



Case Summaries March 23, 2022

ELECTIONS Voting by Mail

Paxton v. Longoria, certified question accepted, — Tex. Sup. Ct. J. — (March 23, 2022)
[22-0224]

The case underlying these certified questions is a pre-enforcement challenge to two recently enacted provisions of the Texas Election Code: section 276.016(a) (the anti-solicitation provision) and section 31.129 (the civil-liability provision) as applied to the anti-solicitation provision. The anti-solicitation provision makes it unlawful for a “public official or election official” while “acting in an official capacity” to “knowingly . . . solicit[] the submission of an application to vote by mail from a person who did not request an application.” The civil-liability provision creates a civil penalty for an election official who is employed by or an office of the state and who violates a provision of the election code.

Isabel Longoria, the Harris County Elections Administrator, and Cathy Morgan, a Volunteer Deputy Registrar serving in Williams and Travis counties—sued the Texas Attorney General, Ken Paxton, to enjoin enforcement of the civil-liability provision, as applied to the anti-solicitation provision. And in response to the recent Court of Criminal Appeals case holding that the Texas Attorney General has no independent authority to prosecute criminal offenses created in the Election Code, they also sued the Harris, Travis, and Williamson County district attorneys to challenge the criminal penalties imposed by the anti-solicitation provision. The plaintiffs argue that the provisions violate the First and Fourteenth Amendments because the risk of criminal and civil liability chills speech that “encourage[s] voters to lawfully vote by mail.

After an evidentiary hearing, the district court granted the plaintiffs’ motion for a preliminary injunction, enjoining the defendants from enforcing and prosecuting under the provisions. Paxton and one of the district attorneys (Shawn Dick of Williamson County) appealed. Because the Harris and Travis County district attorneys did not appeal, only Longoria’s challenge to the civil penalty permitted by the civil-liability provision and the Volunteer Deputy Registrar’s challenge to the

criminal liability imposed under the anti-solicitation provision were at issue in the appeal.

On its own motion, the U.S. Court of Appeals for the Fifth Circuit has certified the following questions to the Court:

- (1) Whether Volunteer Deputy Registrars are “public officials” under the Texas Election Code;
- (2) Whether the speech Plaintiffs allege that they intend to engage in constitutes “solicitation” within the context of Texas Election Code § 276.016(a)(1). For example, is the definition narrowly limited to seeking application for violative mail-in ballots? Is it limited to demanding submission of an application for mail-in ballots (whether or not the applicant qualifies) or does it broadly cover the kinds of comments Plaintiffs stated that they wish to make: telling those who are elderly or disabled, for example, that they have the opportunity to apply for mail-in ballots?; and
- (3) Whether the Texas Attorney General is a proper official to enforce Texas Election Code § 31.129.

The Court accepted the certified questions and set oral argument for May 11, 2022.