No. 87321

IN THE SUPREME COURT OF MISSOURI

PLANNED PARENTHOOD OF KANSAS AND MID-MISSOURI, et al.,
Appellants,

v.

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

On Appeal from the Circuit Court of Jackson County, Missouri

APPELLANTS' BRIEF

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JURISDICTIONAL STATEMENT

At issue in this case is whether Mo. Rev. Stat. § 188.250 (the "Act" or the "Teen Assistance Ban") violates the Missouri Constitution and the United States Constitution. Because this appeal involves the constitutional validity of a Missouri statute, it falls within the exclusive appellate jurisdiction of this Court. Mo. Const. art. 5, § 3.

INTRODUCTION

Plaintiffs-Appellants[1] appeal from the November 17, 2005 ruling of the Circuit Court of Jackson County (Atwell, J.) (hereinafter the "Trial Court"), which upheld the Teen Assistance Ban based on a "construction" that has no basis in the plain meaning of the statutory terms. However, even with the Trial Court's construction, the Act violates constitutional rights of Plaintiffs and their clients.

[1] Plaintiffs-Appellants are: Planned Parenthood of Kansas & Mid-Missouri, Inc. ("PPKM"); Planned Parenthood of the St. Louis Region, Inc. ("PPSLR"); Comprehensive Health of Planned Parenthood of Kansas & Mid-Missouri, Inc. ("Comprehensive Health"); Reproductive Health Services of Planned Parenthood of the St. Louis Region, Inc. ("RHS"); and the Missouri Religious Coalition for Reproductive Choice ("MO RCRC") (collectively, these entities will be referred to herein as "Plaintiffs"; collectively, PPKM, PPSLR, Comprehensive Health, and RHS will be referred to herein as "Planned Parenthood").

Plaintiffs brought this action against Defendants-Appellees (hereinafter "Defendants"), challenging the Act because it threatens them with potentially significant civil liability as well as license revocation and other penalties for engaging in core speech and constitutionally-protected conduct. The Act broadly prohibits "intentionally caus[ing], aid[ing] or assist[ing]" minors to obtain abortions out of state without first complying with Missouri's parental consent abortion law, even if the abortion is fully legal under the laws of the state where it is performed. Through its broad and open-ended prohibition, the Act denies Plaintiffs' minor clients counseling, accurate information, referrals, accompaniment, religious guidance, and other forms of assistance in obtaining abortions outside Missouri. The harms caused by the Act are exacerbated by the fact that abortions are virtually unavailable in Missouri other than in the St. Louis region. Thus, in many parts of Missouri, the most accessible abortion provider is out of state.

The Act violates Plaintiffs' right under the Missouri and U.S. Constitutions to speak freely about the availability of abortions outside Missouri and the logistics of obtaining out-of-state abortions. It also violates the rights of Plaintiffs' minor clients to receive accurate information on those subjects. In addition to the substantial constitutional issues raised by the Act's ban on speech, the Act unduly burdens the abortion right of Plaintiffs' clients by forcing some of them to go through two separate judicial bypass proceedings if their parents will not consent

to their abortions, and by making it harder for teens to obtain out-of-state abortions because they cannot receive assistance such as help in making arrangements, adult accompaniment, and transportation. Likewise, the burdens imposed by the Act on minors who seek out-of-state abortions denies Plaintiffs' minor clients the equal privileges and immunities of citizenship by subjecting them to burdens when seeking abortions outside Missouri that citizens of the state to which they travel do not face. It also violates the right of Plaintiffs' patients to leave Missouri by erecting barriers to interstate movement.

Finally, in blatant defiance of our federalist structure, the Teen Assistance Ban seeks to hold non-Missouri medical providers responsible for complying with Missouri's laws when providing medical services to Missouri teens – even if their speech and actions take place entirely outside Missouri and is lawful in the state where the services are provided. This attempt to export State policies nationwide (at least as to those non-Missouri citizens who are subject to Missouri's long-arm jurisdiction) violates the U.S. Constitution's Commerce Clause and denies due process to those non-Missouri citizens who are at risk of being brought into Missouri courts for conduct that was legal where it occurred.

The Trial Court overstepped its judicial role by re-writing and limiting the Act's broad and open-end terms in an attempt to render it constitutional. Its ruling cannot be sustained. For the reasons set forth below, this unprecedented law must be declared unconstitutional and enjoined in its entirety.

STATEMENT OF FACTS

A. The Challenged Statute

The Teen Assistance Ban was passed during the Missouri General Assembly's September 2005 Extraordinary Session and took immediate effect upon its signing on September 15, 2005. The Act prohibits any person – without exception – from "intentionally caus[ing], aid[ing], or assist[ing] a minor to obtain an abortion without the consent or consents required by section 188.028." Mo. Rev. Stat. § 188.250(1).[2] The Act refers to the "consent or consents required by section 188.028,"[3] a reference to the Missouri parental consent abortion law, which criminally prohibits physicians in Missouri from performing an abortion upon a minor unless either a) the young woman's parent or guardian has provided informed written consent or b) a Missouri juvenile court has approved the abortion. Mo. Rev. Stat. § 188.028.[4] Nothing in Missouri law prohibits women (minors or adults) from having abortions outside the State.

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[2] A copy of the Act is contained in the Appendix ("Appx.") submitted herewith. (Appx. at A31.)

[3] A copy of Mo. Rev. Stat. § 188.028 is contained in the Appendix submitted herewith. (Appx. at A29-A30.)

[4] Mo. Rev. Stat. § 188.028 does not specify that the juvenile court must be in Missouri, but it does specify that any appeals must be taken to "the court of appeals of this state." Mo. Rev. Stat. § 188.028.1(5). From this it can be inferred

In addition to applying to speech and conduct in-State, the Act applies to speech and conduct that occurs wholly outside Missouri. The Act explicitly states that one charged with violating the Act cannot claim as a defense that "the abortion was performed or induced pursuant to consent to the abortion given in a manner that is otherwise lawful in the state or place where the abortion was performed or induced." Mo. Rev. Stat. § 188.250(3). Given this subsection, a person who intentionally "aids" or "assists" a young woman to obtain an abortion outside Missouri would violate the Act even if the totality of their speech and/or conduct occurred out of state.[5]

The Act may be enforced either by state officials or by private citizens. The Attorney General or a prosecuting or circuit attorney may ask a Missouri court to "enjoin conduct that would be in violation [of the Act] . . . ." Mo. Rev. Stat. § 188.250(5). In

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that Mo. Rev. Stat. § 188.028 requires judicial bypass proceedings to be conducted by Missouri juvenile courts.

[5] That the General Assembly intended the Act to apply beyond the state borders to all who are subject to Missouri long-arm jurisdiction is confirmed by the Missouri House of Representatives' Summary of the Truly Agreed Version of the Act, which states: *"Any person who is subject to the jurisdiction of the State of Missouri* and violates this provision will be civilly liable to persons adversely affected by the action." Mo. House of Representatives, "Summary of the Truly Agreed Version of the Bill" (2005) http://www.house.mo.gov/bills053/bilsum/truly/sSB1t.htm, (emphasis added).

addition, the Missouri Board of Registration for the Healing Arts ("MBRHA") may seek to revoke or suspend the license of a physician who allegedly violates the Act. See Mo. Rev. Stat. § 334.100.2(4) (MBRHA has authority to deny, revoke, or suspend the licenses of physicians and surgeons who engage in "unethical conduct or unprofessional conduct"); cf. Planned Parenthood Sioux Falls Clinic v. Miller, 63 F.3d 1452, 1467 (8th Cir. 1995) (noting, in context of South Dakota law, that "an intentional violation of the abortion law would presumably be conduct unbecoming to a license to practice medicine"). The Act further provides that violators "shall be civilly liable to the minor and to the person or persons required to give the consent or consents under section 188.028" for damages, including uncapped claims for emotional injury, punitive damages, and attorney's fees. Mo. Rev. Stat. § 188.250(2). Notably, in this litigation the Attorney General claimed the authority to bring a civil damages action for violation of the Act, even if the young woman's parents chose not to do so. See Transcript of Proceedings 64-67.[6]

Violation of the Act does not carry criminal penalties.

B. The Instant Litigation and the Trial Court Ruling

Immediately after it was signed into law, Plaintiffs challenged the Act,

[6] This asserted power may derive from the Attorney General's authority "to protect the rights and interests of the state," Mo. Rev. Stat. § 27.060, in order to "prevent injury to the general welfare." Taylor v. Wade, 231 S.W.2d 179, 182 (Mo. banc 1950).

seeking a temporary restraining order (TRO) and/or a preliminary injunction on the grounds that the Act violated: their right to free speech; their clients' right to receive information; their right to laws that provide fair warning of what they proscribe; the Commerce Clause of the United States Constitution; their due process right not to be penalized for speech and conduct that is lawful in the state where it takes place;[7] their clients' right to choose a previability abortion without impermissible governmental interference; and their clients' right to interstate travel and to equal privileges and immunities.

On September 26, 2005, the Trial Court issued a fifteen-day TRO, finding that the Act "threatens irreparable harm to Plaintiffs and their patients by chilling the exercise of the right to free speech as protected by both the Missouri and United States Constitution[s]." (Legal File Volume 1 of 1 ("LF") at 33-34.) Subsequently, the Defendants stipulated to extending the TRO through November 9, 2005. (LF at 53, ¶ 2.) With the consent of all parties, the Trial Court consolidated the hearing on Plaintiffs' motion for preliminary injunction with the final hearing on the merits. (LF at 53, ¶ 1.)

[7] The Trial Court was incorrect in suggesting that this claim was not alleged in the Amended Complaint (see Appx. A11 n.5); it was in fact alleged. (See LF at 47-48, ¶¶ 38-39.)

On October 27, 2005, the Trial Court conducted a final hearing based on the parties' stipulated evidence and briefing.[8] At that time, the Trial Court asked Defendants to stipulate to extend the TRO for a brief additional period beyond November 9, 2005, but Defendants declined to do so. (See LF at 95.) Because of the imminent expiration of the TRO, on November 8, 2005, the Trial Court issued a preliminary injunction against enforcement of the Act. (LF at 94-96.)

On November 17, 2005, the Trial Court, "with substantial trepidation," entered judgment upholding the Act. (Appx. at A1, A27.) The Trial Court specified that its decision was premised on a "narrowing construction" of the Act, under which, it asserted, the Act did not reach certain speech. (Appx. at A26-A27.) The Trial Court's ruling does not directly set forth its "narrowing construction." One may deduce the "narrowing construction" from a combination of the Trial Court's listing of the elements of a violation of the Act (Appx. at A9-A10), and the Trial Court's hypothetical verdict-directing instruction (Appx. at A21-A22). The crux of the "narrowing construction" appears to be that the term "intentionally" in the Act "is the equivalent of 'purposely' as opposed to 'knowingly'" (Appx. at A9), and that "[a] person who only provides information or counseling to a minor regarding one's reproductive rights does not act purposely or with purpose" (Appx. at A22). (See also Appx. at A26 ("counseling

[8] In lieu of presenting live testimony, the parties stipulated to the evidence that would have been introduced at trial. (LF at 74-78.)

or the giving of information would not constitute purposeful conduct").) Nowhere does the Trial Court state that *all* constitutionally protected speech is excluded from the reach of the Act.

The Trial Court acknowledged that "[e]ven with the suggested narrowing construction, there are many problems with this statute and the approach [the Trial Court] . . . suggest[s] . . . ." (Appx. at A23.) In particular, the Trial Court expressed its concern that it was not "appropriate for [it] to borrow from Missouri criminal law in an effort to save this civil statute" and further that "the suggested construction [is] a . . . rewriting . . . [that] infring[es] upon the powers clearly invested in the legislative branch." Id. Despite these serious misgivings, the Trial Court upheld the Act against all constitutional claims, based on the admittedly "problem[atic]" construction. Id. Because of the "importance of the First Amendment considerations" raised by the Act and the "complexity of [the] issues," the Trial Court entered an injunction pending appeal, pursuant to Mo. Rule of Civil Procedure 92.03. (Appx. at A27.)

On December 6, 2005, Plaintiffs filed a Notice of Appeal in the Trial Court. (LF at 125.)

C. Background Facts

The parties stipulated to the evidence that the Trial Court should consider in

adjudicating the constitutionality of the Act.[9] (LF at 74-78.) The Government introduced no evidence into the Trial Court record. The Trial Court ruled that, at least for purposes of Plaintiffs' free speech claim, "all of the factual matters contained in the [four submitted and stipulated] affidavits are deemed to be findings of fact by the Court."[10] (Appx. at A15.) The stipulated findings of fact include the following:

1. Access to Abortion in Missouri is Extremely Limited

Abortions are presently available in Missouri only in Boone County, St. Louis County and the City of St. Louis. (Appx. at A15, LF at 111.) The only abortions performed in the metropolitan Kansas City area take place in Kansas. (LF at 14, ¶ 11.) To the extent abortions are available in Boone County, they are very limited. In particular, abortions are performed in Boone County only once

[9] The evidence that the parties stipulated to is set forth in the: Affidavit of Paula Gianino, sworn September 13, 2005 (LF at 1-10); Affidavit of Peter Brownlie, sworn September 14, 2005 (LF at 11-23); Affidavit of Rev. Rebecca Turner, sworn September 12, 2005 (LF at 24-32); and Supplemental Affidavit of Paula Gianino, with Attached Exhibit 1, sworn October 18, 2005 (LF at 70-72). The parties further stipulated that these affidavits and the contents thereof are admissible, and that the Exhibit is authentic. (LF at 74.) The parties reached an additional stipulation of fact at the outset of the final hearing, which is reflected in the Trial Court's ruling. (Appx. at A15, bullet 2.)

[10] It is unclear why the Trial Court limited this ruling to the free speech claim.

per week, and only if the pregnancy is still in the first-trimester. (LF at 12, ¶ 4; LF at 15, ¶ 12.)

2. Missouri Women Seek Abortions Out of State for Many Reasons

Many Missouri women (minors and adults) choose to have abortions out of state. (LF at 14-15, ¶¶ 11-14; LF at 3-4, ¶¶ 8-9.) The reasons for this include: (1) the near-absence of abortion providers anywhere in Missouri except the City of St. Louis and St. Louis County (LF at 14-15, ¶¶ 11-12); (2) the fact that even in the St. Louis region, Illinois providers may, for some Missouri residents, be closer than St. Louis providers (LF at 3, ¶ 8); and (3) the desire of some women to avoid abortion clinics near home in Missouri because of the presence of picketers who may recognize them from the community or seek to identify them through their license plate number (LF at 3-4, ¶ 9). (See also Appx. at A13 (Trial Court finding that there is often picketing at RHS, causing some patients to go to Illinois for abortions).)

In addition, some women may travel out of state for abortions to avoid Missouri's parental consent abortion law. Several states that border Missouri do *not* require minors to obtain parental consent or a judicial bypass for an abortion. In Iowa, Kansas, Nebraska, and Oklahoma, minors have the option of giving parental *notice* of their abortion decision or seeking a judicial bypass, rather than

obtaining *consent*.[11] Iowa Code § 135L.3; Kan. Stat. Ann. § 65-6705; Neb. Rev. Stat. § 71-6902; Okla. Stat. tit. 63, § 1-740.2. In addition, Illinois currently has no enforceable parental involvement abortion law. See Zbaraz v. Ryan, No. 84CV771, 1996 WL 33293423 (N.D. Ill. Feb. 8, 1996).

3. Most Minors Need Assistance in Obtaining an Abortion, Although Some Cannot Get That Assistance from Their Parents

The Trial Court found that "Plaintiffs frequently provide information to women and at times minors regarding their reproductive rights and options. At times this information and counseling includes the subject of abortion." (Appx. at A15.) It further found that "Plaintiffs frequently provide information which can include the legal rights available to women in various states and at times can even include lists of locations where abortions are performed. This is frequently done as relates to abortion providers in the states of Illinois and Kansas. At times this information is, in fact, provided to minors." (Appx. at A13; see also LF at 7-8, ¶¶ 19-20; LF at 17-20, ¶¶ 19-20, 24-25; LF at 27-28, ¶¶ 9-11; and LF at 70-72, ¶ 2 & Ex. 1.)

Providing information and counseling to minors is crucial because one of the most important things young women need if they are pregnant is accurate, non-

[11] A significant proportion of minors who give parental *notice* of their abortion would probably not be able to obtain parental *consent*. (LF at 14, ¶ 9.)

judgmental information about their options, and referral to providers who offer whatever services the minor chooses. (LF at 5, ¶¶ 12-13; LF at 26, ¶ 7.)

When counseling pregnant teens, Planned Parenthood always encourages the young woman to involve her parents in her abortion decision, and most teens choose to do so. (LF at 2-3, ¶ 6; LF at 4, ¶ 10; LF at 14, ¶¶ 9-10.) Some young women, however, cannot obtain their parents' consent. (LF at 14, ¶ 9.) Others believe that it would not be in their or their parents' interests to involve them in their abortion decision. (LF at 4-5, ¶ 11; LF at 14, ¶ 10; LF at 18-19, ¶ 22; LF at 26, ¶ 7.) The reasons for this are varied and include the fact that: some minors have previously experienced physical, sexual, and/or emotional abuse from parents or stepparents or others close to the family, and they fear the reaction to the news of their pregnancy; others have good reason to believe that informing their parents will lead to first-time abuse, or being thrown out of the house; still others are confident that for religious or other reasons their parents will try to force them to carry the pregnancy to term. (LF at 4-5, ¶ 11; LF at 18-19, ¶ 22.) Sometimes young women decline to involve their parents because their parents are overwhelmed by stressful and traumatic problems of their own – ranging from a parent's medical crisis to a debilitating alcohol or drug addiction.[12] (LF at 4-5, ¶ 11.)

[12] Case law is replete with evidence of minors for whom notification is not in their best interest, including those who face expulsion from the home, physical violence, emotional

For minors who cannot involve their parents in their abortion decision, assistance from other trustworthy adults – such as clergy or grandparents – is often essential. (LF at 5, ¶ 14; LF at 26, ¶ 7; LF at 28, ¶ 12.) These teens often need information, guidance, transportation, and/or funds to cover travel and the cost of

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harm, or coercion to carry to term if their parents are notified. See, e.g., Hodgson v. Minnesota, 497 U.S. 417, 459-60 (1990) (O'Connor, J. concurring) (recognizing need for a bypass to a notification requirement because parents do not always have the best interests of their daughters in mind); Planned Parenthood Sioux Falls Clinic, 63 F.3d at 1462 (recounting case of father opposed to abortion who, upon learning daughter was at clinic, assaulted clinic staff and forced her to leave); id. (emphasizing that "a stressful, but non-abusive, parent-child relationship can become abusive or neglectful after the parent learns of the daughter's pregnancy or desire to have an abortion"); Planned Parenthood of the Blue Ridge v. Camblos, 155 F.3d 352, 390 n.3 (4th Cir. 1998) (Michael, J. concurring) (recounting case of father who killed daughter upon learning of her intended abortion); N. Fla. Women's Health & Counseling Servs., Inc. v. State, 866 So.2d 612, 617 (Fla. 2003) (citing trial court's findings that "some minors have legitimate fears of physical and emotional abuse if their parents are consulted"); id. at 631-32 (recognizing parents' ability to coerce and intimidate minors into foregoing an abortion); cf. Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 888-93 (1992) (emphasizing that spousal notification may lead to physical abuse, verbal harassment, destruction of possessions, and withdrawal of financial support).

the abortion itself. (LF at 5, ¶¶ 13-14; cf. LF at 18, ¶ 20.) For some minors who cannot involve their parents in their abortion decision, unless they can obtain information, counseling, and assistance with transportation and/or finances from a trusted adult, abortion will not be an option. (LF at 5-6, ¶¶ 13-16; LF at 26, ¶ 7.)

As a result of the Act, it will be more difficult for pregnant minors to turn to supportive adults, including clergy counselors, for help and counseling. (LF at 26, ¶¶ 7-8.) Some agencies that previously provided assistance to pregnant teens in need of counseling, information, referrals and/or other forms of aid, including MO RCRC and Planned Parenthood, may be forced to stop doing so. (LF at 26, ¶ 8; LF at 29, ¶ 15; LF at 30-31, ¶¶ 18-20; LF at 7, ¶ 18; LF at 17, ¶ 18.) This result will inevitably cause irreparable harm to some teens. (LF at 21, ¶ 28; LF at 9, ¶ 25; LF at 26, ¶¶ 7-8; LF at 29, ¶ 15; LF at 31, ¶ 20.)

4. Impact of the Act on Kansas-Located Comprehensive Health and Its Patients

Plaintiff-Appellant Comprehensive Health is a Kansas corporation that operates a Kansas-licensed ambulatory surgery center in Overland Park, Kansas, which provides abortions. (LF at 12-13, ¶ 5.) Among its patients are Missouri minors whose parents have been notified of the abortion or who have received a judicial bypass from a Kansas court (as required by Kansas law), but whose parents have neither consented to the abortion nor have they received a judicial bypass from a Missouri court. (LF at 20, ¶ 25.) In addition to actually performing

the abortions for Missouri minors in Kansas, Comprehensive Health provides other forms of aid and assistance to Missouri minors seeking abortions in Kansas: it provides information and counseling about the abortion option; it schedules appointments for abortions; and it provides written information to the minor about abortion at least 24 hours before the procedure as is required by Kansas law, Kan. Stat. Ann. § 65-6709. (LF at 19-20, ¶ 24.)

In addition, Comprehensive Health manages a fund of money established and maintained by private donations, which is used to fund abortions of low-income women having abortions at Comprehensive Health. (LF at 18, ¶¶ 20-21.) This financial help may "aid" or "assist" some Missouri minors who have abortions at Comprehensive Health in Kansas. (Id.)

Although Comprehensive Health is incorporated in Kansas and its only health care facility is in Kansas, it fears that it could be sued in Missouri courts for violating the Act under Missouri's long-arm statute. (LF at 20-21, ¶ 27.) Accordingly, the Act may force Comprehensive Health to stop providing assistance to Missouri teens in need of counseling, information, and/or other forms of aid, unless they have parental consent for an abortion, and may be forced to stop providing abortions for Missouri teens unless they have parental consent, despite the fact that parental consent is not required by Kansas law. (LF at 17, ¶ 18.)

POINTS RELIED ON

I. THE TRIAL COURT ERRED IN "CONSTRUING" THE ACT RATHER THAN ADJUDICATING ITS CONSTITUTIONALITY BASED ON ITS "PLAIN MEANING" BECAUSE MISSOURI COURTS MUST REFRAIN FROM APPLYING RULES OF CONSTRUCTION OR REWRITING STATUTES WHEN THE STATUTORY LANGUAGE IS CLEAR IN THAT THE TERMS "AID" AND "ASSIST" PLAINLY INCLUDE SPEECH, THEY CANNOT BE CONSTRUED OR REWRITTEN TO HAVE A CONTRARY MEANING, THE MENS REA ELEMENT DOES NOT EXCLUDE SPEECH, AND THE TRIAL COURT'S ATTEMPT TO CONSTRUE THE ACT RENDERS IT VAGUE

Civil Serv. Comm'n v. Bd. of Aldermen, 92 S.W.3d 785 (Mo. banc 2003)

Southwestern Bell Yellow Pages v. Dir. of Revenue, 94 S.W.3d 388 (Mo. banc 2002)

State v. Young, 695 S.W.2d 882 (Mo. banc. 1985)

Keyishian v. Bd. of Regents of Univ. of State of N.Y., 385 U.S. 589 (1967)

Mo. Rev. Stat. § 1.090

Mo. Rev. Stat. § 562.016 (2)

Merriam-Webster's Collegiate Dictionary (11th ed. 2003)

The American Heritage College Dictionary (4th ed. 2000)

II. THE TRIAL COURT ERRED BY FAILING TO FIND THAT THE ACT VIOLATES FREE SPEECH RIGHTS BECAUSE CONTENT-BASED RESTRICTIONS ON PROTECTED SPEECH AND INTERFERENCE WITH THE RIGHT TO RECEIVE INFORMATION ARE NOT PERMITTED UNDER EITHER ARTICLE I, SECTION 8 OF THE MISSOURI CONSTITUTION OR THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION IN THAT THE ACT PROHIBITS PLAINTIFFS' SPEECH ABOUT OUT-OF-STATE ABORTIONS BASED ON ITS CONTENT AND VIEWPOINT, AND DENIES ACCURATE HEALTH INFORMATION TO MINORS IN VIOLATION OF THE MISSOURI CONSTITUTION AND UNITED STATES CONSTITUTION

Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 65 (1983)

Interactive Digital Software Ass'n v. St. Louis County, Mo., 329 F.3d 954 (8th Cir. 2003)

Bigelow v. Virginia, 421 U.S. 809 (1975)

Virginia State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748 (1976)

Mo. Const. art. 1, § 8

U.S. Const. amend. I

III. THE TRIAL COURT ERRED BY FAILING TO FIND THE ACT UNCONSTITUTIONAL BASED ON ITS EXTRA-TERRITORIAL REACH BECAUSE LAWS THAT ATTEMPT TO REGULATE SPEECH AND CONDUCT BEYOND A STATE'S BORDERS VIOLATE THE COMMERCE CLAUSE AND VIOLATE PRINCIPLES OF STATE SOVEREIGNTY AND COMITY IN THAT THE ACT ATTEMPTS TO REGULATE COMMERCE OUTSIDE THE STATE'S BORDERS AND TO PENALIZE PERSONS OUTSIDE MISSOURI FOR CONDUCT THAT IS LEGAL WHERE IT OCCURS

Healy v. Beer Inst., 491 U.S. 324 (1989)

Cotto Waxo Co. v. Williams, 46 F.3d 790 (8th Cir. 1995)

Bigelow v. Virginia, 421 U.S. 809 (1975)

State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003)

U.S. Const. art. I, § 8, cl. 3

U.S. Const. amend. XIV

IV. THE TRIAL COURT ERRED BY FAILING TO FIND THAT THE ACT UNCONSTITUTIONALLY BURDENS THE ABORTION RIGHT FOR SOME MISSOURI MINORS WHO CANNOT INVOLVE THEIR PARENTS IN THEIR ABORTION DECISION AND FOR WHOM AN OUT-OF-STATE ABORTION IS THE BEST

OPTION BECAUSE WHILE STATES CAN REQUIRE MINORS TO OBTAIN THEIR PARENTS' CONSENT TO THEIR ABORTION DECISION, SUCH REQUIREMENTS CANNOT IMPOSE AN "UNDUE BURDEN" ON THE ABORTION RIGHT, AND THEY MUST PROVIDE MINORS WITH AN "EFFECTIVE OPPORTUNITY" TO SEEK A JUDICIAL BYPASS OF THE CONSENT REQUIREMENT, IN THAT REQUIRING MINORS TO GO THROUGH TWO SEPARATE JUDICIAL BYPASS PROCEEDINGS IMPOSES AN "UNDUE BURDEN" AND DENIES TEENS AN "EFFECTIVE OPPORTUNITY" TO OBTAIN A JUDICIAL BYPASS

Bellotti v. Baird, 443 U.S. 622 (1979)

Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992)

Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52 (1976)

Kan. Stat. Ann. § 65-6704(a)

U.S. Const. amend. XIV

V. THE TRIAL COURT ERRED IN FAILING TO FIND THAT THE ACT VIOLATES THE RIGHTS OF PLAINTIFFS' MINOR CLIENTS TO EQUAL PRIVILEGES AND IMMUNITIES AND TO TRAVEL INTERSTATE BECAUSE CITIZENS OF ONE STATE HAVE THE RIGHT TO TRAVEL TO ANOTHER STATE AND BE

TREATED THE SAME AS THE CITIZENS OF THE SECOND STATE, AND THEY HAVE THE RIGHT TO TRAVEL INTERSTATE TO SEEK MEDICAL SERVICES WITHOUT INFRINGEMENT ON THEIR ABILITY TO TRAVEL, IN THAT THE ACT DENIES MISSOURI MINORS THE SAME PRIVILEGES AS CITIZENS OF ANY OTHER STATE AND IMPOSES BARRIERS ON THEIR ABILITY TO TRAVEL INTERSTATE WHEN THEY HAVE ABORTIONS OUTSIDE MISSOURI

Saenz v. Roe, 526 U.S. 489 (1999)

Toomer v. Witsell, 334 U.S. 385 (1948)

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

Bigelow v. Virginia, 421 U.S. 809 (1975)

U.S. Const. art. IV, § 2, cl. 1

VI. GIVEN THE ACT'S CONSTITUTIONAL INFIRMITIES, THE COURT MUST INVALIDATE THE LAW IN ITS ENTIRETY BECAUSE IT IS UNCONSTITUTIONAL IN ALL APPLICATIONS, OR, IN ANY EVENT, THIS COURT CANNOT SEVER APPLICATIONS OF A LAW WHERE THERE IS NO ASSURANCE THAT THE LEGISLATURE WANTED SEVERANCE IN THAT THERE IS STRONG EVIDENCE THAT THE GENERAL ASSEMBLY DID NOT WANT THE ACT TO BE SEVERED IF

FOUND UNCONSTITUTIONAL IN SOME, BUT NOT ALL, APPLICATIONS

Akin v. Dir. of Revenue, 934 S.W.2d 295 (Mo. banc 1996)

Associated Industries of Missouri v. Dir. of Revenue, 918 S.W.2d 780 (Mo. banc. 1996)

State v. Young, 695 S.W.2d 882 (Mo. banc. 1985)

L&R Distrib., Inc. v. Missouri Dep't of Revenue, 529 S.W.2d 375 (Mo. 1975)

Mo. Rev. Stat. § 1.140

ARGUMENT

This appeal comes before this Court on a record of undisputed facts, and involves exclusively questions of law relating to the constitutionality of the Teen Assistance Ban under the Missouri and United States Constitutions. Because the only issues under review are legal issues, the standard of review is *de novo.* Smith v. Shaw, 159 S.W.3d 830, 832 (Mo. banc 2005). In addition, the Trial Court's narrowing "construction" of the Act is entitled to no deference. Rather, this Court must determine the scope and meaning of the Act *de novo*. Smith, 159 S.W.3d at 833 (interpretation of a statute is a question of law); Delta Air Lines, Inc. v. Dir. of Revenue, 908 S.W.2d 353, 355-56 (Mo. banc 1995) (upon *de novo* interpretation of statute, this Court reversed Administrative Hearing Commission because it had misconstrued statute by replacing the word "service" with "system," in contravention of plain meaning).

I. THE TRIAL COURT ERRED IN "CONSTRUING" THE ACT RATHER THAN ADJUDICATING ITS CONSTITUTIONALITY BASED ON ITS "PLAIN MEANING" BECAUSE MISSOURI COURTS MUST REFRAIN FROM APPLYING RULES OF CONSTRUCTION OR REWRITING STATUTES WHEN THE STATUTORY LANGUAGE IS CLEAR IN THAT THE TERMS "AID" AND "ASSIST" PLAINLY INCLUDE SPEECH, THEY CANNOT BE CONSTRUED OR REWRITTEN TO HAVE A CONTRARY MEANING, THE MENS REA ELEMENT DOES NOT EXCLUDE SPEECH, AND THE TRIAL COURT'S ATTEMPT TO CONSTRUE THE ACT RENDERS IT VAGUE

The Trial Court erred in attempting to save the Act by issuing what it called a "construction" that excludes some (but not *all*) speech from the Act's prohibition. According to the Trial Court's "construction": a) the term "intentionally," as used in the Act, means "purposely"; and b) neither "counseling [n]or the giving of information . . . constitute[s] purposeful conduct." (Appx. at A26.) This so-called "construction" (more aptly, a raw assertion) is impermissible for four reasons:

• first, given that the language of the Act is clear, the Trial Court should have applied the plain meanings of the terms "aid or assist" and "intentionally,"

rather than "construing" their scope in a manner at odds with their dictionary definitions;

• second, the Trial Court had no basis for "construing" the *mens rea* element as excluding certain speech as a matter of law;

• third, because the "construction" deviates so dramatically from the plain meaning of the Act's terms, it is tantamount to a judicial rewriting of the legislation, and thus oversteps the appropriate role of the judiciary; and

• fourth, the "construction" renders the Act unconstitutionally vague.

A. The Trial Court Should Have Considered the Constitutionality of the Act in Light of Its "Plain Meaning"

This Court has firmly held that the "'primary rule of statutory construction is to ascertain the intent of the lawmakers from the language used, to give effect to that intent if possible, and *to consider words used in the statute in their plain and ordinary meaning*.'" Metro Auto Auction v. Dir. of Revenue, 707 S.W.2d 397, 401 (Mo. banc 1986) (quoting Blue Springs Bowl v. Spralding, 551 S.W.2d 596, 598 (Mo. banc 1977) (reversing lower court that had construed statute against its plain meaning)) (emphasis added). Thus, where – as here – the language of a statute "is clear and unambiguous, there is no room for construction." Metro Auto, 707 S.W.2d at 401. Rather, the Court "must be guided by what the legislature said, not by what the Court thinks it meant to say," id., "'even when the court may prefer a policy different from that enunciated by the legislature.'"

Keeney v. Hereford Concrete Products, Inc., 911 S.W.2d 622, 624 (Mo. banc 1995) (quoting Kearney Special Road Dist. v. County of Clay, 863 S.W.2d 841, 842 (Mo. banc. 1993)). See also Civil Serv. Comm'n v. Bd. of Aldermen, 92 S.W.3d 785, 787 (Mo. banc 2003) ("Where a provision's language is clear, courts must give effect to its plain meaning and refrain from applying rules of construction unless there is some ambiguity"); State v. Rowe, 63 S.W.3d 647, 649 (Mo. banc 2002) ("When the words are clear, there is nothing to construe beyond applying the plain meaning of the law"); State v. Burns, 978 S.W.2d 759, 761 (Mo. banc 1998) ("Courts lack authority to read into a statute a legislative intent contrary to the intent made evident by the plain language").[13]

When a statute does not define its terms, a dictionary provides the plain meaning. Southwestern Bell Yellow Pages v. Dir. of Revenue, 94 S.W.3d 388, 390 (Mo. banc 2002); Tendai v. Mo. State Bd. of Registration for Healing Arts, 161 S.W.3d 358, 369 (Mo. banc 2005) ("When a term is undefined, the Court looks to its plain and ordinary meaning according to the dictionary"). Merriam-Webster's Collegiate Dictionary, (11th ed. 2003) defines "aid" as "to provide with what is useful or necessary in achieving an end," and defines "assist" as "to help, stand by; . . . to give support or aid." The American Heritage College Dictionary,

[13] Missouri statutes also so require. Mo. Rev. Stat. § 1.090 (statutory terms must be understood in "their plain or ordinary and usual sense").

(4th ed. 2000) defines "aid" as "[t]o help or furnish with help, support, or relief," and defines "assist" as "[t]o help or support . . .; aid."

Given that the plain meaning of the terms "aid" and "assist" can be found by looking to the dictionary, the Trial Court should have "refrain[ed] from applying rules of construction" to resolve the Act's meaning. Civil Serv. Comm'n, 92 S.W.3d at 787. Rather, the Trial Court should have concluded that under the dictionary definitions, providing information and counseling constitutes "aid" or "assist[ance]." For example, if a St. Louis minor wants to obtain an abortion without parental consent, and a clergy member informs her that Illinois does not require parental consent and gives her the names and addresses of abortion providers in Illinois, they have most certainly provided her with "what is useful" in achieving her end.[14] Merriam-Webster's Collegiate Dictionary, (11th

[14] When Plaintiff MO RCRC provides abortion referrals to women (including minors) in the St. Louis area, it gives them the names of the three closest abortion providers, one of which is in Illinois, and if asked, it advises callers that Illinois does not require minors to involve their parent in their abortion decision. (LF at 27, ¶ 9.) Similarly, Plaintiff PPSLR provides clients on request with a "referral sheet" with contact information about three abortion providers in the St. Louis region. This document, at least as of September 13, 2005, advises clients whether or not minors will need parental consent at each of the listed abortion providers. (See LF at 72.) This document, like the information and referral provided by MO

ed. 2003). Similarly, if a minor from Kansas City, Missouri wants to obtain an abortion near her home, informing her about the availability of abortions in Overland Park, Kansas is providing her with what is "useful or necessary" to achieving her goal. Id.

Indeed, the Trial Court itself recognized that the plain terms of the Act prohibit protected speech. It ruled that "[i]t is *clear* that [the Act] *can involve protected speech*." (Appx. at A17 (emphases added).) It further stated that "*clearly* 'aid' and 'assist' or 'cause' *can include speech* or expression or the giving of information or counseling." (Appx. at A9 (emphases added)); cf. (Appx. at A7-A8 (noting that as used in MAI criminal jury instructions, "[e]ncouragement in the context of aider liability includes the concepts of words or speech")).[15] Because

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RCRC, would certainly provide a minor who sought to avoid parental consent with "what is useful or necessary in achieving [her] end." Merriam-Webster's Collegiate Dictionary, (11th ed. 2003).

[15] In a variety of contexts, court rulings have recognized that one form of "aid" is speech. See, e.g., Epton v. New York, 390 U.S. 29, 32 (1968) (Douglas, J., dissenting) ("On the other hand, a citizen may take actions which do *aid* and comfort the enemy—*making a speech critical of the government or opposing its measures*, profiteering, striking in defense plants or essential work . . . .") (first emphasis added) (quotation and citation omitted); Nat'l Labor Relations Bd. v. Pratt & Whitney Air Craft Div., United Tech. Corp., 789 F.2d 121, 134 (D.C. Cir.

there is no ambiguity about the plain meaning of the terms "aid" and "assist," the Trial Court erred in not "refrain[ing] from applying rules of construction" to determine the scope of the Act's prohibition. Civil Serv. Comm'n, 92 S.W.3d at 787.

Likewise, there is no basis for the Trial Court's assertion that the word "'intentionally' in the context of this statute is the equivalent of 'purposely' . . . ." (Appx. at A9.) Rather, because the *mens rea* element of "intentionally" is "clear and unambiguous, there is no room" for the Trial Court to have peremptorily

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1986) ("Granting an employer the opportunity to *communicate* with its employees does more than affirm its right to freedom of speech; it also *aids* the workers . . . .") (emphasis added) (citations omitted); Minn. Med. Ass'n v. Minnesota, 274 N.W.2d 84, 92 (Minn. 1978) ("[D]isclosure [of the fact that a doctor has performed abortions] could *aid* women seeking abortions to find a doctor willing to provide the service.") (emphasis added).

Moreover, the Supreme Court in Bigelow v. Virginia, 421 U.S. 809 (1975), clearly understood that the dissemination of information about abortion can aid or assist women in obtaining those services. See 421 U.S. at 822 (recognizing that an "advertisement conveyed information of potential interest and value" to women in need of abortion services); see also Bolger, 463 U.S. at 74 (restricting advertising about contraceptives would deny adults "truthful information bearing on their ability to discuss birth control and to make informed decisions . . . .").

concluded that the Legislature meant to say "purposely."[16] Metro Auto, 707 S.W.2d at 401. Indeed, if the Legislature had meant to use the word "purposely," it "knows how to" do so, Fidelity Sec. Life Ins. Co. v. Dir. of Revenue, 32 S.W.3d 527, 529 (Mo. banc 2000), as it did, for example, when it defined "deceit" as "purposely making a representation which is false . . . ." Mo. Rev. Stat. § 570.010(7). Accordingly, it was error for the Trial Court to declare that the *mens rea* element required by the Act is "purposely."

B. There Is No Basis for the Trial Court's Construction of the *Mens Rea* Element as Excluding Certain Speech

The Trial Court construed the *mens rea* element of the Act as excluding, as

[16] It is irrelevant that the Missouri *Criminal* Code does not recognize the culpable mental state of "intentionally," see Mo. Rev. Stat. § 562.016 (listing criminal law mental states), because the Act is not a criminal statute. As here, the General Assembly has specifically chosen to include the *mens rea* of "intentionally" in a variety of statutes. See, e.g., Mo. Rev. Stat. § 193.087(5) (in context of affidavits acknowledging paternity when a single woman gives birth, "[a]ny affiant who intentionally misidentifies another person as a parent may be prosecuted for perjury"); Mo. Rev. Stat. § 210.165(2) ("[a]ny person who intentionally files a false report of child abuse or neglect shall be guilty of a class A misdemeanor"). There is no basis for the Trial Court's decision to unilaterally alter the word chosen by the General Assembly.

a matter of law, "counseling or the giving of information." (Appx. at A26.) But this construction has no basis, whether the *mens rea* is "intentionally" or "purposely."

If the *mens rea* for violating the Act is, as the Act states, "intentionally," there is little doubt that "counseling or the giving of information" (id.) can be done "intentionally." Under established principles, intent "focuses upon the commission of the act rather than the achievement of a result," and the law presumes that a person "intend[s] the natural and probable consequences of his intentional acts." State v. Dixon, 655 S.W.2d 547, 558-59 (Mo. App. E.D. 1983), overruled on other grounds by State v. Carson, 941 S.W.2d 518 (Mo. banc 1997); see also State v. O'Brien, 857 S.W.2d 212, 218 (Mo. banc 1993). Under this definition, if Plaintiffs' speech helps a minor to obtain an out-of-state abortion, it is "intentional." This is because Plaintiffs know that the "natural and probable consequences," id., of informing teens that some Missouri-border states do not require parental consent to their abortion decision, are that some minors, especially those who cannot involve their parents in their decision, will have an abortion out of state. (LF at 7-8, ¶¶ 20, 23; LF at 17-19, ¶¶ 19-22.) Thus, when Plaintiffs provide information and counseling to teens about the availability of out-of-state abortions, they could be found to "intend" to "aid or assist" those teens in obtaining an out-of-state abortion. Dixon, 655 S.W.2d at 558-59; O'Brien, 857 S.W.2d at 218.

Even if the Trial Court were somehow correct that the Legislature meant "purposely" when it used the term "intentionally," there is still no basis for concluding that, as a matter of law, "counseling or the giving of information would not constitute purposeful conduct." (Appx. at A26.) There is nothing intrinsic to speech that makes it lacking in purpose. To the contrary, speech, by its nature, is often purposeful. Cf., e.g., Mo. Rev. Stat. § 570.010(7) (defining "deceit" as "purposely making a representation which is false . . . ."). Moreover, there is nothing about the particular speech Plaintiffs engage in that lacks purpose. The Missouri Criminal Code defines "purposely" as meaning "with respect to his conduct *or* to a result thereof when it is his conscious object to engage in that conduct *or* to cause that result." Mo. Rev. Stat. § 562.016 (2) (emphases added). When Plaintiffs provide information or counseling to minors about out-of-state abortions, it is their "conscious object to engage in that conduct," meaning it is done "purposely," as defined by the Missouri Criminal Code. Id. Moreover, it is also sometimes Plaintiffs' "conscious object to . . . cause th[e] result" of a minor going out of state for an abortion, especially if the minor has advised that she will encounter serious adverse consequences if her parents learn of the abortion. See, e.g., LF at 17-19, ¶¶ 19-22; LF at 4-8, ¶¶ 11,13-16, 19-23; LF at 27-28, ¶¶ 9-12; LF at 72.

In sum, the *mens rea* element of the Act (whether "intentionally" or "purposely") does not provide a basis for excluding "counseling or the giving of information" from the Act's broad prohibition on "aid and assist[ance]."

C. The Trial Court's "Construction" Is Tantamount to a Judicial Rewriting

Courts lack the authority to rewrite statutes, as the Trial Court did here. See State v. Young, 695 S.W.2d 882, 886 (Mo. banc. 1985) ("for this Court to convert the statute into a constitutional proscription would be to indulge in statutory revision, a matter within the exclusive provide of the General Assembly"). Even where the constitutional validity of a law is at stake, "[t]he courts cannot transcend the limits of their constitutional powers and engage in judicial legislation, supplying omissions and remedying defects in matters delegated to a coordinate branch of our tripartite government." Bd. of Educ. v. State, 47 S.W.3d 366, 371 (Mo. banc 2001) (citations omitted). Thus, in State v. Carpenter, 736 S.W.2d 406, 408 n.1 (Mo. banc 1987), for example, this Court ruled that "[a]lthough, a limiting construction would avoid imposition of the facial overbreadth conclusion . . ., there is no indication that such a construction would be consistent with the intent of the legislature. In fact, the plain language of the statute would indicate to the contrary. We thus refrain from any attempt to redraft the statute." (Citations omitted.)

Given that the plain meaning of the terms "aid" and "assist" includes speech (see Argument § I, A, supra), and that Plaintiffs' counseling and provision of information to minors is intentional and purposeful (see Argument § I, B, supra), the Trial Court's construction is so counter to the Act's plain meaning that it is tantamount to judicial rewriting.[17] Indeed, the Trial Court seemingly so recognized, questioning the legitimacy of its own ruling: "Is the suggested construction a legitimate act of judicial interpretation or does it constitute a rewriting of [the Act] infringing upon the powers clearly invested in the legislative branch?" (Appx. at A23.) There can be little doubt that it is the latter

[17] Construing the Act to exclude speech also violates the Legislature's intent because the Legislature was fully aware of concerns that the Act would restrict free speech, and did nothing to limit the broad language of the Act to exclude protected speech. The House Summary of the Committee Version of the Bill, in summarizing the arguments of those who testified against the bill, states: "Those who oppose the bill say that if it becomes law it will hinder the ability for mentors, preachers, and teachers to provide guidance and counseling to young girls." See http://www.house.mo.gov/bills053/bilsum/commit/sHB1C.htm. If the Legislature had wanted to exclude application of the Act to free speech based on the expressed concerns, it certainly could have done so, but chose not to. This Court should not rewrite the Act to say what the Legislature expressly chose not to say.

– a "rewriting" that oversteps judicial authority and "infring[es]" on legislative prerogatives. For this reason, the Trial Court's rewriting of the Act cannot stand.

D. The Trial Court's "Construction" Renders the Act Unconstitutionally Vague

The Trial Court's construction is also impermissible because it renders the Act unconstitutionally vague. In construing the Act as not banning a defined category of speech – namely "provid[ing] information or counseling to a minor regarding one's reproductive rights" (Appx. at A22) – the Trial Court's order implies that other speech is, in fact, banned. But, what speech is permitted as encompassed within the term "information and counseling regarding one's reproductive rights" and what banned? If Plaintiffs give a young woman driving directions to an out-of-state abortion provider, would that speech be "regarding one's reproductive rights"? Is it "regarding one's reproductive rights" to tell a minor when the next available abortion appointment is? Is it "regarding one's reproductive rights" to call an abortion provider on behalf of a teen, and arrange for her to have an abortion? Is it "regarding one's reproductive rights" for a clergy person to explain a particular denomination's teaching about when parents must be told about an abortion choice? Would speech offering transportation to an out-of-state abortion provider be "regarding one's reproductive rights"? Any of this speech could be "useful or necessary," Merriam-Webster's Collegiate Dictionary (definition of "aid"), to a minor in achieving her goal of obtaining an abortion out

of state, but it is unclear if it is protected by the Trial Court's narrowing construction or not.

The result of the Trial Court's construction is a law that is so unclear that persons "of common intelligence must necessarily guess at [their] meaning and differ as to [their] application." Smith v. Goguen, 415 U.S. 566, 573 n.8 (1974) (citations omitted); City of Festus v. Werner, 656 S.W.2d 286, 287 (Mo. App. E.D. 1983) (citations omitted) (holding municipal ordinance "too vague to be enforceable or constitutional"). The vagueness created by the Trial Court's construction is impermissible, especially because "the uncertainty . . . threatens to inhibit the exercise of constitutionally protected rights." Colautti v. Franklin, 439 U.S. 379, 391, 394 (1979) (citations omitted); State ex rel. Nixon v. Telco Directory Publ'g, 863 S.W.2d 596, 600 (Mo. banc 1993) (the most important factor affecting the clarity that the Constitution demands of a law is "whether [the law] threatens to inhibit the exercise of constitutionally protected rights").

Because Plaintiffs cannot determine what speech is permitted under the Trial Court's construction, their constitutional rights will inevitably be abridged. As the United States Supreme Court has long recognized, "uncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked." Grayned v. City of Rockford, 408 U.S. 104, 109 (1972) (quoting Baggett v. Bullitt, 377 U.S. 360, 372 (1964)). The need for clarity is especially critical when a law threatens free

speech. See, e.g., Keyishian v. Bd. of Regents of Univ. of State of N.Y., 385 U.S. 589, 684 (1967) ("because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity") (citation omitted).

In sum, whether the Act is read in accord with its "plain meaning" – such that the provision of information and counseling to minors about out-of-state abortions constitutes "aid" or "assist[ance]" and is prohibited – or pursuant to the Trial Court's construction – such that only an undefined category of speech remains permissible – *the Act bans some speech*. For this reason, as explained below, it must be found unconstitutional.

II. THE TRIAL COURT ERRED BY FAILING TO FIND THAT THE ACT VIOLATES FREE SPEECH RIGHTS BECAUSE CONTENT-BASED RESTRICTIONS ON PROTECTED SPEECH AND INTERFERENCE WITH THE RIGHT TO RECEIVE INFORMATION ARE NOT PERMITTED UNDER EITHER ARTICLE I, SECTION 8 OF THE MISSOURI CONSTITUTION OR THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION IN THAT THE ACT PROHIBITS PLAINTIFFS' SPEECH ABOUT OUT-OF-STATE ABORTIONS BASED ON ITS CONTENT AND VIEWPOINT, AND DENIES ACCURATE HEALTH INFORMATION TO MINORS IN

VIOLATION OF THE MISSOURI CONSTITUTION AND UNITED STATES CONSTITUTION

A. The Speech Banned by the Act Is Entitled to Special Protection

While any ban on protected speech is presumptively unconstitutional, see Argument, § II, B infra, the Act bans speech that is entitled to special legal protection because it is between, among others, health care providers and patients, and clergy and their congregants. "An integral component of the practice of medicine is the communication between a doctor and a patient. Physicians must be able to speak frankly and openly to patients." Conant v. Walters, 309 F.3d 629, 636 (9th Cir. 2002) (enjoining on First Amendment grounds government policy that threatened to punish physicians for communicating with their patients about the medical use of marijuana). Indeed, Roe v. Wade, 410 U.S. 113 (1973), was premised on the understanding that a woman's abortion decision would be made only after communication and consultation with her physician. 410 U.S. at 153 ("[a]ll these are factors the woman and her responsible physician necessarily will consider in consultation").

Likewise, the United States Supreme Court has recognized that communication between clergy members and their congregants is entitled to special privileges because of the "human need to disclose to a spiritual counselor, in total and absolute confidence, what are believed to be flawed acts or thoughts

and to receive priestly consolation and guidance in return." Trammel v. United States, 445 U.S. 40, 51 (1980).[18]

B. The Act Violates Plaintiffs' Free Speech Rights

The Missouri Constitution broadly protects the right to free speech. It states: "[No] law shall be passed impairing the freedom of speech, no matter by what means communicated . . . ." Mo. Const. art. 1, § 8. This constitutional provision must "be understood in its plain, untechnical sense." Marx & Haas Jeans Clothing Co. v. Watson, 67 S.W. 391, 394 (Mo. banc 1902). Relying on the "plain . . . sense" of Article I, § 8, this Court has noted:

> "Special protection is given speech to assure the free exchange of political and social ideas. All ideas having even the slightest redeeming social importance – unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion – have the full protection of the

[18] Because of the Act's impact on clergy and their congregants (see generally LF at 24-32) (Affidavit of Rev. Rebecca Turner), it also violates the rights of clergy and their congregants to freely exercise their religion, as protected both under the Missouri Constitution and the United States Constitution. See Brief of the American Jewish Committee and Eleven Other Organizations Listed on the Inside Cover as Amici Curiae in Support of Plaintiffs-Appellants, filed in this appeal.

guaranties, unless excludable because they encroach upon the limited area of more important interests."

State v. Roberts, 779 S.W.2d 576, 578 (Mo. banc 1989), quoting State v. Vollmar, 389 S.W.2d 20, 27 (Mo. 1965), quoting Roth v. United States, 354 U.S. 476, 484 (1957). See also Marx & Haas Jeans Clothing Co., 67 S.W. at 393 ("Language could not be broader, nor prohibition nor protection more amply comprehensive. Wherever, within our borders, speech is uttered, . . . there stands the constitutional guaranty giving stanch assurance that each and every one of them shall be free. The legislature cannot pass a law which even impairs the freedom of speech . . . ."). Like the Missouri Constitution, the First Amendment to the United States Constitution strongly protects the right to free speech by broadly prohibiting the Government from "abridging the freedom of speech." U.S. Const. amend. I.

Because this case is before the Supreme Court of Missouri and the statute under review was passed by the Missouri General Assembly, Plaintiffs urge the Court to rule on Plaintiffs' free speech claims under the Missouri Constitution, as well as under the United States Constitution, finding that the Act violates both constitutions, and specifying that the Missouri Constitution provides "separate, adequate, and independent grounds" for facially invalidating the Act. Michigan v. Long, 463 U.S. 1032, 1041 (1983).

The Act restricts speech based entirely on its content in that it bans only communications with a minor that relate to abortions outside Missouri; no other

communication is regulated. Given Article I, section 8's broad protection for speech, content-based restrictions, such as the Act, are plainly impermissible under the Missouri Constitution, just as they are under the United States Constitution. "[T]he First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 65 (1983) (quoting Police Dept. v. Mosley, 408 U.S. 92, 95 (1972)). See BBC Fireworks, Inc. v. State Highway Transp. Comm'n, 828 S.W.2d 879, 881 (Mo. banc 1992) (recognizing that the broad interpretation of the Missouri Constitution free speech clause in Marx & Haas was justified because the speech restriction at issue was content-based); Ryan v. Fitzpatrick, 669 S.W.2d 215, 218 (Mo. banc 1984) ("the government may not limit expression because of the message to be conveyed, its ideas, subject matter or content").

Because the Act imposes a content-based restriction on speech, penalizing speech that the State disfavors, it is "presumptively invalid," R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992), and is subject to the most stringent judicial review. Reno v. American Civil Liberties Union, 521 U.S. 844, 868 (1997). See also Interactive Digital Software Ass'n v. St. Louis County, Mo., 329 F.3d 954, 958 (8th Cir. 2003) (ordinance banning sale of "graphically violent" videos to minors without parental consent was subject to strict scrutiny because it was content-based).

Moreover, the Act's constitutional infirmity is heightened because it discriminates between kinds of speech on the basis of viewpoint. For example, under the Act a person could lawfully discourage or counsel against abortion, or could lawfully advocate that the minor carry her pregnancy to term, drop out of school and raise the child. But if a physician or other person gives accurate information that assists a minor to choose an out-of-state abortion, he or she would violate the Act. Such discrimination on the basis of viewpoint is antithetical to the Missouri Constitution, just as it is to the First Amendment. "When the government targets not subject matter, but particular views taken by speakers on a subject, the violation . . . is all the more blatant." Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 829 (1995); see Planned Parenthood of S.C. Inc. v. Rose, 361 F.3d 786, 799 (4th Cir. 2004), reh'g and reh'g en banc denied, 373 F.3d 580 (4th Cir. 2004), cert. denied, 542 U.S. 1119 (2005) ("By limiting access to a specialty license plate to those who agree with its pro-life position, the State has distorted the forum in favor of its own viewpoint. This it may not do.").

The Act cannot survive the strict scrutiny under which its constitutionality must be assessed. Under both the Missouri and United States Constitutions, the only exceptions to the presumption of invalidity for content-based restrictions are for "limited areas" of speech that are of "slight social value," like obscenity and "fighting words." R.A.V., 505 U.S. at 383 (quotation marks and citation omitted);

Carpenter, 736 S.W.2d at 408 ("'Missouri courts have held that statutes abridging speech are constitutional to the extent that they prohibit only that speech which is likely to incite others to immediate violence'" or "fighting words") (quoting State v. Swoboda, 658 S.W.2d 24, 25 (Mo. banc 1983)).

But the information and counseling provided by Plaintiffs is core protected speech, not obscenity, fighting words or incitement. This is shown by Bigelow v. Virginia, 421 U.S. 809 (1975), a very similar case in which the United States Supreme Court found constitutional protection for a Virginia newspaper's advertisement of the availability of legal abortion in New York at a time when abortion was illegal in Virginia. Id. at 825-26. Bigelow held that factual information about the availability of legal abortion is "of potential interest and value to a diverse audience," Bigelow, 421 U.S. at 822, and thus is entitled to constitutional protection. Id. at 825.[19] Just as the Virginia newspaper had the right to advertise the availability of legal abortions in New York, Plaintiffs here have the right to provide accurate information to minors about the availability of legal abortions outside Missouri.

[19] See also cases cited in Argument, § II, A, supra; cf. Eisenstadt v. Baird, 405 U.S. 438, 457, 459 (1972) (Douglas, J. concurring) (First Amendment protects the freedom to learn about contraception and to advocate the use of contraception); Bolger, 463 U.S. at 75 n.30 (noting that minors have a "pressing need" for information about contraception).

Nor can the state justify this content-based restriction on speech by invoking parental rights. As the Eighth Circuit held in striking down a ban on selling graphically violent video games to minors without parental consent: "the government cannot silence protected speech by wrapping itself in the cloak of parental authority." Interactive Digital Software, 329 F.3d at 960. Thus, an interest in promoting parental rights cannot justify banning constitutionally protected speech.

The Trial Court erred in analyzing Plaintiffs' free speech claims under the overbreadth doctrine, rather than as a content- and viewpoint-based restriction on protected speech. First, the overbreadth doctrine applies to statutes that sweep within their prohibition both protected speech and unprotected speech/conduct. Cf. State v. Moore, 90 S.W.3d 64, 66 (Mo. banc 2002) (an overbreadth challenge asserts that "while a narrowly drawn statute could prohibit [the challenger's] activity, the challenged statute is so overbroad as to include speech that is constitutionally protected"). As explained herein, none of the speech or conduct proscribed by the Act could permissibly be banned by a narrowly drawn statute because banning any form of "aid or assist[ance]" violates the constitutional rights of Plaintiffs and/or their clients. Second, the overbreadth doctrine generally applies when a person against whom a statute operates constitutionally seeks to invalidate the statute because it could violate *someone else's* First Amendment rights. Cf. id. (criminal defendant had standing under overbreadth doctrine to

bring First Amendment challenge to statute based on its application to the speech activities of others). Here, Plaintiffs are not seeking to vindicate the First Amendment rights of a party who is not before the Court; rather, they are seeking to vindicate their own free speech rights, which are directly violated by the Act.

For all these reasons, this Court must conclude that the content- and viewpoint-based ban on speech imposed by the Act violates the Missouri Constitution and the United States Constitution.

C. The Act Violates Free Speech Rights of Plaintiffs' Patients and Congregants Under Both the Missouri Constitution and the United States Constitution Because It Denies Them Access to Truthful Information About an Important Personal Health Decision

The Act also violates Plaintiffs' clients' right to receive truthful information about abortion in violation of their free speech rights under the Missouri Constitution and the United States Constitution. The "[f]reedom of speech presupposes a willing speaker. But where a speaker exists . . . the protection afforded is to the communication, to its sources and to its recipients both." Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 756 (1976) (footnote omitted); see also Parmley v. Mo. Dental Bd., 719 S.W.2d 745, 749 (Mo. banc 1986) ("perhaps most important" interests underlying constitutional protection for commercial speech are the interests of the consumer/listener who

has a "great" need for "complete and accurate information" in order to make choices). The United States Supreme Court has

> held that in a variety of contexts "the Constitution protects the right to receive information and ideas." Stanley v. Georgia, 394 U.S. 557, 564, 89 S.Ct. 1243, 1247, 22 L.Ed.2d 542 (1969); see Kleindienst v. Mandel, 408 U.S. 753, 762-763, 92 S.Ct. 2576, 2581, 33 L.Ed.2d 683 (1972) (citing cases).

Bd. of Educ., Island Trees Union Free School Dist. No. 26 v. Pico, 457 U.S. 853, 867 (1982) (plurality opinion) (finding that high school students have a First Amendment right not to have local school board remove school library books with which it disagrees); see also Griswold v. Connecticut, 381 U.S. 479, 482 (1965) ("the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge. The right of freedom of speech and press includes not only the right to utter or to print, but the right to . . . receive . . . ."). The constitutional protection for the right to receive information rests on the long-held notion that "information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them." Va. State Bd. of Pharmacy, 425 U.S. at 770; see also Parmley, 719 S.W.2d at 748-49 (discussing societal interest in free flow of information).

The Act offends these established free speech principles. By restricting the provision of truthful information about abortions outside Missouri, the provision impairs minors' ability to make informed choices about whether and where to have an abortion. Encumbering a young woman's decision-making in this manner could not be more inimical to the values underlying free speech rights. See Bolger, 463 U.S. at 75 (law restricting "free flow of truthful information" relating to birth control "may bear on one of the most important decisions [prospective] parents have a right to make," and thus "constitutes a basic constitutional defect regardless of the strength of the government's interest") (quotation marks and citations omitted); see also Eisenstadt, 405 U.S. at 457 (Douglas, J. concurring) (even when government disagrees with the advocacy of birth control, "the freedom to learn about [those ideas] . . . may not be abridged . . . . Freedom of discussion, . . . must embrace all issues about which information is needed or appropriate . . .") (quotation marks and citation omitted); Cent. Hudson Gas and Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 574-75 (1980) (Blackmun, J., concurring) (state's attempt to "manipulate the choices of its citizens" by suppressing information needed to make a free choice "strikes at the heart of the First Amendment").

The Act cannot be saved merely because the recipient of the information is a minor. The First Amendment to the Constitution "indisputably" protects minors' "fundamental right" to receive information. Sund v. City of Wichita Falls, Tex., 121 F. Supp. 2d 530, 547 (N.D. Tex. 2000); see also Erznoznik v. City of

Jacksonville, 422 U.S. 205, 214 (1975) (footnote omitted) ("In most circumstances, the values protected by the First Amendment are no less applicable when the government seeks to control the flow of information to minors."); Bd. of Educ., Island Trees Union Free School Dist. No. 26, 457 U.S. at 867 (high school students have First Amendment right to access school library books with which local school board disagrees); cf. Bolger, 463 U.S. at 75 n.30 (because statute that "denies information to minors" about the availability of contraceptives was unconstitutional on other grounds, court did not reach issue of minors' rights to receive the information, but observed that "it cannot go without notice" that minors have a "pressing need" for information about contraception). The analysis under the Missouri Constitution must be the same. See Mo. Const. art. 1, § 8 ("*every* person shall be free to say . . . whatever he will on *any* subject . . . .") (emphases added); cf. Parmley, 719 S.W.2d at 748-49.

Accordingly, Missouri's attempt to deny minors accurate information about out-of-state abortions must be found unconstitutional under both the Missouri Constitution and the United States Constitution.

III. THE TRIAL COURT ERRED BY FAILING TO FIND THE ACT UNCONSTITUTIONAL BASED ON ITS EXTRA-TERRITORIAL REACH BECAUSE LAWS THAT ATTEMPT TO REGULATE SPEECH AND CONDUCT BEYOND A STATE'S BORDERS VIOLATE THE COMMERCE CLAUSE AND VIOLATE

PRINCIPLES OF STATE SOVEREIGNTY AND COMITY IN THAT THE ACT ATTEMPTS TO REGULATE COMMERCE OUTSIDE THE STATE'S BORDERS AND TO PENALIZE PERSONS OUTSIDE MISSOURI FOR CONDUCT THAT IS LEGAL WHERE IT OCCURS

The Act applies extra-territorially because a person can violate it by "caus[ing], aid[ing], or assist[ing]" a minor to obtain an abortion outside of Missouri even if the minor's "abortion was performed or induced . . . in a manner that is otherwise lawful in the state or place where the abortion was performed or induced." Mo. Rev. Stat. § 188.250(3); see also note 5, supra. In light of this provision, when those outside Missouri who arguably have "minimum contacts" with Missouri (such as Comprehensive Health, see Statement of Facts, § C, 4, supra), provide information about abortion, or provide abortions, to Missouri minors, they must comply with Mo. Rev. Stat. § 188.028 or risk potentially significant civil liability. Thus, the practical effect of the Act is to require non-Missouri health care providers, counselors and others to comply with Missouri law when providing medical care and information to Missouri minors if they have "minimum contacts" with Missouri.

A. The Act Violates the Commerce Clause

Given the Act's extra-territorial effect,[20] the Trial Court erred in not finding the Act unconstitutional as a violation of the Commerce Clause of the United States Constitution, which provides: "The Congress shall have Power . . . To regulate Commerce . . . among the several States . . . ." U.S. Const. art. I, § 8, cl. 3. It has long been understood that the Commerce Clause's "affirmative grant of authority to Congress also encompasses an implicit or 'dormant' limitation on the authority of the States to enact legislation affecting interstate commerce." Healy v. Beer Inst., 491 U.S. 324, 326 n.1 (1989) (citations omitted). On this basis, the United States Supreme Court has invalidated laws that – like the Act – have the "practical effect" of regulating commerce outside a state's borders. See, e.g., id. at 336 (invalidating Connecticut beer price affirmation statute that resulted in that state controlling the beer prices in neighboring states); Edgar v. MITE Corp., 457 U.S. 624, 642-43 (1982) (invalidating Illinois Business Takeover Act that had "sweeping extraterritorial effect"); see also cases cited in Healy, 491 U.S. at 331-36; cf. Nat'l Foreign Trade Council v. Natsios, 181 F.3d 38, 69 (1st Cir. 1999) (Massachusetts statute prohibiting state from doing business with companies that do business with Burma violated Foreign Commerce Clause

[20] "[A] statute has extraterritorial reach when it necessarily requires out-of-state commerce to be conducted according to in-state terms." Cotto Waxo Co. v. Williams, 46 F.3d 790, 794 (8th Cir. 1995).

because, among other reasons, it "attempt[s] to regulate conduct beyond [the state's] borders and beyond the borders of this country"), aff'd on other grounds, 530 U.S. 363 (2000).

Indeed, citing Healy, the Eighth Circuit has held that:

> Under the Commerce Clause, a state regulation is *per se invalid* when it has an "extraterritorial reach," that is, when the statute has the practical effect of controlling conduct beyond the boundaries of the state. The Commerce Clause precludes application of a state statute to commerce that takes place wholly outside of the state's borders.

Cotto Waxo, 46 F.3d at 793 (emphasis added) (citations omitted). Because the Act has the practical effect of controlling commerce beyond Missouri's borders by requiring non-Missouri health care providers, counselors and others who are engaged in speech and conduct wholly outside Missouri to comply with Mo. Rev. Stat. § 188.028 before they "cause, aid, or assist" a Missouri minor to obtain an abortion outside Missouri, it violates the Commerce Clause *per se*. See Healy, 491 U.S. 324; Cotto Waxo, 46 F.3d at 793.

Nor is the Trial Court correct in suggesting that Plaintiffs' Commerce Clause claim is not appropriate in the context of this pre-enforcement challenge. Indeed, Cotto Waxo was a pre-enforcement facial challenge on Commerce Clause grounds to a Minnesota statute. That case was brought against a Minnesota

administrative agency that had taken no action to enforce the challenged statute. The Eighth Circuit reversed a grant of summary judgment upholding the statute, and remanded for a trial on the statute's constitutionality. In so doing, the Court never suggested that the case was not ripe for resolution. Likewise, Associated Industries of Missouri v. Lohman, 511 U.S. 641 (1994), which was initially filed in the Missouri courts, was a pre-enforcement challenge under the Commerce Clause to Missouri's use tax. See St. Charles County v. Dir. of Revenue, 961 S.W.2d 44, 45 (Mo. banc 1998) (summarizing the Associated Industries litigation, and noting: "[b]efore the local use tax was first implemented, Associated Industries of Missouri . . . challenged its constitutionality, claiming that it violated the Commerce Clause of the United States Constitution.").

So, here, there is no bar to Plaintiffs bringing a pre-enforcement Commerce Clause challenge to the Act.

B. The Act Violates the Due Process Rights of Non-Missouri Professionals Who Are at Risk of Violating the Act by Engaging in Speech and Conduct That Is Legal Where It Is Performed

The Trial Court also erred in not finding that the Act violates the rights of persons, including, for example, Plaintiff Comprehensive Health and its staff, who are located outside of Missouri at the time they provide aid or assistance to Missouri minors in obtaining abortions. The Act denies these individuals due process by penalizing them for speech and conduct that takes place wholly outside

Missouri, even when their speech and conduct is entirely lawful in the state where it occurs. As Bigelow makes clear, Missouri's attempt to regulate speech and conduct beyond its borders cannot stand. In that case, the Court held that: "The Virginia Legislature could not have regulated the advertiser's activity in New York, and *obviously could not have proscribed the activity in that State . . . .*" 421 U.S. at 822-24 (emphasis added) (citations omitted). The Court went on to explain that

> [a] State does not acquire power or supervision over the internal affairs of another State merely because the welfare and health of its own citizens may be affected when they travel to that State . . . . *[I]t may not, under the guise of exercising internal police powers, bar a citizen of another State from disseminating information about an activity that is legal in that State.*

Id. at 824-25 (emphasis added). The Court concluded that a state law prohibiting the advertisement of an activity that is lawful where it occurs violates the First Amendment. Id.

Recent cases confirm that this fundamental principle applies to conduct as well as speech because a "basic principle of federalism is that each State may make its own reasoned judgment about what conduct is permitted or proscribed within its own borders . . . ." State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 422 (2003) (finding due process violated by state court's imposition of

punitive damages for out-of-state conduct). Similarly in BMW v. Gore, 517 U.S. 559 (1996), the United States Supreme Court found that "it follows from . . . principles of state sovereignty and comity that a State may not impose economic sanctions on violators of its laws with the intent of changing . . . lawful conduct in other States." 571 U.S. at 571-72 (finding due process violated by state court's imposition of punitive damages for lawful out-of-state conduct because a state can neither punish a defendant for conduct that was lawful in the state where it occurred nor impose sanctions to deter such conduct). Cf. N.Y. Life Ins. Co. v. Head, 234 U.S. 149, 161 (1914) (finding that constitutional rights to contract would be violated if Missouri law invalidated an agreement made in conformity with the laws of another state because "it would be impossible to permit the statutes of Missouri to operate beyond the jurisdiction of that State . . . without throwing down the constitutional barriers by which all the States are restricted within the orbits of their lawful authority and upon the preservation of which the Government under the Constitution depends.").

The Act violates this fundamental principle of our constitutional structure by attempting to legislate activities *outside of Missouri* that are legal where they occur. The cases cited above make clear that this attempt to enforce Missouri law extra-territorially is simply impermissible.

IV. THE TRIAL COURT ERRED BY FAILING TO FIND THAT THE ACT UNCONSTITUTIONALLY BURDENS THE ABORTION

RIGHT FOR SOME MISSOURI MINORS WHO CANNOT INVOLVE THEIR PARENTS IN THEIR ABORTION DECISION AND FOR WHOM AN OUT-OF-STATE ABORTION IS THE BEST OPTION BECAUSE WHILE STATES CAN REQUIRE MINORS TO OBTAIN THEIR PARENTS' CONSENT TO THEIR ABORTION DECISION, SUCH REQUIREMENTS CANNOT IMPOSE AN "UNDUE BURDEN" ON THE ABORTION RIGHT, AND THEY MUST PROVIDE MINORS WITH AN "EFFECTIVE OPPORTUNITY" TO SEEK A JUDICIAL BYPASS OF THE CONSENT REQUIREMENT, IN THAT REQUIRING MINORS TO GO THROUGH TWO SEPARATE JUDICIAL BYPASS PROCEEDINGS IMPOSES AN "UNDUE BURDEN" AND DENIES TEENS AN "EFFECTIVE OPPORTUNITY" TO OBTAIN A JUDICIAL BYPASS

Without doubt, the United States Constitution permits prohibiting abortions for minors unless the parents have consented, so long as the minor has the option of bypassing parental consent by seeking judicial authorization for the abortion through an expedited, confidential "judicial bypass" proceeding. Bellotti v. Baird, 443 U.S. 622, 649 (1979); see also Planned Parenthood Ass'n of Kansas City v. Ashcroft, 462 U.S. 476 (1983) (upholding Missouri's parental consent abortion law with judicial bypass option). But this general principle is not unlimited:

Under the United States Constitution, parental consent laws, like all laws regulating abortion, may not impose an "undue burden" on the abortion right, meaning that the law may not have the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion. Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 877 (1992). Moreover, the required judicial bypass proceeding must "assure that a resolution of the issue, and any appeals that may follow, will be completed with anonymity and sufficient expedition *to provide an effective opportunity for an abortion to be obtained*." Bellotti, 443 U.S. at 644 (emphasis added).

Underlying the constitutional requirement of a judicial bypass option is the Supreme Court's holding in Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 50 (1976), that despite parents' interests, a minor's constitutional right to abortion would be violated if parents could exercise an "absolute, and possibly arbitrary, veto" over their daughter's abortion right. Id. at 74; Bellotti, 443 U.S. at 643.[21] The Supreme Court's jurisprudence in this area thus recognizes that some

[21] In Bellotti, the Court specifically observed that "the potentially severe detriment facing a pregnant woman . . . is not mitigated by her minority. Indeed, considering her probable education, employment skills, financial resources, and emotional maturity, unwanted motherhood may be exceptionally burdensome for a minor. In addition, the fact of having a child brings with it adult legal responsibility, for parenthood, like attainment of the age of majority, is one of the traditional criteria

minors will not or cannot involve their parents in their abortion decision, and that the lack of parental involvement is an insufficient basis for unduly burdening a minor's abortion right, so long as she is sufficiently mature to make the abortion decision on her own, or an abortion is in her best interests. Bellotti, 443 U.S. at 643-44.

The Act violates these principles for at least some Missouri minors who cannot obtain parental consent to their abortion and for whom an out-of-state abortion is the best option. See Statement of Facts § C, 2, supra (describing range of reasons Missouri minors seek out-of-state abortions). Under the Act, if a Missouri minor's parents will not consent to the abortion, and the minor seeks an abortion in another state with a parental involvement law, she will be forced to seek a judicial bypass in *two separate legal proceedings* – one in Missouri, and one in the state where she is having the abortion. (See LF at 22, ¶¶ 30-31.) For example, prior to the Act, a minor who lived in Kansas City, Missouri who could not involve a parent in her abortion decision most likely sought a bypass of Kansas's parental notice law in a Kansas court and had her abortion a few miles from her home, on the Kansas side of the Kansas City metropolitan area. If the Act were enforced, however, she would have two options: (1) obtain a judicial

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for the termination of the legal disabilities of minority. In sum, there are few situations in which denying a minor the right to make an important decision will have consequences so grave and indelible." 443 U.S. at 642.

bypass in Missouri (to comply with the Act) and then obtain a judicial bypass in Kansas (to comply with that state's parental notice law) in order to have her abortion in the Kansas City metropolitan area; or (2) seek a judicial bypass in Missouri and travel close to 250 miles roundtrip to Columbia (if she was within their gestational age limit) or 500 miles roundtrip to St. Louis for the abortion.

This result serves no state interest, rational, compelling or otherwise. A minor who has obtained a judicial bypass of one state's parental involvement law has satisfied all legitimate governmental interests in ensuring that she is mature enough to make the abortion decision or that the proposed abortion is in her best interests. Bellotti, 443 U.S. at 644; Planned Parenthood Sioux Falls Clinic, 63 F.3d at 1460. Requiring the minor to go through two separate judicial bypass proceedings, or to travel hundreds of additional miles to obtain an abortion, serves no purpose other than to create obstacles to a minor's choice. As such, the Act creates an undue burden on a minor's right to abortion. Casey, 505 U.S. at 877 (undue burden created when a statute has the purpose or effect of creating a substantial obstacle to a woman's ability to have an abortion).

The Act also violates the constitutional principle that a bypass must provide minors with "an effective opportunity for an abortion to be obtained." Bellotti, 443 U.S. at 644. For minors who believe that they are unable to involve a parent in their abortion decision, confidentiality is of the utmost importance. For these minors, going to court twice in two different states, while trying to maintain their

confidentiality, would not only be an overwhelming proposition, but it could also force them to seek a later, more risky, more expensive abortion – or to forgo having the procedure at all. Similarly, for minors who are trying to protect their confidentiality and who may have difficulty accessing transportation, seeking one bypass and traveling hundreds of miles for an abortion procedure within Missouri (such as for a teen from Kansas City, Missouri who travels to St. Louis rather than going out of state) is also no real option. Cf. Ind. Planned Parenthood Affiliates Assoc., Inc. v. Pearson, 716 F.2d 1127, 1138 (7th Cir. 1983) (navigating the court system may be intimidating for minors and deter them from seeking a bypass); id. at 1142 (minors seeking judicial bypasses must have "considerable flexibility" in accessing the state court system); Memphis Planned Parenthood, Inc. v. Sundquist, 2 F. Supp. 2d 997, 1005 (M.D. Tenn. 1997) (recognizing that the confidentiality of minors who seek bypasses may be compromised if they are forced to travel inconvenient distances), rev'd on other grounds, 175 F.3d 456 (6th Cir. 1999). Accordingly, for some Missouri minors, the Act denies them "an effective opportunity for an abortion to be obtained." Bellotti, 443 U.S. at 644.

For Missouri minors seeking abortions in Kansas, the Act would impose an "undue burden" even if this Court ruled that Kansas health care providers were not bound to comply with the Act because Missouri statutes cannot have extra-territorial effect. See Argument § III, supra. This is because Kansas law requires that "[a] parent or guardian, or a person 21 or more years of age who is not

associated with the abortion provider and who has a personal interest in the minor's well-being, shall accompany the minor and be involved in the minor's decision-making process regarding whether to have an abortion." Kan. Stat. Ann. § 65-6704(a); (see also LF at 14, ¶ 10). Thus, to have an abortion in Kansas, a minor must be accompanied by an adult "who has a personal interest in the minor's well-being," even if she has obtained a judicial bypass of the parental notice requirement. Kan. Stat. Ann. § 65-6704(a). For many Missouri minors, the only such adult they know will be a Missouri resident. But, under the Act, Missouri adults cannot accompany a Missouri minor to a Kansas abortion provider without running afoul of the Act's ban on "aid" or "assist[ance]," unless the Missouri minor first obtains a judicial bypass from a Missouri court, as well as the Kansas court. Thus, even if Kansas abortion providers did not have to comply with Mo. Rev. Stat. § 188.028, Missouri minors who cannot involve their parents in their abortion decisions would have to go through two judicial bypass proceedings in order for a Missouri adult to accompany them to a Kansas abortion provider, as Kansas law requires, or the Missouri adult would be at risk of significant liability under the Act.

Moreover, although other states bordering on Missouri do not *mandate* that minors be accompanied by a trusted adult when they have an abortion, many minors who cannot involve their parents in their abortion decision want and need a trusted adult to accompany them, and, in fact, most teens bring an adult with them.

(See, e.g., LF at 14, ¶¶ 9-10.) However, given the potentially significant liability under the Act for assisting a teen, many Missouri minors may be unable to find a trusted adult willing to help them arrange for an out-of-state abortion, or accompany them or transport them to the abortion appointment. For these young women, the Act's effect will be to deny them the significant benefit of having a trusted adult with them during the abortion, which for many young women is a difficult and emotional time. This, too, constitutes an unreasonable and "undue" burden on the abortion right.

V. THE TRIAL COURT ERRED IN FAILING TO FIND THAT THE ACT VIOLATES THE RIGHTS OF PLAINTIFFS' MINOR CLIENTS TO EQUAL PRIVILEGES AND IMMUNITIES AND TO TRAVEL INTERSTATE BECAUSE CITIZENS OF ONE STATE HAVE THE RIGHT TO TRAVEL TO ANOTHER STATE AND BE TREATED THE SAME AS THE CITIZENS OF THE SECOND STATE, AND THEY HAVE THE RIGHT TO TRAVEL INTERSTATE TO SEEK MEDICAL SERVICES WITHOUT INFRINGEMENT ON THEIR ABILITY TO TRAVEL, IN THAT THE ACT DENIES MISSOURI MINORS THE SAME PRIVILEGES AS CITIZENS OF ANY OTHER STATE AND IMPOSES BARRIERS ON THEIR ABILITY TO TRAVEL INTERSTATE WHEN THEY HAVE ABORTIONS OUTSIDE MISSOURI

The Trial Court also erred by failing to rule that the Act violates the right to interstate travel, which is "a virtually unconditional personal right, guaranteed by the Constitution to us all" that is "firmly embedded in [the Supreme Court's] jurisprudence." Saenz v. Roe, 526 U.S. 489, 498 (1999) (internal quotations omitted).[22] The right to travel is made up of "at least three different components." It protects [1] the "right of a citizen of one State to enter and to leave another State"; [2] the "right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State;" and [3] "for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State." Saenz, 526 U.S. at 500. Most relevant here are the right of Missouri minors to enter and leave a neighboring state, and "to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in [a] second State."

[22] As the United States Supreme Court has explained, "the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement." Shapiro v. Thompson, 394 U.S. 618, 629 (1969), overruled on other grounds, Edelman v. Jordan, 415 U.S. 651 (1974); see also, e.g., Mem'l Hosp. v. Maricopa County, 415 U.S. 250, 254 (1974) ("The right of interstate travel has repeatedly been recognized as a basic constitutional freedom.").

The right to be treated "as a welcome visitor" is based, at least in part, on the Privileges and Immunities Clause of Article IV of the Constitution. Saenz, 526 U.S. at 501. This Clause was designed "to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned." Paul v. Virginia, 8 Wall. 168, 180 (1869); see also Toomer v. Witsell, 334 U.S. 385, 395 (1948) (the Privileges and Immunities Clause "was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy").

In Doe v. Miller, 405 F.3d 700 (8th Cir. 2005), cert. denied, 125 S. Ct. 757 (2005), the Eighth Circuit summarized the United States Supreme Court's holdings in this area as establishing "that the federal guarantee of interstate travel 'protects interstate travelers against two sets of burdens: "the erection of actual barriers to interstate movement" and "being treated differently" from intrastate travelers.'" Doe, 405 F.3d at 711, quoting Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 277 (1993) (quoting Zobel v. Williams, 457 U.S. 55, 60 n.6 (1982)).

The Act violates the right to interstate travel of Plaintiffs' clients who are Missouri minors. First, it violates Missouri minors' constitutional right to enter a state and to receive medical services there on the same basis as the state's residents. Not only would Missouri minors have to comply with the law in the

state where the abortion occurs (as would citizens of every state), they, alone, would also have to comply with Missouri's parental consent for abortion requirement, Mo. Rev. Stat. § 188.028. These minors would thus not be assured "the same privileges which the citizens of [any other] State [] enjoy" if they seek abortions outside Missouri. Toomer, 334 U.S. at 395.

Preventing residents of one state from obtaining medical services on the same basis as the residents of the state to which they travel, as the Act would do, has been found unconstitutional in the specific context of abortion restrictions. In Doe v. Bolton, 410 U.S. 179, 200 (1973) (cited in Saenz, 526 U.S. at 502), the Court struck down a Georgia requirement that a woman be a citizen of Georgia in order to obtain an abortion there, finding that this restriction violated the right to travel. Likewise, in Bigelow, the Court held that Virginia may not forbid its citizens from obtaining abortion services lawfully provided in New York. Bigelow, 421 U.S. at 827-28. Because the Act would have the effect that was found impermissible in Doe and Bigelow, it violates the right of Missouri residents to travel *from* their state to another state and to be afforded the same options as the citizen of the second state.

Second, the Act impermissibly "erect[s] . . . actual barriers to interstate movement," Doe v. Miller, 405 F.3d at 711 (quotations omitted), of Missouri minors by depriving them of information, referrals, accompaniment, transportation, funding and any other type of assistance that some minors need in

order to obtain an out-of-state abortion. (See LF at 15, 21-22, ¶¶ 12, 28-29; LF at 5-6, 9-10, ¶¶ 13-16, 25-26; LF at 26, 29, 30-31, ¶¶ 8, 15, 18-19.) This, too, is unconstitutional. See Saenz, 526 U.S. at 500-01 (discussing right to interstate travel without obstacles); see also Edwards v. California, 314 U.S. 160, 178-181 (1941) (Douglas, J., concurring) (explaining that law that made criminals of those who assisted indigents to enter a state impaired the indigents' right to free movement). That the Act does not impose an absolute prohibition on a minor's ability to travel out of state for an abortion is irrelevant because free travel need not be prohibited in order for the right to travel to be infringed. See, e.g., Attorney Gen. of N.Y. v. Soto-Lopez, 476 U.S. 898, 911-12 (1986); Dunn v. Blumstein, 405 U.S. 330, 339-42 (1972); Shapiro, 394 U.S. at 634-38.

The Act's infringement on the right to interstate travel of Plaintiffs' patients is subject to heightened scrutiny. See, e.g., Mem'l Hosp. v. Maricopa County, 415 U.S. at 258-59 (applying compelling state interest test to law that operated to penalize persons who exercised right of interstate travel); Dunn v. Blumstein, 405 U.S. at 339-43 (1972) (reiterating that the right to travel is abridged in a "constitutionally relevant sense" if travel is penalized even if it is not actually deterred and compelling state interest test applies).

The Act cannot survive such scrutiny. Any claim by Missouri that this restriction is justified by concern for minors' health and welfare must fail. As the United States Supreme Court stated in Bigelow, "[a] State does not acquire power

or supervision over the internal affairs of another State merely because the welfare and health of its own citizens may be affected when they travel to that State." 421 U.S. at 824 (rejecting that justification for state law limiting access to information about out-of-state abortions); accord State of Fla., Dep't of Health & Rehabilitative Servs. v. Friends of Children, Inc., 653 F. Supp. 1221, 1227 (N.D. Fla. 1986) (rejecting Florida's argument that it may prevent its citizens from traveling to Georgia to place a child up for adoption because of Florida's interest in the welfare of the child). Moreover, the Act's requirement that some minors obtain a "double judicial bypass," see Argument § IV, supra, clearly serves no state interest. Furthermore, the Act will actually endanger some minors by causing them to undertake interstate travel alone and unassisted rather than with the help of a trusted relative or friend, see id., thus increasing the risks those teenagers face. Such a means to accomplish the government's objective is itself impermissible. See Carey v. Population Servs. Int'l, 431 U.S. 678, 694-95 (1977) (striking down state ban on the distribution of contraceptives to minors; rejecting the defense that the law served the government's interest in discouraging sexual activity among the young because the government may not deter social behavior by making the disfavored conduct more dangerous).

Nor should the Court conclude that the Act's infringement on the right to travel is permissible because the burden fall on minors, not adults. Rights are no less "fundamental" for minors than for adults. Nunez v. San Diego, 114 F.3d 935,

945 (9th Cir. 1997) (striking down juvenile curfew ordinance as unconstitutional constraint on minors' fundamental right to free movement) (quotations omitted); see also Ramos v. Town of Vernon, 353 F.3d 171, 180-81 (2d Cir. 2003); Schleifer v. City of Charlottesville, 159 F.3d 843 (4th Cir. 1998); and Qutb v. Strauss, 11 F.3d 488 (5th Cir. 1993).[23] Indeed, in the context of a minor's right to choose abortion, the Supreme Court has specifically held: "Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights." Danforth, 428 U.S. at 74-75. Given the constitutional protection for the right to choose, minors seeking abortion services have an even stronger right to freedom of movement in order to effectuate that right. Implicit in the constitutional requirement that all parental involvement statutes must provide a judicial bypass alternative is the recognition that minors seeking bypasses will, at least to that extent, be operating outside of parental

[23] These juvenile curfew cases make clear that minors' right to freedom of movement is constitutionally protected. The right to travel between states is more firmly established than the right to intrastate travel. Hutchins v. District of Columbia, 188 F.3d 531, 536-37 (D.C. Cir. 1999). The lack of cases directly addressing the right of minors to travel interstate points out the unprecedented nature of this legislation. Plaintiffs are aware of no other attempt by a state to single out and penalize its minor residents who choose to leave the state.

custody and control. The United States Supreme Court decisions requiring that minors have the judicial bypass option explicitly hold that minors have a right to seek a bypass without prior notice to a parent, Bellottti, 443 U.S. at 647 ("every minor must have the opportunity – if she so desires – to go directly to a court without first consulting or notifying her parents"), implicitly acknowledging that minors, including some immature minors, will be outside the control of their parents when they attend a bypass hearing and obtain abortion services without parental knowledge. Given the United States Supreme Court's recognition that even immature minors have the right to be outside parental custody and control to seek a judicial bypass, the State cannot attempt to justify the Act by claiming that parents have an absolute right to control the activities of their children. The fact is that in the context of abortion rights, there are constitutional limits on parental rights. See Argument § IV, supra.

Because the Act denies Missouri minors equal privileges and immunities and burdens the fundamental right to interstate travel, it is unconstitutional. Saenz, 526 U.S. at 499.

VI. GIVEN THE ACT'S CONSTITUTIONAL INFIRMITIES, THE COURT MUST INVALIDATE THE LAW IN ITS ENTIRETY BECAUSE IT IS UNCONSTITUTIONAL IN ALL APPLICATIONS, OR, IN ANY EVENT, THIS COURT CANNOT SEVER APPLICATIONS OF A LAW WHERE THERE IS NO ASSURANCE

THAT THE LEGISLATURE WANTED SEVERANCE IN THAT THERE IS STRONG EVIDENCE THAT THE GENERAL ASSEMBLY DID NOT WANT THE ACT TO BE SEVERED IF FOUND UNCONSTITUTIONAL IN SOME, BUT NOT ALL, APPLICATIONS

By its plain meaning, the Act unconstitutionally prohibits any and all forms of aid or assistance – whether it be counseling, providing information, accompanying, transporting, or any other helpful speech or conduct – to a Missouri minor seeking an out-of-state abortion, unless the minor has first complied with Mo. Rev. Stat. § 188.028. See Argument §§ I-V, supra. Because as to all of its applications, the Act violates the constitutional rights of Plaintiffs and their clients, it must be declared unconstitutional and enjoined in its entirety.

Even if the Court finds that the Act violates constitutional rights of Plaintiffs and their clients as applied to some forms of "aid" or "assist[ance]," but not as to *all* forms, Missouri law still requires that the Act be enjoined in its entirety. Although Missouri's general severability statute, Mo. Rev. Stat. § 1.140,[24] permits, in some contexts, the severance of unconstitutional "*provisions*"

[24] Mo. Rev. Stat. § 1.140 provides: "If any provision of a statute is . . . unconstitutional, the remaining *provisions* of the statute are valid unless the court finds the valid *provisions* of the statutes are so essentially and inseparably connected with, and so dependent upon, the void *provision* that it cannot be

in a statute, nowhere does Missouri law permit the severance of unconstitutional *applications* from a single statutory provision. Thus, in Associated Industries of Missouri v. Director of Revenue, 918 S.W.2d 780 (Mo. banc. 1996), this Court held: "§ 1.140 does not address the 'as applied' situation."[25] Id. at 784.

For the Court to sever applications from a statute containing a single unified provision, like the Act, would necessarily require the court to insert words into the statute to limit its scope, as opposed to severing separate, unconstitutional provisions. For example, to exclude constitutionally protected speech from the Act, the Court would have to insert words clarifying that notwithstanding the Act's unlimited prohibition on "aid and assist[ance]," any "aid and assist[ance]" that takes the form of speech is permitted. Likewise, to prevent the Act from unduly burdening the abortion right of some minors, the Court would have to insert words clarifying that no minor has to obtain two separate judicial bypasses

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presumed the legislature would have enacted the valid *provisions* without the void one . . . ." (Emphases added.)

[25] In that case, Attorney General Nixon argued that "once it is determined that § 1.140 does not apply, severability is no longer an issue in the case, and . . . principles of severability are inapplicable unless some provision of the statute in question is actually stricken." Id. Under the Attorney General's reasoning in that case, no portion of the Act can be severed, and the Act in its entirety must be invalidated even if the Court concludes it has some permissible applications.

to obtain an abortion, despite the fact that the plain language of the Act, coupled with other states' laws, so requires. But inserting words into the Act to limit its scope is plainly impermissible given that the General Assembly specifically chose broad, open-ended terms, without limitation, using the terms "aid or assist" rather than, for example, "finance" and/or "transport." In sum, "[f]or this Court to convert the statute into a constitutional proscription would be to indulge in statutory revision, a matter within the exclusive province of the General Assembly." State v. Young, 695 S.W.2d at 886.

For this reason, this Court, reviewing recent Missouri jurisprudence on severability, stated: "The statutory doctrine of severability permits one offending provision of a law to be stricken and the remainder to survive. *It has never allowed courts to insert words in a statute which were not placed there by the General Assembly*." Akin v. Director of Revenue, 934 S.W.2d 295, 300 (Mo. banc 1996) (emphasis added). Akin bases this statement on Associated Industries, in which this Court held that where an entire statute is invalid in some, but not all, applications, "the statute must, in effect, be rewritten to accommodate the constitutionally imposed limitation." 918 S.W.2d at 784. The Court went on to state, however, that this will be done only "as long as it is consistent with legislative intent." Id.; cf. Ayotte v. Planned Parenthood of Northern New

England, 126 S. Ct. 961, 963 (2006) ("the touchstone for any decision about remedy is legislative intent").[26]

Applying this rule in Associated Industries (after the U.S. Supreme Court ruled that Missouri's use tax was unconstitutional *as applied* in those localities where the aggregate use tax exceeded the aggregate sales tax), this Court "refuse[d] to speculate that the General Assembly would have approved the statute as now limited, and therefore [it was compelled to] strike down the statute altogether." Id. at 785; see also State ex rel. City of Ellisville v. St. Louis County Bd. of Election, 877 S.W.2d 620, 624 (Mo. banc 1994), superseded on other grounds by constitutional amendment, Mo. Const. art. 6, § 8 ("We do not believe it is possible to sever the offending provision . . . from the remainder of the law . . . . We cannot say with any degree of assurance that the legislature intended the boundary commission law to apply to all counties . . . . Indeed, by the language it used, the legislature clearly intended that the legislation apply *only* to St. Louis County. For this Court to hold otherwise . . . would be to engage in an act of legislation which neither the constitution nor Section 1.140 permits.").

[26] One strong indicator of legislative intent is the language the Legislature chose to enact. Cf. Associated Industries, 918 S.W.2d at 785 ("had the General Assembly wished to exempt certain local taxing districts . . ., it certainly could have used such language"). Here, the General Assembly chose to word the scope of the Act's prohibition using broad, open-ended language.

Here, too, this Court "cannot say with any degree of assurance," id., and thus should not "speculate that the General Assembly would have approved" the Act if it were limited to only some applications of "aid" or "assist[ance]." Associated Industries, 918 S.W.2d at 785. Consider, for example, that this Court might conclude that the Act is unconstitutional as applied to *all* speech, and is unconstitutional to the extent that it applies extra-territorially, but that it is not unconstitutional to the extent it applies to "aid" or "assist[ance]" in the form of actually transporting Missouri minors out of state for an abortion. Although Plaintiffs strongly believe that this result would be legally incorrect (because it would violate minors' right to interstate travel and impose undue burdens on the abortion right), the Act would still have to be declared unconstitutional and enjoined in its entirety, rather than rewritten. This is because there is no "assurance," State ex rel. City of Ellisville**,** 877 S.W.2d at 624, that the Legislature would have passed a statute that prohibited only "intentionally transporting a minor to obtain an abortion without the consent or consents required by section 188.028," rather than prohibiting a broader, more open-ended range of "aid" and "assist[ance]."

Indeed, the Legislature's explicit intent *not* to limit the Act's prohibition to "transporting" minors is evidenced by the Missouri Senate's rejection of such a narrowing amendment. See "Journal of the Senate," S.B. 1, 93rd Leg., 1st Ex. Sess. S.A. 10, at 29-30 (Mo. 2005) (rejecting amendment that would have resulted

in a bill reading: "No person shall intentionally transport a minor in order to obtain an abortion without the consent or consents required by section 188.028," by a vote of 26-5). The rejection of such an amendment "clearly shows the legislature's view of its own intent" and the Missouri courts will not read into statutes language specifically rejected by the legislature. L&R Distrib., Inc. v. Missouri Dep't of Revenue, 529 S.W.2d 375, 379 (Mo. 1975); see also Reprod. Health Servs. of Planned Parenthood v. Nixon, 97 S.W.3d 54, 61 (Mo. App. E.D. 2002).

In addition, if the legislature wanted to ensure that any specific application of the Act remained if others were found unconstitutional, it could have specifically listed the different forms of "aid" and "assist[ance]" it sought to ban, such that unconstitutional ones could be stricken, while leaving others in place. Indeed, in Akin, this Court held that "[o]ne method the legislature uses to signal its intent as to what provisions are severable is to segregate a bill into separate sections." 934 S.W.2d at 301. Thus, in Akin, this Court found the statute at issue severable because the legislature had "clearly segregat[ed] the provisions of Section A from the troublesome sections involving referendum," and had thereby "signaled an intent that Section A be treated as severable from the latter provisions should constitutional questions as to the referendum arise." Id. Here, in contrast, although the Legislature surely knew that the Act would be subject to constitutional challenge, it did not "signal[] an intent" that any particular

applications of the Act be severed if others were struck down by "segregating" applications into separate sections, or even into separate words. Id.

If the General Assembly wants to ban particular forms of "aid" or "assistance" to minors that this Court upholds as constitutional, if any, it is free to do so.[27] This Court should not engage in quintessentially legislative work by rewriting this statute in an attempt to cure its constitutional defects. This is especially so because the Court must be "wary" that the General Assembly "would rely on [the Court's] intervention, for 'it would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside' to announce to whom the statute may be applied."

[27] For example, after this Court struck down the boundary commission law in its entirety in State ex rel. City of Ellisville on the ground that it was expressly prohibited by Mo. Const. art. 6, § 8, a constitutional amendment was adopted deleting the sentence in Mo. Const. art. 6, § 8 with which the boundary commission law conflicted. See Berry v. State, 908 S.W.2d 682, 683-84 (Mo. banc 1995). Likewise, after this Court found the unconstitutional use tax on interstate transactions to be unseverable, the General Assembly repealed the bill, and adopted Mo. Rev. Stat. § 144.757, which gives counties and municipalities the option of adopting a use tax if approved by popular vote. This shows that the General Assembly and/or the people of this State know well how to fix laws that the courts have found constitutionally deficient.

Ayotte, 126 S. Ct. at 968 (quoting United States v. Reese, 92 U.S. 214, 221 (1876)); see also State v. Young, 695 S.W.2d at 886 (same).

Given the strong evidence that the General Assembly did not want the Act to be severed if found partially unconstitutional, and, at a minimum, that the Court "cannot say with any degree of assurance" that the Legislature wanted any constitutional applications to be severed, or which applications it wanted severed, the appropriate course is for this Court to remain true to its limited judicial role and declare the Act unconstitutional and enjoin it in its entirety, rather than to "indulge in statutory revision." State v. Young, 695 S.W.2d at 886. As in Associated Industries, "because [this Court] ha[s] no power to rewrite the statute, [it] must strike it down in its entirety." 918 S.W.2d at 785.

CONCLUSION

The Court should reverse the decision of the court below, declare the Act to be unconstitutional in its entirety, and enjoin its enforcement in its entirety.

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Respectfully submitted,

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CERTIFICATION

Pursuant to Rule 84.06(c), I hereby certify that this brief (1) includes the information required by Rule 55.03; (2) complies with the limitations contained in Rule 84.06; and (3) contains 20,166 words. Moreover, the enclosed floppy disk has been scanned for viruses and is virus-free.

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CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the foregoing, along with a floppy disk containing the word processing file of the same, was sent by United States mail, first class postage prepaid, this 28th day of March, 2006, to:

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