least 65 years old, sick or disabled, confined due to childbirth, absent from their county of residence, or, in some instances, confined to jail or victims of family violence, sexual assault, or other similar crimes. Tex. Elec. Code

§§ 82.001–.004, .007–.008. Any eligible person who timely submits an application to vote by mail may do so. *Id.* § 86.001(b).

In September 2021, the Texas legislature enacted Senate Bill 1 ("S.B. 1"). ROA.69; Election Integrity Protection Act of 2021, 87th Leg., 2d C.S., ch. 1, 2021 Tex. Sess. Law Serv. 3783. Among other things, S.B. 1 added Election Code Sections 276.016(a)(1) and 31.129, which create a novel content- and viewpoint-based offense that carries criminal and civil penalties for soliciting applications to vote by mail.

Section 276.016(a)(1) provides that "[a] public official or election official commits an offense if the official, while acting in an official capacity, knowingly . . . solicits the submission of an application to vote by mail from a person who did not request an application." An "offense" under Section 276.016(a)(1) is a state jail felony, which carries a mandatory minimum of six months' imprisonment, a maximum of two years' imprisonment, and a fine of up to $10,000. *Id.* § 276.016(b); Tex. Penal Code § 12.35. The law includes only two exceptions: A public official or election official may (1) "provide[] 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) engage in solicitation "while acting in the official's capacity as a candidate for a public elective office." Tex. Elec. Code § 276.016(e).

Section 31.129(b) establishes civil penalties for a violation of the Election Code by certain election officials, including a violation of the solicitation offense. Section 31.129(b) provides that certain election officials "may be liable to this state for a civil penalty if the official: (1) is employed by or is an officer of this state or a political subdivision of this state; and (2) violates a provision of [the election] code." Section 31.129 does not define what civil penalties are available (or unavailable), other than to specify that "[a] civil penalty imposed under this section may include termination of the person's employment and loss of the person's employment benefits." *Id.* Section 31.130 notes that "[a]n 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." Section 31.129 does not expressly vest any state official with enforcement authority, nor does any other statute.

B. Plaintiffs' Speech Is Chilled by the Solicitation Ban

The enactment of the solicitation ban casts a deep chill on the speech of public and election officials in Texas. "Solicitation" ordinarily means "requesting or seeking to obtain something"; "a request or petition"; "urging, advising, commanding, or otherwise inciting." *Solicitation*, BLACK'S LAW DICTIONARY (11th ed. 2019). As a result, Plaintiffs fear seeking, requesting, urging, recommending, or encouraging others to apply to vote by mail because of the risk that Defendants will prosecute them or take civil enforcement action against them under Sections 276.016(a)(1) and 31.129. *See, e.g.*, ROA.769–70, 772 (Morgan); ROA.803–08, 814–16 (Longoria). They are accordingly refraining from protected speech in which they would otherwise engage. Moreover, Plaintiffs' reasonable fear of prosecution is enough to establish that they have suffered an injury in fact. In the pre-enforcement context, "a plaintiff satisfies the injury-in-fact requirement where he alleges an intention to engage in a course of conduct *arguably* affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014) (emphasis added) (citation omitted).

1. Longoria's Speech and the Threat of Punishment

Plaintiff Isabel Longoria is the Harris County Elections Administrator. ROA.797. Longoria is responsible for registering people to vote, encouraging them to vote, and managing the logistical functions of elections in Harris County. ROA.797. Longoria testified that the solicitation ban is causing her to refrain from a wide range of speech. She testified that she now will not "advise, recommend, urge, [or] counsel people to submit a mail ballot application ultimately to vote by mail, even if it's the only way they can vote." ROA.801. Longoria further testified that she has to "stop [her] nature to be proactive to help voters" and "can't even respond . . . appropriately to negative impacts" that she sees "from these laws in other areas of mail ballot voting." ROA.808. When pressed with questions about mail-in voting, she has to "stop mid-sentence sometimes" and tell voters that "the law prevents me from saying much more. If you have a question, good luck, and call us, but I can't—I'm tentative to overreach in this moment." ROA.808.

Longoria further testified that, in the past, she had "conducted outreach events at senior citizen homes and residential facilities, where [she] spoke with numerous voters about their rights 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." ROA.91–92. She had also "conducted similar outreach events for disabled voters and voters in jail." ROA.91–92. Due to the solicitation ban, however, she was refraining from engaging in such efforts due to the risk that her speech would qualify as solicitation.

More broadly, Longoria testified that she otherwise would speak at public events, public fora, and town halls, and with individual voters about who is eligible to apply to vote by mail and "who should apply to vote by mail given the laws and the context." ROA.802. At these meetings and in these conversations in the past, she has fielded questions about who should vote by mail, and under what circumstances she would recommend that someone vote by mail. ROA.802. She explained that she also uses social media, letters, phone calls, emails, faxes, and text messages to reach voters on these topics, but no longer feels comfortable advising voters about voting by mail for fear of violating the solicitation ban. ROA.802, 806–09. Longoria further testified she wanted to send a letter to voters explaining "where to get a mail ballot application, who is eligible to get a mail ballot application, why they should get a mail ballot application, et cetera." ROA.810–11. She has not done so, however, because at a recent conference of elections officials, representatives

of the Secretary of State's office intimated that sending letters to voters about renewing their applications to vote by mail "might get close to the line" of violating the solicitation ban. Longoria accordingly fears criminal prosecution for engaging in "solicitation." ROA.810–11.

As an election official, Longoria also fears possible civil penalties and the loss of her employment or benefits due to the threat of a potential enforcement action by the Attorney General under Section 31.129. Section 31.129 provides that "an election official," "may be liable to this state for a civil penalty if the official . . . violates a provision of [the election] code." Tex. Elec. Code § 31.129(b); *see also id.* § 1.005(4-a) (defining "election official"). Although the statute does not expressly provide for enforcement by the Attorney General, by indicating that an election official may be "liable to this state," the statute caused Longoria to believe that the Attorney General could potentially bring such an action to enforce civil penalties for violations of the Election Code. Longoria thus fears civil enforcement as well.

2. Morgan's Speech and the Threat of Punishment

Plaintiff Cathy Morgan is a Volunteer Deputy Registrar ("VDR") in Travis and Williamson Counties. ROA.762–63. Texas law permits each county's voter registrar to appoint VDRs to assist in the voter registration

process. Tex. Elec. Code § 13.031. As a VDR, Morgan "register[s] people to vote" by distributing voting information to potential voters, explaining voting options to them, and helping them fill out voter registration forms. ROA.762–64, 774. She provides voting information to potential voters while staffing booths near the University of Texas campus and at a farmers market and also while walking through her neighborhood to speak with neighbors. ROA.762–64. Morgan actively and regularly encourages people to vote and, until recently, to vote by mail. *See* ROA.765-67.

Morgan similarly testified that the threat of enforcement under Section 276.016(a)(1) has chilled her speech. ROA.769–70. Morgan explained that, in the past, she would call an elderly neighbor to ask if she "turned in her application for ballot by mail," but she no longer does so for fear of prosecution under Section 276.016(a)(1). ROA.770. Likewise, in the past, Morgan has asked homebound neighbors or college students living away from home if they have "considered voting by mail" when they expressed that in-person voting would be difficult, leading those voters to submit applications to vote by mail. ROA.765–66. But Morgan is now refraining from such speech due to reasonable fear that it would subject her to prosecution for urging or recommending ballot applications. ROA.766–68.

Morgan also fears that, as a VDR, she is a "public official" within the meaning of Section 276.016(a)(1), and therefore subject to possible criminal punishment for her speech. Although there is no statutory definition of the term, S.B. 1 elsewhere defines "public official" in a manner that covers VDRs: For purposes of an anti-nepotism provision in the Texas Government Code, S.B. 1 defines "public official" 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." S.B. 1 § 8.05 (codified at Tex. Gov't Code § 22.304). VDRs fit that definition as they are "appointed" by a county official and empowered to "distribute voter registration application forms throughout the county and receive registration applications" for the registrar, thus acting as "agents" of "a political subdivision." *See* Tex. Elec. Code §§ 13.033, .038; *see also Voting for Am., Inc. v. Andrade*, 488 F. App'x 890, 892 (5th Cir. 2012) ("Texas has instituted a system whereby volunteers can be appointed as [VDRs] empowered to accept voters' applications to be registered."). Morgan thus reasonably fears prosecution, and the chilling effect has caused her to refrain from engaging in protected speech.

C. Procedural History

With their speech chilled by the risk of criminal prosecution (and for Longoria civil penalties), Plaintiffs brought suit in the United States District Court for the Western District of Texas against the Texas Attorney General to vindicate their First Amendment rights and obtain protection against enforcement. ROA.25. Five days later, the Texas Court of Criminal Appeals ruled that the Attorney General does not have the independent authority to prosecute criminal cases in the district court, including those brought under the Election Code. *State v. Stephens*, No. PD-1032-20, 2021 WL 5917198, at *10 (Tex. Crim. App. Dec. 15, 2021) (not released for publication). On December 27, 2021, Plaintiffs filed an amended complaint adding the District Attorneys of Harris, Travis, and Williamson Counties as defendants and filed a motion for preliminary injunction the following day. ROA.37, 40, 88; TEX. CONST. art. V, § 21; Tex. Code Crim. Proc. art. 2.01.

On February 11, 2022, the district court held an evidentiary hearing. The court heard testimony from Longoria, Morgan, and Brian Keith Ingram, the Director of Elections for the Texas Secretary of State's office. *See generally* ROA.756–940. Longoria and Morgan testified that the solicitation

ban prevented them from recommending that voters lawfully request mail-in ballot applications. *See generally* ROA.761–836.

Later that day, the district court entered a preliminary injunction barring the District Attorney Defendants from enforcing Section 276.016(a)(1) and all Defendants from enforcing Section 31.129 against Plaintiffs. ROA.720–21. The court held that Plaintiffs had standing because their "speech has been and continues to be chilled" by Sections 276.016(a)(1) and 31.129 and their injury would be redressed by an order enjoining the provisions' enforcement. ROA.638, 641–44. The court further held that the *Ex parte Young* exception applied to the District Attorney Defendants due to the threat that they would bring a criminal prosecution, and applied to the Attorney General due to the threat that he would seek civil enforcement under Section 31.129. ROA.646–47.

On the merits, the district court held that the solicitation ban was likely unconstitutional. ROA.655–58. At the hearing, Defendants did not dispute that Section 276.016(a)(1) is a viewpoint-based restriction on speech. ROA.928–29; *see also* ROA.658. Such laws are presumptively unconstitutional. *See Iancu v. Brunetti*, 139 S. Ct. 2294, 2299 (2019). Defendants did not—and cannot—articulate any reasoned basis for the law's

existence, much less a compelling interest that could satisfy strict scrutiny. *See, e.g.*, ROA.848. The district court also determined that Plaintiffs' speech was entitled to full First Amendment protection because enforcement of the solicitation ban does not fit within the "public-employee speech" exception of *Garcetti v. Ceballos*, 547 U.S. 410 (2006). ROA.655. To that point, the court found that Defendants do not employ either Longoria or Morgan, as they instead report to county officials. ROA.654. The court also found that *Garcetti* does not apply to criminal punishment because imprisonment is a sovereign act, not a form of "employer discipline" permitted under *Garcetti*. ROA.654–655; *see also, e.g.*, *Ex parte Perry*, 483 S.W.3d 884, 911–12 (Tex. Crim. App. 2016).

The Attorney General and Williamson County District Attorney Shawn Dick appealed, and the Attorney General moved for a stay pending appeal or, in the alternative, a temporary administrative stay, and asked the court to expedite the appeal. ROA.722–23, 752, 754–55. The Fifth Circuit granted an administrative stay and expedited the appeal. ROA.752. Following briefing and argument, the Fifth Circuit certified three questions to this Court relating to the scope of the solicitation ban and the threat of

civil enforcement by the Attorney General.[1] This Court accepted the questions on March 23, 2022.

SUMMARY OF THE ARGUMENT

I. This Court should answer "no" to the first certified question. Although the statute is ambiguous, Plaintiff Morgan agrees with Defendants that VDRs do not qualify as "public officials" within the meaning of the solicitation ban. That is correct as a matter of ordinary meaning. And this reading provides full protection to the speech of VDRs by excluding them from the ambit of the statute and thus allowing them to freely exercise their First Amendment rights.

II. This Court should answer "no" to the second certified question. At the outset, as a matter of ordinary meaning, much of Plaintiffs' proposed speech is subject to prosecution as "solicitation" of mail-in ballot applications: They seek to affirmatively recommend, advise, encourage, and urge particular voters to seek to vote by mail. This Court should adopt a

[1] On the same day that this case was argued before the Fifth Circuit, Longoria announced her intent to resign from her position as Harris County Elections Administrator, effective July 1, 2022. On April 19, 2022, the Harris County Elections Commission accepted her resignation. This case remains a live controversy at least until Longoria leaves her position because she intends to encourage, urge, request, advise, and recommend that eligible voters submit applications to vote by mail as the November general election approaches, and remains at risk of criminal prosecution and civil penalties.

narrowing construction of the statute, however, and hold that the statute applies only to knowing encouragement of ballot requests by ineligible voters. That construction would avoid grave constitutional problems and would exclude all of Plaintiffs' proposed speech from the ambit of the statute.

III. This Court should answer "no" to the third certified question. Although the statute is ambiguous, Plaintiff Longoria agrees with the Attorney General that he lacks authority to pursue civil penalties under Section 31.129 for violating the solicitation ban. Section 31.129 states that an election official "may be liable to this state for a civil penalty" if the official violates the Election Code. Tex. Elec. Code § 31.129(b). But no statute empowers the Attorney General (or any other state official) to enforce that provision. As a result, no state official has that authority.

ARGUMENT

I. Volunteer Deputy Registrars Are Not "Public Officials"

First, although Plaintiff Morgan brought this action due to the chilling effect that arises from the risk of possible criminal liability, she ultimately agrees with the Attorney General and District Attorney Dick that VDRs are best read not to be "public officials" within the scope of § 276.016(a)(1). AG Br. 13–27; Brief of Shawn Dick 23–35 [hereinafter Dick Br.]. That

interpretation would exclude VDRs from the ambit of the statute and provide Morgan with complete relief.

As a matter of ordinary meaning, VDRs are not "public officials." A "public official" is "[s]omeone who holds or is invested with a public office; a person elected or appointed to carry out some portion of a government's sovereign powers." *Public Official*, BLACK'S LAW DICTIONARY (11th ed. 2019). And "sovereign power" ordinarily refers to "[t]he power to make and enforce laws." *Sovereign Power*, BLACK'S LAW DICTIONARY (11th ed. 2019); *see also Tex. Off. of Pub. Util. Couns. v. FCC*, 183 F.3d 393, 449 (5th Cir. 1999) ("[S]tates have a sovereign interest in the power to create and enforce a legal code." (citation omitted)).

VDRs neither hold, nor are invested with, any public office. The position is both temporary and on a volunteer basis. And although they are appointed by county officials to help with certain tasks relating to elections, those tasks do not involve "carry[ing] out some portion of a government's sovereign powers." *Public Official*, BLACK'S LAW DICTIONARY (11th ed. 2019). Indeed, VDRs are not empowered to "make" or "enforce laws." *Sovereign Power*, BLACK'S LAW DICTIONARY (11th ed. 2019). Rather, they accept voter-registration applications, determine whether they are complete, and

deliver them, thus facilitating the administration of elections. Tex. Elec. Code §§ 13.038–39, .042. This process does not involve exercise of the state's sovereign power. A voter may also submit a voter-registration application in person, through the mail, or by fax, without the involvement of the state in any way. *Id.* § 13.002(a).

The statutory context further supports the point. The statute reaches speech by "election officials" and "public officials," and the legislature included a defined list of specific positions that qualify as "election officials"—from which VDRs are notably absent. *See* Tex. Elec. Code § 1.005(4-a). The natural inference is that VDRs and any other positions whose sole responsibilities relate to elections that are *not* listed as "election officials" do not qualify as "public officials" either. Otherwise, the term "public official" would have an expansive meaning that would render meaningless the legislatures' strict limitations on the scope of "election officials": Even positions that the legislature deliberately omitted from the list of "election officials" would qualify as "public officials." But this Court will not construe an ambiguous statute in a manner that would render key language meaningless or superfluous. *See In re Mo. Pac. R.R. Co.*, 998 S.W.2d 212, 216 (Tex. 1999) ("We do not lightly presume that the Legislature

may have done a useless act."). Thus, the legislature's decision to catalog the election-related positions that constitute "election officials" and to omit VDRs from that list suggests VDRs are not "election officials" *or* "public officials" and therefore are not covered.

That interpretation of "public official" also avoids grave constitutional problems for a defined class of individuals by removing VDRs from the ambit of the statute and thus conclusively eliminating any chilling effect for them. *See Brady v. Fourteenth Court of Appeals*, 795 S.W.2d 712, 715 (Tex. 1990). This Court accordingly should clarify that VDRs do not constitute "public officials" under the solicitation ban, and, therefore, that VDRs do not need to fear prosecution for exercising their First Amendment rights by encouraging eligible voters to submit vote-by-mail applications. That interpretation would provide Plaintiff Morgan complete relief in this action.

II. Some of Plaintiffs' Speech Would Qualify as "Solicitation" as a Matter of Ordinary Meaning, But This Court Should Limit the Statute To Knowing Encouragement of Illegal Mail-in Ballot Applications

The ordinary and most common usage of the term "solicit" covers a wide range of speech urging, encouraging, recommending, or requesting a person to do something. On that reading, much of Plaintiffs' proposed speech could trigger a possible prosecution as "solicitation." Another more legalistic

meaning is limited to urging another *to commit a crime*. *See Longoria*, 2022 WL 832239, at *6 (asking this Court whether the definition of "solicitation" is "narrowly limited to seeking application for violative mail-in ballots"). On that reading, none of Plaintiffs' proposed speech would be covered by the statute because Plaintiffs do not seek to knowingly urge others to request illegal mail-in ballot applications. That interpretation also avoids the constitutional problem because the statute, as construed, would fit within the "speech integral to crime" exception to the First Amendment. *United States v. Alvarez*, 567 U.S. 709, 717–18 (2012). As a matter of constitutional avoidance, this Court should thus adopt the latter interpretation and conclusively hold that the answer to the second question is "no." The Court should also reject the Attorney General's unnatural reading of the term "solicit" because it simply substitutes one undefined term for another equally indeterminate—and unconstitutionally vague—definition.

A. As a Matter of Ordinary Meaning, Much of Plaintiffs' Proposed Speech Qualifies as "Solicitation"

1. "When a statute contains a term that is undefined," as "solicit" is in this case, "the term is typically given its ordinary meaning." *Sw. Royalties, Inc. v. Hegar*, 500 S.W.3d 400, 405 (Tex. 2016). To discern ordinary meaning, Texas courts refer to "a wide variety of sources, including dictionary

definitions, treatises and commentaries, [this Court's] own prior constructions of the word in other contexts, the use and definitions of the word in other statutes and ordinances, and the use of the words in our rules of evidence and procedure." *Jaster v. Comet II Constr., Inc.*, 438 S.W.3d 556, 563 & n.10 (Tex. 2014) (collecting cases); *see also* Tex. Gov't Code § 311.023 (listing factors courts may consider in construing statutes).

The broader and more commonplace interpretation of "solicit" is strongly supported by dictionary definitions. *See In re Athans*, 478 S.W.3d 128, 132 (Tex. App.—Houston [14th Dist.] 2015, orig. proceeding) ("[C]ommon dictionary definitions of the word 'solicit' contain a diverse array of meaning[s]."). For example, *Webster's Second New International Dictionary* defines "solicit" as "to approach with a request or plea"; "to endeavor to obtain by asking or pleading"; "[t]o make petition to"; "to entreat"; "importune"; "to seek eagerly or actively"; "to court"; "[t]o urge"; "[t]o tempt"; "to seek to induce or elicit." *Solicit*, WEBSTER'S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE (2d ed. 1950) [hereinafter WEBSTER'S SECOND]. *Webster's Third New International Dictionary* similarly defines "solicit" to mean "to make petition to: entreat, importune, concern"; "to approach with a request or a plea"; "to move to action: serve as an urge or

incentive to"; "to strongly urge (as one's cause or point)"; "to endeavor to obtain by asking or pleading"; and "to seek eagerly or actively." *Solicit*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (2002 ed.) [hereinafter WEBSTER'S THIRD]. The *Oxford English Dictionary* defines "solicit" as "[t]o entreat or petition (a person) for, or to do, something"; "to urge, importune"; "to ask earnestly or persistently"; "[t]o make request or petition"; and "to beg or entreat." *Solicit*, OXFORD ENGLISH DICTIONARY (2d ed. 1989).

Legal dictionaries reflect this ordinary reading, as *Black's Law Dictionary* defines "solicitation" as "[t]he act or an instance of requesting or seeking to obtain something"; "a request or petition." *Solicitation*, BLACK'S LAW DICTIONARY (11th ed. 2019). Other editions of *Black's Law Dictionary* further provide that the term "solicit" "implies a serious request," but "it requires no particular degree of importunity, entreaty, imploration, or supplication." *Solicit*, BLACK'S LAW DICTIONARY (6th ed. 1990). *Black's* also states that the term implies "personal petition" addressed "to a particular individual." *Id.* Leading treatises support a similar interpretation. *See* 2 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 11.1 (3d ed. 2021) (solicitation occurs when "the actor with intent that another person commit a crime, have enticed, advised, incited, ordered or otherwise encouraged that

person to commit a crime."); *see also id.* § 11.1(c) (noting authority "to the effect that it is not a criminal solicitation to make a general solicitation by publication to a large indefinable group.").

Texas statutes defining "solicitation" are also consistent with this interpretation. *See, e.g.*, Tex. Penal Code § 15.03(a) (defining criminal solicitation as "request[ing], command[ing], or attempt[ing] to induce another" to commit a felony); Tex. Lab. Code § 51.0145(a)(2)(B) (defining "solicit" to include "request[ing] donations"); *Smith v. State*, 959 S.W.2d 1, 21–22 (Tex. App.—Waco 1997, pet. ref'd) (defining "solicit" for purposes of Tex. Penal Code § 36.08(d) "to mean the taking of some action which the relation of the parties justifies in construing into a serious request" (citation omitted)).

Texas courts, in turn, have often adopted that same meaning when interpreting statutes. *See Coutlakis v. State*, 268 S.W.2d 192, 258 (Tex. Crim. App. 1954) (op. on reh'g) ("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' . . . ."); *Athans*, 478 S.W.3d at 135 & n.5 (collecting and relying upon ordinary dictionary definitions); *see also, e.g.*, *Ex parte Victorick*, 453 S.W.3d 5, 15 (Tex. App.—Beaumont

2014, pet. ref'd) (construing "solicit" according to its commonly defined terms as "to approach with a request or plea" and "to endeavor to obtain by asking or pleading"); *Martinez v. State*, 696 S.W.2d 930, 932 (Tex. App.—Austin 1985, pet. ref'd) (finding solicitation of a bribe where a police officer "asked for" $150 from a motorist in return for not issuing a traffic citation).

That interpretation of "solicit" is also consistent with the State government's own understanding of the contours of the offense. During the preliminary injunction hearing, Brian Keith Ingram, the Director of the Elections Division in the Texas Secretary of State's Office, testified, "If there was a recommendation that voters vote by mail, that would be a solicitation of an application for a ballot by mail I believe." ROA.858; *see also* ROA.850 ("I would be very careful with that. I would suggest [that voting by mail is] one of the options for a person. I wouldn't be using words that recommend it as a first option.").

2. On that ordinary reading, some of Plaintiffs' speech would be exempt from possible prosecution because it would fall outside the reach of the statute. First, some of Plaintiffs' speech would be exempt as generalized speech directed to the public at large (including on social media) because

such speech does not involve a "personal petition" addressed "to a particular individual." *Solicit*, BLACK'S LAW DICTIONARY (6th ed. 1990); *see, e.g.*, ROA.833–34. Merely providing generalized information about voting is similarly excluded both because it does not involve urging another to vote and because it fits within the statutory safe harbor. Such abstract advocacy does not entail recommendations or requests directed at any particular people, but instead is directed to the public. *See* ROA.833–34. Second, some of the communications involve merely asking a question, without urging, recommending, requesting, pleading, commanding, enticing, or importuning a person to vote by mail. *E.g.*, ROA.770; *cf. Athans*, 478 S.W.3d at 132 ("merely asking" a question does not qualify).

Still, much of Plaintiffs' speech would face a threat of criminal prosecution. For example:

1. Longoria testified that "[m]any" of her communications "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." ROA.92–93.

2. Longoria testified that in the past, she engaged in "outreach events at senior citizen homes and residential facilities" where she "spoke with numerous voters," "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." ROA.91–92. She also

engaged in similar outreach for "disabled voters and voters in jail." ROA.92.

3. Longoria testified that a county commissioner directed her "to do everything you can to encourage people to vote by mail," which she understood to mean taking "proactive" steps to encourage people to submit applications. ROA.814.

4. Longoria testified that she intended to "send[] a letter to voters reminding them and urging them to re-apply to vote by mail, and . . . advising them of the urgency," but that officials from the Secretary of State's Office informed her that such speech was potentially unlawful. ROA.813.

5. Longoria testified that, but for the solicitation ban, she would "bring vote-by-mail applications to events" at which she would discuss the benefits of mail-in voting, but she is refraining from doing so because of the risk that it "conveys a message that encourages voters to submit such an application." ROA.94.

6. Morgan testified that, but for the solicitation ban, she would "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." ROA.101.

As a matter of ordinary English, each of those communications (and others) would trigger a threat of prosecution as "solicitation" by requesting, urging, encouraging, seeking, imploring, or inducing people to submit mail-in ballot applications. *See Solicit*, WEBSTER'S SECOND; *Solicit*, WEBSTER'S THIRD. Plaintiffs testified that, but for the threat of possible enforcement, they would "proactively" and "affirmatively" recommend mail-in voting to particular voters, and indeed that Longoria would do "everything she could"

to encourage people to vote by mail. *E.g.*, ROA.92–93 (Longoria); ROA.101 (Morgan); ROA.770 (Morgan).[2] Indeed, if this case involved bribery, drugs, robbery, or murder (rather than voting), there could be no serious doubt that such speech would qualify as "solicitation." *See, e.g.*, *Cook v. State*, No. 04-17-00149-CR, 2018 WL 3747737, at *3 (Tex. App.—San Antonio Aug. 8, 2018, no pet.) (unpublished) (upholding solicitation conviction where "a rational trier of fact could have found Cook requested, commanded, or attempted to induce Cowan to murder").

B. As a Matter of Constitutional Avoidance, This Court Should Limit the "Solicitation" Offense To Knowingly Encouraging Illegal Mail-In Voting Applications

As a matter of constitutional avoidance, however, this Court should adopt the narrower and more legalistic interpretation of "solicitation" as limited to encouraging another to commit a crime and, as a result, hold that none of Plaintiffs' speech could trigger prosecution or civil enforcement.

As noted above, the statute does not define "solicitation." And the narrower definition is amply supported. For example, among the definitions

[2] Morgan's question to the college students is closer to the line, but "proactively" raising the issue can be fairly understood in context to be more than merely asking a question and instead also to connote implicit advice or recommendation provided in earnest. As a result, she would face a threat of prosecution even for that speech.

of "solicitation" in *Black's Law Dictionary* is "[t]he criminal offense of urging, advising, commanding, or otherwise inciting another *to commit a crime*." *Solicitation*, BLACK'S LAW DICTIONARY (11th ed. 2019) (emphasis added); *see also Solicit*, AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (5th ed. 2022) ("To commit the criminal offense of enticing or inciting (another) *to commit an illegal act*." (emphasis added)). Leading treatises reflect this same understanding. *See* 2 SUBSTANTIVE CRIMINAL LAW § 11.1 (describing the "crime of solicitation" as being completed when a person acting with intent "enticed, advised, incited, ordered or otherwise encouraged that person *to commit a crime*" (emphasis added)). Texas statutes also embody this more limited definition. For example, Texas Penal Code § 15.03(a) defines criminal solicitation as "request[ing], command[ing], or attempt[ing] to induce another to engage in specific conduct that . . . would constitute [a] felony."

The surrounding context strongly supports reading the statute to be limited to knowingly encouraging applications for illegal mail-in ballots, *i.e.*, knowingly seeking a mail-in ballot application from a person the official knew was ineligible and did not request an application. The fact that the anti-solicitation offense carries criminal penalties strongly implies that the

underlying conduct must also be unlawful. When solicitation is made a criminal offense, the underlying conduct that was solicited is virtually always a crime or a civil infraction of some kind. *E.g.*, Tex. Gov't Code § 432.127 (making it an offense to "solicit" someone to desert, mutiny, or commit an act of sedition). Rather than interpreting the solicitation ban as a bizarre outlier, this Court should simply interpret it to be limited to knowingly encouraging an illegal mail-in ballot request, consistent with other criminal solicitation laws.

This interpretation also finds support in the statutory context. As the Attorney General notes, the legislature's enactment of Section 276.016 was, at least partly, "a response to the facts underlying *Hollins*," AG Br. 33, where an election official proposed "mass-mailing unsolicited ballot applications to voters" and thereby encouraging them to vote by mail. *State v. Hollins*, 620 S.W.3d 400, 403 (Tex. 2020) (per curiam). In particular, in *Hollins*, a Harris County official tried to distribute mail-in ballot applications to all registered voters in the county, including many who were plainly ineligible to vote by mail. *See id.* But the Director of Elections for the Texas Secretary of State's Office raised concerns that such conduct could generate voter confusion because voters who were ineligible for mail-in voting could be

misled to believe that they were eligible to vote by mail and potentially even submit unlawful mail-in ballot applications. *See id.* at 404.

Interpreting the solicitation ban to be limited to knowingly encouraging illegal mail-in ballot requests would be directly responsive to the voter confusion concerns articulated in *Hollins*: Knowing encouragement by a public official of an *illegal* application—*i.e.*, encouraging a voter the official knows is not even potentially eligible to vote by mail to submit a mail-in ballot application—would create a risk of voter confusion and increase the likelihood of submission of invalid mail-in ballot applications. By contrast, encouraging a *lawful* mail-in ballot request creates no risk of voter confusion because the voter is eligible or potentially eligible to vote by mail and thus may lawfully request such a ballot. Indeed, encouragement of lawful mail-in ballot applications can help *reduce* voter confusion by helping eligible voters understand how they can lawfully exercise their right to vote. ROA.806–07 (testimony from Longoria explaining that "if a voter calls us with . . . confusion [about mail-in voting], we try our best to help them," but S.B. 1 "prohibits me from . . . sharing certain information or doing certain things"). The narrower definition thus advances the concerns that purportedly prompted enactment of S.B. 1, whereas the broader definition

would undermine those very concerns by exacerbating risks of voter confusion.

The narrower interpretation would also avoid grave constitutional problems. *See Brady*, 795 S.W.2d at 715. Under the canon of constitutional avoidance, "[s]tatutes are given a construction consistent with constitutional requirements, when possible, because the legislature is presumed to have intended compliance with state and federal constitutions." *Id.*; *accord Trs. of Indep. Sch. Dist. v. Johnson Cnty. Democratic Exec. Comm.*, 52 S.W.2d 71, 72 (Tex. 1932).

On the ordinary reading, the solicitation ban gives rise to grave constitutional problems—as the district court has already determined in holding the statute unconstitutional and entering a preliminary injunction. Indeed, it is undisputed that the solicitation ban is a viewpoint-based restriction on speech, and one-sided restrictions on protected speech are "presumptively unconstitutional." *Iancu*, 139 S. Ct. at 2299 (citation omitted). It is also essentially undisputed that the solicitation ban is unconstitutional as applied to elected officials, as the Fifth Circuit has held that speech by elected officials is fully protected by the First Amendment. *See City of El Cenizo*, 890 F.3d at 184. The Texas Court of Criminal Appeals

also affirmed in *Ex parte Perry*, 483 S.W.3d at 911–12, that public official speech is protected from criminal punishment because such punishment does not qualify as "employer discipline" within the meaning of *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006). Here, as the district court concluded, the *Garcetti* exception does not apply for the additional reason that "Longoria and Morgan are not employed by the State." ROA.654. They are instead county-level officials, and they report not to state officials but to elected county-level officials. Tex. Elec. Code §§ 31.032, .036–.037 (appointment and termination of election administrator); *id.* §§ 13.031, .036 (appointment and termination of VDR); *see also Krier v. Navarro*, 952 S.W.2d 25, 29 (Tex. App.—San Antonio 1997, writ denied) (elections administrator is an "agent or employee of the county"). There is thus no basis for attributing their speech to the State, and no basis for the state to treat them as employees. At a minimum, those are serious and difficult constitutional problems.

Those constitutional problems evaporate if the statute is limited to knowingly encouraging illegal mail-in ballot applications. It is well-settled that "speech integral to criminal conduct" is categorically excluded from First Amendment protection. *Alvarez*, 567 U.S. at 717; *see also, e.g.*, *Williams*, 553 U.S. at 298. If the solicitation ban is limited to knowing encouragement of

illegal mail-in ballot applications, then it would fit within the exception for "speech integral to criminal conduct" and thus would raise no significant constitutional issues.

On that reading, the prohibition would not apply to any of Plaintiffs' proposed speech. Plaintiffs have clearly indicated that they do not intend to engage in speech encouraging illegal ballot applications, and instead only intend to recommend mail-in voting to individuals who are eligible or potentially eligible to vote by mail. *See supra* Section II(A)(2) (collecting intended speech). As a matter of constitutional avoidance, this Court accordingly should adopt this limiting construction.

C. This Court Should Reject the Government's Novel and Amorphous Definition, Which Does Not Exclude Plaintiffs' Proposed Speech and Is Hopelessly Vague

This Court should not adopt the Attorney General's strained construction of "solicitation" as meaning only to "importune or strongly urge," with the meaning depending on whether an "ordinary listener" would perceive the official to be "applying significant pressure." AG Br. 12. That novel gloss on "solicitation" lacks support in dictionary definitions, case law, or statute. It also does not avoid the constitutional problem, and instead exacerbates the vagueness problems that already

arise as a matter of ordinary meaning. Indeed, even though Plaintiffs submitted affidavits about their planned speech and testified at an evidentiary hearing, the Attorney General *still* cannot say whether Plaintiffs could be prosecuted for their intended speech under the Attorney General's proposed rule. The Attorney General instead asserts that, under his interpretation, "the second certified question cannot be definitely answered on this record." *Id.* at 11. That is a telling signal that his interpretation is seriously vague and continues to threaten protected speech.

First, the Attorney General's definition lacks support in dictionaries or case law. The Attorney General identifies no dictionary that adopts the peculiar formulation he proposes, and much less the unusual requirement that the strength of the urging be viewed from the perspective of the listener. To the contrary, the vast majority of the definitions found in dictionaries, statutes, and Texas case law impose no requirement about the strength or degree of the urging, requesting, or entreating. *See supra* Section II(A)(1) (collecting definitions); *e.g.*, *Solicitation*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining "solicitation" as "requesting or seeking to obtain something; a request or petition"). And the statutory definition of "solicitation" in the

Penal Code is tied to the perspective of the *speaker*, not the listener. *See* Texas Penal Code § 15.03(a) (liability attaches only if an actor "attempts to induce another to engage in specific conduct that, under the circumstances surrounding his conduct as the actor believes them to be," would constitute a felony).

The Attorney General identifies only one dictionary—*Webster's Third*—that even uses the "strongly urge" portion of his formulation. *See* AG Br. 28. But that is only one of many definitions in that dictionary, and thus overlooks many other verbs (including approach, entreat, ask, etc.) that lack an adverb of any kind.[3] The statutes, case law, and treatises above similarly use long laundry lists of verbs, without qualification with adverbs like "strongly." *See Solicit*, WEBSTER'S THIRD. *Black's Law Dictionary* also rebuts the Attorney General's argument, stating that the term "implies a serious request," but "requires *no particular degree* of importunity, entreaty,

[3] The more definitive *Webster's Second* omits "strongly" from that same sense of "solicitation." *Compare Solicit*, WEBSTER'S SECOND ("To urge (one's cause, point, etc.)"), *with Solicit*, WEBSTER'S THIRD ("[T]o strongly urge (as one's cause or point)"); *see MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 227–29 & n.3 (1994) (Scalia, J.) (noting criticism of *Webster's Third* for portraying "common error as proper usage"). That definition is also inapt, as this statute does not merely involve soliciting for a cause; it covers soliciting a person to do something, namely, to request a mail-in ballot application.

imploration, or supplication." *Solicit*, BLACK'S LAW DICTIONARY (6th ed. 1990) (emphasis added).

The Attorney General's interpretation also exacerbates the serious vagueness problems here, as it cannot draw any definite or established line between lawful speech and a crime: How strongly or forcefully must the urging be? What kind of "pressuring" is "significant"? The Attorney General has no answers. Unlike the ordinary meaning of solicitation, which is familiar and invokes a longstanding body of case law, the Attorney General's definition is wholly novel and thus has never been explicated, leaving speakers with little or no guidance. *See Sessions v. Dimaya*, 138 S. Ct. 1204, 1232 (2018) (Gorsuch, J., concurring) ("Nor does the statute call for the application of some preexisting body of law familiar to the judicial power."); *Jordan v. De George*, 341 U.S. 223, 227, 229–31 (1951) (holding that a term was not vague, in part, because it had "deep roots in the law").

Even worse, the answer does not depend on the state of mind of the speaker, but instead lies in the eye of the beholder: The Attorney General's rule looks "from the perspective of the ordinary listener," and asks "would an ordinary person believe the official is trying to importune or strongly urge

them to submit an application for a mail-in ballot that the voter did not request?" AG Br. 12, 36. "Such a 'reasonable person' standard is a familiar feature of civil liability in tort law, but is inconsistent with the conventional requirement for criminal conduct—*awareness* of some wrongdoing." *Elonis v. United States*, 575 U.S. 723, 737–38 (2015) (citation omitted). "Having liability turn on whether a 'reasonable person' regards the communication as [solicitation]—regardless of what the defendant thinks—reduces culpability on the all-important element of the crime to negligence . . . ." *Id.* at 738 (citation omitted). Yet courts "have long been reluctant to infer that a negligence standard was intended in criminal statutes." *Id.*

Indeed, the Attorney General does not identify any definable line between what constitutes "strongly" urging (or "importun[ing]"), and merely urging, advising, commanding, or otherwise encouraging the submission of a mail-in ballot request. That is a classic signal of a vagueness problem, as the contours of liability are unknowable and people "of common intelligence must necessarily guess at its meaning." *Coates v. Cincinnati*, 402 U.S. 611, 614 (1971) (citation omitted). In addition to failing to provide meaningful notice about what the law requires, on that reading the statute also would "authorize and even encourage arbitrary and discriminatory enforcement,"

City of Chicago v. Morales, 527 U.S. 41, 56 (1999), as police officers and prosecutors would have immense leeway to bring charges on the ground that the urging was, in their view, sufficiently "strong." Vague laws "hand off the legislature's responsibility for defining criminal behavior to unelected prosecutors and judges, and they leave people with no sure way to know what consequences will attach to their conduct." *United States v. Davis*, 139 S. Ct. 2319, 2323 (2019).

Tellingly, *the Attorney General himself* cannot determine whether the proposed speech would be exempt from possible criminal prosecution under his own proposed definition. He writes, "[i]t is unclear . . . exactly what Longoria means by recommending or encouraging"; "some of what Longoria wishes to say is unclear—recommending and encouraging people to vote by mail." AG Br. 12, 35–36. But from the beginning of their lawsuit, Longoria and Morgan have been clear that they wish to recommend, encourage, advise, and urge voters to vote by mail, yet they are chilled from doing so because of the threat of prosecution. The fact that they would *still* face that threat of prosecution under the Attorney General's definition means that Longoria and Morgan would remain in the same position as when they filed

suit—unsure of what they can say and in what context they can say it, and therefore silenced for fear of falling on the wrong side of the line.

In any event, the evidentiary record establishes that Plaintiffs could be subject to prosecution under the Attorney General's rule for at least some of their proposed speech. Longoria testified that she was asked to "do everything [she] can" to encourage voting by mail and would "affirmatively" advise, recommend, encourage, and urge voters to use mail-in voting, including in a wide variety of in-person interactions with ballot applications on hand for ready use. ROA.92–93, 813–14. Morgan similarly confirmed in her affidavit that she would "proactively raise vote by mail" in communications with specific voters. ROA.101. Under the Attorney General's amorphous definition, the State itself cannot rule out the possibility that such speech would fall within the ambit of Section 276.016(a)(1), and accordingly the threat of prosecution remains.

* * *

In sum, the only way to avoid a constitutional problem is to interpret Section 276.016(a)(1) to be limited to the knowing encouragement of illegal applications to vote by mail. This Court should hold accordingly. In the alternative, this Court should simply apply the ordinary meaning of

solicitation, which is familiar and well-settled and thus provides at least some modicum of predictability. But the Court should not adopt the Attorney General's novel construction, which is unsupported, unmoored from history and tradition, and still raises grave First Amendment problems—while also raising even greater vagueness concerns.

III. The Attorney General Lacks Authority To Enforce Civil Penalties

Finally, although Longoria reasonably feared that the Attorney General might bring a civil enforcement action against her in light of Section 31.129's indication that an election official may be "liable to this state," Longoria agrees with the Attorney General that he has no power to "bring a suit for civil penalties under Texas Election Code section 31.129" because "the Legislature did not explicitly grant the Attorney General the authority to seek these particular penalties on behalf of the State." AG Br. 37. "[W]hen the Legislature creates a new or additional cause of action in favor of the State it may also constitutionally authorize the Attorney General to prosecute such cause of action in both the trial and appellate courts of the State." *Smith v. State*, 328 S.W.2d 294, 295 (Tex. 1959). But for the Attorney General to possess such authority, the Legislature must provide it. In particular, this Court has generally required a clear statement

that "expressly authorized the Attorney General, as well as any District or County Attorney, to institute and prosecute the statutory suit thus created." *Id.* at 294–95. Here, however, the express authorization is entirely missing. Nor does the statutory context provide a similar unmistakable indication that the Legislature intended to vest the Attorney General (or any other state official) with that authority.

Indeed, it is "possible" that Section 31.129 is "unenforceable by any public official, attorney, or agency" because the legislature did not unmistakably specify who can bring an action for civil penalties. *Brown v. De La Cruz*, 156 S.W.3d 560, 566 (Tex. 2004); *see also State ex rel. Durden v. Shahan*, No. 04-19-00714-CV, 2021 WL 1894904, at *5 (Tex. App.—San Antonio May 12, 2021, pet. filed) ("[T]he constitution delegates to the Legislature the power to fix the respective duties of county attorneys and district attorneys, and absent express legislative authority, county attorneys (in counties with district attorneys) lack authority to institute suits on behalf of the State." (citation omitted)); *A.B.C. Rendering, Inc. v. State*, 342 S.W.2d 345, 348 (Tex. Civ. App.—Houston 1961, no writ) (similar). But an oversight by the legislature "does not give [this Court] the power . . . to legislate . . . to fill any *hiatus* [the legislature] has left." *Brown*, 156 S.W.3d at 566 (citation

omitted) (emphasis in original). At a minimum, the Legislature has provided no indication that any state official possesses the requisite enforcement authority. As a result, this Court should hold that the Attorney General does not possess that authority, and should answer the third question "no."

PRAYER

For the reasons set forth above, the Court should hold that the answers to the questions certified by the Fifth Circuit are "no," "no," and "no."

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Texas Rule of Appellate Procedure 9.4(i)(2)(B) because, according to the Microsoft Word word-count function, it contains 9,353 words, excluding the parts of the brief exempted by Texas Rule of Appellate Procedure 9.4(i)(l).

2. This brief also complies with the typeface requirements of Texas Rule of Appellate Procedure 9.4(e) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Century Schoolbook font in 14-point size in text and Century Schoolbook font in 12-point size in footnotes.

/s/ Sean Morales-Doyle
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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of April 2022, the foregoing Appellees' Response Brief was forwarded to all counsel of record by electronic filing in accordance with the Texas Rules of Appellate Procedure.

/s/ Elizabeth Y. Ryan
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