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-1223-XR, Hon. Xavier Rodriguez

BRIEF OF APPELLANT SHAWN DICK

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CERTIFICATE OF INTERESTED PERSONS

Under Fifth Circuit Rule 28.2.1, as a governmental party Appellant need not furnish a certificate of interested persons.

/s/ Sean Breen

Attorney of Record for Appellant Shawn Dick, in his Official Capacity as Williamson County District Attorney

STATEMENT REGARDING ORAL ARGUMENT

The Court has set this appeal for oral argument on March 8, 2022.

TABLE OF CONTENTS

Page(s)

Certificate of Interested Persons 2

Statement Regarding Oral Argument 3

Table of Contents 4

Table of Authorities 5

Statement of Jurisdiction.....7

Issues Presented 8

Statement of the Case.....11

Standard of Review.....16

Argument.....17

TABLE OF AUTHORITIES

Page(s)

Cases

Air Evac EMS, Inc. v. Tex. Dep't of Ins.,
851 F.3d 507 (5th Cir. 2017) 17

Atchafalaya Basinkeeper v. U.S. Army Corps of Eng'rs,
894 F.3d 692 (5th Cir. 2018) 16

Barber v. Bryant,
860 F.3d 345, 352 (5th Cir. 2017) 28

City of Austin v. Paxton,
943 F.3d 993 (5th Cir. 2019) ..... passim

Daves v. Dallas County,
2022 U.S. App. LEXIS 547 (5th Cir. Jan. 7, 2022).....27

Ex parte Young,
209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908)..... passim

Fenner v. Boykin,
271 U.S. 240 (1926).....31

Frew ex rel. Frew v. Hawkins,
540 U.S. 431 (2004).....17

In re Abbott,
956 F.3d 696 (5th Cir. 2020) 17, 19

K.P. v. LeBlanc,
627 F.3d 115 (5th Cir. 2010) 18

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992)..... 15, 27

Mazurek v. Armstrong,
520 U.S. 968 (1997).....16

Morris v. Livingston,
739 F.3d 740 (5th Cir. 2014) 18

NiGen Biotech, L.L.C. v. Paxton,
804 F.3d 389 (5th Cir. 2015) 19

PCI Transp. Inc. v. W.R.R. Co.,
418 F.3d 535 (5th Cir. 2005) 16

Tex. Ass'n of Bus. v. Earle,
388 F.3d 515 (5th Cir. 2004) 16

Tex. Democratic Party v. Abbott,
961 F.3d 389 (5th Cir. 2020) 14, 17, 18, 20

Tex. Democratic Party v. Abbott,
978 F.3d 168 (5th Cir. 2020) ..... passim

Thole v. U.S. Bank N.A.,
140 S.Ct. 1615 (2020).....28

Valley Rapides Par. Sch. Bd.,
118 F.3d 1047 (5th Cir. 1997) 16

Winter v. NRDC, Inc.,
555 U.S. 7 (2008).....16

Younger v. Harris,
401 U.S. 37 (1971)..... passim

Statutes

Texas Election Code Section 276 ..... passim

STATEMENT OF JURISDICTION

Plaintiffs Isabel Longoria and Cathy Morgan invoked the federal district court's jurisdiction under 28 U.S.C. §§1331 & 1343. ROA.38 at ¶1. The district court entered its preliminary injunction on February 11, 2022. ROA.720-21. District Attorney Dick timely filed his notice of appeal on February 21, 2022. ROA.754-55. This Court has jurisdiction to review the district court's preliminary injunction pursuant to 28 U.S.C. §1292(a)(1).

ISSUES PRESENTED

The district court entered a preliminary injunction enjoining four state officials – including Williamson County District Attorney Shawn Dick – from enforcing certain newly-enacted provisions of Section 276.016(a)(1) of the Texas Election Code as to these plaintiffs pending a final resolution of the case. The issues presented are:

1. Did the district court err when it concluded that sovereign immunity does not bar the claims asserted by plaintiff Morgan against District Attorney Dick in his official capacity – and that subject matter jurisdiction thus exists – when there were no allegations or evidence of any step or affirmative action taken by Mr. Dick or a demonstrated willingness by him to enforce the challenged statute as to Morgan or anyone else?

2. Did the district court err when it concluded that Morgan has standing to sue District Attorney Dick, and thus subject matter jurisdiction exists over her claims, when there were no allegations or evidence that Morgan's alleged injury-in-fact ("chilled speech" and a fear of prosecution) was caused by Mr. Dick?

3. Did the district court abuse its discretion to abstain under the *Younger* abstention doctrine from exerting federal jurisdiction over Morgan's claims against District Attorney Dick in a matter involving a state statute, state officials, and state prosecutorial discretion?

INTRODUCTION

This interlocutory appeal arises from a constitutional challenge to a provision contained in the election legislation commonly referred to as Senate Bill 1 (SB1) that was recently enacted by the Texas Legislature and signed into law. Two plaintiffs are asserting claims; only one (Cathy Morgan) has asserted a claim against Williamson County District Attorney Shawn Dick.

As a longstanding general rule, federal claims such as Morgan's against state officials in their official capacity are precluded by state sovereign immunity absent a waiver by the state, abrogation by Congress, or an exception. The *Ex parte Young* exception to this general rule of sovereign immunity has been litigated before this Court several times in recent years. In these cases, the Court has consistently held that *something more* than a state official's general connection to enforcement of the challenged statute must be pled and shown: the plaintiff must plausibly plead and show that the state official "***must have taken some step to enforce***" the challenged law, or "at least must show the defendant has 'the particular duty to enforce the statute in question ***and a demonstrated willingness to exercise that duty.***'" *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 400 (5th Cir. 2020) (emphasis added). This burden falls squarely on the plaintiff at each stage in the litigation.

The district court recently issued its order granting Morgan's motion for preliminary injunction and enjoining (among others) District Attorney Dick from enforcing the law – even though *(i)* there are no allegations by Morgan in her pleadings that Mr. Dick ever took any such enforcement "step" or that he has ever exhibited any such "demonstrated willingness" to enforce the statute as to her or

anybody else, and *(ii)* there is zero evidence in the record that he has. The district court erred in concluding that this record somehow establishes that the *Ex Parte Young* exception applies to Morgan's claims against Mr. Dick and, thus, that subject matter jurisdiction exists. In addition to constituting error, the district court's ruling, if allowed to stand, would make literally every publicly-elected district or county attorney in Texas's 254 counties a potential target of federal lawsuits without regard to whether that district or county attorney has ever actually taken a "step," undertaken any "affirmative action," or otherwise "demonstrated willingness" to enforce a challenged statute.

For these and other reasons discussed herein, this Court should reverse the district court's preliminary injunction order.

STATEMENT OF THE CASE

In this suit, Plaintiffs-Appellees Isabel Longoria and Cathy Morgan are seeking declaratory and injunctive relief in connection with the recently-enacted Texas Senate Bill 1 (SB1) election legislation. ROA.37-52. They seek a declaration from the district court that certain "anti-solicitation provisions" pertaining to mail-in voting applications now codified in Section 276.016(a)(1) of the Texas Election Code violate the First and Fourteenth Amendments of the U.S. Constitution, and seek to enjoin certain public officials – Texas Attorney General Ken Paxton and the district attorneys of Harris, Travis and Williamson Counties – from enforcing this and a related provision. ROA.37-52.

Longoria and Morgan filed their original complaint on December 10, 2021, naming Attorney General Paxton as the sole defendant. ROA.14-27. They filed their first amended complaint (their live complaint) on December 27, 2021, adding the three district attorneys as defendants. ROA.37-52. Longoria, who serves as the Harris County Elections Administrator, is asserting claims only against the Attorney General and the Harris County District Attorney in their official capacities. ROA.37-52 at ¶¶37-46. Morgan serves as a "Volunteer Deputy Registrar" (VDR) in Central Texas and is asserting her claims only against the Travis and Williamson County District Attorneys in their official capacities. ROA.37-52 at ¶¶37-43. On December 28th, Plaintiffs filed their motion for entry of a preliminary injunction,

attaching declarations of Longoria and Morgan to that motion. ROA.65-104.

On January 27, 2022, District Attorney Dick filed a motion to dismiss pursuant Federal Rules 12(b)(1) and 12(b)(6) as his first responsive pleading. ROA.249-64. In that motion, which remains pending (through at least March 2nd under the district court's scheduling order[1]), he seeks dismissal on the grounds that *(i)* sovereign immunity bars these claims, the plaintiffs lack standing, and thus there is no subject matter jurisdiction, *(ii)* the plaintiffs have failed to assert a claim upon which relief can be granted, and *(iii)* the longstanding "national policy forbidding federal courts from staying or enjoining state court proceedings" except under "very special circumstances," as discussed by the U.S. Supreme Court in *Younger v. Harris*, 401 U.S. 37 (1971), militates strongly against federal court intervention in this matter. ROA.249-64.

The district court set the plaintiffs' motion for preliminary injunction for hearing to be held on February 11, 2022. *See* ROA.244. Longoria and Morgan were each deposed on February 4th, a week before the hearing. *See* ROA.351-466 & ROA.500-26. Mr. Dick timely filed his response in opposition to the plaintiffs' motion for preliminary injunction on February 8th, consistent with the court-established briefing schedule. ROA.334-466. Plaintiffs filed their reply brief on February 10th. ROA.599-624.

[1] ROA.243-44.

The preliminary injunction evidentiary hearing was held on February 11th. *See* ROA.756-940. Longoria and Morgan both gave testimony at the hearing. Later that day, the district court issued its memorandum opinion and order granting the motion for preliminary injunction.[2] ROA.626-65. In its order, the district court concluded that Plaintiffs had each satisfied their burden of showing that the court had subject matter jurisdiction over the case and their respective claims, and had also established that there was "a substantial likelihood that they will succeed on the merits of their claims that the anti-solicitation provision set forth in Section 276.016(a)(1) … constitutes unlawful viewpoint discrimination in violation of the First and Fourteenth Amendments, both facially and as applied to Plaintiffs' speech." ROA.664. The district court enjoined the defendants from enforcing Section 276.016(a)(1) against Plaintiffs "pending final resolution of this case." ROA.664.

The Attorney General filed his notice of appeal of the preliminary injunction on February 14th, ROA.722-23, and shortly thereafter moved this Court for an emergency stay and for an expedited appeal (which was granted). District Attorney Dick timely filed his notice of appeal on February 21st. ROA.754-55. Mr. Dick did not join in the Attorney General's request for a stay or expedited appeal.

[2] The same order appears twice in the appellate record. The second copy is located at ROA.682-721.

SUMMARY OF THE ARGUMENT

The district court erred when it concluded that subject matter jurisdiction exists over the declaratory judgment and injunctive relief claims that Morgan has asserted against District Attorney Dick, a state official, and then issued the preliminary injunction.

First, the federal district court erred in concluding that sovereign immunity does not bar Morgan's claims against Mr. Dick. State sovereign immunity generally precludes suits against state officials in their official capacities, unless such immunity has been waived by the state, abrogated by Congress, or an exception applies. *City of Austin v. Paxton*, 943 F.3d 993, at 997 (5th Cir. 2019). While *Ex parte Young* recognized an exception to this general rule, this Court has repeatedly held that the "some connection" requirement of *Ex parte Young* requires more than a state official's "mere connection" to a challenged law's enforcement. Instead, the plaintiff must plausibly plead and show that the state official "***must have taken some step to enforce***" the challenged law, or "at least must show the defendant has 'the particular duty to enforce the statute in question ***and a demonstrated willingness to exercise that duty.***'" *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 400 (5th Cir. 2020) (emphasis added). Here, Morgan failed to both sufficiently plead and then prove that the *Ex parte Young* exception applies vis-à-vis Mr. Dick and, indeed, the record is devoid of any evidence that Mr. Dick took any steps or otherwise

demonstrated any willingness to enforce the challenged statute as to Morgan or anyone else.

Second, the district court also erred in concluding that Morgan has standing to sue District Attorney Dick on these claims. Under the second prong of the *Lujan* standing analysis, a plaintiff must plead and prove that her alleged injury-in-fact was caused by the defendant against whom relief is sought. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). But, Morgan failed to meet her burden to satisfy this causal nexus requirement of standing to pursue claims against Mr. Dick for essentially the same reason that the *Ex parte Young* exception does not apply: she failed to establish through a "clear showing" that her alleged injury – *i.e.*, any alleged "chilling effect" on her speech or a speculative fear of prosecution – was caused by Mr. Dick.

Additionally and alternatively, the district court abused its discretion by refusing to abstain from exercising federal jurisdiction pursuant to the *Younger* abstention doctrine. *See Younger v. Harris et al.*, 401 U.S. 37 (1971). Under that longstanding prudential doctrine, a federal court should abstain from staying or enjoining state court proceedings and interfering with state prosecutorial decisions except under "very special circumstances" not present here.

STANDARD OF REVIEW

Sovereign Immunity. This Court "review[s] the district court's jurisdictional determination of sovereign immunity de novo." *City of Austin v. Paxton*, 943 F.3d 993, 997 (5th Cir. 2019).

Preliminary Injunction. A preliminary injunction is an extraordinary remedy, and the decision to grant such relief is to be treated as the exception rather than the rule. *Valley Rapides Par. Sch. Bd.*, 118 F.3d 1047, 1050 (5th Cir. 1997). "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. NRDC, Inc.*, 555 U.S. 7, 20 (2008). The party seeking injunctive relief carries the burden on all four of these requirements. *PCI Transp. Inc. v. W.R.R. Co.*, 418 F.3d 535, 545 (5th Cir. 2005). The plaintiff must make "*a clear showing*" on each of these. *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam). "A grant of a preliminary injunction is reviewed for abuse of discretion. Factual determinations within the preliminary injunction analysis are reviewed for clear error, and legal conclusions within the analysis are reviewed de novo." *Atchafalaya Basinkeeper v. U.S. Army Corps of Eng'rs*, 894 F.3d 692, 696 (5th Cir. 2018) (citation omitted).

Younger Abstention. This Court reviews district courts' abstention rulings for abuse of discretion, but it reviews de novo whether the elements for *Younger* abstention are present. *Younger v. Harris*, 401 U.S. 37 (1971); *Tex. Ass'n of Bus. v. Earle*, 388 F.3d 515, 518 (5th Cir. 2004).

ARGUMENT

I. Sovereign immunity bars Morgan's claims against District Attorney Dick.

"Generally, state sovereign immunity precludes suits against state officials in their official capacities." *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 400 (5th Cir. 2020) (citing *City of Austin*, 943 F.3d at 997) (hereinafter "*Tex. Democratic Party I*"). "Unless waived by the state, abrogated by Congress, or an exception applies, the immunity precludes suit." *Tex. Democratic Party v. Abbott*, 978 F.3d 168, 179 (5th Cir. 2020) (citing *City of Austin*, 943 F.3d at 997) (hereinafter "*Tex. Democratic Party II*").

"The important case of *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), is an exception to that baseline rule, but it permits only 'suits for prospective … relief against state officials acting in violation of federal law.'" *Tex. Democratic Party I*, 961 F.3d at 400 (citing and quoting *Frew ex rel. Frew v. Hawkins*, 540 U.S. 431 (2004)). To be sued under this exception, the state officials must "have 'some connection' to the state law's enforcement," *Air Evac EMS, Inc. v. Tex. Dep't of Ins.*, 851 F.3d 507, 517 (5th Cir. 2017), which ensures that "the suit is [not] effectively against the state itself." *In re Abbott*, 956 F.3d 696, 708 (5th Cir. 2020).

While the Fifth Circuit has held that "[t]he precise scope of the 'some connection' requirement is still unsettled, … the requirement traces its lineage to

Young itself." *Tex. Democratic Party I*, 961 F.3d at 400. "[I]t is not enough that the official have a 'general duty to see that the laws of the state are implemented.'" *Id.* (citing *Morris v. Livingston*, 739 F.3d 740, 746 (5th Cir. 2014)). "Moreover, a mere connection to a law's enforcement is not sufficient – the state officials ***must have taken some step to enforce.***" *Id.* (emphasis added). "[T]he plaintiff at least must show the defendant has 'the particular duty to enforce the statute in question ***and a demonstrated willingness to exercise that duty.***'" *Tex. Democratic Party II*, 978 F.3d at 179 (citing *Morris*, 739 F.3d at 746) (emphasis added). "Enforcement typically means 'compulsion or constraint.'" *Id.* (citing and quoting *K.P. v. LeBlanc*, 627 F.3d 115, 124 (5th Cir. 2010)). At the bare minimum, there must be "some scintilla" of affirmative action of the state official. *Tex. Democratic Party I*, 961 F.3d at 401 (citing *City of Austin*, 943 F.3d at 1002).

In *City of Austin*, the Fifth Circuit held that the Texas Attorney General's alleged "habit" of intervening in lawsuits involving municipal ordinances "to enforce the supremacy of state law" did not constitute "some connection" to the ordinance at issue and that there was not a "scintilla" of evidence of enforcement. *City of Austin*, 943 F.3d at 1001-02. It held that sovereign immunity thus barred the City's claims against the Attorney General. *Id.* In *In re Abbott*, this Court declined to apply *Ex parte Young* where the Attorney General had issued a press release warning that anyone who violated the Governor's recent emergency order would be

"met with the full force of the law." *In re Abbott*, 956 F3d at 709. And in *Tex. Democratic Party II*, this Court held that a letter that was sent to judges and election officials by the Attorney General explaining that advising voters to pursue disability-based mail-in voting without a qualifying condition (such as age) constituted a felony under Texas law did not "intimat[e] that formal enforcement was on the horizon" and thus declined to apply *Ex parte Young* to him. *Tex. Democratic Party II*, 978 F.3d at 181 (quoting and distinguishing *NiGen Biotech, L.L.C. v. Paxton*, 804 F.3d 389, 397 (5th Cir. 2015)).[3]

Here, Morgan's pleadings and the evidence she presented in the district court fell woefully short of establishing that subject matter jurisdiction exists in this federal court suit filed against a state official – District Attorney Dick. She fundamentally failed to both allege and sufficiently establish that Mr. Dick has "some connection" to the enforcement of Section 276.016(a)(1) such that the *Ex parte Young* exception to sovereign immunity applies.[4] And, more particularly, she utterly failed to allege or proffer any evidence that Mr. Dick's office *(i)* took any

[3] In *NiGen*, the Fifth Circuit allowed a suit brought against the Attorney General to go forward where the evidence showed that the Attorney General had sent the plaintiff-manufacturer "numerous threatening letters" that "intimat[ed] that formal enforcement" of the Texas Deceptive Trade Practices Act "was on the horizon." *NiGen*, 804 F.3d at 392 & 397; *see Tex. Democratic Party II*, 978 F.3d at 181.

[4] Morgan has not pleaded or shown that the State of Texas waived sovereign immunity with respect to any claim or issue raised in the complaint, or that Congress has abrogated state sovereign immunity for such matters. *See* HOA.37-52 (Plaintiffs' First Amended Complaint)*; see also Tex. Democratic Party II*, 978 F.3d at 179; *City of Austin*, 943 F.3d at 997.

step or "affirmative action" whatsoever to enforce the statute at issue (as to Morgan or anybody else), or *(ii)* had a particular duty to enforce the statue and had "demonstrated any willingness to exercise that duty" (again, as to her or anyone else). *See Tex. Democratic Party I*, 961 F.3d at 400-01.

With respect to pleadings, Morgan did not allege any prior or current attempts by Mr. Dick or his office to enforce the statute, or that enforcement is forthcoming. *See* ROA.37-52. She did not allege any prior or current prosecutions or attempted prosecutions by Mr. Dick or his office in connection with the statute, or that any prosecution is forthcoming. *See id.* She did not allege that there have been any investigations by Mr. Dick or his office regarding or pertaining to the statute. *See id.* She did not allege that any threats were made by Mr. Dick or his office regarding exercising enforcement of the challenged statute or conduct that allegedly violates it. *See id.* Indeed, she did not even make any allegations regarding a single statement or writing that Mr. Dick has made of *any sort whatsoever* in connection with the statute or its enforcement or prospective enforcement. *See id.*

Morgan also failed to present any evidence whatsoever that Mr. Dick or his office took any steps or affirmative action to enforce Section 276.016(a)(1) as to her or anyone else, or that he had otherwise demonstrated any willingness to enforce the statute. Indeed, the uncontroverted evidence presented to the district court with the parties' written pre-hearing briefings and at the February 11th evidentiary hearing

itself established *just the opposite*.

Mr. Dick cited and attached portions of Morgan's deposition testimony to his preliminary injunction response brief. *See* ROA.351-466. That testimony established that Morgan serves as an unpaid VDR in Travis and Williamson Counties, but holds no other offices, appointments, or employment with the State of Texas or with any political subdivision of the state – including Williamson County. ROA.440-43 at 89:19-92:1. Although Morgan's complaint and her declaration assert some wholly speculative and inchoate allegations of her "fear of criminal prosecution for encouraging eligible voters to request an application to vote by mail" and that "[t]he possibility of criminal prosecution by the Defendants under Section 276.016(a)(1) therefore chills [her] from encouraging voters to request mail-in applications," ROA.37-52 at ¶35, Morgan's testimony provided no objective evidence regarding Mr. Dick or his office that could support any such subjective alleged fear. Among other things, she unequivocally testified that:

- She is <u>not presently being prosecuted</u> for any alleged criminal violation of the Texas Election Code by District Attorney Dick or anybody else. ROA.445 at 94:6-9.

- She has <u>never been prosecuted</u> by District Attorney Dick or anybody in his office for any alleged criminal violation of the election code. ROA.445 at 94:13-16.

- She has <u>never been convicted</u> of any criminal offense established by the Texas Election Code. ROA.444 at 93:8-12.

- She is <u>not currently charged or indicted</u> by District Attorney Dick

or his office for any alleged violation of the Texas Election Code. ROA.445 at 94:18-25.

- She is not currently being prosecuted by District Attorney Dick or anyone in his office for anything. ROA.445 at 94:2-5.

- She has never been threatened with prosecution by District Attorney Dick or anybody in his office for any alleged violation of the election code. ROA.446 at 95:6-22.

- She is not aware of any investigation of her by District Attorney Dick for any alleged violation of an election code. ROA.446 at 95:23-96:2.

- She has never been threatened with an investigation or an election code violation by anybody from the Williamson County District Attorney's office. ROA.447 at 96:3-7.

- She has never been contacted by any law enforcement officer of the State of Texas or Williamson County regarding or in connection with any alleged election code violation. ROA.447 at 96:8-12.

Indeed, Morgan testified that she is not aware of *anyone at all* who has ever been prosecuted by District Attorney Dick for any violation of the Election Code – including Section 276.016(a)(1) – much less threatened with any such prosecution:

- She is not personally aware of any person at all who has ever been prosecuted by District Attorney Dick or his office for an alleged violation of the Texas Election Code. ROA.447 at 96:13-17.

- She is not aware of any threat of prosecution of anybody by District Attorney Dick or anyone from his office in connection with an alleged violation of the election code. ROA.447 at 96:18-22.

- She is not aware of any person who has ever been charged by

> District Attorney Dick for an alleged violation of Section 276.016(a)(1). ROA.447 at 96:23-97:2.

And, Ms. Morgan testified that she has *never had any communications of any sort* with District Attorney Dick or his office, much less ever read or heard or seen anything by him or attributed to him regarding Section 276.016(a)(1), its contents, or its enforcement:

- She has never communicated with the district attorney. ROA.421 at 70:9-11.
- She has never communicated with anyone from the district attorney's office. ROA.421 at 70:12-14.
- She has never even been contacted by anyone from the District Attorney's office regarding any aspect of her role or responsibilities as a VDR in Williamson County. ROA.455 at 104:18-21.
- She has never personally spoken with District Attorney Dick or anybody in his office about Section 276 of the Texas Election Code, its contents, or enforcement of the statute. ROA.448 at 97:3-7.
- She has never sought any type of clarification, advice or input from District Attorney Dick or anybody from his office about Section 276. ROA.448 at 97:8-12 & ROA.450 at 99:17-20.
- She has never heard District Attorney Dick or anybody from his office speak about Section 276 of the code, its contents, or enforcement of the statute. ROA.455 at 104:24-104:3.
- She has never read or seen anything authored by District Attorney Dick or anyone in his office regarding Section 276 or its contents. ROA.455 at 104:4-8.

- She has never seen or read anything that was attributed to District Attorney Dick or his office regarding Section 276. ROA.455 at 104:9-12.

- She has not seen any social media posts from District Attorney Dick or anyone in his office regarding Section 276 or its enforcement. ROA.455 at 104:13-17.

Notably, Morgan specifically agreed that she has never seen or heard anything from District Attorney Dick to even "intimate" that enforcement of Section 276 "was on the horizon" for her or anybody else in Williamson County:

> **Q. Is it true, then, from your personal knowledge, District Attorney Dick, until you sued him, had never heard of you, never threated you, never accused you of violating the law, and never, to your knowledge, even publicly mentioned Section 276; isn't that true?**
>
> *[Objection]*
>
> A. That is correct.
>
> **Q. And that Attorney – District Attorney Dick never intimated or said, that you heard, formal enforcement of Section 276 was on the horizon for you or anybody else in Williamson County; isn't that true?**
>
> A. That is true.

ROA.455-56 at 104:22-105:10.

Morgan's testimony at the February 11th evidentiary hearing was no different. Among other things, she testified that she has not been threatened or ever even contacted by Mr. Dick or anyone in his office about a violation of the Election Code.

ROA.787 at 32:24-33:2. And, once again, she agreed that Mr. Dick and his office had never even "intimated" that any sort of enforcement "was even on the horizon." ROA.789 at 34:14-19.

In its order, the district court completely sidestepped this Court's prior holdings that the *Ex parte Young* "some connection" analysis requires more than simply demonstrating a state official's "mere connection" to the challenged statute – requiring instead a showing that the official "must have taken some step to enforce" the statute or "at least show the defendant has the particular duty to enforce the statute in question and a demonstrated willingness to exercise that duty." *Tex. Democratic Party II*, 978 F.3d at 179. Instead, the district court cited the Plaintiffs' barebones allegation that district attorneys are authorized to investigate and prosecute violations of the Texas Election Code, and held that this assertion sufficiently establishes an enforcement connection for the purposes of *Ex parte Young*. ROA.646-47. But, this analysis improperly takes the "and" out of this Court's prior holdings – that is, that a plaintiff must plead and prove the targeted defendant's duty to enforce ***and*** show a demonstrated willingness of that defendant to exercise that duty. The district court's ruling renders this language meaningless.

The requirement that a plaintiff show that a particular defendant has taken "some step" or has engaged in some "affirmative action" with regard to enforcement of a statute makes particular sense in the context of district and county attorneys.

Texas has many hundred elected district and county attorneys. Some district attorneys prosecute both felonies and misdemeanors, and others only felonies; county attorneys with prosecutorial jurisdiction prosecute only misdemeanors. If the holding of the district court is allowed to stand, a plaintiff can choose (*i.e.,* forum shop) among 254 counties in Texas for a district or county attorney to sue in federal court and seek a declaration that a Texas statute violates the federal constitution. Many district and county attorneys across the state have very small offices and quite limited resources to defend against such entities such as the ones supporting Morgan, much less take on the additional costs and burdens of defending the constitutionality of newly-enacted statewide legislation over and above their day-to-day work of prosecuting crimes. That is why, at a minimum, a plaintiff should be required to show under *Ex parte Young* and the Fifth Circuit cases that have followed that a particular prosecutor has demonstrated some evidence of a willingness to enforce a statute before that prosecutor can be forced to answer and then defend a federal claim seeking a declaration that the statute is unconstitutional (and face a potential assessment of costs and fees if the state statute is ultimately found to be unconstitutional).

Because there are literally no allegations or evidence that Mr. Dick has taken any step or affirmative action to enforce the challenged statute, has ever demonstrated a willingness to exercise any duty to enforce the statute, or has

otherwise "intimated that formal enforcement was on the horizon," Morgan failed to establish with even a scintilla of evidence – much less *clearly show* – that the *Ex parte Young* exception to sovereign immunity applies and that subject matter jurisdiction exists over her claims against Mr. Dick. *See Tex. Democratic Party II*, 978 F.3d at 181 (citing and quoting *NiGen*, 804 F.3d at 392 (5th Cir. 2015)). The district court accordingly erred when it concluded that subject matter jurisdiction existed on this record and issued its preliminary injunction order enjoining District Attorney Dick.

Because sovereign immunity precludes suit against Mr. Dick, the preliminary injunction order should be reversed and Morgan's claims against Mr. Dick should be dismissed for want of subject matter jurisdiction.

II. Morgan also lacks standing to sue District Attorney Dick on these claims.

"'[A]n essential and unchanging part of the case-or-controversy requirement of Article III' is the requirement that the plaintiff establish standing." *Daves v. Dallas County*, 2022 U.S. App. LEXIS 547, *40 (5th Cir. Jan. 7, 2022) (citing and quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). "To establish standing, the plaintiff must show '(1) that he or she suffered an injury in fact that is concrete, particularized, and actual or imminent, (2) that the injury ***was caused by the defendant***, and (3) that the injury would likely be redressed by the requested judicial relief." *Id.* at **40-41 (citing and quoting *Thole v. U.S. Bank N.A.*, 140 S.Ct.

1615, 1618 (2020)) (emphasis added). At the preliminary-injunction stage, "the plaintiffs must make a 'clear showing' that they have standing to maintain the preliminary injunction." *Id.* (citing and quoting *Barber v. Bryant*, 860 F.3d 345, 352 (5th Cir. 2017)). Moreover, standing must be established as to each named plaintiff and each form of relief sought; "[s]tanding to sue one defendant does not, on its own, confer standing to sue a different defendant." *Id.* at *41.

The Fifth Circuit has noted that the "Article III standing analysis and *Ex parte Young* analysis 'significantly overlap.'" *City of Austin*, 943 F.3d at 1002 (citation omitted). This significant overlap is fully displayed here in connection with the second prong of the *Lujan/Thole* standing analysis – the requirement that the injury alleged be caused by the defendant against whom relief is sought. Just as Morgan failed to satisfy the "some connection" requirement for the *Ex parte Young* exception to sovereign immunity to apply to Mr. Dick, she failed to meet her burden to satisfy the causation requirement of standing to pursue claims against Mr. Dick. Specifically, she failed to establish through a "clear showing" that her alleged injury – *i.e.*, any alleged "chilling effect" on her speech or an inchoate and speculative fear of prosecution – were caused by Mr. Dick. Indeed, the evidence discussed above that was before the district court does not establish any causal link whatsoever between *(i)* any alleged injury to Morgan on the one hand, and *(ii)* any action or

statement attributable to District Attorney Dick on the other. (There were and are no such actions or statements in this record.)

As it did with the *Ex parte Young* "some connection" requirement, the district court sidestepped this causal nexus standing requirement in its order. After discussing the injury-in-fact standing issues, the court simply stated that the "causation and redressability prongs of the standing analysis are easily satisfied here" and that the alleged injury is "fairly traceable to the Defendants" without providing any analysis of the specific conduct of any district attorney defendant alleged (or, here, not alleged or shown) to have caused this injury. *See* ROA.642-44.

Morgan lacks standing to bring her claim against Mr. Dick, and the district court erred when it concluded that Morgan had met her burden to establish standing vis-à-vis Mr. Dick and issued the preliminary injunction.

III. The district court should also have abstained from exercising any jurisdiction under the *Younger* abstention doctrine.

Mr. Dick has raised the *Younger* abstention doctrine twice in the district court proceedings: first in his motion to dismiss, and again in his response to Plaintiffs' motion for preliminary injunction. *See* ROA.261-63 (motion to dismiss) & ROA.348-49 (response to preliminary injunction). The Supreme Court's opinion and decision in *Younger v. Harris* is highly relevant in this case – in at least two key respects. *See Younger v. Harris et al.*, 401 U.S. 37 (1971).

Younger involved issues pertaining to the constitutionality of certain provisions of the California penal code known as the California Criminal Syndicalism Act. *Id.* at 38. Harris, who was being actively prosecuted by the Los Angeles County District Attorney for alleged criminal violations of the act, had filed suit in a federal district court seeking an injunction prohibiting prosecution by the state district attorney (Younger) on the ground that the act violated his First and Fourteenth Amendment rights. *Id.* at 38-39. Three other individuals who were *not* being prosecuted but asserted that their free speech rights were being unconstitutionally "inhibited" had intervened in the federal litigation. *Id.* at 39-40.

In its opinion, the *Younger* court first cited and discussed approvingly the lower court's ruling that the three intervenors lacked standing to pursue their claims. *See id.* at 41-42. The court noted that, while Harris had been indicted and was actually being prosecuted by the district attorney, none of the three intervenors (like Morgan here) had been indicted, arrested, or even threatened by the prosecutor:

> But here appellees Dan, Hirsch, and Broslawsky do not claim that they have ever been threatened with prosecution, that a prosecution is likely, or even that a prosecution is remotely possible. They claim the right to bring this suit solely because, in the language of their complaint, they "feel inhibited." ***We do not think this allegation, even if true, is sufficient to bring the equitable jurisdiction of the federal courts into play to enjoin a pending state prosecution. A federal lawsuit to stop a prosecution in a state court is a serious matter. And persons having no fears of state prosecution except those that are imaginary or speculative, are not to be accepted as appropriate plaintiffs in such cases.***

Id. at 42 (emphasis added). The court declined to find that these three individuals had standing. *Id.*

The *Younger* court then proceeded to address Harris's claims in the context of the longstanding "national policy forbidding federal courts from staying or enjoining state court proceedings" except under "very special circumstances." *Id.* at 41 & 45. The court cited and discussed its prior decision in *Fenner v. Boykin*, 271 U.S. 240 (1926), which involved a civil suit that had been brought in federal district court seeking to enjoin state court prosecutions under a recently enacted state law that allegedly interfered with the free flow of interstate commerce. *Id.* at *45.* The *Younger* court quoted the *Fenner* court holding:

> "*Ex parte Young*, 209 U.S. 123, and following cases have established the doctrine that when absolutely necessary for protection of constitutional rights courts of the United States have power to enjoin state officers from instituting criminal actions. ***But this may not be done except under extraordinary circumstances where the danger of irreparable loss is both great and immediate. Ordinarily, there should be no interference with such officers; primarily, they are charged with the duty of prosecuting offenders against the laws of the State and must decide when and how this is to be done.*** The accused should first set up and rely upon his defense in the state courts … ".

Id. (quoting *Fenner,* 271 U.S. at 243-44) (emphasis added). The court then held that an alleged "chilling effect" to First Amendment speech, in and of itself, "should not by itself justify federal intervention" in matters concerning state laws and matters pertaining to a state's prosecutorial discretion to enforce those laws. *Younger*, 401 U.S. at 50. "[I]t can seldom be appropriate for [federal] courts to exercise any such

power of prior approval or veto over the [state] legislative process." *Id.* at 53. On these grounds, the Supreme Court reversed the district court's ruling enjoining District Attorney Younger from prosecuting Harris. *Id.* at 54.

Younger thus underscores the twin notions that *(i)* Morgan, who has not alleged or demonstrated that she has been prosecuted or even been remotely threatened with prosecution by District Attorney Dick, lacks standing to sue Mr. Dick; and *(ii)* under longstanding national policy the district court should refrain from exercising any power of prior approval of state laws and matters regarding prosecutorial decisions involving those laws by state officials like District Attorney Dick, even when an alleged "chilling effect" to free speech is the alleged injury.

The district court abused its discretion when it refused to abstain from exercising jurisdiction on the facts and circumstances presented in this record.

CONCLUSION AND PRAYER

For the foregoing reasons, Defendant-Appellant Shawn Dick, sued in his official capacity as Williamson County District Attorney, respectfully requests that this Court reverse the district court's order granting Plaintiffs' motion for preliminary injunction, and remand this action for further proceedings consistent therewith.

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Respectfully submitted,

s/ Sean Breen

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Counsel for Appellant Shawn Dick In His Official Capacity as Williamson County District Attorney

CERTIFICATE OF SERVICE

I certify that on February 23, 2022, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. I further certify that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13 and that (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1

s/ Sean Breen
Attorney of Record for Appellant Shawn Dick

CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limit of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because, excluding the parts of the document exempted by Rule 32(f) and 5th CIR. R. 32.1: this document contains **6,033** words.

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