No.

IN THE

Supreme Court of the United States

JUDY DOE, PETITIONER

v.

MICHAEL L. PARSON, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

W. JAMES MAC NAUGHTON
Counsel of Record

7 Fredon Marksboro Road
Newton, NJ 07806
wjm@wjmesq.com
732-634-3700

CURRY & TAYLOR ♦ 202-350-9073

QUESTIONS PRESENTED

1. Is the Establishment Clause violated by the proclamation in an abortion statute that "The life of each human being begins at conception. Abortion will terminate the life of a separate, unique, living human being?"

2. Can a State constitutionally compel a woman seeking an abortion to acknowledge receipt of the proclamation "The life of each human being begins at conception. Abortion will terminate the life of a separate, unique, living human being" as a condition for getting an abortion when her religious belief is the non-viable fetus is not a human being but rather part of her body that can, in good conscience, be removed on demand without regard to its current or future condition?

3. Can a State can constitutionally compel a woman seeking an abortion to submit to a three day waiting period whose only purpose is to promote her consideration of the State's proclamation that "The life of each human being begins at conception. Abortion will terminate the life of a separate, unique, living human being" when her religious belief is the non-viable fetus is not a human being but rather part of her body that can, in good conscience, be removed on demand without regard to its current or future condition?

4. Does the undue burden analysis of *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) ("*Casey*") or the rational basis analysis of *Employment Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872 (1990) ("*Smith*") apply to a claim an abortion statute violates the Free Exercise clause?

5. Must a complaint alleging a violation of 42 U.S.C. §1983 by an abortion statute also explicitly allege an "undue burden" - rather than a "substantial burden" - to state a claim the statute violates the Constitutional standards articulated in *Casey*?

PARTIES TO THE PROCEEDINGS

Michael L. Parson, Governor of the State of Missouri; Eric S. Schmitt, Attorney General of the State of Missouri; David A. Poggemeier, M.D., Chairman of the Missouri Board of Registration for the Healing Arts; James A. DiRenna, D.O., Member of the Missouri Board of Registration for the Healing Arts; Sara Martin, PhD, Member of the Missouri Board of Registration for the Healing Arts; Katherine J. Matthews; Jade D. James, M.D., Secretary of the Missouri Board of Registration for the Healing Arts; David E. Tannenhill, D.O., Member of the Missouri Board of Registration for the Healing Arts; John Doe I; John Doe II

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

CONSTITUTION

RULES

PETITION FOR WRIT OF CERTIORARI

Petitioner Judy Doe ("Petitioner") respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit (the "Eighth Circuit").

OPINIONS BELOW

The memorandum opinion of the Eighth Circuit in *Doe v. Parson*, 960 F.3d 1115 (8th Cir. 2020) is included herein as an Appendix at page 1 ("App. 1a"). The memorandum opinion of the United States District Court for the Eastern District of Missouri (the "District Court") in *Doe v. Parson*, 368 F. Supp.3d 1345 (E.D. Mo.) is included herein at App. 11a.

JURISDICTION

This Court has jurisdiction of this petition to review the Eight Circuit's judgment pursuant to 28 USC §1254(1). The Eight Circuit's memorandum opinion was filed on June 9, 2020 and Petitioners' Petition for Rehearing and Rehearing En Banc was denied on July 15, 2020. App. 27a. The District Court had subject matter jurisdiction pursuant to 42 U.S.C. §1983 and 28 USC §1331 because the civil action arises under the Constitution and the laws of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution provides, in relevant part: "Congress shall

make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech * * *." U.S. Const. Amend. I.

The Fourteenth Amendment to the United States Constitution provides, in relevant part: "* * * No State shall . . . . deprive any person of life, liberty, or property, without due process of law * * *." U.S. Const. Amend. XIV.

42 U.S.C. §1983 provides, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .

STATEMENT OF THE CASE

In 1986, the State of Missouri ("Missouri") enacted a law proclaiming "the life of each human being begins at conception" as part of a ban on state funding for abortions. In 1989, the U.S. Supreme Court declined to consider whether that proclamation violated the Establishment Clause due to the lack of a "concrete set of facts to which the statute is to be applied." *Webster v. Reproductive Health Services*, 492 U.S. 490, 507 (1989) ("*Webster*").

Missouri created that set of facts in 2014 by enacting a law that requires a woman to acknowledge receipt of the proclamation "The life of each human

being begins at conception. Abortion will terminate the life of a separate, unique, living human being" as a condition for getting an abortion in Missouri. Missouri also requires a woman to wait for three (3) days after acknowledging receipt of the proclamation before having an abortion (the "Waiting Period").

Petitioner Judy Doe is a member of the Satanic Temple and holds its religious beliefs (the "Satanic Tenets").[1] The primary Satanic Tenet is her body is inviolable and subject to her will alone. A corollary Satanic Tenet is that her non-viable fetus is part of her body and can be removed "in good conscience . . . on demand and without regard to its current or future condition."

Another Satanic Tenet is she "must not comply with any law that directly or indirectly, conditions her getting an abortion in a manner antithetical to the Satanic Tenets, including without limitation any law that serves no medical purpose or purports to protect the interests of her [non-viable fetus]."

Petitioner does not believe a human being comes into existence at conception or that abortion will terminate a separate, unique, living human life. Petitioner believes the non-viable fetus is part of her body that can, in good conscience, be removed on demand and without regard to its current or future condition. Petitioner believes the Waiting Period serves no purpose other than to persuade her to change her beliefs in the Satanic Tenets.

---

[1] The Eighth Circuit raised "the possibility that her beliefs about abortion may be political, not religious" but "assumed" Petitioner had sufficiently alleged they are "religious." App. 9a.

In 2018, Petitioner, who was then pregnant, filed an action in the United States District Court for the Eastern District of Missouri. App. 28a. Jurisdiction was based on 28 U.S.C. §1331. The complaint alleged Missouri's abortion laws violated 42 U.S.C. §1983. The complaint characterized the statement "The life of each human being begins at conception. Abortion will terminate the life of a separate, unique, living human being" as the "Missouri Tenet." Petitioner alleged the Missouri Tenet and Waiting Period serve no medical purpose, violate her rights under the Religion Clauses and "substantially burden [her] ability to act in accordance with The Satanic Tenets" in getting an abortion. The complaint did not explicitly cite *Casey* or use the precise words "undue burden."

The District Court dismissed the complaint pursuant to Fed. R. Civ. Pro. 12(b)(6) citing *Casey* saying, "[t]he Missouri Tenets neither regulate abortion nor promote religious beliefs. . . they are a permissible expression of the State's secular interest in protecting the unborn." App. 22a. The Eight Circuit, which had jurisdiction pursuant to 28 U.S.C. §1291, affirmed the dismissal.

The Eight Circuit said the Missouri Tenet did not violate the Establishment Clause because *Casey* removed any doubt over whether there is any "limitation on the authority of a State to make a value judgment favoring childbirth over abortion." App. 7a. The Eight Circuit held Petitioner had failed to plead a strict scrutiny standard for her Free Exercise claim by not explicitly alleging an "undue burden" or citing *Casey* in the complaint. App. 4a-5a.

The Eight Circuit refused to consider whether compelled acknowledgment of the Missouri Tenet and the Waiting Period violate *Casey* because the words

"undue burden" or "*Casey*" do not appear in the complaint "which creates the impression that this case is all about religion." App. 4a. The Eight Circuit acknowledged Petitioner's argument that the Religion Clauses are "at the 'root' of *Casey*. See *Casey*, 505 U.S. at 851 ('At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.')." But the Eight Circuit said "Missouri could not, without more, have anticipated Doe's creative reading of *Casey*. *See Casey*, 505 U.S. at 846–51 (locating the right to an abortion in the Fourteenth Amendment)." App. 5a.

The Eight Circuit held "we will not permit Doe to plead a new claim now" for a violation of *Casey*. App. 5a. Thus, the Eighth Circuit simply ignored Petitioner's core argument – Petitioner's concept of existence, of meaning, of the universe, and the mystery of human life, defined in *Casey* as a liberty interest and expressed in the Satanic Tenets, is protected by the Religion Clauses and Missouri's attempt to influence her beliefs as a condition for getting an abortion is unconstitutional.

This case is the second time the Eighth Circuit avoided deciding this issue. In 2018, the Eighth Circuit held another member of the Satanic Temple did not have standing to raise the same issues because she had obtained her abortion before the complaint was filed. *Satanic Temple v. Parson*, No. 16-3387 (8th Cir. Aug. 28, 2018).

Petitioner filed a petition for rehearing *en banc* arguing the Eighth Circuit's refusal to consider her "new claim," i.e., a *Casey* violation, conflicts with *Johnson v. City of Shelby*, 574 U.S. 10 (2014) ("*Johnson*") ("[I]t is unnecessary to set out a legal theory for the plaintiff's claim for relief.") and *Skinner*

v. Switzer, 562 U.S. 521, 530 (2011) ("*Skinner*") ("[U]nder the Federal Rules of Civil Procedure, a complaint need not pin plaintiffs claim for relief to a precise legal theory."). Petitioner pointed out Missouri had argued the application of *Casey* to the District Court and was not surprised by Petitioner's reliance on *Casey*. The Eighth Circuit denied the petition without comment. App. 27a.

REASONS FOR GRANTING THE WRIT

I. The Eighth Circuit's Gross Departures From the Precedents of This Court and The Establishment Clause Require the Exercise of This Court's Jurisdiction.

A. *Johnson* and *Skinner* Hold the Complaint Does Not Need to Allege "Undue Burden" or *Casey* to State a Claim for a Violation of *Casey*.

Fed. R. Civ. Pro. 8(a)(2) requires Petitioner's complaint to contain "a short and plain statement of the claim showing the pleader is entitled to relief." It is reversible error to dismiss a complaint pursuant to Fed. R. Civ. Pro. 12(b)(6) on the grounds the complaint did not allege a legal theory for relief or use particular "magic words" that express a legal theory. *Johnson; Skinner*.

Petitioner alleged a violation of 42 U.S.C. §1983 which applies to a "deprivation of . . . rights . . . secured by the Constitution." *Casey* does not, by itself, create any Constitutional rights. *Casey* is an opinion by this Court applying the Constitution to the facts before the Court. Alleging a violation of 42 U.S.C. §1983 does not

require an express reference to any case law interpreting Constitutional rights, including *Casey*. Indeed, under *Johnson* and *Skinner*, Petitioner did not even need to allege 42 U.S.C. §1983 or any specific Constitutional provision to state a claim Missouri's abortion laws violate *Casey*.

The Eight Circuit's requirement that Petitioner explicitly alleges an "undue burden" before she can rely on *Casey* is absurd. "[U]ndue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *June Med. Servs. v. Russo*, No. 18-1323 (June 29, 2020) ("*Russo*") (Roberts, J., concurring) (Slip op. at p. 5).

The complaint explicitly alleged the Missouri Tenet and Waiting Period "substantially burdened" Petitioner's ability to get an abortion including, without limitation "forcing Plaintiff to act and forgo acting in a manner that violates her belief in The Satanic Tenets as a condition for getting an abortion in Missouri." App. 39a. The complaint alleged the Missouri Tenet and Waiting Period are not "medically necessary for [Petitioner] to make an informed decision to get an abortion. App. 35a. The complaint alleged a violation of 42 U.S.C. §1983. These elements were sufficient to state a claim pursuant to 42 U.S.C. §1983 for a violation of the Constitution as interpreted by *Casey*, without the magic words "undue burden" or an explicit reference to *Casey*. *Griffith v. Johnston*, 899 F.2d 1427, 1435 (5th Cir. 1990) (citations omitted), *cert. denied*, 498 U.S. 1040 (1991) ("To state a cause of action under §1983 for violation of the Due Process Clause, plaintiffs must show that they have asserted a recognized liberty or property interest within the purview of the Fourteenth Amendment, and that they were

intentionally or recklessly deprived of that interest, even temporarily, under color of state law." [internal citations and quotations omitted].

The Eighth Circuit's rationale – surprise to an adversary – is not supported by the record. Like many aspects of the Eighth Circuit's decision, it is a pretext for the Eighth Circuit's refusal to address the significant and challenging issues raised by this case.

B. *Wallace* and *Cantwell* Hold the Religion Clauses Are a Liberty Interest Protected by the Fourteenth Amendment.

The Eighth Circuit said, "we have every reason to believe" the Religion Clauses are not "at the root" of *Casey*. The Eighth Circuit is wrong. The rights protected by the Religion Clauses are the very essence of "liberty" as defined and applied by *Casey*.

Casey holds a woman's right to get an abortion is a liberty interest protected by the Fourteenth Amendment. *Id.*, 505 U.S. at 851-852 ("At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State."). The humanity of a fertilized egg is a matter of subjective belief – not objective scientific fact. That belief can define one's concept of existence. As the Court said in *Roe v. Wade*, 410 U.S. 113, 160 (1973) ("*Roe*"):

> We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any

> consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.

A belief explaining the mystery of human life shared by a wider community is "religious" even in the absence of a deity. *Torcaso v. Watkins*, 367 U.S. 488, 495 n. 11, (1961) (Ethical Culture and Secular Humanism are "religions"). Compare, *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, __, 134 S. Ct. 2751, 2764 (2014) ("*Hobby Lobby*") ("The Mennonite Church opposes abortion and believes that the fetus in its earliest stages shares humanity with those who conceived it." [internal quotations omitted]). Petitioner's religious belief is her non-viable fetus is not a human being. *Casey* protects her right to formulate that belief and act on it in getting an abortion.

As this Court recognized in *Wallace v. Jaffree*, 472 U.S. 38, 67-68 (1985) ("*Wallace*"), "liberty" for purposes of the Fourteenth Amendment, includes the rights guaranteed by the Religion Clauses:

> The Religion Clauses of the First Amendment, coupled with the Fourteenth Amendment's guarantee of ordered liberty, preclude both the Nation and the States from making any law respecting an establishment of religion or prohibiting the free exercise thereof. *Cantwell* v. *Connecticut*, 310 U.S. 296, 303 (1940). Although a distinct jurisprudence has enveloped each of these Clauses, their common purpose is to secure religious liberty. See *Engel* v. *Vitale*, 370 U.S. 421, 430 (1962). On these principles the Court has been and remains unanimous.

See also, *Espinoza v. Montana Dept. of Revenue*, No. 18-1195 (June 30, 2020) (Slip Op. at p. 8) ("The Free Exercise Clause, which applies to the States under the Fourteenth Amendment, protects religious observers against unequal treatment and against laws that impose special disabilities on the basis of religious status." [internal quotations omitted]).

The Eighth Circuit refused to acknowledge that Petitioner's liberty interest, as defined in *Casey*, includes her rights under the Religion Clauses. That refusal turned a blind eye to *Wallace* and *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940). It resulted in the Eight Circuit analyzing the Religion Clauses without reference to Petitioner's rights under *Casey*. However, that did not stop the Eighth Circuit from justifying the violation of the Establishment Clause by the Missouri Tenet on the grounds *Casey* removed any limits on Missouri's expression of its preference for childbirth over abortion.

C. The Eighth Circuit Should Have Applied *Casey*, Not *Smith*, to the Free Exercise Claim.

The Eight Circuit interprets *Smith* as applying a strict scrutiny standard to a Free Exercise claim made in conjunction with other constitutional protections. *Telescope Media Grp. v. Lucero*, 936 F.3d 740, 759 (8th Cir. 2019) ("*Telescope Media*"). The Eighth Circuit refused to apply that strict scrutiny standard to Petitioner's Free Exercise claim on the grounds the complaint did not explicitly allege an "undue burden" or cite *Casey*. Thus, under the Eighth Circuit's crabbed interpretation of the complaint, there were no "other constitutional protections" to support a strict scrutiny

analysis of the Free Exercise claim pursuant to *Telescope Media*.

Instead, applying the *Smith* rational basis standard, the Eighth Circuit found a "legitimate government interest" for the Missouri Tenet in *Casey* – "reducing the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed." App. 9a. By relying on *Smith*, the Eighth Circuit excused itself from addressing *Casey*'s requirement to weigh that State interest in "reducing the risk" against the Missouri Tenet's intrusion into Petitioner's "zone of conscience."

The Eighth Circuit's fundamental error was its refusal to apply *Casey* to the Petitioner's claims, except when *Casey* served Missouri's interests. *Casey* protects a broad swath of liberty interests, not just religious beliefs, and provides the appropriate framework for analyzing those interests in the abortion context. *Smith* has no such scope.

Casey protects liberty interests beyond the Religion Clauses because getting an abortion is a process of making and then implementing a decision. The decision is made in a woman's "zone of conscience" where she decides her "own concept of existence, of meaning, of the universe, and of the mystery of human life." Her right to make that decision without government intrusion is a liberty interest protected by the Religion Clauses and Fourteenth Amendment.

Casey allows Missouri to influence Petitioner's decision to get an abortion using truthful and non-misleading facts. But the Missouri Tenet is manifestly not a truthful and non-misleading statement of fact. It is a State-sanctioned religious belief delivered in a manner that inflicts guilt on a woman who is

considering terminating "the life of a separate, unique, living human being." This is the antithesis of *Casey*'s admonition that truthful and non-misleading facts "must be calculated to inform the woman's free choice, not hinder it." *Id.*, 505 U.S. at 877.

Any obstacles Missouri puts on the execution of Petitioner's decision to get an abortion necessarily affect her thought process and thus intrude on her "zone of conscience." But they also intrude on the other liberty interests protected by *Casey* that are not rooted in the Religion Clauses.

One of those liberty interests is the Petitioner's right to preserve her bodily integrity by refusing unwanted medical treatment, a liberty interest grounded in the Fourth Amendment. *Casey*, 505 U.S. at 857, citing *Cruzan ex rel. Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261, 278 (1990) and *Washington v. Glucksberg*, 521 U.S. 702, 777 (1997) ("*Glucksberg*") ("Every human being of adult years and sound mind has a right to determine what shall be done with his own body in relation to his medical needs." [internal citations and quotations omitted]). Assuming, *arguendo*, the Waiting Period serves some legitimate medical purpose for Petitioner; it does not supersede Petitioner's Constitutional right to protect her bodily integrity by refusing that treatment.[2]

---

[2] As alleged in the complaint, the only purpose served by the Waiting Period is the promotion of Missouri's policy to discourage the destruction of "separate, unique, living human being." That is far outside of *Casey*'s scope of permissible purposes for an informed consent statute.

Another liberty interest is privacy, derived from the First, Third, Fourth, Fifth and Ninth Amendments. *Russo*, (Thomas, J., dissenting) (Slip Op. at p. 14). Though subject to much criticism, privacy remains a liberty interest protected by *Casey*. *Casey*, 505 U.S. at 915 (Stevens, J., concurring).

Casey bundles these liberty interests together in an abortion case by asking the precise and pragmatic question of whether a government regulation imposes a substantial burden on a woman's decision to get an abortion and then implementing that decision. *Casey* eschews any rational basis or strict scrutiny analysis for either the decision making or implementation process of an abortion. See *Planned Parenthood Ariz., Inc. v. Humble*, 753 F.3d 905 (9th Cir. 2014) (Applying *Casey* to the regulation of RU-486 in violation of a woman's right to bodily integrity.)

Once the Eighth Circuit severed Petitioner's rights under the Free Exercise Clause from her rights under *Casey*, it was left with no analytical framework other than *Smith* to decide the Free Exercise claim. *Smith* has no place in analyzing a Free Exercise claim when the matter *sub judice* is getting an abortion. *Casey* provides the appropriate framework for testing all of Petitioner's liberty interests, including those under the Religion Clauses, in getting an abortion.

As alleged in the complaint, the Missouri Tenet serves no purpose other than to intrude on Petitioner's "zone of conscience" and persuade her she is making a morally wrong choice in getting an abortion. That is an undue burden under *Casey* on Petitioner's religious beliefs, regardless of whether it contravenes a rational basis or strict scrutiny standard.

As alleged in the complaint, the Waiting Period is unwanted, unnecessary, and serves no medical

purpose. That is an undue burden under *Casey* on Petitioner's liberty interest in protecting her bodily integrity, regardless of whether it contravenes a rational basis or strict scrutiny standard.

D. The Establishment Clause Bars the State From Adopting Catholic Dogma as State Policy.

The Eighth Circuit characterized the Missouri Tenet as a "value judgment" that "happens to coincide or harmonize with the tenets of some or all religions." App. 6a. That is highly disingenuous. Labeling a policy as a "value judgment" does not exempt it from scrutiny under the Religion Clauses. *Walz v. Tax Commission of New York*, 397 U.S. 664, 669-70 (1970) ("Each value judgment under the Religion Clauses must therefore turn on whether particular acts in question are intended to establish or interfere with religious beliefs and practices or have the effect of doing so.").

A "value judgment" that the State prefers live births over abortion may be "harmonious" with Catholic dogma that a human being comes into existence at conception. But the Missouri Tenet does more than just express a preference for live births over abortion; it adopts Catholic dogma practically *in haec verba*. It is the same as if Missouri passed a law decreeing Jesus Christ rose from the dead.

Belief in the truth of the Missouri Tenet requires an act of faith. *Yellowbear v. Lampert*, 741 F.3d 48, 54 (10th Cir. 2014) (Gorsuch, C.J.) ("Faith means belief in something concerning which doubt is still theoretically possible."). "The Religion Clauses of the Constitution aim to foster a society in which people of all beliefs can live together harmoniously. " *Am. Legion v. Am.*

Humanist Ass'n, 588 U.S. ___, ____, 139 S.Ct. 2067, 2074 (2019) ("*American Legion*").

The Missouri Tenet falls far short of fostering such harmony. Instead, it puts Missouri's imprimatur on a religious belief that has driven a deep wedge in our society over the morality of abortion. *Gillette v. United States*, 401 U.S. 437, 450 (1971) ("[T]the 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.")

The Missouri Tenet crosses the line from harmonious coincidence to overt proselytizing in violation of the Establishment Clause. "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Board of Education v. Barnette*, 319 U.S. 624, 642 (1943).

As the U.S. Supreme Court said in *McCreary County v. American Civil Liberties Union of Ky.*, 545 U.S. 844, 883 (2005) ("*McCreary*"):

> When the government associates one set of religious beliefs with the state and identifies nonadherents as outsiders, it encroaches upon the individual's decision about whether and how to worship. In the marketplace of ideas, the government has vast resources and special status Government religious expression therefore risks crowding out private observance and distorting the natural interplay between competing beliefs. Allowing government to be a potential mouthpiece for competing religious

> ideas risks the sort of division that might easily spill over into suppression of rival beliefs. Tying secular and religious authority together poses risks to both. [The Framers knew] that line-drawing between religions is an enterprise that, once begun, has no logical stopping point. They worried that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects. The Religion Clauses, as a result, protect adherents of all religions, as well as those who believe in no religion at all." [internal quotations and citations omitted]

II. This Court Should Decide How the Religion Clauses Apply to Abortion.

A. This Case Presents the Questions Left Unanswered in *Webster*.

The Eight Circuit's errors applying this Court's precedents and the Establishment Clause are not mere judicial oversight or confusion. They are an intentional abandonment by the Eighth Circuit of its duty to grapple with one of the most challenging and contentious issues of our time – what role, if any, does government play in deciding when a human being comes into existence.[3] *Webster* declined to address the issue due to the lack of concrete facts. This case picks

---

[3] A more Machiavellian interpretation would be the Eighth Circuit panel preferred to gut *Casey* with a procedural knife rather than legitimize Petitioner's Satanic religious beliefs.

up where *Webster* left off and presents the Court with the facts necessary to decide whether the complaint has stated a claim that the Missouri Tenet and Waiting Period are unconstitutional as applied to Petitioner under both religious and abortion jurisprudence.[4]

The Eight Circuit grossly distorted this Court's rulings in *City of Akron v. Akron Ctr.for Reprod. Health, Inc.*, 462 U.S. 416 (1983) ("*Akron*"), *Gonzales v. Carhart*, 550 U.S. 124 (2007) ("*Carhart*"), *Webster* and *Casey* to conclude Missouri is free to adopt the Catholic theory of life to promote its policy of favoring life birth over abortion. In *Roe*, the Court said, "we do not agree that, by adopting one theory of life, Texas may override the rights of the pregnant woman that are at stake." 410 U.S. at 162. In *Akron*, the Court said the requirement that a woman be informed "[t]hat the unborn child is a human life from the moment of conception . . . is designed not to inform the woman's consent but rather to persuade her to withhold it altogether . . . [and is] inconsistent with the Court's holding in *Roe* v. *Wade* that a State may not adopt one theory of when life begins to justify its regulation of abortions." 462 U.S. at 444. In *Webster*, the Court said this language in *Akron* was "dictum" that "a State could not 'justify' an abortion regulation otherwise invalid under *Roe v. Wade* on the ground that it embodied the State's view about when life begins." 492 U.S. at 506.

In *Casey*, the Court abandoned the trimester framework established in *Roe*. It overruled *Akron* "to

---

[4] Petitioner has indisputable standing. Compare, *Russo*, (Thomas, J., dissenting) (Slip Op. at p. 3).

the extent" the State was precluded from delivering "truthful, non-misleading information about the nature of the procedure, the attendant health risks and those of childbirth, and the 'probable gestational age' of the fetus" in getting a woman's informed consent." That is far from a green light for Missouri to proclaim the Missouri Tenet as its "value judgment," if for no other reason than it is not "truthful, non-misleading information" but rather a religious belief.

Webster left for another day deciding whether the Establishment Clause is violated by proclaiming the Catholic theory of life as official state policy in regulating abortion. Nothing in *Casey* or *Carhart* even remotely suggests a consideration of Establishment Clause issues. The Eighth Circuit's reliance on *Casey* to support its conclusion the Missouri Tenet does not violate Establishment Clause is a triumph of wishful thinking over disciplined analysis, particularly as Petitioner's rights under *Casey* were ignored.

The Eighth Circuit simply refused to consider whether the Missouri Tenet is an impermissible trespass into Petitioner's "zone of conscience" protected by *Casey* while cherry-picking *Casey* to support its dismissal of the complaint. If this Court decides to turn the same blind eye to Petitioner, then *Casey* is at risk for death by a thousand cuts of neglect and procedural legerdemain by the lower courts. While that might be tempting in some quarters, it would be a grave disservice to the integrity of the federal judiciary.

Missouri and the Eighth Circuit view the Missouri Tenet as a benign expression of a value judgment favoring birth over abortion. Petitioner sees it as pernicious and discriminatory psychological warfare on her religious beliefs. This Court should

resolve that dispute by granting the Petition and addressing the Questions Presented for Review.

B. This Court Should Fashion a Common Mandate Based on Constitutional Principles.

This Court is searching for a standard that allows religion to play a meaningful role in public life while remaining true to the principle that each of us decides his or her own religious beliefs without government influence. See, e.g., *American Legion*. This Court is searching for a Constitutional standard that effectively balances a woman's right to decide for herself whether and how to create a family while protecting the inchoate progeny who could become that family. See, e.g., *Carhart*.

The ferocity of the political debate in those searches is well known, and the Constitutional stakes are high. It would not be an overstatement to say this Court puts its credibility with the public on the line in deciding this case – even if it does nothing more than turn the same blind eye as the Eighth Circuit did to *Casey* and the Establishment Clause.

Any standard the Court articulates must, in the words of *Casey*, be an acceptable common mandate rooted in the Constitution and based on the most convincing justification of existing precedent. This Court cannot stake its authority on anything less.

> Where, in the performance of its judicial duties, the Court decides a case in such a way as to resolve the sort of intensely divisive controversy reflected in *Roe* and those rare, comparable cases, its decision has a dimension that the resolution of the normal case does not carry. It is

> the dimension present whenever the Court's interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution . . . [O]nly the most convincing justification under accepted standards of precedent could suffice to demonstrate that a later decision overruling the first was anything but a surrender to political pressure, and an unjustified repudiation of the principle on which the Court staked its authority in the first instance.

Casey, 505 U.S. at 866-67

C. The Mandate Should Fulfill Constitutional Purposes.

A primary purpose of Religion Clause jurisprudence is to "to promote and assure the fullest scope of religious liberty and religious tolerance for all and to nurture the conditions which secure the best hope of attainment of that end." *Abington School Dist. v. Schempp*, 374 U.S. 203, 305 (1963) (opinion of Goldberg, J., joined by Harlan, J.). An overarching objective is "to foster a society in which people of all beliefs can live together harmoniously," *American Legion*, and avoid "division that might easily spill over into suppression of rival beliefs," *McCreery*, 545 U.S. at 883. See also *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 535 (1993) (Striking down a law that promoted "religious gerrymander.")

One key to achieving harmony is for this Court to establish what is "religious." See *Calvary Chapel Dayton Valley v. Sisolak*, No. 19A1070 (July 24, 2020)

(Kavanaugh, J. dissenting) (Slip Op. at p. 2) ("But the parties to religion cases and the judges deciding those cases often do not share a common vocabulary or common background principles. And that disconnect can muddy the analysis, build resentment, and lead to litigants and judges talking past one another.")

An unambiguous ruling from this Court that the proposition "a human being comes into existence at conception" is a religious belief when expressed in the Missouri Tenet comports with reality.[5] Acknowledging that reality goes a long way towards establishing a legal benchmark against which religious tolerance can be measured. When held by Evangelical Christians, the belief is recognized as religious. *Hobby Lobby*, 134 S.Ct. at 2764-65 ("[H]uman life begins at conception [and] the termination of human life after conception . . . is a sin."). There is no reason why the antithesis of that belief should not also be a religious belief when held by someone who is not an Evangelical Christian. Otherwise, there is no common vocabulary.

Without the legal benchmark of a religious statement, the Court has no point of reference to examine whether and to what extent the Missouri Tenet can play a role in public life by promoting shared values. See, e.g. *Town of Greece v. Galloway*, 572 U.S. 565, 583 (2014) ("Prayer that is solemn and respectful in tone, that invites lawmakers to reflect upon shared ideals and common ends before they embark on the fractious business of governing, serves [a] legitimate function."). If the Missouri Tenet is not recognized as a

---

[5] "Religious" and "secular" are not mutually exclusive. *Wiggins v. Sargent*, 753 F. 2d 663, 666-67 (8th Cir. 1985).

religious belief, then deciding when a human being come into existence is taken out of the hearts and minds of individuals. The decision becomes political, made only by those who hold the levers of power. The serious erosion of the Religion Clauses by that outcome is self-evident.

The objective of abortion jurisprudence is to strike the appropriate balance between a woman's right to terminate her pregnancy before viability and the State's interests in protecting her health and the potentiality of the human life she carries. *Russo*, (Roberts, J. concurring) (Slip op. at p. 4). The operative word is "potentiality."

A bedrock value of our society is we are each free, in our own hearts, minds and consciences, to refuse medical services, even if it means our own death and the suffering of our children. See *Public Health Trust of Dade County v. Wons*, 541 So.2d 96 (Fla. 1989). Unless this Court is prepared to create a right out of whole cloth guaranteeing the future existence of an "unborn child," its potentiality is and must remain subordinate to the right of the woman who carries it to decide what that future will be.

D. The Mandate Should Respect Established Procedure.

Pretext is the enemy of good government. When government officials offer shibboleths to justify their failures, the governed lose faith in both the office holder and the office.

Government officials are best held to account by adherence to established procedures. In this case, the Eighth Circuit failed to follow the procedure for pleading established by Fed. R. Civ. Pro. 8(a)(2). It

justified that failure by relying on the pretext Missouri had been surprised by Petitioner's "creative" reading of *Casey*. Litigants cannot respect a Court that does not follow its own rules and then justifies itself by offering flimsy excuses.

Governments that legislate religious beliefs into secular policies commonly rely on pretext and sham. In *Edwards v. Aguillard*, 482 U.S. 578 (1987), this Court struck down Louisiana's Creationism Act, which required the teaching of "creation science" along with Darwinism in public schools. The Court said, "[w]hile the Court is normally deferential to a State's articulation of a secular purpose, it is required that the statement of such purpose be sincere and not a sham." *Id.* at 586-87.

Missouri has engaged in a similar sham in this case. The legislatively stated purpose for the forced indoctrination of Petitioner with the Missouri Tenet is 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." Mo. Rev. Stat. § 188.027(11). This is a pretext of Orwellian magnitude. Petitioner cannot get an abortion unless she acknowledges receipt of the Missouri Tenet – with which she disagrees - and then waits three days to think about it before having the procedure. Even a four-year-old understands the meaning of "time out."

Abortion jurisprudence is rife with pretext, shams, and dubious claims. See, e.g. "seven or eight providers could meet the [abortion] demand of [Texas] stretches credulity." *Whole Woman's Health v. Hellerstedt*, 579 U.S. ___, ____136 S. Ct. 2292, 2302 (2016). Pretext and sham are by-products of the culture war over abortion. Petitioner submits the most effective way to cut through pretext and sham to reach

a common mandate is to adhere to process. The first step on that road is to acknowledge that Fed. R. Civ. Pro. 8(a)(2), *Johnson* and *Skinner* mean what they say and grant the Petition.[6]

E. The Mandate Should Be Contextual.

As this Court recognized in *American Legion*, context is critical in Religion Clause cases, particularly if the mandate seeks to promote shared ideals and common ends. The long history of the Bladensburg Cross shows the evolution of an overtly religious symbol into an "embedded feature[] of a community's landscape . . . value[d] . . . . without necessarily embracing [its] religious roots." *American Legion*, (Alioto, J.) (slip op. at p. 19).

In *McGowan v. Maryland*, 366 U.S. 420 (1961) ("*McGowan*"), relied on by the Eight Circuit, the Court reviewed Sunday Closing Laws going back to 1237 in England and 1649 in Maryland. The Court said:

> In light of the evolution of our Sunday Closing Laws through the centuries, and of their more or less recent emphasis upon secular considerations, it is not difficult to discern that as presently written and administered, most of them, at least, are of a secular rather than of a religious character, and that presently they bear no relationship to establishment of religion as

---

[6] Missouri will have ample opportunity at trial to challenge the *bona fides* of Petitioner's belief in the Satanic Tenets and the other facts alleged in the complaint.

> those words are used in the Constitution of the United States.

Id. 366 U.S. at 444

The Court ruled Maryland's Sunday Closing Law did not violate the Establishment Clause even though numerous religions mandate a day of rest. The Court said:

> [I]t is equally true that the "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. In many instances, the Congress or state legislatures conclude that the general welfare of society, wholly apart from any religious considerations, demands such regulation. Thus, for temporal purposes, murder is illegal. And the fact that this agrees with the dictates of the Judaeo-Christian religions while it may disagree with others does not invalidate the regulation. [emphasis added]

Id. 366 U.S. at 442

The Eighth Circuit relied on *McGowan* to rule the Missouri Tenet simply "harmonizes" with Catholic dogma and therefore does not violate the Establishment Clause. But unlike the Sunday Closing Laws or the Bladensburg Cross, the Missouri Tenet has no history of evolving from a religious belief into a secular statement of shared ideals and common ends. On its face, the Missouri Tenet is the very embodiment of "religious considerations."

The Court recognized in *American Legion* that Religion Clause litigation is very fact-specific and there

is no "grand unified theory" that applies across the board. The language used to express Constitutional values in one kind of case, e.g. assisted suicide, is not readily applicable to another, e.g., legislative prayer.

The context of this case is abortion. It is very clear, very fact-specific and the subject of case law going back nearly fifty years to *Roe*. *Casey* has already set the standard for applying the liberty interests expressed in the Religion Clauses to abortion regulation. Petitioner respectfully requests this Court grant the Petition and apply *Casey* to the facts of this case.

CONCLUSION

For the reasons set forth above, Petitioner respectfully requests this Petition for Certiorari be granted.

Respectfully submitted
W. James Mac Naughton, Esq.
7 Fredon Marksboro Road
Newton, NJ 07806
wjm@wjmesq.com
732-634-3700-o
732-875-1250-f
Counsel for Petitioner Judy Doe

960 F.3d 1115

United States Court of Appeals, Eighth Circuit.

Judy DOE, Plaintiff - Appellant

v.

Michael L. PARSON, Governor of the State of Missouri; Eric S. Schmitt, Attorney General of the State of Missouri; David A. Poggemeier, M.D., Chairman of the Missouri Board of Registration for the Healing Arts; James A. DiRenna, D.O., Member of the Missouri Board of Registration for the Healing Arts; Sara Martin, PhD, Member of the Missouri Board of Registration for the Healing Arts; Katherine J. Matthews; Jade D. James, M.D., Secretary of the Missouri Board of Registration for the Healing Arts; David E. Tannenhill, D.O., Member of the Missouri Board of Registration for the Healing Arts; John Doe I; John Doe II, Defendants - Appellees

No. 19-1578

Submitted: January 16, 2020

Filed: June 9, 2020

Rehearing and Rehearing En Banc Denied July 15, 2020

Appeal from United States District Court for the Eastern District of Missouri - St. Louis

Attorneys and Law Firms

Counsel who presented argument on behalf of the appellant and appeared on the brief was William James Mac Naughton, of Newton, NJ.
Counsel who presented argument on behalf of the appellee was Peter T. Reed, former AAG, of Jefferson City, MO. The following attorney also appeared on the appellee brief; Dean John Sauer, AAG, of Jefferson City, MO.

Before BENTON, GRASZ, and STRAS, Circuit Judges.

Opinion

STRAS, Circuit Judge.

A Missouri law requires Judy Doe to certify that she has had a chance to review certain information before having an abortion. This requirement, she alleges, violates her Satanist beliefs. The district court[1] dismissed both of her First Amendment claims, and we affirm.

I.

Missouri and Doe have different views on when life begins. Missouri's official position is that "[t]he life of each human being begins at conception." Mo. Rev. Stat. § 188.027.1(2), (5). Its informed-consent law requires women seeking an abortion to certify that they have received "[m]edically accurate information" that bears on "the decision of whether" to have one. *Id.* § 188.027.1(1)(b), 188.027.3.

Doe, who was pregnant at the time she filed this lawsuit, sees the matter differently. *See Doe v. Poelker*,

497 F.2d 1063, 1067 (8th Cir. 1974) (explaining that pregnancy is a "classic justification" for the capable-of-repetition-yet-evading-review exception to mootness that does not need to be "established" on appeal (citation omitted)). As a member of "The Satanic Temple," she believes that the "Human Tissue" that she was carrying was "part of her body." As she stated in her complaint, her "body is inviolable" and "[s]he alone" gets to decide what to do with it, regardless of "the current or future condition of the Human Tissue" within.

In her two-count complaint, Doe alleges that Missouri's informed-consent law violates the Establishment and Free Exercise Clauses of the First Amendment. The district court, concluding that neither count stated a claim, dismissed the case.

II.

Before we address these two counts, Doe seeks to introduce a third:

> whether Missouri's informed-consent law imposes an undue burden on her right to an abortion. *See Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992). Her theory proceeds in two steps. First, the law infringes on her religious beliefs. Second, by infringing on her religious beliefs, the law creates an undue burden on her right to an abortion.
>
> Missouri could not have had "fair notice" of this claim based on the complaint itself, *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 512, 514, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002) (describing the basic

> purpose of pleading), which described the case as follows:
>
> > This is an action for declaratory relief pursuant to 42 U.S.C. § 1983 as all Defendants are acting under color of state law to deprive Plaintiff of her constitutional rights *under the Establishment and Free Exercise Clauses (the "Religion Clauses")* in obtaining an abortion in a manner required by her religious beliefs as an adherent to the tenets of The Satanic Temple.

(Emphasis added). It also lists only two counts: "**First Count – Violation of the Establishment Clause**" and "**SECOND COUNT – FREE EXERCISE VIOLATION**." *See Hopkins v. Saunders*, 199 F.3d 968, 973 (8th Cir. 1999) (considering claims that were expressly pleaded in the complaint when deciding whether the defendant had notice of unpleaded claims).

The specific factual allegations just connect the dots for those two claims. The complaint refers to Missouri's views on life as "Missouri [t]enets," the informed-consent law as the "Missouri [l]ectionary," and says that neither serves any purpose other than making her feel guilty for not believing in them. All of this, according to the complaint, communicates a "religious belief." Nowhere, by contrast, do the words "undue burden" or *Casey* appear, which creates the impression that this case is all about religion.

Doe nevertheless believes that we can consider her unpleaded claim for two reasons. The first is that she made an undue-burden *argument* in response to Missouri's motion to dismiss. Still, she had an obligation to amend her complaint once she identified the

potential claim. *See* Fed. R. Civ. P. 15 (explaining how to amend a complaint); *Morgan Distrib. Co. v. Unidynamic Corp.*, 868 F.2d 992, 995 (8th Cir. 1989) (pointing out that a responsive brief is neither the time nor the place to raise a new claim). The second is that an undue-burden claim was part and parcel of her religious-liberty claims from the start, because the First Amendment is at the "root" of *Casey*. Oral Arg. at 1:30–2:20; *cf. Casey*, 505 U.S. at 851, 112 S.Ct. 2791 ("At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."). Even if this were true—and we have every reason to believe that it is not—Missouri could not, without more, have anticipated Doe's creative reading of *Casey*. *See Casey*, 505 U.S. at 846–51, 112 S.Ct. 2791 (locating the right to an abortion in the Fourteenth Amendment). In short, we will not permit Doe to plead a new claim now.

III.

We now turn to the two claims that do appear in the complaint. "At this stage, our task is to review the complaint de novo to determine whether it alleges one or more actionable claims." *Telescope Media Grp. v. Lucero*, 936 F.3d 740, 750 (8th Cir. 2019).

A.

Doe's Establishment Clause challenge focuses on the requirement that every woman seeking an abortion in Missouri must first receive a state-authored informed-consent booklet. The booklet expresses Missouri's view that "[t]he life of each human being begins at conception [and that] [a]bortion will terminate the life of a separate, unique, living human being." Mo. Rev. Stat. § 188.027.1(2). It then goes on to describe

"the probable anatomical and physiological characteristics of the unborn child at two-week gestational increments ...." *Id.*; *see also id.* § 188.027.1(5). Doe believes that the booklet violates the Establishment Clause in two ways.

First by promoting "Catholic dogma" about when life begins. *See Larson v. Valente*, 456 U.S. 228, 244, 102 S.Ct. 1673, 72 L.Ed.2d 33 (1982) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."). The problem with this theory is that a state does not establish religion by passing a law that just "happens to coincide or harmonize with the tenets of some or all religions." *Harris v. McRae*, 448 U.S. 297, 319, 100 S.Ct. 2671, 65 L.Ed.2d 784 (1980) (quoting *McGowan v. Maryland*, 366 U.S. 420, 442, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961)) (upholding the Hyde Amendment's ban on publicly funded abortions). Mere alignment with certain religious beliefs, in other words, is not enough.

But Doe argues that there is something "more" than just alignment here, *id.* at 320, 100 S.Ct. 2671, because Missouri has elected to publish its views on this topic, even though it is "highly divisive." Even so, taking sides on a divisive issue, even when it breaks down "along religious lines," does not establish religion either. *Clayton ex rel. Clayton v. Place*, 884 F.2d 376, 378–79 (8th Cir. 1989) (determining that a school district's no-dancing rule did not establish religion even though some local churches "staunchly opposed ... social dancing" and viewed it as "sinful"). This is especially true here because, as the Supreme Court has recognized, a state is free to use "*its voice* ... to show its profound respect for" life. *Gonzales v. Carhart*, 550 U.S. 124, 157, 127 S.Ct. 1610, 167 L.Ed.2d 480

(2007) (emphasis added); *see also Casey*, 505 U.S. at 873, 112 S.Ct. 2791 (plurality opinion) (explaining that *Roe* and its progeny had "undervalue[d] the State's interest in potential life").

Indeed, the circumstances of this case show why alignment alone cannot be enough. Some religions, including Catholicism, embrace the view that life begins at conception. Others, like Doe's Satanism, do not. *Any* theory of when life begins necessarily aligns with some religious beliefs and not others. So under Doe's theory, Missouri's only option would be to avoid legislating in this area altogether.

Not a problem, Doe says, because her second argument is that states may *never* adopt a "theory of when life begins." *Reprod. Health Servs. v. Webster*, 851 F.2d 1071, 1075–76 (8th Cir. 1988) (*Webster I*) (quoting *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 444, 103 S.Ct. 2481, 76 L.Ed.2d 687 (1983), *overruled by Casey*, 505 U.S. 833, 112 S.Ct. 2791 (1992)), *rev'd*, 492 U.S. 490, 109 S.Ct. 3040, 106 L.Ed.2d 410 (1989) (*Webster II*). At one time, this argument had legs. But as the unwieldy citation may make obvious, our statement from *Webster I* is no longer good law. The Supreme Court clarified in *Webster II* that states still have a role to play on this issue. *Webster II*, 492 U.S. at 506, 109 S.Ct. 3040 ("*Roe v. Wade* implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion." (internal quotation marks and citation omitted)). And to the extent any doubt lingered, none remains now that the Supreme Court has decided *Carhart* and *Casey*. *Carhart*, 550 U.S. at 157, 127 S.Ct. 1610; *Casey*, 505 U.S. at 873, 112 S.Ct. 2791 (plurality opinion). So whatever support our

statement in *Webster I* could have once provided Doe, it cannot help her today.

B.

The focus of Doe's free-exercise claim is on Missouri's certification requirement. Before she can have an abortion, Missouri law requires her to certify in writing that she has both had a chance to view an ultrasound at least 24 hours ahead of time, Mo. Rev. Stat. § 188.027.1(4), 188.027.3, 188.027.12, and received an informed-consent booklet, *id.* § 188.027.1(2), (5), 188.027.3. Certifying these two facts, she alleges, would violate her Satanist beliefs.[2]

It does so, according to Doe, by forcing her to comply with a law that

> conditions her getting an abortion in a manner antithetical to the Satanic Tenets, including without limitation any law *that serves no medical purpose or purports to protect the interests of her Human Tissue.*

(Emphasis added). Her free-exercise claim, in other words, can be summed up in the following way: her religion allegedly "forbids certain conduct that the government requires." *Telescope Media Grp.*, 936 F.3d at 759.

Doe makes no argument, however, that the informed-consent law is anything other than "neutral" and "generally applicable." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 544, 546, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993). In these circumstances, it must only survive rational-basis review, which requires it to be "rationally related to a

legitimate government interest." *Gallagher v. City of Clayton*, 699 F.3d 1013, 1019 (8th Cir. 2012); *see Telescope Media Grp.*, 936 F.3d at 759. To the extent Doe argues that the certification requirement lacks a rational basis,[3] we disagree. *Casey* itself recognized that informed-consent laws like this one serve "the legitimate purpose of reducing the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed." *Casey*, 505 U.S. at 882, 112 S.Ct. 2791 (plurality opinion); *see id.* at 883–87, 112 S.Ct. 2791 (explaining that provisions requiring doctors to provide information to those seeking an abortion and imposing a waiting period were "reasonable means" of pursuing legitimate government interests).

IV.

We accordingly affirm the judgment of the district court.

Footnotes

1The Honorable Henry Edward Autrey, United States District Judge for the Eastern District of Missouri.

2According to Doe, the Satanic Temple has both "politically aware Satanists" and "*secularists* and advocates for individual liberty" among its members. (Emphasis added). Arguably, her own description raises the possibility that her beliefs about abortion may be political, not religious. *See Frazee v. Illinois Dep't of Emp't Sec.*, 489 U.S. 829, 833, 109 S.Ct. 1514, 103 L.Ed.2d 914 (1989) ("[O]nly beliefs rooted in religion are protected by the Free Exercise Clause." (citation omitted)). Nevertheless, we assume, but do not

decide, that she has done enough by alleging that her beliefs are "religious" and that she is a member of an organization that includes "Satanists."

3Doe believes the standard should be higher—something akin to strict scrutiny—but once again, her complaint does not support her theory. On appeal, she suggests that her free-exercise claim is really a hybrid of two separate constitutional rights: one prohibiting Missouri from unduly burdening her right to an abortion and the other allowing her to freely exercise her religion. *See Telescope Media Grp.*, 936 F.3d at 758–60 (noting that, under a hybrid-rights theory, strict scrutiny would apply to a free-exercise claim "intertwined" with a free-speech claim). But in addition to failing to plead an undue-burden claim, any suggestion of the hybrid-rights theory is absent from her complaint too. Without either, we cannot consider this argument. *See Stone v. Harry*, 364 F.3d 912, 914 (8th Cir. 2004).

368 F.Supp.3d 1345
United States District Court, E.D. Missouri, Eastern Division.

Judy DOE, Plaintiff,

v.

Michael L. PARSON[1], et al., Defendants.

No. 4:18CV339 HEA
Signed 02/21/2019

Attorneys and Law Firms

William J. Mac Naughton, W. James Mac Naughton, Newton, NJ, for Plaintiff.
Dean John Sauer, Joshua M. Divine, Attorney General of Missouri, Jefferson City, MO, for Defendants.

OPINION, MEMORANDUM AND ORDER

HENRY EDWARD AUTREY, UNITED STATES DISTRICT JUDGE

This matter seeking declarative and injunctive relief comes before the Court on Defendants' Motion to Dismiss Plaintiff's Complaint for failure to state a claim, [Doc. No. 17]. Plaintiffs seek (1) declaratory judgment that certain Missouri Statutes are void and (2) injunctive relief against Defendants' enforcement of the statutes. For the reasons below, Defendants' motion to dismiss will be granted.

Facts and Background

Plaintiff's Complaint alleges the following:

Plaintiff Judy Doe ("Doe" or "Plaintiff") is a competent, adult woman who is pregnant and plans to have an abortion in St. Louis, Missouri. Doe is a Missouri citizen and a member of The Satanic Temple. Doe holds certain religious beliefs as a member of The Satanic Temple. Doe complains that Missouri's Voluntary and Informed Consent law, RSMo § 188.027.1, violates the First Amendment's Establishment and Free Exercise Clauses.

Named as defendants are the Missouri Governor and Attorney General (the "State Defendants"), as well as the Chairman, Secretary and Members of the Missouri Board of Registration of the Healing Arts (the "Board Defendants"), and John Doe I and John Doe II, two medical professionals who are licensed by the state of Missouri to deliver healthcare services in Missouri (the "Healthcare Defendants").

Mo. Rev. Stat. § 188.027.1(2), requires that prior to providing a woman with an abortion, the Healthcare Defendants must deliver to her a booklet prepared by the Missouri Department of Health and Senior Services (the "Booklet"). The Booklet states, in pertinent part, "The life of each human being begins at conception. Abortion will terminate the life of a separate, unique, living human being" (the "Missouri Tenets").

Plaintiffs allege that the Missouri Tenets communicate the religious belief that human tissue *in utero* that is not viable ("Human Tissue") is, starting at conception, a unique human being with a life of its own, separate and apart from the woman whose uterus it occupies. Implicit in this belief is that the destruction of Human Tissue is morally wrong.

The Missouri Tenets are believed by some but not all people in Missouri, including without limitation

members of the Catholic Church and some evangelical and fundamentalist Christian congregations.

The Booklet contains detailed descriptions and images of the anatomical and physiological characteristics of Human Tissue at two-week gestational increments from conception to full term.

Mo. Rev. Stat. § 188.027.1(4) requires that prior to providing a woman with an abortion, the Healthcare Defendants "shall provide the woman with the opportunity to view ... an active ultrasound of the unborn child and hear the heartbeat of the unborn child if the heartbeat is audible" (the "Ultrasound Opportunity"). The Ultrasound Opportunity must include "the dimensions of the unborn child, and accurately portray [ ] the presence of external members and internal organs, if present or viewable, of the unborn child."

Mo. Rev. Stat. § 188.027.1(4) requires the Healthcare Defendants to wait seventy-two hours after the Ultrasound Opportunity before providing Plaintiff with an abortion (the "72 Hour Waiting Period").

Mo. Rev. Stat. § 188.027.12 requires The Healthcare Defendants to wait twenty-four hours after the Ultrasound Opportunity before providing a woman with an abortion if the 72 Hour Waiting Period is enjoined by the Court (the "24 Hour Waiting Period.").

Mo. Rev. Stat. § 188.027.3 also requires a woman to certify in writing that she has received the Booklet and the Ultrasound Opportunity before she may get an abortion (the "Certification Requirement").

The Booklet, the Ultrasound Opportunity, the 72 Hour Waiting Period, the 24 Hour Waiting Period and Certification Requirement are referred to by Plaintiffs as the "Missouri Lectionary." The purpose of the Missouri Lectionary is to "inform" a woman who has

decided to get an abortion that the Missouri Tenets are true.

Plaintiffs contend that the effect of the Missouri Lectionary is to:

> A) Encourage Plaintiff to believe the Missouri Tenets and forgo an abortion; and
> B) Compel Plaintiff to wait and consider the Missouri Tenets and Missouri Lectionary for at least three (3) days before getting the abortion; and
> C) Cause Plaintiff doubt, guilt, and shame for getting an abortion.
>
> The Healthcare Defendants are required by law to deliver the Missouri Lectionary to Plaintiff. The Missouri Lectionary is delivered when Plaintiff has already decided to get an abortion.

Plaintiff's religious beliefs include the following (the "Satanic Tenets"):

> A) A woman's body is inviolable and subject to her will alone;
> B) She makes decisions regarding her health based on the best scientific understanding of the world, even if the science does not comport with the religious or political beliefs of others;
> C) Human Tissue is part of her body;
> D) She alone decides whether to remove Human Tissue from her body;
> E) She may, in good conscience, have Human Tissue removed from her body on demand and without regard to the current or future condition of the Human Tissue; and

F) She must not comply with any law that directly or indirectly, conditions her getting an abortion in a manner antithetical to the Satanic Tenets, including without limitation any law that serves no medical purpose or purports to protect the interests of her Human Tissue.

Plaintiff does not believe the Missouri Tenets are true. Specifically, she does not believe:

A) The life of a human being begins at conception;
B) Abortion terminates "the life of a separate, unique, living human being;" or
C) The removal of Human Tissue from a woman's body is morally wrong.

The Missouri Tenets and Missouri Lectionary are irrelevant to Plaintiff in making a decision to get an abortion because she believes Human Tissue can be removed from her body on demand and, in good conscience, without regard to the current or future condition of the Human Tissue.

Neither the Missouri Tenets nor the Missouri Lectionary is medically necessary for Plaintiff to make an informed decision to get an abortion. Women can and do routinely have safe abortions on demand throughout the country using established medical procedures and without consideration of the Missouri Tenets or the Missouri Lectionary.

Count I – Establishment Clause

Plaintiff states the following allegations in support of her claim of a violation of the Establishment Clause:

All people have the right to formulate, hold, change or reject their own belief of whether Human Tissue is the life of a separate and unique human being that begins at conception (the "Freedom to Believe When a Human Being Comes Into Existence"). All women who are contemplating getting an abortion in Missouri have the right, pursuant to the First Amendment, to exercise their Freedom to Believe When a Human Being Comes Into Existence and act upon their belief without interference or influence by the State of Missouri.

All people have the right to formulate, hold, change, or reject their own belief of whether abortion prior to viability of Human Tissue is morally right or wrong (the "Freedom to Believe Abortion is Not Immoral.") All women who are contemplating getting an abortion in Missouri have the right, pursuant to the First Amendment, to exercise their Freedom to Believe Abortion is Not Immoral and act upon their belief without interference or influence by the State of Missouri.

The purpose and effect of the Missouri Tenets and Missouri Lectionary are to promote the religious belief that Human Tissue is, from conception, a separate and unique human being whose destruction is morally wrong. The creation, distribution and enforcement of the Missouri Lectionary promotes the Missouri Tenets in violation of the Establishment Clause of the First Amendment because the State of Missouri is using its power to regulate abortion to promote some, but not all, religious beliefs that Human

Tissue is, from conception, a separate and unique human being whose destruction is morally wrong.

The Missouri Tenets and Missouri Lectionary foster an excessive entanglement between the State of Missouri and adherents to the religious belief that Human Tissue is a separate and unique human being from conception whose destruction is morally wrong.

Neither the Missouri Tenets nor the Missouri Lectionary promote the religious belief that Human Tissue is part of a woman's body that may be removed on demand in good conscience and without consideration of the current or future condition of the Human Tissue.

Defendants are acting under color of state law in the creation, distribution and enforcement of the Missouri Lectionary to promote the Missouri Tenets.

Defendants have infringed on Plaintiffs' rights under the Establishment Clause in violation of 42 U.S.C. § 1983 in the creation, distribution and enforcement of the Missouri Lectionary to promote the Missouri Tenets.

Plaintiff has been and will be irreparably injured by that violation because the Missouri Tenets and Missouri Lectionary are forced upon her with the intent and purpose to cause her guilt for believing the Satanic Tenets and not believing the Missouri Tenets.

Count II – Free Exercise Clause

Plaintiff alleges the following in support of her Free Exercise violation claim:

The Missouri Tenets and Missouri Lectionary discriminate between a viewpoint that adheres to the Missouri Tenets and those viewpoints that do not. Specifically, Missouri Tenets and Missouri Lectionary

do not mention the Satanic Tenets or the scientific fact that an umbilical cord makes Human Tissue part of a woman's body.

The Missouri Tenets and Missouri Lectionary substantially burden Plaintiff's ability to act in accordance with the Satanic Tenets. That burden includes, without limitation, forcing Plaintiff to act and forgo acting in a manner that violates her belief in the Satanic Tenets as a condition for getting an abortion in Missouri. The Missouri Lectionary and Missouri Tenets have caused and will cause Plaintiff to endure guilt, doubt, and shame because she believes the Satanic Tenets and does not believe the Missouri Tenets.

Plaintiffs claim Defendants have infringed on Plaintiffs' rights under the Free Exercise Clause in violation of 42 U.S.C. § 1983 in the creation, distribution and enforcement of the Missouri Lectionary to promote the Missouri Tenets. Plaintiff claims she has been and will be irreparably injured by the stigmatic injury the Missouri Tenets and Missouri Lectionary force on her as an adherent to the Satanic Tenets.

Plaintiffs seek a declaration that the Missouri Tenets are null and void; a declaration that Mo. Rev. Stat. §§ 188.027.1(2), (4) and (5); 188.027.3; and 188.027.12 are null and void; a declaration that Plaintiff may obtain an abortion without complying with Mo. Rev. Stat. §§ 188.027.1(2) (4) and (5); 188.027.3; and 188.027.12; a declaration that the Healthcare Defendants may provide Plaintiff with an abortion without complying with Mo. Rev. Stat. §§ 188.027.1(2)(4) and (5); 188.027.3; and 188.027.12.

Plaintiffs also seek an injunction against Defendants from enforcing Mo. Rev. Stat. §§ 188.027.1(2), (4) and (5) and 188.027.3 or 188.027.12 against Plaintiff.

Legal Standard

The purpose of a Rule 12(b)(6) motion to dismiss for failure to state a claim is to test the legal sufficiency of a complaint so as to eliminate those actions "which are fatally flawed in their legal premises and deigned to fail, thereby sparing litigants the burden of unnecessary pretrial and trial activity." *Young v. City of St. Charles*, 244 F.3d 623, 627 (8th Cir. 2001) (citing *Neitzke v. Williams*, 490 U.S. 319, 326–27, 109 S.Ct. 1827, 104 L.Ed.2d 338 (1989)). "To survive a motion to dismiss, a claim must be facially plausible, meaning that the 'factual content...allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.' " *Cole v. Homier Dist. Co., Inc.*, 599 F.3d 856, 861 (8th Cir. 2010)(quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009)). The Court must "accept the allegations contained in the complaint as true and draw all reasonable inferences in favor of the nonmoving party." *Id.*(quoting *Coons v. Mineta*, 410 F.3d 1036, 1039 (8th Cir. 2005)). However, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements," will not pass muster. *Iqbal*, 556 U.S. at 678, 129 S.Ct. 1937.

Discussion

In support of their motion to dismiss Plaintiff's Complaint for failure to state a claim, Defendants assert that Count I should be dismissed because Missouri's informed consent law merely is consistent with certain religions' beliefs, and that Count II should be dismissed (1) because Missouri's informed consent law is neutral, generally applicable, and rationally

related to the State's legitimate interest in facilitating informed consent, and (2) because Plaintiff has not alleged that the informed consent law interferes with any religious exercise.

Establishment Clause

The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244, 102 S.Ct. 1673, 1683, 72 L.Ed.2d 33 (1982). It is jurisprudentially elementary that "it does not follow that a statute violates the Establishment Clause because it 'happens to coincide or harmonize with the tenets of some or all religions.' " *Harris v. McRae*, 448 U.S. 297, 319, 100 S.Ct. 2671, 2689, 65 L.Ed.2d 784 (1980) (*quoting McGowan v. Maryland*, 366 U.S. 420, 442, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961)).

That "[t]he life of each human being begins at conception" and that "[a]bortion will terminate the life of a separate, unique, living human being" are not facially religious statements. These beliefs are neither exclusive to nor universally held by adherents to Catholicism or evangelical Christianity. Nevertheless, Plaintiff asserts that the Missouri Tenets convey the messages that abortion is "morally wrong" and that "abortion is murder." This interpretation is not reasonable. A woman absolutely maintains the right and ability to legally terminate her pregnancy, making the contention that the state legally conflates abortion with murder through the Missouri Tenets unfounded and untenable. A person's belief as to whether abortion is "morally wrong" is, as Plaintiff points out, the subjective conclusion of one's moral, theological, and philosophical ideas and beliefs. The Missouri Tenets do

not reach the depth of such beliefs. Rather, the Missouri Tenets merely represent the state's ability to "use its voice and its regulatory authority to show its profound respect for the life within the woman." *Gonzales v. Carhart*, 550 U.S. 124, 157, 127 S.Ct. 1610, 1633, 167 L.Ed.2d 480 (2007).

Plaintiff argues that the Missouri Tenets are "impermissible state adoption of a theory when life begins." For her contention, she cites the Eighth Circuit's opinion in *Reproductive Health Service v. Webster*, 851 F.2d 1071, 1075-76 (8th Cir. 1988)which held the preamble to a Missouri statute that stated "the life of each human being begins at conception" (the "preamble") was impermissible. Plaintiff claims that the "U.S. Supreme Court declined to review this holding [in *Webster v. Reproductive Health Services*, 492 U.S. 490, 109 S.Ct. 3040, 106 L.Ed.2d 410 (1989)] and it stands as the binding interpretation of the Missouri Tenet in this Circuit."

This argument is unavailing, as the Supreme Court provided guidance to the contrary when it reversed the Eighth Circuit's decision on other grounds in *Webster*, 492 U.S. 490, 109 S.Ct. 3040. The majority opinion did not pass on the constitutionality of the preamble, reasoning that the preamble did "not by its terms regulate abortion." *Id.* at 506, 109 S.Ct. 3040. Moreover, the majority wrote that its previous statement from *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 444, 103 S.Ct. 2481, 76 L.Ed.2d 687 (1983) that "a State may not adopt one theory of when life begins to justify its regulation of abortions" was dictum. *Id.* at 505, 109 S.Ct. 3040. It also held:

> 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." The preamble can be read simply to express that sort of value judgment.

Webster, 492 U.S. at 506, 109 S.Ct. 3040 (*quoting Maher v. Roe*, 432 U.S. 464, 474, 97 S.Ct. 2376, 53 L.Ed.2d 484 (1977)).

The Missouri Tenets neither regulate abortion nor promote religious beliefs. The Missouri Tenets, as the Supreme Court said of the preamble in *Webster*, express the State's value judgment favoring childbirth over abortion. As such, Plaintiff's Establishment Clause claim necessarily fails. Even though the Missouri Tenets are harmonious with some religious beliefs, they are a permissible expression of the State's secular interest in protecting the unborn. *See Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 883, 112 S.Ct. 2791, 2823–24, 120 L.Ed.2d 674 (1992) ("As we have made clear, we depart from the holdings of *Akron I* and *Thornburgh* to the extent that we permit a State to further its legitimate goal of protecting the life of the unborn by enacting legislation aimed at ensuring a decision that is mature and informed, even when in so doing the State expresses a preference for childbirth over abortion.").

Plaintiff's Establishment Clause claim also fails with respect to the remainder of the Missouri Lectionary. Plaintiff does not allege that the Booklet contains information about the gestation of a fetus that is factually inaccurate. Neither the Ultrasound Opportunity nor the 72-Hour Waiting Period advance a religion or religious beliefs. It follows that the

Certification Requirement, in which a woman only acknowledges receipt of the Booklet and Ultrasound Opportunity, does not implicate the Establishment Clause. Count I of Plaintiff's Complaint will be dismissed.

Count II – Free Exercise Clause

"The Free Exercise Clause requires only that the statutes at issue be neutral and generally applicable; incidental burdens on religion are usually not enough to make out a free exercise claim." *New Doe Child # 1 v. United States*, 901 F.3d 1015, 1025 (8th Cir. 2018) (*citing Holt v. Hobbs*, —— U.S. ——, 135 S.Ct. 853, 859, 190 L.Ed.2d 747 (2015)). "A law is not neutral, however, if its object or purpose is the 'suppression of religion or religious conduct.' " *Id.*(*quoting Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993)).

Defendants claim that the Missouri informed consent laws are generally applicable and religion-neutral. In response, Plaintiff argues that "the Missouri Tenets and Missouri Lectionary are not 'content neutral' but rather are 'an impermissible state adoption of a theory when life begins' with no discernible secular purpose."

As previously noted, if a state is not absolutely prohibited from adopting a theory of when life begins, the State has a legitimate, secular interest in "protecting the life of the unborn." *Casey*, 505 U.S. at 883, 112 S.Ct. 2791. The content of the Missouri Tenets and Missouri Lectionary (collectively, the "Informed Consent Provisions") are religion-neutral.

Plaintiff's claim that the Informed Consent Provisions are not "generally applicable laws" because

they apply only to the narrow category of pregnant women seeking abortions in Missouri similarly fails. For Free Exercise claims, the only relevant categorizations are those based on religion. *Lukumi Babalu Aye*, 508 U.S. at 542–43, 113 S.Ct. 2217 ("The Free Exercise Clause protects religious observers against unequal treatment, and inequality results when a legislature decides that the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation." (internal citations and quotations omitted)). The Informed Consent Provisions are generally applicable because they are applied to *every* woman who seeks an abortion in Missouri, not just members of the Satanic Temple.

"[T]he right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." *Employment Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872, 879, 110 S.Ct. 1595, 1600, 108 L.Ed.2d 876 (1990) (internal citations and quotations omitted)). The Informed Consent Provisions are neutral laws of general applicability. The Informed Consent Provisions prescribe that all women who seek an abortion in Missouri must be given the Booklet, must receive an Ultrasound Opportunity, must wait 72 hours, and must confirm that she received the Booklet and Ultrasound Opportunity before she can get an abortion. The Satanic Tenets proscribe compliance with any law that places conditions on abortion that are antithetical to the Satanic Tenets. Following *Smith*, Plaintiff's faith does not relieve her from compliance with the Informed Consent Provisions.

Plaintiff's argument concerning the "substantial burden" placed on the free exercise of her religion is inapt. The *Sherbert* balancing test, which includes a substantial burden component, was rejected as to generally applicable criminal laws in *Smith*. The Supreme Court indicated that a balancing test was not appropriate for neutral and generally applicable civil laws, either. *Smith*, 494 U.S. at 885, 110 S.Ct. 1595 ("The government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development." (internal quotation omitted)).

Plaintiff also asserts a "hybrid right" theory with respect to her Free Exercise claim. The theory of hybrid rights comes from *Smith*, in which the Supreme Court noted that the First Amendment can bar "application of a neutral, generally applicable law to religiously motivated action" in cases involving "the Free Exercise Clause in conjunction with other constitutional protections." *Id.* at 881, 110 S.Ct. 1595. Plaintiff alleges that the accompanying First Amendment right in this case is her fundamental right to get an abortion without undue burden as established in *Roe v. Wade* 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973). Plaintiff states that the Missouri Lectionary is an undue burden under *Roe* because "the Missouri Lectionary serves absolutely no medical purpose" and "is a State sanctioned instrument of psychological torture intended to coerce Plaintiff into changing her religious beliefs in the Satanic Tenets or punishing her if she acts upon her religious beliefs." This argument is not well taken.

The Eighth Circuit upheld a South Dakota statute with very similar language to the Missouri Tenets in *Planned Parenthood Minn. v. Rounds*, 653 F.3d 662 (8th Cir. 2011). A waiting period and certification requirement were upheld by the Eighth Circuit in *Fargo Women's Health Org. v. Schafer*, 18 F.3d 526 (8th Cir. 1994). The Ultrasound Opportunity is not burdensome because a woman is given a choice whether to have an ultrasound. The Missouri Lectionary does not place an undue burden on a woman's right to get an abortion. A hybrid right analysis is simply inapt in this case.

Conclusion

Based upon the foregoing analysis, the Court concludes that Plaintiff's claims set forth in the Complaint necessarily fail.

Accordingly,

IT IS HEREBY ORDERED that Defendants' Motion to Dismiss, [Doc. No. 17], is **GRANTED.**

Footnotes

1Effective June 1, 2018, Michael L. Parson is the Governor of Missouri. Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, Michael L. Parson should be substituted for Governor Eric R. Greitens as the defendant in this suit.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 19-1578

Judy Doe
Appellant
v.
Michael L. Parson, Governor of the State of Missouri, et al.
Appellees

Appeal from U.S. District Court for the Eastern District of Missouri - St. Louis
(4:18-cv-00339-HEA)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

July 15, 2020

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION
Docket No.

JUDY DOE
Plaintiff
-vs-
ERIC R. GREITENS, GOVERNOR OF THE STATE OF MISSOURI, JOSH HAWLEY, ATTORNEY GENERAL OF THE STATE OF MISSOURI, DAVID A. POGGEMEIER, M.D., CHAIRMAN OF THE MISSOURI BOARD OF REGISTRATION FOR THE HEALING ARTS, JADE D. JAMES, M.D., SECRETARY OF THE MISSOURI BOARD OF REGISTRATION FOR THE HEALING ARTS, JAMES A. DIRENNA, D.O., MEMBER OF THE MISSOURI BOARD OF REGISTRATION FOR THE HEALING ARTS, SARAH MARTIN, PHD, MEMBER OF THE MISSOURI BOARD OF REGISTRATION FOR THE HEALING ARTS, KATHERINE J. MATTHEWS, M.D., MEMBER OF THE MISSOURI BOARD OF REGISTRATION FOR THE HEALING ARTS DAVID E. TANNENHILL, D.O., MEMBER OF THE MISSOURI BOARD OF REGISTRATION FOR THE HEALING ARTS JOHN DOE I and JOHN DOE II
Defendants

COMPLAINT

Plaintiff Judy Doe, by her attorney W. James Mac Naughton, alleges as follows:

Parties

1. Plaintiff Judy Doe is an adult and competent woman who is pregnant.
2. Plaintiff is a resident of Missouri and plans to have an abortion in St. Louis, Missouri.
3. Plaintiff is a member of The Satanic Temple, an association of politically aware Satanists, secularists and advocates for individual liberty.
4. Judy Doe is not Plaintiff's real name; Plaintiff needs to keep her real name confidential because this action involves her most intimate personal beliefs and she will be subject to personal attack for bringing this action.
5. Defendant Eric Greitens is the Governor of the State of Missouri.
6. Defendant Josh Hawley is the Attorney General of the State of Missouri.
7. Defendant David A. Poggemeier, M.D is the Chairman of the Missouri Board of Registration of the Healing Arts (the "Board").
8. Defendant Jade D. James, M.D., is the Secretary of the Board.
9. Defendant James A. DiRenna, D.O., is a Member of the Board.
10. Defendant Sarah Martin, PhD is a Member of the Board.
11. Defendant Katherine Matthews M.D., is a Member of the Board.
12. Defendant David E. Tannehill, D.O., is a Member of the Board.
13. Defendants David A. Poggemeier, M.D., Jade D. James, M.D., James A. DiRenna, D.O., Sarah Martin, PhD, Katherine Matthews M.D. and David E. Tannehill, D.O. are referred to herein jointly and severally as the Board Defendants.

14. Defendants Eric Greitens, Josh Hawley and the Board Defendants are referred to herein jointly and severally as the State Defendants.

15. Defendants John Doe I and John Doe II are medical professionals licensed by the State of Missouri to deliver healthcare services in Missouri (the "Healthcare Defendants").

16. The Healthcare Defendants are physicians or qualified professionals within the meaning of Mo. Rev. Stat. §§ 188.015, et seq. and subject to regulation by the Board Defendants.

17. John Doe I and John Doe II are not the real names of the Healthcare Defendants. Plaintiff does not know the real names of the Healthcare Defendants.

Moreover, Plaintiff needs to keep the real names of the Healthcare Defendants confidential to protect her privacy because this action involves Plaintiff's most intimate personal beliefs and disclosure of the identities of the Healthcare Defendants could subject her and them to personal attack for Plaintiff bringing this action.

18. State Defendants and their agents and officers are responsible for the enforcement of Missouri state law for the regulation of abortions set forth in Mo. Rev. Stat. §§ 188.015, et seq.

19. The Healthcare Defendants are obligated by Mo. Rev. Stat. §§ 188.015, et seq. to perform or assist in performing an abortion in the manner established by the statute.

Jurisdiction

20. The Court has jurisdiction over the case pursuant to 28 U.S.C. §1331 as the claims arise under 42 U.S.C. §1983.

Venue

21. Venue is proper in this district pursuant to 28 U.S.C. §1391(b)(2) as the events giving rise to the claims occurred and will occur in this district.
22. This is an action for declaratory relief pursuant to 42 U.S.C. §1983 as all Defendants are acting under color of state law to deprive Plaintiff of her constitutional rights under the Establishment and Free Exercise Clauses (the "Religion Clauses") in obtaining an abortion in a manner required by her religious beliefs as an adherent to the tenets of The Satanic Temple.

Facts Common to All Counts

23. Mo. Rev. Stat. § 188.027.1(2) requires that prior to providing Plaintiff with an abortion, the Healthcare Defendants must deliver to her a booklet prepared by the Missouri Department of Health and Senior Services (the "Booklet").
24. The Booklet states, in pertinent part, "The life of each human being begins at conception. Abortion will terminate the life of a separate, unique, living human being" (the "Missouri Tenets").
25. The Missouri Tenets communicate the religious belief that human tissue *in utero* that is not viable ("Human Tissue") is, starting at conception, a unique human being with a life of its own, separate and apart from the woman whose uterus it occupies. Implicit in this belief is that the destruction of Human Tissue is morally wrong.
26. The Missouri Tenets are believed by some but not all people in Missouri, including without limitation

members of the Catholic Church and some evangelical and fundamentalist Christian congregations.

27. The Booklet contains detailed descriptions and images of the anatomical and physiological characteristics of Human Tissue at two-week gestational increments from conception to full term. The description includes statements such as:

A. "The fetal heartbeat can be detected with a Doppler or heart monitor;"
B. "The fetal heartbeat can now be heard with a stethoscope;"
C. "The fetus can blink, grasp, and move its mouth;"
D. "If the hand floats to the mouth, the fetus may suck its thumb;"
E. "The fetus hears the mother's sounds such as her heartbeat, breathing and speaking;"
F. "The fetus sleeps and wakes regularly;"
G. "At least by 22 weeks of gestational age, the fetus possesses all the anatomical structures, including pain receptors, spinal cord, nerve tracts, thalamus, and cortex, which are required to feel pain," a statement required by Mo. Rev. Stat. § 188.027.1(5).

28. Mo. Rev. Stat. § 188.027.1(4) requires that prior to providing a woman with an abortion, the Healthcare Defendants "shall provide the woman with the opportunity to view . . . an active ultrasound of the unborn child and hear the heartbeat of the unborn child if the heartbeat is audible" (the "Ultrasound

Opportunity"). The Ultrasound Opportunity must include "the dimensions of the unborn child, and accurately portray[] the presence of external members and internal organs, if present or viewable, of the unborn child."

29. Mo. Rev. Stat. § 188.027.1(4) requires the Healthcare Defendants to wait seventy-two hours after the Ultrasound Opportunity before providing Plaintiff with an abortion (the "72 Hour Waiting Period").

30. Mo. Rev. Stat. § 188.027.12 requires the Healthcare Defendants to wait twenty-four hours after the Ultrasound Opportunity before providing Plaintiff with an abortion if the 72 Hour Waiting Period is enjoined by the Court (the "24 Hour Waiting Period.")

31. Mo. Rev. Stat. §188.027.3 requires Plaintiff to certify in writing that she has received the Booklet and the Ultrasound Opportunity before she may get an abortion the "Certification Requirement").

32. The Booklet, the Ultrasound Opportunity, the 72 Hour Waiting Period, the 24 Hour Waiting Period and Certification Requirement are referred to herein jointly and severally as the Missouri Lectionary.

33. The purpose of the Missouri Lectionary is to "inform" Plaintiff the Missouri Tenets are true.

34. The effect of the Missouri Lectionary is to:

A. Encourage Plaintiff to believe the Missouri Tenets are true and forgo an abortion; and
B. Compel Plaintiff to wait and consider the Missouri Tenets and Missouri Lectionary for at least three (3) days before getting an abortion; and
C. Cause Plaintiff doubt, guilt and shame for getting an abortion.

35. The Healthcare Defendants are required by law to deliver the Missouri Lectionary to Plaintiff.

36. The Healthcare Defendants are subject to sanction by the Board Defendants if they do not deliver the Missouri Lectionary to Plaintiff.

37. The Missouri Lectionary is delivered when Plaintiff has already decided to get an abortion.

38. Plaintiff, as a members of The Satanic Temple, holds the following religious beliefs (the "Satanic Tenets"):

A woman's body is inviolable and subject to her will alone;

B. She makes decisions regarding her health based on the best scientific understanding of the world, even if the science does not comport with the religious or political beliefs of others;

C. Human Tissue is part of her body;

D. She alone decides whether to remove Human Tissue from her body; and

E. She may, in good conscience, have the Healthcare Defendants remove Human Tissue from her body on demand and without regard to the current or future condition of the Human Tissue;

F. She must not comply with any law that directly or indirectly, conditions her getting an abortion in a manner antithetical to the Satanic Tenets, including without limitation any law that serves no medical purpose or purports to

protect the interests of her Human Tissue.

39. Plaintiff does not believe the Missouri Tenets are true. Specifically, she does not believe:

A. The life of a human being begins at conception; or

B. Abortion terminates "the life of a separate, unique, living human being;"

or

C. Abortion is morally wrong.

40. The Missouri Tenets and Missouri Lectionary are irrelevant to Plaintiff in making her decision to get an abortion because she believes Human Tissue can be removed from her body on demand and, in good conscience, without regard to the current or future condition of the Human Tissue.

41. Neither the Missouri Tenets nor the Missouri Lectionary are medically necessary for Plaintiff to make an informed decision to get an abortion.

42. Women can and do routinely have safe abortions on demand throughout the country using established medical procedures and without consideration of the Missouri Tenets or the Missouri Lectionary.

First Count – Violation of the Establishment Clause

43. Plaintiff repeats and re-alleges ¶¶ 1 to 42.

44. All people have the right to formulate, hold, change or reject their own belief of whether Human Tissue is the life of a separate and unique human being that begins at conception (the "Freedom to Believe When a Human Being Comes Into Existence").

45. All women who are contemplating getting an abortion in Missouri have the right, pursuant to the First Amendment, to exercise their Freedom to Believe When a Human Being Comes Into Existence and act upon their belief without interference or influence by the State of Missouri.

46. All people have the right to formulate, hold, change or reject their own belief of whether abortion prior to viability of Human Tissue is morally right or wrong (the "Freedom to Believe Abortion is Not Immoral").

47. All women who are contemplating getting an abortion in Missouri have the right, pursuant to the First Amendment, to exercise their Freedom to Believe Abortion is Not Immoral and act upon their belief without interference or influence by the State of Missouri.

48. The purpose and effect of the Missouri Tenets and Missouri Lectionary are to promote the religious belief that Human Tissue is, from conception, a separate and unique human being whose destruction is morally wrong.

49. The creation, distribution and enforcement of the Missouri Lectionary promotes the Missouri Tenets in violation of the Establishment Clause of the First Amendment because the State of Missouri is using its power to regulate abortion to promote some, but not all,

religious beliefs that Human Tissue is, from conception, a separate and unique human being whose destruction is morally wrong.

50. The Missouri Tenets and Missouri Lectionary foster an excessive entanglement between the State of Missouri and adherents to the religious belief that Human Tissue is a separate and unique human being from conception whose destruction is morally wrong.

51. Neither the Missouri Tenets nor the Missouri Lectionary promote the religious belief that Human Tissue is part of a woman's body that may be removed on demand in good conscience and without consideration of the current or future condition of the Human Tissue.

52. Defendants are acting under color of state law in the creation, distribution and enforcement of the Missouri Lectionary to promote the Missouri Tenets.

53. Defendants have infringed on Plaintiff's rights under the Establishment Clause in violation of 42 U.S.C. §1983 in the creation, distribution and enforcement of the Missouri Lectionary to promote the Missouri Tenets.

54. Plaintiff has been and will be irreparably injured by that violation because the Missouri Tenets and Missouri Lectionary are forced upon her with the intent and purpose to cause her guilt for believing The Satanic Tenets and not believing the Missouri Tenets.

WHEREFORE, Plaintiff respectfully requests the entry of an order that:

A. Declares the Missouri Tenets null and void; and

B. Declares Mo. Rev. Stat. §§ 188.027.1(2), (4) and (5); 188.027.3; and 188.027.12 are null and void; and

C. Declares she may obtain an abortion without complying with Mo. Rev. Stat. §§ 188.027.1(2) (4) and (5); 188.027.3; and 188.027.12

D. Declares Healthcare Defendants may provide Plaintiff with an abortion without complying with Mo. Rev. Stat. §§ 188.027.1(2) (4) and (5); 188.027.3; and 188.027.12; and

E. Enjoins State Defendants, their officers and agents from enforcing Mo. Rev. Stat. §§ 188.027.1(2), (4) and (5) and 188.027.3 or 188.027.12 against Plaintiff;

F. Directs State Defendants to pay Plaintiff's reasonable attorney fees and costs; and

G. Grants Plaintiff any additional relief the Court deems just and proper.

SECOND COUNT – FREE EXERCISE VIOLATION

55. Plaintiff repeats and re-alleges ¶¶ 1 to 54.

56. The Missouri Tenets and Missouri Lectionary discriminate between a viewpoint that adheres to the Missouri Tenets and those viewpoints that do not. Specifically, but not by way of limitation, the Missouri Tenets and Missouri Lectionary do not mention the Satanic Tenets or the scientific fact that an umbilical

cord makes Human Tissue part of a woman's body.

57. The Missouri Tenets and Missouri Lectionary substantially burden Plaintiff's ability to act in accordance with The Satanic Tenets. That burden includes, without limitation, forcing Plaintiff to act and forgo acting in a manner that violates her belief in The Satanic Tenets as a condition for getting an abortion in Missouri.

58. The Missouri Lectionary and Missouri Tenets have caused and will cause Plaintiff to endure guilt, doubt and shame because she believes The Satanic Tenets and does

not believe the Missouri Tenets.

59. Defendants have infringed on Plaintiff's rights under the Free Exercise Clause in violation of 42 U.S.C. §1983 in the creation, distribution and enforcement of the Missouri Lectionary to promote the Missouri Tenets.

60. Plaintiff has been and will be irreparably injured by the stigmatic injury the Missouri Tenets and Missouri Lectionary force on her as an adherent to The Satanic Tenets.

WHEREFORE, Plaintiff respectfully requests the entry of an order that:

A. Declares the Missouri Tenets null and void;

B. Declares Mo. Rev. Stat. §§ 188.027.1(2), (4) and (5); 188.027.3; and 188.027.12 are null and void;

C. Declares Plaintiff may obtain an abortion without complying with Mo. Rev. Stat. §§ 188.027.1(2) (4) and (5); 188.027.3; and 188.027.12;

D. Declares the Healthcare Defendants do not need to comply with Mo. Rev. Stat. §§ 188.027.1(2) (4) and (5); 188.027.3; and 188.027.12 in providing an abortion to Plaintiff;

E. Enjoins Defendants, their officers and agents from enforcing Mo. Rev. Stat. §§ 188.027.1(2), (4) and (5) and 188.027.3 or 188.027.12 against Plaintiff;

F. Directs State Defendants to pay Plaintiff's reasonable attorney fees and costs; and

G. Grants Plaintiff any additional relief the Court deems just and proper.

February 28, 2018

W. James Mac Naughton
W. James Mac Naughton
7 Fredon Marksboro Road
Newton, NJ 07860
732-634-3700 (o)
732-875-1250 (f)
wjm@wjmesq.com
Bar ID No. 701985NJ
Attorney for Plaintiff The Satanic Temple