

CASE NO. 06-5188

**UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

MARY BISHOP AND SHARON BALDWIN, INDIVIDUALS;)	
SUSAN G. BARTON AND GAY E. PHILLIPS, INDIVIDUALS,)	
PLAINTIFF-APPELLEES)	
VS.)	
)	
THE STATE OF OKLAHOMA, EX REL DREW EDMONDSON,)	
IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL; BRAD)	CASE No. 06-5188
HENRY, IN HIS OFFICIAL CAPACITY AS GOVERNOR;)	
DEFENDANT-APPELLANTS)	
and)	
)	
THE UNITED STATES OF AMERICA, EX REL, JOHN)	
ASHCROFT, IN HIS OFFICIAL CAPACITY AS ATTORNEY)	
GENERAL, AND GEORGE W. BUSH, IN HIS OFFICIAL)	
CAPACITY AS PRESIDENT,)	
DEFENDANTS.)	

APPEAL FROM INTERLOCUTORY ORDER OF
THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA
CASE No.: 04-CV-848-TCK-SAJ
THE HONORABLE TERRENCE C. KERN

APPELLEES' OPENING BRIEF

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APPELLEES' STATEMENT REGARDING ORAL ARGUMENT
APPELLEES' REQUEST ORAL ARGUMENT

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STATEMENT OF RELATED CASES

Pursuant to 10th Cir. R. 28.2(C)(1), Defendants/Appellees represent that
there are no prior or related appeals.

SUMMARY OF ARGUMENT

The Plaintiffs in this matter are seeking prospective injunctive relief against state officials in their official capacity. The Governor Brad Henry (“Governor”) and the Attorney General Drew Edmondson (“Attorney General”), collectively referred to as “Defendants” are the duly elected officials of the State of Oklahoma endowed with the powers and authority to enforce the laws of the State of Oklahoma, as alleged by Plaintiffs in their Complaint [**App, p. 10; p. 12 @ ¶¶ 9 & 10; p. 13 @ ¶¶ 16**].

The Trial Court the denied Defendants’ Fed.R.Civ.P. 12(b)(6) Motion to Dismiss based on their Eleventh Amendment Immunity arguments as it related to Plaintiffs’ allegations that Oklahoma Art. 2 §35 violated their Equal Protection and Substantive Due Process rights guaranteed under the 14th Amendment to the Constitution of the United States.

The limited issue which the Defendants bring to this Court centers on the standing of the Plaintiffs herein as it relates to the application of the doctrine of Qualified Immunity and the requirements of the *Ex Parte Young*, 209 U.S. 123, 28 S. Ct. 441, 52 L.Ed. 714 (1908). Initially, Defendants center their arguments on the outcome of this Court’s Opinion in the case of *Opala v. Watt*, 454 F.3d 1154 (10th Cir, 2006). The *Opala* case, however, was dismissed because Justice Opala no longer was in a position where prospective injunctive relief would provide an appropriate remedy since he no longer held the position of Vice Chief Justice. This is not the situation the Court faces herein.

In the case at hand, the Trial Court properly addressed the various issues presented by the Defendants, which were not presented below in nearly as much detail as they are herein. The Trial Court's decision was in accordance with the requirements of this Court and its Opinions as well as those of the Supreme Court, and should be affirmed.

ARGUMENTS & AUTHORITIES

**ISSUE: WHETHER THE GOVERNOR AND ATTORNEY GENERAL ARE IMMUNE FROM
 SUIT UNDER A PROPER ANALYSIS OF THEIR ELEVENTH AMENDMENT
 IMMUNITY RIGHTS**

A. STANDARD OF REVIEW

This Court reviews de novo a Trial Court's decision on Motion to Dismiss for want of subject matter jurisdiction de novo.. *Brumark Corp. v. Samson Resources Corp.*, 57 F.3d 941, 944 (10th Cir.1995); *Opala v. Watt*, 454 F.3d 1154, 1156-57 (10th Cir, 2006). In so doing, this Court accepts all Plaintiffs' allegations as true and determines only whether these allegations state a claim recognized at law. *Sutton v. Utah State School for the Deaf & Blind*, 173 F.3d 1226, 1236 (10th Cir.1999); *Pierce v. Gilchrist*, 359 F.3d 1279, 1300 (10th Cir., 2004). "Dismissal of a case pursuant to Fed.R.Civ.P. 12(b)(6) requires the legal determination that the plaintiff can prove no set of facts in support of his claim to entitle him to relief." *Hospice of Metro Denver, Inc. v. Group Health Ins. of Oklahoma, Inc.*, 944 F.2d 752, 753 (10th Cir. 1991). A Rule 12(b)(6) motion to dismiss will be granted

only if it appears beyond a doubt that the plaintiff is unable to prove any set of facts entitling him to relief under his theory of recovery. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). On a motion to dismiss, the allegations of the complaint must be accepted as true. *Cruz v. Beto*, 405 U.S. 319, 322 (1972).

B. DISCUSSION

1. THE TRIAL COURT CORRECTLY APPLIED THE APPLICABLE LAW

The Plaintiffs in this action are being deprived of their right to marry, a fundamental right according to the United States Supreme Court. The fact that the State has defined marriage in such a way as to exclude them from the institution instantly places them in a position where their relationship cannot be recognized and sanctioned by the state. The parties made a decision to marry, but are being prevented from doing so or that marriage (out of the country) is not being recognized.

The decision to marry is properly described as a fundamental right, see *id.* [*Zablocki v. Redhail*, 434 U.S. 374, 385-86, 98 S.Ct. 673, 680-81, 54 L.Ed.2d 618 (1978)] at 383-84 and *Loving v. Virginia*, 388 U.S. 1, 18 L.Ed.2d 1010 (1967), as well as a right encompassed by the fundamental right of privacy, *Whalen v. Roe*, 429 U.S. 589, 598-600 n. 26, 51 L.Ed.2d 64, 73 n. 26 (1977), and state laws which significantly interfere with that right must be strictly examined. See, e.g., *Roe v. Wade*, 410 U.S. 113, 155-56, 35 L.Ed.2d 147, 178-79 (1973).

Vaughn v. Lawrenceburg Power Sys., 269 F.3d 703 (6th Cir. 2001).

The Eleventh Amendment simply does not bar a constitutional challenge to a State enactment under the Due Process and Equal Protection clauses of the Fourteenth Amendment. The District Court properly analyzed this issue and found that the

exception to Eleventh Amendment Immunity set out in *Ex Parte Young*, recognized that “where prospective relief is sought against individual state officers in a federal forum based on a federal right, the Eleventh Amendment in most cases is not a bar. *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 276-277 (1997); *Nelson v. Geringer*, 295 F.3d 1082, 1096 (10th Cir., 2002). [App, 107] The Defendants now argue that the Trial Court should dismiss this case base on *Ex Parte Young*, but in their 12(b)(6) Motion & Brief below, they argued that *Ex Parte Young* should not apply in this case since there was no enforcement or threat of enforcement. To justify this change in their arguments, Defendants’ offer up the *Opala* and *Robinson* cases as new authority by this Court. The *Opala* Opinion, however, made it clear that the basis for their dismissal was that the *prospective* injunctive relief sought by Justice Opala was no longer a viable remedy:

Because we are only permitted to grant prospective equitable relief under *Ex Parte Young*, we cannot undo this election. Moreover, a declaration that New Rule 4 is unconstitutional will not remedy Justice Opala's claimed injury that he was not able to stand for election under Old Rule 4 while serving as Vice-Chief Justice.

Opala, p. 1157. This is not the situation in the case at hand, and the *Opala* case does not change the law upon which the District Court based its decision.

In *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), the United States Supreme Court discussed the test of whether Congress has the power to abrogate unilaterally the States' immunity from suit. The Court stated that this issue “is narrowly

focused on one question: Was the Act in question passed pursuant to a constitutional provision granting Congress the power to abrogate?" *See, e.g., Fitzpatrick v. Bitzer*, 427 U.S. 445, 452-456 96 S.Ct. 2666, 2669-2671, 49 L.Ed.2d 614 (1976)." *Id.* at 58.

In discussing their position on this matter, the Court stated:

Previously, in conducting that inquiry, we have found authority to abrogate under only two provisions of the Constitution. In *Fitzpatrick*, we recognized that the Fourteenth Amendment, by expanding federal power at the expense of state autonomy, had fundamentally altered the balance of state and federal power struck by the Constitution. *Id.*, at 455, 96 S.Ct., at 2671. We noted that §1 of the Fourteenth Amendment contained prohibitions expressly directed at the States and that §5 of the Amendment expressly provided that "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." *See id.*, at 453, 96 S.Ct., at 2670 (internal quotation marks omitted). We held that through the Fourteenth Amendment, federal power extended to intrude upon the province of the Eleventh Amendment and therefore that §5 of the Fourteenth Amendment allowed Congress to abrogate the immunity from suit guaranteed by that Amendment.

Id.

In *Ex parte Young*, 209 U.S. 123 (1908). The United States Supreme Court explained its application in when it said:

The Court has recognized an important exception to this general rule: a suit challenging the constitutionality of a state official's action is not one against the State. This was the holding in *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed.2d 714 (1908), in which a federal court enjoined the Attorney General of the State of Minnesota from bringing suit to enforce a state statute that allegedly violated the Fourteenth Amendment. This Court held that the Eleventh Amendment did not prohibit issuance of this injunction. The theory of the case was that an unconstitutional enactment is "void" and therefore does not "impart to [the officer] any immunity from responsibility to the supreme authority of the United States." *Id.*, at 160, 28 S.Ct., at 454. Since the State could not authorize the action, the officer was "stripped of his official or representative character and [was] subjected to

the consequences of his official conduct." *Ibid.*

While the rule permitting suits alleging conduct contrary to "the supreme authority of the United States" has survived, the theory of *Young* has not been provided an expansive interpretation. Thus, in *Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974), the Court emphasized that the Eleventh Amendment bars some forms of injunctive relief against state officials for violation of federal law. *Id.*, at 666-667, 94 S.Ct., at 1357-1358. In particular, *Edelman* held that when a plaintiff sues a state official alleging a violation of federal law, the federal court may award an injunction that governs the official's future conduct, but not one that awards retroactive monetary relief. Under the theory of *Young*, such a suit would not be one against the State since the federal-law allegation would strip the state officer of his official authority.

Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89 (1984). And more recently, in *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997), the Court, in an exhaustive analysis of *Young* and its effect, concluded:

Our precedents do teach us, nevertheless, that where prospective relief is sought against individual state officers in a federal forum based on a federal right, the Eleventh Amendment, in most cases, is not a bar. See, e.g., *Willcox*, 212 U.S., at 40, 29 S.Ct., at 195. Indeed, since *Edelman* we have consistently allowed suits seeking prospective injunctive relief based on federal violations to proceed.

Id. at 277.

Just as in *Ex Parte Young*, Plaintiffs are seeking *prospective injunctive relief* against State Officials *in their Official capacity*.

2. THE DEFENDANTS' IMPROPERLY RELY ON FACTUAL QUESTIONS TO SUPPORT THEIR PROPOSITION THAT THE DISTRICT COURT SHOULD HAVE DISMISSED

Defendants' break their arguments down into the four parts of what they claim to

be the requirements of the *Opala/Robinson*¹ cases. The District Court addressed many of the same arguments set out in Defendant's issues when dealing with the requirements of "case or controversy" and issues of standing. [App, 89-90] Other issues were simply not alleged below.

The continual reference to the fact that Plaintiffs have not shown that the Attorney General has threatened them or violated their rights in any way is similar to the allegations of Appellants in the case of *Pierce v. Gilchrist*, 359 F.3d 1279 (10th Cir., 2004) where this Court stated:

First, Mr. Macy asserts that Plaintiff has failed to show the facts required to support his allegations. At various points in his brief, Mr. Macy claims that Mr. Pierce has "no proof for [his] claim," Macy Br. 10, "there [is] no evidence showing that Macy or his office" violated Plaintiff's constitutional rights, *id.* at 9, and that Mr. Pierce's "assertion[s] lack[] merit and cannot be supported." *Id.* at 6.

Simply put, neither the facts nor the reasonable inferences to be drawn from them are at issue at this stage of the litigation. See *Ramirez*, 222 F.3d at 1240. Rather, in reviewing a motion to dismiss we accept all Plaintiff's allegations as true and determine only whether these allegations state a claim recognized at law. *Sutton v. Utah State School for the Deaf & Blind*, 173 F.3d 1226, 1236 (10th Cir.1999). For this reason, Mr. Macy's protestations regarding the lack of evidentiary basis for Plaintiff's claims are to no avail; on a motion to dismiss we evaluate the legal, not the factual, basis of the complaint.

Id. at 1300-1301.

The determination as to those facts will be brought forth at the Summary Judgment stage. In their Motion & Brief below, the State relied on *Lujan v. Defenders of*

¹ *Robinson v. Kansas*, 295 F.3d 1183 (2002)

Wildlife, 504 U.S. 555, (1992) for the Supreme Court's application of the three-prong test [App, p. 30] again ignoring there as they have here the Supreme Court's application of these factors only at the final stage of trial by presentation of evidence of injury or at the summary judgment stage through affidavits and proper proof attached. The Court specifically stated that this was not an applicable test on a *Motion to Dismiss*:

At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we "presum[e] that general allegations embrace those specific facts that are necessary to support the claim." *National Wildlife Federation*, supra, 497 U.S., at 889, 110 S.Ct., at 3189. In response to a summary judgment motion, however, the plaintiff can no longer rest on such "mere allegations," but must "set forth" by affidavit or other evidence "specific facts," Fed.Rule Civ.Proc. 56(e), which for purposes of the summary judgment motion will be taken to be true. And at the final stage, those facts (if controverted) must be "supported adequately by the evidence adduced at trial." *Gladstone*, supra, 441 U.S., at 115, n. 31, 99 S.Ct., at 1616, n. 31.

Id. at 561.

While Defendants are forced to rely on cases from other Circuits, this Circuit has addressed the issues presented herein on numerous occasions and have consistently found an exception to the bar against citizens bringing suits against the state in federal court unless it meets the appropriate criteria. Recently in *Trujillo v. Williams*, 465 F.3d 1210 (10th Cir., 2006), once again, this Court went through an analysis similar to that which the District Court herein conducted and affirmed the dismissal of those claims against officials in their individual capacity and those claims seeking monetary relief, but held that:

Remaining, then, are Mr. Trujillo's claims against the New Mexico defendants in their official capacities for injunctive relief only, and his claims against the New Mexico defendants in their personal capacities for money damages. Liberally construing Mr. Trujillo's pro se complaint, *Price v. Philpot*, 420 F.3d 1158, 1162 (10th Cir.2005), we read it to allege against these remaining defendants 1) a Fourteenth Amendment due process and equal protection claim; 2) a denial of the constitutional right of access to the courts claim; and 3) an Eighth Amendment nutritionally inadequate diet claim. The district court determined that no relief could be granted on any of these claims and dismissed them with prejudice pursuant to 1915(e)(2) and Fed.R.Civ.P. 12(b)(6).

A district court may dismiss under §1915 for failure to state a claim if "it is 'patently obvious' that the plaintiff could not prevail on the facts alleged, and allowing him an opportunity to amend his complaint would be futile." *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir.1991) (quotations omitted). "In determining whether dismissal is proper, we must accept the allegations of the complaint as true and we must construe those allegations, and any reasonable inferences that might be drawn from them, in the light most favorable to the plaintiff." *Perkins*, 165 F.3d at 806.

All four of the parts of Defendant's arguments in their Appellants Opening Brief are based on the allegations that the individual officials sued are not responsible for the enforcement of the law and have not threatened enforcement. This is a ludicrous claim in that the force and effect of an Attorney Generals' Opinion in the State of Oklahoma is precedent and binding on the Courts. Attorney General has indeed written opinions prior to the enactment of the Amendment which interpreted previous law, saying

Under Oklahoma law, a marriage is a civil contract between one man and one woman. 43 O.S. 2001, §§ 1, 3. Oklahoma law specifically provides that Oklahoma shall not recognize as valid and binding a marriage between persons of the same gender performed by another state.

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03/19/2004. The entire issue of enforcement, however, is a factual issue that is not relevant to the present inquiry. It would have been error for the Court to make those considerations on a 12(b)(6) Motion and this Court will not review this issue at this time, either. Indeed in light of the fact that each of Defendants arguments depend upon factual findings, under recent precedent, it may be that the immediate appeal of this Order was improvidently brought. In *Robbins v. Wilkie*, 433 F.3d 755 (10th Cir., 2006) this Court said:

A denial of qualified immunity is actually only immediately appealable to the extent the district court's decision turns on an abstract issue of law. *Mitchell* at 530, 105 S.Ct. 2806; *Johnson v. Jones*, 515 U.S. 304, 313-14, 317, 115 S.Ct. 2151, 132 L.Ed.2d 238 (1995). Thus, an appellate court may examine on interlocutory appeal the purely legal question of whether the facts alleged by plaintiff support a claim of violation of clearly established law. *Mitchell*, 472 U.S. at 528 n. 9, 105 S.Ct. 2806. An appellate court may not, however, review questions of evidentiary sufficiency on interlocutory appeal.

Robbins at 761.

CONCLUSION

Defendants have failed to present any applicable law which would support their contentions that the District Court erred in its failure to grant their 12(b)(6) Motion to Dismiss. The Constitutional Amendment at issue deprives the Plaintiffs of a fundamental right guaranteed to them by the 14th Amendment which is specifically applied to the states. The contentions regarding who enforces the law are factual issues and are not at issue herein. Plaintiffs did allege that the Defendants were responsible for the

enforcement, and, at this stage this will be assumed true. This Appeal was based on factual allegations regarding responsibility for enforcement and law from other jurisdictions. This Circuit follows the jurisprudence set out by the Supreme Court and it clearly reveals that the judgment of the District Court should be affirmed so that the issues can be determined at Summary Judgment.

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