UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

ISABEL LONGORIA and CATHY MORGAN,	§	
	§	
***Plaintiffs*,**	§	
	§	
v.	§	**Case No. 5:21-cv-1223-XR**
	§	
WARREN K. PAXTON, in his official capacity as the Attorney General of Texas, *et al*.,	§	
	§	
	§	
	§	
***Defendants*.**		

DEFENDANT SHAWN DICK'S MOTION TO DISMISS
(FED. R. CIV. P. 12(B)(1) AND 12(B)(6))

Defendant Shawn Dick, sued in his official capacity as the District Attorney of Williamson County, Texas, files this motion to dismiss pursuant to Federal Rules 12(b)(1) and 12(b)(6), respectfully showing:

INTRODUCTION

Defendant Shawn Dick, the District Attorney of Williamson County, has absolutely no connection with these Plaintiffs, yet they have sued him. Mr. Dick hasn't heard of them, hasn't prosecuted them, hasn't threatened them, hasn't accused them of violating the law, and he hasn't even intimated that formal enforcement of the law in question was even on the horizon for them or anyone else, yet he's been sued.

Plaintiffs Isabel Longoria and Cathy Morgan are seeking declaratory and injunctive relief in connection with the recently enacted Texas Senate Bill 1 (SB1) election legislation. They seek a declaration from the 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 from enforcing this and a related provision. Morgan, who alleges that she serves as a "Volunteer Deputy Registrar" (VDR) in Travis and Williamson Counties, is asserting her claims against the Travis County District Attorney (Jose Garza) and the Williamson County District Attorney (Mr. Dick). Longoria is not asserting any claims against these two district attorneys.

Mr. Dick, who has been sued in his official capacity, is moving to dismiss Morgan's claims pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules – for two distinct reasons. First, Morgan's claims against Mr. Dick are precluded by sovereign immunity. While certain federal suits for injunctive or declaratory relief against a state official acting in violation of federal law are allowed if there is a "sufficient 'connection' to enforcing an allegedly unconstitutional law," *In re Abbott*, 956 F.3d 696, 708 (5th Cir. 2020), this is not such a case with respect to Mr. Dick. Among other things, there are zero allegations and not even a scintilla of evidence that Mr. Dick has "the particular duty to enforce the statute in question and a demonstrated willingness to exercise that duty." *Morris v. Livingston*, 739 F.3d 740, 746 (5th Cir. 2014). Second, Morgan lacks standing to bring her claims against Mr. Dick because she has not plausibly alleged or shown: *(i)* any cognizable injury-in-fact that would confer standing; *(ii)* any causal connection between her claims and Mr. Dick that would support standing; and *(iii*) that unpaid volunteers such as herself are subject to enforcement of a statute that, on its face, only applies to conduct of "election officials" and "public officials" who are acting in their "official capacity." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992); TEX. ELEC. CODE §276.016(a)(1).

The claims against Mr. Dick must be dismissed because this Court lacks subject matter jurisdiction over them. Additionally or alternatively, the claims should be dismissed because

Morgan has failed to state a claim upon which relief can be granted by this Court. Put simply, the case against Mr. Dick is meritless and this Court should dismiss it.

PROCEDURAL BACKGROUND AND ALLEGATIONS

Plaintiffs filed their original complaint on December 10, 2021, naming Texas Attorney General Ken Paxton as the sole defendant. (ECF No. 1) They filed their first amended complaint (their live complaint) on December 27, 2021, adding three district attorneys – including Mr. Dick of Williamson County – as defendants. (ECF No. 5) Longoria, who serves as the Harris County Elections Administrator, is asserting claims against the Attorney General and the Harris County District Attorney in their official capacities. (ECF No. 5 at ¶¶37-46) Morgan is a VDR in Central Texas and is asserting her claims against the Travis and Williamson County District Attorneys in their official capacities. (ECF No. 5 at ¶¶37-43) On December 28th, Plaintiffs filed a motion for entry of a preliminary injunction, attaching declarations of Longoria and Morgan to that motion. (ECF Nos. 7, 7-1 & 7-2) This is Mr. Dick's first responsive pleading.

Notably, Morgan does not allege that Mr. Dick, as Williamson County District Attorney, has ever said or done anything *whatsoever* – whether explicitly or implicitly – to threaten or even suggest that he or his office had any intention of prosecuting or investigating Morgan (or anybody else) in connection with the so-called "anti-solicitation provisions" of Section 276.016(a)(1). (*See* ECF No. 5 at ¶¶1-43) Indeed, there are *zero* allegations that Mr. Dick has taken any steps whatsoever or made any statements at all pertaining to possible enforcement of Section 276.016(a)(1) – whether as to Morgan specifically or anybody else. (*See id.*) Morgan's declaration is similarly bereft of any such averments. (*See* ECF No. 7-2) Instead, Morgan alleges some general and speculative concerns about "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." (ECF No. 5 at ¶35) (italics added).

APPLICABLE LAW

A. Standing and Sovereign Immunity under Federal Rule 12(b)(1).

Rule 12(b)(1) applies to challenges to the court's subject matter jurisdiction based on standing. "Federal courts have jurisdiction only over 'cases' or 'controversies.'" *Williams v. Parker*, 843 F.3d 617, 620 (5th Cir. 2016). There is no case or controversy if the plaintiff lacks standing. *Id.* Because standing is necessary for subject matter jurisdiction, it "is a threshold issue that [the court] consider[s] before examining the merits" of a claim. *Id.* The plaintiff bears the burden of showing that subject matter jurisdiction exists. *See Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001).

"To establish standing under Article III of the Constitution, a plaintiff must demonstrate *(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." *Thole v. U.S. Bank N.A.*, ___ U.S. ___, 140 S.Ct. 1615, 1618 (2020); *see Lujan*, 504 U.S. at 560. Plaintiffs must meet their burden of establishing standing "with the manner and degree of evidence required at the successive stages of the litigation, which means that on a motion to dismiss plaintiffs must allege facts that give rise to a plausible claim of standing." *Cornerstone Christian School v. Univ. Interscholastic League*, 563 F.3d 127, 133-34 (5th Cir. 2009) (quoting *Lujan*, 504 U.S. at 561).

Courts may dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) based on *(1)* the complaint alone; *(2)* the complaint supplemented by undisputed facts in the record; or *(3)* the complaint supplemented by undisputed facts plus the court's resolution of disputed facts. *Lane v. Halliburton*, 529 F.3d 548, 557 (5th Cir. 2008). The court must "take the well-pled factual

allegations as true and view them in the light most favorable to the plaintiff." *Stratta v. Roe*, 961 F.3d 340, 349 (5th Cir. 2020). The court may also consider matters outside the pleadings such as affidavits to resolve a factual challenge to subject matter jurisdiction, without converting the motion to dismiss into a motion for summary judgment. *See Garcia v. Copenhaver, Bell & Assocs.*, 104 F.3d 1256, 1261 (11th Cir. 1997). The court has substantial authority "to weigh the evidence and satisfy itself as to the existence of its power to hear the case." *Id.*

Because sovereign immunity "deprives the court of jurisdiction," the Fifth Circuit has held that the court should consider motions to dismiss based on sovereign immunity under Rule 12(b)(1). *Warnock v. Pecos County*, 88 F.3d 341, 343 (5th Cir. 1996).

B. Sufficiency of Pleadings under Federal Rule 12(b)(6).

A pleading is deficient and may be dismissed under Rule 12(b)(6) if the plaintiff fails "to state a claim upon which relief can be granted." FED. R. CIV. P. 12(b)(6). This rule is read in conjunction with Rule 8, which requires "a short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a)(2). Under the well-established *Twombly/Iqbal* rubric, a complaint must contain "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). While Rule 8 "does not require detailed factual allegations," it does demand "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Iqbal*, 556 U.S. at 678. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.*

Under Rule 12(b)(6), "courts must limit their inquiry to the facts stated in the complaint

and documents either attached to or incorporated in the complaint." *Lovelace v. Software Spectrum, Inc.*, 78 F.3d 1015, 1018 (5th Cir. 1996). The court may consider these materials without converting the motion to dismiss into a summary judgment motion. *See Isquith v. Middle S. Utils., Inc.*, 847 F.2d 186, 193 n.3 (5th Cir. 1988). As with Rule 12(b)(1), under Rule 12(b)(6) the court "take all factual allegations as true and must construe the facts in the light most favorable to the plaintiff." *Alexander v. Verizon Wireless Servs., L.L.C.*, 875 F.3d 243, 249 (5th Cir. 2017).

ARGUMENT AND AUTHORITIES

Here, taking all of the allegations in Morgan's complaint and her declaration as true, she has *(i)* failed to establish jurisdiction and standing; *(ii)* failed to state a claim upon which relief may be granted.

A. Sovereign immunity bars Morgan's claims.

"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 v. Paxton*, 943 F.3d 993, 997 (5th Cir. 2019)) (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*, the Fifth Circuit 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*, the Fifth Circuit 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)[1].

Here, Morgan's pleadings fall woefully short of establishing that subject matter jurisdiction exists in this federal court suit filed against a state official – Williamson County District Attorney Shawn Dick – and her declaration does nothing to salvage her claims for the purposes of Rule 12(b)(1). She has fundamentally failed to allege 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.[2] And, more particularly, she has utterly failed to allege or proffer any evidence that Mr. Dick's office *(i)* took any affirmative action whatsoever to enforce the statute at issue (as to her 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). For example, she does not allege any prior or current attempts by Mr. Dick or his office to enforce the statute, or that enforcement is forthcoming. She does 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. She does not allege that there have been any investigations by Mr. Dick or his office regarding or pertaining to the statute. She cannot point to any threats made by Mr. Dick or his office regarding

[1] 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.

[2] Morgan has also neither pleaded nor 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 Tex. Democratic Party II*, 978 F.3d at 179; *City of Austin*, 943 F.3d at 997.

exercising enforcement of the challenged statute or conduct that allegedly violates it. Indeed, she does not even offer 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. Nothing at all.

Because there are literally no allegations or evidence that Mr. Dick has demonstrated a willingness to exercise any duty to enforce the challenged statute or otherwise "intimated that formal enforcement was on the horizon," Morgan has failed to establish with even a scintilla of evidence that the *Ex parte Young* exception to sovereign immunity applies and that subject matter jurisdiction exists. *See Tex. Democratic Party II*, 978 F.3d at 181 (citing and quoting *NiGen*, 804 F.3d at 392 (5th Cir. 2015)). As such, immunity precludes suit and Morgan's claims against Mr. Dick must be dismissed for want of subject matter jurisdiction pursuant to Rule 12(b)(1). Additionally or alternatively, for these reasons Morgan has failed to plausibly state a claim upon which relief may be granted, and her claims against Mr. Dick should be dismissed pursuant to Rule 12(b)(6). *Twombly*, 550 U.S. at 555; *Iqbal*, 556 U.S. at 678.

B. Morgan lacks standing.

Subject matter jurisdiction also does not exist over Morgan's claims against Mr. Dick because she has failed to establish that she has standing to pursue these claims. Her standing problems are multi-fold.

1. Morgan has not established any injury-in-fact.

Morgan has not alleged or shown a cognizable injury that confers standing. As discussed above, she has very generically alleged subjective concerns about "her fear of criminal prosecution for *encouraging* eligible voters to request an application to vote by mail," and asserted 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." (ECF No. 5 at ¶35) (emphasis

added) But, she does not plausibly allege that she faces a prosecution, investigation, or other potential enforcement by Mr. Dick or his office that is actual and existing, that is imminent or "certainly impending," or even one that is remotely on the horizon. *See Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 418 (2013) ("Subjective fear … does not give rise to standing."). Speculative allegations of a possible future injury are insufficient to establish standing. *Id.* at 409.

Moreover, in her complaint and in her declaration, Morgan does not assert that she has intended or intends to "solicit" eligible voters to request mail ballots. She instead asserts that she fears potential prosecution for "encouraging" eligible voters to request mail-in ballot applications. (ECF No. 5 at ¶35; ECF No. 7-2 at ¶¶18 & 20). But, on its face Section 276.016(a)(1) does not prohibit Morgan or anyone else from simply "encouraging" voters to request a mail-in ballot application. Instead, according to its plain text the statute prohibits "*solicit[ing]* 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) (emphasis added). Morgan thus has not plausibly alleged "a serious intention to engage in conduct proscribed by" Section 276.016(a)(1), much less any actual or imminent threat of prosecution. *Zimmerman v. City of Austin*, 881 F.3d 378, 389 (5th Cir. 2018).

(Merriam-Webster defines "solicit" as meaning "to ask for (something, such as money or help) from people, entities, etc.," "to make a petition to," "to approach with a request or plea," and "to urge (something, such as one's cause) strongly"[3], whereas it defines "encourage" as "to inspire with courage, spirit or hope" and "to attempt to persuade."[4] There is nothing confusing, vague or inherently unconstitutional about the use of the word "solicit" in criminal, election, and other laws. Indeed, many states and municipalities prohibit the "solicitation" of various things (*e.g.*,

[3] *See* https://www.merriam-webster.com/dictionary/solicit.

[4] *See* https://www.merriam-webster.com/dictionary/encourage.

votes, signatures, campaign contributions) specifically in the context of elections.[5] The Bar Association has rules limiting the "solicitation" of clients.[6] And, the federal government prohibits its employees from engaging in certain forms of "solicitation."[7])

Because Morgan has failed to plausibly allege or show that she has suffered an injury in fact that is concrete, particularized, and actual or imminent, she has failed to establish that she has standing and her claims should be dismissed under Rule 12(b)(1). Additionally or alternatively, for these reasons Morgan has failed to plausibly allege a claim upon which relief may be granted and her claims against Mr. Dick should be dismissed pursuant to Rule 12(b)(6). *Twombly*, 550 U.S. at 555; *Iqbal*, 556 U.S. at 678.

2. Morgan has not satisfied the causal connection requirement of standing.

Morgan has also failed to satisfy the second prong of the standing analysis: an injury that was caused by the defendant. *Thole*, *supra*. She has not alleged or averred to even a single action or statement attributable to Mr. Dick or his office concerning any matter at issue in this suit, specifically including her purported fear of being prosecuted for violating Section 276.016(a)(1), much less anything else that could plausibly satisfy the causal connection requirement. Morgan's claims should be dismissed under Rule 12(b)(1) and/or Rule 12(b)(6) for this additional reason.

3. Morgan, a VDR, has failed to establish that the challenged statute even applies to her.

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[5] *See* National Conference of State Legislatures website ("Electioneering Prohibitions"), https://www.ncsl.org/research/elections-and-campaigns/electioneering.aspx; City of San Diego Ethics Commission website ("Campaign Contribution Solicitation"), https://www.sandiego.gov/ethics/faqs/solicitation.

[6] See American Bar Association website (Professional Rule 7.3), https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_7_3_direct_contact_with_prospective_clients/.

[7] *See* U.S. Dept. of Justice website ("Misuse of Position and Government Resources"), https://www.justice.gov/jmd/misuse-position-and-government-resources.

Morgan's claims in this action are based on her role as a "Volunteer Deputy Registrar" or VDR.[8] (ECF No. 5 at ¶¶33-35; ECF No. 7-2 at ¶¶3-8) That is, she is asserting claims based on her role as an *unpaid volunteer* – not as an elected official or as an employee of the state, a state board or agency, or any political subdivision of the state.

Section 276.016(a) establishes a criminal offense for "[a] public official or election official" who, "while acting in an official capacity," knowingly engages in certain prohibited conduct associated with mail-in ballot applications. TEX. ELEC. CODE §276.016(a)(1). Section 1.005(4-a) of the Election Code expressly defines the term "election official" with a specific laundry list of persons such as county clerks, elections administrators, and state and municipal judges of different stripes. *See id.* at §1.005(4-a). Volunteer deputy registrars – a role which is defined elsewhere in the Election Code[9] – are not included within this definition.

While the term "public official" is not specifically defined in the Election Code, *see id.* at §1.005, as an unpaid volunteer Morgan does not fit within any commonly-used or understood definition or the plain meaning of that term. For example, Merriam-Webster defines the term in the context of "a person who holds a public office …".[10] Section 573.001 of the Texas Government Code (Texas's anti-nepotism statute) defines a public official as: "(A) an officer of this state or of a district, county, municipality, school district, or other political subdivision of this state; (B) an officer or member of a board of this state or of a district, county, municipality, school district, or other political subdivision of this state; or (C) a judge of a court created by or under a

[8] Morgan's declaration states that she has "submitted [her] name to be an alternate election judge in Williamson County during the 2022 elections," but does not state that she has been appointed to serve in such a role. (ECF No. 7-2 at ¶9)

[9] *See* TEX. ELEC. CODE §§13.031 *et seq.*

[10] *See Merriam-Webster.com Legal Dictionary*, Merriam-Webster, https://www.merriam-webster.com/legal/public%20official.

statute of this state." TEX. GOV'T CODE §573.001(a)(3). And, in the context of adjudicating cases involving the Texas Citizens Participation Act, which also uses the term "public official"[11] but does not define it, Texas state courts have defined the term to include a *subset* of state *employees* who have a certain degree of responsibility or control for the conduct of governmental affairs:

> "[N]ot all governmental employees qualify as public officials, and there is no specific test for determining whether an individual is a public official for the purposes of a defamation action. However, public official status applies to governmental employees "at the very least … who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs. An employee holding an office of 'such apparent importance that the public has an independent interest in the qualifications and performance of a person who holds it, beyond the general public interest in the qualifications and performance of all government employees,' is a public official for defamation purposes."

Hoskins v. Fuchs, 517 S.W.3d 834, 842 (Tex.App.–Fort Worth 2016, pet. denied) (citing and quoting *HBO v. Harrison*, 983 S.W.2d 31, 36 (Tex.App.–Houston [14th Dist.] 1998, no pet.) (internal cites omitted).

Morgan lacks standing because she has not plausibly alleged or shown that she is, as an unpaid volunteer, in the class or category of persons who are potentially subject to the provisions of Section 276.016(a)(1). As such, there is no subject matter jurisdiction over her claims against Mr. Dick and they should be dismissed under Rule 12(b)(1). Additionally or alternatively, her claims should be dismissed under Rule 12(b)(6) because she has not plausibly alleged a claim upon which relief may be granted.

C. The Supreme Court's opinion in *Younger v. Harris* is highly instructive.

The Supreme Court's opinion in *Younger v. Harris* is instructive 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

[11] *See* TEX. CIV. PRAC. & REM. CODE §27.001(7)(A).

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 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 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)* plaintiff Morgan, who has not alleged that she has been prosecuted or even been remotely threatened with prosecution, lacks standing; and *(ii)* under longstanding national policy this federal 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.

CONCLUSION AND PRAYER

WHEREFORE, PREMISES CONSIDERED, defendant Shawn Dick, sued in his official capacity as Williamson County District Attorney, respectfully requests that the Court dismiss all claims and causes of action that have been asserted against him in this action pursuant to Rule

12(b)(1) and/or Rule 12(b)(6) for the reasons stated herein, and for such other and further relief to which he may be justly entitled.

Dated: January 27, 2022

Respectfully submitted,

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Attorneys for Defendant Shawn Dick
In His Official Capacity as
Williamson County District Attorney.

CERTIFICATE OF SERVICE

I certify that a true and accurate copy of the foregoing document was filed electronically (via CM/ECF) on January 27, 2022, and that all counsel of record were served by CM/ECF.

Sean E. Breen