IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

MARY DOE,	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	**No. WD80387**
	)	
JEREMIAH JAY NIXON, GOVERNOR OF THE STATE OF MISSOURI, et al.,	)	
	)	
Defendants-Appellees.	)	

BRIEF OF PLAINTIFF-APPELLANT MARY DOE

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I. JURISDICTION STATEMENT

Plaintiff-Appellant Mary Doe ("Mary Doe") appeals the dismissal of three (3) counts in her Second Amended Petition (the "Petition") which seek to enjoin enforcement of § 188.027.1 RSMo., which requires her "voluntary and informed consent, given freely and without coercion" to an abortion at least seventy-two hours prior to the procedure (the "Informed Consent Law"). The Informed Consent Law states May Doe is not deemed to have given her informed consent to an abortion unless, at least seventy-two hours prior to the procedure, she is provided with and acknowledges receipt of a booklet (the "Booklet") that contains:

- A prominent display of the statement "The life of each human being begins at conception. Abortion will terminate the life of a separate, unique, living human being."
- Information about "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."

- "[T]he possibility of the abortion causing pain to the unborn child."

The Informed Consent Law requires that Mary Doe be told, at least seventy-two hours prior to her abortion:

- "The gestational age of the unborn child at the time the abortion is to be performed or induced;" and
- "The anatomical and physiological characteristics of the unborn child at the time the abortion is to be performed or induced."

The Informed Consent Law further requires at § 188.027.1.(4) RSMo. that, "[t]he physician who is to perform or induce the abortion or 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."

The Informed Consent Law includes § 188.027.12 RSMo which states, "[i]f the provisions in subsections 1 and 8 of this section requiring a seventy-two-hour waiting period for an abortion are ever temporarily or permanently restrained or enjoined by judicial order, then the waiting period for an abortion shall be twenty-four hours; provided, however, that if such temporary or permanent restraining order or injunction is stayed or dissolved, or otherwise ceases to have effect, the waiting period for an

abortion shall be seventy-two hours."

The Informed Consent Law states there is "a compelling state interest of the state to ensure that the choice to consent to an abortion is voluntary and informed, and given freely and without coercion." § 188.027.11 RSMo.

Mary Doe was subjected to the Informed Consent Law when she obtained an abortion. A18. Mary Doe alleges the Informed Consent Law burdens the free exercise of her religious beliefs ("Plaintiff's Tenets"). A19. Plaintiff's Tenets are:

- Mary Doe's body is inviolable and subject to her will alone;
- Mary Doe 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;
- Mary Doe's non-viable fetus is part of her body and not a separate, unique, living human being;
- Mary Doe alone decides whether, when and how to proceed with aborting her non-viable fetus;
- Mary Doe may, in good conscience, have an abortion without regard to the current or future condition of her non-viable fetus;
- Mary Doe must not support religious, philosophical or political beliefs that imbue her non-viable fetus with an existence separate, apart or

unique from her body; and

- Mary Doe must not support any religious, philosophical or political beliefs that cede to control to a third party over the abortion of her non-viable fetus.

A11 to A12.

The first three counts of the Petition allege Mary Doe has the right under the Missouri Religious Freedom Restoration Act, § 1.302 RSMo, ("RFRA")[1] to be exempt from the Informed Consent Law as a condition of

[1] § 1.302. 1. RSMo. states "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 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.

2. As used in this section, 'exercise of religion' shall be defined 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."

getting an abortion (the "RFRA Claim"). *See* Petition at Counts One, Two and Three; A20 to A27. The Appellate Court has jurisdiction to decide the RFRA Claim because it involves the interpretation and application of RFRA to the Informed Consent Law. *Ross v. Robb*, 651 S.W.2d 680, 685 (Mo. App. 1983).

Mary Doe also appeals the dismissal of two (2) other counts in the Petition, which seek to enjoin the enforcement of the Informed Consent Law on the grounds it violates the Free Exercise and Establishment Clauses of the First Amendment. See Petition at Counts Four and Five; A29 to A34. Mary Doe does not dispute the Trial Court's finding that if she fails to state a claim for a violation of RFRA then she also fails to state a claim for violation of the Free Exercise Clause. A77.

However, the Informed Consent Law violates the Establishment Clause because it promotes the Missouri Tenet, regardless of its effect on Mary Doe.[2] Thus if the Appellate Court finds Mary Doe is not exempt from the Informed Consent Law pursuant to RFRA, then it must address whether Mary Doe has stated a claim for violation of the Establishment Clause (the "Establishment Clause Claim").

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[2] See discussion *supra* in Section IV. B.

If the Appellate Court finds Mary Doe has failed to state a claim pursuant to RFRA, then the Appellate Court has jurisdiction to decide whether the Establishment Clause Claim is colorable. If the Appellate Court determines the Establishment Clause Claim is not colorable, then it has jurisdiction to affirm the Trial Court and deny the appeal. *White v. White*, 293 S.W.3d 1, 24 (Mo. App. W.D. 2009)

If the Appellate Court determines the Establishment Clause Claim is colorable, then it has the obligation to transfer this appeal to the Supreme Court for disposition. *Knight v. Carnahan*, 282 S.W.3d 9, 17 (Mo. App. W.D. 2009) ("If it appears that we do not have jurisdiction, but that the Supreme Court of Missouri does, our only authority in this matter is to transfer it to the Supreme Court.").

II. STATEMENT OF FACTS

Mary Doe, a resident of Greene County, became pregnant in or about February 2015 and starting making plans in March 2015 to have an abortion. A10, A15. She knew she would be subjected to the Informed Consent Law so she worked about forty-five hours to earn the money necessary to pay for the ultrasound and a three day stay in a motel in St. Louis. A15 to A16.

Mary Doe understood the Informed Consent Law required her to acknowledge receipt of the Booklet that states the Missouri Tenet. A18.

She does not believe the Missouri Tenet is true. A11. Mary Doe believes a non-viable fetus is part of her body that can be removed in good conscience and without consideration of its current or future condition. A11.

Mary Doe believes her body is inviolable, subject to her will alone and decisions regarding her health must be based on the best scientific understanding of the world. A11. She believes the information the State of Missouri seeks to disseminate pursuant to the Informed Consent Law—including the Missouri Tenet—is not based on the best scientific understanding of the world but is rather a political and religious point of view intended to dissuade women from getting an abortion. A17.

On May 7, 2015, Mary Doe traveled by bus to Planned Parenthood's offices in St. Louis to get her abortion. A17. Planned Parenthood is the only place in the State of Missouri Mary Doe could get a legal abortion. A14.

When Mary Doe arrived at Planned Parenthood on May 8, 2015, she gave her doctors a letter that read:

> I am submitting this letter to you as part of my request to obtain an abortion. As an adherent to the principles of the Satanic Temple, my sincerely held religious beliefs are:
>
> • My body is inviolable and subject to my will alone.

• I make any decision regarding my 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.

• My inviolable body includes any fetal or embryonic tissue I carry so long as that tissue is unable to survive outside my body as an independent human being.

• I -- and I alone -- decide whether my inviolable body remains pregnant and I may, in good conscience, disregard the current or future condition of any fetal or embryonic tissue I carry in making that decision.

The State of Missouri claims a compelling interest in ensuring my choice to obtain an abortion is informed, voluntary, given freely and without coercion. To that end, the State of Missouri requires you to provide me with information prepared by the Missouri Department of Health and Senior Services (the "Department") that prominently displays the following statement "The life of each human being begins at conception. Abortion will terminate the life of a separate, unique, living human being" (the ["Missouri Tenet"). It is my

deeply held religious belief that the [Missouri Tenet] is merely a political and religious statement and not based on the best scientific understanding of the world.

The information related to the [Missouri Tenet] is delivered in a booklet prepared by the Department (the "Booklet"). I have already reviewed the Booklet. It makes clear that a fetus is not able survive outside my body as an independent human being prior to twenty-six weeks after the first day of my last normal menstrual period. Please be advised that less than twenty-six weeks have elapsed since my last normal menstrual period. I give you permission to physically examine me to determine that my pregnancy is not in the third trimester as defined in the Booklet.

It is my deeply held religious belief an abortion does not terminate the life of a separate, unique, living human being. I therefore absolve you of any responsibility you may have to deliver the Booklet to me. I also absolve you of any responsibility you may have to wait seventy-two hours before performing an abortion.

This letter is my statement that I chose to have an

abortion today – now – and without further review of the Booklet. I make that choice voluntarily, freely, without coercion. I am informed to my satisfaction – both as a religious and scientific matter – that an abortion will not terminate the life of a separate, unique, living human being.

I respectfully request that you provide me with an abortion today.

A64 to A65.

Planned Parenthood, as it was required to do by the Informed Consent Law, refused to give Mary Doe her requested abortion on May 8, 2015. A18. Instead, it gave her an ultrasound and the opportunity to listen to the fetal heart beat as required by the Informed Consent Law. A18. Mary Doe paid for this procedure. A19. She declined to listen to the fetal heartbeat and, as a consequence, felt guilt, doubt and shame. A18.

Planned Parenthood, as it was required to do by the Informed Consent Law, made Mary Doe acknowledge receipt of the Booklet and Missouri Tenet. A18. Planned Parenthood, as it was required to do by the Informed Consent Law, then sent Mary Doe away and would not provide her with her requested abortion until after the lapse of three calendar days. A18. During this time, Mary Doe stayed in and paid for a motel in St. Louis. A18. She

returned to Planned Parenthood on May 12, 2015, and received an abortion. A18.

No medical purpose was served by compelling Mary Doe to get an ultrasound. A20. No medical purpose was served by compelling Mary Doe to acknowledge receipt of the Booklet or to wait three days before getting an abortion. A24, A26. Exposure to the Missouri Tenet caused her to feel guilt, doubt, and shame because she does not believe the Missouri Tenet. A24.

On May 11, 2015, Mary Doe filed a Petition with the Circuit Court for the Nineteenth Judicial District, Cole County (the "Trial Court"), seeking an exemption from the Informed Consent Law pursuant to RFRA. LF7. The Petition was dismissed without prejudice by the Trial Court, per the Hon. Jon E. Beetem. C.J., on December 24, 2015. LF17.

Mary Doe filed her Second Amended Petition on September 23, 2016, which added claims the Informed Consent Law violated the Free Exercise and Establishment Clauses of the First Amendment. A7 to A35. The Trial Court, per the Hon. Jon E. Beetem, C.J., dismissed the Second Amended Petition with prejudice on December 12, 2016. A65 to A79. This appeal was timely filed. LF92.

III. POINTS RELIED ON

A. The Trial Court Erred In Dismissing Mary Doe's RFRA Claim Because Mary Doe Stated a RFRA Claim In That the Informed Consent Law 1) Substantially Burdens Mary Doe's Free Exercise of Religion; 2) Does Not Serve the Government's Compelling Interest in Obtaining Mary Doe's Informed Consent to an Abortion; and 3) Is Not the Least Restrictive Means of Obtaining Mary Doe's Informed Consent to an Abortion.

§ 1.302.1 RSMo,

A.A. v. Needville Indep. Sch. Dist., 611 F.3d 248 (5th. Cir. 2010)

Merced v. Kasson, 577 F.3d 578 (5th. Cir. 2009)

Barr v. City of Sinton, 295 S.W.3d 287 (Tex. 2009)

Warner v. City of Boca Raton, 887 So.2d 1023 (Fla. 2004)

B. The Trial Court Erred In Dismissing Mary Doe's Establishment Clause Claim Because the Informed Consent Law Violates the Establishment Clause In That The Informed Consent Law Promotes the Religious Belief a Human Being Comes Into Existence At Conception.

Webster v. Reproductive Heath Servs., 851 F.2d 1071 (8th Cir. 1988), *rev'd other grounds*, 492 U.S. 490 (1989)

School Dist. v. Ball, 473 U.S. 373 (1985)

Larson v. Valente, 456 U.S. 228 (1982)

IV. ARGUMENT

A. Point A: The Trial Court Erred In Dismissing Mary Doe's RFRA Claim Because Mary Doe Stated a RFRA Claim In That the Informed Consent Law 1) Substantially Burdens Mary Doe's Free Exercise of Religion; 2) Does Not Serve the Government's Compelling Interest in Obtaining Mary Doe's Informed Consent to an Abortion; and 3) Is Not the Least Restrictive Means of Obtaining Mary Doe's Informed Consent to an Abortion.

The Court reviews the Trial Court's dismissal of the RFRA Claim *de novo*. *Lynch v. Lynch*, 260 S.W.3d 834, 836 (Mo. banc 2008). The Court must assume "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. banc 2009).

This case presents a significant issue of first impression – whether RFRA protects the right of a pregnant woman to refuse to subject herself to the Informed Consent Law when she has sincere religious beliefs that A) her non-viable fetus is not a separate or unique "human being" but rather merely part of her own body; B) she can, in good conscience, abort her non-viable fetus without any consideration whatsoever of its current or future condition;

C) her body is inviolable and subject to her sole control; D) she must make decisions regarding her body (including the non-viable fetus) based solely on the best scientific information available; E) she must not support religious, philosophical or political beliefs that imbue her non-viable fetus with an existence separate, apart or unique from her body; and F) she must not support any religious, philosophical or political beliefs that cede to control to a third party over the abortion of her non-viable fetus. There are no reported decisions interpreting or applying RFRA in Missouri so the Court must look for guidance in the decisions of other courts that have interpreted and applied the RFRA's of other states.

RFRA finds its genesis in the U.S. Supreme Court decision in *Employment Division, Department of Human Resources of Oregon v. Smith,* 494 U.S. 872 (1990) ("*Smith*"). The U.S. Supreme Court ruled in *Smith* a content neutral statute that infringes upon the free exercise of religion would no longer be analyzed under the "strict scrutiny" standard set by *Sherbert v. Verner,* 374 U.S. 398 (1963) ("*Sherbert*"). In response to *Smith*, Congress adopted the federal Religious Freedom Restoration Act, 42 U.S.C. § 2000bb, which re-established the "strict scrutiny" standard of review set by pre-*Smith* decisions for infringement upon the free exercise of religion. However,

Congress only has the authority to adopt RFRA for federal laws. *City of Boerne v. Flores,* 521 U.S. 507 (1997).

Missouri and nineteen other states have enacted their own versions of RFRA that apply to state laws.[3] The federal circuit and state appellate courts considering state RFRA statutes have reached a consensus on the legal standards that apply to state RFRA claims. *A.A. v. Needville Indep. Sch. Dist*., 611 F.3d 248 (5th. Cir. 2010) ("*Needville*"); *Merced v. Kasson*, 577 F.3d 578 (5th. Cir. 2009) ("*Merced*"); *Barr v. City of Sinton*, 295 S.W.3d 287 (Tex. 2009) ("*Barr*"); *Warner v. City of Boca Raton*, 887 So.2d 1023 (Fla. 2004) ("*Warner*"). Drawing on extensive federal precedent in free exercise of religion cases – both under the federal RFRA and the First Amendment – these cases hold a plaintiff states a claim for a state RFRA violation upon a showing that 1) plaintiff sincerely holds a religious belief; and 2) state law places a substantial burden on the free exercise of plaintiff's religious belief. If plaintiff makes that showing, then the government can still prevail if it shows that 3) the law actually furthers a compelling interest

[3] https://en.wikipedia.org/wiki/State_Religious_Freedom_Restoration_Acts (last visited April 21, 2017).

in plaintiff's case and 4) the law is the least restrictive means of furthering that interest. *Needville*, 611 F.3d at 260, *Merced*, 577 F.3d at 588; *Warner*, 887 So.2d at 260; *Barr*, 295 S.W. 3d at 307.

The plaintiff in *Needville* was a Native American student who sought to wear his hair long, uncut and unbraided in school. The manner in which he wore his hair was part of his "familial religious tradition" of being Native American. 611 F.3d at 254. The school's grooming policy required his hair "not cover any part of the ear or touch the top of the standard collar in back." The school district granted plaintiff a limited exemption to wear his hair in a braid tucked inside his shirt. *Id.* at 256. Plaintiff sought to enjoin the grooming policy, including the exemption, under the Texas RFRA so he could wear his hair unbraided and outside his shirt. The Court found the grooming policy (and exemption), as applied to plaintiff, violated the Texas RFRA. *Id.* at 257.

The Court first addressed whether plaintiff was sincere in his religious belief about wearing his hair unbraided. The school district acknowledged some Native Americans held a sincere religious belief about wearing their hair unbraided. However, the school district argued plaintiff's religious beliefs were not burdened because other Native Americans routinely wore

their long hair in braids without feeling their religious beliefs had been compromised. *Id.* at 261.

Citing *Thomas v. Review Board of Indiana Employment Security Division,* 450 U.S. 707 (1981) ("*Thomas*"), the Court ruled it would defer to plaintiff's claim that the manner in which he wore his hair was motivated by religious beliefs, and not just cultural or philosophical ones. The Court said:

> Sincere religious belief cannot be subjected to a judicial sorting of the heretical from the mainstream-certainly not in discharge of duty to faithfully apply protections demanded by law. Efforts to that end would put at risk the protection that the First Amendment and TRFRA are meant to provide.

Needville, 611 F.3d at 261.

The Court reviewed the history of the case and concluded plaintiff had met his burden of proving the sincerity of his religious belief in wearing his hair without braids. *Id.* at 262.

The Court then moved to the next issue of whether the school's grooming policy substantially burdened plaintiff's exercise of his religion. The Court said:

> [A] burden is substantial if it is real vs. merely perceived, and significant vs. trivial-two limitations that leave a broad range of

> things covered[–] The focus of the inquiry is on the degree to which a person's religious conduct is curtailed and the resulting impact on his religious expression, as measured from the person's perspective, not from the government's. This inquiry is case-by-case and fact-specific and must take into account individual circumstances.

Id. at 264.

The Court found the grooming policy, even with the exception crafted for plaintiff, imposed a substantial burden on plaintiff's religious beliefs under RFRA because "it curtails religious conduct and impacts religious expression to a significant and real degree." *Id.* at 263. The Court said the restriction was significant because the school district's dress code precluded plaintiff from expressing his religious belief by wearing his hair unbraided outside his shirt during the school day. The Court said the restriction was real because the restriction subjected plaintiff to guilt and shame. *Id.* at 266.

The Court then stated:

> To say that a person's right to free exercise has been burdened, of course, does not mean that he has an absolute right to engage in the conduct. TRFRA permits the regulation of free exercise if the government can establish a compelling interest that

> justifies the burden and that it has adopted the least restrictive means of achieving that interest. Because religious exercise is a fundamental right justification can be found only in interests of the highest order." [internal quotations and citations omitted].

611 F.3d at 266.

The Court rejected the school district's assertion of a compelling interest to "teach hygiene, instill discipline, prevent disruption, avoid safety hazards, and assert authority." The Court said:

> A court must searchingly examine the interests that the State seeks to promote and the impediment to those objectives that would flow from recognizing the claimed exemption. For government to prevail, then, it cannot rely on general platitudes, but must show by specific evidence that the adherent's religious practices jeopardize its stated interests.

Id. at 268.

The Court reviewed the record and found the school district had presented no evidence that any of its stated interests were actually served by imposing the grooming code on plaintiff. 611 F.3d at 268 to 269. The Court found plaintiff's rights under RFRA had been violated by grooming code and said:

> [W]hile a school may set grooming standards for its students, when those standards substantially burden the free exercise of religion, they must accomplish *something.* Under TRFRA, that "something" is a compelling interest. The District only invokes the same five generalized interests without explaining the play of those interests here. TRFRA demands more. The questions of detail and degree that the District would answer for its student do not rise to the level of compelling interest, and are therefore left to the adherent alone. [emphasis is original; internal quotations and citations omitted]

611 F.3d at 273.

Needville relied extensively on the seminal decision by the Texas Supreme Court in *Barr*. The plaintiff in *Barr* operated a halfway house for drug offenders who had were on parole. The parolees were required to accept a Christian ministry as part of their participation in the halfway house. The defendant City of Sinton sought to remove the halfway house from the community by various targeted zoning restrictions. Plaintiff asserted those restrictions violated the Texas RFRA. 295 S.W.3d at 292.

The Court rejected the City's argument the Texas RFRA did not apply because "the halfway house need not be a religious operation." The Court

said RFRA protects secular actions motived by religious beliefs. *Id.* at 300 ("Just as a Bible study group and a book club are not treated the same, neither are a halfway house operated for religious purposes and one that is not"). The Court said the record "easily establishes that Barr's ministry was 'substantially motivated by sincere religious belief' for purposes of the TRFRA." *Id.* at 301. The Court said the zoning restrictions substantially burdened plaintiff because they "severely restricted" the operation of the halfway house in the community. *Id.* at 305.

The Court rejected the City's claim that its zoning authority was a compelling state interest protected by RFRA. Quoting *Gonzales v. O Centro Espírita Beneficente União do Vegetal* 546 U.S. 418, 439, (2006) ("*Gonzalez*"), the Court held:

> RFRA requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law to the person — the particular claimant whose sincere exercise of religion is being substantially burdened. To satisfy this requirement, the Supreme Court stated, courts must look beyond broadly formulated interests justifying the general applicability of government mandates and scrutinize the

asserted harm of granting specific exemptions to particular religious claimants. [internal quotations and citations omitted].

295 S.W.3d at 306.

Merced also followed *Barr*. In *Merced*, plaintiff claimed a municipal ordinance banning the slaughter of livestock violated the Texas RFRA because it prohibited his ritual killing of livestock motivated by his Santeria religion. 557 F.3d at 582. The Court said the focus of the first prong of the RFRA test was whether the plaintiff's conduct was motivated by a sincere religious belief.

> As discussed in *Barr,* the focus of this initial prong is on plaintiff's free exercise of religion; that is, whether plaintiff's sincere religious beliefs motivate his conduct. For example, if Merced wanted to keep and kill goats and sheep because he could thereby ensure the quality of the meat he consumed, such a purpose, while meritorious, is non-religious in motivation and lies beyond TRFRA's reach.

557 F.3d at 588.

The Court said the purpose of RFRA was to reinstate the compelling state interest standard for violations of the free exercise of religion set by *Sherbert*. The Court adopted the *Sherbert* test for whether a burden had

been placed on the exercise of religion, *viz*, whether plaintiff is forced to chose between compliance with the law and acting (or not acting) in a manner motivated by plaintiff's religious beliefs. 577 F.3d at 589 ("The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand.").

The Court found the municipal ordinance put plaintiff between the proverbial rock and a hard place under the *Sherbert* test because he had to choose between complying with law and engaging in conduct (or refusing to engage in conduct) motivated by his religious beliefs. *Id.* at 591 ("[A] government's regulation is significant if it forces the adherent to choose between, on the one hand, enjoying some generally available, non-trivial benefit, and, on the other hand, following his religious beliefs."); *see also Korte v. Sebelius*, 735 F.3d 654, 706-07 (7th Cir. 2013) (Rovner, C.J., dissenting) (Plaintiff's religious beliefs are violated by a law that puts plaintiff between "a rock and hard place" of forcing a choice between accepting government benefits or engaging in conduct motivated by religious belief.).

The city argued in *Merced* its ordinance served the compelling state interests of public health and animal treatment. The Court rejected the city's

argument because there was no evidence of any actual public health risks to the ritual slaughter of livestock by plaintiff nor any evidence the animals suffered any more than they would in a legal, commercial slaughter for meat. 557 F3d at 593.

The four-prong *Needville/Barr/Merced* analysis for the Texas RFRA was followed by *Warner* for the Florida RFRA. In *Warner*, the plaintiffs, sought to put vertical markers on gravesites, including standing crosses. They claimed a city ordinance banning vertical markers but permitting horizontal markers violated their rights under the Florida RFRA. 887 So.2d at 1025.

The Court rejected the argument that "any act by an individual motivated by religion is subject to the compelling state interest test, or strict scrutiny standard." The Court said the Florida RFRA applies to state actions that "substantially burden" the free exercise of religion. The Court applied the *Sherbert* test saying, "a substantial burden on the free exercise of religion is one that either compels the religious adherent to engage in conduct that his religion forbids or forbids him to engage in conduct that his religion requires." *Id.* at 1033. The Court ruled the plaintiff's religious beliefs were sincere but were not "substantially burdened" because the ban on vertical markers "merely inconvenienced" the plaintiffs, who remained free to have

horizontal markers engraved with any kind of religious symbol they wanted. *Id.* at 1035.

Mary Doe has alleged a violation of RFRA under the four-prong analysis used in *Needville, Barr, Merced* and *Warner*. The Trial Court erred because it failed to adopt or correctly apply the four-prong analysis.

Mary Doe met the first prong – sincerity of religious belief – by her allegations in the Petition that she holds the Plaintiff's Tenets. A11 to A12. On a motion to dismiss, the trial court must accept as true Mary Doe's allegation that she held the religious beliefs described in the Plaintiff's Tenets. The Trial Court erred when it did not. Indeed, it compounded the error by assuming Mary Doe's beliefs were not religious beliefs at all but rather secular political posturing. The Trial Court said:

> 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.

A72.

Reliance on a board-game metaphor is a poor substitute for legal

reasoning. Labeling Mary Doe's beliefs as "political" shows the Trial Court did not believe the truth of her allegations about her religious beliefs in Plaintiff's Tenets. The State of Missouri is certainly free at trial to try and prove Mary Doe's beliefs are political and not religious. But that must be decided after a full record is developed and not at the pleadings stage.

Mary Doe would be the first to admit her religious beliefs are outside the mainstream thinking of many Christians in Missouri. Indeed, some would label her with the sobriquet "Satanist." But if religious freedom is going to have any meaning under RFRA, the Court must accord Mary Doe the same respect for her religious beliefs it would grant Mother Theresa. This proposition was well stated by the Illinois Supreme Court in *In Re Brooks' Estate*, 205 N.E.2d 435, 442, 32 Ill.2d 361, 373 (Ill. 1965) ("*Brooks' Estate*"):

> Courts may decide whether the public welfare is jeopardized by acts done or omitted because of religious belief; but they have nothing to do with determining the reasonableness of the belief. That is necessarily a matter of individual conscience. There is hardly a group of religious people to be found in the world who do not hold to beliefs and regard practices as important which seem utterly foolish and lacking in reason to others equally

> wise and religious; and for the courts to attempt to distinguish between religious beliefs or practices on the ground that they are reasonable or unreasonable would be for them to embark upon a hopeless undertaking and one which would inevitably result in the end of religious liberty.

Mary Doe is not asking to be excused from the law altogether because of her religious beliefs. Rather she is exercising her right—granted by RFRA--to require the State of Missouri to show a compelling state interest is actually served by forcing her to accept and pay for the medical procedures required by the Informed Consent Law. See *Barr*, 295 S.W.3d at 305 ("To say that a person's right to free exercise has been burdened, of course, does not mean that he has an absolute right to engage in the conduct. The government may regulate such conduct in furtherance of a compelling interest."). The State of Missouri cannot escape that obligation by pretending Mary Doe has a political ax to grind rather than religious beliefs to protect.

Mary Doe has also met the second prong of the analysis from *Needville/Barr/Merced/Warner* by alleging the Informed Consent Law

imposes a substantial burden on the exercise of her religious beliefs.[4] On the day she walked into Planned Parenthood, Mary Doe told her doctors she had already made up her mind to have an abortion and did not need to review or want to review any of the information in the Booklet or be subjected to any of the other medical procedures required by the Informed Consent Law. She told her doctors she did not need or want to wait three days before getting an abortion. She told the doctors she regarded the Missouri Tenet to be "merely a political and religious statement and not based on the best scientific understanding of the world," and said, "I am informed to my satisfaction–both as a religious and scientific matter–that an abortion will not terminate the life of a separate, unique, living human being. I respectfully request that you provide me with an abortion today." A17, A18.

Mary Doe tried to act in a manner motivated by her sincerely held religious beliefs. Her letter spelled out precisely what she proposed to do—get an abortion on May 8, 2015 without the ultrasound, Booklet or waiting period. But the Informed Consent Law prevented her from acting in the

[4] The Missouri RFRA does not actually use the language "substantial burden." However, the Missouri legislature intended its state RFRA to be in line with the RFRA's of other states and the federal government, which expressly use the phrase "substantial burden."

manner motivated by her religious beliefs. The Informed Consent Law made her acknowledging receipt of the Booklet, including the Missouri Tenet, and subject herself to, and pay for, the ultrasound and three-day waiting period.

Mary Doe was forced to choose between acting in the manner motivated by her religious beliefs or forego an abortion. To add insult to injury, she had to pay for the ultrasound and the waiting period and suffer guilt, doubt and shame.

This is a textbook example of the imposition of a substantial burden under RFRA. It was real and substantial because it cost Mary Doe time, liberty, money and the emotional pain of guilt, doubt and shame. It was a burden because it put Mary Doe between the proverbial rock and a hard under the *Sherbert* test of acting in a manner motivated by her religious beliefs or foregoing medical treatment.

The U.S. Supreme Court has ruled a substantial burden exists where the state "puts substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Thomas*, 450 U.S. at 718, 101 S.Ct. at 1432. As alleged in the Petition, the Informed Consent Law was intended to pressure Mary Doe into believing a part of her body was a "human being" and forego an abortion. A20 to A21.

The Informed Consent Law is an integral part of the medical procedure of an abortion. Mary Doe has the right to reject any part of any medical procedure on religious grounds. In *Public Health Trust of Dade County v. Wons*, 541 So.2d 96 (Fla. 1989), the Florida Supreme Court reviewed the cases addressing the "delicate balancing analysis in which the courts weigh, on the one hand, the patient's constitutional right of privacy and right to practice one's religion, as against certain basic societal interests" when the parent of minor children refuses medical treatment on religious grounds. The Court protected the parent's right to refuse medical treatment and said:

> Running through all of these decisions, however, is the courts' deeply imbedded belief, rooted in our constitutional traditions, that an individual has a fundamental right to be left alone so that he is free to lead his private life according to his own beliefs free from unreasonable governmental interference. Surely nothing, in the last analysis, is more private or more sacred than one's religion or view of life, and here the courts, quite properly, have given great deference to the individual's right to make decisions vitally affecting his private life according to his own conscience. It is difficult to overstate this

> right because it is, without exaggeration, the very bedrock on which this country was founded.

541 So.2d at 98.

The forced imposition of the Missouri Tenet on Mary Doe is every bit as intrusive and burdensome as forcing a Jehovah's Witness to accept an unwanted blood transfusion. The law readily acknowledges forcing a Jehovah's Witness to accept a blood transfusion against his will places a burden on his religious beliefs. The Court should acknowledge that forcing Mary Doe to consider–against her will—whether her fetus is a "human being" places the same burden on her religious beliefs. *See Wilcut v. Innovative Warehousing*, 247 S.W.3d 1 (Mo. App. 2008) (Refusal by Jehovah's Witness to accept blood transfusion not "unreasonable" for purposes of death benefit claim under state Worker's Compensation Law.); *In Re Brown*, 478 So.2d 1033 (Miss. 1985) (Jehovah's Witness has the right under the Free Exercise Clause to refuse a blood transfusion.); *Brooks' Estate*, 205 N.E.2d at 438 (It is "self evident" that forcing a blood transfusion on a Jehovah's Witness has a coercive effect on the person.).

The Trial Court erred – both on the facts and law – when it said the Informed Consent Law merely required Mary Doe to "be present" for her ultrasound and waiting period and that "[a]t worst, Missouri created an

opportunity—but not an obligation—for Plaintiff to hear State speech regarding abortion. Such requirements do not offend RFRA." A71. The so-called "opportunity" means Mary Doe must submit to and pay for a medically unnecessary ultrasound, acknowledge receipt of the Booklet and Missouri Tenet, and then wait three days in a St. Louis motel before getting an abortion.

The "opportunity" is akin to lecturing a new prisoner about prison regulations, giving her copy of the rules then putting her in solitary confinement (at her own expense) for three days to think about them. That may present the "opportunity" for a "teaching moment" from the State's perspective; but the prisoner understandably sees it as arbitrary and punitive.

The State of Missouri uses the Informed Consent Law as an "opportunity" to preach a human being comes into existence at conception. Mary Doe experienced that "opportunity" as the repression of her religious beliefs costing her money, liberty, and emotional pain. As the Court said in *Needville,* "[t]he focus of the inquiry is on the degree to which a person's religious conduct is curtailed and the resulting impact on his religious expression, as measured from the person's perspective, not from the government's." [emphasis added] 611 F.3d at 264. From Mary Doe's perspective, the "teaching moment" provided by the Informed Consent Law

is religious persecution–not an "opportunity." The Informed Consent Law inflicted real and substantial injury to her feelings, pocketbook, and liberty.

The Petition alleges facts, which the Court must accept as true, that show Mary Doe has the sincere religious beliefs stated in Plaintiff's Tenets. The Petition alleges facts that show the Informed Consent Law forced Mary Doe to subject herself to and pay for medically unnecessary procedures—including an ultrasound and waiting period—and acknowledge receipt of the Missouri Tenet as a condition for getting an abortion. The Petition alleges those medically unnecessary procedures and the message they promote cost Mary Doe time, money liberty and psychic pain as the price of getting an abortion. The Petition has met the first two prongs of the test from *Needville/Barr/Merced/Warner*—sincerity of her religious beliefs and a substantial burden imposed on her beliefs by the Informed Consent Law.

The burden now shifts to the State of Missouri to show the Informed Consent Law served a compelling state interest and is the least intrusive means on achieving that objective. And the State of Missouri must show how a compelling state interest is served by the application of the Informed Consent Law to Mary Doe and not the general population of women seeking an abortion. *Gonzales,* 546 U.S. at 439; *Needville,* 611 F.3d at 268.

The Petition alleges the purposes of the Informed Consent Law are, as applied to Mary Doe to:

- Promote the belief that "The life of each human being begins at conception. Abortion will terminate the life of a separate, unique, living human being;"
- Persuade Mary Doe the Missouri Tenet is true and an abortion is murder;
- Cause Mary Doe doubt, guilt and shame to dissuade her from getting an abortion; and
- Punish Mary Doe for her beliefs.

A20 to A21. The Petition further alleges these are not compelling government interests for purposes of Mary Doe's RFRA claims. A21.

Accepting these pleadings as true, the State of Missouri has no compelling state interest in enforcing the Informed Consent Law on Mary Doe. Mary Doe has therefore stated claims in the first three counts of the Petition for an exemption from the Informed Consent Law pursuant to RFRA.

B. Point B: The Trial Court Erred In Dismissing Mary Doe's Establishment Clause Claim Because the Informed Consent Law Violates the Establishment Clause In That The Informed Consent Law Promotes the Religious Belief a Human Being Comes Into Existence At Conception.

One of the most contentious philosophical, religious and political debates of our time is when does human tissue *in utero* become imbued with sufficient stature as a "human being" to be treated in the same manner as a baby that lives and breathes separate and apart from the mother. The Informed Consent Law expressly adopts and aggressively promotes the Missouri Tenet and thus weighs in on the side of those who believe a "human being" begins at conception and abortion is murder. The Informed Consent Law dictates—by legislative fiat—a definition of "human being," which the Establishment Clause preserves for resolution solely in the hearts and minds of individuals. *Engel v. Vitale*, 370 U.S. 421, 443 (1962) ("*Engel")*, (Douglas, J., concurring) ("[I]f a religious leaven is to be worked into the affairs of our people, it is to be done by individuals and groups, not by the Government.").

The Informed Consent Law promotes the very sectarian divisions the Establishment Clause was intended to avoid. *Larson v. Valente*, 456 U.S.

228, 252 (1982) ("*Larson*") (State law drafted with the explicit intention of promoting one religious denomination violates the Establishment Clause because it "engender[s] a risk of politicizing religion [causing] political fragmentation on sectarian lines."). The Informed Consent Law does not simply "happen[] to coincide or harmonize with the tenets of some or all religions." *McGowan v. Maryland*, 366 U.S. 420, 442 (1961). It takes a clear side in an extremely contentious debate that shapes state and federal elections and the appointment of government officials and judges.

The Eighth Circuit held the Missouri Tenet is "an impermissible state adoption of a theory when life begins." *Webster v. Reproductive Heath Servs.*, 851 F.2d 1071, 1076 (8th Cir. 1988) ("*Webster*"), *rev'd other grounds*, 492 U.S. 490 (1989). The Missouri Tenet adopts the religious belief of some—though not all—Christians that the life of a human being starts at conception. This is a full frontal assault on one of the bedrock principles of our democracy–each individual's unique right to decide a spiritual truth for himself or herself. "We are all of us on a search for truth, and the Establishment Clause prohibits the government from purposefully steering us in a particular direction." *ACLU Neb. Found. v. City of Plattsmouth, Neb.,* 358 F.3d 1020, 1042 (8th Cir. 2004), *rev'd en banc on other grounds,* 419 F.3d 772 (8th Cir. 2005) ("*City of Plattsmouth*"). *See*

also Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994) ("At the heart of the First Amendment lies the principle that each person should decide for him or herself the ideas and beliefs deserving of expression, consideration, and adherence. Our political system and cultural life rest upon this ideal.").

The U.S. Supreme Court said the Missouri Tenet could be read to express a "value judgment" favoring childbirth over abortion.[5] However, the Supreme Court left undecided the very issue presented to this Court of whether the forced imposition of that "value judgment" on pregnant women by way of the Informed Consent Law violates the Establishment Clause: [6]

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[5] This judicial gloss does not appear in the Informed Consent Law. The only government interest expressly stated in Missouri's abortion law is § 188.027.11 RSMo., which states there is a compelling state interest "to ensure that the choice to consent to an abortion is voluntary and informed, and given freely and without coercion."

[6] The Trial Court erred when it ruled, "The Supreme Court rejected an Establishment Clause challenge to a different Missouri statute with nearly identical language." A75. A majority of the U.S. Supreme Court Justices studiously avoided addressing whether the Missouri Tenet violated the Establishment Clause.

> "The extent to which the [Missouri Tenet] might be used to interpret other state statutes or regulations is something that only the state courts can definitively decide, and, until those courts have applied the [Missouri Tenet] to restrict Appellees' activities in some concrete way, it is inappropriate for federal courts to address its meaning."

492 U.S. at 491.

Justice Stevens, who concurred in part and dissented in part in *Webster*, found the Missouri Tenet violated the Establishment Clause:

> Indeed, I am persuaded that the absence of any secular purpose for the legislative declarations that life begins at conception and that conception occurs at fertilization makes the relevant portion of the preamble invalid under the Establishment Clause of the First Amendment to the Federal Constitution. This conclusion does not, and could not, rest on the fact that the statement happens to coincide with the tenets of certain religions, or on the fact that the legislators who voted to enact it may have been motivated by religious considerations. Rather, it rests on the fact that the preamble, an unequivocal endorsement of a religious tenet of some but by no means all

> Christian faiths, serves no identifiable secular purpose. That fact alone compels a conclusion that the statute violates the Establishment Clause." [internal quotations and citations omitted]

492 U.S. at 566-67.[7]

Neither the Eighth Circuit nor the U.S. Supreme Court was presented with the Establishment Clause issue in this case and thus neither had reason to conclusively decide whether a legislative declaration of "when life begins" violates the Establishment Clause. Thus the question for this Court is whether preaching the "state's theory of when life begins" to a woman seeking an abortion by way of the Informed Consent Law violates the Establishment Clause. Mary Doe submits it does.

[7] Justice Stevens traced the theological origins for the Missouri Tenet back to St. Thomas Aquinas and concluded, "[i]f the views of St. Thomas were held as widely today as they were in the Middle Ages, and if a state legislature were to enact a statute prefaced with a 'finding' that female life begins 80 days after conception and male life begins 40 days after conception, I have no doubt that this Court would promptly conclude that such an endorsement of a particular religious tenet is violative of the Establishment Clause." 492 U.S. at 568.

There are few absolutes in Establishment Clause jurisprudence. However, one absolute is the Establishment Clause forbids "government-sponsored indoctrination into the beliefs of a particular religious faith." *School Dist. v. Ball*, 473 U.S. 373, 385 (1985) ("*Ball*"); *see also Larson*, 456 U.S. at 244 ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."). The sole purpose of the Informed Consent Law, as alleged in the Petition, is to promote the Missouri Tenet. But the Missouri Tenet is a statement of religious belief held by some–not all–Christians.

Plaintiff and millions of other Missouri citizens do not believe the Missouri Tenet. Nor, for that matter, do the secular courts in this country. *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 779 (1986) (Stevens, J., concurring) ("[T]here is a fundamental and well-recognized difference between a fetus and a human being.").

As alleged in the Petition, the *sole* purpose of the Informed Consent Law is to indoctrinate pregnant women into the belief held by some Christians that a separate and unique human being begins at conception. The Informed Consent Law is devoid of any facts or consideration of the theological proposition that a fetus is not a separate and unique human being but rather tissue physically integrated into a woman by an umbilical cord.[8]

On its face and in practice, the Informed Consent Law discriminates against Mary Doe in the exercise of her religious belief that she can, in good conscience, abort her non-viable fetus on demand and without consideration of its current or future condition. The Informed Consent Law offers nothing to support any of Mary Doe's religious beliefs. Such discrimination renders the Informed Consent Law unconstitutional because it is not narrowly tailored to serve a compelling government interest. *Larson*, 456 U.S. at 247.

In L*arson*, Court found a facially neutral law discriminated between "well-established churches" and "churches which are new and lacking in a constituency." This discrimination violated the Establishment Clause because the law had both the purpose and the effect of discriminating against certain religious points of view. The Supreme Court struck down the law

[8] The Booklet does not even mention the umbilical cord – the very tissue that makes a non-viable fetus part of a woman's body.

under the Establishment Clause saying it "does not operate evenhandedly [and] effects the selective legislative imposition of burdens and advantages upon particular denominations." *Id.* at 253-54.

If the Informed Consent Law were truly evenhanded, it would present the myriad viewpoints on when a "human being" comes into existence, including Mary Doe's belief that her fetus is not a "human being" until it becomes viable. A neutral statement would also presumably include St. Thomas Aquinas' view that female life begins 80 days after conception and male life begins 40 days after conception.

The Trial Court ruled Mary Doe's rights under the Establishment Clause were not violated because the Informed Consent Law "does not require that the patient ever read the printed materials or have the ultrasound." [9] A75. The Trial Court erred because the impact of the

[9] The Trial Court erred in its interpretation of § 188.027.1.(4) RSMo. This section requires Planned Parenthood to "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." [emphasis added]. One cannot determine whether there is an audible fetal heartbeat without an ultrasound.

Informed Consent Law on Mary Doe or any other patient is irrelevant to an Establishment Clause claim. *Engel,* 370 U.S. at 430 ("The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce non-observing individuals or not.").

The Trial Court erred when it found the Informed Consent Law pass Constitutional muster under *Lemon v. Kurtzman,* 403 U.S. 602 (1971) ("*Lemon*"). *Lemon* does not apply to this case because the Informed Consent Law is discriminatory on its face and in practice. *City of Plattsmouth,* 358 F.3d at 1032 ("When the challenged government action discriminates among religions we apply *Larson* and review the government action with the 'strict scrutiny' standard" [internal citations omitted]).

Moreover, the *Lemon* test is not satisfied because the Informed Consent Law makes clear Mary Doe's beliefs do not enjoy the approval of the State of Missouri. That disapproval is the essence of an Establishment Clause violation. *Ball*, 473 U.S. at 389 ("Government promotes religion as effectively when it fosters a close identification of its powers and responsibilities with those of any — or all — religious denominations as when it attempts to inculcate specific religious doctrines. If this

identification conveys a message of government endorsement or disapproval of religion, a core purpose of the Establishment Clause is violated."); *Gillette v. United States*, 401 US 437, 450 (1971) ("[T]he Establishment Clause prohibits government from abandoning secular purposes in order to put an imprimatur on one religion, or on religion as such, or to favor the adherents of any sect or religious organization.").

V. CONCLUSION

For the reasons set forth above, Mary Doe respectfully requests the Trial Court be reversed, the Petition be reinstated and the case be remanded for trial. In the alternative, Mary Doe respectfully requests the case be transferred to the Supreme Court, as the Establishment Clause Claim is colorable.

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CERTIFICATION OF COMPLIANCE

I certify that this brief includes the information required by Missouri Supreme Court Rule 55.03, complies with limitations contained in Missouri Supreme Court Rule 84.06(b), contains 9,951 words, and was prepared in Microsoft Word:MAC 2011.

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