IN THE CIRCUIT COURT OF ST. LOUIS CITY
22ND JUDICIAL CIRCUIT
STATE OF MISSOURI

THE REVEREND TRACI BLACKMON, *et al.*	)	
Petitioners,	)	No. 2322-CC00120
v.	)	
STATE OF MISSOURI, *et al.*	)	Div. 18
Defendants.	)	

DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS AND SUGGESTIONS IN SUPPORT

Pursuant to Rule 55.27(b), the State Defendants[1] move for judgment on the pleadings in their favor, stating as follows.

[1] The State Defendants include the State of Missouri, Missouri Governor Mike Parson, Missouri Attorney General Andrew Bailey, Marc Taormina and the other officers and members of the Missouri State Board of Registration for the Healing Arts (named Defendants Naveed Razzaque, Jeffrey D. Carter, James A. Direnna, Jeffrey S. Glaser, Jade D. James-Halbert, Katherine J. Mathews, and David E. Tannehill), and Paula F. Nickelson—Acting Director of the Missouri Department of Health and Senior Services. (6.30.23 Order p. 2 ¶ 2).

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INTRODUCTION

For 198 years, Missouri has had statutes on the books restricting abortion. *See Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2285 & n.69 (2022) (listing Missouri laws prohibiting abortions since 1825). After all this time, Petitioners now raise an off-the-wall theory (already rejected by both the U.S. Supreme Court and the Missouri Supreme Court) asserting that abortion laws amount to an unconstitutional establishment of religion. Restriction on abortion is unconstitutional, they say, because it enshrines into law a religious belief particular to one specific religion. But both Petitioners' premise and conclusion are wrong.

Consider first the premise. In their filings, Petitioners conceded that a law cannot be held unconstitutional if it "corresponds" with the belief of more than one religion. Opp. to Mot. Dismiss at 30. Their theory instead is that legislation is unlawful if it cannot be justified by any secular argument and corresponds with only "*one* religion." *Id.* at 26 (emphasis added); *see also id.* at 35 (justifying the Civil Rights Act of 1964 because, although corresponding with religion, it "did not codify *one* specific religious belief") (emphasis added); *id.* at 36 (stating that Petitioners' "complaint is that these statutes implement *a particular* religious belief") (emphasis added); Am. Pet. ¶¶ 237, 214, 245 (claiming that the statutes violate the Missouri Constitution "[b]y establishing in law and imposing on Missourians *a specific* religion's beliefs" and thus "establish an official preference for *a particular* faith") (emphasis added). The problem with this argument is obvious: Petitioners have not pleaded (and could never plausibly plead) that no secular views justify opposition to abortion—much less that only "one religion" opposes abortion.

Next consider Petitioner's conclusion. That falls just as swiftly. Both the Missouri Supreme Court and the U.S. Supreme Court have rejected arguments that restrictions on abortion violate any prohibition on establishing a religion. *Rodgers v. Danforth*, 486 S.W.2d 258, 259 (Mo. banc

1972); *Harris v. McRae*, 448 U.S. 297 (1980). While *Harris* is persuasive (exceedingly so), *Rodgers* is directly controlling and compels judgment against Petitioners.

Even aside from precedent, the laws here plainly do not violate the Constitution, much less "clearly and undoubtedly" so. *See St. Louis Cnty. v. Prestige Travel, Inc.*, 344 S.W.3d 708, 712 (Mo. banc 2011). First, as stated above, they can be justified on secular grounds. Second, comparable Missouri laws have historically coexisted with the Missouri Constitution for hundreds of years. Third, Petitioners' interpretation of the Missouri Constitution would make it internally inconsistent. Fourth, even if these laws 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. And finally, the canon of constitutional avoidance favors judgment against Petitioners because their arguments would render provisions of the Missouri Constitution invalid under the U.S. Constitution.

Petitioners complain about three laws: a law prohibiting abortions (except for in medical emergencies), a law requiring organizations to adopt complication plans before providing chemical abortions, and a law allowing the Missouri Attorney General to enforce the first two laws. Rather than try to change the minds of legislators or other citizens, Petitioners ask this Court to strike down these laws and institute a new constitutional regime that would discriminate against religious legislators and perpetuate anarchy. This Court should reject Petitioners' off-the-wall legal theory and speedily enter judgment on the pleadings in favor of Defendants.

FACTS

I. Petitioners' First Amended Petition

Petitioners are 14 individuals who allege that they hold various religious views generally but jointly hold a religious view that abortion should be legally permissible. Am. Pet. ¶¶ 15-16. In their First Amended Petition, Petitioners alleged that Missouri Revised Statute §§ 1.205, 188.017,

188.021, 188.027, 188.037, 188.038, 188.039, 188.056, 188.057, 188.058, 188.075, and 188.375 and certain regulations (19 CSR 30-30.061(2)(D) and (2)(G)(1)-(2)) amount to an establishment of religion under article I, sections 5–7 of the Missouri Constitution. Am. Pet ¶¶ 3, 5, 11, 16, 166–89, 234–46. On this basis, Petitioners asked that this Court declare these laws unconstitutional and prevent Defendants from enforcing them.

On June 30, 2023, this Court granted in part Defendants' motion to dismiss, leaving a challenge to only three laws: the No Elective Abortion Law, the Medication Abortion Regulations, and the Concurrent Original Jurisdiction Provision (collectively, the remaining "Challenged Provisions"). Order p. 16 (June 30, 2023).

Remaining Challenged Provisions	Citation (RSMo)	Bill Number, Year
1. No-Elective-Abortion Law Am. Pet. ¶¶ 168–172	§ 188.017	H.B. 126 (2019)
2. Medication Abortion Regulations Am. Pet. ¶¶ 187–189	§ 188.021.2–.3 19 CSR 30-30.061(2)(D) 19 CSR 30-30.061(2)(G)(1)-(2)	S.B. 5 (2017) *regs adopted April 2018
3. Concurrent Original Jurisdiction Provision Am. Pet. ¶¶ 3, 11, 190	§ 188.075.3	S.B. 5 (2017)

These provisions were enacted from two bills: S.B. 5 (2017) and H.B. 126 (2019), attached as Exhibits A and B, respectively. Exhibit C contains a chart with the text of the Challenged Provisions. Exhibits D, E, F, and G contain Westlaw printouts of the Challenged Provisions. H.B. 126 (2019) enacted one provision that is challenged in this suit.

1. **The No-Elective Abortion Law**, § 188.017.2, provides that "no abortion shall be performed or induced upon a woman, except in cases of medical emergency." It also contains penalties for violations of the law.

S.B. 5 (2017) enacted the other two provisions that are challenged.

2. **The Medication Abortion Regulations** are challenged in three separate parts—two statutory subsections and two regulation subsections. The challenged statute is § 188.021.2–.3.

- **Subsection 2** states, in relevant part, that when an abortion drug causes "more than one percent" of patients to require "surgical intervention after its administration," then physicians may not prescribe or administer that drug without first obtaining approval from the Missouri Department of Health and Senior Services (DHSS) of a complication plan for that drug's administration.
- **Subsection 3** provides, in relevant part, that DHSS may adopt regulations "governing complication plans to ensure that patients undergoing abortions induced by drugs or chemicals have access to safe and reliable care."

The challenged regulation subsections are 19 CSR 30-30.061(2)(D) and (2)(G)(1)–(2).

- **Subsection (2)(D)** states that "[e]very complication plan shall provide that an OB/GYN is on-call and available twenty-four hours a day, seven days a week [ ] to treat complications related to drugs prescribed or administered via the [abortion] facility." It also requires this coverage to be formalized in a written agreement.
- **Subsection (2)(G)(1)–(2)** requires the complication plans to include provisions that the on-call OB/GYN will personally treat all complications (with certain exceptions), will assess each patient with complications individually, and will not refer all patients with complications to the emergency room (or other facilities or physicians) unless the patient is experiencing an immediately life-threatening complication.

3. **The Concurrent Original Jurisdiction Provision, § 188.075.3,** permits the Attorney General to "commence actions for [1] a violation of any provision of [Chapter 188],

[2] for a violation of any state law on the use of public funds for an abortion, or [3] for a violation of any state law which regulates an abortion facility or a person who performs or induces an abortion." It also specifies that the Attorney General may seek injunctive or other relief against any person or entity who violates these laws.

II. Legislators' Comments

According to Petitioners,[2] some legislators made comments about S.B. 5 and H.B. 126 in the legislature or elsewhere around the time those bills were passed.

A. S.B. 5 (2017)

In their First Amended Petition, Petitioners point to and complain about comments allegedly made by 5 legislators, some from around the passage of S.B. 5 (2017).

1. Legislator 1: Rep. Mike Moon

- **Rep. Mike Moon** asked S.B. 5's sponsors whether they shared the belief that "abortion ends the life of a separate, unique, living human being," argued that an embryo is alive and that abortion is the "murder of . . . whole human beings," and asked that the law be changed "to protect the right of all human beings born and unborn." Am. Pet. ¶ 139. He later said, after Rabbi Jonah Zinn testified in a committee hearing, "I guarantee you one thing, we're always gonna disagree on the killing of a human life." Am. Pet. ¶ 143.

- Rep. Moon later said: "I just know one thing. That once my time is done here in the House, I can go back to my farm, go back to my family, go back to the district I represent and I can hold my head high and say that I've done the very best to represent them and to truly protect life, what the governor calls innocent life. I can lay my head on the pillow and rest well to know that I did what I thought was right. And I know it doesn't meet the approval of everyone, but as we all know, we're not going to please everybody. All I have to do is know that I tried to follow the precepts of my Heavenly Father the best I could and do what I can while I still have an opportunity to do it. So my apologies to you who I've offended." Am. Pet. ¶ 144.

[2] When deciding a motion for judgment on the pleadings, a court must treat as true the petitioners' well-pleaded facts. *City of St. Louis v. State*, 643 S.W.3d 295, 299 (Mo. banc 2022). Thus, the facts included in this motion for judgment on the pleadings are based solely on the allegations in the First Amended Petition and, where appropriate, on material that is subject to judicial notice. Defendants do not admit the truth of any of these facts or that they are well-pleaded.

- Before S.B. 5 was introduced (on Christmas Eve of 2016), Moon posted a picture on Facebook including the text: "We are ambassadors of Jesus Christ pleading from God a message of reconciliation Repent and believe for the kingdom of God is at hand!" Am. Pet. ¶ 139.

- Moon has previously stated that his "personal faith in Jesus Christ is evidenced…by the way in which he conducts his daily business" (though the Amended Petition does not say exactly when he made this comment). Am. Pet. at ¶ 139.

2. **Legislators 2 and 3: Rep. Jason Barnes and Rep. Kathryn Swann**

- When two representatives, Jason Barnes and Kathryn Swann, were asked why S.B. 5 was necessary to "protect health and safety," they pointed to the investigative report from Senate Committee on Sanctity of Life. Am. Pet. ¶ 138.

- Swann stated that she "empathize[d] with Rep. Moon's desire to prohibit abortions outright because she had "taken a personal oath in [her] religious belief to preserve the sanctity of human life from conception to natural death," but the proposed bill was all they could legally do. Am. Pet. ¶ 140.

- Barnes said he agreed with Rep. Moon's beliefs but that the bill was all they could do at the time. Am. Pet. ¶ 140.

3. **Legislator 4: Rep. Steve Cookson**

- Rep. Steve Cookson stated that "We've heard a lot of testimony today about pro-life and pro-choice. And life—fetuses are life. My question is—what choice does the fetus have in all of this process." Am. Pet. ¶ 141.

4. **Legislator 5: then-Senator Mike Kehoe**

- During S.B. 5 floor debate, then-Senator Mike Kehoe stated, "[F]or myself, for my own personal beliefs, and for the constituents I represent, if we come together in our minds, if we do anything that just saves one innocent life, I think it was worth being here.… I believe that to my heart." Am. Pet. ¶ 138.

B. H.B. 126 (2019)

The First Amended Petition also points to and complains about several personal comments made by 10 representatives and 1 senator, some from around the passage of H.B. 126 (2019).

1. **Legislator 1: Rep. Nick Schroer**

- In the legislature, H.B. 126's lead sponsor, **Rep. Nick Schroer**, stated that, "as a Catholic I do believe life begins at conception and that is built into our legislative

findings." Am. Pet. ¶¶ 8, 129, 136. Schroer also stated, on his campaign website, that: "As a Christian, I was educated from an early age on just how precious life is…[w]hether within the womb or in a Mother's arms, I firmly believe that life is a gift from God," and asserted that he will thus "fight for the unborn." Am. Pet. ¶ 136.

2. **Legislator 2: Rep. Barry Hovis**

- In the legislature, one of the bill's co-sponsors, **Rep. Barry Hovis**, explained: "So I had to make a decision on when I believe that life was present. And being from the Biblical side of it, I've always believed that life does occur at the point of conception." Am. Pet. ¶¶ 8, 128.

3. **Legislator 3: Rep. Ben Baker**

- In the legislature, fellow co-sponsor, **Rep. Ben Baker**, said, "Ladies and gentlemen, from the one-cell stage at the moment of conception, you were already there. We just couldn't see you yet. And what makes you valuable is that you equally share the image of our Creator. You are His work of art. And the masterpiece of your life will only happen if you allow it to develop." Am. Pet. ¶¶ 8, 127. After H.B. 126's passage, Baker stated that "[t]he God-given right to life is fundamental to both our liberty and our form of government" and that he was therefore "honored to co-sponsor" the bill. Am. Pet. ¶ 136, p.49.

4. **Legislator 4: Rep. Holly Thompson Rehder**

- In the legislature, **Rep. Holly Thompson Rehder** said, in support of H.B. 126 (2019), "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." She also stated that "Life begins at conception. Psalms 119 says 'Your hands made me and formed me.' That's the very initial stages. . . . to stand on the floor and say 'How could we make someone look at a child from rape or incest, and to care for them? I can say how we can do that. We can do that with the love of God that he puts in our hearts for those children." Am. Pet. ¶¶ 8, 133, 135.

- On her website, at the time H.B. 126 was being debated, Rehder stated that: "As a Christian…I believe there can be no debate—life begins at conception. We have an all-powerful God and…[t]aking the life of an unborn baby is playing God…." In a Facebook post on March 5, 2020 (the year after the General Assembly passed H.B. 126), Rehder posted to explain her pro-life views and that she was motivated by her view that "the God of the universe declared that human life is sacred, and to be protected. He said in Genesis 1:27 that He has made us in His image and likeness. I think it is important that we have a society that values and protects human life, at all stages of development…."

5. **Legislator 5: Rep. Kathryn Swan**

- In the legislature, **Rep. Kathryn Swan** said, "Yesterday there was a lot of dialogue regarding religion, religious beliefs, how this weighs into our decisions, how this weighs into what we do in this chamber. Lest we forget, why did our country, why was it formed to begin with? Opportunity, freedom, freedom of religion, and faith, and it was all based upon a foundation of faith. We just recited the Pledge of Allegiance, 'One Nation Under God.' Is that not how we built this country? Upon our religious faith, upon our principles, upon the Golden Rule, about helping other people and being able to have the opportunity to better ourselves. I beg to differ at the time of choice. The time of choice is the time of conception, not after conception. We must support this bill." Am. Pet. ¶ 131.

6. **Legislator 6: Rep. Adam Schnelting**

- In the legislature, **Rep. Adam Schnelting** said, "[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.

7. **Legislator 7: Rep. Mary Elizabeth Coleman**

- In the legislature, **Rep. Mary Elizabeth Coleman** said, "I believe firmly that no matter what age you are, that if you are a woman, if you are a man, your life has value. You have inherent dignity provided by the Constitution. I'm sorry, protected by the Constitution. And inherent dignity provided by God." Am. Pet. ¶ 134.

8. **Legislator 8: Rep. Mike Moon**

- **Rep. Mike Moon** wrote on his website, shortly before H.B. 126 was introduced, that "[t]housands of preborn human beings are murdered by abortion each day," and "[t]his attack upon the imago Dei—image of God—has been taking place since 1973 when the Supreme Court unlawfully perpetrated this bloodshed upon the nation." Am. Pet. p.49.

9. **Legislator 9: Rep. Mary Elizabeth Coleman**

- On Twitter on June 30, 2021 (two years after the passage of H.B. 126), **Rep. Mary Elizabeth Coleman**, who argued for passage of H.B. 126, issued a statement stating that "[a]s a mother, a catholic, a conservative, and a woman I made a promise to the people of Jefferson County that I would take every advantage of every chance I had every day I represented them to end abortion in Missouri." Am. Pet. at p.50.

10. **Legislator 10: Rep. Elijah Haar**

- Approximately a year and a half before passage of H.B. 126, **Elijah Haar** (who served as Speaker *pro tempore* of the House of Representatives during the H.B. 126 debate), posted on Facebook "The most crucial thing the government can do is defend the unalienable rights of all people, especially the God-given right to life." Am. Pet. p.50.

11. **Legislator 11: Senator Andrew Koenig**

- On Facebook, **Senator Andrew Koenig**, a H.B. 126 sponsor, shared a message by an anti-abortion group against a referendum petition that could have resulted in H.B. 126 being repealed. The message concluded with the statements 'we all need to call upon Almighty God, the author of life, to protect and guide us" and "[p]lease fervently pray for God's guidance and protection over all of Missouri's elected officials, as well as the conversion of hearts of those who would use the government to oppose the sanctity of human life." Am. Pet. pp. 49–50.

LEGAL STANDARD

A motion for judgment on the pleadings tests whether the non-moving party's well-pleaded facts, which are deemed admitted for the purpose of the motion, are nevertheless insufficient to establish the petitioners' cause of action as a matter of law. *Gross v. Parson*, 624 S.W.3d 877, 883 (Mo. banc 2021). Legal conclusions drawn by the pleaders are *not* assumed to be true. *Id.*

ARGUMENT

This Court should grant the State Defendants' motion for judgment on the pleadings for several reasons. First, binding precedent requires judgment against Petitioners. Second, even absent this precedent, the challenged provisions do not violate the Missouri Constitution, much less "clearly and undoubtedly" so. These laws have secular justifications and do not correspond with "one religion." That these kinds of laws have coexisted for 200 years with the Missouri Constitution is powerful evidence that they are constitutional. And nothing any legislator may have said changes the analysis. Finally, the canon of constitutional avoidance favors ruling against Petitioners' because their interpretation would violate the U.S. Constitution. This Court should grant judgment on the pleadings in favor of defendants.

I. Binding Missouri Supreme Court Precedent Already Holds that Abortion Regulations Do Not Constitute an Establishment of Religion.

This Court is bound by Missouri Supreme Court precedent, which holds that abortion regulations like the ones challenged in this suit are not an establishment of religion. In *Rodgers v. Danforth*, plaintiffs asserted that then-Section 559.100[3] "constitutes an establishment of religion." 486 S.W.2d 258, 259 (Mo. banc 1972). Like the law Petitioners challenge today, then-section 559.100 prohibited causing or intending to cause a woman to have an abortion, regardless of the gestational age of the unborn child. *Id*. The Missouri Supreme Court disagreed with the plaintiffs that the law "constitutes an establishment of religion"; it instead held that the law "is constitutional." *Id.* And although the Missouri Supreme Court cited federal case law to support its holding, the Missouri Supreme Court did not cite *any* federal case law about the Establishment Clause. It instead cited federal case law on the death penalty as persuasive authority "on the taking of 'human life.'" *Id.* Nor did the Missouri Supreme Court ever limit its judgment to a holding under the U.S. Constitution, rather than a judgment under the Missouri Constitution.

If the statute prohibiting abortion in 1972 did not "constitut[e] an establishment of religion," neither, then, do the Challenged Provisions, which (1) prohibit elective abortions (the No-Elective-Abortion Law), (2) regulate medical abortions for the health and safety of women who receive them (the Medication Abortion Regulations), and (3) state that the Attorney General

[3] The Section read: "Any person who, with intent to produce or promote a miscarriage or abortion, advises, gives, sells or administers to a woman (whether actually pregnant or not), or who, with such intent, procures or causes her to take, any drug, medicine or article, or uses upon her, or advises to or for her the use of, any instrument or other method or device to produce a miscarriage or abortion (unless the same is necessary to preserve her life or that of an unborn child, or if such person is not a duly licensed physician, unless the said act has been advised by a duly licensed physician to be necessary for such a purpose), shall, in event of the death of said woman, or any quick child, whereof she may be pregnant, being thereby occasioned, upon conviction be adjudged guilty of manslaughter, and punished accordingly; and in case no such death ensue, such person shall be guilty of the felony of abortion[.]"

may enforce the first two laws (the Concurrent Original Jurisdiction Provision). On this basis, this Court can enter judgment against Petitioners.

II. Even Absent this Precedent, Petitioners Cannot Establish That These Provisions "Clearly and Undoubtedly" Violate the Missouri Constitution.

Even if the Missouri Supreme Court had not decided *Rodgers*, Petitioners' challenge necessarily must fail as a matter of law. "An act of the legislature is presumed to be valid and will not be declared unconstitutional unless it *clearly and undoubtedly* contravenes some constitutional provision." *Americans United v. Rogers*, 538 S.W.2d 711, 716 (Mo. banc 1976) (emphasis added); *see also St. Louis Cnty. v. Prestige Travel, Inc.*, 344 S.W.3d 708, 712 (Mo. banc 2011); Opp. to Mot. Dismiss at 26 (admitting "clearly and undoubtedly" standard). For many reasons, Petitioners cannot meet their burden of showing that these laws violate the Missouri Constitution, much less "clearly and undoubtedly" so.

A. Petitioners Have Not Pleaded and Cannot Plead That the Challenged Provisions Advance the View of "One Religion."

In light of six decades of U.S. Supreme Court precedent rejecting the claim that a statute establishes a religion simply because it corresponds with the beliefs of one or more religions, Petitioners have conceded that they must prove that the legislation advances not just a religious belief, but a religious belief unique to "one religion." *See, e.g.*, Am. Pet. ¶¶ 237, 214, 245 (claiming that the statutes violate the Missouri Constitution "[b]y establishing in law and imposing on Missourians *a specific* religion's beliefs" and thus "establish an official preference for *a particular* faith") (emphasis added); Opp. to Mot. Dismiss at 26 (arguing that a statute is unconstitutional if it "has the 'purpose' or 'effect' of advancing *one* religion") (emphasis added); *id.* at 35 (justifying the Civil Rights Act of 1964 because, although corresponding with religion, it "did not codify *one* specific religious belief") (emphasis added); *id.* at 36 (stating that Petitioners' "complaint is that these statutes implement *a particular* religious belief") (emphasis added); *see also Boone v. State*,

147 S.W.3d 801, 805 (Mo. App. E.D. 2004) (rejecting claim where statute "does not excessively entangle the government with *a particular* religion") (emphasis added). Petitioners have not and cannot plead this, and in fact, the legislative findings in the challenged provisions establish conclusively that these statutes are constitutional.

1. For six decades, the U.S. Supreme Court has consistently held that statutes do not establish a religion simply because the statute advances a position that is consistent with a religion's position. For instance, the U.S. Supreme Court squarely held that prohibiting government funding of abortion does not establish a religion even though that policy decision is consistent with "the Roman Catholic Church['s] [doctrine] concerning the sinfulness of abortion and the time at which life commences." *Harris v. McRae*, 448 U.S. 297, 319 (1980). The same is true with respect to other laws that "coincide or harmonize with the tenets of some or all religions." *See id*. To hold otherwise would invite anarchy. That "Judaeo-Christian religions oppose stealing does not mean that a State or the Federal Government may not, consistent with the Establishment Clause, enact laws prohibiting larceny." *Id*. at 319. So, too, "murder is illegal. And the fact that this agrees with the dictates of the Judaeo-Christian religions while it may disagree with others does not invalidate the regulation." *McGowan v. Maryland*, 366 U.S. 420, 442 (1961); *see also id.* (polygamy); *id.* (adultery). Even a Sunday-closing law that expressly "forbids persons to 'profane the Lord's day'" does not establish a religion. *Id.* at 446; *see also City of St. Joseph v. Elliott*, 47 Mo. App. 418, 423 (Mo. App. 1891) (upholding a Sunday-closing law even though "the object of the law [is] to prevent the desecration of the Sabbath").

2. Recognizing the futility of advancing a claim as broad as that in *Harris* and *McGowan*, Petitioners instead state in their filings that they can prevail only if they prove that the laws, unlike

the Civil Rights Act of 1964, have *no* plausible secular justification and advance the view of just "*one* religion."

But Petitioners have not pleaded this. Plaintiffs do offer the conclusion that the statutes advance views held by just one religion. Am. Pet. ¶¶ 237, 214, 245. But they offer no facts to support that conclusion. They do not even identify the "one religion" they think these laws advance. And in fact, their contention that these laws establish the viewpoint of "one religion" fails as a matter of law under binding Missouri Supreme Court precedent. Petitioners principally contend that the laws establish one religion's viewpoint because they protect life from "conception," which Petitioners say is "inherently religious" and "not a medical or scientific term." Am. Pet. ¶ 102. But the Missouri Supreme Court has recognized that an unborn child "is not only regarded as [a] human being, but as such from the moment of conception—which it is in fact." *Steggall v. Morris*, 258 S.W.2d 577, 579 (Mo. banc 1953) (internal quotation marks omitted); *see also State v. Emerich*, 13 Mo. App. 492, 495 (1883), *affirmed*, 87 Mo. 110 (Mo. banc 1885) ("[T]he child is, in truth, alive from the moment of conception."). Under Missouri case law, "conception" is a scientific term, not a religious term.

Petitioners also *cannot* plausibly plead that the laws at issue conform to the viewpoint of only one religion, not any other religion, and not any secular view. The biggest pro-life event each year is run by an organization that adopts a view corresponding to the one advanced by Missouri's law and is secular: "March for Life is a non-profit, non-religious pro-life organization founded in 1973 following the Supreme Court's decision in *Roe v. Wade*. March for Life holds as a foundational tenet the idea that life begins at conception. … March for Life does not qualify for the religious exemption because it is not religious." *March for Life v. Burwell*, 128 F. Supp. 3d 116, 122–23 (D.D.C. 2015) (internal citations omitted). Many other secular organizations also

oppose abortion. Pro-Life San Francisco, for example, "is a multi-partisan, nonsectarian group of human rights activists" and describes its executive director as a "progressive, feminist, vegan, atheist, and social justice activist."[4] The pro-life organization "Secular Pro-Life" similarly is a "coalition … led exclusively by atheist women" that "oppose[s] abortion" at all stages of pregnancy.[5] And Plagal is "a nonsectarian, nonpartisan, educational organization that promotes the pro-life ethic within the LGBT+ community."[6]

When considering a motion for judgment on the pleadings, this Court considers only allegations that are "well-pleaded," *City of St. Louis v. State*, 643 S.W.3d 295, 299 (Mo. banc 2022), meaning they must be plausible. No plaintiff could plausibly allege that opposition to abortion is inherently religious, much less that all persons who oppose abortion necessarily belong to the same religion. *See, e.g.*, Bruce M. Carlson, *Foundations of Embryology* 3 (6th ed. 1996) ("The time of fertilization represents the starting point in the life history, or ontogeny, of the individual."); Ronan O'Rahilly, et al., *Human Embryology & Teratology* 8, 29 (2d ed. 1996) ("[F]ertilization is a critical landmark because, under ordinary circumstances, a new, genetically distinct human organism is thereby formed."); *Stinnett v. Kennedy*, 232 So. 3d 202, 221 & nn.19, 20 (Ala. 2016) (Parker, J., concurring) ("The fact that life begins at conception is beyond refutation.") (citing numerous medical sources); *Nealis v. Baird*, 996 P.2d 438, 453 & n.69 (Okla.

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[4] https://prolifesf.com/about

[5] https://secularprolife.org/mission/; Brief of 240 Women Scholars and Professionals, and Prolife Feminist Organizations, *Dobbs v. Jackson Women's Health Organization*, No. 19-1392 (2021), https://www.supremecourt.gov/DocketPDF/19/19-1392/185366/20210804180314919_19-1392%20Brief%20of%20240%20Women%20Scholars%20et%20al%20In%20Support%20of%20Petitioners.pdf.

[6] Pro-Life Alliance of Gays and Lesbians, https://www.plagal.org.

1999) ("[S]cientific precepts accept as a given that human life begins at conception.") (citing numerous medical sources); *Renslow v. Mennonite Hosp.*, 367 N.E.2d 1250, 1254 (Ill. 1977) ("As medical science progressed, the courts took notice that a fetus is a separate human entity prior to birth. It is by now commonly accepted that at conception the egg and sperm unite to jointly provide the genetic material requisite for human life."); *Puhl v. Milwaukee Auto. Ins. Co.*, 99 N.W.2d 163, 170 (Wisc. 1959), *overruled on other grounds by Matter of Stromsted's Estate*, 299 N.W.2d 226 (Wisc. 1980) (recognizing "the biological fact there is a living human being before viability" and holding that "[i]t would be more accurate to say that the fetus from conception lives within its mother rather than as a part of her").

3. Even if Petitioners could plead and had pleaded that the laws advance the viewpoint of a single religion, the text of the laws themselves would undermine that pleading. Under binding precedent, a court must defer to the legislature's "stated goal." *Boone*, 147 S.W.3d at 805. The statutes at issue here expressly have secular "stated goals." The purpose of the Medication Abortion Provisions is expressly secular and is stated right in § 188.021.2—to "ensure the safety of any patient suffering complications as a result of the administration of the [abortion] drug or chemical" used. The purpose of the No-Elective-Abortion Provision is contained in another part of H.B. 126 (2019)—§ 188.026—which explicitly expresses the State's secular interests in the law, including:

> (1) Protecting unborn children throughout pregnancy and preserving and promoting their lives from conception to birth;
>
> (2) Encouraging childbirth over abortion;
>
> (3) Ensuring respect for all human life from conception to natural death;
>
> (4) Safeguarding an unborn child from the serious harm of pain by an abortion method that would cause the unborn child to experience pain while she or he is being killed;
>
> (5) Preserving the integrity of the medical profession and regulating and restricting practices that might cause the medical profession or society as a whole to become insensitive, even disdainful, to life. This includes regulating and restricting abortion

methods that are not only brutal and painful, but if allowed to continue, will further coarsen society to the humanity of not only unborn children, but all vulnerable and innocent human life, making it increasingly difficult to protect such life;

(6) Ending the incongruities in state law by permitting some unborn children to be killed by abortion, while requiring that unborn children be protected in nonabortion circumstances through, including, but not limited to, homicide, assault, self-defense, and defense of another statutes; laws guaranteeing prenatal health care, emergency care, and testing; state-sponsored health insurance for unborn children; the prohibition of restraints in correctional institutions to protect pregnant offenders and their unborn children; and protecting the interests of unborn children by the appointment of conservators, guardians, and representatives;

(7) Reducing the risks of harm to pregnant women who obtain abortions later in pregnancy; and

(8) Avoiding burdens on the health care system, taxpayers, and the workforce because of increased preterm births, low birthweight babies, compromised pregnancies, extended postpartum recoveries, and behavioral health problems caused by the long-term effects of abortions performed or induced later in the pregnancy.

In *Boone*, the Missouri Court of Appeals for the Eastern District had no trouble rejecting the argument that a civil confinement statute was an impermissible "advancement of a religion" that violated the Missouri Constitution's prohibition on establishing a religion. *Boone*, 147 S.W.3d at 805. In rejecting the argument, the court deferred to "[t]he stated goal" of the civil confinement program and quickly concluded that the program advanced at least one secular cause. *Id.* Indeed, the establishment claim was deemed so weak that the Missouri Supreme Court transferred the case to the Court of Appeals, concluding that the constitutional argument was not substantial enough to invoke the Missouri Supreme Court's mandatory "exclusive appellate jurisdiction in all cases involving the validity of … a statute or provision of the constitution of this state." Mo. Const. art. V, § 3; *Boone*, 147 S.W.3d at 805. As in *Boone*, the legislation here plainly has a public, secular goal—regardless of whatever harmony that goal may also have with the views of some religions. The laws here are not establishments of religion for the same reason that Sunday-closing laws and laws against fraud, theft, murder, and larceny are not establishments of religion.

The Eighth Circuit recently upheld this view in *Doe v. Parson*, 960 F.3d 1115, 1118 (8th Cir. 2020), and this Court should do so here. In *Doe*, the Eighth Circuit considered whether a law requiring that women be given "a chance to review certain information before having an abortion" established a religion. *Id*. at 1116. Doe argued that the law did so because (1) the booklet she was required to receive from the State "promot[ed] 'Catholic dogma' about when life begins" and because (2) "states may *never* adopt a 'theory of when life begins.'" *Id*. at 1118. But the Eighth Circuit rejected both arguments—even though *Roe v. Wade* was still U.S. Supreme Court precedent at the time. *Id*.

Petitioners in this case suffer from the same fatal flaw as the plaintiff in *Doe*. If this Court were to hold that "taking sides on a divisive issue" that "breaks down 'along religious lines'" establishes a religion, then the "only option would be to avoid legislating in th[at] area altogether." *Id*. But as noted above, that is not how the cases shake out. *See id.*; *Harris*, 448 U.S. at 319; *McGowan*, 366 U.S. at 442; *Clayton ex rel. Clayton v. Place*, 884 F.2d 376, 378–79 (8th Cir. 1989) (determining that a school district's no-dancing rule did not establish religion even though some local churches "staunchly opposed…social dancing" and viewed it as "sinful"). What petitioners propose is a recipe not for a lack of religious establishment—but for anarchy.

B. The 200-Year History of Abortion Restriction in Missouri Provides Powerful Evidence That These Laws Are Constitutional, and Petitioners Identify No Constitutional Text to Suggest Otherwise.

As mentioned above, Missouri has restricted abortion by statute since 1825, just four years after admission to the Union. Indeed, Missouri was the *first* State to pass such a statute (although States restricted abortion at common law before 1825). *See Dobbs*, 142 S. Ct. at 2285 & n.69. This provides powerful evidence against Petitioners' position because the "primary goal in interpreting Missouri's constitution is to ascribe to the words of a constitutional provision the meaning that the people understood them to have when the provision was adopted." *State v. Honeycutt*, 421 S.W.3d

410, 414–15 (Mo. banc 2013). This means reviewing the statutes that were on the books before and shortly after the constitutional provisions were adopted. *See, e.g.*, *Am. Fed. of State, Cnty. & Mun. Emps. v. State* (*AFSCME*), 653 S.W.3d 111, 126 (Mo. banc 2022) (looking at statutes passed in the first 30 years of article I, section 29 to determine that section's meaning); *Dortch v. State*, 531 S.W.3d 126, 129 (Mo. banc 2019) (citing favorably *District of Columbia v. Heller*, 554 U.S. 570 (2008), for the proposition that "longstanding prohibitions on the possession of firearms by felons and the mentally ill" do not violate the Second Amendment).

Here, Missouri statutes restricting abortion run the entire history of Missouri as a State. These statutes precede the 1945 Constitution by 120 years and continued to exist after 1945. Defendants are unaware of even a single incident until the *Rodgers* decision in 1972 (150 years after Missouri became a State) where anybody contended that restrictions on abortion are an establishment of religion, and Petitioners have cited none to justify their novel theory. So 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.

Petitioners identify no such text. They contend that these laws violate three provisions of the Missouri Constitution: Article I, sections 5–7. Article I, section 5 provides in relevant part that the State may not "establish any official religion," "coerce any person to participate in any prayer or other religious activity," or "control or interfere with the rights of conscience." Although their pleadings are unclear, Petitioners appear to focus on the establishment provision, not the free-exercise provisions. Am. Pet. ¶¶ 234–238. Article I, section 6 provides in relevant part that the State may not compel a person to "erect, support or attend any place or system of worship, or to maintain or support any priest, minister, preacher or teacher of any sect, church, creed, or denomination of religion," and article I, section 7 provides that "[t]hat no money shall ever be

taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such; and 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."

The idea that the challenged laws coerce anybody to participate in a religious activity,[7] establish an "official religion," or take money out of the treasury to aid a church is ridiculous on its face. Indeed, the U.S. Supreme Court recently declared the last of these provisions unconstitutional. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 455 (2017) (declaring unconstitutional a Missouri policy "compelled by Article I, Section 7 of the Missouri Constitution" that prohibited a Lutheran church from receiving funds); *see also Carson v. Makin*, 142 S. Ct. 1987 (2022). None of the text in these provisions comes remotely close to suggesting that the State cannot restrict abortion, much less "clearly and undoubtedly" rebutting the strong presumption created by 200 years of statutory regulation. *Americans United*, 538 S.W.2d at 716; *Honeycutt*, 421 S.W.3d at 414–15.

Indeed, almost all these constitutional provisions date back to 1875, fifty years after Missouri started regulating abortion by statute.[8] If these provisions were understood in 1875 to

[7] The only challenged provision that mandates any activity at all is the statute requiring providers of abortion to adopt complication plans, but that is plainly a health-and-safety regulation, not something that coerces "prayer or other religious activity."

[8] The 1875 Constitution contained the same article I, section 6 language that is in effect today (though it was listed as art. II, § 6 in 1875), as did the 1945 Constitution. *See* Mo. Const. art. II, § 6 (1875); Exhibit H (original text of 1875 Missouri Constitution, article II, section 6); Mo. Const. art. I, § 6 (1945); Exhibit I (original text of 1945 Missouri Constitution, article I, section 6). The 1875 Constitution contained the same article I, section 7 that is in effect today (except it was listed in article II, section 7), as did the 1945 Constitution. Mo. Const. art. II, § 7 (1875);

prohibit laws restricting abortion, one would expect somebody to have said something. But Petitioners identify nothing. Instead, Missouri statutes in the same period time restricted abortion. *See* Mo. Rev. Stat. Art. II, § 1268 (1879) (abortion crime statute), attached as Exhibit J; Mo. Rev. Stat. § 559.100 (1949) (abortion crime statute), attached as Exhibit K. In fact, Missouri's statutes prohibiting abortion had been in place for 120 years when the presently operative Constitution of Missouri was adopted. Given this long history of coexistence between statutes criminalizing abortion and the constitutional provisions at issue, Petitioners cannot establish their high burden of showing that these laws "clearly and undoubtedly" violate the Missouri Constitution.

To be sure, a few of the relevant provisions—in article I, section 5—were adopted as recently as 2012.[9] But that just means these constitutional provisions were adopted on a 190-year

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Exhibit H (original text of 1875 Missouri Constitution, article II, section 7); Mo. Const. art. I, § 7 (1945); Exhibit I (original text of 1945 Missouri Constitution, article I, section 7).

The only text that has changed is in article I, section 5, but much of that language existed in 1875: "**That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences**; that no person can, on account of his religious opinions, be rendered ineligible to any office of trust or profit under this State, nor be disqualified from testifying, or from serving as a juror; **that no human authority can control or interfere with the rights of conscience**; that no person ought, by any law, to be molested in his person or estate, on account of his religious persuasion or profession, but the liberty of conscience hereby secured, shall not be so construed as to excuse acts of licentiousness, or to justify practices inconsistent with the good order, peace or safety of this State, or with the rights of others." Mo. Const. art. II, § 5 (1875); *see* Exhibit H (original text of 1875 Constitution).

The 1945 version is substantially similar to the 1875 version: "**That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences**; **that no human authority can control or interfere with the rights of conscience**; that no person shall, on account of his religious persuasion or belief, be rendered ineligible to any public office of trust or profit in this state, be disqualified from testifying or serving as a juror, or be molested in his person or estate; but this section shall not be construed to 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." Mo. Const. art. I, § 5 (1945); Exhibit I (original text of 1945 Constitution).

[9] The following portions of article I, section 5 were added in 2012:

backdrop of consistent statutes on the books in Missouri restricting abortion. New constitutional provisions do not overturn 200 years of regulation *sub silentio*.

Not only does the text fail to undermine authority to regulate abortion; it in fact *supports* that regulatory authority. Article I, section 5 states that the constitutional right recognized by that section "shall not be construed to … 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." *See also Stone v. Bogue*, 181 S.W.2d 187, 189 (Mo. App. W.D. 1944) (interpreting the provision to permit a Missourian the right "to practice his religion as he sees fit, subject only to the power of the state to intervene in the interests of the peace and good order of society"). Given that the right in Missouri's Constitution does not overcome "the rights of others," and given that there is no right to abortion under the Missouri or U.S. Constitution, it is well within the legislature's express authority to restrict a practice that "destroys … an 'unborn human being.'" *Dobbs*, 142 S. Ct. at 2243; *see also Blunt*, 810 S.W.2d at 516 (holding that constitutional provisions must be interpreted harmoniously with other constitutional provisions).

C. Any Alleged Religious Comments by Legislators in No Way Makes These Laws Unconstitutional.

Petitioners now acknowledge that any comments by legislators cannot themselves make these laws unconstitutional. They limit their legal claim to the argument that the comments simply provide additional "evidence" that the statutes enshrine into law one "particular religious belief."

- the provision stating that **"neither the state nor any of its political subdivisions shall establish any official religion"**;
- the provision stating that **"the state shall not coerce any person to participate in any prayer or other religious activity"**

See Exhibit L for the full language added in 2012.

Opp. to Mot. Dismiss at 36; *see also* Am. Pet. ¶¶ 124, 126-36, 138-40, 144. Petitioners' claim fails because, as stated above, these statutes as a matter of law do not enshrine any belief exclusive to religion, much less a belief exclusive to *one* religion. Moreover, these comments are irrelevant because (1) courts have upheld laws when the *laws themselves* have included expressly religious language; (2) the Constitution expressly protects the statements of religious legislators; (3) the Missouri Supreme Court does not consider this kind of "legislative intent"; and (4) both bills—S.B. 5 (2017) and H.B. 126 (2019)—would have passed even if every legislator who allegedly made religious comments voted *against* the bill.

1. Courts, including Missouri courts, regularly uphold legislation with expressly religious text.

Petitioners complain about alleged comments by legislators, some occurring *years* apart from the passage of legislation, yet courts routinely uphold legislative text that is expressly religious. If expressly religious language *in* a statute does not render it unconstitutional, then allegedly religious statements *outside* the text of the statute similarly cannot.

Consider Sunday-closing laws. In a challenge to a set of laws requiring closing of shops on Sunday but creating a mandatory exception for trains, the Missouri Supreme Court stressed that "Missouri has had a legislative policy on the subject of Sunday laws" since "1825"—precisely the same year Missouri adopted abortion restrictions by statute. *State v. Chicago, B. & Q.R. Co.*, 143 S.W. 785, 786 (Mo. banc 1912). That law included expressly religious language. It prohibited "Sabbath Breaking" and work "on the Lord's Day." *Id.* at 787. Yet the Court rejected a constitutional challenge, stating that the laws, despite their overt religious language, were "civil, not religious, regulations, and are based upon a sound public policy which recognizes that rest one day in seven is for the general good of mankind." *Id.* at 786, 793–94.

Years earlier, the Missouri Court of Appeals similarly upheld a Sunday-closing law even though "the object of the law [was] to prevent the desecration of the Sabbath." *Elliott*, 47 Mo. App. at 423. Even though "'[i]n a christian community where a very large majority of people celebrate the first day of the week as their chosen period of rest from labor, it is not surprising that that day should have the legislative sanction, … [i]t is still, essentially, but a civil regulation made for the government of man as a member of society.'" *Id.* at 423–24 (citation omitted).

Much more recently, the U.S. Supreme Court similarly upheld against an Establishment Clause challenge a Sunday-closing law entitled "Sabbath Breaking" that "forbids persons to 'profane the Lord's day'"; permitted certain activities "only … during the afternoon and late evening," while "most Christian church services, of course, are held on Sunday morning and early Sunday evening"; and did not permit "the allowed Sunday activities to be carried on within one hundred yards of any church where religious services are being held." *McGowan*, 366 U.S. at 445.

Simply put, if the inclusion of overtly religious language *in* the text of a statute does not render the statute unconstitutional, then mere statements by legislators *outside* the text cannot. In all cases, courts have been satisfied that the statute serves some secular public purpose, even if it also expressly corresponds with religious purposes.

2. The Constitution expressly protects the statements of religious legislators.

Petitioners lack any textual basis for their claim that statements by a small minority of legislators somehow turn facially constitutional bills into ones unconstitutional ones. Article I, sections 5–7 do not prohibit religious commentary during bill passage. Nor do they prohibit religious legislators from voting for bills simply because those bills are consistent with their religious beliefs. (Indeed, it is hard to imagine legislators voting for a bill that is *inconsistent* with such beliefs.)

Instead, the logical conclusion of Petitioners' arguments would run afoul of article I, section 5, which expressly states that "no person shall, on account of his or her religious persuasion or belief, be rendered ineligible to any public office … in this state." Because religious individuals have a constitutional right to seek election to the legislature, it necessarily follows that they are entitled to the same speaking privileges as nonreligious legislators. Petitioners' argument would have the effect of imposing a gag order on religious legislators (but not nonreligious legislators)—something no Missouri court in 200 years has done.

3. The Missouri Supreme Court does not consider "legislative intent" based on the statements of individual legislators, as Petitioners' theory requires.

This Court should reject Petitioner's theory that the allegedly religious statements of a small minority of legislators provides evidence that S.B. 5 (2017) or H.B. 126 (2019) is unconstitutional. First, in determining whether a law is constitutional, the Missouri Supreme Court does not permit consideration of the statements made by a small minority of legislators. Second, even if this Court could consider those statements, they do not demonstrate any intent to create an established or preferred religion in the State.

The Missouri Supreme Court's "primary rule of statutory interpretation is to give effect to legislative intent *as reflected in the plain language of the statute at issue*." *Black River Motel, LLC v. Patriots Bank*, 669 S.W.3d 116, 122 (Mo. banc 2023). Courts do not take into account the purpose or motivations of individual legislators when determining whether a particular bill is constitutional. *Ocello v. Koster*, 354 S.W.3d 187, 202 (Mo. banc 2011).

This case is similar to *Ocello*. In that case, certain sexually oriented businesses challenged a law that regulated them, arguing that the law violated their First Amendment freedom of speech. *Id*. at 195. The businesses argued that certain legislative "statements [by] a member of the General Assembly disparaging sexually-oriented businesses demonstrate[d] the legislature's intent to

suppress sexually oriented speech." *Id*. at 202. The Missouri Supreme Court rejected this argument because it "ignore[d] the well-settled principle that a court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive" because "[w]hat motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for [the Court] to eschew guesswork." *Id*. (internal quotation marks and brackets omitted).

The same is true here. Even if the legislators' statements demonstrated that they wanted to establish some sort of traditional Christian religion in Missouri (they do not, *see* below), this Court may not consider statements from a small minority of legislators to determine the bill's purpose.

The U.S. Supreme Court said the same thing just last year. In response to the argument that Missouri's 1825 statute and the statutes in other States "were enacted for illegitimate reasons," the U.S. Supreme Court said "[t]his Court has long disfavored arguments based on alleged legislative motives." *Dobbs*, 142 S. Ct. at 2255. It instead dismissed the argument as "a testament to the lack of any real historical support" for that party's position. *Id.* "Even when an argument about legislative motive is backed by statements made by legislators who voted for a law, we have been reluctant to attribute those motives to the legislative body as a whole." *Id.* at 2256.

In fact, the alleged statements by the representatives and senators do not evince any intent to do anything prohibited by the Missouri Constitution. Those constitutional sections prohibit the State from establishing religion, from coercing citizens to participate or support religious institutions, and from funding religious institutions and ministers. The remaining Challenged Provisions do none of those things—nor did the representatives and senators suggest that they did. Rather, the representatives and senators explained why they believed that intentionally ending the lives of children in utero is unethical and should be prohibited except for in medical emergencies.

See Fact Section, Part III.A, *above*. The fact that the remaining Challenged Provisions happen to harmonize with the tenants of some religions, or the legislators' own religions, does not cause them to violate the Missouri Constitution's Establishment Clause. *See McGowan*, 366 U.S. at 442; *Harris*, 448 U.S. at 319. Holding the opposite would "have the effect of disenfranchising religious groups when they succeed in influencing secular decisions." *Clayton*, 884 F.2d at 380. "Religious groups have an absolute right to make their views known and to participate in public discussion of issues." *Id*. "At bottom, the proper remedy for [Petitioner's] disenchantment" with the remaining Challenged Provisions "is found at the ballot box and not in the Constitution." *Id*. at 381.

4. Like in *Ocello*, Petitioners complain about statements made by only a small percentage of legislators whose votes, even if set aside, would not change the outcome of the legislation.

As in *Ocello*, the complained-of comments here were made by a small percentage of legislators. With respect to S.B. 5 (2017) (which contained Medication Abortion Regulations and Concurrent Original Jurisdiction Provision), the Amended Petition lists only five allegedly religious statements—four by representatives and one by a senator. That law would have passed even if these representatives and senator had voted against it.[10] It passed by 68 votes in the House (106 ayes, 38 noes) and 12 votes in the Senate (21 ayes, 9 noes).[11] H.B. 126 (2019) (which contained the No-Elective-Abortion Law) likewise would have passed if the 10 representatives and 1 senator who made allegedly religious statements had all voted the other way. H.B. 126 (2019) passed by 66 votes in the House (110 ayes, 44 noes) and 14 votes in the Senate (24 ayes,

[10] Mo. Const. art. III, § 27 requires a majority vote from both chambers to pass a bill.

[11] H.R. No. 43 (2d Spec. Sess. 2017) (online at https://documents.house.mo.gov/billtracking/bills174/jrnpdf/jrn005.pdf); S.R. No. 41-42 (2d Spec. Sess. 2017) (online at https://www.senate.mo.gov/17info/Journals/S2Day10072538-44.pdf).

10 noes).[12] Accordingly, this Court should "not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive" because "[w]hat motivate[d] one legislator to make a speech about a statute is not necessarily what motivate[d] scores of others to enact it, and the stakes are sufficiently high … to eschew guesswork." *Ocello*, 354 S.W.3d at 202. At the very least, these statements do not "clearly and undoubtedly" show that any legislator—much less the legislature as a whole—operated with an intent to impose an unconstitutional establishment of religion. This Court should grant judgment on the pleadings in favor of Defendants on all three counts.

III. The Canon of Constitutional Avoidance Resolves Any Doubt Because Petitioners' Interpretation of the Missouri Constitution Would Make the Missouri Constitution Conflict With the U.S. Constitution.

Even if Petitioners could present a close case on the merits (they cannot), the canon of constitutional avoidance favors rejecting their petition. "If a constitutional provision can be interpreted in different ways, one constitutional and the other unconstitutional, the constitutional construction shall be adopted." *Johnson v. State*, 366 S.W.3d 11, 26 (Mo. banc 2012). The U.S. Supreme Court has already declared that one provision of the Missouri Constitution violates the U.S. Constitution. *Trinity Lutheran*, 582 U.S. at 455–58. This Court should reject Petitioners' arguments that would render even more provisions of the Missouri Constitution invalid under federal law.

Petitioners in effect argue that if too many legislators vote in favor of legislation that coincides with their religious beliefs or speak about their religious motivations for voting in favor of such legislation, then that renders the statute unconstitutional. *See* Am. Pet. ¶¶ 4, 8-9, 119–149.

[12] H.R. No. 2728-2729 (2019) (online at https://documents.house.mo.gov/BillTracking/PDFViewer/web/viewer.html?file=https://documents.house.mo.gov/billtracking/bills191/jrnpdf/jrn072.pdf#page=22.); S.R. No. 1252 (2019) (online at http://www.senate.mo.gov/19info/Journals/RDay6705151250-1469.pdf).

That interpretation would itself make the Missouri Constitution violate (1) the Equal Protection Clause and the Free Speech Clause of the U.S. Constitution and (2) Missouri's Equal Protection Clause.

A. Religious Individuals Have Just as Much Right as Nonreligious Individuals to Seek Election and to Speak Their Minds.

If accepted, Petitioners' interpretation of the Missouri Constitution would cause it to violate both the federal and state equal protection clauses, as well as the First Amendment right to freedom of religion. U.S. Const. amend. XIV, § 1; *see also* Mo. Const. art. I, § 2 (similar). As the U.S. Supreme Court has made clear, "government regulations … trigger strict scrutiny … whenever they treat any comparable secular activity more favorably than religious exercise." *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021) (emphasis in original); *see also Blaske v. Smith & Entzeroth, Inc.*, 821 S.W.2d 822, 829 (Mo. banc 1991) (holding that religious exercise is a fundamental right subject to strict scrutiny in the equal protection context). Here, Petitioners advance an interpretation that would permit nonreligious legislators to act in accordance with their moral beliefs while denying the same right to religious legislators. If Petitioners were correct that the Missouri Constitution requires courts to treat religious legislators with special disfavor, then that provision of the Missouri Constitution would be invalid under the U.S. Constitution. The canon of constitutional avoidance thus favors rejecting their argument.

Petitioners' argument is also wholly unbelievable. Petitioners 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. Consider all the legislation that would be undermined if Petitioners' theory were accepted by this Court and in other jurisdictions.

For instance, allies of the President of the United States say his policies are motivated by his faith.[13] Petitioners' theory would cast constitutional doubt on everything the President has done. The Civil Rights Movement in the 1960s—including the passage of the Civil Rights Act of 1964[14]—was greatly influenced by religion.[15] The Congressional Record for the Civil Rights Act of 1964 itself contains religious exhortations that elected officials vote for it.[16] Our country's founding document, the Declaration of Independence, states that the very purpose of government is to "secure the[] rights" given to Americans "by their Creator." And every state constitution in the country but one expressly includes religious language.[17] Under Petitioners' theory, courts would have to strike down all these policies because of the religious motives of their supporters—even

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[13] Khalid, Asma, *How Joe Biden's Faith Shapes His Politics*, NPR (Sept. 20, 2020), https://www.npr.org/2020/09/20/913667325/how-joe-bidens-faith-shapes-his-politics.

[14] Pub. L. No. 88-352, 78 Stat. 241 (1964), codified at 42 U.S.C. § 2000d *et seq*.

[15] NPR, *I Have a Dream Speech in its Entirety* (Jan. 16, 2023), https://www.npr.org/2010/01/18/122701268/i-have-a-dream-speech-in-its-entirety (referencing God, religion, and religious themes).

[16] 110 Cong. Rec. 7,375–80 (1964), www.tedkennedy.org/page/-/legacy/pdf/kennedy-speech-1964-civil-rights.pdf (Senator Ted Kennedy adding religious arguments to the Congressional Record in support of the Civil Rights Act of 1964).

[17] Ala. Const. art I, § 1; Alaska Const. Preamble; Ariz Const. Preamble; Ark. Const. Preamble; Cal. Const. Preamble; Colo. Const. Preamble; Conn. Const. Preamble; Del. Const. Preamble; Fla. Const. Preamble; Ga. Const. Preamble; Haw. Const. Preamble; Idaho Const. Preamble; Ill. Const. Preamble; Ind. Const. Preamble, art. I, § 1; Iowa Const. Preamble; Kan. Const. Preamble; Kent. Const. Preamble; La. Const. Preamble; Me. Const. Preamble; Md. Const. Decl. of Rights, art. 36; Mass. Const. Preamble; Mich. Const. Preamble; Minn. Const. Preamble; Miss. Const. Preamble; Mo. Const. Preamble; Mont. Const. Preamble; Neb. Const. Preamble; Nev. Const. Preamble; N.H. Const. Part Second, art. 84; N.J. Const. Preamble; N.M. Const. Preamble; N.Y. Const. Preamble; N.C. Const. Preamble; N.D. Const. Preamble; Ohio Const. Preamble; Okla. Const. Preamble; Penn. Const. Preamble; R.I. Const. Preamble; S.C. Const. Preamble; S.D. Const. Preamble; Tenn. Const. Preamble; Tex. Const. Preamble; Utah Const. Preamble; Vt. Const. art. 3; Va. Const. art. 1, § 16; Wash. Const. Preamble; W.V. Const. Preamble; Wisc. Const. Preamble; Wyo. Const. Preamble.

though identical policies would be allowed when supported by secular advocates. The U.S. Constitution and Missouri Constitutions do not permit this disfavoring of religion.

All the provisions challenged here are simple health-and-welfare regulations. Petitioners plainly do not like them, but this Court cannot disfavor religion by holding that these laws are permissible only if enacted and drafted by secular legislators. This Court should grant judgment on the pleadings in favor of Defendants.

B. Holding That Legislators or Public Citizens Cannot Speak About Their Religious Convictions When Passing or Proposing Laws Violates the U.S. Free Speech Clause and Article I, Section 5 of Missouri's Constitution.

The Free Speech Clause in the First Amendment is designed protect the "freedom to think as you will and to speak as you think." *303 Creative LLC v. Elenis*, 143 S. Ct. 2298, 2310 (2023). It is an inalienable human right because it is "indispensable to the discovery and spread of political truth." *Id.* at 2311. Along the same lines, government may not exclude a legislator's speech based on "religious viewpoint" because doing so "constitutes impermissible viewpoint discrimination." *Shurtleff v. City of Boston, Mass.*, 142 S. Ct. 1583, 1593 (2022).

It is no answer to assert, as Petitioners do (at 32) in their opposition to the Motion to Dismiss that "government employee[s]" do not enjoy a First Amendment right to say whatever they please while engaging in the duties of their employment. Elected legislators are not government "employees." And courts have recognized that the First Amendment applies in its fullest force in the legislature—the place of political debate. *Bond v. Floyd*, 385 U.S. 116, 135–36 (1966) ("The manifest function of the First Amendment in a representative government requires that legislators be given the widest latitude to express their views on issues of policy."); *North Carolina Right to Life, Inc. v. Leake*, 525 F.3d 274, 305 (4th Cir. 2008) (stating that the First Amendment protects political speech for sitting legislators).

In any event, legislators would not be the only ones affected by Petitioners' novel interpretation. Petitioners allege at the very beginning of their petition that religious individuals and organizations have proposed legislation. Am. Pet. ¶ 2. But of course these individuals have a fundamental First Amendment right to petition the government, which includes the right "to influence government officials in creating or implementing legislation." *TEC Cogeneration Inc. v. Fla. Power & Light Co.*, 76 F.3d 1560, 1570 (11th Cir. 1996). To permit nonreligious individuals to suggest legislation in accord with their moral convictions, but not religious individuals, would violate the First Amendment as much as the Fourteenth.

If this Court accepts Petitioners' theory that religious legislators cannot speak about how bills relate to religion, and religious individuals cannot propose legislation in accord with their views, those legislators and individuals will be forced to remain silent about their viewpoints. This is unconstitutional viewpoint discrimination. *Shurtleff*, 142 S. Ct. at 1593. It also runs afoul of the Missouri's Constitution's article I, section 5, which "secure[s] a citizen's right to … express his or her religious beliefs" and right not to "be rendered ineligible to any public office" "on account of his or her religious persuasion or belief."

CONCLUSION

The facts pleaded in Petitioners' Amended Complaint are insufficient for a judgment as a matter of law. Thus, this Court should enter a judgment on the pleadings in favor of Defendants.

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Respectfully submitted,

ANDREW BAILEY
Attorney General

/s/ *Maria A. Lanahan*
Joshua M. Divine, #69875
Solicitor General
Maria A. Lanahan, #65956
Deputy Solicitor General
Caleb Rutledge, #74820
Assistant Attorney General
Missouri Attorney General's Office
Post Office Box 899
Jefferson City, MO 65102
Tel: (573) 751-8870
Fax: (573) 751-0774
Email: Josh.Divine@ago.mo.gov
Maria.Lanahan@ago.mo.gov
Caleb.Rutledge@ago.mo.gov

Counsel for State Defendants

CERTIFICATE OF SERVICE

I hereby certify that, on September 20, 2023, the foregoing was filed electronically through the Court's electronic filing system to be served electronically on all counsel of record.

/s/ Maria A. Lanahan