UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

THE SATANIC TEMPLE and MARY DOE,	)	
Plaintiffs,	)	
v.	)	**Case No. 15-986-HEA**
JEREMIAH JAY NIXON, GOVERNOR OF THE STATE OF MISSOURI,	)	
and	)	
CHRIS KOSTER, ATTORNEY GENERAL FOR THE STATE OF MISSOURI,	)	
Defendants.	)	

REPLY MEMORANDUM IN FURTHER SUPPORT OF DEFENDANTS' MOTION TO DISMISS

Respectfully submitted,

November 9, 2015

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In our Memorandum in Support, Defendants showed that this case should be dismissed for two reasons. First, the Court lacks Article III jurisdiction to declare Mo. Rev. Stat. § 188.027[1] unconstitutional as to *these Plaintiffs* (who have alleged no imminent or certainly impending threat of harm) or enjoin its enforcement by *these Defendants* (who have no connection to the statute's enforcement). Second, Plaintiffs fail to state a claim because Missouri may make a value judgment regarding abortion without establishing religion, and the expression of that value judgment in state-produced documents does not interfere with Plaintiffs' free exercise of religion. Plaintiffs fail to counter either argument in their opposition papers, relying heavily on overruled Eighth Circuit precedent, a partial dissent by a single Justice of the Supreme Court, and inapposite cases concerning the Free Speech Clause of the First Amendment. Defendants' Motion to Dismiss should be granted.

I. Plaintiffs have still not alleged a live case or controversy regarding § 188.027.

Tacitly conceding that neither Mary Doe nor any other member of the Satanic Temple was actually pregnant and seeking an abortion when they filed this lawsuit, Plaintiffs assert "it is irrelevant whether or when [they] are pregnant." *Id.* at 3-4. "What is relevant for an Establishment Clause claim," they argue, "is whether Plaintiffs have had direct and unwelcomed contact with ... 'the alleged establishment of religion.'" *Id.* at 4(quoting *Red River Freethinkers v. City of Fargo*, 679 F.3d 1015, 1022 (8th Cir. 2012)(emphasis added). Plaintiffs miss the point of Defendants' standing argument. The issue here is not which *right* has allegedly been violated, but what *relief* Plaintiffs are seeking and *whom* they are seeking it against.

[1] All statutory citations in this Memorandum refer to the Missouri Revised Statutes (2014 Supp.) unless stated otherwise.

A. Plaintiffs have not identified any "certainly impending" injury that could be redressed by injunctive or declaratory relief.

A plaintiff "must establish standing for each type of remedy sought, including declaratory and injunctive relief." *Digital Recognition Network, Inc. v. Hutchinson*, No. 14-3084, 2015 WL 5933168, at *3 (8th Cir. Oct. 13, 2015)(citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.* (TOC), Inc., 528 U.S. 167 (2000). "In the case of complaints for injunctive relief, the 'injury in fact' element of standing requires a showing that the plaintiff faces a threat of *ongoing or future harm*." *Park v. Forest Serv. of U.S.*, 205 F.3d 1034, 1037 (8th Cir. 2000)(citing *City of Los Angeles v. Lyons*, 461 U.S. 95, 101–05 (1983); *Harmon v. City of Kansas City*, 197 F.3d 321, 327 (8th Cir.1999) ("In order to have standing to seek *injunctive* relief [a plaintiff] must demonstrate a real, and immediate threat that she would again suffer similar injury *in the future*.")(emphasis added). "The mere fact that injurious activity took place *in the past* does nothing to convey standing to seek injunctive relief against *future* constitutional violations." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 210–11 (1995)(emphasis added); *see also Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 109, 118 S. Ct. 1003, 1020, 140 L. Ed. 2d 210 (1998)("Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief ... if unaccompanied by any continuing, present adverse effects."); *O'Shea v. Littleton*, 414 U.S. 488, 496 (1974)(same).

Not only must the plaintiff seeking injunctive relief show ongoing or future harm, the "threatened injury must be *certainly impending* to constitute injury in fact." *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013)(emphasis added). "Allegations of *possible* future injury do not satisfy the requirements of Art. III." *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990)(emphasis added). "[I]f it rests upon contingent future events that may not occur as

anticipated, or indeed may not occur at all," the claim is not ripe for review and the court lacks Article III jurisdiction. *KCCP Trust v. City of N. Kansas City*, 432 F.3d 897, 899 (8th Cir. 2005).

In this case, the only concrete and particularized injuries Plaintiffs have alleged in their Complaint occurred entirely *in the past* or rest upon *contingent future events* that may never occur:

> Planned Parenthood delivered the [Statutory Requirements] to Plaintiff Mary Doe *when she was pregnant and sought an abortion*.
>
> Planned Parenthood will deliver the [Statutory Requirements] to Plaintiff Mary Doe *if she becomes pregnant again* and seeks an abortion in Missouri.
>
> Defendants have infringed on Plaintiffs' rights under the Establishment Clause in violation of 42 U.S.C. §1983 in the creation, distribution and enforcement of the [Statutory Requirements].
>
> Plaintiffs *have been and will b*e irreparably harmed by that violation because the [Statutory Requirements] are forced upon them with the intent and purpose to influence their Freedom to Believe When Human Life Begins.

Compl. ¶¶27-28, 44-45 (emphasis added). Even assuming the statutes Plaintiffs challenge in this suit violated one or both of the Religion Clauses of the First Amendment when Mary Doe or another member of the Satanic Temple obtained an abortion *before their Complaint was filed*, that past violation does not confer Article III standing on either Plaintiff to seek declaratory or injunctive relief. Nor is there a "certainly impending" violation in Plaintiffs' future. Neither Mary Doe nor any member of the Satanic Temple is alleged to be pregnant and seeking an abortion *now*. Nor do Plaintiffs alleged a concrete plan to become pregnant and seek an abortion in the future. Unless and until a pregnancy occurs, neither Plaintiff is even subject to § 188.027. Thus, no violation of Plaintiffs' First Amendment rights by the application or enforcement of

§188.027 is "certainly impending." Because Plaintiffs have not established an injury-in-fact, they lack standing to challenge §188.027.

Plaintiffs cite *Red River Freethinkers v. City of Fargo* for the proposition that they can establish standing for an Establishment Clause violation merely by alleging "direct and unwelcome personal contact with the alleged establishment of religion." Pl. Mem. at 4; *Red River Freethinkers*, 679 F.3d 1015, 1022 (8th Cir. 2012)). However, Red River is distinguishable from this case in two key respects. First, unlike Plaintiffs here, the Freethinkers sought *damages* (in addition to injunctive and declaratory relief), *id.* at 1020, for which *past* injury is sufficient to establish Article III standing. More importantly, the Freethinkers' claims of future injury were not speculative and did not depend on contingent future events that might never occur: "The injuries to Freethinkers's members are no doubt actual and *imminent*. The City's display of the Ten Commandments monument has continued now for fifty years, *with no end in sight*." *Id.* at 1023-24 (emphasis added). So long as the monument remained on City property, the Freethinkers would continue to "experience[ ] direct, offensive, and alienating contact with the Ten Commandments monument" every day. *Id.* at 1024. Their prayer for injunctive relief—an order to remove the monument—would bring an end to the ongoing injury and prevent future injury as well. In this case, by contrast, the "direct and unwelcome personal contact with the alleged establishment of religion" occurred—and can only recur—when attempting to obtain an abortion. As Plaintiffs were not pregnant when they filed this suit, there is no imminent or "certainly impending" threat of future contact. Thus, Plaintiffs have did not and cannot allege an injury in fact to establish standing for the declaratory and injunctive relief they seek.

B. Plaintiffs have not shown how any injury resulting from the operation of enforcement of §188.027 could be "fairly traceable" to Governor Nixon or Attorney General Koster, both of whom enjoy Eleventh Amendment Immunity.

"[T]he questions of Article III jurisdiction and Eleventh Amendment immunity are related." *Digital Recognition Network, Inc. v. Hutchinson*, No. 14-3084, 2015 WL 5933168, at *3 (8th Cir. Oct. 13, 2015). To establish Article III standing, "there must be a causal connection between the injury and the conduct complained of—the injury has to be 'fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court.'" *Lujan v. Defenders of Wildlife*, 504 U.S. at 560 (1992)(quoting *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 41–42 (1976). Similarly, to overcome a state official's Eleventh Amendment immunity, a plaintiff must show "some connection" between the state official and the enforcement of the challenge statute. *Ex parte Young*, 209 U.S. 123, 157 (1908). "[W]here state officials ha[ve] 'some connection with the enforcement' of a state law for purposes of the *Ex Parte Young* doctrine, then the case or controversy requirement of Article III was satisfied." *Digital Recognition Network*, 2015 WL 5933168, at *3.

The Eighth Circuit recently held that a plaintiff lacked standing to challenge an Arkansas statute on First Amendment grounds because its alleged injuries were not fairly traceable to state officials named as Defendants. *Digital Recognition Network, Inc. v. Hutchinson*, No. 14-3084, 2015 WL 5933168, at *3 (8th Cir. Oct. 13, 2015). In that case, the plaintiffs brought suit against the governor and attorney general of Arkansas seeking injunction relief prohibiting enforcement of the Arkansas Automatic License Plate Reader System Act, Ark.Code § 12–12–1801 *et seq.*, and a declaration that the Act was unconstitutional. *Id.* at *1. Arkansas's governor and attorney general moved to dismiss, "arguing that there is no case or controversy under Article III, and that

they are immune from suit under the Eleventh Amendment." *Id.* at *2. The district court agreed that the plaintiffs lacked standing for injunctive relief, but it held the plaintiffs had standing to pursue declaratory relief "because the court thought a declaratory judgment would redress the company's injury." *Id.*

On appeal, the Eighth Circuit held that the plaintiffs "lack[] standing to sue the governor and attorney general because the injury of which [plaintiffs] complain[] is not 'fairly traceable' to either official." *Id.* at *3. The court reasoned that "[W]hen a plaintiff brings a pre-enforcement challenge to the constitutionality of a particular statutory provision, the causation element of standing requires the named defendants to possess authority to enforce the complained-of provision." *Id*. (quoting *Bronson v. Swensen*, 500 F.3d 1099, 1110 (10th Cir.2007); *see also Okpalobi v. Foster*, 244 F.3d 405, 426 (5th Cir.2001) (en banc)(abortion provider lacked standing to sue governor and attorney general of Louisiana because they had no power to enforce the challenged statute). The Eighth Circuit held:

> The governor and attorney general do not have authority to enforce the Reader System Act, so they do not cause injury to [the plaintiffs]. The Act provides for enforcement only through private actions for damages. … [T]he attorney general does not initiate enforcement or seek relief against a putative defendant. Digital Recognition's injury is 'fairly traceable' only to the private civil litigants who may seek damages under the Act and thereby enforce the statute against the companies.

Id. at *4. The Eighth Circuit also held that the plaintiffs lacked standing for declaratory relief because "[t]he redressability prong is not met when a plaintiff seeks relief against a defendant with no power to enforce a challenged statute." *Id.* at *4. As the court explained:

> A declaration that the Reader System Act is unconstitutional would not redress [plaintiffs'] injury by virtue of its effect on the defendant officials. Private litigants with rights to enforce the Act would not be the subject of any relief in this action, and any judgment would not oblige private litigants to refrain from proceeding under the Act.

> A declaration of the Act's unconstitutionality would provide [plaintiffs] with a favorable judicial precedent on an abstract legal issue under the First Amendment. But if that measure of relief were sufficient to satisfy Article III, then the federal courts would be busy indeed issuing advisory opinions that could be invoked as precedent in subsequent litigation.

Id. at *5.

The Plaintiffs in this case have the same problem. Section 188.027 is a criminal statute for which Missouri's 115 county prosecuting attorneys have original jurisdiction, not its governor or its attorney general. Plaintiffs suggest that Mo. Rev. Stat. §27.030 grants the attorney general "authority to prosecute anyone who provides[2] an abortion without delivering the [DHSS Handbook and Ultrasound Opportunity] if so directed by the Governor." Pl. Mem. at 9. Plaintiffs' argument is not supported by the statute itself, which provides as follows:

> When directed by the governor, the attorney general, or one of his assistants, shall *aid* any prosecuting or circuit attorney in the discharge of their respective duties in the trial courts and in examinations before grand juries, *and when so directed by the trial court, he may sign indictments* in lieu of the prosecuting attorney.

Mo. Rev. Stat. § 27.030 (emphasis added). In other words, neither the governor nor the AG has any authority to bring charges under or prosecute violations of §188.027 unless and until the local prosecutor requests assistance or recuses due to a conflict, in which case the court appoints a special prosecutor which may or may not be the attorney general.

Thus, even assuming a 100% probability that Plaintiffs will become pregnant again and will seek to have any abortion in Missouri, the alleged injuries resulting from the operation and enforcement of §188.027 cannot be fairly traced to the named Defendants. Whether under Article III standing or the Ex parte Young doctrine, the absence of causal connection between the statute and the defendants leaves this Court without jurisdiction to enjoin the Governor or

[2] Even if this were true, neither of the Plaintiffs could be prosecuted because neither provide, perform, or induce abortions themselves.

Attorney General from enforcing §188.027. Plaintiffs' action should therefore be dismissed.

II. Plaintiffs have still not stated a claim upon which relief can be granted because § 188.027 does not establish a state religion abridge the free exercise of Plaintiffs' religious beliefs.

Although Plaintiffs do not cite a single opinion from any state or federal court holding that a state's expression of a value judgment about abortion constitutes an establishment of religion, they nonetheless assert that the "Eighth Circuit has already found the Missouri Tenets are an 'impermissible state adoption of a theory when life begins.'" Pl. Mem. at 10 (quoting *Reprod. Health Serv. v. Webster*, 851 F.2d 1071 (8th Cir. 1988) *rev'd sub nom. Webster v. Reprod. Health Servs*., 492 U.S. 490 (1989)). The Eighth Circuit decision on which they rely was reversed by the Supreme Court *26 years ago*. Rejecting the argument Plaintiffs advance here, *Webster* held (1) that *Roe v. Wade* "implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion," and (2) the statutory language Plaintiffs challenge here—that life begins at conception—"can be read simply to express that sort of value judgment." *Webster v. Reprod. Health Servs*., 492 U.S. 490, 506 (1989)(internal citation omitted). Plaintiffs dismiss the *Webster* majority's decision as "turn[ing] a blind eye to [Missouri's] 'value judgment'" about when life begins, and urge this Court to adopt the contrary conclusion from Justice Stevens's *partial dissent*. Pl. Mem. at 11. Indeed, Plaintiffs cite only one *majority* opinion that has not since been overruled—*Gillette v. United States*, 401 U.S. 437 (1971).[3] Their Establishment Clause claims should be dismissed for failure to state a claim.

Plaintiffs' opposition papers do little to clarify the legal theory underlying Plaintiffs' Free

[3] The other cases Plaintiffs cite are *Sch. Dist. of City of Grand Rapids v. Ball*, 473 U.S. 373 (1985), which was overruled by *Agostini v. Felton*, 521 U.S. 203 (1997); Justice Stevens concurring opinion *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747 (1986), which was overruled by *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833 (1992); and Justice O'Connor's concurring opinion in *Lynch v. Donnelly*, 465 U.S. 668 (1984).

Exercise claim. Of the three majority opinions cited in that section of their memorandum, two are *Free Speech* cases—*Phelps-Roper v. Koster*, 713 F.3d 942 (8th Cir. 2013), and *Survivors Network of Those Abused by Priests, Inc. v. Joyce*, 779 F.3d 785 (8th Cir. 2015). As Defendants have argued, Plaintiffs do not identify any conduct *undertaken for religious reasons* with which § 188.027 interferes. Consequently, they have not stated a claim under the Free Exercise Clause upon which relief can be granted. Count II of the Complaint should therefore be dismissed.

CERTIFICATE OF SERVICE

The undersigned certifies that on this 9th day of November 2015, the foregoing was filed on the Court's ECF system, which has delivered electronic notice of this filing and copies also sent by U.S. mail, postage prepaid, to the following:

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