UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

DAKOTA RURAL ACTION, DALLAS GOLDTOOTH, INDIGENOUS ENVIRONMENTAL NETWORK, NDN COLLECTIVE, SIERRA CLUB, and NICHOLAS TILSEN, Plaintiffs, v. KRISTI NOEM, in her official capacity as Governor of the State of South Dakota, JASON RAVNSBORG, in his official capacity as Attorney General, and KEVIN THOM, in his official capacity as Sheriff of Pennington County, Defendants.	)	Case No. 19-5026 **MEMORANDUM IN SUPPORT OF SHERIFF THOM'S MOTION TO DISMISS**

COMES NOW Defendant Kevin Thom, in his official capacity as Sheriff of Pennington County, by and through J. Crisman Palmer and Rebecca L. Mann or Gunderson, Palmer, Nelson & Ashmore, LLP, his attorneys, and respectfully submits this Memorandum in Support of his Motion to Dismiss the Complaint pursuant to Fed. R. Civ. P. 12(b)(1) and 12(h)(3) for lack of subject matter jurisdiction and Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted. The Plaintiffs lack standing against Sheriff Thom and the challenged statutes are not municipal policy.

BACKGROUND

Plaintiffs bring an as-applied and facial challenge to South Dakota Senate Bill 189, 2019 Legislative Session, to be codified in South Dakota Codified Laws Chapter 20-9-1 et. seq. ("Act") and South Dakota Codified Law sections 22-10-6 and 22-10-6.1 ("Criminal Statutes"). (Doc 1 at ¶ 1.) Plaintiffs sued Kristi Noem, in her official capacity as Governor of the State of South Dakota, Jason Ravsbnorg, in his official capacity as Attorney General for the State of

South Dakota, and Kevin Thom, in his official capacity as the Sheriff of Pennington County. *Id.* at ¶¶ 14-16. Plaintiffs allege they plan to protest the Keystone XL Pipeline and to advise and encourage others to do the same. *Id.* at ¶ 3. They also allege they "are not inciting any individuals to commit imminent violent or forceful actions", and that they "advocate against the use of violence." *Id.* at ¶ 52. Plaintiffs allege they "plan to advise and encourage others to try and stop the pipeline through peaceful methods." *Id.* Plaintiffs seek declaratory and injunctive relief requesting a declaration that the challenged statutes are unconstitutional and enjoining Defendants from enforcement. *Id.* at ¶ 93.

The challenged Act provides in relevant part:

> In addition to any other liability or criminal penalty under law, a person is liable for riot boosting, jointly and severally with any other person, to the state or a political subdivision in an action for damages if the person:
> (1) Participates in any riot and directs, advises, encourages, or solicits any other person participating in the riot to acts of force or violence;
> (2) Does not personally participate in any riot but directs, advises, encourages, or solicits other persons participating in the riot to acts of force or violence; or
> (3) Upon the direction, advice, encouragement, or solicitation of any other person, uses force or violence, or makes any threat to use force or violence, if accompanied by immediate power of execution, by three or more persons, acting together and without authority of law.

2019 Senate Bill 189, § 2. The Act will be a new section to chapter 20-9, "Liability For Torts." *Id.* No criminal liability is imposed by the Act.

The challenged Criminal Statutes provide:

> Encouraging or soliciting violence in riot--Felony. Any person who participates in any riot and who directs, advises, encourages, or solicits other persons participating in the riot to acts of force or violence is guilty of a Class 2 felony.

SDCL § 22-10-6.

> Encouraging or soliciting violence in riot without participating--Felony. Any person who does not personally participate in any riot but who directs, advises, encourages, or solicits other persons participating in the riot to acts of force or violence is guilty of a Class 5 felony.

SDCL § 22-10-6.1.

STANDARD

1. Fed. R. Civ. P. 12(b)(1) Standard

> The legal standard this Court shall use to evaluate a motion to dismiss pursuant to Rule 12(b)(1) depends on whether the Court must resolve a facial or a factual attack on subject matter jurisdiction. *Osborn v. United States*, 918 F.2d 724, 729 n. 6 (8th Cir. 1990). A facial attack requires a court to determine if a plaintiff has sufficiently alleged a basis for subject matter jurisdiction. *Id.* As with a Rule 12(b)(6) motion to dismiss for failure to state a claim, a court evaluating a facial challenge under Rule 12(b)(1) must accept all facts in the complaint as true and view the complaint in the light most favorable to the non-moving party. *Id.* In a factual attack, however, a court does not presume the allegations to be true because the jurisdictional facts themselves are challenged. *Faibisch v. University of Minnesota*, 304 F.3d 797, 801 (8th Cir. 2002); 2 James Wm. Moore et al., *Moore's Federal Practice* ¶ 12.30[4], at 12-39 (3d ed. 2007). The court thus has wide discretion in such a case, to look beyond the complaint and the pleadings to evidence that calls the court's jurisdiction into doubt. *Osborn*, 918 F.2d at 730.

Riveretz's Auto Care v. Citi Cards, 2009 U.S. Dist. LEXIS 77245, at *4 (D.S.D. Aug. 27, 2009). Although Sheriff Thom is not presenting matters outside the pleadings, "the trial court is free to . . . satisfy itself as to the existence of its power to hear the case." *Osborn*, 918 F.2d at 730.

2. Fed. R. Civ. P. 12(b)(6) Standard

To survive a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), "'a complaint . . . must contain either direct or inferential allegations respecting all the material elements necessary to sustain recovery under some viable legal theory.'" *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1969, 167 L. Ed. 2d 929 (2007) (quoting *Ascon Props., Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1155 (9th Cir. 1989)) (omission in original). All factual allegations in the complaint must be accepted as true and all reasonable inferences are granted in the plaintiff's favor. *Creason v. City of Washington*, 435 F.3d 820, 823 (8th Cir. 2006). "A complaint must allege facts sufficient

to state a claim as a matter of law." *Stringer v. St. James R-1 Sch. Dist.*, 446 F.3d 799, 802 (8th Cir. 2006). "However, the complaint must contain sufficient facts, as opposed to mere conclusions, to satisfy the legal requirements of the claim to avoid dismissal." *Quinn v. Ocwen Fed. Bank FSB,* 470 F.3d 1240, 1244 (8th Cir. 2006) (quoting *DuBois v. Ford Motor Credit Co.*, 276 F.3d 1019, 1022 (8th Cir. 2002)).

ARGUMENTS AND AUTHORITIES

Federal courts are courts of limited jurisdiction and can only hear cases that are "'authorized by Article III of the Constitution and the statutes enacted by Congress pursuant thereto.'" *Gray v. City of Valley Park, Mo.*, 567 F.3d 976, 982-83 (8th Cir. 2009) (quoting *Bender v. Williamsport Area School District*, 475 U.S. 534, 541 (1986)). "The limitations imposed by Article III are usually referred to as the 'case or controversy' requirement." *Schanou v. Lancaster County School District No. 160*, 62 F.3d 1040, 1042 (8th Cir. 1995) (quoting *Arkansas AFL-CIO v. FCC*, 11 F.3d 1430, 1435 (8th Cir. 1993) (en banc)). This requirement, also known justiciability, is typically tested by three doctrines: ripeness, mootness, and standing. *Id.* "Article III standing represents 'perhaps the most important' of all jurisdictional requirements." *Gray v. City of Valley Park*, 567 F.3d 976, 983 (8th Cir. 2009) (quoting *FW/PBS, Inc., v. City of Dallas*, 493 U.S. 312, 231 (1990)).

Standing is always a "threshold question" in determining whether a federal court may hear a case. *Eckles v. City of Corydon*, 341 F.3d 762, 767 (8th Cir. 2003). A party invoking federal jurisdiction has the burden of establishing that he has the right to assert his claim in federal court. *Schanou*, 62 F.3d at 1045. "To satisfy Article III's standing requirement, (1) there must be "injury in fact" or the threat of "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury must be fairly traceable to defendant's challenged action; and (3) it must be likely (as opposed to merely speculative) that a

favorable judicial decision will prevent or redress the injury." *Gray*, 567 F.3d at 984 (citing *Summers v. Earth Island Institute*, 129 S. Ct. 1142, 1149 (2009); *Friends of the Earth, Inc. v. Laidlaw Environmental. Services (TOC), Inc.*, 528 U.S. 167, 180-81 (2000)). Plaintiffs must demonstrate standing as to each defendant. *Calzone v. Hawley*, 866 F.3d 866, 869 (8th Cir. 2017).

1. There is No Injury in Fact

An alleged "future injury may suffice if the threatened injury is 'certainly impending,' or there is a 'substantial risk that the harm will occur.'" *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014) (quoting *Clapper v. Amnesty International USA*, 568 U.S. 398, 133 S. Ct. 1138, 1147, 1150 n.5 (2013)). The injury in fact requirement is satisfied if a plaintiff alleges "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder." *Susan B. Anthony List*, 134 S. Ct. at 2342 (quoting *Babbitt v. United Farm Workers National*, 442 U.S. 289, 298 (1979)). A plaintiff need not "first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights." *Steffel v. Thompson*, 415 U.S. 452, 459 (1974). However, a plaintiff does not establish standing if he fails to allege that he has been threatened with prosecution, that a prosecution is likely, or that a prosecution is remotely possible. *Babbitt*, 442 U.S. at 298-99.

Plaintiffs have pleaded an intention to protest the Keystone XL Pipeline by exercising their First Amendment rights of free speech and an intention to advise and encourage others to do the same. They have provided and plan to provide funding, training and other advice and encouragement to others who plan to protest the pipeline. However, Plaintiffs allege they are not inciting anyone to commit imminent violent or forceful actions, that they advocate against the use of violence, and that they plan to advise and encourage others through peaceful methods.

Pursuant to the challenged Criminal Statutes, a person is guilty of a felony who "directs, advises, encourages, or solicits other persons participating in the riot to acts of force or violence". SDCL §§ 22-10-6 and -6.1 (emphasis added).[1] Plaintiffs' allege their planned conduct specifically *does not* include encouraging persons to acts of force or violence. There is no "realistic fear of prosecution" because the planned conduct does not fall within the scope of the Criminal Statutes or the Act. "As a general rule, a federal court should refrain from entertaining a pre-enforcement constitutional challenge to a state criminal statute in the absence of 'a realistic fear of prosecution.'" *SOB, Inc. v. County of Benton*, 317 F.3d 856, 865 (8th Cir. 2003) (quoting *Poe v. Ullman*, 367 U.S. 497, 508 (1961)). When a plaintiff's desired conduct falls outside the scope of the challenged statute, he lacks standing to pursue the claim. *Id.*

2. The Injury is not Fairly Traceable to Sheriff Thom

"The conflict between state officials empowered to enforce a law and private parties subject to prosecution under that law is a classic 'case' or 'controversy' within the meaning of Art. III." *Diamond v. Charles*, 476 U.S. 54, 64 (1986) (emphasis added). "Thus, a controversy exists not because the state official is himself a source of injury, but because the official represents the state whose statute is being challenged as the source of the injury." *Wilson v. Stocker*, 819 F.2d 943, 947 (10th Cir. 1987) (citing *Kentucky v. Graham*, 473 U.S. 159 (1985)) (emphasis added). Suits against governmental actors in their official capacity are treated as a suit against the governmental entity itself. *Hafer v. Melo*, 502 U.S. 21, 25 (1991) (citing *Graham*, 473 U.S. at 166). Thus, the suit is against Pennington County. Although Sheriff Thom is required to "execute and enforce all the laws of this state" SDCL § 7-12-4, the challenged laws are not Pennington County's. There is no jurisdictional basis for suing Sheriff Thom to

[1] The Act contains similar language creating liability if a person "directs, advises, encourages, or solicits any other person participating in the riot to acts of force or violence". 2019 S.B. 189, § 2. The Act creates tort liability and is not a criminal statute that Sheriff Thom could enforce.

challenge the constitutionality of state statutes. *See e.g. Odonnell v. Harris County*, 882 F.3d 528, 538 (5th Cir. 2018) (holding Sheriff not a proper defendant to in a suit challenging the constitutionality of state bail statutes because "the Sheriff is legally obligated to execute all lawful process and cannot release prisoners committed to jail by a magistrate's warrant-even if prisoners are committed "for want of bail." . . . State statutes, in other words, do not authorize the County Sheriff to avoid executing judicial orders imposing secured bail by unilaterally declaring them unconstitutional.") Pennington County is not a proper party to defend the constitutionality of state statutes nor should it be burdened with the expense of defending statutes it has no power to change.

3. There is No Municipal Liability

The "policy or custom" requirement set forth in *Monell v. Department of Social Services of City of New York*, 436 U.S. 658 (1978) "applies in § 1983 cases irrespective of whether the relief sought is monetary or prospective." *L.A. County v. Humphries*, 562 U.S. 29, 33 (2010). Accordingly, a claim against Pennington County requires a Pennington County "policy or custom" and enforcing a state law does not constitute municipal policy. "It is difficult to imagine a municipal policy more innocuous and constitutionally permissible, and whose causal connection to the alleged violation is more attenuated, then the 'policy' of enforcing state law." *Surplus Store & Exchange, Inc. v. City of Delphi*, 928 F.2d 788, 791-92 (7th Cir. 1991).

When a municipality is acting under compulsion of state law, "it is the policy contained in that state or federal law, rather than anything devised or adopted by the municipality, that is responsible for the injury." *Bethesda Lutheran Homes & Services, Inc. v. Leean*, 154 F.3d 716, 718 (7th Cir. 1998). "Although the Eighth Circuit has not decided whether to adopt this common-sense limitation on municipal liability under § 1983, *see Slaven v. Engstrom*, 710 F.3d 772, 781 n.4 (8th Cir. 2013), every circuit to have ruled on this issue has done so. *See Vives v.*

City of New York, 524 F.3d 346, 353 (2d Cir. 2008) (collecting and analyzing cases)." *Calgaro v. St. Louis County*, No. 16-cv-3919 (PAM/LIB), 2017 U.S. Dist. LEXIS 79551, at *11-12 (D. Minn. May 23, 2017). *See also Maynard v. Greater Hoyt Sch. Dist. No. 61-4*, 876 F. Supp. 1104, 1108 (D.S.D. 1995) ("The mere fact that local government officials acted pursuant to state law does not give rise to municipal liability.) (citing *Pusey v. City of Youngstown*, 11 F.3d 652, 657 (6th Cir. 1993); *Surplus Store & Exchange, Inc.*, 928 F.2d at 791-92)).

In *Martin v. Evans*, 241 F.Supp. 3d 276 (D. Mass 2017), two civil rights activists brought a pre-enforcement challenge to the Massachusetts Wiretap Statute naming as defendants the Boston Police Department Commissioner and the Suffolk County District Attorney. The plaintiffs sought only declaratory and injunctive relief and the court analyzed the claim pursuant to *Monell*. *Id.* at 15. The court recognized that a municipality can not be liable under *Monell* for enforcing state law if the state law mandates enforcement. *Id.* at 16 (citing *Surplus Store & Exchange*, 928 F.2d at 791; *Bethesda Lutheran Homes & Services, Inc.*, 154 F.3d at 718). However, when a municipality decides to enforce a state statute that it is authorized, but not required, to enforce, it could be creating municipal policy. *Martin*, 241 F.Supp.3d at 284-85 (citing *Vives*, 524 F.3d at 353).

In *Martin*, plaintiffs alleged a conscious decision by the police department to enforce the Wiretap statute because the police department had training materials that instructed officers they may arrest individuals who secretly record police officers performing their duties in public. *Id.* at 285. Accordingly, the complaint was not dismissed for failure to state claim pursuant to *Monell*. *See also Puente Arizona v. Arpaio*, 76 F.Supp.3d 833 (D. Ariz. 2015) (*Monell* analysis applied to county defendant in challenge to identify theft law). In the case *sub judice*, there are no allegations of any Pennington County policy or custom. The only alleged source of injury are state statutes. State law requires sheriffs to enforce "all the laws of this state". SDCL § 7-12-4.

The statutory mandate to enforce all laws is not a Pennington County policy or custom and the Complaint fails to state a claim against Sheriff Thom in his official capacity.

CONCLUSION

Plaintiffs lack standing against Sheriff Thom because there is no injury in fact as Plaintiffs' planned conduct falls outside the scope of the challenge statutes. The injury is not fairly traceable to Sheriff Thom because the challenged statutes are state statutes, not Pennington County's. Finally, there is no policy or custom which is required even for prospective relief only claims. Sheriff Thom respectfully requests dismissal from the Complaint.

Dated: April 23, 2019.

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