IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
ST. JOSEPH DIVISION

BRIAN KIRK, Plaintiff, v. CITY OF ST. JOSEPH, MISSOURI, *et al*., Defendants.	)	Case No. 5:24-cv-06023-SJ-GAF

SUGGESTION IN SUPPORT OF MOTION TO DISMISS AND MOTION TO STRIKE OF DEFENDANTS BLEVINS AND GREIERT

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INTRODUCTION

Defendants Josh Blevins and Steve Greiert ("Defendants") respectfully move for this Court to dismiss all claims against them. Plaintiff has failed to state a claim against them upon which relief may be granted, Fed. R. Civ. P. 12(b)(6), and Plaintiff's claims are subject to a special motion to dismiss under the Missouri anti-SLAPP statute, § 537.528, RSMo.

Plaintiff seeks to hold Defendants, who Plaintiff admits are and were at all relevant times private citizens, liable under 42 U.S.C. § 1983 purely for engaging in protected First Amendment activities. The great irony is that Plaintiff alleges that his free speech rights have been violated by Defendants, who are *not* state actors, while at the same time Plaintiff attempts to tramp out Defendants' First Amendment rights to free speech, religion, assembly, and petition through a court order, which *is* state action. Under Plaintiff's theory, Defendants suddenly became state actors when "Defendant Greiert wrote" to the Mayor and City Council as a private citizen, **Doc. 1-2 at 14 ¶¶ 40-41**, and "Defendant Blevins wrote" to the City Council, "posted . . . on his personal Facebook page," and "preached" a sermon at his church as a private citizen, ***id.* at 8 ¶¶ 27, 29; *id.* at 10 ¶ 34**. All these allegedly "unlawful" activities are quintessential private actions protected by the First Amendment—not actions taken under color of state law. Plaintiff's frivolous theory proves too much. It would transform every private person who writes to a government official, casts a vote, or expresses an opinion on a political or religious issue into a state actor susceptible to liability under § 1983. But that is obviously not the law. Accordingly, the claims against Defendants must be dismissed.

Defendants request the Court consider this motion "on a priority or expedited basis to ensure the early consideration of the issues raised by the motion and to prevent the unnecessary expense of litigation." § 537.528-1, RSMo. Defendants also request the Court suspend all

discovery pending a decision on the motion by Court and the exhaustion of all appeals regarding the special motion. *Id*. Defendants further request the Court grant Defendants' motion and award attorneys' fees and costs incurred by Defendants in defending the action. *Id*. § 537.528-2; 42 U.S.C. § 1988.

ARGUMENT

I. Plaintiff has failed to state a claim upon which relief may be granted.

Plaintiff has failed to state a claim upon which this Court may grant relief against Defendants for several independent reasons. Fed. R. Civ. P. 12(b)(6). First, he has failed to show that Defendants were acting under color of state law as required by 42 U.S.C. § 1983. Second, he has failed to show that Defendants were state actors as required to show a deprivation of his constitutional rights under the First and Fourteenth Amendments. Third, even if Defendants were state actors, they are entitled to absolute legislative immunity or qualified immunity. Finally, this Court cannot award part of the relief Plaintiff requests—the revocation of Grace Calvary Chapel's tax-exempt status under 42 U.S.C. §§ 1983, 1988. Defendants are entitled to attorneys' fees and costs as the prevailing party in this frivolous lawsuit. 42 U.S.C. § 1988.

A. Defendants, as private citizens, are not persons under 42 U.S.C. § 1983.

All Plaintiff's claims arise 42 U.S.C. § 1983. **Doc. 1-2 at 14-19, ¶¶ 44-78**.[1] Section 1983 only creates a cause of action for claims brought against a "person" acting "under color of" state law. 42 U.S.C. § 1983. "The traditional definition of acting under color of state law requires that the defendant in a § 1983 action have exercised power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'" *West v. Atkins*,

[1] Plaintiff brings several claims against Defendants Greiert and Blevins: Count I, violation of the First Amendment and Equal Protection Clause of the Fourteenth Amendment under 42 U.S.C. § 1983; Count II, First and Fourteenth Amendment retaliation under 42 U.S.C. § 1983; Count III, conspiracy to violate constitutional rights under 42 U.S.C. §§ 1983, 1985; and Count V, injunctive relief. **Doc. 1-2, at 14-19, ¶¶ 44-78**.

487 U.S. 42, 49 (1988) (quoting *United States v. Classic*, 313 U.S. 299, 326 (1941)); *see also Neighborhood Enters., Inc. v. City of St. Louis*, 540 F.3d 882, 885 (8th Cir. 2008) (same). The definition also encompasses instances where "a defendant's conduct satisfies the state-action requirement of the Fourteenth Amendment." *Neighborhood Enters.*, 540 F.3d at 885 (quoting *West*, 487 U.S. at 49). To show a private actor engaged in "state action," the private actor's conduct at issue must be "fairly attributable" to the State. *Meier v. City of St. Louis, Mo.*, 78 F.4th 1052, 1058 (8th Cir. 2023) (quoting *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 929 (1982)). In other words, "the deprivation must be caused by the exercise of some right or privilege created by the State . . . or by a person for whom the State is responsible," and "the party charged with the deprivation must be a person who may fairly be said to be a state actor." *Lugar*, 457 U.S. at 937. These limits are extremely important to protect private parties from constitutional litigation. *Id.*

Plaintiff has failed to demonstrate that Defendants Blevins and Greiert are persons acting under color of state law or state actors. He admits that Defendants are and were private actors at all relevant times, and he does not allege that Defendants ever acted with the State's authority or represented that they had such authority. Accordingly, the claims against them must be dismissed.

First, Plaintiff admits that neither Defendant serves in any governmental capacity. **Doc. 1-2 at 8 ¶ 28, 14 ¶ 39**. Plaintiff admits that Defendant Blevins "is" and was at all relevant times "the Senior Pastor of Grace Calvary Chapel, which is a tax exempt 501(c)(3) religious institution." ***Id.* at 8 ¶ 28**. (Among the extraordinary relief Plaintiff requests against this alleged state actor is "[r]ecission of Grace Calvary Tax Exempt status," which only further demonstrates Defendant Blevins's private status. ***Id.* at 20**.) Plaintiff also admits that Defendant Greiert was the Buchanan County Republican Central Committee Chair at all relevant times. ***Id.* at 14 ¶ 39**. He identifies no power that Defendants had or exercised "by virtue or state law" or under "the authority of state

law." *West*, 487 U.S. at 49 (quoting *Classic*, 313 U.S. at 326). Thus, Defendants are not traditional "persons" for purposes of 42 U.S.C. § 1983.

Second, Plaintiff does not even attempt to claim that Defendants engaged in activities that could be "fairly attributable" to the State. *Lugar*, 457 U.S. at 929. Plaintiff does not claim that Defendants' allegedly unlawful conduct (*i.e.* protected First Amendment activities of speaking, preaching, and petitioning their government) had their "source in state authority." *Id.* at 939. The State never delegated any power to Defendants; Defendants already possessed the rights to engage in these protected activities as private citizens by virtue of the First Amendment. *Cf. Doe v. N. Homes, Inc*., 11 F.4th 633, 638 (8th Cir. 2021). Plaintiff thereby fails to draw the requisite connection between the City and Defendants.

Nonetheless, Plaintiff alleges that the connection existed because Defendants "deeply advocated and influenced the Defendant Council Members and Josendale" and these advocacy efforts somehow turned Defendants into "agent[s] of the City of St. Joseph." **Doc. 1-2 at 14 ¶¶ 38, 41**. But a party does not become an agent merely by influencing the principal.

And in fact, all Plaintiff's factual allegations in support of this "agency" theory entirely disprove it. Plaintiff's only allegations of Defendants' conduct involve the exercise of Defendants' rights to free speech, rights to free exercise of religion, rights to association, and rights to petition their government as private citizens under the First Amendment. His "gotcha" evidence? Merely that "Defendant Greiert wrote" to the Mayor and City Council as a private citizen, **Doc. 1-2 at 14 ¶¶ 40-41**, and that "Defendant Blevins wrote" to the City Council, "posted . . . on his personal Facebook page," and "preached" a sermon at his church as a private citizen, ***id.* at 8 ¶¶ 27, 29; *id.* at 10 ¶ 34**. All these allegedly "unlawful" activities taken by Defendants are quintessential private actions protected by the First Amendment. If such activities were enough to prove Defendants

were state actors, every single private person who writes to a government official, casts a vote, or expresses an opinion on a political or religious issue could be liable under § 1983. Plaintiff does not even allege that Defendants did any of these activities at the bequest of the government or under its authority. Defendants acted of their own free, private volition. Thus, none of Defendants' conduct can be "attributed to" the government. *Lugar*, 457 U.S. at 940. Plaintiff, "therefore, does not state a cause of action under § 1983 but challenges only private action." *Id*. Thus, the Court should dismiss the claims against them.

B. Defendants are not state actors under the U.S. Constitution.

Plaintiff has likewise failed to satisfy the state action requirement of the First and Fourteenth Amendments to bring his claims against Defendants. 42 U.S.C. § 1983 requires him to show a "deprivation of any rights, privileges, or immunities secured by the Constitution and laws." Plaintiff alleges that he has suffered a deprivation of his First and Fourteenth Amendment rights. **Doc. 1-2 at 14-19, ¶¶ 44-78**. However, to allege a deprivation of those rights, he must show that a *state actor* injured him. *See Lugar*, 457 U.S. at 929 (noting that a person can only allege a deprivation of Fourteenth Amendment rights against a state actor); *Wickersham v. City of Columbia*, 481 F.3d 591, 597 (8th Cir. 2007) (noting that the First Amendment "guards against abridgment through state action alone" and "does not inhibit private restrictions on speech"). The under-color-of-state-law requirements to bring a claim under § 1983 "are, for most practical purposes, identical" to the state-action requirements. *Montano v. Hedgepeth*, 120 F.3d 844, 849 n.9 (8th Cir. 1997) (citing *Lugar*, 457 U.S.at 928). And the same test of whether private action is "fairly attributable" to the State applies in all three contexts. *Lugar*, 457 U.S. at 929 (applying it in the § 1983 and Fourteenth Amendment contexts); *Wickersham*, 481 F.3d at 597 (applying identical *Lugar* test in the First Amendment context). Thus, for the same reasons previously stated,

Plaintiff has not shown that Defendants deprived him of his "rights . . . secured by the Constitution" to make his claims under § 1983. *See supra* Part I.A.

C. Alternatively, if Defendants are to be treated as state actors, they are entitled to absolute legislative immunity.

"It is well established that federal, state, and regional legislators are entitled to absolute immunity from civil liability for their legislative activities." *Bogan v. Scott-Harris*, 523 U.S. 44, 46 (1998). This immunity extends to the local St. Joseph City Council and to other "local officials performing legislative functions" who are not legislators, such as mayors. *Id*. It is a functional test that applies when any person engages in a legislative activity. The Supreme Court has construed "legislative activities" broadly to include instances when a legislative body "vot[es] for" and "eliminat[es] the government office" of a government employee. *Id*. (holding that officials who fired an employee for constitutionally protected speech in violation of the First Amendment were absolutely immune from any liability because this action was legislative). Here, Plaintiff's alleged injury (which is not even a cognizable constitutional injury, *see infra* Part I.D) was entirely due to legislative activity. Specifically, he alleges he incurred an injury because the City Council voted to not appoint Plaintiff to a subsequent term on the Library Board. **Doc. 1-2 at 2 ¶ 1, 14 ¶ 43**. Such "acts of voting" are "quintessentially legislative." *Bogan*, 523 U.S. at 55. Thus, even if Defendants are deemed state actors, which they are not, they are entitled to absolute legislative immunity because Plaintiff alleges that their activities were taken alongside the legislators on City Council; any alleged "wrongdoing" is legislative in nature.

D. Alternatively, if Defendants are state actors, they must be given qualified immunity.

Even if Defendants are state actors (which they are not), and even if they would not be entitled to absolute immunity for any legislative activities if deemed state actors (which they would

be), Defendants still could not be held liable. That's because they would be entitled to qualified immunity. Defendants did not violate Plaintiff's constitutional rights, much less his *clearly established* constitutional rights. Therefore, the claims against them must be dismissed. *Estate of Nash v. Folsom*, 92 F.4th 746, 754 (8th Cir. 2024).

"Qualified immunity shields a public official from liability for civil damages when his 'conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Blazek v. City of Iowa City*, 761 F.3d 920, 922 (8th Cir. 2014) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). "'Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments,' and 'protects all but the plainly incompetent or those who knowingly violate the law.'" *Stanton v. Sims*, 571 U.S. 3, 6 (2013) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011)). For the law to be clearly established, "existing precedent must have placed the constitutional question beyond debate" at the time of the alleged violation. *al-Kidd*, 563 U.S. at 741. The contours of the right must be so clear that "every 'reasonable official would [have understood] that what he is doing violates that right.'" *Id*. (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). Thus, government officials are presumably entitled to qualified immunity unless the plaintiff establishes both: "1) the evidence, viewed in the light most favorable to the plaintiff, establishes a violation of a constitutional or statutory right; and 2) the right was clearly established at the time of the violation, such that a reasonable official would have known that his or her actions were unlawful." *Masters v. City of Independence*, No. 16-01045-CV-W-GAF, 2018 WL 8188462, at * (W.D. Mo. Oct. 24, 2018). A plaintiff's failure to meet either prong dooms his case. Plaintiff cannot make either showing here.

First, Plaintiff cannot show the right was clearly established. Plaintiff identifies no law, much less clearly established law, that shows Defendants violated his constitutional rights when they engaged in protected First Amendment activity as private citizens. *al-Kidd*, 563 U.S. at 741. Moreover, no reasonable person would have known he was violating Plaintiff's constitutional rights by sending a letter, delivering a sermon in a church, speaking on social media, or otherwise petitioning the government in these circumstances. *Id*.

Second, the facts as alleged by Plaintiff do not demonstrate that Defendants violated his constitutional rights. *Id*. As previously stated, Defendants are not state actors as required to show a deprivation of constitutional rights under the First and Fourteenth Amendments. *See supra* Part I.A-B. And even if they were, Plaintiff fails to meet other essential, glaring elements of each of his claims, rendering each one utterly frivolous.

Count I is frivolous. Plaintiff claims that his right to free speech was violated because he was not nominated and voted into a Library Board position. **Doc. 1-2 at 15, ¶¶ 46-48**. But he has no First Amendment "right" to a Library Board position. The First Amendment protects the rights to free exercise of religion, freedom of speech, freedom of the press, assembly, and petition. U.S. Const. amend. I. Plaintiff's alleged nomination rescission to the Library Board did not deprive him of any of these rights. If this theory were true, a deprivation would occur any time the government terminates an employee, or a candidate does not receive a nomination, or a candidate loses an election. To say it out loud shows how frivolous Count I is.

Count II is frivolous. To make a First Amendment retaliation claim, Plaintiff must show that he engaged in protected First Amendment activity, the government officers took an adverse action against him as a result, and the officers would not have taken the adverse action but for retaliatory animus against him for exercising his First Amendment rights. *Aldridge v. City of St.*

Louis, 75 F.4th 895, 898-99 (8th Cir. 2023). Plaintiff fails to meet this burden at the pleading stage for several reasons.[2] Two will suffice for now: (1) as previously discussed, Defendants Blevins and Greiert are not government officials capable of taking an adverse action against Plaintiff; (2) and even if Defendants Blevins and Greiert were capable of taking adverse action against him, Plaintiff's claim fails because he identifies no such action. The *only* allegedly retaliatory action he identifies is that "Defendants . . . rescinded his Library Board nomination." **Doc. 1-2 at 16, ¶ 57**. Even if this was an adverse action, Plaintiff never alleges that Defendants Blevins and Greiert specifically rescinded his nomination or participated in the decision to do so. Thus, Plaintiff has failed to make a constitutional claim against them. *See Aldridge*, 75 F.4th at 898-99.

Count III is frivolous. Plaintiff alleges that Defendants engaged in a conspiracy to deprive him of his constitutional rights. **Doc. 1-2 at 17, ¶ 65**. To bring a conspiracy claim under § 1983, Plaintiff must show two or more persons had an object to be accomplished, a meeting of the minds on the object or course of conduct to accomplish the object, the completion of one or more unlawful overt acts that injured him, and damages resulted. *Livers v. Schenck*, 700 F.3d 340, 360-61 (8th Cir. 2012). Among other things, Plaintiff must allege "specific facts tending to show a 'meeting of the minds' among the alleged conspirators." *Murray v. Lane*, 595 F.3d 868, 870 (8th Cir. 2010) (quoting *Kearse v. Moffett*, 311 F.3d 891, 892 (8th Cir. 2002) (per curiam)). Plaintiff has failed to do so; he provides no specific facts to show the requisite meeting of the minds of Defendants with the City of St. Joseph or other government officials whereby they decided to deprive Plaintiff of constitutional rights to state a conspiracy claim. Thus, the claims must be dismissed. *See Ashcroft v. Igbal*, 556 U.S. 662, 678-79 ("Threadbare recitals of the elements of a cause of action, supported

[2] Plaintiff also does not establish that any protected speech was the "but-for" reason that he did not receive a nomination, nor does he establish that a nomination rescission is an adverse action, nor does he establish that Defendants had retaliatory animus against him.

by mere conclusory statements, do not suffice . . . [and] where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.'" (quoting Fed. R. Civ. P. 8(a)(2))).

Accordingly, Defendants respectfully ask the Court to dismiss the claims against them.

E. This Court cannot award part of the relief requested.

This Court cannot award part of the relief requested, namely the "[r]ecission of Grace Calvary Tax Exempt status," under the stated cause of action. **Doc. 1-2 at 20**. 42 U.S.C. § 1983 and § 1988 only provide for the award of injunctive relief, damages, and fees. The rescission of Grace Calvary Chapel's tax-exempt status does not qualify as lawful relief under the statute. Moreover, Grace Calvary Chapel's tax-exempt status is wholly "immaterial" and "impertinent" to this cause of action, except to further demonstrate the private nature of Defendant Blevins's comments and the complete lack of evidence of his liability. Fed. R. Civ. P. 12(f). Thus, Defendants respectfully request the Court strike Plaintiff's request for relief to rescind the tax-exempt status pursuant to Fed. R. Civ. P. 12(f).

F. Defendants are entitled to fees under 42 U.S.C. § 1988.

Finally, Defendants request the Court grant them an award of costs and fees as prevailing parties under 42 U.S.C. § 1988. Plaintiff's suit is "frivolous, unreasonable, [and] groundless." *Williams v. City of Carol Junction, Mo*., 523 F.3d 841, 843 (8th Cir. 2008); *see also Milliman v. Howell County, Mo*., No. 6:21-CV-03119-MDH, 2023 WL 4636065 (W.D. Mo. July 11, 2023). It fails to state a claim for multiple independent legal and factual reasons and attempts to prevent Defendants from engaging in protected First Amendment activities. Thus, Defendants respectfully ask for an award of costs and fees incurred in defending this frivolous lawsuit.

II. Plaintiff's claims must be dismissed under Missouri's anti-SLAPP law.

Defendants also respectfully move for this Court to grant a special motion to dismiss pursuant to Missouri's anti-SLAPP law, § 537.528, RSMo, which applies to suits in federal court, *Hallmark Cards, Inc. v. Monitor Clipper Partners, LLC*, 2010 WL 4853848, at *1 (W.D. Mo. Nov. 22, 2010); § 537.528-7, RSMo. ("The provisions of this section shall apply to all causes of actions."). The law provides:

> Any action against a person for conduct or speech undertaken or made in connection with a public hearing or public meeting, in a quasi-judicial proceeding before a tribunal or decision-making body of the state or any political subdivision of the state is subject to a special motion to dismiss, motion for judgment on the pleadings, or motion for summary judgment that shall be considered by the court on a priority or expedited basis to ensure the early consideration of the issues raised by the motion and to prevent the unnecessary expense of litigation.

§ 537.528-1, RSMo. The law broadly applies to lawsuits brought to curtail any speech related to "any meeting established and held by a state or local governmental entity, including without limitations meetings or presentations before state, county, city, town or village councils, planning commissions, review boards or commissions." *Id*. § 537.528-4. The statute "recognizes that many such suits are intended to prevent participation in governmental matters and accelerates the consideration of motions to dispose of such obstructive efforts." *Hallmark Cards, Inc*., 2010 WL 485348, at *1.

Here, Plaintiff has presented such a SLAPP lawsuit that entitles Defendants to a special motion to dismiss and attorneys' fees. Plaintiff alleges that Defendants engaged in unlawful conduct by petitioning and sending letters to City Council in connection with an official meeting. **Doc. 1-2 at 14 ¶ 40**. Plaintiff has thereby brought an action against them for "speech undertaken or made in connection with" a meeting of a "political subdivision of the state" as defined by the statute. § 537.528-1, RSMo. Thus, Defendants are entitled to all relief available under the anti-SLAPP statute, including but not limited to a special motion to dismiss, consideration of the motion

on an expedited basis, suspension of all discovery pending the Court's disposition and exhaustion of all appeals, the award of attorneys' fees and costs to Defendants for defending this action, and all other relief the Court may award.

CONCLUSION

For the foregoing reasons, Defendants respectfully request the Court dismiss all claims against them with prejudice. Defendants request the Court consider this motion "on a priority or expedited basis to ensure the early consideration of the issues raised by the motion and to prevent the unnecessary expense of litigation." § 537.528-1, RSMo. Defendants also request the Court suspend all discovery pending a decision on the motion by Court and the exhaustion of all appeals regarding the special motion. *Id*. Defendants further request the Court grant Defendants' motion and award attorneys' fees and costs incurred by Defendants as the prevailing party pursuant to § 537.528-2, RSMo. and 42 U.S.C. § 1988. Defendants request all other relief the Court deems appropriate.

Dated: March 7th, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 7th, 2024, I caused the above and foregoing to be filed with the Court's electronic CM/ECF filing system, which automatically served counsel for all parties with a notice of filing the same.

/s/ Katherine E. Graves
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