**IN THE CIRCUIT COURT OF ST. LOUIS CITY,
STATE OF MISSOURI**

The Reverend Traci Blackmon, *et al.*, Petitioners, v. State of Missouri, *et al.*, Respondents.	)	No.: 2322-CC00120 Div. 18

PETITIONERS' RESPONSE TO RESPONDENTS' ROGER JOHNSON, DANIEL PATTERSON, THERESA KENNEY, AND ST. CHARLES COUNTY PROSECUTOR'S MOTION TO DISMISS

Stripped of its curious references to the First Amendment of the U.S. Constitution and the "Van Gelders," Respondents Roger Johnson, Daniel Patterson, Theresa Kenny, and the St. Charles County Prosecutor's (collectively, the "Prosecutor Respondents") Motion to Dismiss boils down to two arguments: First, that this Court lacks the authority to review and enjoin an unconstitutional statute, and second, that Petitioners' claims are not justiciable. The Prosecutor Respondents are mistaken on both counts.

Petitioners bring a facial challenge to several abortion restrictions, seeking both a declaration that they violate the Missouri Constitution's Establishment Clauses and an injunction against their enforcement. It is black letter law that a court may review a constitutional challenge to a statute prior to its enforcement, even when there is no actual or threatened enforcement against the plaintiffs, as long as the plaintiffs have standing and the claim is ripe. *See, e.g.*, *Planned Parenthood of Kansas v. Nixon*, 220 S.W.3d 732, 739 (Mo. banc 2007). Each of the laws

Petitioners challenge is currently in force, codified into the Revised Statutes of Missouri, and ripe for review, irrespective of whether they are currently being enforced.

Moreover, Prosecutor Respondents' insistence that Petitioners' claims are not justiciable because Petitioners have not alleged a threat of prosecution misunderstands the requirements for proving an injury-in-fact and Petitioners' theory of injury. A plaintiff challenging the constitutionality of a criminal statute need not be subject to prosecution under a criminal law or otherwise directly regulated by that law in order to have standing to challenge it. Rather, Petitioners need only show an actual or potential injury resulting from the law to have standing. *E. Mo. Laborers Dist. Council v. St. Louis Cnty.*, 781 S.W.2d 43, 46 (Mo. banc 1989). Each Petitioner has standing to sue under Missouri's broad taxpayer standing doctrine to prevent the State from funding the unconstitutional establishment of religious beliefs. Petitioner Reverend Molly Housh Gordon further has standing to sue based on the substantial risk to her life and health resulting from the Challenged Provisions. The Prosecutor Respondents fail even to acknowledge that Petitioners are suing as taxpayers, let alone offer any argument challenging Petitioners' taxpayer standing. Because Petitioners' injuries flow from an unconstitutional establishment of religion by the state, this Court has the power—and indeed, the obligation—to declare the Challenged Provisions unconstitutional under the Missouri Constitution and enjoin Respondents from enforcing them. Prosecutor Respondents' Motion should be denied.

FACTS PLED IN THE PETITION

In assessing a motion to dismiss, the Court must "assume[] that all of the plaintiff's averments are true." *Lebeau v. Comm'rs of Franklin Cnty., Missouri*, 422 S.W.3d 284, 288 (Mo. 2014). A summary of the key factual allegations from the Amended Petition follows.

On June 24, 2022, the federal right to abortion was overturned by the U.S. Supreme Court in *Dobbs v. Jackson Women's Health Organization*, No. 19-1392, 597 U.S. __ (2022). Am. Pet. ¶ 6. Within hours, Missouri's then-Attorney General, Eric Schmitt, issued an Opinion Letter and Governor Michael Parson issued a proclamation stating that a total ban on abortion in the state, § 188.017 RSMo (the "Total Abortion Ban"), went immediately into effect and would be enforced. *Id.* At the same time, *Dobbs* gave new effect to a decades-old law co-written by the Missouri Catholic Conference that codified the statement that the "life of each human being begins at conception" and requires that the laws of Missouri "shall be interpreted and construed" in a manner that gives all fertilized eggs, embryos, and fetuses the same "rights, privileges and immunities available to other persons," § 1.205(1)(1), (2) RSMo (the "Religious Interpretation Policy"). Am. Pet. ¶ 2. The result of *Dobbs* and the loss of the federal right to abortion is that *all* Missouri laws—including the other laws challenged in this suit—must be interpreted by reference to a particular religious view of when life begins. *Id.*

Missouri's Total Abortion Ban was enacted in 2019 as part of H.B. 126, legislation that expressly codified into the Missouri statutes the religious views that "Almighty God is the author of life" and that "the life of an individual human being begins at conception . . . .," §§ 188.010, .026. RSMo. Am. Pet. ¶ 4. That same legislation also included 8-week, 14-week, 18-week, and 20-week pre-viability abortion bans, §§ 188.056, .057, .058, .375, RSMo (collectively, the

"Gestational Age Bans"), and a ban on particular reasons for obtaining abortion care, § 188.038, RSMo (the "Reason Ban"). Am. Pet. ¶¶ 174, 178, 179. Notwithstanding the Total Abortion Ban, the Gestational Age Bans and Reason Ban remain codified in the Revised Statutes of Missouri, are currently in effect, and may well be enforced in the event an abortion is performed, either unlawfully or in any case that might be permitted as a "medical emergency." §§ 188.038, 056, .057, .058, .375, RSMo.

Myriad other provisions enacted prior to H.B. 126 that have restricted abortion access in the state remain in force. Am. Pet. ¶¶ 3, 181–90. These provisions also enshrine into Missouri law and impose on all Missourians a particular religious view about when life begins, Am. Pet. ¶¶ 137–50, and are further imbued with religious intent through the Religious Interpretation Policy, Am. Pet. ¶¶ 2, 166–67. This includes legislation enacted in 2014 that requires individuals seeking abortion care to wait 72 hours after receiving state-mandated information before obtaining care, H.B. 1307, codified at §§ 188.027, .039, RSMo (the "72-Hour Delay"), as well as legislation enacted in 2017 that (i) mandates that the same physician who provides the abortion care must provide this state-mandated information S.B. 5 (2d. special sess. 2017), codified at § 188.027(5), RSMo (the "Same-Physician Requirement") and (ii) imposes onerous procedural requirements on the provision of medication abortion, S.B. 5, codified at § 188.021(2), (3),

RSMo (the "Medication Abortion Restrictions").[1] Am. Pet. ¶¶ 3, 181–89. The 2014 legislation also included a provision that is currently in effect creating "concurrent original jurisdiction" for the Attorney General to "commence actions for a violation of any provision of [chapter 188], for a violation of any state law on the use of public funds for an abortion, or for a violation of any state law which regulates an abortion facility or a person who performs or induces an abortion" without participation of the prosecuting or circuit attorney for the jurisdiction, S.B. 5, codified at § 188.075(3), RSMo (the "Concurrent Original Jurisdiction Provision"). Am. Pet. ¶¶ 3, 190. These provisions remain operative and enforceable. §§ 188.021, 027, .039, .075, RSMo.; 19 CSR 30-30.061, *available at* https://www.sos.mo.gov/cmsimages/adrules/csr/current/19csr/19c30-30.pdf.

The cumulative result of each of these religiously based laws has been to radically burden and curtail abortion access in the state, particularly for women of color, people with low incomes, people living in rural areas, young people, and others already facing systemic barriers to health care. Am. Pet. ¶ 3. While the regulatory regime that existed before *Dobbs* had already severely inhibited abortion access in the state, such that by early 2019 only one abortion clinic was operating in the entire state of Missouri, *see id*., *Dobbs* and the imposition of the Total Abortion Ban forced the sole remaining licensed abortion clinic to cease providing abortion care

[1] Prosecutor Respondents contend that the statutes and regulations cited in Am. Pet. ¶¶ 187–189 regarding the Medication Abortion Restrictions "are not to statutes impacted by S.B. 5." Mem. at 16. With the exception of the citation to § 188.052(2), RSMo in ¶ 187, which is a typo that should read § 188.021(2), they are mistaken. The regulations cited are those implementing S.B. 5's requirement, codified at § 188.021, RSMo, that physicians who provide medication abortions have a "complication plan" approved by DHSS. Am. Pet. ¶ 189 (citing 19 CSR 30-30.061). The other statutes cited indicate the penalties for violating § 188.021. *Id.*

entirely. Am. Pet. ¶ 6. Missourians who seek abortions must now travel across state lines to access basic reproductive health care—including Missourians facing life-threatening pregnancy-related conditions. Am. Pet. ¶ 7 & n.3. The harm to the health, lives, and futures of women and all who can become pregnant caused by the Challenged Provisions' establishment of religion is immediate and concrete. Am. Pet. ¶ 1, 3, 6, 7, 217–25.

The Challenged Provisions also pose an immediate threat to religious pluralism in Missouri, a value that the Missouri constitution holds sacrosanct. Am. Pet. ¶¶ 10, 148, 151–60; 198–99. People hold various religious views about abortion, Am. Pet. ¶¶ 200–09, and for many religious denominations, clergy, and individuals, their faith calls them to support abortion access because of the critical importance it holds for the health, autonomy, economic security, and equality of women and all who can become pregnant. Am. Pet. ¶¶ 198, 210–16. Yet the Challenged Provisions impose a particular conservative Christian notion of "conception" and "sanctity of life" on all Missourians, as they were intended to do, coercing people and faith communities with different beliefs and commitments to adhere to religious requirements of a faith that is not their own. Am Pet. ¶ 119–50, 199, 217-25. This harm to religious freedom arises simply by virtue of the Challenged Provisions' codification into Missouri law. *Id.*

Petitioners are all clergy and sue in their capacity as Missouri taxpayers. Am. Pet. ¶¶ 14, 17. Although Petitioners represent different faith traditions and denominations, they share a deep conviction that abortion access and faith are compatible, Am. Pet. ¶¶ 14, 18–112, 214–16, and oppose the Challenged Provisions based on their individual religious beliefs, traditions, and commitments, *id.* at 16. Specifically, Petitioners allege that taxpayer dollars are currently being

and will in the future be used to implement and enforce the Challenged Provisions, constituting unlawful expenditures of taxpayer funds to establish religion and promote and enforce particular religious beliefs and articles of faith in Missouri. Am. Pet. ¶ 191–97.

In addition to the taxpayer standing properly pled by Petitioners, Petitioner Reverend Molly Housh Gordon is a Missouri citizen of reproductive age who is also directly impacted by the abortion ban. Am. Pet. ¶¶ 40–43. Rev. Gordon suffers from severe and persistent autoimmune issues that are exacerbated by pregnancy. Am. Pet. ¶¶ 40–41. Given the high likelihood of severe pregnancy-related complications, Rev. Gordon would seek abortion care if she became pregnant unintentionally. Rev. Gordon is at substantial risk of unintended pregnancy because she is unable to use IUDs or any hormonal contraceptives and relies solely on condoms for contraception, and nearly 20% of women who rely on condoms for a year will become pregnant. Am. Pet. ¶ 42. Rev. Gordon reasonably fears that she will not be able to obtain health care in the state of Missouri that would be necessary to preserve her own life, health, and well-being—which would not only put her life and health at substantial and imminent risk of harm but also run counter to her religious beliefs about the sacredness of her bodily autonomy and agency. *Id.*

STANDARD OF REVIEW

On a motion to dismiss, the Court not only "assumes that all of the plaintiff's averments are true," but also "liberally grants to plaintiff all reasonable inferences therefrom." *Lebeau*, 422 S.W.3d at 288. Likewise, the Court may "not consider matters outside the pleadings." *City of Lake Saint Louis v. City of O'Fallon*, 324 S.W.3d 756, 759 (Mo. banc 2010). Actions seeking declaratory and injunctive relief are, by statute, to be "liberally construed and administered."

Planned Parenthood of Kansas, 220 S.W.3d at 738 (citing RSMo § 527.120). Further, a court may only assess the factual allegations and may "make no attempt to weigh their credibility or persuasiveness." *Fenlon v. Union Elec. Co.*, 266 S.W.3d 852, 854 (Mo. App. E.D. 2008).

ARGUMENT

I. This Court Has Authority to Declare the Challenged Provisions Unconstitutional and Enjoin their Enforcement.

Missouri courts may—and routinely do—hear and decide challenges to the constitutional validity of state laws, including criminal laws.[2] *See, e.g.*, *City of St. Louis v. State*, 643 S.W.3d 295, 296-7 (Mo. 2022); *Alpert v. State*, 543 S.W.3d 589, 592 (Mo. banc 2018); *Tupper v. City of St. Louis*, 468 S.W.3d 360, 364-65, 368 (Mo. banc 2015); *Planned Parenthood of Kansas*, 220 S.W.3d at 739; *Bldg. Owners & Managers Ass'n of Metro. St. Louis, Inc. v. City of St. Louis*, 341 S.W.3d 143, 147, 152 (Mo. Ct. App. 2011); *see also* Declaratory Judgment Act, RSMo §§ 527.010, .080, .120. Prosecutor Respondents insist that this Court lacks such authority because the Petition does not allege "that any one of the petitioners or for that matter that any person in the state of Missouri is currently a defendant charged, being investigated for, or [] threatened with being charged with committing a crime in violation of any of the challenged provisions." Mem. at 3; *see also id.* at 6, 8, 11, 14, 15, 17, 18, 21. But even assuming Prosecutor Respondents are correct that none of the Challenged Provisions are currently being enforced anywhere in the state, it is black letter law that Missouri courts may adjudicate pre-enforcement constitutional

[2] To be clear, Petitioners seek to enjoin the Challenged Provisions as facially unconstitutional. To the extent Prosecutor Respondents suggest that Petitioners seek an injunction against any individual prosecution, they misunderstand the Amended Petition. Petitioners do not seek an injunction against any individual prosecutor to prevent any individual prosecutions, against Petitioners or otherwise.

challenges, issue declaratory relief, and enjoin the enforcement of laws held to be unconstitutional, even when there is no actual or threatened enforcement against the plaintiffs.

In the seminal case *Tietjens v. City of St. Louis*, the Missouri Supreme Court allowed a pre-enforcement challenge to a city ordinance even though the "city was not prepared . . . to enforce the ordinance when this action was filed," and no plaintiff had been the subject of threatened or actual enforcement. 222 S.W.2d 70, 72 (Mo. banc 1949). The Court forcefully rejected the defendants' arguments that a pre-enforcement challenge to the law was untimely because enforcement had not yet begun and no funding had been allocated for enforcement, stating that "[t]he plaintiffs must assume the city will enforce its laws." *Id.*; *see also, e.g.*, *City of St. Louis*, 643 S.W.3d at 300 (Mo. banc 2022) (rejecting argument that court could not review constitutional challenge to state law because no "attempt by the state to enforce or threaten to enforce" the law had been made); *Planned Parenthood of Kansas*, 220 S.W.3d at 739 ("One must assume the State will enforce its laws.").

It makes no difference that several of the Challenged Provisions carry criminal penalties or may be enforced by Circuit and Prosecuting Attorneys—Missouri courts may review the constitutionality of a criminal law prior to enforcement so long as the plaintiff has standing and

the claim is ripe.[3] Thus, in *Alpert v. State*, the Supreme Court of Missouri adjudicated the merits of a pre-enforcement declaratory judgment action challenging the constitutionality of a state criminal law that precluded convicted felons from obtaining a federal firearms license and possessing firearms, explaining that "[a] declaratory judgment action has been found to be a proper action to challenge the constitutional validity of a criminal statute or ordinance." *Alpert*, 543 S.W.3d at 591 (quoting *Tupper*, 468 S.W.3d at 368). The *Alpert* Court went on to address the distinct question of whether the claim was ripe for review, noting that while "a ripe controversy generally exists when the state attempts to enforce the statute," there are "situations in which a ripe controversy may exist prior to the statute being enforced." *Id.* at 593. The *Alpert* Court thus rejected the state's argument that lack of actual or threatened enforcement of the law against Alpert precluded review. *Id.* at 595.

Missouri courts also regularly *enjoin* prosecutors and other officials from enforcing unconstitutional laws, even when no individual enforcement action has been taken or threatened. Indeed, the Declaratory Judgment Act specifically permits courts to grant "[f]urther relief based on a declaratory judgment" such as injunctive relief that the court deems "necessary or proper." RSMo § 527.080. In *Planned Parenthood of Kansas v. Nixon*, the Supreme Court of Missouri

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[3] Generally, a plaintiff must also establish that she lacks an adequate remedy at law to bring a claim for declaratory judgment and injunctive relief. *Alpert*, 543 S.W.3d at 591. However, the Supreme Court of Missouri has repeatedly rejected the argument that the possibility of asserting a constitutional defense in the event of prosecution or enforcement is an adequate remedy at law precluding pre-enforcement review. *Id*. at 594 (collecting cases). But even if it were, Prosecutor Respondents themselves point out that none of the Petitioners may be subject to prosecution or enforcement under any of the Challenged Provisions. Mem. at 20–21. An action for declaratory and injunctive relief is thus their only remedy for the injuries they suffer as taxpayers and that Rev. Gordon faces as a woman of reproductive age in Missouri.

enjoined the Missouri Attorney General and several county prosecuting attorneys from enforcing an abortion regulation notwithstanding the state's argument that the abortion provider plaintiffs had not been threatened with enforcement. 220 S.W.3d at 737-39. The Court held that the plaintiffs "need not . . . await the imposition of penalties under an unconstitutional enactment in order to assert their constitutional claim for an injunction." 220 S.W.3d at 738–39. In other words, "[o]nce the gun has been cocked and aimed and the finger is on the trigger, it is not necessary to wait until the bullet strikes." *Id.*; *see also Tupper*, 468 S.W.3d at 364–65 (affirming both injunctive and declaratory relief entered against City of St. Louis in action challenging constitutionality of ordinance carrying criminal penalties despite neither plaintiff facing prosecution at the time the challenge was raised); *Bldg. Owners & Managers Ass'n,* 341 S.W.3d at 147, 152 (similar).

Prosecutor Respondents ignore this precedent, incorrectly insisting that it is a "general rule" that "a federal court should refrain from entertaining a pre-enforcement constitutional challenge to a state criminal statute, in the absence of a 'realistic fear of prosecution.'" Mem. at 4-5 (quoting *SOB, Inc. v. Cnty. of Benton*, 317 F.3d 856, 865–66 (8th Cir. 2003)). As a threshold matter, this case is in state, not federal, court, and as set forth *supra*, Missouri courts have squarely and repeatedly rejected the notion that threat of prosecution is a prerequisite for pre-enforcement review.[4] But more fundamentally, far from announcing any "general rule" against

[4] Federal courts also routinely adjudicate facial constitutional challenges, including to criminal laws, even in the absence of a "realistic fear of prosecution" or other enforcement against the plaintiff. *E.g.*, *Huizenga v. Indep. Sch. Dist. No. 11*, 44 F.4th 806, 809 (8th Cir. 2022); *Ams. United for Separation of Church & State v. Prison Fellowship Ministries, Inc.*, 509 F.3d 406, 420 (8th Cir. 2007); *Garner v. White*, 726 F.2d 1274, 1276 (8th Cir. 1984).

pre-enforcement challenges to criminal laws, the issue in *SOB* and the case it quotes for support, *Poe v. Ullman*, 367 U.S. 497 (1961), addressed the distinct question of whether the claims at issue were *justiciable*. Unlike the Petitioners here, who advance a theory of injury based on their status as taxpayers and, for Rev. Gordon, as a woman of reproductive age whose health is in jeopardy (*see* Part II, *infra*), the plaintiffs in these federal cases *relied on fear of prosecution as their theory of injury*, which both courts determined to be unfounded. *See SOB, Inc.*, 317 F.3d at 865 (declining to entertain a pre-enforcement challenge to a criminal ordinance where enforcement officials had explicitly excluded the conduct that plaintiffs feared would open them up to prosecution); *Poe*, 367 U.S. at 508 (declining to review a law that had not been enforced in eighty years, which the Court interpreted as a "tacit agreement" not to prosecute).[5] Accordingly, Prosecutor Respondents' reliance on *SOB* and *Poe* is misplaced.

Similarly, the Prosecutor Respondents misleadingly quote century-old decisions to argue that courts cannot enjoin prosecutors from enforcing an unconstitutional law. Mem. at 5–6 (quoting *State ex rel. Chase v. Hall,* 250 S.W. 64 (Mo. banc 1923); *State ex rel. Kenamore v. Wood,* 56 S.W. 474 (1900)). Again, not only do Prosecutor Respondents ignore the ample modern Missouri precedent to the contrary cited *supra*, but the cases cited do not support their position. Prosecutor Defendants conveniently omit the sentence immediately following the one they quote from *Hall*, in which the court explained that injunctions against criminal prosecutions

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[5] As discussed in Part II, *infra*, a plaintiff also need not show "a realistic fear of prosecution" for a pre-enforcement challenge to be justiciable. Rather, the plaintiff need only show "some direct injury as the result of its enforcement." *Poe*, 367 U.S. at 505. A threat of criminal prosecution is simply not the basis for Petitioners' theory of harm and thus not relevant to the separate question of whether this case is justiciable.

are appropriate where necessary to prevent irreparable injury. *Hall*, 250 S.W. at 65. For this reason, the Court *upheld* an injunction against criminal prosecution in that case. *Id.* at 67–68. Furthermore, the *Hall* court explained that *Wood* likewise recognized that such injunctions are appropriate to prevent irreparable injury, and distinguished *Wood* on the ground that no such injury was alleged in that case. *Id.* at 67.

It is axiomatic that a statute cannot stand if it runs afoul of the protections guaranteed by the Missouri constitution. *See, e.g.*, *Trout v. State*, 231 S.W.3d 140, 148 (Mo. banc 2007) ("An unconstitutional statute is no law and confers no rights." (quoting *State ex rel. Miller v. O'Malley*, 117 S.W.2d 319, 324 (Mo. banc 1938)) (internal quotations omitted)); *Ex parte Smith*, 36 S.W. 628, 630 (Mo. 1896) (affirming that "an unconstitutional law is no law"); *State v. Burgin*, 203 S.W.3d 713, 717 (Mo. App. E.D. 2006), *opinion adopted and reinstated after retransfer* (Nov. 9, 2006) ("[A] statute which is found to be unconstitutional is void."). Petitioners request that this Court declare that the Challenged Provisions violate Missouri's Establishment Clauses and enjoin their enforcement. Am. Pet. at ¶ 12, Request for Relief at A-B. Taken to its logical end, Prosecutor Respondents' argument suggests that courts of this State have no authority to enforce the promises and protections embedded in Missouri's Constitution "until the bullet strikes." *Planned Parenthood of Kansas*, 220 S.W.3d at 739. That position is wrong under Missouri law.

II. Petitioners' Claims are Justiciable.

A. Petitioners' Claims Are Ripe for Review.

To the extent Prosecutor Respondents mean to argue that the challenge is not yet ripe for

review, they are incorrect. Again, Missouri law does not require enforcement or even threat of enforcement against a petitioner for a facial challenge to an unconstitutional law to be ripe for review. *Alpert*, 543 S.W.3d at 593. Indeed, the Supreme Court of Missouri "repeatedly has rejected the notion a person must violate the law to create a ripe controversy." *Id.* at 594. Under Missouri law, a pre-enforcement constitutional challenge to a statutory scheme is ripe for review when "the facts necessary to adjudicate the underlying claims are fully developed" and "the laws at issue are affecting the plaintiffs in a manner that gives rise to an immediate, concrete dispute." *Tupper*, 468 S.W.3d at 370 (internal quotations and alterations omitted). Furthermore, cases involving "predominantly legal questions" are "particularly amenable to a conclusive determination in a pre-enforcement context." *Planned Parenthood of Kansas*, 220 S.W.3d at 739.

Here, the particulars of any individual enforcement that may occur in the future are irrelevant to Petitioners' claims. Instead, Petitioners allege that the codification of the Challenged Provisions into law itself constitutes an impermissible establishment of religion—an ongoing, concrete constitutional injury that came into being the day each Challenged Provision became effective. *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 314 (2000) ("the mere passage by the District of a policy that has the purpose and perception of government establishment of religion" was ripe for review). The facts alleged in the Amended Petition—including the clear religious intent reflected on the face of the Challenged Positions and espoused by members of Missouri's legislature, and the coercive imposition of religious beliefs to the detriment of the health and lives of Missourians that results, Am. Pet. ¶ 119–50, 199, 217–25—are already fully developed and sufficient to adjudicate this dispute. *See Missouri Health Care Ass'n v. Att'y Gen.*

of the State of Mo., 953 S.W.2d 617, 621 (Mo. 1997) (holding that "the facts necessary to adjudicate the underlying claim are fully developed" where plaintiffs challenge the "procedure used to pass the bill").

Each of the Challenged Provisions are codified in the Missouri Code and are currently *in force* and remain the law of Missouri; none have been repealed or enjoined. Because all of the Challenged Provisions remain in the Missouri Code, an individual who is charged under the Total Abortion Ban could also be charged or otherwise penalized under a Gestational Age Ban, the Reason Ban, the 72-Hour Delay Requirement, the Same-Physician Requirement, and/or the Medication Abortion Restrictions. Indeed, there is no language in the Total Abortion Ban or elsewhere that says an individual cannot be charged under both that statute and another Challenged Provision. Moreover, the Reason Ban may be enforced with respect to any abortions performed under the "medical emergency" provision (Am. Pet. ¶¶ 179-80), and the Attorney General currently may invoke the "Concurrent Original Jurisdiction Provision" to enforce any of the abortion laws codified in ch. 188 of the Revised Statutes of Missouri. Am. Pet. ¶ 3. The Gestational Age Bans, Reason Ban, 72-Hour Delay Requirement, the Same-Physician Requirement, and the Medication Abortion Restrictions will remain enforceable even if the Total Abortion Ban is enjoined. *See* § 188.018, RSMo. Finally, as a result of *Dobbs*, the Religious Interpretation Policy now injects a religious view of when life begins into each of the Challenged Provisions. Am. Pet. ¶¶ 2, 123. Since these provisions remain in the Missouri Code, Petitioners and all Missourians must conform their conduct to comply. *See Alpert*, 543 S.W.3d at 593 (collecting cases holding that "the interruption or prevention of previous lawful conduct supports

adjudicating pre-enforcement challenges on the merits," even where no violation has occurred).[6] Each of Petitioners' claims are ripe for review.

Finally, ripeness is a prudential, not jurisdictional, inquiry. *Schweich v. Nixon*, 408 S.W.3d 769, 773 (Mo. 2013). State Respondents concede that the Total Abortion Ban and Concurrent Original Jurisdiction Provision are ripe for judicial review. *See* State Mem. at 8-9; see also *id.* at 1 (noting the ripeness challenge does not apply to two statutes). The Court should thus consider the impact on judicial economy that would result from entertaining Petitioners' challenges to some but not all of the Challenged Provisions. It would be a waste of the resources of this Court and the parties to require piecemeal litigation of these claims, particularly given that Petitioners attack each of the Challenged Provisions for the same constitutional infirmity.

B. Petitioners Have Standing.

Prosecutor Respondents' argument that Petitioners do not have *standing* because they are not subject to enforcement under the Challenged Provisions fundamentally misunderstands the harm that Petitioners allege. Petitioners are proceeding on a theory of taxpayer standing and a substantial risk of injury to the health and life of Petitioner Rev. Gordon,[7] not "a realistic fear of prosecution." Am. Pet. ¶¶ 8, 17, 40–43; *see* Mem at 4. Prosecutor Respondents fail even to acknowledge that Petitioners are suing under a theory of taxpayer standing, let alone make any

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[6] Thus, Contrary to Prosecutor Respondents' argument that "the existence of a 'chilling effect,' . . . has never been considered a sufficient basis, in and of itself, for prohibiting state action," Mem. at 5, Missouri courts have *repeatedly* held that a change in behavior provides a sufficient basis for a challenge's ripeness. *Alpert*, 543 S.W.3d at 593.

[7] Rev. Gordon sues based on her own substantial risk of injury from the Challenged Provisions; she does not sue on behalf of her daughters.

argument that their taxpayer standing allegations are insufficient. And their insistence that Rev. Gordon lacks standing because she is neither pregnant nor at risk of prosecution misapprehends the legal standard for alleging an injury-in-fact.

Prosecutor Respondents cite no case law for the proposition that one must be directly regulated by a law or subject to its penalties to have standing to challenge it. Rather, to establish injury-in-fact, one need only show they are "directly and adversely affected" by the law and thus have a "legally protectable interest" in the outcome of the litigation. *Planned Parenthood of Kansas*, 220 S.W.3d at 737 (quoting *Ste. Genevieve School Dist. R–II v. Board of Alderman of the City of Ste. Genevieve*, 66 S.W.3d 6, 10 (Mo. banc 2002)); *see also Schweich*, 408 S.W.3d at 775. This injury need not be presently occurring; rather declaratory and injunctive relief may issue where the injury is "threatened" to occur in the future. *See Manzara v. State*, 343 S.W.3d 656, 659 (Mo. 2011) (citing *E. Mo. Laborers Dist. Council*, 781 S.W.2d at 46).[8]

For all the Clergy Petitioners, Missouri law allows taxpayers to sue to enjoin the unlawful expenditure of public funds. Indeed, under Missouri law, "[a] usual instance of the taxpayer suit

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[8] Federal cases involving state challenges to federal contraceptive coverage regulations are instructive. Even though those regulations imposed no obligations or penalties on the plaintiff states, every federal court of appeals to consider the issue held that the states had standing to challenge the regulations because they posed a "substantial risk" of fiscal injury to the state's health care programs. *See, e.g.*, *Massachusetts v. U.S. Dep't of Health & Hum. Servs.*, 923 F.3d 209, 223 (1st Cir. 2019); *Pennsylvania v. Trump*, 930 F.3d 543, 562 (3d Cir. 2019), *overruled on other grounds* 140 S. Ct. 2367 (2020); *California v. Azar*, 911 F.3d 558, 571 (9th Cir. 2018); *see also DeOtte v. State*, 20 F.4th 1055, 1070 (5th Cir. 2021) (similar). So too here. Although Petitioners are not subject to criminal prosecution or other enforcement under the Challenged Provisions, they all suffer a cognizable legal injury from those provisions: All Petitioners suffer the injury to the public interest flowing from taxes being expended on an unconstitutional establishment of religion, and Rev. Gordon faces a "substantial risk" to her health and well-being. Am. Pet. ¶¶ 8, 17, 40–43.

has been to preserve the . . . separation between church and state." *Missourians for Separation of Church & State v. Robertson*, 592 S.W.2d 825, 838 (Mo. App. 1979) (citing cases). As stated in the Amended Petition, "taxpayer funds are currently being and will in the future be used to implement and enforce the Challenged Provisions, constituting unlawful expenditures of taxpayer funds to establish religion and promote and enforce particular religious beliefs and articles of faith in Missouri." Am. Pet. at ¶ 191. Under taxpayer standing, the harm is to the public interest and flows from taxes being expended on an unconstitutional establishment of religion—namely, the enshrinement into law of a particular religious viewpoint on when life begins and the permissibility of abortion care. *Missourians for Separation of Church & State*, 592 S.W.2d at 839 ("In taxpayer cases it is not the damage suffered by each taxpayer or by all taxpayers as a class that opens the door to equity for relief, but it is the public interests which are involved. . . ." (alterations and quotations omitted)); *see also E. Mo. Laborers Dist. Council*, 781 S.W.2d at 47. Taking all allegations alleged as true and granting Petitioners all reasonable inferences, as well-established precedent requires, Petitioners have sufficiently established taxpayer standing.

Moreover, as a Missouri citizen of reproductive age whose personal religious beliefs sanction abortion care, Petitioner Rev. Gordon has demonstrated that she has a "legally protectable interest" in the litigation and will be "directly and adversely affected" by its outcome. *Planned Parenthood of Kansas*, 220 S.W.3d at 737. Rev. Gordon has suffered from a persistent, chronic autoimmune disorder that causes severe pain and fatigue for over a decade. Am. Pet. ¶ 40. Pregnancy significantly exacerbates Rev. Gordon's condition, so much so that during her

previous pregnancy and immediate postpartum period, she was referred for a brain MRI, electromyography, and blood panels, and her medical team was concerned that she was suffering from a severe degenerative disease like Amyotrophic Lateral Sclerosis (ALS). Am. Pet. ¶ 41. In light of this history, and given the high likelihood of severe pregnancy-related complications, Rev. Gordon would seek abortion care if she became pregnant unintentionally, which the Challenged Provisions prohibit. Am. Pet. ¶ 42. Unintended pregnancy is by no means a speculative concern for Rev. Gordon given that she must rely on condoms for birth control and nearly 20% of women who rely on condoms for a year will become pregnant. Am. Pet. ¶ 42.

Prosecutor Respondents cite no authority for the proposition that Rev. Gordon must be currently pregnant, suffering from severe and painful symptoms, and unable to get the care she needs before she may sue to challenge the constitutionality of the law threatening her health. Mem. at 7–8, 10-11. To the contrary, as discussed *supra*, Missouri courts have reiterated time and again that a plaintiff need not "wait until the bullet strikes" before seeking relief from an unconstitutional law. *City of St. Louis*, 643 S.W.3d at 301; *Alpert*, 543 S.W.3d at 595; *Planned Parenthood of Kansas*, 220 S.W.3d at 739. At any moment, Rev. Gordon may find that she has become pregnant and that her health is deteriorating, yet she lives in a state that would unconstitutionally prohibit her from receiving the treatment she needs to protect her health or life. This substantial and ongoing risk of harm to her health and well-being suffices to "give[] rise to an immediate, concrete dispute." *Planned Parenthood of Kansas*, 220 S.W.3d at 739 (internal alterations omitted).

In sum, Petitioners' allegations of injury are sufficient to establish standing even if none

of the Petitioners were ever threatened with prosecution or other enforcement action. Whether enforced or not, the Challenged Provisions have harmed and continue to threaten harm to Petitioners and all Missourians who now operate under this religious regime. Abortion care has been regulated out of existence in Missouri, and those seeking abortion care have been forced to flee to other states—including Missourians seeking emergency abortion care for health- and life-threatening conditions. Am. Pet. ¶ 7 & n.3. Under these circumstances, the Court can and should declare the Challenged Provisions unconstitutional and enjoin their enforcement.

Conclusion

For the reasons stated above, Petitioners respectfully request that this Court deny the Prosecutor Respondents' Motion.

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Respectfully submitted,

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**pro hac vice* granted