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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

IDAHO FEDERATION OF TEACHERS et al., Plaintiffs, v. RAÚL LABRADOR, in his official capacity as Attorney General of the State of Idaho, et al., Defendants.	**Case No. 1:23-cv-353-DCN** **REPLY MEMORANDUM IN SUPPORT OF ADA COUNTY PROSECUTING ATTORNEY JAN M. BENNETTS' MOTION TO DISMISS [DKT. 38]**

Plaintiffs do not allege that Prosecutor Bennetts has done anything—anything to make the Plaintiffs fear prosecution, anything as an "agent of the State of Idaho," nor anything to cause the Plaintiffs harm. Plaintiffs have alleged no action for which to hold Prosecutor Bennetts or Ada County liable, but they attribute their harm solely to the Legislature in passing Section 18–8705. Prosecutor Bennetts, sued in her official capacity, should be dismissed from this case.

I. REPLY ARGUMENT

A. The fact that Prosecutor Bennetts is a prosecutor is insufficient to create a standing to sue her.

Plaintiffs take the position that Prosecutor Bennetts' mere existence creates a standing-sufficient fear that she will prosecute them under Section 18–8705. They assert that they can hold her accountable for the Idaho Legislature passing a statute they acknowledge she had no role in passing, and which she has never enforced or threatened to enforce.

A credible threat of prosecution is based on the *actions* of the defendant—indicting or arresting the plaintiffs, communicating a specific warning or threat to initiate proceedings, or a history of past prosecution under the challenged statute. *Lopez v. Candaele*, 630 F.3d 775, 786 (9th Cir. 2010). There is no standing unless a plaintiff alleges injury "fairly traceable to the defendant's allegedly unlawful *conduct*." *California v. Texas*, 141 S. Ct. 2104, 2113 (2021) (emphasis added). "[P]laintiffs bear the burden of pleading and proving concrete facts showing that [Prosecutor Bennetts'] actual action has caused the substantial risk of harm." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 n.5 (2013). "Here, there is no action—actual or threatened—whatsoever." *California*, 141 S. Ct. at 2115.

Where a plaintiff's complaint is based on the "adoption and maintenance of a policy" that allegedly caused constitutional injury, the plaintiff "must therefore allege facts linking [the defendant] to the adoption, regulation, and revision of the Policy." *Hartmann v. California Dep't of Corr. & Rehab.*, 707 F.3d 1114, 1129 (9th Cir. 2013). Here, Plaintiffs' complaint alleges injury stemming from the passage and existence of a statute they argue is unconstitutional, and therefore Plaintiffs must allege facts linking Prosecutor Bennetts to the passage and existence of Section 18–8705.

Despite this, Plaintiffs assert that no action is necessary. Rather, they argue that the existence of a prosecutor with a role to prosecute crimes is all they need to show. "But general threats by officials to enforce those laws which they are charged to administer do not create the necessary injury in fact."[1] *Lopez*, 630 F.3d at 787 (cleaned up) (citing *United Pub. Workers of Am. v. Mitchell*, 330 U.S. 75, 88 (1947); *Rincon Band of Mission Indians v. San Diego Cnty.*, 495 F.2d 1, 4 (9th Cir.1974)).

Plaintiffs also assert that the existence of Section 18–8705 causes them to fear prosecution by Prosecutor Bennetts and to self-censor because "most people are frightened of violating criminal statutes." Dkt. 50, pp. 17–18 (citing *California Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1095 (9th Cir. 2003)). But self-censorship alone is insufficient to show injury, and the Ninth Circuit "[did] not mean to suggest [in *Getman*] that any plaintiff may challenge the constitutionality of a statute on First Amendment grounds by nakedly asserting that his or her speech was chilled by the statute. The self-censorship door to standing does not open for every plaintiff." *Lopez*, 630 F.3d at 792 (quoting *Getman*, 328 F.3d at 1095).

As the Ninth Circuit has explained, the Plaintiffs' assertion of standing based on fear stemming from the statute's text "is misguided: our inquiry into injury-in-fact does not turn on the strength of plaintiffs' concerns about a law, but rather on the credibility of the threat that the challenged law will be enforced against them." *Id.* at 792.

Plaintiffs' fear is based solely on "hypothetical future harm that is not certainly impending," and Plaintiffs are attempting to "manufacture standing merely by inflicting harm on

[1] To be clear, Plaintiffs do not allege that Prosecutor Bennetts has even threatened to enforce those laws she is charged to administer. They argue that her existence alone is the threat. But even if Plaintiffs had alleged that Prosecutor Bennetts made such a statement, it would be insufficient to create a standing-sufficient threat.

themselves" based on this hypothetical fear. *Clapper*, 568 U.S. at 416. The factors weigh against standing when a plaintiff fails to plead any facts of past enforcement or future warning of prosecution, but merely recounts "serious" penalties for violation "without any indication that such penalties are imminent or realistic." *Unified Data Servs., LLC v. Fed. Trade Comm'n*, 39 F.4th 1200, 1211 (9th Cir. 2022). Again, Plaintiffs don't allege that Prosecutor Bennetts has done anything at all—their fears that Prosecutor Bennetts will cause university professors to suffer imprisonment merely for their academic activities are purely hypothetical, and such an outcome is neither imminent nor based on fact.

Plaintiffs fail to bear their "burden of pleading and proving concrete facts showing that the defendant's actual action has caused the substantial risk of harm." *Clapper*, 568 U.S. at 414 n.5.

B. Plaintiffs cannot rest on "failure to disavow" to establish standing.

Plaintiffs argue that Prosecutor Bennetts is required, upon the ACLU's demand, to issue advisory opinions as to hypothetical charging decisions, otherwise she has caused Plaintiffs harm sufficient for standing. Plaintiffs provide no authority for this non-existent duty, and they do not allege in their complaint that any breach of this non-existent duty caused them harm. As numerous examples show, *e.g.*, dkt. 38-1, pp. 11–13, Plaintiffs allege that the Idaho Legislature and the existence of Section 18–8705 caused them their alleged harm, and they *never* allege that any action or non-action by Prosecutor Bennetts or Ada County has caused them harm.[2]

[2] Plaintiffs point to paragraphs 74, 77, 85, 89 in their complaint for the proposition that "Fear that Defendant Bennetts will seek to enforce the NPFAA against academic speech has chilled the teaching and scholarship of faculty members at BSU." Dkt. 50, p. 10. But none of these paragraphs reference Prosecutor Bennetts or any action she has taken. Each paragraph blames "the NPFAA" alone for this fear. Plaintiffs are asking the Court to make the unreasonable and unsupported leap from the existence of Section 18–8705 to the proposition that Prosecutor Bennetts in particular *will* take a specific, discretionary action against them. To reiterate, since the Ada County (cont.)

Even assuming for the sake of argument that the fact that Prosecutor Bennetts did not provide the ACLU their demanded advisory opinion constituted a "failure to disavow," Plaintiffs cite no case supporting their argument that a failure to disavow enforcement of a statute is sufficient, alone, to show a threat of harm sufficient for standing.

LSO makes a point of stating explicitly that "we cannot go so far as to say that a plaintiff has standing whenever the Government refuses to rule out use of the challenged provision." *LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1155 (9th Cir. 2000). The court found standing based on a record of the government enforcing and threatening to enforce the challenged statute against specific clients of the plaintiff and conducting raids under the statute. *Id.* at 1149–52, 1156. Prosecutor Bennetts has not enforced Section 18–8705, threatened to enforce it, or taken any other enforcement-related action under Section 18–8705, such as conducting a raid. And Plaintiffs do not allege she has done any of these things.

In *Tingley*, the court found that there was a threat of enforcement not merely because the State of Washington had not disavowed enforcement, but because it affirmatively "confirmed that it will enforce the ban on conversion therapy"; the court concluded that "Washington's general warning of enforcement coupled with Tingley's self-censorship in the face of the law satisfy the second prong of the *Thomas* inquiry for standing." *Tingley v. Ferguson*, 47 F.4th 1055, 1068 (9th Cir. 2022). Prosecutor Bennetts has issued no such warning, and Plaintiffs have not alleged that she did.

Prosecutor's Office has never brought charges under Section 18–8705, nor threatened to do so, "we have no idea how it will exercise its [prosecutorial] discretion *or if it ever will*. We simply do not know enough to evaluate this claim." *Freedom to Travel Campaign v. Newcomb*, 82 F.3d 1431, 1441 (9th Cir. 1996) (emphasis added).

In *Bonta*, the State of California "notified the regulated community that it intends to enforce" the challenged law, "began 'moving aggressively to enforce'" it, and "commenced a number of prosecutions" under the law. *California Trucking Ass'n v. Bonta*, 996 F.3d 644, 653 (9th Cir. 2021). Prosecutor Bennetts has issued no such notification and has not commenced a single prosecution under the challenged law—and Plaintiffs do not allege she has done either.

In *Bland*, the California Attorney General actually sponsored the bill that became the challenged law. *Bland v. Fessler*, 88 F.3d 729, 737 (9th Cir. 1996). Prosecutor Bennetts did not sponsor or in any way push for the passage of Section 18–8705, and Plaintiffs do not allege that she did.

In all the cases cited by Plaintiff, the defendant took some kind of action that created a fear of prosecution. In none of the cases did the court allow the plaintiff to allege that the prosecutor did nothing, and instead require the prosecutor who had done nothing to prove that she *won't* do something that could harm the plaintiff. Failure to disavow, on its own, does not create standing, and this is consistent with the rule that Plaintiffs bear the "burden of pleading and proving concrete facts showing that the *defendant's actual action* has caused the substantial risk of harm." *Clapper*, 568 U.S. at 414 n.5 (emphasis added).[3]

[3] Plaintiffs attempt to argue that Prosecutor Bennetts' non-action *after Plaintiffs initiated this lawsuit* retroactively provides them standing because of "Prosecutor Bennetts' refusal to disavow enforcement 'during this litigation.'" Dkt. 50, p. 17. Plaintiffs must show that they had an injury in fact *before* filing their complaint because jurisdiction is determined by "the facts as they exist when the complaint is filed." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 569 n. 4 (1992); *Yamada v. Snipes*, 786 F.3d 1182, 1203–04 (9th Cir. 2015). A plaintiff cannot sue first and obtain standing later.

C. Plaintiffs cannot show that Prosecutor Bennetts has acted as an agent of the State of Idaho, and they fail to state a claim against Prosecutor Bennetts in her official capacity.

Plaintiffs assert in their response to the motion to dismiss, for the first time, that they are suing Prosecutor Bennetts "as an agent of the *State of Idaho*," dkt. 50, p. 24, although they make no indication of this in their complaint, in which they chose to sue her "in her official capacity as Ada County Prosecuting Attorney," dkt. 1, p. 1. Nowhere in their complaint do Plaintiffs allege that Prosecutor Bennetts has taken any action as an agent of the State of Idaho.

As Plaintiffs acknowledge, a § 1983 plaintiff must "identify the law or policy challenged as a constitutional violation and name the official *within the entity* who can appropriately respond to injunctive relief." *Hartmann*, 707 F.3d at 1127 (emphasis added). The law challenged is a state statute, and the appropriate defendant *within the entity* is a state official, not a county official like Prosecutor Bennetts.[4]

Nevertheless, Plaintiffs assert that Prosecutor Bennetts is an agent of the State of Idaho, and they do so without actually engaging in the appropriate analysis to determine whether she

[4] Plaintiffs' characterization of *Wasden* as controlling is incorrect, as the Ninth Circuit did not analyze the question of whether the Ada County Prosecutor is a proper defendant under *Ex parte Young*. Two sets of claims were at issue in *Wasden*. The Ninth Circuit noted that the former Ada County Prosecutor had not challenged on appeal whether he was a proper defendant as to one set of claims, and so it did not analyze this question—although it did analyze whether the Attorney General was a proper defendant. *Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908, 919 (9th Cir. 2004). Because the former Ada County Prosecutor did not raise the issue, the Ninth Circuit did not "resolve[] it after reasoned consideration." *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1173 (9th Cir. 2004). As to the other set of claims, the former Ada County Prosecutor argued that he was not a proper defendant, but the Ninth Circuit declined to rule on that argument. *Wasden*, 376 F.3d at 919–20. Because it did not resolve, after reasoned consideration, the question of whether the Ada County Prosecutor is an appropriate defendant under *Ex parte Young*, *Wasden* made no "law of the circuit" on that issue. *Bush*, 386 F.3d at 1173. The Ninth Circuit's inclusion of the word "correctly" in its statement, "The Ada County prosecutor acknowledges, correctly, that he is a proper defendant with regard to those provisions creating the potential for prosecution," *Wasden*, 376 F.3d at 919, was "unnecessary to the decision in the case, and is therefore not precedential." *Bush*, 386 F.3d at 1173 (cleaned up).

acted as a state agent with regard to the allegations in this case. The first step in the analysis is to "home in on the challenged actions the [defendant] took," and identify "the particular acts the official is alleged to have committed" to determine whether they fall within the range of state or county functions. *Buffin v. California*, 23 F.4th 951, 962 (9th Cir. 2022).

The analysis fails at the outset because Plaintiffs have not challenged any action of Prosecutor Bennetts—in fact, they have not alleged Prosecutor Bennetts has taken any action at all.[5] Instead, the "challenged action" in this case—the "action alleged to have caused the particular constitutional or statutory violation at issue," *McMillian v. Monroe Cnty., Ala.*, 520 U.S. 781, 785 (1997)—is the Legislature's passage of Section 18–8705, which Plaintiffs allege chills their speech. *E.g.*, dkt. 38-1, pp. 11–13. Plaintiffs do not allege that Prosecutor Bennetts played any role in the passage of that statute. They have therefore failed to show that Prosecutor Bennetts acted as an agent of the state regarding the claims in this case.

Thus, Plaintiffs have sued a county official in her official capacity, thereby suing the government entity itself, dkt. 38-1, p. 15, and must meet the requirements of *Monell* to state a claim. *Kentucky v. Graham*, 473 U.S. 159, 165–66 (1985). Plaintiffs must demonstrate that Ada County's conduct was the cause-in-fact and the proximate cause of their alleged harm in order to show liability under § 1983. *Chaudhry v. Aragon*, 68 F.4th 1161, 1169–70 (9th Cir. 2023). Further, they must show that that the "moving force behind the constitutional violation" is the implementation or execution of a "policy statement, ordinance, regulation, or decision officially adopted and promulgated by" Ada County's officers. *Rivera v. Cnty. of Los Angeles*, 745 F.3d 384,

[5] This illuminates the truism that underlies this entire motion to dismiss: a plaintiff must allege that a defendant did something that harmed them in order to have a valid case against them.

389 (9th Cir. 2014) (quoting *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 690 (1978); *Edgerly v. City and Cnty. of San Francisco*, 599 F.3d 946, 960 (9th Cir. 2010)).

Monell applies even though Plaintiffs seek prospective injunctive relief. As the Supreme Court has explained,

> The *Monell* Court thought that Congress intended potential § 1983 liability where a municipality's *own* violations were at issue but not where only the violations of others were at issue. The "policy or custom" requirement rests upon that distinction and embodies it in law. To find the requirement inapplicable where prospective relief is at issue would undermine *Monell*'s logic. For whether an action or omission is a municipality's "own" has to do with the nature of the action or omission, not with the nature of the relief that is later sought in court."

Los Angeles Cnty., Cal. v. Humphries, 562 U.S. 29, 37 (2010).

Plaintiffs are attempting to hold Ada County liable: they sued the Ada County Prosecutor in her official capacity. Otherwise, Plaintiffs would have simply sought to hold the State of Idaho liable by suing an appropriate state official under *Ex parte Young* and obtaining a ruling striking down Section 18–8705 as unconstitutional—either facially or as applied—thereby obtaining all the relief they seek.

But Plaintiffs chose to sue a county officer in her official capacity in addition to the Idaho Attorney General. Their suit is misdirected, as they are attempting to hold Ada County liable for actions that are not its "own," for alleged violations of others. *Humphries*, 562 U.S. at 37. The lack of any allegation that Prosecutor Bennetts or Ada County did anything—and the plethora of allegations about the acts of the State of Idaho—makes this clear. Even though Plaintiffs seek injunctive relief, they have failed to state a claim as required under *Monell*, and the Ada County Prosecutor should not be a defendant in this lawsuit. The complaint should be dismissed as to Prosecutor Bennetts in her official capacity.

II. CONCLUSION

Plaintiffs' complaint should be dismissed as to Prosecutor Bennetts for failure to allege that the Court has subject-matter jurisdiction as to claims against her and for failure to state a claim.

DATED this 30th day of November, 2023.

JAN M. BENNETTS
Ada County Prosecuting Attorney

By: */s/ Dayton P. Reed*
Dayton P. Reed
Deputy Prosecuting Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of November, 2023, I served a true and correct copy of the foregoing *Reply Memorandum in Support of Ada County Prosecuting Attorney Jan M. Bennetts' Motion to Dismiss [Dkt. 38]* electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

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AND I FURTHER CERTIFY that on such date I served the foregoing on the following non-CM/ECF Registered Participants in the manner indicated as follows:

N/A

By: /s/ Chyvonne Tiedemann
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