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UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

KODY BROWN, MERI BROWN,
JANELLE BROWN, CHRISTINE
BROWN, ROBYN SULLIVAN,

Plaintiffs,

vs.

GARY R. HERBERT, MARK
SHURTLEFF, JEFFREY R. BUHMAN,
Defendants.

**MEMORANDUM IN SUPPORT OF
MOTION TO DISMISS FOR LACK OF
STANDING**

Civil No. 2:11CV00652

Judge Waddoups

Defendants Gary R. Herbert, Governor of the State of Utah, Mark Shurtleff, Attorney General of State of Utah, and Jeffrey R. Buhman, County Attorney for Utah County, State of Utah, hereby file this Memorandum in support their Motion to Dismiss Plaintiffs' Complaint for Lack of Standing.

STATEMENT OF FACTS

1. Plaintiffs claim to be polygamists, living as a husband with four wives. Plaintiff Kody Brown claims to be legally married to plaintiff Meri Brown, and spiritually married to the remaining three plaintiffs. (Pltfs' Cmplt. ¶¶ 32-36, 113-114, 117-118.)

2. Prior to Jan. 2011¹ all plaintiffs lived in Lehi, Utah. They currently reside in Nevada. (Pltfs' Cmplt. ¶¶ 32-36.)

3. In Sept. 2010 the Browns became the subject of a reality TV show entitled "*Sister Wives*," airing on the TLC network. (Pltfs' Cmplt. ¶ 157.)

4. The Brown family lived openly as a plural or polygamous family in Utah for many years before they became the subject of the TV series *Sister Wives*. (Pltfs' Cmplt. ¶ 119.)

5. Plaintiffs allege that despite years of investigation and total transparency by the Browns, Utah law enforcement officials have never found any evidence that the Browns committed any crime, beyond the allegation of bigamy. (Pltfs' Cmplt. ¶ 120.)

6. Like thousands of polygamists in Utah, the Brown family was known to local public officials but were never investigated or prosecuted under Utah's criminal bigamy statute. (Pltfs' Cmplt. ¶ 123.)

7. The Brown family was often asked to confirm their plural family, which state

¹ Plaintiffs' Complaint states that Plaintiffs left the State of Utah in January 2010. Pltfs' Cmplt ¶¶ 32-36. Defendants believe the correct date is January 2011.

agencies officially took into consideration when denying them some State benefits. (Pltfs' Cmplt. ¶ 124.)

8. For years before the start of the *Sister Wives* program, plaintiff Christine Brown was a recognized and outspoken advocate for polygamous families. (Pltfs' Cmplt. ¶ 128.)

9. After the appearance of the Browns on the TV series "*Sister Wives*" in Sep. 2010, the Lehi City police "commenced an official investigation of the Browns for possible criminal prosecution." (Pltfs' Cmplt. ¶¶ 158, 162.)

10. Plaintiffs claim that as a result of Lehi City police investigation they left Utah. (Pltfs' Cmplt. ¶¶ 32-36.)

11. It is the policy of the Utah Attorney General's office not to prosecute polygamists living in Utah under Utah's criminal bigamy statute for only the practice of polygamy. (Shurtleff Decl. ¶ 5.) It is the policy of the Attorney General's office that a polygamist would not be charged with the crime of bigamy unless it is in conjunction with the a prosecution for a violation of some other criminal statute. (Shurtleff Decl. ¶¶ 5 and 6.) It is not the intent of the Utah Attorney General's office to prosecute the Browns for the practice of polygamy while they were living in Lehi, Utah (or elsewhere) unless it is found that they were also committing some other crime worthy of prosecution. At the present time the office has no information indicating the Browns have committed any other crimes. (Shurtleff Decl. ¶ 11.)

12. Utah County Attorney Jeffrey R. Buhman states that Utah County does not have a

formal, declared policy regarding prosecution of polygamy like the Attorney General's office does. (Buhman Decl. ¶ 6.) He indicates, however, that to his knowledge and that of other prosecutors in the Utah County Attorney's office, no charge has ever been brought against someone just for the practice of polygamy. (Buhman Decl. ¶ 7.) He also states that at this time no decision has been made by the Utah County Attorney's office whether or not the Browns will be prosecuted. (Buhman Decl. ¶ 12.)

13. Since 1960, there are only three reported (appellate) criminal cases in which someone in Utah has been charged with violation of Utah's bigamy statute. All three cases involved other crimes besides bigamy: *State v. Geer*, 765 P.2d 1 (Utah Ct. App. 1988) (engaging in bigamy for fraudulent purposes), *State v. Green*, 99 P.3d 820 (Utah 2004) (criminal non-support of spouses and children), and *State v. Holm*, 137 P.3d 726 (Utah 2006) (sexual relationship with a minor).

ARGUMENT

PLAINTIFFS LACK STANDING TO CHALLENGE THE CONSTITUTIONALITY OF UTAH'S CRIMINAL BIGAMY STATUTE.

I. PLAINTIFF'S FAIL TO MEET THE REQUIREMENTS OF ARTICLE III STANDING

The judicial power of the federal courts extends only to actual cases or controversies.

U.S. CONST. art. III, §2. In order to have an actual case or controversy, the burden of proof is on

the plaintiffs to show that the case is ripe for adjudication and that they have standing, or a “personal stake in the outcome of the controversy.” *Flast v. Cohen*, 392 U.S. 83, 99 (1968) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)). In *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), the Supreme Court stated that at an “irreducible constitutional minimum” three elements must be met to establish standing: First, the plaintiff must have suffered an “injury in fact” which is both “concrete and particularized” and “actual or imminent.” The alleged injury may not be “conjectural” or “hypothetical.” Second, there must be a causal connection between the injury and the conduct being complained about by plaintiff. And third, it must be “likely” that the injury will be redressed by a favorable decision from the court. *Id.* at 560-61.

II. PLAINTIFFS HAVE FAILED TO SHOW THAT THEY HAVE SUFFERED AN INJURY-IN-FACT.

The Brown family is hardly the only polygamist family in Utah. As noted in their complaint, it is estimated that approximately 30,000 polygamists live in Utah. Pltfs’ Cmplt. ¶ 54. There are not 30,000 cases currently being prosecuted in Utah – there is not even one. In fact, in the last 50 years there are only three such reported cases in Utah and in each such case the prosecution occurred only in conjunction with some other crime. *See* ¶ 13, Stmt. of Facts *supra*. Shurtleff decl. ¶¶ 9-10.

Attorney General Shurtleff states that he is well aware of the polygamist communities living in the State, but that the Utah AG’s office does not prosecute polygamists under Utah’s

criminal bigamy statute for the mere practice of polygamy. Shurtleff decl. ¶¶ 2-5. Utah County Attorney Jeffrey R. Buhman states that “it is common knowledge” in his office, as well as throughout the community, “that there are a number of polygamist enclaves” in Utah County. Buhman decl. ¶ 8. Yet no one currently in his office, including himself, knows of the Utah County Attorney’s Office ever prosecuting anyone for polygamy. Buhman decl. ¶ 7. Plaintiffs claim to be members of the Apostolic United Brethren Church (“AUB”). Pltfs’ Cmplt. ¶ 26, 111. Buhman is informed that there are AUB members in southern Utah County, some of whom may be practicing polygamy. Buhman decl. ¶ 9. Yet his office does not prosecute these AUB Church members on account of their practicing polygamy. *Id.*

Furthermore, the Browns claim they “have been open in both Utah and Nevada about their plural family,” Pltfs’ Cmplt. ¶ 20, that they “have a long history of interaction with (Utah) authorities,” Pltfs’ Cmplt. ¶ 21, that “like thousands of polygamists in Utah, the Brown family was known to local public officials” in Utah, but never investigated or prosecuted under the criminal bigamy statute, Pltfs’ Cmplt. ¶ 123, that they have admitted their polygamist status to State Medicaid officials, Pltfs’ Cmplt. ¶ 126, and that Plaintiff Christine Brown has been very out-spoken and public about her polygamist lifestyle, having participated in many conferences and public interviews. Pltfs’ Cmplt. ¶¶ 129-133. Further, Plaintiff Kody Brown claims to have spoken with Attorney General Shurtleff and his press secretary about his polygamist lifestyle. Pltfs’ Cmplt. ¶ 137.

Based on the above facts, it is clear that the Plaintiffs have not suffered any “actual,” nor are about to suffer an “imminent,” injury-in-fact. Rather, Plaintiffs allege that because of the airing to the TV series *Sister Wives*, the Lehi City police department initiated an investigation. However, that does not negate any of the above facts. Lehi City’s report was turned over to the Utah County Attorney’s Office in October, 2010, Buhman decl. ¶ 3, and still – ten months later – no prosecution has been filed. Nevertheless, that is the basis for Plaintiffs claiming an injury-in-fact. In the words of the Supreme Court, such is strictly “conjectural” or “hypothetical.”

A. Plaintiffs Have No “Credible Threat” of Prosecution to Establish an Injury-In-Fact.

As the Tenth Circuit has said: “Allegations of possible future injury do not satisfy the injury in fact requirement.” *Mink v. Suthers*, 482 F.3d 1244, 1253 (10th Cir. 2007) (quoting *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1087-88 (10th Cir. 2006)). However, “when a plaintiff challenges a criminal statute under which he has not been prosecuted, he must show a “real and immediate threat” of his future prosecution under that statute to satisfy the injury in fact requirement.” *D.L.S. v Utah*, 374 F.3d 971, 974 (10th Cir. 2004) (quoting *Faustin v. City and County of Denver, Colo.*, 268 F.3d 942, 948 (10th Cir. 2001)).

1. Plaintiffs Do No Show That Their Circumstances are Similar to Cases Finding a Credible Threat.

A “credible threat” of prosecution arises from an “objectively justified fear of real consequences.” *D.L.S.*, 374 F.3d at 975; *Initiative & Referendum Inst.*, 450 F.3d at 1082;

Bronson v. Swensen, 500 F.3d 1099, 1107 (10th Cir. 2007). The “credible threat” test is an analysis of the “likelihood of enforcement.” *Bronson*, 500 F.3d at 1108. A “credible threat” exists where the party responsible for enforcing the challenged statute “threatens a particular plaintiff with arrest or even prosecution.” *Id.* This would include situations where the enforcing entity has actually warned the plaintiff to cease the illegal behavior or face arrest and prosecution. *Id.* The Tenth Circuit held that a credible threat did exist in the cases of *Steffel v. Thompson*, 415 U.S. 452, (1974), and *Doctor John’s, Inc. v. City of Roy*, 465 F.3d 1150 (10th Cir. 2006). In *Steffel*, a Vietnam War protestor had standing when he was warned to stop hand-billing, was threatened with arrest and prosecution, and after his companion had been arrested and arraigned. In *Doctor John’s*, an adult bookstore owner was found to have a credible threat of prosecution under a city ordinance when he received a letter from the city warning him that if he did not comply with the ordinance, the city would take “appropriate legal action.” *Id.* at 1156. As stated in *Lujan*, these are instances where the injury-in-fact is “concrete,” “particularized,” and “imminent.” *Lujan* at 560.

The present case is distinctly dissimilar from *Steffel* and *Doctor John’s*. Unlike either of those two cases, Plaintiffs have not received any actual threat of prosecution or arrest despite their openness about their polygamous relationships. (Statement of Facts ¶¶ 5-6, Pltf’s Cmplt. ¶¶120,123). They have not been warned that if they do not cease to engage in their polygamous relationships that legal action will be taken against them. Prosecutors have not threatened them

with legal action. And – what is probably the tipping point – there have been no arrests or prosecutions for the mere practice of polygamy in Utah in over 50 years.

As the Tenth Circuit has said:

The mere presence on the statute books of an unconstitutional statute, in the absence of enforcement or the credible threat of enforcement, does not entitle any to sue, even if they allege an inhibiting effect on constitutionally protected conduct prohibited by the statute.

Winsness v. Yocom, 433 F.3d 727, 732 (10th Cir. 2006)

2. Plaintiffs’ Circumstances Are Similar to Cases Finding No “Credible Threat.”

The Tenth Circuit found no credible threat of prosecution in the case of *D.L.S. v. Utah*, 374 F.3d 971 (10th Cir. 2004) in which an unmarried adult brought a §1983 claim for fear of prosecution under Utah’s anti-sodomy statute for engaging in sexual activity with his girlfriend. Except for one instance involving completely different circumstances, there was a complete lack of history of prosecution in Utah County under the challenged anti-sodomy statute. The Utah County Attorney filed an affidavit attesting that to his knowledge Utah County had never charged anyone under the challenged statute. Based on those circumstances the Tenth Circuit Court found it unlikely the plaintiff would be prosecuted under the statute and upheld the District Court’s granting of Defendants’ Motion to Dismiss for lack of standing. By pointing to only a single instance in which someone had been prosecuted under the statute, the Court held that plaintiff failed to show a “credible threat” of prosecution. *Id.* at 974.

In the present case, Plaintiffs cannot point to even one case in which someone has been prosecuted under Utah's bigamy statute in the last 50 years – not only in Utah County, but in the entire State of Utah. Simply stated, there is a lack of history of prosecution of polygamy in Utah since the 1950s except when it is in conjunction with some other crime.

The Tenth Circuit also found no credible threat of prosecution in a case four years ago similarly challenging Utah's bigamy statute. In *Bronson v. Swensen*, 500 F.3d 1099 (10th Cir. 2007), a husband and wife and the husband's fiancée brought suit challenging both Utah's criminal and civil prohibitions of polygamy because Bronson had been denied a license for the polygamous marriage to his fiancée. Because the plaintiffs were never charged, prosecuted, or directly threatened with prosecution under Utah's bigamy statute the Tenth Circuit found no credible threat of prosecution and upheld the District Court's dismissal of the case. *Id.* at 1109. Similar to *D.L.S.*, Bronson attempted to establish a an "objective fear" of prosecution based on two recent State prosecutions under the bigamy statute, *State v. Green*, 99 P.3d 820 (Utah 2004); and *State v. Holm*, 137 P.3d 726 (Utah 2006). But as the court pointed out, the defendants in *Green* and *Holm* had committed *independent* crimes in connection to forming their polygamous relationships. *Bronson*, at 1109. Moreover, the Court said, the alleged credibility of plaintiffs' fear of prosecution "is contradicted by their repeated admission that 'Utah's criminal law against polygamy is not being enforced.'" *Id.*

Like *Bronson*, Plaintiffs have not been charged, prosecuted or directly threatened with

prosecution under Utah's bigamy statute. Neither can they point to any recent prosecutions under the bigamy statute to create an "objective fear" of prosecution under Utah's bigamy statute. According to Utah's Attorney General, the Utah Attorney General's office does not prosecute polygamists living in Utah under the criminal bigamy statute just for the sake of practicing polygamy. (Shurtleff decl. ¶ 5.) The Attorney General's officer policy is to prosecute for polygamy under the bigamy statute only when it is accompanied by some other crime. (Shurtleff decl. ¶ 6.) The Attorney General has declared that his office has no intent to prosecute the Plaintiffs for the practice of polygamy unless it is found that they have committed some other crime worthy of prosecution. (Shurtleff decl. ¶ 11.) As the Plaintiffs claim that law officials have never found any evidence that the Browns have committed any crimes independent of bigamy, it is unlikely that they will face prosecution under the bigamy statute. (Statement of Facts, ¶ 5, Pltfs' Cmplt. ¶ 120).

Although the Utah County Attorney's office has not adopted the same formal policy regarding polygamy that the Attorney General's office has, the track record of Utah County belies any likely future prosecution. It is no secret that polygamists live in Utah County. (Buhman decl. ¶ 8-9.) Yet no one has any memory of when the last prosecution for polygamy occurred in Utah County. (Buhman decl. ¶ 7.) By their own admission Plaintiffs have lived openly as a polygamous family in Utah County for many years. (Statement of Facts, ¶ 4, Pltfs' Cmplt. ¶ 119). The Plaintiffs have on more than one occasion confirmed their status as a

polygamous family to State officials. (Statement of Facts ¶7, Pltfs' Cmplt. ¶124.) Even before the *Sister Wives* program, Plaintiff Christine Brown was an outspoken advocate for polygamous families, airing her views "at many public conferences" and on HBO. (Statement of Facts ¶ 8, Pltfs' Cmplt. ¶128-130.) And yet, despite these years of openness about their polygamous family, and public airing of their position with regard to polygamy, Plaintiffs have never been threatened with prosecution by the Utah County Attorney's office under Utah's criminal bigamy statute. Neither has anyone else in Utah County who is practicing polygamy.

Now, however, Plaintiffs claim that because they became the subject of *Sister Wives* and the Lehi City police reported that to the Utah County Attorney's office that they are now somehow the target of prosecution. (Pltfs' Cmplt. ¶¶ 22-23.) But Utah County has been in possession of the Lehi police investigation report since October 2010. (Buhman decl. ¶ 3.) The Utah County Attorney has never stated that Plaintiffs will be prosecuted by the Utah County Attorney's office.² (Buhman Affd. ¶ 5.) Such circumstances or claims do not present an "objectively justified fear of real consequences" and do not constitute standing to bring this action. *D.L.S.*, 374 F.3d at 975.

B. Incidental Chilling Effect on Plaintiffs' Speech Is Not Sufficient to Give Standing.

² Defendants also acknowledge that the Utah County Attorney has not stated that the Browns will not be prosecuted. He just has not said anything publically about it one way or the other.

Plaintiffs claim that the criminal investigation of their family has a “chilling” effect on their free speech. (Pltfs’ Cmpl. ¶¶ 208-209). However, mere “[a]llegations of a subjective ‘chill’” on a plaintiff’s speech “are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm,” *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1088 (10th Cir. 2006) (quoting *Laird v. Tatum*, 408 U.S. 1, 13-14 (1972)). Plaintiffs may show standing, even in First Amendment cases, only “where they can demonstrate ‘a credible threat of prosecution or other consequences flowing from the statute’s enforcement.’” *Id.* at 1088 (quoting *D.L.S.*, 374 F.3d at 975).

III. PLAINTIFFS FAIL TO SHOW THE DEFENDANTS “CAUSED” A DEPRIVATION OF THEIR RIGHTS.

The second element Plaintiffs must establish to gain standing is a causation. *Bronson*, 500 F.3d at 1106. Causation requires a showing of “substantial likelihood that [each] defendant’s conduct caused plaintiff’s injury in fact.” *Bronson*, at 1110.

In the case of *Bishop v. Oklahoma*, 333 Fed. Appx. 361 (10th Cir. 2009), two lesbian couples challenged Oklahoma’s amendment to its constitution permitting marriage only between a man and a woman. Plaintiffs named the Oklahoma Attorney General and Governor as defendants. *Id.* The case was dismissed because the plaintiffs failed to name a single defendant having a causal connection to their alleged injury that was redressible by the court. *Id.* at 364. The Oklahoma officials’ generalized duty to enforce state law, alone, was insufficient to establish

standing to challenge the constitutional amendment. *Id.* at 365. The Court found that the duties of neither the Attorney General nor the Governor created enough of a causal connection to give plaintiffs standing.

Rizzo v. Goode, 423 U.S. 362 (1976), was a civil rights action against a city, its mayor and police officials for alleged civil rights violations caused by some police officers' misconduct. In *Rizzo* the Supreme Court found a lack of justiciability and standing because none of the defendants were acting to deprive, or directing others or establishing a policy to deprive the plaintiffs of any constitutional rights. Under 42 U.S.C. §1983, the civil rights statute, there is a cause of action only against one who "subjects, or causes to be subjected" a citizen to a deprivation of their civil rights. Mere executive authority, or a general duty to enforce the laws, is not sufficient.

Plaintiffs in this case have not shown that these Defendants have subjected them, or caused them to be subjected to, a deprivation of their constitutional rights. Plaintiffs have thus not shown the second element for injury-in-fact -causation - and have not established standing or a justiciable cause of action.

CONCLUSION

For the foregoing reasons, plaintiffs do not have standing to bring this suit. Accordingly Defendants request this court dismiss this action.

DATED this ____ day of September, 2011.

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/s/ Jerrold S. Jensen _____
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