IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
(Western Division)

MARGIE J. PHELPS, et al., **Petitioners,** **vs.** **RED OAK POLICE CHIEF DRUE POWERS, et al.,** **Respondents,** **and** **STATE OF IOWA,** **Intervenor.**	**DOCKET NO. 1:13-cv-00011** **INTERVENOR'S MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

COMES NOW the State of Iowa and submits the following Brief in Support of its Motion for Summary Judgment.

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NATURE OF THE CASE

Petitioners, members of the Westboro Baptist Church in Topeka, Kansas filed a 42 U.S.C. section 1983 claim against Red Oak, Iowa Chief of Police Drue Powers, Montgomery County Sheriff Joe Sampson, and Council Bluff Police Chief Ralph O'Donnell. (Doc. No. 30). Petitioners claim that Iowa Code sections 718A.1A, 718A.6, and 723.4(6) (collectively "Iowa's flag desecration statutes") unconstitutionally infringe both facially and as applied on their rights to free exercise of their religion and freedom of speech under the United States and Iowa Constitutions. (Doc. No. 30). Petitioners have in the past and intend in the future to demonstrate in Iowa, including using privately-owned United States flags. (Doc. No. 30, ¶¶ 22, 32). Petitioners have not alleged arrest, citation, or conviction under the challenged statutes. (Doc. No. 30). The State of Iowa intervened to defend the constitutionality of the statutes.

SUMMARY JUDGMENT STANDARDS

Federal Rule of Civil Procedure 56 governs motions for summary judgment and provides the analytical framework for trial courts to decide these motions. A district court should grant summary judgment when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56. The moving party must show the absence of a material fact and show that it is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553, (1986). A factual issue is material only if the dispute is over facts that might affect the outcome of the lawsuit under governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 317, 323, 106 S. Ct. 2548, 2553 (1986); *Beyerbach v. Sears*, 49 F.3d 1324, 1326 (8th Cir. 1995); *Hartnagel v. Norman*, 953 F.3d 394, 394 (8th Cir. 1992). When considering a motion for summary judgment, the court must view all the facts in the light most favorable to the nonmoving party. *Matushita Elec. Industr. Co. v. Zenith Radio*

Corp., 475 U.S. 574, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986) (quoting *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S.Ct. 993, 994 (1962)); *Munz v. Michael*, 28 F.3d 795, 796 (8th Cir. 1994); *Allison v. Flexway Trucking, Inc.*, 28 F.3d 64, 66 (8th Cir. 1994); *Burk v. Beene*, 948 F.2d 489, 492 (8th Cir. 1991).

STATUTES AT ISSUE

Petitioners challenge the constitutionality of three Iowa statutes. The first is Iowa Code section 718A.1A, entitled "Desecration of flag or insignia," which provides,

> Any person who in any manner, for exhibition or display, shall place or cause to be placed, any word, figure, mark, picture, design, drawing, or any advertisement of any nature, upon any flag, standard, color, ensign, shield, or other insignia of the United States, or upon any flag, ensign, great seal, or other insignia of this state, or shall expose or cause to be exposed to public view, any such flag, standard, color, ensign, shield, or other insignia of the United States, or any such flag, ensign, great seal, or other insignia of this state, upon which shall have been printed, painted, or otherwise placed, or to which shall be attached, appended, affixed, or annexed, any word, figure, mark, picture, design, or drawing, or any advertisement of any nature, or who shall expose to public view, manufacture, sell, expose for sale, give away, or have in possession for sale, or to give away, or for use for any purpose any article or substance, being an article of merchandise or a receptacle of merchandise or article or thing for carrying or transporting merchandise, upon which shall have been printed, painted, attached or otherwise placed, a representation of any such flag, standard, color, ensign, shield, or other insignia of the United States, or any such flag, ensign, great seal, or other insignia of this state, to advertise, call attention to, decorate, mark, or distinguish the article or substance on which so placed, or who shall publicly mutilate, deface, defile or defy, trample upon, cast contempt upon, satirize, deride or burlesque, either by words or act, such flag, standard, color, ensign, shield, or other insignia of the United States, or flag, ensign, great seal, or other insignia of this state, or who shall, for any purpose, place such flag, standard, color, ensign, shield, or other insignia of the United States, or flag, ensign, great seal, or other insignia of this state, upon the ground or where the same may be trod upon, shall be deemed guilty of a simple misdemeanor.

The second statute, Iowa Code section 718A.6 imposes a duty upon sheriffs, chiefs of police, and city marshals to enforce section 718A.1A. Iowa Code § 718A.6. Failure to enforce section 718A.1A is ground for removal from office. *Id.* The final statute challenged is Iowa Code section 723.4(6). Iowa Code section 723.4 defines the simple misdemeanor of disorderly

conduct. One of the ways to commit disorderly conduct in Iowa is to "[k]knowingly and publicly use[] the flag of the United States, with the intent or reasonable expectation that such use will provoke or encourage another to commit trespass or assault." Iowa Code § 723.4(6)(*a*).

ARGUMENT

I. Petitioners Do Not Have Constitutional Standing.

This is a U.S.C. 42 section 1983 challenge. (Doc. No. 30). Petitioners challenge the constitutionality of Iowa's flag desecration statutes "both facially and as applied to their religious and expressive beliefs and activities." (Doc. No. 30, ¶ 42). Petitioners, however, do not have constitutionality standing to bring these claims. " 'Standing, whether constitutional or prudential, is a jurisdictional issue which cannot be waived or conceded.' " *Roe v. Milligan*, 479 F. Supp. 2d 995, 1002 (S.D. Iowa 2007) (quoting *Animal Legal Defense Fund, Inc. v. Espy*, 29 F.3d 720, 723 n.2 (D.C. Cir. 1994)). To demonstrate constitutional standing under Article III, Petitioners must show:

> (1) an "injury in fact that is both (a) concrete and particularized, and (b) actual or imminent, rather than conjectural or hypothetical; (2) a causal connection between the alleged injury and the defendant's conduct; that is, that the injury is "fairly traceable" to the challenged action; and (3) that it is likely that a favorable decision will redress the injury."

Id. (quoting *Ben Oehrleins & Sons & Daughter, Inc. v. Hennepin County*, 115 F.3d 1372, 1378 (8th Cir. 1997). Petitioners do not suffer from an "injury in fact" that is both concrete and actual or imminent.

This issue was thoroughly explored in the last challenge to Iowa's flag desecration statutes, *Roe v. Milligan*, 479 F. Supp. 2d 995 (S.D. Iowa 2007).[1] In that case, plaintiffs claimed

[1] The constitutionality of Iowa Code section 718A.6 will not be individually addressed. Petitioners seemingly assert that section 718A.6 "is unconstitutional on its face because it requires enforcement of a statute that has been declared facially void for vagueness on constitutionally valid grounds." (Doc. No. 30, ¶ 38). Both section 718A.1A and section 723.4(6) have been amended since the ruling. *See* 2007 Iowa Acts ch. 202, §§ 13, 15. (Doc.

to have been injured by having to give up or hesitating to exercise their First Amendment rights. *See Int'l Ass'n of Firefighters, Local 2665 v. City of Ferguson*, 283 F.3d 969, 973 (8th Cir. 2002). It is not entirely clear, however, from the Complaint what injury Petitioners are alleging. In the introductory section of the Complaint, Petitioners note they "reasonably fear future arrest and prosecution." (Doc. No. 30, p. 2). They also note they "have been censorially chilled in their intentional expressive use of the U.S. Flag and in their religious practices and beliefs concerning handling of the flag." (Doc. No. 30, p. 2). However later in the Complaint, Petitioners refer to the chilling effect on other members of the public. (Doc. No. 30, ¶ 10).

Even if Petitioners are alleging an injury, it is not clear *how* they have been injured or could be injured by use of the flag in the future. The Complaint is silent as to how Petitioners' prior use of the flag was circumvented by the Respondents. The Complaint is further silent as to how Petitioners intend to use the flag in the future. Do they want to burn the flag? Fly it upside down? Drag the flag on the ground? Without even an allegation as to what activity is being chilled or constrained, it is impossible to know whether Petitioners' fear from engaging in that activity is actual and concrete and not merely hypothetical.

Even if Petitioners' alleged injury is construed as the same presented in *Roe*, there is one significant difference between the plaintiffs' subjective fear of prosecution in *Roe* and the Petitioners' fear here—Plaintiff Roe was charged with violating Iowa Code section 718A.1A and Plaintiff Klyn was charged with violating Iowa Code section 723.4(6). *Roe*, 479 F. Supp. 2d at 998–99. The Petitioners do not allege that they have been cited for or arrested under any of the challenged statutes. (Stmt. of Undisputed Facts ¶ 3). Under these circumstances, Petitioners' fears of injury are wholly speculative. Admittedly there has been no affirmative resurgence from

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No. 51, ¶ 15). Moreover, Petitioners are not asserting a void-for-vagueness challenge under the Fourteenth Amendment. It thus does not appear that Petitioners are asserting a separate challenge to the constitutionality of section 718A.6.

the Respondents that Petitioners will not be arrested and prosecuted under these statutes. Law enforcement training material produced by the State of Iowa, however, reveals that law enforcement officials in Iowa are trained that section 718A.1A and 723.4(6) have been declared unconstitutional. (Stmt. of Undisputed Facts, ¶ 6). As a result, this case is similar to *Lawson v. Hill*, 368 F.3d 995 (7th Cir. 2004), and *Winsness v. Yocom*, 433 F.3d 727 (10th Cir. 2006).

II. Iowa's Flag Desecration Statutes Do Not Unconstitutionally Infringe Upon Petitioners' Right to Free Exercise of Religion.[2]

The United States Supreme Court has long held, "Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs." *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 594–95, 60 S. Ct. 1010, 1012–13 (1940). The Court has applied this principle to uphold laws concerning polygamy, *Reynolds v. United States*, 98 U.S. 145 (1878), child labor, *Prince v. Massachusetts*, 321 U.S. 158, 64 S. Ct. 438 (1944), Sunday closing, *Braunfield v. Brown*, 366 U.S. 599, 81 S. Ct. 1144 (1961) (plurality opinion), the military Selective Service System, *Gillette v. United States*, 401 U.S. 437, 91 S. Ct. 828 (1971), the Social Security System, *United States v. Lee*, 455 U.S. 252, 102 S. Ct. 1051 (1982), and criminalization of controlled substances, *Employment Div. v. Smith*, 494 U.S. 872, 110 S. Ct. 1595 (1990).[3] This principle is based on the simple contention that the Free Exercise Clause protects beliefs, not conduct. *Smith*, 494 U.S. at 882, 110 S. Ct. at 1602.

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[2] Petitioners claim that Iowa's flag desecration statutes violate both the First Amendment of the Federal Constitution and Article I, section 3 of the Iowa Constitution. The Iowa Supreme Court has held that Iowa's provision "has a common origin and parallel history with the First Amendment to the United States Constitution." *Rudd v. Ray*, 248 N.W.2d 125, 130 (Iowa 1976). As a result, the claim under the Iowa Constitution will not be separately analyzed. In any event, Petitioners cannot bring a claim under the Iowa Constitution in a section 1983 claim.

"[A] law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 531-32, 113 S. Ct. 2217, 2226 (1993). Neutral laws survive constitutional challenge if the laws' universal requirements are rationally related to a legitimate governmental purpose. *Smith*, 494 U.S. at 876-81, 110 S. Ct. at 1599-1602. To determine if a law is neutral, the court must first look to the statutory text. *Church of Lukumi Babalu Ave*, 508 U.S. at 533, 113 S. Ct. at 2226. "A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernible from the language or context. . . ." *Id.* Facial neutrality, however, is not wholly dispositive. "The Free Exercise Clause protects against governmental hostility which is masked as well as overt. The Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders." *Id.* at 534, 113 S. Ct. at 2227.

All three of Iowa's flag desecration statutes survive facial neutrality. None of the disputed statutes explicitly refers to a particular religion or includes religiously charged language like "sacrifice," "idol," or "ritual."[4]

A meticulous survey of the statutes further fails to reveal overt government hostility towards the Petitioners or the Petitioners' religion.[5] These statutes have a long history in Iowa.

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[3] *Smith* was later abrogated by statute, the Religious Freedom Restoration Act (RFRA). The United States Supreme Court, however, determined that RFRA could not be constitutionally applied to the states. *City of Boerne v. Flores*, 521 U.S. 507, 511, 117 S. Ct. 2157 (1997).

[4] Some circuits have adopted a "hybrid rights" theory. Under the "hybrid rights" theory, a "generally applicable regulation is subject to strict scrutiny if it 'incidentally burdens rights protected by the Free Exercise Clause in conjunction with other constitutional protections.' " *Brown n. City of Pittsburgh*, 586 F.3d 263, 284 (3d Cir. 2009) (quoting *Tenafly Eruv Ass'n v. Tenafly*, 309 F.3d 144, 165 n.26 (3d Cir. 2002)). It is not clear whether the Eighth Circuit has adopted this "hybrid rights" theory. *Cornerstone Bible Church v. City of Hastings*, 948 F.2d 464, 473 (8th Cir. 1991)). In any event, Petitioners have brought a secondary claim for freedom of speech. Petitioners "hybrid rights" claim would be analyzed in the same fashion as their freedom of speech claim.

[5] Nothing in the record details the religious basis for the Petitioners' desire to desecrate or misuse the United States flag. See Doc. 30 ¶ 4. Moreover, Petitioners assert they are bringing both an as applied challenge and

See State v. Waterman, 190 N.W.2d 809 (Iowa 1971). There is no evidence in the record or in published cases that these statutes have been used to target particular religious groups or to attack particular religious beliefs. *Id.*; *Roe*, 479 F. Supp. 2d at 995. The challenged laws are also generally applicable. Iowa Code chapter 718A's apparent purpose is to prevent the desecration of the United States and Iowa flags. Section 723.4's purpose is to maintain the public order. There is no evidence in the record that the laws were passed in response to a longstanding religious practice. *See Mitchell County v. Zimmerman*, 810 N.W.2d 1, 11 (Iowa 2012) (finding steel wheel ordinance passed in response to Amish use of steel wheel tractors). Finally, there is only one exception to Iowa's flag desecration law—when a flag retirement ceremony is conducted pursuant to federal law. Iowa Code § 718A.7. This exception, however, only reinforces the purpose of chapter 718A and does not evidence a religiously-hostile motivation. *See Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1115–17 (9th Cir. 2009), *abrogated on other grounds by Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22, 129 S. Ct. 365, 376 (2008) (finding law of general applicability even though there were exceptions when exceptions reinforced the law's purpose). "Absent evidence of an 'intent to regulate religious worship,' a law is a neutral law of general applicability." *Olsen v. Mukasey*, 541 F.3d 827, 832 (8th Cir. 2008) (quoting *Cornerstone Bible Church v. City of Hastings*, 948 F.2d 464, 472 (8th Cir. 1991)).

Because Iowa's flag desecration laws are facial neutral and are generally applicable, they will not offend the Free Exercise Clause if they are rationally related to a legitimate government interest. As noted previously, the government has an interest in both protecting the sanctity of the flag and maintaining the public order. *Waterman*, 190 N.W.2d at 811.

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facial challenge to Iowa's flag desecration statutes. It's unclear whether Petitioners can bring a facial challenge to a Free Exercise Clause claim or what other religious practice or religion is affected by Iowa's flag desecration laws.

III. Iowa's Flag Desecration Statutes Do Not Unconstitutionally Infringe on Petitioners' Right to Freedom of Speech.

As noted previously, Petitioners challenge Iowa's flag desecration statutes both facially and as applied under both the United States and Iowa Constitutions.[6] The First Amendment mandates that the government "shall make no law . . . abridging the freedom of speech." U.S. Const. amend I. Imposing criminal sanctions on "protected speech is a stark example of speech suppression." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 244, 122 S. Ct. 1389, 1398 (2002). Although both statutes in question are misdemeanors, Iowa Code sections 718A.1A and 723.4, "even minor punishments can chill protected speech." *Id.*; *see also Wooley v. Maryland*, 430 U.S. 705, 97 S. Ct. 1428 (1977).

Turning first to Petitioners facial challenge, because of the great importance of First Amendment freedoms, federal jurisprudence allows individuals to bring a facially overbroad challenge. *State v. Milner*, 571 N.W.2d 7, 13 (Iowa 1997). There are two types of overbroad challenges. In the first, "Plaintiffs 'must demonstrate that the challenged law[s] . . . "could never be applied in a valid manner." ' " *Roe*, F. Supp. 2d at 1005 (quoting *N.Y. State Club Ass'n, Inc. v. City of New York*, 478 U.S.1, 11, 108 S. Ct. 2225, (1988). In the second, a statute can violate the First Amendment and be overly broad if "(1) it substantially proscribes protected speech 'judged in relation to the statute's plainly legitimate sweep,' and (2) the court cannot narrow the statute to cover only nonprotected speech." *Milner*, 571 N.W.2d at 13 (quoting *Osborne v. Ohio*, 495 U.S. 103, 112, 110 S. Ct. 1691, 1697 (1990).

[6] The Iowa Supreme Court has held "the Iowa Constitution generally imposes the same restrictions on regulation of speech as does the federal constitution." *State v. Milner*, 571 N.W.2d 7, 12 (Iowa 1997); *Des Moines Register & Tribune Co. v. Osmundson*, 248 N.W.2d 493, 498 (Iowa 1976). As a result, Intervenors will not separately address the claim under the Iowa Constitution. In any event, Petitioners cannot bring a claim under the Iowa Constitution in a section 1983 claim.

The facial validity of Iowa's flag desecration has been vindicated by both state and federal courts. First, both state and federal courts have noted that Iowa's flag desecration statutes can be constitutionally applied. Forty years ago, the Iowa Supreme Court held that the flag desecration statute could be constitutionally applied to an individual who wore the United States flag as a poncho without any expressive purpose. *Iowa v. Waterman*, 190 N.W.2d 809, 813 (Iowa 1971). This court likewise found that Iowa's statutes could be applied to a tired person who drug the flag through the mud without thought of expressing an idea. *Roe*, 479 F. Supp. 2d at 1006; *see also Texas v. Johnson*, 491 U.S. 397, 109 S. Ct. 2533 (1989).

In order to prevail on the second type of overbreadth challenge, Petitioners must show there is " 'a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court.' " *Roe*, 479 F. Supp. 2d at 1006 (quoting *N.Y. State Club Ass'n*, 487 U.S. at 11, 108 S. Ct. 2225). This court rejected such a challenge to Iowa's flag desecration statutes in *Roe*, 470 F. Supp. 2d at 1006. In *Roe*, this court found (1) that Plaintiffs had "not made a showing that the statutes at issue pose a 'realistic danger' of 'substantially' deterring or chilling constitutionally protected speech or conduct of other parties;" (2) that the statutes' application to protected speech is not substantial because the statutes can be constitutionally applied in numerous circumstances; and (3) "the danger of the statutes substantially deterring or chilling constitutionally protected speech of conduct of parties not before the Court does not seem realistic." *Id.* at 1007–08. A different result is not warranted here, especially in light of this court's ruling on Plaintiff's attempt to certify a class. *See Phelps v. Powers*, 295 F.R.D. 349, 354 (S.D. Iowa 2013) (holding that Petitioners does not have standing to class action because they had not alleged injury to all members of the class).

In addition to their facial challenge, Petitioners also assert that the statutes violated their right to free speech as applied. The First Amendment, of course, not only protects the written or spoken word, but also protects conduct when the person engaging in the conduct intends to express an idea. *Johnson*, 491 U.S. at 404, 109 S. Ct. at 2539. The United States Supreme Court has recognized that a myriad of conduct in connection with flag constitutes communicative speech. *Id.* at 404–05, 109 S. Ct. at 2539–40. Such expressive conduct can include attaching a peace sign to the flag, *Spence v. Washington*, 418 U.S. 405, 94 S. Ct. 2727 (1974), refusing to salute the flag, *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 63 S. Ct. 1178 (1943), displaying a red flag, *Stromberg v. California*, 283 U.S. 359, 51 S. Ct. 532 (1931), and even burning the flag, *Johnson*, 491 U.S. at 397, 109 S. Ct. at 2533.

As noted previously, however, despite the symbolism inherent in the flag, not all conduct associated with the flag is automatically expressive and thus within the ambit of the First Amendment. *Id.* Although Petitioners assert an "expressive" use of the flag, it is not at all clear from the Complaint what manner and for what purpose Petitioners intend to use the flag. The clearest intent expressive use of the flag from the Complaint lies in paragraph 4. There the Petitioners note an intention to show an "absence of respect for the United States flag and the elimination of that flag as an idolatrous symbol. . . ." (Doc. No. 30, ¶ 4). The expressive intention is reflective of Petitioners' Free Exercise Clause claim, which was addressed above. Petitioners have not alleged an intention to desecrate or misuse the flag for any other expressive purpose independent of their religious beliefs. As such, Petitioners as applied challenge is not materially different from the facial overbreadth challenge.

CONCLUSION

For the reasons expressed above, the State of Iowa respectfully requests that its motion for summary judgment be granted. Should summary judgment, however, be granted in favor of the Plaintiffs, the proper remedy is solely declaratory relief. *See Roe*, 479 F. Supp. 2d at 1014 (declining to issue preliminary and permanent injunctive relief preventing future enforcement of the statutes on the presumption that Iowa prosecutorial authorities will give full credence to the court's decision).

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All parties were served electronically.

Proof of Service

The undersigned certifies that the foregoing instrument was served upon each of the persons identified as receiving a copy by delivery in the following manner on the 14th day of May, 2014.

___ U.S. Mail	___FAX
___ Hand Delivery	___Overnight Courier
___ Federal Express	___Other
___ E-mail	_X_ Electronically ECF System

Signature: /s/ Lisa Wittmus