WD80387

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

MARY DOE,
Plaintiff/Appellant,

v.

ERIC GREITENS, GOVERNOR OF THE STATE OF MISSOURI, et al.
Defendants/Respondents.

Appeal from the Circuit Court of Cole County, Missouri
The Honorable Jon Edward Beetem, Circuit Judge

AMENDED
BRIEF OF RESPONDENTS

SUPERSEDES RESPONDENT'S BRIEF FILED JUNE 30, 2017

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JURISDICTIONAL STATEMENT

Respondents agree that this Court has jurisdiction over this appeal because the Appellant's challenge to the validity of provisions of RSMo § 188.027 under the federal Establishment Clause is not "real and substantial," but is instead "merely colorable." *In the Matter of the Care and Treatment of Carl Kirk v. State*, -- S.W.3d ----, SC 95752, 2017 WL 2774419, *1 n.2 (June 27, 2017).

In her Second Amended Petition, Plaintiff Mary Doe ("Doe") brought two constitutional challenges to the validity of portions of Missouri's informed consent law relating to abortion, RSMo. § 188.027 ("Informed Consent Law"). LF 40-45, Appx. A29-34. Specifically, Count IV alleged that the Informed Consent Law violates the Establishment Clause. LF 40-43, Appx. A29-32. Count V alleged that the Informed Consent Law violates the Free Exercise Clause. LF 43-45, Appx. A32-34. While Doe has abandoned her Free Exercise claim on appeal, *see infra* Section III & App. Br., 11, she appeals from the dismissal of her Establishment Clause claim. *See* Doe's Second Point Relief On, App. Br., at 18, 41-50.

The Missouri Supreme Court has exclusive jurisdiction over real and substantial challenges to the validity of state statutes, but the Missouri Courts of Appeal have jurisdiction over merely colorable constitutional claims. MO. CONST. art V, § 3; *Kirk*, 2017 WL 2774419, *1 n.2. Claims are "merely colorable" when they "have been addressed by either the United States Supreme Court or the Missouri Supreme Court and, therefore, do not involve fair doubt or reasonable room for disagreement." *Kirk*, 2017 WL 2774419, *1 n.2.

As discussed in more detail below, *see infra* Part II, Doe rests her Establishment Clause argument heavily upon the reversed Eighth Circuit opinion in *Reproductive Health Services v. Webster*, 851 F.2d 1071 (8th Cir. 1988), *rev'd sub. nom*, *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), and the vacated Eighth Circuit panel opinion in *ACLU Neb. Found. v. City of Plattsmouth, Neb.*, 358 F.3d 1020 (8th Cir. 2004), *vacated en banc*, 419 F.3d 772 (8th Cir. 2005).

The proposition for which Doe cites the Eighth Circuit *Reproductive Health* case, that the state may not enact a value judgment on when life begins, was directly contradicted by the U.S. Supreme Court's decision in the same case. *Webster v. Reproductive Health Services*, 492 U.S. 490, 506 (1989) ("The Court has emphasized that Roe v. Wade 'implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion.' [RSMo. § 1.205] can be read simply to express that sort of value judgment.") (citation omitted). Though Doe does twice cite the U.S. Supreme Court *Webster* opinion, one citation is of the Court's unofficial syllabus and the second is of the dissenting opinion of Justice Stevens. *See*, App. Br., 44-45 (Citing "492 U.S. at 491," the syllabus, and "492 U.S. at 566-67," Justice Stevens' dissent arguing that an Establishment Clause violation had occurred, contrary to the decision of a majority of the Court).

The Eighth Circuit's panel opinion in *Plattsmouth*, holding that a city could not display a Ten Commandments monument in a city park, was vacated by the Eighth Circuit en banc, which followed a U.S. Supreme Court decision upholding the municipal display of Ten Commandment monuments. *ACLU Nebraska Found. v. City of*

Plattsmouth, 419 F.3d 772, 778 (8th Cir. 2005) ("Although the text of the Ten Commandments has undeniable religious significance, '[s]imply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause.'"); *Van Orden v. Perry*, 545 U.S. 677 (2005) (upholding the municipal display of the Ten Commandments).

Because Doe's Establishment Clause argument relies almost entirely on dissenting opinions and case law that has been vacated or reversed on the very points for which she cites them, it is clear that these claims "have been addressed by either the United States Supreme Court or the Missouri Supreme Court and, therefore, do not involve fair doubt or reasonable room for disagreement." *Kirk*, 2017 WL 2774419, *1 n.2. Therefore, her Establishment Clause claim is not "real and substantial," but "merely colorable," *id.*, and this Court properly has jurisdiction over this appeal.

STATEMENT OF FACTS

Appellant Mary Doe ("Doe") alleges that she is a member of the Satanic Temple. LF 75, Exhibit 2 to Second Amended Petition, Appx. A63. She alleges that she believes that abortion is morally permissible under the tenets of the Satanic Temple. *Id.* Specifically, her alleged "Satanic" beliefs[1] include:

1. "Her body is inviolable and subject to her will alone." LF 22, Second Amended Petition, ¶ 27(a), Appx. A11.
2. "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." LF 22, Second Amended Petition, ¶ 27(b), Appx. A11.
3. "Her Fetal Tissue is part of her body and not a separate, unique, living human being." LF 22, Second Amended Petition, ¶ 27(c), Appx. A11.
4. "She alone decides whether, when and how to proceed with the Removal Procedure." LF 22, Second Amended Petition, ¶ 27(d), Appx. A11.

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[1] Because this case was decided on a motion to dismiss, Respondents assume solely for purposes of argument that the "religious" beliefs alleged in Doe's Second Amended Petition constitute sincerely held religious beliefs. Respondents do not concede that these beliefs are in fact religious beliefs, rather than political and philosophical views on abortion dressed up as religious beliefs in order to manufacture a legal controversy.

5. "She may, in good conscience, have an abortion without regard to the current or future condition of her Fetal Tissue." LF 22, Petition, ¶ 27(e), Appx. A11.
6. "She must not support religious, philosophical or political beliefs that imbue her Fetal Tissue with an existence separate, apart or unique from her body." LF 22, Second Amended Petition, ¶ 27(f), Appx. A11.
7. "She must not support any religious, philosophical or political beliefs [*sic*] that cede to [*sic*] control to a third party over the Removal Procedure." LF 23, Second Amended Petition, ¶ 27(g), Appx. A12.
8. "She must not support any religious, philosophical or political belief that promotes the idea Fetal Tissue is a human being or imbued with an identity separate, apart and unique from her body." LF 23, Second Amended Petition, ¶ 27(h), Appx. A12.

Missouri has an Informed Consent Law, RSMo. § 188.027, that sets out pre-conditions for an abortion. The requirements relevant to this case are:

- Under RSMo § 188.027.1(2), the abortion provider must offer Doe a copy of a Missouri Department of Health and Senior Services booklet ("Booklet") that describes the anatomical and physiological growth of her unborn child[2] and that states: "The life of each human being begins at

[2] RSMo. § 188.015(9) defines "unborn child" as "the offspring of human beings from the moment of conception until birth."

conception. Abortion will terminate the life of a separate, unique, living human being."

- Under RSMo § 188.027.1(4),[3] the abortion provider must offer Doe an opportunity to view an ultrasound image and hear the heartbeat of her unborn child (the "Ultrasound Opportunity").
- Under RSMo §§ 188.027.1(2), (4) and 188.027.12, the abortion provider must wait a period of time after offering the Booklet and Ultrasound Opportunity before performing the abortion. The waiting period is currently set at 72 hours, with a statutory fallback period of a 24 hour if the 72-hour waiting period is ever held unconstitutional. RSMo § 188.027.12. (72-hour and 24-hour waiting periods, collectively, "Waiting Period.")

LF 23-24, Second Amended Petition, ¶¶ 30-37, Appx. A12-13.

In mid-February 2015, Doe alleged that she became pregnant. LF 21, Second Amended Petition, ¶ 22, Appx. A10. In March 2015, she learned of her pregnancy and began planning for her abortion. LF 22, Second Amended Petition, ¶ 25, Appx. A11. She earned money to pay for travel to St. Louis, her abortion, and a stay in a hotel in St. Louis. LF 26, Second Amended Petition, ¶¶ 47-52, Appx. A15. Doe alleged that she

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[3] Doe's Second Amended Petition and briefing erroneously cite this as RSMo § 188.027.3, but the language that Doe cites is from RSMo § 188.027.1(4). *See, e.g.*, LF 23, Second Amended Petition, ¶ 30, Appx. A12.

worked for 45 hours to earn the money required to comply with the Informed Consent Law. LF 26-27, Second Amended Petition, ¶¶ 53-55, Appx. A15-16.

On May 7, 2015, Doe traveled from Greene County, Missouri, to St. Louis, Missouri. LF 28, Second Amended Petition, ¶ 59, Appx. A17. On May 8, 2015, she made her first visit to the abortion clinic, and delivered a letter purporting to waive the Informed Consent Law requirements according to her Satanic beliefs and requesting an immediate abortion. LF 28-29, Second Amended Petition, ¶¶ 61-63, Appx. A17-18; LF 75, Exhibit 2 to Second Amended Petition, Appx. A63. The abortion provider refused to provide an abortion on May 8, 2015, but it offered Doe the Booklet and gave Doe an ultrasound. LF 29, Second Amended Petition, ¶ 64, Appx. A18. Doe had already voluntarily read the Booklet. LF 29, Second Amended Petition, ¶¶ 65, Appx. A18; LF 75, Exhibit 2 to Second Amended Petition, Appx. A63. Doe alleges that she felt guilt and shame during the Waiting Period. LF 31, Second Amended Petition, ¶ 72(e), Appx. A20.

On May 11, 2015, Doe filed this lawsuit. LF 1. On May 12, 2015, Doe returned to Planned Parenthood and received an abortion. LF 29, Second Amended Petition, ¶ 70, Appx. A18. Filing her RFRA action was not required in order to obtain her abortion. Doe did not plead that she was permitted to have an abortion because she initiated this litigation. She does not dispute that her abortion was legal and proceeded without any legal intervention for or against it by the State.

Originally, this lawsuit challenged the Booklet, the Ultrasound Opportunity, and the Waiting Period requirements of Missouri's Informed Consent Law and sought an

injunction against the Governor and Attorney General. LF 7-16, Verified Petition.[4] On December 24, 2015, the state court dismissed Doe's state court claims without prejudice. LF 17. She filed an Amended Petition in state court on January 21, 2016. LF 3.

On September 23, 2016, Doe filed her Second Amended Petition in the trial court, adding additional defendants and her constitutional claims to the state court lawsuit. LF 18-46, Second Amended Petition, Appx. A7-35. Doe challenges the Booklet, Ultrasound Opportunity, and Waiting Period requirements of Missouri's Informed Consent Law under the state's Religious Freedom Restoration Act ("RFRA"), RSMo. § 1.302 (Counts I-III) and the Establishment Clause and Free Exercise Clause of the U.S. Constitution (Counts IV-V). LF 18-46, Second Amended Petition, Appx. A7-35. Doe sought a permanent injunction against eight Missouri officials—the Governor, the Attorney General, and six members of the Missouri Board of Registration for the Healing Arts

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[4] On June 23, 2015, another litigant calling herself "Mary Doe," along with the Satanic Temple, filed a parallel lawsuit in federal court challenging the Booklet, the Ultrasound Opportunity, and Waiting Period requirements of Missouri's Informed Consent Law under the Establishment Clause and Free Exercise Clause of the U.S. Constitution. *The Satanic Temple, et al. v. Nixon, et al.*, 4:15-cv-00986-HEA (E.D. Mo. June 23, 2015) ("*Satanic Temple* Lawsuit"). On July 15, 2016, the federal court dismissed the *Satanic Temple* Lawsuit for lack of standing. *The Satanic Temple, et al. v. Nixon, et al.*, 4:15-cv-00986-HEA (E.D. Mo. Jul 15, 2016). That case is now on appeal, *The Satanic Temple, et al. v. Greitens, et al.*, 16-3387 (8th Cir. August 11, 2016).

(collectively, "the State"). LF 18-19, Second Amended Petition, Appx. A7-8. The trial court dismissed Doe's Second Amended Petition with prejudice for failure to state a claim on which relief could be granted, LF 77-91, Judgment, Appx. A65-79, and Doe timely appealed.

ARGUMENT

I. The Trial Court Properly Dismissed Doe's RFRA Claims because She Failed to State a Claim Upon Which Relief Could Be Granted (Responds to Appellant's First Point Relied On).

Standard of Review. The trial court's decision to dismiss Counts I-III of Doe's Second Amended Petition, raising RFRA claims, is reviewed *de novo*. *Hess v. Chase Manhattan Bank, USA, N.A.*, 220 S.W.3d 758, 768 (Mo. 2007).

Doe claims that she is entitled to an exemption under Missouri's Religious Freedom Restoration Act ("RFRA") to Missouri's Informed Consent Law. This claim fails as a matter of law. First, Doe failed to allege that the Informed Consent Law forced her to engage in any "act or failure to act" under RFRA, so she failed to allege an "exercise of religion" restricted by the Informed Consent Law. Second, Doe failed to allege any conflict between her putative Satanic beliefs and the operation of the Informed Consent Law, so she failed to allege a "restriction" on free exercise under RFRA. Third, even if Doe had alleged a restriction on free exercise, the Informed Consent Law clearly serves compelling state interests and is not unduly restrictive on Doe's asserted exercise of religion. For all these reasons, Doe's RFRA claim necessarily fails.

A. Missouri's RFRA law requires Doe to plead that the State has "restrict[ed]" her from engaging in an "act or refusal to act" that is motivated by religion, and that the State's restriction does not advance a compelling governmental interest or is unduly restrictive of Doe's exercise of religion.

Missouri's RFRA law provides that "[a] governmental authority may not restrict a person's free exercise of religion, unless" the following criteria are satisfied:

> (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.

RSMo. § 1.302.1(1)-(2). The statute 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." RSMo § 1.302.2.

Accordingly, under the plain text of Missouri's RFRA, a plaintiff claiming a RFRA violation must allege that: (1) he or she wishes to engage in an "act or refusal to act" that is substantially motivated by a sincere religious belief, and (2) a governmental authority has restricted or will "restrict" that act. RSMo § 1.302.1, 2. If the plaintiff alleges such a restriction on the free exercise of religion, the plaintiff must also allege that either (3) the restriction was not "in a form of a rule of general applicability," but instead

"discriminate[d] against religion, or among religions"; or (4) the application of the restriction to the person was not "essential to further a compelling government interest"; or (5) the restriction was "unduly restrictive considering the relevant circumstances." RSMo § 1.302.1(1)-(2).

Doe's petition failed to satisfy these pleading standards. First, Doe failed to allege an "exercise of religion" within the meaning of RFRA, because she failed to allege an act or failure to act *on her own part* that was substantially motivated for religious belief. Rather, she alleged that she did not wish to be exposed to information with which she disagreed or suffer inconvenience prior to her abortion, but she did not include any allegation that her religious beliefs prevented her from being exposed to alternative viewpoints or incur inconvenience to obtain an abortion. Second, Doe failed to allege any substantial burden on her Satanic religious beliefs from the operation of Missouri's Informed Consent Law, and thus she failed to plead a "restriction" within the meaning of the RFRA. Third, even if she had identified any restriction on her Satanic beliefs, the Informed Consent Law is a rule of general applicability that does not discriminate against religion; the Law furthers the State's compelling governmental interests in promoting human life, in encouraging careful consideration before the grave and irreversible decision to terminate a human life, and in ensuring that the abortion decision is free from pressure or coercion; and the Law does so in a way that was not "unduly restrictive" to Doe "considering the relevant circumstances." RSMo § 1.302.1(1)-(2). Accordingly, the trial court correctly dismissed Doe's RFRA challenges to the Informed Consent Law for failure to state a claim.

B. Doe failed to allege an "exercise of religion" that was "restricted" within RFRA's meaning, because she alleged only an interest in avoiding exposure to information with which she disagreed, and she failed to allege any religious belief that would be violated by such exposure to information.

Doe failed to allege an "exercise of religion" as defined by RFRA for two reasons. First, she failed to identify any affirmative "act or refusal to act" mandated by the Informed Consent Law. The Informed Consent Law requires *others* to act by offering Doe certain information before her abortion, and Doe's alleged interest in avoiding exposure to information with which she disagrees does not involve any "act or refusal to act" by Doe. Second, even if she had alleged an act or refusal to act, Doe failed to allege any religious belief that conflicted with any requirement of the Informed Consent Law. Accordingly, she failed to allege that the Informed Consent Law "restricted" any action motivated by her sincere beliefs.

1. Doe failed to allege an "exercise of religion" restricted by the Informed Consent Law because her interest in avoiding exposure to information does not involve any "act or refusal to act" by Doe.

In her Second Amended Petition, Doe claimed that the Informed Consent Law violated her Satanic beliefs in three ways: (1) by requiring her physician or a qualified professional to provide Doe with an "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," RSMo § 188.027.1(4); (2) by requiring her

physician or a qualified professional to provide Doe with "printed materials provided by the department, which describe the probable anatomical and physiological characteristics of the unborn child at two-week gestational increments," RSMo § 188.027.1(2); and (3) by requiring her physician or other qualified professional to provide such materials at least 72 hours before the abortion, RSMo § 188.027.1. *See* LF 31-40, Appx. A20-29.

By its plain terms, the Informed Consent Law requires Doe's *physician* or other qualified professional to perform these acts. RSMo § 188.027.1. It does not require Doe herself to perform these acts. As the trial court correctly found, nothing in the Informed Consent Law purports to require Doe to review the ultrasound, listen to the heartbeat, or read the printed materials about fetal development. Doe was free to decline to review any of the information that the statute required Doe's abortion provider to make available to her. Accordingly, the only interests that Doe asserted was an interest in being free from exposure to information with which she disagrees, and an interest in avoiding inconvenience or expense prior to obtaining an abortion.

Under the plain language of the statute, the interest in avoiding exposure to information with which one disagrees is not an "exercise of religion" because it does not involve any "act or refusal to act" that is substantially motivated by sincere religious belief. *See* RSMo § 188.027.2; *see also State v. Bazell*, 497 S.W.3d 263, 266 (Mo. 2016) (per curiam) (holding that "the primary rule of statutory interpretation" is "to give effect to the plain and ordinary meaning of the statutory language"). When one is merely exposed to information, one is not "acting" or "refusing to act." Rather, *someone else* is acting—namely the purveyor of the information, in this case Doe's physician. *See*

Webster's Third New International Dictionary 20 (2002) (defining the intransitive verb "act" as "to carry into effect a determination of the will : take action : move"); Black's Law Dictionary 26 (8th ed. 2004) (defining "act" as "something done or preformed, esp. voluntarily; a deed"). Thus, Doe's claim that her religion entitles her to avoid exposure to the information prescribed by the Informed Consent Law does not identify any "act" of Doe. Similarly, the only "refusal to act" that Doe alleged was her refusal to accept the proffered information, which of course is fully consistent with Doe's asserted religious beliefs. Because Doe did not and cannot allege that the Informed Consent Law requires her to take any affirmative action or refusal to take action, she failed to plead that she was engaged in any "exercise of religion" that was restricted by the State. RSMo § 188.027.2. As the trial court stated, "Plaintiff has not identified any 'act or refusal to act' that is 'substantially motivated by religious belief.'" LF 82, Appx. A70.

Because the plain meaning of the statute is clear, that ends the inquiry. *Bazell*, 497 S.W.3d at 266. But even if the statute were ambiguous on this point, Doe's interpretation must be rejected because it leads to unreasonable and absurd results that the General Assembly could not have intended. *See Aquila Foreign Qualifications Corp. v. Dir. of Revenue*, 362 S.W.3d 1, 4 (Mo. 2012) ("[C]onstruction of a statute should avoid unreasonable or absurd results."). If Doe could assert a sincere religious belief in avoiding exposure to information with which one disagrees, Doe could employ Missouri's RFRA as a formidable club to silence different viewpoints in the marketplace of ideas. This is an "unreasonable or absurd result" that the legislature could not have

intended and did not intend. *Id.*; *see also Akins v. Dir. of Revenue*, 303 S.W.3d 563, 565 (Mo. 2010).

2. Doe failed to plead that the statute "restrict[s]" her free exercise of religion because she failed to allege any religious belief that conflicted with the operation of the Informed Consent Law.

Not only did Doe fail to identify any "act or refusal to act" that the Informed Consent Law purportedly restricts, she also failed to allege any sincere religious belief that conflicts with the operation of the Informed Consent Law.

As discussed above, Doe alleged eight "deeply held religious beliefs" in her Second Amended Petition. LF 22-23, Second Amended Petition, ¶ 27(a)-(h), Appx. A11-12. These beliefs included:

1. "Her body is inviolable and subject to her will alone." LF 22, ¶ 27(a), Appx. A11.
2. "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." LF 22, ¶ 27(b), Appx. A11.
3. "Her Fetal Tissue is part of her body and not a separate, unique, living human being." LF 22, ¶ 27(c), Appx. A11.
4. "She alone decides whether, when and how to proceed with the Removal Procedure." LF 22, ¶ 27(d), Appx. A11.
5. "She may, in good conscience, have an abortion without regard to the current or future condition of her Fetal Tissue." LF 22, ¶ 27(e), Appx. A11.

6. "She must not support religious, philosophical or political beliefs that imbue her Fetal Tissue with an existence separate, apart or unique from her body." LF 22, ¶ 27(f), Appx. A11.
7. "She must not support any religious, philosophical or political beliefs that cede to [*sic*] control to a third party over the Removal Procedure." LF 23, ¶ 27(g), Appx. A12.
8. "She must not support any religious, philosophical or political belief that promotes the idea Fetal Tissue is a human being or imbued with an identity separate, apart and unique from her body." LF 23, ¶ 27(h), Appx. A12.

Notably, Doe did not allege that her sincere religious beliefs prevent her from being exposed to, or from refusing to review, information about abortion with which she personally disagrees. In fact, far from claiming that her religion requires her to avoid exposure to the State's information, Doe actually alleged that she voluntarily reviewed the information required by RSMo § 188.027.1(2) before seeking an abortion or filing this lawsuit. *See* LF 75, Appx. A63 (Doe asserting in a letter to her abortion provider that "I have already reviewed the Booklet"). Accordingly, as the trial court correctly observed, "Plaintiff does not claim a deeply held religious belief *against complying with 'irrelevant and unnecessary' regulations.*" LF 82-83, Appx. A70-71 (emphasis in original).

Similarly, Doe did not allege that her compliance with the 72-hour waiting period conflicted with any sincerely held religious belief. None of her asserted religious beliefs stated that her religion dictated that she must obtain an abortion more quickly than 72

hours after first making contact with an abortion provider. Doe's fourth asserted belief stated that "[s]he alone decides whether, when and how to proceed with the [abortion]." LF 22, ¶ 27(d), Appx. A11. But the Informed Consent Law fully permits Doe to "decide[] whether, when, and how" to proceed with her abortion. If for some reason she wanted to have her abortion on a particular day, she needed only to plan ahead by making contact with the abortion provider 72 hours in advance. As the trial court correctly stated, "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." LF 84, Appx. A72. Rather, "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*." *Id.* (emphases in original).

Similarly, Doe argues repeatedly that she was forced to incur inconvenience and expense to obtain her abortion as a result of the Informed Consent Law—both by incurring travel and lodging costs, and by (allegedly) paying for the cost of an ultrasound performed by the abortion provider.[5] *See, e.g.*, App. Br., 12, 33, 35, 38, 39. But Doe did

[5] Doe repeatedly objects that she was allegedly required by the abortion provider to *pay* for the ultrasound, *see* App. Br., 12, 33, 35, 38, 39, but this is not required by the text of the statute, and thus it does not constitute a "restriction" imposed by the statute.

not allege that she holds a sincerely held religious belief that prevents her from paying any money or incurring any inconvenience incidental to her compliance with the State's Informed Consent Law. She alleges that she must not "support any religious, philosophical or political belief that promotes the idea Fetal Tissue is a human being," but her payment of bus fare and hotel bills does not "support any religious, philosophical or political belief" whatsoever. LF 23, ¶ 27(h), Appx. A12. In short, though Doe is plainly unhappy that the Informed Consent Law allegedly forced her to incur incidental costs, she failed to allege that payment of such costs is inconsistent with her sincerely held religious beliefs. Under these circumstances, the trial court correctly concluded that Doe's petition failed to allege any inconsistency between her putative religious beliefs and the operation of the Informed Consent Law. The trial court correctly viewed her lawsuit as an attempt to manufacture a religious controversy out of Doe's political and philosophical disagreement with the Informed Consent Law. *See* LF 84, Appx. A72 ("Plaintiff is merely cloaking her political beliefs in the mantle of religious faith in order to avoid laws of general applicability that she finds prudent or offensive.").

See RSMo § 188.027.1(4) (requiring that the abortion provider "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").

3. Doe failed to plead that the statute "restrict[s]" her free exercise of religion because she alleged only *de minimis* burdens on her free exercise of religion.

Missouri's RFRA provides that "a governmental authority may not *restrict* a person's free exercise of religion." RSMo § 188.027.1 (emphasis added). The plain meaning of the word "restrict" requires that the plaintiff allege more than a *de minimis* burden on the free exercise of religion. *See* Webster's Third, at 1937 (defining "restrict" as "to set bounds or limits to : hold within bounds . . . to check free activity, motion, progress, or departure of : restrain"). A merely *de minimis* or inconsequential burden on freedom action does not constitute a "restriction." *See Kaemmerling v. Lappin*, 553 F.3d 669, 678 (D.C. Cir. 2008) ("A substantial burden exists when government action puts 'substantial pressure on an adherent to modify his behavior and to violate his beliefs.' . . . An inconsequential or *de minimis* burden on religious practice does not rise to this level, nor does a burden on activity unimportant to the adherent's religious scheme.").

The Informed Consent Law imposes no "restriction" on Doe, because it does not require any action from her, and it imposes no penalty on her for any action. Rather, by its plain terms, the Informed Consent Law imposes duties, obligations, and penalties on *other* people—namely, abortion providers—not on Doe herself. Doe alleges that the imposition of these obligations on third parties *indirectly* restricts her freedom of action by dictating the terms under which she may obtain abortion services from those people. But she cites no authority holding that regulation of the seller of services may constitute a "restriction" on the free exercise of a *buyer* by indirectly making it more complicated for

the buyer to purchase those services. Rather, every case on which Doe relies constitutes a direct restriction on the party asserting religious free exercise. *See A.A. v. Needville Indep. Sch. Dist.*, 611 F.3d 248, 253 (5th. Cir. 2010) (school restricted way in which a Native American student could wear his hair); *Merced v. Kasson*, 577 F.3d 578, 582 (5th. Cir. 2009) (city ordinance against animal slaughter restricted animal sacrifices); *Barr v. City of Sinton*, 295 S.W.3d 287, 289 (Tex. 2009) (city enacted zoning restrictions on Christian half-way house); *Warner v. City of Boca Raton*, 887 So.2d 1023, 1025 (Fla. 2004) (city ordinance prohibited grave owners from erecting vertical decorations).

By contrast, multiple cases have held that there is no restriction on free exercise of religion when a law requires *other parties* to act in a way that the plaintiff perceives as offensive to his or her religious beliefs. For example, in *Kaemmerling*, the plaintiff contended that the federal Bureau of Prisons would substantially burden his religious exercise by collecting his DNA and entering it into a national database. 553 F.3d at 679. The D.C. Circuit held that the actions of third-party governmental actors could not constitute a restriction on the plaintiff's religious beliefs, even if the plaintiff sincerely believed that the government's collection of his DNA would violate his religious tenets: "Religious exercise necessarily involves an action or practice . . . . Kaemmerling, in contrast, alleges that the DNA Act's requirement that the federal government collect and store his DNA information requires the government to act in ways that violate his religious beliefs, but he suggests no way in which these governmental acts pressure him to modify *his own* behavior in any way that would violate his beliefs." *Id.*

Similarly, in *Bowen v. Roy*, 476 U.S. 693 (1986), the Supreme Court rejected a free-exercise challenge brought by Native American parents against the government's use of their daughter's Social Security number, based on their sincere belief that the government's use of the number would "rob the spirit" of their child. *Id.* at 696. The Supreme Court rejected this claim, stating: "Never to our knowledge has the Court interpreted the First Amendment to require the Government *itself* to behave in ways the individual believes will further his or her spiritual development or that of his or her family. The Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens." *Id.* at 699.

As in these cases, the Informed Consent Law requires no action and imposes no penalty on Doe. Rather, it requires certain actions of third parties, which Doe claims are offensive to her religious beliefs and impose an indirect burden on her. As in *Kaemmerling* and *Bowen*, this claim should be rejected. The trial court correctly stated that "Plaintiff in this case does not identify any *act* required under Missouri law but prohibited 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." LF 85, Appx. A73.

Moreover, even if the Informed Consent Law imposed any direct restriction on Doe, it was *de minimis* at most. She was not required to read the State's information. She was not required to view the ultrasound. She was not required to listen to the heartbeat. The state-mandated offer of information merely exposed her to a different

viewpoint. This was not a substantial burden under any theory. *See Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1321 (10th Cir. 2010) (holding that to offer a Muslim inmate a food tray with pork imposed a *de minimis* burden on his religion, even if he was occasionally forced to accept the food).

C. Even if Doe had alleged a restriction on the free exercise of her religion, the Informed Consent Law is a generally applicable law that advances compelling state interests and does not unduly restrict religious exercise.

Moreover, even if Doe had alleged a restriction on the free exercise of religion within the meaning of RFRA, her RFRA claims would still fail as a matter of law. The Informed Consent Law is a generally applicable statute that does not discriminate against or among religions. The Law advances the State's compelling interests in promoting human life, in ensuring that the decision to abort is free from undue pressure or coercion, and in ensuring that the often wrenching, morally profound, and irreversible decision to terminate an unborn human life follows a period of significant deliberation and reflection. Further, the Law "is not unduly restrictive considering the relevant circumstances," which include the critical period in which someone is deliberating about whether to terminate the life of an unborn human being. RSMo § 1.302.1(2).

1. The Informed Consent Law is a generally applicable statute that does not discriminate against religion or among religions.

First, the Informed Consent Law is "in the form of a rule of general applicability, and does not discriminate against religion, or among religions." RSMo § 1.302.1(1).

The statute applies to all abortion providers, irrespective of their religion, and it applies in all cases where someone is seeking an abortion, irrespective of religion. *See* RSMo § 188.027.1. Doe presents no serious argument that the statute facially discriminates on the basis of religion. Accordingly, this requirement is met.

2. The Informed Consent Law advances the State's compelling interests in promoting human life, in ensuring that the abortion decision is free from coercion, and in ensuring that the profound and irreversible decision to terminate an unborn human life follows a significant period of deliberation and reflection.

Second, the Informed Consent Law "is essential to further a compelling governmental interest." RSMo § 1.302.1(2). In particular, the Law advances the State's compelling interests in protecting human life, in ensuring that the decision to have an abortion is voluntary and free from coercion, and in ensuring that the profound, often wrenching, and irreversible decision to terminate an unborn human life follows a significant period of reflection.

First, the question whether the protection of unborn human life constitutes a "compelling governmental interest" within the meaning of RSMo § 1.302.1(2) is a question of *state statutory interpretation*, not a federal constitutional question. Doe has not brought any claim alleging that the Informed Consent Law imposes an undue burden on her federal constitutional right to abortion. Rather, her RFRA claims rely solely on one state statute—Missouri's RFRA—to seek an exemption from another state statute—Missouri's Informed Consent Law. Thus, the question whether the State's asserted

interests in this context are "compelling" turns entirely on whether the General Assembly understood them to be "compelling governmental interest[s]" under § 1.302.1(2). This is a question of statutory interpretation arising solely under state law.

Here, the answer to the question is very clear, because the General Assembly directed in a nearby state statute that all Missouri statutes must be interpreted on the understanding that an unborn human life is just as valuable as a born human life. Specifically, RSMo § 1.205 provides that "the life of each human being begins at conception," and that "unborn children have protectable interests in life, health, and well-being." RSMo § 1.205.1(1)-(2). Further, that statute provides that "*the laws of this state shall be interpreted and construed* to acknowledge on behalf of the unborn child at every stage of development, all the rights, privileges, and immunities available to other persons, citizens, and residents of this state, subject only to the Constitution of the United States." RSMo § 1.205.2 (emphasis added). "[T]he laws of this state," *id.*, of course, include both Missouri's RFRA and the Informed Consent Law, from which Doe seeks a state-law exemption under the RFRA. In other words, in construing the phrase "compelling governmental interest" in Missouri's RFRA, the courts must presume that the lives of unborn children are to be viewed as having equal value as those of all other persons in Missouri. *Id.*; RSMo. § 1.302. Because it is unquestionable that the State has a compelling interest in protecting the lives of *born* humans in Missouri, the State's interest in promoting and protecting *unborn* human life is an equally "compelling governmental interest" within the meaning of Missouri's RFRA.

The same is true of the State's parallel interest, expressed in the Informed Consent Law, in ensuring that the profound, often wrenching, and irreversible decision to terminate an unborn human life through abortion follows a significant period of deliberation and reflection. Because the unborn human life terminated through abortion is just as valuable as a born child or adult human under Missouri law, *see* RSMo § 1.205.2, it is unquestionable that the State has a "compelling governmental interest" in ensuring that any decision to terminate a human life proceeds from significant deliberation and reflection. RSMo § 1.302.1(2).

Further, by calling for a period of deliberation and reflection prior to abortion, the Informed Consent Law also advances the State's compelling interest in ensuring that the decision to have an abortion is voluntary and free from coercion. RSMo § 188.027.11. There can be no doubt that this state interest is a "compelling governmental interest" within the meaning of § 1.302.1(2), because the General Assembly, in enacting the Informed Consent Law, explicitly determined that it was a "compelling interest." *See* RSMo § 188.027.11 ("In order to preserve the compelling interest of the state to ensure that the choice to consent to an abortion is voluntary and informed, and given freely and without coercion . . . ."). Because the General Assembly stated in the Informed Consent Law that it advances a "compelling interest," it is clear that the Informed Consent Law advances a "compelling governmental interest" within the meaning of the RFRA, which is another statute enacted by the General Assembly. *See Aquila*, 362 S.W.3d at 4 ("[N]o portion of a statute is read in isolation, but rather is read in context to the entire statute, harmonizing all provisions.").

Moreover, even in the context of interpreting the federal Constitution, courts have repeatedly recognized the State's strong interest in promoting and protecting human life, including the lives of unborn humans. *Roe v. Wade* initially held that the State's interest in protecting human life became "compelling" at viability. *Roe v. Wade*, 410 U.S. 113, 162 (1973). In subsequent decisions, however, the U.S. Supreme Court has strongly indicated that this interest becomes compelling prior to viability. "[W]e do not see why the State's interest in protecting potential human life should come into existence only at the point of viability . . . ." *Webster v. Reproductive Health Services*, 492 U.S. 490, 519 (1989) (Rehnquist, C.J., plurality opinion). "Even in the earliest stages of pregnancy, the State may enact rules and regulations designed to encourage her to know that there are philosophic and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy to full term . . . ." *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 872 (1992) (O'Connor, J., plurality opinion). "[T]here is a substantial state interest in potential life throughout pregnancy." *Id*. at 876 (citing *Webster*, 492 U.S. at 519).

For these reasons, the State's interests in promoting and protecting unborn human life, and in ensuring that any decision to terminate a human life follows a period of significant reflection and deliberation, unquestionably constitute "compelling governmental interest[s]" within the meaning of Missouri's RFRA, RSMo § 1.302.1(2).

3. The Informed Consent Law is not "unduly restrictive" of Doe's alleged free-exercise interests "considering all the circumstances," because the Informed Consent Law advances the most compelling state interests imaginable and imposes minimal burdens on Doe.

For similar reasons, the Informed Consent Law is not "unduly restrictive considering the relevant circumstances," RSMo § 1.302.1(2), because the State's interests in protecting human life is the most compelling interest imaginable, and the alleged burdens on Doe's free exercise of religion are minimal or non-existent.

As with the phrase "compelling governmental interest," the meaning of the phrase "unduly restrictive considering the relevant circumstances" in § 1.302.1(2) presents a question of statutory interpretation under state law, not a federal constitutional question. Again, the meaning of this statutory phrase must be informed by the General Assembly's directive in the neighboring statute that "the laws of this state shall be interpreted and construed to acknowledge on behalf of the unborn child at every stage of development, all the rights, privileges, and immunities available to other persons, citizens, and residents of this state." RSMo § 1.205.2. In other words, the "relevant circumstances" under § 1.302.1(2) include General Assembly's directive that the state RFRA must be interpreted on the understanding that unborn human lives are just as valuable as born human lives. RSMo § 1.205.2.

For this reason, the Informed Consent Law cannot be deemed to be "unduly restrictive under the relevant circumstances" within the meaning of RFRA. On the one hand, the State's interests in promoting human life, preventing coercion in abortion

decisions, and encouraging careful deliberation and reflection before terminating human life are the most compelling interests imaginable. Assuming, as the Court must when interpreting the state statute, that the lives of unborn children are just as important as the lives of born children and adults, there could be no more "compelling governmental interest" than the State's interest in protecting those lives. RSMo § 1.302.1(2).

By contrast, any alleged burdens on Doe's putative religious beliefs in this case are *de minimis* or non-existent. For the reasons discussed above, Doe failed to allege any real conflict between her putative religious beliefs and the operation of the Informed Consent Law. On appeal, Doe contends that the inconvenience and expense that she allegedly incurred as a result of the Informed Consent Law constituted undue restrictions on her, but she did not allege that her religion prohibits her from incurring inconvenience or expense in order to obtain an abortion. As the trial court held, "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." LF 84, Appx. A72.

For these reasons, Doe failed to allege any facts that could support the conclusion that the Informed Consent Law is "unduly restrictive considering the relevant circumstances," and her RFRA claims failed as a matter of law.

Moreover, even though the federal abortion cases are not determinative here because Doe has not asserted a federal due process challenge to the Informed Consent Law, it is notable that federal courts have consistently concluded that informed consent laws, like Missouri's, do not impose an "undue burden" on the federal right to abortion.

See Casey, 505 U.S. at 886 (affirming holding of the trial court that a 24-hour waiting period was not an "undue burden" because it did not impose a "substantial obstacle" on the right to abortion). "[T]he waiting period is a reasonable measure to implement the State's interest in protecting the life of the unborn, a measure that does not amount to an undue burden." *Id.* at 885. *See also*, *e.g.*, *Barnes v. Moore*, 970 F.2d 12, 15 (5th Cir. 1992) (upholding informed consent law that included a waiting period); *Karlin v. Foust*, 188 F.3d 446, 483-88 (7th Cir. 1999) (upholding informed consent law that required physician provide information about fetal development and instituted a waiting period); *Planned Parenthood, Sioux Falls Clinic v. Miller*, 63 F.3d 1452, 1467 (8th Cir. 1995) (upholding informed consent law that included a waiting period). Because the Informed Consent Law does not impose an "undue burden" on Doe's right to abortion under federal constitutional law, the Court may readily conclude that it is likewise "not unduly restrictive considering the relevant circumstances" under Missouri's RFRA.

For all these reasons, the district court's ruling dismissing Doe's RFRA claims should be affirmed.

II. The Trial Court Correctly Dismissed Appellant's Establishment Clause Claim Because the Informed Consent Law Does Not Establish Any Religious Belief, But Permissibly Expresses the State's Political and Philosophical Interest in Protecting Unborn Human Life (Responds to Appellant's Second Point Relied On).

Standard of Review. The trial court's decision to dismiss Count IV of Doe's Second Amended Petition, raising the Establishment Clause claim, is reviewed *de novo*. *Hess*, 220 S.W.3d at 768.

Missouri's Informed Consent Law does not violate the Establishment Clause because the law is not one "respecting the establishment of a religion." U.S. CONST. AMEND. I. It is a secular law by which the political branches of state government addressed a political issue properly subject to their authority. Doe bases her Establishment Clause argument almost entirely on dissenting opinions and cases that have been reversed or vacated on appeal. The law when applied correctly to this issue clearly favors the State.

Doe incorrectly argues this Court should apply the *Larson* test, which only applies when a statute facially discriminates against religion or among religions. Instead, this Court should reject Doe's Establishment Clause because it raises a political, not a religious, issue. Alternatively, if the Court finds the Informed Consent Law implicates the Establishment Clause, it should evaluate Doe's challenge under the *Lemon* test, as the trial court did, and find that the Informed Consent Law is constitutional.

Notably, though Doe purports to challenge the Informed Consent Law generally, in her briefing she only raises arguments against the requirement that abortion patients be informed that life begins at conception. She raises no arguments that either the 72-hour Waiting Period or the Ultrasound Opportunity is the establishment of a religious belief. Therefore, these provisions of the Informed Consent Law should stand regardless of the success of Doe's Establishment Clause claims.

A. The Informed Consent Law is not a religious tenet but a political and philosophical position adopted by the political branches of Missouri's government.

Doe did not sufficiently allege that Missouri adopted a religious tenet or otherwise established a state religion. Doe makes the conclusory allegation that the Informed Consent Law is a religious tenet because Missouri's definition of when life begins is similar to the definition used by some religions. LF 24, ¶ 38, Appx. A13. Doe has not alleged a single fact that establishes that Missouri has adopted a "religious belief" other than alleging the conclusion. *Id.* Government speech is not religious speech solely because government speech "happens to coincide" with a religious tenet. *McGowan v. Maryland*, 366 U.S. 420, 442 (1961) ("[T]he 'Establishment' Clause does not ban federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions.").

The U.S. Supreme Court has applied this very principle to abortion cases. In *Harris v. McRae*, the Court rejected a challenge to the Hyde Amendment's ban on public funding of abortion under the Establishment Clause. *Harris v. McRae*, 448 U.S. 297,

319-320 (1980). After citing *McGowan*, the Supreme Court stated, "[t]he Hyde Amendment, as the District Court noted, is as much a reflection of 'traditionalist' values towards abortion, as it is an embodiment of the views of any particular religion. In sum, we are convinced that the fact that the funding restrictions in the Hyde Amendment may coincide with the religious tenets of the Roman Catholic Church does not, without more, contravene the Establishment Clause." *Id.*(citations omitted).

This principle, that a law is not an establishment of religion because it "coincides" with religious tenets, is seen even more strongly in *McGowan*. In that case, seven individuals were charged with violating Maryland's statutes restricting the sale of certain goods on Sundays. *McGowan,* 366 U.S. at 422-23. The statutes used religious terminology, such as "Sabbath Breaking," and referred to Sunday as "the Lord's day" and "Sabbath day." *Id.* at 445. The Court held that, despite the religious underpinnings of Sunday laws, Maryland did not violate the Establishment Clause by enacting a criminal law that paralleled Christian teachings regarding the Sabbath. *Id.* at 449 ("[W]e accept the State Supreme Court's determination that the statutes' present purpose and effect is not to aid religion but to set aside a day of rest and recreation."). The *McGowan* Court compared Doe's argument to arguing that the state cannot criminalize murder because murder is prohibited by the Ten Commandments. *Id*. at 442. So too, the *Harris* Court noted that Doe's argument would strike down laws prohibiting larceny because of Christianity's views on theft. *Harris*, 448 U.S. at 319. And the Supreme Court has addressed, and rejected, these same arguments regarding bigamy. *Reynolds v. United*

States, 98 U.S. 145, 165 (1878) (upholding bigamy laws, and noting Virginia's bigamy law dates from the same time as Virginia's establishment of religious freedom).

The reason that the State may legislate on these issues—issues that are within the religious realm—is that murder, larceny, marriage, and abortion are also within the social realm and subject to the powers of the political branches of the government. Doe herself acknowledges this truth in the very first sentence of her brief addressing her Establishment Clause claim, which states that abortion is "[o]ne of the most contentious philosophical, religious and political debates of our time." App. Br., 41. *See also id.*, at 9 (stating pro-life views are "religious, philosophical or political beliefs"); *id.* at 10 (same); *id.* at 20 (same). On this point, Doe is correct—abortion is a philosophical issue, it is a religious issue, *and* it is a social and political issue. And because it is a political issue, Missouri's political branches of government can address the issue without "making a law respecting the establishment of a religion." U.S. CONST., AMEND. I. "Even in the earliest stages of pregnancy, the State may enact rules and regulations designed to encourage her to know that there are *philosophic and social* arguments of great weight that can be brought to bear in favor of continuing the pregnancy to full term . . . ." *Casey*, 505 U.S. at 872 (O'Connor, J., plurality opinion) (emphasis added).

B. Doe errs in relying on the Eighth Circuit's opinion in *Reproductive Health*, because the Supreme Court overruled that opinion and explicitly stated that Missouri may express a judgment on when life begins.

Doe relies heavily on the Eighth Circuit's opinion in *Reproductive Health Services v. Webster* ("*Reproductive Health*"), even though the U.S. Supreme Court reversed the Eighth Circuit in that case, and a majority of the Supreme Court expressly disagreed with the very Eighth Circuit proposition that Doe cites.

The *Reproductive Health* case pertained to the constitutionality of RSMo § 1.205, which, like the Informed Consent Law, states that life begins at conception. RSMo § 1.205.1(1). The Eighth Circuit held § 1.205 unconstitutional, calling it "an impermissible state adoption of a theory when life begins." *Reproductive Health*, 851 F.2d at 1076. The Eighth Circuit interpreted the RSMo § 1.205 to be inconsistent with *Roe v. Wade* and therefore unconstitutional. *Id.*

The U.S. Supreme Court disagreed and reversed the Eighth Circuit. The Court stated that the Eighth Circuit had misapplied Supreme Court precedent regarding the ability of a state to express the State's view on when life begins. "The Court has emphasized that *Roe v. Wade* 'implies ***no limitation on the authority of a State to make a value judgment favoring childbirth over abortion***.' [RSMo. § 1.205] can be read simply to express that sort of value judgment." *Webster*, 492 U.S. at 506 (emphases

added) (citation omitted).[6] Because Missouri "express[ed] that sort of value judgment," *id.*, in a way that did not infringe upon Reproductive Health Services' ability to provide abortions, the Supreme Court held that the Eighth Circuit should not have reached the issue of the constitutionality of the State's definition of when life begins. *Id.* at 507 ("We therefore need not pass on the constitutionality of the Act's preamble [RSMo. § 1.205].").

Doe's substantive argument regarding the unconstitutionality of the Informed Consent Law is based almost entirely on the single sentence she quotes from the Eighth Circuit's *Reproductive Health* opinion and on Justice Stevens' dissent in *Webster*. App. Br., 42-45. She ignores that the U.S. Supreme Court explicitly stated that the State of Missouri is permitted to express its opinion that life begins at conception. *Webster*, 492 U.S. at 506. Doe does not allege that Missouri prevented her from receiving an abortion, or that the Informed Consent Law imposed an undue burden on her right to abortion under the federal Constitution. Doe merely argues, in relying on *Reproductive Health*, that being offered the opportunity to hear the State's opinion on when life begins violates the federal Constitution. The U.S. Supreme Court has already held that Missouri may

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[6] In the *Webster* case, there were five separate filed opinions, including the opinion of Chief Justice Rehnquist who wrote the Opinion of the Court. Here, Respondents cite Section II-A of Chief Justice Rehnquist's opinion, which is one of the sections of his opinion for which he speaks for a majority of the Court. *Webster*, 492 U.S. at 498 ("Chief Justice Rehnquist announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II-A, II-B, and II-C . . . .").

permissibly hold and express this opinion. *Id*. Justice Stevens' view did not carry a majority of the Supreme Court in 1989, and Doe offers no reason why this Court should follow that dissenting opinion now. This Court should follow the Opinion of the Court in *Webster* and hold that the State may validly express its preference for the protection of unborn human life without violating the Establishment Clause.

C. The *Plattsmouth* case favors the Respondents here, as the Eighth Circuit vacated the opinion cited by Doe and allowed a city to display the Ten Commandments.

In addition to relying on the reversed *Reproductive Health* case, Doe relies on *ACLU Neb. Found. v. City of Plattsmouth* to argue that the State cannot "purposefully steer[]" its citizens on their own individual "search for truth." App. Br., 42. Once again, the case on which Doe relies is not good law, and the actual case law supports the Respondents here.

In *Plattsmouth*, the plaintiff sued to force the city to remove a Ten Commandments monument. Doe cites the panel decision of the Eighth Circuit, which held that the monument was unconstitutional because it attempted to "steer its citizens in the direction of the mainstream Judeo-Christian religion." *ACLU Nebraska Found. v. City of Plattsmouth*, 358 F.3d 1020, 1042 (8th Cir. 2004), *reh'g granted and opinion vacated* (Apr. 6, 2004), *on reh'g en banc*, 419 F.3d 772 (8th Cir. 2005). But that panel opinion was vacated and the case was re-heard en banc. On rehearing in front of the Eighth Circuit en banc, and following a U.S. Supreme Court decision upholding the public display of Ten Commandment monuments, *Van Orden v. Perry*, 545 U.S. 677

(2005), the Eighth Circuit vacated the decision cited by Doe and held the display of the Ten Commandments to be constitutional. *ACLU Nebraska Found. v. City of Plattsmouth*, 419 F.3d 772, 778 (8th Cir. 2005). In holding the display of the Ten Commandments to be constitutional, the Eighth Circuit stated: "Although the text of the Ten Commandments has undeniable religious significance, '[s]imply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause.'" *Id.* (citing numerous U.S. Supreme Court cases, including *McGowan v. Maryland*, discussed above) (brackets in original). Doe has alleged nothing more than that the Informed Consent Law coincides with religious principles, and therefore her claim too fails.

D. The *Larson* test does not apply here because the Informed Consent Law does not discriminate against religion or among religions.

Following her reliance on dissents and reversed and vacated case law, Doe proposes that the Court use the *Larson* test to assess the Informed Consent Law under the Establishment Clause. App. Br., 47-49. Doe argues that the *Larson* test applies here because the Informed Consent Law is discriminatory. *Id.* at 49 (citing the vacated *Plattsmouth* case). But the *Larson* test does not apply here because the Informed Consent Law does not discriminate based on religion or among religions. If any Establishment Clause test is required, it would be the *Lemon* test.

The U.S. Supreme Court established the *Larson* test for laws that treat some religious groups differently than other religious groups—laws that discriminate *among*

religions. *Larson v. Valenta*, 456 U.S. 228, 252 (1982). In *Larson*, Minnesota enacted a law to regulate religious organizations receiving charitable donations. *Id.*at 230. It divided religious organizations into two groups depending on the amount of donations each organization received from its own members, and granted a blanket exemption from regulation to one group. *Id.* at 231-232. Therefore, Minnesota acted to regulate some religious organizations while giving others an exemption. *Id.* This discrimination *among* religions is wholly inapposite to Doe's challenge. Missouri's Informed Consent Law applies to all individuals who seek an abortion, regardless of whether the woman is a Satanist like Doe, a Catholic, a Protestant, or a Buddhist. Doe simply mischaracterizes the law when she states that the Informed Consent Law is "discriminatory on its face." App. Br., 49. The *Larson* test does not control.

E. Even if the Court finds that the Informed Consent Law raises Establishment Clause concerns, the Law is constitutional under the *Lemon* test.

The trial court relied on and used the *Lemon* test to evaluate Doe's Establishment Clause claims. LF 85-89, Appx. A73-77. Even though the Informed Consent Law is constitutional under the *Lemon* test, the Court need not resort to it. *See Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring). In *Harris*, the Supreme Court rejected an Establishment Clause challenge to the restriction on public funding of abortion without even addressing the Lemon test. *Harris*, 448 U.S. 297. Likewise here, where there is simply no showing of any impermissibly

religious purpose or effect, this Court may reject Doe's claim without relying on the *Lemon* test.

But if the Court determines that the Informed Consent Law raises concerns under the Establishment Clause, the Informed Consent Law is constitutional even under the *Lemon* test. Under *Lemon*, a statute is constitutional if "(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." *Plattsmouth*, 419 F.3d at 775. These three requirements are not mandatory elements of the test, but are factors that "serve as no more than helpful signposts." *Van Orden v. Perry*, 545 U.S. 677, 686 (2005) (Rehnquist, C.J., plurality opinion).

As discussed above, Doe alleges that the Informed Consent Law is not a secular law, but does so only by a conclusory allegation. LF 24, ¶ 38, Appx. A13. Doe has not alleged a single fact supporting her conclusory claim that Missouri has adopted a "religious belief," and her Second Amended Petition rests on the legal conclusion alone. *Id.* She does not even allege which religion's tenets the State of Missouri may have established. *Id.* The Informed Consent Law might coincide with the religious beliefs of some religions, but this is in and of itself insufficient to render a law religious in nature. *McGowan*, 366 U.S. at 442; *Plattsmouth*, 419 F.3d at 778. As even Doe repeatedly recognizes, abortion is not merely a religious issue, but it is also a philosophical and political issue. App. Br., 41. The State's political branches can therefore legislate on abortion and the definition of human life while maintaining a secular purpose. App. Br., 41. *See* Section II.A, *supra*.

As for the second *Lemon* factor, the Informed Consent Law neither advances nor inhibits religion. The Informed Consent Law merely provides an abortion patient the opportunity to learn the State's views on when life begins, and guarantees a period of deliberation before the decision to terminate human life is carried out. The mere coincidence of a secular law with religious beliefs does not advance those religious beliefs. *Edwards v. Aguillard*, 482 U.S. 578, 615 (1987) ("[W]e will not presume that a law's purpose is to advance religion merely because it 'happens to coincide or harmonize with the tenets of some or all religions.'") (quoting *Harris*, 448 U.S. at 319, and *McGowan*, 366 U.S. at 442). Nothing in the Informed Consent Law mandates that Doe or others read the Booklet or its claims regarding the beginning of life. Each abortion patient is free to decline the offer, or to receive the material but leave it unread. Even if the law mandated that patients read the State's opinions, these are political and philosophical opinions, not religious ones. App. Br., 41. *See* Section II.A, *supra*. Doe has not alleged any one religion that is advanced, or any one religion that is inhibited, by the Informed Consent Law.

As for the third *Lemon* factor, Doe has not sufficiently alleged how the Informed Consent Law causes entanglement with religion. She makes a conclusory allegation that there is entanglement, LF 41, ¶ 106, Appx. A30, but alleges nothing further. For instance, Doe does not allege that the Informed Consent Law causes the State to inquire into the abortion beliefs of various religions. Neither does it require that the State or the clinic teach religious principles to the patients. It merely makes information available to the patient to review if she desires. *See Greenville Women's Clinic v. Commissioner*, 317

F.3d 357, 363-64 (4th Cir. 2002) (rejecting an Establishment Clause challenge to a law requiring abortion clinics to make arrangements to be able to refer patients to clerical counseling).

III. The Appellant waived any arguments regarding her Free Exercise Clause claim by failing to raise a Point Relied On related to that claim.

Doe's two Points Relied On only raise errors related to her RFRA claims (Counts I-III) and her Establishment Clause claim (Count IV). She raises no points of error with respect to her Free Exercise Clause claim (Count V). Doe acknowledges that, if she loses on her RFRA claims, she necessarily loses on her Free Exercise Clause claim. App. Br., 11. Because she has alleged no points of error with respect to the dismissal of her Free Exercise Clause claim, she has waived her arguments on that claim even in the event that this Court reverses the trial court's dismissal of her RFRA claims. Mo. R. Civ. P. 84.13(a) ("[A]llegations of error not briefed or not properly briefed shall not be considered in any civil appeal . . . .").

CONCLUSION

The Court should affirm the trial court's order dismissing the Second Amended Petition with prejudice.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENTS

CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that a true and correct copy of the foregoing was filed and served electronically via Missouri CaseNet on June 30, 2017, to all counsel of record in this case.

The undersigned further certifies that the foregoing brief complies Mo. R. Civ. P. 55.03 and with the word limitations contained in Mo. R. Civ. P. 84.06(b), as reduced by Local Rule XLI, in that the brief contains 10,680 words, excluding those portions excluded by Mo. R. Civ. P. 84.06(b) and Local Rule XLI(d).

/s/ D. John Sauer
State Solicitor