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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

IN RE: CONDITIONS AT LAKE COUNTY JAIL	Cause No.: CV 22-127-M-DWM **DEFENDANT GOVERNOR GREG GIANFORTE'S REPLY TO PLAINTIFFS' RESPONSE TO GOVERNOR GREG GIANFORTE'S MOTION TO DISMISS**

Defendant Governor Greg Gianforte (the "Governor") files this reply brief to the Plaintiffs' Response in Opposition to Defendant Governor Greg Gianforte's Motion to Dismiss ("Plaintiffs' Response"). (Doc. 41). The Plaintiffs' Response

misapprehends the standards governing Eleventh Amendment immunity and the *Ex parte Young* doctrine, as well as the requisite "personal involvement" element for imposing liability under 42 U.S.C. § 1983. Pursuant to Fed. R. Civ. P. 10(c), the Governor also adopts and incorporates in full his contemporaneously filed reply to Lake County's response brief.

I. The Claims against Governor Gianforte in Counts 1 and 3 are Barred by the Eleventh Amendment.

"Generally, States are immune from suit under the terms of the Eleventh Amendment and the doctrine of sovereign immunity." *Whole Woman's Health v. Jackson*, ___ U.S. ___, 142 S. Ct. 522, 532, 211 L. Ed.2d 316 (2021). Under the Eleventh Amendment, states are protected from suit in federal court. *See Savage v. Glendale Union High Sch.*, 343 F.3d 1036, 1040 (9th Cir. 2003). In *Ex parte Young*, 209 U.S. 123, 159-60, 28 S. Ct. 441, 52 L. Ed 714 (1908), the Supreme Court carved out a narrow exception to Eleventh Amendment immunity for suits seeking prospective declaratory or injunctive relief against a state official sued in his or her official capacity. In order to sue a state official in their official capacity under *Ex parte Young*, the official "must have some connection with the enforcement of the [allegedly unconstitutional] act." 209 U.S. at 157. "This connection must be fairly direct; a generalized duty to enforce state law or general supervisory power over the persons responsible for enforcing the challenged provision will not subject an official to suit." *Los Angeles Cnty. Bar. Ass'n v. Eu*,

979 F.2d 697, 704 (9th Cir. 1992) (citation omitted). Yet this is precisely the connection which the plaintiffs claim exists in this case. *See Plaintiffs' Response*, p. 9 ("The Governor holds '[t]he executive power' and 'shall see that the laws are faithfully executed.' Mont. Const. art. VI, § 4(1)."). (Doc. 41, at p. 9).

The plaintiffs cite *Los Angeles Cnty. Bar Ass'n v. Eu*, 979 F.2d 697 (9th Cir. 1992), in which the Ninth Circuit allowed claims to proceed against the Governor of California under *Ex parte Young*, in purported support of their argument that Governor Gianforte has a "fairly direct" connection with the allegedly unconstitutional conditions and policies at the Lake County jail. The *Eu* case, however, is plainly distinguishable.

The plaintiff in *Eu* challenged a California statute that prescribed the number of judges in Los Angeles County, arguing that the number of judges was unconstitutionally low. *Id.* at 699. The Ninth Circuit explained that the plaintiff could sue the Governor because, if the court held that the statute prescribed too few judges, the state legislature would need to amend the statute to provide for more judges, and the Governor would be statutorily bound to appoint judges to fill those newly-created judicial positions. *Id.* at 704. Thus, the Ninth Circuit reasoned, the Governor had "a specific connection to the challenged statute." *Id.*

The Ninth Circuit's conclusion in *Eu*, however, provides no assistance to the plaintiffs here. The plaintiffs do not, and cannot, allege that Governor Gianforte

has any authority or control over the alleged conditions or policies that exist at the Lake County jail. The plaintiffs do not, and cannot, allege that Governor Gianforte played any personal role in creating or prolonging those alleged conditions or policies, or that he had any other connection to the plaintiffs' alleged injuries. Finally, and unlike the situation which existed in *Eu*, the plaintiffs do not, and cannot, show that Governor Gianforte can redress the plaintiffs' alleged injuries, except ostensibly by an allocation of State funds to Lake County for the upkeep of the Lake County jail. Pursuant to Public Law 280 and Montana's effectuating statutes, however, any allocation of State funds is within the exclusive prerogative of the Montana Legislature and outside the Governor's authority. *See Gianforte's Brief in Support of Motion to Dismiss*, pp. 2, 8. (Doc. 28).

Furthermore, "*Ex parte Young* cannot be used to obtain an injunction requiring the payment of funds from the State's treasury…or an order for specific performance of a State's contract." *Council 31 of the Am. Fed'n of State, County, and Muni. Emp's, AFL-CIO v. Quinn*, 680 F.3d 875, 882 (7th Cir. 2012) (quoting *Va. Office for Protection and Advocacy v. Stewart*, 563 U.S. 247, 256-257 (2011)). "[W]here a plaintiff's request for relief 'would have an effect upon the state treasury that is not merely ancillary but is the essence of the relief sought,' it is barred by the Eleventh Amendment." *Id*. at 882-883. (quotations omitted). Once again, *Ex parte Young* is inapplicable to this case because Plaintiffs have not

advanced any theory as to how Governor Gianforte could remedy their alleged harms except by sending money to Lake County, but that solution, even assuming it is viable, is insufficient under *Ex parte Young*.

In sum, because Governor Gianforte has no connection with the allegedly unconstitutional conditions or policies which exist at the Lake County jail, *Ex parte Young* does not apply and he is immune from suit under the Eleventh Amendment. Other courts have reached similar conclusions. *See, e.g., Farhoud v. Brown*, No. 3:20-cv-2226-JR, 2022 WL 326092, at *4-5 (D. Or. Feb. 3, 2022) (concluding that *Ex parte Young* did not apply to the governor of Oregon because her only connection to the challenged law involved "a general duty to 'take care' that all laws of the state are faithfully executed."); *Ass'n des Eleveurs de Canards et d'Oies du Quebec v. Harris*, 729 F.3d 937, 943 (9th Cir. 2013) (concluding that *Ex parte Young* did not apply to the governor of California because "his only connection to" the challenged law was "his general duty to enforce California law"); *Jevons v. Inslee*, 561 F. Supp. 3d 1082, 1096 (E.D. Wash. 2021), *appeal docketed*, No. 22-35050 (9th Cir. Jan. 18, 2022) (concluding that *Ex parte Young* did not apply to the governor of Washington because he had no enforcement authority over the challenged law beyond a "duty of general enforcement"); *Axos Bank v. Rosenblum*, No. 3:20-cv-01712-HZ, 2020 WL 7344594, at *4 (D. Or. Dec. 14, 2020) (concluding that *Ex parte Young* did not apply to the plaintiff's claim

against the Oregon Attorney General because she lacked enforcement authority over the challenged law).

II. *Ex parte Young* Does Not Apply to Alleged Violations of State Law.

"[T]he *Ex parte Young* exception applies only where the state officials are allegedly violating federal law; **it does not reach suits seeking relief against state officials for violations of state law**." *Steshenko v. Gayrad*, 44 F. Supp. 3d 941, 950 (N.D. Cal. 2014) (emphasis added) (*citing Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984) (concluding that the *Ex parte Young* doctrine is "inapplicable in a suit against state officials on the basis of state law.")); *see also Virginia Office for Prot. and Advocacy v. Stewart*, 563 U.S. 247, 268 (2011) ("We have … held that the fiction of *Ex parte Young* does not extend to suits … where the claimed violations are based on state law.") (*citing Pennhurst*, 465 U.S. at 106) (Roberts, J., dissenting). Here, the plaintiffs do not argue that the Governor has personally violated any federal law, as he must have done for *Ex parte Young* to apply; rather, the plaintiffs argue that the Governor has personally violated a Montana law that, according to the plaintiffs, makes him ultimately responsible for the upkeep of the Lake County jail.

The basic theory underlying the plaintiffs' argument is that "the Governor's legal duties to tribal members are premised in his role as the head of the Executive Branch and his assumption of responsibilities pursuant to Public Law 280 . . . ."

Plaintiffs' Response, pp. 6-7. (Doc. 41, at pp. 6-7). But Public Law 280 explicitly applies only to "[e]ach of the States listed in the following table," which table plainly does not include Montana. *See* Pub. L. No. 280, § 2, 67 Stat. 590. Rather, Montana's relationship to Public Law 280 derives solely from § 2-1-301, MCA, whereby the State "hereby obligates and binds itself to assume, as provided in this section, criminal jurisdiction over Indians and Indian territory of the Flathead Indian reservation and country within the state in accordance with the consent of the United States given by the act of August 15, 1953 (Public Law 280, 83rd congress, 1st session)." § 2-1-301(1), MCA (emphasis added).

Thus, Public Law 280 authorized Montana to assume criminal jurisdiction over Native Americans within its borders, but it was a state law, not any federal law, that actually effectuated such assumption. Accordingly, there is no federal law that would obligate the Governor to oversee criminal jurisdiction of Native Americans in Lake County. That obligation, assuming *arguendo* that it even exists, is purely a creature of Montana state law. As the *Ex parte Young* doctrine applies "only where the state officials are allegedly violating federal law," *Steshenko*, 44 F. Supp. 3d at 950, it clearly has no application in this case.

III. The Plaintiffs Fail to Allege Facts Showing Governor Gianforte's Personal Involvement in their Constitutional Deprivations under 42 U.S.C. § 1983.

"To state a claim under section 1983, a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law." *West v. Atkin*, 487 U.S. 42, 48, 108 S. Ct. 2250, 101 L. Ed.2d 40 (1988). In order to state a plausible claim under 42 U.S.C. § 1983, "[a] plaintiff must allege facts, not simply conclusions, that show that an individual was personally involved in the deprivation of his civil rights." *Barren v. Harrington*, 152 F.3d 1192, 1194 (9th Cir. 1998). "Liability under section 1983 arises only upon a showing of personal participation by the defendant." *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989).

Here, the plaintiffs fail to assert any facts to establish that Governor Gianforte was personally involved or personally participated in any alleged deprivation of their constitutional or federal rights. Instead, the plaintiffs merely allege in conclusory fashion that the Governor is liable under § 1983 due to unspecified "acts and omissions." (*See* Doc. 8, ¶¶ 50, 56). Those conclusory allegations are wholly insufficient to withstand a motion to dismiss under Rule 12(b)(6). *See Reedy v. California*, No. 2:21-cv-0223-TLN-CKD (PS), 2021 WL 3662471, at *1 (E.D. Cal. Aug. 18, 2021) ("Plaintiff has failed to allege any facts

plausibly supporting a claim that Governor Newsom had any personal involvement in the denial" of his constitutional rights under § 1983); *McGary v. Cunningham*, 728 Fed.App'x. 705, 707 (9th Cir. 2018) ("The district court properly dismissed the claims against Governor Inslee because [plaintiff] failed to allege facts showing Inslee's personal involvement in any constitutional violation or a causal connection between Inslee's conduct and any such violation."); *Samonte v. Bauman*, 264 Fed.App'x. 634, 636 (9th Cir. 2008) (§ 1983 claims against governor of Hawaii properly dismissed where "[plaintiff] did not allege that Governor Lingle had any personal involvement in delaying or denying his medical treatment."); *Silva v Gregoire*, No. C05-5731RJB, 2006 WL 3246145, at *1 (W.D. Wash. Nov. 7, 2006) ("[Plaintiff] fails to allege personal participation of defendant Governor Gregoire in support of his claims under 42 U.S.C. § 1983."); *Confederated Tribes & Bands of Yakama Indian Nation v. Locke*, 176 F.3d 467, 470 n.7 (9th Cir. 1999) (claims brought against governor of Washington in his official capacity properly dismissed where "Section 1983 … imposes liability only upon a defendant who participates individually in the activity that allegedly violates federal law.") (citations omitted); *Carwile v. Ray,* 481 F. Supp. 33, 35 (E.D. Wash. 1979) ("The law is clear that in order to successfully impose liability under 42 U.S.C. § 1983, a plaintiff must show personal involvement by the putative defendant in the activities that allegedly deprived plaintiff of any constitutional rights. . . . Here, plaintiff has

utterly failed to assert any facts that show a personal involvement by defendant [Governor of Washington] Ray."); *Miesegaes v. Allenby*, No. CV 15-01574-CJC (RAO), 2017 WL 10562958, at *9 (C.D. Cal. Dec. 29, 2017), *Findings and Recs. adopted*, No. CV 15-01574 CJC (RAO), 2018 WL 1033220 (C.D. Cal. Feb. 22, 2018) (dismissing § 1983 claim against governor of California for failure to "adequately allege personal involvement of [the Governor] in any constitutional violations").

IV. Conclusion

For the reasons stated herein and in the Governor's opening brief, and based upon established law, the Court should appropriately dismiss all claims asserted against the Governor in Plaintiffs' First Amended Class Action Complaint for failure to state a claim, as well as Lake County's cross-claim for contribution or indemnity.

DATED this 20th day of October, 2022.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 7.1(d)(2) of the District of Montana Local Rules, I certify that this brief contains 2,136 words, excluding caption and certificate of compliance, is printed in 14-point font, and is double spaced, except for footnotes and indented quotations.

By /s/ Leonard H. Smith
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