

**IN THE MISSOURI CIRCUIT COURT
FOR THE NINETEENTH JUDICIAL CIRCUIT
COUNTY OF COLE**

MARY DOE,)	
)	
Plaintiff,)	
)	
v.)	Case No. 15AC-CC00205
)	Hon. Jon E. Beetem
JEREMIAH JAY NIXON,)	
GOVERNOR OF THE STATE OF)	
MISSOURI,)	
)	
and)	
)	
CHRIS KOSTER, ATTORNEY)	
GENERAL FOR THE STATE OF)	
MISSOURI,)	
)	
Defendants.)	

**DEFENDANTS' MOTION TO DISMISS
FOR FAILURE TO STATE A CLAIM**

Defendants Jeremiah Nixon and Chris Koster (collectively, “the State”) move this Court under Rule 55.27 for an order dismissing Plaintiff’s Verified Petition for Temporary Restraining Order, Preliminary Injunction, and Permanent Injunction (“Petition”) for failure to state a claim upon which relief can be granted. The State submits the attached Suggestions in Support of its Motion to Dismiss.

WHEREFORE, Defendants respectfully request that this case be dismissed for failure to state a claim upon which relief can be granted.

Date: June 22, 2015

Respectfully submitted,

CHRIS KOSTER
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**SUGGESTIONS IN SUPPORT
OF DEFENDANTS' MOTION TO DISMISS
FOR FAILURE TO STATE A CLAIM**

Plaintiff brings this action under Missouri's Religious Freedom Restoration Act¹ (MORFRA) to preliminarily and permanently enjoin enforcement of four provisions of Missouri law that allegedly restrict her free exercise of religion. As discussed below, Plaintiff's case should be dismissed because her petition fails to state a claim upon which relief can be granted.

¹ § 1.302 RSMo (2103 Supp.). All statutes cited in these suggestions refer to the Missouri Revised Statutes (2013 Supp.) unless stated otherwise.

Plaintiffs' Factual Allegations

Plaintiff Mary Doe is a pregnant, mentally competent, adult resident of Missouri.² Although she does not expressly plead when her pregnancy began, Plaintiff implicitly alleges that she was between 22 and 26 months pregnant as of May 8, 2015.³

Plaintiff purports to be an adherent to the principles of the Satanic Temple.⁴ As such, she believes: (a) “Her body is inviolable and subject to her will alone”; (b) “She makes decisions regarding her health based on the best scientific understanding of the world, even if the science does not comport with the religious or political beliefs of others”; (c) “Her inviolable body includes [non-viable fetal] Tissue”; (d) “She alone decides whether to remove the [fetal] Tissue from her inviolable body”; and (e) She may, in good conscience, have the [fetal] Tissue removed from her inviolable body and

² Pet. ¶¶1, 8.

³ Plaintiff’s petition does not indicate exactly when her pregnancy began. However, she alleges that when she sought an abortion at Planned Parenthood on May 8, 2015, Missouri law required that she be given written materials that “offer information on the possibility of the abortion causing pain to the unborn child.” Pet. ¶22, quoting § 188.027.1(5) (mistakenly cited as § 188.027(g)(5)). By its terms, this provision applies only to abortions “being performed or induced on an unborn child of *twenty-two weeks gestational age or older.*” § 188.027.1(5) (emphasis added). Implicit in her assertion of standing to challenge § 188.027.1(5) is an unstated allegation that Plaintiff was at least 22 weeks pregnant on May 8, 2015. Elsewhere, Plaintiff alleges that she told Planned Parenthood on May 8, 2015 that *fewer than 26 weeks* had passed since her last normal menstrual period. Pet. Ex. B at 1.

⁴ *Id.* ¶¶1, 8-9, 32, Ex. B.

without regard to its current or future conditions.”⁵

On May 8, 2015, Plaintiff tried to procure an abortion at Planned Parenthood in St. Louis; however, Planned Parenthood refused to perform the abortion until Plaintiff (a) acknowledged in writing that she had received a booklet abortion providers are required under Missouri law to give every woman seeking an abortion in this state, and (b) waited 72 hours after receiving the materials and being offered the opportunity to view an ultrasound of her fetus.⁶ In a written letter she delivered at the same time, Plaintiff informed Planned Parenthood that she was an adherent to the principles of the Satanic Temple; claimed that she had already read the state-mandated booklet; noted her disagreement with statements presented in the booklet; represented that she was voluntarily, freely, and without coercion choosing to abort her pregnancy; and purported to absolve Planned Parenthood of its legal obligation to provide her the state-mandated booklet 72 hours before performing her abortion.⁷ Nonetheless, Planned Parenthood refused to perform an abortion on Plaintiff on May 8, 2015.⁸

⁵ *Id.* ¶11.

⁶ Pet. ¶¶31-33.

⁷ Pet. Ex. B.

⁸ Pet. ¶¶34-36.

The Statutory Provisions at Issue

Plaintiff challenges several provisions of Missouri law requiring abortion providers to offer their patients certain information at least 72 hours prior to performing an abortion. The first provision prohibits elective abortion unless a qualified professional has, at least 72 hours prior, personally presented the woman seeking the abortion with written materials, prepared by the Department of Health and Senior Services, that

describe the probable anatomical and physiological characteristics of the unborn child at two-week gestational increments from conception to full term, including color photographs or images of the developing unborn child at two-week gestational increments. Such descriptions shall include information about brain and heart functions, the presence of external members and internal organs during the applicable stages of development and information on when the unborn child is viable. The printed materials shall prominently display the following statement: “The life of each human being begins at conception. Abortion will terminate the life of a separate, unique, living human being.”⁹

Plaintiff challenges another provision that prohibits elective abortion of a pregnancy that is of “twenty-two weeks gestational age or older” unless a qualified professional has, at least 72 hours prior, personally presented the woman seeking the abortion with written materials, prepared by the Department of Health and Senior Services, that “offer information on the

⁹ § 188.027.1(2) RSMo. Plaintiff mistakenly cites this provision as § 188.027.1(g)(2)). Pet ¶¶17-21.

possibility of the abortion causing pain to the unborn child.”¹⁰

The third challenged provision mandates that “a qualified professional shall provide the woman with the opportunity to view at least seventy-two hours prior to the abortion an active ultrasound of the unborn child and hear the heartbeat of the unborn child if the heartbeat is audible.”¹¹

The final subsection Plaintiff challenges provides that if the 72-hour waiting period imposed by the other three challenged provisions is “ever temporarily or permanently restrained or enjoined by judicial order, then the waiting period for an abortion shall be twenty-four hours.”¹²

Motion to Dismiss Standard

“A motion to dismiss for failure to state a cause of action is solely a test of the adequacy of the plaintiff’s petition. It assumes that all of plaintiff’s averments are true, and liberally grants to plaintiff all reasonable inferences therefrom.”¹³ In other words, “the petition is reviewed in an almost academic manner, to determine if the facts alleged meet the elements of a recognized

¹⁰ *Id.* §188.027.1(5)(Plaintiff mistaken cites this provision as § 188.027.1(g)(5) in Pet. ¶22). Since Plaintiff has standing to challenge this provision only if she was at least 22 weeks pregnant on May 8, 2015, Plaintiff has implicitly alleged that she became pregnant on or before December 12, 2014.

¹¹ § 188.027.1(4). Plaintiff mistaken cites this provision as § 188.027.3. Pet. ¶22.

¹² § 188.027.1

¹³ *State ex rel. Henley v. Bickel*, 285 S.W.3d 327, 329-30 (Mo. 2009).

cause of action, or of a cause that might be adopted in that case.”¹⁴

Argument

At the outset, it is important to distinguish the causes of action Plaintiff *does not assert* in her petition from those that she does. Plaintiff does not claim that any provision of § 188.027 violates her *constitutional* rights to the free exercise of religion, privacy, or substantive due process as protected by the First, Fourth, Ninth, and Fourteenth Amendments to the U.S. Constitution and their counterparts in the Missouri Constitution. Nor does Plaintiff claim that any provision of § 188.027 imposes a substantial burden on her right to an abortion under *Roe v. Wade*, 410 U.S. 113 (1973) and subsequent U.S. Supreme Court case law. Plaintiff’s *sole* claim in this case is that four provisions of § 188.027 RSMo impose “a restriction on Plaintiff’s free exercise of religion” in violation of a Missouri statute.¹⁵ Her claim fails a matter of law because Plaintiff does not allege § 188.027 restricts her right or ability to engage in any *act* that is substantially motivated by her religious beliefs or to refrain from engaging in any act prohibited by her religious beliefs.

To state a claim for relief under MORFRA, a plaintiff must allege that a governmental authority has restricted or is restricting her free exercise of

¹⁴ *Id.*

¹⁵ Pet. ¶¶20, 25, 28, 30, 35.

religion.¹⁶ MORFRA defines “exercise of religion” as any “*act or refusal to act*” that is “substantially motivated by religious belief, whether or not the religious exercise is compulsory or central to a larger system of religious belief.”¹⁷ For example, the Supreme Court has held that a South American religious sect, which ritually consumes hallucinogenic chemicals during their ceremonies, could sue under the federal Religious Freedom Restoration Act (RFRA) to enjoin enforcement of the Controlled Substances Act’s prohibition against the chemicals’ use.¹⁸

Here, Plaintiff does not identify a single *act* that (a) she is substantially motivated by her religious beliefs to perform, but (b) she is restricted from performing by Missouri law. Plaintiff doesn’t allege that she was substantially motivated by her religious beliefs to seek an abortion. Nor does she allege that she was substantially motivated by her religious beliefs to do so within 72 hours of deciding to end her pregnancy. Rather, Plaintiff alleges that she *disagrees with* the content of the written materials Missouri law requires abortion providers to give women seeking abortions at least 72 hours

¹⁶ § 1.302.1 RSMo.

¹⁷ § 1.302.2 RSMo (emphasis added).

¹⁸ See *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006).

before an abortion is performed.¹⁹ But even assuming Plaintiff's disagreement with the content of those written materials is substantially motivated by her religious beliefs, her disagreement is neither an *act* nor a *failure to act*. Nothing in § 188.027 requires Plaintiff to agree with the content of the state-mandated written materials anyway. The statute doesn't even require that Plaintiff *read* the materials. It merely requires that the materials are presented to her at least 72 hours before the abortion is performed.

MORFRA allows a plaintiff to seek a court order exempting her from performing *an act* required by law (or permitting her to perform *an act* prohibited by law) where her performance of the required *act* (or her failure to perform the prohibited *act*) would violate her religious beliefs. In *Burwell v. Hobby Lobby Stores, Inc.*, for example, the Supreme Court held HHS regulations requiring employers to provide contraceptive coverage for their employees imposed a substantial burden on the religious exercise of a closely held corporation's sole shareholders whose religious beliefs prohibit the use of

¹⁹ See, e.g., Pet. ¶18 (“*Plaintiff does not believe, as a matter of her deeply held religious beliefs, that the [fetal] Tissue is a ‘life of a separate, unique, living human being,’ because the best scientific understanding of the world does not support that proposition.*”)(emphasis added); *id.* ¶19 (“*Plaintiff does not believe, as a matter of her deeply held religious beliefs, that removing [fetal] Tissue from her body terminates ‘the life of a separate, unique, living human being,’ because one of her Tenets is her inviolable body includes the Tissue.*”)

contraceptives.²⁰ Unlike *Hobby Lobby*, which alleged that federal regulations required its shareholders to participate in *acts* prohibited by their religious beliefs (namely, buying contraceptive coverage for their employees), the Plaintiff in this case does not identify any *act* she is required to perform under Missouri law but prohibited by her religious beliefs, nor any act she is prohibited from performing under Missouri law but required to perform by her religious beliefs.

As neither the performance of a required act (receiving information she does not want or with which she disagrees) nor the non-performance of a prohibited act (having an abortion less than 72 hours after receiving those materials) forces Plaintiff to participate in any act prohibited by her religious beliefs (or to refrain from participating in any act required by her religious beliefs), her MORFRA claim fails as a matter of law.

²⁰ 134 S. Ct. 2751, 2779 (2014)

WHEREFORE, the State requests the petition be dismissed for failure to state a claim upon which relief can be granted.

Date: June 22, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on this 22nd day of June 2015, the foregoing was filed on the Court's ECF system, which has delivered electronic notice of this filing and copies also sent by U.S. mail, postage prepaid, to the following:

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