

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA

ANNE WHITE HAT, RAMON MEJIA,
KAREN SAVAGE, SHARON LAVIGNE,
HARRY JOSEPH, KATHERINE
AASLESTAD, PETER AASLESTAD,
THEDA LARSON WRIGHT, ALBERTA
LARSON STEVENS, JUDITH LARSON
HERNANDEZ, RISE ST. JAMES, 350 NEW
ORLEANS, and LOUISIANA BUCKET
BRIGADE,

Plaintiffs,

v.

JEFF LANDRY, in his official capacity as
Attorney General of Louisiana, BO DUHE, in his
official capacity as District Attorney of the 16th
Judicial District Attorney's Office; RONALD J.
THERIOT, in his official capacity as Sheriff of
St. Martin Parish,

Defendants.

CIVIL ACTION

NO. 6:20-cv-983-RRS-CBW

JUDGE ROBERT R. SUMMERHAYS

**ATTORNEY GENERAL LANDRY'S OPPOSITION TO PLAINTIFFS'
MOTION TO RECONSIDER**

Plaintiffs move for reconsideration of Judge DeGravelle's Order (ECF 48) ("Dismissal Order") dismissing the Attorney General on the basis of sovereign immunity. But Plaintiffs simply rehash arguments that Judge DeGravelles expressly considered and rejected, without any explanation of how Judge DeGravelles erred. That Plaintiffs disagree with a prior ruling is no basis for reconsideration. *See Cook v. Flight Servs. & Sys., Inc.*, No. 16-15759, 2019 WL 2067640, at *2 (E.D. La. May 10, 2019) (explaining that Rule 54(b) does not require the Court to "rehash arguments it has already considered."). To prevent further vexatious motions and facilitate proper review of the Dismissal Order by the Fifth Circuit, the Attorney General respectfully suggests the Court

“expressly determine[] that there is no just reason for delay” and designate the Dismissal Order as a final judgment. *See* Fed. R. Civ. P. 54(b).

ARGUMENT

I. Plaintiffs’ claims against Attorney General Landry are barred by sovereign immunity.

Attorney General Landry is named as a defendant only in his official capacity. Compl. (ECF 1) ¶ 30. Such “a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official’s office.” *Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 71 (1989). “[I]t is no different from a suit against the State itself,” *id.*, and is thus barred by sovereign immunity. Louisiana has not waived its sovereign immunity, and the State’s immunity was not abrogated by Section 1983. *Champagne*, 188 F.3d at 314.

Plaintiffs thus implicitly invoke the exception set forth in *Ex Parte Young*, 209 U.S. 123, 155-56 (1908), which permits a federal court to provide prospective injunctive relief against state officials. That exception applies only to officials who have “some connection” with enforcement of the challenged statute. *Id.* at 157. An official’s general obligation to execute the State’s laws or represent the State in litigation is not enough to trigger the exception. *Id.* at 157. A court must therefore look to the official’s specific duties under state law. *Id.* at 160-61.¹

¹ A plurality of the en banc Fifth Circuit held that the *Ex Parte Young* exception requires a “close” or “special relation” to enforcement of the challenged statute. *Okpalobi v. Foster*, 244 F.3d 405, 413 (5th Cir. 2001) (quoting *Fitts v. McGee*, 172 U.S. 516, 529 (1899)). The same plurality also held that the exception “only applies when the named defendant state officials . . . threaten and are about to commence proceedings to enforce” the challenged statute. *Id.* at 416. A subsequent panel noted that, as a plurality opinion, the portion of *Okpalobi* that addresses the scope of *Ex Parte Young* is not binding precedent. *K.P. v. LeBlanc*, 627 F.3d 115, 124 (5th Cir. 2010). That panel declined to “resolve whether *Ex Parte Young* requires only ‘some connection’ or a special relationship’ between the state actor and the challenged statute.” *Id.* Another panel similarly declined to resolve “whether *Ex Parte Young* applies only when there is a threatened or actual proceeding to enforce the challenged state law.” *Air Evac EMS, Inc. v. Tex., Dep’t of Ins., Div. of Workers’ Comp.*, 851 F.3d 507, 520 (5th Cir. 2017). Under the limitations set forth in *Okpalobi*, Attorney General Landry is even more clearly not a proper defendant.

Plaintiffs plead no specific acts by Attorney General Landry, but point to Article 62 of the Louisiana Code of Criminal Procedure as providing the Attorney General with authority to “exercise[] supervision over all district attorneys in the state” and “institute a prosecution . . . for the assertion or protection of the rights and interests of the State.” Mem. (ECF 66-1) at 4; *see also* Compl. ¶ 30. Plaintiffs ignore the *constitutional* limitations on that statutory provision, *see Kemp v. Stanley*, 204 La. 110 (1943), despite those limitations being called to their attention by both the Attorney General and Judge DeGravelles. The Louisiana Constitution provides that “a district attorney . . . shall have charge of every criminal prosecution by the state in his district” La. Const. art. V Section 26(B). In contrast, the Attorney General’s authority “to institute, prosecute, or intervene in any criminal action” can be exercised only “for cause, when authorized by the court which would have original jurisdiction” over the prosecution. La. Const. art. IV Section 8.²

Plaintiffs do not plead any facts suggesting good cause for the Attorney General institute a prosecution against them, or that he has been authorized to do so by any court. *See also* Landry Dec. (ECF 30-2) ¶¶ 4-6. Certainly in the absence of such allegations, and because the Louisiana Constitution makes “any involvement the Attorney General might have in prosecuting cases under the statute . . . indirect and remote,” *Doe v. Jindal*, No. 11-554-BAJ-SCR, 2011 U.S. Dist. LEXIS 93094, at *8 (M.D. La. Aug. 19, 2011) (quoting *Entm’t Software Ass’n v. Foti*, 451 F. Supp. 2d 823, 828

² In *Kemp v. Stanley*, 204 La. 110 (1943), the Louisiana Supreme Court construed essentially identical provisions in Article VII Section 56 of the Louisiana Constitution of 1921. Exhs. 6-8. In that case, the Attorney General contended he had the power to supersede a district attorney in a criminal proceeding and that, by statute, the exercise of his discretion in doing so could not be inquired into by the courts. 204 La. at 118-19. The Louisiana Supreme Court disagreed, holding that the Attorney General could not arbitrarily supersede a district attorney. *Id.* at 121. Rather, for the Attorney General to do so, there must be evidence in the record “to show that the District Attorney has failed or neglected or will fail or neglect to perform the duties imposed upon him by law or . . . fail to assert and protect the rights and interests of the State.” *Id.* The Court reached that conclusion despite the absence of the “for cause” limitation found in the current Louisiana Constitution.

(M.D. La. 2006)), Attorney General Landry was properly dismissed as a party-defendant. Nothing in Plaintiffs' proposed supplemental complaint changes that conclusion. *See Opp.* (ECF 46) at 6.

II. Judge DeGravelles correctly held that Plaintiffs allegations are insufficient to trigger the *Ex Parte Young* exception.

The Dismissal Order cited and quoted from Supreme Court and Fifth Circuit cases making clear that some enforcement *by the defendant* is required to trigger the *Ex Parte Young* exception, and agreed with the analysis set forth above:

Defendants argue that because the Attorney General is sued in his official capacity and Louisiana has not waived sovereign immunity, the only manner in which Plaintiffs may seek prospective injunctive relief against an official is under *Ex Parte Young*. Plaintiffs respond that they have alleged sufficient facts to show the *Ex Parte Young* exception applies to the Attorney General. The Court agrees with Defendants.

* * * * *

[F]or the *Ex Parte Young* doctrine to apply, the official must have “some connection” to the enforcement of the act at issue. *Ex Parte Young*, 209 U.S. 123, 157 (1908) (“[I]t is plain that such officer must have some connection with the enforcement of the act.”); *City of Austin v. Paxton*, 943 F.3d 993, 1002 (5th Cir. 2019) (“[W]e recognize that this circuit’s caselaw requires some scintilla of ‘enforcement’ by the relevant state official with respect to the challenged law.”). Therefore, “[w]hile enforcement power may be ‘found implicitly’ in state law other than the challenged statute, it may not be implied from the Attorney General’s general duty to faithfully execute state law.” *Entm’t Software Ass’n v. Foti*, 451 F. Supp. 2d 823, 827 (M.D. La.

* * * * *

Plaintiffs argue that the as the “chief legal officer” of Louisiana, the Attorney General has the “authority to advise and assist in the prosecution of any criminal case at the request of district attorneys in the state, and to institute, prosecute, or intervene in any criminal action or proceeding, or supersede any attorney representing the state in any civil or criminal action, for cause and with judicial authorization.” (Doc. 34 at 4-5.) The Attorney General argues that his authority to prosecute criminal cases is limited by the terms of article IV Section 8 of the Louisiana Constitution. The Court agrees with the Attorney General.

* * * * *

The Court agrees that absent some showing that the Attorney General has been asked to assist in the criminal prosecution of the Statute, or has instituted, prosecuted, or intervened for cause when authorized by a court having original jurisdiction over the criminal prosecution, the general obligation of the Attorney General as the chief legal officer of Louisiana in prosecuting cases under the statute is indirect and remote. Therefore, the Court finds that because Plaintiffs have not alleged sufficient facts to show that the Attorney General has more than a scintilla of a connection with the enforcement of or prosecution under La. R.S. 14:61, the

Attorney General is not a proper defendant under the *Ex Parte Young* exception to sovereign immunity.

Dismissal Order at 20-23.

Plaintiffs' motion for reconsideration simply rehashes the arguments Judge DeGravelles rejected without any explanation as to why Judge DeGravelles was wrong. Plaintiffs couldn't even bother to respond to the controlling Supreme Court and Fifth Circuit authority Judge DeGravelles identified. Indeed, Plaintiffs instead – literally and vexatiously – copied their prior argument regarding *In re Abbott*, 956 F.3d 696 (5th Cir. 2020) (“*Abbott IP*”). *Compare* Mem. at 4-5 *with* Reply (ECF 61) at 8-9. But far from helping Plaintiffs, *Abbott II* makes clear that an attorney general's contingent authority to enforce criminal statutes is — absent an actual threat of enforcement by that attorney general — insufficient to overcome sovereign immunity. *Abbott II*, 956 F.3d at 709.

III. That the Attorney General is tasked with providing counsel or representation to State agencies does not trigger the *Ex Parte Young* exception.

Plaintiffs' attempt to bolster their position by noting that the Attorney General is tasked – in some cases discretionarily – with providing counsel or representation to certain State agencies.

Plaintiffs point to three statutes:

- La. R.S. 29:725.1, which provides that “[t]he attorney general shall be the legal advisor to the Governor's Office of Homeland Security and Emergency Preparedness and, except as otherwise provided by law, shall counsel and advise the office and shall represent it in any and all matters when called upon to do so.”
- La. R.S. 8:306, which provides, *inter alia*, that “the protection of unmarked human burial sites has been entrusted to the Louisiana Division of Archaeology and the attorney general” and “the attorney general *may* represent the board or the Louisiana Division of Archaeology in any action filed pursuant to Subsection B of this Section.” (emphasis added).
- La. R.S. 8:69, which provides, *inter alia*, that “[t]he attorney general shall represent the board in all matters pertaining to the administration or enforcement of this Title, or both, *except in those matters in which the board has employed special counsel.*” (emphasis added).

Mem. at 4-5. None of those statutes are challenged. That the Attorney General may provide counsel or advice in connection with *other* statutes is insufficient to trigger the *Ex Parte Young* exception to sovereign immunity. See *Abbott II*, 956 F.3d at 709. Indeed, “[i]f the official sued is not statutorily tasked with enforcing ***the challenged law***, then the requisite connection is absent and [the Court’s *Ex Parte*] *Young* analysis ends.” *Id* (emphasis added).³

CONCLUSION

A key aspect of sovereign immunity is freedom from suit. Plaintiffs nevertheless are forcing the Attorney General -- and this Court -- to respond to a mere rehash of soundly-rejected arguments. Plaintiffs’ Motion for Reconsideration should be denied. To prevent further vexatious motions and to facilitate proper review of the Dismissal Order by the Fifth Circuit, the Attorney General respectfully suggests the Court “expressly determine[] that there is no just reason for delay” and designate the Dismissal Order as a final judgment. Fed. R. Civ. P. 54(b); *Johnson v. Ocwen Loan Serv.*, 916 F.3d 505, 509 (5th Cir. 2019). Plaintiffs can then timely appeal if they desire to do so.⁴

³ As the Attorney General previously explained, there are cases in which he has been dismissed as a proper defendant but continued to defend . Likewise, Judge DeGravelles:

Plaintiffs’ argument that the Attorney General is a proper defendant under *Ex Parte Young* because he has previously intervened in actions to defend the constitutionality of a state law in a civil suit, conflates the broad authority of the attorney general of the state of Louisiana “to institute, prosecute, or intervene in any civil action or proceeding” and the duty to defend the constitutionality of a state law, with the more limited authority that the attorney general has in a criminal proceeding. The relevant inquiry under *Ex Parte Young* is not whether the attorney general can intervene in this civil proceeding but rather whether the attorney general has a connection to the enforcement of the statute.

Dismissal Order at 23 n.1

⁴ To the extent the Court grants reconsideration, it should consider the portions of Attorney General Landry’s Motion to Dismiss (ECF 30) that were not reached by Judge DeGravelles, especially arguments that go to the Court’s subject matter jurisdiction. Judge DeGravelles presumably did not reach those arguments once he determined that the Attorney General was entitled to dismissal on the basis of sovereign immunity.

Dated: September 17, 2020

JEFF LANDRY
ATTORNEY GENERAL

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CERTIFICATE OF SERVICE

I hereby certify that, on this date, I am causing the foregoing document to be filed using the CM/ECF system, which will send notification of such filing to all CM/ECF participating attorneys.

This the 17th day of September 2020.

/s/ Elizabeth B. Murrill

Counsel for Attorney General Jeff Landry