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 RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Defendant Shawn Dick, sued in his official capacity as the District Attorney of Williamson County, Texas, files this response in opposition to plaintiffs' motion for preliminary injunction (ECF No. 7), respectfully showing:

INTRODUCTION

Plaintiffs' motion for issuance of a preliminary injunction against Williamson County District Attorney Shawn Dick should be denied for the very same reasons that Mr. Dick's pending motion to dismiss (ECF No. 31) should be granted:

(1) Plaintiffs' claims against Mr. Dick are barred by sovereign immunity, and subject matter jurisdiction thus does not exist;

(2) Plaintiffs lack standing and there is no subject matter jurisdiction for this additional reason; and

(3) this Court should abstain from intervening in matters concerning state laws

> and a state district attorney's prosecutorial discretion to enforce those laws under the *Younger* abstention doctrine.

Mr. Dick has already briefed these issues in his pending motion to dismiss and will not replicate those arguments in detail in this response; instead, he incorporates his motion to dismiss for all purposes herein.

However, since the motion to dismiss was filed the plaintiffs have both been deposed in connection with the upcoming hearing on their preliminary injunction motion. The testimony given by the plaintiffs – and, more specifically, the testimony given by plaintiff Cathy Morgan, who is the only plaintiff asserting a putative cause of action against Mr. Dick in this matter – makes absolutely clear that there is no evidence to support any justiciable claims against Mr. Dick in addition to the absence of any plausible allegations giving rise to any such claims. Indeed, in her deposition Ms. Morgan unequivocally testified (among other things) that: she is not and has never been prosecuted, charged, or investigated by Mr. Dick in connection with Section 276.016(a)(1) or any other law; she has never been threatened with any such prosecution, charge or investigation; she doesn't know of anyone who has been prosecuted or threatened with prosecution under that law; she has never even spoken with Mr. Dick or his office about Section 276.016(a)(1) or its contents or enforcement, and in fact has never heard, seen or read anything by Mr. Dick or attributable to him about the statute or its enforcement.

The motion for preliminary injunction should be denied as to Mr. Dick because *(i)* subject matter jurisdiction simply does not exist and no injunctive relief can be granted, *(ii)* there is no plausible claim upon which final relief (much less preliminary injunctive relief) can be granted, and *(iii)* the *Younger* abstention doctrine mandates against federal court intervention in state prosecutorial matters under the facts and circumstances presented here.

PROCEDURAL BACKGROUND, ALLEGATIONS, AND DEPOSITION TESTIMONY

Procedural Background

Plaintiffs Isabel Longoria and Cathy Morgan 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[1] – 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) (Longoria is asserting no claims against Mr. Dick, and has so acknowledged in her recent deposition.) Morgan serves as a "Volunteer Deputy Registrar" (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 their motion for entry of a preliminary injunction, attaching declarations of Longoria and Morgan to that motion. (ECF Nos. 7, 7-1 & 7-2)

On January 27, 2022, Mr. Dick filed a motion to dismiss pursuant Federal Rules 12(b)(1) and 12(b)(6) as his first responsive pleading. (ECF No. 31) In that motion, which remains pending, 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

[1] While the other named state district attorney defendants have entered into non-participation stipulations with the Plaintiffs, District Attorney Dick, as an elected public official, continues to pursue dismissal of claims that *(i)* are barred by sovereign immunity and contrary to the *Younger* abstention doctrine, *(ii)* the plaintiffs lack standing to bring, and *(iii)* improperly and improvidently attempt to rope state district attorneys in as named defendants to individually defend the constitutionality of laws that are passed on a state-wide level. Mr. Dick notes that there are 254 counties in Texas and almost as many state district attorneys who are potentially subject to such suits.

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. (*See id.* at pp. 6-15)

Plaintiffs' motion for preliminary injunction has been set for hearing on Friday, February 11th. (ECF. No. 37). In preparation for that hearing, Ms. Longoria and Ms. Morgan were both deposed on February 4th. Excerpts of Ms. Morgan's deposition are attached as Exhibit "A" to this response and incorporated herein.

Plaintiffs' Allegations

In the complaint, Ms. 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.*) The declaration of Morgan that is attached to plaintiffs' preliminary injunction motion 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)

Plaintiffs' Depositions

The plaintiffs' February 4th depositions confirm that dismissal of Mr. Dick as a defendant

is warranted and that no preliminary injunction should be issued as to him.

As a threshold matter, the deposition testimony establishes that Ms. 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. Among other things, Ms. Morgan testified that:

- She's been appointed to serve as a voluntary deputy registrar (VDR) in both Williamson and Travis Counties since 2014. (MORGAN DEPO TR., Exh. A, at 89:19-25)
- She is not paid in her role as a VDR. (*Id.* at 90:1-3)
- She is not currently appointed to serve as an alternate election judge in either Williamson or Travis County. (*Id.* at 90:4-10)
- She is not a full-time or part-time employee of the State of Texas or any state agency. (*Id.* at 90:15-18)
- She is not a full-time or part-time employee of any political subdivision of the state, including Williamson and Travis Counties. (*Id.* at 90:19-22)
- She doesn't hold any elected public office in the state of Texas. (*Id.* at 90:23-91:22)
- She is not the appointed member of any board or commission of the State of Texas or of Williamson or Travis Counties. (*Id.* at 91:23-92:1)

Further, Ms. Morgan specifically agreed that she does not presently serve in any of the roles listed in the definition of "election official" that are contained in Subsection 1.005 of the Texas Election Code. (*Id.* at 92:1-6)

Next, although the complaint and her declaration assert some highly 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," (ECF No. 5 at ¶35), she has absolutely no objective evidence that could support any such subjective alleged fear. Among other things, she unequivocally testified that:

- She is not presently being prosecuted for any alleged criminal violation of the Texas Election Code by District Attorney Dick or anybody else. (*Id.* at 94:6-9)
- She has never been prosecuted by District Attorney Dick or anybody in his office for any alleged criminal violation of the election code. (*Id.* at 94:13-16)
- She has never been convicted of any criminal offense established by the Texas Election Code. (*Id.* at 93:8-12)
- She is not currently charged or indicted by District Attorney Dick or his office for any alleged violation of the Texas Election Code. (*Id.* at 94:18-25)
- She is not currently being prosecuted by District Attorney Dick or anyone in his office for anything. (*Id.* 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. (*Id.* 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. (*Id.* 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. (*Id.* 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. (*Id.* at 96:8-12)

Indeed, Ms. Morgan confirmed 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) – 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. (*Id.* 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. (*Id.* at 96:18-22)

- She's not aware of any person who has ever been charged by District Attorney Dick for an alleged violation of Section 276.016(a)(1). (*Id.* 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. (*Id.* at 70:9-11)

- She has never communicated with anyone from the district attorney's office. (*Id.* at 70:12-14)

- She's 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. (*Id.* 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. (*Id.* at 97:3-7)

- She's never sought any type of clarification, advice or input from District Attorney Dick or anybody from his office about Section 276. (*Id.* at 97:8-12 & 99:17-20))

- She never contacted the Williamson County Elections Administrator to get any kind of clarification or interpretation about Section 276. (*Id.* at 101:22-102:1)

- She's never heard District Attorney Dick or anybody from his office speak about Section 276 of the code, its contents, or enforcement of the statute. (*Id.* 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. (*Id.* at 104:4-8)

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

- She hasn't seen any social media posts from District Attorney Dick or anyone in his office regarding Section 276 or its enforcement. (*Id.* at 104:13-17)

Indeed, she specifically agreed that she's 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.

(*Id.* at 104:22-105:10)

In fact, Ms. Morgan testified that *no one in the entire State of Texas* has ever threatened to prosecute her or to seek a civil penalty against her in connection with the provision of the Texas Election Code she is challenging or any other provision of that code. Specifically, she testified that:

- No one has ever threatened to prosecute her for violating Section 276.016(a)(1). (*Id.* at 70:15-17)
- She has never been threatened with a criminal prosecution for violating any other law. (*Id.* at 70:18-30)

- No one has ever threatened to seek a civil penalty against her under Texas Election Code Section 31.129. (*Id.* at 70:21-23)

- No one has ever threatened to seek a civil penalty against her under any other provision of law. (*Id.* at 71:1-5)

- She is not being prosecuted for any criminal offense of any kind in the State of Texas currently. (*Id.* at 94:10-12)

Finally, Ms. Morgan testified that she has continued to engage in VDR-related activities – including handing out mail-in ballot applications to potential voters – without repercussion since the "SB1" election legislation was passed last summer (except for very understandable Covid-related concerns). For example, she worked a voter information booth near the University of Texas in Austin for a number of days in October 2021 – handing out a number of mail-in ballot applications. (*Id.* at 20:19-21:3, 37:12-38:15 & 44:17-49:5) And, she has provided mail-in registration information to neighbors. (*Id.* at 21:4-20) But, despite her purported fears regarding Section 276.016(a)(1) and its enforcement, she testified that she has never personally sought advice, clarification, or input from any official in the State of Texas (including the Secretary of State) or Williamson County (including the Williamson County Elections Administrator) about Section 276. (*Id.* at 97:12-15, 99:9-12 & 101:22-102:1)

INCORPORATION OF MOTION TO DISMISS

Mr. Dick incorporates his motion to dismiss (ECF No. 31) and its contents for all purposes as if fully set forth herein.

APPLICABLE LAW

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).

A movant cannot be granted a preliminary injunction unless she can establish that she will suffer irreparable harm without an injunction. *Amazon.com, Inc. v. Barnesandnoble.com, Inc.*, 239 F.3d 1343, 1350 (Fed. Cir. 2001). "[B]ecause 'the court must decide whether the harm will *in fact* occur,' a party seeking injunctive relief must 'substantiate the claim of irreparable injury' and 'must show that the injury is of such *imminence* that there is a clear and present need for equitable relief to prevent *irreparable* harm." *Sierra Club v. U.S. Army Corps of Eng'rs*, 482 F.Supp.3d 543, 559 (W.D. Tex. 2020) (quoting *Sierra Club v. U.S. Army Corps of Eng'rs*, 990 F.Supp.2d 9, 39 (D.D.C. 2013)) (italics in original). "[S]peculation built upon further speculation does not amount to a 'reasonably certain threat of imminent harm' and does not warrant injunctive relief." *Id.* (quoting *Friends of Lydia Ann Channel v. U.S. Army Corps of Eng'rs,* 701 F. App'x 352, 357 (5th Cir. 2017)).

ARGUMENT & AUTHORITIES

A. Plaintiffs' motion for preliminary injunction should be denied because they have failed to make the requisite "clear showing" that subject matter jurisdiction even exists.

As discussed in more detail in Mr. Dick's pending motion to dismiss, "'an 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)). 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.

Plaintiffs' motion should be denied because they have not even brought their case over this initial jurisdictional threshold for the purposes of preliminary injunctive relief: they have not shown (as is their burden) that subject matter jurisdiction exists. (It does not.) More specifically, they have not met their burden to plead and show clearly that: *(i)* the *Ex Parte Young* exception to sovereign immunity applies here such that subject matter jurisdiction exists and they may maintain suit against District Attorney Dick in federal court; and *(ii)* they otherwise have standing to sue Mr. Dick in this matter.

1. Sovereign Immunity and *Ex Parte Young*

As set forth in Mr. Dick's motion to dismiss, sovereign immunity bars suits against state officials like Mr. Dick unless the "some connection" requirement of *Ex Parte Young* exception is established. (*See* ECF No. 31 at pp. 6-9) 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 v. Abbott*, 961 F.3d 389, 400 (5th Cir. 2020) (citing *City of Austin v. Paxton*, 943 F.3d 993, 997 (5th Cir. 2019). "[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 v. Abbott*, 978 F.3d 168, 179 (5th Cir. 2020) (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*, 961 F.3d at 40 (citing *City of Austin*, 943 F.3d at 1002).

Here, Plaintiffs – specifically, plaintiff Morgan, who is the only plaintiff asserting a claim against District Attorney Dick in this action – has not pleaded nor can she "clearly show" that Mr. Dick ever took "some step to enforce" Section 276.016(a)(1), that he has ever "demonstrated willingness to exercise that duty," or that he has taken any "affirmative action." There is not a scintilla of evidence that Mr. Dick has ever done such, and, indeed, the deposition testimony from Ms. Morgan's February 4th deposition establishes *just the opposite*. As set forth above, she testified that she has never been prosecuted, charged, indicted or investigated by Mr. Dick or his office in connection with the Texas Election Code or any other statute. She has not been threatened with any such prosecution, charge, indictment, or investigation. She agreed that nobody from Mr. Dick's office has even "intimated" that any such matters "are on the horizon." Indeed, she testified that she's never even met or spoken with Mr. Dick or his office, and has not read or heard or seen anything by Mr. Dick or attributable to him that even remotely relates to Section 276.016(a)(1).

2. Standing Under the *Lujan* and *Thole* Standards

Similarly, issuance of a preliminary injunction enjoining District Attorney Dick is

improper because Plaintiffs have not pleaded and cannot meet their burden to clearly show that they have standing to sue Mr. Dick. Plaintiff Longoria is the Harris County Elections Administrator and is not asserting claims against Mr. Dick, who is the Williamson County District Attorney. Plaintiff Morgan is asserting putative claims against Mr. Dick, but she has not alleged and cannot clearly show that the claims she has attempted to plead satisfy any of the three requirements of standing under *Lujan* and *Thole*: injury-in-fact; causation attributable to the defendant; and redressability.

a) Injury in Fact

To establish standing for the purposes of a preliminary injunction, Ms. Morgan must plead and clearly show that she suffered an injury in fact that is concrete, particularized, and actual or imminent. *Thole, supra.* She has not pleaded any such injury, and, as the deposition testimony cited and discussed above shows, no such injury exists by her own admission. The Supreme Court has held that subjective fears of the sort she has alleged, without more, do "not give rise to standing." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 418 (2013). Speculative and hypothetical allegations of a possible future injury of the sort Ms. Morgan claims are simply not sufficient to establish standing. *See id.* at 409.

b) Causation

Ms. Morgan must also plead and clearly show an injury that was caused by the defendant named. *Thole, supra.* But, she has not pleaded any such injury (or any injury at all) attributable to Mr. Dick, and she admitted in her deposition that there is none.

c) Redressability

Finally, for standing to exist such that preliminary injunctive relief may issue, Ms. Morgan must plead and clearly show that the alleged injury would likely be redressed by the requested

judicial relief. *Thole, supra.* But, again, she has not pleaded anything other than a subjective and unsubstantiated fear – unsubstantiated by any evidence and by her own admissions in her deposition – that would give rise to any redressability for the purposes of the standing analysis.

B. The motion for preliminary injunction should also be denied because Morgan has no irreparable injury attributable to District Attorney Dick, or a substantial likelihood of success on the merits on her claim against Mr. Dick.

1. Irreparable Injury

In addition to making the requisite threshold showing regarding standing, a plaintiff seeking a preliminary injunction must show that she will likely suffer an irreparable injury. *Winter, supra*, at 20. To satisfy this requirement, the plaintiff must show that *(1)* she will likely suffer an imminent injury, and (2) the injury would be irreparable. *Sierra Club*, 482 F.Supp. at 559. An irreparable injury must be both actual and imminent. *Grand River Enter. Six Nations, Ltd. v. Pryor*, 481 F.3d 60, 66 (2d Cir. 2007). Speculative harm or the mere possibility of irreparable injury is not sufficient; instead, irreparable injury must be likely. *Winter, supra*, at 22.

Here, Morgan has neither plausibly pleaded nor can she prove that there is any irreparable injury exists such that a preliminary injunction may issue. As her deposition testimony shows, there is no actual injury – certainly nothing at all with respect to District Attorney Dick and his office. Nothing is imminent, much less even "on the horizon" by her own admission. She hasn't even spoken with him, much less heard, read or seen anything remotely relevant to this case that is attributable to him. Instead, the harm she claims is purely speculative and subjective, and she has not even shown that it rises to the "mere possibility" level.

2. Substantial Likelihood of Success

A plaintiff seeking a preliminary injunction in federal court must also show that she has a substantial likelihood of succeeding on the merits of her claim. *Winter, supra.* Irrespective of the

merits of any overarching claims she is asserting in this lawsuit about Section 276.016(a)(1) and its constitutionality, she has made no showing whatsoever that she is substantially likely to prevail on claims she is asserting against a state district attorney who has not said or done anything to even remotely suggest that he has or will impinge upon any of her constitutional rights.

C. The Court should abstain from issuing an injunction under the *Younger* doctrine.

District Attorney Dick has previously raised and briefed the *Younger* abstention doctrine in his pending motion to dismiss. (*See* ECF No. 31 at pp. 13-15) While *Younger* abstention is "not a jurisdictional issue, a court may 'abstain under *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 748, 27 L.Ed.2d 669 (1971), without deciding whether the parties are presenting a case or controversy." *Daves, supra*, at *16 (citing *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 584 (1999)).

Notwithstanding the sovereign immunity, standing, and other issues discussed above, this Court should refrain from issuing any preliminary injunction as to Mr. Dick pursuant to the *Younger* doctrine. In *Younger*, the Supreme Court discussed 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 quoted its previous holding in *Fenner v. Boykin*, 271, U.S. 240 (1926):

> "*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, of the sort that Morgan is claiming here "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.

Younger thus underscores the notion under longstanding national policy that *this* federal court should refrain – through use of injunctive relief or otherwise – from exercising any power of prior approval of matters regarding prosecutorial decisions involving state 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 *(i)* the Court deny Plaintiffs' motion for preliminary injunction (ECF No. 7) in its entirety, *(ii)* dismiss all claims and causes of action that have been asserted against Mr. Dick in this action pursuant to Rule 12(b)(1) and/or Rule 12(b)(6) for the reasons stated in his motion to dismiss (ECF No. 31), and *(iii)* for such other and further relief to which he may be justly entitled.

Dated: February 8, 2022

Respectfully submitted,

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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 February 8, 2022, and that all counsel of record were served by CM/ECF.

Sean E. Breen