No. SC86768

IN THE SUPREME COURT OF MISSOURI

REPRODUCTIVE HEALTH SERVICES OF PLANNED PARENTHOOD OF THE ST. LOUIS REGION, INC. et al.,
Appellants,

v.

JEREMIAH W. NIXON, Attorney General of Missouri, in his official capacity, et al.,
Respondents.

On Appeal from the Circuit Court of Boone County, Missouri

RESPONDENT'S BRIEF

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STATEMENT OF FACTS

I. Procedural Background

The Missouri General Assembly enacted, over the veto of the Governor, a statute requiring a treating physician to obtain the informed written consent of a woman seeking an abortion at least 24 hours prior to the scheduled procedure or the provision of abortion inducing medicine (L.F. 1, Petition 2; Appendix A). The statute – § 188.039, RSMo Cum. Supp. 2003 – was to take effect October 11, 2000 (L.F. 2, Petition 2).[1] Its enforcement was temporarily stayed by the United States District Court for the Western District of Missouri upon the request of Reproductive Health Services of Planned Parenthood of the St. Louis Region, Inc., and Comprehensive Health Services of Planned Parenthood of Kansas and Mid-Missouri, Inc. (Planned Parenthood), which organizations challenged the statute as unconstitutionally vague (L.F. 3; Petition 3). Planned Parenthood provides abortions in the cities of Columbia and St. Louis, Missouri (L.F. 3; Petition 3). The named defendants in the federal lawsuit are Missouri Attorney General Nixon, St. Louis Circuit Attorney Jennifer Joyce, and Boone County Prosecuting Attorney Kevin Crane (L.F. 3; Petition 3).

[1]While Planned Parenthood refers to § 188.039, RSMo Cum. Supp. 2003, as "The Act" (App. br. 8), Attorney General Nixon refers to the challenged statutory provision as "the informed consent statute" or the "new statute" to avoid confusion with the "Regulation of Abortions Act" which encompasses several provisions (§§ 188.010 - 188.230).

In motions for summary judgment in federal court, defendants explained that the scienter requirements in two companion statutes – §§ 188.065 and 188.075, RSMo 2000 – cured any alleged vagueness in the challenged informed consent statute (L.F. 8; Petition 8).

On May 6, 2004, upon motion of Planned Parenthood, the United States District Court issued a *Pullman*[2] stay of the federal lawsuit, leaving for Missouri's state courts the issue of whether the scienter requirements in §§ 188.065 and 188.075, RSMo 2000, cure any vagueness in the informed consent statute of § 188.039, RSMo Cum. Supp. 2003 (L.F. 16). The District Court also continued a temporary restraining order (TRO) (L.F. 16). The United States Court of Appeals for the Eighth Circuit vacated the TRO on May 27, 2004, causing § 188.039 RSMo, to immediately become effective (L.F. 24, 135). After nearly one month, on June 22, 2004, the United States District Court issued a preliminary injunction, again staying

[2] In *Railroad Commission of Texas v. Pullman Co.,* 312 U.S. 496, 501-02 (1941), the United States Supreme Court recognized a need for a federal court to stay its proceedings to allow state courts to resolve state law questions, thus avoiding unnecessary adjudication of federal questions and needless friction with state policies.

enforcement of § 188.039 RSMo. The state's appeal of that injunction, No. 04-2674, is still pending in the Eighth Circuit (L.F. 28).

II. The State Court Action

After the United States District Court issued its stay and preliminary injunction, Planned Parenthood filed an action on June 23, 2004, in the Circuit Court of Boone County, Missouri, seeking a declaratory judgment that § 188.039, RSMo, violates the Missouri Constitution (L.F. 1). Planned Parenthood again named Attorney General Nixon, Boone County Prosecutor Kevin Crane, and St. Louis Circuit Attorney Jennifer Joyce as defendants (L.F. 1).

In cross motions for summary judgment, the parties relied on deposition testimony

that had been obtained during the federal court proceedings (L.F. 55, 78, 173). Attorney General Nixon relied on the depositions of Planned Parenthood's experts H. Marvin Camel, M.D. and Phillip Stubblefield, M.D. (L.F. 96-134). Dr. Camel is a board member and medical director for Planned Parenthood's St. Louis facility (L.F. 99). Dr. Stubblefield is a physician licensed in Massachusetts (L.F. 110; Stubblefield depo Exhibit 1). Planned Parenthood relied on the deposition of Attorney General Nixon's expert Dr. Robert Ferris, an obstetrician and gynecologist in private practice (L.F. 184, Ferris depo. 4).

A. Patients Need Information

Doctors need to discuss with their patients various risks attendant with an abortion procedure (L.F. 100, 117, 125; Camel depo. 27; Stubblefield depo. 42, 66). The decision to abort should be made with a thorough knowledge of the abortion procedures' consequences and the alternatives to abortion (L.F. 101, 115; Camel depo. 29; Stubblefield depo 39). It is important for a patient to have the best information that is available (L.F. 100; Camel depo. 28). The questions a physician should ask during an evaluation of a woman seeking an abortion differ with each patient and are dependant upon the answers received during the evaluation (L.F. 120-121; Stubblefield depo. 56-57). While the evaluation and topics discussed with the woman seeking an abortion may encompass many things, the items discussed depend "on the situation" (L.F. 194; Ferris depo. 45). "Every situation is unique and different" (L.F. 195; Ferris depo. 46). A physician's recommendations are dependent upon a patient's "unique circumstances or situation and her physical and emotional makeup" (L.F. 194; Ferris depo. 44). "There is not a cookbook for each patient" (L.F. 201; Ferris depo. 71)

B. Doctors Understand: "Indicators," "Contraindicators," "Risk Factors," and "Situational Factors"

Both doctors for Planned Parenthood understood the dictionary definition for the word "indicator" that is used in the Missouri's new informed consent statute (L.F. 103, 123-124; Camel depo. 37; Stubblefield depo. 63-64). The dictionary definition

for "indicator" means "one that indicated." WEBSTERS' THIRD NEW INTERNATIONAL DICTIONARY 1150 (1993) (L.F. 122, 231; Stubblefield depo. 64). The prefix for "contra," as used in the statutory term "contraindicator" means "against" or "opposite." WEBSTER'S THIRD NEW WORLD INTERNATIONAL DICTIONARY 494 (1993) (L.F. 231; Stubblefield depo. 62).

Dr. Stubblefield understood the meaning of the term "risk factor," which he defined as a personal attribute of a patient that increases the probability that some hazard could befall the patient. (L.F. 114: Stubblefield depo. 33). He also understood that the statutory term "situational factors" may be different from "physical" or "psychological" factors (L.F. 128; Stubblefield depo. 72). Safety factors, willingness to follow directions, language barriers, and access to a telephone and emergency care are examples of situational factors (L.F. 178; Stubblefield depo. 70-72). He agreed that doctors should screen or discuss situational factors with a patient (L.F. 131; Stubblefield depo. 85).

C. A 24 Hour Wait Does Not Increase Risk

Planned Parenthood's doctors stated that a 24-hour waiting period does not make an abortion more difficult to perform, nor measurably increase the risks for the abortion (L.F. 102, 118; Camel depo. 30; Stubblefield depo. 43).

D. Circuit Court's Order and Judgment Upholds Statute

On March 16, 2005, after the parties had filed cross motions for summary judgment and presented oral argument, the Honorable Ellen S. Roper, ruled as follows:

> Defendants' motions for summary judgment are sustained, the court finding:
>
> 1. There is no genuine issue of material fact;
>
> 2. The terms of section 188.039, RSMo (Cum. Supp. 2003) are not impermissibly vague;
>
> 3. A knowing violation of section 188.039 RSMo is required to subject an individual to criminal prosecution and/or license revocation pursuant to sections 188.075 and 188.065 RSMo;
>
> 4. The twenty-four hour waiting period to obtain an abortion does not violate the Missouri or United States Constitution;
>
> 5. Defendants are entitled to judgment as a matter of law.
>
> Accordingly, judgment is entered in favor of defendants and against plaintiffs. Plaintiffs motion for summary judgment is denied. Costs taxed against plaintiffs.

(L.F. 493; Appendix A). Planned Parenthood appeals from this Order and Judgment.

ARGUMENT

I.

Section 188.039, RSMo Cum. Supp. 2003, Is Not Unconstitutionally Vague.

(Responding to Appellant's Point I)

A. Standard of Review

The Missouri Supreme Court's review is essentially *de novo* and the criteria on appeal for testing the propriety of summary judgment are the same as those employed by the trial court to determine the motion initially. *ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.,* 854 S.W.2d 371, 376 (Mo. banc 1993).

In reviewing whether § 188.039, RSMo, is vague, statutes are presumed constitutional and the burden to show otherwise rests with Appellant Planned Parenthood. *Suffian v. Usher,* 19 S.W.3d 130, 134 (Mo. banc 2000). This Court does not invalidate a statute "unless it clearly and undoubtedly contravenes the constitution and plainly and palpably affronts fundamental law embodied in the constitution." *Smith v. Coffey,* 37 S.W.3d 797, 800 (Mo. banc 2001) (internal citations omitted). It is well established that "if the law is susceptible of any reasonable and practical construction which will support it, it will be held valid, and...the courts must endeavor, by every rule of construction, to give it effect." *State v. Duggar,* 806 S.W.2d 407, 408 (Mo. banc 1991).

Because this case is a facial challenge to § 188.039, RSMo, this Court does not determine if there is some imagined situation in which the language used could be vague or confusing. *State v. Self,* 155 S.W.3d 756, 760 (Mo. banc 2005); *Brooks v. State,* 128 S.W.3d 844, 851 (Mo. banc 2004). If a statute can be applied constitutionally, the appellant "will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional." *State v. Ellis,* 853 S.W.2d 440, 446 (Mo. App. E.D.1993), *quoting U.S. v. Raines,* 362 U.S. 17, 21, 80 S. Ct. 519, 4 L.Ed.2d 524 (1960).

B. The Challenged Terms Are Not Ambiguous or Boundless

Planned Parenthood complains, with little elaboration, that the following terms in the new informed consent statute are undefined and not limited in any way: "risk factors," "indicators," "contraindicators," and "situational factors" (App. br. 15) and therefore, physicians allegedly cannot determine what conduct will incur liability (App. br. 14). This Court should affirm the State Circuit Court's holding that Missouri's new informed consent statute is not ambiguous because the terms in the statute are clear on their face, capable of dictionary definition, understood by Planned Parenthood's own experts, and Missouri appellate courts have employed the terms in their own decisions without further delineation. Moreover, the terms are not boundless.

a. Indicators and Contraindicators

Words used in the statute are given their plain and ordinary meaning, as "found in the dictionary...unless the legislature provides a different definition." *State v. Reproductive Health Services of Planned Parenthood of the St. Louis Region, Inc.,* 97 S.W.3d 54, 61 (Mo. App. E.D. 2002) (quoting *Lincoln Indus. Inc. v. Director of Revenue,* 51 S.W.3d 462, 465 (Mo. banc 2001)). "Indicator" and "contra-indicator" both have ordinary dictionary definition. "Indicator" means "one that indicates." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1150 (1993). The prefix "contra" simply means "against" or "opposite." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 494 (1993). Plaintiffs' experts expressed no difficulty understanding the ordinary dictionary definitions (L.F. 103, 123-124; Camel depo. 37; Stubblefield depo. 63-64). Missouri's Court of Appeal has used the term "indicators" in previous decisions, evidencing that the term is within common understanding. *See e.g. In re Coffel,* 117 S.W.3d 116, 124 (Mo. App. E.D. 2003) (referencing "indicators" that inform a psychologist whether test results are valid); *Still v. Ahnemann,* 984 S.W.2d 568, 569 (Mo. App. W.D. 1999) (discussing "clinical indicators of preeclampsia"). Indicators and

contraindicators are not vague terms.

b. Situational Factors

Planned Parenthood's expert Dr. Stubblefield understood the meaning of "situational factors" (L.F. 126-128; Stubblefield depo. 70 -72). The Missouri Supreme Court has employed the term "situational factors" in a decision, without definition. *See e.g., Suffian v. Usher,* 19 S.W.3d 130, 135 (Mo. banc 2000) (minor child suffered depression that was influenced "by both mental and situational factors"). *See also Cocktail Fortune, Inc. v. Supervisor of Liquor Control*, 994 S.W.2d 955, 958 (Mo. banc 1999) (finding it significant that a challenged term in a liquor control regulation had been used by this Court in prior decisions without specific definition).

c. Risk Factors

The term "risk factors" likewise is not foreign to Missouri court decisions. *See e.g., Aldridge v. Southern Missouri Gas Co.,* 131 S.W.3d 876, 881 (Mo. App. S.D. 2004) ("risk factors" for a heart attack); *Wright v. Barr,* 62 S.W.3d 509, 516 (Mo. App. W.D. 2001) (atrial fibrillation is a risk factor for stroke); *Morgan v. Union Pacific R. Co.,* 979 S.W.2d 477, 481 (Mo. App. E.D.1998) (risk factors for developing carpal tunnel syndrome). Dr. Stubblefield's testimony belies any claim that this term is ambiguous, as he defined it as "personal attributes of this patient that increase the probability that some hazard could befall her." (L.F. 114 ; Stubblefield depo. 33).

d. Statute is Not Boundless; Meets Needs of Patients

> [P]hysical, emotional, psychological, familial, and the woman's age, [are] all relevant to the well-being of the patient. All these factors may relate to health. This allows the attending physician the room he needs to make his best medical judgment. And it is room that operates for the benefit, not the disadvantage, of the pregnant woman.

Doe v. Bolton, 410 U.S. 179, 192 (1973).

As evidenced in the above passage, the United States Supreme Court has recognized that various factors relate to the maternal health of a woman seeking an abortion. And, as the Court iterated in *City of Akron v. Akron Center for Reproductive Health, Inc.* 462 U.S. 416 (1983) *rev'd on other grounds in Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992) (*Casey*), a State may seek to ensure that the decision to abort is made "in the light of all attendant circumstances psychological and emotional as well as physical that might be relevant to the well-being of the patient." 462 U.S. at 443. Section 188.039 legitimately strikes a balance between State's authorized interest in assuring that certain necessary information be provided for the maternal health of the patient, and the case-by-case needs of patient care. If the statute was too specific, it might be challenged as not meeting the needs of the patient or not allowing the physician to exercise his or her professional, clinical judgment.

In paragraph 2 of § 188.039, RSMo, physicians are directed to tailor discussions with a patient "in light of her medical history and medical condition." In paragraph 3 of

§ 188.039, RSMo, physicians are directed to evaluate the patient for risk factors that are unique to the patient: "factors which would predispose the patient or increase the risk of...one or more adverse...reactions to the proposed procedure...as compared with women who do not possess such risk factors." Given the boundaries expressly prescribed in paragraphs 2 and 3 of § 188.039, RSMo, it is inconceivable that the legislature intended for a physician to counsel on every possible anomaly, irrespective of the patient's situation, or that the physician would be prosecuted for failing to do so. Therefore, the new informed consent statute is not "boundless" as alleged by Planned Parenthood.

Attorney General Nixon's expert Dr. Robert Ferris substantiates the position that the statute is not boundless. He testified that while the evaluation and topics discussed with the woman seeking an abortion may encompass many things, it always "depends on the situation" (L.F. 194; Ferris depo. p. 45). "Every situation is unique and different." (L.F. 195; Ferris depo. p. 46). A physician's recommendations are dependent upon a patient's "unique circumstances or situation and her physical and emotional makeup" (L.F. 194; Ferris depo. p. 44).

Planned Parenthood's experts agreed that doctors need to discuss with their patients the various risks attendant with an abortion procedure (L.F. 100, 117, 125;

Camel depo. 27; Stubblefield depo. 42, 66). They agreed that the decision to abort should be made with a thorough knowledge of the abortion procedures' consequences and the alternatives to abortion (L.F. 101, 115; Camel depo. 29; Stubblefield depo 39). Dr. Camel concurred that it is important for a patient to have the best information that is available (L.F. 100; Camel depo. 28). Dr. Stubblefield asserted that the questions a physician should ask during an evaluation of a woman seeking an abortion differ with each patient and are dependant upon the answers received during the evaluation (L.F. 120-121; Stubblefield depo. 56-57). As summarized by Attorney General Nixon's expert Dr. Ferris, "There is not a cookbook for each patient" (L.F. 201; Ferris depo. 71). Missouri's new informed consent statute provides just what these doctors have prescribed: the freedom to ask the questions doctors should ask, depending on the situation. And while the statute provides guidelines for discussion and evaluation, it does not mandate that everything in the universe be considered. Dr. Ferris specifically testified that he did not believe the new statute was boundless or unreasonable (L.F. 197; Ferris depo. p. 54).

Planned Parenthood, however, argues that Dr. Ferris agreed the new statute was unduly broad when he said that a physician need only follow the consent form that is to be promulgated by the Missouri Department of Health (App. br. 19). Dr. Ferris never even implied that absent a standardized form a doctor would be unable to follow the law. To the contrary, Dr. Ferris clearly stated that a physician was bound to follow the law even if no standardized consent form was promulgated (L.F. 205-206;

Ferris depo. 89-90). He merely expressed his opinion that if the patient signed the promulgated consent form 24 hours prior to the abortion procedure, it could insulate a physician from prosecution (L.F. 198; Ferris depo. 58). Indeed, imagine the difficulty a prosecutor would face in proving a violation of the new consent statute if a patient signed a State promulgated form, certifying that her physician had evaluated and counseled her in conformity with the statute at least 24 hours prior to the abortion procedure.

e. New Statute Has a Legitimate Purpose

Planned Parenthood contends that the predecessor to the new informed consent law "more clearly defined boundaries and allowed physicians to exercise their professional judgment" (App. br. 16-17). Planned Parenthood concludes, therefore, that the General Assembly must have had an illegitimate purpose in enacting the new law because the legislature is presumed not to have done a meaningless act (App. br. 17). It is puzzling that Planned Parenthood would even suggest that Missouri's legislature had an improper purpose in enacting a new informed consent statute to replace the prior statute when Planned Parenthood and its lead counsel in this case argued nearly two decades ago that the prior statute was unconstitutional and successfully sought a permanent injunction against its enforcement in *Reproductive Health Services v. Webster,* 662 F.Supp. 407 (W.D. Mo. 1987), *aff'd in part, rev'd in part,* 851 F.2d 1071 (8th Cir. 1988), *rev'd*, 492 U.S. 490 (1989).

Morever, Planned Parenthood's argument that the Missouri General Assembly had some illegitimate purpose in enacting § 188.039, RSMo Cum. Supp. 2003, requires speculation as to purpose – speculation that is foreclosed by the opening provision in Chapter 188, which states that it is the intention of the General Assembly "to regulate abortion to the full extent permitted by the Constitution of the United States, decisions of the United States Supreme Court, and federal statutes." § 188.010, RSMo 2000.

Further, like all canons of construction, the meaningless or "useless act" cannon is subordinate to the requirement that courts determine, if possible, the intent of the legislature from the language of the provision and consider the words used in their plain and ordinary meaning. *State Bd. of Registration for Healing Arts v. Boston*, 72 S.W.3d 260, 263 (Mo. App. W.D. 2002). The Missouri Supreme Court has long recognized that the "useless act" canon of statutory construction does not compel courts to adopt any particular interpretation of a statute. *Gartenbach v. Board of Education,* 356 Mo. 890, 204 S.W.2d 273, 276 (Mo. 1947). It is reasonable that in some instances, the subsequent legislation simply was intended to clarify the legislature's original intent; not adopt an illegitimate purpose.

Statutes are presumed constitutional, *Conseco Finance Servicing Corp. v. Missouri Dept. of Revenue,* 98 S.W.3d 540 (Mo. banc 2003), and that necessarily includes a presumption that the statute was enacted for a legitimate purpose. The

State may adopt structural mechanisms by which the State expresses concern for maternal health or profound respect for life of the unborn. *Casey,* 505 U.S. at 877-878. There is no admissible evidence in the record to overcome the presumption that Missouri's statute was enacted for these legitimate reasons.

Planned Parenthood's statement that Missouri's law was intended to end abortion or hold abortionists civilly liable for failing to screen patients is pure conjecture and not based on admissible evidence (App. br. 17 -18 n. 4). Such contention rests solely on inadmissible hearsay that was included with Planned Parenthood's summary judgment motion, to which Attorney General Nixon strenuously objected (L.F. 351 -354). Merely because Planned Parenthood sought to include such hearsay in the Legal File does not mean it was admissible evidence, or considered by any court.

C. Scienter Requirements Ameliorate Any Perceived Vagueness

Planned Parenthood's vagueness argument is eviscerated in large part by the scienter requirements in §§ 188.065 and 188.075, RSMo 2000. There is no criminal or civil sanction prescribed in the new informed consent statute. The sanctions and the scienter requirements for violation of any provision within the Missouri's Regulation of Abortions Act (§§ 188.010 - 188.230) are contained in §§ 188.065 and 188.075. Section 188.075, relating to misdemeanor prosecution for violating the provisions of the Act, requires that one "knowingly" act contrary to the provisions.

Section 188.065, relating to the revocation of a health professional's license, requires that the individual "willfully and knowingly" perform some act made unlawful by the Regulation of Abortion Act. In this regard, Missouri's statue is akin to the one at issue in *Fargo Women's Health Organization v. Schafer,* 18 F.3d 526, 534-535 (8th Cir. 1994), where the court held that scienter requirements defeated claims that North Dakota's informed consent statute was unconstitutionally vague.

Outside the abortion context, this Court and the Missouri Courts of Appeal have looked to scienter requirements identical to those in §§ 188.065 and 188.075 in finding statutes constitutional. *See e.g. State v. Lee Mechanical Contractors, Inc.,* 938 S.W.2d 269 (Mo. banc 1997) (upholding statute providing for the "willful" violation of the prevailing wage law); *State v. Shaw,* 847 S.W.2d 768, 776 (Mo. banc 1993) (scienter element "willfully and knowing" sufficiently cured any uncertainty as to the meaning of the phrase "unfair practices"); *State v. Dale,* 775 S.W.2d 126 (Mo. banc 1989) (statute making it a class D felony to "knowingly" abuse or neglect nursing home residents held not vague); *State v. Condict,* 65 S.W.3d 6 (Mo. App. S.D. 2001) (statute prohibiting possession of chemicals with intent to create controlled substance was not unconstitutionally vague where crime included scienter requirement); *State v. Foster,* 838 S.W.2d 60 (Mo. App. E.D. 1992) (statutes defining offense of promoting child pornography are not unconstitutionally vague as they required some element of scienter).

This Court most recently addressed the effect of a scienter requirement on a criminal statute in *State v. Beine,* 162 S.W.3d 483 (Mo. banc 2005). Beine challenged his conviction for sexual misconduct by indecent exposure, alleging that a man could be prosecuted under § 566.083.1, RSMo, simply by urinating in a public restroom. This Court reversed the conviction, holding the criminal statute unconstitutional because it solely required proof that a defendant knowingly exposed his genitals to a child under 14 years. 162 S.W.3d at 488. The instant case is distinguishable. Unlike the statute used to convict Biene, the scienter requirement in § 188.075, RSMo, relating to the new informed consent statute, applies to each element of the crime by virtue of § 562.021, RSMo 2000. That provision reads as follows:

> If the definition of an offense prescribes a culpable mental state but does not specify the conduct, attendant circumstances or result to which it applies, the prescribed culpable mental state applies to each such material element.

§ 562.021, RSMo 2000.

The court in *Planned Parenthood Ass'n of Kansas City, Missouri, Inc. v. Ashcroft,* 655 F.2d 848 (8th Cir. 1981), *aff'd,* 462 U.S. 476 (1983), discussed the effect of

§ 562.021, RSMo, on a provision in the Regulation of Abortions Act. The court held that the mens rea requirement in § 188.075, RSMo, applied to each element of the crime of violating § 188.030, RSMo, (prohibiting most abortions of viable unborn children). And, such a mens rea requirement saved § 188.030, RSMo, from a charge of unconstitutional vagueness.[3] 655 F.2d at 862. Because the scienter requirement in § 188.075, RSMo, applies to each element of the crime and was sufficient in *Ashcroft* to save one provision of the Missouri's Regulation of Abortions Act from being struck as unconstitutionally vague, the same scienter requirement should be sufficient in the instant case involving another provision of the same Act.

Planned Parenthood's reliance on *Planned Parenthood of Idaho, Inc., v. Wasden,* 376 F.3d 980 (9th Cir. 2004), and *Richmond Med. Ctr. for Women v. Gilmore,* 55 F.Supp. 2d 441, 449 (E.D. Va. 1999), do not aid its position as both cases are wholly distinguishable. In the Idaho case, the challenged statute involved a parental consent provision. The vagueness problem involved a judicial by-pass

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[3] In quoting *Planned Parenthood Ass'n of Kansas City v. Ashcroft,* in support of its position that the presence of a scienter requirement does not entirely eliminate vagueness, Planned Parenthood omits a significant part of the appellate court's language (App. br. 21). The entire sentence reads: "Although the presence of a scienter requirement will not entirely eliminate problems caused by vagueness, we are satisfied it is sufficient here." 655 F.2d at 860.

provision that allowed for abortions only when the emergency was so urgent that there was insufficient time for the physician to obtain the informed consent of a parent or a court order. The court held as unconstitutionally vague the provision that subjected a physician to criminal prosecution for failing to correctly estimate how long even an expeditious bypass might take. *Id.* at 933, n. 24. In effect, the Idaho statute required a physician to second guess the judicial system in determining a fact that was outside the physician's area of knowledge. Missouri's informed consent statute requires only that a physician consult with and evaluate a patient – conduct that is well within a competent physician's expertise.

In the Richmond case, Virginia's partial birth abortion statute was held unconstitutionally vague despite the statute's scienter requirements that the doctor "knowingly" perform an abortion that the person "knows" will kill the fetus. 55 F.Supp.2d at 499. The scienter requirements did not save the statute from being unconstitutionally vague because the provision's imprecise description of a "partial birth" abortion could encompass procedures that were not intended to be outlawed and left an ordinary physician without notice of what was illegal. 55 F.Supp.2d at 500. That is not the case with Missouri's informed consent law. That law does not attempt to outlaw any particular type of procedure, but merely imposes duties of conference, evaluation, and a waiting period for abortions, absent a medical emergency. The conference and evaluation duties are to be performed within the boundaries relevant to the patient. § 188.039.2 and 3, RSMo. There is no

overbreadth and no risk of being prosecuted merely because the doctor "knowingly" performs the abortion. Rather, the physician must knowingly violate each element of the statutory provision – such as *knowingly* fail to discuss with a woman he *knows* to be seeking an abortion a risk factor that he *knows* to exist in light of the patient's medical history and medical condition.

II.

The 24 Hour Waiting Period is Constitutional.

(Responding to Appellant's Point II)

A. Federal and Missouri Constitutions Have Like Liberty and Privacy Rights

"*Roe v. Wade* was express in its recognition of the State's 'important and legitimate interest[s] in preserving and protecting the health of the pregnant woman [and] in protecting the potentiality of human life.'" *Casey,* 505 U.S. at 875-876 (citing *Roe v. Wade,* 410 U.S. 113, 162 (1973)). Missouri's 24-hour waiting period does nothing more than advance the legitimate state interests of protecting potential life and maternal health by ensuring that a decision to abort is made after a period of reflection, with information that a reasonable patient might require and with proper medical screening.

That such a waiting period does not violate the United States Constitution is clear from *Casey.* There, the United States Supreme Court upheld a law requiring informed consent 24 hours before an abortion. 505 U.S. at 881-87. The Supreme Court has reaffirmed its position that such waiting periods impose no undue burden when it denied certiorari in *A Woman's Choice-East Side Women's Clinic v. Newman,* 305 F.3d 684, 691-92 (7th Cir. 2002), *cert denied,* 437 U.S. 1192 (2003). Lower federal courts have followed suit. *See e.g.*, *Fargo Women's Health*

Organization, 18 F.3d 526 (upholding North Dakota's 24-hour waiting period); *Eubanks v. Schmidt,* 126 F.Supp. 451 (W.D. Ky. 2000) (upholding a 24-hour waiting period requiring two visits to an abortion provider). Despite the plethora of federal precedent, Planned Parenthood asks this Court to overturn Missouri's abortion waiting period, contending that our state constitution has broader and more sweeping rights of liberty and privacy (App. br. 24). Missouri case law provides otherwise.

The right to choose an abortion emanates from the substantive portion of the Due Process Clause of the Fourteenth Amendment of the United States Constitution. *Casey,* 505 U.S. at 874. Planned Parenthood has admitted that Missouri's due process clause (Article I, § 10) is similar to the federal counterpart (App. br. 26). This Court has held that if a statute does not infringe the due process requirements of the Federal Constitution, there is no reason why it should be held to infringe the same provisions of the Missouri Constitution. *State ex rel. Sullivan v. Cross,* 314 S.W.2d 889, 893 (Mo. banc 1958). In *State v. Hill,* 827 S.W.2d 196, 198 (Mo. banc 1992), this Court again held that Art. I, § 10 of the Missouri Constitution provides the same guarantees as the due process rights under the federal constitution (following federal precedent on a constitutional claim in a drug prosecution). The construction given to similar provisions of the federal constitution "is strongly persuasive in construing the like section of our state constitution." *State v. Rushing,* 935 S.W.2d 30, 34 (Mo. banc 1996).

To divide state and federal constitutional interpretation, Planned Parenthood misconstrues this Court's holding in *State ex rel. J.D.S. v. Edwards,* 574 S.W.2d 405 (Mo. banc 1978), a case involving the rights of a putative father against the State. In *J.D.S.,* the Missouri Supreme Court "held that the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the *United States Constitution* require that a putative father be given an opportunity for a hearing before his parental rights are severed." *Roe v. Ross*, 701 S.W.2d 799, 802 (Mo. App. W.D. 1985) (emphasis added); *accord Roque v. Frederick,* 614 S.W.2d 667, 669 (Ark. 1981) ("The Missouri Supreme Court found that a Missouri law which denied putative fathers any opportunity for a hearing on their rights in a custody case violated the due process and equal protection guarantees of the Fourteenth Amendment to the United States Constitution."). The Missouri Supreme Court did not hold that the United States and Missouri Constitutions differed with respect to the validity of the state statute in issue. Instead, this Court said that the "best interests of the child" standard that was applied in *Quilloin v. Walcott*, 434 U.S. 246 (1978), should be replaced with the "presumption of fitness" standard, afforded married fathers in parental termination proceedings, when the putative father has made a "reasonable showing of fatherly concern." 574 S.W.2d at 409. In *Quillon*, there had been no showing of fatherly concern by the natural father who had been absent from the child's life for a period of 11 years prior to the filing of the adoption petition. 434 U.S. at 254. Thus, it

was on this factual difference that the Missouri Supreme Court adopted a more lenient standard. This Court did not indicate that the Missouri Constitution afforded putative fathers more protection than the federal counterpart.

Planned Parenthood also cites *Strahler v. St. Luke's Hospital,* 706 S.W.2d 7 (Mo. banc 1986) and *Paster v. Tussey,* 512 S.W.2d 97 (Mo. banc 1974), purportedly as evidence that Missouri's Constitution provides greater constitutional rights than those guaranteed by the United States Constitution. But *Strahler* involved the "open courts" provision of Art. I, § 14, as it related to the medical malpractice claims of a minor. 706 S.W.2d at 9. In *Paster,* this Court ruled that the Missouri Constitutional provisions declaring a separation of church and state were more explicit and restrictive than the Establishment Clause of the United States Constitution. 512 S.W.2d at 101-102. Neither case addressed state and federal constitutional provisions that are essentially identical. Neither case pertains to individual rights of privacy and liberty. Neither case provides assistance in determining whether the Missouri Constitution prohibits a 24-hour waiting period for abortions.

Planned Parenthood's reliance on cases from other states likewise is misplaced. Absent a detailed analysis of how these other state constitutions and their historical interpretations compare to that of Missouri, the cases have no value. For instance in *Women's Health Ctr of W.Va., Inc. v. Panepinto,* 446 S.E.2d 658, 664 (W.Va. 1993), the court recognized that it has "determined repeatedly that the West

Virginia Constitution's due process clause is more protective of individual rights than its federal counterpart." The opposite is true in Missouri. There is nothing in Missouri's jurisprudence suggesting that our due process clause has been interpreted as more protective of individual rights. Likewise in *Planned Parenthood v. Middle Tennessee v. Sundquist,* 38 S.W.3d 1 (Tenn. 2000), a majority of the Tennessee Supreme Court struck as unconstitutional a provision requiring a *two* day waiting period for abortion with no emergency exception for the health of the mother. 38 S.W.3d at 24.[4] In so ruling, the Tennessee Court found that its state constitution provided a greater right of liberty than the federal constitution based on the following clause: "That government being instituted for the common benefit, the doctrine of non-resistence against arbitrary power and oppression is absurd, slavish, and destructive of the good and happiness of mankind." 38 S.W.3d at 14, citing Tenn. Const. Art I, § 2. The Tennessee Court found that this language "exemplifies the strong and unique concept of liberty embodied in our constitution in that it 'clearly assert[s] the right of revolution.'" *Id.* (citation omitted). This case is wholly inapplicable because the provisions in the Tennessee abortion statute were far more restrictive than those in § 188.039, RSMo, and more importantly, Missouri's Constitution contains no language similar to that in the Tennessee Constitution. The other out of state cases cited by

[4] Missouri's statute has only a one day waiting period and its exception is not limited to circumstances that endanger the "life" of the woman. § 188.039, RSMo.

Planned Parenthood likewise do not assist in determining whether Missouri provides expansive constitutional rights that would invalidate the new informed consent law.[5] Attorney General Nixon can likewise cite to cases from other states in which the courts have concluded that their states' constitutions provide no greater rights to abortion than in the United States Constitution. *See e.g., Mahaffey v. Attorney General* 564 N.W.2d 104, 114 (Mich. App. 1997) (holding that the Michigan Constitution has no greater right to abortion than set forth in the United States Constitution), and *Preterm Cleveland v. Voinovich,* 627 N.E.d2d 570, 584 (Ohio App. 10 Dist., 1993) (holding that the Ohio constitutional provision guaranteeing right to liberty encompassed woman's choice whether to bear a child but was not broader than the right conferred by due process clause of Fourteenth Amendment).

[5] In fact, none of those cases cited by Planned Parenthood pertain to a 24-hour waiting period. Rather than compel a finding that the Missouri Constitution guarantees greater rights of liberty or privacy than are found in the United States Constitution, they highlight the differences between various state constitutions.

Planned Parenthood cites no Missouri case holding that the right to privacy or liberty in Missouri is broader in abortion matters than under the federal constitution. There is, however, ample Missouri precedent for concluding that Missouri's Constitution offers Planned Parenthood and its clients no broader rights than those guaranteed by the United States Constitution. As stated in *State v. Walsh,* 713 S.W.2d 508, 513 (Mo. banc 1986), there is no express recognition of the right to privacy in Missouri's Constitution. The "application of Missouri's right of privacy to date has not paralleled the right of privacy said to inhere in the Federal Constitution." *Id.* This Court reaffirmed its opinion that there is no unfettered right of privacy in the Missouri Constitution in *Cruzan by Cruzan v. Harmon,* 760 S.W.2d 408, 417 (Mo. banc 1988), *aff'd,* 497 U.S. 261 (1990). Other provisions in Missouri's Constitution also have been held to afford the same guarantees as that protected by the United States Constitution. *See State v. Baker,* 103 S.W.3d 711, 717-718 (Mo. banc 2003) (Fourth Amendment affords the same guarantees against unreasonable search and seizures as Art. I, § 15 of the Missouri Constitution); *State v. Rushing,* 935 S.W.2d 30, 34 (Mo. banc 1996) ("The state and federal constitutional protections from unreasonable searches and seizures are coextensive."); *State v. Hester,* 801 S.W.2d 695, 697 (Mo. banc 1991) ("[e]ach time our courts have compared the state and federal constitutional provisions, they have concluded that Art. I, § 18(a) of the Missouri Constitution protects the same rights as the Sixth Amendment of the United

States Constitution."). *See also State v. Schaal,* 806 S.W.2d 659, 662 (Mo. banc 1991) (confrontation rights - Art. I, § 18); *State v. Bolin,* 643 S.W.2d 806, 811 n. 5 (Mo. banc 1983) (right to speedy trial - Art. I, § 18); *Alexander v. State,* 864 S.W.2d 354, 359 (Mo. App. W.D. 1993) (compulsory process - Art. I, § 18). As these cases demonstrate, Planned Parenthood has no greater rights under the Missouri Constitution than that provided by the Constitution of the United States. Therefore, the 24-hour waiting period is valid here, as it was under *Casey*.

B. Undue Burden Standard Applies

As noted above, the United States Supreme Court has adopted the "undue burden" standard for determining the constitutionality of provisions affecting an woman's right to seek an abortion, holding that an abortion statute is constitutional unless it has the "purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion." *Casey*, 505 U.S. at 877. "The fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it." *Casey*, 505 U.S. at 874. A state regulation that does not "reach into the heart" of the protected liberty does not violate the abortion decision right. *Id.*

Only if the protections of the Missouri Constitution are more broad than those protections guaranteed by the United States Constitution can this Court consider

holding abortion regulations to the rigors of strict scrutiny analysis. Planned Parenthood urges this Court to adopt a strict scrutiny standard for reviewing the constitutionality of § 188.039, RSMo, quoting *Akron*, 462 U.S. at 449-451, and if the strict scrutiny standard is applied, Planned Parenthood alleges that Missouri can point to no compelling interest to support its legislation.

Planned Parenthood cites no Missouri precedent for applying the "strict scrutiny" standard in this type of case, and Attorney General Nixon is are aware of none. Planned Parenthood relies on three Missouri cases to support its position that application of the strict scrutiny test is appropriate (App. br. 33 -34). But in *In re Marriage of Woodson*, 92 S.W.3d 780 (Mo. banc 2003), the Court applied a rational basis test in upholding as constitutional a statute classifying a teacher's retirement as non-marital property. In so ruling, the Court relied on federal precedent, noting that in a rational basis review, "this Court does not question the social or economic policies underlying a statute." 92 S.W.3d at 784. Likewise in *Witte v. Dir. of Revenue,* 829 S.W.2d 436 (Mo. banc 1992), this Court refused to depart from the usual rule regarding the presumption of constitutionality in upholding the denial of a tax deduction on contributions to the federal civil service retirement system. While the Supreme Court applied strict scrutiny in *Labor's Educ. & Political Club Indep. v. Danforth,* 561 S.W.2d 339 (Mo. 1977), the case is factually distinguishable as it

involved an equal protection challenge to a law denying the right to run for public office.

More applicable is *Herndon v. Tuhey,* 857 S.W. 203, 208 (Mo. banc 1993), in which this Court cited with approval Justice O'Connor's dissent in *Akron*. There, Justice O'Connor argued for application of the undue burden standard, stating that "[n]ot every regulation that the State imposes must be measured against the State's compelling interests and examined with strict scrutiny...[.]" 462 U.S. at 461-462. The *Akron* decision was overruled by *Casey,* when the Court adopted the "undue burden" standard. 505 U.S. at 838-839.

Planned Parenthood does not argue that Missouri's 24-hour waiting period (or any other provision in § 188.039) fails to pass Constitutional muster under the *Casey's* undue burden standard. Indeed, the only evidence in the record is that a 24-hour wait does not, by itself, cause the procedure to be more dangerous or more difficult to perform (L.F. 102, 118; Camel depo. 30; Stubblefield depo. 43). There is nothing in the record to support the conclusion, using the undue burden standard, that a 24-hour wait poses a substantial obstacle in the path of a woman seeking an abortion. And even if this Court finds a specific right to abortion guaranteed by the Missouri Constitution, "undue burden" remains the appropriate standard under which to review the constitutionality of the challenged statute. *See e.g., Pro-Choice Mississippi v. Fordice*, 716 So.2d 645 (Miss. 1998) (finding a right to abortion under

the Mississippi Constitution, but applying the undue burden standard in upholding a mandatory consultation and 24-hour waiting period).

Planned Parenthood cites a number of federal cases in which waiting periods have been struck as unconstitutional when analyzed under the strict scrutiny standard of *Akron* (App. br. 35). These opinions were all issued prior to *Casey,* which overruled *Akron.* It can not be legitimately argued that these federal courts would rule the same today.[6]

CONCLUSION

[6] Planned Parenthood also cites an unreported decision entitled *Planned Parenthood of Missoula v. State*, No. BDV 95-772 (Mt. Dt. Ct. May 12, 1999). Unpublished decisions are not persuasive authority. *J.B.M. v. S.L.M.,* 54 S.W.3d 711, 714 (Mo. App. S.D. 2001).

For the reasons stated above, the decision of the Circuit Court of Boone County should be affirmed.

Respectfully Submitted,

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CERTIFICATION

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I further certify that the labeled disk, simultaneously filed with the hard copies of the brief, has been scanned for viruses and is virus-free.

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Assistant Attorney General

APPENDIX

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