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

HANNAH MAGEE PORTEE, *Plaintiff*,	§	
v.	§	CIVIL ACTION NO. 1:23-cv-00551-RP
MIKE MORATH, in his official capacity as COMMISSIONER OF EDUCATION OF TEXAS, TEXAS EDUCATION AGENCY, and STATE BOARD FOR EDUCATOR CERTIFICATION, *Defendants*.	§	

STATE DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

Defendants Mike Morath, in his official capacity as the Commissioner of the Texas Education Agency, the Texas Education Agency, and the State Board for Educator Certification, (collectively, "Defendants") respectfully file this Opposition to Plaintiff's Motion for Preliminary Injunction. In support, Defendants show the following:

I. INTRODUCTION

Plaintiff Hannah Magee Portee brings this suit against Defendants seeking declaratory and injunctive relief related to the alleged denial of her right and property interest in the validity and portability of her out-of-state school counselor licenses.

Plaintiff alleges that the Servicemembers Civil Relief Act ("SCRA") makes her Ohio and Missouri teaching licenses "portable," such that Texas is required to recognize them as valid. More specifically, Plaintiff alleges that by enforcing 19 Texas

Administrative Code Section 230.113(b), which requires Plaintiff to demonstrate two years of full-time, wage-earning experience in the role of a licensed school counselor to be issued a license in Texas, Defendants have arbitrarily interfered with her property interest in her licenses. In her motion, Plaintiff asks this Court to enjoin Defendants from enforcing the regulations prescribing those requirements.

Defendants file this Memorandum in Opposition to Plaintiff's Motion for Preliminary Injunction on the following grounds:

(1) Plaintiff is unlikely to succeed on the merits of her claim;

a. Plaintiff's claim is rooted in the SCRA, for which she does not qualify.

b. Plaintiff lacks standing under the SCRA;

c. The SCRA and Texas law do not conflict, so there is no preemption; and

d. Plaintiff does not have a property interest in her out-of-state teaching license.

(2) Plaintiff has not alleged irreparable harm or injury which cannot be remedied by monetary or other damages;

(3) Plaintiff's requested injunction does not serve the public interest; and

(4) Plaintiff seeks a mandatory injunction that will upend the status quo and has failed to meet her burden to such extraordinary relief.

For the reasons set forth below, Plaintiff's request for a preliminary injunction should be denied.

II. BACKGROUND

Plaintiff first became licensed as a school counselor through the State of Ohio on July 1, 2021, and obtained a second license as a school counselor through the State of Missouri on July 7, 2022. Plaintiff alleges that in 2022, she was employed as a guidance school counselor at an elementary school in Missouri and as a long-term substitute teacher in a middle school in Ohio. She and her now-husband, a United States Air Force Officer, married in July 2022, and Plaintiff terminated her employment in Missouri and moved to Texas on or before January 9, 2023, when her husband was required to report to duty in this state.

The SCRA, codified at 50 U.S.C. Section 4025a, requires limited reciprocity among the states in recognizing certain covered licenses held by servicemembers or their spouses who change residency due to military orders. The SCRA requires the licenseholder to provide certain information to the licensing authority of the jurisdiction into which the licenseholder has relocated due to military orders. This information includes: a copy of military orders requiring relocation and evidence the licenseholder remains in good standing with the licensing authorities in both the old and new jurisdiction. The licenseholder must also submit to the authority of the licensing authority in the new jurisdiction.

Most importantly, for the SCRA's protection to apply, the license at issue must be a "covered license" as defined by the SCRA. A "covered license" is one which "the servicemen or spouse of a servicemember has actively used during the two years

immediately preceding the relocation described in section (a)…" 50 U.S.C. 4025a(c)(2).

At the time of the filing of the Complaint and Motion for Preliminary Injunction, Plaintiff had been licensed as a school counselor for less than two years and was employed as a school guidance counselor for one year.

III. ARGUMENT AND AUTHORITIES

A. Legal Standard for Preliminary Injunction

"A preliminary injunction is an extraordinary remedy, requiring a clear showing that plaintiffs are entitled to such relief." *Schelske v. Austin*, --- F. Supp. 3d ---, 2022 WL 17835506, at *11 (N.D. Tex. Dec. 21, 2022) (Hendrix, J.) (quoting *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22, 24 (2008)). "The purpose of a preliminary injunction is to preserve the status quo and prevent irreparable injury until the court renders a decision on the merits." *Id.* (quoting *Canal Auth. of Fla. v. Callaway*, 489 F.2d 567, 576 (5th Cir. 1974)). To prevail on a preliminary injunction motion, a movant must demonstrate (1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable harm if the injunction does not issue; (3) that the threatened injury outweighs any harm that will result to the opposing party if the injunction is granted; and (4) that the grant of an injunction is in the public interest. *Id.* (quoting *Moore v. Brown*, 868 F.3d 398, 402–03 (5th Cir. 2017)). The first two factors—likelihood of success and irreparable harm—remain the "most significant." *Schelske*, 2022 WL 17835506, at *11 (*Louisiana v. Becerra*, 20 F.4th 260, 262 (5th Cir. 2021)).

B. Plaintiff Cannot Succeed on the Merits

Plaintiff cannot satisfy the first factor necessary to obtain a preliminary injunction because she cannot show a substantial likelihood of success on the merits. Specifically, Plaintiff cannot show that the licenses that are the basis of her complaint are "covered licenses" under the SCRA, which also deprives her of standing to bring a claim under the SCRA. It also moots any preemption argument Plaintiff attempts to bring.

1. Plaintiff's Licenses Are Not SCRA "Covered Licenses"

Plaintiff's own pleadings confirm her licenses are not entitled to the protections of the SCRA. To be covered under the SCRA, Plaintiff must have "actively used" her licenses "during the two years immediately preceding" her relocation. 50 U.S.C. § 4025a(c)(2). Plaintiff and her husband relocated to Texas in January 2023; therefore, to be covered, her licenses must have been actively used beginning in January 2021. By her own admission, Plaintiff did not even obtain her first license until July 2021 and did not actively use the licenses until 2022 when she was employed as a school counselor in Missouri.[1] Plaintiff's licenses, therefore, fail to meet a threshold requirement of the SCRA and are not entitled to its protections.

2. Plaintiff lacks standing

To establish standing, a plaintiff must show: (1) an actual or imminent, concrete and particularized "injury-in-fact"; (2) that is fairly traceable to the challenged action of the defendant (causation); and (3) that is likely to be redressed

[1] ECF 5 at p. 5.

by a favorable decision (redressability). *Friends of the Earth, Inc. v. Laidlaw Envt'l. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000). All three elements are "an indispensable part of the plaintiff's case" and the party seeking to invoke federal jurisdiction bears the burden to establish them. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). To establish a particularized and concrete "injury-in-fact," a plaintiff must allege specific facts that the challenged practices harm her personally. *See Warth v. Seldin*, 422 U.S. 490, 508 (1975).

Plaintiff has not demonstrated a particularized "injury-in-fact." Plaintiff argues Defendants' refusal to recognize her licenses is illegal and is, therefore, depriving her of a property interest and ability to earn a livelihood.[2] This claim is entirely premised on the argument that her school counseling licenses are portable under the SCRA.[3] However, Plaintiff's statutory interpretation is mistaken and her licenses do not meet the definition of a "covered license" as defined by the SCRA. 50 U.S.C. 4025a(c)(2). Because she cannot demonstrate that she meets the requirements for portable teaching licenses under SCRA, Plaintiff has no entitlement to a portable teaching license. Therefore, Plaintiff cannot demonstrate she has suffered a legally cognizable injury, much less a concrete or particularized injury.

3. Plaintiff's Preemption Argument Fails

Plaintiff has pled only one cause of action—a putative violation of the SCRA[4]—but argues the SCRA "preempts" Texas law in her motion for preliminary injunction.[5]

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[2] ECF 5, at p. 2.
[3] *Id.* at p. 5.
[4] ECF 1 at pp. 10-11.
[5] ECF 5 at pp. 1, 10, 14, 16.

Plaintiff's preemption argument fails because the Supremacy Clause does not create a private right of action and because the SCRA does not conflict with Texas law. Plaintiff is therefore unlikely to prevail on the merits.

a. The Supremacy Clause creates no private right of action.

"[T]he Supremacy Clause does not create a right to challenge state laws on preemption grounds" and does not create any causes of action. *Air Evac EMS, Inc. v. Texas, Dep't of Ins.*, 851 F.3d 507, 515 (5th Cir. 2017); *Armstrong v. Exceptional Child Care, Inc.*, 575 U.S. 320, 324 (2015). Nor can someone bring a claim for a violation of the Supremacy Clause through the statutory vehicle of 42 U.S.C. § 1983 (hereafter "Section 1983"). "Section 1983 provides a federal remedy for 'the deprivation of any rights, privileges, or immunities secured by the Constitution and laws.'" *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 105 (1989). But "the Supremacy Clause is not the source of any federal rights." *Armstrong*, 575 U.S. at 324 (internal quotations and citations omitted) (citing *Golden State Transit Corp.*, 493 U.S. at 107).

Plaintiff has no private right of action by which to pursue her preemption argument, and such argument fails as a matter of law.

b. The SCRA does not conflict with Texas law.

Federal law can preempt state law in three ways. First, a federal law may state its preemption of state law in express terms. *Pac. Gas & Elec. Co. v. State Energy Resources Conservations & Development Com'n*, 461 U.S. 190, 203 (1983) (citing *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977)). Second, a federal law may preempt state law if Congress intends to supersede state law through a "scheme of federal

regulation so pervasive as to make reasonable the inference that Congress left no room to supplement it," "because the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject," or because "the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose." *Id*. at 204 (quoting *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982)). Third, federal law preempts state law to the extent the two conflict, where (1) compliance with both state and federal provisions is physically impossible, or (2) state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id*. (citing *Florida Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132 (1963); quoting *Hines v. Davidowitz,* 312 U.S. 52, 67, (1941)).

Here, Plaintiff argues a case of conflict preemption: Plaintiff alleges her Ohio and Missouri school licenses are portable under the SCRA but not Texas law and regulations. Specifically, she claims that the Texas regulation imposes a requirement that she have two years of working experience in the area of the license sought, which is beyond what is required by the SCRA. As established above, though, the SCRA requires that for a license to be "covered," it must have been actively used for the preceding two years before an active service member or their spouse relocates. 50 U.S.C. § 4025a(c)(2). In other words, the SCRA requires two years of working experience in the relevant field.

In Texas, an applicant for a standard Texas teaching certificate must pass the appropriate exam requirements or qualify for an exemption from the exam. To qualify for an exemption, an applicant "must verify two creditable years of service in an Early Childhood-Grade 12 public or accredited private school in the specific student services or administrative area sought." 19 Tex. Admin. Code § 230.113(b).

Therefore, 19 Texas Administrative Code Section 230.113(b) does not require a "threshold" requirement of demonstrating two-years of experience that is not also required by the SCRA. Rather, Texas law clearly requires an individual with a non-Texas license to verify two years of experience to receive an exemption from an assessment exam, just as the SCRA requires two years of experience for a license to be deemed "covered" and, thus, portable between jurisdictions. In short, the SCRA and Texas regulations are not in conflict, and the SCRA does not preempt Section 230.113(b).

4. Sovereign Immunity Bars Any Due Process Claims by Plaintiff

As noted above, Plaintiff sues only for a putative violation of the SCRA and pleads no cause of action for either a substantive or procedural due process violation. Nevertheless, Plaintiff argues she suffers irreparable harm because her lack of Texas licensure amounts to a violation of both her substantive and procedural due process rights.[6] The Court should not grant injunctive relief to halt unpled constitutional harms. Moreover, to the extent Plaintiff alleges a violation of her substantive due process rights separate from her claim brought under the SCRA, those claims are

[6] ECF 5 at pp. 14-15.

barred by sovereign immunity.

a. Sovereign immunity and *Ex parte Young*.

"[F]or over a century now, [the Supreme Court has] made clear that the Constitution does not provide for federal jurisdiction over suits against nonconsenting States." *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 73 (2000). "[A]bsent waiver by the State or valid congressional override, the Eleventh Amendment bars a damages action against a State in federal court." *Kentucky v. Graham*, 473 U.S. 159, 169 (1985).

"Even in cases where the State itself is not a named defendant, the State's Eleventh Amendment immunity will extend to any state agency or other political entity that is deemed the 'alter ego' or an 'arm' of the State." *Vogt v. Bd. of Comm'rs of the Orleans Levee Dist.*, 294 F3d 684, 688–89 (5th Cir. 2002) (citing *Regents of the Univ. of Cal. v. Doe*, 519 US 425, 429 (1997)); *see also Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977). As a state agency, Texas Education Agency ("TEA") and The State Board for Educator Certification ("SBEC") are entitled to the same sovereign immunity the State itself has. *see* Tex. Educ. Code § 7.021 (establishing TEA); *see* Tex. Educ. Code § 7.101 (establishing SBEC); *Ross v. Tex. Educ. Agency*, 409 Fed. Appx. 765 (5th Cir. 2011) (holding the state of Texas and the TEA were entitled to Eleventh Amendment sovereign immunity against Section 1983 claims); *City of Austin v. Paxton*, 943 F.3d 993, 1004 (5th Cir. 2019) (dismissing claim against the Texas Workforce Commission and concluding that the claim could not be brought under *Ex parte Young*). Claims against state officials in their official

capacities are also treated as suits against the State. *Hafer v. Melo*, 502 U.S. 21, 25 (1991).

The *Ex parte Young* doctrine provides a limited exception to Eleventh Amendment immunity for official capacity claims. *Edelman v. Jordan*, 415 U.S. 651, 664–68 (1974). Under this limited exception, immunity may be overcome when the suit "seeks prospective, injunctive relief from a state actor, in [his] official capacity, based on an alleged ongoing violation of the federal constitution" or other federal law. *K.P. v. LeBlanc*, 729 F.3d 427, 439 (5th Cir. 2013); *McCarthy ex rel. Travis v. Hawkins*, 381 F.3d 407, 413–14 (5th Cir. 2004). "In determining whether the *Ex parte Young* doctrine avoids 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. Public Serv. Com'n of Md.*, 535 U.S. 635, 645 (2002) (quoting *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 296, 298–299 (1997)).

b. Sovereign immunity bars any putative due process claim, and *Ex parte Young* is unavailing to Plaintiff.

Defendants are entitled to sovereign immunity from Plaintiff's due process claims. *Hall v. Tex. Comm. on Law Enforcement*, 685 Fed. Appx. 337, 340–41 (S.D. Tex. 2017) (holding sovereign immunity barred officer's claims alleging TCOLE's refusal to recertify violated his due process rights, and that *Ex parte Young* created no exception for TCOLE personnel sued in their official capacities).

TEA and SBEC are entitled to sovereign immunity as agencies of the State. Commissioner Morath, sued in his official capacity, is likewise entitled to sovereign

immunity. Plaintiff alleges no waiver of sovereign immunity, and Defendants assert there has been none. Plaintiff's due process claims against are foreclosed by sovereign immunity. The limited *Ex parte Young* exception to sovereign immunity for prospective relief sought against a state official is unavailing to Plaintiff because—as described above—her claim against Commissioner Morath does not allege an ongoing violation of federal law.

To the extent Plaintiff argues a due process violation as a claim in this lawsuit or as a basis for a preliminary injunction, Plaintiff cannot succeed on the merits because sovereign immunity bars any such claim. The Court should therefore deny Plaintiff's motion for preliminary injunction.

c. Plaintiff's due process argument also fails because she cannot show a cognizable property interest.

Even if Plaintiff's due process arguments were not foreclosed by sovereign immunity, Plaintiff could not prevail on such arguments—or on such a cause of action, had she brought one—on the merits because she cannot show a cognizable property interest in her out-of-state licenses.

The first step in examining whether due process rights have been violated is determining whether a liberty or property interest exists and has been interfered with by the State. *Meza v. Livingston*, 607 F.3d 392, 399 (5th Cir. 2010) (quoting *Ky. Dep't of Corr. v. Thompson*, 490 U.S. 454, 460 (1989)).

"The procedural component of the Due Process Clause does not protect everything that might be described as a 'benefit.'" *Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748, 756 (2005). "To have a property interest in a benefit, a person

clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972). Property interests arise from contract or state law, or "rules or understandings" creating entitlement to property or benefits. *Maurer v. Indep. Town*, 870 F.3d 380, 385 (5th Cir. 2017); *Edionwe v. Bailey*, 860 F.3d 287, 292 (5th Cir. 2017) (quoting *Paul v. Davis*, 424 U.S. 693, 709 (1976)).

In support of her claim, Plaintiff cites *Bowlby v. City of Aberdeen, Miss.*, 681 F.3d 215, 220 (5th Cir. 2012), in which the Fifth Circuit found that the plaintiff had a property interest in business permits issued by the state zoning and planning board, which later proceeded to rescind said permit. Such a scenario is not present here; a business permit issued by a state zoning and planning board—which later reversed its decision after a plaintiff materially relied upon it—is substantially different than the present case, in which Plaintiff seeks to have property interests attach to a teaching license issued by another state. Plaintiff erroneously relies on this holding to support her belief she has a property interest at issues. Plaintiff cites no case law supporting the theory licenses issued in one state create property interests in another and ignores case law to the contrary. *See Leis v. Flynt*, 439 U.S. 438, 442 (1979). "A claim of entitlement under state law, to be enforceable, must be derived from statute or legal rule or through a mutually explicit understanding." *Id* (citing *Perry v. Sindermann*, 408 U.S. 593, 601–02 (1972)).

There is no legal obligation for states to recognize teaching licenses issued by other states because teaching licenses are not granted by contract or statute. "A property interest in employment can, of course, be created by ordinance, or by an implied contract. In either case, however, the sufficiency of the claim of entitlement must be decided by reference to state law." *Bishop v. Wood*, 426 U.S. 341, 344 (1976). Instead, teaching licenses are granted by individual states, and each state has the right to determine its own standard for teacher licensing. The Fifth Circuit has spoken clearly on this subject: "We agree with the district court that various provisions of the [Texas Education] Code support the conclusion that a teacher must be certified in order to be entitled to a continuing contract of employment. *Montez v. S. San Antonio Indep. Sch. Dist.*, 817 F.2d 1124, 1126 (5th Cir. 1987). As a result, absent a statute mandating otherwise, out-of-state teaching licenses do not have a property interest. While Plaintiff argues the SCRA is such a statute , that statute does not apply to her, as discussed above. Thus, because her licenses have no weight under Texas law, there is no property interest to support a substantive due process claim. *See id* (holding that without a teacher's certificate, plaintiff "was never a 'teacher' for purposes of Texas . . . law" and therefore had "no property interest"). *See also Nunez v. Simms*, 341 F.3d 385, 387 (5th Cir. 2003) (holding "pursuant to Texas law, that absent certification, [Plaintiff] could not be employed as a teacher . . . and that [Plaintiff] consequently had no property interest in continued employment.").

C. Plaintiff Cannot Show Irreparable Harm

Plaintiff cannot show irreparable harm. Plaintiff correctly notes that irreparable harm is that which cannot be remedied by monetary damages. *Deerfield*

Med. Ctr. v. City of Deerfield Beach, 661 F.2d 328, 338 (5th Cir. 1981). However, Plaintiff errs when she argues she will suffer irreparable harm if she does not receive an injunction allowing her to forgo Texas licensure requirements so she can arrange future employment. Rather, to the extent Plaintiff prevails on her claim (which Defendants dispute), she may be compensated through monetary relief, and Plaintiff has failed to plead otherwise.

D. Public Interest Weighs in Favor of State Defendants

Public interest also weighs heavily against Plaintiff. The State, through the TEA and SBEC, "have a sovereign interest in 'the power to create and enforce a legal code.'" *Tex. v. United States*, 809 F.3d 134, 153 (5th Cir. 2015). States are delegated law enforcement authority and, through their agencies, serve the public interest by promulgating rules and regulations. "A state is not obligated to educate or certify teachers who cannot pass a fair and valid test of basic skills necessary for professional training." *United States v. LULAC*, 793 F.2d 636, 639 (5th Cir. 1986). It is in the public interest to ensure the qualification and licensure of Texas teachers, and it serves neither the State nor public's best interest to allow individuals to forego licensure requirements.

E. Plaintiff Seeks to Upend the Status Quo

The status quo in this case is that Plaintiff does not have a school counseling license in Texas. Plaintiff's out-of-state licenses do not meet the requirements for portability under either the SCRA or Texas law. 50 U.S.C. § 4025a(c)(2); 19 Tex. Admin. Code § 230.113(b). Therefore, Plaintiff is not asking this Court to maintain

the status quo, but rather is asking this Court to require Defendants to bypass Texas law and regulations so that her licenses can be recognized as valid, without meeting federal statutory requirements to do so.

Such mandatory injunctions, which seek to alter the status quo, are disfavored. *See Wenner v. Tex. Lottery Comm'n*, 123 F.3d 321, 326 (5th Cir. 1997) (holding that "[p]reliminary injunctions commonly favor the status quo and seek to maintain things in their initial condition so far as possible until after a full hearing permits final relief to be fashioned"); *Fox v. City of West Palm Beach*, 383 F.2d 189, 194 (5th Cir. 1967) ("There is no question but that mandatory injunctions are to be sparingly issued and upon a strong showing of necessity and upon equitable grounds which are clearly apparent"). If a party seeks "a mandatory injunction, it bears the burden of showing a clear entitlement to the relief under the facts and the law." *Justin Indus., Inc. v. Choctaw Secs., L.P.*, 920 F.2d 262, 268 n.7 (5th Cir. 1990). As described above, Plaintiff has failed to show a clear entitlement to the relief she seeks under either the law or the facts; therefore, under prevailing Fifth Circuit authority, her request for a preliminary injunction must be denied.

IV. CONCLUSION

For the reasons discussed herein, Plaintiff has failed to meet her burden to obtain a mandatory injunction, and her motion should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that that on July 7, 2023, this document was filed electronically via the Court's CM/ECF system, causing electronic service upon all counsel of record.

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