No. 24-50783

In the United States Court of Appeals for the Fifth Circuit

LA UNIÓN DEL PUEBLO ENTERO, ET AL.,
Plaintiffs-Appellees,

v.

GREGORY W. ABBOTT, ET AL.,
Defendants-Appellants.

On Appeal from the United States District Court
for the Western District of Texas, San Antonio Division

DEFENDANTS' EMERGENCY MOTION TO STAY DISTRICT COURT ORDER AND PERMANENT INJUNCTION PENDING APPEAL AND FOR A TEMPORARY ADMINISTRATIVE STAY

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-1700
Fax: (512) 474-2697

AARON L. NIELSON
Solicitor General

LANORA C. PETTIT
Principal Deputy Solicitor General
Lanora.Pettit@oag.texas.gov

Counsel for State Defendants-Appellants

Certificate of Interested Persons

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Under the fourth sentence of Fifth Circuit Rule 28.2.1, State Appellants, as governmental parties, need not furnish a certificate of interested persons.

/s/ Lanora C. Pettit
Lanora C. Pettit
Counsel of Record for
State Defendants-Appellants

Introduction and Nature of Emergency

It is blackletter law that "federal court[s] should avoid altering state election rules close to an election," *Tex. League of United Latin Am. Citizens v. Hughs*, 978 F.3d 136, 142 (5th Cir. 2020) (citing *Purcell v. Gonzalez*, 549 U.S. 1, 6 (2006) (per curiam); *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 589 U.S. 423, 424 (2020) (per curiam))—a settled rule that the district court deemed inapplicable here. With only 23 days until early voting starts and at least 7 days after Counties *already* have started mailing out absentee ballots, the district court enjoined enforcement of Texas's paid-vote-harvesting ban. And if that weren't enough, the injunction creates different voting rules for voters participating in the same election. After all, it applies to the District Attorneys of only 3 of Texas's 254 counties, as well as the Secretary of State and Attorney General who cannot directly enforce the law at all.

Absent an emergency stay by this Court, the injunction will irreparably injure Texas's sovereignty and confuse voters, potential voter assistants, and election officials alike. It will also result in different rules being applied to an in-progress election. Therefore, as the Court has already previously done with respect to this same voting statute and same district court, *see* Orders, *United States v. Paxton*, No. 50885 (5th Cir. Dec. 6, 2023 & Dec. 15, 2023) (granting administrative stay and then stay pending appeal) (App.D & App.E), Defendants respectfully urge the Court to promptly enter a temporary administrative stay and a stay pending appeal.

Background

In 2021, as part of Senate Bill 1 ("S.B.1"), Texas banned paid vote harvesting, which it defined as the "in-person interaction with one or more voters, in the physical presence of an official ballot or a ballot voted by mail, intended to deliver votes for a specific candidate or measure." Tex. Elec. Code §276.015(a)(2). This ban only applies to interactions that (1) are performed for compensation or benefit, (2) occur in the presence of a ballot or during the voting process, (3) involve an official ballot or mail-in ballot, (4) are conducted in-person with a voter, and (5) are designed to deliver votes for or against a specific candidate or measure. *Id.* §276.015.

Among challenges to dozens of provisions of S.B.1, some of which are already pending before the Court, *see Paxton*, No. 50885, Plaintiffs—a coalition of organizations rather than individual voters—facially challenged this common-sense voter-integrity provision as violating free speech and being unconstitutionally vague. On September 11, 2023, the district court started its bench trial on Plaintiffs' claims and on February 13, 2024, heard closing arguments. Then on September 28, 2024—seven months later and only 23 days before early voting starts—the district court issued its opinion enjoining Defendants from enforcing the paid-vote-harvesting ban. *See* Findings of Fact and Conclusions of Law (App.A). On September 30, 2024, Texas asked the district court to stay its injunction, which was denied the next day. *See* Order Denying Motion for Stay Pending Appeal (App.F).

Statement of Jurisdiction

The Court has jurisdiction under 28 U.S.C. §1292.

ARGUMENT

The district court has declared unconstitutional a major state law that has been in effect for over three years in the middle of an ongoing presidential election. Accordingly, all four traditional factors favor a stay: (1) the State Defendants are likely to succeed on the merits; (2) they will suffer irreparable harm absent a stay; (3) Plaintiffs will not be substantially harmed by a stay; and (4) the public interest favors a stay. *See Nken v. Holder*, 556 U.S. 418, 434 (2009). Moreover, where, as here, the "balance of the equities weighs *heavily* in favor of granting the stay," only a "*serious legal question*" about the merits is required. *Tex. Dem. Party v. Abbott*, 961 F.3d 389, 397 (5th Cir. 2020).

I. The Equities Favor Granting a Stay.

The equities strongly favor staying an injunction that disrupts the rules governing an election that has already begun. Indeed, the injunction irreparably injures not only the State's sovereignty but also the orderly administration of a major election—not to mention exposing both voters and those who seek to assist them to potential liability should the Court (as it is likely to do) reverse the injunction after the election. By contrast, a stay will not harm Plaintiffs, who have no constitutionally protected interests implicated by a regulation of mail-in ballots.

A. The State and the public interest will suffer irreparable injury without a stay.

1. A stay is vital here under the well-established *Purcell* principle, which provides that federal courts "should not alter state election laws in the period close to an election." *Democratic Nat'l Comm. v. Wis. State Legislature*, 141 S. Ct. 28

(2020) (Kavanaugh, J., concurring) (upholding Seventh Circuit's stay of injunction entered six weeks before the general election). This rule flows from the fact that elections are complex affairs, and changes to election rules—even minor ones—without care and planning risks chaos that will neither ensure the integrity of an election nor engender public confidence in its outcome. *See, e.g.*, *Purcell*, 549 U.S. at 5-6; *see also Robinson v. Ardoin*, 37 F.4th 208, 228 (5th Cir. 2022) (per curiam).[1] That is, it reflects that "[w]hen an election is close at hand, the rules of the road must be clear and settled. Late judicial tinkering with election laws can lead to disruption and to unanticipated and unfair consequences for candidates, political parties, and voters, among others." *Merrill v. Milligan*, 142 S.Ct. 879, 880-81 (2022).

Although "the Supreme Court has never specified precisely what it means to be 'on the eve of an election' for *Purcell* purposes," *League of Women Voters of Fla., Inc. v. Fla. Sec'y of State*, 32 F.4th 1363, 1371 (11th Cir. 2022)), this injunction comes far too late. And the risk of such confusion and disruption will only continue to increase as the "election draws closer." *Purcell*, 549 U.S. at 5. Thus, the Supreme Court has applied the *Purcell* principle to stay injunctions entered 29, 33, and even 60 days before elections. *Robinson*, 37 F.4th at 229 (citations omitted).

Here, the district court has issued an order—with respect to some but not all Counties—addressing a provision that governs the mechanism of mail-in balloting *after* such ballots have already been dispatched. *See* App.A. Leaving aside that the

[1] This is in addition to the sovereign injury the State *always* suffers when its law is enjoined—and will suffer here. *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers).

months of training that Counties must undertake to ensure that election judges and clerks know the rules they are to apply,[2] they have *already* started mailing out absentee ballots. Federal and state law required counties to mail ballots to military personnel overseas by September 21, 2024—seven days before the district court's order. 52 U.S. Code § 20302(a)(8); Tex. Elec. Code § 86.004(b). Each mail-in ballot included a letter stating, in bold, that "**[i]f anyone attempts to pressure or intimidate you, we urge you to report this**" and that an assistant "**cannot suggest how you should vote.**" Tex. Sec'y of State, *Form 6-29*, https://perma.cc/N5FY-XSCL. Those instructions further state that any person who "**deposits your [c]arrier [e]nvelope in the mail or delivers your ballot to a common or contract carrier**" must disclose "**whether he or she received or accepted any form of compensation or other benefit**." Tex. Sec'y of State, *Form 6-26*, https://perma.cc/QGT9-UH9E. As only Texas's paid-vote-harvesting ban mentions compensation or other benefits, *see* Tex. Elec. Code §276.013, it is unclear whether those instructions are proper. But, at minimum, any voter who has already received these instructions will not know whether compensation disclosures are still necessary. Accordingly, "[w]hatever *Purcell*'s outer bounds," this "case fits within them." *League*, 32 F.4th at 1371 (discussing challenge to voter-registration rules while registration underway).

2. The district court acknowledged the *Purcell* principle, but—as before when it considered a provision of S.B. 1, *see* App.D & App.E—it dismissed that principle's

[2] *See, e.g.*, Fort Bend County, *Training Dates*, https://perma.cc/4ENP-5NYB.

relevance. App.A.75-76. This time, the court asserted that *Purcell* was inapplicable because it governs only provisions addressing the "mechanics and procedures" of voting. *Id.* at 76. The district court insists that an injunction here does not "create the potential for confusion and disruption of the election administration" because it "does not affect any voting or election procedures." *Id.* at 75. The court further explained that "an injunction against enforcement proceedings is removed in space and time from the mechanics and procedures of voting" and is thus "unlike an order requiring affirmative changes to the election process before it occurs." *Id.* at 76. This is wrong for several reasons.

To start, the State is aware of no case in which the Supreme Court has limited the *Purcell* principle to the "mechanics" of voting. To the contrary, the Supreme Court has applied the principle to "substantive" issues—for example, gerrymandering. *See Robinson v. Callais*, 144 S.Ct. 1171, 1171-72 (2024); *Merrill*, 142 S. at 879-80; *North Carolina v. Covington*, 585 U.S. 969, 979 (2018) (per curiam).

Even if the *Purcell* principle applies only to mechanics and procedures, Texas's paid-vote-harvesting ban qualifies as both because it applies only to interactions that (1) are performed for compensation or benefit, (2) occur in the presence of a ballot or during the voting process, (3) "involve an official ballot or ballot by mail", (4) are "conducted in-person with a voter", and (5) are "designed to deliver votes for or against a specific candidate or measure." Tex. Elec. Code § 276.015(e). These requirements—location, intent, and payment conditions with respect to harvesting votes—are just as mechanical and procedural as the eligibility requirements, mask-

mandate exemptions, and ballot forms that the district court acknowledged *would* be subject to *Purcell* even under its own rule. App.A.76 n.46.

The threat of irreparable harm to the State absent a stay, moreover, also means that the public interest favors a stay. "Because the State is the appealing party, its interest and harm merge with that of the public." *Veasey*, 870 F.3d at 391; *see also, e.g.*, *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers).

B. The Plaintiffs will suffer no injury from a stay.

The harm to the State and to the public outweighs any supposed harm to Plaintiffs. An injunction requires a showing of "irreparable harm" that is *likely*, not merely possible. *See, e.g.*, *Winter v. NRDC*, 555 U.S. 7, 22 (2008); *see also Crown Castle Fiber, LLC v. City of Pasadena*, 76 F.4th 425, 441 (5th Cir. 2023) (applying *Winter* standard in context of permanent injunction). And the threatened harm must be "imminent." *Chacon v. Granata*, 515 F.2d 922, 925 (5th Cir. 1975). In considering that factor, "the maintenance of the status quo is an important consideration in granting a stay." *E.T. v. Paxton*, 19 F.4th 760, 770 (5th Cir. 2021). Here, a stay will not substantially injure Plaintiffs but will simply maintain the status quo that has existed in Texas since 2021, when S.B. 1 went into effect.

In holding to the contrary, the district court relied upon the principle that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." App.A.75 (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality op.)). But Plaintiffs' constitutional rights are not implicated by this common-sense regulation of mail-in ballots. After all, Plaintiffs

have numerous ways to influence elections: They can try to persuade voters all they want *outside the presence of a ballot*. What they cannot do, however, is engage in vote harvesting "in exchange for compensation or other benefit." Tex. Elec. Code § 276.015(b). As explained below, this is a regulation of conduct, not speech.

II. The State Will Likely Succeed on the Merits.

Because the "balance of the equities weighs *heavily* in favor of granting the stay," even a "*serious legal question*" is enough to require a stay. *Tex. Dem. Party*, 961 F.3d at 397. Here, however, the lower standard of proof is of no moment. The State Defendants are likely to succeed on the merits because under ordinary canons of statutes of construction, the provision easily satisfies the void-for-vagueness standard and is a reasonable and content-neutral regulation of either conduct or the time, place and manner of speech. And even if the Court were to disagree on all of that, the district court's injunction cannot be affirmed as written because it lacked jurisdiction to issue that injunction as to the Secretary or the Attorney General.

A. The paid-vote-harvesting ban is not unconstitutionally vague.

Under the Fourteenth Amendment, statutes must give "'fair notice' of the conduct [the] statute proscribes." *Sessions v. Dimaya*, 584 U.S. 148, 155-56 (2018) (citation omitted). "Fair notice" does not require precision, and indeed, "[m]any perfectly constitutional statutes use imprecise terms." *Id.* at 159. Due process "does not require impossible standards" of clarity. *United States v. Petrillo*, 332 U.S. 1, 7 (1947). The district court gave short shrift to this principle in holding that the terms

"compensation," "benefit," and "physical presence" rendered the statute unconstitutionally vague.

Start with "compensation," which means "[r]emuneration and other benefits received in return for services rendered; esp., salary or wage." *Compensation*, Black's Law Dictionary (12th ed. 2024). An ordinary individual thus would understand that "compensation" "consists of wages and benefits in return for services" and "is payment for work." *Id.* (quoting Kurt H. Decker & H. Thomas Felix II, *Drafting and Revising Employment Contracts* §3.17, at 68 (1991)). People use "compensation" in everyday life to mean wages and salary for work—not sharing bottled water with volunteers when it is hot outside (which is inevitable in Texas).

The district court erroneously found vagueness based largely on the fact that *other* provisions of the Election Code use different definitions of "compensation," which generally refer to fees and payments. App.A.68-69. But when interpreting an *undefined* term, the district court should have given the words in the vote-harvesting ban their ordinary meaning. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 69, at 195 (2012). Moreover, the district court was required to indulge in any reasonable interpretation that *avoided* constitutional infirmity. *See Ostrewich v. Tatum,* 72 F.4th 94, 107 (5th Cir. 2023). The district court did the opposite when it read "compensation" broadly to include not only *monetary* compensation but also meals, bus fare, and t-shirts. App.A.68.

Next, section 276.015(1) defines a benefit as "anything reasonably regarded as a gain or advantage, including a promise or offer of employment, a political favor, or an official act of discretion[.]" Tex. Elec. Code §276.015(a)(1). Under the

associated-words canon, the phrase "anything reasonably regarded as a gain or advantage" means something like the accompanying examples of "employment," "political favors," and "official acts." *See* Scalia & Garner, *supra*. Items, like food, water, and letters of recommendation bear no resemblance to employment, political favors, and official acts.

Finally, the law's scienter requirement also removes any vagueness concerns over "physical presence"—itself, a common term that is generally understood to include an "in-person interaction." *See, e.g.*, 42 U.S.C. § 3030s(a). The district court acknowledged that scienter can cure vagueness but observed that "knowledge that there is a ballot in the vicinity" does not require knowledge that the person is in the "physical presence" of a ballot. App.A.70. Even if that were true, Texas law includes a default *mens rea* requirement of criminal recklessness, Tex. Penal Code §6.02(c), meaning a paid persuader cannot be criminally liable unless he *at least* "consciously disregards a substantial and unjustifiable risk" that a ballot is present, *id.* §6.03(c). Merely being unsure if there is a ballot nearby falls well short of that demanding standard.

B. The paid-vote-harvesting ban complies with the First Amendment.

1. The vote-harvesting ban is not overbroad.

The paid-vote-harvesting provision is also far from constitutionally overbroad. Under the overbreadth doctrine, courts hold statutes "facially unconstitutional even though [they have] lawful applications" if they "'prohibit[] a substantial amount of protected speech' relative to [their] 'plainly legitimate sweep.'" *United States v. Hansen*, 599 U.S. 762, 769-70 (2023) (quoting *United States v. Williams*, 553 U.S.

285, 292 (2008)). Here, despite proceeding all the way to trial, Plaintiffs have offered nothing more than farfetched hypothetical examples of potentially chilled speech. Yet "[t]he 'mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge.'" *Williams*, 553 U.S. at 303 ((citation omitted)).

For example, Plaintiffs' hypotheticals include a paid canvasser unknowingly advocating for a particular vote while a ballot is hidden somewhere in the room or even in a voter's purse. *See*, *e.g.*, Second Amended Complaint, ECF No. 208 at ¶294 (Jan. 25, 2022) (App.B); Transcript of Bench Hearing at 1790-81 (Sept. 22, 2023) (App.C). But such a circumstance would not satisfy the scienter requirement discussed above. Moreover, Plaintiffs presented no actual evidence that (1) such a scenario has ever occurred or realistically would occur, (2) prosecutors are likely to learn it happened, or (3), having learned of such an event, a prosecutor would charge individuals under such outlandish facts. That the law "might cover" such farfetched circumstances does not establish constitutional overbreadth. *Cf. Williams*, 553 U.S. at 292, 302-03.

The district court fares no better by speculating that "a voter discussing his mail ballot with a like-minded GOTV volunteer would arguably violate Section 7.04 by offering a glass of water as a pick-me-up during a hot afternoon of door-knocking." App.A.56. As discussed above, water is clearly not "compensation" or a "benefit." *Supra* pp. 8-10. And, given that Plaintiffs presented no evidence prosecutors would pursue voters for giving out water, this Court is unlikely to uphold an overbreadth challenge based on such speculation. *See Williams*, 553 U.S. at 292, 302-03.

2. The vote-harvesting ban is a content-neutral restriction on the manner of narrow situations of paid election influence.

The Court is also unlikely to hold that the injunction survives the familiar *Anderson/Burdick* test—or that the vote-harvesting ban is subject to strict scrutiny because it addresses core political speech. App.A.48-49. True, strict scrutiny typically applies to content-based restrictions on speech. *Cf. Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). But the Supreme Court has recognized that a different test is needed in this context because elections themselves are a form of political expression, and all "[e]lection laws will invariably impose some burden upon individual voters." *Burdick v. Takushi*, 504 U.S. 428, 433 (1992). Accordingly, "subject[ing] every voting regulation to strict scrutiny ... would tie the hands of States seeking to assure that elections are operated equitably and efficiently." *Id.* To avoid this problem, courts apply a "more flexible standard" to election laws. *Id.* at 434; *see also Voting for America Inc. v. Steen*, 732 F.3d 382, 385 (5th Cir. 2013) (recognizing lower standard in canvassing restriction challenge). Under this more flexible standard, the *Anderson/Burdick* test, the level of scrutiny applied depends on the severity of the restriction. 504 U.S. at 434. Strict scrutiny applies to severe restrictions, but "the State's important regulatory interests are generally sufficient to justify" other "reasonable, nondiscriminatory restrictions." *Id.* Here, as a regulation of the privilege of voting by mail, it is questionable if anything more than a rational basis is required. *See Tex. Dem. Party v. Abbott*, 961 F.3d 389, 406 (5th Cir. 2020). But even if *Anderson/Burdick* did require a heightened level of scrutiny, the challenged provisions here would easily pass it.

a. The paid-vote-harvesting ban is a content-neutral restriction—analogous to time, place, and manner restrictions—that is subject at most to a deferential form of intermediate scrutiny under *Anderson/Burdick*. Specifically, the ban applies only where an individual is knowingly "in the physical presence" of a ballot—an inherently narrow range of scenarios. *Supra* p.10. Paid persuaders otherwise remain free to say whatever they want on behalf of whichever candidate they please so long as a ballot is not immediately present—which will be the *vast majority* of the time. In this respect, the ban functions like constitutionally permissible bans on solicitation near polling places. *See Ostrewich,* 72 F.4th at 106-07; *Burson v. Freeman*, 504 U.S. 191, 210 (1992). And the State has a "compelling interest"—not just an important one—"in protecting voters from confusion and undue influence." *Burson*, 504 U.S. at 199. The risk that paid partisans will unduly pressure voters—particularly the elderly—to fill out their ballots is especially acute when the voter has their ballot in hand.[3] *See Veasey v. Abbott*, 830 F.3d 216, 239 (5th Cir. 2016).

b. Even if strict scrutiny applied, the vote-harvesting ban would survive review. *First*, the State has a compelling interest "in protecting voters from confusion and undue influence," *id.*, and "in preserving the integrity of its election process," *Brnovich v. Democratic Nat'l Comm.*, 594 U.S. 647, 685 (2021). These interests are reflected by all 50 States requiring secret ballots and limiting access to

[3] It is no response that the district court was unconvinced such fraud would occur. *See, e.g.*, *Crawford v. Marion Cnty Elec. Bd.*, 553 U.S. 181, 193-95 (2008) (allowing States to enact prophylactic legislation even in the absence of fraud).

polling places to prevent voter coercion. *See Burson*, 504 U.S. at 206. The same concerns that justify protecting in-person voters apply even more forcefully to mail-in voters, whose ballots are, by definition, "completed far from any government office or employee." *Vote.Org v. Callanen*, 89 F.4th 459, 489 (5th Cir. 2023); *see also Brnovich*, 594 U.S. at 685-86. *Second*, the statute is narrowly tailored as it restricts paid persuaders from advocating while physically in the presence of a ballot—a moment when the risk of pressure is highest. *Veasey*, 830 F.3d at 239. And "[l]imiting the classes of persons who may handle early ballots to those less likely to have ulterior motives" furthers the State's compelling interests. *Id.* That is, if every State can shield in-person voting from pressure by paid persuaders, surely Texas can extend the same protection to voters who fill out their ballots elsewhere.

c. The district court improperly relied on campaign finance caselaw to conclude that *any* use money in an election context is inherently protected speech. *See* App.A.52. Such cases, however, deal with limits on how much people can spend on advocating for their preferred candidates—not on which services such money can be spent. *See Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 339 (2010); *Buckley v. Valeo*, 424 U.S. 1, 19 (1976) (per curiam). This distinction makes all the difference. No one would read those cases to authorize, for example, buying votes merely because money is used—a practice that all would surely agree is anathema to our democratic process. They similarly say nothing about the only conduct barred by Texas's vote-harvesting ban: The use of paid service providers either to collect completed ballots or influence voters in the presence of the physical ballots. *See* Tex.

Elec. Code § 276.015. Therefore, the vote-harvesting ban complies with the First Amendment, and the district court erred in holding otherwise.

C. The district court lacked jurisdiction to enjoin the Attorney General and Secretary.

Even if the Court were to conclude that some portion of the injunction could be stayed (and it should not), a stay would still be appropriate because the injunction *as written* cannot be affirmed. Because Texas's Attorney General and Secretary of State do not enforce this criminal statute, they are immune from suit.

1. The Attorney General and Secretary have sovereign immunity.

Because of sovereign immunity, "individuals may not sue a state" unless (1) "Congress abrogates state sovereign immunity through the Fourteenth Amendment," (2) "the state itself consents to suit," or (3) "a state actor enforces an unconstitutional law." *Russell v. Jones*, 49 F.4th 507, 512 (5th Cir. 2022) (citation omitted). Of course, the *Ex parte Young* doctrine provides a limited exception to this rule "where a state actor enforces an unconstitutional law." *Id.* (citing *Ex parte Young*, 209 U.S. 123, 160 (1908)). But for the doctrine to apply, "state officials must have some connection to the state law's enforcement" and "have taken some step to enforce" it. *Tex. Democratic Party*, 961 F.3d at 400-01 (cleaned up). The district court cited two possible ways the defendants might enforce the vote-harvesting provision. Neither is sufficient because neither involves "compelling" or "constraining" anyone to comply with the Election Code. *Mi Familia Vota v. Ogg*, 105 F.4th 313, 332 (5th Cir. 2024).

First, the district court asserted that the Attorney General *must* investigate certain election crimes, *may* investigate other crimes (including at the instigation of the Secretary), and is "*likely*" to investigate vote-harvesting crimes specifically. App.A.31-32. But this Court has already stated—with respect to this very statute—that "investigations" are not "enforcement" and will not bring a state official within the scope of *Ex parte Young*. *See Mi Familia Vota*, 105 F.4th at 331; *see also id.* at 1332 ("Furthermore, to the extent the Plaintiffs argue Ogg's ability to investigate election code violations compels or constrains their conduct, that power does not rise to the level of compulsion or constraint needed.").

Second, the district court then noted that the Attorney General and Secretary have (1) enforced and referred for investigation, respectively, election laws in the past and (2) not disavowed an intent to do so in the future. App.A.32-33. Yet the Secretary's role is largely administrative and informational—not prosecutorial. *See, e.g.*, *Richardson v. Flores*, 28 F.4th 649, 654 (5th Cir. 2022) (discussing, *inter alia*, *Tex. Dem. Party*, 978 F.3d at 179). And her investigation referrals are not enforcement actions. *See Mi Familia Vota*, 105 F.4th at 332.

Moreover, the Texas Court of Criminal Appeals struck down the Election Code statute purporting to give the Attorney General such authority. *See Ostrewich*, 72 F.4th at 101 (citing *State v. Stephens*, 663 S.W.3d 45, 57 (Tex. Crim. App. 2021)).[4] And this Court has already rejected the district court's suggestion (at App.A.42-44) that "[s]peculation that [the Attorney General] might be asked by a local prosecutor

[4] While the State maintains that *Stephens* was wrongly decided, *Stephens* is nonetheless binding on this Court.

to 'assist' in enforcing" criminal laws is sufficient "to support an *Ex parte Young* action." *In re Abbott*, 956 F.3d 696, 709 (5th Cir. 2020) (citation omitted). Indeed, so long as *Stephens* is the law, "the Attorney General and Secretary of State" have no authority "to exercise undue influence over [a district court's exclusive] prosecutorial discretion." *Mi Familia Vota*, 105 F.4th at 331.

2. The Plaintiffs lack standing.

Such speculation is also insufficient to establish standing. Under Article III, Plaintiffs have standing only if they have suffered an injury in fact that is "fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *California v. Texas*, 593 U.S. 659, 668-69 (2021). Plaintiffs must also show that their alleged self-censorship arises from a fear of prosecution that is not "imaginary or wholly speculative." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 302 (1979). A fear of prosecution is "imaginary or speculative" where plaintiffs "do not claim that they have ever been threatened with prosecution, that a prosecution is likely, or even that a prosecution is remotely possible." *Id.* at 289-99 (citation omitted). For the reasons discussed above, plaintiffs have shown no such reasonable fear of prosecution for protected conduct. *Supra* pp. 15-16.[5]

[5] The district court's reliance on *303 Creative LLC v. Elenis*, 600 U.S. 570 (2023), is misplaced. App.A.42. Plaintiffs fail to show they face the daunting threat that the plaintiff did in *303 Creative*. *See* 600 U.S. at 580 (plaintiff was required to "show 'a credible threat' existed that [the State] would, in fact, seek to compel speech from her that she did not wish to produce." (citation omitted)). Indeed, that plaintiff pointed to a recent, concrete example of a prosecution under similar circumstances, *id.* at 581-82, whereas Plaintiffs here lack such real-world evidence. Furthermore, at issue here is primarily organizational standing, which the Supreme

To prove traceability, Plaintiffs also must show that the Attorney General's and Secretary's "actual or threatened *enforcement*" of the vote-harvesting ban caused Plaintiffs' alleged injury—here, chilling of their paid vote harvesting. *California*, 593 U.S. at 669-70. The Article III standing and *Ex parte Young* analyses for enforcement "significantly overlap." *City of Austin v. Paxton*, 943 F.3d 993, 1002 (5th Cir. 2019) (citation omitted). Plaintiffs lack standing for the same reason that they fall outside the scope of *Ex parte Young*: Neither the Secretary nor the Attorney General enforces the paid-vote-harvesting ban.

III. The Court Should Enter a Temporary Administrative Stay.

For the reasons set out above, Appellants are entitled to a stay pending appeal. Appellants request that the Court enter an order granting a stay **as soon as possible**—given that ballots have already been mailed—and by no later than **October 10, 2024**. In the alternative to ruling on the stay motion by that time, Appellants request that the Court immediately enter an administrative stay while it considers this motion. Such stays "freeze legal proceedings until the court can rule on a party's request for expedited relief." *United States v. Texas*, 144 S.Ct. 797, 798 (2024) (Barrett, J., concurring in denial of application to vacate stay) (citation omitted). They are a common "docket-management" tool and "do not typically reflect the court's consideration of the merits of the stay application." *Id.*

Court significantly curtailed in *FDA v. Alliance for Hippocratic Medicine*, 602 U.S. 367 (2024). And the district court's nod towards associational standing (at App.A.45 n.32) ignored that for a facial claim, individualized member discovery is now all but essential under *Moody v. NetChoice, LLC*, 144 S.Ct. 2383 (2024).

Such stays are routine where activities in the district court or events outside the court are moving so quickly that even a reasoned stay pending appeal may prove too late. *BST Holdings, L.L.C. v. OSHA*, No. 21-60845, 2021 WL 5166656, at *1 (5th Cir. Nov. 6, 2021) (per curiam) *Richardson v. Tex. Sec'y of State*, 978 F.3d 220, 227-28 (5th Cir. 2020); *M.D. ex rel. Stukenberg v. Abbott*, No. 18-40057, ECF 12 (5th Cir. Jan. 19, 2018). Indeed, it has done so in an earlier appeal involving a different order from the same judge addressing a different provision of the same statute—there too issued in the middle of an ongoing election. *See* App.D & App.E.

Here, an administrative stay would be, in the parlance of the All Writs Act, "necessary or appropriate in aid of" this Court's collateral-order jurisdiction. *See* 28 U.S.C. § 1651(a). As noted above, because voting has already started, time is of the essence. At the same time, this case involves multiple constitutional issues and an extensive record, including a trial that spanned six weeks—and about which the district court has been contemplating findings of fact and conclusions of law for more than six months. An administrative stay would preserve the status quo long enough to allow the Court to adequately consider whether a full stay pending appeal is appropriate before Texas's ongoing election is further disrupted. *See Veasey v. Abbott*, 870 F.3d 387, 392 (5th Cir. 2017) (per curiam) (holding that "a temporary stay is appropriate to 'suspend[] judicial alteration of the status quo.'").

Conclusion

The Court should enter a stay pending appeal of the district court's order and permanent injunction by **October 10, 2024**. Additionally, or alternatively, the Court should immediately enter a temporary administrative stay while it considers this motion.

Respectfully submitted.

Ken Paxton
Attorney General of Texas

Brent Webster
First Assistant Attorney General

Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-1700
Fax: (512) 474-2697

Aaron L. Nielson
Solicitor General

/s/ Lanora C. Pettit
Lanora C. Pettit
Principal Deputy Solicitor General
Lanora.Pettit@oag.texas.gov

Counsel for State Defendants-Appellants