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

REPLY BRIEF OF APPELLANT SHAWN DICK

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SUMMARY OF APPELLANT'S REPLY

Sovereign Immunity. This Circuit has tackled the *Ex parte Young* sovereign immunity analysis a number of times in the past two decades. A recurring requirement throughout these cases is that the plaintiff must plead and show "some scintilla of 'enforcement' by the relevant state official with respect to the challenged law" for the *Ex parte Young* exception to sovereign immunity to apply. *City of Austin v. Paxton*, 943 F.3d 993, 1002 (5th Cir. 2019). To satisfy this, panels on this Circuit have variously required evidence of "some step" of enforcement by the official; evidence of "affirmative action" of enforcement; or evidence of a "demonstrated willingness" of the official to enforce the challenged statute. Regardless how this requirement is specifically characterized, Morgan has failed to both plead and prove even a scintilla of "enforcement" by District Attorney Dick such that the sovereign immunity exception applies. There is literally zero evidence in this record of any such "enforcement" by Mr. Dick.

Having presented no such evidence of "enforcement" to either the district court or now to this Court, Morgan resorts to some legal diversions. These diversions, whether taken individually or collectively, do not carry the day for her.

First, she relies on this Circuit's 2020 holding in *Speech First, Inc. v. Fenves* for the proposition that the existence of a criminal or penal statute itself establishes that a credible threat of prosecution exists. But, *Fenves* is a standing case in which

Ex parte Young and sovereign immunity are not even discussed. *Fenves* is of little or no assistance regarding the sovereign immunity issues presented here.

Second, she relies on *Fenves* for the proposition that, in the pre-enforcement speech context, a court may simply "assume" that a credible threat of prosecution exists based on the existence of a criminal statute; a state defendant's authority to enforce the law at issue constitutes "enough of a threat" to satisfy *Ex parte Young*. But this argument runs headfirst into the Circuit's *Young* caselaw, which requires that a plaintiff plead and sufficiently prove some "enforcement" of the statute by the state official before any sovereign immunity exemption applies.

Third, she attempts to shift her burden to establish that subject matter jurisdiction exists into a burden on the defendants to present "compelling evidence" that they will *not* enforce the challenged statute. The burden to establish jurisdiction falls squarely on Morgan as a matter of law – not on Mr. Dick. This improper burden-shifting, if indulged, would make every district and county prosecutor a target of constitutional challenges to statutes regardless of what the prosecutor has or hasn't done or said in connection with the statute at issue.

Standing. Contrary to Morgan's assertion, District Attorney Dick has raised a standing issue in this appeal that is distinct from the sovereign immunity issues that have been raised: whether the district court erred in finding that standing exists because Morgan failed to sufficiently plead and prove that her alleged injury (chilled

speech) is fairly traceable to Mr. Dick. While this Court has noted that the Article III standing analysis and the *Ex parte Young* analysis "significantly overlap," *City of Austin*, 943 F.3d at 1002, they nevertheless remain distinct issues. This case on this record falls within the *City of Austin* finding and paradigm: Morgan has both failed to establish the requisite "connection to enforcement" under *Ex parte Young*, and failed to establish standing under *Lujan* due to her complete failure to trace any alleged injury to Mr. Dick.

REPLY TO APPELLEES' RESPONSE

A. Sovereign Immunity Bars Morgan's Claims

This Circuit is no stranger to cases involving the *Ex parte Young* exception to sovereign immunity. Indeed, there have been over a half-dozen cases in this Circuit in recent years involving this exception. *See, e.g., Okpalobi v. Foster*, 244 F.3d 405 (5th Cir. 2001); *K.P. v. LeBl*anc, 627 F.3d 115 (5th Cir. 2010); *Morris v. Livingston*, 739 F.3d 740 (5th Cir. 2014); *NiGen Biotech, L.L.C. v. Paxton*, 804 F.3d 389 (5th Cir. 2015); *Air Evac EMS, Inc. v. Tex. Dep't of Ins.*, 851 F.3d 507 (5th Cir. 2017); *City of Austin v. Paxton*, 943 F.3d 993 (5th Cir. 2019); *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 400 (5th Cir. 2020); *Tex. Democratic Party v. Abbott*, 978 F.3d 168, 179 (5th Cir. 2020); *In re Abbott*, 956 F.3d 696, 708 (5th Cir. 2020).

The Court summarized the *Ex parte Young* analysis in *City of Austin v. Paxton*, a case that Plaintiffs cite and discuss several times in their brief but do not follow. The analysis involves three steps. First, a court must consider whether the plaintiff has even named the correct state actor or actors as defendants. *City of Austin*, 943 F.3d at 998. If she did not, the *Ex parte Young* analysis ends. *Id.* Second, the court engages in a *Verizon* analysis to determine if the complaint alleges "an ongoing violation of federal law and seeks relief properly characterized as prospective." *Id.* (citing *Verizon Md., Inc. v. Pub. Serv. Comm'n*, 535 U.S. 635, 645 (2002)). And third, if the first two steps are satisfied, the court must determine if the

state officials named have a "sufficient connection [to] the enforcement of the challenged law." *Id.*

In *City of Austin*, after surveying and analyzing recent Fifth Circuit cases and the third prong of this analysis, the court "recognize[d] that this circuit's caselaw requires ***some scintilla of 'enforcement' by the relevant state official with respect to the challenged law***" for the *Ex parte Young* exception to apply. *Id.* at 1000-02. (emphasis added). Other panels in this circuit have stated this as a requirement that a plaintiff plead and sufficiently demonstrate that the state official took "some step" to enforce the challenged statute; that the official took some "affirmative action" regarding its enforcement; or that the official has "the particular duty to enforce the statute in question and a demonstrated willingness to enforce that duty." *See Tex. Democratic Party*, 961 F.3d at 400 ("some step" and "affirmative action"); *Morris*, 739 F.3d at 746 ("demonstrated willingness"); *Tex. Democratic Party*, 978 F.3d at 179 ("demonstrated willingness").

Regardless how this requirement is specifically characterized, in the end the Fifth Circuit caselaw requires the plaintiff – plaintiff Morgan here – to plead and sufficiently show that *(i)* the state official named (District Attorney Dick) *(ii)* has in some form or fashion affirmatively demonstrated some form of "enforcement" *(iii)* of the challenged law (Section 276.016(a)(1) of the Election Code). But Morgan hasn't done that, either in the district court below or now on appeal. In her brief she

didn't even try to point to any such allegations or evidence in the record *because there aren't any*. Not having even a scintilla of evidence of "enforcement" of the challenged statute by District Attorney Dick that she can point to as to herself or anyone else, Morgan veers instead toward several diversions. She points to *Speech First, Inc. v. Fenves*, a standing case that does not even discuss sovereign immunity, as one such diversion. She contends that this Court should simply "assume" enforcement by the very existence of the statute as another. And, she has attempted to shift the burden regarding subject matter jurisdiction on to Mr. Dick to present "compelling evidence" why the *Ex parte Young* exception should not apply. None of these diversions carry the day for her here.

1. Morgan has not pointed to any allegation or to an iota of evidence of "enforcement" by District Attorney Dick.

Morgan's silence in her brief on the absence of any evidence of enforcement by District Attorney Dick is deafening. While she has made some salutary statements regarding a district attorney's "duty to enforce" Texas law[1], *e.g.*, APPELLEES' BRIEF at 25, 27 & 31, she has not pointed to a single allegation in her pleadings or even a shred of evidence of "enforcement" (or "credible threat of enforcement") by Mr.

[1] In her brief, Morgan has mischaracterized a district attorney's "enforcement" duties under Texas law. Section 2.01 of the Texas Code of Criminal Procedure provides that district attorneys "shall represent the State in all criminal cases in the district courts of his district and appeals therefrom …". TEX. CODE CRIM. PROC. §2.01. Nowhere does the statute state that a district attorney has a duty to enforce the laws of the State. Instead, his or her primary duty is "not to convict, but to see that justice is done." *Id.*

Dick in the record with which she can satisfy her burden to show that the *Ex parte Young* exception to sovereign immunity applies. There is no evidence of any "step" taken by Mr. Dick to enforce Section 276.016(a)(1) as to Morgan or anyone else. There is no evidence of any "affirmative action" he took, will take, or might take. There is no evidence of any "demonstrated willingness to enforce" the statute. Indeed, as Mr. Dick has pointed out to this Court (and to the district court below), the record shows that Morgan has repeatedly acknowledged that there is and has been no such enforcement, none has been even remotely threatened[2], and Morgan is not aware of any that is even "on the horizon." *See* SHAWN DICK'S APPELLANT'S BRIEF at 20-25.

With this record, Morgan is seeking to make this Circuit's precedent requiring some evidence of "enforcement" meaningless.

2. *Fenves*, a standing case, does not address or discuss *Ex parte Young* or the "some connection" requirement.

Morgan invokes and heavily relies on the Fifth Circuit's decision in *Speech First, Inc. v. Fenves*, 979 F.3d 319 (5th Cir. 2020) in the sovereign immunity portion of her appellate brief. *See* APPELLEES' BRIEF at 28. *Fenves* involved a student

[2] There is good reason why prosecution has not even been remotely threatened given Morgan's testimony that her job duties as a Volunteer Deputy Registrar do not even require her to solicit or encourage people to vote by mail; she does not do so and testified that she only wants to give out information, which the statute allows. ROA.377-78; *see* TEX. ELEC. CODE §276.016(a))

association's constitutional free speech challenges to UT-Austin's campus speech regulations. *Id.* at 323-27. But *Fenves* is of little or no assistance regarding the sovereign immunity issues presented in this case.

First and foremost, *Fenves* is not a sovereign immunity case. Instead, it is a standing and mootness case. *Id.* at 327-39. Sovereign immunity, *Ex parte Young*, and the Fifth Circuit cases addressing the *Ex parte Young* exception are mentioned nowhere in the *Fenves* decision. There is no discussion at all regarding the intersection and interplay of standing issues with sovereign immunity issues in the decision.

Second, *Fenves* does not address issues pertaining to which state officials or actors, if any, were the proper officials to name as defendants to any suit (pre-enforcement or otherwise) challenging the constitutionality of a speech regulation. In *Fenves*, the associational plaintiff (with student members) sued university officials in connection with regulations that the university had promulgated; that the university was specifically tasked with enforcing; and that the university had previously enforced. *See id.* at 322-27. Here, on the other hand, Morgan has sued local district attorneys regarding a statewide statute that was passed by the Texas state legislature; that did not specifically task district attorneys with its enforcement; and regarding which there are no allegations or evidence that any of the named

district attorneys have enforced or even threatened enforcement as to Morgan or anyone else.

3. This Court does not and should not "assume" enforcement by virtue of the existence of the statute.

Like the district court below, Morgan cites *Fenves* for the additional proposition that, in pre-enforcement cases, "courts will assume a credible threat of prosecution in the absence of compelling contrary evidence." APPELLEES' BRIEF at 22 & 28 (quoting and discussing *Fenves*). "Otherwise," she argues, "the requisite threat is 'latent in the existence of the statute.'" *Id.* at 23 (quoting *Fenves*). A state defendant's authority to enforce the law at issue, her argument goes, is in and of itself "enough of a threat." *Id.* at 29.

But this argument runs headfirst into this Circuit's *Ex parte Young* caselaw. The Fifth Circuit has consistently required some allegations and evidence of "enforcement" by the state official who has been sued for the *Ex parte Young* exception to apply. When the plaintiff has sufficiently satisfied this some-evidence-of-enforcement standard, the Court has held that the exception applies. *See K.P.*, 627 F.3d at 119-25 (finding that the Louisiana Board that had been sued took an "active role" in enforcing the statute at issue); *Air Evac*, 851 F.3d at 510-13 (noting that the state officials at issue were actively involved in rate-setting and overseeing the arbitration processes implicated by the challenged law); *NiGen*, 804 F.3d at 392-95

(finding that the *Young* exception applied when the attorney general had sent "numerous 'threatening letters'" to the plaintiffs). But when the plaintiff has not satisfied this standard requiring some evidence, the Court has held that the exception does not apply. *See In re Abbott*, 956 F.3d at 709 (finding that a press release issued by the attorney general warning of enforcement of the law at issue was insufficient evidence of enforcement under *Ex parte Young* to confer jurisdiction to retain the attorney general in the suit); *Tex. Democratic Party*, 978 F.3d at 181 (declining to apply *Ex parte Young* where the attorney general had sent a letter advising that certain election-related activities constituted a felony under Texas law).

City of Austin is particularly instructive on this point. In that case, the Court noted that the attorney general did have the authority under Texas law to enforce the law that was being challenged: "Here, the State concedes in its brief that the Attorney General has the authority to enforce §250.007: '[T]he Attorney General does have the power to enforce this provision [§250.007].'" *City of Austin*, 943 F.3d at 998. But, the Court did not find that the *Ex parte Young* exception applied simply because the attorney general had this enforcement authority. Instead, it required something more in terms of evidence of enforcement – something that the plaintiff failed to allege and show in that case. "[W]e hold that Attorney General Paxton is not subject to the *Ex parte Young* exception ***because our Young caselaw requires a higher***

showing of 'enforcement' than the City has proffered here." *Id.* at 1000 (emphasis added).

In her brief Morgan attempts to distinguish her case from *City of Austin* by pointing to the Supreme Court's opinion in *Steffel v. Thompson*, 415 U.S. 452 (1974): "This case is like *Steffel*, not *City of Austin*, because the threat of prosecution and civil enforcement by the Defendants is causing the harmful chilling effect to the Plaintiffs' expression." APPELLEES' BRIEF at 30-31. But *Steffel* does not help Morgan's cause, and, indeed, underscores District Attorney Dick's points on appeal.

Steffel involved constitutional free speech challenges to Georgia's criminal trespass law in the context of anti-war handbilling. *Steffel*, 415 U.S. at 454-56. Unlike here, the plaintiff had twice been specifically threatened with arrest by police officers for violating that law, and his companion had been arrested and charged with criminal trespass during the second incident. *Id.* The state defendant had further stipulated that if the plaintiff returned and refused upon request to stop handbilling, a warrant would be sworn out and he might be arrested and likely charged with a violation of the statute. *Id.* The Supreme Court held that, given these facts, the plaintiff had amply demonstrated that his concern with arrest had not been "imaginary or speculative" or "chimerical." *Id.* at 459. Morgan's case is decidedly not like *Steffel* – and certainly so with respect to Mr. Dick.

Morgan also favorably cites the Sixth Circuit's opinion in *Russell v. Lundergan-Grimes*, 784 F.3d 1037 (6th Cir. 2015) several times in her brief. *See* APPELLEES' BRIEF at 25, 28 & 29 n.3. *Russell* does not advance her cause, but instead undercuts it.

At issue in *Russell* was the constitutionality of a state law that created a 300-foot no-political-speech buffer zone around polling places on election days. *Id.* at 1043-44. The plaintiff, who owned property within 150 feet of a polling place and routinely engaged in electioneering on his property, filed suit against state officials asserting that the statute infringed on his free speech rights and was unconstitutional. *Id.*

On appeal the appellate court addressed issues pertaining to sovereign immunity and the *Ex parte Young* exception. In its discussion, the *Russell* court noted that "*Young* does not apply when a defendant state official has neither enforced nor threatened to enforce the allegedly unconstitutional state statute." *Id.* at 1047 (citing *Children's Healthcare is a Legal Duty v. Deters*, 92 F.3d 1412, 1415 (6th Cir. 1996)). The court noted that plaintiff himself had had political signs removed from his property on multiple occasions because they were in violation of the statute, and that the record established that the state officials at issue had in fact acted to enforce the statute. For example, the record evidence showed that the state attorney general's office had "repeatedly fielded and investigated complaints of

impermissible electioneering, and promised the public that it would pursue possible criminal sanctions" under the challenged law. *Id.* And, in what it described as a "closer question," the court cited evidence in the record that the state "Board" defendants were tasked with administering the state election laws; adopted administrative regulations concerning those laws; trained state and local personnel on how to administer the laws; and had "routinely partnered with the Attorney General in responding to complaints of improper election activity." *Id.* at 1048. The record in *Russell* was materially different from the record here, where there is literally zero evidence of any enforcement or threat of enforcement by District Attorney Dick.

This Court has not jettisoned the requirement that a plaintiff must plead and show some evidence of "'enforcement' of the relevant state official with respect to the challenged law" in favor of simply *assuming* enforcement by the mere existence of the law. *City of Austin*, 943 F.3d at 1002. The district court erred when it held that the *Ex parte Young* exception applied to Morgan's claims against District Attorney Dick based on the allegations and evidence (or, more pointedly, the *absence* of any allegations or evidence) of "enforcement" presented here.

4. The burden did not shift to the defendants to show that the *Ex parte Young* exception applies.

Morgan's brief and her reliance on *Fenves* and related cases seems to suggest that the plaintiff's burden of establishing that subject matter jurisdiction exists has morphed into a defendant's burden to show that subject matter jurisdiction does not exist: she argues that a court should assume that the requisite "enforcement" exists (in the form of a credible threat of prosecution) for the purposes of *Ex parte Young* "in the absence of compelling contrary evidence." APPELLEES' BRIEF at 22 & 28 (quoting *Fenves*). In other words, the named state official must supposedly present compelling evidence that he or she will *not* enforce the challenged statute. *See id.* at 24 ("Defendants failed to introduce 'compelling evidence' that they would not enforce the anti-solicitation provision against Plaintiffs.") That argument flies in the face of the law and the facts of this case.

First, the burden to establish subject matter jurisdiction *always* rests with the proponents of federal-court jurisdiction – here, Plaintiffs – as a matter of law. *Physician Hosps. Of Am. v. Sebelius*, 691 F.3d 649, 652 (5th Cir. 2012). And, once again, *City of Austin* is illustrative of this principle in the specific context of *Ex parte Young* in its holding that the plaintiff bore the burden of showing sufficient "enforcement" but failed to do so. *City of Austin*, 943 F.3d at 1000.

Second, the district court's decision in this case illustrates the functional infeasibility of any such improper burden-shifting. Two of the district attorney defendants (District Attorneys Ogg and Garza) entered into binding stipulations with

the Plaintiffs stating that the district attorneys would not prosecute them for any alleged violations of the challenged Election Code provisions. ROA.271-73 and ROA.274-76. But the district court did not find these binding non-prosecution agreements "compelling" enough. ROA.643. And, District Attorney Dick presented detailed evidence (summarized at pages 20 through 25 of his appellant's brief) showing that Morgan had never been prosecuted or even remotely threatened with any prosecution or investigation by him or anybody in his office, but the district court did not find that evidence "compelling" enough when it exercised jurisdiction over the case and claims and issued its injunction. *See* ROA.643.

The practical implication of this improper burden-shifting, of course, is that literally every district and county attorney becomes a target for any constitutional challenges to statewide laws *regardless of what he or she has done or hasn't done regarding enforcement of those laws*. "Enforcement" for sovereign immunity purposes is effectively established under this errant theory simply by the fact that a person holds the office of district or county attorney, and nothing more. And a dubious corollary to this proposition is that a district or county attorney can be the *only* named defendant in such an action – saddled with the burden and expense of defending the constitutionality of a statewide statute irrespective of whether he or she has actually done anything whatsoever to enforce the statute or manifested any intent to do so (or even agrees with the statute). That cannot be and is not the case.

B. Morgan Did Not Establish Standing to Sue District Attorney Dick

Morgan's brief addresses standing, but essentially just summarizes the district court's order. *See* APPELLEES' BRIEF at 22-24. She claims that "Defendants invoke standing but do not raise any independent argument why the district court committed a reversible error." *Id.* at 24. That statement is incorrect. On appeal, District Attorney Dick has raised a standing-related issue that is distinct from the sovereign immunity issues that have also been raised: the district court erred because Morgan failed to sufficiently plead and prove that her alleged injury (chilled speech) is fairly traceable to Mr. Dick such that she satisfies the second prong of *Lujan* on the claims she is asserting against him in his official capacity. *See* SHAWN DICK'S APPELLANT'S BRIEF at 27-29; *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

While this Court has noted that the Article III standing analysis and the *Ex parte Young* analysis "significantly overlap," they nevertheless remain distinct issues. *City of Austin*, 943 F.3d at 1002 (citing *Air Evac*, 851 F.3d at 520). Standing is implicated in all cases; Eleventh Amendment sovereign immunity arises only in cases where a plaintiff names a state or state actor as a defendant. Under the caselaw, a plaintiff suing a state officer thus bears the burden of establishing that subject matter jurisdiction exists on both counts – that is, that *(i)* he or she has standing to sue, and *(ii)* that the state official is not immune from suit.

In its discussion of this "significant overlap" in *City of Austin*, the Court did not hold that a finding of standing satisfies the *Ex parte Young* "connection to enforcement" standard for jurisdictional purposes, or vice versa. Instead, the Court observed that a finding of standing tends toward a finding that the *Young* exception applies to the state official(s) in question. *Id.* (citing *K.P.*, 627 F.3d at 122). But, in *City of Austin* the Court actually held that the plaintiff's proof regarding its claims against the attorney general – who, as discussed above, had agreed that he had enforcement authority over the statute at issue – failed to satisfy the *Ex parte Young* "connection to enforcement" requirement and (without expressly ruling) likely failed to establish standing as well. *Id.* at 1002. In other words, the absence of some "connection to enforcement" evidence also tends to nullify standing.

This case on this record falls within that *City of Austin* finding and paradigm. Morgan has failed to establish the requisite "connection to enforcement" showing for the *Ex parte Young* exception to apply as to District Attorney Dick. But, due to her complete failure to trace any alleged injury to Mr. Dick through her allegations and any evidence of his words or actions, Morgan has also failed to satisfy the second prong of *Lujan* and thus establish standing vis-à-vis Mr. Dick.

CONCLUSION AND PRAYER

For the foregoing reasons, Defendant-Appellant Shawn Dick, sued in his official capacity as Williamson County District Attorney, respectfully requests that

this Court reverse the district court's order granting Plaintiffs' motion for preliminary injunction, and remand this action for further proceedings consistent therewith.

Dated: March 2, 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 March 2, 2022, this brief 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 the paper document in compliance with Fifth Circuit Rule 25.2.1

/s/ Sean Breen
Attorney of Record for Appellant Shawn Dick

CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limit of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because, excluding the parts of the document exempted by Rule 32(f) and 5th CIR. R. 32.1: this document contains **4,080** words.

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/s/ Sean Breen
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