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 STATE RESPONDENTS' MOTION FOR JUDGMENT ON THE PLEADINGS AND SUGGESTIONS IN SUPPORT

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INTRODUCTION

The Missouri Constitution's robust Establishment Clauses prohibit forcing religious beliefs on Missourians. Petitioners have alleged that Missouri's abortion ban and other restrictions violate those prohibitions because they have the purpose of enshrining religious beliefs in law, give preference to specific religious beliefs about when life begins, and coerce Missourians to live according to those specific religious beliefs. Petitioners plead, among other things, that the Challenged Provisions were passed with explicitly religious justifications, including that "Almighty God is the author of life."

Mere months after this Court denied State Respondents' Motion to Dismiss, State Respondents now seek judgment on the pleadings. Much of State Respondents' Motion rehashes the motion-to-dismiss arguments that were already rejected by this Court. The rest of the motion misunderstands the state Establishment Clauses, misstates Petitioners' allegations and arguments, and ignores the standard for a motion for judgment on the pleadings. Put simply, State Respondents are wrong on both the law and the facts. The motion should be denied.

FACTS PLEADED IN THE PETITION

In assessing a motion for judgment on the pleadings, the "party moving for judgment on the pleadings admits, for purposes of the motion, the truth of all well pleaded facts in the opposing party's pleadings." *Barker v. Daner*, 903 S.W.2d 950, 957 (Mo. App. W.D. 1995) (citations omitted)). A summary of the key factual allegations from the Amended Petition follows.

Missouri's Total Abortion Ban was enacted in 2019 as part of H.B. 126, legislation that expressly codified 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, 188.026 RSMo; Am. Pet. ¶ 4. Other provisions enacted prior to H.B. 126 that have restricted abortion access, Am. Pet. ¶¶ 3, 181–89, also enshrine in Missouri law and impose on all Missourians a particular religious view

about the beginning of human life, Am. Pet. ¶¶ 137–45. This includes legislation enacted in 2017, S.B. 5, that imposes onerous procedural requirements on the provision of medication abortion, codified at §§ 188.021(2), (3), RSMo (the "Medication Abortion Restrictions"), and creates concurrent original jurisdiction for the Attorney General to prosecute violations of the abortion ban and related laws without the participation of the prosecuting or circuit attorney for the jurisdiction, codified at § 188.075(3), RSMo (the "Concurrent Original Jurisdiction Provision"). Am. Pet. ¶¶ 3, 181–89.[1]

The cumulative result of each of these laws, which impermissibly establish religious beliefs in violation of Article I, Sections 5–7 of the Missouri Constitution, *see* Am. Pet. ¶¶ 11, 236, 240, 244, 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, the enforcement 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 result is that many Missourians who can become pregnant will be compelled to continue pregnancies in service of the State's preferred religious beliefs, no matter the harm to their health, lives, and futures. Am. Pet. ¶¶ 1, 3, 6, 7, 172, 217–25. A woman's risk of death

[1] Petitioners also challenged other religiously based abortion restrictions, including the Religious Interpretation Policy, Gestational Age Bans, Reason Ban, 72-Hour Delay, and Same-Physician Requirement, but this Court dismissed those claims as unripe. *See* Am. Pet. ¶¶ 166–67, 173–86; Order on State's Mot. Dismiss at 13.

associated with childbirth nationwide is approximately 14 times higher than that associated with abortion, and the health risks of forced pregnancy are particularly acute in Missouri given its already high rates of maternal mortality. Am. Pet. ¶¶ 218–19. Illustrating this danger, Petitioner Molly Housh Gordon, who is of reproductive age and suffers from an autoimmune condition exacerbated by pregnancy, risks likely long-term health deterioration, physical pain, and even death if she becomes pregnant and is denied an abortion due to the Challenged Provisions. Am. Pet. ¶¶ 40–43.

Likewise, forced pregnancy has devastating implications for individuals' financial well-being, job security, workforce participation, and educational attainment. Am. Pet. ¶ 221. Unplanned births significantly reduce women's participation in the labor force, and the inability to obtain an abortion undermines educational and professional achievement while increasing the risk of economic insecurity and poverty. Am. Pet. ¶¶ 222–23. These risks are particularly severe in Missouri given the state's failure to provide adequate support for women and families. Am. Pet. ¶¶ 223–24.

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 and the beginning of human life, Am. Pet. ¶¶ 56, 74, 121, 163–65, 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. ¶¶ 163, 198, 210–16. Yet the Challenged Provisions impose conservative Christian and non-scientific notions 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 beliefs that are 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. Am. Pet. ¶ 225.

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. Legislators debating S.B. 5 repeatedly invoked the bill's true intent to protect "innocent life." Am. Pet. ¶ 138. When asked during committee hearings for evidence for why the bill was necessary to instead "protect health and safety," sponsors of the proposed House Bill, Representatives Jason Barnes and Kathryn Swan, could point only to the report from an investigation by a Senate committee on the "Sanctity of Life." Am. Pet. ¶ 138. And when pressed by Representative Mike Moon to take an even more overtly religious position in S.B. 5, Representatives Barnes and Swan noted their agreement with his religious beliefs against abortion but said that the bill was the most they could legally do at the time. Am. Pet. ¶¶ 139–40.

Rabbi Jonah Zinn of Congregation Shaare Emeth testified in opposition to S.B. 5, warning that the proposed abortion restrictions infringed on Jewish beliefs and violated constitutional antiestablishment provisions. Am. Pet. ¶ 142. He stated that S.B. 5 "serves to privilege the religious beliefs of those who oppose abortion over the religious beliefs of those who understand it to be a necessary medical reality at times" and noted that "we live in a society that guarantees the free exercise and expression of all different religious beliefs." Am. Pet. ¶ 142. Whereas Representative Stacey Newman agreed that "we should not be basing, you know, our legislative intent on one religion over another," Representative Moon doubled down, replying: "I guarantee you one thing, we're always gonna disagree on the killing of a human life." Am. Pet. ¶ 143–144.

And in the debate around H.B. 126, the bill's lead sponsor, Representative Nick Schroer, stated in support of the legislation that "as a Catholic I do believe life begins at conception, that is built into our legislative findings." Am. Pet. ¶ 129. One of that 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.

Representative Ian Mackey raised specific concerns about the constitutionality of H.B. 126, questioning "how many of our constituents agree with the statement that God is the author of human life" and warning his colleagues that the bill "itself is in violation of the separation of church and state." Am. Pet. ¶ 130. And Senators Scott Sifton and Jamilah Nasheed had an extended interchange about how the bill violates antiestablishment principles and religious freedom, with Senator Nasheed warning: "People can practice their religions as they see fit, but don't come legislating your own religious beliefs on to other people. That's not right." Am. Pet. ¶ 130.

But supporters of H.B. 126 explicitly chose to disregard these warnings. Representative Kathryn Swan, responding to the "dialogue regarding religion" and "how [religion] weighs into what [legislators] do in this chamber," said that legislators "must support this bill" because she "beg[ged] to differ at the time of choice. The time of choice is the time of conception." Am. Pet. ¶ 131. And Representative Adam Schnelting explicitly urged the legislature to ignore its

constitutional mandates: "[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.[2]

STANDARD OF REVIEW

"A motion for judgment on the pleadings is not favored." *Helmkamp v. Am. Fam. Mut. Ins. Co.*, 407 S.W.2d 559, 565 (Mo. App. 1966). Judgment on the pleadings is appropriate only when the question before the court is strictly one of law. *Eaton v. Mallinckrodt, Inc.*, 224 S.W.3d 596, 599 (Mo. banc 2007). "[T]he well-pleaded facts of the petition are treated as true for purposes of the motion, and the non-moving party is accorded all reasonable inferences drawn therefrom." *Twehous Excavating Co., Inc. v. L.L. Lewis Invs., L.L.C.*, 295 S.W.3d 542, 546 (Mo. App. W.D. 2009). A trial court cannot grant a motion for judgment on the pleadings "where a material issue of fact exists." *Madison Block Pharmacy, Inc. v. U.S. Fid.*, 620 S.W.2d 343, 345 (Mo. banc 1981); *see also Cantor v. Union Mut. Life Ins. Co.*, 547 S.W.2d 220, 224 (Mo. App. 1977).

"If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment." Mo. S. Ct. R. 55.27(b). "[A]ll parties shall be given reasonable opportunity to present all materials made pertinent to such a motion." *Id.*; *see also State ex rel. Polaris Indus., Inc. v. Journey*, 505 S.W.3d 370, 374 (Mo. App. W.D. 2016) (converting motion for judgment on the pleadings to motion for summary judgment after both parties submitted materials outside the pleadings).

[2] State Respondents' Motion does not address or discuss standing and State Respondents have refused to answer a single discovery request Petitioners propounded on the issue. Therefore, Petitioners' Opposition does not discuss standing or the facts underlying it.

ARGUMENT

Petitioners' claims are straightforward: the Challenged Provisions violate Missouri's Establishment Clauses because the laws have both the purpose and the effect of enshrining in law legislators' religious beliefs about abortion and the beginning of human life. Nonetheless, State Respondents mistakenly argue they are entitled to judgment on the pleadings, relying on inapposite cases, disputed factual allegations, irrelevant history, misstated tests, and inapplicable constitutional rights, none of which deserve serious consideration.

I. The Challenged Provisions violate Article I, Sections 5, 6, and 7 because they have the purpose and effect of enshrining religious beliefs in law.

Petitioners allege that the Challenged Provisions violate Article I, Sections 5, 6, and 7 of the Missouri Constitution, which together outline the boundaries of Missouri's separation of church and state. *See* Am. Pet. ¶¶ 236, 240, 244. Each of the three distinct Establishment Clauses 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, 251–52 (Mo. banc 2001). Indeed, the principles of religious freedom and religious equality have been "a guiding star in the growth and development of our form of government." *Harfst v. Hoegen*, 163 S.W.2d 609, 611 (Mo. banc 1941). 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) (internal quotations and citation omitted).[3] As a

[3] *See also Saint Louis Univ. v. Masonic Temple Ass'n of St. Louis*, 220 S.W.3d 721, 729 (Mo. banc 2007) ("Missouri's establishment clause is more restrictive than the federal provision.") (citing *Ams. United v. Rogers*, 538 S.W.2d 711, 720 (Mo. banc 1976)); *Waites v. Waites*, 567 S.W.2d 326, 333 (Mo. banc 1978) ("We reiterate our determination that the Missouri Constitution contemplates a strict and pervasive severance between religion and the state."); *Harfst*, 163 S.W.2d at 614 ("The constitutional policy of our State has decreed the absolute separation of church and state . . . in governmental matters.").

result, if a law has the purpose or effect of establishing religion, that law would "clearly and undoubtedly contravene[ ]" the state's more restrictive Establishment Clauses. *Ams. United v. Rogers*, 538 S.W.2d 711, 718–19, 721 (Mo. banc 1976).[4]

Here, the Challenged Provisions are triply flawed: They have the purpose of establishing religious beliefs as law, the effect of preferencing certain religious beliefs, and the effect of coercing Missourians to abide by those religious beliefs.

A. The Challenged Provisions have the purpose of enshrining religious beliefs in law.

Under Missouri's Establishment Clauses, a law cannot have a primary or predominant purpose of codifying religious beliefs into law. *See, e.g.*, *Menorah Med. Ctr. v. Health & Educ. Facilities Auth.*, 584 S.W.2d 73, 86–87 (Mo. banc 1979); *see also, e.g.*, *McCreary Cnty. v. ACLU of Ky.,* 545 U.S. 844, 860 (2005). The unconstitutional purpose of the Challenged Provisions—to enshrine in law religious beliefs about abortion and the beginning of human life—is apparent in the context surrounding their enactment and in their plain text.[5]

1. The inquiry into improper purpose is necessarily fact- and context-specific, looking to "total effect of all of the facts and circumstances in evidence." *Berghorn v. Reorganized Sch. Dist. No. 8, Franklin Cnty.*, 260 S.W.2d 573, 583 (Mo. banc 1953). And courts are "not limited to a consideration of any particular fact separate and apart from all other facts and circumstances shown

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[4] Though the U.S. Supreme Court subsequently "abandoned" this type of analysis for federal Establishment Clause challenges, *see Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2411 (2022), Missouri's distinct Establishment Clauses and the stricter standard that courts of this state use to evaluate challenges thereunder remain unchanged.

[5] State Respondents suggest in passing that "even if [the Challenged Provisions] were subject to constitutional scrutiny, they would satisfy that scrutiny because there is a compelling interest in preventing the destruction of human life and these laws are narrowly tailored toward that end." Mem. at 5. But this strict-scrutiny analysis has no place in federal or state establishment-clause caselaw. Unlike in the free-exercise context, where a governmental restriction on the free exercise of religion can be upheld if the government's interest is sufficiently compelling (*see Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 466 (2017)), no governmental interest is compelling enough to force religion onto its citizens. *See, e.g.*, *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 316 (2000) ("[T]he simple enactment of this policy, with the purpose and perception of school endorsement of student prayer, was a constitutional violation.").

by the whole record." *Id.* Even under the less-demanding standard of the federal Establishment Clause, courts consider the "plain meaning of the statute's words, enlightened by their context and the contemporaneous legislative history and the historical context of the statute, . . . and the specific sequence of events leading to its passage." *McCreary*, 545 U.S. at 862 (quotation marks and alterations omitted); *see also Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 315 (2000) (instructing that courts cannot ignore "the context in which [a] policy arose," especially when "that context quells any doubt" that the policy was intended to advance a religious belief).[6]

Missouri courts have gone even further than the federal predominant-purpose test, holding that where a law has multiple stated purposes, if even *one* is to impose religion, such a law would violate the Missouri Constitution. *See State v. Chi., B. & Q.R. Co.*, 143 S.W. 785, 794 (Mo. banc 1912). Analyzing a Sunday-closing law, the Court in *Chicago* explained that "[i]f this clause means that all men must observe Sunday, *not only* as a day of rest, *but also* as a day of worship, then the preamble violates [an earlier version of Article I, Section 6], and, as a consequence, an established religion by the state follows." *Id.* (emphasis added). The Court ultimately upheld the law only because it found that the law had not in fact "denied, aided, or commanded the observance of the day as a day of worship." *Id.* Thus, the question before this Court is whether *a* purpose of the Challenged Provisions—or at most, a predominant or primary purpose of those provisions—is to advance religion. If so, the provisions cannot stand.

Among the facts and circumstances Petitioners allege, which this Court must accept as true, are that "human life begins at 'conception,'" as used in Missouri law, is a religious, not a scientific

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[6] *See also Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 540 (1993) (permitting courts to look to legislative history and intent to determine if a law is religiously neutral); *Edwards v. Aguillard,* 482 U.S. 578, 591–92, nn.13–14 (1987) (relying extensively on statements made in legislative hearings by several senators who sponsored or supported the law in holding law had impermissible religious purpose in violation of the federal Establishment Clause); *Epperson v. Arkansas*, 393 U.S. 97, 107–10 (1968) (reviewing public appeals, newspaper articles, and letters to determine legislative purpose).

idea, and that legislators admitted that the Challenged Provisions are intended to bring all Missourians into line with their particular religious view of the beginning of human life. *See, e.g.*, Am. Pet. ¶¶ 126 –29. Legislators who supported S.B. 5 spoke of "innocent life," pointed to a report by the Senate "Sanctity of Life" Committee, and ignored the testimony of clergy who warned that the bill impermissibly imposed one religious view on everyone else. Am. Pet. ¶¶ 138–45. One of H.B. 126's opponents expressly warned that passing religiously motivated legislation would violate the Constitution. Am. Pet. ¶¶ 130, 132. But its supporters encouraged the legislature to ignore the constitutional infirmity of the bill, instead emphasizing that the legislature "must support this bill" because of "religious beliefs" about "conception" and "gift[s] from our Creator." Am. Pet. ¶¶ 131–32. Taken together, the language and context show that the purpose of the Challenged Provisions is plain as day: to establish religious beliefs as law.

2. Even if this Court were limited to examining the legislature's "stated goal," as State Respondents argue, Mem. at 18–19, Petitioners still demonstrate that the stated goals of the Challenged Provisions are impermissibly religious. Section 188.010, entitled "Intent of general assembly," states that "it is the intention of the general assembly of the state of Missouri" to "[r]egulate abortion to the full extent permitted" "[i]n recognition that Almighty God is the author of life." This section was passed as part of H.B. 126, which also contained the Total Abortion Ban. Likewise, the primary justification for S.B. 5 cited by the bill's sponsors was a biased investigation by the Senate "Sanctity of Life" Committee—a committee name that itself underscores the committee's religious motivations and objectives. Am. Pet. ¶¶ 138, 138 n.8 ("'Sanctity' is, of course, an inherently religious term meaning 'holy or sacred' and entailing concepts of 'godliness.'" *Sanctity*, Merriam-Webster, https://www.merriamwebster.com/dictionary/sanctity (last visited Jan. 18, 2023)). Every legislator who voted to approve H.B. 126 and S.B. 5 therefore

voted for bills that regulated abortion *because* of religious beliefs—ones that many Missourians do not share.

By its text, Section 188.010 is not limited even to laws within H.B. 126. Section 188.010 introduces Chapter 188 of the Revised Statues of Missouri, entitled "Regulation of Abortions," announcing "the intention of general assembly" for the chapter as a whole. Section 188.010 thus provides further evidence that the intent of the legislature in passing the Challenged Provisions was to restrict abortion access in the name of religion.

State Respondents additionally concede that several of the stated goals for the Total Abortion Ban are protection and respect for life beginning at "conception." Mem. at 18 (citing §§ 188.026(1), (3), RSMo). Petitioners have pleaded that the belief that life begins at conception is religious. *See* Am. Pet. ¶¶ 121, 121 n.5. Because the Court must accept Petitioners' well-pleaded facts, these stated goals are fatal to the Total Abortion Ban.

B. The Challenged Provisions give preference to religious beliefs.

In addition to having an improper religious purpose, the Challenged Provisions implement particular religious views of abortion and the beginning of human life, elevating them to the level of state law over those of other religions. Article I, Section 7 specifically requires "that no preference shall be given to nor any discrimination made against any church, sect or creed of religion or any form of religious faith or worship." These words "are to be taken in accord with their fair intendment and their natural and ordinary meaning, which can be determined by consulting dictionary definitions." *Saint Louis Univ.,* 220 S.W.3d at 726 (citations omitted). "Preference" is defined as "the act, fact, or principle of giving advantages to some over others,"

while "discrimination" is defined as "prejudiced or prejudicial outlook, action, or treatment."[7] "Creed" is defined as "a brief authoritative formula of religious belief" or a "set of fundamental beliefs."[8] "Faith," in the context of religion, is defined as "belief in the traditional doctrines of a religion."[9] And finally, "religion" is defined to include "a cause, principle, or system of beliefs held to with ardor and faith."[10] The plain language of Article I, Section 7 thus prohibits the state from "preferenc[ing]"—*i.e.* "giving advantage to"—particular "creeds" of "religion" or "religious faiths," which includes sets of religious "beliefs" about abortion or when life begins. But Missouri did just that by enshrining those beliefs in law, thereby elevating the beliefs of certain religious denominations while "discriminat[ing]" against—*i.e.* "prejudicing"—all Missourians whose religious or personal beliefs on these questions differ.

Missouri takes this prohibition against religious preference very seriously. Because "the Missouri Constitution contemplates a strict and pervasive severance between religion and the state[, a]ny suggestion that a state . . . officer were favoring or tending to favor one religious persuasion over another in a [state action] would be intolerable to our organic law." *Waites v. Waites*, 567 S.W.2d 326, 333 (Mo. banc 1978). Indeed, even *un*intentional preference of particular religious beliefs is unconstitutional. *Harfst*, 163 S.W.2d at 614 (holding that government officials "unintentionally but unquestionably violated" earlier versions of Article I, Sections 5–7).

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[7] *Preference*, Merriam-Webster, https://www.merriam-webster.com/dictionary/preference (last visited Oct. 25, 2023); *Discrimination*, Merriam-Webster, https://www.merriam-webster.com/dictionary/discrimination (last visited Oct. 25, 2023).

[8] *Creed*, Merriam-Webster, https://www.merriam-webster.com/dictionary/creed (last visited Oct. 25, 2023). The Supreme Court of Missouri took a similar approach when interpreting the same word as it appears in Article IX, section 8 of the Missouri Constitution. *See Saint Louis Univ.*, 220 S.W.3d at 726 (quoting *Webster's New Int'l Dictionary* 533 (Unabridged 3d ed. 1993)).

[9] *Faith*, Merriam-Webster, https://www.merriam-webster.com/dictionary/faith (last visited Oct. 25, 2023).

[10] *Religion*, Merriam-Webster, https://www.merriam-webster.com/dictionary/religion (last visited Oct. 25, 2023).

The Challenged Provisions give preference to faiths that are opposed to abortion and believe life begins at "conception," codifying those beliefs into law. Many religious denominations do not share these beliefs. *See* Am. Pet. ¶¶ 121, 121 nn.6–7, 163–65.[11] The Challenged Provisions thus construct a legal regime in which Missourians whose religious beliefs counsel against abortion access are able to block access by Missourians whose religious beliefs counsel in favor of abortion access. This is precisely what Section 7 prohibits.

C. The Challenged Provisions coerce all Missourians into abiding by specific religious beliefs.

The Challenged Provisions have the additional effect of impermissibly coercing Missourians into abiding by religious beliefs about abortion and the beginning of human life. Article I, Section 5 mandates "that the state shall not coerce any person to participate in any . . . religious activity," and Section 6 ensures "[t]hat no person can be compelled to erect, support, or attend any place or system of worship." Section 5 preserves the right to be "devot[ed] to religious beliefs according to the dictates only of one's conscience without . . . forcible direction." *Harfst*, 163 S.W.2d at 611–12, 612 n.9.

Again, the Challenged Provisions violate the plain text of these provisions. "Coerce" is defined as "to compel to an act or choice," "to achieve by force or threat," and "to restrain or dominate by force."[12] "Compel" is defined as "to drive or urge forcefully or irresistibly" and "to cause to do or occur by overwhelming pressure."[13] The term "to support" is broadly defined to include to "promote the interests or cause of."[14] And "system" means, among other things, "an

[11] *See also, e.g.*, Am. Pet. ¶ 56 (discussing Petitioner Rabbi Bennett's belief "that human life does not begin at conception"); *id.*, ¶ 74 (discussing Rev. Taves' objection to the belief that life begins "at what they call 'conception'"); *id.*, ¶ 121 (noting that Islam does "not believe that a fetus has a soul until 120 days into pregnancy" (citations omitted)).

[12] *Coerce*, Merriam-Webster, https://www.merriam-webster.com/dictionary/coerce (last visited Oct. 25, 2023).

[13] *Compel*, Merriam-Webster, https://www.merriam-webster.com/dictionary/compel (last visited Oct. 25, 2023).

[14] *Support*, Merriam-Webster, https://www.merriam-webster.com/dictionary/support (last visited Oct. 25, 2023).

organized set of doctrines, ideas, or principles," while "worship" has a facially religious meaning: "a form of religious practice with its creed and ritual."[15] And again, creed includes a "set of fundamental beliefs."[16] Article I, Sections 5 and 6 thereby prohibit the state from compelling, through "force or threat" of criminal or civil penalty, any person to "support" a "system of worship"—*i.e.*, promote a set of religious beliefs—including by compelling them to endure forced pregnancy in service of the state's preferred religious beliefs.

Thus, in *Oliver v. State Tax Commission*, the Missouri Supreme Court analyzed the claim that a property tax form's requirement of the oath "So help me God" was religiously coercive. 37 S.W.3d at 245. The Court suggested that the claim was a "trifle[ ]," but it acknowledged that "in the area of religious beliefs the contentions made by the parties are taken seriously." *Id.* at 251. The Court held the oath constitutional only because it offered the alternative of a nonreligious affirmation and was "neither a requirement nor an exhortation to [a specific religious] belief." *Id.*

The Challenged Provisions adopt particular religious beliefs about abortion and impose those beliefs on all people in Missouri. For Petitioner Molly Housh Gordon, the state's coercion—which would force her to remain pregnant against her will—directly threatens her life and health as someone with an autoimmune condition exacerbated by pregnancy. Am. Pet. ¶¶ 40–43. Her faith is also coerced by these laws; the statement in law that life begins at "conception" forces upon Unitarian Universalists a religious idea about the beginning of human life that is antithetical to their beliefs. Am. Pet. ¶ 43; *see also* Am. Pet. ¶ 71. More broadly, the Challenged Provisions force Missourians of various faiths, including Petitioners, to "support," with their taxpayer dollars, a "system of worship" guided by a fundamentally different set of beliefs. Mo. Const. Art. I, § 6.

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[15] *System*, Merriam-Webster, https://www.merriam-webster.com/dictionary/system (last visited Oct. 25, 2023); *Worship*, Merriam-Webster, https://www.merriam-webster.com/dictionary/worship (last visited Oct. 25, 2023).

[16] *Creed*, Merriam-Webster, https://www.merriam-webster.com/dictionary/creed (last visited Oct. 25, 2023).

Unlike in *Oliver*, the Challenged Provisions offer no accommodation or alternative. Put differently, the people of Missouri—no matter their own beliefs and no matter the burdens—are forced to abide by the religious view that "God doesn't give us a choice in this area." Am. Pet. ¶ 133 (statement of Rep. Holly Thompson Rehder in support of H.B. 126). Most significantly, Missourians who can become pregnant like Petitioner Gordon will be forced to support that belief through forced pregnancy—sacrificing their bodies and their autonomy to support the state's preferred religious beliefs—potentially at great detriment to their health, economic security, and equality. Am. Pet. ¶¶ 217–20 (explaining that "a woman's risk of death associated with childbirth nationwide is approximately 14 times higher than that associated with abortion," and that risks from pregnancy and childbirth are particularly acute in Missouri given its already high rate of maternal mortality); Am. Pet. ¶¶ 221–25 (explaining that "denial of abortion care also has devastating implications for individuals' financial well-being, job security, workforce participation, and educational attainment"). If that doesn't constitute coercion in violation of Missouri's Establishment Clauses, it's difficult to imagine what does.

* * *

In all, Petitioners have sufficiently alleged that the Challenged Provisions were passed with the purpose of enshrining religious beliefs in law, that the provisions unconstitutionally preference certain religious beliefs, and that the provisions coerce Missourians into living according to those religious beliefs. Any one of those would be sufficient to survive a motion for judgment on the pleadings. All together, there can be no question.

II. State Respondents' Motion misstates the governing law and misunderstands Petitioners' claims.

In the motion for judgment on the pleadings, State Respondents put forth a mishmash of inapplicable legal standards, misstatements of Petitioners' claims, and non sequiturs about the rights of individual legislators. Each argument is as novel as it is wrong.

A. Neither *Rodgers v. Danforth* nor the history of abortion regulations more generally make the Challenged Provisions constitutional.

State Respondents are wrong when they argue that the Challenged Provisions are constitutional because in 1972 the Missouri Supreme Court upheld a different law regulating abortion. And State Respondents are wrong when they argue that because there is a history of state regulation of abortion generally, Petitioners' specific challenge fails on the pleadings.

1. State Respondents incorrectly contend that *Rodgers v. Danforth*, 486 S.W.2d 258 (Mo. banc 1972), is controlling, or even persuasive, here. In that decision, the Missouri Supreme Court rejected multiple challenges under the federal Constitution to a Missouri abortion law, based entirely on three sentences of analysis of a single Supreme Court death-penalty case, *Furman v. Georgia*, 408 U.S. 238 (1972), which has subsequently been overruled.[17] In *Rodgers*, the Missouri Supreme Court determined that it was "bound to follow" the decisions of the U.S. Supreme Court, that the U.S. Supreme Court in *Furman* had "generally expressed its disapproval of the practice of putting to death persons who, some would argue, had forfeited their right to live," and therefore concluded that the rights of fetuses—stipulated by both sides to be "unborn children"—must be

[17] State Respondents suggest that *Rodgers* interpreted the Missouri Constitution, as opposed to the federal Constitution. Mem. at 13. But, as the dissent clarifies, no state constitutional claims were before the Court. *See Rodgers v. Danforth*, 486 S.W.2d 258, 261 (Mo. banc 1972) (Seiler J., dissenting) (noting that the plaintiffs claimed a "violation of their rights under the 1st, 4th, 5th, 9th and 14th Amendments"). In addition, the *Rodgers* majority specifically noted that it was "bound to follow the decisions of the Supreme Court of the United States," *id.* at 259, citing *Cooper v. Aaron*, in which the Supreme Court held that the "interpretation of the Fourteenth Amendment enunciated by this Court . . . was of binding effect on the States." *Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

given "at least equal solicitude" due to their "innocen[ce]." *Rodgers*, 486 S.W.2d at 259. Thus, because it read *Furman* to hold the death penalty unconstitutional, the Missouri Court reasoned that it was bound to conclude that the ending of what was stipulated to be a human life through abortion was also unconstitutional. *Id.*

But *Furman* was overruled just four years later. Although *Furman* resulted in a brief four-year moratorium on the death penalty in the United States, *see Baze v. Rees*, 553 U.S. 35, 88 (2008) (Scalia, J., concurring), the Court reversed course in *Gregg v. Georgia*, 428 U.S. 153 (1976), holding "that the punishment of death does not invariably violate the Constitution." *Id.* at 168–69. Because *Rodgers* was predicated wholly upon a decision that has since been overruled, *Rodgers* itself is no longer good law.

The *Rodgers* decision included no analysis of Missouri's Establishment Clauses, and indeed the *Rodgers* Court had no occasion to consider the particular claims presented here because they were not before the Court. The parties also *stipulated* to an issue at the very heart of Petitioners' case—that life begins at conception—which the Court found to be dispositive. The parties in *Rodgers* stipulated that: "Intervenor Defendant in this case, and all other unborn children have all the qualities and attributes of adult human persons differing only in age or maturity. Medically, human life is a continuum from conception to death." *Rodgers*, 486 S.W.2d at 259. The majority relied heavily on this stipulation in deciding the case, noting that "[t]he issues in this case are sharply and significantly narrowed by the . . . facts stipulated to by the parties." *Id.*

In this case, however, Petitioners repeatedly dispute that human life begins at "conception" and contend that, as used in Missouri law, it is a religious idea and not a question that can be answered by science as a matter of fact. Am. Pet. ¶ 121 ("[T]he term 'conception' is not a medical or scientific term, and the exact moment when life begins cannot be determined as a matter of

science. Rather, when life begins, and whether or when 'ensoulment' occurs, are purely theological and philosophical questions about which religious sects and individuals have different perspectives.").[18] *See also* Am. Pet. ¶¶ 2, 4, 8. On a motion for judgment on the pleadings, this Court must accept these well-pleaded allegations as true. *See Madison Block Pharmacy, Inc.,* 620 S.W.2d at 345.[19]

Finally, *Rodgers* is also not binding here because that case considered a different statute enacted in a different context by a different legislature. As discussed in Section I.A, *supra*, the inquiry into impermissible purpose under the Establishment Clauses is necessarily fact- and context-specific. *See Berghorn*, 260 S.W.2d at 583; *see also McGowan v. Maryland*, 366 U.S. 420, 448–50 (1961) (requiring courts to look at the current purpose of a law, not what the purpose of a similar law may have been in the past). Accordingly, the Missouri Supreme Court's consideration of the constitutionality of a prior law on the same topic is simply irrelevant to the question of whether the laws challenged in this case were enacted with an improper purpose. This is particularly so where, as here, the prior law was enacted over a century ago in a different scientific,

[18] The Amended Petition cites a medical journal article by Dr. Richard J. Paulson entitled "It Is Worth Repeating: 'Life Begins at Conception' is a Religious, not Scientific, Concept" which states: "It must be pointed out that the concept of 'life begins at conception' is neither scientific nor a part of any (ancient) traditional religious teaching. . . . Life is continuous. Dichotomous thinking (0% human life for the egg, 100% human life for the zygote) is not scientific. It is religious thinking. Fertilization is not instantaneous, embryonic development is not precise, and individual blastomeres can make separate individuals."). Am. Pet. ¶ 121 n.5.

[19] As set forth in Section II.C, *infra*, whether "life begins at conception" is knowable as a matter of science or is a theological question is a factual issue, not a legal one, and so State Respondents' arguments that this question can be resolved by reference to case law must fail. Perhaps recognizing this, State Respondents also attempt to dispute Petitioners' well-pleaded facts by introducing extraneous material from outside the pleadings, including two articles on embryology from 1996 that discuss fertilization (not conception). *See* Mem. at 16–17. If this Court chooses to consider material outside the pleadings, it must treat Respondents' Motion as a motion for summary judgment. Petitioners contend that doing so would be premature, as they have not had a reasonable opportunity to present pertinent materials supporting their claims, including but not limited to expert reports. *See* Rule 55.27(b); *see also State ex rel. Polaris Indus., Inc. v. Journey*, 505 S.W.3d 370, 374 (Mo. App. W.D. 2016) (converting motion for judgment on the pleadings to motion for summary judgment after both parties submitted materials outside the pleadings). As Petitioners will show more fully after the close of discovery, State Respondents' argument that Missouri law has conclusively settled the conception question in their favor fails, in part because it relies on outdated, flawed science.

religious, and political context. *See Rodgers*, 486 S.W.2d at 261 (Seiler, J., dissenting) (noting that the statute at issue in *Rodgers* was "enacted a hundred years or more ago, when the danger to women's health from infection following any surgical procedure which entered a body cavity was so great that direct interference with her constitutional rights was justified"). *Cf.* Am. Pet. ¶ 218 ("Abortion is one of the safest medical procedures in the United States. . . . [with a lower] mortality rate [than] colonoscopies, plastic surgery, and adult tonsillectomies."); Am. Pet. ¶ 219 ("[T]he national average rate for maternal mortality was a depressing 19.3 maternal deaths per 100,000 live births from 2016–2020, [and] the rate in Missouri was more than 20% higher."). Even if *Rodgers* were still good law, it is not binding here.

2. Similarly, State Respondents ask this Court to adopt the novel theory that a law cannot be found unconstitutional if it resembles a statutory scheme that coexisted with any version of the state's Constitution. Mem. at 20–24. Put more directly, they argue that no current or future statute can be held unconstitutional if a historical analogue preceded or coexisted with a version of the Missouri Constitution. This argument fails at multiple levels.

First, State Respondents' argument fails because of the dates of the Challenged Provisions. The Total Abortion Ban was adopted as part of H.B. 126 in 2019 and the Medication Abortion Restrictions and Concurrent Original Jurisdiction Provision arose from S.B. 5 in 2017. *See* Am. Pet. ¶¶ 3–4. Under Missouri law, a "provision is to be tested by a constitutional provision in effect at the time of [its] adoption . . . not by a constitutional provision subsequently [or previously] adopted." *City of Kansas City v. St. Paul Fire & Marine Ins. Co.*, 639 S.W.2d 903, 905 (Mo. App. W.D. 1982); *see State ex rel. Oliver v. Hunt*, 247 S.W.2d 969, 971 (Mo. banc 1952). Thus, whether different abortion restrictions coexisted with a different version of the Missouri Constitution in 1879 or 1949 is irrelevant.

Second, there were significant changes to the Missouri Constitution since those earlier bans were enacted. As State Respondents acknowledge in a footnote, some of the constitutional text at issue was not adopted until 2012. Mem. at 23, 23 n.9. Article I, Section 5 was amended in August 2012 to include additional anti-establishment protections. Specifically, some of the added language states that "neither the state nor any of its political subdivisions shall establish any official religion."[20] Despite this unequivocal prohibition on religious establishments, the Challenged Provisions adopt a narrow religious view of abortion and force people and faith communities with different beliefs to adhere to religious requirements in tension with their own. State Respondents are thus wrong when they say that "absent specific text in the 1945 Constitution expressly rejecting the long history of abortion regulation in the State, this Court must conclude that these kinds of restrictions are lawful." Mem. at 21. Specific text rejecting laws like the Challenged Provisions *was* added to the operative Constitution—in 2012.

Third, State Respondents also ignore ample case law decided after 1945 interpreting the Missouri Constitution's Establishment Clauses upon which Petitioners rely here. *See, e.g.*, *Ams. United*, 538 S.W.2d at 720 (collecting cases decided after 1945 holding that Missouri's Establishment Clauses are more restrictive than the federal clause in protecting "absolute separation of church and state"); *Berghorn*, 260 S.W.2d at 583 (requiring consideration of the totality of the circumstances in assessing antiestablishment claims); *see also supra* n.3 and accompanying text.

[20] State Respondents claim that Article I, Section 5 supports the legislature's authority to regulate abortion healthcare because it "states that the constitutional right recognized by that section 'shall not be construed to [expand the rights of prisoners in state or local custody beyond those afforded by the laws of the United States,] excuse acts of licentiousness, nor to justify practices inconsistent with the good order, peace or safety of the state, or with the rights of others.'" Mem. at 23. This language contemplates individual actions and prohibits the use of the rights and liberties embedded in this Section as a personal defense. It does not endow the legislature with authority to codify religious value judgments into law.

Fourth, and finally, State Respondents cite the 1879 and 1949 statutes for the proposition that if the constitutions adopted in 1875 and 1945 "prohibite[ed] laws restricting abortion, one would expect someone to have said something." Mem. at 22–23. Of course, this statement conveniently ignores that no woman could legally cast a vote in Missouri until 1919. *In re Graves*, 30 S.W.2d 149, 150–51 (Mo. banc 1930). In other words, claiming that someone would have said something if the law was unconstitutional ignores: (i) that for the relevant historical period, the Missouri legislature excluded people who were most impacted by abortion restrictions; and (ii) when the Challenged Provisions were enacted, people *did* say something. Lawmakers and faith leaders alike pointed out that S.B. 5 and H.B. 126 unconstitutionally legislated religion, but the legislature enacted those bills into law anyway. *See* Am. Pet. ¶¶ 130, 142.

Even if it *were* correct that the prior bans were identical in language and purpose to the ban challenged today, and it were correct that "nobody said anything" about those bans, that would still not be dispositive. The Missouri Supreme Court has made clear that even "long acquiescence" in unconstitutional activity does not make it proper because "[n]o one may waive the public interest; the constitutional provisions are mandatory and must be obeyed." *Harfst*, 163 S.W.2d at 614. State Respondents are asking this Court to ignore recent changes to the actual text of the Constitution as well as case law interpreting the Constitution's protections against the establishment of religion. That is not how constitutional law works.

B. Petitioners do not have to show that there's no plausible secular justification for the Challenged Provisions, that all supportive lawmakers made religious statements, or that the provisions enshrine the view of one specific religious group.

1. Despite the raft of case law about religion being *an* impermissible purpose for legislation, *see supra* Section I.A., State Respondents argue that Petitioners must show that the

only legislative purpose is religious, or that the State's ability to identify even one secular justification for the laws could defeat the claim.[21] That is flatly wrong.

The U.S. Supreme Court has repeatedly refused—under the less-strict federal Establishment Clause—to allow secular reasons given for government actions to defeat a claim when an impermissible religious purpose also motivated the government. In *Santa Fe*, for example, the Court struck down a prayer practice before football games, despite the school district arguing that the prayers had the secular purpose to "solemnize sporting events, promote good sportsmanship and student safety, and establish an appropriate environment for competition." *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 309 (cleaned up); *see also McCreary*, 545 U.S. at 860.

Likewise, the U.S. Supreme Court has also held that "[t]he Free Exercise Clause, like the Establishment Clause, extends beyond facial discrimination." *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993). In *Lukumi*, the Court held that city ordinances unconstitutionally targeted religious practice because the context surrounding the challenged ordinances showed their true discriminatory purpose. *Id.* at 534–40. Several justices found legislative history relevant to that contextual analysis, analogizing to Equal Protection cases that engage in similar inquiry. *Id.* at 540–42 (Kennedy & Stevens, J.J., opinion) (citing *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267–68 (1977)); *see also U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) (striking down a law where the legislature's purpose was unconstitutionally discriminatory, regardless of whether the same law could have been passed for other reasons); *City of Ladue v. Horn*, 720 S.W.2d 745, 751–52 (Mo. App. E.D. 1986) (noting

[21] State Respondents briefly allege that the "provisions challenged here are simple health-and-welfare regulations." Mem. at 33. But the Amended Petition alleges that this is mere pretext and that these laws are unnecessary, contrary to the scientific evidence, and cause great harm. *See, e.g.*, Am. Pet. ¶¶ 138, 172, 218–19. In any event, Missouri courts must strike down a supposed public health statute if it "has no real or substantial relation to these objects, or is a palpable invasion of rights secured by the fundamental law . . . and thereby give effect to the constitution." *State v. Layton*, 61 S.W. 171, 174 (Mo. 1901) (quoting *Mugler v. Kansas*, 123 U.S. 623, 661 (1887)).

that zoning ordinances may be improper if they are based on invidious discrimination). Indeed, "[e]xamination of purpose is a staple of statutory interpretation that makes up the daily fare of every appellate court in the country, . . . and governmental purpose is a key element of a good deal of constitutional doctrine." *McCreary*, 545 U.S. at 861 (noting centrality of purpose in equal protection, commerce, and free exercise jurisprudence).[22]

The only authority State Respondents cite to support their novel "no-secular-purpose" test is *Boone v. State*. *See* Mem. at 19 (citing *Boone v. State*, 147 S.W.3d 801, 805 (Mo. App. E.D. 2004)). But in *Boone*, the court analyzed the text of a law authorizing a treatment program which stated that "the ultimate goal [of the program] shall be the prevention of future sexual assaults by the participants." 147 S.W.3d at 805 (quoting § 589.040(1), RSMo). The petitioner in that case did not present any evidence showing that this stated goal was either religious in itself or pretext for a religious purpose. Nor did he provide any evidence of any religious effect of the program; he simply claimed that he could not comply with the program because of *his* religious beliefs (effectively making a free-exercise argument). *Id.* at 805–06. The court accordingly rejected the petitioner's claim, concluding that he had not carried his burden to show that the law was an establishment of religion.

2. In yet another attempt to dodge the controlling legal standard, State Respondents argue that a plain-text approach to statutory interpretation forbids consideration of the legislative record, including legislators' statements. Mem. at 27. State Respondents further argue it is somehow relevant that the Challenged Provisions hypothetically would have passed if the votes of lawmakers who made the statements Petitioners cited in the Amended Petition were not counted.

[22]Although far from a conventional Establishment Clause claim, the U.S. Supreme Court even looked at the purpose behind a government policy that involved foreign affairs—an area in which the President's power is almost plenary—including by examining extrinsic statements made by the President prior to taking office—even though the policy was "facially neutral toward religion." *See Trump v. Hawaii*, 138 S. Ct. 2392, 2418, 2420 (2018).

Petitioners have repeatedly explained that context is relevant in considering a challenge under the Establishment Clauses; none of the cases cited by State Respondents hold otherwise. *Black River Motel, LLC v. Patriots Bank*, 669 S.W.3d 116, 122 (Mo. banc 2023), was a case about the Missouri Commercial Receivership Act, and stands for the unremarkable proposition that statutory text is the primary interpretive tool of a statute's meaning. Mem. at 27. State Respondents next rely on *Ocello v. Koster*, 354 S.W.3d 187 (Mo. banc 2011), to argue that the constitutionality of a bill cannot be determined by the statements of a few individual legislators. *Id*. But *Ocello* involved a different legal test under a different constitutional provision. *Ocello* was a challenge under the federal Free Speech Clause to statutes restricting sexually oriented businesses. *Id.* at 195. The test under the Free Speech Clause asks whether a statute is content-neutral and, if so, whether it constitutes appropriate time, place and manner restrictions that are designed to serve a substantial government purpose. *Id*. at 200, 202. Under *that* standard, an individual legislator's negative statements about adult-oriented businesses in passing the law did not matter because the law did not target them based on the content of their speech. *Id.* at 201–02.[23]

With respect to the vote-count argument, it is not only the lawmakers quoted by Petitioners who intended to establish religious beliefs as law. 100% of the legislators who supported H.B. 126 voted for a bill that expressly stated the "intent of the general assembly" was to recognize "that Almighty God is the author of life" and completely ban abortion in support of that religious belief.

[23] In all events, the cases State Respondents cite reveal that the legislative record *does* matter. In *Ocello*, the Court considered that the legislature engaged in factfinding regarding the secondary effects of sexually oriented business on their neighboring communities with regard to crime, health, and property values that included: "(1) judicial opinions; (2) crime, land use and health impact reports; (3) expert testimony; and (4) anecdotal evidence." *Ocello v. Koster*, 354 S.W.3d 187, 204 (Mo. banc 2011). Likewise, in conducting an extensive analysis of the legislative record and other evidence at trial, the District Court in *Harris v. McRae*, discussed more fully in Section II.D, *infra*, said that while "the healthy working of our political order cannot safely forego [sic] the political action of the churches. . . [t]hat does not mean that the fact of denominational support is not relevant to analysis of legislation to determine whether it violates the establishment clause; *the law is otherwise*." *McRae v. Califano*, 491 F. Supp. 630, 640–41 (E.D.N.Y. 1980), *rev'd sub nom. Harris v. McRae*, 448 U.S. 297 (1980) (emphasis added).

See §§ 188.010, 188.017, 188.026, RSMo. And all the lawmakers who voted to enact S.B. 5 did so even though the primary justification for the law was the biased Senate "Sanctity of Life" Committee investigation. Am. Pet. ¶¶ 9, 138. The laws themselves are what have an impermissible religious purpose, even without the statements of individual legislators, which merely provide additional context. That not all of the bills' supporters made religious statements does not negate this impermissible purpose.

3. As to State Respondents' suggestion that Petitioners must show that the Challenged Provisions advance the tenets of only "one religion," Mem. at 4, 14, 16, that is neither Petitioners' claim nor the law. Petitioners need to show only that the Challenged Provisions have an impermissible purpose or effect of "advancing religion." *McCreary*, 545 U.S. at 860; *see also Chi., B. & Q.R. Co.*, 143 S.W. at 794. State Respondents point to no authority for the proposition that the religious belief advanced must belong to only one religion, and Petitioners have never suggested as much. Petitioners allege that the Challenged Provisions violate Article I, Sections 5–7 of the Missouri Constitution because they "constitute[] thinly veiled efforts to enshrine in law state officials' particular religious beliefs against abortion." *See* Am. Pet. ¶ 3. The First Amended Petition repeatedly refers to the Challenged Provisions as the establishment of "particular religious beliefs against abortion" (¶ 3) and "particular religious beliefs about God and when life begins" (¶ 149).[24] Petitioners' focus has always been on the unconstitutional establishment of religious beliefs, doctrine, and teachings about abortion and the beginning of human life**,** which may be shared by multiple religions or denominations. Put simply, an unconstitutional establishment of

[24] *See also* Am. Pet. ¶ 4 ("a particular religious view," "personal religious beliefs"), ¶ 9 ("certain religious beliefs"), ¶ 12 ("others' religious beliefs"), ¶ 119 ("particular religious beliefs"), ¶ 160 ("one set of beliefs"), ¶ 237 ("a particular faith and set of religious beliefs," "system of religious beliefs"), ¶ 241 ("religion and system of religious beliefs"), and ¶ 245 ("set of religious teachings").

religious beliefs isn't made constitutional because the religious belief is shared by more than one religion.

C. The Missouri courts have not decided when human life begins as a legal matter, nor could they, because it is a factual question.

As discussed above, whether "life begins at conception" as used in Missouri law is a religious belief is a factual issue, not a legal one. *See supra* Section II.A. But to the extent that a response is required to State Respondents' assertion that this is a settled legal issue, neither *Steggall v. Morris,* 258 S.W.2d 577 (Mo. banc 1953), nor *State v. Emerich*, 13 Mo. App. 492 (1883), support their argument.

In *Steggall*, the Missouri Supreme Court held that a parent may, *after their child is born*, maintain a wrongful death action for a tort that harmed the pregnant person and their fetus, later resulting in the child's death. *Steggall,* 258 S.W.2d at 578–79. The holding in *Steggall* simply resolved the legal question of whether a tort claim is cognizable, not the moral, philosophical, and religious question of when life begins (nor could it possibly answer the latter). Where the *Steggall* Court's decision muddies the waters between the two, it relies on opinions of other courts that in turn rely on "medical authorities" that are more than 70 years old. *Id.* at 579. Moreover, the Court explicitly "confine[d] [its] ruling to the facts presented." *Id.*

In *Emerich*, a criminal case under a prior abortion ban, the court's statement that a fetus was alive from conception was *dicta*. The actual holding in the case applied the common-law definition of "quickening," the time at which fetal movement was detectable by a pregnant person, to determine the appropriate degree of manslaughter for a defendant who caused a pregnant person's death. *Emerich*, 13 Mo. App. at 493–94. The abortion ban in place when this case was decided 140 years ago, and the common law "quickening" standard, are no longer part of the law. *Id.* at 495.

Scientific understanding of prenatal development has significantly advanced since *Emerich* and *Steggall*, and neither case is directly on point. A much more recent and relevant statement from the Missouri Supreme Court recognizes that if the state engages in action that "unduly restrict[s]" abortion access based upon the notion that "human life begins at conception," courts may assess whether that action reflects an impermissible "religious purpose." *Doe v. Parson*, 567 S.W.3d 625, 629 (Mo. banc 2019) (*Parson I*). Petitioners have pleaded that the Challenged Provisions reflect exactly that kind of impermissible purpose. *See supra* Section I.A.

D. The Challenged Provisions go far beyond coincidental similarity to religion; they enshrine particular religious views in law.

State Respondents misconstrue Petitioners' claim to be that the Challenged Provisions are unconstitutional "just because some legislators passed [them] based on ethical motivations consistent with their religions." Mem. at 31. But as set forth at length in Part I, *supra*, Petitioner's claim is that the plain language of the Challenged Provisions and the context in which they were enacted reveal that they were passed with an impermissible purpose of enshrining in law particular religious beliefs about abortion and when life begins, that they preference those beliefs over all others, and that they compel Missourians to comply with a system of beliefs with which they may disagree, no matter the burden or harm to their health or lives. Petitioners do not allege that the Challenged Provisions "merely coincide" with religious beliefs. *See id*. at 15.

In any event, the cases State Respondents cite—namely, *McGowan v. Maryland,* 366 U.S. 420 (1961), *Harris v. McRae*, 448 U.S. 297 (1980)*,* and the Eighth Circuit's decision in *Doe v. Parson*, 960 F.3d 1115 (8th Cir. 2020) (*Parson II*)—did not deal with the overtly religious purpose

and effect present here, which rise well above the level of mere coincidence apparent in the federal cases and did not address Missouri's stronger anti-establishment protections.[25]

In *McGowan v. Maryland*, the U.S. Supreme Court held that the federal Establishment Clause does not "ban federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions." 366 U.S. at 442. But the Court further clarified that when "it can be demonstrated that [the legislation's] purpose—evidenced either on the face of the legislation, in conjunction with its legislative history, or in its operative effect—is to use the State's coercive power to aid religion," that legislation may violate the Establishment Clause. *Id.* at 453.

Likewise, neither *Harris*, nor *Parson II*—both of which were decided under the less-protective federal Establishment Clause—are controlling or even persuasive here. In both cases the courts determined that the abortion restrictions at issue merely expressed a value judgment discouraging abortion as opposed to forcing compliance with that judgment, as the Challenged Provisions do here. In *Harris*, the Court considered the constitutionality of the Hyde Amendment, which prohibits federal dollars from being used towards coverage of abortion in Medicaid. 488 U.S. at 301. The Court's holding turned on its conclusion (however misguided) that the Hyde Amendment places "no governmental obstacle in the path of a woman who chooses to terminate her pregnancy, but rather, by means of unequal subsidization of abortion and other medical services, encourages alternative activity deemed in the public interest." *Id.* at 315. Similarly,

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[25] State Respondents raise the specter of many laws being struck down if their misinterpretation of Petitioners' claims is adopted and give the example of the Civil Rights Act of 1964. Petitioners do not disagree that some individuals supported (or opposed) that law because of their religious beliefs. *See* State Resp't Mot. to Dismiss at 25; State Resp't Reply in Supp. Mot. to Dismiss at 37 n.27 (noting that "[m]any people harbored religiously based racial prejudices," such as the idea that the "separation of the races was ordained by God"). Yet none of this has any bearing on the constitutionality of the Civil Rights Act of 1964, because it was enacted for the purpose of executing the Fourteenth Amendment's protections, not for the purpose of favoring one religious belief over another. *See, e.g.*, *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 249 (1964).

in *Parson II*, the Eighth Circuit considered the constitutionality of a single provision of Missouri law requiring that women seeking abortions must receive a state-sponsored booklet encouraging childbirth over abortion. 960 F.3d at 1118 (quoting § 188.027.1(2), RSMo). The court determined that the state was merely using "*its voice*" to take "sides on a divisive issue"—an issue the court did not dispute broke down "along religious lines." *Id.*[26]

But here, there can be no confusion or doubt about the coerciveness of the Challenged Provisions. The Total Abortion Ban prohibits abortion outright, subject to criminal penalty. No more coercive restriction is imaginable. And even before the Total Abortion Ban went into effect, the other Challenged Provisions so radically burdened and curtailed abortion access in the state that by early 2019 only one abortion clinic was open in the entire state of Missouri. Am. Pet. ¶ 3. By making abortion wholly inaccessible in Missouri and thereby compelling pregnant women to sacrifice their bodies, autonomy, health, and economic security in support of the state's preferred religious beliefs, the Challenged Provisions violate the more robust protections for separation of church and state guaranteed by Article I, Sections 5, 6, and 7 of the Missouri Constitution.[27]

E. Legislators do not have a free-exercise, free-speech, or equal-protection right to establish their religious beliefs into law.

State Respondents' Motion recycles the argument, rejected by this Court in its Order on their Motion to Dismiss, that the relief Petitioners seek would violate the federal and state

[26] The provision at issue in *Parson II* was enacted as part of S.B. 793 (2010), legislation not at issue in this case.

[27] For similar reasons, Petitioners' action is also distinguishable from the separate state-court challenge to portions of § 188.027, RSMo, *Parson I*, 567 S.W.3d 625 (Mo. banc 2019). In *Parson I*, the Missouri Supreme Court emphasized the lack of coerciveness of the relevant provisions in rejecting petitioner's federal Establishment Clause challenge. *See id.* at 626 (explaining that the "law neither requires a pregnant woman to read the booklet in question nor requires her to have or pay for an ultrasound. It simply provides her with that opportunity."). The Court also placed considerable emphasis on the petitioner's failure to challenge the Religious Interpretation Policy, § 1.205, RSMo (initially challenged by Petitioners but dismissed by this Court as unripe), and specifically left open the issue of whether that Policy "expressed a value judgment or instead reflected a religious purpose to unduly restrict access to lawful abortions." *Id.* at 629.

constitutions.[28] *See* Order at 14 ("The Court will not assume that Petitioners seek an unconstitutional order when it is not apparent from the record that they do so. In addition, this Court would not enter such an order."). Although this iteration of State Respondents' argument cites different constitutional provisions, the core of their argument remains unchanged: they misconstrue Petitioner's request to be free from established religion as somehow asking this Court to disfavor religion. In fact, what Petitioners seek is to prevent the *state* from impermissibly favoring particular religions and imposing one religious creed on abortion on everyone in Missouri. Judicial review does not violate lawmakers' rights; the Court's ability to evaluate the constitutionality of laws passed by the legislature is an important part of the checks and balances of our system of government. *Rebman v. Parson*, 576 S.W.3d 605, 609 (Mo. banc 2019), *as modified* (June 25, 2019) ("It is emphatically the province and duty of the judicial department to say what the law is." (citation omitted)). No tension exists between the relief Petitioners seek under the Establishment Clauses and any other constitutional provision.

1. The act of passing a law is neither speech nor religious exercise, it is government action by the legislative branch, subject to judicial review by the judicial branch. "The whole point of the First Amendment is to afford individuals protection . . . . The First Amendment does not protect the government." *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 206 (2014); *see also Emp't 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). Indeed, the Supreme Court has expressly held that "[r]estrictions upon legislators' voting are not restrictions upon legislators' protected speech," because "a legislator's vote is the commitment of his apportioned share of the

[28] State Respondents do not contend the analysis here is different under the federal versus state constitutional provisions on equal protection, free exercise, and free speech, and Petitioners agree.

legislature's power . . . [which] is not personal to the legislator but belongs to the people; the legislator has no personal right to it." *Nevada Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 125–26 (2011). This is why lawmakers generally lack the right to participate in cases challenging the constitutionality of laws they supported or opposed—because those challenges do not implicate their personal rights. *Cf. Raines v. Byrd*, 521 U.S. 811, 821 (1997) (members of Congress lacked standing to challenge the constitutionality of the line-item veto act because they had no "personal injury," since any harm was "solely because they are Members of Congress"). State Respondents fail to cite a single case in which a court has held that the First Amendment applies to the passage of legislation. To the contrary, the Supreme Court has expressly held that "a legislator has no right to use official powers for expressive purposes." *Carrigan*, 564 U.S. at 127.

That does not mean, however, that individual lawmakers do not have free-speech or free-exercise rights like everyone else. Petitioners do not dispute that those rights would generally prevent a government entity from punishing an individual—legislator or not—for expressing or exercising their religious beliefs. Nor do Petitioners dispute that lawmakers have absolute immunity for any statements they make on the floor, which may include statements of their own religious beliefs as well as false and malicious factual statements that would otherwise be libelous or even criminal. *See* Mo. Const. art. III, § 19(a); Mo. Const. art I, § 5 ("[E]lected officials . . . shall have the right to pray on government premises and public property so long as such prayers abide within the same parameters placed upon any other free speech under similar circumstances."); *United States v. Johnson*, 383 U.S. 169, 184–85 (1966) (criminal prosecution of an individual lawmaker cannot consider their legislative acts or motives). But the right of an individual lawmaker to speak or exercise religion must not be conflated with the government action inherent in the act of passing legislation. To hold otherwise would permit absurd results—

for example, it would be absurd to suggest that a trial court could preclude the Missouri Supreme Court from overturning its decision on the basis that trial judges have a First Amendment right to their opinions.

2. Neither judicial review of individual legislators' statements nor entry of relief from an unconstitutional law infringes any constitutionally protected rights of legislators. Contrary to State Respondents' contention that any consideration of the legislative record is akin to a "gag order" against legislators and would violate Article I's prohibition against religious tests for public office, Mem. at 27, the legislators aren't defendants, and Petitioners do not seek to make anyone "ineligible to any public office." [29] Mo. Const. art. I, § 5. Neither reviewing legislators' statements nor granting Petitioners relief in this case would unconstitutionally disfavor legislators who act in accordance with their religious beliefs vis-à-vis those who act on secular beliefs.

Legislators have no right to enact legislation that violates the Missouri or U.S. Constitutions, regardless of their personal motivation. As the Supreme Court pointed out in *Nevada Commission on Ethics v. Carrigan*, 564 U.S. 117, 125–26 (2011), there are many reasons lawmakers cast votes, including not only their "deeply held view[s]" but also: "my personal view is the other way, but my constituents [or big contributors] want this," and even "I don't have the slightest idea what this legislation does, but on my way in to vote the party Whip said vote 'aye'."[30] In other words, *legislative* purpose and individual lawmakers' personal motivations are not always the same. To illustrate this, take the example of a bill stating, "Methodist Christianity is the official

[29] To the extent that State Respondents would seek to raise the rights of individual lawmakers, if any existed in this context, they lack standing to do so. *See McGowan v. Maryland*, 366 U.S. 420, 429–30 (1961) (holding that appellants had standing under the Establishment Clause but not the Free Exercise Clause because "a litigant may only assert his own constitutional rights or immunities," not those of other "persons whose religious rights are allegedly impaired").

[30] The issue in *Carrigan* was not about legislative intent, but whether "legislators have a personal, First Amendment right to vote on any given matter" such that a state ethics recusal law should be subject to First Amendment scrutiny. 564 U.S. at 119. The Court held that they do not. *Id.* at 127.

religion of Missouri." If that law actually passed, it would obviously be an unconstitutional establishment of religion. Nonetheless, a bill that designates an official state religion could also be passed by atheist lawmakers who cast their votes for it for one of these other, nonreligious reasons—and such a bill would be just as unconstitutional, because the *bill's* purpose is to advance religion. Therefore, State Respondents' claim that a purpose analysis necessarily distinguishes between religious and nonreligious lawmakers and categorically disadvantages the former is false.

If the fact that a religious lawmaker supported a law because religious beliefs insulated it from being struck down as an establishment of religion, the federal Establishment Clause and the relevant provisions of Article I, Sections 5, 6, and 7 of the Missouri Constitution would be rendered meaningless. Continuing with the Methodist-Christianity-as-official-religion example, it is likely that many, if not most, lawmakers supporting this bill would be members of that religious denomination, but that doesn't change that this would be an unconstitutional establishment of religion. Yet under State Respondents' argument, striking that law down would violate the individual rights of the legislators who supported the law because of their personal beliefs.

Indeed, if it were true that lawmakers had a free-exercise, free-speech, or equal-protection right to violate the Establishment Clauses in passing legislation, what violation could not be reframed in this way? Take for example a public-school teacher who is proselytizing to students during class time—a clear-cut Establishment Clause violation.[31] Under State Respondents' theory, that teacher has a constitutionally protected 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

[31] *See, e.g.*, *McCollum v. Bd. of Educ.*, 333 U.S. 203, 212 (1948) (Establishment Clause forbids religious instruction in public schools).

Establishment Clause. 505 U.S. 577 (1992). If the clergy invited to give religious invocations at a public-school graduation had a right to do so on the basis that the valedictorian gave a secular speech, the Court would have reached the opposite result. If the Court were to adopt State Respondents' interpretation of the federal and state Constitutions, it would write the Establishment Clauses out of existence, which this Court cannot do. *See State ex inf. Ashcroft ex rel. Bell v. City of Fulton*, 642 S.W.2d 617, 620 (Mo. banc 1982) (stating that when two constitutional provisions are seemingly in conflict, they must be construed together and if the conflict is not irreconcilable both provisions must stand).

State Respondents' argument rests entirely on the U.S. Supreme Court's shadow-docket decision in *Tandon v. Newsom*, 141 S. Ct. 1294 (2021). Mem. at 31. But *Tandon* had nothing to say about the constitutional rights of elected officials, or whether those rights could preclude judicial review of an unconstitutional law. To the contrary, the plaintiffs in *Tandon* were all private parties seeking exemptions from COVID-19 restrictions to engage in at-home religious exercise. 141 S. Ct. at 1297.[32] *Tandon* does not support the sweeping proposition that legislators have a free-exercise, free-speech, or equal-protection right to write their religious beliefs into law and thereby force *everyone else* to follow them.

The other cases cited by State Respondents equally fail to support their novel understanding of constitutional law. *Blaske v. Smith & Entzeroth, Inc.*, 821 S.W.2d 822, 829 (Mo. banc 1991), Mem. at 31, dealt with a statute of repose in the tort-law context; the Missouri Supreme Court noted that no classification in the statute was a suspect class, and no fundamental right was involved, giving "freedom of religion" as one example of such a right. There is no statutory

[32] Although the plaintiffs 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.

classification at issue here—and, for all the reasons already discussed, examining the legislative purpose of a law does not classify lawmakers based on religious belief—so there is no equal-protection analysis to conduct.

Shurtleff v. City of Boston, 596 U.S. 243 (2022), the main speech case cited by State Respondents, Mem. at 33, only reinforces that government speech must comply with the Establishment Clause, whereas nongovernment speech (like the campaign speech of individual lawmakers) need not. The issue in that case was whether the city of Boston engaged in viewpoint discrimination when it flew the flags of various secular organizations but refused to fly one for a religious organization. *Shurtleff,* 596 U.S. at 247. In response to the City's argument that it was concerned flying the Christian flag would violate the Establishment Clause, the Court held that, "[w]hen a government *does not speak for itself*, it may not exclude speech based on 'religious viewpoint.'" *Id.* at 258 (emphasis added). Thus, the whole case turned on the fact that "Boston did not make the raising and flying of private groups' flags a form of government speech." *Id.* at 248. Government speech must comply with the Establishment Clause. *Pleasant Grove City v. Summum*, 555 U.S. 460, 467–68 (2009).

Finally, State Respondents' reliance on *Bond v. Floyd*, 385 U.S. 116, 135–36 (1966), and *North Carolina Right to Life, Inc. v. Leake*, 525 F.3d 274, 305 (4th Cir. 2008), is misplaced. Mem. at 33. In *Bond*, the Supreme Court held that Georgia could not refuse to seat a duly elected individual lawmaker, Mr. Bond, because of his views on the Vietnam War. 385 U.S. at 136–37. The Georgia lawmakers made no attempt to justify their refusal to seat Mr. Bond as an expression of their own First Amendment rights to express their disagreement with Mr. Bond's views. The case thus stands only for the unremarkable proposition that individual legislators retain free speech rights. Likewise, *North Carolina Right to Life,* a case involving campaign spending, simply held

that "political speech is as necessary for political challengers as for sitting legislators," 525 F.3d at 305, and had nothing to say about whether the right of individual legislators to free speech precludes judicial review of the laws they pass.[33]

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. Because their reading would nullify the Establishment Clauses, it must not be adopted by this Court.

CONCLUSION

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

[33] Finally, State Respondents object to Petitioners' observation that religious individuals and organizations proposed one of the Challenged Provisions that this Court has dismissed as unripe, arguing that granting Petitioners relief would also violate the right of religious individuals to petition the government. Again, State Respondents miss the mark. As with religious legislators' speech rights, Petitioners do not disagree that religious individuals can petition the government. Nonetheless, as already discussed at length, what organizations advocated for the legislation is relevant evidence in evaluating its purpose in an Establishment Clause challenge. *See* Section I.A.

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Respectfully submitted,

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