UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

BARBARA BEAVERS, ET AL.	PLAINTIFFS
V.	CIVIL ACTION NO. 3:19-CV-735-DPJ-FKB
CITY OF JACKSON, MISSISSIPPI	DEFENDANT

ORDER

This challenge to a City of Jackson Ordinance "Prohibiting Certain Activities Near Health Care Facilities" is before the Court on a motion to remand. The sole question raised in the motion is whether the Court has subject-matter jurisdiction. The Court finds that it does not. Therefore, Plaintiffs' motion to remand [3] is granted.

I. Background

Barbara Beavers, Monica Cable, Laura Knight, and Pamela Miller (collectively "Plaintiffs") volunteer for Sidewalk Advocates for Life, a group that "regularly provide[s] information about alternatives to abortion to individuals patronizing the Jackson Women's Health Organization, an abortion facility located in Jackson, Mississippi[.]" Pls.' Notice of Appeal [1-1] ¶¶ 11, 14. In accordance with the organization's mission, Plaintiffs "regularly congregate with others near the entrance of the property of the abortion facility, in order to engage in speech," sometimes shouting at the facility's patrons. *Id.* ¶¶ 15–16.

In October 2019, Defendant City of Jackson, Mississippi ("the City"), adopted an ordinance that places limits on how close persons can come to others for the purpose of distributing information/protesting. *Id.* ¶ 20. The ordinance also restricts how close to the Jackson Women's Health Organization and its entrance persons can protest. *Id.* ¶¶ 21–22.

Pursuant to Mississippi Code § 11-51-75, Plaintiffs appealed the City's decision to enact the ordinance to the Circuit Court of Hinds County, Mississippi. They allege that the ordinance violates their right to (1) free speech under article 3, section 13 of the Mississippi Constitution; (2) peacefully assemble under article 3, section 11 of the Mississippi Constitution; (3) due process of law under article 3, section 14 of the Mississippi Constitution; and (4) equal protection of the law under article 3, section 14 of the Mississippi Constitution. Pls.' Notice of Appeal [1-1] ¶¶ 34–70. They also say the ordinance was "beyond the scope or power granted to the Jackson City Council by statute, . . . was not supported by substantial evidence, . . . [and] was arbitrary and capricious[.]" *Id.* ¶¶ 71–73.

In their Notice of Appeal, Plaintiffs studiously avoid premising any of their claims on the United States Constitution. They do, however, state that "Article 3, Section 13 of the Mississippi Constitution is more protective of the individual's right to freedom of speech than is the First Amendment to the United States Constitution, since the Mississippi Constitution makes free speech worthy of religious veneration." Pls.' Notice of Appeal [1-1] ¶ 35.

The City removed the case claiming that "arising under" or "federal question" jurisdiction existed under 28 U.S.C. § 1331. Def.'s Notice of Removal [1] at 1. Plaintiffs now seek remand, contending that this Court lacks subject-matter jurisdiction. They also seek attorneys' fees and costs.

II. Standard

Under 28 U.S.C. § 1441(a), any state-court case "of which the district courts of the United States have original jurisdiction" may be removed to federal court. "The removing party bears the burden of showing that federal jurisdiction exists and that removal is proper." *Manguno v. Prudential Prop. & Cas. Ins. Co.*, 276 F.3d 720, 723 (5th Cir. 2002). Accordingly,

"[a]ny ambiguities are construed against removal because the removal statute should be strictly construed in favor of remand." *Id.*

Federal courts have federal-question jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. "Under the well-pleaded complaint rule, 'a federal court has original or removal jurisdiction only if a federal question appears on the face of the plaintiff's well-pleaded complaint; generally, there is no federal jurisdiction if the plaintiff properly pleads only a state law cause of action.'" *Gutierrez v. Flores*, 543 F.3d 248, 251–52 (5th Cir. 2008) (quoting *Bernhard v. Whitney Nat'l Bank*, 523 F.3d 546, 551 (5th Cir. 2008)).

III. Analysis

A. Jurisdiction

In its Notice of Removal, the City says there are three bases for jurisdiction: (1) Plaintiffs' free-speech claim raises a substantial federal issue under the First Amendment; (2) Plaintiffs' allegation that the Mississippi Constitution makes "free speech worthy of religious veneration" raises a claim under the federal Establishment and Free Exercise Clause; and (3) Plaintiffs assert that their rights under the Mississippi Constitution "supersede the Due Process and Equal Protection provision of the United States Constitution," thereby implicating the Supremacy Clause. Notice of Removal [1] ¶¶ 2–4. The City does not contend that Plaintiffs' peaceful-assembly, due-process, or equal-protection claims confer federal jurisdiction. Plaintiffs argue that their challenges to the City's ordinance relies exclusively on state-constitutional grounds and do not implicate the federal constitution.

1. Free Speech

The City acknowledges that Plaintiffs' free-speech claim is raised under state law but argues that the claim is "inextricably entwined with rights created by the United States Constitution" and "at the center of controversial and evolving federal jurisprudence[.]" Def.'s Resp. [9] at 6, 7. Plaintiffs say the Court need not examine the United States Constitution to decide their state-law claim. Pls.' Reply [10] at 5.

"[A] case can 'aris[e] under' federal law in two ways": "when federal law creates the cause of action asserted" or when a "state-law claim necessarily raise[s] a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities[.]" *Gunn v. Minton*, 568 U.S. 251, 257–58 (2013) (quoting *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg*, 545 U.S. 308, 314 (2005)).

Accordingly, the parties dispute the latter avenue to federal jurisdiction, which applies in a "'special and small category' of cases[.]" *Id.* at 258. In such cases, "[a] federal question exists 'only [in] those cases in which a well-pleaded complaint establishes . . . that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law.'" *Singh v. Duane Morris LLP*, 538 F.3d 334, 33–38 (5th Cir. 2008) (quoting *Franchise Tax Bd. v. Constr. Laborers Vacation Tr.*, 463 U.S. 1, 27–28 (1983)). So "federal jurisdiction over a state law claim will lie if a federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress." *Gunn*, 568 U.S. at 258.

Here, Plaintiffs brought this action pursuant to section 11-51-75 of the Mississippi Code. Pls.' Notice of Appeal [1-1] ¶ 1. The statute permits "[a]ny person aggrieved by a judgment or

decision of the board of supervisors of a county, or the governing authority of a municipality" to "appeal the judgment or decision to the circuit court of the county in which the board of supervisors is the governing body or in which the municipality is located." Miss. Code. § 11-51-75. Plaintiffs use this statute to challenge the City's ordinance under article 3, sections 11, 13, and 14 of the Mississippi Constitution. Pls.' Notice of Appeal [1-1] ¶¶ 37, 50, 63, 70. Thus, if federal-question jurisdiction exists, Plaintiffs' free-speech claim must "necessarily raise a stated federal issue, actually disputed and substantial[.]" *Gunn*, 568 U.S. at 258.

The Fifth Circuit faced a nearly identical legal issue under Texas law in *Carpenter v. Wichita Falls Independent School District*, 44 F.3d 362 (5th Cir. 1995), *abrogated on other grounds by Rivet v. Regions Bank of La.*, 522 U.S. 470 (1998). In *Carpenter*, a school-district employee filed suit in Texas court alleging a violation of his free-speech rights under the Texas constitution as well as a state-law contract claim. *Id.* at 365. Like the City in this case, the school district in *Carpenter* argued that the employee's free-speech claim was "'essentially' a federal claim in disguise." *Id.* at 367. The Fifth Circuit rejected the school district's argument, holding that it "disregard[ed] principles of federalism; it ignore[d] the superiority of state-court forums for state-law claims and denigrate[d] the state's authority to fashion independent constitutional law." *Id.* Additionally, the court explained that Texas courts' "reliance on the rules and reasoning of federal constitutional case law and scholarship in no way diminishe[d] the independence of the state right." *Id.* at 368. Thus, the Fifth Circuit concluded that "the Texas constitutional right to free speech is not essentially federal, and to present a Texas constitutional claim is not necessarily to present a federal claim." *Id.*

The same reasoning applies here. "'It is fundamental . . . that state courts be left free and unfettered . . . in interpreting their state constitutions.'" *Florida v. Powell*, 559 U.S. 50, 56

(2010) (quoting *Minnesota v. Nat'l Tea Co.*, 309 U.S. 551, 557 (1940)). This is because "a state court is entirely free to read its own State's constitution more broadly than [federal courts] read[] the Federal Constitution, or to reject the mode of analysis used by [federal courts] in favor of a different analysis of its corresponding constitutional guarantee." *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 293 (1982).

Mississippi courts have interpreted the state's free-speech clause many times before. *See, e.g.*, *PHE, Inc. v. State*, 877 So. 2d 1244 (Miss. 2004); *Richmond v. City of Corinth*, 816 So. 2d 373 (Miss. 2002); *Jeffries v. State*, 724 So. 2d 897 (Miss. 1998); *City of Meridian v. Meadors*, 222 So. 3d 1045 (Miss. Ct. App. 2016). Although they often cite federal constitutional decisions when interpreting Mississippi's free-speech clause, this does not necessarily raise a federal issue. *Carpenter*, 44 F.3d at 368. Indeed, the Mississippi Supreme Court has indicated that the Mississippi Constitution may offer broader protection than the First Amendment. *See Gulf Pub. Co. v. Lee*, 434 So. 2d 687, 696 (Miss. 1983) ("We are of the opinion, without deciding, that Article 3, Section 13 [of the Mississippi Constitution] by modern-day standards, appears to be more protective of the individual's right to freedom of speech than does the First Amendment since our constitution makes it worthy of religious veneration.") (quoting *ABC Interstate Theatres, Inc. v. State*, 325 So. 2d 123, 127 (Miss. 1976)). It is up to Mississippi's courts to interpret the state's constitution and develop the state's constitutional law.

Accordingly, Plaintiffs' free-speech claim does not raise a federal issue. Rather, it requires interpretation of the Mississippi Constitution, which is not coextensive with the First Amendment in all cases. In other words, "resolution of a federal [law] question is [not]

'necessary' to [Plaintiffs'] case." *Gunn*, 568 U.S. at 259. Thus, the case does not "aris[e] under" federal law.[1]

2. Free Exercise/Establishment Clause

Plaintiffs say the reference to "religious veneration" in their Notice of Appeal does not raise a federal issue because it is a direct quote from the Mississippi Supreme Court explaining why the state's free-speech clause is more protective than the First Amendment. Pls.' Mem. [4] at 6. Because there was no response to this argument, the Court takes the point as conceded by the City. Even if it were not conceded, the Court finds no merit in the City's assertion of jurisdiction under the Free Exercise/Establishment Clause.

3. Supremacy Clause

According to the City, Plaintiffs implicate the Supremacy Clause of the United States Constitution by asserting that their rights under the Mississippi Constitution supersede the federal constitutional rights of other citizens. Def.'s Resp. [9] at 12. Plaintiffs respond that this is merely an anticipated defense. Pls.' Rebuttal [10] at 12.

The U.S. Constitution's Supremacy Clause "creates a rule of decision: Courts 'shall' regard the 'Constitution,' and all laws 'made in Pursuance thereof,' as 'the supreme Law of the Land.'" *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 324 (2015) (quoting U.S. Const. art VI, cl. 2). "It is equally apparent that the Supremacy Clause in not the source of any federal rights, and certainly does not create a cause of action." *Id.* at 324–25 (internal quotation marks and citations omitted).

[1] To the extent that the City invokes the "artful pleader" doctrine, *Carpenter* also rejects such an argument. The Fifth Circuit explained that the doctrine applies only "*when the plaintiff has no state claim at all*." *Carpenter*, 44 F.3d at 367 (emphasis in original). Plaintiffs in this case have viable claims under the Mississippi Constitution and section 11-51-75 of the Mississippi Code.

Plaintiffs' cause of action arises under state law, not the Supremacy Clause. Plaintiffs' Notice of Appeal does not allege that the City's ordinance conflicts with federal law or that Plaintiffs' rights trump anyone else's. Rather, this is a defense that the City apparently intends to assert. Indeed, in the City's own brief it says Plaintiffs "overlook the potential conflict *identified by the City*[.]" *Id.* at 12 (emphasis added). "Federal jurisdiction cannot be predicated on an actual or anticipated defense[.]" *Vaden v. Discover Bank*, 556 U.S. 49, 60 (2009) (citing *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149, 152 (1908)). The face of Plaintiffs' Notice of Appeal does not raise a federal issue under the Supremacy Clause. The Court thus lacks subject-matter jurisdiction.

B. Fees and Costs

Plaintiffs say they are entitled to attorneys' fees and costs under 28 U.S.C. § 1447(c) because the City did not have an objectively reasonable basis for removing the action. The City says that they are not entitled to costs and fees because federal jurisdiction is proper. Def.'s Resp. [9] at 14.

Section 1447(c) provides that "[a]n order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." 28 U.S.C. § 1447(c). "'[T]here is no automatic entitlement to an award of attorney's fees.'" *Am. Airlines, Inc. v. Sabre, Inc.*, 694 F.3d 539, 541 (5th Cir. 2012) (quoting *Valdes v. Wal-Mart Stores, Inc.*, 199 F.3d 290, 292 (5th Cir. 2000)). Additionally, "[t]he statute does not embody either a strong preference for or a strong preference against fee awards." *Admiral Ins. Co. v. Abshire*, 574 F.3d 267, 280 (5th Cir. 2009).

The Supreme Court has explained that "[t]he appropriate test for awarding fees under § 1447(c) should recognize the desire to deter removals sought for the purpose of prolonging

litigation and imposing costs on the opposing party, while not undermining Congress' basic decision to afford defendants a right to remove as a general matter[.]" *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 140 (2005). Thus, "[a]bsent unusual circumstances, courts may award attorney's fees under § 1447(c) only where the removing party lacked an objectively reasonable basis for seeking removal. Conversely, when an objectively reasonable basis exists, fees should be denied." *Id.* at 141. "A fee award is inappropriate if the removing party 'could conclude from [existing] case law that its position was not an unreasonable one.'" *Probasco v. Wal-Mart Stores Texas, L.L.C.*, 766 F. App'x 34, 37 (5th Cir. 2019) (quoting *Valdes*, 199 F.3d at 293).

The Court is hard-pressed to find a reasonable basis justifying removal in this case. All of Plaintiffs' claims allege that the ordinance violated their rights under the Mississippi Constitution. As to Plaintiffs' free-speech claim, the City said that Plaintiffs necessarily raised a federal issue because their claim concerns an abortion-related law, which "is at the center of controversial and evolving federal jurisprudence[.]" Def.'s Resp. [9] at 7. That may be true, but the City cites no case law—nor can the Court find any—from which it could reasonably conclude that this could form the basis of federal-question jurisdiction. As explained, the case law, and basic principles of federalism, are to the contrary. *Powell*, 559 U.S. at 56 ("It is fundamental . . . that state courts be left free and unfettered . . . in interpreting their state constitutions") (quoting *Nat'l Tea Co.*, 309 U.S. at 557) (internal quotation marks omitted); *Carpenter*, 44 F.3d at 367–68. The City does not address, or even cite, *Carpenter*, which is directly on point.[2]

[2] The City says that "the overwhelming majority of jurisprudence [related to this issue] ha[s] been developed in the federal court system for the past thirty years." Def.'s Resp. [9] at 14. Although the City does not cite any cases to support that proposition, earlier in its brief the City

Perhaps because there is little legal support for its argument, the City cites only one case in the section of its brief dedicated to identifying a federal issue necessarily raised by Plaintiffs' claims. It points to *Jackson v. Mississippi Farm Bureau Mutual Insurance Co.*, 947 F. Supp. 252 (S.D. Miss. 1996). There, the court considered whether the plaintiff's statement in an interrogatory that "Defendants have violated Mississippi Constitution (sic) and the United States Constitution by systematically recording and adjusting claims with its insureds based on race" justified federal jurisdiction. *Id.* at 253. The court explained two competing principles in analyzing federal-question jurisdiction:

> The court recognizes that references to the federal constitution and/or statutes in pleadings or "other paper[s]" may be surplusage and/or may not be intended to and may not have the effect of advancing a federal cause of action. Contrariwise, plaintiffs may not avoid federal jurisdiction simply by failing to denominate as federal what is in substance a federal claim, i.e., by artful pleading.

Id. at 255 (internal citations omitted). Ultimately, the court denied the motion to remand because the plaintiff raised a federal discrimination claim, which was not cognizable under Mississippi law at the time. *Id.* at 256–57. Nonetheless, there is nothing from the above-quoted passage suggesting that a hot-button issue is necessarily a federal issue; this was not an objectively reasonable basis for removal.

Alternatively, the City relies on the Supremacy Clause. It says "on the face of their pleading, []Plaintiffs assert a claim that their individual rights to free speech, according to the

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cites four Supreme Court cases dealing with "buffer zone" laws: *McCullen v. Coakley*, 573 U.S. 464 (2014); *Hill v. Colorado*, 530 U.S. 703 (2000); *Schenck v. Pro-Choice Network of W. N.Y.*, 519 U.S. 357 (1997); and *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994). To start, two of the cases—*Madsen* and *Hill*—were decided in state courts and made their way to the Supreme Court after decisions by state supreme courts. In the other two cases the plaintiffs expressly brought claims under federal law; the *Schenck* plaintiffs alleged violation of 42 U.S.C. § 1985(3), 519 U.S. at 859, and the *McCullen* plaintiffs alleged that the buffer-zone law "violate[d] the First and Fourteenth Amendments," 573 U.S. at 475. None of these cases can be reasonably read to support federal jurisdiction over exclusively state-constitutional claims.

Mississippi Constitution, supersede the United States Constitution's substantive due process rights of others[.]" Def.'s Resp. [9] at 11. But on the very next page of its brief, the City says Plaintiffs "overlook the potential conflict *identified by the City*[.]" *Id.* at 12 (emphasis added). That is, the City seems to admit that the purported "federal issue" does not appear on the face of the Notice of Appeal. Supreme Court precedent is clear that federal-question jurisdiction cannot be based on an anticipated defense. *See Vaden*, 556 U.S. at 60. This too was not an "objectively reasonable basis for seeking removal." *Martin*, 546 U.S. at 141. Accordingly, Plaintiffs are entitled to attorneys' fees and costs under 28 U.S.C. § 1441(c).

Plaintiffs are instructed to file a motion within one week with an affidavit from counsel supported by billing records documenting the reasonable attorneys' fees and costs they have incurred. Defendants' response and the reply will be filed within the deadlines established by Uniform Local Civil Rule 7(b).

IV. Conclusion

The Court has considered all arguments. Those not addressed would not change the outcome. For the reasons stated, Plaintiffs' motion to remand [3] is granted. The Court will retain jurisdiction until the attorneys' fees and costs have been determined.

SO ORDERED AND ADJUDGED this the 12th day of February, 2020.

s/ *Daniel P. Jordan III*
CHIEF UNITED STATES DISTRICT JUDGE