

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-01223-XR
The Honorable Xavier Rodriguez, U.S. District Judge

**BRIEF OF AMICUS CURIAE EL PASO COUNTY
ELECTIONS ADMINISTRATOR LISA WISE IN SUPPORT OF
PLAINTIFFS-APPELLEES**

COOLEY LLP
Kathleen R. Hartnett
(khartnett@cooley.com)
3 Embarcadero Center, 20th Floor
San Francisco, CA 94111
+1 415 693 2000 (telephone)
+1 415 693 2222 (facsimile)

STATES UNITED DEMOCRACY
CENTER
Ranjana Natarajan
(ranjana@statesuniteddemocracy.org)
1801 E 51st St., Suite 365, No. 334
Austin, TX 78723
+1 323 422 8578 (telephone)

*Attorneys for Amicus Curiae Lisa Wise,
El Paso County Elections Administrator*

CERTIFICATE OF INTERESTED PERSONS

No. 22-50110

Longoria, et al. v. Paxton, et al.

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1. have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. Plaintiffs-Appellees

Isabel Longoria

Cathy Morgan

2. Attorneys for Plaintiffs-Appellees

Sean Morales-Doyle, Andrew B. Garber, and Ethan J. Herenstein,
Brennan Center for Justice at NYU Law School

Christian Menefee, Jonathan Fombonne, Tiffany Bingham, Sameer Birring,
Christina Beeler, and Susannah Mitcham, Office of the Harris County
Attorney

Zachary D. Tripp, Paul R. Genender, Elizabeth Y. Ryan, Matthew Berde,
Alexander P. Cohen, and Megan Cloud, Weil, Gotshal & Manges LLP

3. Defendants-Appellants

Warren K. Paxton, in his official capacity as the Attorney General of Texas

Shawn Dick, in his official capacity as the District Attorney of
Williamson County, Texas

4. *Attorneys for Defendants-Appellants*

Judd E. Stone II, Benjamin D. Wilson, Cody Rutowski, Brent Webster, William Thompson, Eric Hudson, Kathleen Hunker, Leif Olson, Patrick Sweeten, and J. Aaron Barnes, Office of the Attorney General of Texas

Sean Breen, Howry, Breen & Herman, L.L.P.

Randy Leavitt, Leavitt & Earvin

5. *Amicus Curiae*

Lisa Wise, El Paso County Elections Administrator

6. *Attorneys for Amicus Curiae*

Kathleen Hartnett, Cooley LLP

Ranjana Natarajan, States United Democracy Center

/s/ Kathleen R. Hartnett

Kathleen Hartnett

*Attorney of Record for Amicus Curiae
Lisa Wise, El Paso County
Elections Administrator*

TABLE OF CONTENTS

	PAGE
I. INTEREST OF AMICUS CURIAE.....	1
II. INTRODUCTION AND SUMMARY OF ARGUMENT.....	2
III. ARGUMENT.....	3
A. As Elections Administrator, Amicus Oversees the Vote by Mail Process and Encourages Voters to Exercise Their Right to Vote.....	3
B. SB 1 Has Caused Unprecedented Numbers of Mail-in Ballot Applications and Mail-in Ballots To Be Rejected In Advance of the March Primary.....	7
C. Amicus Reasonably Fears that SB 1 Will Subject Her to Criminal Penalties for Speech Undertaken in the Course of Administering Elections.....	9
D. Section 276.016(a)(1)'s Anti-Solicitation Provision Violates the First Amendment.....	11
IV. CONCLUSION.....	16

TABLE OF AUTHORITIES

	PAGE(S)
 Cases	
<i>City of El Cenizo, Texas v. Texas</i> , 890 F.3d 164 (5th Cir. 2018)	13, 14
<i>Connick v. Myers</i> , 461 U.S. 138 (1983).....	13
<i>Garcetti v. Ceballos</i> , 547 U.S. 410 (2006).....	12, 13, 14
<i>Grayned v. City of Rockford</i> , 408 U.S. 104 (1972).....	16
<i>Janus v. Am. Fed’n. of State, Cnty., & Mun. Emps., Council 31</i> , 138 S. Ct. 2448 (2018).....	15
<i>La Union Del Pueblo Entero, et al. v. Gregory W. Abbott, et al.</i> , No: 5:21-cv-844-XR (W.D. Tex.)	1
<i>Rankin v. McPherson</i> , 483 U.S. 378 (1987).....	13
<i>Reagan Nat’l Advert. of Austin, Inc. v. City of Austin</i> , 972 F.3d 696 (5th Cir. 2020)	11
<i>Reed v. Town of Gilbert</i> , 576 U.S. 155 (2015).....	11
<i>Reno v. Am. C.L. Union</i> , 521 U.S. 844 (1997).....	16
<i>Rosenberger v. Rector & Visitors of Univ. of Va.</i> , 515 U.S. 819 (1995).....	11
<i>United States v. National Treasury Employees Union</i> , 513 U.S. 454 (1995).....	14, 15

TABLE OF AUTHORITIES
(CONTINUED)

	PAGE(S)
<i>Waters v. Churchill</i> , 511 U.S. 661 (1994).....	13
 Statutes	
Election Integrity Protection Act of 2021, 87th Leg., 2d C.S. (2021).....	1
Tex. Elec. Code Ch. 82	2, 5
Tex. Elec. Code	
§ 31.043.....	2
§ 31.045.....	4
§ 84.007(c).....	5
§ 86.0015.....	5
§ 276.016(a)(1)	<i>passim</i>
§ 276.016(b).....	10
§ 276.016(e).....	10, 16
Tex. Penal Code § 12.35(a)–(b).....	10
Texas Health and Safety Code Chapter 841	5
 Other Authorities	
Alexa Ura, <i>Hundreds of mail-in ballot applications are being rejected under Texas’ new voting rules</i> , THE TEXAS TRIBUNE (Jan. 13, 2022), https://www.texastribune.org/2022/01/13/texas-voting-mail-rejections/	7
Ashley Lopez, <i>High numbers of mail ballots are being rejected in Texas under a new state law</i> , NPR (Feb. 15, 2022), https://www.npr.org/2022/02/15/1080739353/high-numbers-of-mail-ballots-are-being-rejected-in-texas-after-a-new-state-law	8
Ashley Lopez, <i>Why Texas election officials are rejecting hundreds of vote-by-mail applications</i> , NPR (Jan. 20, 2022), https://www.npr.org/2022/01/20/1074296368/why-texas-election-officials-are-rejecting-hundreds-of-vote-by-mail-applications	8

TABLE OF AUTHORITIES
(CONTINUED)

	PAGE(S)
Robert Moore, <i>45% of El Paso mail ballots rejected in first week of early voting</i> , EL PASO MATTERS (Feb. 21, 2022), https://elpasomatters.org/2022/02/21/45-of-el-paso-mail-ballots-rejected-in-first-week-of-early-voting/	8
State Advisory, <i>Secretary Scott Encourages Texas Voters to Register by Deadline, Prepare to Vote in March 1 Primary Election</i> (Jan. 17, 2022), https://www.sos.state.tx.us/about/newsreleases/2022/011722.shtml	4
Tex. Secretary of State, <i>Application for a Ballot by Mail</i> , https://www.sos.texas.gov/elections/voter/reqabbm.shtml	5
<i>Voting by Mail</i> , https://www.votetexas.gov/voting-by-mail/index.html	3

I. INTEREST OF AMICUS CURIAE¹

Amicus Curiae is Lisa Wise, the El Paso County Elections Administrator. 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 was enacted as part of the Election Integrity Protection Act of 2021, 87th Leg., 2d C.S. (2021) (hereinafter “SB 1”),² and 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 the Brief of Plaintiffs-Appellees, which asks this Court to affirm the district court’s grant of a preliminary injunction. Amicus writes specifically to address how Section 276.016(a)(1) infringes on her First Amendment freedoms and impairs her administration of elections, including

¹ All parties consented to the filing of this amicus brief. Undersigned counsel for Amicus Curiae certify that this brief was not authored in whole or part by counsel for any of the parties; no party or party’s counsel contributed any money intended to fund preparing or submitting this brief; and no one other than Amicus and her counsel have contributed money that was intended to fund preparing or submitting this brief.

² 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 (W.D. Tex.), which also involve challenges to provisions of SB 1.

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. 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 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, Amicus joins Plaintiffs-Appellees in requesting that the Court affirm the district court’s grant of a 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 explained on the VoteTexas.gov website administered by the Secretary of State, “[v]oting by mail in Texas has been available to elderly voters and voters with physical disabilities for decades.” *Voting by Mail*, <https://www.votetexas.gov/voting-by-mail/index.html>. And as stated 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.

Texas 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>. 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 be eligible to vote by mail in Texas, the voter must (a) be 65 years or older, (b) be sick or disabled, (c) be out of the county during the period for early voting by personal appearance and on Election Day, (d) be

expected to give birth within three weeks before or after Election Day, (e) be confined in jail, but otherwise eligible, or (f) be civilly committed under Chapter 841 of the Texas Health and Safety Code. *See* Tex. Elec. Code Ch. 82.³ Amicus has historically engaged in a variety of affirmative voter outreach efforts aimed at ensuring that these eligible voters understand the availability of mail-in balloting and the requirements for the mail-in ballot application process.⁴ 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; (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.

³ *See also* Tex. Secretary of State, *Application for a Ballot by Mail*, <https://www.sos.texas.gov/elections/voter/reqabbm.shtml>.

⁴ 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).

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' 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' historical efforts to encourage eligible voters to apply to vote by mail have made the in-person voting experience safer and more efficient for voters and election workers alike, with less crowding and shorter lines at polling places—particular concerns during the COVID-19 pandemic. 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 and her staff routinely interact with a significant number of voters on an individual basis when both new and repeat

vote-by-mail 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. SB 1 Has Caused Unprecedented Numbers of Mail-in Ballot Applications and Mail-in Ballots To Be Rejected In Advance of the March Primary.

SB 1 implemented stricter identification requirements that apply to voters seeking to vote by mail. Election officials of Texas counties have reported that an alarming number of mail-in ballot applications from Texans seeking to vote in the upcoming March primary election have been rejected for their failure to comply with the new SB 1 requirements. *See Alexa Ura, Hundreds of mail-in ballot applications are being rejected under Texas' new voting rules, THE TEXAS TRIBUNE* (Jan. 13,

2022), <https://www.texastribune.org/2022/01/13/texas-voting-mail-rejections/>; Ashley Lopez, *Why Texas election officials are rejecting hundreds of vote-by-mail applications*, NPR (Jan. 20, 2022), <https://www.npr.org/2022/01/20/1074296368/why-texas-election-officials-are-rejecting-hundreds-of-vote-by-mail-applications>. Amicus and her staff have had to reject more than 20% of the 3200 mail-in ballot applications they have received from El Paso County voters in the first few weeks of January 2022. That rate of rejection is more than double what the rate was in 2020 and 2021.

In addition to mail-in ballot applications, mail-in ballots for the March primary election have also been rejected and sent back at unprecedented rates far greater than those seen in prior years because the ballots did not comply with SB 1's requirements. See Ashley Lopez, *High numbers of mail ballots are being rejected in Texas under a new state law*, NPR (Feb. 15, 2022), <https://www.npr.org/2022/02/15/1080739353/high-numbers-of-mail-ballots-are-being-rejected-in-texas-after-a-new-state-law> ("In Harris County – Texas' largest county, which is home to Houston – election officials said they'd received 6,548 mail-in ballots as of Saturday and had returned almost 2,500 – nearly 38% – for correction because of an incorrect ID. That's a far higher rejection rate than is typical."); Robert Moore, *45% of El Paso mail ballots rejected in first week of early voting*, EL PASO MATTERS (Feb. 21, 2022), <https://elpasomatters.org/2022/02/21/45->

of-el-paso-mail-ballots-rejected-in-first-week-of-early-voting/ (“In prior years, 5 to 10% of El Paso mail-in ballots were rejected[.] ... Through Saturday [Feb. 19], 45% of the 2022 primary mail ballots have been rejected.”).

SB 1 complicated both the mail-in ballot application process and the mail-in ballots themselves, which had already involved multiple steps and/or detailed requirements. As a result, Amicus and her staff have had to spend significantly increased time processing the vote-by-mail applications or ballots, sending out cure notifications, and answering calls about the rejections and the new SB 1 requirements. SB 1’s significant impact on election administration in El Paso County—and in fact, across all counties in Texas—further demonstrates that early outreach and communications about mail-in voting are critical to ensure that all eligible Texas voters will have the opportunity to cast their ballots.

C. Amicus Reasonably Fears that SB 1 Will Subject Her to Criminal Penalties for Speech 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(a)(1). 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—more critical now than before the enactment of SB 1—may run afoul of Section 276.016(a)(1) 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 and the stricter requirements added by SB 1.

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.

D. 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)(1) 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(a)(1) violates that fundamental constitutional command and cannot survive strict scrutiny.

The Attorney General’s brief to this Court does not attempt to articulate how Section 276.016(a)(1) could satisfy strict scrutiny. Instead, he argues that strict scrutiny does not apply because Section 276.016(a)(1) allegedly regulates speech by a government employee. *See* Appellant’s Br. at 20-30 (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.

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 stated 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 noted 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)(1)’s criminal penalties.

The Attorney General’s citation to *City of El Cenizo, Texas v. Texas*, 890 F.3d 164 (5th Cir. 2018) is entirely inapposite. In *City of El Cenizo*, this Court expressly declined to address whether *Garcetti* applied to justify the imposition of civil monetary penalties for speech by non-elected public employees—much less criminal penalties for such speech—given that “[s]uch issues [were] not properly before [the Court] because the appellees [did] not represent the public employees putatively

covered by *Garcetti* and the government speech doctrine.” *Id.* at 185. Moreover, as in *Garcetti*, the statute at issue in *City of El Cenizo* did not impose criminal penalties for speech by government employees and thus *City of El Cenizo* does not speak to the government’s exercise of its unique power as a *sovereign* to impose criminal penalties. *See id.* at 175; *Garcetti*, 547 U.S. at 420-24.

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.* (internal quotations omitted)⁵; *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 Amicus’s ability to efficiently and effectively conduct elections in El Paso County, 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.⁶

⁵ The Attorney General mischaracterizes the holding of *NTEU* by asserting that it applied “the *Pickering* balancing test to a statute that was enforced by ‘[t]he Attorney General’ through ‘a civil action to recover a penalty.’” Appellant Br. at 27 (citing *NTEU*, 513 U.S. at 460); *see NTEU*, 513 U.S. at 466-68 (finding that the case was “[u]nlike *Pickering* and its progeny” because it did not involve “a *post hoc* analysis of one employee’s speech” and holding that “the Government’s burden is greater with respect to [a] statutory restriction on expression than with respect to an isolated disciplinary action”). *NTEU* did not, as here, involve threatened criminal penalties.

⁶ Section 276.016(a)(1)’s anti-solicitation provision is also unconstitutionally vague. Although the State has made clear that “solicitation” (which otherwise is arguably vague) includes any communication with voters that may facilitate the submission

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, Amicus joins Plaintiffs-Appellees in urging this Court to affirm the district court's grant of a preliminary injunction.

of a mail-in ballot application (in violation of the First Amendment, as discussed above), the provision does not define what it means for an election official to act in his or her "official capacity." Section 276.016(e) states that the anti-solicitation provision does not apply if the official was "acting in the official's capacity as a candidate for a public elective office." This subsection suggests that there are actions that can be taken by an election official in an official capacity, like actions "as a candidate for a public elective office," that would not fall under the scope of "official" speech or conduct contemplated by Section 276.016(a)(1)'s anti-solicitation provision, which is not defined. *See Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) (A law "is void for vagueness if its prohibitions are not clearly defined"); *Reno v. Am. C.L. Union*, 521 U.S. 844, 871-72 (1997) (finding that the vagueness of a statute that can impose criminal penalties to regulate speech "raises special First Amendment concerns").

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Respectfully submitted,

By: /s/ Kathleen R. Hartnett

Kathleen R. Hartnett
COOLEY LLP
khartnett@cooley.com
3 Embarcadero Center, 20th Floor
San Francisco, CA 94111
Telephone: +1 415 693-2000
Facsimile: +1 415 693-2222

Ranjana Natarajan
STATES UNITED DEMOCRACY
CENTER
ranjana@statesuniteddemocracy.org
1801 E 51st St., Suite 365, No. 334
Austin, TX 78723
Telephone: +1 323 422-8578

*Attorneys for Amicus Curiae Lisa Wise,
the El Paso County Elections
Administrator*

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Kathleen R. Hartnett

Kathleen R. Hartnett

Attorney for Amicus Curiae

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 3,950 words excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5)(A) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced type face using Microsoft Word in Times New Roman in font size 14.

/s/ Kathleen Hartnett

Kathleen R. Hartnett

Attorney for Amicus Curiae