UNITED STATE DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DISTRICT

ASHLEY STOCK, Plaintiff, v. JAMES L. GRAY, et al., Defendants,	Case No. 22-CV-4104-DGK Hon. David Gregory Kays

PLAINTIFF ASHLEY STOCK'S SUGGESTIONS IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Much of defendants' motion to dismiss (Dkts. 19, 19-1) duplicates their opposition (Dkt. 17-1) to Stock's motion for a preliminary injunction (Dkts. 7, 8). In line with Fed. R. Civ. P. 1 and W.D. Mo. L. R. 7.0(a), Stock will not burden the Court by replowing the same ground as Stock's suggestions and reply suggestions (Dkts. 8, 20-1) in support of her motion for an injunction. Instead, she will merely incorporate those filings by reference here and concisely address only the points that defendants newly raise in their motion to dismiss.

INTRODUCTION

Through the pharmacist speech ban in Missouri Revised Statute § 338.055.7, Missouri attempts to blot out the North Star "in our constitutional constellation"—"that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion." *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). States may not dictate what viewpoints private citizens may hold or express. This is especially so "in the fields of medicine and public health, where information can save lives" and "candor is crucial." *Nat'l Institute for Fam. and Life Advocates v. Becerra*, 138 S. Ct. 2361, 2374 (2018) (internal quotations omitted) ("*NIFLA*"). Section 338.055.7 casts a pall of orthodoxy over the profession of pharmacy in the state of Missouri; Stock seeks relief narrowly tailored to remove that pall and remedy the constitutional harm. Defendants' motion to dismiss should be denied.

LEGAL STANDARD FOR MOTION TO DISMISS

Under Fed. R. Civ. P. 12(b)(6), defendants assert that Stock's claims fail on the merits because Section 338.055.7 is not facially unconstitutional, overbroad, or unconstitutional as applied to the speech Stock wishes to engage in. Def. Suggestions in Support of Mot. 6-13. In adjudicating a motion to dismiss, a court must "assume the allegations in the complaint are true and view them in the light most favorable" to the non-moving party. *Telescope Media Grp. v. Lucero*, 936 F.3d 740, 749 (8th Cir. 2019). It must "draw all reasonable inferences in favor of the

nonmoving party." *Mo. Broadcasters Ass'n v. Lacy*, 846 F.3d 295, 300 (8th Cir. 2017) (internal quotation omitted)

In assessing a facial challenge in the First Amendment context, the Court should "apply[] the relevant constitutional test to the challenged statute, without trying to dream up whether or not there exists some hypothetical situation in which application of the statute might be valid." *Bruni v. City of Pittsburgh*, 824 F.3d 353, 363 (3d Cir. 2016); *Doe v. City of Albuquerque*, 667 F.3d 1111, 1124-25 (10th Cir. 2012) (collecting cases). "Where a statute fails the relevant constitutional test [(if for example it discriminates based on viewpoint)], it can no longer be constitutionally applied to anyone—and thus there is 'no set of circumstances' in which the statute would be valid." *Bruni*, 824 F.3d at 363 (quoting *Doe*); *see also Mo. Broadcasters Ass'n*, 846 F.3d at 300-303 (applying the relevant First Amendment test and concluding that the complaint survived a motion to dismiss); *Krantz v. City of Fort Smith*, 160 F.3d 1214, 1218-22 (8th Cir. 1998) (similar, in the posture of cross-motions for judgment on the pleadings).

ARGUMENT

I. Section 338.055.7 unconstitutionally restricts speech on the basis of viewpoint.

According to defendants, because Section 338.055.7 "prescribes the circumstances in which the pharmacist may initiate contact and does not otherwise regulate the pharmacist's speech, it regulates conduct and not [speech]." Def. Mot. 10. That is sophistry. "Speech is not conduct just because the government says it is." *Telescope Media Group*, 936 F.3d at 752. The unconstitutional provision of Section 338.055.7 does not prohibit bumping into or literally initiating contact with patients or physicians (a regulation of conduct). And it does not prohibit initiating contact with patients or physicians to speak on any matter regardless of subject (a content-neutral regulation of speech). And it does not even prohibit initiating contact with patients or physicians to talk about a particular subject matter like the two drugs (a content-based regulation of speech). It prohibits initiating contact to *express a particular view about the two drugs*

(a viewpoint-based regulation of speech). Simply, nothing in Section 338.055.7 regulates conduct; it only regulates speech *qua* speech.

Initiating contact with others to communicate ideas and opinions is quintessential First Amendment protected expression. Indeed, initiating "one-on-one communication" is "the most effective, fundamental, and perhaps economical avenue of political discourse." *McCullen v. Coakley*, 573 U.S. 464, 488-89 (2014) (holding unconstitutional an ordinance that prohibited individuals from approaching others to initiate conversation within a certain radius of an entrance to abortion clinics); *see also Watchtower Bible & Tract Soc'y of N.Y. v. Village of Stratton*, 536 U.S. 150 (2002) (invalidating municipal ordinance that prohibited unlicensed door-to-door canvassing); *Rodgers v. Bryant*, 942 F.3d 451 (8th Cir. 2019) (invalidating state that prohibited initiating contact to solicit charity or gifts). Initiating contact to engage someone in speech falls outside *NIFLA*'s exception of speech incidental to conduct; it is the antithesis, because the contact is conduct incidental to speech.

Stock has already briefed at length why *NIFLA*'s two exceptions do not embrace the speech Section 338.055.7 wishes to regulate. Reply Suggestions 5-6. But defendants add one conclusory argument that the "rule is not view point discrimination because it prevents contact to dispute whether the FDA-approved drugs are effective for humans or ineffective." Def. Mot. 11. This reasoning is difficult to follow. When a pharmacist receives a prescription, it carries no message of "ineffectiveness" to dispute. And even if hypothetically it could carry such a message, Section 338.055.7 does not prohibit pharmacists from responding by disputing "inefficacy" (*i.e.,* touting, crediting, endorsing, or acclaiming the drugs). That is exactly the problem. It is taking sides in a politically charged debate about the efficacy of the drugs. That is viewpoint discrimination. *See* Suggestions in support of Motion for Preliminary Injunction at 3-8. For both on-label and off-label uses, the pharmacist is permitted only to tout the efficacy of the drugs in connection with a given prescribed treatment, but not to dispute the efficacy of the

drugs in connection with that treatment. The on-label vs. off-label distinction (Def. Mot. 6) is a red herring; the viewpoint discrimination inheres in the law itself.

Again, finding viewpoint discrimination "end[s] the matter." *Iancu v. Brunetti*, 139 S. Ct. 2294, 2302 (2019); *see, e.g.*, *Ison v. Madison Loc. Sch. Dist. Bd. of Educ.*, 3 F.4th 887, 895 (6th Cir. 2021) (ending constitutional inquiry after finding the rule viewpoint discriminatory). "'[R]estrictions based on content must satisfy strict scrutiny, and those based on viewpoint are prohibited,' seemingly as a *per se* matter." *Speech First v. Cartwright*, 32 F.4th 1110 (11th Cir. 2022) (quoting *Minn. Voters Alliance v. Mansky*, 138 S. Ct. 1876, 1885 (2018)).

Still, defendants argue that the law can satisfy strict scrutiny. Def. Mot. 9-10, 11-12. Stock has addressed most of these in her preliminary injunction reply. Reply Suggestions 8-11. But now, defendants acknowledge that one aim of the law is "prohibiting what is essentially unwanted contact." Def. Mot. 12; *accord* Def. Mot. 9 (the law "simply prevents [Stock] from making unwanted contact from the 'many patients [that] refuse to divulge what the prescriptions are for.'").[1] This new argument is unavailing.

First, this rationale fails under the verified facts in the complaint, that "Patients and doctors have previously thanked Stock after she initiates contact with them to provide guidance or to suggest alterative pharmaceutical options that are more effective." Complaint ¶ 24. And there is no evidence to the contrary in the legislative record. "Because the Government is defending a restriction on speech as necessary to prevent an anticipated harm, it must do more than simply posit the existence of the disease sought to be cured. It must instead point to record evidence or legislative findings demonstrating the need to address a special problem." *FEC v.*

---

[1] Defendants also newly posit "a compelling interest in the accuracy of prescription drug information." Def. Mot. 9-10 (citing *Edenfield v. Fane*, 507 U.S. 761 (1993)). *Edenfield*, however, involved only pure commercial solicitation (*i.e.*, commercial speech; *see* Reply Suggestions 5, not professional opinions of the sort discussed in *NIFLA*. Ultimately, *Edenfield* did not sustain that regulation even under intermediate scrutiny as it amounted to an unsupported "prophylactic" rule. *Id.* at 770-77.

Ted Cruz for Senate, 142 S. Ct. 1638, 1653 (2022) (internal quotations omitted). "Mere conjecture" is not "adequate to carry a First Amendment burden." *Id.* (internal quotations omitted).

Second, regardless of the evidence, the rationale defies free speech principles. The First Amendment means that individuals necessarily risk encountering uncomfortable and unwelcome speech in public. "Many are those who must endure speech they do not like, but that is a necessary cost of freedom." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 575 (2011); *Wollschlaeger v. Governor*, 848 F.3d 1293, 1315-16 (11th Cir. 2017) (*en banc*) (same). That a few individuals may feel "coerced" or "harassed" can doubtfully "sustain a broad content-based rule." *Sorrell*, 564 U.S. at 575. Disinclined physicians and patients have a simple remedy: they can refuse to entertain the conversation with the pharmacist. *See id.* "[I]n public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment." *Madsen v. Women's Health Ctr.*, 512 U.S. 753, 774 (1994) (internal quotation omitted). Simply put, disputatious speech is fully protected, and preventing such speech is not a lawful compelling interest. Suggestions in support of Motion for Preliminary Injunction 10.

II. Stock appropriately brings a pre-enforcement facial challenge seeking an injunction against defendants' enforcement.

Defendants conceptualize Stock as "largely attempt[ing] to plead an as-applied challenge under § 1983." Def. Mot. 12. But the conceptualization is off base. Although Stock pleads facts to show her personal standing to bring a pre-enforcement challenge, such challenges are most often, if not always, facial, simply because, by definition, there has been no enforcement (*i.e.*, no application) of the law before the suit. *Jacoby & Meyers, LLP v. Presiding Justices of the First, Second, Third & Fourth Departments, Appellate Div. of the Supreme Court of New York*, 852 F.3d 178, 184 (2d Cir. 2017); *see also Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 392 (1988) (addressing "pre-enforcement facial challenge"); *Krantz*, 160 F.3d at 1218 (same).

"[T]he distinction between facial and as-applied challenges …. goes to the breadth of the remedy employed by the Court, not what must be pleaded in a complaint." *Citizens United v. FEC*, 558 U.S. 310, 331 (2010) (citation omitted). When the plaintiff seeks relief relating to the ordinance itself and "reaches beyond the particular circumstances of the[] plaintiff[]," the "claim is facial." *Free the Nipple - Springfield Residents Promoting Equal. v. City of Springfield*, 923 F.3d 508, 509 n.2 (8th Cir. 2019). Defendants insist both that Stock does not plead any injuries to Missouri pharmacists besides herself, and that Section 1983 does not permit Stock to vindicate others' rights. Def. Mot. 8-9, 13. They are mistaken on both scores.

First, it is a reasonable inference from the allegations of the complaint as to Stock's situation that other Missouri pharmacists will feel the same type of chilling effect under Section 338.055.7. In fact, Stock has directly pled that "Section 338.055.7 threatens Missouri pharmacists" although "pharmacists in Missouri are as entitled as every other citizen to express their viewpoints." Complaint ¶ 49. She has also pled that "[m]any pharmacists who are skeptical of ivermectin's effectiveness as a COVID-19 cure try to consult with patients about why they were prescribed ivermectin." Complaint ¶ 49. Defendants acknowledge that Section 338.055.7 "prevents" exactly that "unwanted contact." Def. Mot. 9. If the Court believes that further specific allegations about the chill to other Missouri-licensed pharmacists are necessary to state a facial claim, then Stock requests the opportunity to amend her complaint to add those averments. But Stock does not believe further express allegations are necessary.

Second, while "the usual rule is that a party may assert only a violation of its own rights … in the First Amendment context, litigants are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 392-393 (1988) (simplified).

Garrett v. Clarke, 147 F.3d 745 (8th Cir. 1998), and *Advantage Media v. City of Eden Prairie*, 456 F.3d 793 (8th Cir. 2006), (both cited by Def. Mot. 13) are not to the contrary. The *Garrett* plaintiff brought Fourth Amendment claims after an allegedly illegal search of his home: a prototypical as-applied challenge. The Eighth Circuit said the plaintiff, who was not present at the time of the search and did not assert any person harm, could not assert the emotional injury of his family members that were present. *Garrett*, 147 F.3d at 746-47. *Garrett* says nothing about a First Amendment plaintiff like Stock asserting a pre-enforcement First Amendment claim based on the chilling effect of an unconstitutional statute. Though *Advantage Media* involved a First Amendment claim, the plaintiff there challenged the constitutionality of a city sign ordinance in its entirety. The Court noted the ordinance was severable by its own terms, and that the plaintiff must therefore show its own standing to challenge each severable provision if it wished to challenge the entire ordinance. *Advantage Media*, 456 F.3d at 801. The plaintiff had only alleged harm by certain of the ordinance's provisions, so the court rightly found any Section 1983 claims brought by the plaintiff as to the other provisions would not be redressable because "damages … are available only for violation of a party's own constitutional rights." *Id.* at 801-02. Stock does not seek retrospective damages, and only challenges the provision of Section 338.055.7 that burdens her constitutional rights, so this case again has no application.

Rodgers is crystal clear: Stock appropriately seeks an injunction against enforcement of the unconstitutional portion of Section 338.055.7. See Reply Suggestions 11-12.

Similarly, defendants incorrectly try to import the "most difficult" general standard for facial challenges, under which the plaintiff "must establish that no set of circumstances exists under which the Act would be valid," to the First Amendment context. Def. Mot. 6 (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)). But *Salerno* is not a "speech case" where courts apply a "second type of challenge"—overbreadth. *United States v. Stevens*, 559 U.S. 460, 472 (2010).

Defendants appear to believe that the statute is constitutional as-applied to "FDA-approved human uses." Def. Mot. 6. Factually and legally, that belief is incorrect. Factually, it is incorrect because many applications of the rule as applied to on-label prescriptions still infringe protected speech. There are any number of circumstances in which a particular drug may not be effective for a particular patient, notwithstanding FDA approval for a given treatment. Legally, it is incorrect because when a law cannot satisfy the applicable First Amendment test, the law is facial invalid: "there is no circumstance in which th[e] particular ban … could be lawfully applied." *White Coat Waste Project v. Greater Richmond Transit Co.*, 35 F.4th 179, 204 (4th Cir. 2022). In other words, when the provision flunks the test, "it is logically unavoidable that the law lacks any legitimate sweep." *Id.* This is exactly what the Supreme Court meant when it asked rhetorically, "once we have found that a law aims at the suppression of views, why would it matter that Congress could have captured some of the same speech through a viewpoint-neutral statute?" *Iancu*, 139 S. Ct. at 2302 (simplified).

Stock both pleads and seeks the appropriate relief for the constitutional harm at issue in the case.

CONCLUSION

For these reasons, the Court should deny defendants' motion to dismiss.

Dated: August 17, 2022

/s/ Jonathan R. Whitehead
Jonathan R. Whitehead, Mo. Bar. 56848
LAW OFFICES OF JONATHAN R. WHITEHEAD LLC
229 SE Douglas, Suite 210
Lee's Summit, MO 64063
Phone: (816) 398-8305
Email: jon@whiteheadlawllc.com

Adam E. Schulman (*pro hac vice*)
HAMILTON LINCOLN LAW INSTITUTE
1629 K Street, NW Suite 300
Washington, DC 20006
Phone: (610) 457-0856
Email: adam.schulman@hlli.org

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of August, 2022, a true and correct copy of the foregoing was electronically filed with the Clerk of the Court using CM/ECF system, which will send notifications of such filing to the CM/ECF participants registered to receive service in this matter.

/s/ Jonathan R. Whitehead