No. 24-581

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

YELP INC.,
Plaintiff-Appellant
v.
KEN PAXTON,
Attorney General of the State of Texas,
in his official capacity,
Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of California
No. 3:23-cv-04977-TLT
Hon. Trina L. Thompson

BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION AND AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA IN SUPPORT OF PLAINTIFF-APPELLANT YELP INC.

Neil K. Sawhney
Shilpi Agarwal
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF NORTHERN CALIFORNIA
39 Drumm Street
San Francisco, CA 94111
(415) 621-2493
nsawhney@aclunc.org

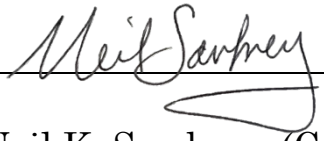
Jennifer Dalven
Brian Hauss
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2500

Counsel for Amici Curiae

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rules 26.1 and 29(a)(4)(A) of the Federal Rules of Appellate Procedure, *amici curiae* state that they do not have a parent corporation and that no publicly held corporation owns 10 percent or more of their stock. Pursuant to Federal Rule of Appellate Procedure Rule 29(a)(4)(E), *amicus curiae* also certify that no person or entity, other than *amicus curiae*, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief or authored this brief in whole or in part.

Date: March 19, 2024



Neil K. Sawhney (Cal. Bar #300130)
AMERICAN CIVIL LIBERTIES UNION FOUNDATION

Counsel for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Rules

Other Authorities

IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

The American Civil Liberties Union ("ACLU") is a nationwide, non-partisan, non-profit organization with approximately two million members and supporters dedicated to protecting the fundamental liberties and basic civil rights guaranteed by the Constitution and our nation's civil rights laws. The ACLU of Northern California ("ACLU NorCal") is a regional affiliate of the national ACLU. Since their founding, the ACLU and ACLU NorCal have appeared before this Court in numerous cases, both as direct counsel and amicus curiae.

Amici file this brief to explain why courts presented with plausible allegations of bad-faith, retaliatory state prosecutions should hesitate from declining jurisdiction under *Younger v. Harris*, 401 U.S. 37, 44 (1971). As described below, the outcome of this appeal will have serious implications for individuals and organizations who seek to prevent state officials from taking retaliatory action against them simply for engaging in protected speech or other constitutionally protected conduct.

---

[1] *Amici* certify that all parties consent to the filing of this brief. *See* Fed. R. App. P. 29(a)(2). No party or party's counsel authored this brief, in whole or in part, or contributed money intended to fund the preparation or submission of the brief, and no one other than *amici*, their members, or their counsel contributed money intended to fund preparation or submission of the brief.

INTRODUCTION

Nearly sixty years ago, the Supreme Court made clear that "abstention" is "inappropriate" where state officials target an individual under a state statute "for the purpose of discouraging protected activities." *Dombrowski v. Pfister*, 380 U.S. 479, 489–490 (1965). Although comity sometimes requires federal courts to decline jurisdiction in favor of a pending state proceeding, it never does so when that proceeding is brought in bad faith or retaliation for exercising constitutional rights. After all, a state has no legitimate "interest in continuing actions brought with malevolent intent." *Diamond "D" Const. Corp. v. McGowan*, 282 F.3d 191, 200 (2d Cir. 2002).

Here, Yelp plausibly alleged that Attorney General Paxton's state enforcement action was motivated by bad faith. The district court essentially agreed: It found Yelp's allegations "persuasive" and was "not convinced" that the state proceeding had a good-faith basis. Despite its misgivings, however, the district court still abstained from deciding Yelp's claims and "reluctantly" dismissed the action. That ruling cannot be squared with the proper scope of *Younger* abstention—a narrow, comity-based exception to federal jurisdiction that must be applied

especially narrowly in cases, like this one, raising section 1983 claims against state officials' alleged violation of federal constitutional rights. At the very least, before deciding to abstain, federal courts presented with plausible allegations of bad faith or retaliation should seriously scrutinize state officials' subjective motivation for bringing a prosecution—an inquiry that will often require discovery and an evidentiary hearing.

The district court did not undertake that sort of serious scrutiny here. To the contrary, it accepted Paxton's version of the story in spite of the substantial evidence suggesting that his enforcement action was actually intended to retaliate against Yelp's exercise of its free-speech rights. If left to stand, the district court's order provides a simple template for state officials to violate federal constitutional rights while evading federal jurisdiction: So long as an official can identify *any* possibly valid basis for the state prosecution—no matter how suspect or unlikely the pretext—abstention will be required. The negative consequences will primarily be borne not by the Yelps of the world, but ordinary civil-rights plaintiff, who will find the federal courthouse doors closed to them.

These concerns are far from hypothetical. In the past six months alone, Attorney General Paxton has initiated multiple bad-faith actions and investigations targeting his perceived political enemies—from journalists investigating online extremism, to nonprofits sheltering asylum seekers, to organizations advocating for Texan transgender youth and their families. Under the district court's reasoning, these victims will have no federal recourse to challenge Paxton's pattern of weaponizing state law to squelch politically disfavored views. That result cannot be squared with Congress's decision to guarantee a federal forum for individuals to vindicate their constitutional and civil rights.

ARGUMENT

I. Federal courts have a "virtually unflagging" obligation to exercise their jurisdiction—particularly in cases involving state officers' violation of federal constitutional rights.

"Federal courts, it was early and famously said, have 'no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.'" *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 77 (2013) (quoting *Cohens v. Virginia*, 6 Wheat. 264, 404 (1821)). As the Supreme Court held more than a century ago: "The courts of the United States are bound to proceed to judgment and to afford redress to suitors

before them in every case to which their jurisdiction extends. They cannot abdicate their authority or duty in any case in favor of another jurisdiction." *Chicot Cnty. v. Sherwood*, 148 U.S. 529, 534 (1893). "Underlying these assertions is the undisputed constitutional principle that Congress, and not the Judiciary, defines the scope of federal jurisdiction within the constitutionally permissible bounds." *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 359 (1989) ("*NOPSI*").[2]

As a result, "when a federal court has jurisdiction, it also has a 'virtually unflagging obligation . . . to exercise' that authority." *Mata v. Lynch*, 576 U.S. 143, 150 (2015) (quoting *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976)). That obligation is especially pronounced in cases, like this one, that challenge state officers' alleged violation of federal constitutional rights under 42 U.S.C. § 1983.

The history of section 1983 demonstrates why. As the Supreme Court recently explained, "[b]efore the Civil War, few direct federal

[2] Unless otherwise indicated, all internal citations and quotation marks are omitted.

protections for individual rights against state infringements existed." *Health & Hosp. Corp. of Marion Cnty. v. Talevski*, 599 U.S. 166, 176 (2023). Although the Reconstruction Amendments and the Civil Rights Act of 1866 "worked a sea change in this regard," neither "successfully prevented postbellum state actors from continuing to deprive American citizens of federally protected rights." *Id.* It was "against this backdrop that the 42d Congress enacted, and President Grant signed, the Civil Rights Act of 1871," which "created the federal cause of action now codified as § 1983." *Id.* at 176–77. This statutory remedy "reflected the regrettable reality that 'state instrumentalities' could not, or would not, fully protect federal rights." *Id.* at 177 (quoting *Mitchum v. Foster*, 407 U.S. 225, 242 (1972)).

With the enactment of section 1983 and other post-Civil War remedial statutes, "the lower federal courts 'ceased to be restricted tribunals of fair dealing between citizens of different states and became the primary and powerful reliances for vindicating every right given by the Constitution, the laws, and treaties of the United States.'" *Steffel v. Thompson,* 415 U.S. 452, 464 (1974) (quoting F. Frankfurter & J. Landis, The Business of the Supreme Court 65 (1928)). And, along with the

Supreme Court's decision in *Ex parte Young*, 209 U.S. 123 (1908), these statutes established "the modern framework for federal protection of constitutional rights from state interference." *Perez v. Ledesma*, 401 U.S. 82, 107 (1971) (Brennan, J., concurring in part). At this framework's core is a "basic principle": "[F]ederal courts will exercise their equity power against state officials to protect rights secured and activities authorized by paramount federal law." *Id.* at 106.

In short, as the Third Circuit observed, section 1983 was expressly "intended to alter significantly the relationship of the federal government to the states." *Ivy Club v. Edwards*, 943 F.2d 270, 277 (3d Cir. 1991). "It *purposely interposed* the federal courts between the States and the people 'to protect the people from unconstitutional action under color of state law, whether that action be executive, legislative, or judicial.'" *Id.* (quoting *Mitchum*, 407 U.S. at 242) (emphasis added).

II. *Younger* abstention is a narrow, comity-based exception to mandatory federal jurisdiction.

As a general rule, "[p]arallel state-court proceedings do not detract from th[e] obligation" of federal courts to exercise federal jurisdiction. *Sprint*, 571 U.S. at 77. Indeed, more than a century ago, the Supreme Court emphasized the "well recognized" rule that "the pendency of an

action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction, for both the state and Federal courts have certain concurrent jurisdiction over such controversies." *McClellan v. Carland*, 217 U.S. 268, 282 (1910); *cf. Ala. Pub. Serv. Comm'n v. S. Ry. Co.*, 341 U.S. 341, 361 (1951) (Frankfurter, J., concurring in the result) ("[I]t was never a doctrine of equity that a federal court should exercise its judicial discretion to dismiss a suit merely because a State court could entertain it.").

Younger abstention "is an extraordinary and narrow exception to th[is] general rule." *Duke v. Gastelo*, 64 F.4th 1088, 1093 (9th Cir. 2023). Courts should exercise it only when "(1) there is an ongoing state judicial proceeding; (2) the proceeding implicate[s] important state interests; (3) there is an adequate opportunity in the state proceedings to raise constitutional challenges; and (4) the requested relief seek[s] to enjoin or has the practical effect of enjoining the ongoing state judicial proceeding." *Id.* at 1094. Each of *Younger*'s requirements "are carefully defined." *Gilbertson v. Albright*, 381 F.3d 965, 969 n. 2 (9th Cir. 2004) (en banc). When they are "not strictly met, the doctrine should not be applied." *AmerisourceBergen Corp. v. Roden*, 495 F.3d 1143, 1148 (9th Cir. 2007).

"[C]omity is the main reason for federal court restraint in the face of ongoing state judicial proceedings." *Gilbertson*, 381 F.3d at 975. The Supreme Court has repeatedly made this clear: Although *Younger* was "based partly on traditional principles of equity," it "rested primarily on the 'even more vital consideration' of comity." *NOPSI*, 491 U.S. at 364 (quoting *Younger v. Harris*, 401 U.S. 37, 44 (1971)); *see, e.g.*, *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 10 (1987); *Juidice v. Vail*, 430 U.S. 327, 334 (1977); *see also Potrero Hills Landfill, Inc. v. Cnty. of Solano*, 657 F.3d 876, 882 (9th Cir. 2011) (noting that "the notion of 'comity'" is the "foremost" of "the doctrine's animating principles").

Younger abstention is therefore "founded on the premise that ordinarily a pending state prosecution provides the accused a fair and sufficient opportunity for vindication of federal constitutional rights." *Kugler v. Helfant*, 421 U.S. 117, 124 (1975). "[I]n that circumstance, the restraining of an ongoing prosecution would entail an unseemly failure to give effect to the principle that state courts have the solemn responsibility, equally with the federal courts to guard, enforce, and protect every right granted or secured by the constitution of the United States." *Steffel v. Thompson*, 415 U.S. 452, 460–61 (1974).

III. *Younger* does not apply to bad-faith or retaliatory state proceedings.

The comity concerns underpinning *Younger* "disappear" when the state prosecution is brought in bad faith or to retaliate against the plaintiff's exercise of constitutional rights. *See Wilson v. Thompson*, 593 F.2d 1375, 1383 (5th Cir. 1979). That is because "[c]entral to *Younger* was the recognition that ours is a system in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with *the legitimate activities* of the States." *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 601 (1975) (emphasis added). As a corollary, however, *Younger*'s comity concerns do *not* arise when state officials' actions against the plaintiff are *illegitimate*—that is, where "the state proceeding is motivated by a desire to harass or is conducted in bad faith." *Id.* at 611. This principle was obvious to the Supreme Court in *Younger* itself: The doctrine's fundamental interests in promoting federalism and comity, the Court repeatedly noted, are served only when the state prosecution is brought in "good faith." 401 U.S. at 46–48; *see, e.g.*, *Duty Free Shop, Inc. v. Administracion De Terrenos De Puerto Rico*, 889 F.2d 1181, 1182 (1st Cir. 1989) (*Younger* "arises out of the federal courts' hesitance to interfere

with a state's *good faith* efforts to enforce its own law in its own courts" (emphasis added)).

Accordingly, "even where the *Younger* factors are satisfied, federal courts do not invoke it if there is a showing of bad faith, harassment, or some other extraordinary circumstance that would make abstention inappropriate." *Bean v. Matteucci*, 986 F.3d 1128, 1133 (9th Cir. 2021) (citing *Middlesex Cnty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 435 (1982)). As the Second Circuit has explained, "the subjective motivation of the state authority in bringing the proceeding is critical to, if not determinative of, this inquiry."[3] *McGowan*, 282 F.3d at 199; *see also* Ruth Colker, *Administrative Prosecutorial Indiscretion*, 63 Tul. L. Rev. 877, 903 (1989) (explaining that the bad-faith exception's "underlying theory" is that "there must have been an impermissible motive behind the prosecution").

"Bad faith," for purposes of *Younger*, generally means that the prosecution "has little expectation of a valid conviction or is initiated to

[3] This Court has expressly recognized that "[t]he Second Circuit has provided . . . helpful guidance for determining what constitutes an allegation of 'bad faith.'" *Applied Underwriters, Inc. v. Lara*, 37 F.4th 579, 596 (9th Cir. 2022).

retaliate for or discourage the exercise of constitutional rights." *Am.-Arab Anti-Discrimination Comm. v. Reno*, 70 F.3d 1045, 1058 (9th Cir. 1995); *see, e.g.*, *Kugler v. Helfant*, 421 U.S. 117, 126 n.6 (1975); *Baffert v. California Horse Racing Bd.*, 332 F.3d 613, 621 (9th Cir. 2003); *Clevenger v. Dresser*, 746 F. App'x 645, 646 (9th Cir. 2018). Where a state proceeding was "initiated with and is animated by a retaliatory, harassing, or other illegitimate motive, . . . th[e] state interest in correcting its own mistakes dissipates, and along with it, the compelling need for federal deference." *McGowan*, 282 F.3d at 199–200.

IV. When bad faith or retaliation is plausibly alleged, courts must strictly scrutinize the state defendant's subjective motivations.

A plaintiff's claim that a state prosecution was brought in bad faith or in retaliation having exercised constitutional rights turns on the improper purpose driving the action. As explained above, "the subjective motivation of the state authority in bringing the proceeding" is *the* "critical," if not "determinative," factor in establishing bad faith or retaliation for purposes of *Younger*. *McGowan*, 282 F.3d at 199; *see Kern v. Clark*, 331 F.3d 9, 12 (2d Cir. 2003) ("Generally, the subjective bad

faith of the prosecuting authority is the gravamen of the exception to *Younger* abstention.").

To be sure, not any conclusory claim of bad faith or retaliation is enough to trigger scrutiny of the state actor's subjective motivation. A plaintiff must "allege *specific facts* to support an inference of bad faith," *Collins v. Kendall Cnty.*, 807 F.2d 95, 98 (7th Cir. 1986) (emphasis added), or that "retaliation was a major motivating factor and played a prominent role in the decision to prosecute." *Smith v. Hightower*, 693 F.2d 359, 367 (5th Cir. 1982). But once the plaintiff "make[s] an initial showing of retaliatory animus" or other bad faith, "the burden then shifts to [the defendant] to rebut the presumption of bad faith by offering 'legitimate, articulable, objective reasons' to justify [its] decision to initiate the[] prosecution." *Phelps v. Hamilton*, 59 F.3d 1058, 1066 (10th Cir. 1995). This resembles the "burden-shifting approach to § 1983 claims of First Amendment retaliation," where, once the plaintiff makes an initial showing of retaliation, "the burden shifts to the defendant official to demonstrate that even without the impetus to retaliate he would have taken the action complained of." *Boquist v. Courtney*, 32 F.4th 764, 777–778 (9th Cir. 2022).

Critically, plaintiffs have little ability to conduct "a subjective inquiry into the prosecutor's state of mind," because in most cases "ascertaining that state of mind is likely to be exceedingly difficult." *Beck v. City of Upland*, 527 F.3d 853, 869 (9th Cir. 2008); *see Hartman v. Moore*, 547 U.S. 250, 264 (2006) (observing that it would be "rare" and "unrealistic" for a prosecutor to disclose their "retaliatory thinking"). For similar reasons, of course, the federal pleading rules allow for "conditions of a person's mind [to] be alleged generally." Fed. R. Civ. P. 9(B); *see Wight v. BankAmerica Corp.*, 219 F.3d 79, 91 (2d Cir. 2000) ("[A] plaintiff realistically cannot be expected to plead a defendant's actual state of mind."). Any other such rule "would be unworkable because of the difficulty inherent in ascertaining and describing another person's state of mind with any degree of exactitude prior to discovery." 5A Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1301 (4th ed. 2023).

These authorities make clear that, when a federal court that is considering whether to abstain under *Younger* is presented with plausible and specific allegations that the state prosecution was motivated by bad faith or retaliatory intent, it must seriously scrutinize

the defendants' subjective motivations. It cannot just take the state officials at their word: The court must find that the officials had "legitimate" and "objective" reasons to initiate the proceeding. *Phelps*, 59 F.3d at 1066. And it must do so *based on the evidence*.

Thus, where plaintiffs have plausibly alleged bad faith or retaliation, and there are factual disputes about the defendant's subjective motivations, the plaintiffs are "entitled" to discovery and an evidentiary hearing. *See Reed v. Giarrusso*, 462 F.2d 706, 711 (5th Cir. 1972); *see also, e.g.*, *Kern*, 331 F.3d at 12 (holding that district court erred "by concluding, without holding an evidentiary hearing, that Kern failed to demonstrate that Defendants have proceeded under anything other than a good faith belief"; *Netflix, Inc. v. Babin*, 88 F.4th 1080, 1091 (5th Cir. 2023) (noting that district court made findings of bad faith "follow[ing] discovery and a seven-hour evidentiary hearing at which [the state official] testified"); *Lewellen v. Raff*, 843 F.2d 1103, 1110 (8th Cir. 1988) (district court "hear[d] testimony and receiv[ed] documentary evidence over a six-day period" on bad faith and retaliatory intent); *Wilson*, 593 F.2d at 1377; *Timmerman v. Brown*, 528 F.2d 811, 816 (4th Cir. 1975).

V. Given the substantial evidence of bad faith and retaliatory intent here, the district court erred in dismissing Yelp's action under *Younger*.

Yelp's allegations here concerning Attorney General Paxton's bad faith and retaliatory intent are more than plausible. The district court itself recognized that "Yelp's allegations of bad faith tell a persuasive story," and cautioned that it was "not convinced that Paxton acted entirely in good faith in bringing this case against Yelp." Order 8, 10. Nevertheless, it concluded that because "Yelp has not provided enough concrete evidence of his subjective motivations to prove otherwise," dismissal under *Younger* was required. *Id.* at 10.

The district court's ruling conflicts with the basic abstention principles discussed above. If a court finds that a plaintiff's allegations of bad faith are "persuasive" and is "not convinced" that the state official acted "entirely in good faith," then it should decline to abstain under *Younger*—at least until it has meaningfully scrutinized the official's subjective motivations for bringing the prosecution. But here, notwithstanding its hesitations, the district court gave Attorney General Paxton the benefit of the doubt on multiple key factual issues bearing on his good faith.

For example, although the court noted that Paxton "conducted a thin investigation into the matter" (indeed, his office never even contacted Yelp during the supposed investigation), it determined that this did not matter, because his staff cursorily reached out to "one or two" crisis pregnancy centers, and so "he did not fail to conduct *any* investigation *at all*." Order 9–10 (emphasis added). Similarly, the court refused to credit Yelp's evidence indicating that Paxton filed this enforcement action to improve his political standing. *Id.* at 10. And it did not place any significance on the fact that Paxton is "the only prosecutor in the country" to have taken enforcement action against Yelp for its notices, *see Netflix*, 88 F.4th at 1094, nor that other state attorneys general (and even Paxton himself) approved Yelp's revisions to the first notice. *See* Yelp Br. 5.

In resolving all these factual disputes in Paxton's favor, the district court put a thumb on the scale in favor of abstention. But, as discussed above, courts should always "begin[] with a heavy thumb on the scale in favor of exercising federal jurisdiction." *Aptim Corp. v. McCall*, 888 F.3d 129, 135 (5th Cir. 2018); *see Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 16 (1983) (holding that abstention analysis

should be "heavily weighted in favor of the exercise of jurisdiction"). And, if resolving the *Younger* question required further development of the facts—as the district court suggested it did here—it should have allowed Yelp to take discovery on Paxton's motivations for bringing the enforcement action, and then evaluated those facts at an evidentiary hearing. *See Kern*, 331 F.3d at 12; *Reed*, 462 F.2d at 711.

The district court's decision to abstain appears premised, at least in part, on the belief that even if a prosecution is brought in bad faith, *Younger* abstention is required so long as it is not "facially meritless." Order 7, 9. Initially, it is doubtful that even that standard can be met here: As Yelp explained (and Paxton previously conceded), its notice to consumers was "literally true," and Paxton never presented any evidence even suggesting that consumers were misled. *Id.* at 9; Yelp Br. 8..

More importantly, however, the district court applied the wrong legal standard. Whether Paxton's state-law theory might not be *entirely* meritless is "irrelevant." *Dombrowski*, 380 U.S. at 490. Paxton's decision to invoke that theory in bad faith—that is, to harass or otherwise retaliate against Yelp's exercise of its constitutional rights—negates any justification for abstention. *See id.* Simply put, a plaintiff's "bad faith

showing . . . will justify an injunction *regardless* of whether valid convictions conceivably could be obtained." *Fitzgerald v. Peek*, 636 F.2d 943, 945 (5th Cir. 1981) (emphasis added).

For purposes of evaluating *Younger*, what ultimately matters is whether the prosecution "would not have been brought but for" the prosecutor's "improper" motivation. *See id.* That's because, as explained, "[t]he state does not have *any* legitimate interest in pursuing such a prosecution"—*even if* there's a slight chance it would be successful. *Lewellen v. Raff*, 843 F.2d 1103, 1110 (8th Cir. 1988) (emphasis added). And, "[t]o the extent that the State *does have* legitimate interests at stake in the prosecution, the question becomes whether the prosecution would have been otherwise brought but for the constitutionally impermissible motivation." *See Wilson*, 593 F.2d at 1383 n. 14. This is a factual issue that the district court here did not consider or even allow the parties to explore through discovery and a hearing.

If left to stand, the district court's ruling could seriously erode section 1983's protections. State officials seeking to target or harass individuals for exercising their constitutional rights could bring pretextual state enforcement actions; despite that obvious improper

motivation, federal courts would be powerless to act so long as the state official could show even a slight chance of success on the merits. These concerns are especially acute in the First Amendment context, where even the threat of state enforcement is likely to chill and deter constitutionally protected speech.

This state of affairs has already materialized in Texas. Just in the past six months, Attorney General Paxton has initiated a series of pretextual actions and investigations that are blatantly intended to suppress views and advocacy that he disfavors. Last month, for example, the Attorney General's office served multiple investigative demands threatening baseless enforcement action—like here, under the state Deceptive Practices Act—against PFLAG, a national organization advocating on behalf of transgender youth and their families. The purpose of these demands, PFLAG has responded, "is neither to enforce Texas law, nor to protect Texas consumers under the DTPA," but to "retaliate[e] for PFLAG successfully standing up for its members, who include Texas transgender youth and their families, against the OAG's, the Attorney General's, and the State of Texas's relentless campaign to

persecute Texas trans youth and their loving parents."[4]

The same week, Paxton's office served multiple subpoenas on Annunciation House, an El Paso-based non-profit and Catholic organization that houses and otherwise assists refugees, asking the organization to turn over reams of documents within *one day*. Although the subpoenas were issued pursuant to the Attorney General's authority under the Texas Business Code, they "did not cite which Texas laws the Attorney General believed were being violated." When the Attorney General refused to give Annunciation House more time to comply, the organization had no choice but to go to court, which ultimately blocked further action based on the subpoena. In doing so, the judge found obvious signs of bad faith and retaliation. As he explained:

> The Attorney General's efforts to run roughshod over Annunciation House, without regard to due process or fair play, call into question the true motivation for the Attorney General's attempt to prevent Annunciation House from providing the humanitarian and social services that it provides. There is a real and credible concern that the attempt to prevent Annunciation House from conducting business in Texas was predetermined.

---

[4] *See* Pet. 2, *PFLAG v. Office of the Attorney General of the State of Texas*, No. D-1-GN-24-001276 (Tex. Dist. Ct., Travis Cnty., Feb. 28, 2024), *available at*: https://wp.api.aclu.org/wp-content/uploads/2024/02/2024.02.28-PFLAG-Original-Petition-req-for-TRO-w-Exs.pdf. *Amici* and its affiliates are counsel to PFLAG in its action challenging the demands.

Order ¶ 9, *Annunciation House v. Paxton*, No. 2024DCV0616 (Tex. Dist. Ct., El Paso Cnty., March 11, 2024).[5]

These two examples are not isolated occurrences. They are part of a deliberate pattern of bad-faith and retaliatory prosecutions that Paxton has undertaken to target constitutionally protected speech and advocacy. *See, e.g.*, Compl., *Media Matters v.* Paxton, No. 24-cv-00147-APM (D.D.C., filed Jan. 17, 2024) (alleging that Paxton launched pretextual investigation under Deceptive Practices Act against media group and journalist for their purportedly "radical left-wing" views and reporting on extremism online); *Twitter, Inc. v. Paxton*, 56 F.4th 1170, 1172 (9th Cir. 2022) (describing retaliatory action by Paxton against Twitter for banning former President Trump's account).

More than fifty years ago, the Fifth Circuit warned of the very scenario that Paxton's pattern of actions presents: "[S]tate officials disposed to suppress speech could easily do so by bringing oppressive criminal [or civil] actions pursuant to valid statutes rather than by

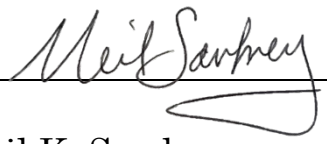
[5] *Available at:* https://www.documentcloud.org/documents/24476263-judge-blocks-texas-attorney-generals-administrative-subpoena.

enacting invalid statutes or using other parts of the state legal machinery, and § 1983 would give no effective relief." *Sheridan v. Garrison*, 415 F.2d 699, 706 (5th Cir. 1969). But the Fifth Circuit also identified the solution—federal jurisdiction. Where "an injunction suit is based [on the fact] that the state proceeding *itself* creates a chilling effect on speech because the state's legal machinery is being used in bad faith, . . . [t]he justification for comity disappears." *Id.* at 707. Abstention is therefore unwarranted.

CONCLUSION

For the reasons above, *amici* urge this Court to reverse the district court's judgment.

Date: March 19, 2024



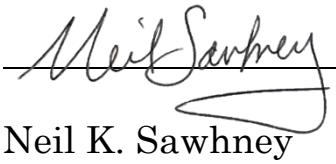
Neil K. Sawhney
Shilpi Agarwal
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION OF NORTHERN CALIFORNIA
39 Drumm Street
San Francisco, CA 94111
(415) 621-2493
nsawhney@aclunc.org

Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE

I certify that this brief contains 4,497 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6). I further certify that this brief is an *amicus* brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).

Date: March 19, 2024



Neil K. Sawhney