

**IN THE CIRCUIT COURT OF JACKSON COUNTY,
MISSOURI, AT KANSAS CITY**

COMPREHENSIVE HEALTH OF
PLANNED PARENTHOOD GREAT
PLAINS, PLANNED PARENTHOOD
GREAT RIVERS-MISSOURI

Plaintiffs,

v.

THE STATE OF MISSOURI, et al.

Defendants,

No. _____

**SUGGESTIONS IN SUPPORT OF PLAINTIFFS’ MOTION TO CERTIFY A
DEFENDANT CLASS**

On November 5, 2024, Missourians voted to adopt the Right to Reproductive Freedom Initiative, enshrining the highest levels of protections for their reproductive rights—including the right to make and carry out decisions about abortion. Yet abortion remains nearly impossible to access in Missouri. To make the Right to Reproductive Freedom Initiative a reality, Plaintiffs are challenging the constitutionality of a host of restrictions on critical and now constitutionally protected health care (the “Challenged Restrictions”). All of the Challenged Restrictions carry criminal penalties and all empower Missouri’s county prosecuting attorneys to bring suit for injunctive relief.

Defendant Jean Peters Baker is the Jackson County Prosecuting Attorney. She is sued in her official capacity only and as a representative of a proposed Defendant Class of prosecuting attorneys who enforce Missouri’s criminal laws, including all the criminal laws

challenged in this case, and have the power to bring a cause of action for injunctive relief to enforce all of the laws challenged in this case. Pls.’ Pet. for Injunctive & Declaratory Relief ¶ 171; § 188.075.3, RSMo.

Plaintiffs are two not-for-profit organizations that provided abortion in Missouri prior to *Dobbs* and plan to provide abortion in Missouri again as soon as the laws challenged in their Motion for Preliminary Injunction or, in the Alternative, Temporary Restraining Order are enjoined. Plaintiff Comprehensive Health of Planned Parenthood Great Plains (“Comp Health”) plans to provide abortions at its health centers, including in particular its health center located in Kansas City, Jackson County.

Plaintiffs have alleged that the Challenged Restrictions violate the right to abortion under subsections 3, 4, 5, and 6 of the Right to Reproductive Freedom Initiative. The proposed Defendant Class, the named Plaintiffs, and class counsel satisfy the requirements for class certification under Rule 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). Missouri courts have held that whether a class should be certified is “based primarily upon the allegations in the petition.” *Elsa 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 evidence in the record, taken as true, satisfies 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). Because the text of Rule 52.08 is essentially the same as Federal Rule of Civil Procedure 23 (“FRCP 23”), Missouri courts have long held that federal court interpretations of FRCP 23 are relevant and may be considered in the determination of class certification questions. *See Kendrick*, 142 S.W.3d at 735 n.5; *Koehr v. Emmons*, 55 S.W.3d 859, 864 n.7 (Mo. App. E.D. 2001) (“Because Missouri Rule 52.08 and Federal Rule 23 are identical, we consider federal interpretations of Rule 23 [as interpreting] Rule 52.08.”). Under the circumstances of this case, a Defendant Class is appropriate.

To satisfy the requirements of Rule 52.08(a), Plaintiffs 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 claims or defenses of the representative parties are typical of the claims or defenses of the class [(typicality)]; and
- (4) the representative parties will fairly and adequately protect the interests of the class [(adequacy)].

Rule 52.08(a)(1)–(a)(4). Second, Petitioners must demonstrate that the proposed Defendant Class fits into at least one of the categories identified in Rule 52.08(b). As relevant here and discussed below, the proposed Defendant Class meets the requirements of Rule 52.08(b)(1)(A), (b)(2), and (b)(3).

DISCUSSION

Because joinder of all 115 prosecuting attorneys would be impracticable and inefficient, each represents common interests, and the question of law in this case is the same for the purposes of each prosecuting attorney, Plaintiffs seek the certification of a Defendant Class of all Missouri Prosecuting Attorneys. Defendant classes are not distinguished from plaintiff classes in Federal Rule of Civil Procedure 23 or Rule 52.08; therefore, Rule 52.08's requirements apply to both. In fact, like Federal Rule of Civil Procedure 23, Rule 52.08 contemplates defendant classes. *Compare* Fed. R. Civ. P. 23(a) (“members of a class may sue or be sued”) *with* Rule 52.08(a) (“[o]ne or more members of a class may sue or be sued as representative parties on behalf of all”).

Courts recognize defendant classes and both the Western District of Missouri and the Jackson County Circuit Court have certified a class of Missouri prosecutors in cases of a similar posture raising constitutional claims to state statutes. In certifying the class of prosecutors, the Western District of Missouri found “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 Fed.R.Civ.P. 23(b)(2).” *Turtle Island Foods, SPC v. Richardson*, 425 F. Supp. 3d 1131, 1138 (W.D. Mo. 2019); *see also, e.g., Akron Ctr. for Reprod. Health v. Rosen*, 110 F.R.D. 576, 580 (N.D. Ohio 1986) (granting class certification of defendant class of Ohio prosecutors in challenge to the constitutionality of abortion restriction and “recogniz[ing] the utility of these actions to enjoin governmental officials from enforcing

locally-administered state statutes which are defective”); *Strawser v. Strange*, 307 F.R.D. 604, 611 (S.D. Ala. 2015) (granting class certification of defendant class of all Alabama county probate judges and noting: “many courts [] have certified defendant classes of local or county-level officials in cases that challenge a law executed at a local level” (citations omitted)); *Hunter v. Underwood*, 471 U.S. 222, 224 (1985) (noting that district court certified a “defendant class of all members of the 67 Alabama County Boards of Registrars”); *Doe v. Miller*, 405 F.3d 700, 705–06 (8th Cir. 2005) (addressing constitutionality of state statute in case involving a “defendant class, including all of Iowa’s county attorneys”); *Kennard v. Kleindienst*, No. 2:14-CV-04017-BCW, 2015 WL 4076473, at *3 n.1 (W.D. Mo. 2015) (granting plaintiff’s motion for attorney’s fees in case involving defendant class which consisted of all Missouri Recorders of Deeds). Likewise, the Jackson County Circuit Court found that a defendant class of Missouri Prosecuting Attorneys was appropriate in a case that challenged the constitutionality of a state statute carrying criminal penalties. *See Mo. Ass’n of Sch. Librs. v. Baker*, No. 2316-CV5732 (16th Jud. Cir. Ct. June 23, 2023).

A. Rule 52.08(a)

The proposed Defendant Class satisfies Rule 52.08(a) because (1) the size of the proposed Defendant Class—115 prosecutors—renders joinder impracticable; (2) the questions raised by this suit 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 and zealously represent the class.

i. The Defendant Class is so numerous that joinder of all members would be impracticable.

This case easily satisfies the numerosity requirement under Rule 52.08(a)(1) because the class is “so numerous that joinder of all members is impracticable.” Rule 52.08(a)(1). There are 115 prosecuting attorneys in Missouri. As of the filing of this motion, none have been enjoined from enforcing the Challenged Restrictions.

To determine whether Rule 52.08’s numerosity requirement has been satisfied, courts examine the number of persons in the proposed class, the nature of the action, the size of the individual claims, and the inconvenience of trying individual claims. *M.B. by Eggemeyer v. Corsi*, 327 F.R.D. 271, 278 (W.D. Mo. 2018) (citing *Paxton v. Union Nat’l Bank*, 688 F.2d 552, 561 (8th Cir. 1982)). And, while there are “[n]o arbitrary rules regarding the necessary size of classes,” *Paxton*, 688 F.2d at 559, “a forty-member class is often regarded as sufficient to meet the numerosity requirement.” *Orr v. Shicker*, 953 F.3d 490, 498 (7th Cir. 2020) (quoting *Mulvania v. Sheriff of Rock Island Cnty.*, 850 F.3d 849, 859 (7th Cir. 2017)) (also explaining that “there is no magic number that applies to every case”); *see also 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.”); *Esler v. Northrop Corp.*, 86 F.R.D. 20, 34 (W.D. Mo. 1979) (certifying class of 186 members). In this case, the proposed Defendant Class is larger than classes that have been certified in prior cases and plainly satisfies the numerosity requirement.

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

Commonality is satisfied when “there are questions of law or fact common to the class.” Rule 52.08(a)(2). Courts have interpreted this requirement as being satisfied so long as there is at least one question of law or fact which is common to the class. *Elsea*, 463 S.W.3d at 419 (“[E]ven a single [common] question will do.”). Further, the commonality requirement “is written in the disjunctive, and hence, the common question may be one of fact *or* law and need not be one of each.” *Elsea*, 463 S.W.3d at 418 (emphasis in original). As a result of the low commonality standard, the 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 also 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.”). The determination of whether a question is “common” or, in the alternative, “individual” is based on the nature of the evidence that will suffice to resolve the question. *Dale v. DaimlerChrysler Corp.*, 204 S.W.3d 151, 175 (Mo. App. W.D. 2006).

The commonality requirement is easily satisfied here because the primary legal questions in this case are common to the entire proposed Defendant Class: whether the Challenged Restrictions are constitutional. Moreover, each prosecuting attorney enforces each of the Challenged Restrictions under the same statutory procedures as the other prosecuting attorneys. Thus, determinations regarding constitutionality of the Challenged Restrictions will apply identically to the entire Defendant Class, affecting their authority

to enforce the statutes. *E.g.*, *Turtle Island Foods*, 425 F. Supp. 3d at 1137; *see also* § 56.060, RSMo (“Each prosecuting attorney shall commence and prosecute all civil and criminal actions in the prosecuting attorney’s county . . .”).¹ As in *Turtle Island Foods*, “the commonality requirement is met, because all of the prosecuting attorneys share the common defense that the statute[s are] constitutional and a determination regarding the constitutionality of [the Challenged Restrictions] would apply to all the prosecuting attorneys and affect whether they could prosecute actions under that statute or not.” 425 F. Supp. 3d at 1137.

iii. Defendant Baker’s available defenses are typical of the defenses of the proposed Defendant Class.

The typicality requirement is met where “the claims or defenses of the representative parties are typical of the claims or defenses of the class.” Rule 52.08(a)(3).

In *Wal-Mart Stores, Inc. v. Dukes*, the Court noted:

We have previously stated in this context that “[t]he commonality and typicality requirements of [class certification] tend to merge. Both serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff’s claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence. Those requirements therefore also tend to merge with the adequacy-of representation requirement, although the latter requirement also raises concerns about the competency of class counsel and conflicts of interest.”

¹ Indeed, prosecutors who willfully or fraudulently violate or neglect their official duties, including willfully failing to prosecute specific laws, may be ousted from office. *State ex rel. Reed v. Reardon*, 41 S.W.3d 470, 474 (Mo. banc 2001) (stating that § 106.220, RSMo applies to prosecuting attorneys); *see State on Inf. of McKittrick v. Graves*, 144 S.W.2d 91, 94 (Mo. banc 1940) (ousting county prosecutor); *State, on Inf. McKittrick v. Wymore*, 132 S.W.2d 979, 986–87 (Mo. banc 1939) (same).

564 U.S. 338, 349 n.5 (2011) (quoting *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 157–158, n.13, (1982) (alteration in original)).

The central legal issue in this case is the constitutionality of the Challenged Restrictions. In her role as the Jackson County Prosecuting Attorney, the representative party, Defendant Baker, is charged with enforcing these restrictions, as are all members of the proposed Defendant Class. The defenses available to Defendant Baker, including the Challenged Restrictions’ constitutionality, 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. Moreover, the interest of the named class representative aligns with the interests of the proposed Defendant Class. *See Turtle Island Foods*, 425 F. Supp. 3d at 1137 (“In this case, because all of the prosecuting attorneys are charged with enforcing Mo.Rev.Stat. § 265.494(7), 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.”). The defenses of the representative party are therefore typical of the class.

iv. Defendant Baker will fairly and adequately protect the interests of the class.

Adequacy is satisfied when “the representative parties will fairly and adequately protect the interests of the class.” Rule 52.08(a)(4). To demonstrate adequacy, Plaintiffs must show that: (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.” *Lucas Subway MidMo, Inc. v. Mandatory Poster Agency, Inc.*, 524 S.W.3d 116, 130 (Mo. App. W.D. 2017).

Counsel for Defendant Baker—attorneys employed by the Baker County Counselor’s Office—are qualified and competent. Additionally, Defendant Baker will fairly and adequately protect the interests of the whole class because 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 Restrictions. *Turtle Island Foods*, 425 F. Supp. 3d at 1138.

The Prosecuting Attorney for Jackson County is an appropriate class representative. Defendant Baker and all prosecuting attorneys throughout the state have the authority and duty to enforce Challenged Restrictions and prosecute any alleged offenders. Because this particular prosecuting attorney’s interests in the constitutionality of the Challenged Restrictions are no different than that of unnamed prosecuting attorneys, the named defendant representative is adequate for purposes of class certification.

B. Rule 52.08(b)

A class must satisfy at least one of the requirements laid out in Rule 52.08(b). The proposed Defendant Class here satisfies all three options. First, because Plaintiffs seek only injunctive and declaratory relief, the proposed Defendant Class satisfies the requirement of Rule 52.08(b)(2).

Under Rule 52.08(b)(2), a class may be certified if:

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[.]

This provision can apply where, as here, a single injunction or declaratory judgment would provide relief against each member of the class. *See Ebert v. Gen. Mills, Inc.*, 823 F.3d 472, 480 (8th Cir. 2016). Here, the Challenged Restrictions deny, interfere with, delay, and restrict access to abortion and Plaintiffs—the party proposing the Defendant Class—and their providers and patients will be constitutionally harmed under the Right to Reproductive Freedom Initiative as a result. Mo. Const. art. I, § 36. The Challenged Restrictions are “generally applicable to the class” as all prosecutors must enforce the laws of the state. Thus, a single injunction or corresponding declaratory relief relating to the constitutionality or application of the Challenged Restrictions against the class as a whole would be appropriate. *See Turtle Island Foods*, 425 F. Supp. 3d at 1138 (finding that the same elements of Federal Rule of Civil Procedure 23(b)(2) were met “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”).² In the alternative, the Defendant Class should be certified under Rule 52.08(b)(1)(A) or (b)(3).

Certification is also appropriate under Rule 52.08(b)(1)(A) because failure to certify the proposed Defendant Class would create a risk of establishing incompatible standards of conduct through inconsistent or varying adjudications. Rule 52.08(b)(1)(A). If the

² Federal Rule of Civil Procedure 23(b)(2) states that a class action may be maintained if “the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief on correspondingly declaratory relief is appropriate respecting the class as a whole.”

constitutionality of the Challenged Restrictions is raised in numerous separate lawsuits against various prosecuting attorneys in their 115 respective jurisdictions, there could be inconsistent adjudications, resulting in different findings and varying interpretations of the laws' applications. As a result, Plaintiffs and their physicians, employees, and patients, who reside and work throughout the state—and are suing, in part, to provide or receive telemedicine abortions throughout the state—could be subjected to conflicting rules and standards for providing abortions, creating significant administrative hurdles and the further risk of arbitrary and inconsistent enforcement of the law, and substantially burdening their ability to engage in these activities. Moreover, inconsistent interpretations of the Challenged Restrictions in various jurisdictions throughout the state would hinder and complicate the work of all prosecutors.

The Defendant Class also satisfies Rule 52.08(b)(3) because questions of law and fact common to the proposed Defendant Class predominate over issues affecting individual members, and a class action is the fairest and most efficient way to adjudicate the matter. Rule 52.08(b)(3). If a Defendant Class is not certified, courts in each of Missouri's 115 prosecutorial jurisdictions considering individual cases raising claims about the constitutionality of the Challenged Restrictions would be required to address questions of law common to the members of the proposed Defendant Class that predominate over any individual questions, making a class action superior to other methods for fairly and efficiently adjudicating the constitutionality of the Challenged Restrictions.

Permitting this lawsuit to proceed in a single adjudication against the proposed Defendant Class is the most efficient use of state court resources and will be the fairest

method of ensuring that parties are not subjected to inconsistent and conflicting rules in different jurisdictions throughout the state.

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, Jean Peters Baker, in her official capacity, as representative of the Defendant Class.

Respectfully submitted,

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