

No. 22-50110

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

ISABEL LONGORIA, CATHY MORGAN,
Plaintiffs - Appellees,

v.

WARREN K. PAXTON, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF
TEXAS; SHAWN DICK, IN HIS OFFICIAL CAPACITY AS WILLIAMSON COUNTY DISTRICT
ATTORNEY.
Defendants – Appellants.

**On Appeal from the United States District Court for the
Western District of Texas, San Antonio Division;
No. 5:21-cv-1223-XR, Hon. Xavier Rodriguez**

**APPELLANT SHAWN DICK’S REPLY TO CATHY MORGAN’S
OPPOSITION TO DICK’S MOTION FOR REMAND**

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ISABELLA LONGORIA AND
CATHY MORGAN,
Plaintiffs-Appellees,

vs.

WARREN K. PAXTON, IN HIS
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IN HIS OFFICIAL CAPACITY
AS WILLIAMSON COUNTY
DISTRICT ATTORNEY,
Defendants-Appellants.

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NO. 22-50110

**DEFENDANT/APPELLANT SHAWN DICK’S REPLY TO
PLAINTIFF/APPELLEE CATHY MORGAN’S OPPOSITION
TO DICK’S MOTION FOR REMAND**

Defendant/Appellant Shawn Dick, in his official capacity as District Attorney of Williamson County, Texas, files this reply to Plaintiff/Appellee Cathy Morgan’s opposition to Dick’s motion for remand with instructions to dismiss for lack of subject matter jurisdiction, respectfully showing:

I. ARGUMENT

District Attorney Dick neither misconstrued Morgan’s prior arguments regarding standing nor misapprehended the “basis for her standing” in his motion to

dismiss. The basis for his motion was set forth quite clearly and is completely accurate: Morgan, through her attorneys, took a position before the Texas Supreme Court that was diametrically opposed to the position she had previously taken in the federal district court and then before this Court in this interlocutory appeal of the preliminary injunction order. Whereas she had repeatedly asserted in the district court and in this Court that she believes she is a public official subject to the §276.016(a)(1) “anti-solicitation” provisions and thus feared prosecution and had chilled her speech accordingly, Morgan unequivocally told the Texas Supreme Court that she is not a public official subject to the statute. Her flip-flop on this fundamental issue – that is, whether as a volunteer deputy registrar (VDR) she is in the class of persons (public officials) potentially affected by §276.016(a)(1) such that she has standing to sue D.A. Dick – undermined any claim she had to standing in this case and warrants a remand to the district court for dismissal of her claims.

Litigants cannot and should not be allowed to take diametrically opposed positions *in the same case* in different forums, as Morgan has done here, without repercussion. Morgan (through her attorneys) originally asserted that VDRs are public officials in an apparent attempt to hitch her wagon to the *Fenves* holding for the purposes of establishing a standing foothold in the federal courts. *See Speech First, Inc. v. Fenves*, 979 F.3d 319, 335 (5th Cir. 2020) (holding that, “when dealing with pre-enforcement challenges to recently enacted (or, at least, non-moribund)

statutes that facially restrict expressive activity by the class to which the plaintiff belongs, courts will assume a credible threat of prosecution in the absence of compelling contrary evidence”) (citations omitted).¹ But, when the road forked – here, to the Texas Supreme Court on the certified questions – Morgan unhitched her wagon from *Fenves* and attached it to a new vehicle traveling a wholly different direction: straight toward dismissal.

Morgan’s initial attempts to allege and obtain standing in federal court by asserting that VDRs like her are public officials, only to reverse course in the Texas Supreme Court on certification and agree that they are not, have resulted in substantial costs and burdens borne by the parties and the courts alike. Many of these costs and burdens would likely have been easily avoided had Morgan informed the district court from the outset that she did not believe that VDRs are public officials and thus are not subject to the provisions of §276.016(a)(1). But, she did not, and D.A. Dick has been roped into a civil suit that has now traveled through a federal

¹ D.A. Dick continues to maintain that this case, at least with respect to Morgan and her claims, presents a materially different standing issue in at least one key respect than the standing issue that was before the *Fenves* court. In *Fenves*, the plaintiff was an association whose members included a “group of students” who were challenging the constitutionality of university policies regulating speech and expression on campus. *Fenves*, 979 F.3d at 322. There was thus no question that these student-member plaintiffs fell within the class of persons affected by the challenged university speech regulations. Here, on the other hand, there was nothing to suggest that Morgan, as a VDR, is a “public official” potentially subject to the provisions of §276.016(a)(1) other than her threadbare assertion that she is – an assertion she has now rebuked. (D.A. Dick specifically challenged this aspect of standing in the motion to dismiss that he filed pursuant to Rules 12(b)(1) and 12(b)(6) as his first responsive pleading in the district court. *See* ROA.259-61)

district court, the Fifth Circuit, and the Texas Supreme Court on accelerated schedules only to find out in the latter that Morgan in fact *agrees* that she is not a public official subject to the statute. (D.A. Dick was roped into this civil suit even though there is no allegation and not an iota of evidence that he had prosecuted, threatened prosecution, or even intimidated prosecution of Morgan or anyone else under §276.016(a)(1), or did anything else other than simply hold the office of District Attorney of Williamson County.)

At the conclusion of her response, Morgan asserts that she will voluntarily dismiss her federal constitutional claim if the Texas Supreme Court holds that VDRs are not public officials. That offer is neither here nor there. Morgan has already undermined her standing to maintain suit in statements she has made in pleadings and in open court, and remand of this case to the district court with instructions to dismiss for lack of standing will accomplish the same outcome jurisdictionally but will also allow the district court to vacate those portions of the preliminary injunction as they pertain in any respect to Morgan and/or D.A. Dick.

III. CONCLUSION AND PRAYER

District Attorney Dick respectfully requests that the Court remand the case to the district court with instructions to dismiss Morgan's claims for lack of subject matter jurisdiction (subject to any consideration regarding assessment of fees and

costs), and vacate the preliminary injunction and order insofar as it pertains in any respect to Morgan and/or Dick. District Attorney Dick also prays for any and all other relief to which he is entitled.

Dated: June 8, 2022

Respectfully submitted,

s/ Sean Breen

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*Counsel for Appellant Shawn Dick In His
Official Capacity as Williamson County
District Attorney*

CERTIFICATE OF SERVICE

I certify that on June 8, 2022, this reply was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. I further certify that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13, and that (2) the electronic submission is an exact copy of any paper documents in compliance with Fifth Circuit Rule 25.2.1

s/ Sean Breen
Attorney of Record for Appellant
Shawn Dick

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CERTIFICATE OF COMPLIANCE

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s/ Sean Breen

Attorney of Record for Appellant
Shawn Dick