UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-50646

CITY OF AUSTIN,

Plaintiff - Appellee

v.

KEN PAXTON, Attorney General of the State of Texas; TEXAS WORKFORCE COMMISSION,

Defendants - Appellants

Appeal from the United States District Court
for the Western District of Texas

(Filed Dec. 4, 2019)

Before: CLEMENT, ELROD, and DUNCAN, Circuit Judges.

EDITH BROWN CLEMENT, Circuit Judge.

The City of Austin enacted a housing ordinance that prohibits landlords from refusing tenants who wish to pay their rent with federal housing vouchers. Shortly thereafter, the State of Texas enacted a statute that sought to invalidate the City's ordinance and to allow landlords to continue to refuse federal vouchers. The City then sued Ken Paxton, the Texas Attorney

General, and the Texas Workforce Commission (together, the "State"), seeking to enjoin the Texas statute, alleging it was preempted by federal law. The State moved to dismiss the complaint for lack of jurisdiction based on standing and Eleventh Amendment sovereign immunity and for the City's failure to state any plausible claims. The district court denied the State's motion, holding that the City had standing, and that the City's suit could proceed against Attorney General Paxton and the Texas Workforce Commission under the *Ex parte Young* exception to sovereign immunity. The State then brought this interlocutory appeal with respect to the district court's sovereign-immunity holding only. Because Attorney General Paxton does not possess the requisite "connection to the enforcement" of the Texas statute to satisfy *Ex parte Young*, and because the Texas Workforce Commission is a state agency immune to suit, we REVERSE and REMAND to the district court.

I.

The Federal Housing Choice Voucher Program (the "voucher program" or the "program") allows low-income families to use federally-funded vouchers to access the private rental market. The United States Department of Housing and Urban Development ("HUD") funds the program, but state and local public-housing authorities administer it. A voucher recipient is responsible for finding a landlord that will accept federal housing vouchers. *See* 24 C.F.R. § 982.302(a).

In December 2014, the City adopted a housing ordinance (the "Ordinance"), that bars landlords from refusing to rent to tenants paying their rent with program vouchers. The City contends that the Ordinance helps to "remove barriers to fair housing choice by allowing voucher holders . . . [to rent] housing in higher opportunity neighborhoods in the City." The City asserts that enacting the Ordinance is part of its obligation under the voucher program's mandate: "[the program was created] [f]or the purpose of aiding low-income families in obtaining a decent place to live and of promoting economically mixed housing." 42 U.S.C. § 1437f(a).

In response to the Ordinance, the Texas legislature enacted Texas Local Government Code § 250.007 to prevent municipalities and counties from adopting ordinances that restrict landlords' rights to refuse to rent to voucher program participants. Section 250.007(a) bars municipalities or counties from "adopt[ing] or enforc[ing] an ordinance or regulation that prohibits [a landlord] . . . from refusing to lease or rent [a] housing accommodation to a person because the person's lawful source of income to pay rent includes funding from a federal housing assistance program." TEX. LOC. GOV'T CODE § 250.007(a). Section 250.007(c) permits municipalities and counties to create incentive and other programs that encourage landlords to allow federal housing vouchers. *Id.* § 250.007(c).

The City originally sued the State of Texas and Greg Abbott, the Governor of Texas, alleging that federal law preempts § 250.007 because § 250.007

"obstructs [Congress's] purposes and objectives" in creating the voucher program. The State of Texas moved to dismiss the proceeding for (i) lack of subject-matter jurisdiction based on standing and sovereign immunity, and (ii) the City's failure to state any plausible claims. The City then amended its complaint, replacing Governor Abbott with Ken Paxton, the Texas Attorney General, in his official capacity, and the Texas Workforce Commission.

The district court denied the State's motion to dismiss for lack of jurisdiction, rejecting the State's standing and sovereign-immunity arguments. The court dismissed the City's conflict-preemption claim and one of its express-preemption claims but denied the State's motion to dismiss the City's second express-preemption claim. The issue in this interlocutory appeal is whether Attorney General Paxton and the Texas Workforce Commission are subject to the *Ex parte Young* exception to Eleventh Amendment sovereign immunity.

II.

We review the district court's jurisdictional determination of sovereign immunity de novo. *NiGen Biotech, L.L.C. v. Paxton*, 804 F.3d 389, 393 (5th Cir. 2015); *Moore v. La. Bd. of Elementary & Secondary Educ.*, 743 F.3d 959, 962 (5th Cir. 2014).

III.

In most cases, Eleventh Amendment sovereign immunity bars private suits against nonconsenting states in federal court. *See Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 253 (2011) ("Sovereign immunity is the privilege of the sovereign not to be sued without its consent."); *see also Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 363 (2001) ("The ultimate guarantee of the Eleventh Amendment is that nonconsenting [s]tates may not be sued by private individuals in federal court."). The Supreme Court has recognized that sovereign immunity also prohibits suits against state officials or agencies that are effectively suits against a state. *See, e.g.*, *Edelman v. Jordan*, 415 U.S. 651, 663-69 (1974) (extending sovereign immunity to state officers in their official capacities); *Ford Motor Co. v. Dep't of Treas.*, 323 U.S. 459, 463-64 (1945) (barring suits in which the state is a real party in interest, despite not being a named defendant). In short, Eleventh Amendment immunity is not limited to cases in which states are named as defendants. So, unless the state has waived sovereign immunity or Congress has expressly abrogated it, the Eleventh Amendment bars the suit. *See AT&T Commc'ns v. Bellsouth Telecomms. Inc.*, 238 F.3d 636, 644-45 (5th Cir. 2001).

Enter the *Ex parte Young* exception to Eleventh Amendment sovereign immunity, which was established in its namesake case. *See* 209 U.S. 123 (1908). The *Young* exception is a legal fiction that allows private parties to bring "suits for injunctive or declaratory

relief against individual state officials acting in violation of federal law." *Raj v. La. State Univ.*, 714 F.3d 322, 328 (5th Cir. 2013). For the 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." *Young*, 209 U.S. at 157. The text of the challenged law need not actually state the official's duty to enforce it, although such a statement may make that duty clearer. *Id.*

The Supreme Court's recent *Ex parte Young* jurisprudence explains that the inquiry into whether a suit is subject to the *Young* exception does not require an analysis of the merits of the claim. *See Verizon Md., Inc. v. Pub. Serv. Comm'n*, 535 U.S. 635, 646 (2002). Rather, "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*, 563 U.S. at 255 (alteration in original) (quoting *Verizon*, 535 U.S. at 645).

It is undisputed that Texas has not consented to this suit and that Congress has not abrogated the State's immunity. The question, then, is whether the defendants are subject to suit under the *Ex parte Young* exception.

A. Ken Paxton, Texas Attorney General

We begin with whether the district court was correct in holding that Attorney General Paxton was subject to the *Young* exception. In conducting our *Ex parte Young* analysis, we first consider whether the plaintiff has named the proper defendant or defendants. Where a state actor or agency is statutorily tasked with enforcing the challenged law and a different official is the named defendant, our *Young* analysis ends. For example, in *Morris v. Livingston*, an inmate in the custody of the Texas Department of Criminal Justice ("TDCJ") sued the Governor of Texas, challenging the constitutionality of a statute that required TDCJ inmates to pay a "health care services fee" if an inmate initiated a visit to a health care provider. 739 F.3d 740, 742 (5th Cir. 2014). The statute specifically tasked the TDCJ as responsible for its enforcement. *Id.* at 745-46. Thus, a panel of this court held that the Governor was an improper defendant and upheld the district court's dismissal of the inmate's claims against him. *Id.* at 746 ("[The challenged statute] makes clear that TDCJ is the agency responsible for the section's administration and enforcement. . . . It does not [ ] task [the] Governor [ ] with its enforcement."). Where no state official or agency is named in the statute in question, we consider whether the state official actually has the authority to enforce the challenged law. Here, the State concedes in its brief that the Attorney General has the authority to enforce § 250.007: "[T]he Attorney General does have the power to enforce this provision [§ 250.007]."

Once it's clear that the named defendant is proper, our precedent directs us to read the language in *Young* and *Verizon* together. Such an approach results in two analyses that help us to determine whether the *Young* exception applies to the relevant state official. We conduct a *Verizon* "straightforward inquiry into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." 535 U.S. at 645. We also decide whether the official in question has a "sufficient connection [to] the enforcement" of the challenged act. *Young*, 209 U.S. at 157; *see Air Evac EMS, Inc. v. Tex., Dep't of Ins., Div. of Workers' Comp.*, 851 F.3d 507, 519 (5th Cir. 2017) ("First, as the district court noted, [plaintiff] claims an ongoing violation of federal law and seeks prospective relief. . . . Next, we hold state defendants have a sufficient connection to the enforcement of the [challenged law].").

The district court held that the "complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon*, 535 U.S. at 645. The court reasoned that the City's allegation that "§ 250.007 is invalid and preempted by federal law . . . qualifies as an ongoing violation of federal law for the purposes of *Ex parte Young.*" This court has previously held that an allegation in a plaintiff's complaint of federal preemption of the law at issue satisfies the *Verizon* standard for the purposes of the *Young* exception. *See Air Evac*, 851 F.3d at 519 (holding that because the complaint claimed federal law "expressly preempt[ed] the [challenged Texas law] and

[sought] an injunction and declaratory judgment," plaintiff claimed "an ongoing violation of federal law and [sought] prospective relief"); *see also Green Valley Special Util. Dist. v. Walker*, 324 F.R.D. 176, 182 (W.D. Tex. 2018). Thus, the district court was correct with respect to its *Verizon* analysis.

However, we next hold that the district court was incorrect in finding that Attorney General Paxton has a sufficient "connection to the enforcement" of § 250.007 to be subject to the *Ex parte Young* exception. What constitutes a sufficient "connection to [ ] enforcement" is not clear from our jurisprudence. In *Okpalobi v. Foster*, an en banc court deciding whether the Governor of Louisiana and Attorney General were entitled to Eleventh Amendment sovereign immunity examined the "connection" element of the "connection [to] the enforcement" language in *Young.* 244 F.3d 405, 410-24 (5th Cir. 2001) (plurality op.); *see Young*, 209 U.S. at 157. The *Okpalobi* plurality held that, for a state official to have the requisite "connection" to apply the *Young* exception, the official must have "the particular duty to enforce the statute in question and a demonstrated willingness to exercise that duty." *Okpalobi*, 244 F.3d at 416. (This same "connection" standard was also phrased in *Okpalobi* as requiring the state official in question to be "specially charged with the duty to enforce the statute" and "be threatening to exercise that duty." *Id.* at 414.)

But panels have recognized that this definition of "connection"—and the entire Eleventh Amendment sovereign immunity analysis in *Okpalobi*—may not be

binding precedent. In *K.P. v. LeBlanc*, 627 F.3d 115, 124 (5th Cir. 2010), a panel of this court "explicitly declin[ed] to follow" the *Okpalobi* "connection" standard because it was not "binding precedent." *Air Evac*, 851 F.3d at 518; *see K.P.*, 627 F.3d at 124 ("Defendants rely heavily on the lead opinion in *Okpalobi* for the proposition that a 'special' relationship—not just 'some connection'—needs to exist [between a state official and the challenged law to apply the *Young* exception]. Because that part of the en banc opinion did not garner majority support, the Eleventh Amendment analysis is not binding precedent." (citations omitted)). Further, the panel in *Air Evac EMS, Inc. v. Texas, Department of Insurance, Division of Workers' Compensation* noted *K.P.*'s holding regarding *Okpalobi*'s Eleventh Amendment analysis but declined to address whether it found that part of the opinion to be precedential. *See Air Evac*, 851 F.3d at 518 ("[T]he Eleventh Amendment analysis in *Okpalobi* . . . received support only from a plurality of our *en banc* court[ ] [and] the majority decided the case on standing. Subsequently, in *K.P.*, our court stated . . . [that] 'the Eleventh Amendment analysis [in *Okpalobi*] is not binding precedent.'" (citations omitted) (quoting *K.P.*, 627 F.3d at 124)). On the other hand, the panel in *Morris*, a published case, quoted the *Okpalobi* "connection" standard as the correct one in analyzing whether a suit against a state official can proceed pursuant to the *Young* exception: "The required 'connection' [to apply the *Ex parte Young* exception to a state official] is not 'merely the general duty to see that the laws of the state are implemented,' but 'the particular duty to enforce the

statute in question and a demonstrated willingness to exercise that duty.'" *Morris*, 739 F.3d at 746 (quoting *Okpalobi*, 244 F.3d at 416).

So, unsurprisingly, the parties devote much of their briefs to arguing over whether Attorney General Paxton has a sufficient "connection" to the enforcement of § 250.007 under the *Okpalobi* standard (reiterated in *Morris*, 739 F.3d at 746). However, in the same vein as panels before us, we find that we need not define the outer bounds of this circuit's *Ex parte Young* analysis today—i.e., whether Attorney General Paxton must have "the particular duty to enforce the statute in question and a demonstrated willingness to exercise that duty" to be subject to the exception. *Okpalobi*, 244 F.3d at 416; *see K.P.*, 627 F.3d at 124 ("We need not resolve whether *Ex parte Young* requires . . . a 'special relationship' between the state actor and the challenged statute."); *see also 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."). Instead, as explained below, we hold that Attorney General Paxton is not subject to the *Ex parte Young* exception because our *Young* caselaw requires a higher showing of "enforcement" than the City has proffered here.

Panels in this circuit have defined "enforcement" as "typically involv[ing] compulsion or constraint." *K.P.*, 627 F.3d at 124; *see Air Evac*, 851 F.3d at 519. The City contends that Paxton's "authority . . . constrain[s] the City's ability to enforce its ordinance, which is

sufficient to show that *Ex [p]arte Young's* exception applies." It claims that the Attorney General has a "habit of suing or intervening in litigation against the City" involving municipal ordinances and policies to "enforce the supremacy of state law."[1] The City supports its allegation that this "habit" exists by pointing to several recent lawsuits where Paxton intervened in matters related to municipal ordinances. The district court agreed with the City, holding that the Attorney General "possesses 'some connection' to the enforcement of the statute" because "*he might similarly* bring a proceeding to enforce the supremacy of § 250.007." (emphasis added). We disagree.

In *K.P.*, a panel of this court considered whether the Louisiana Patients' Compensation Fund Oversight Board (the "Board") had the requisite "connection [to] the enforcement" of a challenged statute that removed the medical malpractice cap for abortion providers. 627 F.3d at 119. The Board was charged with overseeing malpractice claims lodged against physicians enrolled in the Patient Compensation Fund, a program that capped physicians' liability in exchange for certain concessions. *Id.* The Board denied the plaintiffs coverage for an abortion-related malpractice claim, relying on the challenged statute. *Id.* Plaintiffs sued the

[1] Although the State concedes that Attorney General Paxton has the authority to enforce § 250.007, we recognize this is an odd type of enforcement authority. It appears § 250.007 would be enforced as a *defense* in a private suit brought by the City against a landlord refusing to abide by the Ordinance—and the Attorney General could intervene in such a suit to "enforce the supremacy of state law."

Board, alleging the abortion statute was unconstitutional, and the Board invoked Eleventh Amendment sovereign immunity. *Id.* at 120. The *K.P.* panel noted that the Board was required to differentiate allowed claims and those not allowed under the challenged abortion statute and, thus, took an "active role" in enforcing the statute. *Id.* at 125. In concluding the Board had the requisite enforcement authority as to the abortion statute under *Young*, the panel held that, "the Board's role starts with deciding whether to have a medical review panel consider abortion claims and ends with deciding whether to pay them." *Id.*

In *Air Evac*, an air-ambulance company alleged that a state workers' compensation statute that set the maximum allowable reimbursement amount for medical services was preempted by federal law. 851 F.3d at 510-13. The air-ambulance company sought to employ the *Ex parte Young* exception to sue the Texas Commissioner of Insurance and the Texas Commissioner of Workers' Compensation. *Id.* The state officials in question engaged in "rate-setting" under the workers' compensation statute and oversaw the initial arbitration process for provider-insurer fee disputes. *Id.* Relying on *K.P.*'s definition of enforcement as "compulsion or constraint," the panel in *Air Evac* held that the state officials were subject to the *Young* exception because they "constrain[ed] [the air-ambulance company's] ability to collect more than the maximum-reimbursement rate under the [workers' compensation statute] . . . [and thus,] effectively ensur[ed] the maximum-reimbursement scheme [was] enforced from start to

finish." *Id.* at 519 (emphasis omitted). Importantly, the *Air Evac* panel noted that *direct* enforcement of the challenged law was not required: actions that constrained the plaintiffs were sufficient to apply the *Young* exception to the *Air Evac* officials under this court's *K.P.* holding. *Id.*

Likewise, in *NiGen Biotech, L.L.C. v. Paxton*, this court considered whether *Ex parte Young* could apply to Attorney General Paxton where he continuously refused to justify numerous "threatening letters" from his office to a manufacturer and distributor of dietary supplements and its retailers alleging that the manufacturer's packaging was in violation of the Texas Deceptive Trade Practices Act ("DTPA"). 804 F.3d at 392-95. There, the court did not explicitly examine Paxton's "connection to the enforcement" of the DTPA. *Id.* But the fact that Paxton sent letters threatening enforcement of the DTPA makes it clear that he had not only the authority to enforce the DTPA, but was also constraining the manufacturer's activities, in that it faced possible prosecution if it continued to make and distribute its products.[2]

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[2] *NiGen* focused on whether the manufacturer's complaint alleged an ongoing violation of federal law for the purposes of the *Young* exception. 804 F.3d at 392-95. It did: (i) the manufacturer alleged the Attorney General was unconstitutionally restraining its commercial speech and punishing it without due process by sending the threatening letters, and (ii) the Attorney General was *violating* federal law because of his "continued refusal (now after nearly four years) to justify [his] threatening letters." *Id.* at 395.

In *K.P., Air Evac*, and *NiGen*, the panels pointed to specific enforcement actions of the respective defendant state officials warranting the application of the *Young* exception: (i) prohibiting payment of claims under the abortion statute in *K.P.*, (ii) rate-setting in *Air Evac*, and (iii) sending letters threatening formal enforcement of the DTPA in *NiGen.* Here, the City has made no such showing with respect to the Attorney General's enforcement of § 250.007. Namely, none of the cases the City cites to demonstrate the Attorney General's "habit" of intervening in suits involving municipal ordinances to "enforce the supremacy of state law" have any overlapping facts with this case or are even remotely related to the Ordinance. And the mere fact that the Attorney General *has* the authority to enforce § 250.007 cannot be said to "constrain" the City from enforcing the Ordinance. The City simply provides no evidence that the Attorney General may "similarly bring a proceeding" to enforce § 250.007: that he has chosen to intervene to defend *different* statutes under *different* circumstances does not show that he is likely to do the same here. Further, we note that the City faces no consequences if it attempts to enforce its Ordinance. Contrary to what the City argues, this is not a case akin to *Steffel v. Thompson*, because the City faces no threat of criminal prosecution like the plaintiff there. *See* 415 U.S. 452, 475 (1974) (holding that "federal declaratory relief is not precluded when no state prosecution is pending and a federal plaintiff demonstrates a genuine threat of enforcement of a disputed state [] statute"). Thus, we find that Attorney General Paxton lacks the requisite "connection to the

enforcement" of § 250.007. And although we don't opine on the *Okpalobi* "connection" standard, we recognize that this circuit's caselaw requires some scintilla of "enforcement" by the relevant state official with respect to the challenged law. We see no "compulsion or constraint" on the part of the Attorney General here. Accordingly, the City's suit against Attorney General Paxton is barred by Eleventh Amendment sovereign immunity.

We also recognize that our standing jurisprudence bolsters this conclusion. This court has acknowledged that our Article III standing analysis and *Ex parte Young* analysis "significantly overlap." *Air Evac*, 851 F.3d at 520. Generally, to have standing to sue under Article III, a plaintiff must allege: (i) an injury-in-fact that is (ii) fairly traceable to the defendant's challenged action and (iii) redressable by a favorable outcome. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 411 (2013); *see Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (noting that an injury-in-fact must be "(a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical"). A plaintiff "can meet the standing requirements when suit is brought under the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02, by establishing actual present harm or a *significant possibility of future harm.*" *Roark & Hardee LP v. City of Austin*, 522 F.3d 533, 542 (5th Cir. 2008) (emphasis added) (quoting *Bauer v. Texas*, 341 F.3d 352, 357-58 (5th Cir. 2003)).

In fact, it may be the case that an official's "connection to [] enforcement" is satisfied when standing

has been established. *See Russell v. Lundergan-Grimes*, 784 F.3d 1037, 1047 (6th Cir. 2015) ("[A]t the point that a threatened injury becomes sufficiently imminent and particularized to confer Article III standing, that threat of enforcement also becomes sufficient to satisfy [the connection to the enforcement] element of *Ex parte Young*."). That is, because it's been determined that an official can act, and there's a significant possibility that he or she will act to harm a plaintiff, the official has engaged in enough "compulsion or constraint" to apply the *Young* exception. And even if Article III standing's requirement of a "significant possibility of future harm" and the "connection to [] enforcement" requirement under our precedent are not identical, there are certainly notable similarities between the two. At the minimum, our caselaw shows that a finding of standing tends toward a finding that the *Young* exception applies to the state official(s) in question. *See, e.g.*, *K.P.*, 627 F.3d at 122 (addressing standing in an appeal of dismissal based on *Ex parte Young* because "there exists a significant question about it" despite "neither party [] rais[ing] the issue," and finding that: (i) standing existed and (ii) the *Young* exception applied to the relevant state officials).

The district court held that the City had standing to sue the Attorney General. We note that it's unlikely the City had standing.[3] The City fails to show how the

[3] Although we decline to do so today, courts in this circuit have considered standing on interlocutory appeal in the past. For example, this court has recognized that a review of standing in the context of a Rule 23(f) class certification interlocutory appeal

Attorney General's past interventions in suits involving municipal ordinances demonstrate that there is "a significant possibility" that the Attorney General will inflict "future harm" by acting to enforce "the supremacy of [§ 250.007]" over the Ordinance.

B. Texas Workforce Commission

We next consider whether the district court correctly found that the Texas Workforce Commission was subject to the *Ex parte Young* exception. The State contends that the court erred in exercising jurisdiction over the Commission because state agencies are not subject to the exception.[4]

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is appropriate in some instances. *See Bertulli v. Indep. Ass'n of Cont'l Pilots*, 242 F.3d 290, 294 (5th Cir. 2001) ("Standing, however, goes to the constitutional power of a federal court to entertain an action, and *this court has the duty to determine whether standing exists even if not raised by the parties.*") (emphasis added). The court also considered standing in an interlocutory appeal of a district court's Eleventh Amendment sovereign immunity determination in an unpublished case, *Walker v. Livingston*, 381 F. App'x 477 (5th Cir. 2010) (per curiam). *Walker* involved a 42 U.S.C. § 1983 wrongful death claim for damages where defendants brought an interlocutory appeal on Eleventh Amendment grounds after the district court denied their motion for summary judgment. *Id.* at 478. There, this court held that although "*Ex parte Young* allows, under certain circumstances, the plaintiff to seek injunctive relief . . . it is clear that the plaintiffs lack standing to assert claims for injunctive or declaratory relief." *Id.*

[4] The State also argues that the City has waived its *Young* arguments with respect to the Texas Workforce Commission because it did not discuss the applicability of the exception to the Commission in its brief. To the extent it matters, we agree. *See Yohey v. Collins*, 985 F.2d 222, 224-25 (5th Cir. 1993) (holding

The State is correct in its assertion that the Commission is immune to suit and not subject to the *Young* exception. State agencies are entitled to Eleventh Amendment sovereign immunity. *See Cozzo v. Tangipahoa Par. Council-President Gov't*, 279 F.3d 273, 280-81 (5th Cir. 2002) ("The Eleventh Amendment bars a state's citizens from filing suit against the state or its agencies in federal courts. . . . When a state agency is the named defendant, the Eleventh Amendment bars suits for both money damages and injunctive relief unless the state has waived its immunity." (citation omitted)). We have held that, "[the] TWC is an agency of the State of Texas and therefore all claims brought against it are barred by the Eleventh Amendment." *Salinas v. Tex. Workforce Comm'n*, 573 F. App'x 370, 372 (5th Cir. 2014) (per curiam). Texas law also confirms that the Commission is a state agency. Texas Local Government Code § 325.002 defines "[s]tate agency" as an entity expressly made subject to Chapter 325. TEX. LOC. GOV'T CODE § 325.002. And the Texas Labor Code states that, "[t]he Texas Workforce Commission is subject to Chapter 325, Government Code (Texas Sunset Act)." TEX. LAB. CODE § 301.008; *see U.S. Oil Recovery Site Potentially Responsible Parties Grp. v. R.R. Comm'n of Tex.*, 898 F.3d 497, 502 (5th Cir. 2018) (finding that the Railroad Commission of Texas is a state agency because it is subject to Chapter 325).

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that one "abandon[s] [one's] arguments by failing to argue them in the body of [one's] brief"); *see also United States v. Thibodeaux*, 211 F.3d 910, 912 (5th Cir. 2000) ("It has long been the rule in this circuit that any issues not briefed on appeal are waived.").

However, "the Eleventh Amendment does not bar suits for injunctive or declaratory relief against individual state officials acting in violation of federal law." *Raj*, 714 F.3d at 328 (citing *Young*, 209 U.S. at 155-56). But in order "[t]o fall within the *Ex parte Young* exception to sovereign immunity . . . a plaintiff must name individual state officials as defendants in their official capacities." *Id.* (finding that although plaintiff had asserted claims for injunctive and declaratory relief, he could not utilize the *Young* exception to sovereign immunity because he named only state entities, and not their individual officers, as defendants). Here, the City clearly named only the "Texas Workforce Commission," a state agency immune to suit, and did not name any individual commissioners. Thus, the City's suit against the Commission is barred by sovereign immunity.

IV.

For the foregoing reasons, we hold that the district court was incorrect in finding that the City's suit against Attorney General Paxton and the Texas Workforce Commission could proceed pursuant to the *Ex parte Young* exception to sovereign immunity. We REVERSE and REMAND to the district court with instructions to dismiss for lack of jurisdiction.

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

CITY OF AUSTIN,
Plaintiff,

v.

Ken PAXTON, in his official capacity as Texas Attorney General, and TEXAS WORKFORCE COMMISSION,
Defendants. /

Cause No.: AU-17-CA-00843-SS

ORDER

(Filed Jul. 12, 2018)

BE IT REMEMBERED on this day the Court reviewed the file in the above-styled cause, and specifically Defendants Attorney General Ken Paxton and Texas Workforce Commission (collectively, the State)'s Motion to Dismiss for Lack of Subject Matter Jurisdiction and Failure to State a Claim [# 21], the City of Austin (the City)'s Response [# 24] in opposition, and the State's Reply [# 27] in support. Having reviewed the documents, the governing law, the arguments of counsel, and the file as a whole, the Court now enters the following opinion and order.

Background

The question in this case is whether federal law preempts a state law—Texas Local Government Code § 250.007(c)—that allows landlords to decline to rent to tenants who seek to pay their rent using federal housing vouchers.

The Federal Housing Choice Voucher Program

Congress created the Housing Choice Voucher Program to "aid[] low-income families in obtaining a decent place to live" and to "promot[e] economically mixed housing." 42 U.S.C. § 1437f(a). The voucher program is funded by the United States Department of Housing and Urban Development (HUD) and administered by state and local public housing authorities in accord with regulations promulgated by HUD.

Once admitted to the voucher program, program participants are responsible for finding a landlord in the private rental market willing to rent to them. 24 C.F.R. § 982.302(a). Landlords who participate in the program may screen prospective tenants and reject them if screening reveals red flags in terms of paying rent and utility bills, caring for rental housing, respecting neighbors, criminal activity, and the like. *Id.* § 982.307(a). And even after potential tenants locate a willing landlord and negotiate the terms of the lease, both the landlord and the tenant must meet numerous administrative requirements imposed by both federal and state law. *See generally Austin Apartment Ass'n v.*

City of Austin, 89 F. Supp. 3d 886, 890–91 (W.D. Tex. 2015) (outlining administrative requirements).

The City Ordinance

In December 2014, the City adopted a housing ordinance (the Ordinance) prohibiting landlords from refusing to rent to tenants who wish to pay for their housing using federal vouchers. Am. Compl. [# 16] at 5. The City enacted the Ordinance because to prevent landlords from discriminating against potential tenants who sought to pay their rent using federal housing vouchers. *Id.* at 3–5. According to the City, such discrimination relegates voucher holders to lower opportunity areas of the City and disproportionately impacts minority residents, children, and the disabled. *Id.* at 4.

The State Law

In response to enactment of the City's Ordinance, the State enacted Texas Local Government Code § 250.007(c) to preserve the right of landlords to decline to accept federal housing vouchers. *Id.* at 7. Section 250.007(c) bars municipalities and counties from adopting or enforcing any ordinance or regulation that prohibits a landlord "from refusing to lease or rent . . . to a person because the person's lawful source of income to pay rent includes funding from a federal housing assistance program." *Id.*

Procedural Posture

In August 2017, the City filed this suit seeking to enjoin § 250.007(c) as preempted by federal law. Compl. [# 1]. The State now files a motion to dismiss which is ripe for review.

Analysis

The State argues the City's complaint must be dismissed because this Court lacks jurisdiction to entertain the City's claims and because, in the alternative, the City has failed to plead sufficient facts to state a plausible preemption claim. The Court first considers whether it has jurisdiction to hear the City's claims. As the Court finds it has jurisdiction, it then considers whether the City's complaint should be dismissed for failure to state a claim.

I. Motion to Dismiss for Lack of Jurisdiction

A. Legal Standard

A motion under Rule 12(b)(1) asks a court to dismiss a complaint for lack of subject matter jurisdiction. FED. R. CIV. P. 12(b)(1). "A case is properly dismissed for lack of subject matter jurisdiction when the court lacks the statutory or constitutional power to adjudicate the case." *Home Builders Ass'n of Miss., Inc. v. City of Madison, Miss.*, 143 F.3d 1006, 1010 (5th Cir. 1998) (internal quotation marks omitted). Motions to dismiss under Rule 12(b)(1) challenge a court's "very power to hear the case," and the court may therefore "weigh the

evidence and satisfy itself" subject matter jurisdiction exists. *MDPhysicians & Assocs., Inc. v. State Bd. of Ins.*, 957 F.2d 178, 181 (5th Cir. 1992) (internal quotation marks omitted).

B. Application

The State argues this Court lacks jurisdiction to hear the City's suit because (1) the City lacks standing and (2) the State is entitled to immunity under the Eleventh Amendment. Mot. Dismiss [# 21] at 7–12. The Court addresses these arguments in turn.

1. Standing

Article III of the Constitution limits the jurisdiction of federal courts to cases and controversies, and, in order to state a case or controversy, plaintiffs must establish they have standing to sue. *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 395 (1980); *Raines v. Byrd*, 521 U.S. 811, 818 (1997). To meet the standing requirement, a plaintiff must show (1) he has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000); *Consol. Cos., Inc. v. Union Pacific R.R. Co.*, 499 F.3d 382, 385 (5th Cir. 2007). "The party invoking federal jurisdiction bears the burden of

establishing these elements." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992).

Here, the City has demonstrated it has standing to sue. As an initial matter, the City has alleged an injury in fact because it alleges § 250.007(c) preempts the Ordinance. Am. Compl. [# 16] at 7. In the same way a state suffers an injury in fact when a federal law purports to preempt a law enacted by the state, a city suffers an injury in fact when the state enacts a law which purports to preempt a local ordinance. *Cf. Texas v. United States*, 809 F.3d 134, 157 (5th Cir. 2015) ("[C]ourts have often held that states have standing based on preemption."); *Wyoming ex rel. Crank v. United States*, 539 F.3d 1236, 1242 (10th Cir. 2008) ("Federal regulatory action that preempts state law creates a sufficient injury-in-fact."); *State of Ohio ex rel. Celebrezze v. U.S. Dep't of Transp.*, 766 F.2d 228, 232–33 (6th Cir. 1985) (concluding state suffered injury in fact when federal government declared state statute preempted by federal law). Indeed, in Texas, "home-rule cities" of the sort at issue here occupy a position akin to that of states in the federal system, in that they "have the full power of self-government" and look to the Legislature "not for grants of power, but only for limitations on their powers." *S. Crushed Concrete, LLC v. City of Hous.*, 398 S.W.3d 676, 678 (Tex. 2013). Thus, "[an] ordinance of a home-rule city that attempts to regulate a subject matter preempted by a state statute is unenforceable to the extent it conflicts with the state statute." *Dall. Merch.'s & Concessionaire's Ass'n v. City of Dall.*, 852 S.W.2d 489, 491 (Tex. 1993). In this

context, the City's inability to enforce its ostensibly preempted Ordinance qualifies as an injury in fact sufficient to support standing.

The City also meets the requirements of traceability and redressability because if the Court invalidates § 250.007(c) as preempted by federal law, then the City's Ordinance will no longer be unenforceable. *Wyoming*, 539 F.3d at 1242 ("[T]here is little doubt that [the injury inflicted by preemption] satisfies the traceability and redressability requirements of standing."); *see also Ohio*, 766 F.2d at 232–33 ("Ohio has standing to challenge the Department's regulation and undertake to vindicate its own law."). In sum, the City has demonstrated an injury in fact, traceability, and redressability and, as a result, has standing to pursue its preemption claims.

2. Eleventh Amendment Immunity

The Eleventh Amendment bars suits by private citizens against a state in federal court. *Okpalobi v. Foster*, 244 F.3d 405, 415 (5th Cir. 2001) (en banc) (citing *Hutto v. Finney*, 437 U.S. 678, 700 (1978)). However, under *Ex parte Young*, plaintiffs may sue state officials to halt the enforcement of an unconstitutional state statute, provided the state official has "some connection with the enforcement of the act." *Ex parte Young*, 209 U.S. 123, 157 (1908); *Okpalobi*, 244 F.3d at 415. In determining whether the doctrine of *Ex parte Young* allows a plaintiff to avoid an Eleventh Amendment bar to suit, 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." *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002) (citation omitted).

The State argues *Ex parte Young* should not apply for two reasons, neither of which is persuasive. First, the State argues the *Ex parte Young* exception should not apply because the City has sued Attorney General Paxton and, according to the State, Attorney General Paxton lacks any "connection" to the enforcement of § 250.007. Mot. Dismiss [# 21] at 9–11. In fact, the State contends no state official possesses the ability to enforce § 250.007 because the provision does not specifically provide for its own enforcement. *Id.*

Though the State argues otherwise, the Attorney General is not bereft of authority to enforce § 250.007. The City has sued Attorney General Paxton in his official capacity, and under the Texas Constitution, the Attorney General is the chief law enforcement officer of the state. Am. Compl. [# 16] at 1; *Agey v. Am. Liberty Pipe Line Co.*, 141 Tex. 379, 172 S.W.2d 972, 974 (Tex. 1943). In this capacity, Attorney General Paxton has repeatedly brought suit to enforce the supremacy of state law over superseded municipal ordinances. *See* Amended Complaint at 40, *Texas v. Travis Cty., Tex.*, 272 F. Supp. 3d 973 (W.D. Tex. May 12, 2017) (No. 1:17-cv-00425-SS) (suing the City of Austin to enforce "the supremacy of legislatively enacted general laws over local ordinances" as established by the Texas Constitution); *see also Republic Waste Servs. of Tex., Ltd. v. Tex.*

Disposal Sys., Inc., 848 F.3d 342, 344–45 (5th Cir. 2016) (noting home-rule cities derive their powers of self-governance from the Texas Constitution). The Attorney General might similarly bring a proceeding to enforce the supremacy of § 250.007 over the City's Ordinance. He therefore possesses "some connection" to the enforcement of the statute and qualifies as an appropriate party under *Ex parte Young*.

Second, the State argues, in reliance on *Okpalobi*, that the *Ex parte Young* exception is not available until the State threatens or commences enforcement proceedings against the City. Mot. Dismiss [# 21] at 11–12. However, as the State correctly observes, the portions of *Okpalobi* that address *Ex parte Young* are not binding precedent. *Okpalobi*, 244 F.3d at 415 (Parker, J., dissenting) ("Judge Jolly's attempt to excessively narrow *Ex parte Young's* scope garners only a plurality of this court, and therefore, to use his language, it 'is not binding authority to any.' "); *see also Air Evac EMS, Inc. v. Tex., Dep't of Ins., Div. of Workers' Comp.*, 851 F.3d 507, 515 (5th Cir. 2017) (declining to decide "whether *Ex parte Young* applies only when there is a threatened or actual proceeding to enforce the challenged state law").

Absent Fifth Circuit precedent to the contrary, this Court sees no reason to deviate from the Supreme Court's admonition that *Ex parte Young* requires only a "straightforward inquiry" into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective. *Verizon*, 535 U.S. at 645; *see also Va. Office for Prot. & Advocacy*

v. Stewart, 563 U.S. 247, 250–52 (2011) (concluding suit by state agency against other state officials falls within the ambit of *Ex parte Young* even in the absence of threatened enforcement proceedings); *Okpalobi*, 244 F.3d at 440 (Benavides, J., concurring in part and dissenting in part) ("The Supreme Court's principal limit [on *Ex parte Young*] has been on the nature of the relief sought: *Ex parte Young* cannot be used to expose states to retroactive monetary damages."); *Summit Medical Assocs. v. Pryor*, 180 F.3d 1326, 1338 (11th Cir. 1999) (holding plaintiff need not wait until enforcement proceedings are in progress to commence suit and clarifying "the ongoing and continuous requirement merely distinguishes between cases where the relief sought is prospective in nature[] . . . and cases where relief is retrospective"). Here, the City alleges § 250.007 is invalid and preempted by federal law. This qualifies as an ongoing violation of federal law for the purposes of *Ex parte Young*, and accordingly, the Court finds the City's suit is not barred by the Eleventh Amendment.

In short, the Court finds that the City has standing to bring its preemption claims and that these claims are not barred by the Eleventh Amendment. The Court therefore DENIES the State's motion to dismiss for lack of jurisdiction. These jurisdictional challenges resolved, the Court proceeds to consider whether the City fails to state a claim on which relief can be granted.

II. Motion to Dismiss for Failure to State a Claim

A. Legal Standard

The Federal Rules of Civil Procedure require each claim in a complaint include "a short and plain statement . . . showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a)(2). The claims must include sufficient factual allegations, accepted as true, to state a claim for relief that is facially plausible. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads sufficient factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678, 129 S.Ct. 1937. Although a plaintiff's factual allegations need not establish the defendant is probably liable, they must establish more than a "sheer possibility" a defendant has acted unlawfully. *Id.* Determining plausibility is a "context-specific task," and must be performed in light of a court's "judicial experience and common sense." *Id.* at 679.

Motions to dismiss for failure to state a claim are appropriate when a defendant attacks the complaint because it fails to state a legally cognizable claim. FED. R. CIV. P. 12(b)(6). When a district court reviews a motion to dismiss pursuant to Rule 12(b)(6), it must construe the complaint in favor of the plaintiff and take all well-pleaded facts as true. *Gonzalez v. Kay*, 577 F.3d 600, 603 (5th Cir. 2009). However, a court is not bound

to accept legal conclusions couched as factual allegations. *Papasan v. Allain*, 478 U.S. 265, 286 (1986). While all reasonable inferences will be resolved in favor of the plaintiff, the plaintiff must plead "specific facts, not mere conclusory allegations." *Tuchman v. DSC Communications Corp.*, 14 F.3d 1061, 1067 (5th Cir. 1994). In deciding a motion to dismiss, courts may consider the complaint, as well as other sources such as documents incorporated into the complaint by reference and matters of which a court may take judicial notice. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007).

B. Application

The State argues the City fails to state a claim because (1) the City lacks a right of action to challenge § 250.007 as preempted by federal law and (2) the City has failed to plead sufficient facts in support of its preemption claims. The Court addresses each argument in turn.

1. Right of Action

The State's first argument—that the City lacks a right of action —is easily disposed of. The Fifth Circuit has repeatedly allowed suits seeking equitable relief on the basis of federal preemption to proceed under *Ex parte Young*. *See*, *e.g.*, *Air Evac*, 851 F.3d at 515 (finding *Ex parte Young* exception applied in action seeking injunctive relief against state officers on the basis of federal preemption); *Planned Parenthood of Houston &*

Se. Tex. v. Sanchez, 403 F.3d 324, 331–33 & n.46 (5th Cir. 2005) (recognizing implied right of action to assert preemption claims seeking injunctive and declaratory relief). As the Court has concluded *Ex parte Young* is applicable here, the City possesses a federal right of action to seek equitable relief in connection with its preemption claims.

2. Federal Preemption

The City puts forward two preemption arguments. First, the City argues § 250.007 is subject to conflict preemption because, by allowing landlords to choose whether or not to participate in the federal voucher program, § 250.007 stands as an obstacle to Congress's goals of assisting low-income families and promoting economically mixed housing. Resp. [# 24] 8–9 (citing 42 U.S.C. § 1437f(a)). Second, the City argues § 250.007 is expressly preempted by 42 U.S.C. § 3615 and § 3617 because it condones a discriminatory housing practice and interferes with protected rights under the Fair Housing Act.[1] *See* Am. Compl. [# 16] at 9. The Court first considers whether § 250.007 is subject to conflict preemption and then considers whether § 250.007 might be expressly preempted by § 3615 or § 3617.

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[1] The City incorrectly labels its express preemption and conflict preemption claims as "statutory preemption" and "constitutional preemption" claims, respectively. *See* Am. Compl. [# 16] at 8–9.

a. Conflict Preemption

Under the Supremacy Clause of the Constitution, state law is preempted to the extent it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372–73 (2000) (citing *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (internal quotation marks omitted)). "What is a sufficient obstacle [to trigger conflict preemption] is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects[.]" *Id.* (citing *Savage v. Jones*, 225 U.S. 501, 533 (1912)). When Congress has legislated in a field, such as housing, that is traditionally occupied by the states, Congress must demonstrate a "clear and manifest purpose" to preempt the state law. *Wyeth v. Levine*, 555 U.S. 555, 565 (2009). The party asserting federal preemption bears the burden of persuasion. *Elam v. Kansas City S. Ry. Co.*, 635 F.3d 796, 802 (5th Cir. 2011).

As an initial matter, the City has not identified any federal statute or regulation demonstrating a clear and manifest intent to preempt § 250.007, *Wyeth*, 555 U.S. at 565, and what evidence exists suggests Congress has not taken a position on whether landlords should be prohibited from discriminating against participants in the federal voucher program. For example, one of the implementing regulations for the federal voucher program, 24 C.F.R. § 982.53, provides that federal law does not preempt state and local laws prohibiting discrimination against voucher holders. This

suggests the federal government has not chosen to enact such antidiscrimination measures itself but has instead allowed the states latitude to decide whether landlords should be required to accept federal housing vouchers and the concomitant burdens attendant upon participation in the voucher program.

In lieu of any federal statutory provision or regulation indicating Congress intended to mandate landlords accept federal vouchers and participate in the federal voucher program, the City suggests legislative history supports its preemption claim and demonstrates a policy of voluntary landlord participation undermines the goals and objectives of Congress. *See* Resp. [# 24] at 9–10 (citing S. Rep. No. 104-195, at 31–32 (1995)).Yet the legislative history relied on by the City actually tends to undercut the City's position, rather than support it.

The City cites only a single piece of legislative history—the Senate Committee Report accompanying the Public Housing Reform and Empowerment Act of 1996 (1996 Reform Act). Resp. [# 24] at 9–10. The 1996 Reform Act reworked a number of aspects of the federal housing voucher program, but two changes are particularly relevant here—the repeal of the "take one, take all" rule and the "endless lease rule." S. Rep. No. 104-195, at 31. The "take one, take all" rule required landlords who rented to one voucher holder to subsequently "rent to all otherwise qualified [voucher holders] and not to refuse to lease to such recipients" simply because they were participants in the voucher program, while the "endless lease" rule required landlords to renew

leases for voucher holders. *Id.* The Senate Report indicates these provisions were repealed because they "constrained the ability of owners to make rational business decisions" and forced landlords to fulfill "time-consuming and costly program requirements" by mandating that landlords continue to accept federal housing vouchers. *Id.*

The repeal of the "take one, take all" and "endless lease" rules demonstrates Congress has previously considered and rejected the idea of mandating landlord participation in the federal voucher program. Indeed, in rejecting even these lesser intrusions on landlord autonomy, the Senate Report accompanying the 1996 Reform Act appears to take for granted the voluntary nature of the federal voucher program. *See id.* (arguing the "take one, take all" and "endless lease" rules discouraged voluntary landlord participation in the voucher program and concluding their repeal would "greatly expand the choice and availability of housing units" by increasing landlord participation). Given Congress's apparent rejection of mandatory landlord participation, it makes little sense to suggest, as the City does, that voluntary landlord participation somehow stands as an obstacle to the purposes and objectives of Congress. Resp. [# 24] at 8–9. More to the point, however, there is nothing in the Senate Committee Report demonstrating a clear and manifest congressional

purpose to preempt state laws preserving the voluntary character of the federal voucher program.[2]

In sum, the City has failed to provide any basis for concluding Congress possessed a clear and manifest purpose to preempt state laws, such as § 250.007, which preserve the voluntary character of the federal housing voucher program.[3] As the City has failed to carry its burden of persuasion, the Court GRANTS the State's motion to dismiss with respect to the City's federal conflict preemption claim.

b. Express Preemption by § 3615

Section 3615 invalidates any state or local law that "purports to require or permit any action that would be a discriminatory housing practice." The City

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[2] In spite of the forgoing, the City contends the 1996 Reform Act demonstrates that Congress expected state and local antidiscrimination laws to step into the void created by Congress's abdication and did not intend to preempt state and local antidiscrimination requirements. Resp. [# 24] at 10. This confuses the issue. The question of whether Congress intended to preempt state and local antidiscrimination requirements is separate from the question of whether a state can validly enact a law preserving the voluntary character of the federal voucher program and invalidating contrary municipal regulations. Only the latter question is at issue here.

[3] Nor has the City given any indication Congress intended to allow the City to mandate landlord acceptance of federal vouchers where the State has made a contrary choice. *See Nixon v. Mo. Mun. League*, 541 U.S. 125 (2004) (holding that where preemption would interpose federal authority between a state and its municipal subdivision, Congress must have been "unmistakably clear" in its intention in order for conflict preemption to apply).

argues § 250.007 permits a discriminatory housing practice because discrimination against voucher holders disproportionately impacts minority residents. Resp. [# 24] at 10–11; *see also Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 135 S. Ct. 2507, 2525 (2015) (holding disparate impact claims cognizable under the Fair Housing Act). In response, the State argues the City has not pleaded facts showing § 3615 preempts § 250.007. Reply [# 27] at 10–11. Specifically, the State argues (1) the City has not identified a specific policy creating a barrier to fair housing and (2) the City has not pleaded a causal link between a policy and the disparate impact. *Id.*

Though the Court has concerns about the viability of the City's disparate impact claim, neither of the State's purported arguments are persuasive. First, the City has identified a policy—voluntary landlord participation in the federal voucher program—which allegedly creates a barrier to fair housing. Am. Compl. [# 16] at 7–8. Second, the City has also pleaded a causal connection between this policy of voluntary landlord participation and disparate impact. According to the City, the policy of voluntary landlord participation restricts the housing choices available to participants in the federal voucher program. *Id.* at 3. Further, the City contends the large majority of individuals in the City who participate in the federal voucher program are African-American or Hispanic. *Id.* Together, these allegations suggest a policy allowing discrimination against voucher holders would disproportionately impact minorities. Absent any further argument from the State

as to why the City's § 3615 preemption claim should be dismissed, the Court DENIES the State's motion to dismiss with respect to this claim.

c. Express Preemption by § 3617

Section 3617 renders it unlawful to "coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of" rights granted under the Fair Housing Act. Here, the City fails to identify any right that § 250.007 might interfere with or explain how § 250.007 might plausibly interfere with such a right. *See* Am. Compl. [# 16] at 5, 9. Given the conclusory nature of the City's allegations with respect to § 3617, the Court GRANTS the State's motion to dismiss with respect to this preemption claim.

Conclusion

As to the State's motion to dismiss for lack of jurisdiction, the Court concludes the City possesses standing to bring its preemption claims and further concludes the City's claims against the State are not barred by the Eleventh Amendment. As to the State's motion to dismiss for failure to state a claim, the Court concludes the City fails to state a claim for conflict preemption or express preemption under § 3617. However, with respect to the City's express preemption claim in connection with § 3615, the Court concludes the State has failed to put forward sufficient justification to merit dismissal at this time.

Accordingly,

IT IS ORDERED the State's Motion to Dismiss for Lack of Subject Matter Jurisdiction and Failure to State a Claim [# 21] is GRANTED IN PART and DENIED IN PART as described in this opinion.

SIGNED this the 12th day of July 2018.

/s/ Sam Sparks
SAM SPARKS
SENIOR UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-50646

CITY OF AUSTIN,

Plaintiff - Appellee

v.

KEN PAXTON, Attorney General of the State of Texas; TEXAS WORKFORCE COMMISSION,

Defendants - Appellants

Appeal from the United States District Court
for the Western District of Texas

ON PETITION FOR REHEARING

(Filed Feb. 3, 2020)

Before CLEMENT, ELROD, and DUNCAN, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.

ENTERED FOR THE COURT:

/s/ Edith Brown Clement
UNITED STATES CIRCUIT JUDGE

ORDINANCE NO. 20141211-050

AN ORDINANCE AMENDING CITY CODE CHAPTER 5-1 RELATING TO SOURCE OF INCOME AND HOUSING DISCRIMINATION.

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF AUSTIN:

PART 1. City Code Sections 5-1-1 (*Declaration of Policy*) and 5-1-2 (*Scope*) are amended to read as follows:

§ 5-1-1 DECLARATION OF POLICY

(A) It is the policy of the City to bring about through fair, orderly and lawful procedures, the opportunity of each person to obtain housing without regard to race, color, creed, religion, sex, national origin, disability, student status, marital status, familial status, sexual orientation, gender identity, [~~or~~] age, or source of income.

(B) This policy is established upon a recognition of the inalienable rights of each individual to obtain housing without regard to race, color, creed, religion, sex, national origin, disability, student status, marital status, familial status, sexual orientation, gender identity, [~~or~~] age, or source of income; and further that the denial of such rights through considerations based on race, color, creed, religion, sex, national origin, disability, student status, marital status, familial status, sexual orientation, gender identity, [~~or~~] age, or source of income, is detrimental to the health, safety and welfare of the

inhabitants of the City and constitutes an unjust denial or deprivation of such inalienable rights which is within the power and the proper responsibility of the government to prevent.

§ 5-1-2 SCOPE

(A) To provide a procedure for investigating and settling complaints of discriminatory housing practices which are violations of state and federal law, to provide rights and remedies substantially equivalent to those granted under federal law and to permit the director to accept referrals of complaints from the Secretary of Housing and Urban Development and from the Civil Rights Division of the Texas Workforce Commission. Article 2 (*Discrimination in Housing – Fair Housing Act Compliance*) prohibits discrimination in housing on the basis of race, color, sex, religion, disability, familial status or national origin and establishes procedures to enforce the provisions of federal and state law.

(B) Even though federal law protects individuals against discrimination in housing based on race, color, sex, religion, disability, familial status or national origin, it is the policy of the City that no person should be denied opportunity to obtain housing on the basis of creed, student status, marital status, sexual orientation, gender identity, [~~or~~] age, or source of income.

PART 2. City Code Section 5-1-13 (*Definitions*) is amended to add a new definition of "Source of Income" to read as follows and to renumber the remaining definitions accordingly.

(24) SOURCE OF INCOME means lawful, regular, and verifiable income including, but not limited to, housing vouchers and other subsidies provided by government or non-governmental entities, child support, or spousal maintenance, but does not include future gifts.

PART 3. City Code Sections 5-1-51 (*Discrimination in Sale or Rental of Housing*), 5-1-52 (*Publication Indicating Discrimination*), 5-1-53 (*Availability for Inspection, Sale, or Rental)*, 5-1-54 (*Entry Into Neighborhood)*, 5-1-56 (*Residential Real Estate Related Transactions*), and 5-1-57 (*Brokerage Services*) are amended to read as follows:

§ 5-1-51 DISCRIMINATION IN SALE OR RENTAL OF HOUSING.

(A) A person may not refuse to sell or rent a dwelling to a person who has made a bona fide offer; refuse to negotiate for the sale or rental of a dwelling; or otherwise make unavailable or deny to a dwelling to any person based on race, color, religion, sex, sexual orientation, gender identity, age, familial status, disability, marital status, student status, creed, [~~or~~] national origin, or source of income.

(B) A person may not discriminate against a person in the terms, conditions, or privileges of

sale or rental of a dwelling or in providing services or facilities in connection with the sale or rental, based on race, color, religion, sex, sexual orientation, gender identity, age, familial status, disability, marital status, student status, creed, [~~or~~] national origin, or source of income.

(C) This section does not prohibit discrimination against a person because the person has been convicted under federal law or the law of any state of the illegal manufacture or distribution of a controlled substance, but does not permit discrimination based on a disability.

§ 5-1-52 PUBLICATION INDICATING DISCRIMINATION

A person may not make, print, or publish or cause to be made, printed, or published any notice, statement, or advertisement with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, sexual orientation, gender identity, disability, age, familial status, marital status, student status, creed, [~~or~~] national origin, or source of income, or an intention to make such a preference, limitation, or discrimination.

§ 5-1-53 AVAILABILITY FOR INSPECTION, SALE, OR RENTAL

A person may not represent to a person based on race, color, religion, sex, sexual orientation, gender

identity, disability, age, familial status, marital status, student status, creed, [~~or~~] national origin, or source of income that a dwelling is not available for inspection, sale or rental when the dwelling is available for inspection.

§ 5-1-54 ENTRY INTO NEIGHBORHOOD

A person may not, for profit, induce or attempt to induce a person to sell or rent a dwelling by representations regarding the entry or prospective entry into a neighborhood of a person of a particular race, color, religion, sex, sexual orientation, gender identity, disability, age, familial status, marital status, student status, creed, [~~or~~] national origin, or source of income.

§ 5-1-56 RESIDENTIAL REAL ESTATE RELATED TRANSACTIONS

(A) A person whose business includes engaging in residential real estate related transactions may not discriminate against a person in making a real estate related transaction available or in the terns or conditions of a real estate related transaction because of race, color, religion, sex, sexual orientation, gender identity, disability, age, familial status, marital status, student status, creed, [~~or~~] national origin, or source of income.

(B) In this section "residential real estate related transaction" means:

(1) Making or purchasing loans or providing other financial assistance:

(a) To purchase, construct, improve, repair, or maintain a dwelling; or

(b) Secured by residential real estate; or

(2) Selling, brokering, or appraising residential real property.

§ 5-1-57 BROKERAGE SERVICES

A person may not deny any person access to, or membership or participation in, a multiple-listing service, real estate brokers' organization or other service, organization, or facility relating to the business of selling or renting dwellings, or discriminate against a person in the terms or conditions of access, membership, or participation in such an organization, service, or facility because race, color, religion, sex, sexual orientation, gender identity, disability, age, familial status, marital status, student status, creed, [~~or~~] national origin, or source of income.

PART 4. This ordinance takes effect on January 12, 2015.

PASSED AND APPROVED

§
§
§ /s/ Lee Leffingwell

December 11, 2014 Lee Leffingwell
Mayor

APPROVED /s/ [Illegible] (illegible)
Karen M. Kennard
City Attorney

ATTEST: /s/ Janette S. Goodall
Jannette S. Goodall
City Clerk