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**OPINION OF THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT
(NOVEMBER 22, 2019)**

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

TERESA ANN WATERS,

Plaintiff-Appellant,

v.

TEXAS ATTORNEY GENERAL, in their Official
Capacity; HARRIS COUNTY DISTRICT
ATTORNEY'S OFFICE, in their Official Capacity;
TEXAS DEPARTMENT OF PUBLIC SAFETY,
in their Official Capacity; TEXAS DEPARTMENT
OF STATE HEALTH SERVICES, c/o Ken Paxton,
in their Official Capacity; JOHN HELLERSTEDT,
in his Official Capacity; STEVE MCCRAW,
in his Official Capacity; KIM OGG,
in her Official Capacity; KEN PAXTON,

Defendants-Appellees.

No. 19-20414

Appeal from the United States United States
District Court for the Southern District of Texas
USDC No. 4:18-CV-2857

Before: HIGGINBOTHAM, HO,
and ENGELHARDT, Circuit Judges.

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PER CURIAM:*

AFFIRMED. *See* Fifth Cir. R. 47.6.

* Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4

**ORDER OF THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF TEXAS
(JUNE 4, 2019)**

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS,
HOUSTON DIVISON

TERESA ANN WATERS,

Plaintiff,

v.

TEXAS ATTORNEY GENERAL'S OFFICE,
HARRIS COUNTY DISTRICT ATTORNEY'S OFFICE,
TEXAS DEPARTMENT OF PUBLIC SAFETY,
TEXAS DEPARTMENT OF STATE HEALTH
SERVICES, KEN PAXTON, JOHN HELLERSTEDT,
STEVE MCCRAW, and KIM OGG,

Defendants.

Civil Action No. H-18-2857

Before: Ewing WERLEIN, JR.
United States District Judge.

Pending is Defendants Ken Paxton, John Hellerstedt, and Steve McCraw's Motion to Dismiss Plaintiff's First Amended Complaint (Document No. 22). After carefully considering the motion, response, and applicable law, the Court concludes as follows.

Pro se Plaintiff Teresa Ann Waters is a registered sex offender under the Texas Penal Code¹. Plaintiff filed suit against Texas Attorney General Ken Paxton, Commissioner of the Texas Department of State Health Services John Hellerstedt, and Director of the Texas Department of Public Safety Steve McCraw, in their official capacities, alleging that her rights to due process and equal protection under the Fourteenth Amendment are being violated by her classification as a Tier III sex offender, a designation which requires lifetime registration² Plaintiff believes her proper classification should be a Tier I sex offender, such that she now may be eligible for early termination of her registration requirement.³ Plaintiff seeks “equitable, declaratory, and injunctive relief that removes all barriers to Plaintiff being deregistered as a Tier I sex Offender.”⁴ Defendants move to dismiss her claims on the basis of Eleventh Amendment immunity and for failure to state a claim.⁵

Although Defendants style their challenge as one for failure to state a claim under Fed. R. Civ. P. 12(b)(6), their primary arguments implicate the Court’s subject-matter jurisdiction. The burden of establishing subject-matter jurisdiction is on the party seeking to

¹ Document No 21, Ex. A (Compl.).

² *Id.* at 3-4

³ *Id.*

⁴ *Id.* at 14

⁵ Document No, 22. Defendants also argue that based on her offense and applicable law, Plaintiff is classified correctly as a Tier III sex offender. However, this legal argument is not a proper subject of consideration on a Rule 12(b)(6) motion to dismiss.

invoke it. *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001). A claim is “properly dismissed for lack of subject-matter jurisdiction when the court lacks the statutory or constitutional power to adjudicate” the claim. *Home Builders Ass’n. Inc. v. City of Madison*, 143 F.3d 2006, 1010 [5th Cir. 1998] [internal citation omitted]. “Federal courts are without jurisdiction over suits against a state, a state agency, or a state official in his official capacity unless that state has waived its sovereign immunity or Congress has clearly abrogated it.” *NiGen Biotech, L.L.C. v. Paxton*, 804 F.3d 389, 393-94 (5th Cir. 2015). “Texas has not consented by statute, and § 1983 does not abrogate state sovereign immunity.” *Id.* at 394. However, claims against state officials in their official capacities are not categorically barred because “[a] suit is not ‘against’ a state . . . when it seeks prospective, injunctive relief from a state actor . . . based on an alleged ongoing violation of the federal constitution.” *NiGen Biotech, L.L.C.*, 804 F.3d at 394 (citation omitted). “Under the doctrine articulated in *Ex parte Young*, [28 S.Ct. 441 (1908)], a state official attempting to enforce an unconstitutional law ‘is stripped of his official clothing and becomes a private person subject to suit.’” *Id.* [citation omitted]. To determine whether a suit falls into the narrow exception drawn by *Ex parte Young*, “a court need only conduct a straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.” *Va. Office for Prot. & Advocacy v. Stewart*, 131 S.Ct. 1632, 1639 (2011).

“In circumstances where ‘the defendant’s challenge to the court’s jurisdiction is also a challenge to the existence of a federal cause of action, the proper course

tion Clause of the Fourteenth Amendment.⁶ Plaintiff describes various conditions of the Tier III sex offender classification as depriving her of her “liberty to be without [these] restrictions” without due process.⁷ She also alleges denial of “equal protection” because she believes she is similarly situated with Tier I sex offenders and yet is being treated as a Tier III sex offender.⁸

These allegations fail to state a claim for violation of either the Due Process or Equal Protection Clause of the Fourteenth Amendment. With regard to Plaintiff’s due process claim, as Defendant argues, Plaintiff “fails to delineate what process she is allegedly being denied.”⁹ Attached to Plaintiff’s complaint is a letter from the Texas Department of State Health Services that states that the Texas Council on Sex Offender Treatment reviewed her application for early termination of her registration requirement and denied it based on her offense, which under both state and federal law does not qualify for deregistration.¹⁰ Assuming *arguendo* that the restrictions Plaintiff lists deprive her of a liberty interest, such restrictions flow from her adjudication for aggravated sexual assault of a child, and she fails to allege any process that she has been denied in connection with that adjudication or her designation as a Tier III sex offender. Accordingly, Plaintiff has not stated a claim for violation of her

⁶ Document No. 21 at 3-4

⁷ *Id.*

⁸ *Id.*

⁹ Document No. 22 at 2

¹⁰ Document No. 21-1 at 2 of 5.

due process rights. See *Connecticut Dep't of Pub. Safety v. Doe*, 123 S.Ct. 1160, 1165 (2003) (finding that because “the [Connecticut sex offender] law’s requirements turn on an offender’s conviction alone—a fact that a convicted offender has already had a procedurally safeguarded opportunity to contest [.]” no further due process was required); *id.* (Scalia, J., concurring) (“[E]ven if the requirements of Connecticut’s sex offender registration law implicate a liberty interest of respondents, the categorical abrogation of that liberty interest by a validly enacted statute suffices to provide all the process that is ‘due’—just as a state law providing that no one under the age of 16 may operate a motor vehicle suffices to abrogate that liberty interest.”); *Meza v. Livingston*, 607 F.3d 392, 401 (5th Cir. 2010) (“When an individual is convicted of a sex offense, no further process is due before imposing sex offender conditions.”); *Hollier v. Watson*, 605 F. App’x 255, 258 (5th Cir. 2015) (“Both the United States Supreme Court, and this court, have held that sex offender registration statutes do not violate a citizen’s right to due process.”).

Plaintiff’s equal-protection claim fails because she did not sufficiently allege that she has been treated differently from others similarly situated. To state a claim for a violation of equal protection as a “class of one,” a plaintiff must show that “(1) he or she was intentionally treated differently from others similarly situated and (2) there was no rational basis for the difference in treatment.” *Lindquist v. City of Pasadena Texas*, 669 F.3d 225, 233 (5th Cir. 2012) (citing *Vill. of Willowbrook v. Olech*, 120 S.Ct. 1073, 1074 (2000)). Plaintiff’s complaint generally alleges that Tier I sex offenders are similarly situated to her and treated

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differently but she points to no specific person or persons let alone anyone adjudicated for her particular offense who is classified differently than Plaintiff and/or subject to different restrictions. Thus, she fails to state a claim. *See Rountree v. Dyson*, 892 F.3d 681. 685 (5th Cir. 2018) (affirming dismissal of a plaintiff's equal protection claim for failure to state a claim because the plaintiff "generally alleges that other similarly situated individuals were treated differently, but he points to no specific person or persons and provides no specifics").¹¹ Accordingly, it is

ORDERED that Defendants Paxton, Hellerstedt, and McCraw's Motion to Dismiss (Document No. 22) is GRANTED pursuant to Fed. R. Civ. P. 12(b)(6) and Plaintiff's remaining claims against Ken Paxton, John Hellerstedt, and Steven McCraw for declaratory and injunctive relief are DISMISSED for failure to state a claim.

A Final Judgment will be entered separately.

The Clerk will enter this Order, providing a correct copy to all counsel of record.

SIGNED at Houston, Texas, on this day 4th day of June, 2019.

/s/ Ewing Werlein, Jr.
United States District Judge

¹¹ Plaintiff also references a challenge to the facial constitutionality of the Texas sex offender statute in a single, conclusory sentence. *See* Document No. 21 at 5. Plaintiff offers no explanation as to why such law is unconstitutional and this sentence is insufficient to delineate a claim independent from the constitutional violations she alleges against the named Defendants.

**FINAL JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF TEXAS
(JUNE 4, 2019)**

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS,
HOUSTON DIVISION

TERESA ANN WATERS,

Plaintiff,

v.

TEXAS ATTORNEY GENERAL'S OFFICE,
HARRIS COUNTY DISTRICT ATTORNEY'S
OFFICE, TEXAS DEPARTMENT OF PUBLIC
SAFETY, TEXAS DEPARTMENT OF STATE
HEALTH SERVICES, KEN PAXTON,
JOHN HELLERSTEDT, STEVE MCCRAW,
and KIM OGG,

Defendants.

Civil Action No. H-18-2857

Before: Ewing WERLEIN, JR.
United States District Judge.

For the reasons set forth in the Order entered
March 22, 2019, and in the separate order signed this
day, it is

ORDERED and ADJUDGED that Plaintiff Teresa Ann Waters shall take nothing in her action against Defendants. Plaintiff's claims are dismissed as follows: Plaintiff's claims against Defendants Texas Attorney General's Officer Harris County District Attorney's Office, Texas Department of Public Safety, and Texas Department of State Health Services as well as Plaintiff's claims for money damages against Ken Paxton, John Hellerstedt, Steve McCraw, and Kim Ogg are DISMISSED for lack of jurisdiction. Plaintiff's claims against Ken Paxton, John Hellerstedt, Steve McCraw, and Kim Ogg for declaratory and injunctive relief are DISMISSED for failure to state a claim.

This is a FINAL JUDGMENT.

The Clerk will enter this Order, providing a correct copy to all counsel of record.

SIGNED in Houston, Texas, on this 4th day of June, 2019.

/s/ Ewing Werlein, Jr.
United States District Judge