UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

ISABEL LONGORIA and CATHY MORGAN,	§	
	§	
***Plaintiffs*,**	§	
	§	
v.	§	**Case No. 5:21-cv-1223-XR**
	§	
WARREN K. PAXTON, in his official capacity as the Attorney General of Texas, *et al*.,	§	
	§	
	§	
	§	
***Defendants*.**		

DEFENDANT SHAWN DICK'S REPLY TO PLAINTIFFS' RESPONSE IN OPPOSITION TO DICK'S MOTION TO DISMISS

Defendant Shawn Dick, sued in his official capacity as the District Attorney of Williamson County, Texas, files this reply to Plaintiffs' Response in Opposition to Defendant Paxton's Motion to Dismiss or Abstain and Defendant Dick's Motion to Dismiss (ECF No. 61), respectfully showing:

INTRODUCTION

In their response to District Attorney Dick's Rule 12(b)(1) and 12(b)(6) motion, Plaintiffs point to this Court's recent order (ECF No. 53) granting their motion for preliminary injunction and argue that *(i)* the law of the case doctrine now governs the sovereign immunity and standing issues raised in Mr. Dick's pending motion to dismiss, and *(ii)* the Court should thus deny Mr. Dick's motion in its entirety. Plaintiffs correctly note that these sovereign immunity and standing issues are presently before the Fifth Circuit Court of Appeals (along with other issues) on an expedited interlocutory appeal, with briefing in the process of being completed and oral argument

set for March 8, 2022. In light of the pending interlocutory appeal, this Court should refrain from ruling on Mr. Dick's motion to dismiss pending the outcome of the expedited appeal. In the alternative, the Court should grant Mr. Dick's motion to dismiss based on the pleadings and evidence pertaining to motion that are presently before this Court.

ARGUMENT AND AUTHORITIES

A. Sovereign immunity bars Morgan's claims against Mr. Dick.

The Fifth Circuit has ruled in a number of cases involving the *Ex parte Young* exception to sovereign immunity. Indeed, there have been over a half-dozen cases in the Fifth 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).

A Fifth Circuit panel recently summarized the circuit's *Ex parte Young* analysis in *City of Austin v. Paxton.* That analysis involves three steps. First, the 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 must engage 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 the Fifth Circuit have variously 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 – specifically, plaintiff Morgan, who is the only plaintiff asserting claims against District Attorney Dick – 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. There are no such allegations in her pleading (*see* ECF No. 5) for the purposes of Mr. Dick's Rule 12(b)(1) and 12(b)(6) motions, and there is no such evidence before this Court in connection with his Rule 12(b)(1) motion.

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

Morgan has not pointed to a single allegation in her pleadings or even an iota of evidence of "enforcement" (or "credible threat of enforcement") by Mr. Dick in this case 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[1], Morgan has repeatedly acknowledged that there is and has been no such enforcement, none has been even remotely threatened, and Morgan is not aware of any that is even "on the horizon."

2. *Speech First, Inc. v. Fenves* is a mootness and standing case. It does not address or discuss *Ex parte Young* or the "some connection" requirement.

To the extent Morgan is either invoking or relying on the Fifth Circuit's decision in *Speech First, Inc. v. Fenves*, 979 F.3d 319 (5th Cir. 2020) for sovereign immunity purposes, *Fenves* – which involved a student association's constitutional free speech challenges to UT-Austin's campus speech regulations – is inapposite. *See* at 323-27.

First, *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

[1] *See* Defendant Shawn Dick's Response in Opposition to Plaintiffs' Motion for Preliminary Injunction (ECF No. 47) at pp. 4-9.

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.

Nor should this Court "assume a credible threat of prosecution" under *Fenves* for *Ex parte Young* purposes, as any such assumption runs counter to the Fifth Circuit's *Young* caselaw. *See id.* at 335-37 (stating that "courts will assume a credible threat of prosecution in the absence of compelling contrary evidence" and that "the requisite threat is 'latent in the existence of the statute.'"). The Fifth Circuit has instead 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 Fifth Circuit 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 circuit 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 Fifth Circuit 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 *City of Austin* 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).

The Fifth Circuit has not abandoned or altered 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 assuming enforcement by the mere existence of the law. *Id.* at 1002. The *Ex parte Young* exception does not apply 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, and dismissal is proper under both Rule 12(b)(1) and 12(b)(6) grounds.

B. Morgan has also not established standing to sue District Attorney Dick.

Morgan has failed to sufficiently plead and prove that her alleged injury (chilled speech) is fairly traceable to Mr. Dick such that she satisfies the second (causal nexus) and third

(redressability) prongs of *Lujan* on the claims she is asserting against him in his official capacity. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

While the Fifth Circuit has noted that the Article III standing analysis under *Lujan* 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); see *Lujan, supra*, at 560. 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 applicable 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 Fifth Circuit 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 appellate 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 of appeals 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 these pleadings and this evidence 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 and third prongs of *Lujan* and thus establish standing vis-à-vis Mr. Dick.

CONCLUSION AND PRAYER

WHEREFORE, PREMISES CONSIDERED, defendant Shawn Dick, sued in his official capacity as Williamson County District Attorney, respectfully requests that the Court refrain from ruling on Mr. Dick's motion to dismiss pending the outcome of the expedited interlocutory appeal. Alternatively, Mr. Dick requests that the Court dismiss all claims and causes of action that have been asserted against him in this action pursuant to Rule 12(b)(1) and/or Rule 12(b)(6) for the reasons stated in his motion to dismiss and herein, and for such other and further relief to which he may be justly entitled.

Dated: March 2, 2022

Respectfully submitted,

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Attorneys for Defendant Shawn Dick
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Williamson County District Attorney.

CERTIFICATE OF SERVICE

I certify that a true and accurate copy of the foregoing document was filed electronically (via CM/ECF) on March 2, 2022, and that all counsel of record were served by CM/ECF.

Sean E. Breen