IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

HALSTEAD BEAD, INC., an Arizona corporation, *Plaintiff*, *v.* KEVIN RICHARDS, in his official capacity as Louisiana Secretary of Revenue, *et al.* *Defendants*.	Civil Action No. 2:21-cv-02106-JTM-KWR **OPPOSITION TO DEFENDANT LOUISIANA SECRETARY OF REVENUE KEVIN RICHARDS' MOTION TO DISMISS**

The Court should deny Defendant Louisiana Secretary of Revenue Kevin Richards's[1] Motion to Dismiss (Dkt. No. 47); Def. Memorandum in Support of Mot. to Dismiss Pursuant to R. 12(b)(6) (Dkt. No. 47-1) ("Secretary Memorandum"). Contrary to the Secretary's arguments, Plaintiff Halstead Bead ("Halstead") properly alleges constitutional injuries, there are material facts in dispute, and the Secretary is properly a party to this action.

STATEMENT OF THE CASE

Halstead incorporates by reference the statement of the case in its Opposition to Defendant Parishes' Joint Motion to Dismiss, filed contemporaneously with this brief.

LEGAL STANDARDS

While claiming only to seek dismissal under Rules 12(b)(6) and 21, the Secretary's Memorandum also questions this Court's jurisdiction. *See* Sec'y Memorandum at 3-5, 8-9. Such questions are properly raised under Rule 12(b)(1) and must be resolved first. *See Ramming v.*

[1] On February 1, 2022, Kevin Richards succeeded Kimberly Lewis as Louisiana Secretary of Revenue. As successor, Richards is automatically substituted as a party pursuant to Federal Rule of Civil Procedure 25(d).

United States, 281 F.3d 158, 161 (5th Cir. 2001). Dismissal under Rule 12(b)(1) "should be granted only if it appears certain that the plaintiff cannot prove any set of facts in support of his claim that would entitle plaintiff to relief." *Id*.

To survive a Rule 12(b)(6) motion, a complaint must contain sufficient factual matter to "state a claim to relief that is plausible on its face," *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted), and dismissal is improper "even if it strikes a savvy judge that actual proof of those facts is improbable, and 'that a recovery is very remote and unlikely.'" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007) (citation and quotation marks omitted). In reviewing the complaint, the Court must "accept all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff." *Edionwe v. Bailey*, 860 F.3d 287, 291, 295 (5th Cir. 2017) (citation and quotation marks omitted).

The Secretary also relies on Federal Rule of Civil Procedure Rule 21, which states that "[m]isjoinder of parties is not a ground for dismiss[al]." But Rule 21 does allow the Court "at any time, on just terms, [to] add or drop a party" or to "sever any claim against a party." *Id*. To do so the Fifth Circuit applies "a two-prong test" using Rule 20 "allowing joinder of plaintiffs when (1) their claims arise out of the 'same transaction, occurrence, or series of transactions or occurrences' and when (2) there is at least one common question of law or fact linking all claims." *Acevedo v. Allsup's Convenience Stores, Inc.*, 600 F.3d 516, 521 (5th Cir. 2010) (internal citation omitted). Otherwise, a complaint need only "give fair notice in the pleadings of all claims brought against the defendant." *Homoki v. Conversion Servs., Inc.*, 717 F.3d 388, 402 (5th Cir. 2013).

ARGUMENT

I. This Court Has Jurisdiction to Hear Halstead's Challenge.

a. Halstead Has Standing.

In response to the Secretary's arguments regarding standing, Halstead incorporates by

reference its discussion of standing in its Opposition to Parishes' Joint Motion to Dismiss, filed contemporaneously with this response, which shows why Halstead has standing.

b. The Eleventh Amendment does not bar Halstead's claims against Defendant Richards.

The Secretary's memorandum argues that, in the absence of a waiver, the Eleventh Amendment bars Halstead from obtaining an award of damages against him. *See* Sec'y Memorandum at 8-9. But Halstead can, and does, seek declaratory and injunctive relief against him under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908).

Under *Ex parte Young*, the Eleventh Amendment does not bar suits for prospective injunctive and declaratory relief "brought against individual persons in their official capacities as agents of the state." *Saltz v. Tenn. Dep't of Emp't Sec.*, 976 F.2d 966, 968 (5th Cir. 1992). Determining whether *Ex parte Young* applies is not difficult: "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 and quotation marks omitted).

Halstead's claims against the Secretary are plainly permissible under *Ex parte Young*. Halstead alleges that Defendants, including Richards, are engaging in an ongoing violation of federal law by enforcing the filing and reporting requirements Halstead challenges. *See* Verified Complaint (VC) ¶ 6. And the relief Halstead seeks (apart from nominal damages) is prospective: a declaration that these requirements violate the Commerce and Due Process Clauses and an injunction against their further enforcement. *Id*. ¶¶ 91-92, 107-08.

II. Halstead Has Stated Viable Commerce Clause and Due Process Clause Claims Against Secretary Richards.

a. Kevin Richards is a Proper Defendant as Louisiana's Secretary of Revenue.

Under *Ex parte Young*, a defendant need only "have 'some connection' to the enforcement

of the act at issue." *White Hat v. Landry*, 475 F. Supp.3d 532, 548 (M.D. La. 2020) (*quoting Ex parte Young*, 209 U.S. at 157). This connection need only be "some scintilla of 'enforcement' by the relevant state official." *City of Austin v. Paxton*, 943 F.3d 993, 1002 (5th Cir. 2019).

Here, there is much more than a scintilla. Richards is sued in his official capacity due to his "responsibil[ity] for enforcing the collection of sales taxes," VC ¶ 6, and that responsibility includes much broader powers than the motion to dismiss indicates. He oversees regulations and investigations, and requires regular reporting from out-of-state businesses. Even the Parish Defendants recognize his role as a "working partner" in enforcing Louisiana's parish-based tax collection system. He is thus properly joined here.[2]

Defendant Richards rests much of his argument on the false premise that the Louisiana Department of Revenue ("Department")'s authority to collect taxes lies only in La. Rev. Stat. § 47:1502. *See* Sec'y Memorandum at 2. But Louisiana courts have ruled otherwise: "contrary to the suggestion of the Department, there is nothing in the language of [the statute] limiting the Department's authority to administer only the taxes referred to therein." *Dep't of Revenue v. Jazz Casino Co., LLC*, No. 2016-0180, 2017 WL 496266 at *4 (La. Ct. App. 1st Cir. Feb. 7, 2017) (unpublished).[3] Indeed, to so hold would ignore the Secretary's powers of "assessment and collection of a tax, [and] for investigations and hearings, imposition of interest and penalties, and the refund of the payment of tax when none was due or of the excess of the amount due." *Id* at *5 (emphasis removed).

[2] If the Court were to conclude that the VC needs further clarity, Halstead would respectfully request leave to amend it, which would be more appropriate than either full dismissal or severance of the party. *See Jones v. Robinson Prop. Grp., L.P.*, 427 F.3d 987, 994 (5th Cir. 2005) (internal quotation marks omitted) (noting a "bias in favor of granting leave to amend").

[3] Unpublished state appellate court opinions are binding authority in Louisiana. *See* La. Code Civ. Proc. art. 2168(B). The decision may be found on the official court's website at https://www.la-fcca.org/opiniongrid/opinionpdf/2016%20CA%200180%20Decision%20Appeal.pdf.

Louisiana law makes the Department of Revenue responsible for "assessing, evaluating, and collecting the consumer, producer, and any other state taxes specifically assigned by law to the department." La. Rev. Stat. § 36:451(B). That includes assuring the collection of state sales taxes as well as audit powers. *See id.* §§ 36:458(B) and (D). The Secretary's Office of Legal Affairs also handles litigation matters before, *inter alia*, the Board of Tax Appeals and the state and federal courts. *See id.* § 36:458(F).

More importantly, parishes may contract with the Department to collect taxes. *See id.* § 47:337.16(A). This power extends to collecting any "related penalty, interest, or other charge, levied by the taxing authorities." *Id*. The statutes further empower the Secretary, "for the purpose of auditing for compliance with local sales and use tax ordinances," to examine and investigate "the place of business, if any; the tangible personal property; and the books, records, papers, vouchers, accounts, and documents of any taxpayer for the purposes of enforcement and collection of any tax imposed by that taxing authority." *Id.* § 47:337.26(B). The Secretary even can get paid by the parishes to do this work, on an hourly basis. *See id*.

And the Secretary has done that work before. *See, e.g., McNamara v. Stauffer Chem. Co.*, 506 So. 2d 1252, 1253 (La. Ct. App. 1987); *Jazz Casino*, 2017 WL 496266 at *4-5 (unreported). It is not apparent whether there is such a contract between the Department and the named Parishes in this case, but the Secretary has not disclaimed such an arrangement. On the contrary, the Parishes' Memorandum says there *is*. The Parishes told this Court that "in the instant matter, the State and local governments *are working partners for the purposes of taxation*…." Parishes' Memorandum at 31 (Dkt. No. 39-1) (emphasis added). And in arguing that a state forum for this challenge exists (which is not true, and the Secretary does not argue it), the Parishes pointed this Court to La. Rev. Stat. § 47:1565, which addresses appeals from an assessment or collection of the

tax by *state's Department of Revenue*. *See id*. at 25. These indicate that the Secretary is participating in and overseeing the challenged regulations and requirements, and is therefore properly named as a defendant.

i. The Secretary further has various powers of investigation, collection, and jurisdiction to reach out of state.

The Secretary claims no paragraphs in the VC apply to him, notwithstanding Halstead's allegation, VC ¶ 6, that he "is responsible for enforcing the collection of sales taxes." *See* Sec'y Memorandum at 3. But not only does he act as an agent for the Parishes, but he also has his own enforcement powers for compelling compliance with the laws challenged here.

The Secretary oversees remote sellers' annual reporting of the taxes they collected and remitted. Every March 1, the Secretary collects annual statements from remote sellers on all "retail sales of tangible personal property or taxable services to Louisiana purchasers in the immediately preceding calendar year." La. Rev. Stat. § 47:309.1(D). He has the power to create the relevant forms and compel they be filed electronically for sellers over the *de minimis* threshold. *See id*. Of course, he collects the *state* sales and use taxes too. *See id.* § 47:303(A). This is the type of "enforcement power" that makes the Secretary a proper *Ex parte Young* defendant. *See K.P. v. LeBlanc,* 627 F.3d 115, 124 (5th Cir. 2010) (holding that delegated enforcement authority is sufficient to make an agent a proper defendant).

Further, the Secretary may subpoena witnesses and documents to enforce the registration and reporting requirements challenged here. *See* La. Rev. Stat. § 47:309.1(E); *Traigle v. Am. Bank & Tr. Co.*, 343 So.2d 253, 256 (La. 1st Cir. Ct. App. 1977). He also has the power to enforce the jurisdiction of the Board of Tax Appeals and make service of process on remote sellers. *See* La. Rev. Stat. § 47:309.1(F). And he promulgates rules concerning the local registration and reporting system. *See* La. Rev. Stat. §§ 47:309.1(G), 47:1511. He has done so in the past. *See* 61 La. Admin.

Code Part I, § 4301. This is the type of "pervasive enforcement" of a challenged statute that makes a state actor a proper *Ex parte Young* defendant. *See, e.g., Air Evac EMS, Inc. v. Tex. Dep't of Ins., Div. of Workers' Comp.*, 851 F.3d 507, 519 (5th Cir. 2017).[4]

b. Halstead Bead Has Stated a Viable Commerce Clause Claim.

As to Defendant Richards's arguments on whether Halstead has stated a Commerce Clause claim, Halstead incorporates by reference its argument on that issue from its opposition to Parishes' Joint Motion to Dismiss, with the following additional points.

The Secretary cites *Hignell v. City of New Orleans*, 476 F. Supp. 3d 369 (E.D. La. 2020), a case about short term rentals in New Orleans. That case was decided on Summary Judgment under Rule 56, and the plaintiffs lost because they provided no evidence to rebut arguments the city used to justify its regulation. *Id*. at 386. This case, in contrast, is still at the pleading stage, so there has been no discovery or fact-finding on the burdens or benefits of Louisiana's complicated tax compliance system. Dismissal is thus inappropriate, and *Hignell* is inapposite.

Furthermore, regulating *all internet sales* into the state is monumentally different form regulating short-term rentals of houses in a city. Real estate ownership is capital-intensive and involves a physical asset sitting forever in a particular parish boundary; it is not comparable to the

[4] The unreported out-of-state, out-of-district cases on which Richards relies are inapposite. *Chantilly Store All, LLC v. Spear*, No. 2:09-CV-921-MEF, 2010 WL 4269131 (M.D. Ala. Oct. 22, 2010), involved a challenger who failed to show how any of the defendants denied her a right to trial on her tax assessment claims. *See id*. at *4. It did not discuss differences in state versus local tax enforcement, and Richards has not shown how the case is relevant. Similarly irrelevant is *Carter v. Mnuchin*, No. 1:19-CV-00450, 2019 WL 5575732 *1 (M.D.N.C. Oct. 29, 2019), in which a *pro se* litigant attempted to stop the garnishment of wages for taxes owed. That case focused on the core application of the Anti-Injunction Act, rather than the difference between local and state collection of sales taxes, and it sheds no light on any issue in the Secretary's Motion. *Stiriling v. Ramsey*, No. 4:17CV1206 RLW, 2018 WL 3489592 (E.D. Mo. July 19, 2018), is likewise inapposite. It focused on the heightened pleading standards for allegations of fraud under Federal Rule of Civil Procedure 9(b), which requires a complaint "state with particularity the circumstances constituting fraud or mistake." Halstead does not allege fraud, and nothing in *Stiriling* is relevant here.

consumable and transitory nature of shipping crafting supplies. The nature of Halstead's claims here is that the challenged laws are so burdensome, confusing, and complicated, as to effectively bar Halstead from selling into Louisiana above the *de minimis* threshold. No such argument was involved in *Hignell*, where the challenged regulation imposed only "incidental" effects on interstate commerce that were "not clearly excessive in relation to the putative local benefits." *Id.* at 385. The *Wayfair* case, which is central to Halstead's argument here, was never even mentioned there.

The Secretary also relies on *Chinatown Neighborhood Ass'n v. Harris*, 794 F.3d 1136, 1146 (9th Cir. 2015), to say that the *Pike* balancing test is rarely applied in favor of a challenger. This, too, is a merits argument, and is therefore not properly presented here. If the Secretary means to suggest that *Pike* has been abrogated, the Supreme Court said that it is a means by which one may challenge tax requirements that unduly burden interstate commerce. *See South Dakota. v. Wayfair*, 138 S. Ct. 2080, 2099 (2018) (citing *Pike* as an example of an "aspect[] of the Court's Commerce Clause doctrine [that] can protect against any undue burden on state commerce…."). Nor may this Court even accept the proposition that the Court has abrogated *Pike*. *See League of United Latin Am. Citizens v. Abbott*, 951 F.3d 311, 316 (5th Cir. 2020) (observing that lower courts must apply precedent not overruled).

c. Halstead Bead Has Stated a Viable Due Process Clause Claim.

In response to Defendant Richards's arguments on whether Halstead has stated a claim for violation of the Due Process Clause, Halstead incorporates by reference its argument on that issue from its opposition to the Parishes' Joint Motion to Dismiss.

III. Misjoinder Under Rule 21 is Inapplicable Here.

Defendant Richards claims, in the alternative, that he is misjoined. *See* Sec'y Memorandum at 9-10. Given his extensive involvement in sales and use tax regulation, including the possibility

of being a Parish's collecting agent, the Secretary is properly joined.

Rule 21 by its own terms precludes the relief the Secretary seeks. It says "[m]isjoinder of parties is not a ground for dismissing an action." While Rule 21 does allow the Court to "add or drop a party," it provides no test for doing so, and so the Fifth Circuit looks to Rule 20 for "a two-prong test, allowing joinder of plaintiffs when (1) their claims arise out of the "same transaction, occurrence, or series of transactions or occurrences" and when (2) there is at least one common question of law or fact linking all claims." *Acevedo*, 600 F.3d at 521. In applying this test, a court considers whether including the party will "facilitate judicial economy," and whether "different witnesses and documentary proof would be required for plaintiffs' claims." *Id*. at 522.

Especially at this early stage, all Halstead need do is "give fair notice in the pleadings of all claims brought against the defendant." *Homoki v. Conversion Servs., Inc.*, 717 F.3d 388, 402 (5th Cir. 2013). A complaint need not even articulate the correct legal theory for relief, only that the defendant had a hand in harm sought to be redressed. *See Doss v. S. Cent. Bell Tel. Co.*, 834 F.2d 421, 425 (5th Cir. 1987).

Here, the VC contains the required notice. Halstead alleges that it is injured by the burdensome compliance system the state and parishes impose on out-of-state sellers. *See* VC ¶¶ 49-65. The parish-based registration and reporting system is a creature of the state's Constitution. *See id*. ¶ 49. The Secretary holds broad enforcement powers, discussed *supra*, including the ability to contract the right to collect on behalf of parishes. An injunction against a parish tax collector would be incomplete if the Department could enforce unconstitutional requirements. *See id*., Prayers for Relief E and F. There are therefore common questions, involving the same witnesses and documentary evidence, pertaining to all Defendants, including the Secretary. Therefore, the Secretary is properly joined.

The Secretary provided no persuasive precedent to support his position, citing two out-of-circuit decisions: *John S. Clark Co. v. Travelers Indem. Co. of Ill.*, 359 F. Supp.2d 429 (M.D.N.C. 2004) and *United States v. Testa*, 548 F.2d 847, 856 (9th Cir. 1977). *Clark* is a non-binding district court opinion that did not apply Louisiana law. To the extent *Clark* applied Rule 21, it did so in a manner favorable to Halstead here, "strongly encourag[ing]" construing the Rules with "the impulse … toward entertaining the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties and remedies" is strongly encouraged. *John S. Clark*, 359 F. Supp.2d at 437 (citations and quotation marks omitted). *Testa* is inapposite because it was a *criminal* matter where one co-conspirator appealed his conviction in part because the venue was allegedly improper under Federal Rule of *Criminal* Procedure 21(b). *See Testa*, 548 F.2d at 856. It has no bearing on this case.

CONCLUSION

For the foregoing reasons, the Court should deny the Secretary's Motion to Dismiss.

Respectfully submitted,

s/ Joseph Henchman

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