

**UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA**

ANNE WHITE HAT, RAMON MEJÍA, 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,

Civil Action No. 6:20-cv-00983

JUDGE ROBERT R. SUMMERHAYS

v.

JEFF LANDRY, in his official capacity as Attorney General of Louisiana; BO DUHÉ, 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.

MAGISTRATE JUDGE
CAROL B. WHITEHURST

**PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION TO RECONSIDER
RULING DISMISSING CLAIMS AGAINST ATTORNEY GENERAL**

Contrary to the Attorney General's mischaracterizations of their Motion to Reconsider, Plaintiffs bring to this Court's attention aspects of the Louisiana Attorney General's authority that have not been explicitly considered in the cases cited by the Court in its ruling on the motion to dismiss nor by the Attorney General. The Motion to Reconsider is not simply a rehash of Plaintiffs' briefing in opposition to the Motions to Dismiss. Dkt. 34.¹

¹ Plaintiffs' opposition to Defendants' motion to dismiss is incorporated by reference. Defendants also suggest that Plaintiffs' Motion to Reconsider is vexatious because Plaintiffs reiterated their arguments concerning the Attorney General as a proper party in this case from their Reply Memorandum in Support of Their Motion for Leave to Supplement the Complaint. Dkt. 61. The two motions seek different forms of relief and one cannot stand in for the other. The same factors were relevant and necessary to respond to arguments made again by the Attorney General in his opposition to the Motion for Leave to Supplement the Complaint. Plaintiffs had to clarify the procedural posture and legal issues that remained in relation to that motion after Judge DeGravelles granted in part and denied in part the Defendants' motions to dismiss. The same legal and factual arguments as to the Attorney General raised in that briefing are relevant to this Motion to Reconsider.

In particular,

1) Plaintiffs point out key distinctions between the scope of enforcement authority bestowed on the Louisiana Attorney General as compared to the Texas Attorney General, which was the subject of inquiry in *In re Abbott*, 956 F.3d 696 (5th Cir.2020), a case revised on April 5, 2020, and which was not mentioned in the Court’s ruling. The Texas Attorney General was also the focus of concern in *City of Austin v. Paxton*, 943 F.3d 993 (5th Cir. 2019) which was cited by the Court in its ruling. Ruling and Order, dkt. 48 at 20.

Plaintiffs point out in this motion that the Texas Attorney General’s enforcement authority is more circumscribed than that of the Louisiana Attorney General.

2) One of the ways in which the scopes of enforcement authority differ is that the Louisiana Attorney General “*shall* exercise supervision over all district attorneys in the state.” La.C.Cr.P. Art. 62(A) (emphasis added); and, “[s]ubject to the supervision of the attorney general, as provided in Article 62, the district attorney has entire charge and control of every criminal prosecution instituted or pending in his district, and determines whom, when, and how he shall prosecute.” La.C.Cr.P. Art. 61. The Texas Attorney General does not have supervisory authority over district attorneys in Texas. Dkt. 66-1 at

None of the cases cited in the Court’s ruling address this statutory obligation.² The point is important because if the Attorney General must exercise supervision over district attorneys, the Attorney General can instruct – and supervise – such officials throughout the State as to the

² This provision was not discussed in *Entm’t Software Ass’n v. Foti*, 451 F. Supp. 2d 823 (M.D. La. 2006), *Doe v. Jindal*, No. CIV.A. 11-554-BAJ, 2011 WL 366449 (M.D. La. 2011), or *Robicheaux v. Caldwell*, 986 F. Supp. 2d 749 (E.D. La. 2013) – the cases cited by the Court in its ruling which deal with the question of whether the Attorney General was a proper party.

unconstitutionality of the Statute challenged in this matter and thus has a role to play in the enforcement of it.

Contrary to the Attorney General's suggestion, Plaintiffs do not ignore the constitutional limitations on the statutory provision. The scope of authority for district attorneys is repeated almost verbatim in Art. 61 and La. Const. Art. V, sec. 26(B). And Plaintiffs quoted the constitutional scope of the Attorney General's authority contained in La. Const. Art. IV, sec. 8, in their original briefing in opposition to the motion to dismiss, dkt. 34 at 4-5, and again in this Motion to Reconsider, dkt. 66-1 at 4.

The two provisions are not in conflict. The fact that the Attorney General *shall* exercise supervision over district attorneys does not negate the fact that the Attorney General may only step in to institute, prosecute, or intervene any specific criminal proceeding for cause and with judicial authorization, or advise and assist criminal proceedings upon request of a district attorney.

3) In his opposition brief, dkt. 70 n. 1, the Attorney General discusses *Okpalobi v. Foster*, 244 F.3d 405, 413 (5th Cir. 2001), arguing that the plurality opinion suggests that the *Ex Parte Young* bar should be even higher for the Attorney General to be a proper party. But that case is not at all on point or binding precedent. As Plaintiffs discussed in their opposition to the Motion to Dismiss, dkt. 34 n. 5, that case involved a law that created a private right of action for patients against abortion providers. Suing the Attorney General would not have afforded plaintiffs relief against private actions. Here, the Attorney General can prosecute violations of the law in some circumstances and has supervisory authority over district attorneys in the state who are charged with prosecuting alleged violations of the Statute – one of whom is already tasked with deciding whether to prosecute three of the Plaintiffs in this case. In any event, a

number of courts have declined to follow *Okpalobi's* analysis. *See Bailey v. Bd. of Commissioners of Louisiana Stadium & Exposition Dist.*, 441 F.Supp.3d 321, 336 (E.D. La. 2020) (collecting cases).

4) In his opposition brief, the Attorney General also cites to *Kemp v. Stanley*, 204 La. 110 (1943) which dealt with a situation where the Attorney General asserted he had power to supersede a district attorney in a criminal proceeding without any oversight by the courts. The case is inapposite as Plaintiffs have never suggested the Attorney General has unfettered authority to institute criminal proceedings or supersede a district attorney.

5) Finally, Plaintiffs bring to the Court's attention two other connections the Attorney General has to the enforcement and application of the law challenged here: First, his role as legal advisor to the Governor's Office of Homeland Security and Emergency Preparedness, which has the authority and mandate to protect critical infrastructure against threats; and second, his role in representing the Louisiana Cemetery Board in all matters relating to the administration and enforcement of the law relating to cemeteries and the protection of unmarked burial sites, as discussed more fully in Plaintiffs' Motion to Reconsider and Memorandum in Support.³ These responsibilities give the Attorney General even more connection to the application of the law. *See Bailey, supra* at 338 (holding that chair of Board of Commissioners was a proper party even though he was only one of seven commission members and could not unilaterally ensure compliance with the law, noting that he had "definite responsibilities relating to the application of the challenged statute") citing *K.P. v. LeBlanc*, 627 F.3d 115, 125 (5th Cir.2010).

³ The relevance of his role regarding the Cemetery Board and unmarked burial sites is also discussed more fully in Plaintiffs' Motion for Leave to File Supplemental Complaint and Reply Brief, dks. 45 and 61.

Judge DeGravelles’ opinion cited *City of Austin v. Paxton*, 943 F.3d at 1002 recognizing Fifth Circuit case law requiring “some scintilla” of enforcement power with respect to a challenged statute. Judge DeGravelles then ruled that “Plaintiffs have not alleged sufficient facts to show the Attorney General has *more than a scintilla* of a connection with the enforcement of or prosecution under La. R.S. 14:1.” Ruling and Order, p. 20, 22-23 (emphasis added). In either case, the Attorney General has more than sufficient connection, more than a scintilla of enforcement authority, to the Statute at issue here.

CONCLUSION

The challenged dismissal order wrongly concluded that the Attorney General does not have “more than a scintilla” of a connection with the application of the law challenged in this matter. The law and the facts in this matter say otherwise. The claims against him should be reinstated.

Date: October 1, 2020
Lafayette, Louisiana

Respectfully submitted,

s/Pamela C. Spees
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CERTIFICATE OF SERVICE

I hereby certify that on October 1, 2020, a copy of the foregoing was filed with the Clerk of Court by using the CM/ECF system which will send a notice of electronic filing to all counsel of record unless indicated otherwise.

s/Pamela C. Spees
Pamela C. Spees