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

NATIONAL PRESS PHOTOGRAPHERS ASSN., *et al.*,	§	
	§	
Plaintiffs,	§	
	§	**CIVIL ACTION NO.**
v.	§	**1:19-CV-00946-RP**
	§	
STEVEN MCCRAW, *et al.*,	§	
	§	
Defendants.	§	

PLAINTIFFS' SUR-REPLY TO DEFENDANT WES MAU'S REPLY

TO THE HON. ROBERT PITMAN, JUDGE OF SAID COURT:

NOW COME Plaintiffs National Press Photographers Association, Texas Press Association, and Joseph Pappalardo and file this Sur-Reply to Defendant Wes Mau's Reply to Plaintiffs' Response to Defendants' Motion to Dismiss (Doc. 26, hereinafter "Mau Reply"), addressing Mau's *Ex parte Young* argument – made for the first time in the Mau Reply, and thus not previously briefed by Plaintiffs. Mau has not properly characterized the applicable standards. In support, Plaintiffs would show the Court as follows:

1. The *Ex parte Young* doctrine holds that the Eleventh Amendment does not bar a suit against public officials in their official capacities if the complaint seeks prospective relief from an ongoing violation of federal law, and if the public official defendant has "some connection" with the enforcement of the challenged state act. *Ex parte Young*, 209 U.S. 123, 157 (1908). Here, Plaintiffs' Complaint demonstrates that their claims against Mau meet the *Ex parte Young* requirements.

2. The Fifth Circuit's *Ex parte Young* analysis follows a two-part test. *First*, the court conducts a "straightforward inquiry into whether the complaint alleges an ongoing violation of

federal law and seeks relief properly characterized as prospective." *City of Austin v. Paxton*, 943 F.3d 993, 998 (5th Cir. 2019) (quoting *Verizon Md. Inc. v. Pub. Serv. Comm'n*, 535 U.S. 635, 645 (2002)). *Second*, the court must "decide whether the official in question has a 'sufficient connection [to] the enforcement' of the challenged act." *City of Austin*, 943 F.3d at 998 (quoting *Ex parte Young*, 209 U.S. at 157). Neither a specific grant of enforcement authority nor a history of enforcement is required to establish a sufficient connection. *City of Austin*, 943 F.3d 993 at 1001; *Air Evac EMS, Inc. v. Tex., Dep't of Ins., Div. of Workers' Comp.*, 851 F.3d 507, 519 (5th Cir. 2017). *Ex parte Young* merely requires that the defendant "officer, by virtue of his office, has *some connection* with the enforcement of the [challenged] act . . . whether it arises out of the general law, or is specially created by the act itself." *Ex parte Young*, 209 U.S. at 157 (emphasis added); *see also K.P. v. LeBlanc*, 627 F.3d 115, 124 (5th Cir. 2010). There need be only a "scintilla of 'enforcement' by the relevant state official" for *Ex parte Young* to apply. *City of Austin*, 943 F.3d at 1002. Actual threat of or imminent enforcement is "not required." *Air Evac*, 851 F.3d at 519.

3. The first *Ex parte Young* element is easily satisfied here since Plaintiffs' Complaint alleges an ongoing violation of federal law and seeks prospective relief. Defendants do not dispute this; nor could they. As detailed in the Complaint, the challenged portions of Texas Government Code Chapter 423 ("Chapter 423") violate federal law by imposing civil and criminal penalties on First Amendment-protected activity and impinging on the federal government's sole and exclusive authority to regulate the national airspace and aviation safety. Plaintiffs ask only for injunctive and declaratory relief, without imposing on the state monetary liability for past actions. Such relief is properly characterized as prospective. *See Verizon Maryland*, 535 U.S. at 645-46. *See also City of Austin*, 943 F.3d at 999 (holding that because the complaint claimed federal law preempted the

challenged Texas law and sought an injunction and declaratory judgment, plaintiff claimed "an ongoing violation of federal law and [sought] prospective relief"); *Air Evac*, 851 F.3d at 519 (same).

4. Mau also possesses the requisite "connection to the enforcement" of Chapter 423 to satisfy the second part of the *Ex parte Young* analysis. The District Attorney of Hays County "exclusively represent[s] the state in all criminal matters pending before" district courts or inferior courts in Hays County. Tex. Gov't Code Ann. § 44.205 (West). Thus, "the general law" establishes that Mau is the sole official in his county responsible for prosecuting violations of Chapter 423, which carries criminal penalties, including fines and potential jail time.[1] This connection—sole responsibility for prosecution under the statute in the county—easily surpasses the "scintilla of enforcement" necessary for *Ex parte Young*'s application. *See, e.g., Russell v. Lundergan-Grimes*, 784 F.3d 1037, 1047 (6th Cir. 2015) (determining that the Attorney General was properly named as a defendant because he has jurisdiction "to investigate and *prosecute* violations of the [laws at issue]" (emphasis added)). Indeed, Mau cites no cases holding that *Ex parte Young* does not apply in cases of pre-enforcement challenges to statutes that criminalize First Amendment-protected activity absent actual prosecution.

5. Mau's reliance on Fifth Circuit caselaw for the contrary argument is misplaced. First, Mau misdescribes, and errs in relying on, *Okpalobi v. Foster*, 244 F.3d 405 (5th Cir. 2001) (en banc). He claims that *Okpalobi* establishes a "high standard" in *Ex parte Young* cases and requires that a defendant have "a demonstrated willingness" to enforce the statute at issue. Mau Reply ¶ 4. Not so. The statements Mau relies upon come from the plurality opinion, and were not

[1] "A system of fines implies an enforcement power in the state." *Okpalobi v. Foster*, 244 F.3d 405, 418 n.22 (5th Cir. 2001) (en banc plurality).

endorsed by a majority of the court. Later Fifth Circuit decisions recognize that the plurality's definition of "connection" as requiring a "demonstrated willingness" to enforce the challenged statute is not binding precedent. *See K.P. v. LeBlanc*, 627 F.3d at 124 ("Because that part of the en banc opinion did not garner majority support, the Eleventh Amendment analysis is not binding precedent."); *Air Evac*, 851 F.3d at 518 (same). As a result, the Fifth Circuit itself has explicitly declined to follow the *Okpalobi* standard, *see, e.g.*, *K.P.*, 627 F.3d at 124, or has avoided the issue, *see City of Austin v. Paxton*, 943 F.3d at 1000 (declining to "define the outer bounds of this circuit's *Ex parte Young* analysis"); *Air Evac*, 851 F.3d at 519 ("The parties debate whether *Ex parte Young* applies only when there is a threatened or actual proceeding to enforce the challenged state law. We need not resolve that question."). Just as the Fifth Circuit has done in numerous post-*Okpalobi* cases, the Court can resolve this case without opining on the minimum *Ex parte Young* requirements because here Plaintiffs show more than the minimum connection between Mau's prosecutorial authority – indeed, his prosecutorial *duty* – and the challenged statute.

6. In addition to being non-binding, *Okpalobi* is easily distinguishable from the case at hand. In *Okpalobi*, plaintiffs challenged the constitutionality of "a purely private tort statute, which can be invoked only by private litigants." *Okpalobi*, 244 F.3d at 422. The challenged law had "no criminal penalties" and imposed no fines owed to the state. Thus "defendants [were] powerless to enforce [it] against the plaintiffs." *Id.* at 426. Here, in contrast, violations of Chapter 423 carry criminal penalties, and Mau has the exclusive authority to directly bring criminal charges to enforce Chapter 423. *See* Tex. Gov't Code Ann. § 44.205(b) (providing that the Hays County criminal district attorney "shall exclusively represent the state in all criminal matters" in the county).

7. Second, Mau's reliance on *City of Austin* is similarly inapt. In that case, the City adopted an ordinance requiring all residential rental property owners to accept federal housing vouchers as payment. In response, the State Legislature passed a statute forbidding such ordinances. The City sued Texas Attorney General Paxton, who moved to dismiss; after the District Court denied the motion, the Fifth Circuit reversed on interlocutory appeal. *City of Austin*, 943 F.3d at 999. The differences between *City of Austin* and the instant case are marked. There, the challenged state law carried no criminal penalties, unlike Chapter 423 here. Additionally, the State, through the Attorney General, could not proactively enforce the state law. Rather, the law would be invoked by a landlord as a *defense* in a private civil suit over the landlord's refusal to accept federal housing vouchers. *Id.* at 1000 n.1. The Attorney General could – but was not required to – intervene in such a lawsuit to enforce the state law. *Id.* Such a law does not impose a threat of enforcement to the City "because the City faces no threat of criminal prosecution" and because "the City faces no consequences if it attempts to enforce its Ordinance." *Id.* at 1002. In contrast here, Plaintiffs face the very real threat of criminal prosecution if they attempt to use drones for newsgathering in ways prohibited by Chapter 423. If Mau's position is accepted, Plaintiffs would be required to violate the law and face actual prosecution in order to challenge its constitutionality.

8. Consistent caselaw from other federal Courts of Appeals confirm that a defendant officer, like Mau, has a "sufficient connection" to enforcing the act so long as the official has the power to prosecute violations of the act. *See, e.g.*, *Russell v. Lundergan-Grimes*, 784 F.3d 1037, 1047 (6th Cir. 2015) (determining that the Attorney General was properly named as a defendant because he has jurisdiction "to investigate and *prosecute* violations of the [laws at issue]" (emphasis added)); *Entm't Software Ass'n v. Blagojevich*, 469 F.3d 641, 645 (7th Cir. 2006)

("some connection" was satisfied when Illinois Attorney General had concurrent authority with State's Attorney to prosecute violations of law); *Mo. Prot. & Advocacy Servs., Inc. v. Carnahan*, 499 F.3d 803, 807 (8th Cir. 2007) (finding that Missouri Attorney General had "some connection" because he can prosecute persons who violate the laws at issue); *Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908, 919 (9th Cir. 2004) ("The Ada County prosecutor acknowledges, correctly, that he is a proper defendant with regard to those provisions creating the potential for prosecution[.]"); *Luckey v. Harris*, 860 F.2d 1012, 1016 (11th Cir. 1988) (finding that Governor has "some connection" with alleged unlawful action because he "has the residual power to commence criminal prosecutions . . . and has the final authority to direct the Attorney General to 'institute and prosecute' on behalf of the state").

9. Finally, as *City of Austin* recognizes, a court can look to standing doctrine in deciding what threat of enforcement is sufficient: The Fifth Circuit's "Article III standing analysis and *Ex parte Young* analysis significantly overlap. . . . In fact, it may be the case that an official's connection to enforcement is satisfied when standing has been established." *City of Austin*, 943 F.3d at 1002 (internal quotes and brackets omitted). Plaintiffs amply demonstrated that their self-censorship constitutes a First Amendment injury sufficient to give them standing (Doc. 23 at 4-12). Mau's connection to enforcement – he is the official charged with the duty to prosecute criminal violations in Hays County, where arrest for violating Chapter 423 has been threatened, *id.* at 10-11 – both reinforces Plaintiffs' standing and demonstrates that *Ex parte Young*'s requirements are satisfied.

CONCLUSION AND PRAYER

Defendant Mau is not entitled to dismissal on Eleventh Amendment immunity grounds because *Ex parte Young* applies and gives this Court jurisdiction. Plaintiffs thus pray that the Court deny Mau's Motion to Dismiss.

Dated: January 2, 2020.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of January, 2020, the foregoing was electronically filed with the Clerk of Court using the CM/ECT system, which will send notification of such filing to the following counsel of record:

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