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and STATE OF HAWAII

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

EMMANUEL TEMPLE, THE HOUSE OF PRAISE; CARL E. HARRIS; LIGHTHOUSE OUTREACH CENTER ASSEMBLY OF GOD; JOE HUNKI, JR.

Plaintiffs,

vs.

NEIL ABERCROMBIE, in his official capacity as Governor of the State of Hawaii; LORETTA J. FUDDY, in her official capacity as Director of Health of the State of Hawaii; STATE OF HAWAII,

Defendants.

CIVIL NO. 11-00790 JMS-KSC

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

(FRCivP, Rules 12(b)(1)(6))

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MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

1. Question Presented

The question presented in Defendants' Motion is: Should this Court dismiss this action? This Court should answer that question in the affirmative because:

- Plaintiffs lack standing; and
- This case is not ripe for adjudication.

2. Review of Plaintiffs' Complaint

The Complaint, filed on December 28, 2011 sets forth that the Plaintiffs are Carl E. Harris who is the Bishop and Pastor of Plaintiff Emmanuel Temple, a corporation. The other Plaintiffs are Joe Hunkin, Jr., the Pastor of Plaintiff Lighthouse Outreach Center Assembly of God, a corporation. The action is not pled as a class action.

The Defendants are Neil Abercrombie, the Governor of the State of Hawaii, Loretta J. Fuddy, Director of the State of Hawaii Department of Health, and the State of Hawaii itself.

The action is being brought pursuant to 42 U.S.C. § 1983 based on Plaintiffs' belief that the provisions of Chapter 572B, Hawaii Revised Statutes violates Plaintiffs' federal civil rights pursuant to the First, Fifth and Fourteenth Amendments.

According to the Complaint, the provisions of Chapter 352 went into effect on February 24, 2011.[1] Chapter 352B does not contain any provisions which exempt religious institutions from the provisions of Chapter 489, Hawaii Revised Statutes[2]. Within the last 12 months private individuals have lodged complaints with the Hawaii Civil Rights Commission against religious institutions for refusing to rent their facilities for same sex unions.[3]

The Complaint does not state that any persons that are considering entering into same-sex civil unions have sought to rent Plaintiffs' facilities or that any investigation of the Hawaii Civil Rights Commission has been directed toward them.

Plaintiffs also had filed a Motion for a Temporary Restraining Order and Preliminary Injunction contemporaneously with their Complaint, which this Court denied on December 30, 2011. Their Motion requested this Court issue a Temporary Restraining Order requiring that Defendants cannot implement the provisions of Chapter 572B, Hawaii Revised Statutes until a trial on the merits of Plaintiffs' claim that the provisions of Chapter 352B violate their federal civil

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[1] Defendants note that the allegations in the Complaint have been superceded by events that have occurred since its filing. Those events are discussed below.

[2] This Chapter generally prohibits discrimination in public accommodation, based on, *inter alia*, sexual orientation.

[3] Defendants are not repeating Plaintiffs' legal conclusions, only the facts pled in the Complaint.

rights . In support of that Motion, Plaintiffs offered the following evidence by way of declaration of Carl E. Harris:

He is the Bishop and Pastor of Emmanuel Temple, a domestic nonprofit corporation and a religious institution. He does not believe that same Chapter 352B, same-sex marriages and civil unions conform with the teachings of Jesus Christ. In Hawaii, and other states, same sex couples have attempted to rent the premises of religious institutions for the purpose of conducting civil unions and receptions. He is aware that the Hawaii Civil Rights Commission accepted a complaint from a same sex couple who attempted to rent the premises of a religious institution for the purpose of performing a same sex marriage.[4] This complaint is still pending.

This Declaration does not state the following:

- **That any person has sought to rent any of Plaintiffs' premises for the purpose of conducting ceremonies to solemnize a civil union (HRS 357B-4(a)) or for a reception to commemorate the solemnization of a civil union;**
- **That any person has been refused the right to rent any of Plaintiffs' premises for purposes Plaintiffs find objectionable;**

[4] Defendants note that same sex marriages are still illegal in Hawaii, and remain so even after implementation of civil unions.

- **That any person has filed a complaint with the Hawaii Civil Rights Commission against any Plaintiff relating to Plaintiffs' refusal to comply with rent any premises to persons for purposes Plaintiffs find objectionable;**
- **That the Hawaii Civil Rights Commission has opened up an investigation involving any Plaintiff for refusing to rent their premises to person wishing to solemnize civil unions or for a reception; or**
- **That any Plaintiff is required to pay any monetary damages or attorneys' fees for refusing to rent their premises to person wishing to solemnize civil unions or for a reception.**

The lack of any of these facts supports Defendants' Motion to Dismiss.[5]

Since the Complaint was filed, the 2012 legislative session was held. The legislature passed H.B. No. 2569, H.D. 2, S.D. 1, C.D. 1, which was signed into law by the Governor on July 6, 2012, as noted by this Court at the status conference held on July 19, 2012. A copy of that bill is attached as Exhibit A. The Court is requested to take judicial notice of the contents of the bill. This Court had stayed this action for the purpose of providing the legislature the opportunity to create an exemption to our civil rights statutes that would be satisfactory to

[5] At the July 19, 2012 status conference Plaintiffs' counsel advised the Court that his clients' status had not changed since the filing of the Complaint. Defendants ask this Court to consider that to be a judicial admission, and that the statements contained in the Declaration of Carl E. Harris are still valid.

Plaintiffs. Although there was an exemption created by the legislature (Ex. A at 3-4), Plaintiffs' counsel advised this Court that his clients did not consider the exemption to be sufficient, and they wished to proceed with the action. This Motion to Dismiss followed.

3. Standard for Determining a Motion to Dismiss for Lack of Subject Matter Jurisdiction

Issues of standing are analyzed under Rule 12(b) (1) of the Federal Rules of Civil Procedure, as they go to the court's subject matter jurisdiction. *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000) (stating that standing pertains to a federal court's subject matter jurisdiction). Rule 12(b) (1) of the Federal Rules of Civil Procedure provides: "Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion: (1) lack of subject-matter jurisdiction."

A motion to dismiss for lack of subject matter jurisdiction under Rule 12(b) (1) may either attack the allegations of the complaint as insufficient to confer upon the court subject matter jurisdiction, or attack the existence of subject matter jurisdiction in fact. *Thornhill Publishing Co. v. General Telephone & Electronics. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979).

When the motion to dismiss attacks the allegations of the complaint as insufficient to confer subject matter jurisdiction, it is a facial challenge requiring all allegations of material fact to be taken as true and construed in the light most

favorable to the nonmoving party. *Federation of African American Contractors v. City of Oakland*, 96 F.3d 1204, 1207 (9th Cir. 1996). However, when the motion to dismiss is a factual attack on subject matter jurisdiction, no presumptive truthfulness attaches to the plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the existence of subject matter jurisdiction in fact. *Thornhill*, 594 F.2d at 733. Unlike a Rule 12(b)(6) motion, the court need not confine its evaluation to the face of the pleadings, but may review and accept any evidence, such as affidavits, or it may hold an evidentiary hearing. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035 (9th Cir. 2004). Defendants are making a factual attack on subject matter jurisdiction and hereby refer to evidence outside of the Complaint to support their assertion that these Plaintiffs should not be allowed to proceed with this action.

4. This Court Lacks Subject Matter Jurisdiction

The judicial power of the United States extends to specified cases and controversies. U.S. Const., art III. § 2. Because Article III is a limit on judicial power, a federal court will not have subject matter jurisdiction over an action absent the requisite case or controversy. *S. Jackson & Son, Inc., v. Coffee, Sugar & Cocoa Exch. Inc.,* 24 F.3d 427, 431 (2nd Cir. 1994). Standing addresses who may bring suit. *Florida Audubon Society v. Bentsen*, 94 F.3d 658, 663 (D.C. Cir 1996) (plaintiff must show it is "proper" party). Standing is determined at the time

of filing suit. *Utah Ass'n of Counties v. Bush*, 455 F.3d 1094, 1099-1101 (10th Cir. 2006) (injury must exist at time complaint is filed).

To have standing, a plaintiff must show he suffered an injury-in-fact and the injury must have affected him in a personal and individual way. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 n.1 (1992) At an "irreducible minimum," the party who invokes the court's authority must show he or she has personally suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant. *See City of Kansas City, Mo. V. Yarco Co., Inc.*, 625 F.3d 1038, 1040 (8th Cir. 2010) (city did not have standing to sue allegedly discriminating landlord under Fair Housing Act because city did not allege any injury to itself).

An injury that is merely conjectural, speculative or hypothetical will not satisfy the injury-in-fact component of standing. *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990). *See San Diego County Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1126 (9th Cir. 1996) (mere possibility of criminal sanctions does not satisfy injury-in-fact requirement); *Gospel Missions of Am. v. City of Los Angeles*, 328 F.3d 548, 555 (9th Cir. 2003) (religious nonprofit corporation lacked standing to challenge professional fundraising provisions of local ordinance as violating First Amendment right to hear speech or be solicited because allegations raised only mere possibility of future injury).

The intensity of the litigant's interest or motivation or the fervor of his or her advocacy is not a substitute for a showing of injury. See *Lee v. Oregon*, 107 F.3d 1382 (9th Cir. 1997) (nursing home owners and administrators did not have standing to challenge physician-assisted suicide law on ground they might be forced to participate in suicide in violation of their religious beliefs; plaintiffs' injuries were not concrete and particularized because law did not impose penalties on those that refused to implement it).

Mr. Harris asserts that he, and presumably the other Plaintiffs, are at "risk" should they decide to violate the law because they believe that civil unions run counter to the teachings of Jesus Christ. He is asking this Court to declare that the newly-amended civil unions bill is unconstitutional because the exemption that was written into the law was not broad enough to protect the Plaintiffs' First Amendment rights.

It is unclear what standards they believe the Court should use in deciding this hypothetical question. The law, as it currently exists, does create an exemption for churches to refuse to conduct civil unions so long as the church property is not operated as a for profit business and is not determined to be a place of public accommodation, as defined in HRS § 489-2. This Court is being asked to make this determination without any facts to work with. **There are numerous circumstances under which the Plaintiffs could refuse to conduct civil unions**

and not be held liable for a civil rights violation, based on the exemption now in existence. Therefore, the existence of this exemption does not, it itself, violate Plaintiffs' civil rights, simply because it is not as broad as they would like it to be. What Plaintiffs are attempting to do is use this lawsuit as a vehicle to overturn the lawful acts of the legislative and executive branches of the government of the State of Hawaii, because they have moral objections to civil unions. The lack of facts for this Court to work with illustrates the reason the case or controversy requirement exists.

Presumably, Plaintiffs will cite to *Awad v. Zirax*, 670 F.3d 1111 (10th Cir. 2012) for the proposition that their clients have standing (and this action is ripe). There, a Muslim Oklahoma resident brought an action against state election officials, alleging that a resolution proposing an amendment to the Oklahoma Constitution to forbid courts from considering or using international law or Sharia law violated the Establishment Clause and the Free Exercise Clause of First Amendment. The District Court granted the resident's motion for a temporary restraining order and a preliminary injunction prohibiting the election officials from certifying the election results until the court ruled on merits of his claims. The election officials appealed. The Tenth Circuit held that the resident had standing to bring Establishment Clause claim and the Establishment Clause claim was ripe for judicial review. Defendants believe that case is distinguishable from the present

action.

As noted by the *Awad* Court, the amendment targeted the plaintiff's religion for disfavored treatment because it is "a constitutional directive of exclusion and disfavored treatment of a particular religious legal tradition…[and the plaintiff] is facing the consequences of a statewide election approving a constitutional measure that would disfavor his religion relative to others." *Id*. at 1123. No such situation is involved in the instant case. The statutes which Plaintiffs are complaining about are statutes of general applicability, and do not favor or disfavor any particular religion. The current Plaintiffs are not the target of the civil unions bill, or our civil rights statutes. Their religion is not targeted for disfavored treatment. Notably, many Christians have embraced civil unions. These particular Christians have not.

Defendants assert that because there is no case-or-controversy, this Court lacks subject matter jurisdiction.

5. This Case is Not Ripe for Adjudication

Even if the Court determines that Plaintiffs have standing, the case is not ripe for adjudication. Ripeness is an independent requirement for judicial review. *New Mexicans for Bill Richardson v. Gonzales*, 64 F.3d 1495 (10th Cir. 1995). It asks whether the case has been brought at a point so early that it is not year clear whether a real dispute to be resolved exists between the parties. *Restigouche, Inc.*

v. City of Jupiter, 59 F.3d 1208, 1212 (11th Cir. 1995). It is the burden of the plaintiff to allege facts demonstrating the appropriateness of invoking judicial resolution of the dispute. *Renne v. Geary*, 501 U.S. 312 (1991). The ripeness doctrine dictates that courts will not decide abstract issues or hypothetical facts. *See Armstrong World Indus., Inc. v. Adams*, 961 F.2d 405, 410 (3rd Cir. 1992) (ruling on federal constitutional matters in advance of necessity of deciding them is to be avoided).

This court's "role is neither to issue advisory opinions nor to declare rights in hypothetical cases, but to adjudicate live cases or controversies consistent with the powers granted the judiciary in Article III of the Constitution." *Thomas v. Anchorage Equal Rights Commission*, 220 F.3d 1134, 1138 (9th Cir. 2000).

Although standing is usually relaxed in First Amendment cases, "when plaintiffs seek to establish standing to challenge a law or regulation that is not presently being enforced against them, they must demonstrate 'a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement." *LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1154 (9th Cir. 2000).

In evaluating the genuineness of a claimed threat of prosecution, trial courts have been instructed to look to "whether the plaintiffs have articulated a 'concrete plan' to violate the law in question, whether the prosecuting authorities have communicated a specific warning or threat to initiate proceedings, and the history

of past prosecution or enforcement under the challenged statute." *Thomas, supra*, at 1139.

Here, Plaintiffs certainly have not articulated a "concrete plan" for violating the statute. In fact, because the violation of the civil rights statute requires that other parties take specific actions, there is certainly no guarantee that these Plaintiffs will ever violate the statute. No prosecuting agency has communicated a specific warning or threat to initiate proceedings, in large part because there is no violation to act upon. Finally, there has apparently been no proceedings initiated against the Plaintiffs, or anyone else, for refusing to allow a civil union ceremony to be conducted in a church or similar property.

The critical question concerning fitness for review is whether the claim involves uncertain and contingent events that may not occur as anticipated or may not occur at all. *See New Mexicans for Bill Richardson, supra* (in determining fitness, central focus is whether case involves uncertain or contingent future events). A case is not ripe where the threatened injury is contingent. *McInnis-Misenor v. Maine Med. Ctr.*, 319 F.3d 63, 71-73 (1st Cir. 2003) (disabled woman sought to compel hospital to render its after-birth recovery area wheelchair accessible in anticipation of a future pregnancy).

In making a ripeness determination, courts will also examine the hardship that the parties would endure if consideration of the issue were withheld on

grounds that the controversy was not ripe. *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289 (1979). The threat of a civil enforcement action is not considered a hardship. *See Lee v. Oregon, supra*.

Normally, both criteria must be satisfied. *Abbott Labs v. Gardner*, 387 U.S. 136, 149 (1967). Courts are particularly vigilant when constitutional issues are at issue. *See Gun Owners' Action League, Inc. v. Swift*, 284 F.3d 198 (1st Cir. 2002).

Again, Plaintiffs are expected to point to *Awad, supra*, for the proposition that this action is ripe. *Awad* is distinguishable with respect to ripeness as well. The *Awad* Court noted that the question presented did not involve the application of the law in a specific factual context. *Id*. at 1124. As noted above, there are only certain factual contexts where Plaintiffs can violate the statutes in question. In *Awad* the challenged action created an "immediate and concrete condemnation injury if we withhold review..." *Id*. at 1125. Again, there is no threat of prosecution or injury on the foreseeable horizon for the Plaintiffs in this action.

Defendants assert this action is not ripe for adjudication, and should be dismissed.

6. Conclusion

For the reasons set forth above, Defendants request this Court dismiss this action, without prejudice.

DATED: HONOLULU, HAWAII, JULY 27, 2012

/s/John F. Molay
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