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 STATE OF MISSOURI ET AL.'S MOTION TO DISMISS

Petitioners have stated a straightforward claim for relief: that enshrining into law an expressly religious viewpoint about when life begins violates the Missouri Constitution's robust prohibitions against the establishment of religion. State Respondents' motion to dismiss this case relies on contorted and extreme arguments, including rewriting the state's broad taxpayer standing jurisprudence and asking this Court to adopt a wholly unprecedented interpretation of the federal Constitution that, if accepted, would essentially write Missouri's Establishment Clauses out of existence. These arguments fly in the face of Missouri's longstanding traditions of holding state officials accountable for unlawful conduct through taxpayer suits and zealously protecting the state's rich history of religious pluralism.

State Respondents' arguments are divorced from Missouri precedent. Petitioners' challenge is both justiciable and plainly states a claim for relief. The Missouri Constitution

prohibits the establishment of religion into law, and Missouri courts have repeatedly held that its protections are more explicit and protective than those mandated by the United States Constitution. By expressly enshrining into Missouri law a religious belief that life begins at "conception" to regulate, restrict, and eliminate abortion access in the state of Missouri, the State has impermissibly elevated one particular belief into law and thereby coerced Missouri citizens into abiding by it. State Respondents' arguments to the contrary notwithstanding, no additional discovery is required to prove Petitioners' claims, as the plain text of the Challenged Provisions[1] unambiguously evidences their religious purpose and effect, even without the ample public statements by the laws' sponsors and supporters confirming their religious motivations. Each Petitioner has standing to challenge the constitutional violations at issue here, and the laws challenged are all currently in effect and ripe for review. Moreover, the remedies Petitioners seek —a declaration that the Challenged Provisions are unconstitutional and an injunction preventing their enforcement—would fully redress Petitioners' ongoing constitutional injury. Nothing more is required on a motion to dismiss. The 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) (quoting *Weber v. St. Louis Cnty.*, 342 S.W.3d 318, 321 (Mo. banc 2011)). A summary of the key factual allegations from the Amended Petition follows.

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[1] The Challenged Provisions include the Religious Interpretation Policy, Total Abortion Ban, Gestational Age Bans, Reason Ban, 72-Hour Delay, Same-Physician Requirement, Medication Abortion Restrictions, and Concurrent Original Jurisdiction Provision. *See* Am. Pet. ¶¶ 11, 166-90.

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 went immediately into effect and would be enforced. § 188.017 RSMo (the "Total Abortion Ban"). Am. Pet. ¶ 6. 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 religious view of when life begins. Am. Pet. ¶¶ 2, 120–23, 166–67.

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 the beginning of life, 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"). 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.

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 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, Am. Pet. ¶ 3, *Dobbs* and the imposition of the Total Abortion Ban forced the sole remaining licensed abortion clinic to cease providing abortion care 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. ¶ 119–150, 199, 217-25. This harm to religious freedom arises simply by virtue of the Challenged Provisions' codification into Missouri law. *Id.*

Legislative history, particularly the statements of the legislations' sponsors and other supporters in the legislature, makes clear that a desire to enforce religious beliefs as law animated the Challenged Provisions. Am. Pet. ¶¶ 120-21, 124-47. For example, H.B. 126's lead sponsor, Representative Nick Schroer, stated in support of the legislation that "as a Catholic I do believe life begins at conception and that is built into our legislative findings." Am Pet. ¶ 129. One of the bill's co-sponsors, Representative Barry Hovis, stated that he was motivated "from the Biblical side of it, . . . life does occur at the point of conception." Am Pet. ¶ 128. Another co-sponsor, Representative Ben Baker, stated: "From the one-cell stage at the moment of conception, you were already there . . . you equally share the image of our Creator . . . you are His work of art." Am Pet. ¶127. Another supporter, Representative Holly Thompson Rehder, urged passage of H.B. 126 by exhorting her colleagues: "God doesn't give us a choice in this area. He is the creator of life. And I, being made in His image and likeness, don't get to choose to take that away, no matter how that child came to be. To me, life begins at conception, and my God doesn't give that option." Am. Pet. ¶ 133. After a debate during which legislators explicitly expressed concern about the invocation of religion, Representative Adam Schnelting urged the legislature to ignore principles of separation of church and state: "[J]ust to touch on something someone had mentioned yesterday, that this is unconstitutional separation of church and state. Well, fact of the matter is, I know of no greater way of affirming the natural rights of man than to declare that they are a gift from our Creator that neither man nor government can abridge, Mr. Speaker." Am. Pet. ¶ 132.

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. ¶¶ 18–112, 214–16, and oppose the Challenged Provisions based on their individual religious beliefs, traditions, and commitments. Am. Pet. ¶ 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 costs of enforcing the Total Abortion Ban through civil penalties and criminal prosecution, even prior to any discovery on this case, Petitioners have identified several direct expenditures tied to the Challenged Provisions, including:

- An additional attorney and IT specialist to be hired by the Department of Health and Senior Services to implement H.B. 126. Am. Pet. ¶ 197.

- The cost of printed materials, which must be provided by DHSS "at no cost" to abortion facilities and family-planning agencies within the state, which "prominently display the following statement: "The life of each human being begins at conception. Abortion will terminate the life of a separate, unique, living human being." Am. Pet. ¶ 192. During the February 27, 2019, floor debate on H.B. 126 over the amendment that added this requirement, it was specifically noted that DHSS would need to expend public—*i.e.*, taxpayer—dollars to finance printing the pamphlets required by this provision. *Id.*

- The cost of developing, printing, and distributing new regulations promulgated pursuant to H.B. 126, S.B. 5, and H.B. 1307, including 19 CSR 10-15.010 ("Report of Induced Termination of Pregnancy"), 19 CSR 30-30.061 ("Complication Plans for Certain Drug- and Chemically-Induced Abortions Via Abortion Facilities"), and 19 CSR 30-30.060 ("Standards for the Operation of Abortion Facilities"). Am. Pet. ¶ 193.

- The cost of defending the abortion Bans in court, including in connection with *Reproductive Health Services of the St. Louis Region et al. v. Parson*, 1 F.4th 552 (8th

Cir. 2020) (vacated after hearing en banc), 389 F. Supp. 3d 631 (W.D. Mo. 2019); *Comprehensive Health of Planned Parenthood Great Plains v. Hawley*, Case No. 1716-cv-24109 (Jackson City Cir. Ct.); *Comprehensive Health of Planned Parenthood Great Plains v. Williams*, No. 2:17-cv-4207 (W.D. Mo.). Am. Pet. ¶ 196.

In addition to the taxpayer standing properly pled by Petitioners, Petitioner Reverend Molly Housh Gordon is a Missouri citizen of reproductive age who is 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 (quoting *Weber*, 342 S.W.3d at 321). 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 v. Nixon*, 220 S.W.3d 732, 738

(Mo. 2007) (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. Petitioners' Claims are Justiciable.

All of Petitioners' claims are justiciable. Under Missouri law, a justiciable controversy exists when a petitioner demonstrates a "legally protectable interest at stake," "a substantial controversy exists between parties with genuinely adverse interests," and "the controversy is ripe for judicial determination." *Schweich v. Nixon*, 408 S.W.3d 769, 773 (Mo. banc 2013). Justiciability is a prudential doctrine in Missouri. *Id.* As Missouri citizens and taxpayers, Petitioners each have a long-recognized, legally protectable interest in seeing that taxpayer dollars do not go toward implementing or enforcing unconstitutional schemes like the Challenged Provisions. What's more, as a woman of reproductive age in Missouri with a chronic health condition exacerbated by pregnancy, Petitioner Reverend Molly Housh Gordon additionally faces a substantial and ongoing risk of harm to her life and health if the Challenged Provisions are allowed to stand. These constitutional injuries are present and ongoing *now*, and Petitioners have demonstrated that a substantial, ripe controversy exists between them and all Respondents as parties charged with enforcing the Challenged Provisions.

A. Petitioners Have Standing.

1. Each Clergy Petitioner is a Missouri citizen and taxpayer and has standing to challenge the use of taxpayer funds to establish religion.

Petitioners' claims fall squarely within Missouri's taxpayer standing doctrine, which allows citizens to hold their government accountable for illegal acts. Under this longstanding doctrine, when "a public interest is involved and public monies are being expended for an illegal purpose, taxpayers have the *right* to enjoin the action." *Manzara v. State*, 343 S.W.3d 656, 659 (Mo. banc 2011) (tracing the doctrine back to the 1873 case *Newmeyer v. Missouri & Mississippi Railroad*, 52 Mo. 81) (emphasis added).[2]

Taxpayer standing cases are crucial to the functioning of democracy in Missouri and to ensuring that citizen voices are heard, and so the test for establishing taxpayer standing is appropriately broad. The injury that forms the basis of taxpayer standing actions is "not the damage suffered by each taxpayer or by all taxpayers as a class." *E. Mo. Laborers Dist. Council v. St. Louis Cnty.*, 781 S.W.2d 43, 47 (Mo. 1989) (quoting *Clark v. Crown Drug Co.*, 348 Mo. 91, 152 S.W.2d 145 (1941)). Instead, taxpayers bring suit to vindicate "the public interests which are involved in preventing the unlawful expenditure of money raised or to be raised by taxation." *Id.*. Contrary to State Respondents' assertion that Petitioners need to establish "a pecuniary or personal interest" to maintain a suit under taxpayer standing (State Mem. at 10), Missouri courts have forcefully rejected the idea that a taxpayer plaintiff is required—or even permitted—to rely on a personal financial loss for standing purposes. *See E. Mo. Laborers Dist. Counci*, 781 S.W.2d

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[2] Missouri courts have repeatedly recognized that Missouri's taxpayer standing doctrine is considerably broader than the comparable doctrine recognized by federal courts. In fact, Missouri courts have explicitly deviated from this more conservative federal doctrine in recognition that "the public interest is served by a citizenry empowered to challenge unlawful governmental expenditure of public funds." *Missourians for Separation of Church & State v. Robertson*, 592 S.W.2d 825, 838 (Mo. Ct. App. 1979). It's worth noting, however, that although taxpayer standing is generally prohibited in federal court, the *only* recognized exception is when Congress uses its taxing and spending power to establish religion. *See Flast v. Cohen*, 392 U.S. 83, 103 (1968); *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 588 (2007).

at 47; *Airport Tech Partners, LLP v. State*, 462 S.W.3d 740, 745–47 (Mo. banc 2015) ("A taxpayer need not allege that it suffered a direct personal loss as a result of the challenged act. . . . To obtain standing the taxpayer must seek to protect the public interest rather than secure a personal benefit."). This "system of checks and balances whereby taxpayers can hold public officials accountable for their acts" is so vital to public policy that even a net *gain* to the public coffers may constitute a direct expenditure. *E. Mo. Laborers Dist. Counci*, 781 S.W.2d at 47

To establish taxpayer standing, Petitioners need only show that a direct expenditure of funds generated through taxation is being used for an unconstitutional establishment of religion. *Id*. The term "direct expenditure" was defined in *Manzara v. State* as "a sum paid out, without any intervening agency or step, of money or other liquid assets that come into existence through the means by which the state obtains the revenue required for its activities." 343 S.W.3d at 660. Missouri courts have repeatedly articulated that the key distinction between direct and indirect expenditures is whether the funds expended can be traced back to the alleged illegal activity, as opposed to being part of the "general operating expenses which an agency incurs *regardless of the allegedly illegal activity*." *Missouri Auto Dealers Ass'n v. Missouri Dep't of Revenue*, 541 S.W.3d 585, 593 (Mo. App. W.D. 2017) (emphasis added) (quoting *John T. Finley, Inc. v. Mo. Health Facilities Review Comm.*, 904 S.W.2d 1, 3 (Mo. App. W.D. 1995)). This does not mean that *no* general operating expenses can qualify as direct expenditures, as the state contends. State Mem. at 10. Rather, general operating expenses are excluded *only if* they would have been made "regardless" of the challenged activity. 541 S.W.3d at 593 (quoting *City of Slater v. State*, 494 S.W.3d 580, 587 (Mo. App. W.D. 2016)) (internal quotation omitted).

Accordingly, Missouri courts have repeatedly held that general operating expenses such as personnel, administrative, or implementation costs may constitute direct expenditures. *See, e.g.*, *Cope v. Parson,* 570 S.W.3d 579, 584 (Mo. banc 2019) (allowing a taxpayer to challenge the Governor's authority to appoint a Lieutenant Governor based on "the expenditure of revenue collected by taxpayers to fund the Office of the Lieutenant Governor," including "at a minimum, the salary of the Lieutenant Governor."); *Harris v. Mo. Gaming Comm'n,* 869 S.W.2d 58, 60 (Mo. 1994), *abrogated on other grounds by City of Aurora v. Spectra Commc'ns Grp.*, LLC, 592, S.W.3d 764 (Mo. banc 2019) (allowing taxpayer standing where plaintiff challenged "the time and effort of state officials who are paid by state funds to carry out their various duties under" the challenged law); *LeBeau v. Comm'rs of Franklin Cnty.*, 422 S.W.3d 284, 290 (Mo. banc 2014) (allowing taxpayers to proceed based on "the creation and operation of a municipal court [that] will require the expenditure of funds generated through taxation").

At this stage of litigation, prior to discovery, only State Respondents can know exactly how much Missouri taxpayers have spent or will spend implementing the Challenged Provisions. But even subject to that limitation, Petitioners have identified multiple direct expenditures—specific outlays of taxpayer funds that would not have been made but for the Challenged Provisions and can be traced to their implementation and enforcement, including the hiring of new personnel, Am. Pet. ¶ 197, the cost of printed materials advancing religious beliefs, Am. Pet. ¶ 192, the cost of developing, printing, and distributing new regulations and forms, Am. Pet. ¶

193, and the costs of defending the Challenged Provisions in litigation. Am. Pet. ¶ 196.[3] In short, the Challenged Provisions establish a vast regulatory framework that requires each of the State Respondents to dedicate personnel, resources, and money to implement the laws, and to investigate and punish abortion providers. Am. Pet. ¶¶ 192–97. These expenditures would not exist absent enforcement of the illegal provisions. They therefore all qualify as direct expenditures under Missouri law.[4] *Mo. Auto Dealers*, 541 S.W.3d at 593.

Notably, State Respondents nowhere dispute that taxpayer funds will be used to implement, enforce, or otherwise support the Challenged Provisions. They only dispute whether these expenditures are "direct." State Mem. at 11–12. The State Respondents seize on the "intervening agency or step" language in *Manzara* to argue that *any* appropriation to or act of discretion by an "intervening" state "agency" renders the expenditure "indirect" and thereby

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[3] Although the "mere filing of a lawsuit" does not create a direct expenditure in the form of a court's cost, *E. Mo. Laborers*, 781 S.W.2d at 46, State Respondents have predictably expended state funds defending constitutional claims brought by other parties against several of the Challenged Provisions. Am. Pet. ¶ 196. The need to expend funds to defend these laws was readily foreseeable given that they were blatantly unconstitutional under *Roe v. Wade* (as well as Missouri's constitutional religious establishment prohibitions) when enacted. *See, e.g.*, *State ex rel Nixon v. Am. Tobacco Co.*, 34 S.W.3d 122, 132-34 (Mo. 2000) (holding legal fees paid out by the Attorney General's office were direct expenditures sufficient to establish taxpayer standing). State Respondents' reliance on *Nixon* overlooks the fact that the court upheld taxpayer standing in that case. *Kinder v. Nixon,* No. WD 56802, 2000 WL 684860, at *4 (Mo. Ct. App. May 30, 2000) (consolidated on appeal and upheld on taxpayer standing grounds with *State ex rel Nixon*)).

[4] State Respondents slide rapidly to the bottom of a slippery slope of their own making when they warn against taxpayer standing "turn[ing] courts into roving advisory commissions." State Mem. at 11. Petitioners do not challenge, as State Respondents suggest, the cost of printing H.B. 126 or "paying for a website to display legislative text" or the general operating expenses of this Court. State Mem. at 11.

defeats taxpayer standing. *Id.* at 10–12. State Respondents appear to interpret the phrase "intervening agency" in *Manzara*'s definition to refer to a *government* agency that exercises some discretion over state funds. *See id.* But this is an extrapolation that has no support in the language or facts of *Manzara*. In fact, the *Manzara* court pulled each of this definition's key terms ("direct," "expenditure," "funds," "generated," "taxation") from dictionaries. 343 S.W.3d at 659–60. Nowhere did the *Manzara* court state or suggest that the phrase "intervening agency" was meant to refer to a state agency, and, in fact, no state agency was involved in the challenge.[5]

Indeed, Missouri case law is *replete* with instances where courts have allowed petitioners to proceed under taxpayer standing when a state agency takes an "intervening step" and uses its discretion to expend funds from the state. *See, e.g.*, *Tichenor v. Missouri State Lottery Comm'n*, 742 S.W.2d 170, 172 (Mo. 1988) (allowing taxpayers to challenge the Commission's decision to join a multi-state lottery program even though the decision was wholly facilitated by internal Commission funds and a net gain was expected); *Berghorn v. Reorganized Sch. Dist. No. 8, Franklin Cnty.*, 260 S.W.2d 573, 575 (1953) (allowing taxpayers to challenge under the Establishment Clause a local school district's use of public tax monies generally appropriated by

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[5] *Manzara* did not involve a state agency at all; the plaintiffs were suing the State of Missouri directly to challenge a set of tax credits that had been passed by the legislature. The other cases State Respondents cite for this proposition are no better. For example, State Respondents cite *Missouri Coalition for the Environment v. State* to argue that "'an expenditure is direct' only if 'it occurs without any intervening agency or step'" such that "taxpayers cannot even sue over salaries paid to employees hired to fulfill the purposes of an allegedly unconstitutional statute because the decision to hire a person necessarily is an 'intervening step.'" State Mem. at 10. This troubling citation misrepresents the facts of *Missouri Coalition* and fabricates a holding out of thin air. In *Missouri Coalition*, the plaintiffs in question had not alleged a single direct expenditure and conceded they did not have taxpayer standing after taking discovery. 579 S.W.3d 924, 926-27 (Mo. banc 2019).

the legislature to fund the district's "free public schools" to instead fund "parochial schools in which a sectarian religion is taught").

From their manufactured "intervening agency action" test, State Respondents posit a series of facts nowhere found in the Amended Petition to assert that each direct expenditure is dependent on an "intervening step." State Mem. at 12. Aside from being legally irrelevant, each of the claimed "intervening" actions raised requires the Court to assume facts beyond the Petition, which is improper in considering a motion to dismiss. *City of Lake Saint Louis*, 324 S.W.3d at 759.

Petitioners need not pass State Respondents' novel test to establish taxpayer standing. Petitioners bring this action under Missouri's longstanding precedent empowering taxpayers to vindicate the public interest. The Amended Petition clearly alleges direct expenditures that have already or will be used to implement or enforce the Challenged Provisions. State Respondents' attempt to rewrite Missouri taxpayer standing law must fail.

2. Petitioner Reverend Molly Housh Gordon also has standing to contest the Challenged Provisions based on their threat to her life and health, and that challenge is ripe for review.

In addition to her standing as a taxpayer, Petitioner Reverend Molly Housh Gordon has standing to contest the Challenged Provisions as a Missouri resident of reproductive age who suffers a chronic health condition that is exacerbated by pregnancy.[6] 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 v. Nixon*, 220 S.W.3d

[6] Petitioner Rev. Gordon does not sue on behalf of her daughters, so State Respondents' arguments on that score are inapposite. State Mem. at 14–15.

732, 737 (Mo. banc 2007). Individual standing in Missouri requires only that "parties seeking relief must have some personal interest at stake in the dispute, even if that interest is attenuated, slight or remote." *Ste. Genevieve Sch. Dist. R–II v. Bd. of Aldermen of Ste. Genevieve*, 66 S.W.3d 6, 10 (Mo. banc 2002). A threatened injury and potential harm can demonstrate a legally cognizable interest. *Roberts v. BJC Health Sys.*, 391 S.W.3d 433, 438 (Mo. banc 2013).

Petitioner Rev. Gordon 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. As State Respondents recognize in their brief, to demonstrate an ongoing threat of injury sufficient to support standing, Rev. Gordon would need to show (1) that her present medical condition is chronic, (2) that she is at substantial risk of becoming pregnant unintentionally, and (3) that the medical emergency provision will not protect her. State Mem. at 15. Rev. Gordon easily satisfies all three conditions. First, 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. State Respondents' speculation, State Mem. at 15, that this disorder will simply disappear after years of medical care and futile treatments is ludicrous.

Second, considering 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. And contrary to State

Respondents' suggestion, unintended pregnancy is by no means a speculative concern for Rev. Gordon because she and her partner currently use condoms to prevent pregnancy and nearly 20% of women who rely on condoms for a year will become pregnant. *Id.* Other, more effective methods, such as IUDs or any hormonal birth control, are contraindicated for Rev. Gordon and thus are not an option for her. *Id.* Her risk of becoming pregnant and falling ill is therefore ever-present and substantial.

Third, what State Respondents refer to as the "medical emergency exception," State Mem. at 17, is not the panacea they claim it to be. The Challenged Provisions narrowly define "medical emergency" as a condition where "immediate abortion" is necessary "to avert the death of the pregnant woman or for which a delay will create a serious risk of substantial and irreversible physical impairment of a major bodily function." § 188.015(7), RSMo. The precise scope of the medical emergency defense is difficult to discern from its plain text. Based on her medical history, Rev. Gordon may suffer symptoms—like muscle fasciculations, muscle fatigue, joint pain, and total body fatigue—that are painful and debilitating (and clearly sufficient to establish injury-in-fact), but may not meet the narrow statutory definition of "medical emergency." Am. Pet. ¶ 40.

Even if Rev. Gordon were to experience a health condition rising to the level of a "medical emergency" under Missouri law, that provision still cannot be relied upon to provide her protection. This is because the medical emergency provision is not actually an exception, but rather an affirmative defense. *See United States v. Idaho*, No. 1:22-CV-00329-BLW, 2022 WL 3692618, at *8 (D. Idaho Aug. 24, 2022) ("An affirmative defense is an excuse, not an exception."). What that means is that medical professionals who provide abortion care pursuant

to this provision risk criminal investigation and prosecution *even if they ultimately succeed on the defense in court*. §§ 188.017(3), 188.056(2), .057(2), .058(2), .375(4), RSMo. Because there is no guarantee that the jury will acquit even if the defense should apply, physicians still may face five to fifteen years of imprisonment and loss of their professional licenses and livelihoods for providing an abortion that is lawful. *See* §§ 188.017(2), 188.056(1), .057(1), .058(1), .375(3), 558.011(1)(2), RSMo.; *see also Idaho*, 2022 WL 3692618, at *1. On top of this, because of the provision's "ambiguous language and the complex realities of medical judgments," it is virtually impossible to determine when a pregnant patient's emergency health condition is sufficiently dire to trigger the defense. *Idaho*, 2022 WL 3692618, at *11. The practical consequence is a "deterrent effect" among providers, or "reluctance to perform abortions in any circumstances." *Id.* It is not surprising, then, that reports continue to surface of individuals in Missouri and other states being denied care in pregnancy-related emergencies, including Mylissa Farmer, a Missouri resident who was denied emergency abortion care from a Missouri hospital when her water broke at nearly 18 weeks of pregnancy. Am. Pet. ¶ 7 & n.3. In sum, the medical emergency defense is simply "cold comfort." *Idaho*, 2022 WL 3692618, at *1. State Respondents' assumption that it would protect Rev. Gordon evidences a shocking lack of understanding of the actual, real-life consequences of the laws that they defend. Rev. Gordon's interest in this case is deeply personal, and the relief at stake for her is far from "attenuated, slight or remote." *Genevieve Sch. Dist. R–II*, 66 S.W.3d at 10.

State Respondents' arguments that Rev. Gordon's claims are unripe for review, State Mem. at 16-17, similarly fail. State 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. State Mem. at 16–17. To the contrary, Missouri courts have reiterated time and again that a petitioner need not "wait until the bullet strikes" before seeking relief from an unconstitutional law. *See, e.g.*, *City of St. Louis v. State*, 643 S.W.3d 295, 301 (Mo. 2022); *Alpert v. State*, 543 S.W.3d 589, 595 (Mo. 2018); *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. Accordingly, her allegations, which must be taken as true for purposes of a motion to dismiss, are clearly sufficient to establish an additional ba[7]

B. All Petitioners' Claims Are Ripe for Review.

Petitioners' lawsuit is ripe for review because it presents challenges to currently active Missouri laws and requests declaratory and injunctive relief against those statutes. State Respondents concede that the Total Abortion Ban (§ 188.017, RSMo) and Concurrent Original Jurisdiction Provision (§ 188.075(3), RSMo) 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). Given the State

[7] Jurisdictional discovery into Rev. Gordon's "religious sincerity" is wholly unwarranted. Rev. Gordon's claim for personal standing is based on the threat to her health and life posed by the Challenged Provisions. Am. Pet. ¶ 40–42. While being denied abortion care would also contravene her "religious beliefs about the sacredness of her bodily autonomy and agency," *id.* ¶ 42, and thus informs the merits of Petitioners' claim that the Challenged Provisions impermissibly establish religion, this is not the basis of the personal injury she asserts. The State's request for blanket discovery into Rev. Gordon's medical condition lacks justification, and in any event, it would be premature for the Court to consider this request at this stage.

Respondents' concession that the challenges to these provisions are ripe, it would be a waste of time and resources for both the Court and the parties to litigate these challenges piecemeal when all of them are unconstitutional for the same reason.

State Respondents incorrectly contend that Petitioners' challenges to the Gestational Age Bans (§§ 188.056, .057, .058, .375, RSMo), Reason Ban (§ 188.038, RSMo), 72-Hour Delay Requirement (§§ 188.027, .039, RSMo), Same-Physician Requirement (§ 188.027(5), RSMo), and the Religious Interpretation Policy (§ 1.205, RSMo) are not ripe. "Determining whether a particular case is ripe for judicial resolution requires a two-fold inquiry: a court must evaluate (1) whether the issues tendered are appropriate for judicial resolution, and (2) the hardship to the parties if judicial relief is denied." *Mo. Soybean Ass'n v. Mo. Clean Water Comm'n*, 102 S.W.3d 10, 27 (Mo. banc 2003) (citing *Abbott Labs.*, 387 U.S. 136, 149 (1967)). Here, "the parties' dispute is developed sufficiently to allow the court to make an accurate determination of the facts, to resolve a conflict that is presently existing, and to grant specific relief of a conclusive character." *Schweich v. Nixon*, 408 S.W.3d 769, 774 (Mo. banc 2013) (quoting *Mo. Health Care Ass'n v. Att'y Gen. of the State of Mo.*, 953 S.W.2d 617, 621 (Mo. banc 1997) (internal quotation omitted). Further, withholding review would cause Petitioners significant hardship because doing so would sustain the coercive imposition of religious beliefs to the detriment of Petitioners and other Missourians. Am. Pet. ¶ 119–150, 199, 217–225.

State Respondents' arguments about ripeness are wrong for three reasons. First, 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.[8] In fact, the Total Abortion Ban expressly preserves the other Challenged Provisions. *See* Because all of the Challenged Provisions remaincould also be charged or otherwise penalized under a Gestational Age Ban,. Indeed, there is no language in the Total Abortion Ban or elsewhere that says an individual cannot be charged or penalized Moreover, the Reason Ban may be enforced with respect to any abortions performed under the "medical emergency" provision. Am. Pet. ¶¶ 179–80. 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. § 188.018, RSMo. Since these provisions remain in the Missouri , 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). It is thus incorrect as a matter of law and logic to say certain Challenged Provisions are "currently non-operative." State Mem. at 8.

Petitioners' challenge to the Religious Interpretation Policy is also ripe for review. This provision instructs that every statute passed into law must be "interpreted and construed" with the understanding that "[t]he life of each human being begins at conception." § 1.205, RSMo. The provision thus injects a religious view about when life begins into the entire Missouri Code,

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[8] If all Respondents concede that the Gestational Bans, Reason Ban, 72-Hour Delay, and Same-Physician Requirement will not be enforced *even if* the Total Abortion Ban is ruled unconstitutional, Petitioners agree that those statutes are not ripe for judicial review. *See e.g.*, *Poe v. Ullman*, 367 U.S. 497, 508 (1961) (declining to review a law that had not been enforced in eighty years, which the Court interpreted as a "tacit agreement" not to prosecute). Absent such a clear-throated concession, these provisions are ripe for review.

including each of the other Challenged Provisions. Am. Pet. ¶¶ 2, 123. State Respondents contend that this challenge is unripe because the Religious Interpretation Policy cannot be the cause of Petitioners' injuries, State Mem. at 9, but this argument misunderstands Petitioners' theory of injury. Petitioners allege that they are injured because adoption of the Challenged Provisions, including the Religious Interpretation Policy, constitutes an impermissible establishment of religion. This is an ongoing, concrete constitutional injury that came into being the day each provision became effective and gained substantial urgency on June 24, 2022, when the overturning of *Roe v. Wade* gave the Religious Interpretation Policy new teeth. *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 314 (2000) (stating that "the mere passage by the District of a policy that has the purpose and perception of government establishment of religion" was ripe for review).

State Respondents rely on *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), for the proposition that the Religious Interpretation Policy provision is merely a declaratory statement of intent that contains no affirmative duties and accordingly did not impact the *Webster* plaintiffs. State Mem. at 9. The language that State Respondents cite is clearly dicta, as *Webster* turned on the application of *Roe v. Wade*. *See Webster*, 492 U.S. at 506–07. The theory of harm alleged in *Webster* was that the Religious Interpretation Policy offended substantive due process guarantees embedded in the United States Constitution. *Id.* at 501–02. That is very different than the instant action, which alleges that the Religious Interpretation Policy, by codifying a religious belief into law, injures Petitioners by violating the Missouri Constitution's guarantee that "neither the state nor any of its political subdivisions shall establish any official religion" and that "no preference shall be given to . . . any church, sect or creed of religion, or any form of

religious faith or worship." Mo. Const. art. 1, § 5, 7. Petitioners were injured the moment the Religious Interpretation Policy became effective, and even more so once *Roe v. Wade* no longer stood as a bulwark against its application throughout the Missouri Code. A holding that the Religious Interpretation Policy is unconstitutional would grant specific relief by curing the Missouri Code of this impermissible religious directive.

Second, Missouri law does not require enforcement or the 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. 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, as here, "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 v. City of St. Louis*, 468 S.W.3d 360, 370 (Mo. 2015) (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 (internal quotations omitted). The facts alleged in the Amended Petition—including the clear religious intent reflected on the face of the Challenged Provisions 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. ¶ 119–150, 199, 217–225—are already fully developed and sufficient to adjudicate this dispute. *See Mo. Health Care Ass'n*, 953 S.W.2d at 621 (holding that "the facts necessary to adjudicate the underlying

claim are fully developed" where plaintiffs challenged the "procedure used to pass the bill"). Petitioners' allegations are clearly ripe for review.

State Respondents do not cite any Missouri case to support their ripeness analysis. Rather, they rely almost exclusively on the United States Supreme Court decision in *Texas v. California*, 141 S. Ct. 2104, 2114 (2021), to support their position that statutes are not ripe for review if they are not actively enforced due to a later-enacted law. State Mem. at 8. In *Texas v. California*, the Court held that plaintiff-states lacked standing to challenge the Affordable Care Act's individual responsibility provision where Congress had eliminated the penalty for non-compliance. 141 S. Ct. at 2112. This decision is inapposite not only because it concerns Article III standing under the U.S. Constitution (not, as here, ripeness under the Missouri Constitution), but also because all of the Challenged Provisions remain enforceable, while the enforcement penalty in *Texas v. California* was completely eliminated by Congress. *Id.* Missouri's challenged laws are in effect whether or not actual prosecutions have occurred, and accordingly, the challenge is ripe.

Finally, under Missouri law, ripeness is a prudential, not jurisdictional, inquiry. *Schweich v. Nixon*, 408 S.W.3d 769, 773 (Mo. banc 2013). Thus, even if State Respondents were correct that some of the Challenged Provisions are temporarily not being enforced (even as they remain operative in the Missouri Code), the Court should also 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 judicial resources to require piecemeal litigation of these claims, particularly given that Petitioners attack each of the Challenged Provisions for the same constitutional infirmity.

II. Petitioners' Claims Are Redressable.

State Respondents do not contest that Petitioners' extensive allegations about the religious purpose and effect of the Challenged Provisions state a claim for relief under the state Constitution's robust anti-establishment provisions. Instead, State Respondents argue that Petitioners' claims are not *redressable* because, they claim, (1) Petitioners require discovery into the subjective intent of particular state legislators that is privileged by the Speech and Debate Clause, (2) action by this Court remedying the violations of the Missouri Establishment Clauses would itself violate the Missouri Establishment Clauses, and (3) the federal Free Exercise and Equal Protection Clauses allow state legislators to enshrine their religious beliefs into law. State Mem. at 18–27. These arguments misunderstand the standard governing claims under the Missouri Establishment Clauses and the nature of the relief Petitioners seek. And, if adopted, these arguments would essentially nullify the Missouri Establishment Clauses in service of an extreme view of the purported federal free exercise and equal protection rights of state officials acting in their official capacity that finds no basis in precedent or common sense.

A. Petitioners Do Not Require Discovery in Violation of Missouri's Speech or Debate Clause to Prevail on Their Claims.

State Respondents ask this Court to dismiss the Amended Petition because Petitioners hypothetically could seek discovery that State Respondents believe is protected by the Missouri Constitution's Speech or Debate Clause. State Mem. at 18–21. State Respondents fail to cite a single case where a court (in Missouri or anywhere else) has dismissed a case on a motion to dismiss because a plaintiff may seek certain discovery or where a court (anywhere) has dismissed a case on a motion to dismiss under the Missouri Speech or Debate Clause (or any

Speech or Debate Clause) where the defendants are not legislators. More fundamentally, this argument fails because it misunderstands both Petitioners' claim for relief and the applicability of the Speech or Debate Clause privilege.

State Respondents contend that Petitioners must depose "each and every senator and representative to delve into their subjective motives" in order to prove their case. State Mem. at 19. This assertion misunderstands the legal standard applicable to claims under the Missouri Establishment Clauses and misconstrues the allegations of the Amended Petition. Article I, Sections 5, 6, and 7 of the Missouri Constitution require "strict neutrality" toward religion and prohibit the state from imposing "requirement[s]" of or "exhortation[s]" to "specific religious belief[s]." *Oliver v. State Tax Comm'n*, 37 S.W.3d 243, 250–52 (Mo. banc 2001). The Missouri Supreme Court has repeatedly stated that "the provisions of the Missouri Constitution declaring that there shall be a separation of church and state are not only more explicit but more restrictive" than the federal First Amendment. *Gibson v. Brewer*, 952 S.W.2d 239, 246 (Mo. banc 1997) (quoting *Paster v. Tussey*, 512 S.W.2d 97, 101–02 (Mo. banc 1974)). Because comparisons to the federal Establishment Clause were made with the understanding that the U.S. Supreme Court evaluated such challenges using the "purpose or effect" test first adopted in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), if a statute has the "purpose" or "effect" of advancing one religion it would "clearly and undoubtedly contravene[ ]" the Missouri Constitution as well. *Americans United v. Rogers*, 538 S.W.2d 711, 716, 721 (Mo. banc 1976) (citing *State ex rel. Eagleton v. McQueen*, 378 S.W.2d 449 (Mo. banc 1964)).

Petitioners need not depose individual legislators to establish impermissible religious purpose. First, the text of the challenged provisions, standing alone, are religious on their face

and are sufficient to establish a cause of action under Missouri's religious establishment prohibitions even without the additional context afforded by the legislative history. Here, the legislature directly and unambiguously enshrined particular religious precepts about personhood and "conception" directly into the Missouri Code, thereby intentionally and knowingly adopting a religious view of abortion, Am. Pet. ¶¶ 2, 4, 119–21, 124, and then the sponsors and other supporters bragged about doing so in their public statements, both in and outside of legislative sessions, Am. Pet. ¶¶ 8, 122, 125–150. Indeed, there is little need for proof of the violations of the Missouri Constitution beyond the text of Section 188.010 and the Religious Interpretation Policy. *See* § 188.010, RSMo (stating that "it is the intention of the general assembly of the state of Missouri" to "[r]egulate abortion to the full extent permitted" "in recognition that Almighty God is the author of life."); § 1.205(1), RSMo. ("The life of each human being begins at conception."). Combined with the legislative sponsors' and supporters' own statements, Petitioners have more than ample evidence to establish the violations at issue.

Even if the Missouri legislature had not so explicitly enshrined religious views in the text of the Missouri statutes, depositions of legislators still would not be necessary. Courts assess intent of government actors all the time without requiring direct testimony from any legislators, much less every legislator. *See, e.g.*, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993) (permitting courts to look to legislative history to determine if a law is religiously neutral); *Edwards v. Aguillard,* 482 U.S. 578, 591-92 & nn.13–14 (1987) (review of state legislative history and statements of sponsoring legislators in hearing sufficient to determine that law requiring the teaching of creationism had the unconstitutional purpose of advancing "the religious belief that a supernatural creator was responsible for the creation of

humankind"); *Epperson v. Arkansas*, 393 U.S. 97, 107–09 & n. 16 (1968) (reviewing public appeals, newspaper articles, and letters to determine legislative purpose).

Moreover, when determining whether a state action violates the Missouri Establishment Clauses, Missouri courts are "not limited to a consideration of any particular fact separate and apart from all other facts and circumstances shown by the whole record" and instead "must consider the total effect of all of the facts and circumstances in evidence." *Berghorn v. Reorganized Sch. Dist. No. 8*, 260 S.W.2d 573, 583 (Mo. 1953). Even under the less-protective standard of the federal Establishment Clause, courts cannot refuse to consider the "context in which [a] policy arose," especially when "that context quells any doubt" that the policy was intended to advance a religious belief. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 315 (2000). The text of the Challenged Provisions and the extensive public evidence of their religious purpose and effect cited in the Amended Petition already demonstrate an unconstitutional establishment of religion. Am. Pet. ¶¶ 8, 119–50, 217–25. No discovery into subjective intent is required.

State Respondents also misconstrue the Missouri Speech or Debate Clause's application to this case. The Speech or Debate Clause states that "Senators and Representatives . . . shall not be questioned for any speech or debate in either house in any other place." Mo. Const. art. III, § 19(a). The Speech or Debate Clause is a privilege held by legislators—not the Respondents in this case. *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408, 415 (D.C. Cir. 1995). The Clause provides legislators immunity against certain lawsuits and a testimonial privilege against certain discovery. *Id.* at 418–19. Neither are at play here; no legislator is a Respondent,

and Petitioners have not sought any discovery against legislators. State Respondents accordingly have no right to assert this privilege for any reason.

State Respondents are ultimately wrong to claim that Missouri's Speech or Debate Clause "prohibits courts from assessing the motives of legislators at all." State Mem. at 21. Curiously, State Respondents cite to *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 508 (1975), to argue that the Speech or Debate Clause prohibitions "are absolute" (State Mem. at 21), implying that *Eastland* prohibits any and all discovery from legislators. Not so. In fact, *Eastland* does not address immunity or privilege from discovery at all. *Eastland* involved a lawsuit against ten federal senators seeking to quash an investigative subpoena *their* committee had issued. *Id.* at 494–95. The Supreme Court ruled that the federal Speech or Debate Clause provided immunity to the senators against the lawsuit. *Id.* at 507. Again, no members of the legislature are Respondents in this action, and Petitioners are not seeking to quash an investigative subpoena. *Eastland* is inapposite.

Finally, State Respondents fail to cite a single case, in Missouri or elsewhere, where a court has granted a motion to dismiss because a petitioner *may* seek certain discovery. That is because a court ruling on a motion to dismiss must "assume[] that all of the plaintiff's averments are true, and liberally grant[] to [the] plaintiff all reasonable inferences therefrom." *Lebeau v. Comm'rs of Franklin Cnty., Missouri*, 422 S.W.3d at 288 (quoting *Weber*, 342 S.W.3d at 321) . To inquire into the permissibility of hypothetical discovery, then, goes well beyond the sufficiency of the pleadings and short-circuits the judicial process. State Respondents' Speech or Debate Clause argument fails.

B. Enjoining The Challenged Provisions Does Not Establish Any Religious Viewpoint.

State Respondents argue that enjoining the Challenged Provisions would somehow impose Petitioners' religious views on all Missourians and substitute Petitioners' religious views for those of the legislature. State Mem. at 21–23. They are wrong. If simply undoing an establishment of religion were itself an establishment of religion, it would essentially write the Establishment Clauses out of existence.

State Respondents' argument again misunderstands Petitioners' claim. State Respondents contend that relief in this case would itself violate the Establishment Clauses under Petitioners' "own theory" of those provisions. State Mem. at 23. But as discussed at length *infra* Part II.C., Petitioners do not suggest that the Missouri Establishment Clauses are violated whenever a law merely "corresponds" with legislators' religious beliefs. State Mem. at 22. To the contrary, Petitioners have stated a claim for relief under the Missouri Establishment Clauses because the plain text of the Challenged Provisions, "clearly and undoubtedly" evidences the "purpose" or "effect" of advancing religion. *See Americans United*, 538 S.W.2d at 721. This conclusion is only reinforced by the legislative sponsors' own statements. Petitioners agree that mere coincidence of state action with religious beliefs does not suffice. And surely, an injunction by this Court that merely *restrains* unconstitutional conduct by state actors and returns to the status quo does not establish religion just because the status quo happens to coincide with the religious beliefs of Petitioners, who are *private parties*. *Cf. McGowan v. Maryland*, 366 U.S. 420, 451–52 (1961) (holding that law that merely coincided with a particular religious belief but did not require petitioners to engage in conduct mandated by that religion did not violate

Establishment Clause). Such reasoning would insulate State Respondents from their obligations under the Missouri Constitution's Establishment Clauses and prevent this Court from fulfilling its duties of judicial review.

Currently, *every* Missourian is constrained by the Challenged Provisions to act in accordance with a religious tradition they may not share, but enjoining the Challenged Provisions would not impose any particular religious view on anyone. Contrary to State Respondents' argument, an injunction would remove the demand of behavior compliant with a particular religious view such that Missourians of all and no religious views may act according to their own beliefs about when life begins and what health care is appropriate. Those who hold a religious belief that life begins at "conception" may act on that belief. Those who believe that life begins at some other time, or that the question of when life begins should not determine reproductive health care decisions, may act on their beliefs as well. The relief sought by Petitioners would protect the rights of all Missourians to make health care decisions within the bounds of their own religious belief. State Respondents make no claim that they would be precluded from engaging in any conduct mandated by their religion if the Challenged Provisions were enjoined (and indeed, the State of Missouri has no religion). Thus, the requested relief would not violate Missouri's Establishment Clauses.

C. State Actors Do Not Have Federal Constitutional Rights to Impose Their Religious Beliefs on Others.

1. State actors do not have a free-exercise right to impose their religious beliefs on others.

State Respondents argue that striking down the Challenged Provisions under the state Establishment Clauses would violate the federal free-exercise rights of the legislators who voted

for them. State Mem. at 23–27. This argument blatantly misapprehends the fundamental nature of the First Amendment's religious protections. The Free Exercise Clause protects private individuals *against government infringement* of their religious exercise. *See Employment Div. v. Smith*, 494 U.S. 872, 877 (1990) (summarizing free-exercise doctrine with a long list of cases proclaiming what "*government* may not" do) (emphasis added). When the government *itself* or government actors engage in religious activities, the Free Exercise Clause is simply inapplicable. Rather, the Establishment Clause is the relevant protection, and it also protects against state action. *See Lee v. Weisman*, 505 U.S. 577, 591-92 (1992) ("Establishment Clause is a . . . prohibition on . . . *state intervention* in religious affairs.") (emphasis added). Neither clause shields state actors engaged in their official duties.

State Respondents point to no case in which state actors have even asserted a free-exercise claim, let alone one in which a court has held that the Free Exercise Clause applies to official duties of a state actor. To the extent that the U.S. Supreme Court has addressed anything remotely close, it has held that when a government employee speaks in his official capacity, that speech is *not* protected by the First Amendment. *See Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006). There is hardly a more clear-cut case of state employees acting "pursuant to their official duties" than legislators debating and voting on a bill on the legislative floor, as those activities are the epitome of what legislators are "employed to do." *See id.* The three federal circuits that have expressly considered whether government speech is protected by the Free Exercise Clause, along with the Free Speech Clause, have held that government speakers cannot assert free-exercise claims. All of them, it should be noted, involved official speech during legislative sessions. *See Fields v. Speaker of Pa. House of Representatives*, 936 F.3d 142, 160 (3d Cir. 2019)

("Because legislative prayer is government speech, the Free Exercise Clause does not apply. . . ."); *Gundy v. City of Jacksonville*, 50 F.4th 60, 80–81 (11th Cir. 2022) (pastor's invocation at city council meeting "constitute[d] government speech . . . 'not susceptible to an attack on free-speech or free-exercise grounds'" (quoting *Fields*, 936 F.3d at 163) (cleaned up)); *Simpson v. Chesterfield Cnty. Bd. of Supervisors*, 404 F.3d 276, 288 (4th Cir. 2005) ("the standards for challenges to government speech" require that free-exercise challenge to legislative invocation policy "must be rejected"). Meanwhile, the Supreme Court has made clear that, although the restraints on government speech are limited, "government speech must comport with the Establishment Clause." *Pleasant Grove City v. Summum*, 555 U.S. 460, 468 (2009).

State Respondents rely solely on the Supreme Court's shadow docket decision in *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021), to argue that legislators have a right to enshrine their religious beliefs in law whenever legislators are permitted to implement secular beliefs into law. State Mem. at 24. But *Tandon* had nothing to say about the free-exercise rights of state officials acting in their official capacity. To the contrary, the petitioners in *Tandon* were all private parties seeking exemptions from COVID-19 restrictions to engage in at-home religious exercise. 141 S. Ct. at 1297. *Tandon* does not support the sweeping proposition that legislators have a First Amendment free-exercise right to write their religious beliefs into law and thereby force *everyone else* to follow them.

State Respondents' unprecedented interpretation of the Free Exercise Clause, if accepted, would completely nullify not only the Missouri Establishment Clauses but also the federal Establishment Clause. But, of course, the Free Exercise Clause cannot nullify another federal constitutional provision.. What Establishment Clause violation could not be reframed as the free-

exercise rights of the government official who is violating the Establishment Clause? Take for example a public-school teacher who is proselytizing to students during class time—a clear-cut Establishment Clause violation.[9] Under State Respondents' theory, that teacher has a free-exercise right to proselytize during class time because other teachers speak about secular topics. Similarly, consider *Lee v. Weisman*, in which the Supreme Court held that nonsectarian prayer at a public-school graduation ceremony violated the Establishment Clause. 505 U.S. 577 (1992). If the clergy invited to give religious invocations at a public school graduation had a free-exercise right to do so, on the basis that the valedictorian or principal was giving a secular speech, the Court would have come to the opposite result. State Respondents' backwards reading of the Free Exercise Clause cannot be correct. And particularly given Missouri's long history of robust protections for religious pluralism, Am. Pet. ¶¶ 151–60, it is remarkable that the State itself would advocate for this Court to adopt a wholly unprecedented interpretation of the federal Constitution that would write core provisions of Missouri's Constitution out of existence.

State Respondents' understanding of Petitioners' arguments is as wrong as their interpretation of the Free Exercise Clause. Petitioners do not suggest that "courts [must] intervene when religious legislators pass or vote for a bill that corresponds with their ethical or moral beliefs." State Mem. at 23. Petitioners understand that legislators have worldviews that influence how they vote. Petitioners, as members of the clergy, also understand that worldviews

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[9] *See, e.g.*, *McCollum v. Bd. of Educ.*, 333 U.S. 203 (1948) (Establishment Clause forbids religious instruction in public schools); *Engel v. Vitale*, 370 U.S. 421, 430 (1962) (reading nondenominational prayer in public school classrooms violates the Establishment Clause); *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 224 (1963) (Establishment Clause prohibits beginning school day with Bible reading); *Malnak v. Yogi*, 592 F.2d 197, 199 (3d. Cir. 1979) (per curiam) (offering transcendental meditation course in public high schools is an unconstitutional establishment of religion).

are shaped by a host of influences, including religion, philosophy, and personal experience. But there is a stark difference between legislators being influenced by their personal religious beliefs and legislators codifying religious beliefs as the law of the land. The latter is forbidden by the Missouri Constitution's Establishment Clauses. *See supra* Section II.A.

State Respondents' suggestion that Petitioners' claims would require a court to strike down the Civil Rights Act of 1964 is not only wrong (State Mem. at 23–26), but is a useful example that demonstrates the violations of the Missouri Constitution at issue here. In passing the Civil Rights Act, some legislators may have been motivated by their religious views on racial equality to vote in favor of nondiscrimination. Some, on the other hand, were undoubtedly influenced by their philosophical beliefs or personal experience. What matters is that the Civil Rights Act of 1964 did not codify one specific religious belief and then force everyone to abide. But that's precisely what the Challenged Provisions do.

To be sure, in some cases the line between religion as an underlying motivation for legislators' actions and the direct implementation of religious beliefs may be a difficult line to draw. But that determination with regard to the Challenged Provisions is not difficult here because these legislators wrote their view of religion into the Missouri statutes, and *told us* they were doing so. The legislative sponsors of the Challenged Provisions reiterated in their statements on the floor that they were seeking to write a specific religious view on abortion into the Missouri Code. Am. Pet. ¶¶ 125–35, 138–47. And then they did just that by including overtly religious language in the statutes. Am. Pet. ¶¶ 120–21, 124. State Respondents assert that we "point to no case in which a facially non-religious law became a religious establishment just because some legislators passed it based on ethical motivations consistent with their religions."

State Mem. at 24. But that is irrelevant, because the Challenged Provisions include language that is expressly religious on its face.

State Respondents' examples of the Declaration of Independence and state constitutions with passing religious references are an even further reach. State Mem. at 25. Petitioners are not challenging the mere presence of religious language in a legal document, with nothing more. The references to God in state constitutions have no legal effect. *See* State Mem. at 25 n.13 (citing constitutional preambles). They do not coerce anyone to adhere to religious beliefs that are not their own. Instead, they are analogous to the optional oath upheld in *Oliver v. State Tax Comm'n*. *See* 37 S.W.3d at 251–52. There, the Missouri Supreme Court concluded that the presence of the words "So help me God" on a property tax form was not an establishment of religion because the taxpayer had the option to "affirm" instead of "swear" and he was permitted to strike the religious words. *Id.* at 245. Adherence to the religious belief was optional and the state maintained "strict neutrality" as to those who chose to act in accordance with that belief and those who did not. *Id.* at 252. In contrast to religious language that has no force of law, the religious beliefs enshrined in the Challenged Provisions coerce compliance with a specific religious viewpoint. In other words, the religious language in the Challenged Provisions, on its own, is not what Petitioners are challenging. Their complaint is that these statutes implement a particular religious belief in violation of the antiestablishment guarantees of the Missouri Constitution. The religious language is simply evidence of this violation.

Finally, State Respondents separately assert that Petitioners' claim violates the First Amendment free-exercise and petition rights of non-state actors who assist in drafting legislation, State Mem. at 26–27, referring to Petitioners' observation that the Missouri Catholic

Conference drafted the Religious Interpretation Policy. Am. Pet. ¶ 122. But that too is merely evidence that this provision enshrines religion in law. *Cf. Santa Fe*, 530 U.S. at 315 ("We refuse to turn a blind eye to the context in which this policy arose."). Petitioners do not question organizations' right to propose legislation, nor their right to petition legislators to support their causes. Religious organizations can petition the legislature all they want. And when what they are asking for is constitutional, the legislature may, if it chooses, heed their requests. But the legislature has a constitutional duty to uphold the separation of religion and government. The legislature here did just the opposite.

State Respondents' First Amendment free-exercise and petition arguments are meritless.

2. Petitioners' Claims Do Not Implicate the Federal Equal Protection Clause.

State Respondents are also wrong to suggest that enjoining laws that violate Missouri's Establishment Clauses would somehow violate a religious legislator's right to equal protection under the law. As a threshold matter, the State Respondents provide no authority for the proposition that the State can assert the equal protection rights of individual legislators as a defense to a violation of the Missouri Establishment Clauses.[10] And again, it is troubling that the State itself would advance a novel interpretation of the federal Constitution that would nullify longstanding provisions of the Missouri Constitution. But regardless, this argument fails because

[10] State Respondents' reliance on *Tandon v. Newsom*, 141 S. Ct. 1294 (2021) is even more misplaced with respect to the Equal Protection Clause. Although the Petitioners in *Tandon* raised an equal protection claim, the Court's decision rested on the Free Exercise Clause and did not include an equal protection analysis—indeed, the decision does not even mention the Equal Protection Clause.

individual legislators acting in their official capacity do not have an equal protection right to impose their religious views on others.

The heart of the State Respondents' argument is that religious legislators are "disfavor[ed]" as compared to "nonreligious drafters." State Mem. at 26. But under the federal Constitution, "religion has never been held to be a suspect classification" when all religious people are affected in the same way regardless of their denomination or sect. *Wirzburger v. Galvin*, 412 F.3d 271, 284–85 (1st Cir. 2005). When there is also no violation of the Free Exercise Clause or other fundamental right, any equal protection claim predicated upon a religious classification is limited to rational basis review. *Locke v. Davey*, 540 U.S. 712, 720 n.3 (2004); *Johnson v. Robinson*, 415 U.S. 361, 375 n.14 (1974) ("[S]ince we hold . . . that the Act does not violate appellee's right of free exercise of religion, we have no occasion to apply to the challenged classification a standard of scrutiny stricter than the traditional rational-basis test.").

Here, state legislators enacted the Challenged Provisions to codify their shared religious views of abortion and the beginning of life and impose them universally. This imposition of religion is challenged by Petitioners who are members of various faiths. If the Court enjoins the law, that act does not result in discrimination based on a particular religion practiced by the State Respondents. Rather, it prohibits the imposition of a particular religious tenet upon all Missourians. As such, there is no inter-religion discrimination and therefore, there is no suspect class.

Of course, Missouri's Establishment Clauses are necessary to preserve the religious pluralism that is core to Missouri's Constitution and traditions. Their enforcement should survive

even the strictest scrutiny; clearly, it survives rational basis review. State Respondents' equal protection argument must fail.

Conclusion

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

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Respectfully submitted,

/s/ Denise D. Lieberman

Denise D. Lieberman MBE #47013
P.O. Box 56574
St. Louis, MO 63156
Tel: (314) 780-1833
denise@deniselieberman.com

Michelle Banker*
Sunu Chandy*
Christen Hammock Jones*
Veronica Faison*
National Women's Law Center
1350 I Street NW, Suite 700
Washington, DC 20005
Tel: (202) 588-7620
mbanker@nwlc.org

Michele Henry *
Kalli A. Joslin*
Catherine M. Feuille*
Americans United for Separation of Church and State
1310 L Street NW, Suite 200
Washington, DC 20005
Tel: (202) 466-3234
mhenry@craighenrylaw.com

John A. Freedman*
Matthew Tabas*
Annie Blackman*
James Thompson*
Arnold & Porter Kaye Scholer LLP
601 Massachusetts Avenue, N.W
Washington, DC 20001
Tel: (202) 942-5000
John.Freedman@arnoldporter.com

Kent A. Yalowitz*
Arnold & Porter Kaye Scholer LLP
250 West 55th Street
New York, NY 10019-9710
Tel: (202) 836-8000
Kent.Yalowitz@arnoldporter.com

**pro hac vice* granted