

I. INTEREST OF *AMICUS CURIAE*

Amicus Curiae is Lisa Wise, the El Paso County Elections Administrator.¹ Amicus administers elections for nearly half-a-million Texas voters. Amicus plays a vital role in ensuring that elections are free, transparent, fair, and secure. She views assisting and encouraging eligible voters to exercise their right to vote, including by mail if appropriate, as essential to administering elections. Amicus believes that Section 276.016(a)(1) of the Texas Election Code, which subjects election officials who “solicit[]” the submission of mail-in ballot applications to criminal penalties, violates the First Amendment. Amicus submits this brief in support of Plaintiffs’ motion for entry of a preliminary injunction against Section 276.016(a)(1)’s anti-solicitation provision and writes specifically to address how Section 276.016(a)(1) infringes on her First Amendment freedoms and impairs her administration of elections, including by chilling speech she routinely makes when administering elections, through threat of criminal prosecution.

II. INTRODUCTION AND SUMMARY OF ARGUMENT

Amicus is responsible for conducting elections in El Paso County and oversees voter registration, ballot distribution and collection, early voting, vote by mail, and Election Day voting, as well as the tabulation of ballots. *See* Tex. Elec. Code § 31.043. Importantly, Amicus also provides, receives, and processes applications to vote by mail. *See id.* §§ 31.043(1)–(2) (voting registrars and county clerks); 83.002 (early voting clerks). The option to vote by mail can be critical to ensuring that voters—including elderly or disabled voters, as well as those who are out of the county on Election Day—are able to exercise their right to vote. *See id.* §§ 82.001–82.008 (setting out eligibility criteria for vote by mail). In addition, vote by mail enhances the efficiency

¹ Amicus is a Defendant in two of the cases consolidated in *La Union Del Pueblo Entero, et al. v. Gregory W. Abbott, et al.*, No: 5:21-cv-844-XR, which also involve challenges to provisions of SB 1.

and timeliness of the election process by helping alleviate the administrative burden on elections administrators on Election Day.

Given her role in administering elections, Amicus routinely interacts with registered voters regarding the vote-by-mail process, including the process for obtaining and submitting mail-in voting applications. In prior election cycles, Amicus has also engaged in substantial outreach activities aimed at ensuring voters eligible to vote by mail are aware they are eligible and understand how to apply to vote by mail. During these interactions, Amicus also sometimes encouraged eligible and interested voters to apply to vote by mail if that was the best way to exercise their right to vote.

Section 276.016(a)(1) of the Texas Election Code, enacted in 2021 as part of SB 1, is unprecedented in Texas, as it exposes Amicus to potential criminal penalties if she continues to engage in these expressive activities she undertakes when administering elections. The resulting chilling effect on her speech will hamper her ability to administer elections and prevent her from helping constituents in El Paso County exercise their right to vote. Critically, Section 276.016(a)(1) imposes criminal penalties only on expression *encouraging* eligible voters to apply to vote by mail—not expression *discouraging* eligible voters from doing so. The First Amendment does not tolerate such content-based and viewpoint-based prohibitions. Accordingly, the Court should grant Plaintiffs’ requested preliminary injunction.

III. ARGUMENT

A. **As Elections Administrator, Amicus Oversees the Vote by Mail Process and Encourages Voters to Exercise Their Right to Vote.**

As noted above, Amicus is statutorily entrusted with conducting and overseeing mail-in voting in El Paso County. *See* Tex. Elec. Code §§ 31.045 (empowering county elections administrator or county clerk with election administration); 31.031–31.049 (role of county

elections administrator); 31.071–31.076 (role of county tax assessor-collector). It is the policy of the State of Texas to encourage eligible Texans to register to vote and to provide eligible Texas voters the tools and resources they need to cast a ballot, including using a mail-in ballot when eligible to do so. Indeed, the Secretary of State recently issued an advisory that states:

Texas Secretary of State John Scott today is encouraging all eligible Texas voters planning to vote in the March 1st Primary Election to make sure they are registered to vote by January 31st. . . . As Texans everywhere prepare to make their voices heard in the upcoming Primary Election, we want to make sure every single eligible Texas voter has the tools and resources they need to cast a ballot - whether that's in person during the early voting period, in person on Election Day, or by mail for those who are eligible to do so.

Tex. Secretary of State Advisory, *Secretary Scott Encourages Texas Voters to Register by Deadline, Prepare to Vote in March 1 Primary Election*, Jan. 17, 2022), <https://www.sos.state.tx.us/about/newsreleases/2022/011722.shtml> (lasted accessed February 2, 2022).

In line with these State policies, Amicus believes that helping to ensure that every eligible voter can vote—including any qualified voter who seeks to vote by mail—is integral to her role in administering elections. To further that end, Amicus has historically engaged in a variety of affirmative voter outreach efforts aimed at ensuring that voters understand the availability of mail-in balloting for eligible individuals and the requirements for the mail-in ballot application process.² Methods of outreach can vary widely, and in the past have included, among others: (a) radio and television commercials in English and Spanish; (b) virtual or in-person education sessions with community groups; (c) communications with individual voters by telephone, email, or in-person;

² Texas's mail-in ballot system requires that voters eligible to vote by mail on grounds of age or disability reapply on a yearly basis, while voters eligible on grounds of absence from county or confinement in jail must reapply on a per-election basis. *See* Tex. Elec. Code §§ 86.0015; 84.007(c).

(d) mailings to registered voters who have previously voted by mail; (e) social media posts; and (f) coordination with the political parties. These outreach efforts have involved, among other things, explaining the eligibility requirements for voting by mail; encouraging potentially eligible voters to fill out vote-by-mail applications by the statutory deadlines; answering voters' questions about the relevant forms; and helping potentially eligible voters cure incomplete vote-by-mail applications as needed. As Elections Administrator, Amicus and her staff also routinely receive and answer questions from both new and repeat vote-by-mail voters about their right to vote by mail and the steps voters must take to apply.

These outreach efforts, particularly when they occur earlier in the election cycle, have helped reduce the number of mail-in ballot applications that ultimately must be rejected for non-compliance or irregularities. Reducing the number of rejections permits Amicus's office to process applications more smoothly and quickly, well ahead of the application deadline. This has ripple effects across the entire local elections system, including allowing the Elections Administrator and her office to focus on the complex logistics of in-person voting as election day approaches.

Amicus accordingly has historically encouraged eligible voters to apply to vote by mail for a number of reasons. These efforts have made the in-person voting experience safer and more efficient for voters and election workers alike, with less crowding at polling places—a particular concern during the pandemic—and shorter lines. Further, encouraging eligible voters to use a mail-in ballot has historically helped to ensure that people who may have difficulty voting in person, such as because of disability or advanced age, are empowered to exercise their right to vote via the mail-in ballot process. In some cases, seniors, individuals with disabilities, and other

eligible voters have not been aware of this option, making outreach and encouragement vital to their voices being heard in the political process.

In addition to broader outreach efforts, Amicus interacts with voters on an individual basis when voters reach out with questions over telephone, by email, or in person. Frequently, voters' questions and concerns center on the mail-in ballot application process, given its multiple steps and the detailed nature of the official application itself. These individual communications with Amicus and her staff have been critical to eligible voters who want to fill out the application properly, steer clear of rejections for avoidable errors, and ultimately vote by mail successfully. Although political parties and certain advocacy organizations may conduct limited outreach and answer voters' questions, elections administrators are unique, trusted resources given their role as non-partisan government officials overseeing the balloting process. Their ability to help eligible voters obtain, fill out, and complete mail-in ballot applications, as well as cure applications submitted with errors or omissions, has been and is a critical component of administering elections in El Paso County.

B. Amicus Reasonably Fears that SB 1 Will Subject Her to Criminal Penalties for Speech She Has Previously Undertaken in the Course of Administering Elections.

Amicus fears that Section 276.016(a)(1)'s anti-solicitation provision is hindering and will continue to hinder her ability to engage in speech necessary and beneficial to the administration of elections. That Section states 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." Tex. Elec. Code § 276.016. Such an offense is a state jail felony with a mandatory minimum sentence of six months and a fine of up to \$10,000. Tex. Elec. Code § 276.016(b); Tex. Penal Code § 12.35(a)–(b).

Because Amicus views encouraging and enabling qualified registered voters to apply to vote by mail as a key part of her role in administering elections, Amicus fears her longstanding ordinary outreach and communication activities may run afoul of Section 276.016(a) and impair her administration of elections. For example, Amicus believes that Section 276.016(a) may prohibit her from making any effort to *encourage* eligible voters, including those 65 or older, to apply to vote by mail, such as by mailing a letter to these individuals explaining their eligibility to apply for an application to vote by mail. In addition, although the provision permits Amicus to “provide general information about voting by mail, the vote by mail process, or the timelines associated with voting to a person or the public,” responding to individual queries over telephone or email may not qualify as “general” information depending on the nature of the query. *See* Tex. Elec. Code § 276.016(e). But such one-on-one interactions can make an enormous difference to applicants trying to submit an application to vote by mail, especially given the complexity of the application form.

In sum, numerous everyday communications that Amicus views as essential to the efficient administration of elections and to enabling eligible Texas voters to exercise their right to vote, including by mail, may be hindered or prohibited under this provision. Critically, Amicus does not aim to encourage or enable *ineligible* voters to vote by mail. To the contrary, her goals are to ensure eligible voters are fully aware of their options and empowered to exercise their right to vote by mail if they desire to do so. Amicus wishes to continue the efforts necessary to achieve that goal—without risk of exposure to criminal penalties.

C. Section 276.016(a)(1)’s Anti-Solicitation Provision Violates the First Amendment.

By threatening elections officials with criminal punishment for *encouraging* voters to apply to vote by mail, while at the same time imposing no such prohibition on *discouraging* such applications, Section 276.016(a) runs headlong into the First Amendment. It is axiomatic that laws

that regulate speech based on content and viewpoint are “‘presumptively unconstitutional’ and subject to strict scrutiny.” *Reagan Nat’l Advert. of Austin, Inc. v. City of Austin*, 972 F.3d 696, 702 (5th Cir. 2020) (citing *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015)); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) (viewpoint-based discrimination is “an egregious form of content discrimination”). Section 276.016 violates that fundamental constitutional command and cannot survive strict scrutiny.

In his recently-filed Motion to Dismiss Plaintiffs’ Complaint, the Attorney General does not attempt to articulate how Section 276.016(a)(1) could do so. Instead, he argues that strict scrutiny does not apply because Section 276.016(a) allegedly regulates speech by a government employee. See ECF No. 24 at 11–14 (citing *Garcetti v. Ceballos*, 547 U.S. 410 (2006)). This argument fails. *Garcetti* does not apply to and cannot justify the imposition of *criminal* consequences for speech, even if those consequences run only against government employees. That is because *Garcetti* speaks only to the government’s role as an *employer* and not to the government’s exercise of its unique power as a *sovereign* to impose criminal penalties. See 547 U.S. at 420–24 (surveying prior cases that have addressed post-hoc “managerial discipline” of employees, which have “sought both to promote the individual and societal interests that are served when employees speak as citizens on matters of public concern and to respect the needs of government employers attempting to perform their important public functions”); see also *id.* at 424 (“[T]he First Amendment does not prohibit *managerial discipline* based on an employee’s expressions made pursuant to official responsibilities.” (emphasis added)). *Garcetti* contains no indication whatsoever that its holding was meant to suspend the speech rights of government officials at risk of criminal prosecution by others who have no connection to their employers.

To the contrary, the Supreme Court has distinguished between “managerial discipline” permissible under the line of cases culminating in *Garcetti* and the circumstances under which government employee speech may be criminally punished. For example, in *Rankin v. McPherson*, the Court made clear that while a clerical employee in Harris County’s constable’s office could properly be discharged for comments she made about the attempted assassination of President Reagan, that speech “could [not] properly be criminalized at all.” 483 U.S. 378, 387 (1987). Similarly, in *Connick v. Myers*, the Court made clear that government employee speech is not “totally beyond the protection of the First Amendment” and would be protectable in contexts other than employee discipline, such as in a libel action. 461 U.S. 138, 147 (1983). The Court’s care in articulating the boundaries of the doctrine summarized in *Garcetti* makes good sense, as “[t]he government as employer indeed has far broader powers than does the government as sovereign.” *Waters v. Churchill*, 511 U.S. 661, 671 (1994). Because imposing criminal penalties is something only a sovereign can do, *Garcetti* does not apply and cannot justify Section 276.016(a)’s criminal penalties.

Section 276.016(a)(1)’s anti-solicitation provision is also unconstitutional because it is a *prospective* ban on expression. Thus, the analysis in *United States v. National Treasury Employees Union*, 513 U.S. 454 (1995) (“*NTEU*”)—not *Garcetti*—would govern here. In *NTEU*, the Supreme Court considered and struck down a law that attempted to *prospectively* ban speech by government officials. *Id.* at 457 (law at issue “broadly prohibit[ed] federal employees from accepting any compensation for making speeches or writing articles”). The Court noted that “[u]nlike *Pickering* and its progeny, this case does not involve a *post hoc* analysis of one employee’s speech and its impact on that employee’s public responsibilities”; instead, it “g[ave] rise to far more serious concerns than could any single supervisory decision.” *Id.* at 466–68.

Recognizing the distinct First Amendment concerns presented by a prospective speech ban, the Court held that “the Government’s burden is greater with respect to [a] statutory restriction on expression than with respect to an isolated disciplinary action.” *Id.* at 468. With respect to a ban, “[t]he Government must show that the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by that expression’s necessary impact on the actual operation of the Government.” *Id.* (cleaned up); *see also Janus v. Am. Fed’n. of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2472 (2018) (noting that *Pickering* analysis must be “modif[ied]” for “rules that affect broad categories of employees” and their speech and that “[t]he end product of those adjustments is a test that more closely resembles exacting scrutiny than the traditional *Pickering* analysis”). Section 276.016(a)(1) clearly fails the *NTEU* test, as it undermines the ability of Amicus’s potential audience to exercise their right to vote and in fact hinders efficient governmental operations, for the reasons explained above. In fact, the Attorney General has not and cannot offer a compelling state interest justifying Section 276.016(a)(1)’s anti-solicitation provision, as that Section does nothing to promote the integrity of elections and instead hampers their administration.

IV. CONCLUSION

As a committed government official who aims to make elections as fair, transparent, and accessible as possible, Amicus strives to educate voters about all available voting methods and to encourage individuals to seek out methods for which they are eligible that are most convenient, safe, and efficient for them. This includes mail-in voting. Section 276.016(a)(1)’s anti-solicitation provision threatens Amicus with criminal penalties in violation of the First Amendment if she continues to engage in speech that is essential to efficient election administration and to helping ensure that eligible voters can vote. Because Section 276.016(a)(1) is unconstitutional and

irreparably harms both voters and election officials alike, the Court should grant Plaintiffs' motion for a preliminary injunction.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing document was filed electronically on February 4, 2022, with the Clerk of the Court for the U.S. Western District of Texas by using the CM/ECF system, causing electronic service upon all counsel of record.

/s/ Orion Armon
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