

**No. 22-50732**

---

**In the United States Court of Appeals  
for the Fifth Circuit**

---

MI FAMILIA VOTA; MARLA LOPEZ; MARLON LOPEZ; PAUL RUTLEDGE,

Plaintiffs-Appellees,

v.

KIM OGG,

Defendant-Appellant.

---

OCA-GREATER HOUSTON; LEAGUE OF WOMEN VOTERS OF TEXAS;  
REVUP-TEXAS; TEXAS ORGANIZING PROJECT; WORKERS DEFENSE  
ACTION FUND,

Plaintiffs-Appellees,

v.

JOSE A. ESPARZA, IN HIS OFFICIAL CAPACITY AS TEXAS SECRETARY  
OF STATE (ACTING), ET AL.,

Defendants.

KIM OGG

Appellant.

---

LULAC TEXAS; VOTO LATINO; TEXAS ALLIANCE FOR RETIRED  
AMERICANS; TEXAS AFT,

Plaintiffs-Appellees,

v.

JOSE ESPARZA, ET AL.,

Defendants.

KIM OGG

Appellant.

---

DELTA SIGMA THETA SORORITY, INC.; HOUSTON AREA URBAN  
LEAGUE; THE ARC OF TEXAS; JEFFREY LAMAR CLEMMONS,

Plaintiffs-Appellees,

v.

GREGORY WAYNE ABBOTT, IN HIS OFFICIAL CAPACITY AS THE  
GOVERNOR OF TEXAS, ET AL.,

Defendants.

KIM OGG

Appellant.

---

MI FAMILIA VOTA; MARLA LOPEZ; MARLON LOPEZ; PAUL RUTLEDGE,

Plaintiffs-Appellees,

v.

GREG ABBOTT, IN HIS OFFICIAL CAPACITY AS THE GOVERNOR OF  
TEXAS, ET AL.,

Defendants.

KIM OGG

Appellant.

---

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

Civil Action No. 5:21-CV-844 (lead case); Civil Action No. 1:21-CV-780; Civil  
Action No. 1:21-CV-786; Civil Action No. 5:21-CV-848; Civil Action No. 5:21-  
CV-920

Honorable Xavier Rodriguez, United States District Judge, presiding

---

**APPELLANT'S REPLY TO PLAINTIFFS' RESPONSE TO  
APPELLANT'S MOTION FOR STAY PENDING APPEAL**

---

Defendant-Appellant District Attorney Kim Ogg, in her official capacity as Harris County District Attorney (“District Attorney Ogg”), files this reply to the Plaintiff-Appellees’ response to District Attorney Ogg’s motion to stay all further discovery and related proceedings against her in the district court.

The Plaintiff-Appellees argue that the Court should not stay discovery and related proceedings against District Attorney Ogg pending District Attorney Ogg's appeal of the district court's denial of her motion to dismiss because:

- (1) District Attorney Ogg is tasked with enforcement of the State's criminal laws, and thus she cannot establish a likelihood of success on the merits of her sovereign immunity defense;
- (2) District Attorney Ogg has no defense against the Plaintiff-Appellees' claims arising under federal statutes that include waivers of sovereign immunity, and thus District Attorney Ogg will face no irreparable injury curable by a stay because she will be subject to identical discovery for those claims; and
- (3) Delaying discovery against District Attorney Ogg threatens to delay trial in this case, causing injury to the Plaintiff-Appellees and the public.

Each of these arguments is unfounded and unavailing. Because District Attorney Ogg has demonstrated a likelihood of success on the merits of her appeal with regard to all of the Plaintiff-Appellees' claims, a stay of all discovery and proceedings against her is warranted.

**I. District Attorney Ogg’s power to prosecute criminal violations, without more, is insufficient to satisfy the *Ex parte Young* exception to sovereign immunity.**

The Plaintiff-Appellees argue that District Attorney Ogg’s responsibility to prosecute criminal violations on behalf of the State of Texas alone defeats her entitlement to sovereign immunity under *Ex parte Young*. Appellees’ Resp. at 15. That argument ignores a critical component of the *Ex parte Young* analysis: an allegation that the state official has a “demonstrated willingness” to enforce the challenged statute, as shown by that official taking “some step” to do so. *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 400 (5th Cir. 2020); *Okpalobi v. Foster*, 244 F.3d 405, 416 (5th Cir. 2001).

The Plaintiff-Appellees remain unable to allege that District Attorney Ogg has taken a single step to enforce the challenged statutes. They even reach outside their own pleadings and point to a generic statement District Attorney Ogg made in March 2020, long before S.B. 1 became law. Appellee’s Resp. at 12 n.3. That historic statement, even if it were alleged in the pleadings, could not satisfy Plaintiff-Appellees’ burden. By pursuing their empty-handed claims against District Attorney Ogg, the Plaintiff-Appellees not only ignore this Circuit’s *Ex parte Young* precedent but also ask this Court to excuse them from their burden to plausibly plead and prove the basic elements of their case. “Where sovereign immunity applies, it applies totally. Plaintiffs stop at the Rule 12(b)(1) stage and

don't get discovery. They don't pass go.” *Russell v. Jones*, No. 21-20269, 2022 WL 4296644, at \*5 (5th Cir. Sept. 19, 2022).

**II. To the extent the Plaintiff-Appellees press statutory claims against District Attorney Ogg, she is likely to succeed on the merits of her justiciability arguments.**

The Plaintiff-Appellees dispute that a stay is warranted with regard to their claims under the Voting Rights Act, the Americans with Disabilities Act, and the Rehabilitation Act, because those statutes contain waivers of sovereign immunity. The issue with this argument is that Plaintiff-Appellees have not plausibly pleaded any claims—much less actionable claims—under any of these statutes against District Attorney Ogg.

Plaintiff-Appellees’ attempted reliance on group-pleading, conclusory allegations about “Defendants” somehow violating statutes provides no cover or basis for circumventing District Attorney Ogg’s sovereign immunity. None of the consolidated complaints contains any specific factual allegations as to how District Attorney Ogg violated any of the cited statutes. Instead, the complaints universally employ generic group-pleading tactics, decry the actions of the Texas Legislature (not District Attorney Ogg), and baselessly predict future unlawful prosecutions without any factual support.

Even if those claims were specifically pled as to District Attorney Ogg—which they are not—she is likely to succeed on the merits of the justiciability

arguments she raised against them. The three requirements for standing are well-established: an injury-in-fact, causation, and redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). At minimum, the Plaintiff-Appellees’ statutory claims fail to meet the first two requirements.

First, the Plaintiff-Appellees have not alleged any cognizable injury-in-fact under these federal statutes as to any claims against District Attorney Ogg. Plaintiff-Appellees do not assert any intention to engage in conduct in the future that is now prohibited under the challenged statutes. *See Barilla v. City of Houston, Tex.*, 13 F.4th 427, 432 (5th Cir. 2021) (pre-enforcement standing established by demonstrating a “serious intent” to engage in proscribed conduct by taking some steps toward the desired activity); *Babbitt v. United Farm Workers Nat’l Union*, 99 S. Ct. 2301 (1979). For example, no plaintiff alleges a present desire or intent to harvest votes in violation of Texas Election Code Sections 86.006 and 276.015; to violate the requirements for assisting voters under Section 86.010; to prevent employees from voting during work hours in contravention of Section 276.004; or to make false statements in an oath or on a voter registration application in violation of Section 276.018.

Additionally, as the United States Supreme Court has held, “[t]he Court’s prior decisions consistently hold that a citizen lacks standing to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened

with prosecution.” *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 (1973). There is no factual support for a credible threat of prosecution here, so Plaintiff-Appellees claim they are entitled to a presumption of it. *See Speech First, Inc. v. Fenves*, 979 F.3d 319, 335 (5th Cir. 2020). Even if such a presumption applied here, it would be overcome by the presence of compelling contrary evidence: namely, District Attorney Ogg’s willingness to commit to not enforcing the challenged statutes while their constitutionality is litigated. In an effort to avoid the need to file a motion to dismiss and participate in extended litigation over whether District Attorney Ogg is a proper defendant, District Attorney Ogg offered to do the following, among other things:

[District Attorney] Ogg stipulates and agrees not to enforce Sections 33.051(g), 33.061, 86.006(f), 86.010(f), 276.004(a), 276.015(b)-(d), 276.016(a), 276.017(a), and 276.018(a) of the Texas Election Code challenged in the above-styled and numbered cause until such time as a final, non-appealable decision has been issued in this matter.

ROA.8719. That stipulation was not acceptable to the Plaintiff-Appellees. But it stands as a bulwark against their claims that they now credibly fear prosecution by District Attorney Ogg.

Second, even if there were a hypothetical injury here, there is no allegation that injury is traceable to District Attorney Ogg. *Lujan*, 504 U.S. at 561. There is no specific factual allegation that District Attorney Ogg has done anything to violate these statutes. Under the Plaintiff-Appellees’ view of the law, every district attorney



in the State of Texas violates federal law, such as the Americans with Disabilities Act, merely by existing in a world in which the Texas Legislature passes criminal laws that are challenged as unconstitutional. Standing requires a more concrete and particularized showing than has been made here.

The district court hand-waived these justiciability arguments in a single sentence, concluding they were indistinguishable from the *Ex parte Young* arguments. ROA.10806. But the Plaintiff-Appellees must establish standing to sue District Attorney Ogg even where she is not immune. Because the Plaintiff-Appellees cannot show any injury in fact that is traceable to any conduct by District Attorney Ogg, District Attorney Ogg is likely to prevail on her argument that the Plaintiff-Appellees lack standing to bring their statutory claims against her.

**III. The Plaintiff-Appellees do not explain how discovery from District Attorney Ogg will meaningfully advance the trial of this case.**

The Plaintiff-Appellees raise urgent concerns about delays of trial in this case yet fail to explain how the discovery sought from District Attorney Ogg will advance the resolution of their constitutional challenges. For example, the Plaintiff-Appellees do not explain what documents and communications from the last six years—including periods long before the legislature passed S.B. 1—could reveal to support their claims. The Plaintiff-Appellees do not need any information from District Attorney Ogg to prosecute their constitutional challenges and offer no

reasoned explanation why a stay of proceedings against her would injure them or the public.

### CONCLUSION

For the foregoing reasons, Defendant-Appellant District Attorney Kim Ogg respectfully requests the Court grant her motion and stay all further discovery and proceedings against her or her office pending this Court's resolution of her interlocutory appeal.

Respectfully submitted,

**BUTLER SNOW LLP**

By: */s/ Eric J.R. Nichols*

Eric J.R. Nichols

State Bar No. 14994900

[eric.nichols@butlersnow.com](mailto:eric.nichols@butlersnow.com)

Karson Thompson

State Bar No. 24083966

[karson.thompson@butlersnow.com](mailto:karson.thompson@butlersnow.com)

1400 Lavaca Street, Suite 1000

Austin, Texas 78701

Tel: (737) 802-1800

Fax: (737) 802-1801

**ATTORNEYS FOR DEFENDANT-  
APPELLANT DISTRICT  
ATTORNEY KIM OGG, IN HER  
OFFICIAL CAPACITY AS HARRIS  
COUNTY DISTRICT ATTORNEY**

**CERTIFICATE OF SERVICE**

I hereby certify that on October 4, 2022, a true and correct copy of the foregoing document was served on all counsel of record by filing with the Court's CM/ECF system.

/s/ Eric J.R. Nichols  
Eric J.R. Nichols

**CERTIFICATE OF COMPLIANCE**

I hereby certify that this document complies with the word limit of FED. R. APP. P. 27(d)(2)(C), because it does not exceed 2,600 words.

/s/ Eric J.R. Nichols  
Eric J.R. Nichols

RETRIEVED FROM DEMOCRACYDOCK.COM