IN THE MISSOURI CIRCUIT COURT
COLE COUNTY

MARY DOE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 15AC-CC00205**
	)	**Hon. Jon E. Beetem**
JEREMIAH JAY NIXON, et al.,	)	
	)	
Defendants.	)	

JUDGMENT

Plaintiff Mary Doe ("Plaintiff") challenges several provisions of Missouri law governing abortion as contrary to the state's Religious Freedom Restoration Act ("RFRA"), § 1.302 RSMo, and the Religion Clauses of the First Amendment. Plaintiff seeks a permanent injunction against eight Missouri officials—Defendants Nixon, Koster, Carter, Tannehill, Direnna, James, Poggemeier, and Martin (collectively, "the State")—as well as two unnamed Planned Parenthood employees (John Does I and II), whom Plaintiff has not attempted to identify or serve with process. The State moves to dismiss with prejudice for failure to state a claim on which relief can be granted.

This action has once been dismissed for failure to state a claim. Leave was granted and Plaintff filed a second amended petition.

Upon due consideration of the parties' papers and oral arguments, the

Court dismisses all claims against John Does I and II for lack of personal jurisdiction. As set forth below, the Court grants the State's motion.

FACTUAL AND PROCEDUREAL BACKGROUND

When she learned that she was pregnant in March 2015, Plaintiff Mary Doe ("Plaintiff") began making plans to have an abortion at Planned Parenthood in St. Louis, the only abortion facility in Missouri. Under Missouri law, an abortion provider must, at least 72 hours before the procedure ("Waiting Period"), present her with "the opportunity to view an active ultrasound image of the unborn child and hear the heartbeat of the unborn child if it is audible," § 188.027.3 RSMo ("Ultrasound Opportunity"); as well as printed materials that "describe the probable anatomical and physiological characteristics of the unborn child at two-week gestational increments," § 188.027.1(2) RSMo ("Booklet"). The Booklet includes the following statements: "The life of each human being begins at conception. Abortion will terminate the life of a separate, unique, living human being."

Plaintiff does not believe that life begins at conception or that abortion with terminate the life of a separate, unique, living human being.

a. Her body is inviolable and subject to her will alone;

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

c. When pregnant, a non-viable fetus is part of her body and not a

separate, unique, living human being;

d. She alone decides whether, when and how to remove a non-viable fetus from her body;

e. She may, in good conscience, have an abortion without regard to the current or future condition of her non-viable fetus;

f. She must not support religious, philosophical, or political beliefs that imbue her fetus with an existence separate, apart, or unique from her body;

g. She must not support any religious, philosophical, or political beliefs that cede to a third party control of the removal of her fetus; and

h. She must not support any religious, philosophical, or political belief that promotes the idea her non-viable fetus is a human being or imbued with an identity separate, apart, and unique from her body.

Plaintiff contends that the purpose and effect of the mandatory Booklet, Ultrasound Opportunity, and Waiting Period are to cause doubt, guilt, and shame in pregnant women and discourage them from getting abortions.

Plaintiff traveled to St. Louis by bus on May 7, 2015, and requested an abortion at Planned Parenthood on May 8. Plaintiff informed Planned Parenthood in writing of her deeply held convictions regarding abortion and purported to "absolve [Planned Parenthood] of any responsibility [it] may have" to provide her the Booklet and the Ultrasound Opportunity, or to wait 72 hours before performing her abortion. Nonetheless, Planned Parenthood refused to perform Plaintiff's abortion until (a) she acknowledged receipt of the Booklet and the Ultrasound Opportunity in writing, and (b) waited 72

hours. *Id.* ¶64.

Because she could not obtain an abortion in Missouri without doing so, Plaintiff acknowledged receipt of the Booklet and Ultrasound Opportunity on May 8, and checked into a motel for the duration of Waiting Period. Plaintiff felt guilt and shame during the Waiting Period. She returned to Planned Parenthood and had an abortion on May 12, 2015. The cost of obtaining the abortion, round-trip travel from Greene County, and lodging in St. Louis during the waiting period was equal to 45 hours' worth of Plaintiff's wages.

Motion to Dismiss Standard

"A motion to dismiss for failure to state a cause of action is solely a test of the adequacy of the plaintiff's petition. It assumes that all of plaintiff's averments are true, and liberally grants to plaintiff all reasonable inferences therefrom." *State ex rel. Henley v. Bickel*, 285 S.W.3d 327, 329-30 (Mo. 2009). In other words, "the petition is reviewed in an almost academic manner, to determine if the facts alleged meet the elements of a recognized cause of action, or of a cause that might be adopted in that case." *Id.*

DISCUSSION

I. Plaintiff's RFRA Claims

In her first three counts, Plaintiff alleges that Missouri's mandatory Ultrasound Opportunity, Booklet, and Waiting Period violate the State's Religious Freedom Restoration Act (RFRA), which states in pertinent part:

> A governmental authority may not restrict a person's free exercise of religion, unless: (1) The restriction is in the form of a rule of general applicability, and does not discriminate against religion, or among religions; and (2) The governmental authority demonstrates that application of the restriction to the person is essential to further a compelling governmental interest, and is not unduly restrictive considering the relevant circumstances.

§ 1.302.1 RSMo. The statute further defines "exercise of religion" as "an act or refusal to act that is substantially motivated by religious belief, whether or not the religious exercise is compulsory or central to a larger system of religious belief." § 1.302.2 RSMo (emphasis added).

Plaintiff alleges that the Ultrasound Opportunity, Booklet, and Waiting Period "restricted [her] free exercise of religion in violation of § 1.302.1" because they subjected her body to the will of the State; they were irrelevant to her health; they were irrelevant to her decision to have an abortion; they cost her time and money; they forced her to consider whether to believe abortion terminates the life of a separate, unique living human being; and they shamed and punished her for not so believing.

RFRA allows a plaintiff to seek a court order exempting her from performing *any act* required by law (or permitting her to perform *any act* prohibited by law) where her performance of the required *act* (or her failure to perform the prohibited *act*) would violate a deeply held religious belief. In *Burwell v. Hobby Lobby Stores, Inc.*, the Supreme Court held HHS

regulations *requiring employers to pay for contraceptive coverage* for their employees imposed a substantial burden on the religious exercise of a closely held corporation's sole shareholders, whose religious beliefs prohibit the use of contraceptives. 134 S. Ct. 2751, 2779 (2014). Unlike *Hobby Lobby*, however, Plaintiff has not identified any "act or refusal to act" that is "substantially motivated by religious belief." Neither the Ultrasound Opportunity nor acknowledging receipt of the Booklet *forced Plaintiff to perform any act* prohibited by a deeply held religious belief. *Cf. Wisconsin v. Yoder*, 406 U.S. 205 (1972)(Wisconsin's compulsory school attendance law unduly burdened Amish family's belief that attending public school endangered their standing in religious community as well as their salvation and that of their children). Nor did the Ultrasound Opportunity or acknowledging receipt of the Booklet *prohibit Plaintiff from performing any act* substantially motivated by a deeply held religious belief. *Cf. Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006) (Controlled Substances Act's prohibition against Schedule I hallucinogenics unduly burdened religious sect's ritual use of sacramental tea containing the prohibited chemicals).

Plaintiff suggests that being given an opportunity to view (and hear) an ultrasound and having to acknowledge receipt of the Booklet forced her to spend time and money on a service that was "irrelevant and unnecessary" to her decision to terminate her pregnancy. SAP ¶¶80, 88. But Plaintiff does

not claim a deeply held religious belief *against complying with "irrelevant and unnecessary" regulations*. Rather, she claims the regulations are irrelevant and unnecessary because they were motivated by a religious belief *she does not share*. Even assuming Plaintiff could prove the challenged provisions in § 188.027 were actually motivated by a *religious* belief, the only thing that matters for RFRA purposes is the *plaintiff's act* the law allegedly requires or prohibits. The only "act" Plaintiff was required to do under the statutory provisions challenged in Counts I and II was *to be present* when a third party made certain information available to her. She did not have to avail herself of that information *or even read it*. She merely had to acknowledge that the third party had complied with *its* statutory obligations.

Plaintiff was not required to accept *or even read about* any particular religious belief (or religious belief in general) to obtain her abortion. Nor was her abortion conditioned on her rejection of any particular religious belief (or religious belief in general). At worst, Missouri created an opportunity—but not an obligation—for Plaintiff to hear State speech regarding abortion. Such requirements do not offend RFRA. *O Centro Espirita* held that Congress could not prohibit the *use* of hallucinogenic drugs as part of a religious sacrament, but the Court has never held Congress cannot mandate that the sale of those drugs be accompanied with State speech on the dangers of their use. Under Plaintiff's interpretation of RFRA, state-mandated warning

labels on cigarettes and alcohol would violate the religious freedom of anyone with a deeply held belief that smoking or drinking is not bad for one's health.

Essentially, Plaintiff argues that RFRA permits her to ignore any law she suspects is *motivated* by a religious belief she does not share. But whose belief would that be? The Senator who introduced the bill? The majority belief in the General Assembly? RFRA claims turn on the religious beliefs *of the plaintiff*, not on what the plaintiff alleges are the religious beliefs of the legislators who enacted the challenged statute. Plaintiff is merely cloaking her political beliefs in the mantle of religious faith in order to avoid laws of general applicability she finds imprudent or offensive. Instead of being a safety hatch to protect minority religious beliefs from the tyranny of the majority, Plaintiff's interpretation of RFRA would establish a faith-based "Get Out of Jail Free" card.

Plaintiff doesn't allege that she was substantially motivated by her religious beliefs to seek an abortion. Nor does she allege that she was substantially motivated by her religious beliefs to do so within 72 hours of deciding to end her pregnancy. Plaintiff merely alleges that she *disagrees with* the content of certain State speech about abortion and finds the waiting period irrelevant, unnecessary, and inconvenient. But even assuming Plaintiff's disagreement with State speech is substantially motivated by her religious beliefs, her disagreement is neither an *act* nor a *failure to act.*

Unlike *Hobby Lobby,* which alleged that federal regulations required its shareholders to purchase products prohibited by their religious beliefs (namely, buying contraceptive coverage for their employees), the Plaintiff in this case does not identify any *act* required under Missouri law but prohibited by her religious beliefs, nor any act prohibited under Missouri law but required by her religious beliefs. At most, she has identified acts required of third parties that may be irrelevant or unnecessary to Plaintiff's religious beliefs.

Counts I through III of her Second Amended Petition fail to state a claim on which relief can be granted and must suffer dismissal.

II. Plaintiff's Establishment Clause Claim

In *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the Supreme Court announced a three-part test for analyzing whether government activity results in a prohibited establishment of religion. *ACLU Nebraska Found. v. City of Plattsmouth, Neb.*, 419 F.3d 772, 775 (8th Cir. 2005). Despite *Lemon*'s "checkered career," *see Van Orden v. Perry*, 545 U.S. 677, 700 (2005) (Breyer, J., concurring), the Eighth Circuit still applies the *Lemon* test to claims that a statute violates the Establishment Clause. *Roark v. S. Iron R-1 Sch. Dist.*, 573 F.3d 556, 563 n.4 (8th Cir. 2009); *see also Doe ex rel. Doe v. Elmbrook Sch. Dist.*, 687 F.3d 840, 849 (7th Cir. 2012) ("*Lemon v. Kurtzman* remains the prevailing analytical tool for the analysis of Establishment Clause

claims"). Under *Lemon*, a statute will not be held to violate the Establishment Clause as long as (1) it has a secular purpose; (2) its principal or primary effect neither advances nor inhibits religion; and (3) it does not foster an excessive entanglement with religion." *ACLU Nebraska Found. v. City of Plattsmouth, Neb*., 419 F.3d 772, 775 (8th Cir. 2005). Plaintiff fails to allege any facts showing that §188.027 fails the *Lemon* test.

In conclusory fashion, Plaintiff alleges that the Ultrasound Opportunity, the Booklet, and the Waiting Period have the purpose and effect of "promot[ing] the religious belief that [fetal tissue] is, from conception, a separate and unique human being whose destruction is morally wrong." She places particular emphasis on §188.027.1(2)'s requirement that the DHSS Booklet include the following statements: "The life of each human being begins at conception. Abortion will terminate the life of a separate, unique, living human being." Plaintiff alleges the Ultrasound Opportunity, the Booklet, and the Waiting Period violate the Establishment Clause because "the State of Missouri is using its power to regulate abortion to promote some, but not all, religious beliefs."

The Supreme Court has repeatedly rejected Establishment Clause challenges that merely alleges some statutory language "happens to coincide or harmonize with the tenets of some or all religions." *McGowan v. Maryland*, 366 U.S. 420, 442 (1961)(holding Maryland's "Sunday Closing Laws" did not

violate Establishment Clause simply because they coincided with observation of the Christian Sabbath). "That the 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." *Harris v. McRae*, 448 U.S. 297, 319 (1980)(holding federal law restricting use of Medicaid funds for elective abortion "is as much a reflection of 'traditionalist' values towards abortion, as it is an embodiment of the views of any particular religion"). Plaintiffs' Establishment Clause claims have even less merit than the challenges rejected in *McGowan* and *Harris*, which involved outright bans on Sunday sales and paying for elective abortions with public funds, respectively. By contrast, §188.027 RSMo doesn't ban anything. It merely requires that abortion providers make certain written materials and ultrasound procedures *available* to their patients at least 72 hours before performing an abortion. It does not require that the patient ever read the printed materials or have the ultrasound.

The Supreme Court rejected an Establishment Clause challenge to a different Missouri statute with nearly identical language. In *Webster v. Reprod. Health Servs.*, the Eight Circuit initially invalidated "legislative findings" by the Missouri General Assembly that "[t]he life of each human being begins at conception" as "an impermissible state adoption of a theory of when life begins." 851 F.2d 1071, 1076 (8th Cir. 1988). The Supreme Court

reversed the court of appeals decision, however, because "the preamble does not by its terms regulate abortion or any other aspect of appellees' medical practice." 492 U.S. at 506. Reiterating that *Roe v. Wade*, 410 U.S. 113 (1973), "implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion," the Supreme Court concluded that Missouri's preamble "can be read simply to express that sort of value judgment." *Webster v. Reprod. Health Servs*., 492 U.S. at 506 (quoting *Maher v. Roe*, 432 U.S. 464, 473-74 (1977)).

Section 188.027 RSMo passes all three elements of the *Lemon* test. The statute has a secular purpose of conveying the General Assembly's policy preference for carrying unwanted pregnancies to term rather than aborting them. *See Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 870 (1992) ("the State has a legitimate interest in promoting the life or potential life of the unborn"). In the pursuit of that secular purpose, §188.027 RSMo neither advances, hinders, nor fosters excessive entanglement with any particular religion or religion in general. Medical professionals and their patients are treated equally regardless of their faith or lack thereof. Catholics, Satanists, evangelicals, and atheists must all be offered the DHSS Booklet, but none of them must agree with or even read its contents to obtain an abortion. All must be offered the opportunity to view an ultrasound, but none of them must have an ultrasound.

Plaintiff's Establishment Clause challenge fails to state a claim on which relief can be granted.

III. Plaintiff's Free Exercise Clause Claim.

RFRA was enacted to provide *greater* protection and requires more stringent review than the Free Exercise Clause. *See Burwell v. Hobby Lobby Stores, Inc*., 134 S. Ct. 2751, 2760 (2014). As Plaintiff cannot state a claim under Missouri's RFRA, *a fortiori* she cannot state a claim under the Free Exercised Clause.

"The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires." *Employment Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872, 877 (1990). It also prohibits the government from enacting legislation that "regulates or prohibits conduct *because it is undertaken for religious reasons*." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993)(emphasis added). However, "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." *Smith*, 494 U.S. at 878-79 (quoting *United States v. Lee*, 455 U.S. 252, 263 n. 3 (1982) (Stevens, J., concurring)).

Plaintiff alleges that the Booklet, Ultrasound Opportunity, and Waiting

Period "interfere with the exercise by Plaintiff of her religious beliefs" by "compel[ing] exposure to religious beliefs she does not have and delaying the implementation of her decision" to obtain an abortion. SAP ¶115. She further alleges that the requirements of §188.027 "caused Plaintiff to endure delay, doubt, guilt and shame when she exercised her religious beliefs to abort [a fetus] in accordance with" her beliefs. SAP ¶116. Neither allegation states a cause of action under the Free Exercise Clause.

Section 188.027 RSMo is a neutral law of general applicability. It requires abortion providers to make certain information *available* to their patients 72 hours before performing or inducing an abortion. It does not compel those patients to accept, read, or agree with the proffered information. Plaintiff does not and cannot identify any provision of that statute which prohibits women seeking abortions or the doctors who perform them from engaging in any conduct *because it is undertaken for religious reasons*. Consequently, Plaintiff has not stated a claim under the Free Exercise Clause.

Having permitted Plaintiff to re-plead after the initial dismissal for failure to state a claim, the dismissals are with prejudice.

It is therefore **ORDERED, ADJUDGED, AND DECREED** that Plaintiff's Second Amended Petition is **DISMISSED WITH PREJUDICE**.

SO ORDERED this 12th day of December, 2016

Jon E. Beetem
Circuit Judge