

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

NATIONAL PRESS PHOTOGRAPHERS §
ASSOCIATION, TEXAS PRESS §
ASSOCIATION, and JOSEPH §
PAPPALARDO, §

Plaintiffs, §

v. §

CIVIL ACTION NO. 1:19-CV-00946

STEVEN MCCRAW, in his official §
capacity as Director of Texas Department §
of Public Safety, RON JOY, in his official §
capacity as Chief of the Texas Highway §
Patrol, and WES MAU, in his official §
capacity as District Attorney of Hays §
County, Texas, §

Defendants. §

WES MAU’S REPLY TO PLAINTIFFS’ RESPONSE TO MOTION TO DISMISS

TO THE HONORABLE COURT:

NOW COMES Defendant Wes Mau, in his official capacity as District Attorney of Hays County, Texas, (“Mau”) and files this Reply to Plaintiffs’ Response to Defendants’ Motion to Dismiss, and would show the Court as follows:

1. Mau adopts the arguments in the State Defendants’ Reply to the Motion to Dismiss in full. However, Mau replies separately to assert that Plaintiffs continue to fail to satisfy the standard of *Ex parte Young*, and that accordingly Mau is not a proper party to this lawsuit.

2. Plaintiffs’ response contains no further factual allegations or legal argument as to why Mau is a proper defendant in this suit. Plaintiffs respond largely on the merits of their First Amendment claims and on the alleged ripeness of those claims, instead of specifying why the named defendants are proper parties.

3. For the *Ex parte Young* exception to apply, the state official “by virtue of his office,” must have “some connection with the enforcement of the [challenged] act, or else [the suit] is merely making him a party as a representative of the state, and thereby attempting to make the state a party.” *City of Austin v. Paxton*, ___ F.3d ____, No. 18-50646, 2019 U.S. App. LEXIS 35985, at *6 (5th Cir. 2019) (quoting *Ex parte Young*, 209 U.S. 123, 157). The question is whether the named defendant has a “sufficient connection [to] the enforcement of the challenged act.” *Id.* at *8 (quotations omitted).

4. The Fifth Circuit has previously articulated a standard for “connection” under *Ex parte Young* that imposes a high burden: the official must have “the particular duty to enforce the statute in question and a demonstrated willingness to exercise that duty.” *Okpalobi v. Foster*, 244 F.3d 405, 416 (5th Cir. 2001). Even in cases that have withdrawn from the *Okpalobi* standard, there still needs to be a showing that “enforcement” of the challenged act either has or will occur in the near future, in a method that “typically involves compulsion or constraint” of the plaintiff. *K.P. v. LeBlanc*, 627 F.3d 115, 124 (5th Cir. 2010).

5. In *City of Austin*, the City alleged that the Attorney General had a “habit of suing or intervening in litigation against the City” in cases involving municipal ordinances and policy. *City of Austin v. Paxton*, ___ F.3d ____, No. 18-50646, 2019 U.S. App. LEXIS 35985, at *13. The Fifth Circuit rejected the City’s argument that the possibility that the Attorney General “*might similarly* bring a proceeding to enforce the supremacy of § 250.007” was sufficient to make him a proper party under *Ex parte Young*. *Id.* at * 13 (emphasis in original). Instead, the Fifth Circuit noted that precedent requires that there must be some “scintilla of ‘enforcement’ by the relevant state official with respect to the challenged law.” *Id.* at *17.

6. Here, Plaintiffs have not even shown a scintilla of enforcement from Mau. Mau has not brought any action to enforce Section 423, or threatened such enforcement. The only “constraint” of Plaintiffs has been self-imposed and summarized in the Complaint in conclusory allegations. *See* Compl. at ¶¶ 62–64, 76–78, 82–84. As the State Defendants’ Reply notes, there is no alleged “credible threat of enforcement” in this matter of any kind. Without a particularized basis to allege that Mau either enforced or threatened to enforce Section 423, he is simply not a proper party under *Ex parte Young*.

WHEREFORE, PREMISES CONSIDERED, Defendant Wes Mau, in his official capacity as District Attorney of Hays County, Texas, respectfully prays that his Motion to Dismiss be granted and that all claims against him be dismissed for failure to state a claim and lack of jurisdiction.

Respectfully submitted,

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capacity as District Attorney of Hays County, Texas*

CERTIFICATE OF SERVICE

I hereby certify that on this the 18th day of December 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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