UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

ISABEL LONGORIA and CATHY MORGAN, *Plaintiffs*, v. WARREN K. PAXTON, in his official capacity as the Attorney General of Texas, *et al.*, *Defendants*.	§ § § § § § § § § §	Case No. 5:21-cv-1223-XR

ATTORNEY GENERAL PAXTON'S RESPONSE TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

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INTRODUCTION

The Court should deny Plaintiffs' motion for a preliminary injunction. Section 276.016(a)(1) is a lawful regulation of government speech, and it does not affect any private speech protected by the First Amendment. The Texas Legislature reasonably prohibited official government solicitations of applications to vote by mail. Such solicitations would nudge voters from in-person voting to mail-in voting, decreasing election security and increasing logistical challenges. They also run the risk of convincing voters who are not qualified to vote by mail to attempt voting by mail, which potentially leads to criminal liability for voters.

But the Court need not reach these merits issues because Plaintiffs have not established federal jurisdiction. Neither Plaintiff has been threatened with prosecution or a suit for civil penalties. They have introduced no evidence that any of the Defendants will imminently file an enforcement action against them for their proposed conduct. They have not shown the "substantial threat" of enforcement required for standing or the "demonstrated willingness" to enforce required to overcome sovereign immunity. By extension, Plaintiffs have not shown they face a sufficiently serious threat of enforcement during the limited time before a trial could be held. Indeed, two Defendants have stipulated not to enforce the challenged provision while the case is pending.

In any event, a preliminary injunction would not redress Plaintiffs' alleged injuries. They say they are chilled by the possibility of future enforcement actions. But a preliminary injunction would not eliminate that possibility. Plaintiffs' deposition testimony confirms that they will remain chilled regardless of whether the court grants their motion. That is reason enough to deny it.

If the Court grants the motion, however, it should significantly narrow the injunctions that Plaintiffs propose. Regardless of what it decides on the merits, the Court cannot enjoin non-parties who are not represented in this litigation, such as district attorneys in other counties. Nor can the Court enjoin the enforcement of Section 276.016(a)(1) against anyone other than the two Plaintiffs

who brought this suit.

BACKGROUND

In September 2021, the Texas Legislature passed An Act Relating to Election Integrity and Security, S.B.1, 87th Leg., 2d C.S. (2021), often known as "SB1." SB1 contains many provisions addressing a variety of election issues, including increasing the availability of early voting. *See* SB1 §§ 3.09, 3.10, (codified at Tex. Elec. Code §§ 85.005(c), 85.006(e)). In this case, Plaintiffs challenge only one provision of SB1: the small portion of Section 7.04 that added Section 276.016(a)(1) to the Election Code.

Section 276.016(a) regulates the official activities of government officials relating to mail-in voting: "A public official or election official commits an offense if the official, while acting in an official capacity, knowingly: (1) solicits the submission of an application to vote by mail from a person who did not request an application." Tex. Elec. Code § 276.016(a). SB1 also regulates the distribution of applications to vote by mail, *see id.* § 276.016(a)(2)–(4), but Plaintiffs do not challenge those provisions. *See* ECF 5 at 14.

Thus, the only provision that Plaintiffs challenge has a number of important limitations. First, it applies only to "[a] public official or election official." Tex. Elec. Code § 276.016(a). Second, it applies only when the official is "acting in an official capacity," not when the official is acting in a personal or individual capacity. *Id.* Thus, if an official stands for election, Section 276.016(a)(1) does not apply when the official is "acting in the official's capacity as a candidate for public elective office." *Id.* § 276.016(e)(2). Third, the provision applies only when the official "solicits the submission of an application," not when the official merely explains a voter's options. *Id.* § 276.016(a). As a result, it does not apply when the official "provide[s] general information about voting by mail, the vote by mail process, or the timelines associated with voting to a person or the public." *Id.* § 276.016(e)(1).

Longoria originally challenged Section 276.016(a)(1) on September 3, 2021. *See* Complaint, *La*

Unión Del Pueblo Entero v. Abbott, No. 5:21-cv-844-XR, ECF 1 ¶¶ 185–87, 223–29 (W.D. Tex. Sept. 3, 2021). Recognizing that she did not need preliminary injunctive relief, Longoria negotiated away her right to seek preliminary injunctive relief before the March primary election in exchange for an expedited trial schedule to conclude before the November general election. *See* ECF 9-1 at 32–33 ("On behalf of LUPE plaintiffs, it is correct that we are not planning to pursue preliminary injunctive relief prior to the March primary."). Longoria, however, voluntarily dismissed her first lawsuit. *See* Notice of Voluntary Dismissal, *La Unión Del Pueblo Entero v. Abbott*, No. 5:21-cv-844-XR, ECF 138 (W.D. Tex. Dec. 1, 2021).

Longoria and Cathy Morgan (a volunteer deputy registrar in Travis and Williamson Counties) later filed a new lawsuit against the Attorney General raising the same challenge to Section 276.016(a)(1). *See* ECF 1. A couple of weeks later, without having served the original complaint, Plaintiffs filed a first amended complaint adding three district attorneys as defendants and altering the claim against the Attorney General. *See* ECF 5. Plaintiffs now seek a preliminary injunction.

Plaintiffs' operative complaint includes two counts. In Count I, both Longoria and Morgan seek to prevent three local district attorneys ("DAs") from criminally prosecuting them for violations of Section 276.016(a)(1). *See* ECF 5 ¶¶ 37–43. In Count II, Longoria (but not Morgan) seeks to prevent the Attorney General from bringing a civil enforcement action against her for violations of Section 276.016(a)(1). *See id.* ¶¶ 44–46; Tex. Elec. Code § 31.129 (providing that certain election officials "may be liable to this state for a civil penalty," including "termination of the person's employment and loss of the person's employment benefits," "if the official . . . violates a provision of this code").

Plaintiffs request preliminary relief before the March primary. *See* ECF 7 at 8. Plaintiffs served the Attorney General with both the First Amended Complaint and the preliminary-injunction motion on January 3, 2021. *See* ECF 15.

Since Plaintiffs moved for a preliminary injunction, two significant developments have

occurred. First, Plaintiffs have given deposition testimony that undercuts their factual contentions. Second, the district attorneys for Harris and Travis Counties have "agree[d] not to enforce Section 276.016(a)(1) of the Texas Election Code . . . until such time as a final, non-appealable decision has been issued in this matter." ECF 35 ¶ 2 (Harris County); ECF 36 ¶ 3 (Travis County).

STANDARD

A motion for a preliminary injunction must satisfy four "prerequisites":

> (1) a substantial likelihood that plaintiff will prevail on the merits, (2) a substantial threat that plaintiff will suffer irreparable injury if the injunction is not granted, (3) that the threatened injury to plaintiff outweighs the threatened harm the injunction may do to defendant, and (4) that granting the preliminary injunction will not disserve the public interest.

Libertarian Party of Tex. v. Fainter, 741 F.2d 728, 729 (5th Cir. 1984).

"The burden of persuasion on all of the four requirements for a preliminary injunction is at all times upon the plaintiff." *Canal Auth. of State of Fla. v. Callaway*, 489 F.2d 567, 573 (5th Cir. 1974). That burden is heavy. It requires "*a clear showing*." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam). "A preliminary injunction is an extraordinary remedy and should only be granted if the plaintiffs have clearly carried the burden of persuasion on all four requirements." *Nichols v. Alcatel USA, Inc.*, 532 F.3d 364, 372 (5th Cir. 2008) (quotation omitted). It is "never awarded as of right" and is instead left to a district court's "sound discretion." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008).

ARGUMENT

The Court should deny preliminary injunctive relief because Plaintiffs have not made a clear showing on any of the four requirements.

I. Plaintiffs Have Not Clearly Established a Likelihood of Success on the Merits

Plaintiffs are not likely to succeed on the merits. First, they have not presented evidence establishing a sufficiently substantial threat of enforcement to allow federal jurisdiction. Second,

Plaintiffs' concerns about ambiguities in a brand-new Texas law support abstention in favor of Texas courts, which can provide clarity. As Morgan testified, such clarity would be "[v]ery helpful." Ex. B at 74. Third, their claims are unlikely to succeed on the merits. Section 276.016(a)(1) is constitutional. Any effects on unprotected government speech are more than justified by the State's interests in making elections more secure and easier to administer. SB1 does not restrict any private speech protected by the First Amendment.

A. Plaintiffs Have Not Made a Clear Showing of Jurisdiction

As the parties invoking federal jurisdiction, Plaintiffs bear the burden of establishing jurisdiction. As the Attorney General explained in his motion to dismiss, Plaintiffs' First Amended Complaint does not plausibly allege facts establishing standing or the applicability of *Ex parte Young*. *See* ECF 24 at 3–9. Bur regardless of whether Plaintiffs satisfied their pleading burden, they face a higher burden in seeking a preliminary injunction. *See Tex. All. for Retired Ams. v. Hughs*, 976 F.3d 564, 568 n.1 (5th Cir. 2020) (per curiam).

Absent evidence that Defendants will imminently enforce Section 276.016(a)(1) against Plaintiffs, a preliminary injunction would be improper. At the preliminary-injunction stage, Plaintiffs "must make a 'clear showing' that they have standing to maintain the preliminary injunction." *Barber v. Bryant*, 860 F.3d 345, 352 (5th Cir. 2017); *accord Daves v. Dallas County*, 22 F.4th 522, 542 (5th Cir. 2022). Because Plaintiffs' theory of injury depends on future criminal or civil enforcement actions, Plaintiffs "must show that the likelihood of future enforcement is 'substantial.'" *California v. Texas*, 141 S. Ct. 2104, 2114 (2021). For Longoria's claim against the Attorney General, she must also satisfy the requirements of the *Ex parte Young* exception to sovereign immunity. Longoria "at least must show the defendant has the particular duty to enforce the statute in question and a demonstrated willingness to exercise that duty." *Tex. Democratic Party v. Abbott*, 978 F.3d 168, 179 (5th Cir. 2020) (quotation omitted).

Despite this burden, Plaintiffs' motion for a preliminary injunction does not address standing or sovereign immunity. It mentions jurisdiction only once, and that assertion is limited to statutory subject-matter jurisdiction under 28 U.S.C. §§ 1331, 1343(a). *See* ECF 7 at 8. The only evidence Plaintiffs have submitted—their own declarations—do not establish a substantial likelihood of enforcement or a demonstrated willingness to enforce in circumstances like these. Considering each claim, one at a time, reveals that Plaintiffs have not carried their burden.

Longoria: As an initial matter, Plaintiffs have not established that Longoria wants to violate Section 276.016(a)(1). Her declaration, for example, describes her proposed speech as "encourag[ing] voters to consider all of their options, engaging in outreach to voters regarding the benefits of the vote-by-mail process, educating voters about their rights, and helping voters to submit their respective applications." ECF 7-1 ¶ 15. On its face, that description does not seem to encompass "solicit[ing] the submission of an application to vote by mail from a person who did not request an application." Tex. Elec. Code § 276.016(a)(1). In any event, even if Longoria did intend to violate Section 276.016(a)(1), she has produced no evidence that she would imminently face an enforcement action.

Longoria's Claim against Ogg: District Attorney Ogg has agreed not to enforce Section 276.016(a)(1) while this case is pending. *See* ECF 35 ¶ 2. The stipulation gives no hint that she is inclined to enforce Section 276.016(a)(1) at all, much less against Longoria for the conduct issue in this case. *Cf. id.* ¶ 3 (discussing "conserving prosecutorial resources"). Longoria has never spoken with District Attorney Ogg, or anyone else at the Harris County District Attorney's Office, about SB1 generally or potential prosecution for violating SB1 in particular. *See* Ex. A at 54–55. Nor does Longoria otherwise "have any knowledge of anyone attempting to bring criminal charges against [her] for violating Section 276.016(a)(1)." *Id.* at 64.

Longoria's Claim against Paxton: Longoria similarly has given no reason to think the Attorney General is planning to bring a civil enforcement action against her. Plaintiffs have not

presented any evidence regarding the Attorney General's authority or inclination to enforce Section 276.016(a)(1) through Section 31.129. *See* ECF 24 at 4–8. Longoria has never spoken with the Attorney General or, until her deposition, anyone from the Office of the Attorney General about SB1. *See* Ex. A at 55. There is no evidence that she has been threatened with a suit for a civil penalty.

Even if Longoria faced a civil enforcement action, it is unlikely that she would face any personal monetary liability. Longoria admits "[i]t is not clear" as a matter of state law whether the Attorney General could seek "monetary penalties" under Section 31.129. ECF 7-1 ¶ 13. Even assuming he could, the suit would presumably be against Longoria in her official capacity. "An action . . . alleging that an election officer violated a provision of this code while acting in the officer's official capacity may only be brought against the officer in the officer's official capacity." Tex. Elec Code § 31.130. But "[a] judgment against a public servant 'in his official capacity' imposes liability on the entity that he represents,"*City of El Paso v. Heinrich*, 284 S.W.3d 366, 373 (Tex. 2009) (quoting *Brandon v. Holt*, 469 U.S. 464, 471–72 (1985)), not the individual officer sued. As a result, Longoria would not be personally liable on the judgment. Because Longoria brought this suit "in her personal capacity," ECF 5 ¶ 3, she has not established an injury in fact flowing from the risk of a monetary civil penalty.

Morgan also has not established a substantial threat of criminal prosecution under Section 276.016(a)(1). First, Morgan does not want to take any actions that would constitute solicitation under Section 276.016(a)(1). According to Morgan, her job as a VDR has two parts: (1) helping individuals fill out forms registering them to vote, and (2) explaining the voters' options, sometimes including an option to vote by mail. Ex. B at 26; *see also* ECF 7-2 ¶ 13.

Helping fill out voter-registration forms cannot constitute solicitation under Section 276.016(a)(1) because it has nothing to do with "the submission of an application to vote by mail." Tex. Elec. Code § 276.016(a)(1); *see* Ex. B at 26–27 ("forms to register to vote").

Explaining voters' options also does not constitute solicitation. Morgan provides "factual information" and does not "tell[] voters what they should do." Ex. B at 29. Whenever Morgan has "explained the vote-by-mail option," her intent was "always" "to provide factual information that would help a voter do what the voter otherwise wanted to do." *Id.* at 31. If she were not "deterred by the threat of criminal prosecution," she would "have the same intent" "going forward in explaining the vote-by-mail option." *Id.* at 32. Morgan's "personal practice . . . isn't to try to get somebody to vote in a certain way; it's to give them information." *Id.* at 114. "[A]ll" Morgan "want[s] to" do as a VDR as "give people . . . information about voting by mail." *Id.* at 116.

Morgan fears prosecution under Section 276.016(a)(1) because she interprets the statute more broadly than its text will support. She defines "soliciting" as "asking a voter if they would like information about voting by mail." Ex. B at 33. But merely asking a voter if the voter would like more information is not "solicit[ing] the submission of an application to vote by mail from a person who did not request an application." Tex. Elec. Code § 276.016(a)(1). Before her deposition, Morgan was not aware of the statutory exception for officials "provid[ing] general information about voting by mail, the vote by mail process, or the timelines associated with voting to a person or the public." Tex. Elec. Code § 276.016(e)(1); *see* Ex. B at 114–16.

Morgan is not even "trying to persuade" a voter to vote by mail; she is merely "offering them options." Ex. B at 38. Neither the Secretary of State nor any county officials have told her that such explanations would violate Section 276.016(a)(1). *See id.* at 38–39.

Second, Morgan does not have any firm plans to work as a VDR going forward. Her past VDR work has consisted of (1) a voter information booth at her church, (2) a voter information booth at a farmer's market, and (3) leaving voter information cards at her neighbors' doors. *See* Ex. B at 55. She has not established that any such work is imminent, much less that it is imminent enough to justify preliminary injunctive relief. She also "do[es]n't have any firm plans to do anything other than [those]

three things." *Id.* at 56.

1. In the past, Morgan has worked as a VDR at a voter information booth outside her church near the UT campus in Austin. *See* Morgan Depo Tr. 39, 41–42. The church would generally host the booth a month before each election, but the COVID-19 pandemic and the weather have left those plans uncertain. *See id.* at 40. The church is not hosting a voter information booth for the March primary election, and Morgan "do[es]n't know if [they] would try to do something" for the runoff election. *Id.* at 41. The church "might have a voter information booth in September of 2022," but Morgan emphasized that "the word is 'might.'" *Id.*

Even if Morgan did work as a VDR at the voter information booth, she gives vote-by-mail information to only a small percentage of the people who stop by the booth. Based on the production at the time of her deposition, the number was only about 7%. *See* Ex. B at 45–53; Ex. F (sum of "Vote by mail info" row divided by sum of "stopped by booth" row). But when considering Morgan's post-deposition production, the number falls to about 4.5%. *See* Ex. G (same calculation).

2. Morgan has not worked at the farmer's market booth since early 2020 due to the pandemic. *See* Ex. B at 54. She intends to return to the farmer's market "someday," but she is "not sure when, in light of the circumstances," including COVID and the weather. *Id.* at 55. When she did work at the farmer's market booth, she offered "factual information about options," as she did at the church booth, not solicitations. *Id.* at 54.

3. Morgan testified that she has worked as a VDR twice in the three months since SB1 took effect. When Morgan's sister's family moved to Morgan's neighborhood, she left them voter-registration cards (which one does not need to be a VDR to do, *see* Ex. H at 7). *See* Ex. B at 56–58. The only thing she was deterred from saying was "Have you considered voting by mail?," *id.* at 57, which SB1 does not prohibit. Next, a member of Morgan's church asked her how to fill out the application to vote by mail, but she was not deterred and "felt confident to reply to him." *Id.* at 58.

Morgan could not recall any other examples of wanting to say something but being deterred by Section 276.016(a)(1). *Id.* at 61–62.

Morgan has no "concrete plans" to work as a VDR going forward, much less to violate Section 276.016(a)(1). *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 564 (1992). Her assertions of "'some day' intentions" to work as a VDR are "simply not enough" to support jurisdiction. *Id.*

Even if Morgan established that she plans to work as a VDR and wants to violate Section 276.016(a)(1), she would also have to show that she faces a substantial threat of criminal prosecution by a Defendant. She has not done so.

Morgan's Claim against Garza: District Attorney Garza has agreed not to enforce Section 276.016(a)(1) while this case is pending. *See* ECF 36 ¶ 3. In his stipulation, District Attorney Garza went so far as to assert that SB1 "place[s] significant practical burdens on Travis County voters, pose[s] significant challenges to successful prosecution, and raise[s] significant constitutional issues." ECF 36 ¶ 2. One need not agree with District Attorney Garza's assertions to see that they undermine any claim that he is substantially likely to prosecute Morgan for a violation of Section 276.016(a)(1). Morgan has not "ever communicated with anyone from a District Attorney's Office," and no one has "ever threatened to criminally prosecute [her] for violating Section 276.016(a)(1)' or "any other law." Ex. B at 74–75. Morgan o not "have an opinion about what the chance of prosecution is in [her] case if [she] were to engage in the explanation of vote-by-mail option that" she described in her deposition. *Id.* at 76. She is deterred even if the "chance of prosecution" is "very small" and "[p]robably" would be deterred even by a "[o]ne-in-a-thousand chance." *Id.*

Morgan's Claim against Dick: District Attorney Dick has provided no reason to think he would imminently prosecute Morgan either. Plaintiffs have introduced no evidence concerning District Attorney Dick's intentions. Indeed, Morgan has never spoken with anyone in the Williamson County District Attorney's Office, *see* Ex. B at 74, much less been threatened with prosecution, *see id.*

at 99–100. And going forward, Morgan is unlikely to conduct her VDR work in Williamson County. "[I]n the next year or two," she will be moving to a retirement center in Travis County. Ex. B at 87. She "do[es]n't know" whether she will continue her "door to door" VDR work in either Travis County or Williamson County after she moves. *Id.* at 88. And as discussed above, she does not have concrete plans to work as a VDR in the meantime.

B. Abstention

A preliminary injunction is also improper because this Court should abstain under *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941). As Defendants explained in their motion to dismiss, there are multiple unsettled questions of state law that justify abstention. *See* ECF 24 at 9–11. This reasoning applies equally here, both because the motion to dismiss remains pending and because abstention is a reason to deny preliminary injunctive relief. *See, e.g.*, *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 397 n.13 (5th Cir. 2020); *id.* at 417–19 (Costa, J., concurring).

In support of abstention, the Attorney General cited Plaintiffs' own declarations, which asserted that the meaning of SB1 is not clear. *See* ECF 24 at 10–11. Morgan's deposition testimony confirms the propriety of abstention. When asked whether she contends she is a public official subject to Section 276.016(a)(1), Morgan explained that she "think[s] it enough to . . . not bring up the subject of vote by mail." Ex. B at 62. But, far from sure about that, *see id.* at 63, Morgan was "hoping the Courts will clarify that issue." *Id.* at 62.

Morgan acknowledged that Section 276.016(a)(1) applies only when a covered official is acting in an official capacity, *see id.* at 71–72; ECF 7-2 ¶ 16, but she does not "have any opinion about what 'while acting in an official capacity' means." Ex. B at 72. She believes that provision is "ambiguous" and "would find it helpful" "if a Texas Court clarified that ambiguity for" her. *Id.* at 86–87; *see also id.* at 71 ("I would like the Courts to clarify what it means to be deputy in this instance with the bill -- with Senate Bill 1.").

Morgan also believes that the meaning of "soliciting" in Section 276.016(a)(1) "is ambiguous." *Id.* at 86; *see also id.* at 113. According to Morgan, "[i]t would be helpful" if "a Texas Court clarified that ambiguity for [her]." *Id.* at 86.

All together, Morgan believes that "Texas law is ambiguous as to whether VDRs are permitted to assist individuals to apply for ballots by mail." Ex. B at 74; *see* Ex. I at MORGAN_00015. Morgan would consider it "[v]ery helpful" if "a Texas Court clarified that ambiguity." *Id.* Longoria agrees that the scope of activity prohibited by Section 276.016(a)(1) is "unclear" and that the way the statute is enforced is "not clear." ECF 7-1 ¶¶ 13–14.

According to their own testimony, what Plaintiffs need is clarity about Texas law, but only the Texas courts can provide such clarity. "[N]o matter how seasoned the judgment of the district court may be, it cannot escape being a forecast rather than a determination" because "[t]he last word on the meaning of" Texas law belongs "to the supreme court of Texas." *Pullman*, 312 U.S. at 499–500. There is more than "a possibility that" such clarity "will moot or present in a different posture the federal constitutional questions raised." *Palmer v. Jackson*, 617 F.2d 424, 428 (5th Cir. 1980). As a result, this Court should abstain.

C. Section 276.016(a)(1) Does Not Violate the First Amendment

Plaintiffs have not made a clear showing that Section 276.016(a)(1) is unconstitutional. First, Plaintiffs' free-speech claims fail because Section 276.016(a)(1) regulates only unprotected official-capacity speech, not protected personal-capacity speech. Second, even if Section 276.016(a)(1) were subject to First Amendment scrutiny, it would pass. Section 276.016(a)(1) ensures that the government's official imprimatur is not used to nudge voters from in-person voting to mail-in voting. Government officials nudging voters toward mail-in voting would cause multiple problems, including leading voters who do not qualify to vote by mail to submit applications claiming that they do (a felony) and increasing logistical and security burdens.

As the Attorney General explained in his motion to dismiss, Section 276.016(a)(1) does not limit any speech protected by the First Amendment. *See* ECF 24 at 11–14. Section 276.016(a)(1) applies only when an official is "acting in an official capacity" rather than a private capacity. Tex. Elec. Code § 276.016(a); *see also id.* § 276.016((2). Morgan recognized this in her deposition and her declaration. *See* Ex. B at 71–72; ECF 7-2 ¶ 16. Longoria likewise confirmed that she is concerned with the effect that SB1 has on how she performs her official job functions rather than her private speech. *See* Ex. A at 76 (confirming her testimony that she is "unable to fulfill [her] sworn duty of Elections Administrator" and listing "portions of [her] job as Elections Administrator" she is "unable to fulfill"). According to Longoria, she is deterred "from engaging in communications" that "are a central part of [her] duties as an elections administrator." ECF 7-1 ¶ 15.

The limited scope of Section 276.016(a)(1) is fatal to Plaintiffs' free-speech claims because "public employees mak[ing] statements pursuant to their official duties . . . are not speaking as citizens for First Amendment purposes." *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006). SB1 affects "activities undertaken in the course of performing one's job" as a government employee, not "the kind of activity engaged in by citizens who do not work for the government," so any speech it affects "is not protected by the First Amendment." *Williams v. Dallas Indep. Sch. Dist.*, 480 F.3d 689, 693–94 (5th Cir. 2007) (per curiam).

Even if Section 276.016(a)(1) affected protected speech, it would pass any level of scrutiny. Texas has a compelling interest in ensuring that official government resources are not used to shift voters from in-person voting to mail-in voting.

First, official solicitations to submit applications to vote by mail can confuse voters into believing they are qualified to vote by mail even when they are not. As Senator Hughes explained to

his colleagues, "official documents coming from the county" can be "confusing to voters."[1] Director of Elections Keith Ingram has confirmed this concern. "Some voters are confused by official mailings and do not carefully review the instructions." Ex. C ¶ 5. Some voters will improperly submit an application to vote by mail if they receive one "sent by a government official" "because of their belief that receipt . . . indicates the official's certification that the voter is eligible to vote by mail." *Id.* ¶ 6. "[A]ny official government communication that voters [are] likely to interpret as an official recommendation to vote by mail and an implicit assurance that they are qualified to do so" would raise "similar concerns." *Id.* ¶ 7.

Second, casting a vote by mail is less secure than casting a vote in person is. Representative Murr explained the difference on the floor. "[W]hen you vote in person and you go in person and you vote, your ballot never leaves the voting location." But "[w]hen you vote by mail," both an application and a ballot are sent through the mail. A mail-in "ballot is unaccompanied, compared to a scenario where you go to a polling location and your ballot is, there is a potential, as we've heard input from folks, that there could be a likelihood of fraud."[2] The Commission on Federal Election Reform—co-chaired by former President Carter and former Secretary of State James A. Baker III—likewise warned that voting by mail "increases the risk of fraud." Ex. J at 35. In some states, mail-in voting "has been one of the major sources of fraud." *Id.*

Moreover, "citizens voting at home may come under pressure to vote for certain candidates." *Id.* In-person "polling locations offer voters guaranteed privacy while casting their ballot," and "poll waters can intervene if a voter is being pressured or coerced to vote a certain way." Ex. E ¶ 18. "That security does not exist when a voter votes by mail." *Id.* As a result, there is "a serious concern that

[1] Senate Journal, 87th Leg., R.S., Sat., May 29, 2021 (Add.) at A93, https://journals.senate.texas.gov/SJRNL/87R/PDF/87RSJ05-29-FA.PDF.
[2] House Journal, 87th Leg., 2d C.S., Thurs., Aug. 26, 2021 (Supp.) at S18, https://journals.house.texas.gov/HJRNL/872/PDF/87C2DAY03CSUPPLEMENT.PDF.

voters who vote by mail may be targeted by other seeking to influence their vote." *Id.*

Third, mail-in ballots pose additional burdens on election administration that in-person ballots do not. The Medina County Elections Administrator explained that "shifting voters form in-person to mail-in voting would, on average, increase the expense and complexity of election administration." Ex. D ¶ 13. "[V]oting by mail . . . is more time-consuming for both voters and the county" than "voting by personal appearance is. *Id.* ¶ 4. While in-person voting is accomplished "all in a single transaction," *id.* ¶ 5, mail-in voting requires a multi-step process. A voter must submit an application for a mail-in ballot. *See id.* ¶ 6. The county then must process the application, send and track a mail-in ballot, and process a returned mail-in ballot, including through the signature-match process. *See id.* ¶¶ 6–9. The Election Administrator for Parker County agrees. "[V]oting by mail poses a significant administrative burden on the county (as well as the voter), as there are multiple steps int eh process, each of which consumes time, manpower, and resources." Ex. E ¶ 17.

To be sure, the Legislature has not sought to abolish voting by mail. Voting by mail remains a lawful option for those who qualify. But not everything that is permitted should be solicited, much less solicited with the imprimatur of the government at taxpayer expense. "The history of absentee voting legislation in Texas shows that the Legislature has been both engaged and cautious in allowing voting by mail." *In re State*, 602 S.W.3d 549, 558 (Tex. 2020). The First Amendment provides no reason to upset the careful balance that the Legislature struck in SB1.

II. Plaintiffs Have Not Made a Clear Showing a Preliminary Injunction Would Redress Irreparable Harm

A. Plaintiffs Have Not Made a Clear Showing of Irreparable Harm

To justify a preliminary injunction, Plaintiffs need to establish not only irreparable harm but also irreparable harm that will occur before this case could go to trial. Plaintiffs have introduced no evidence of any imminent enforcement plans from any Defendant. *See supra* Part I.A. A preliminary injunction against District Attorneys Ogg and Garza would be especially inappropriate because it

would not accomplish anything. Both district attorneys have already agreed not to enforce Section 276.016(a)(1) "until such time as a final, non-appealable decision has been issued in this matter." ECF 35 ¶ 2; ECF 36 ¶ 3. A preliminary injunction against Ogg and Garza could not give Plaintiffs any greater relief.

More generally, however, Plaintiffs' delay in seeking a preliminary injunction demonstrates a lack of irreparable harm. Longoria first heard about SB1 and the provision she is challenging in "the summer of 2021," Ex. A at 20, and she originally filed suit on September 3, 2021. *See* Complaint, *La Unión Del Pueblo Entero v. Abbott*, No. 5:21-cv-844-XR, ECF 1 ¶¶ 185–87, 223–29 (W.D. Tex. Sept. 3, 2021). Morgan also heard about SB1 in the summer of 2021, probably August. *See* Ex. B at 14–15. Yet neither Plaintiff served their motion for preliminary injunction under January 3, 2022. *See* ECF 15.

Such delay weighs heavily against a finding of irreparable harm because it "demonstrat[es] that there is no apparent urgency to the request." *Wireless Agents, LLC v. T Mobile USA, Inc.*, 2006 WL 1540587, *3 (N.D. Tex. June 6, 2006)); *see also Tough Traveler, Ltd. v. Outbound Prods.*, 60 F.3d 964, 968 (2d Cir. 1995) (delay "standing alone" may "preclude the granting of preliminary injunctive relief, because the 'failure to act sooner undercuts the sense of urgency that ordinarily accompanies a motion for preliminary relief and suggests that there is, in fact, no irreparable injury").

It is true that courts have found irreparable harm based on "[t]he loss of First Amendment freedoms[] for even minimal periods of time." *Opulent Life Church v. City of Holly Springs*, 697 F.3d 279, 295 (5th Cir. 2012). But those cases do not involve delays of months due to a plaintiff's own dilatory conduct. *Id.* at 297 (argument based on delay was "unconvincing *on . . . these facts*" where the "majority of [plaintiff's] four-month delay was caused by [defendant's] refusal to produce" necessary documents (emphasis added)). Here, Plaintiffs delayed longer than four months. None of that delay is attributable to Defendants.

B. Even If Plaintiffs Faced Irreparable Harm, a Preliminary Injunction Would Not Help

In this case, Plaintiffs identify only one allegedly irreparable harm: "the chilling effect that arises from the threat of imprisonment and civil penalties." ECF 7 at 19. On these facts, no preliminary injunction from a federal district court could remedy that alleged harm. Any threat of future enforcement would remain given the significant possibility that a preliminary injunction would be stayed, reversed, or not turned into a permanent injunction (including on procedural grounds). Plaintiffs would still face the possibility of criminal prosecution (or civil enforcement) for solicitation committed during the pendency of the injunction if the injunction were set aside. They have introduced no evidence that a preliminary injunction would eliminate the alleged "chill" about which they complain. As the requested relief would not prevent the alleged irreparable harm, it should be denied.

A preliminary injunction ceases to be binding if "it is reversed by orderly and proper proceedings." *United States v. United Mine Workers of Am.*, 330 U.S. 258, 293 (1947). And if that were to happen, the preliminary injunction would not be a defense to a subsequent enforcement action. A preliminary injunction cannot serve as "a grant of total immunity from future [enforcement]." *Edgar v. MITE Corp.*, 457 U.S. 624, 649 (1982) (Stevens, J., concurring in part and concurring in the judgment). "[F]ederal judges have no power to grant such blanket dispensation from the requirements of valid legislative enactments." *Id.* The most a preliminary injunction could do is pause any enforcement actions while it is in effect. Even if one were to think that the preliminary injunction somehow might prohibit heartbeat suits for abortions performed before it was set aside on appeal, Plaintiffs *cannot know now that courts will later so hold.*

In her deposition, Longoria confirmed that a "pause" in the threat of prosecution would not give her meaningful relief: "[W]hether there is a pause in [District Attorney Oggs] actions or not because of this lawsuit does nothing to abate my overall fears and concerns . . . ." Ex. A at 60. A

preliminary injunction that "only delayed, not permanently stopped" "imprisonment and other penalties" would leave Longoria "just as concerned." *Id.* at 99.

The same is true for Morgan. She testified that she would "still be deterred from providing the information that" she "want[s] to provide" if the district attorney "agreed not to prosecute [her] for a time period, but he could prosecute [her] down the road for things [she] did while the case was pending." Ex. B at 82. But a preliminary injunction could accomplish no more than such an agreement would. A preliminary injunction therefore would not remove the "chill" that Morgan claims as her irreparable injury. *See id.* at 83–84.

At her deposition, Morgan could think of only two things that would alleviate the alleged chill of Section 276.016(a)(1): first, "if the Legislature repealed that provision," and second, a court order saying she is "allowed to" engage in her proposed conduct and "will never be prosecuted for it." *Id.* at 85. A preliminary injunction cannot accomplish either of those things.

"An indispensable prerequisite to issuance of a preliminary injunction is *prevention* of irreparable injury." *Tate v. Am. Tugs, Inc.*, 634 F.2d 869, 870 (5th Cir. 1981) (emphasis added). "[I]t is a necessary corollary to the idea of irreparable injury without a preliminary injunction that the injury complained of will in fact be prevented by the injunction." *Viands Concerted, Inc. v. Reser's Fine Foods, Inc.*, No. 2:08-cv-914, 2008 WL 4823053, at *11 (S.D. Ohio Oct. 31, 2008), *report and recommendation adopted*, 2009 WL 1728289, at *13 (S.D. Ohio June 16, 2009) ("An injunction would not, as a matter of law, prevent the irreparable injury Viands asserts it will endure.").

When a proposed preliminary injunction "would not likely prevent the kind of irreparable injury Plaintiff seeks to prevent," it cannot issue. *Coleman v. United States*, No. 5:16-cv-817-DAE, 2017 WL 1278734, at *2 (W.D. Tex. Jan. 3, 2017); *see also Foy v. Univ. of Tex. at Dall.*, No. 3:96-cv-3406, 1997 WL 279879, at *3 n.1 (N.D. Tex. May 13, 1997), *aff'd*, 146 F.3d 867 (5th Cir. 1998) (per curiam) (denying an injunction because the plaintiff had not shown it would "remedy the irreparable injury of

which he complains").

Applying this rule, the Second Circuit reversed a preliminary injunction in *American Postal Workers Union, AFL-CIO v. U.S. Postal Service*, 766 F.2d 715 (2d Cir. 1985). There, the alleged "chilling of protected speech and union activities stem[med] not from the interim discharge, but from the threat of permanent discharge" by an employer. *Id.* at 722. But "the threat of permanent discharge . . . is not vitiated by an interim injunction," so there was no way the "chilling of the right to speak or associate could logically be thawed by the entry of an interim injunction." *Id.*; *see also Buckingham Corp. v. Karp*, 762 F.2d 257, 262 (2d Cir. 1985).

Similarly, in *Chiafalo v. Inslee*, the plaintiffs argued "that the mere potential of a monetary penalty has a chilling impact on [their] ability to exercise their First Amendment rights." 224 F. Supp. 3d 1140, 1147 (W.D. Wash. 2016). The court denied a preliminary injunction because such "relief would have no impact on Plaintiffs' decisionmaking calculus." *Id.* at 1148. "Whether or not the court preliminarily enjoins the State from enforcing the $1,000.00 civil penalty," the plaintiffs' decision-making would occur in light of the prospect of eventually having to pay the penalty because a preliminary injunction does not guarantee permanent relief. *Id.* In the end, "preliminary injunctive relief would not mitigate the chilling effect of the discretionary statutory penalty." *Id.*

More recently, a federal court denied a motion for preliminary injunction against the federal government on this same theory. In *Ohio v. Yellen*, the State of Ohio sought a preliminary injunction preventing the Secretary of the Treasury from attempting to recoup federal funding from it. No. 1:21-cv-181, 2021 WL 1903908, at *14 (S.D. Ohio May 12, 2021). Ohio argued that a preliminary injunction "would provide clarity about the legal consequences of its decisions." *Id.* at *15. The court denied relief because a preliminary injunction effective "while this case is pending does not—indeed cannot—provide the clarity that Ohio seeks." *Id.* Regardless of whether the court issued injunctive relief, Ohio would face the same lack of clarity about the defendant's power to recoup federal funds. With a

preliminary injunction, Ohio would face "possible recoupment . . . once the Court issues a merits decision, *i.e.*, if the Court . . . were to decline to convert the preliminary injunction into a permanent injunction." *Id.* Similarly, without a preliminary injunction, "the funds possibly could be recouped down the road . . . once again depending on the outcome of this case." *Id.*

The same rationale applies here. Because no preliminary injunction can guarantee that Longoria and Morgan will not face future enforcement actions, it cannot alleviate the chill they allegedly feel.

III. Plaintiffs Have Not Clearly Shown that the Balance of the Equities and Public Interest Favor Relief

The balance of the equities and the public interest weigh against an injunction here, particularly because an injunction would interfere with the orderly administration of Texas elections.

Challenges to the enforcement of state law always implicate these factors. "When a statute is enjoined, the State necessarily suffers the irreparable harm of denying the public interest in the enforcement of its laws." *Veasey v. Abbott*, 870 F.3d 387, 391 (5th Cir. 2017) (per curiam). In such cases, the State's "interest and harm merge with that of the public." *Id.* (citing *Nken v. Holder*, 556 U.S. 418, 435 (2009)). As a result, "a court should be particularly cautious when contemplating relief" like that sought here. *Salazar v. Buono*, 559 U.S. 700, 714 (2010) (noting that "[e]quitable relief is not granted as a matter of course," especially when the requested relief "implicates public interests").

These factors apply with special force in election-law cases. Binding "precedents recognize a basic tenet of election law: When an election is close at hand, the rules of the road should be clear and settled." *DNC. v. Wis. State Leg.*, 141 S. Ct. 28, 31 (2020) (Kavanaugh, J., concurring). Even well-intentioned injunctions often cause more problems than they solve. As the Supreme Court has recognized, "[c]ourt orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase." *Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006) (per curiam). These concerns apply

to not only broad relief but also "seemingly innocuous late-in-the-day judicial alterations to state election laws" because even those "can interfere with administration of an election and cause unanticipated consequences." *DNC*, 141 S. Ct. at 31 (Kavanaugh, J., concurring).

To avoid these dangers, the Supreme Court "has repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election." *RNC v. DNC*, 140 S. Ct. 1205, 1207 (2020) (per curiam). The Fifth Circuit takes this precedent very seriously. In the 2020 election cycle, that Court repeatedly stayed injunctions that would have interfered with Texas elections. *See, e.g.*, *Mi Familia Vota v. Abbott*, 834 F. App'x 860, 863 (5th Cir. 2020) (per curiam); *Richardson v. Tex. Sec'y of State*, 978 F.3d 220, 244 (5th Cir. 2020) (Higginbotham, J., concurring); *Tex. Alliance for Retired Ams. v. Hughs*, 976 F.3d 564, 566–67 (5th Cir. 2020) (per curiam); *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 411–12 (5th Cir. 2020).

In this case, the Director of Elections has explained that "changing the election procedures in the middle of an election cycle can create considerable confusion and frustration among voters and local election officials." Ex. C ¶ 10. Drawing on past experience in which last-minute injunctions confused, scared, and angered voters, *see id.* ¶¶ 10–11, Mr. Ingram has explained what is at stake in this case: "If, in the middle of an election, election officials began soliciting the submission of applications to vote by mail from people who did not request applications, despite a high-profile law prohibiting that practice, I would expect at least some voters to be confused and lose trust in the election process." *Id.* ¶ 12.

Losing voter trust is always a problem, but it is a particularly big problem today. "Voter trust is considerably lower today than it has been in the past." *Id.* "Further eroding voter trust could have serious consequences." *Id.*

IV. Plaintiffs' Proposed Injunction Is Overbroad

If the Court concludes that preliminary injunctive relief is warranted, it should nevertheless

refuse to enter Plaintiffs' proposed order. Plaintiffs propose a universal injunction beyond the power of any court. Plaintiffs would have this Court enjoin literally every state and local government official in Texas (including countless non-parties) from enforcing Section 276.016(a)(1) against literally anyone (including countless non-parties). That is not how federal adjudication works, much less is it how federal courts apply an equitable remedy like a preliminary injunction. *See, e.g.*, *Lewis v. Casey*, 518 U.S. 343, 360 (1996) ("[G]ranting a remedy beyond what was necessary to provide relief to [two plaintiffs] was therefore improper.").

Plaintiffs' proposed order suffers from two fundamental defects. First, it aims to protect non-plaintiffs. *See* ECF 7-3. "[N]either declaratory nor injunctive relief can directly interfere with enforcement of contested statutes or ordinances except with respect to the particular federal plaintiffs, and the State is free to prosecute others who may violate the statute." *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931 (1975). A "district court lack[s] authority to enjoin enforcement of [a challenged law] as to anyone other than the named plaintiffs." *In re Abbott*, 954 F.3d 772, 786 n.19 (5th Cir. 2020), *vacated as moot*, 141 S. Ct. 1261 (2021); *accord McKenzie v. City of Chicago*, 118 F.3d 552, 555 (7th Cir. 1997) ("[P]laintiffs lack standing to seek—and the district court therefore lacks authority to grant—relief that benefits third parties."). When a court finds "actual injury on the part of only one named plaintiff," "the proper scope of [an] injunction" cannot include the "population at large." *Lewis v. Casey*, 518 U.S. 343, 358 (1996). Plaintiffs' proposed order, on the other hand, "assumes an affirmative answer to the question at issue: whether a court may grant relief to non-parties. The right answer is no." *McKenzie*, 118 F.3d at 555.

Second, Plaintiffs' proposed order is improper because it would purport to enjoin the statute itself and numerous non-Defendants. *See* ECF 7-3. Federal courts do not enjoin statutes. "Remedies . . . ordinarily operate with respect to specific parties. In the absence of any specific party, they do not simply operate on legal rules in the abstract." *California v. Texas*, 141 S. Ct. 2104, 2115

(2021) (quotations and citations omitted). On the contrary, courts, in appropriate circumstances, enjoin particular defendants. Even in those circumstances, they enjoin "not the execution of the statute, but the acts of the official, the statute notwithstanding." *Commonwealth of Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923).

Plaintiffs could have moved to certify either a plaintiff-side class or a defendant-side class. *See* Fed. R. Civ. P. 23. They did not. As a result, this litigation involves only the named parties, and any relief must be limited to those parties. *See In re Abbott*, 954 F.3d at 786 n.19; *McKenzie*, 118 F.3d at 555.

CONCLUSION

The Attorney General respectfully requests that the Court deny Plaintiffs' motion for a preliminary injunction.

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Respectfully submitted.

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CERTIFICATE OF SERVICE

I certify that a true and accurate copy of the foregoing document was filed electronically (via CM/ECF) on February 8, 2022, and that all counsel of record were served by CM/ECF.

/s/ William T. Thompson
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