IN THE UTAH SUPREME COURT

STATE OF UTAH, *et al.*, *Defendant-Appellant*, v. PLANNED PARENTHOOD ASSOCIATION OF UTAH, on behalf of its patients, physicians, and staff, *Plaintiff-Appellee.*	Appellate Case No. 20220696-SC On appeal from the Third Judicial District Court, Judge Andrew H. Stone No. 220903886

BRIEF AMICUS CURIAE OF THE SUTHERLAND INSTITUTE IN SUPPORT OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Constitutional Provisions

INTEREST OF AMICUS CURIAE

Sutherland Institute is a nonpartisan policy and educational institution – a think tank – that informs the public and policymakers alike. Its mission is to advance principled public policy in selected areas of emphasis. Promoting a sound understanding, and application of, constitutional principles of religious freedom is a primary focus of the Institute's efforts.

Notice of amici's intent to file was provided as required by Rule 25(a). All parties consented to the filing of the brief, per Rule 25(b)(2). And, per Rule 25(6), amici state that no party or party's counsel authored the brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person—other than the amici curiae, their members, or their counsel—contributed money that was intended to fund preparing or submitting the brief.

ARGUMENT

I. The United States Supreme Court has convincingly identified the fatal flaws in plaintiff's religious freedom claims.

Plaintiff argues: "By imposing on Utahns the State's inherently spiritual and religious view that life begins in the earliest days of pregnancy" the state's abortion regulations violate article I, section 4 of the Utah Constitution.

Decades ago, the U.S. Supreme Court addressed an analogous claim. In *Harris v. McRae*, 448 U.S. 297 (1980), plaintiffs argued that a prohibition of public funding of abortion violates either "the prohibition under the Establishment Clause of the First Amendment against any 'law respecting an establishment of religion,'" or "the right to freedom of religion protected by the Free Exercise Clause of the First Amendment." *Id*. at

311.

The specific Establishment Clause argument was that the abortion law "violates the Establishment Clause because it incorporates into law the doctrines of the Roman Catholic Church concerning the sinfulness of abortion and the time at which life commences." *Id*.

In regard to Free Exercise, they claimed: "insofar as a woman's decision to seek a medically necessary abortion may be a product of her religious beliefs under certain Protestant and Jewish tenets, the appellees assert that the funding limitations of the Hyde Amendment impinge on the freedom of religion guaranteed by the Free Exercise Clause." *Id*.

The Court rejected the Establishment Clause claim outright:

> It is well settled that "a legislative enactment does not contravene the Establishment Clause if it has a secular legislative purpose, if its principal or primary effect neither advances nor inhibits religion, and if it does not foster an excessive governmental entanglement with religion." *Committee for Public Education v. Regan*, 444 U. S. 646, 653. . . . Although neither a State nor the Federal Government can constitutionally "pass laws which aid one religion, aid all religions, or prefer one religion over another," *Everson v. Board of Education*, 330 U. S. 1, 15, it does not follow that a statute violates the Establishment Clause because it "happens to coincide or harmonize with the tenets of some or all religions." *McGowan v. Maryland*, 366 U. S. 420, 442. 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. *Ibid*. The Hyde Amendment, as the District Court noted, is as much a reflection of "traditionalist" values towards abortion, as it is an embodiment of the views of any particular religion. 491 F. Supp., at 741. *See also Roe v. Wade*, 410 U. S., at 138-141. In sum, we are convinced that the fact that the funding restrictions in the Hyde Amendment may coincide with the religious tenets of the Roman Catholic Church does not, without more, contravene the Establishment Clause. *Id*. at 319-320.

The Court did not address the Free Exercise claim "because the appellees lack standing to

raise a free exercise challenge." Some of the plaintiffs in that case were pregnant women and they lacked standing "because none alleged, much less proved, that she sought an abortion under compulsion of religious belief." *Id*. at 320. This case has this same feature with nothing in the briefing suggesting plaintiff is required by religious beliefs to seek an abortion.

The Court's reasoning in *McRae* is relevant here. Plaintiff has simply alleged that there exists a similarity between Utah's abortion regulation and religious teaching which offends the religious freedom protections in the Utah Constitution. The *McRae* decision makes clear that the similarity of legislation to religious teachings does not establish religion. Though the Court did not decide the free exercise claims made in that case for reasons of standing (parallel to the circumstances of this case), plaintiff here also premises its free exercise-type claims on the similarity of religious teachings with the Utah statute. Thus, the U.S. Supreme Court's rejection of the idea that this similarity alone makes the law constitutionally suspect is at least suggestive of the fatal flaws in plaintiffs' arguments.[1]

II. Nothing in article I, section 4 of the Utah Constitution prevents the state from acting to protect unborn children.

While plaintiffs are correct that the Utah Constitution provides more robust protection for religious freedom than some interpretations of the United States

[1] The logic of plaintiff's position would seem to invalidate any abortion law. Plaintiff points to religious statements that reflect beliefs that the life of an unborn child does not begin until birth or begins at some point during pregnancy. Since some states have laws allowing abortion at any point during pregnancy or allowing abortion after a certain point in gestation, it would seem these would be open to an Establishment Clause challenge for reflecting religious teachings that abortion is morally acceptable at either some point or any time during pregnancy.

Constitution, Utah's regulation of the practice of abortion do not implicate religious freedom and are, thus, not at odds with article I, section 4.

A. Utah's abortion regulation does not establish religion, effect a "union of Church and State" or allow "any church [to] dominate the State or interfere with its functions."

The U.S. Supreme Court's analysis of Establishment Clause objections to abortion regulations was not premised on language specific to the First Amendment. The reasoning in *McRae* is entirely apposite to similar claims made by Planned Parenthood in this case. The allegation that a law "happens to coincide or harmonize with the tenets of some or all religions," *McGowan v. Maryland*, 366 U. S. 420, 442 (1961) does not in itself create an official state religion, or demonstrate inappropriate sectarian influence on the law.

The fact that the protections of religious freedom against church-state combinations in Utah's Constitution are more specific and more emphatic than the First Amendment's Establishment Clause does not make the *McRae* reasoning irrelevant here. No Utah case has held that a similarity between religious teachings and state legislation creates an established religion for the state or effects a union of church and state. Nor has any of this court's decisions suggested that such a similarity by itself constitutes evidence of domination or interference by any church.

Plaintiff has offered no suggestion, much less evidence, that any church actually interfered with or dominated the legislative process that created Utah's current law. In fact, whatever similarity there is between religious teachings about abortion, there is an even closer similarity to the Model Penal Code recommendation of 1962:

(2) Justifiable Abortion. A licensed physician is justified in terminating a

> pregnancy if he believes there is substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother or that the child would be born with grave physical or mental defect, or that the pregnancy resulted from rape, incest, or other felonious intercourse. All illicit intercourse with a girl below the age of 16 shall be deemed felonious for purposes of this subsection. Justifiable abortions shall be performed only in a licensed hospital except in case of emergency when hospital facilities are unavailable. [Additional exceptions from the requirement of hospitalization may be incorporated here to take account of situations in sparsely settled areas where hospitals are not generally accessible.]
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> (3) Physicians' Certificates; Presumption from Non-Compliance. No abortion shall be performed unless two physicians, one of whom may be the person performing the abortion, shall have certified in writing the circumstances which they believe to justify the abortion. Such certificate shall be submitted before the abortion to the hospital where it is to be performed and, in the case of abortion following felonious intercourse, to the prosecuting attorney or the police. Failure to comply with any of the requirements of this Subsection gives rise to a presumption that the abortion was unjustified. American Law Institute, Model Penal Code §230.3, reprinted in LINDA GREENHOUSE & REVA B. SIEGEL, BEFORE *ROE V. WADE* 25 (2012), https://documents.law.yale.edu/sites/default/files/beforeroe2nded_1.pdf.

The exemptions in the MPC are very similar to those in Utah's law. Utah's law also includes the requirement of two physicians certifying the conditions for the exemption.

The Texas statute invalidated in *Roe v. Wade*, 410 U.S. 113 (1973), includes an exception to the state's prohibition on performing abortions "for the purpose of saving the life of the mother." *Id*. at 119. The Georgia statute invalidated in *Doe v. Bolton*, 410 U.S. 479 (1973), the same day, was modeled on the MPC provision and included similar exemptions (life of mother, fetal defects, rape) and procedures (certification by three doctors) to those in Utah's current law. *Id*. at 183-184.

In summary, in 2012, Utah enacted abortion regulations that closely resembled abortion regulations suggested by the American Law Institute and adopted in other states

prior to *Roe v. Wade*. The Utah regulations were to go into effect after *Roe v. Wade* was overturned. At this point, Utah's law would resemble pre-*Roe* law in other states. None of this supports in any way the suggestion that Utah's regulation was merely a codification of religious teaching. It is far more plausible to assume that Utah was influenced by policies that began with the American Law Institute rather than with a religious organization.

B. Utah's abortion regulation does not impinge on the "rights of conscience" or prohibit the free exercise of religion.

The essential nature of a claim that one has been deprived of the ability to freely exercise religion or a right of conscience is that the claimant has a religious or conscientious duty either to do or to refrain from doing something and has been subjected to a state-sponsored burden for doing or failing to do that thing. There is no allegation in this case that any plaintiff is seeking abortion as a religious duty. The one example raised by plaintiff of a religious obligation to have an abortion involved a threat to the life of the mother. Utah's law would allow for an abortion in that circumstance, so the law does not impinge on that belief. The absence of any religious or conscientious obligation to secure or perform an abortion precludes any right of conscience or free exercise claim.[2]

[2] Even if plaintiff was to assert a conscientious or religious duty to perform or procure an abortion, that would not be dispositive of the claim. The state would still be allowed to show that it has a compelling interest that would justify the abortion regulation. It is proverbial that human sacrifice would not be considered a protected practice of religion. See *Fulton v. Philadelphia*, 141 S. Ct. 1868, 1895 n. 28 (2021) (Alito, J. concurring) ("No one has ever seriously argued that the Free Exercise Clause protects every conceivable religious practice or even every conceivable form of worship, including such things as human sacrifice."); *Reynolds v. United States*, 98 U.S. 145, 166 (1879) ("Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to

Plaintiff appears to understand this, so by contrast to a normal free exercise/right of conscience claim, it frames its claim with a restatement of the establishment-type claim: "The Criminal Abortion Ban violates these foundational precepts by imposing on Utahns a state-mandated view as to when life begins, which is an inherently religious and spiritual one."

This claim mischaracterizes the legislation. Here is the relevant section of Utah's legislation:

> (1) (a) "Abortion" means:
> (i) the intentional termination or attempted termination of human pregnancy after implantation of a fertilized ovum through a medical procedure carried out by a physician or through a substance used under the direction of a physician;
> (ii) the intentional killing or attempted killing of a live unborn child through a medical procedure carried out by a physician or through a substance used under the direction of a physician; or
> (iii) the intentional causing or attempted causing of a miscarriage through a medical procedure carried out by a physician or through a substance used under the direction of a physician.

Subsection (1)(a)(i) is the only portion that discusses the temporal point at which the law goes into effect and it uses a clear biological marker, "after implantation of a fertilized ovum."

This definition is consistent with what this Court identified as "the commonsense meaning of the term 'unborn child'": "a human being at any stage of development in utero because once fertilization occurs, an unborn child is an 'individual human life' that is 'in existence and developing prior to birth.'" *State v. MacGuire*, 84 P. 3d 1171, 1175 (Utah

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prevent a sacrifice?"). By the same token, surely the state could assert a compelling interest in acting to protect human life that would overcome a religious freedom claim to take life.

2004) (quoting Black's Law Dictionary 1058 (abridged 6th ed.1991)).

While the next subsection refers to a "live unborn child" it does not propose a point at which life begins. This subsection parallels the next part of the statute which specifies procedures that are not abortions, including, "'Abortion' does not include: (i) removal of a dead unborn child." It is reasonable to assume that (1)(a)(ii) is not making a philosophical or theological claim but specifying what procedures are allowed (removing an unborn child who has died) by contrast to those that are not (taking the life of an unborn child).[3]

Finally, the plaintiff's religious freedom/right of conscience claim fails because these rights do not include a right to prevent the state from enforcing laws with which one disagrees on religious or conscientious grounds. It cannot be the case that the state is foreclosed from legislating on matters otherwise within its authority to regulate because there exist different religious or moral views about that matter. There are a variety of religious beliefs that touch on many issues, from taxation, to immigration, to welfare spending, to education, etc. that are understood to be fit subjects for legal regulation and on which people of different religious and conscientious perspectives have firmly held beliefs and on which they come to different conclusions.

Even a sincere religious conviction that current laws on drug use or immigration are

[3] As noted above, even if we accept the argument that the statute weighs in on the question of when life begins, this introduces a strange circularity. If the state cannot make a law that coincides with the beliefs of some religious groups as to when life begins because to do so would violate the religious freedom of people who believe life begins at four months or when a child draws breath. Thus, the state must allow abortion, which of course, is at odds with the religious beliefs of those who believe life begins at conception and would thus infringe their religious liberty. This logic can hardly be credited.

too restrictive do not create a religious freedom-based right to prevent those laws from being enforced.

CONCLUSION

For the foregoing reasons, this Court should reject the serious mischaracterization of the Utah Constitution's protection of religious freedom proposed by plaintiffs. Religious liberty is a critical constitutional guarantee but trying to shoehorn a difference of opinion on policy as a religious freedom claim trivializes that guarantee.

Respectfully submitted this 6th day of December, 2022.

/s/ William C. Duncan
Attorney for Amicus Curiae

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that:

1. This brief complies with the word limits set forth in Utah Rules of Appellate Procedure 25(f) because this brief contains 2,658 words, excluding those parts of the brief exempted under the rule.

2. This brief complies with Utah Rules of Appellate Procedure 21(h) regarding public and non-public filings.

DATED this 6th day of December, 2022.

/s/ William C. Duncan
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CERTIFICATE OF SERVICE

Undersigned counsel hereby certifies that on the 6th day of December, 2022, a copy of the foregoing **BRIEF AMICUS CURIAE OF SUTHERLAND INSTITUTE IN SUPPORT OF APPELLANT** was served via electronic mail, on the following:

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