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

PLAINTIFF-APPELLEE CATHY MORGAN'S OPPOSITION TO DEFENDANT-APPELLANT SHAWN DICK'S MOTION TO DISMISS

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

Aaron J. Curtis
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, New York 10153
(212) 310-8000

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

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

Counsel for Plaintiffs-Appellees

INTRODUCTION

This Court should deny Williamson County District Attorney Shawn Dick's motion to dismiss, which misconstrues Plaintiff Cathy Morgan's arguments and misapprehends the basis for her standing. Morgan has a live First Amendment challenge because she reasonably fears that she could be prosecuted as a "public official" under Section 276.016(a)(1) for engaging in protected speech. This Court certified the question of whether she is indeed a "public official" as a matter of state law to the Texas Supreme Court, and Morgan argued there that the Texas court should interpret the term "public official" in Section 276.016(a)(1) to exclude volunteer deputy registrars. But Morgan's argument about how the Texas Supreme Court *should* interpret the law does not mean that she no longer has anything to fear. Litigants do not get to decide what the law is; only courts can do that. Morgan still faces a threat of prosecution unless and until the Texas Supreme Court concludes that she is *actually* beyond the statute's reach. Until then, Morgan continues to have standing. And at this point, the Texas Supreme Court has not yet rendered a decision, so the threat of prosecution remains. This Court accordingly should deny DA Dick's motion.

BACKGROUND

A. Factual Background

This case presents a First Amendment challenge to Sections 276.016(a)(1) and 31.129 of the Texas Election Code, enacted as part of Senate Bill 1 last year. ROA.42, 47–50; 2021 Tex. Sess. Law Serv. 2nd Called Sess. Ch. 1 ("S.B. 1") § 10.04. The anti-solicitation provision, Section 276.061(a)(1), provides that "[a] public official or election official" commits a criminal offense punishable by a minimum of six months in jail "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." Plaintiff Cathy Morgan is a volunteer deputy registrar ("VDR") in Travis and Williamson Counties. ROA.098. Although she wishes to do so, Morgan has avoided encouraging others to submit applications to vote by mail because she reasonably fears that she is a "public official" within the meaning of Section 276.016(a)(1), and therefore subject to possible criminal prosecution for soliciting mail-in voting applications. ROA.100–01.

B. Procedural Posture

Based on her reasonable fear of prosecution and the resulting chill on her speech, Morgan, along with Harris County Elections

Administrator Isabel Longoria, filed this lawsuit seeking to enjoin the enforcement of Sections 276.016(a)(1) and 31.129 of the Texas Election Code. Plaintiffs sought a preliminary injunction, which the district court granted, holding that VDRs "likely qualify as public officials under Section 276.016(a)(1)" and that the anti-solicitation provision is likely an unconstitutional viewpoint- and content-based restriction on speech. ROA.699, 709–14. DA Dick and the Texas Attorney General appealed that injunction, and this Court entered an administrative stay, which remains in place. ROA.722–23, 752, 754–55.

Following briefing and argument, this Court certified three questions to the Texas Supreme Court, including "whether Volunteer Deputy Registrars are 'public officials' under the Texas Election Code," determining that certification would be "necessary and valuable" because of the "limited state law authority to guide [the] analysis." *Longoria v. Paxton*, 2022 WL 832239, at *4 (5th Cir. Mar. 21, 2022) (citation omitted). The Texas Supreme Court heard argument on the certified questions on May 11, 2022, but has not yet ruled. Nevertheless, DA Dick filed a motion asking this Court to remand the case to the district court with instructions to vacate

the preliminary injunction with respect to Morgan and dismiss her claims for lack of subject matter jurisdiction. Mot. to Dismiss 8–9 (May 23, 2022).

ARGUMENT

Morgan continues to have standing and this Court should deny DA Dick's motion to dismiss. In a pre-enforcement challenge, Article III's injury-in-fact requirement is met where a plaintiff intends to "engage in a course of conduct arguably affected with a constitutional interest," her "intended future conduct is arguably proscribed by the statute," and "there exists a credible threat of prosecution thereunder." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159, 161–64 (2014) (cleaned up). "[W]hen dealing with pre-enforcement challenges to recently enacted (or, at least, non-moribund) statutes that facially restrict expressive activity by the class to which the plaintiff belongs, courts will assume a credible threat of prosecution in the absence of compelling contrary evidence." *Speech First, Inc. v. Fenves*, 979 F.3d 319, 335 (5th Cir. 2020) (citation omitted).

Morgan currently fears prosecution and her speech remains chilled because VDRs are arguably public officials covered by the anti-solicitation provision. ROA.100–01. Although the Election Code does not

define "public official," S.B. 1 elsewhere defines the term in a manner that covers VDRs like Morgan. 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" and "receive registration applications" for the registrar, thus acting as "agents" of "a political subdivision" for those purposes. *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 reasonably fears that the same or a similar definition of "public official" applies here as well, and as a

result, reasonably fears prosecution if she engages in protected speech that is criminalized by the statute. She therefore has standing.[1]

Nothing in the litigation of the certified questions changes that analysis. The certified questions offer the Texas Supreme Court an opportunity to decide conclusively the meaning of the anti-solicitation provision and potentially avoid the constitutional issues it raises. Thus, rather than focusing on the First Amendment inquiry of whether she has a reasonable fear that she is a "public official," as she did before this Court, Morgan asked the Texas Supreme Court to adopt what she argues is the "best" reading of the statute. Under that reading, VDRs are not public officials because they "hold no public office" and "perform duties . . . that can be performed without state involvement at all, and thus do not involve the exercise of sovereign power." Appellees' Response Brief at 3, 12–14, 18–22, *Paxton v. Longoria*, No. 22-0224 (Tex. Apr. 22, 2022). Morgan argued that the Texas Supreme Court should adopt this "interpretation of 'public official'"

[1] This Court questioned whether VDRs were covered even under the Government Code's definition of "public official," on the argument that VDRs might be appointed agents only in a "technical sense." *Longoria*, 2022 WL 832239, at *5. But it is unclear whether that is the correct interpretation of Texas law, and thus, Morgan's fear of prosecution remains reasonable. Indeed, this Court's certification to the Texas Supreme Court illustrates that the statutory text does not provide the necessary clarity on this point.

in part because it "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." *Id.* at 22. During oral argument, however, Plaintiffs' counsel made clear that Morgan continues to fear prosecution under the anti-solicitation provision unless and until the Texas Supreme Court clarifies that VDRs are not "public officials" covered by the statute. Oral Argument at 20:10–21:47, *Paxton v. Longoria*, No. 22-0224 (Tex. May 11, 2022), https://www.youtube.com/watch?v=FijtefaLwHg.

DA Dick argues that "Morgan has now admitted in both judicial pleadings and in open court that VDRs are not 'public officials' for the purposes of [Section] 276.016(a)(1)" and thus cannot allege a cognizable injury arising from Section 276.016(a)(1) in this federal case. Mot. to Dismiss 8. But that misconstrues Morgan's position in the Texas Supreme Court, which was different from the one she is taking in this federal case because she was responding to a different question. The question certified to the Texas Supreme Court—what "public official" *actually* means under the Texas Election Code—and the question before this Court—what "public official" *could* mean for purposes of determining

whether Morgan has standing to mount a pre-enforcement challenge to Section 276.016(a)(1)—are two separate and distinct inquiries.

Morgan argued that the Texas Supreme Court *should* interpret the statute to exclude VDRs, but making that argument did not mean that she no longer has a reasonable fear of prosecution. Morgan filed suit and sought an injunction barring the enforcement of Section 276.016(a)(1) because she fears she is covered by the statute in her capacity as a VDR. *See* ROA.603–04 (explaining the plausible application of the S.B. 1 § 8.05 definition of "public official"); Brief of Plaintiffs-Appellees at 23, *Longoria*, No. 22-50110 (Feb. 28, 2022) ("Morgan likely qualifies as 'a public official' in her capacity as a VDR"); Appellees' Response Brief at 3, 12–14, 19, *Paxton*, No. 20-0224 (Apr. 22, 2022) (explaining that "Morgan brought this action due to the chilling effect that arises from the risk of possible criminal liability"). The chilling effect of the anti-solicitation provision on Morgan's speech will persist unless and until the Texas Supreme Court definitively says that VDRs are *not* public officials under the Texas Election Code. What Morgan needs is clarity from that court.

Morgan's argument about how the law *should* be construed thus does not eliminate her fear or otherwise deprive her of standing. The

Texas Supreme Court needs to say what the law *is*. After all, the state courts have the first and the last word as to the meaning of state statutes. *Levy Gardens Partners 2007, LP v. Commonwealth Land Title Ins. Co.*, 706 F.3d 622, 629 (5th Cir. 2013). Indeed, that is precisely why this Court found that certification was "necessary and valuable." *Longoria*, 2022 WL 832239, at *4. As Plaintiffs' counsel explained during oral argument before this Court, "if the result of this case is to say that Ms. Morgan is definitively not a public official, that's an okay result by Ms. Morgan," but "until there is some determination that she is not facially restricted by the statute, she is in reasonable fear of prosecution." Oral Argument at 30:39–31:11, *Longoria v. Paxton*, No. 22-50110 (5th Cir. Mar. 8, 2022), https://www.ca5.uscourts.gov/OralArgRecordings/22/22-50110_3-8-2022.mp3.

Finally, as Plaintiffs' counsel has stated to DA Dick's counsel, should the Texas Supreme Court hold that VDRs are not public officials, Morgan plans to voluntarily dismiss her federal constitutional claim. There is accordingly no need for any motion to dismiss.

CONCLUSION

For these reasons, this Court should deny DA Dick's motion to dismiss.

June 2, 2022

Respectfully submitted,

By: */s/ Sean Morales-Doyle*

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

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

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

Aaron J. Curtis
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, New York 10153
(212) 310-8000

Counsel for Plaintiffs-Appellees

CERTIFICATE OF COMPLIANCE

1. This response complies with the type-volume limitation of FED. R. APP. P. 27(d)(2)(A) because it contains 1,801 words, excluding the parts of the response exempted by FED R. APP. P. 32(f).

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

June 2, 2022

/s/ *Sean Morales-Doyle*
Sean Morales-Doyle
BRENNAN CENTER FOR JUSTICE AT
NYU SCHOOL OF LAW
120 Broadway, Suite 1750
New York, New York 10271
(646) 292-8310

Counsel for Plaintiffs-Appellees

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of June 2022, the foregoing Plaintiff-Appellee Cathy Morgan's Opposition to Defendant-Appellant Shawn Dick's Motion to Dismiss was electronically filed with the Clerk of the Court by using the CM/ECF system. I further certify that all parties are registered CM/ECF users and that service will be accomplished through the CM/ECF system.

/s/ Sean Morales-Doyle
Sean Morales-Doyle