

CAUSE NO. 23-2326

THE STATE OF TEXAS	§	IN THE DISTRICT COURT
EX REL. AVREY J. ANDERSON,	§	
	§	
<i>Plaintiff,</i>	§	
	§	
v.	§	
	§	274TH JUDICIAL DISTRICT
	§	
KELLY HIGGINS, in his official capacity	§	
as Criminal District Attorney of Hays	§	
County, Texas,	§	
	§	
<i>Defendant.</i>	§	HAYS COUNTY, TEXAS

DEFENDANT’S ORIGINAL ANSWER AND ORIGINAL COUNTERCLAIM

TO THE HONORABLE JUDGE OF SAID COURT:

Defendant Kelly Higgins, in his Official Capacity as Criminal District Attorney of Hays County, Texas (“D.A. Higgins”), files this Original Answer and Original Counterclaim in response to Plaintiff The State of Texas by relation of Avrey J. Anderson’s (“Anderson”) Second Amended Petition. In support, D.A. Higgins would respectfully show the Court as follows:

D.A. HIGGINS’ ORIGINAL ANSWER

**I.
GENERAL DENIAL**

1. Pursuant to Rule 92 of the Texas Rules of Civil Procedure, D.A. Higgins generally denies each and every, all and singular, the material allegations contained within Anderson’s Second Amended Petition¹, and any amendments or supplements thereto, and demands strict proof in accordance with the laws of the State of Texas.

¹ Within six days, Plaintiff had to file three separate pleadings in apparent efforts to comply with the statute under which he has brought this suit, Chapter 87 of Local Government Code. It was not until the Second Amended Petition that Plaintiff swore to the allegations in his pleadings as clearly set out in section 87.015 of the Act. Plaintiff’s allegations continue to change with each pleading. He has now dropped some of his allegations regarding “policies” he previously alleged violated the statute.

2. Why then did Anderson file this suit? The answer is simple, this suit is a “preemptive strike.”

3. Specifically, since taking office on January 1, 2023, Anderson has demonstrated repeatedly that he cannot fulfill the lawful duties of Hays County District Clerk. D.A. Higgins became aware of these problems in January 2023 and spoke to Anderson about serious problems in the District Clerk’s office that were directly impeding the administration of justice in Hays County. Anderson’s apparent goal in filing this lawsuit is to preclude D.A. Higgins or others from his office undertaking any legal action against Anderson. Should some resident of Hays County file a petition to remove Anderson from office for incompetence, Anderson will now argue that D.A. Higgins is required to defer to another prosecuting authority in any action to remove him.

4. By way of background, following the November 2022 election, in which both D.A. Higgins and Anderson were elected, many within the Hays County legal community were concerned about Anderson’s youth, inexperience, and failure to prepare for the role of District Clerk. Anderson addressed these concerns publicly, stating that he had “been reading the manuals,” “trying to get some training,” and had “talk[ed] to the deputies that still worked in the [District Clerk’s office] to get their input, feedback and thought processes.”²

5. However, after assuming office in January, Anderson terminated/replaced a number of the most experienced people in the District Clerk’s office and replaced them with less experienced persons. In January of 2023, D.A. Higgins began to hear concerns from line prosecutors who conduct criminal trials on behalf of the people of Hays County and the State of

² Anderson also addressed his inexperience to KXAN by stating: “I’ve heard that 80% of your job success is your ability to deal with people. I think that I’m pretty well able to do that.” See Sam Stark, KXAN, *How a 19-year-old with no experience beat an incumbent for political office*, Nov. 11, 2022, 5:59 p.m. (updated Nov. 14, 2022, 12:21 p.m.), <https://www.kxan.com/news/local/hays/how-a-19-year-old-with-no-experience-beat-an-incumbent-for-political-office/>

Texas. Subpoenas were not being properly or timely processed, and the court's trial docket was seriously impacted. District Judges were forced to deal with the District Clerk failing to provide jury panels for criminal trials. Delays in trials meant delays in justice, the possible violation of the rights of criminal defendants, and an intolerable interference with the pressing work of the courts. D.A. Higgins had a conversation with Anderson regarding the gravity of promptly processing subpoenas for criminal trials, to which Anderson responded, "I have no idea what you are talking about."

6. Subsequently, D.A. Higgins visited with Anderson, urging him to enroll in Public Administration classes and to hire experienced deputy clerks from nearby counties. As it became apparent that Anderson was unable or unwilling to address his shortcomings that were affecting the Hays County Justice system, members of the legal community in Hays County began opening discussing whether Anderson may need to be removed as District Clerk. His failure to comprehend the duties of the office, his intransigence at earnest attempts to assist him in stabilizing his office, and his demonstrated incompetence and unwillingness to improve caused many to question his competence. During this time, Anderson was often observed in the courtrooms during dockets drinking tea and taking selfies. He was also observed by court staff twirling in a District Judge's chair. Anderson and his operation of the District Clerk's office is a daily concern among the professional prosecutors in the District Attorney's Office and others. Following is a partial list of noted failures in Anderson's official duties:

- (A) Systemically failed to send temporary protective orders to the appropriate law enforcement entities. This failure is particularly concerning because it put crime victims and witnesses at risk since law enforcement personnel were unaware that court orders were in place to prohibit criminals from having any contact or making threats to victims and witnesses.

- (B) Consistently failed to timely file grand jury indictments. This failure resulted in delays in the issuance of warrants for the arrest of criminal defendants, issuance of bonds, and delays in setting court dates.
- (C) Consistently mishandled or lost court filings and proceedings. Since assuming office, Anderson's office failed to issue subpoenas for witnesses as requested by the District Attorney's Office which resulted in criminal cases that were set for trial having to be continued. Similarly, Anderson failed to call jury panels for trial settings which, again, caused criminal and civil cases that were set for trial to be continued.
- (D) Failed to file documents with the Austin Court of Appeal for criminal cases that were up on appeal which resulted in him repeatedly being admonished by the Austin Court of Appeal and given deadlines for submitting the "record" in cases on appeal.
- (E) Failed to timely disburse restitution and other funds his office had collected to the proper recipients.

7. Anderson now files this petition to remove D.A. Higgins from his position as Criminal District Attorney of Hays County, Texas. Anderson recently provided an explanation for filing this suit in a statement to Fox 7 Austin:

There are legal grounds and there are my grounds.

... I will elaborate that our District Attorney lacks professional courtesy and decorum. I experienced Kelly Higgins' blind rage firsthand in the beginning of this year when he exploded in my office and attempted to intimidate me by threatening litigation via mandamus action for a misunderstanding about how we process subpoenas. This could have been solved with a meeting or a simple phone call.

...

I also believe that Kelly Higgins ran on a misleading platform. Higgins told his constituents that he would "not use the resources of Hays County to prosecute abortion or other medical decisions made between a patient and their physicians." Negating and refusing to mention the fact that no doctor would be performing an abortion under risk of losing their license. In other words, it's easy to say you are not going to punish an act or offense that is very unlikely to be achieved without judicial bypass.

In the end I believe that Hays County deserves better.

See Jessica Rivera, *Hays County district clerk files petition to remove DA from office*, FOX 7 AUSTIN, Sept. 14, 2023, 10:13 p.m., <https://www.fox7austin.com/news/hays-county-district-clerk-petition-remove-da>

8. Thus, Anderson's stated purpose in filing this suit is not to pursue a good faith belief that D.A. Higgins violated Chapter 87 of the Texas Local Government Code. Rather it is based on a personality conflict and disagreements over campaign strategies.

9. At the same time, the statute makes clear that D.A. Higgins' campaign statement cannot be a basis of the new "Rogue Prosecutor" law. Under the statute, only statements made after September 1, 2023, are subject to the statute.

10. Further, D.A. Higgins is not, by any measure, a "rogue prosecutor." He has assembled an excellent executive management team, comprised of seasoned prosecutors and staff. Together, they reduced the case backlog, reduced the jail population, improved relationships with law enforcement agencies, and sought and achieved high sentences for violent offenders.

II.
AFFIRMATIVE DEFENSES & OTHER DEFENSIVE PLEAS

11. D.A. Higgins asserts that Anderson's claims are barred in whole or in part by Texas Local Government Code § 87.001.

D.A. HIGGINS' ORIGINAL COUNTERCLAIM

I.
DISCOVERY CONTROL PLAN

12. D.A. Higgins intends that discovery in this lawsuit should be governed by Discovery Control Plan Level 3.

II.
RULE 47 STATEMENT

13. D.A. Higgins seeks only non-monetary relief and reserves the right to amend this statement as the lawsuit progresses.

III.
JURISDICTION & VENUE

14. This Court has jurisdiction over this Counterclaim and venue is proper in this Court because all or a substantial part of the events giving rise to this action occurred in Hays County, Texas.

IV.
FACTUAL BACKGROUND

15. Following the November 2022 election, D.A. Higgins assumed the office of Criminal District Attorney of Hays County, Texas on January 1, 2023. Among other things, D.A. Higgins inherited more than 5,000 unfiled criminal cases from his predecessor. To address this backlog, and in the exercise of his constitutionally-grounded prosecutorial discretion, D.A. Higgins' executive management team implemented structural changes that provided increased attention to violent crime and addressed the clearance of the burdensome backlog, with meaningful success. With this improved structure, a professional prosecutor reviews each case and makes appropriate decisions regarding the matter. Assistant District Attorneys exercise the authority of the office to exacting standards, supervised by lawyers with substantial experience. All members of the Hays County District Attorney's office are assiduously working to fulfill their duty to pursue justice in compliance with constitutional and statutory strictures in all cases. They are supervised, but not directed with policy in their decisions. To be clear, D.A. Higgins has not implemented and/or executed any policy regarding the non-prosecution of any class or type of crime. Instead, D.A. Higgins has exercised appropriate prosecutorial discretion, which may not be disturbed absent an express constitutional provision. *Meshell v. State*, 739 S.W.2d 246, 254-55 (Tex. Crim. App. 1987).

16. By filing suit and going to the media, Anderson has openly stated that D.A. Higgins has and is violating Chapter 87 of the Local Government Code, as well as questioned whether statements made by D.A. Higgins constitute an illegal act under Texas law. Accordingly, there is a case and controversy regarding whether D.A. Higgins' actions were inappropriate and/or illegal. Accordingly, D.A. Higgins seeks a declaration from this Court that (1) any statements made by D.A. Higgins prior to his assumption of office on January 1, 2023 cannot serve as the basis of an action to remove him under Chapter 87 of the Texas Local Government Code, and (2) as of the final resolution in this case, D.A. Higgins has not implemented and/or executed a policy or policies of refusing to prosecute a class or type of criminal offense under state law.

V.

CAUSE OF ACTION: DECLARATORY RELIEF

17. D.A. Higgins incorporates by reference all preceding factual allegations as if stated fully herein.

18. Pursuant to Texas Civil Practice & Remedies Code § 37.004(a) D.A. Higgins seeks determination of his rights and/or status arising under a statute. Namely, D.A. Higgins is entitled to seek a determination of his rights and/or status under Texas Local Government Code § 87.012(a)(2).

19. D.A. Higgins seeks a declaration from this Court that:

- a. Any public statements made by D.A. Higgins prior to his assumption of office on January 1, 2023, cannot serve as the basis of an action to remove him under Texas Local Government Code § 87.012(a)(2).
- b. Any statements posted on D.A. Higgins' campaign website cannot serve as the basis of an action to remove him under Texas Local Government Code § 87.012(a)(2).
- c. As of September 15, 2023, D.A. Higgins has not implemented and/or executed a policy or policies of refusing to prosecute drug possession offenses.

- d. As of September 15, 2023, D.A. Higgins has not implemented and/or executed a policy or policies of refusing to prosecute cannabis possession offenses.
- e. As of September 15, 2023, D.A. Higgins has not implemented and/or executed a policy or policies of refusing to prosecute criminal offenses related to medical treatment of transgender persons.³
- f. As of September 15, 2023, D.A. Higgins has not implemented and/or executed a policy or policies of refusing to prosecute criminal offenses related to medical providers performing abortions.
- g. As of the final trial in this action, D.A. Higgins has not taken any action which constitutes a violation of Chapter 87 of the Texas Local Government Code.

VI.
ATTORNEY'S FEES

20. Under both Chapter 37 of the Texas Civil Practices Remedies Code and Chapter 87 of the Local Government Code, D.A. Higgins is entitled to recover all attorney's fees and costs incurred herein from Plaintiff.

CONCLUSION & PRAYER

For all these reasons, D.A. Higgins, following a determination on the merits, requests the Court (1) to deny Anderson's Petition to Remove D.A. Higgins, (2) issue a declaratory judgment in favor of D.A. Higgins, (3) recover his attorney's fees and court costs from Anderson; and (4) award D.A. Higgins such other and further relief that the Court deems appropriate under the circumstances.

³ Since the filing of his Petition, Anderson has told at least one reporter that he does not believe the District Attorney's office has had any cases submitted to it about a transgender person receiving medical care. See Claire Osborn, *Hays County district clerk seeks to remove district attorney from office with lawsuit*, AUSTIN AMERICAN-STATESMAN, Sept. 14, 2023, 6:10 p.m., <https://www.statesman.com/story/news/local/2023/09/14/hays-county-district-clerk-avrey-anderson-lawsuit-district-attorney-kelly-higgins-removal/70856744007/>

Respectfully submitted,

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Capacity as the Criminal District Attorney of Hays
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CERTIFICATE OF SERVICE

I hereby certify, by my signature below, that a true and correct copy of the above and foregoing has been electronically filed and forwarded, via the Texas E-filing Manager, to the following on the 20th day of September, 2023:

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/s/ Michael Shaunessy

MICHAEL SHAUNESSY

Automated Certificate of eService

This automated certificate of service was created by the e filing system. The filer served this document via email generated by the e filing system on the date and to the persons listed below. The rules governing certificates of service have not changed. Filers must still provide a certificate of service that complies with all applicable rules.

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Filing Code Description: Counter Claim/Cross
Action/Interpleader/Intervention/Third Party
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Status as of 9/20/2023 2:11 PM CST

Associated Case Party: Kelly Higgins

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