IN THE SUPREME COURT OF MISSOURI

Case No. SC88783

STATE OF MISSOURI and FRIENDS OF MISSOURI MIDWIVES, et al.,

Appellants,

v.

MISSOURI STATE MEDICAL ASSOCIATION, et al.,

Respondents.

Appeal from the Circuit Court of Cole County
Honorable Patricia Joyce, Circuit Judge
Case No. 07AC-CC00567

BRIEF OF APPELLANTS FRIENDS OF MISSOURI MIDWIVES, ET AL.

James B. Deutsch, #27093
Marc H. Ellinger, #40828
Jane A. Smith, #28681
Thomas W. Rynard, #34562
Blitz, Bardgett & Deutsch, L.C.
308 East High Street, Suite 301
Jefferson City, MO 65101
E-mail: jdeutsch@blitzbardgett.com
E-mail: trynard@blitzbardgett.com
E-mail: mellinger@blitzbardgett.com
E-mail: jsmith@blitzbardgett.com

Attorneys for Appellants Friends of Missouri Midwives, et al.

TABLE OF CONTENTS

Table of Authorities 3

Jurisdictional Statement 8

Statement of Facts 9

Standard of Review 24

Points Relied On 26

- Point I 26
- Point II 27
- Point III 28
- Point IV 29

Argument 30

- Point I 30
- Point II 45
- Point III 50
- Point IV 56

Conclusion 66

Certificate of Authority 67

Certificate of Service 67

Appendix ..... Filed Separately

TABLE OF AUTHORITIES

Akin v. Director of Revenue 24

American Drug Stores, Inc. v. Harvard Pilgrim Care, Inc., 973 F. Supp. 60 (D. Mass. 1997) 26,27,28,42,48,54

Blue Cross Hospital Service, Inc. of Missouri v. Frappier, 681 S.W.2d 925 (Mo. banc 1984), *vacated on other grounds*, 472 U.S. 1014, 105 S.Ct. 3471, 87 L.Ed.2d 608 (1985), *on remand*, 698 S.W.2d 326 (Mo. banc 1985)..... 24,26,27,28,36-37,38,48,54

C.C. Dillon Co. v. City of Eureka, 12 S.W.3d 322 (Mo. banc 2000) 51

Citizens for Rural Preservation, Inc. v. Robinett, 648 S.W.2d 117 (Mo. App. 1982) 59

City of St. Charles v. State, 165 S.W.3d 149 (Mo. banc 2005) 24,33

Columbia Sussex Corp. v. Missouri Gaming Com'n, 197 S.W.3d 137 (Mo. App. W.D. 2006) 56,57,63

Community Care Centers, Inc. v. Missouri Health Facilities Review Committee, 735 S.W.2d 13 (Mo. App. 1987).....63

Community Health Partners, Inc. v. Commonwealth of Kentucky, 14 F. Supp.2d 991 (W.D. Ky. 1998).....26,29,41,43,54

Edwards v. Business Men's Assurance Co., 350 Mo. 666, 168 S.W.2d 82 (1942) 28,52-54, 55

Home Builders Association of Greater St. Louis v. State, 75 S.W.3d 267, 270 (Mo. banc 2002) 51

Jackson County Sports Complex Authority v. State, 226 S.W.3d 156 (Mo. banc 2007) 24,27,44-47

Lincoln Credit Co. v. Peach, 636 S.W.2d 31(Mo. banc 1982) 51-52

McEuen ex rel. McEuen v. Missouri State Bd. of Educ., 120 S.W.3d 207 (Mo. banc 2003) 46

Missouri Growth Association. v. Metropolitan St. Louis Sewer, 941 S.W.2d 615 (Mo. App. 1997) 64

Missouri Health Care Association v. Attorney General, 953 S.W.2d 617 (Mo. banc 1997) 29,57,58,62

Missouri State Medical Association v. Missouri Department of Health, 39 S.W.3d 837 (Mo. banc 2001) 52

Neighbors Against Large Swine Operations v. Continental Grain Co., 901 S.W.2d 127 (Mo. App. 1995) 60

Querry v. State Highway and Transportation Commission, 60 S.W.3d 630 (Mo. App. 2001) 58-59

Saxe v. Metropolitan Life Ins. Co., 618 N.Y.S.2d 180, 180 (N.Y. City Civ. Ct. 1994) 39

Schmitt v. City of Hazelwood, 487 S.W.2d 882 (Mo. App. 1972) 63

St. Joseph's Hill Infirmary, Inc. v. Mandl, 682 S.W.2d 821 (Mo. App. 1984) 29,63,64

Stroh Brewery Co. v. State, 954 S.W.2d 323 (Mo. banc 1997) 31,33

Trout v. State, 231 S.W.3d 140 (Mo. banc 2007) 26,33,37,46,47

Westin Crown Plaza Hotel Co. v. King, 664 S.W.2d 2 (Mo. banc 1984) 27,47,49

Article III, Section 21, Mo. Const.....8,46,47,65

Article III, Section 23, Mo. Const.....8,32,44,51,55,65

Article V, Section 3, Mo. Const. 8

Mo. Rev. Stat. §334.010 62

Mo. Rev. Stat. §334.100.1(10).....62

Alaska Statutes §21.36.090.....40

Alaska Statutes §21.42.355.....40

Cal. Ins. Code §10354.....40

Conn. Gen. Stat. §38a-499.....40

Conn. Gen. Stat. §38a-526.....40

18 Del. C. §3553 40

Fla. Stat. Ann. §627.6406 40

Fla. Stat. Ann. §627.6574 40

Me. Rev. Stat. Ann. title 24, §2332-K 40

Me. Rev. Stat. Ann. title 24A, §2757.....40

Md. Code Ann. Insurance § 15-709.....40

Mich. Comp. Laws Ann. § 550.1416(d) 40

Minn. Stat. § 62A.15.....40

N.H. Rev. Stat. Ann. § 415.18-q.....40

N.H. Rev. Stat. Ann. §420-B:8-p.....40

N.H. Rev. Stat. Ann. §420-A:17-f 40

N.J. Rev. Stat. §17.48A-34 40

N.M Stat. Ann. §59A-22-40 40

N.M Stat. Ann. §59A-23B-3.....40

N.M Stat. Ann. §59A-46-42 40

N.M Stat. Ann. §59A-47-28.1 40

R.I. Gen. Laws §27-18-31.....40

Tenn. Code Ann. §56-7-2407 41

Tenn. Code Ann. §56-32-237 41

Wash. Rev. Code Ann. §48.42.100.....41

W.Va. Code §33-15-14.....41

W.Va. Code §33-16-10.....41

W.Va. Code §33-24-43.....41

W.Va. Code §33-25-20.....41

W.Va. Code §33-25 A-31 41

42 U.S.C. 1396 r-6(b)(4)(E)(ii)(I).....38

31 Appleman on Insurance 2d, Health Insurance §185.01[A] (Matthew Bender 2007).....34

31 Appleman on Insurance 2d, Health Insurance §185.02-185.03 (Matthew Bender 2007).....34

31 Appleman on Insurance 2d, Health Insurance)§186.03[A][2] (Matthew Bender 2007).....34

William F. Meyer, “Life and Health Insurance Law,” §12:1 (Clark Boardman Callaghan 1972).....34

William F. Meyer, “Life and Health Insurance Law,” §12:2 (Clark Boardman Callaghan 1972).....34

William F. Meyer, “Life and Health Insurance Law,” §§18:1-18:4 (Clark Boardman Callaghan 1972).....34

William F. Meyer, “Life and Health Insurance Law,” chs. 17&18 (Clark Boardman Callaghan 1972).....34

“Tocology,” The American Heritage College Dictionary (Houghton Mifflin Company 1993) at 1422 38

JURISDICTIONAL STATEMENT

This Court has exclusive jurisdiction over this appeal pursuant to Article V, Section 3, as it is a case involving the validity under the Missouri Constitution of a statute of the State. Appellants appeal from the Final Judgment of the Circuit Court of Cole County, Missouri, entered on August 8, 2007. That Final Judgment declared §376.1753, RSMo., invalid for the failure of the Legislature to adhere to the clear title, single subject and original purpose requirements of article III, §§ 21 and 23 of the Missouri Constitution, in enacting Senate Substitute No. 2, Senate Committee Substitute, House Committee Substitute, House Bill 818 ("HB 818") at the 2007 legislative session. Section 376.1753 was one part of HB818. In addition to the declaratory relief granted, the Circuit Court permanently enjoined enforcement and implementation of §376.1753. Appellants duly and timely filed their Notice of Appeal in this matter on August 23, 2007.

STATEMENT OF FACTS

House Bill 818

HB 818, in the version finally enacted, added among its provisions a new section, designated Section 376.1753, which read as follows:

> 376.1753. Notwithstanding any law to the contrary, any person who holds current ministerial or tocological certification by an organization accredited by the National Organization for Competency Assurance (NOCA) may provide services as defined in 42 U.S.C. 1396 r-6(b)(4)(E)(ii)(I).

L.F. 402.[1]

HB 818 was originally introduced in the Missouri House of Representatives on February 8, 2007. Joint Ex. A at 7. As originally introduced, House Bill 818 was titled, "An act to repeal sections 376.961, 376.962, 376.964, and 376.989, RSMo, and to enact in lieu thereof nineteen new sections relating to portability

---

[1] For ease of reference, the citation to this final version and other versions of HB 818 are to the copy attached to Plaintiffs' Petition and included in the Legal File. The final version of the bill and earlier versions were also offered and admitted into evidence pursuant to a Joint Stipulation of Facts and Exhibits filed with the circuit court. The Joint Stipulation of Facts, which was admitted as Joint Exhibit A by the circuit court at hearing and the joint exhibits are filed separately in accordance with the Court's rules.

and accessibility of health insurance." L.F. 24. The original version of the bill made amendments and additions to existing statutory provisions of chapter 376 of the Missouri Revised Statutes relating to: the Missouri Health Insurance Pool, L.F. 24-29, *amending* §§ 376.961, 376.962, 376.964, & 376.989, and *adding* § 376.967; and the Missouri Health Insurance Portability and Accountability Act. L.F. 29-43, *adding* §§376.1800-376.1839.

HB 818 was assigned to the House Special Committee on Health Insurance. Joint Ex. A at 7. Following a public hearing on the bill, the Committee voted out House Committee Substitute for HB 818 ("HCS HB 818"). Joint Ex. A at 7. The title of HCS HB 818 read, "To repeal sections 376.960, 376.961, 376.962, 376.964, 376.966, 376.986, 376.989, 379.930, 379.938, 379.940, 379.942, 379.943, 379.944, and 379.952, RSMo., and to enact in lieu thereof seventeen new sections relating to portability and accessibility of health insurance." L.F. 45. HCS HB 818 made amendments, additions and repeals to existing statutory provisions of chapter 376 and 379 of the Missouri Revised Statutes relating to: the Missouri Health Insurance Portability and Accountability Act, L.F. 45-57, *adding* §§376.450-376.454; the Missouri Health Insurance Pool, L.F. 57-71, *amending* §§ 376.960, 376.961, 376.962, 376.964, 376.966, 376.886 & 376.989, and *adding* § 376.967; the Small Employer Health Insurance Availability Act, L.F. 71-84, *amending* §§ 379.930, 379.938, 379.940 & 379.952; the Missouri Small Employer Health Reinsurance Program, L.F. 84-91, *repealing* §§379.942 & 379.943; and the Health Benefit Plan Committee, L.F. 92-93, *repealing* § 379.944.

HCS HB 818 was reported to the House Rules Committee on March 15, 2007, and voted "Do Pass" on March 28, 2007. Joint Ex. A at 7. A perfected version of HCS HB 818 was passed by the House on April 12, 2007. Joint Ex. A at 7. The perfected version included three floor amendments. Joint Ex. A at 7. The title of the perfected bill was, "To repeal sections 376.960, 376.961, 376.962, 376.964, 376.966, 376.986, 376.989, 379.930, 379.938, 379.940, 379.942, 379.943, 379.944, and 379.952, RSMo., and to enact in lieu thereof seventeen new sections relating to portability and accessibility of health insurance." L.F. 95. The amendments added on the floor consisted of a new provision regarding prescriptions benefits provided by health insurance carriers and health benefit plans, L.F. 95, *adding* §376.392; and claims reporting requirements for health insurers with respect to requests for claims experience from employers covered under a group health insurance plan, L.F. 96, *adding* §376.435. The third change eliminated any amendment to §376.962. L.F. 112 (*compare with* L.F. 62).

HCS HB 818 was first read on the Senate floor on April 12, 2007, and referred to the Health and Mental Health Committee on April 12, 2007. Joint Ex. A at 8. The committee held a public hearing on the matter, adopted its substitute for the bill and voted the senate committee substitute "Do Pass" on May 1, 2007. Joint Ex. A at 8. Senate Committee Substitute for HCS HB 818 ("SCS HCS HB 818") was titled, "An Act to repeal sections 143.782, 313.321, 376.960, 376.961, 376.964, 376.966, 376.986, 376.989, 369.930, 379.938, 379.940, 379.942, 379.943, 379.944, and 379.952, RSMo, and to enact in lieu thereof twenty new

sections relating to health insurance." L.F. 142. SCS HCS HB 818 made amendments, additions and repeals to existing statutory provisions of chapters 143, 313, 376 and 379 of the Missouri Revised Statutes relating to: payment of unpaid health care services to hospitals or health care providers through set-offs of state tax refunds and lottery winnings, L.F. 142-146, *amending* §§ 143.782 & 313.321, and adding §143.790; prescription benefits provided by health insurance carriers and health benefit plans (the provisions added to the bill by floor amendment in the House), L.F. 146-47, *adding* §376.392; claims reporting requirements for health insurers with respect to requests for claims experience from employers covered under a group health insurance plan (also originally added by the floor amendment in the House), L.F. 147, *adding* §376.435; the Missouri Health Insurance Portability and Accountability Act, L.F. 147-161, *adding* §§376.450-376.454; the Missouri Health Insurance Pool, L.F. 161-172, *amending* §§376.960, 376.961, 376.964, 376.966, 376.986 & 376.989 (this version of the bill did not add a section 376.967, as found in prior versions); the Small Employer Health Insurance Availability Act, L.F. 172-187, *amending* §§379.930, 379.938, 379.940, & 379.952; the Missouri Small Employer Health Reinsurance Program, L.F. 187-197, *repealing* §§379.942 & 379.943; and the Health Benefit Plan Committee, L.F. 197-198, *repealing* §379.944.

A substitute to SCS HCS HB 818 was offered on the floor of the Senate on May 8, 2007 ("SS SCS HCS HB 818"). Joint Ex. A at 8. The title of the senate substitute was, "An Act to repeal sections 143.121, 143.782, 313.321, 376.426,

376.776, 376.960, 376.961, 376.964, 376.966, 376.986, 376.989, 369.930, 379.936, 379.938, 379.940, 379.942, 379.943, 379.944, and 379.952, RSMo, and to enact in lieu thereof forty-five new sections relating to health insurance, with an effective date for certain sections." L.F. 201. SS SCS HCS HB 818 made amendments, additions and repeals to existing statutory provisions of chapters 143, 313, 376 and 379 of the Missouri Revised Statutes relating to: state income tax adjustments, credits and deductions for payments to a health care sharing ministry or for certain health insurance premium payments, L.F. 202-208, *adding* §§143.118 & 143.119, and *amending* §143.121; payment of unpaid health care services to hospitals or health care providers through set-offs of state tax refunds and lottery winnings, L.F. 208-212 & 214-216, *amending* §§ 143.782 & 313.321, and adding §143.790; mandatory informative counseling for prenatally diagnosed conditions during prenatal screening, L.F. 212-214, *adding* §191.912; continuation of coverage for qualifying dependent children even after attaining the limiting age under HMO plans, L.F. 216-217, *adding* §354.536; prescription benefits provided by health insurance carriers and health benefit plans, L.F. 217-218, *adding* §376.392; mandatory provisions for group health insurance policies, L.F. 218-225, *amending* §376.426 to add requirements relating to continuation coverage for qualifying dependent children; the Missouri Health Insurance Portability and Accountability Act, L.F. 225-245, *adding* §§376.450-376.454; mandatory provisions for accident or sickness insurance policies, L.F. 246-247, *amending* §376.776 to add requirements relating to continuation coverage for qualifying

dependent children; the Missouri Health Insurance Pool, L.F. 247-265, *amending* §§376.960, 376.961, 376.964, 376.966, 376.986 & 376.989 and *adding* §376.987; operation of discount medical plan organizations, L.F. 265-276, *adding* §§376.1500-376.1532; operation of health care sharing ministries, L.F. 276-278, *adding* §376.1750; the Small Employer Health Insurance Availability Act, L.F. 278-308, *amending* §§379.930, 379.936, 379.938, 379.940, & 379.952; the Missouri Small Employer Health Reinsurance Program, L.F. 308-317, *repealing* §§379.942 & 379.943; and the Health Benefit Plan Committee, L.F. 317-318, *repealing* §379.944.

SS SCS HCS HB 818 was withdrawn on May 10, 2007, and a second substitute offered ("SS#2 SCS HCS HB 818"). Joint Ex. A at 8-9. SS#2 SCS HCS HB 818 was amended once before being passed by the Senate on May 10, 2007. Joint Ex. A at 9. The title of SS#2 SCS HCS HB 818 was, "An Act to repeal sections 103.086, 143.121, 143.782, 313.321, 376.426, 376.776, 376.960, 376.961, 376.964, 376.966, 376.986, 376.989, 379.930, 379.936, 379.938, 370.940, 379.942, 379.943, 379.944, and 379.952, RSMo., and to enact in lieu thereof forty-nine new sections relating to health insurance, with an effective date for certain sections." L.F. 320. SS#2 SCS HCS HB 818 made amendments, additions and repeals to existing statutory provisions of chapters 103, 143, 313, 376 and 379 of the Missouri Revised Statutes relating to: health savings plans for state employees and retirees, L.F. 321-323, *adding* §103.080 and *amending* §103.085; state income tax adjustments, credits and deductions for payments to a

health care sharing ministry or for certain health insurance premium payments, L.F. 323-330, *adding* §§143.118 & 143.119, and *amending* §143.121; payment of unpaid health care services to hospitals or health care providers through set-offs of state tax refunds and lottery winnings, L.F. 330-334 & 335-338, *amending* §§ 143.782 & 313.321, and adding §143.790; mandatory informative counseling for prenatally diagnosed conditions during prenatal screening, L.F. 334-335, *adding* §191.912; continuation of coverage for qualifying dependent children even after attaining the limiting age under HMO plans, L.F. 338-339, *adding* §354.536; prescription benefits provided by health insurance carriers and health benefit plans, L.F. 339, *adding* §376.392; mandatory provisions for group health insurance policies, L.F. 340-347, *amending* §376.426; the Missouri Health Insurance Portability and Accountability Act, L.F. 347-367, *adding* §§376.450-376.454; mandatory provisions for accident or sickness insurance policies, L.F. 367-369, *amending* §376.776; the Missouri Health Insurance Pool, L.F. 369-388, *amending* §§376.960, 376.961, 376.964, 376.966, 376.986, 376.989, 376.990 and *adding* §376.987; operation of discount medical plan organizations, L.F. 388-400, *adding* §§376.1500-376.1532; operation of health care sharing ministries, L.F. 400-402, *adding* §376.1750; services related to pregnancy by persons holding qualified ministerial or tocological certifications, L.F. 402, *adding* §376.1753; the Small Employer Health Insurance Availability Act, L.F. 402-432, *amending* §§379.930, 379.936, 379.938, 379.940, & 379.952; the Missouri Small Employer

Health Reinsurance Program, L.F. 432-441, *repealing* §§379.942 & 379.943; and the Health Benefit Plan Committee, L.F. 441-442, *repealing* §379.944.

SS#2 SCS HCS HB 818 was passed by the House on May 11, 2007, and signed by the Speaker of the House and President Pro Tem of the Senate on May 18, 2007. Joint Ex. A at 9. The bill was signed into law by the Governor on June 1, 2007. Joint Ex. A at 9.

With respect to the issues in this case, the substance of the constituent parts of HB 818 is as follows. The focus of the Missouri Health Insurance Portability and Accountability Act provisions was the establishment of a Missouri Health Insurance Exchange with provision for requirements and limitations related to participation in the exchange by health insurers in the state and to the benefits and coverage to be provided by those insurers participating in the exchange. L.F. 347-357. Medical care is defined under the act to include "amounts paid for . . . The diagnosis, cure, mitigation, treatment, or prevention of disease or amounts paid for the purpose of affecting any structure or function of the body." L.F.352. Pregnancy is specifically recognized as a condition covered by the Act in the provision prohibiting participants in the exchange from imposing a pre-existing condition exclusion relating to a pregnancy existing at the effective date of coverage. L.F. 356. A health insurance issuer under the Act is defined as an entity providing a plan of health insurance or health benefits. L.F. 351-52. A group health plan and health insurance coverage are defined with reference to "medical care, as defined in this section," and to "items and services paid for as

medical care." L.F. 351. Insurers participating in the exchange, when permitted to impose an exclusion for pre-existing conditions, must tie the exclusion "to a condition, whether physical or mental." L.F. 354. Insurers participating in the exchange are also prohibited from establishing underwriting criteria that discriminate against persons enrolled in the group health plan based on health status, medical condition, claims experience and receipt of health care, among other reasons. L.F. 359-360. However, the antidiscrimination provision does not prevent the insurer from "establishing limitations or restrictions on the amount, level, extent, or nature of the benefits or coverage" for similarly situated enrollees in the plan. L.F. 360. References to benefits and/or coverage are also found in the definition of "Excepted benefits," to include care provided at onsite medical clinics, dental or vision benefits, various types of long-term/nursing home care, and specified diseases or illness, L.F. 350; requirements relating to the discontinuation of a particular type of health care coverage by the insurer, L.F. 365-366; and requirements relating to modifications to health insurance coverage to be made on renewal of the coverage, L.F. 367.

Provisions relating to the Missouri Health Insurance Pool contained similar definitions and references as contained in the Missouri Health Insurance Portability and Accountability Act and outlined above. L.F. 374 (definition of medical care); 372 (definition of group health plan); 370-71 (definition of excepted benefits). Eligibility for membership in the pool by individual persons includes those who were refused health insurance for health conditions by at least

two insurers. L.F. 379. Ineligible for membership in the pool are those who are ineligible for other health insurance coverage because of medical conditions directly due to alcohol, drug abuse or self-inflicted injury. L.F. 381. The pool is required to offer major medical expense coverage with a schedule of benefits, exclusions and other limitations as set by the board of the pool, prescription drugs and supplies, and patient education services. L.F. 383. The provisions relating to the pool also provide that "[m]edical expenses shall include expenses for comparable benefits for those who rely solely on spiritual means through prayer for healing." L.F. 386.

Provisions relating to the Small Employer Health Insurance Availability Act contained similar definitions and references as contained in the Missouri Health Insurance Portability and Accountability Act and Missouri Health Insurance Pool as outlined above. L.F. 410 (definition of medical care); L.F. 425 (incorporating by reference prohibition against pre-existing conditions exclusion for pregnancy in the Missouri Health Insurance Portability and Accountability Act); L.F. 407-08 (definition of group health plan); L.F. 408 (definition of health benefit plan or health insurance coverage); L.F. 406-407 (definition of excepted benefits); L.F. 420 (discontinuing a particular type of coverage), L.F. 422 (requirements relating to modifications to health insurance coverage); L.F. 408 & 428-429 (definition of health status-related factor and prohibition against discrimination based on health status-related factors, respectively). The Small Employer Health Insurance Availability Act also contains a provision which

allows insurers to offer policies that charge a reduced premium or deductible for those who do not smoke or use tobacco products. L.F. 431.

HB 818 also contained provisions for alternate or substitute means for covering medical expenses other than by traditional methods of health insurance coverage. Discount medical plans provided medical services and the right to receive medical services for those who paid a fee or dues for membership in the plan. L.F. 388-400. As a benefit for membership in the plan, the member receives the covered services at a discount. L.F. 394, 395, 396. The medical services covered by a discount plan are defined with reference to both a condition and the type of health care service being provided. L.F. 390. Health care sharing ministries are faith-based non-profit organizations that provide informational and financial support to assist members or subscribers in the payment of medical expenses. L.F. 400-401. The versions of HB 818 included other provisions referencing health care services and coverage (or limitations to coverage) for physical or mental conditions, such as provision for a right to set off from state tax refunds and lottery winnings for health care services not covered by health insurance, L.F. 331 & 337; notice requirements for reductions in coverage for prescription services under health plans, L.F. 339; required provisions to be included in group health insurance policies relating to exclusion under the policy of "a disease or physical condition of a person, not otherwise excluded from the person's coverage by name or specific description effective on the date of the

person's loss, which existed prior to the effective date of the person's coverage under the policy." L.F. 341-42.

During the same session of the legislature, Senate Bill 303 ("SB 303) was offered. Plaintiffs' Exs. 18&19. This bill related to the practice of midwifery, included a definitional section, provided for a state Board of Direct-Entry Midwives, established licensing and practice requirements for persons covered by the act, established the Board of Direct-Entry Midwives Fund and amended existing provisions in chapter 334 relating to the practice of midwives. Plaintiffs' Exs. 18&19. SB 303 did not seek to make any amendment to chapter 376 of the Revised Statutes. Plaintiffs' Exs. 18&19. Nor did it contain the language found in HB 818 at §376.1753. Plaintiffs' Exs. 18&19. The provisions of SB 303 involved additions to Chapter 324 and Chapter 334 of the Revised Statutes. Plaintiffs' Exs. 18&19.

Also at the same legislative session, House Bill No. 364 ("HB 364") was introduced. Plaintiffs' Ex. 12. This bill was originally titled "An Act to repeal section 143.121, RSMo., and to enact in lieu thereof one new section relating to Missouri adjusted gross income calculations." Platinfiffs' Ex. 12. HB 364 was amended various times during the session. Plaintiffs' Ex. 13, 14 & 17. On May 16, 2007, an amendment was offered to HB 364 which would have added §§ 324.1230 to 324.1245, amended §§334.010 and 334.120, and repealed §334.260, in the same manner as was provided for under SB 303. Plaintiffs' Ex. 15 at 1753-1759. A point of order was raised that the offered amendment went beyond the

scope of the original bill and it was ruled that the point of order was well-taken. Plaintiffs' Ex. 15 at 1759. The final version of HB 364 was offered and adopted by the Senate on May 16, 2007. Plaintiffs' Ex. 17. The final version was titled "An Act to repeal sections 103.085, 143.121, 376.426, 376.776, 376.960, 376.961, 376.964, 376.966, 376.986, 376.989, 379.930, 379.936, 379.938, 379.940, 379.942, 379.943, 379.944, and 379.952, RSMo, and to enact in lieu thereof twenty-eight new sections relating to health insurance, with an effective date for certain sections." Plaintiffs' Ex. 17. The provisions added to HB 364 by this final amendment contained some provisions which were identical to what had been enacted five days earlier by final action of the House of HB 818. Plaintiffs' Ex. 17 at 12-20, *amending* §376.426 and including provisions relating to the Missouri Health Insurance Portability and Accountability Act," Plaintiffs' Ex. 17 at 22-40, continuation coverage for dependents beyond the limiting age for coverage, Plaintiffs' Ex. 17 at 40-41, the Missouri Health Insurance Pool, Plaintiffs' Ex. 17 at 41-61, health care sharing ministries, Plaintiffs' Ex. 17 at 61-63, and the Small Employer Health Insurance Availability Act, Plaintiffs' Ex. 17 at 63-103. The final version of the bill did not include a provision on services related to pregnancy by persons holding qualified ministerial or tocological certifications. Plaintiffs' Ex. 17 at 1-103. The House did not pass HB 364 in its final or any form, and it did not become law. Plaintiffs' Ex. 20 at 3.

Plaintiffs' Standing

The Respondents (Plaintiffs below) are professional membership associations of licensed physicians. Plaintiffs Exs. 8-11. Many of the members of the association provide services related to pregnancy, including prenatal, delivery and postpartum services. Plaintiffs Exs. 8-11. The associations represent the interests of their members before the state legislature, state agencies and state courts. Plaintiffs Exs. 8-11. It was not stated whether the member interests represented were professional, economic, competitive or otherwise, the representation simply stated as "represents its members' interests." Plaintiffs Exs. 8-11. Each of the associations also shared the concerns of its member licensees as expressed in the affidavit evidence of seven physicians which was introduced. Plaintiffs Exs. 8-11.

Those seven physicians were members of the associations which are parties to this litigation and provide pregnancy services as part of their practice. Plaintiffs Exs. 1-7. The physicians have a concern that §376.1753 in HB 818 will adversely affect the health of their patients. It was their view that the health of mother and child is jeopardized without the care of a licensed and competent physician; that serious conditions might arise during the course of a pregnancy that would require the skill and care of a physician; and that unlicensed laypersons holding themselves out as midwives do not have the expertise or training to effectively and safely detect, diagnose and treat all pregnancy related conditions. Plaintiffs Exs. 1-7. The physicians said nothing about whether they would have the same

concerns as relates to any midwife who met the certification requirement set out in §376.1753. Plaintiffs Exs. 1-7. The physicians are also very worried that their medical licenses would be subject to discipline if they coordinate care, have treatment discussions, or otherwise participate in the care of a patient who is also receiving pregnancy related services from a person not licensed to practice medicine as allowed by §376.1753. Plaintiffs Exs. 1-7. The physicians understand the practice of medicine to include the provision of pregnancy related services and understand that their medical license could be subject to discipline for assisting or enabling any person not licensed as a physician to practice medicine or knowingly perform any act which in any way aided, assisted, procured, advised or encouraged any person to practice medicine who is not registered or eligible to practice medicine. Plaintiffs Exs. 1-7. The physicians also stated that discipline of a license would have substantial negative effects on their professional reputation and economic livelihood. Plaintiffs Exs. 1-7. The physicians did not state that their interpretation of what might happen to their licenses in light of the enactment of §376.1753 was based on any threat, interpretation or communication of the Board of Registration for the Healing Arts relating to §376.1753 and what effect it would have on physicians treating a patient for pregnancy who is also utilizing the services of a midwife qualified under §376.1753 for the same pregnancy. Plaintiffs Exs. 1-7. There was no evidence presented on what the position of the Board of Registration is with respect to §376.1753.

STANDARD OF REVIEW

In reviewing a challenge to the validity of an enactment of the Legislature under Article III, §§21 and 23, the Court approaches the issue with a strong presumption in favor of the constitutionality of the legislation. *Jackson County Sports Complex Authority v. State*, 226. S.W.3d 156, 160 (Mo. banc 2007). Any doubts raised are to be resolved in favor of the procedural and substantive validity of the legislation. *City of St. Charles v. State*, 165 S.W.3d 149, 150 (Mo. banc 2005). The Court likewise ascribes to the general assembly the same "good and praiseworthy motivations as inform [the Court's] own decision-making process." *Akin v. Director of Revenue*, 934 S.W.2d 295, 301 (Mo. banc 1996). The use of the constitutional procedural limitations relating to enactment of legislation to undermine its validity and prevent its application is not favored. *Jackson County Sports Complex Authority*, 226 S.W.3d at 160. The party challenging the validity of a statute on procedural grounds in its enactment bears a heavy burden of proof in such a challenge. *Id.* Only if the act clearly and undoubtedly violates the constitutional procedural limitation will it be declared invalid. *Id.* Otherwise, the constitutionality of the statute must be upheld. *Id.* The provisions of Article III, §§21 and 23 are to be liberally construed, *Id.*, and are not to be construed or applied in a manner which inhibits the normal legislative processes. *Blue Cross Hospital Service, Inc. of Missouri v. Frappier*, 681 S.W.2d 925, 929 (Mo. banc 1984), *vacated on other grounds*, 472 U.S. 1014, 105 S.Ct. 3471, 87 L.Ed.2d 608 (1985), *on remand*, 698 S.W.2d 326 (Mo. banc 1985).

This statement of the standard of review applies to Points I – III of the brief. Point IV, which relates to the jurisdictional issue of standing of the Respondents to maintain this action is different. The standard of review for that argument is set out separately under Point IV.

POINTS RELIED ON

I.

THE TRIAL COURT ERRED IN DECLARING SECTION 376.1753 IN HB 818 INVALID BECAUSE ITS INCLUSION IN THE BILL VIOLATED THE SINGLE SUBJECT REQUIREMENT OF MO. CONST. ART. III, §23, BECAUSE SECTION 376.1753 FAIRLY RELATES TO THE SUJECT OF HEALTH INSURANCE, HAS A NATURAL CONNECTION WITH IT AND IS A MEANS TO ACCOMPLISH THE LAW'S PURPOSE IN THAT THE CHALLENGED PROVISION (I) ENABLES HEALTH INSURANCE COVERAGE TO BE AVAILABLE FOR MIDWIFE SERVICES PROVIDED BY MIDWIVES HAVING THE DESIGNATED CERTIFICATION, AND (II) ACCORDS MIDWIFE SERVICES THE STATUS OF MEDICALLY NECESSARY CARE FOR PURPOSES OF HEALTH INSURANCE POLICIES.

Trout v. State, 231 S.W.3d 140 (Mo. banc 2007)

Blue Cross Hospital Service, Inc. of Missouri v. Frappier, 681 S.W.2d 925 (Mo. banc 1984), *vacated on other grounds*, 472 U.S. 1014, 105 S.Ct. 3471, 87 L.Ed.2d 608 (1985), *on remand*, 698 S.W.2d 326 (Mo. banc 1985)

Community Health Partners, Inc. v. Commonwealth of Kentucky, 14 F. Supp.2d 991 (W.D. Ky. 1998)

American Drug Stores, Inc. v. Harvard Pilgrim Care, Inc., 973 F. Supp. 60 (D. Mass. 1997)

II.

THE TRIAL COURT ERRED IN DECLARING SECTION 376.1753 IN HB 818 INVALID BECAUSE ITS INCLUSION IN THE BILL VIOLATED THE ORIGINAL PURPOSE PROVISION OF MO. CONST. ART. III, §21, BECAUSE SECTION 376.1753 IS GERMANE TO THE OVERARCHING PURPOSE OF HEALTH INSURANCE OR, ALTERNATIVELY, ACCESSIBILITY OF HEALTH INSURANCE IN THAT THE CHALLENGED PROVISION PROVIDES EXPANDED ACCESS TO HEALTH INSURANCE COVERAGE FOR A PARTICULAR TYPE OF HEALTH CARE (MIDWIFE SERVICES) PROVIDED BY A PARTICULAR HEALTH CARE PRACTITIONER (CERTIFIED MIDWIFES).

Jackson County Sports Complex Authority v. State, 226 S.W.3d 156 (Mo. banc 2007).

Blue Cross Hospital Service, Inc. of Missouri v. Frappier, 681 S.W.2d 925 (Mo. banc 1984), *vacated on other grounds*, 472 U.S. 1014, 105 S.Ct. 3471, 87 L.Ed.2d 608 (1985), *on remand*, 698 S.W.2d 326 (Mo. banc 1985)

Westin Crown Plaza Hotel Co. v. King, 664 S.W.2d 2 (Mo. Banc 1984)

American Drug Stores, Inc. v. Harvard Pilgrim Care, Inc., 973 F. Supp. 60 (D. Mass. 1997)

III.

THE TRIAL COURT ERRED IN DECLARING SECTION 376.1753 IN HB 818 INVALID BECAUSE THE TITLE OF HB *!* WAS UNDERINCLUSIVE AND, THUS, VIOLATED THE CLEAR TITLE REQUIREMENT OF MO. CONST. ART. III, §23, BECAUSE §376.1753 WAS NEITHER INCONGRUOUS, DISCONNECTED NOR WITHOUT NATURAL RELATION TO THE AND ITS TITLE WAS A FAIR INDEX OF THE MATTERS IN THE BILL IN THAT EVERYTHING WITHIN HB 818 FELL WITHIN THE SUBJECT OF HEALTH INSURANCE INCLUDING §376.1753 WHICH (I) ENABLES HEALTH INSURANCE COVERAGE TO BE AVAILABLE FOR MIDWIFE SERVICES PROVIDED BY MIDWIVES HAVING THE DESIGNATED CERTIFICATION, AND (II) ACCORDS MIDWIFE SERVICES THE STATUS OF MEDICALLY NECESSARY CARE FOR PURPOSES OF HEALTH INSURANCE POLICIES.

Edwards v. Business Men's Assurance Co., 350 Mo. 666, 168 S.W.2d 82 (1942)

American Drug Stores, Inc. v. Harvard Pilgrim Care, Inc., 973 F. Supp. 60 (D. Mass. 1997)

Blue Cross Hospital Service, Inc. of Missouri v. Frappier, 681 S.W.2d 925 (Mo. banc 1984), *vacated on other grounds*, 472 U.S. 1014, 105 S.Ct. 3471, 87 L.Ed.2d 608 (1985), *on remand*, 698 S.W.2d 326 (Mo. banc 1985)

Community Health Partners, Inc. v. Commonwealth of Kentucky, 14 F. Supp.2d 991 (W.D. Ky. 1998)

IV.

THE TRIAL COURT ERRED IN HOLDING THE RESPONDENTS HAD STANDING TO CHALLENGE THE VALIDITY OF SECTION 376.1753 BECAUSE ASSOCIATIONAL STANDING WAS NOT APPLICABLE TO THIS ACTION IN THAT (I) RESPONDENTS' MEMBERS DO NOT HAVE A LEGALLY PROTECTIBLE INTEREST TO PROTECT AND COULD NOT BRING THIS ACTION IN THEIR OWN RIGHT; (II) THERE IS NO SHOWING THAT THE INTERESTS OF THE MEMBERS BEING ADVANCED BY THE ASSOCIATIONS ARE GERMANE TO THE ORGANIZATIONAL PURPOSE OF THE ASSOCIATIONS; AND (III) NEITHER THE ASSOCIATIONS NOR THEIR MEMBERS MAY BRING THIS ACTION TO ADVANCE THE INTERESTS OF THE MEMBER PHYSICIANS' PATIENTS.

Planned Parenthood of Kansas v. Nixon, 220 S.W.2d 732 (Mo. banc 2007)

Missouri Health Care Association v. Attorney General of the State of Missouri, 953 S.W.2d 617 (Mo. banc 1997)

St. Joseph's Hill Infirmary, Inc. v. Mandl, 682 S.W.2d 821 (Mo. App. 1984)

Columbia Sussex Corp. v. Missouri Gaming Commission, 197 S.W.3d 137 (Mo. App. 2006)

ARGUMENT

I.

THE TRIAL COURT ERRED IN DECLARING SECTION 376.1753 IN HB 818 INVALID BECAUSE ITS INCLUSION IN THE BILL VIOLATED THE SINGLE SUBJECT REQUIREMENT OF MO. CONST. ART. III, §23, BECAUSE SECTION 376.1753 FAIRLY RELATES TO THE SUJECT OF HEALTH INSURANCE, HAS A NATURAL CONNECTION WITH IT AND IS A MEANS TO ACCOMPLISH THE LAW'S PURPOSE IN THAT THE CHALLENGED PROVISION (I) ENABLES HEALTH INSURANCE COVERAGE TO BE AVAILABLE FOR MIDWIFE SERVICES PROVIDED BY MIDWIVES HAVING THE DESIGNATED CERTIFICATION, AND (II) ACCORDS MIDWIFE SERVICES THE STATUS OF MEDICALLY NECESSARY CARE FOR PURPOSES OF HEALTH INSURANCE POLICIES.

The trial court erroneously concluded that HB 818 violated the single subject requirement of Article III, §23, of the Missouri Constitution because, in its words, "§376.1753 does not assign the regulation of midwifery to any department of government," L.F. 605, and "The midwife provision was assigned to Chapter 376 concerning Life, Health and Accident Insurance. However, the midwife provision bears no relationship to life, health or accident insurance." The trial court is clearly wrong in both respects. As an initial matter, the test apparently applied by the trial court with its emphasis on the statutory designation of the

challenged provision is directly contrary to this Court's holding in *Stroh Brewery Co. v. State*, 954 S.W.2d 323, 327 (Mo. banc 1997). The Court looks to the organization of subjects by the Constitution or the contents of the bill by reference to chapters of the Revised Statutes only if the title of the bill is so amorphous as to render its contents uncertain. *Id.* Otherwise, the Court looks to the subject matter of the bill as expressed in its title and the relationship of the parts to it. *Id.* Respondents have never contended that the subject of HB 818 is so amorphous as to render its contents uncertain and the trial court did not make such a determination in its order. The fact that the provision being challenged here was placed in chapter 376 of the Revised Statutes and that HB 818 did not provide for a comprehensive regulation of midwife practice has no effect on the correct analysis in a single subject challenge, *i.e.*, whether the challenged provision fairly relates to the subject of health insurance, has a natural connection with it or is a means to accomplish the law's purpose.

As detailed in the remainder of the discussion under this point, the more fundamental flaw in the trial court's ruling and in the Respondents' arguments on which it is based, is a complete misunderstanding of the subject of health insurance. Indeed, in rushing to condemn HB 818, the trial court and Respondents failed totally to consider the nature of health insurance. As shown below, the substance of health insurance is the undertaking of the health insurer to provide coverage for the health and medical expenses incurred by an insured, an undertaking that both by the contractual provisions of the insurance policy and

terms imposed by state statute may involve particular health services by a variety of health care providers. What the trial court failed to consider, and what Respondents would have this Court ignore, is that §376.1753 is the means by which the Legislature has chosen to facilitate the provision of health insurance benefits for those who have chosen to deliver their children at home and/or with the assistance of a midwife. Given the broad statutory and policy definitions of "medical care" as applies to health insurance policies, the typical limitations on coverage premised on some type of certification of the practitioner, and the public policy argument often advanced to disallow health insurance coverage for unauthorized health care practice, the Legislature chose the most efficient and direct means to enable an insured going through a pregnancy to be fully reimbursed or indemnified by the person's health insurer for all health care services related to the pregnancy, including the services of a midwife. This means was to authorize insurers to cover the services of persons with the designated tocological certification by recognizing the validity of designated midwife services by designated certified midwives. What the trial court and Respondents seem to object to is that the Legislature chose to accomplish its end by a simple means and, in doing so, eschewed some complex system of regulation of both health insurance and midwives.

The single subject requirement of Mo. Const. Art. III, § 23, states that "No bill shall contain more than one subject which shall be clearly expressed in its title.[.]" Mo. Const. Art. III, §23. Single subject analysis looks to the bill as

finally passed. *Trout v. State*, 231 S.W.3d 140, 146 (Mo. banc 2007). In its analysis of the issue, the Court first determines the subject of the bill as stated in its title. *Stroh Brewery Co. v. State*, 954 S.W.2d 323, 327 (Mo. banc 1997). Once the subject is determined from the title of the bill, the Court turns to an analysis of the bill's contents and the relationship of the challenged portion to the subject expressed in the bill:

> Like the emphasis on a general, overarching purpose in original purpose analysis, single subject analysis turns on the 'general core purpose of the legislation.' More specifically, article III, section 23 dictates that the subject of a bill include 'all matters that fall within or reasonably relate to [that] general core purpose. To determine, then, whether a bill violates the single-subject rule, the test is 'not whether individual provisions of a bill relate to each other . . . [but] whether [the challenged provision] fairly relates to the subject described in the title of the bill, has a natural connection to the subject, or is a means to accomplish the law's purpose.'"

Trout, 231 S.W.3d at 146, *quoting City of St. Charles v. State*, 165 S.W.3d 149, 151 (Mo. banc 2005)(citation omitted)(brackets in original).

Beginning with the title, the title of HB 818 as enacted read "An Act to repeal sections 103.086, 143.121, 143.782, 313.321, 376.426, 376.776, 376.960, 376.961, 376.964, 376.966, 376.986, 376.989, 379.930, 379.936, 379.938, 370.940, 379.942, 379.943, 379.944, and 379.952, RSMo., and to enact in lieu

thereof forty-nine new sections relating to health insurance, with an effective date for certain sections." L.F. 320 (emphasis added). Health insurance, in its general sense, encompasses several types of insurance, including health or sickness coverages and disability coverages. 31 Appleman on Insurance 2d, Health Insurance §185.01[A] (Matthew Bender 2007). The purpose and effect of health insurance is to provide coverage (either through indemnity or direct payment) for health care costs incurred by an insured and usually described as a "loss" or "benefits." William F. Meyer, "Life and Health Insurance Law," §12:1 at 434 (Clark Boardman Callaghan 1972). The coverages provided by health insurance is varied, depending on the policy terms typically set out in a schedule of benefits and further defined by policy exclusions and limitations. *Id.*, §12:2 and chs. 17 & 18. Two common limitations found in health insurance policies concern covered services in terms of the person providing the service and whether certain health care services provided were medically necessary or reasonable (usually referred to as "medically necessary services" in policies). *Id.* §§18:1-18:4; 31 Appleman on Insurance 2d, Health Insurance §186.03[A][2]. In addition to the transformation from medical to health insurance over the years, the federal and state governments have increasingly played a role in determining the content of health insurance policies, including the types of health care services and health care providers that would or could be available under health insurance policies. *See, generally,* 31 Appleman on Insurance 2d, Health Insurance §§185.02 & 185.03.

Many of the provisions included in HB 818 illustrate that health insurance is about schedules of benefits, exclusions to and limitations on coverage. Health insurance is not just, as the trial court limited it, to the regulation of health insurance companies. The term medical care is defined with respect to "diagnosis, cure, mitigation, treatment or prevention of disease or amounts paid for the purpose of affecting any structure or function of the body," and costs of transportation associated primarily for and essential to medical care. L.F. 352, 374, 410. In other areas of the bill, the coverage of the provisions is designated with reference to the health care services and/or providers of those services: L.F. 383 (coverage offered by Missouri Health Insurance pool to include schedule of benefits, exclusions and limitations, including prescription drugs and patient education services); L.F. 390 (benefits provided under discount medical plans to be designated with reference to physical or medical condition and type of health care service provided); L.F. 339 (requirements related to coverage for prescription services); L.F. 359, 360, 408 & 428-29 (prohibitions against discrimination based on health status-related factors); L.F. 341-42, 354, 425 (general and specific limitations on pre-existing conditions clauses); L.F. 350, 370-71, 406-07 (definition of excepted benefits with reference to providers and services, e.g., onsite medical clinics, long-term care, dental and vision care, and specific diseases or illness); L.F. 379 (eligibility criteria for coverage under Missouri Health Insurance Pool includes being refused health insurance by two insurers for health conditions reasons). Pregnancy is recognized as a covered condition with specific

requirements established for continuation of coverage for health care expenses when an insured changes insurers. L.F. 356, 425. The substance of health insurance as defined and recognized by the Legislature is also not narrowly constrained to "medical" services provided by traditional "medical" practitioners. Provisions of the Missouri Health Insurance Pool specifically requires that the pool provide coverage for expenses "for comparable benefits for those who rely solely on spiritual means through prayer for healing." L.F. 386. Similarly, HB 818 established provisions for health care sharing ministries, which provide both informational support and financial support related to health care issues. L.F. 400-01.

Blue Cross Hospital Service, Inc. of Missouri v. Frappier perhaps best illustrates that the substance of health insurance encompasses both health care services and health care providers. 681 S.W.2d 925, 929 (Mo. banc 1984), *vacated on other grounds*, 472 U.S. 1014, 105 S.Ct. 3471, 87 L.Ed.2d 608 (1985), *on remand*, 698 S.W.2d 326 (Mo. banc 1985). The case involved procedural and substantive challenges to a bill which prohibited health insurance companies from discriminating in terms of the coverage the insurers provided against chiropractors providing chiropractic services. As this Court recognized in its ruling on the substantive challenges, the area of health insurance extends to ensuring that insureds have a meaningful freedom of choice among health care practioners in the coverage being offered to them. 681 S.W.2d at 930. The substance of health insurance includes provisions in the health insurance statutes that positively affect

insurance coverage for health care services and practitioners which might otherwise be excluded from health insurance policies. *Id.* In upholding the anti-discrimination statute, the Court said, "There is an obvious state interest in providing freedom of choice for health care consumers, and the statute bears a rational relationship to that interest." *Id.* This Court thereby recognized the direct link between health insurance and provisions that enable insurers to provide coverage for services of health care providers, particularly those practitioners who are not among the traditional medical practitioners. Among the constituent parts making up the subject of health insurance is the matter of health insurance coverage and what health care services by which health care providers are going to be covered under health insurance policies issued within the state.

For purposes of analysis of a single subject challenge, having determined the scope of the subject of health insurance, the next step in the analysis looks to the relationship between the provision under challenge and the subject of health insurance. *Trout*, 231 S.W.3d at 146. The section being challenged states, "Notwithstanding any law to the contrary, any person who holds current ministerial or tocological certification by an organization accredited by the National Organization for Competency Assurance (NOCA) may provide services as defined in 42 U.S.C. 1396 r-6(b)(4)(E)(ii)(I)." In including this provision in HB 818, the Legislature placed it in chapter 376 of the Revised Code, the chapter dealing with health insurance.

As the clear language of this section shows, it refers to both health care services and the practitioners providing those services. The provision of the United States Code cited in §376.1753, states "services related to pregnancy (including prenatal, delivery and post partum services([.]" 42 U.S.C. 1396 r-6(b)(4)(E)(ii)(I). Contrary to the trial court's finding, the term "tocological", which describes the type of practitioner covered by reference to the person's certification, and "tocology" are not obscure Greek terms. It may be true that the term tocology is derived from the ancient Greek word (in this instance, "tokos"), but countless other words found in a standard dictionary of the English language also have derivations from ancient Greek, Latin or some other language. The word "tocology" in its English usage is found and defined in standard English dictionaries: "**Tocology** . . . The science of childbirth; midwifery or obstetrics." The American Heritage College Dictionary (Houghton Mifflin Company 1993) at 1422.

As noted in the discussion of the substance of health insurance, medical care is defined with respect to "diagnosis, cure, mitigation, treatment or prevention of disease or amounts paid for the purpose of affecting any structure or function of the body," costs of emergency transportation associated with medical care" among other criteria. L.F. 352, 374, 410. Given that pregnancy is a "function of the body" and that midwife services is a form of health care treatment related to pregnancy, this definition is broad enough to encompass midwife services provided by a midwife to the extent that such services are not prohibited by law.

Similarly, definitions of provider in health insurance policies are often made with reference to the qualifications of the health care practitioner, such as "'any doctor, dentist, nurse, chiropractor, certified nurse midwife, optometrist, physical therapist, visiting nurse service, or facility legally licensed to perform a covered medical service; it also includes certified and registered social workers . . .[,]" *Saxe v. Metropolitan Life Ins. Co.*, 618 N.Y.S.2d 180, 180 (N.Y. City Civ. Ct. 1994).

To achieve the end of making health insurance more accessible to those who wanted to involve midwives in the birth of their children, the Legislature did not have to provide for an elaborate system of regulation. It had a simple, self-enforcing device not involving systems of regulation already available to it that would achieve the end it sought. Section 376.1753 merely (and simply) opens the way for insureds in the state to obtain coverage for the utilization of midwife services in the delivery of their children through existing language in health insurance policies and statutes.

The Court should not, as the trial court did, put on blinders to the true nature of health insurance and the Legislature's interest in providing a meaningful freedom of choice among health care providers in terms of the health insurance coverage being provided in the state. An individual's or couple's decision about who will be attending the birth of the child, where the birth will occur, and the utilization of the services of a midwife are personal health care choices made by the individual or couple. The effect of §376.1753 is that it recognizes that a

personal choice of health care services occurs and that it is the public policy of the state to relieve those making such choices of the economic burden of that particular health care choice by making the choice subject to health insurance coverage. Section 376.1753 neatly fits within what this Court recognized as a freedom of choice provision in *Blue Cross Hospital Service, Inc.* 681 S.W.2d at 930.

Not surprisingly, at least sixteen other states have enacted freedom of choice legislation that affects the coverage under health insurance policies issued in the state for qualified mid-wife services. *See, e,g.*, Alaska Statutes §§21.36.090 & 21.42.355 (certified direct entry midwives); Cal. Ins. Code §10354 (licensed midwives); Conn. Gen. Stat. §§38a-499; 38a-526 (certified nurse midwife); 18 Del. C. § 3553 (valid certification by the American College of Nurse Midwives); Fla. §§627.6406 & 627.6574 (certified and licensed nurse midwives and midwives); Me. Rev. Stat. Ann. title 24, §2332-K & title 24A, §2757 (certified nurse midwife); Md. Code Ann., Insurance § 15-709 (licensed registered nurse certified by the American College of Nurse Mid-wives); Mich. Comp. Laws Ann. § 550.1416(d) (specialty certification in the practice of nurse midwifery); Minn. Stat. § 62A.15 (advance practice registered nurse including certified nurse midwife as defined under §148.171); N.H. Rev. Stat. Ann. § 415.18-q, 420-B:8-p, 420-A:17-f (certified midwives); N.J. Rev. Stat. § 17.48A-34 (certified nurse midwife); N.M Stat. Ann. § 59A-22-40, 59A-23B-3, & 59A-46-42 (2005); 59A-47-28.1 (certified nurse midwives); R.I. Gen. Laws § 27-18-31 (licensed

midwives); Tenn. Code Ann. § 56-7-2407 (certified as a nurse midwife by the American College of Nurse Midwives); 56-32-237 (certified nurse midwives); Wash. Rev. Code Ann. § 48.42.100 (licensed midwives); and W.Va. Code § 33-15-14; 33-16-10; 33-24-43; 33-25-20; 33-25 A-31 (licensed midwives). (These statutory provisions are included in Defendants' Exhibit 1.) Clearly, at least 16 other states have recognized the connection the trial court found missing.

That a freedom of choice provision as found in §376.1753 is part of the subject of insurance is most cogently stated in *Community Health Partners, Inc. v. Commonwealth of Kentucky*, 14 F. Supp.2d 991, 1000 (W.D. Ky. 1998), in dealing with a challenge under ERISA to an "any willing provider" statute, a form of freedom of choice statute:

> From a practical standpoint, freedom of choice in selecting a personal physician is as important to many insureds as are the policy terms relating to coverage and costs. In this regard, the AWP [freedom of choice provision] differs from general health care regulation regarding provider certification[.]

The court went on to note that the freedom of choice provision "focuses directly on the relationship between the insurer and the insured." *Id.* The court found that the provision affected the provision of insurance in the state because it affected the specific terms of insurance policies issued in the state, *Id.* at 1002, and because the provisions were codified in the state's comprehensive insurance code. *Id.*

American Drug Stores, Inc. v. Harvard Pilgrim Care, Inc., 973 F. Supp. 60 (D. Mass. 1997), similarly illustrates that freedom of choice provisions in health insurance statutes fairly relates to health insurance, has a natural connection with it, and is a means to accomplish a health insurance purpose:

> First, the Act has the effect of transferring or spreading a policyholder's risk because, by enabling insureds to fill their prescriptions at additional pharmacies, it transfers some of the cost of treatment-which is the risk insured against-from the insured to the carrier. Without the Act, insureds who fill prescriptions at mom-and-pop pharmacies which are not part of their carrier's network must bear the cost of the medication; with the Act, there is a far greater chance that an insured may be reimbursed for filling a prescription at a neighborhood pharmacy. Second, the Act is an integral part of the relationship between the insurer and insured because it affects the substantive terms of the policy by broadening the range of providers that an insured may choose.

Id. at 71 (any willing provider statute dealing with pharmacy coverage).

Everything that was said in *Community Health Partners* and *American Drug Stores* about the relationship between freedom of choice among health care practitioners provisions and the subject of health insurance have equal application to midwives and the provisions of §376.1753 in HB 818. A provision which allows insureds greater freedom of choice to choose to utilize midwives in the

delivery of their children by shifting the costs of those services to health insurers is the subject of health insurance. Freedom of choice among health care practitioners as it relates to coverages provided under health insurance policies is a matter of importance and concern of insureds. Such provisions focus directly on the relationship between the insured and the insurer. It involves the risk transfer of costs associated with the health care insured under the policy and it broadens the range of providers that an insured may choose for his or her health care needs. Finally, as *Community Health Care Partners* stated, freedom of choice provisions differ from general health care regulation and certification of practitioners. 14 F. Supp.2d at 1000.

Section 376.1753 also directly affects the subject of health insurance in other ways. By recognizing the qualified midwife services designated in §376.1573, the Legislature has validated these services for purposes of application of the "medically necessary" clauses under policies of health insurance.

The fundamental fallacy in the trial court's Judgment on the single subject issue (and the other two substantive issues in the case) is that it allowed itself to be fooled by the misdirection tactics of the Respondents into believing that this is a case about the regulation of the practice of midwives. This case is not about regulating midwife practice. It is a case about health insurance and about enabling health insurance coverage for a specific type of health care services (qualified midwife services) by a specific type of health care provider (qualified midwives holding the necessary certification). Had the trial court been focused on the

substance of health insurance as it should have been, it would have understood that §376.1753 in HB 818 fairly and directly relates to health insurance, has a natural connection to health insurance, or is a means to accomplish the law's purpose. There is no violation of the single subject requirement of Art. III, §23.

II.

THE TRIAL COURT ERRED IN DECLARING SECTION 376.1753 IN HB 818 INVALID BECAUSE ITS INCLUSION IN THE BILL VIOLATED THE ORIGINAL PURPOSE PROVISION OF MO. CONST. ART. III, §21, BECAUSE SECTION 376.1753 IS GERMANE TO THE OVERARCHING PURPOSE OF HEALTH INSURANCE OR, ALTERNATIVELY, ACCESSIBILITY OF HEALTH INSURANCE IN THAT THE CHALLENGED PROVISION PROVIDES EXPANDED ACCESS TO HEALTH INSURANCE COVERAGE FOR A PARTICULAR TYPE OF HEALTH CARE (MIDWIFE SERVICES) PROVIDED BY A PARTICULAR HEALTH CARE PRACTITIONER (CERTIFIED MIDWIFES).

The singular reason given by the trial court for striking §376.1753 under the original purpose clause of Art. III, §21 is that the original purpose of HB 818 was health insurance portability and accessibility and that the provision relating to midwives was "inconsistent and irreconcilable" with that purpose. L.F. 605. The trial court's reasoning is wrong on two counts. First, as is clearly evident by the authority of this Court discussed below, the original purpose of HB 818 was health insurance, not the more limiting health insurance portability and accessibility. The discussion under Point I establishes the relationship between §376.1753 and health insurance. In addition, even if the original purpose of HB 818 is limited to health insurance portability and accessibility, there is no conflict between §376.1753 and

that purpose. As a form of health insurance freedom of choice provision, §376.1753 is concerned not only with affecting health insurance, it is concerned with the more specific purpose of providing insureds access to health insurance coverage for midwife services. Following the enactment of HB 818, health insurance schedules of benefits in policies and statutory provisions effective in the state were expanded to include health care services provided by midwife practitioners.

Art. III, §21 provides that "no bill shall be amended in its passage through either house as to change its original purpose." Mo. Const. Art. III, §21. Analysis of the original purpose clause under Art III, §21, is similar to analysis of the single subject requirement of Art. III, §23, as relates to the general core purpose of the legislation under consideration. *Trout*, 231 S.W.3d at 146. A bill's original purpose is determined as of the date of introduction of the bill. *McEuen v. Missouri State Board of Education*, 120 S.W.3d 207, 210 (Mo. banc 2003). The bill's original purpose is not limited to what is stated in the bill's title as enacted. *Jackson County Sports Complex Authority v. State*, 226 S.W.3d 156, 160 (Mo. banc 2007). The title of a bill can be changed without violating the original purpose clause. *Id.* The clause is concerned with the general or overarching purpose of the bill, something that is not necessarily constrained by reference to specific statutory sections in the bill's original title or text. *Id.* With respect to application of the original purpose clause:

> This Court has long held that the original purpose prohibition does not restrict legislators from making '[a]lterations that bring about an extension or limitation of the scope of [a] bill,' and 'even new matter is not excluded if germane. Rather, the prohibition is against amendments that are clearly and undoubtedly not 'germane'; that is, they are not '[r]elevant to or closely allied' with a bill's original purpose.

Id. See, also, Westin Crown Plaza Hotel Co. v. King, 664 S.W.2d 2, 6 (Mo. Banc 1984).

Consistent with case law on the original purpose clause, the overarching original purpose of HB 818 is not limited to the language in the title, "portability and accessibility of health insurance." The original bill contained provisions relating to who can be covered under health insurance policies and the breadth and scope of insurance coverage in terms of physical and mental conditions, health care services and expenses, and health care practitioners.. The overarching purpose is, as the title to the bill as amended and finally enacted stated it, to enact provisions relating to health insurance. Such a statement of purpose is supported by the cases on original purpose. *Trout v. State*, 231 S.W.3d 140, 145 (Mo. banc 2007); *Stroh Brewery Co. v. State*, 954 S.W.2d 323, 326 (Mo. banc 1997).

The question of whether §376.1176 is germane to the purpose of enacting provisions related to health insurance was answered conclusively in the discussion under Point I of the direct relationship between the section and the subject of

health insurance. *See, generally,* discussion under Point I, *supra*. The effect of §376.1176 is that it expands available health insurance coverage to include coverage for midwife services by properly certified mid-wives. It is a form of freedom of choice provision that is directly related to health insurance and the schedule of benefits, exclusions and limitations that make up such policies. *Blue Cross Hospital Service*, 681 S.W.2d at 930; *Community Health Care Partners*, 14 F. Supp.2d at 1000-1002; *American Drug Stores*, 973 F. Supp. at 71.

Even if the original purpose of HB 818 is limited to the language of the original title – "portability and accessibility of health insurance" – §376.1176 is germane to this purpose. As shown in Point I, §376.1176 provides expanded access to health insurance coverage for a type of health care service that might not have come within the policy and statutory meanings of health care or health care services for which health insurance coverage was provided. *See, generally,* discussion under Point I, *supra*. The *American Drug Stores* case also illustrates this point when it says that providing insureds a freedom of choice of health care providers "is an integral part of the relationship between the insurer and insured because it affects the substantive terms of the policy by broadening the range of providers that an insured may choose." 973 F. Supp. at 71. Section 376.1176 is germane to the accessibility of health insurance because it broadens the range of health care services and practitioners an insured may choose and gives that insured greater access to health insurance coverage.

Regardless of whether the original purpose of HB 818 is deemed to be "portability and accessibility of health insurance" or "health insurance", the provisions of §376.1753 are, in the words of the Court in the *Westin Crown Plaza Hotel* case, an amendment "that merely changed the details through which the original purpose was to be manifested and effectuated." 664 S.W.2d at 6. The amendment of HB 818 to include §376.1753 did not violate the original purpose clause of Art. III, §21, of the Missouri Constitution.

III.

THE TRIAL COURT ERRED IN DECLARING SECTION 376.1753 IN HB 818 INVALID BECAUSE THE TITLE OF HB 818 WAS UNDERINCLUSIVE AND, THUS, VIOLATED THE CLEAR TITLE REQUIREMENT OF MO. CONST. ART. III, §23, BECAUSE §376.1753 WAS NEITHER INCONGRUOUS, DISCONNECTED NOR WITHOUT NATURAL RELATION TO THE AND ITS TITLE WAS A FAIR INDEX OF THE MATTERS IN THE BILL IN THAT EVERYTHING WITHIN HB 818 FELL WITHIN THE SUBJECT OF HEALTH INSURANCE INCLUDING §376.1753 WHICH (I) ENABLES HEALTH INSURANCE COVERAGE TO BE AVAILABLE FOR MIDWIFE SERVICES PROVIDED BY MIDWIVES HAVING THE DESIGNATED CERTIFICATION, AND (II) ACCORDS MIDWIFE SERVICES THE STATUS OF MEDICALLY NECESSARY CARE FOR PURPOSES OF HEALTH INSURANCE POLICIES.

In declaring §376.1753 invalid for violating the clear title provision of Art. III, §23, of the Missouri Constitution, the trial court again relied on its erroneous determination that the provision is unrelated to health insurance and, thus, not encompassed within the title of HB 818. L. F. 603. This misunderstanding of what constitutes health insurance and misconception of §376.1753's direct relationship to that subject has been fully explained in the first two points of the brief. *See, generally,* discussion under Points I&II, *supra*. The trial court also

relies on the fact that the terms "midwife" and "pregnancy" were not used in §376.1753, while the section referred to "tocological certification" and to services defined in a federal regulation. Yet, neither the trial court nor the Respondents in their argument below point to any requirement in Art. III, §23, or anywhere else in the Missouri Constitution that imposes a simplified language requirement or prohibits the legislation of the state from incorporating by reference statutes, regulations, codes or certifications by recognized certifying agencies. They do not because there are none.

Based on its erroneous determinations, the trial court went on to hold that the title of HB 818 was underinclusive and did not clearly express its subject. L.F. 604. The clear title requirement is found in the words, "No bill shall contain more than one subject which shall be clearly expressed in its title[.]" Mo. Const. Art. III, §23 (emphasis added). Clear title challenges are of two varieties: "a title is attacked on the basis that it is so restrictive and underinclusive that some of the provisions of the bill fall outside its scope," or "a title may be unclear because the subject it expresses is so broad and amorphous in scope that it fails to give notice of its content[.]" *Home Builders Association of Greater St. Louis v. State*, 75 S.W.3d 267, 270 (Mo. banc 2002). Clear title analysis looks to the title of the bill as passed. *C.C. Dillon Company v. City of Eureka*, 12 S.W.3d 322, 329 (Mo. banc 2000). For purposes of compliance with the clear title requirement, the title need not express the limitations in the body of the act unless the title descends to particulars and details. *Lincoln Credit Co. v. Peach*, 636 S.W.2d 31, 39 (Mo. banc

1982). As expressed in *State Medical Association v. Missouri Department of Health*, unless the title includes specific itemization, the bill can contain multiple and diverse topics and not run afoul of the clear title provision when the title is expressed according to the commonality of the topics. 39 S.W.3d 837, 841 (Mo. banc 2001). Nor will the title be defective because it omits particular details of the act and the bill includes material that is new in Missouri law. *Lincoln Credit Co. v. Peach*, 636 S.W.2d at 40.

In *Edwards v. Business Men's Assurance Co.*, 350 Mo. 666, 168 S.W.2d 82 (1942), the Court was concerned with a clear title challenge to a bill amending the state insurance code which was titled generally, "An Act to revise and amend the Insurance Laws of the State of Missouri." In addition to the challenged provision of the Act relating to expanding coverage under life insurance policies for suicide, the bill also included a provision that stated, "All acts and parts of acts inconsistent with this act are hereby repealed." *Id.* at 92. The insurance company challenged the bill because the title made no mention of "suicide," the provision on suicide was a new one and there was no existing insurance law on suicide to amend or revise. *Id.* at 92. In rejecting the challenge to the bill, the Court expressed the test as follows:

> The provision requires that matters which are incongruous, disconnected and without natural relation to each other must not be joined in one bill, and the title must be a fair index of the matters in the bill. It does not prevent the inclusion in one bill, under one

> general title, of subjects naturally and reasonably related to each other. "The law does not require each separate legislative thought to be embodied in a different bill, when they have a natural connection with each other." "The evident object of the provision of the organic law relative to the title of an act was to have the title, like a guideboard, indicate the general contents of the bill, and contain but one general subject, which might be expressed in a few or a greater number of words. If those words only constitute one general subject; if they do not mislead as to what the bill contains; if they are not designed as a cover to vicious and incongruous legislation,-then the title can stand on its own merits, as an honest title, and does not impinge on constitutional prohibitions." The mere generality of the title will not prevent the act from being valid, where the title does not tend to cover up or obscure legislation which is in itself incongruous and has no necessary or proper connection, and in case of an amendatory act a requisite of congruity is that such act shall pertain to and admit of being made a consistent part of the law to be amended.

Id. at 93 (citations omitted). The Court went on to add, "The constitutional provision simply requires that the title shall give information of the general subject of the act. While it may be so general in its terms as to omit matters germane to the principal features of the statute, if it sufficiently indicates

the substantial purpose of the law, it will not be violative of the Constitution." *Id.* (citations omitted).

As with the prior two points, the trial court's error is based in large measure on its inability to comprehend what is involved in health insurance. The topic is not limited to the regulation of insurance company operations or licensure. It includes the very purpose of health insurance to provide coverage under schedules of benefits and statements of limitations and exclusions, whether that coverage is provided by private health insurance policies or through statutorily-created programs. *See, generally,* discussion under Point I. Access to coverage for particular health care services and/or particular health care practitioners, especially statutory provisions that expand the freedom of choice of insureds is neither incongruous, disconnected or without natural relation to health insurance: freedom of choice provisions, such as §376.1753, involve the transfer of risk of loss for the covered services from the insured to the insurer (the very essence of insurance) and are "an integral part of the relationship between the insurer and insured because it affects the substantive terms of the policy by broadening the range of providers that an insured may choose." *American Drug Stores*, 973 F. Supp. at 71. *See, also, Blue Cross Hospital Service, Inc.*, 681 S.W.2d at 929; *Community Health Partners, Inc.*, 14 F. Supp.2d at 1000.

When health insurance is not limited in the fashion adopted by the trial court and when the effect of §376.1753 in terms of broadening the range of choice of health care services for insureds is given its just due, it becomes clear that the

trial court has erroneously applied the clear title provisions of Art. III, §23, in invalidating §376.1753. The failure of the title of HB 818 to mention pregnancy or mid-wives does not render the title flawed no more than did the failure in *Edwards* to reference "suicide" in its title. 168 S.W.2d at 92. That §376.1753 is a new provision to the state insurance code and that no prior provision dealt with the subject of coverage for midwife services under health insurance policies (whether positively or negatively) does not obscure the title of HB 818 any more than did the absence of a suicide provision in the state insurance code in *Edwards*. *Id.* The fact that the title of HB 818 referred generally to health insurance without descending to particulars about what aspects of the topic of health insurance were being affected by the contents of the bill does not undermine the natural connection or congruity of the general description of the bill's subject and the constituent parts of the bill, including §376.1753, any more than did the more broader topic of insurance laws of the state in *Edwards* and the provision enabling life insurance coverage for qualified suicides. *Id.*

Section 376.1753 had a direct and natural connection to "health insurance" as set out in the title to HB 818. It was the most direct and efficient means for the Legislature to broaden the scope of available health insurance coverage to include coverage for midwife services. Given the direct and natural connection, the title of HB 818, "relating to health insurance," was not underinclusive under Art. III, §23 of the Missouri Constitution.

IV.

THE TRIAL COURT ERRED IN HOLDING THE RESPONDENTS HAD STANDING TO CHALLENGE THE VALIDITY OF SECTION 376.1753 BECAUSE ASSOCIATIONAL STANDING WAS NOT APPLICABLE TO THIS ACTION IN THAT (I) RESPONDENTS' MEMBERS DO NOT HAVE A LEGALLY PROTECTIBLE INTEREST TO PROTECT AND COULD NOT BRING THIS ACTION IN THEIR OWN RIGHT; (II) THERE IS NO SHOWING THAT THE INTERESTS OF THE MEMBERS BEING ADVANCED BY THE ASSOCIATIONS ARE GERMANE TO THE ORGANIZATIONAL PURPOSE OF THE ASSOCIATIONS; AND (III) NEITHER THE ASSOCIATIONS NOR THEIR MEMBERS MAY BRING THIS ACTION TO ADVANCE THE INTERESTS OF THE MEMBER PHYSICIANS' PATIENTS.

Standard of Review. Appellate review of the issue of standing is *de novo*. *Columbia Sussex Corp. v. Missouri Gaming Commission*, 197 S.W.3d 137, 140 (Mo. App. 2006). The court determines standing as a matter of law based on the petition along with other facts in the record and relevant to the issue of standing. *Id.*

Argument. Standing is a jurisdictional issue which goes to the heart of a court's power to grant relief based on the legally-cognizable interest of the plaintiffs in the subject matter of the litigation. *Columbia Sussex Corp. v.*

Missouri Gaming Commission, 197 S.W.3d 137, 140-41 (Mo. App. 2006). As was summarized in the *Columbia Sussex* case:

> Standing asks whether the persons seeking relief have the right to do so. Reduced to its essence, standing roughly means that the parties seeking relief must have some personal interest at stake in the dispute, even if that interest is attenuated. Where, as here, a question is raised about a party's standing, courts have a duty to determine the question of their jurisdiction before reaching substantive issues, for if a party lacks standing, the court must dismiss the case because it does not have jurisdiction of the substantive issues presented.

Id. (citations omitted).

The Respondents in this case are associations, not individuals, whose own interests are not alleged to be directly impacted by the provisions of §376.1753. Plaintiffs' Exs. 8-11. Instead, the Respondents brought this action in a representational capacity, seeking to protect the interests of their members. Plaintiffs' Exs. 8-11. An association has standing to sue if: 1) its members would have standing to institute the action in their own right; 2) the interests which the organization is attempting to protect are germane to its purpose; and 3) neither the asserted action nor the requested relief requires the individual members' participation. *Missouri Health Care Association v. Attorney General of the State of Missouri*, 953 S.W.2d 617, 620 (Mo. banc 1997).

The trial court held the Respondent associations met the three requirements for associational standing. L.F. 598-600. In large measure, this finding was based on the court's determination that the individual members of the association had legally-cognizable interests that would support their standing if brought by them. L.F. 598-600. This determination as to individual standing of association members was based on the affidavits of seven doctors, who all gave their opinion on the legal issue of the potential legal effect of §376.1753 on the possibility of physician license discipline should §376.1753 become effective. Plaintiffs' Exs.1-7. They also voiced their concerns that §376.1753 and practice by unlicensed midwifes would adversely affect the health of their patients. Plaintiffs' Exs.1-7. The trial court also determined that independent of their individual interests, individual physician association members had representational standing to advance the interests of their patients. L.F. 600.

As to the trial court's determination that individual physicians have representational standing to advance the interests of their patients, the rule of associational standing is that the association has standing to advance the interests of its own members, not some downstream interest that the member itself may be able to advocate in a representational capacity. The operative language in the associational standing rule is that an association has standing to maintain an action if "its members would have standing to bring suit in their own right." *Missouri Health Care Association*, 953 S.W.2d at 620 (emphasis added). *See, also, Querry v. State Highway and Transportation Commission*, 60 S.W.3d 630, 634 (Mo. App.

2001)(inquiry into associational standing first begins with "whether the members have standing to bring suit in their own right"). This aspect of the associational standing rule requires that the association establish that its own members are suffering an immediate or threatened injury. *Citizens for Rural Preservation, Inc. v. Robinett*, 648 S.W.2d 117, 133 (Mo. App. 1982). In other words, the associational standing rule does not allow the association to represent the representational interests of its members. There would be no limit to the associational rule if associations could maintain actions not only on behalf of their members but also on behalf of what are essentially the customers of their members.

The trial court's reliance on *Planned Parenthood of Kansas v. Nixon*, 220 S.W.2d 732 (Mo. banc 2007), is also misplaced. *Planned Parenthood of Kansas* was not a blanket grant of standing to physicians to assert the rights or interests of their patients. What *Planned Parenthood of Kansas* noted was that, due to the obstacles involved in a woman asserting her own abortion rights, physicians had been allowed to assert the rights of women patients "'as against governmental interference with the abortion decision.'" *Id.* at 737. The trial court stands this Court's ruling in *Planned Parenthood of Kansas* on its head. Where this Court's decision was concerned with the highly emotional constitutional right of access by women to a particular health care procedure, the trial court would grant standing on any general issue of health and allow standing to be wielded to prevent access to health care services rather than to further access. The problem with the trial

court's order on this issue is further troubling given the record before the court. The Respondents' doctors were not voicing the personal concerns of their patients with their own safety as it related to the effect of the enactment of §376.1753. Plaintiffs' Exs. 1-7. This evidence was voicing the personal concerns and opinions of the doctors themselves. Plaintiffs' Exs. 1-7. On the other hand, the only evidence of actual patients in this case was to the opposite effect. i.e., that patients desired access to midwife services and felt safe in utilizing such services in the delivery of their children. Joint Ex. A at 4-5.

The associations also lack standing because their individual members would not have standing to maintain the action if those individuals were parties to this action. For an individual to have standing to challenge a particular action, the party must have a legally protectibile interest in the relief sought. *Neighbors Against Large Swine Operations v. Continental Grain Co.*, 901 S.W.2d 127 (Mo. App. 1995). "A legally protectible interest contemplates a pecuniary or personal interest directly in issue or jeopardy which is subject to some consequential relief." *Id.*

The statements of interest of the various doctors providing affidavits to support standing are essentially identical. Plaintiffs' Exs. 1-7. Outside of the stated concern for the safety of their patients, the affidavits provide:

> I am also very concerned that my medical license will be disciplined if I coordinate care, have treatment discussions, or otherwise participate in the care of a patient who is also receiving pregnancy

> related services from a person not licensed to practice medicine as allowed by the midwife provision. I understand that the practice of medicine includes the provision of pregnancy related services and that my license is subject to discipline for assisting or enabling any person not licensed as a physician to practice medicine or knowingly perform any act which in any way aids, assists, procures, advises or encourages any person to practice medicine who is not registered or eligible to practice medicine. Discipline of my license would have substantial negative effects on my professional reputation and economic livelihood.

See, e.g., Plaintiffs' Ex. 1 at 2.

The trial court accepted on blind faith the legal opinions given by these medical professionals. It also accepted these legal opinions without any concern with the position of the actual agency responsible for regulating the member doctors or whether there actually existed any threat by that agency to bring disciplinary action against any medical practitioner who is involved with a patient who also is utilizing the services of a midwife meeting the criteria of §376.1753. By ignoring the Board of Registration for the Healing Arts, the association plaintiffs have taken an interesting approach to their challenge to §376.1753. It seems that if disciplinary action could be forthcoming against licensed physicians because §376.1753 authorizes a greater level of midwife practice, the physicians should direct their concerns in litigation to the Board of Registration over what the

physicians assume will be its unwarranted interpretation of the effect of §376.1753 as it impacts the practice of licensed physicians.

In determining the association members had standing to maintain this action in their own right, the trial court relied on *Missouri Health Care Association v. Attorney General of the State of Missouri*, 953 S.W.2d 617 (Mo. banc 1997). That reliance is misplaced. When this Court stated, "The interest in doing business free from the constraints of an unconstitutional law is entitled to legal protection," *Id.* at 620, that language must be read in the context of the case. In that case, the provisions which were challenged were directly applicable to the plaintiffs. *Id.* Section 376.1753, in contrast, is not directed at physicians, does not regulate them, and does not include them in its subject matter. As noted above, it is mere speculation of the physicians that discipline could result, a speculation that is uninformed by any knowledge or evidence of the construction the Board of Registration will place on §334.010 and 334.100.1(10) in light of the language of §376.1753. But more importantly, §376.1753 works no direct regulation on physicians. It may (or may not) have an impact on the practice of physicians but this indirect and uncertain effect is not the type of direct regulation which existed in *Missouri Health Care Association.*

That the associations have chosen the route they have speaks volumes to the real interests they are trying to protect. If they seek their declaratory relief against the Board of Registration, they run the risk of being told by the Board or the courts that their physician licenses will not be subject to discipline if they treat

patients who are also receiving midwife services from those who meet the requirements set out in §376.1753. That is not what they want, though. They are not interested in whether their members will be subject to discipline if §376.1753 becomes effective. They are interested in stifling access to a health care service that competes with the similar service provided by them or, failing that, to impose a system of regulation on the practice of midwifery that is different from the policy choice made by the Legislature to provide health insurance coverage for qualified midwife services.

Neither of these interests are legally cognizable interests for standing purposes, though. The right to suppress or stifle competition is not one that the law recognizes and enforces. *Community Care Centers, Inc. v. Missouri Health Facilities Review Committee*, 735 S.W.2d 13, 15 (Mo. App. 1987); *Columbia Sussex Corp. v. Missouri Gaming Commission*, 197 S.W.3d 137, 144 (Mo. App. 2006); *Schmitt v. City of Hazelwood*, 487 S.W.2d 882 (Mo. App. 1972). As *Community Care Centers* pointed out, this doctrine "is neither new nor limited to the health care field." 735 S.W.2d at 15. In *St. Joseph's Hill Infirmary, Inc. v. Mandl*, 682 S.W.2d 821, 826 (Mo. App. 1984), the court further expounded on why the right to be free of competition or an interest in preventing competition was not a legally enforceable one: "The purpose of restricting competition through licensing is to benefit the public generally, not to protect the rights or interests of the regulated companies. As such, competitors may be the

beneficiaries of the licensing procedures but those procedures do not directly affect their 'private rights'."

Neither do they have a right to demand any particular level of regulation of midwifes. Interests in levels of regulation of a particular activity, including licensing, are a public right not a private one. *St. Joseph's Hill Infirmary*, 682 S.W.2d at 826.

The associations also lack standing because they have failed to establish that the interest being advanced in this litigation is germane to the purpose of the association. The affidavits of the association are bereft of any information identifying what the purpose of the association is other than a general statement that it advances its members interests. It does not designate what specific types of interests among the myriad possibilities of interests of its members was the purpose of the organization. Plaintiffs' Exs. 8-11. These interests could be professional, economic, competitive or a host of other interests. Simply stating that it exists to further some generalized interest of its members without a showing that the membership interest being advanced in the litigation is furthering a specific organizational purpose is not sufficient to give the associations standing. Thus, as was held in *Missouri Growth Association. v. Metropolitan St. Louis Sewer*, 941 S.W.2d 615 (Mo. App. 1997), something more than a generalized, broad organizational purpose to advance the interests of the association's members is required to grant standing to the organization.

The trial court erred in holding the association that are parties to this litigation have standing to maintain this action.

CONCLUSION

Senate Substitute No. 2 for SCS HCS HB 818 has a clear title, a single subject and maintained its original purpose. There is no violation of Art. III, §§ 21 and 23 of the Missouri Constitution. The trial court erred in invalidating §376.1753 on the grounds of violations of these provisions. In addition, the Respondents have no standing to maintain this action in the first instance and it was error for the trial court to hold otherwise. The Court should reverse the judgment of the trial court and either grant judgment in Appellants' favor or remand the case to the trial court with instructions to enter judgment for the Appellants.

Respectfully submitted,

BLITZ, BARDGETT & DEUTSCH, L.C.

By: _____

James B. Deutsch, #27093
Marc H. Ellinger, #40828
Jane A. Smith, #28681
Thomas W. Rynard, #34562
Blitz, Bardgett & Deutsch, L.C.
308 East High Street, Suite 301
Jefferson City, MO 65101
E-mail: jdeutsch@blitzbardgett.com
E-mail: trynard@blitzbardgett.com
E-mail: mellinger@blitzbardgett.com
E-mail: jsmith@blitzbardgett.com

Attorneys for Appellants Friends of Missouri Midwives, et al.

CERTIFICATE OF ATTORNEY

I hereby certify that the foregoing Brief of Appellants Friends of Missouri Midwives, et al. complies with the provisions of Rule 55.03 and complies with the limitations contained in Rule 84.06(b) and that:

(A) It contains 14,381 words, as calculated by counsel's word processing program;

(B) A copy of this Brief is on the attached 3 ½" disk; and that

(C) The disk has been scanned for viruses by counsel's anti-virus program and is free of any virus.

_____
Thomas W. Rynard

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the above and foregoing Brief of Appellants and Appendix were sent by U.S. Mail, postage prepaid, this 26th day of November, 2007, to:

John McManus
Assistant Attorney General
P.O. Box 899
Jefferson City, MO 65102

Jeffrey S. Howell
113 Madison Street
P. O. Box 1028
Jefferson City, MO 65102

Harvey M. Tettlebaum
Robert L. Hess, II
Laura M. Llorente
Husch & Eppenberger, LLC
235 East High Street, Suite 200
Jefferson City, MO 65101

_____
Thomas W. Rynard