IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

LAURINDA HAFNER, a Reverend of The United Church of Christ in Miami-Dade County, Florida,

Plaintiff,

v.

THE STATE OF FLORIDA, et al.,

Defendants.
_____/

CASE NO.: 2022-14370-CA-01
COMPLEX BUSINESS LITIGATION

ORDER DENYING PLAINTIFFS' MOTIONS FOR TEMPORARY INJUNCTION

Presently before the Court are the Motions for Temporary Injunction ("Motions") filed by Plaintiffs Laurinda Hafner, a Reverend of the United Church of Christ in Miami-Dade County, (D.E. 53); Reverend Tom Capo, a Minister of the Unitarian Universalist Congregation in Miami-Dade County, (D.E. 56); Rabbis Gayle Pomerantz, Robyn Fisher and Jason Rosenberg (D.E. 50); Lama Karma Chotso, a Lama of Buddhism in Miami-Dade County (D.E. 55); and John/Jane Doe, a Priest of the Episcopal Church in Miami-Dade County (D.E. 53) (collectively "Plaintiffs").[1] Having carefully reviewed the Parties' submissions, and after entertaining argument, the Court denies the Motions for the reasons stated on the record and as further elaborated herein.

[1] This action has been consolidated with the following four cases that advance the same claims asserted here: (1) *Rev. Tom Capo v. State of Florida, et al.,* Case No. 2022 -014374-CA-01 (Fla. 11th Cir. Ct.); (2) *Pomerantz v. State of Florida, et al.,* Case No. 2022-14373-CA-01 (Fla. 11th Cir. Ct.); (3) *Lama Karma Chotso v. State of Florida, et al.,* Case No. 2022-014371-CA-01 (Fla. 11th Cir Ct.); and (4) *Jane/John Doe. v. State of Florida, et al.,* Case No. 2022-014372-CA-01 (Fla. 11th Cir Ct.). *See* Plaintiff's Motion to Consolidate (D.E. 137), and Order on Case Management Conference (D.E. 150).

I. INTRODUCTION/ THE MOTIONS

Plaintiffs, as clerical members of their respective faiths, seek an order temporarily enjoining "Defendants, their agents, servants, employees, attorneys, and all persons in active concert and participation with Defendants, from enforcing Sections 3-4 of House Bill 5, Reducing Fetal and Infant Mortality Act (the "Act" or "HB 5")," amending Florida Statute Sections 390.0111(1)(a)–(b) and 390.011(6). Mots., p. 1. Plaintiffs argue that HB 5 criminalizes their right to provide counseling in accordance to their religious beliefs and doctrines, in support of a person's freedom to choose, as it relates to abortion, family planning, and reproductive health. The Motions assert that "the Act contains no exceptions for the psychological health of the mother or family, non-fatal fetal abnormalities, or victims of incest, rape, or trafficking, which are all circumstances in which Plaintiff[s] would, amongst other circumstances, support and/or counsel in favor of a girl or woman's decision to have an abortion before or after 15 weeks." *Id.* at 6.

Plaintiffs insist that because HB 5 places them at "immediate and ongoing risk of prosecution, as someone who aids or abets the crime HB 5 codifies," Mots., p. 2, it: (1) violates their right to freedom of religious speech under the First Amendment of the United States Constitution and Article I, § 4 of the Florida Constitution; (2) infringes on their right to free exercise of religion (targeting "clergy whose faith is burdened by the Act's purpose to serve 'God's will' to elevate the fetus at the expense of the pregnant woman or girl"); (3) violates the Establishment Clause (by the "imposition of a singular religious belief on everyone in the State"); and (4) "fails to adhere to the requirements of the Florida Religious Freedom Restoration Act ("FRFRA"), which requires the State to accommodate religious believers whose religious beliefs and conduct are substantially burdened by a law in the state." *Id.*, p. 3. Plaintiffs then claim that they are entitled to an injunction prohibiting enforcement of the Act because: (a) they have a

substantial "likelihood of success on all four of their theories: free speech, free exercise of religion, separation of church and state, and FRFRA" *Id.*, at p. 8; (b) they will suffer irreparable harm and lack remedy at law since they will be "subjected to severe criminal and disciplinary penalties for encouraging, advising, and/or counseling abortions beyond HB 5's severe restrictions"; and (c) will serve the public interest by protecting federal and state constitutional rights.

On February 10, 2023, Intervenor-Defendant, Ashley Moody, the Attorney General of Florida (the "Attorney General" or "Defendant"), filed her "Omnibus Response in Opposition to Plaintiff's Motion for Temporary Injunction." (D.E. 176).[2] Through that Response the Attorney General correctly points out that HB 5's amendment to Section 390.0111 of the Florida Statutes is limited to changing the temporal reach of proscribed pregnancy terminations - previously prohibiting abortions in the third trimester of pregnancy to now, subject to the same existing narrow exceptions, prohibiting abortions where the fetus has a gestational age of more than 15 weeks. HB 5 did not amend Section 390.0111(10), which has always imposed criminal penalties for any person "who performs, or actively participates in, a termination of pregnancy in violation of this section." *Id.* Similarly, Florida Statute Section 777.011, which exposes to prosecution anyone who "aids, abets, counsels, hires, or otherwise procures" a criminal offense, has been on the "books" since 1957, and is not affected at all by HB 5. Put simply, the laws that Plaintiffs say place them at risk of prosecution have been extant for decades, yet no member of the clergy has ever been prosecuted (or threatened with prosecution) for counseling a congregant on the decision of whether to have an abortion – regardless of the stage of the pregnancy.

---

[2] Hefner's Complaint originally included as Defendants the state attorney of each Judicial Circuit of Florida. (D.E. 2). On December 8, 2022, Plaintiff voluntarily dismissed without prejudice all claims asserted against the State of Florida, Florida's Attorney General, all of the state attorneys from the different Judicial Circuits of Florida, with the exception of the State Attorney for the Eleventh Judicial Circuit in and for Miami-Dade County. (D.E. 140). Florida's Attorney General was then granted leave to intervene. (D.E. 150). The consolidated cases contain identical filings.

For this (and other) reasons, the Attorney General says that Plaintiffs lack standing to challenge HB 5 because absent establishing a "credible threat of prosecution," *Pittman v. Cole*, 267 F.3d 1269, 1283-1284 (11th Cir. 2001), they have not, and cannot, demonstrate "any concrete, palpable injury sufficient to confer standing." *DeSantis v. Fla. Ed. Ass'n*, 306 So. 3d 1202, 1213 (Fla. 1st DCA 2020). The Court agrees and denies the Motion on this narrow ground.[3] *See, e.g., State ex rel. Frazier v. Coleman*, 156 Fla. 413 (Fla. 1945) ("it being well settled that the court will not pass upon the constitutionality of a statute, even when directly challenged on constitutional grounds, if the cause in which the challenge arises can be fully determined on other meritorious grounds"); *NW Austin Municipal Utility Dist. No. One v. Holder*, 129 S. Ct. 2504, 2513 (2009) ("it is a well-established principle governing the prudent exercise of this Court's jurisdiction that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case"); *In re Forfeiture of One Cessna 337H Aircraft*, 475 So. 2d 1269, 1270-71 (Fla. 4th DCA 1985) ("[i]t is a fundamental maxim of judicial restraint that 'courts should not decide constitutional issues unnecessarily . . . , [i]f there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable'").

II. GOVERNING LAW/ANALYSIS

As an initial matter, it is well settled the issuance of a temporary injunction, particularly restraining enforcement of a duly enacted law, is an extraordinary remedy which should be granted sparingly, and only when a court is satisfied that the movant has, through competent evidence,

[3] Because the Court finds that Plaintiffs lack standing it need not, and does not, address whether they have demonstrated a substantial likelihood of success on the merits of any substantive claim. *See PDK Labs. Inc. v. U.S. D.E.A.*, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J. concurs) ("[i]f it is not necessary to decide more, it is necessary not to decide more . . ."). The Court notes, however, that a duly enacted statute arrives with a strong presumption of constitutionality, and that a party mounting a constitutional challenge has the burden of establishing invalidity beyond a reasonable doubt. *State v. Lick*, 390 So. 2d 52 (Fla. 1980).

satisfied the burden of proving: (1) a substantial likelihood of success on the merits; (2) the unavailability of an adequate remedy at law; (3) irreparable harm absent entry of an injunction; and (4) that the injunction would serve the public interest. *See, e.g., Florida Dep't of Health v. Florigrown, LLC*, 317 So. 3d 1101 (Fla. 2021); *City of Miami Beach v. Clevelander Ocean, L.P.*, 338 So. 3d 16 (Fla. 3d DCA 2022). And a plaintiff that has "simply not demonstrated any concrete, palpable injury sufficient to confer standing" cannot, *a fortiori,* satisfy the burden of showing that "they are likely to succeed on the merits of their claims." *DeSantis*, 306 So. 3d at 1214.

"For a court of law operating as one of the three branches of government under the doctrine of the separation of powers, standing is a threshold issue which must be resolved before reaching the merits of a case." *Solares v. City of Miami*, 166 So. 3d 887, 888 (Fla. 3d DCA 2015). Generally speaking, to establish standing a plaintiff must have a "legitimate or sufficient interest at stake in the controversy that will be affected by the outcome of the litigation." *Equity Res., Inc. v. Cnty. of Leon*, 643 So. 2d 1112, 1117 (Fla. 1st DCA 1994). To satisfy this exacting standard, a plaintiff must demonstrate: (1) an injury-in-fact that is concrete, distinct and palpable, and actual or imminent; (2) a causal connection between the injury and the conduct complained of; and (3) a substantial likelihood that the requested relief will remedy the alleged injury-in-fact. *See, e.g., Vermont Agency of Nat. Res. v. U.S. ex rel. Stevens*, 529 U.S. 765 (2000); *Whitmore v. Arkansas*, 495 U.S. 149 (1990); *Southam v. Red Wing Shoe Co., Inc.*, 343 So. 3d 106 (Fla. 4th DCA 2022); *Cmty. Power Network Corp. v. JEA*, 327 So. 3d 412 (Fla. 1st DCA 2021).

In the context of a challenge to legislation, satisfying this first element of standing requires that a plaintiff "demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement." *Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289, 298 (1979). As the Attorney General correctly points out, this does not mean that a plaintiff must wait to be

prosecuted before challenging a criminal law. "If the injury is certainly impending, that is enough." *Commonwealth of Pennsylvania v. State of W. Virginia*, 262 U.S. 553, 593 (1923). But a plaintiff must demonstrate an injury that is more than abstract, conjectural or speculative.

In cases like that at bar, involving a claim of "self-censorship," establishing injury in fact requires a showing that the plaintiff intends "to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and [that] there exists a credible threat of prosecution thereunder." *Babbitt,* 442 U.S. at 298. Establishing a "credible threat of prosecution" can be done by showing either: (1) an actual threat of prosecution; (2) that prosecution is likely; or (3) an objectively reasonable credible threat of prosecution. *Pittman v. Cole*, 267 F.3d 1269 (11th Cir. 2001); *Am. Civil Liberties Union v. The Fla. Bar*, 999 F.2d 1486 (11th Cir. 1993); *Wilson v. State Bar of Ga.*, 132 F.3d 1422 (11th Cir. 1998). As the Tenth Circuit succinctly put it: "[w]hen a plaintiff [such as this one] challenges the validity of a criminal statute under which [she or he] has not been prosecuted, [she or he] must show a 'real and immediate threat' of [her or 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).

Turning to the statutes relevant here, Section 390.0111(10)(a), as amended by HB 5, provides that, with certain limited exceptions, any person who "willfully performs" or "actively participates" in a termination of pregnancy after a fetus' gestational age is more than 15 weeks "commits a felony of the third degree." § 390.0111(10)(a), Fla. Stat. Plaintiffs, who are not licensed physicians, obviously have not, and cannot, allege that they intend to "perform" an abortion that would be proscribed by this Statute. They therefore must, and do, claim that the conduct they intend to participate in – counseling their congregants in order to "provide support

. . . in making life decisions within the context of the . . . overreaching beliefs in religious freedom and reverence for human life," Verified Comp., ¶ 3, could constitute "actively participat[ing]" in an illegal termination of pregnancy. § 390.0111(10)(a), Fla. Stat.[4] Plaintiffs also claim that the conduct they intend to engage in could expose them to criminal prosecution under Florida Statute Section 777.011, as a "principal in the first degree," because they could be deemed to have "counseled" another congregant to commit a criminal offense "against the state." § 777.011, Fla. Stat. Plaintiffs therefore say that they have an objectively reasonable fear of prosecution for engaging in expressive activity. The Court disagrees.

First, as the Attorney General points out, Section 390.0111 has criminalized active participation in an illegal abortion since at least 1997. § 390.0111(1), Fla. Stat. (1997). Section 777.011 – which permits the prosecution of persons that are "principal(s) in the first degree" – has been in the books for decades. And Section 390.0111 has, since 1997, had the same exceptions to the proscribed termination of pregnancy. Yet no member of the clergy has ever been prosecuted (or as far as this record goes even threatened with prosecution) for counseling a congregant to obtain an abortion. This anecdotal absence of evidence strongly suggests that Plaintiffs' fear of prosecution is not objectively reasonable. *Younger v. Harris*, 401 U.S. 37, 42 (1971) ("persons having no fears of state prosecution except those that are imaginary or speculative, are not to be accepted as appropriate plaintiffs"); *Wilson,* 132 F.3d at 1428 ("[a] party's subjective fear that she may be prosecuted for engaging in expressive activity will not be held to constitute an injury for standing purposes unless that fear is objectively reasonable"). *Compare, e.g., Steffel v. Thompson*, 415 U.S. 452 (1974) (found a "credible threat" of prosecution

[4] *See also*, Hafner Verified Comp. ¶ 13 ("Plaintiff intends to engage in counseling regarding abortion beyond the narrow limits of HB 5 and, therefore, risks incarceration and financial penalties").

existed because the plaintiff was actually threatened with arrest on two separate occasions for violating law, and because his companion was actually arrested under the same law); *Solomon v. City of Gainesville*, 763 F.2d 1212 (11th Cir. 1985) (finding a "credible threat of prosecution" because city officials sent the claimant letters notifying him he was in violation of the ordinance at issue).

Second, even ignoring the fact that no clergy member has ever been prosecuted for "counseling" a congregant on the issue of whether to abort a pregnancy, the Court, as a matter of statutory interpretation, rejects Plaintiffs' argument that such a theoretical prosecution would be viable.

The "plain meaning of the statute is always the starting point in statutory interpretation." *Alachua Cnty. v. Watson*, 333 So. 3d 162, 169 (Fla. 2022), citing *GTC, Inc. v. Edgar*, 967 So. 2d 781 (Fla. 2007). And under the "supremacy-of-text principle" – which our Supreme Court "adheres to," *Boyle v. Samotin*, 337 So. 3d 313, 317 (Fla. 2022), words of a governing text are of "paramount concern, and what they convey, in their context, is what the text means." *Ham v. Portfolio Recovery Associates, LLC*, 308 So. 3d 942, 946 (Fla. 2020) (quoting Antonin Scalia and Bryan A. Garner, *Reading Law*: *The Interpretation of Legal Texts* 56 (2012)).

Section 390.0111(10)(a) exposes any person who "actively participates" in an illegal abortion to criminal prosecution. The Statute does not define what constitutes active participation and, for that reason, the phrase must be given its "natural and ordinary signification and import." *Lab. Corp. of Am. v. Davis*, 339 So. 3d 318, 323 (Fla. 2022) (quoting James Kent, *Commentaries on American Law* 432 (1826), *quoted in* Scalia & Garner, *Reading Law* at 69 n.1). *See also, Metro. Cas. Ins. Co. v. Tepper,* 2 So. 3d 209, 214 (Fla. 2009) (when considering statutory terms that are

not defined, "this Court looks first to the terms' ordinary definitions . . . definitions [that] may be derived from dictionaries").

While the Parties have not extensively briefed the question, it does not require an authoritative disquisition, a string citation of precedent, or a "study of an acute and powerful intellect," *Lynch v. Alworth-Stephens Co*, 267 U.S. 364, 370 (1925), to discern that a member of the clergy, who does no more than offer counsel and support to a congregant on the decision of whether to abort a pregnancy, is not an "active participant" in an abortion that their congregant may decide to have after thoughtful deliberation. Actively participating in a termination of pregnancy must involve more – indeed far more – than religious counseling standing alone, and Plaintiffs do not claim that they intend to do "more" than counsel those who seek spiritual guidance regarding this often difficult decision. For the reasons cogently articulated by the First District in *Williams v. State*, 314 So. 3d 775 (Fla. 1st DCA 2021), the conduct Plaintiffs intend to participate in here also falls far short of exposing them to criminal prosecution as "principal(s)" under §777.011, Fla. Stat. *See also, Staten v. State,* 519 So. 2d 622, 624 (Fla. 1988) ("to be guilty as a principal for a crime physically committed by another, one must intend that the crime be committed and do some act to assist the other person in actually committing the crime").

In sum, and as the Attorney General conceded during oral argument, these statutory provisions cannot be reasonably construed to criminalize mere religious counseling. [5]

III. CONCLUSION

The Court fully appreciates that "[a]bortion presents a profound moral issue on which Americans hold sharply conflicting views," *Dobbs v. Jackson Women's Health Org.*, 213 L. Ed. 2d

[5] To support their claim that HB 5 places them in harms way, Plaintiffs point out that Governor DeSantis has made clear that he "expects the law to be enforced." Reply Brief, p. 5. The fact that the Governor expects a law to be enforced hardly demonstrates that these putative Plaintiffs face a credible threat of prosecution.

545 (2022), and understands that many on both sides of this debate hold deep and unwavering convictions; unable to even acknowledge (let alone appreciate) any contrary point of view. There is perhaps no more divisive social issue than the question of abortion rights. The Court also has no doubt that these Plaintiffs strongly and sincerely believe that the Act unconstitutionally infringes upon their fundamental rights. The constitutionality of HB 5 will soon be adjudicated by our Supreme Court, via a case brought by other plaintiffs. But the clergy who bring these consolidated cases do not have a reasonably objective fear of criminal prosecution and, for that reason, lack standing to challenge the Act.

Accordingly, it is hereby **ORDERED**:

Plaintiffs' Motions for Temporary Injunction are **DENIED**.

DONE AND ORDERED in Chambers at Miami-Dade County, Florida this 3rd day of March 2023.

MICHAEL A. HANZMAN
Circuit Court Judge

MICHAEL HANZMAN
CIRCUIT COURT JUDGE

Electronically served:
filings@jswflorida.com
buddy@jswflorida.com
dmoriber@spiroharrison.com
fsimone@spiroharrison.com
emily.witthoeft@myfloridalegal.com
complexlitigation.eservice@myfloridalegal.com
john.turanchik@myfloridalegal.com
complexlitigation.eservice@myfloridalegal.com
nrekant@pardojackson.com
mfuentes@pardojackson.com
breyes@pardojackson.com
shayna.freyman@jayaramlaw.com
sao4civilservice@coj.net
ssiegel@coj.net
spardo@pardojackson.com
mfuentes@pardojackson.com

breyes@pardojackson.com
egainsburg@pardojackson.com
mfuentes@pardojackson.com
LJackson@pardojackson.com
breyes@pardojackson.com
mfuentes@pardojackson.com
nrekant@pardojackson.com
mfuentes@pardojackson.com
breyes@pardojackson.com
llovell@pardojackson.com
mfuentes@pardojackson.com
william.stafford@myfloridalegal.com
complexlitigation.eservice@myfloridalegal.com
alisha.robinson@myfloridalegal.com
christopher.sutter@myfloridalegal.com
katia.marques@myfloridalegal.com
martine.legagneur@myfloridalegal.com
john.turanchik@myfloridalegal.com
complexlitigation.eservice@myfloridalegal.com
marcih@sas.upenn.edu
vivek@jayaramlaw.com
liz@jayaramlaw.com
palak@jayaramlaw.com