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**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, et al.,** | ) | |
| | ) | |
| **Defendants.** | ) | |

# DEFENDANTS NIXON AND KOSTER'S MOTION TO DISMISS SECOND AMENDED PETITION AND SUGGESTIONS IN SUPPORT

Defendants Jeremiah Nixon and Chris Koster move this Court under Rule 55.27 for an order dismissing Plaintiff's Second Amended Petition for failure to state a claim on which relief can be granted. In support of their Motion, Defendants Nixon and Koster submit the following suggestions.

Plaintiff challenges the validity of several abortion statutes under Missouri's Religious Freedom Restoration Act (RFRA), § 1.302 RSMo[1], and the First and Fourteenth Amendments to the United States Constitution. Her state law claims (Counts I – III) are essentially the same as the claims she asserted in her original petition, which this Court dismissed on December 24, 2015 for failure to state a claim. Plaintiff's federal claims (Counts IV – V) are

[1] Unless noted otherwise, all statutes cited in these Suggestions refer to the Missouri Revised Statutes as amended up through the 2015 Supplement.

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essentially the same as those she raised in her companion federal lawsuit (filed around the same time as her original state court petition), which the United States District Court for the Eastern District of Missouri dismissed on July 15, 2016 for lack of standing. *See The Satanic Temple, et al., v. Nixon, et al.,* Case No. 4:15-cv-00986-HEA, at *11 (Mo.W.D. July 15, 2016).[2]

Like her original state court petition and her federal court complaint, the facts alleged in Plaintiff's Second Amended Petition fail to state any claims on which relief can be granted. Having failed to cure the deficiencies that doomed her previous pleadings, there is no reason to believe Plaintiff would be able to do so if given further opportunities to amend. Her claims should be dismissed with prejudice.

**Plaintiff's Amended Factual Allegations**

Mary Doe ("Plaintiff") is an adult resident of Missouri. Second Amended Petition ("SAP") ¶1. Plaintiff has the following deeply held beliefs about abortion:

a. Her body is inviolable and subject to her will alone;

b. She must make 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. When pregnant, a non-viable fetus is part of her body and not a

[2] Plaintiff's appeal from the dismissal of her federal lawsuit is pending in the Eighth Circuit. *The Satanic Temple, et al., v. Nixon, et al.*, Case No. 16-3387 (docketed August 17, 2016).

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separate, unique, living human being;

d. She alone decides whether, when and how to remove a non-viable fetus from her body;

e. She may, in good conscience, have an abortion without regard to the current or future condition of her non-viable fetus;

f. She must not support religious, philosophical, or political beliefs that imbue her fetus with an existence separate, apart, or unique from her body;

g. She must not support any religious, philosophical, or political beliefs that cede to a third party control of the removal of her fetus; and

h. She must not support any religious, philosophical, or political belief that promotes the idea her non-viable fetus is a human being or imbued with an identity separate, apart, and unique from her body.

*Id.* ¶27.

Plaintiff learned that she was pregnant in March 2015, and began making plans to have an abortion at Planned Parenthood in St. Louis, the only abortion facility in Missouri. *Id.* ¶¶22-25, 41. Plaintiff learned that Planned Parenthood was required, at least 72 hours before the procedure (hereinafter, "Waiting Period"), to provide her with "the opportunity to view an active ultrasound image of the unborn child and hear the heartbeat of the unborn child if it is audible"[3] (hereinafter, "Ultrasound Opportunity"), as well as printed materials that "describe the probable anatomical and physiological

[3] § 188.027.3 RSMo.

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characteristics of the unborn child at two-week gestational increments"[4] (hereinafter, "Booklet"). ¶¶29-37. The Booklet includes the following statements: "The life of each human being begins at conception. Abortion will terminate the life of a separate, unique, living human being." *Id.* ¶¶36-37. Plaintiff contends that the statements in the Booklet promote a religious belief she does not share. *Id.* ¶¶27-28, 38. She also contends that the purpose and effect of the mandatory Booklet, Ultrasound Opportunity, and Waiting Period are to cause doubt, guilt, and shame in pregnant women and discourage them from getting abortions. *Id.* ¶¶39-40.

Plaintiff traveled to St. Louis by bus on May 7, 2015, and requested an abortion at Planned Parenthood on May 8. *Id.* ¶¶60-61. Plaintiff informed Planned Parenthood in writing of her deeply held convictions regarding abortion and purported to "absolve [Planned Parenthood] of any responsibility [it] may have" to provide her the Booklet and the Ultrasound Opportunity, or to wait 72 hours before performing her abortion. *Id.* ¶¶62-63. Nonetheless, Planned Parenthood refused to perform Plaintiff's abortion until (a) she acknowledged receipt of the Booklet and the Ultrasound Opportunity in writing, and (b) waited 72 hours. *Id.* ¶64.

Because she could not obtain an abortion in Missouri without doing so, Plaintiff acknowledged receipt of the Booklet and Ultrasound Opportunity on

[4] § 188.027.1(2) RSMo.

May 8, and checked into a motel for the duration of Waiting Period. *Id.* ¶¶66-69. Plaintiff felt guilt and shame during the Waiting Period. *Id.* ¶68. She returned to Planned Parenthood and had an abortion on May 12, 2015. *Id.* ¶70. The cost of obtaining the abortion, round-trip travel from Greene County, and lodging in St. Louis during the waiting period was equal to 45 hours' worth of Plaintiff's wages. *Id.* ¶¶47-55.

## 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." *State ex rel. Henley v. Bickel*, 285 S.W.3d 327, 329-30 (Mo. 2009). In other words, "the petition is reviewed in an almost academic manner, to determine if the facts alleged meet the elements of a recognized cause of action, or of a cause that might be adopted in that case." *Id.*

## Argument

### I. Plaintiff cannot state a claim for relief under RFRA.

In her first three counts, Plaintiff alleges that portions of § 188.027 RSMo violate Missouri's Religious Freedom Restoration Act (RFRA), which states in pertinent part:

> A governmental authority may not restrict a person's free exercise of religion, unless: (1) The restriction is in the form of a rule of general applicability, and does not discriminate



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> against religion, or among religions; and (2) The governmental authority demonstrates that application of the restriction to the person is essential to further a compelling governmental interest, and is not unduly restrictive considering the relevant circumstances.

§ 1.302.1 RSMo. The statute further defines "exercise of religion" as "an 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." § 1.302.2 RSMo (emphasis added).

In Count I, Plaintiff challenges the provision of Missouri law mandating that all women seeking abortions be provided "the opportunity to view an active ultrasound image of the unborn child and hear the heartbeat of the unborn child if it is audible." § 188.027.3. RSMo. Plaintiff alleges that the Ultrasound Opportunity "restricted [her] free exercise of religion in violation of § 1.302.1" because it subjected her body to the will of the State; it was irrelevant to her health; it was irrelevant to her decision to have an abortion; it cost her time and money; it forced her to consider whether to believe abortion terminates the life of a separate, unique living human being; and it shamed and punished her for not so believing. SAP ¶80.

In Count II, Plaintiff challenges the provision of Missouri law requiring abortion providers to present their patients with the Booklet that includes the statements, "The life of each human being begins at conception. Abortion will terminate the life of a separate, unique, living human being."



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§ 188.027.1(2) RSMo. Plaintiff alleges that "compelled delivery of the Booklet restricted [her] free exercise of religion in violation of § 1.302.1" because it was irrelevant to her health; it was irrelevant to her decision to have an abortion; it forced her to consider whether to believe abortion terminates the life of a separate, unique living human being; and it shamed and punished her for not so believing. SAP ¶88.

Counts I through II fail to state a claim under Missouri law. RFRA allows a plaintiff to seek a court order exempting her from performing *any act* required by law (or permitting her to perform *any act* prohibited by law) where her performance of the required *act* (or her failure to perform the prohibited *act*) would violate a deeply held religious belief. In *Burwell v. Hobby Lobby Stores, Inc.*, for example, the Supreme Court held HHS regulations requiring employers to pay for 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 contraceptives. 134 S. Ct. 2751, 2779 (2014).

Nowhere in her Petition has Plaintiff alleged that Missouri proscribes any "*act* or *refusal to act*" that is "substantially motivated by religious belief." Neither the Ultrasound Opportunity nor acknowledging receipt of the Booklet forced Plaintiff to perform any *act* prohibited by a deeply held religious belief. *Cf. Wisconsin v. Yoder*, 406 U.S. 205 (1972)(Wisconsin's



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compulsory school attendance law unduly burdened Amish family's belief that attending public school endangered their standing in religious community as well as their salvation and that of their children). Nor did the Ultrasound Opportunity or acknowledging receipt of the Booklet prohibit Plaintiff from *performing any act* substantially motivated by a deeply held religious belief. *Cf. Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006) (Controlled Substances Act's prohibition on use of Schedule I hallucinogenic chemicals unduly burdened religious sect's ritual use of sacramental tea containing the prohibited chemicals).

Plaintiff suggests that being given an opportunity to view (and hear) an ultrasound and having to acknowledge receipt of the Booklet forced her to spend time and money on a service that was "irrelevant and unnecessary" to her decision to terminate her pregnancy. SAP ¶¶80, 88. But Plaintiff does not claim a deeply held religious belief *against complying with "irrelevant and unnecessary" regulations*. Rather, she claims the regulations are irrelevant and unnecessary because they were motivated by a religious belief she does not share. Even assuming Plaintiff could prove the challenged provisions in § 188.027 were actually motivated by a *religious* belief, the only thing that matters for RFRA purposes is the *act* the law requires or prohibits. The only "act" Plaintiff was required to do under the statutory provisions challenged in Counts I and II was *to be present* when a third party made

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certain information available to her. She did not have to avail herself of that information *or even read it*. She merely had to acknowledge that the third party had complied with *its* statutory obligations.

Plaintiff was not required to accept *or even read about* any particular religious belief (or religious belief in general) to obtain her abortion. Nor was her abortion conditioned on her rejection of any particular religious belief (or religious belief in general). At worst, Missouri created an opportunity—but not an obligation—for Plaintiff to hear State speech regarding abortion. Such requirements do not offend RFRA. *O Centro Espirita* held that Congress could not prohibit the *use* of hallucinogenic drugs as part of a religious sacrament, but the Court has never held Congress cannot mandate that the sale of those drugs be accompanied with State speech on the dangers of their use. Under Plaintiff's interpretation of RFRA, state-mandated warning labels on cigarettes and alcohol would violate the religious freedom of anyone with a deeply held belief that smoking or drinking is not bad for one's health.

Essentially, Plaintiff argues that RFRA permits her to ignore any law she suspects is *motivated* by a religious belief she does not share. But whose belief would that be? The Senator who introduced the bill? The majority belief in the General Assembly? RFRA claims turn on the religious beliefs *of the plaintiff*, not on what the plaintiff alleges are the religious beliefs of the legislators who enacted the challenged statute. Plaintiff is merely cloaking

her political beliefs in the mantle of religious faith in order to avoid laws of general applicability she finds imprudent or offensive. Instead of being a safety hatch to protect minority religious beliefs from the tyranny of the majority, Plaintiff's interpretation of RFRA would establish a faith-based "Get Out of Jail Free" card.

In Count III, Plaintiff challenges the provision of Missouri law imposing a 72-hour Waiting Period between receiving the Booklet and the Ultrasound Opportunity and having an abortion. §§ 188.027.1(2) and 188.027.3. RSMo Plaintiff alleges that the "Waiting Period restricted [her] free exercise of religion in violation of § 1.302.1" because it subjected her body to the will of the State; it was irrelevant to her health; it was irrelevant to her decision to have an abortion; it cost her time and money; it forced her to consider whether to believe abortion terminates the life of a separate, unique living human being; and it shamed and punished her for not so believing. SAP ¶96.

None of the allegations in Count III identify a single act substantially motivated by Plaintiffs' religious beliefs or a single refusal to act substantially motivated by Plaintiffs' religious beliefs. Plaintiff does not allege any deeply held religious belief that an abortion must be performed in a single doctor visit, or that she cannot miss more than one day of work to have a medical procedure, or that she cannot be given an opportunity to read



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State speech or see an ultrasound—neither of which she is ever required to do. All Plaintiff has alleged is that the Waiting Period required by § 188.027 RSMo was *unnecessary* and *irrelevant* to her decision to have an abortion. Complying with laws of general applicability does not violate Missouri's Religious Freedom Restoration Act simply because the person complying believes the law to be irrelevant or unnecessary. At worst, the provisions challenged in Count III caused Plaintiff's abortion to occur at an inconvenient time and place. RFRA does not create a cause of action to enjoin irrelevant, unnecessary, or inconvenient regulations.

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. Plaintiff merely alleges that she *disagrees with* the content of certain State speech about abortion and finds the waiting period irrelevant, unnecessary, and inconvenient. But even assuming Plaintiff's disagreement with State speech is substantially motivated by her religious beliefs, her disagreement is neither an *act* nor a *failure to act.*

Unlike *Hobby Lobby,* which alleged that federal regulations required its shareholders to purchase products prohibited by their religious beliefs (namely, buying contraceptive coverage for their employees), the Plaintiff in this case does not identify any *act* required under Missouri law but prohibited

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by her religious beliefs, nor any act prohibited under Missouri law but required by her religious beliefs. At most, she has identified acts required of third parties that may be irrelevant or unnecessary to Plaintiff's religious beliefs. Her RFRA claims fail as a matter of law.

## II. Plaintiff cannot state a claim under the Establishment Clause.

In *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the Supreme Court announced a three-part test for analyzing whether government activity results in a prohibited establishment of religion. *ACLU Nebraska Found. v. City of Plattsmouth, Neb.*, 419 F.3d 772, 775 (8th Cir. 2005). Despite *Lemon*'s "checkered career," *see Van Orden v. Perry*, 545 U.S. 677, 700 (2005) (Breyer, J., concurring), the Eighth Circuit still applies the *Lemon* test to claims that a statute violates the Establishment Clause. *Roark v. S. Iron R-1 Sch. Dist.*, 573 F.3d 556, 563 n.4 (8th Cir. 2009); *see also Doe ex rel. Doe v. Elmbrook Sch. Dist.*, 687 F.3d 840, 849 (7th Cir. 2012) ("*Lemon v. Kurtzman* remains the prevailing analytical tool for the analysis of Establishment Clause claims"). Under *Lemon*, a statute will not be held to violate the Establishment Clause as long as (1) it has a secular purpose; (2) its principal or primary effect neither advances nor inhibits religion; and (3) it does not foster an excessive entanglement with religion." *ACLU Nebraska Found. v. City of Plattsmouth, Neb.*, 419 F.3d 772, 775 (8th Cir. 2005). Plaintiff fails to allege any facts showing that §188.027 fails the *Lemon* test.

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In conclusory fashion, Plaintiff alleges that the Ultrasound Opportunity, the Booklet, and the Waiting Period have the purpose and effect of "promot[ing] the religious belief that [fetal tissue] is, from conception, a separate and unique human being whose destruction is morally wrong." SAP. ¶104. She places particular emphasis on §188.027.1(2)'s requirement that the DHSS Booklet include the following statements: "The life of each human being begins at conception. Abortion will terminate the life of a separate, unique, living human being." *See, e.g.*, SAP ¶¶36-38; 104-107. Plaintiff alleges the Ultrasound Opportunity, the Booklet, and the Waiting Period violate the Establishment Clause because "the State of Missouri is using its power to regulate abortion to promote some, but not all, religious beliefs." SAP ¶105.

The Supreme Court has repeatedly rejected Establishment Clause challenges that merely alleges some statutory language "happens to coincide or harmonize with the tenets of some or all religions." *McGowan v. Maryland*, 366 U.S. 420, 442 (1961)(holding Maryland's "Sunday Closing Laws" did not violate Establishment Clause simply because they coincided with observation of the Christian Sabbath). "That the Judaeo-Christian religions oppose stealing does not mean that a State or the Federal Government may not, consistent with the Establishment Clause, enact laws prohibiting larceny." *Harris v. McRae*, 448 U.S. 297, 319 (1980)(holding federal law restricting use

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of Medicaid funds for elective abortion "is as much a reflection of 'traditionalist' values towards abortion, as it is an embodiment of the views of any particular religion"). Plaintiffs' Establishment Clause claims have even less merit than the challenges rejected in *McGowan* and *Harris*, which involved outright bans on Sunday sales and paying for elective abortions with public funds, respectively. By contrast, §188.027 RSMo doesn't ban anything. It merely requires that abortion providers make certain written materials and ultrasound procedures *available* to their patients at least 72 hours before performing an abortion. It does not require that the patient ever read the printed materials or have the ultrasound.

The Supreme Court has even rejected an Establishment Clause challenge to a different Missouri statute with language nearly identical to the provisions Plaintiffs challenge here. In *Webster v. Reprod. Health Servs.*, the Eight Circuit initially invalidated "legislative findings" by the Missouri General Assembly that "[t]he life of each human being begins at conception" as "an impermissible state adoption of a theory of when life begins." 851 F.2d 1071, 1076 (8th Cir. 1988). The Supreme Court reversed the court of appeals decision, however, because "the preamble does not by its terms regulate abortion or any other aspect of appellees' medical practice." 492 U.S. at 506. Reiterating that *Roe v. Wade*, 410 U.S. 113 (1973), "implies no limitation on the authority of a State to make a value judgment favoring childbirth over

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abortion," the Supreme Court concluded that Missouri's preamble "can be read simply to express that sort of value judgment." *Webster v. Reprod. Health Servs*., 492 U.S. at 506 (quoting *Maher v. Roe*, 432 U.S. 464, 473-74 (1977)).

Section 188.027 RSMo passes all three elements of the *Lemon* test. The statute has a secular purpose of conveying the General Assembly's policy preference for carrying unwanted pregnancies to term rather than aborting them. *See Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 870 (1992) ("the State has a legitimate interest in promoting the life or potential life of the unborn"). In the pursuit of that secular purpose, §188.027 RSMo neither advances, hinders, nor fosters excessive entanglement with any particular religion or religion in general. Medical professionals and their patients are treated equally regardless of their faith or lack thereof. Catholics, Satanists, evangelicals, and atheists must all be offered the DHSS Booklet, but none of them must agree with or even read its contents to obtain an abortion. All must be offered the opportunity to view an ultrasound, but none of them must have an ultrasound.

Count IV should be dismissed.

## III. Plaintiff cannot state a claim under the Free Exercise Clause.

As Plaintiff cannot state a claim under Missouri's RFRA, *a fortiori* she cannot state a claim under the Free Exercised Clause. *See Burwell v. Hobby*

*Lobby Stores, Inc.*, 134 S. Ct. 2751, 2760 (2014)(noting that RFRA was enacted to provide greater protection and require more stringent review than the Free Exercise Clause).

"The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires." *Employment Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872, 877 (1990). It also prohibits the government from enacting legislation that "regulates or prohibits conduct *because it is undertaken for religious reasons*." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993)(emphasis added). However, "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." *Smith*, 494 U.S. at 878-79 (quoting *United States v. Lee*, 455 U.S. 252, 263 n. 3 (1982) (Stevens, J., concurring)).

Plaintiff alleges that the Booklet, Ultrasound Opportunity, and Waiting Period "interfere with the exercise by Plaintiff of her religious beliefs" by "compel[ing] exposure to religious beliefs she does not have and delaying the implementation of her decision" to obtain an abortion. SAP ¶115. She further alleges that the requirements of §188.027 "caused Plaintiff to endure delay, doubt, guilt and shame when she exercised her religious beliefs to abort [a



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fetus] in accordance with" her beliefs. SAP ¶116. Neither allegation states a cause of action under the Free Exercise Clause.

Section 188.027 RSMo is a neutral law of general applicability. It requires abortion providers to make certain information *available* to their patients 72 hours before performing or inducing an abortion. It does not compel those patients to accept, read, or agree with the proffered information. Plaintiff does not and cannot identify any provision of that statute which prohibits women seeking abortions or the doctors who perform them from engaging in any conduct *because it is undertaken for religious reasons*. Consequently, she has not stated a claim under the Free Exercise Clause. Count V should therefore be dismissed.

**CONCLUSION**

WHEREFORE, Defendants Nixon and Koster respectfully ask this Court to enter its Order and Judgment dismissing Plaintiff's Second Amended Petition *with prejudice*.

Date: September 29, 2016

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

The undersigned certifies that on this 29th day of September 2016, the foregoing was filed on Case.net, which has delivered electronic notice of this filing to the following:

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