IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

PASTORS PROTECTING YOUTH, *et al.*	)	
Plaintiffs,	)	Case No. 16-cv-08034
v.	)	Honorable Judge Ronald A. Guzman
LISA MADIGAN, Illinois Attorney General, in her Official Capacity,	)	
Defendant.	)	

REPLY MEMORANDUM IN SUPPORT OF THE ILLINOIS ATTORNEY GENERAL'S RULE 12(b)(1) AND 12(b)(6) MOTION TO DISMISS

Plaintiffs have brought suit against the Illinois Attorney General claiming their speech has been chilled by the Youth Mental Health Protection Act, 405 ILCS § 48/1, *et seq*. ("the Act"), which prohibits a "mental health provider" from engaging "in sexual orientation change efforts" with a minor and bans deceptive advertising of such efforts by persons engaged "in trade or commerce." 405 ILCS 48/20 and 25. Plaintiffs' semantical arguments do not negate two incontestable facts – Plaintiffs are not mental health providers and Plaintiffs are not engaged in trade or commerce. Given the fact that the Act only proscribes the conduct of persons who fall within these two categories, Plaintiffs have presented no actual controversy for this Court to resolve. Federal law prohibits such actions under the doctrines of case or controversy, ripeness, standing and sovereign immunity.

ARGUMENT

I. The Complaint Should Be Dismissed For Lack of Subject Matter Jurisdiction.

A. Plaintiffs Have Failed To Establish That There is An Actual Controversy Between Adverse Parties.

Plaintiffs argue that contrary to the Attorney General's assertion that there is no actual controversy between the parties because the Plaintiffs have averred that the Act does not apply to their conduct, Plaintiffs "have said repeatedly that they fear [the Act] does apply to them and are seeking a declaration that it *should not* apply to them." (Pls Resp. at 11.) Such quibbling over semantics misses the key point that there is no actual controversy between adverse parties in this case. No matter if Plaintiffs have alleged that they *do not* or *should not* fall within the purview of the Act, Plaintiffs seek declaratory relief that they "fall outside 'trade or commerce' and cannot be subject to the Act." (Compl. Prayer ¶A.) Based on Plaintiffs' allegations that they are engaged in pastoral counseling without charge, Plaintiffs' conduct falls outside trade or commerce and thereby Plaintiffs are not covered by the Act. As a result, Plaintiffs have not alleged an actual controversy and the Plaintiffs are not adverse to the Attorney General. Plaintiffs' attempt to convert the Attorney General's case or controversy argument into a "mootness" argument is improper. (Pls Resp. at 11-12.) The Attorney General makes no argument at this juncture that the matter is moot. The Attorney General's position remains that where, as here, no actual controversy between parties having adverse legal interests exists, the Court lacks jurisdiction over the claims.[1] *See Nuclear Eng'g Co. v. Scott*, 660 F.2d 241, 251-52 (7th Cir. 1981).

[1] Plaintiffs repeatedly make the argument that the Attorney General should agree to enter into a consent decree to resolve this matter. (Pls Resp. at 5, 13, 15.) However, it would be inappropriate for the Attorney General to enter into an agreement designed to resolve disputes, when there is no actual dispute between the parties.

1. Plaintiffs Concede That Section 20 of the Act Does Not Apply To Their Conduct.

As addressed in the Attorney General's Motion to Dismiss, the parties agree that the Plaintiffs are not licensed mental health providers and thereby are not covered by Section 20 of the Act. (*See* Dkt. 21 at 5.)

2. Plaintiffs Have Failed to Establish That Their Alleged Conduct Falls Within "Trade or Commerce".

Plaintiffs aver that the legal issue of whether their conduct falls within "trade or commerce" is not "clear cut". (Pls Resp. at 12.) Plaintiffs make no effort to distinguish the three cases cited by the Attorney General which support the conclusion that pastoral counseling without charge cannot be characterized as the type of commercial conduct understood to be within the meaning of "trade or commerce" for the purposes of the Illinois Consumer Fraud and Deceptive Business Practices Act ("ICFA"). (*See* Dkt. 21 at 6.) In fact, the two cases cited by Plaintiffs in a footnote to suggest that Illinois courts have interpreted the ICFA broadly, both involve parties who were engaged in commercial, business practices. *See* Dkt. 21 at 12; *Nichols Motorcycle Supply Inc. v. Dunlop Tire Corp.*, 913 F. Supp. 1088 (N.D. Ill. 1995) (where plaintiff was a motorcycle tire distributer who brought an action against a tire manufacturer); *see People ex rel. Daley v. Datacom Sys. Corp.*, 531 N.E.2d 839 (1988) (where the Cook County State's Attorney brought an action against a debt collection agency hired by the city to collect delinquent parking ticket fines). Plaintiffs point to no case law that supports the view that "trade or commerce" has been interpreted in the context of the ICFA to be inclusive of persons or entities like Plaintiffs who have not alleged that they are engaged in commercial enterprises.

3. Subject Matter Jurisdiction Is Lacking Where There is No Case Or Controversy Between Adverse Parties.

Based on the allegations regarding Plaintiffs' practices, Plaintiffs are not covered by Section 20 or Section 25 of the Act. "[F]ederal courts will find an action unripe if…the possibility exists that state courts might construe state law in a manner that would avoid the asserted federal constitutional difficulty." *Wisconsin's Envtl. Decade, Inc. v. State Bar of Wis.*, 747 F.2d 407, 411-412.

B. Plaintiffs' Claims Are Not Ripe for Judicial Determination.

The Attorney General's Motion to Dismiss outlines the factors set out by the Seventh Circuit in the first amendment case *Wisconsin's Envtl. Decade, Inc. v. State Bar of Wis.*, 747 F.2d 407, 411 (7th Cir. 1984) for determining whether a suit seeking a declaration that a state law violates the federal Constitution is ripe. (*See* Dkt. 21 at 7-8.) Plaintiffs ignore this case and the fact that they fail to meet the *Wisconsin Environmental* factors, asserting instead that the Seventh Circuit in *Wis. Right to Life, Inc. v. Schober*, 366 F.3d 485 (7th Cir. 2004) rejected the requirement in pre-enforcement challenges like this one that a plaintiff demonstrate that there has been a threat of enforcement. (Pls Resp. at 10.) Plaintiff is incorrect. To begin, the Court in *Schober* did not consider ripeness and focused on the alternate grounds of standing and mootness. 366 F.3d at 487-89. Accordingly, *Schober* could not have implicitly repealed the test for ripeness set out by *Wisconsin Environmental*. Furthermore, the Court in *Schober* dismissed the case for lack of standing based on the very requirement Plaintiffs assert the Court rejected, finding that the plaintiffs had failed to tie the "theoretical harm" that the defendants would enforce a statute against plaintiffs that the State's Attorney General had conceded was unconstitutional and that had already been declared unconstitutional by a district court, "to an actual and imminent threat of enforcement." *Id.* at 490.

Nonetheless, Plaintiffs assert that challenges to laws that chill protected speech are presumptively ripe. (Pls Resp. at 11.) This conclusion necessarily includes the assumption that the law at issue actually covers and/or impacts Plaintiffs' alleged conduct. "The power of a federal court to pass upon the constitutionality of a statute can be exercised only if the interests of the litigants require the use of this judicial authority for protection against actual interference with their rights." *J.N.S., Inc. v. State of Ind.*, 712 F.2d 303, 305 (7th Cir. 1983). Here, there is no reasonable basis to conclude that Plaintiffs' speech is chilled by an Act that, as discussed *supra*, does not apply to Plaintiffs' alleged conduct, and that the Attorney General has not enforced or threatened to enforce against them. Consequently, Plaintiffs claims are not ripe for judicial determination.

C. Plaintiffs Lack Standing To Bring This Action Because They Have Not Alleged An Injury In Fact Traceable To The Attorney General.

Plaintiffs argue that actual injury exists for the purposes of standing if a plaintiff's speech is objectively reasonably chilled. (Pl Resp. at 6.) According to Plaintiffs, a plaintiff's speech is chilled if there exists a credible threat of prosecution latent in the statute, which exists so long as the statute "arguably covers" a plaintiff's actions. (*Id.* at 7.) Plaintiffs rely on two cases involving criminal statutes – *Republican Party of Minn., Third Cong. Dist. v. Klobuchar*, 381 F.3d 785 (8th Cir. 2004) and *Majors v. Abell*, 317 F.3d 719 (7th Cir. 2003) – to support this conclusion. It is not clear that the courts in *Klobuchar* and *Abell* intended their concerns regarding a plaintiff's fear of criminal consequences deterring constitutionally protected speech to apply in the context of civil statutes like the Act; yet even if they did, the Court in *Abell* makes clear that a credible threat of prosecution is lacking if the statute at issue clearly fails to cover a plaintiff's alleged conduct. 317 F.3d at 721.

Here, Plaintiffs have conceded that their conduct does not fall within Section 20 of the Act and have not alleged any facts to support the notion that their conduct falls within trade or commerce and is thereby covered by Section 25 of the Act. Furthermore, the legislative history of the Act confirms that the Act does not apply to religious counseling. (*See* Dkt. 21 at 3.) Accordingly, there is no threat of prosecution latent in the Act to establish an injury in fact for the purposes of standing. Moreover, merely alleging that the Attorney General has the authority to enforce the Act is insufficient to establish the causation element of standing in a case like this where a credible threat of prosecution is not latent in the statute. Instead, Plaintiffs must show that their alleged injury is fairly traceable to the Attorney General's actions. *Lujan*, 504 U.S. at 561. Plaintiffs have failed to meet that burden since they have not and cannot allege that the Attorney General has enforced or threatened to enforce the Act against them.[2] "When plaintiffs 'do not claim that they have ever been threatened with prosecution, that a prosecution is likely, or even that a prosecution is remotely possible,' they do not allege a dispute susceptible to resolution by a federal court." *See Schirmer v. Nagode*, 621 F.3d 581, 586 (7th Cir. 2010) (quoting *Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289, 298–99 (1979)).

Further, where, as here, a statute clearly does not apply to a plaintiff's alleged conduct, a declaratory judgment is unlikely to prevent any injury to the plaintiffs. *See Schrimer*, 621 F.3d at 585 (finding plaintiff failed to meet redressability prong of standing because the record did not support that the plaintiffs alleged conduct was covered by the complained about provision). For these reasons, Plaintiffs lack standing to pursue their claims and the case must be dismissed.

[2] Similarly, Plaintiffs newfound fear of prosecution by private counselees is not a basis upon which Plaintiffs can establish standing to sue the Attorney General. *See* Pls Resp. at 7; *See Lujan*, 504 U.S. at 560-61 ("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.")

D. Because Plaintiffs Fail To Establish Standing To Bring Their Own Claims, They Also Fail To Assert Standing On Behalf Of Their Counselees.

As discussed above, Plaintiffs have failed to establish standing to pursue claims on their own behalf because they have not alleged an injury in fact that is traceable to the actions of the Attorney General. As a result, Plaintiffs also fail to establish standing to pursue claims on behalf of their counselees. *See In re African-Am. Slave Descendants Litig.*, 304 F. Supp. 2d 1027, 1052 (N.D. Ill. 2004).

II. Sovereign Immunity Bars Plaintiffs' Action Because There Is No Ongoing Violation Of Federal Law.

Plaintiffs argue that the Eleventh Amendment does not bar their action against the Attorney General because they have alleged an ongoing violation of federal law by averring that the Act "chilled and continues to chill their free speech activities." (Pl Resp. at 14.) As discussed *supra*, Plaintiffs speech has not been chilled because Plaintiffs alleged conduct is not covered by the Act and Plaintiffs have not alleged that the Attorney General has enforced or threatened to enforce the Act against them. Consequently, Plaintiffs have failed to allege an ongoing violation of federal law and their claims are barred by the Eleventh Amendment.

III. Plaintiffs' As-Applied Challenges to the Act Must Be Dismissed Because Plaintiffs Have Failed to Sufficiently Allege that the Act Applies to Them.

Plaintiffs attempt to refute the Attorney General's assertion that Plaintiffs have failed to properly plead their as-applied challenges to the Act by asserting that "the purpose for seeking declaratory judgment is because Plaintiffs believe that the Act *could* apply to them." (Pl Resp. at 14.) Again, this linguistic hairsplitting does not relieve Plaintiffs of their burden to plead that the Act actually applies to them or that the Act is being applied to them in order to properly assert as-applied challenges. Because Plaintiffs fail to make such allegations, Plaintiffs' as-applied challenges fail to state a cognizable cause of action.

CONCLUSION

For the foregoing reasons, the Illinois Attorney General respectfully requests the Court to dismiss Plaintiffs' Complaint.

Date: December 13, 2016

Respectfully submitted,

LISA MADIGAN
Attorney General of the State of Illinois

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CERTIFICATE OF SERVICE

I, Krenice M. Roseman, an attorney, hereby certify that on this 13th day of December, 2016 before 5:00 p.m., I caused copies of the foregoing documents to be served on those who have appeared and are of record via the Court's electronic filing system.

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