

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

Case No. 6:21-cv-06303-FPG

**Emilee Carpenter, LLC, d/b/a
Emilee Carpenter Photography
and Emilee Carpenter**

Plaintiffs,

vs.

Letitia James, in her official capacity
As Attorney General of New York;
Johnathan J. Smith, in his official
Capacity as Interim Commissioner of
the New York State Division of Human
Rights; and, **Weeden Wetmore**, in his
Official capacity as District Attorney of
Chemung County,

Defendants.

REPLY MEMORANDUM OF LAW
in support of a Dismissal, or in the alternative, Opposing Preliminary Injunction
as to Chemung County District Attorney

County of Chemung Department of Law
Attorneys for Respondent, Weeden Wetmore,
District Attorney of Chemung County
167 Lake Street
Elmira, New York 14902
By: Jeffrey D. Walker, Esq.

This Reply Memorandum, submitted with the Affidavit of the Defendant, the District Attorney of Chemung County, Weeden Wetmore, are made in furtherance of said Defendant's motion to dismiss, or in the alternative in opposing a Preliminary Injunction as to said Defendant.

**Dismissal of Complaint as against Chemung County District Attorney
for Failure to State a Cause of Action**

The Complaint should be dismissed because Plaintiffs have not demonstrated any credible threat of prosecution from the Defendant moving hereunder.

Although it is conceded that a Plaintiff testing the constitutionality of a criminal statute does not need to first expose themselves to actual arrest or prosecution to be entitled to challenge such a statute (see, e.g., Babbitt v. United Farm Workers Nat. Union, 442 U.S. 289, 298 [1979], citing Steffel v. Thompson, 415 U.S. 452, 459 [1974]), such a pre-prosecution challenge may only be entertained by this Court when that Plaintiff shows that “... *there exists a credible threat of prosecution thereunder.*” Babbitt, *supra* citing Doe v. Bolton, 410 U.S. 179, 188 (1973) [emphasis supplied].

A federal court may only adjudge the legal rights of litigants in actual controversies; persons having no fears of state prosecution except those that are imaginary or speculative, are not to be accepted as appropriate plaintiffs. Roe v. Butterworth, 958 F.Supp. 1569, 1572 (United States District Court, S.D. Florida, 1997) [internal citations omitted]. “The basic inquiry is whether the ‘conflicting contentions of the parties ... present a real, substantial controversy between parties having adverse legal interests, a dispute definite and concrete, not hypothetical or abstract.’” *Id.* citing Railway Mail Assn. v. Corsi, 326 U.S. 88, 93 (1945); Evers v. Dwyer,

358 U.S. 202, 203 (1958); Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 273, (1941); Babbitt v. United Farm Workers Nat. Union, *supra* at 297-298.

In a case like Steffel v. Thompson, *supra*, where police have threatened a Plaintiff with arrest, a credible threat of prosecution exists. However, as in the Roe case, the Plaintiffs here do not allege having ever been prosecuted before for these matters; and further, there is not any evidence beyond their mere fears that they may face a pending threat of prosecution for violating the challenged statutes from the District Attorney Defendant. See, Roe at 1572. In Roe, a credible threat of prosecution was nonetheless established because the Petitioner there alleged a desire to engage in conduct prohibited by a Statute; alleged that she was at the time refraining from doing so out of fear of prosecution; and, the proof demonstrated that the Respondent in that case had previously enforced that ordinance and, most importantly, that Respondent "... indicated that it will continue to enforce the challenged ordinance." *Id.*

In this case, however, there is no evidence that the Chemung County District Attorney has any intention to pursue any action against Plaintiff for alleged violations of the Civil Rights laws, nor any evidence that any local District Attorney in this State has ever initiated an action against any party for an alleged Civil Rights Law violation, unless the same also accompanied allegations of traditional crimes, such as: Assault, Harassment, Menacing, or other penal law violations.¹ As such, it is submitted that Plaintiffs have not sufficiently shown any credible threat of prosecution by the County Defendant. Babbitt, *supra*. Therefore, this Complaint should be dismissed as against the County Defendant.

¹ See Memorandum of Law from the County of Chemung submitted on or about 6/16/2021 in the section entitled: "New York State's Civil Rights Laws" on pages 6-9

Disavowal of Intent

Page 4 of the “Combined Memorandum of Law in Response to County Defendant’s Motion to Dismiss and Reply in Support of Plaintiffs’ Preliminary Injunction” states, among other things, that: “The District Attorney hasn’t explicitly disavowed enforcing the law against Emilee,” and thereafter cites cases referencing “disavowal” statements from prosecutors, plus an accompanying Footnote which states that: “Without an express disavowal, Emilee still ‘face[s] a clear Hobson’s choice’ of risking prosecution or refraining from speaking.”

In specific response to this section, Defendant submits the accompanying affidavit of District Attorney Wetmore, confirming that his Office would not prosecute an action under the State Civil Rights Law absent contemporaneous violations of the Penal Law, or absent allegations indicating another explicit criminal violation (such as a Defendant resisting, preventing, impeding or interfering with employees from the Division of Human Rights, and /or a Defendant being in noncompliance with an existing enforcement order from the State Human Rights Board, as codified in Executive Law Sect. 299). Moreover, District Attorney Wetmore confirms that the alleged possible scenarios presented in Plaintiffs’ complaint would *not* be prosecuted by the Chemung County District Attorney’s office. It is submitted that this affidavit from the District Attorney, if not treated as being an express “disavowal” of intent by the District Attorney to engage in any alleged prosecution of the Plaintiffs for the behavior outlined in their Complaint, should at any rate be sufficient for this Court to find that there is “another reason to conclude that no such intent existed” in this case. See, Hedges v. Obama, 724 F.3d 170, 197 (United States Court of Appeals, Second Circuit, 2013).

There exists no credible claim of prosecution from the Chemung County District Attorney for the behavior Plaintiffs allege they seek to engage in as stated in the Complaint.

Therefore, respectfully, Plaintiffs can offer nothing more than a “chimerical” fear of enforcement of the cited provisions of law from the District Attorney of Chemung County. See, Poe v. Ullman, 367 U.S. 497, 508 (1961). The federal court is not empowered to give plaintiff advisory opinions where there is no actual controversy. Shell Oil Co. v. Noel, 608 F.2d 208, 213 (U.S. Ct. of Appeals, 2nd Cir., 1979).

Accordingly, the Complaint should be dismissed as against the Chemung County District Attorney, either for failure to state a plausible claim against the Chemung County District Attorney, or due to a lack of subject matter jurisdiction as to said Defendant.

If the inclusion of this Affidavit is necessary to resolve this Motion in favor of the moving Defendant, Defendant requests the motion originally filed as under FRCP 12(b) to be treated as one for summary judgment under Rule 56, as permitted by FCRP 12(d) by virtue of considering matters outside of the pleadings (to wit: the Chemung County District Attorney’s Affidavit). See, e.g., Larson v. Agos, 449 Fed. Appx. 725, 729 (United States Court of Appeals, Tenth Circuit, 2011).

Further, if the motion to dismiss as requested herein is granted, Defendant Wetmore further requests that the court strike all references in the pleadings with respect to Weeden Wetmore. [See: FCRP 12(b)(f)].

If Dismissal is not granted, a demand for a more definitive pleading is requested

The arguments previously submitted as well as the ones above are adopted and re-incorporated herein as if fully pled. It is reasserted that the possible scenarios presented within the complaint do not form a recognizable action against Plaintiffs from the Chemung County District Attorney². [See: FCRP 12(e)]. The District Attorney would not bring an action against

² See also accompanying affidavit for District Attorney, Weeden Wetmore

the plaintiffs under the circumstances as described in the Complaint; therefore the Chemung County District Attorney would be unable to reasonably prepare a response without a more definite statement or pleading.

Opposing Preliminary Injunction

The arguments previously submitted as well as the ones above are adopted and re-incorporated herein as if fully pled. If this matter is not dismissed as to the Chemung County District Attorney, then the District Attorney opposes the plaintiffs' preliminary injunction request.

The possible prosecution by the Chemung County District Attorney is not real or imminent under the facts recited in the Complaint. Therefore, the extraordinary remedy of a preliminary injunction should not be granted. See, Distribution Sys. Of Am., Inc. v. Vill. Of Old Westbury, 785 F.Supp.347, 352 (E.D.N.Y. 1992), *quoting* JSG Trading Corp. v. Tray-Wrap, Inc., 917 F.2d 75, 79 (2nd Cir. 1990).

Conclusion

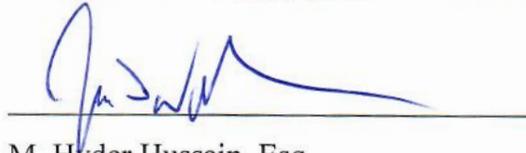
For the reasons stated herein, Defendant Weeden Wetmore, who is being sued in his official capacity as Chemung County District Attorney, requests an Order granting:

- A Dismissal of the complaint for failure to state a claim upon which relief can be granted [See: FRCP 12(b)(6), 12(h)(2)(B)] and /or;
- A Dismissal for lack of subject matter jurisdiction as to this defendant, because any dispute involving Weeden Wetmore is not ripe for adjudication [See: FRCP 12(b)(1)];
- Requesting the Court to strike all references in the pleadings with respect to Weeden Wetmore if the dismissal motion is granted [See: FRCP 12(b)(f)];
- If the motions to dismiss are not granted, in the alternative, a request for a more definite statement or pleading, [See: FRCP 12(b)(e)];
- Extending the time to answer, either within 14 days after the more definite statement is served or as otherwise ordered [See: FRCP 12(a)(4)]; and
- Seeking a Denial of the request for a preliminary injunction as to Weeden Wetmore.

Dated: Elmira, New York

July 21, 2021

CHEMUNG COUNTY LAW DEPARTMENT



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By: Jeffrey Walker

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

Emilee Carpenter, LLC, d/b/a Emilee Carpenter
Photography and Emilee Carpenter,

Plaintiffs,

AFFIDAVIT OF WEEDEN A. WETMORE
District Attorney of Chemung County

-against-

Letitia James, in her official capacity as Attorney
General of New York; Johnathan J. Smith, in his
official capacity as Interim Commissioner of the
New York State Division of Human Rights; and,
Weeden Wetmore, in his official capacity as
District Attorney of Chemung County,

Case NO. 6:21-cv-06303

Defendants.

STATE OF NEW YORK)
COUNTY OF CHEMUNG)ss:

WEEDEN A. WETMORE, being duly sworn, deposes and says:

1. I am the District Attorney for the County of Chemung. I am a Defendant in this matter.
2. It is not a local district attorney’s job to enforce Civil Rights Law generally; those enforcements rest with the State Attorney General or the Division of Human Rights.
3. The District Attorney’s Office would not prosecute an action under the State Civil Rights Law, absent contemporaneous violation of the Penal Law (like the existing case law demonstrating local district attorneys in New York only prosecuting Civil Rights Law violations if they are accompanied by other violations of the Penal Law), or absent allegations indicating another explicit criminal violation (such as a Defendant resisting, preventing, impeding or interfering with employees from the Division of Human Rights, and /or a Defendant being in noncompliance with an existing enforcement order from the

State Human Rights Board)¹.

4. None of the possible scenarios which Plaintiffs claim would allegedly result in prosecution as drafted in the Complaint would be prosecuted by this office.

Dated: Elmira, New York

7/21, 2021



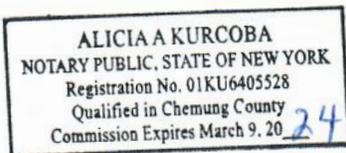
Weeden A. Wetmore

Sworn before me on this

21 day of July, 2021



Notary Public



¹ See Executive Law Sect. 299