IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI

AT KANSAS CITY

RIGHT BY YOU,	)	
	)	CASE No. 2516-CV13783
	)	
Plaintiff,	)	
	)	
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.	)	

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

INTRODUCTION

In cases raising constitutional claims against statutes, "courts have shown a willingness to certify defendant classes where local government officials have acted pursuant to a unified state-wide governmental policy." 2 William Rubenstein, *Newberg and Rubenstein on Class Actions* § 5.3 (6th ed. 2025). Indeed, the State Defendants concede that this Court has already certified a defendant class of prosecutors just like this one. State Opp. at 9. Here, class certification is proper under Rule 52.08(a). And the defendant class also satisfies Rule 52.08(b)(1), (b)(2), and (b)(3).

The State Defendants' arguments against certification fall flat. First, class certification would not violate due process, and not having notified all prospective class members at this early stage of proceedings does not support denying class certification. Nevertheless, Right By You fully intends to notify to all prospective class members.

Second, the State Defendants' argument that the Jackson County Prosecutor cannot adequately protect the interests of the class as its representative rests on readily distinguishable case law. Moreover, the State Defendants attempt to impose adequacy requirements that do not exist. By implying that, because the proposed defendant class handily meets 52.08(a)'s numerosity, commonality, and typicality requirements, no member of the class could adequately represent it, the State Defendants flip Rule 52.08(a) on its head.

Third, the State Defendants distort the class certification requirements under Rule 52.08(b), arguing that if a suit neither raises riparian rights nor seeks damages, certification of a defendant class is categorically excluded. But, again, this is a misreading of Missouri law.

The Court should grant Plaintiff's motion to certify the class of defendant prosecutors and name Jackson County Prosecutor Johnson as its representative because the State Defendants' opposing arguments lack merit.[1]

ARGUMENT

I. Class Certification Would Not Violate Due Process.

Insisting on notice to all prospective class defendants at this early stage in the proceedings is a distraction from the merits of class certification here. "Though Rule 52.08(c)(2) does not specify the timing of the notice to the class, it seems clear from the binding nature of the action that notice should be given promptly *after an order is entered allowing the action to proceed as a class action*." *State ex rel. Am. Family Mut. Ins. Co. v. Clark*, 106 S.W.3d 483, 492 (Mo. banc. 2003) (Wolff, J., concurring) (emphasis added). Right By You fully intends to comply with this directive. This alone is sufficient to dispel the State Defendants' due process concerns. Moreover, "the ability to opt out" of the class action pursuant to Rule 52.08(b)(3), State Opp. at 17 (quoting *Craft v. Philip Morris Cos., Inc.*, 190 S.W.3d 268, 380 (Mo. App. E.D. 2005)), at some later point does not hinge on having notice at this juncture.

At any rate, the State Defendants' argument that defendant class actions "present special due process concerns" is ineffective. State Opp. at 5 (citing *City of Excelsior Springs v. Elms Redevelopment Corp.*, 18 S.W.3d 53, 60 (Mo. App. W.D. 2000)). First, Right By You sues Defendants in their official capacities, and "[o]fficial capacity suits . . . generally

[1] Defendant Johnson does not oppose class certification.

represent only another way of pleading an action against an entity of which an officer is an agent." *Kentucky v. Graham*, 473 U.S. 159, 165 (1985) (quotation omitted). *See Creek v. Vill. of Westhaven*, No. 83 C 1851, 1987 WL 5429 (N.D. Ill. Jan. 15, 1987); *see also* 2 William Rubenstein, *Newberg and Rubenstein on Class Actions* § 5.3 (6th ed. 2025) ("Without the defendant class action device, litigation against one government entity would not technically bind the others. . . '[I]t is reasonable for the [Plaintiff] to try to hold all counties accountable within one suit.' . . . This is a recurring type of defendant class suit.") (quoting *Payton v. Cty. Of Kane*, 308 F.3d 673, 680 (7th Cir. 2002)).

Though the State Defendants do not raise it, a more pressing issue is that "[W]hen one is an unnamed member of a defendant class, one may be required to pay a judgment without having had the opportunity to personally defend the suit." *Marchwinski v. Oliver Tyrone Corp.*, 81 F.R.D. 487, 489 (W.D. Penn. 1979); *see also Lindsay v. University of Connecticut Health Ctr.*, No 3:20-cv-173 (KAD), 2020 WL 783655 at *4 (D. Conn. 2020) ("Due process concerns 'are particularly acute in defendant class actions where the unnamed class members risk exposure to liability.'") (quoting *Bakalar v. Vavra*, 237 F.R.D. 59, 63 (S.D.N.Y. 2006)). But Right By You challenges the constitutionality of a statute that the prospective class defendants have a duty to enforce, seeking equitable relief only, so those concerns "are minimized here." *Nelson v. Warner*, 336 F.R.D. 118, 125 (S.D.W. Va. 2020).

Second, the State Defendants suggest without evidence that Defendant Johnson is a "weak adversar[y] to represent the class." *City of Excelsior Springs*, 18 S.W.3d at 60. But the State Defendants have failed to provide any reason supporting this assertion aside from implying that her "substantial interests are not necessarily or even probably the same as those

whom [she is] deemed to represent." State Opp. at 5 (quoting *Hansberry v. Lee*, 311 U.S. 32, 45 (1940)). There is no evidence for this.

Indeed, the State Defendants have merely repackaged Rule 52.08(a)'s requirements of commonality, typicality, and adequacy of representation, which, as noted in Right By You's opening brief, Defendant Johnson handily satisfies. It is undisputed that "all of the prosecuting attorneys share the common defense that the statutes are constitutional." *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). And "because 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." *Turtle Island Foods, SPC*, 425 F. Supp. 3d at 1137. Nor is there any indication that counsel for Defendant Johnson are unqualified or incompetent. Moreover, 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. Prosecutor Johnson Satisfies Rule 52.08(a)'s Adequacy Requirement.

As explained *supra* 4-5, Defendant Johnson can adequately protect the interests of the proposed defendant class of county prosecutors. The State Defendants' arguments to the contrary are grounded in neither law nor fact.

As an initial matter, a defendant is an adequate class representative when "class counsel is qualified and competent to conduct the litigation," and the proposed class

representative has "no interests that are antagonistic to the other proposed class members." *Lucas Subway Midmo, Inc. v. Mandatory Poster Agency, Inc.*, 524 S.W.3d 116, 130 (Mo. App. W.D. 2017).

Significantly, the State Defendants raise the same adequacy concerns it raised in *Comprehensive Health of Planned Parenthood Great Plains v. Missouri*, No. 2416-CV31931 (16th Cir. Ct. Feb 14, 2024), and *Mo. Ass'n of Sch. Librs. v. Baker*, No. 2316-CV5732 (16th Cir. Ct. June 23, 2023). State Opp. at 9. Each court soundly rejected those contentions, as this Court should here. *Id*.

The State Defendants' first meritless argument against Defendant Johnson's adequacy as class representative is that she has limited resources, and her responsibility is "not to defend every county but to enforce the laws of Missouri in Jackson County." State Opp. at 8-9. But those issues are irrelevant to Rule 52.08(a)'s adequacy requirement; the State Defendants create these requirements out of whole cloth.

But even on its own terms, this argument fails. The State Defendants cite to *Fund Tex. Choice v. Deski*, 738 F. Supp. 3d (W.D. Tex. June 26, 2024), and *Henson v. E. Lincoln Twp.*, 814 F.2d 410 (7th Cir. 1987) (Posner, J.), for support, but these cases are inapposite. Right By You does not ask this Court to "[d]esignat[e] one county prosecutor to serve as legal representative for the entire state." State Opp. at 11. That is the responsibility of the Attorney General, who is both a named Defendant and counsel for the Defendant State of Missouri.

That distinguishes the present matter from the facts in *Deski* and *Henson*, where the only Defendants were local officials. *Deski*, 738 F. Supp. 3d at 839; *Henson*, 814 F.2d at 412. *Deski* involved a constitutional challenge of statewide implication, with "254 counties and at least 160 local prosecutors representing" them, with neither the State nor the Attorney

General as defendants. 738 F. Supp. 3d at 839. *Henson*, meanwhile, involved 770 local welfare departments across 65 counties in Illinois, in an action that determined their "essential and financially burdensome public functions" of granting or denying applications for welfare disbursements of public funds to private individuals. 814 F.2d at 412, 415. Here, by contrast, Right By You names both the State and Attorney General as defendants, and seeks only equitable relief. The potentially weighty burden on proposed class representatives in *Deski* and *Henson* would not fall to Defendant Johnson.

Second, in support of its limited resources argument, the State Defendants state that "Johnson is already defending all 115 counties in two ongoing defendant class actions." State Opp. at 9. But this contention, too, falls flat. As explained *supra* 6-7, the facts of *Deski* and *Henson* are not present here, changing the context within which the burden on resources should be understood: As prospective class representative, Prosecutor Johnson would be asked neither to speak for the whole state, nor to defend it from financial liability. Moreover, to argue that Prosecutor Johnson could not represent a class of defendant prosecutors because they are too numerous flips Rule 52.08(a)(1) on its head. Class certification is appropriate, in part, *precisely because* "joinder of all members is impracticable." Mo. R. Civ. P. 52.08(a)(1). This is a textbook application of Rule 52.08(a)(1).

Similarly, the State Defendants' argument that Prosecutor Johnson could not provide adequate representation because this Court has twice already certified a class of all 115 prosecuting attorneys with her as their representative corrupts Rules 52.08(a)(2) and 52.08(a)(3). This Court has certified a class of defendant prosecutors with the Jackson County prosecutor as representative *precisely because* "the sole question [of law] . . . is common to the entire proposed Defendant Class: whether the challenged laws are constitutional"; "a

determination . . . would apply to all the prosecuting attorneys and affect whether they could prosecute actions under that statute or not"; and "[t]he defenses available to Defendant Johnson are the same defenses available to any prosecuting attorney charged with adhering to the statutory provisions and rely on the same legal and factual bases." *See Planned Parenthood*, No. 2416-CV31931 at ¶¶ 19, 21, 26. That commonality and typicality ensure that representation is not duplicative; as class representative, Defendant Johnson would respond to the same issues and raise the same defenses as she would on her own as an individual defendant. That is, even without a defendant class to represent, Prosecutor Johnson would nevertheless be a named defendant and would have to engage in the same litigation as she would as a class representative.

Third, the State Defendants attempt a sleight of hand, arguing that "Johnson's mere duty to enforce the law is not good enough; otherwise, a defendant would *always* be adequate." State Opp. at 11. They then correctly assert that "if there is *any* evidence that the defendant representative is not able to or will not vigorously defend the action, then the class should not be certified." *Id*. (quoting *City of Excelsior Springs*, 18 S.W.3d at 60) (emphasis in State Opp.). But 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. And the State Defendants provide no support for their implication that Defendant Johnson "may have an interest in the outcome of the litigation in conflict with that of the litigants," State Opp. at 6 (quoting *Hansberry*, 311 U.S. at 45). Nor do they provide *any*

evidence that Defendant Johnson "is not able to or will not vigorously defend the action." State Opp. at 11 (quoting *City of Excelsior Springs*, 18 S.W.3d at 60).

Defendant Johnson satisfies the requirement for adequacy of class representation, and the State's arguments to the contrary lack merit.

III. Rule 52.08(b) Provides Multiple Bases for Class Certification.

As explained in Right By You's opening brief, certifying the defendant class is proper under any of Rule 52.08(b)'s three requirements. The State Defendants' erroneous arguments to the contrary do not unsettle that.

A. Class Certification is Appropriate Under Rule 52.08(b)(1).

Class certification is appropriate under Rule 52.08(b)(1) 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).

This matter presents straightforward application of Rule 52.08(b)(1)(a). Indeed, "challenging the constitutionality of a state law" is "a paradigmatic defendant class action." *Nelson*, 336 F.R.D. at 125. In *Nelson*, the court held that certification of a defendant class of ballot commissioners was warranted, explaining that:

> "[u]nless all ballot commissioners are parties to the case, ballot commissioners throughout the state . . . could continue implementing the Statute . . . A possibility also exists that other individuals or groups could bring similar actions against other ballot commissioners contesting the constitutionality of the Statute. Either of these scenarios could result in inconsistent decisions on the Statute's constitutionality, resulting in incompatible standards of conduct for the proposed class members. Unless all ballot commissioners are bound by

> this Court's decision, *the Ballot Order Statute may be inconsistently applied throughout the state*.

Id. at 125 (emphasis added). So too here. If the proposed defendant class is not certified, prosecutors throughout Missouri may enforce the Challenged Abortion Restrictions inconsistently: precisely the result Rule 52.08(b)(1)(a) is meant to address. The support that Right By You provides its clients would potentially become unlawful as the young person travels through different counties.

The State Defendants misunderstand Right By You's argument, the rule itself, or both. They assert that Rule 52.09(b)(1)(a) applies only when "the party opposing the class," which they here claim is Right By You, "would face incompatible legal obligations from different courts." State Opp. at 12 (citing *Green v. Fred Weber, Inc.*, 254 S.W.3d 874, 884 (Mo. banc 2008)). But Right By You is *moving* for class certification, not opposing it. Indeed, the court rejected certification of a *plaintiff* class in *Green* because "plaintiffs seek money damages . . . and not injunctive relief" so "there is little risk that separate suit could establish incompatible standards for *the party opposing the class*," here, the Defendant. *Id*. (emphasis added) (internal quotation omitted).

The State Defendants lean on other cases for support, but none hold water. The Court in *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997), did not, as the State Defendants claim, hold that Rule 52.08(b)(1)(a) "is designed for . . . certification in riparian-rights cases, where varying adjudications about the same water source would be impossible to simultaneously comply with." State Opp. at 12. Instead, the Court explained that one instance in which the rule may apply is "where the party must treat all [class members] alike as a

matter of practical necessity." *Amchem Prods., Inc.*, 521 U.S. at 614. It then noted that "a riparian owner using water as against downriver owners," may be one such example. *Id*.

Similarly, *Smith v. Brown Williamson Tobacco Corp.*, 174 F.R.D. 90 (W.D. Mo. 1997) is distinguishable for the same reasons as *Green*. In *Smith*, class certification was rejected, despite the possibility of individual lawsuits leading to different results, because the suit was for damages and involved individual determinations of medical monitoring, neither of which apply here.

Finally, the State Defendants' reliance on *Deski* here is again inapposite. When holding that different judgments in different jurisdictions would not be an incompatible result, the court in *Deski* was comparing named defendant prosecutors—who might be enjoined from enforcing the challenged laws—to prosecutors not named as defendants—who would presumably continue enforcing those laws. 738 F. Supp. 3d at 843-44. But here, the appropriate comparison is between only prosecutors against whom a judgment is sought. If *Deski* stood for the proposition the State Defendants claims it does, it would be anomalous in the case law. *See, e.g.*, *Nelson*, 336 F.R.D. at 125. The Court should reject the State's arguments.

B. Class Certification is Appropriate Under Rule 52.08(b)(2).

"[I]t is now settled that 23(b)(2) is an appropriate vehicle for injunctive relief against a class of local public officials." *Marcera v. Chinlund*, 595 F.2d 1231, 1238 (2d Cir. 1979), *vacated on other grounds sub. nom., Lombard v. Marcera*, 442 U.S. 915 (1979); *see also Turtle Island Foods, SPC v. Richardson*, 425 F. Supp. 3d 1131, 1138 (W.D. Mo. 2019), *aff'd sub nom. Turtle Island Foods, SPC v. Thompson*, 992 F.3d 694 (8th Cir. 2021) ("[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)"); *Nelson*, 336 F.R.D. at 125 (concluding that defendant class certification was appropriate under Federal Rule 23(b)(2) and appropriate remedy was "injunctive and declaratory relief with respect to the defendant class as a whole").

The State Defendants incorrectly argue otherwise, citing *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011). Interpreting the application of Rule 23(b)(2), the Court in *Dukes* honed in on the need for an "indivisible nature of the injunctive or declaratory remedy awarded—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them." *Id*. at 360. A reasonable read of this interpretation is that it applies here: the proposed class defendants can all be enjoined from enforcing the challenged abortion restrictions, or none of them; enforcement of the Challenged Abortion restrictions can be declared unconstitutional as to all proposed class defendants, or as to none of them.

The State Defendants ignore this, the crux of the analysis, instead focusing on the following sentence, where the Court states that Rule 23(b)(2) "applies only when a single injunction or declaratory judgment would provide relief to each member of the class." *Id*. According to the State Defendants, this single line concluding in-depth analysis about the

indivisible nature of the equitable relief requested is actually about whether the suit involves a class of plaintiffs or defendants.[2]

While other courts have adopted the State Defendants' "literal approach" and declined to certify a defendant class under Federal Rule 23(b)(2), *see, e.g., Brown v. Kelly*, 609 F.3d at 476–79 (2d Cir. 2010) (identifying split, collecting cases, and ultimately calling defendant class certification under Federal Rule 23(b)(2) a "reasonable interpretation" of the Rule), this interpretation conflicts with the principle that the rules governing class certification should be given "a liberal rather than a restrictive construction . . . to best serve the ends of justice for the affected parties and [] promote judicial efficiency." *Nelson*, 336 F.R.D. at 122 (citation and quotation omitted).

Declining to certify a defendant class under Federal Rule 23(b)(2) is inefficient, unfair, and risks inconsistent outcomes. *See* 2 William Rubenstein, Newberg and Rubenstein on Class Actions § 5:22 (6th ed. 2022). This Court should exercise its "broad discretion to determine whether the requirements" for class certification are met, *Sherman ex. rel. Sherman v. Twp. High Sch. Dist.*, 540 F. Supp. 2d 985, 991 (N.D. Ill. 2008), and apply Subsection (b)(2) here, just as other courts have. *See Comprehensive Health of Planned Parenthood Great Plains v. Missouri*, No. 2416-CV31931 at ¶ 41 ("Because Plaintiffs seek only injunctive and declaratory relief against an unconstitutional application of state statutes, the proposed Defendant Class satisfies Rule 52.08(b)(2).").

[2] Because *Dukes* involved a class of plaintiffs, 564 U.S. at 342-45, it stands to reason that the court would be discussing the appropriateness of class certification within the context of a plaintiff, not a defendant, class.

C. Class Certification is Appropriate Under Rule 52.08(b)(3).

Class certification is appropriate under 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.

The State Defendants once again take an unusual reading of *Dukes*, erroneously claiming that Rule 52.08(b)(3) "does not apply to cases when the plaintiff seeks only equitable relief." State Opp. at 15. But *Dukes* says no such thing. The Court in *Dukes* merely held that, of the three subparts, "individualized monetary claims belong in Rule 23(b)(3)." 564 U.S. at 362 (citing the procedural protections in subsection (b)(3) as an important distinguishing feature for suits seeking damages). Indeed, it reiterated that, with regard to Rule 23(b)(3), "[i]ts only prerequisites are that 'the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.'" *Id*. (quoting Fed. R. Civ. P. 23(b)(3)).

The State Defendants next argue that class certification under Rule 52.08(b)(3) is nevertheless inappropriate because Plaintiff "fails to provide any evidence showing" predominance and superiority. State Opp. at 16. But this argument borders on nonsensical. Right By You brings a pre-enforcement suit challenging the constitutionality of state statutes

that the proposed class defendants have a legal duty to enforce. This plainly evinces that "questions of law and fact common to the members of the class predominate over any questions affecting only individual members." *Comprehensive Health of Planned Parenthood Great Plains v. Missouri*, No. 2416-CV31931 at ¶ 42 (Feb. 14, 2025). Moreover, 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 is also "the fairest and most efficient way to adjudicate the matter." *See id*. at 9, ¶ 42.

Moreover, the State Defendants' argument that this ability to opt out "makes certification under subpart (b)(3) 'a pointless judicial exercise'" is incorrect. State Opp. at 17 (quoting *In re Arthur Treacher's Franchise Litig.*, 93 F.R.D. 590 (E.D. Pa. 1982)). The State Defendants take this statement about judicial futility out of context: in *In re Arthur Treacher's Franchise Litig.*, there were "already a number of cases involving the same controversy pending" in the court, which "were consolidated for pretrial purposes." 93 F.R.D. at 595. And there were "a presently indeterminate number of defendants whose very identity is in question," who would have to be noticed by publication. *Id.* No such circumstances are present here.

Finally, the State Defendants lean on dicta from *Wyandotte Nation v. City of Kansas City, Kansas*, 214 F.R.D. 656 (D. Kan. 2003), in which the court was asked to certify a class "under Rule 23(b)(1)(B) and/or (2)." *Id*. at 664. The appropriateness of certification under Rule 23(b)(3) was not even before the court. Indeed, after finding "that the requirement of Rule 23(b)(1)(B0 are satisfied," the court did not even "examine whether Rule 23(b)(2) presents an additional ground for class certification." *Id*. The State's arguments have no merit,

and this Court should reject them. Moreover, granting class certification would "promote judicial efficiency." *Nelson*, 336 F.R.D. at 122.

CONCLUSION

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

Dated: July 7, 2025

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Ryan R. Agnew, do hereby certify that on July 7, 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.

/s/ Ryan R. Agnew
Ryan R. Agnew