

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI

AT KANSAS CITY

RIGHT BY YOU,)	
)	CASE NO. 2516-CV13783
)	
Plaintiff,)	Division No. 9
)	
v.)	
)	
THE STATE OF MISSOURI;)	
ANDREW BAILEY, in his official)	
capacity as Attorney General of)	
Missouri; and MELESA JOHNSON,)	
in her official capacity as Jackson)	
County Prosecuting Attorney and on)	
behalf of a Defendant Class of all)	
Missouri Prosecuting Attorneys,)	
)	
Defendants.)	

**SUGGESTIONS IN SUPPORT OF PLAINTIFF'S MOTION TO CERTIFY A
DEFENDANT CLASS**

On November 5, 2024, Missourians voted to enshrine the Right to Reproductive Freedom in their Constitution. That includes “the right to make and carry out decisions about all matters relating to reproductive health care, including but not limited to . . . abortion care.” Mo. Const. art. I, § 36.2. “[No one] assisting a person in exercising their right to reproductive freedom with that person’s consent [shall] be penalized, prosecuted, or otherwise subjected to adverse action for doing so.” *Id.* § 36.5. Further, “[t]he Government shall not discriminate against persons . . . obtaining reproductive health care or *assisting another person in doing so.*” *Id.* § 36.6 (emphasis added). “Any denial, interference, delay, or restriction of the right to reproductive freedom shall be presumed invalid.” *Id.* § 36.3.

Plaintiff Right By You—which seeks to provide financial and practical support to young people in Missouri seeking an abortion even if they lack parental involvement or judicial approval—has challenged two Missouri laws for cruelly excluding young people and their supporters from the Right to Reproductive Freedom’s ample protections.¹ These are the 1) Parental Consent and Notice Requirement, § 188.028, RSMo, which prohibits young people from obtaining an abortion unless they secure one parent’s consent and notify another, or undergo a stressful and potentially traumatic judicial bypass process, and 2) Ban on Abortion Support, § 188.250, RSMo, which prohibits providing financial or practical support to young people who cannot satisfy the Parental Consent and Notice Requirement (collectively, the “Challenged Abortion Restrictions”). The Parental Consent and Notice Requirement carries criminal penalties, §§ 188.075(1), 558.011(1)(6), 558.002(1)(2), RSMo, and subjects Right By You to third-party criminal liability if it were to help young people obtain an abortion in Missouri without parental involvement, § 562.041, RSMo (“Criminal Responsibility for Another” Statute). And the Ban on Abortion Support empowers Missouri’s Prosecuting Attorneys to sue Plaintiff Right By You for injunctive relief. § 188.250(5), RSMo.

Defendant Melesa Johnson is the Jackson County Prosecuting Attorney. She is sued in her official capacity and as a representative of a proposed Defendant Class of Prosecuting Attorneys who enforce Missouri’s criminal laws, including the Parental Consent and Notice Requirement and the Criminal Responsibility for Another Statute, §§ 188.075(1),

¹ This brief uses “young person” as shorthand for an unemancipated person under age eighteen.

558.011(1)(6), 558.002(1)(2), 562.041 RSMo, and who have authority to bring a cause of action for injunctive relief to enforce the Ban on Abortion Support, § 188.250(5), RSMo..

The named Plaintiff, the proposed Defendant Class, and class counsel satisfy the requirements for class certification under Missouri Rule of Civil Procedure 52.08.

LEGAL STANDARD

“A class action is designed to promote judicial economy by permitting the litigation of the common questions of law and fact of numerous individuals in a single proceeding.” *State ex rel. Union Planters Bank, N.A. v. Kendrick*, 142 S.W.3d 729, 735 (Mo. banc 2004). Whether a class should be certified is “based primarily upon the allegations in the petition.” *Elsea v. U.S. Eng’g Co.*, 463 S.W.3d 409, 414 (Mo. App. W.D. 2015). In a “class certification determination, the court assumes the named plaintiffs’ allegations are true.” *Hale v. Wal-Mart Stores, Inc.*, 231 S.W.3d 215, 224 (Mo. App. W.D. 2007).

A class is properly certified if the requirements of Rule 52.08(a)(1)–(a)(4) and the requirements of *either* Rule 52.08(b)(1), 52.08(b)(2), or 52.08(b)(3) are satisfied. “Because Missouri Rule 52.08 and Federal Rule 23 are identical, [Missouri courts] consider federal interpretations of Rule 23 [as interpreting] Rule 52.08.” *Koehr v. Emmons*, 55 S.W.3d 859, 864 n.7 (Mo. App. E.D. 2001); *see Kendrick*, 142 S.W.3d at 735 n.5 (“Because . . . Rule 52.08 and Federal Rule 23 parallel, federal interpretations of Rule 23 may be considered in interpreting Rule 52.08.”).

To satisfy the requirements of Rule 52.08(a), Plaintiff must demonstrate that the proposed Defendant Class satisfies the following requirements:

- (1) the class is so numerous that joinder of all members is impracticable [(numerosity)];

- (2) there are questions of law or fact common to the class [(commonality)];
- (3) the defenses of the representative parties are typical of the defenses of the class [(typicality)]; and
- (4) the representative party will fairly and adequately protect the interests of the class [(adequacy)].

Mo. R. Civ. P. 52.08(a)(1) – (4).

Plaintiff must also demonstrate that the proposed Defendant Class fits into at least one of the categories identified in Rule 52.08(b):

- (1) the prosecution of separate actions by or against individual members of the class would create a risk of
 - a. inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
 - b. adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or
- (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or
- (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that

a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to these findings include:

- a. the interest of members of the class in individually controlling the prosecution or defense of separate actions;
- b. the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;
- c. the desirability or undesirability of concentrating the litigation of the claims in the particular forum;
- d. the difficulties likely to be encountered in the management of a class action.

Mo. R. Civ. P. 52.08(b)(1) – (3).

DISCUSSION

The proposed Defendant class meets the requirement of Rule 52.08(a) and Rule 52.08 52.08(b)(1)(A), (b)(2), and (b)(3). Missouri courts, including this Court, have previously certified a defendant class of Missouri prosecutors in cases raising constitutional claims against Missouri statutes, just as in this case. *Comprehensive Health of Planned Parenthood Great Plains v. Missouri*, No. 2416-CV31931 (16th Jud. Cir. Ct. Feb. 14, 2025) (certifying a defendant class of all Missouri Prosecuting Attorneys in a challenge to multiple state statutes under the Right to Reproductive Freedom); *Mo. Ass’n of Sch. Librs. v. Baker*, No. 2316-CV5732 (16th Jud. Cir. Ct. June 23, 2023) (certifying a defendant class of Missouri Prosecuting Attorneys in a challenge to the constitutionality of a state statute carrying criminal penalties).

Federal courts have reached the same conclusion. *Turtle Island Foods, SPC v. Richardson*, 425 F. Supp. 3d 1131, 1138 (W.D. Mo. 2019) (“[B]ecause plaintiffs are

challenging the constitutionality of the statute and because all 115 prosecuting attorneys in Missouri are charged with prosecuting violations of this statute and defending its constitutionality, plaintiffs have met the requirements to certify the Missouri Prosecuting Attorneys as a Defendant class under Fed. R. Civ. P. 23(b)(2).”); *Doe v. Miller*, 405 F.3d 700, 705–06 (8th Cir. 2005) (involving a “defendant class, including all of Iowa’s county attorneys” in a challenge to the constitutionality of a state statute); *Akron Ctr. for Reprod. Health v. Rosen*, 110 F.R.D. 576, 580 (N.D. Ohio 1986) (certifying a defendant class of city prosecuting attorneys throughout Ohio in a challenge to the constitutionality of a state abortion restriction and “recogniz[ing] the utility of these actions to enjoin governmental officials from enforcing locally-administered state statutes which are defective”).

I. Rule 52.08(a)

The proposed Defendant Class satisfies Rule 52.08(a) because (1) the size of the proposed Defendant Class renders joinder impracticable; (2) the questions raised by this constitutional challenge are common to all members of the putative class, and a decision by this Court on those common questions would resolve class claims simultaneously; (3) the named prosecutor’s claims and interests are aligned with and typical of those of the putative class members; and (4) the named prosecutor and their counsel will adequately represent the class.

a. Joinder of all 115 Prosecuting Attorneys would be impracticable.

The proposed Defendant Class satisfies the numerosity requirement because a group of 115 Prosecuting Attorneys is “so numerous that joinder of all members is impracticable.” Mo. R. Civ. P. 52.08(a)(1). There are “[n]o arbitrary rules regarding the necessary size of classes.” *Paxton v. Union Nat’l Bank*, 688 F.2d 553, 559 (8th Cir. 1982). But courts have

certified defendant classes with fewer defendants than the 115 Prosecuting Attorneys here. *Orr v. Shicker*, 953 F.3d 490, 498 (7th Cir. 2020) (“[A] forty-member class is often regarded as sufficient to meet the numerosity requirement.”) (quoting *Mulvania v. Sheriff of Rock Island Cty.*, 850 F.3d 849, 859 (7th Cir. 2017)); *Bradford v. AGCO Corp.*, 187 F.R.D. 600, 604 (W.D. Mo. 1999) (“This Court finds that a class of twenty to sixty-five members is sufficiently numerous under Rule 23.”); see *Comprehensive Health of Planned Parenthood Great Plains v. Missouri*, No. 2416-CV31931 at ¶16 (Feb. 14, 2025) (“The proposed Defendant Class satisfies the numerosity requirement because joinder of all 115 prosecuting attorneys who are class members would be impracticable.”).

b. There are questions of law and fact common to the Defendant Class.

The proposed Defendant Class also satisfies the commonality requirement. When interpreting the commonality requirement, courts have held that “even a single common question [of fact or law] will do.” *Elsea v. U.S. Eng’g Co.*, 463 S.W.3d 409, 419 (Mo. App. W.D. 2015) (quoting I Rubenstein, *Newberg on Class Actions*, § 3:20). “What really matters in class certification is . . . the ability of a classwide proceeding to generate common answers apt to drive the resolution of the litigation.” *Id.* This requirement is “easily met in most cases because it ‘requires only that the course of conduct giving rise to a cause of action affects all class members, and that at least one of the elements of that cause of action is shared by all class members.’” *Egge v. Healthspan Services Co.*, 208 F.R.D. 265, 268 (D. Minn. 2002); see *Douglas Phillip Brust, D.C., P.C. v. Opensided MRI of St. Louis LLC*, 343 F.R.D. 581, 592 (E.D. Mo. 2023) (“Commonality is easily satisfied in most cases.”).

Here, the primary legal question—whether the Challenged Abortion Restrictions are constitutional—is common to the entire proposed Defendant Class. That is, a classwide

proceeding would generate an answer applicable to each Prosecuting Attorney equally, since “all of the prosecuting attorneys share the common defense that the statutes are constitutional and a determination regarding the constitutionality of the challenged laws would apply to all the prosecuting attorneys and affect whether they could prosecute actions under that statute or not.” *Comprehensive Health of Planned Parenthood Great Plains v. Missouri*, No. 2416-CV31931 at ¶21 (Feb. 14, 2025) (quoting *Turtle Island Foods, SPC v. Richardson*, 425 F. Supp. 3d at 1137).

c. Defendant Johnson’s available defenses are typical of the proposed Defendant Class’s defenses.

For similar reasons, the typicality requirement is also satisfied. Indeed, “[t]he commonality and typicality requirements of [class certification] tend to merge.” *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349 n.5 (2011) (quoting *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 157, n.13 (1982) (alteration in original)). Both issues determine whether “a class action is economical and whether the . . . claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence.” *Id.* at 349 n.5 (quoting *Falcon*, 457 U.S. at 157, n.13).

Defendant Johnson is charged with enforcing the Challenged Abortion Restrictions, as is each member of the proposed Defendant Class. The defense available to her—that the Challenged Abortion Restrictions are constitutional—is the same defense available to any Prosecuting Attorney charged with enforcing the statutes. And Defendant Johnson’s interest aligns with that of the proposed Defendant Class. *See Turtle Island Foods, SPC*, 425 F. Supp. 3d at 1137 (“[B]ecause all of the prosecuting attorneys are charged with enforcing [the statute], the defense of the representative party – the Prosecuting Attorney of [Jackson]

County would be typical of the defenses raised by all of the other prosecuting attorneys in the state. Accordingly, the Court finds that the typicality requirement is also met.”).

d. Defendant Johnson will fairly and adequately protect the interests of the class.

For much of the same reasons, the adequacy requirement is also satisfied. “Adequacy is found where: (1) class counsel is qualified and competent to conduct the litigation and (2) the proposed class representatives have no interests that are antagonistic to the other proposed class members.” *Comprehensive Health of Planned Parenthood Great Plains v. Missouri*, No. 2416-CV31931 at ¶ 30 (Feb. 14, 2025) (quoting *Lucas Subway MidMo, Inc. v. Mandatory Poster Agency, Inc.*, 524 S.W.3d 116, 130 (Mo. App. 2017)).

There is no indication that counsel for Defendant Johnson are unqualified or incompetent. Additionally, her interests are “sufficiently similar to those of the class because as prosecuting attorneys they are all charged with prosecuting and defending the constitutionality of” the Challenged Abortion Restrictions. *Turtle Island Foods*, 425 F. Supp. 3d at 1138.

II. Rule 52.08(b)

While a class must satisfy only one of Rule 52.08(b)’s requirements, the proposed Defendant Class satisfies all three.

First, certification is appropriate under Rule 52.08(b)(1)(a) because failure to certify the proposed Defendant Class would lead to “the prosecution of separate actions . . . against individual members of the class [and] would create a risk of inconsistent or varying adjudications,” leading to “incompatible standards of conduct.” Mo. R. Civ. P. 52.08(b)(1)(a). If Plaintiffs were required to sue each of the 115 Prosecuting Attorneys individually, they could receive inconsistent adjudications across the various jurisdictions.

This would create a patchwork of varying interpretations, leading to incompatible standards of conduct across the state, and a practical inability for Plaintiff to support young people seeking an abortion who lack parental involvement or judicial approval. And “[i]nconsistent interpretations would hinder and complicate the work of all prosecutors,” with “further risk of arbitrary and inconsistent enforcement of the law.” *Comprehensive Health of Planned Parenthood Great Plains v. Missouri*, No. 2416-CV31931 at ¶¶ 36-37 (Feb. 14, 2025).

Second, and for a similar reason, the proposed Defendant Class satisfies the Rule 52.08(b)(2) requirement that “the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.” Mo. R. Civ. P. 52.08(b)(2). This provision is applicable “when a single injunction or declaratory judgment would provide relief” against each member of the class. *Cf. Dukes*, 564 U.S. at 360. Such is the case here. Each of the Prosecuting Attorneys has the duty to enforce the Challenged Abortion Restrictions. Thus, a single injunction prohibiting their enforcement—or a declaratory judgment of their unconstitutionality—would provide relief against each member of the proposed class. *See Turtle Island Foods, SPC*, 425 F. Supp. 3d at 1138 (“The Court . . . finds that because plaintiffs are challenging the constitutionality of the statute and because all 115 prosecuting attorneys in Missouri are charged with prosecuting violations of this statute and defending its constitutionality, plaintiffs have met the requirements to certify the Missouri Prosecuting Attorneys as a defendant class under [the federal analogue to Rule 52.08(b)(2)].”); *Comprehensive Health of Planned Parenthood Great Plains v. Missouri*, No. 2416-CV31931 at ¶¶ 41 (Feb. 14, 2025) (“Because Plaintiffs seek only injunctive and

declaratory relief against an unconstitutional application of state statutes, the proposed Defendant Class [of state prosecutors] satisfies Rule 52.08(b)(2).”).

Third, and finally, the Defendant Class satisfies Rule 52.08(b)(3) because “questions of law and fact common to the members of the class predominate over any questions affecting only individual members, and a class action is the fairest and most efficient way to adjudicate the matter.” *Comprehensive Health of Planned Parenthood Great Plains v. Missouri*, No. 2416-CV31931 at ¶ 42 (Feb. 14, 2025). The alternative would be 115 “individual cases raising identical claims about the constitutionality of” the Challenged Abortion Restrictions clogging up courts throughout Missouri. *See id.* at 9, ¶ 43. Certifying this class of defendants therefore promotes efficiency and furthers judicial economy.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court certify a Defendant Class of all Missouri Prosecuting Attorneys and appoint the Jackson County Prosecuting Attorney, Melesa Johnson, in her official capacity, as representative of the Defendant Class.

Dated: May 1, 2025

Respectfully submitted,

/s/ Ryan R. Agnew

Ryan R. Agnew, MO #72599
720 Seneca St., Suite 107 - #146
Seattle, WA 98101
Phone: (206) 372-0588
agnew.rr@gmail.com

Rupali Sharma*
LAWYERING PROJECT
443 Western Ave., No. 1025
South Portland, ME 04106
Phone: (646) 490-1219
Fax: (646) 480-8622
rsharma@lawyeringproject.org

Allison Zimmer*
LAWYERING PROJECT
3157 Gentilly Blvd., No. 2231
New Orleans, LA 70122
Phone: (347) 515-6074
Fax: (646) 480-8622
azimmer@lawyeringproject.org

Juanluis Rodriguez*
LAWYERING PROJECT
41 Schermerhorn St., No. 1056
Brooklyn, NY 11201
Phone: (646) 490-1080
Fax: (646) 480-8622
prodriguez@lawyeringproject.org

**Motion for admission pro hac vice forthcoming*

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I, Ryan Agnew, do hereby certify that on May 1, 2025, I caused the foregoing to be electronically filed using the Missouri E-Filing system. Service will be made on all counsel of record by operation of the Missouri E-Filing system, if registered.

/s/ Ryan R. Agnew
Ryan R. Agnew