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

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

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Defendants move to dismiss the Petition on the grounds it fails to state a claim. Defendants argue Plaintiff failed to allege Missouri Revised Statutes "§ 188.027 restricts her right or ability to engage in any *act* that is substantially motivated by her religious beliefs." (Defs.' Suggestions in Supp. of Defs.' Mot. to Dismiss ("Brief") at 6 (emphasis in original).) Specifically, Defendants argue

> 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 before an abortion is performed. 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.*

(*Id.* at 7 (emphasis in original).)

Defendants grossly mischaracterize the Petition. The Petition alleges that Plaintiff, in the exercise of her religious beliefs, decided to get an abortion and proceeded

to implement her decision on May 8, 2015. The Petition alleges specific acts Plaintiff took on May 8 to implement her decision: she went to Planned Parenthood; she asked Planned Parenthood to immediately give her an abortion; and she delivered to Planned Parenthood a letter absolving it of responsibility for giving her an immediate abortion in contravention of Mo. Rev. Stat. § 188.027, et seq.

The Petition alleges Planned Parenthood refused to give Plaintiff an abortion on May 8, 2015, because Mo. Rev. Stat. § 188.027, et seq., precluded it from granting her request until after she had the opportunity to consider—for three days–the following: 1) the official State proclamation that "[t]he life of each human being begins at conception" and that "[a]bortion will terminate the life of a separate, unique, living human being"; and 2) the opportunity to view the results of an ultrasound of the "unborn child"; and 3) state mandated materials describing the fetal tissue's current and future condition. Plaintiff does not agree, as a matter of her religious beliefs, that abortion will "terminate the life of a separate, unique, living human being" that "begins at conception." Nor does she believe, as a matter of her religious beliefs, that the current or future condition of the "unborn child" is relevant to her decision to get an abortion. Nonetheless, she had to acknowledge receipt of these materials and then wait at least 72 hours before getting an abortion.

The statute thus interfered for at least three days with Plaintiff's getting an abortion in a manner motivated by her religious beliefs. It is no different than if Plaintiff had gone to attend a meeting of The Satanic Temple in St. Louis so she could meditate on its Tenets only to find the state police had locked the Temple's doors and would not open

them until three days after she acknowledged receipt of the State of Missouri's official written repudiation of the Tenets.

Plaintiff's conduct included voluntary action motivated by her religious beliefs; asking for the immediate removal of a part of her body without regard to its current or future condition. And it included involuntary action compelled by Section 188.027; having to wait 72 hours after acknowledging receipt of State mandated dogma that is contrary to her religious beliefs.

Defendants argue this voluntary and involuntary conduct does not rise to the level of the "exercise of religion" for purposes of Mo. Rev. Stat. § 1.302.2. But Defendants offer no authority in support of their argument because none exists. The best they can muster is *ipse dixit* in italics:

> [T]he 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."

(Brief at 9 (emphasis in original).)

This formulation of "required" and "prohibited" conduct misstates Section 1.303.2, which explicitly provides the act or refusal to act does not necessarily have to be "compulsory or central to a larger system of religious belief." Mo. Rev. Stat. § 1.303.2.

All of the judicial interpretations of the Free Exercise Clause and Religious Freedom Restoration statutes recognize the "exercise of religion" means performing physical acts or refraining from performing physical acts motivated by a religious belief. *See Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 877 (1990) ("But the 'exercise of religion' often involves not only belief and profession but the performance of (or abstention from) physical acts.").

The physical act does not necessarily have to be imbued with inherent religious meaning, e.g., prayer. Rather, the physical act includes the entire scope of secular human activity. It runs the range of from paying Social Security taxes, to engaging in business, to purchasing health insurance, to going to school, to wearing beads and killing livestock. It also includes walking into an abortion clinic on any given day and getting an abortion on demand, a routine occurrence in most parts of the country.

If the physical act—or abstention therefrom—is motivated by a religious belief, then it is the "exercise of religion." The Amish refusal to pay Social Security taxes on religious grounds is the "exercise of religion." *United States v. Lee*, 455 U.S. 252 (1982). The Amish refusal to have their children attend public school on religious grounds is the "exercise of religion." *Wisconsin v. Yoder*, 406 U.S. 205, 216 (1972). Many other secular acts are the "exercise of religion" when done for religious reasons. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) (killing chickens); *Davila v. Gladden*, 777 F. 3d 1198 (11th Cir. 2015) ("*Davila*") (wearing beads); *Merced v. Kasson*, 577 F. 3d 578 (5th Cir. 2009) (killing goats).

The refusal to engage in secular business practices, such as buying health insurance for contraceptives, is the "exercise of religion" when motivated by religious reasons. *Burwell v. Hobby Lobby Stores, Inc.*, ___ U.S. ____, 134 S. Ct. 2751, 2770 (2014) ("*Hobby Lobby*") ("[T]he exercise of religion involves not only belief and profession but the performance of (or abstention from) physical acts that are engaged in for religious reasons. Business practices that are compelled or limited by the tenets of a religious doctrine fall comfortably within that definition" (internal quotations and citations omitted).).

The federal health insurance requirements at issue in *Hobby Lobby* were struck down because they compelled a business to buy employee health insurance coverage for contraceptives in violation of its owner's religious beliefs. The Supreme Court recognized that the business owners in *Hobby Lobby* have the right to engage in business and buy health insurance for their employees in a manner consistent with their religious beliefs. A government requirement that business owners buy health insurance coverage for contraceptives offended their religious beliefs and therefore restricted their "exercise of religion," in violation of the federal Restoration of Religious Freedom Act.

Plaintiff has just as much right to get an abortion without government regulation that offends her religious beliefs as the *Hobby Lobby* owners have to buy health insurance without government regulation that offends their religious beliefs. Mo. Rev. Stat. § 188.027, et seq., compels Plaintiff to engage in conduct as a precondition for getting an abortion that violates her religious beliefs. That conduct includes 1) acknowledging receipt of the official State proclamation that "[t]he life of each human being begins at conception" and "[a]bortion will terminate the life of a separate, unique, living human being"– a proclamation that Plaintiff does not agree with as a matter of her religious beliefs; 2) being offered the opportunity to view an ultrasound of the "unborn child," which Plaintiff believes is irrelevant as a matter of her religious beliefs; 3) acknowledging receipt of materials regarding the current and future condition of the "unborn child," which Plaintiff believes are irrelevant as a matter of her religious beliefs; and 4) then waiting for 72 hours for no discernible reason other than to contemplate dogma and information offensive to her religious beliefs. The statute therefore restricts her exercise of religion under Section 1.302.1.

The Court's only function in deciding what actions constitute the "exercise of religion" is whether they are motivated by honestly held religious beliefs. As stated in *Davila*:

> First turning to religious exercise, the Supreme Court recently explained that it is not for us to say that a plaintiff's religious beliefs are mistaken or insubstantial. Instead, our narrow function in this context is to determine whether the line drawn between conduct that is and is not permitted under one's religion reflects an *honest conviction.* This rule minds the Supreme Court's warning that judges must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim. A secular, civil court is a poor forum to litigate the sincerity of a person's religious beliefs, particularly given that faith is, by definition, impossible to justify through reason. It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds. It is difficult to gauge the objective reasonableness of a belief that need not be acceptable, logical, consistent, or comprehensible to others. . . . Congress made plain that we lack any license to decide the relative value of a particular exercise to a religion. That being the case, we look only to see whether the claimant is in essence seeking to perpetrate a fraud on the court—whether he actually holds the beliefs he claims to hold.

Davila, 777 F. 3d at 1204 (emphasis in original; internal quotations and citations omitted).

Accepting the allegations of the Petition as true, the Court must deny the motion to dismiss. Plaintiff voluntarily engaged in actions motivated by her religious beliefs. She was forced to engage in actions in violation of her religious beliefs. Her religious beliefs are honestly held. Plaintiff has therefore stated a claim for violation of Mo. Rev. Stat. § 1.303.1.

WHEREFORE, Plaintiff requests that Defendants' Motion to Dismiss be denied.

SCHULTZ & ASSOCIATES LLP

By: /s/ Ronald J. Eisenberg
Ronald J. Eisenberg, #48674
640 Cepi Drive, Suite A
Chesterfield, MO 63005
636-537-4645 (office)
636-537-2599 (fax)
reisenberg@sl-lawyers.com

Attorney for Plaintiff

W. JAMES MAC NAUGHTON, ESQ.

By: /s/ W. James Mac Naughton
7 Fredon Marksboro Road
Newton, NJ 07860
732-634-3700 (office)
732-875-1250 (fax)
wjm@wjmesq.com

Attorney for Plaintiff (pro hac vice)

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above and foregoing was eFiled on June 29, 2015, and thus served by email to the following:

J. Andrew Hirth
Deputy General Counsel
CHRIS KOSTER, Attorney General
207 W. High Street
P.O. Box 899
Jefferson City, MO 65102
(573) 751-0818
(573) 751-0774 (fax)
Andy.Hirth@ago.mo.gov

Attorney for Defendants

/s/ Ronald J. Eisenberg