IN THE
SUPREME COURT OF MISSOURI

No. SC 87321

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

Appellants,

v.

JEREMIAH W. NIXON, et al.,

Respondents.

Appeal from the Circuit Court of Jackson County, Missouri
The Honorable Charles E. Atwell, Circuit Judge

BRIEF OF RESPONDENTS NIXON AND THE MISSOURI BOARD OF REGISTRATION FOR THE HEALING ARTS

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ATTORNEYS FOR RESPONDENT NIXON AND THE BOARD OF REGISTRATION FOR THE HEALING ARTS

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STATEMENT OF FACTS AND PROCEDURAL HISTORY

Background on § 188.250, RSMo

On September 15, 2005, the Missouri General Assembly enacted the "Consent to Assist Act," § 188.250, RSMo.[1] Subsection 1 of the new statute provides:

> No person shall intentionally cause, aid, or assist a minor to obtain an abortion without the consent or consents required by section 188.028.

The cross-referenced consent provisions of § 188.028, RSMo, contained in subsection 1 of that section, provide that:

> 1. No person shall knowingly perform an abortion upon a pregnant woman under the age of eighteen years unless:
>
> (1) The attending physician has secured the informed written consent of the minor and one parent or guardian; or
>
> (2) The minor is emancipated and the attending physician has received the informed written consent of the minor; or
>
> (3) The minor has been granted the right to self-consent to the abortion by court order pursuant to subsection 2 of this section, and the

[1]Section 188.250, RSMo, is set out in full at page A31 of the Appendix to Appellants' Brief.

attending physician has received the informed written consent of the minor; or

(4) The minor has been granted consent to the abortion by court order, and the court has given its informed written consent in accordance with subsection 2 of this section, and the minor is having the abortion willingly, in compliance with subsection 3 of this section.[2]

In addition to the new statutory restrictions of § 188.250.1 on causing, aiding, or assisting a minor to obtain an abortion, the new Consent to Assist Act provides that persons who have violated those restrictions may be sued for civil damages by minors receiving an abortion without parental consent or judicial order, or by the parents or guardians whose consent should have been obtained. § 188.250.2. The Act also provides that it is not a defense to a civil claim brought under its provisions that "the abortion was performed or induced pursuant to consent to the abortion given in a manner that is otherwise lawful in the state or place where the abortion is performed or induced." § 188.250.3. Furthermore, the Consent to Assist Act authorizes "the attorney general, a prosecuting or circuit attorney, or any person adversely affected or who reasonably may be adversely affected" by reasonably

[2]Section 188.028, RSMo, is set out in full at pages A29-30 of the Appendix to Appellants' Brief.

anticipated future conduct that would be in violation of § 188.250.1 to seek an injunction against such conduct. § 188.250.5.

Procedural History

The initial Plaintiffs in this case were Planned Parenthood of Kansas and Mid-Missouri (PPKM), Planned Parenthood of the St. Louis Region, Inc. (PPSLR), Comprehensive Health of Planned Parenthood of Kansas and Mid-Missouri, Inc. (Comprehensive Health), and Reproductive Health Services of Planned Parenthood of the St. Louis Region, Inc. (Reproductive Health). These Plaintiffs filed this action against the Missouri Attorney General, the St. Louis City Circuit Attorney, the Boone and Jackson County Prosecuting Attorneys, and the Missouri Board of Registration for the Healing Arts in Jackson County Circuit Court on September 15, 2005, seeking a declaration that the Consent to Assist Act is inconsistent with the United States and Missouri Constitutions in several respects and injunctive relief barring enforcement of the Act. On September 26, 2005, the circuit court granted the Plaintiffs' request for a temporary restraining order preventing enforcement of the Act for 15 days. LF 33-35.

On October 7, 2005, the Plaintiffs filed an amended petition largely identical to their initial petition, but adding the Missouri Religious Coalition for Reproductive Choice (MO RCRC as an additional Plaintiff. Lf 36-51. On October 11, 2005, the court extended the TRO through November 9. LF 53.

The circuit court held a hearing on October 27, 2005. LF 94, 98. The evidence included affidavits of several witnesses. The parties stipulated that the

testimony of these witnesses, if called to testify live, would be consistent with those affidavits. LF 74-78, 98. Pending its decision on the merits, the circuit court issued a preliminary injunction against enforcement of the Consent to Assist Act on November 8, 2005. LF 94-96.

On November 17, 2005, the circuit court entered its order upholding the Consent to Assist Act as constitutional and dissolved the November 8 preliminary injunction as moot. LF 97-124. The court, however, enjoined enforcement of the Act pending appeal. LF 28.

Plaintiffs filed a notice of appeal on December 6, 2005. LF 125-30.

Evidence Before the Trial Court

Abortions are performed in Missouri only in St. Louis, through Reproductive Health, and in Columbia, through PPKM. LF 2 (¶ 4), 12 (¶ 4), 14 (¶ 11), 111. Abortions are performed at Reproductive Health in St. Louis through the twenty-second week from the first day of a woman's last menstrual period. LF 2 (¶ 4). "[T]he majority of minors who have abortions at [Reproductive Health] obtain parental consent to an abortion. The remaining minors who obtain abortions at [Reproductive Health] receive a court order allowing the procedure without parental consent." LF 2-3 (¶ 6). Abortions at PPKM in Columbia are performed, up through the thirteenth week from the first day of a woman's last menstrual period. LF 12 (¶ 4). All of the minors seeking an abortion at PPKM in Columbia in the recent years have received parental consent for the abortion. LF 14 (¶ 8).

Abortions may also be obtained in Illinois and Kansas, and some Missouri women (including minors) prefer to go to a provider in a nearby state rather than to a provider in Missouri. LF 3 (¶¶ 8-9), 14-15 (¶¶ 11-14), 111. Many minors who travel to Illinois to obtain an abortion have the support and consent of their parents, while some travel to Illinois because Illinois law does not require parental consent. LF 3 (¶ 8). Other reasons why individuals seeking an abortion go outside of Missouri include the fact that abortion facilities in other states may be closer in proximity than those in Missouri, and that there may be greater anonymity in seeking abortions outside of one's home state. LF 3-4 (¶¶ 8-9), 14-15 (¶¶ 11-14), LF 27 (¶ 9).

Due to family circumstances, some young women either cannot obtain their parents' consent or do not feel that they can involve their parents in their abortion decision. LF 4-5 (¶ 11), 14 (¶¶ 9-10), 18-19 (¶ 22), 26 (¶ 7). As one of the Plaintiffs' witnesses stated:

> Some minors have previously experienced physical, sexual, and/or emotional abuse from parents or stepparents or others close to the family, and they fear the reaction to the news of their pregnancy. Others have good reason to believe that informing their parents will lead to first-time abuse, or being thrown out of the house. Still others are confident that for religious or other reasons their parents will try to force them to carry the pregnancy to term. Sometimes young women decline to involve their parents because their parents are overwhelmed

> by stressful and traumatic problems of their own – ranging from a parent's medical crisis to a debilitating alcohol or drug addiction.

LF 4-5 (¶ 11).

Plaintiffs provide information to minors regarding the subject of abortion, including referrals for abortion clinics, and some Plaintiffs provide abortions. LF 1-2 (¶¶ 2-4), 7 (¶ 19), 11-12 (¶¶ 2-3), 19-20 (¶¶ 24-26), 27-28 (¶¶ 9-10), 109, 111. Minors need accurate information regarding abortions and reproductive rights and options. LF 5 (¶¶ 12-13), 26 (¶ 7). Furthermore, minors facing an unplanned pregnancy need support from family members, friends, clergy, and counselors. LF 5 (¶ 14), 26 (¶ 7), 28 (¶ 12). Sometimes those without parental consent need someone else to provide transportation and funding to cover the cost of the abortion. LF 5 (¶ 14), 18 (¶ 20).

STANDARD OF REVIEW

In this case, the Plaintiffs-Appellants have appealed to obtain review of the a circuit court judgment regarding their claims for declaratory and injunctive relief from a statute claimed to be unconstitutional. This Court recently described the applicable standard of review in such a case as follows:

> The court's judgment in a suit in equity will be affirmed unless there is no substantial evidence to support it, unless it was against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law. *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976); *Nothaus v. City of Salem*, 585 S.W.2d 244, 245 (Mo. App. S.D. 1979). Because this case involves statutory interpretation, which is a question of law, this Court's review is *de novo*. *Ochoa v. Ochoa*, 71 S.W.3d 593, 595 (Mo. banc 2002). Statutes are presumed constitutional. *In re Marriage of Kohring*, 999 S.W.2d 228, 231 (Mo. banc 1999). A statute will not be invalidated "unless it clearly and undoubtedly contravenes the constitution and plainly and palpably affronts fundamental law embodied in the constitution." *Id.*

Conseco Fin. Servicing Corp. v. Missouri Dep't of Revenue, 98 S.W.3d 540, 542 (Mo. banc 2003).

ARGUMENT

I.

There is no justiciable controversy before this Court because Plaintiffs' claims are not ripe and because Plaintiffs lack standing

"A justiciable controversy exists where the plaintiff has a legally protectable interest at stake, a substantial controversy exists between parties with genuinely adverse interests, and that controversy is ripe for judicial determination." *Home Builders Assn. of Greater St. Louis, Inc. v. City of Wilwood,* 32 S.W.3d 612, 614 (Mo. App. E.D. 2000). Standing relates to the interest of an adversary in the subject of the suit so as to give that party the right to relief. *Western Cas. and Sur. Co. v. Kansas City Bank and Trust Co.,* 743 S.W.2d 578, 580 (Mo. App. W.D. 1988). In the present case, the Plaintiffs' claims are not ripe and they have no standing to present the issues before the Court, particularly with respect to minors whose interests may be adverse to the Plaintiffs.

A. Claims Are Not Ripe

The question of ripeness turns on "a two-fold inquiry: a court must evaluate (1) whether the issues tendered are appropriate for judicial resolution, and (2) the hardship to the parties if judicial relief is denied." *Missouri Soybean Ass'n v. Missouri Clean Water Comm'n*, 102 S.W.3d 10, 27 (Mo. banc 2003). A claim is not ripe for adjudication unless "the parties' dispute is developed sufficiently to allow the court to make an accurate determination of the facts, to resolve a conflict that is

presently existing, and to grant specific relief of a conclusive character." *Missouri Health Care Ass'n v. Attorney General,* 953 S.W.2d 617, 621 (Mo. banc 1997). Courts "should not issue advisory opinions on hypothetical facts or on some possible future transaction. A declaratory judgment presupposes a present controversy between actual parties as to their respective rights and obligations arising from an actual transaction or an intended transaction presently prohibited by law or contract." *Tietjens v. City of St. Louis.,* 222 S.W.2d 70, 71-72 (Mo. banc 1949). A declaratory judgment is not a general panacea for all real and imaginary legal ills and the Court is not to rule on disputes that may never come to pass. *Missouri Soybean Ass'n,* 102 S.W.3d at 25.

In the context of a constitutional challenge to a Missouri statute, a ripe controversy generally exists when the state attempts to enforce the statute. *Missouri Health Care Ass'n,* 953 S.W.2d at 621. But the Plaintiffs have not alleged an attempted enforcement by the Attorney General, prosecutors, or individuals of their respective rights and powers under the Consent to Assist Act, § 188.250, RSMo. Indeed, Defendant Nixon is unaware of any act that would require enforcement once the injunctive relief is lifted.

In *Poe v. Ullman,* 367 U.S. 497 (1961), the United States Supreme Court dismissed a declaratory judgment action seeking to invalidate certain Connecticut statutes prohibiting the use of contraceptives. The complaint alleged that the prosecutor intended to prosecute any offense against the Connecticut law and that the prosecutor claimed the use of and advice concerning contraceptives would

constitute offenses. In determining that the record disclosed no justiciable controversy because it failed to show that the challenged statutes would be enforced against the Appellants, the Court emphasized that it is only "actual or threatened operation upon rights," by a state law that permits a federal court to exercise its power to strike the law. 367 U.S. at 504. In short, a plaintiff "must be able to show not only that the statute is invalid, but that he has sustained or is immediately in danger of sustaining some direct injury as a result of its enforcement . . . ." 367 U.S. at 504-505. The same judicial restraint should be applied in this case because the Plaintiffs are not in any immediate danger of sustaining a direct injury.

In this case, the challenged statute, § 188.250, provides two new remedies in the event a person interferes with a family relationship and intentionally causes, aids, or assists a minor in obtaining an abortion without parental consent or court order. The first remedy is a civil action by the person who is required to provide consent for the minor's abortion. § 188.250.2 (the minor herself also may pursue this civil remedy provided in this subsection). The Plaintiffs have alleged no threat of civil suit by any person. The second remedy is a court order enjoining conduct that would be in violation of this section upon petition of the attorney general, prosecuting or circuit attorney, or an adversely affected person. § 188.250.5. Neither of these remedies has been threatened, certainly not by Defendant Nixon or the other defendant prosecutors.

In some situations a ripe controversy may exist even before the statute is enforced, but only when the facts necessary to adjudicate the underlying claims are

fully developed and the laws at issue affect a plaintiff in a manner that gives rise to an immediate, concrete dispute. *Tietjens,* 222 S.W.2d at 72. "A mere difference of opinion or disagreement or argument on a legal question does not afford adequate ground for invoking the judicial power." *Id.*

The Plaintiffs here have presented nothing other than a difference of opinion on a legal question. They have presented only testimony (via affidavit, with defendants' agreement) setting out what the affiants believe or fear might occur *if,* for instance, a Planned Parenthood employee provides information to a minor regarding out of state abortion facilities and *if* such information was provided without a parent consenting to the abortion, and then only *if* the new statute was construed as prohibiting the provision of information. The plain language of the statute, however, does not prohibit mere speech.

When a statute has yet to be enforced, that is, when the case seeks an examination of the words on a cold page without reference to particular conduct, the challenger bears a heavy burden of showing that the statute is impermissibly vague in all of its applications, and thereby interferes with constitutionally protected conduct. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.,* 455 U.S. 489, 494-495 (1982). "[S]peculation about possible vagueness in hypothetical situations not before the Court will not support a facial attack on a statute when it is surely valid 'in the vast majority of its intended applications.' " *Hill v. Colorado,* 530 U.S. 703, 733 (2000) (quoting *United States v. Raines,* 362 U.S. 17, 23 (1960)). Hypothetical speculation is inconsistent with the long-standing Missouri rule that "'it

is not necessary to determine if a situation could be imagined in which the language used might be vague or confusing; the language is to be treated by applying it to the facts at hand.'" *Brooks v. State,* 128 S.W.3d 844, 851 (Mo. banc 2004) (quoting *State v. Lee Mechanical Contractors,* 938 S.W.2d 269, 271 (Mo. banc 1997)). The Plaintiffs' hypotheticals cannot create a controversy that does not now, and may never, exist.

With the presentation of nothing more than a difference of opinion as to the meaning of the statute, and absent some evidence of a real threatened action, the Plaintiffs' claims do not afford an adequate ground for invoking the judicial power of this Court. Because the case is not ripe, this Court should remand it to the circuit court with instructions that it be dismissed.

B. Plaintiffs Lack Standing

"Standing is a jurisdictional matter antecedent to the right to relief." *Farmer v. Kinder,* 89 S.W.3d 447, 451 (Mo. banc 2002). "[I]f a party lacks standing, the court must dismiss the case because it does not have jurisdiction of the substantive issues presented." *Id.;* Rule 55.27(g)(3). "Lack of standing cannot be waived." *Kinder*, 89 S.W.3d at 451.

Standing involves two distinct questions. First, plaintiffs must allege an "injury in fact, that is, a sufficiently concrete interest in the outcome of their suit to make it a case or controversy . . . and, second whether, as a prudential matter, the plaintiff[s] . . . are proper proponents of the particular legal rights on which they base their suit." *Schaeffer v. Kleinknecht,* 604 S.W.2d 751, 752 (Mo. App. E.D. 1980) (internal

quotations omitted). Private citizens must possess more than a common concern for obedience to the law before they can maintain an action for an injunction against public officers. *Id.*

Here, the Plaintiffs have only offered their common concern for obedience of the law. Their interests are not concrete. Nothing in the Consent to Assist Act even intimates that the Plaintiffs' rights of free speech or to engage in business are threatened by any of the named Defendants.

Moreover, even if this Court were to conclude that the Plaintiffs do have standing to sue on their own behalf, they still have no standing to bring any claims on behalf of clients who are minors who are not in their custody. For a justiciable controversy, the Plaintiffs must demonstrate a substantial controversy between parties and genuinely adverse interests that are ripe for judicial determination. *Missouri Health Care Ass'n,* 953 S.W.2d at 620. A plurality opinion of the United States Supreme Court has recognized that in some circumstances a doctor may file actions asserting the rights of their patients. *Singleton v. Wulff*, 428 U.S. 106, 118 (1976) (plurality opinion) (Blackmun, J.). But no physician is a plaintiff here.

Further, the statute that Plaintiffs attack on behalf of minors gives those very minors the right to sue the Plaintiffs or others who have caused, assisted, or aided the minor in having an abortion without parental consent or judicial order. § 188.250.2. Thus, the Plaintiffs' interests may be adverse to those of the minors they may cause, aid, or assist in having an abortion: A decision in the Plaintiffs' favor would extinguish these minors' statutory rights to sue. Therefore, even if this Court

were to find that this case is ripe for decision and that the Plaintiffs have standing to sue on some claims in their own right, the Plaintiffs would still lack standing to assert the individual claims of minors as set out in the third, fifth, sixth, and eighth claims for relief of their petition. LF 47-49. These claims assert violations of the rights of minors to receive information about abortions (Third Claim), to interstate travel and to equal privileges and immunities of citizens of other states (Fifth and Sixth Claims), and to obtain an abortion without undue burden (Eighth Claim). LF 47-49. These rights, however, are personal to individuals seeking an abortion and may not be pursued by the Plaintiffs in this case (none of whom are minors who are, or may someday be, seeking to obtain an abortion), especially considering the potential adversity between the Plaintiffs and minors who have rights under the statute being challenged by the Plaintiffs.

II.

The trial court did not err in construing the statute as constitutional because the plain meaning of the words of the Consent to Assist Act do not prohibit protected speech. (Response to the Plaintiffs' Points Relied On I and II.)

It is a cardinal rule of statutory construction that where a statute is fairly susceptible of a construction in harmony with the Constitution it must be given that construction by the courts and, unless the statute is clearly repugnant to the organic law, its constitutionality must be upheld. *Chamberlin v. Missouri Elections Comm'n,* 540 S.W.2d 876, 879 (Mo. banc 1976). The Consent to Assist Act can be construed to avoid any First Amendment problem, i.e., it need not be read as proscribing free speech. In fact, the use of the words in the statute show that speech was not contemplated. Thus, because this statute can be construed harmoniously with free speech rights, and there is no clear repugnancy, the circuit court properly held that the statute is constitutional.

Rather than find merit in language that can be construed to have a meaning that is clearly constitutional, the Plaintiffs attack the language as vague. Many statutes will have some inherent vagueness, for "[i]n most English words and phrases there lurk uncertainties." *Robinson v. United States*, 324 U.S. 282, 286, (1945). But, "Condemned to the use of words, we can never expect mathematical certainty from our language." *Grayned v. City of Rockford,* 408 U.S. 104, 110 (1972).

Thus, courts employ common sense and practical interpretation in construing statutes. *State ex rel. Dravo Corp. v. Spradling,* 515 S.W.2d 512, 516 (Mo. 1974); *Concord Pub. House, Inc. v. Director of Revenue,* 916 S.W.2d 186, 194 (Mo. banc 1996). Common sense leads here to a constitutionally permissible construction.

A. The Terms of the Act Are Easily Understood and Constitutionally Valid Under Their Ordinary Dictionary Definitions

Words used in a statute are given the plain and ordinary meaning, as "found in the dictionary . . . unless the legislature provides a different definition." *State v. Reproductive Health Servs.,* 97 S.W.3d 54, 61 (Mo. App. E.D. 2002) (quoting *Lincoln Indus. Inc. v. Director of Revenue,* 51 S.W.3d 462, 465 (Mo. banc 2001)). *See also State ex rel. Nixon v. Telco Directory Pub.* 863 S.W.2d 596, 600 (Mo. banc 1993) ("'deception'" has a commonly understood meaning to persons of reasonable intelligence [and] its use in § 407.020.1, RSMo, does not violate due process.).

Using the dictionary definitions for commonly understood terms, there is little potential that the terms of the Consent to Assist Act could be construed as proscribing the mere provision of information or as violating due process and First Amendment rights, and the terms of the Act should not be so construed.

1. "Cause" Means to Make; Not Inform

The verb "cause" means "to serve as cause or occasion of: bring into existence: make...: to effect by command, authority, or force." *Mikulich v. Wright,* 85 S.W.3d 117, 120 (Mo. App. W.D. 2002), quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 356 (1971).

Thus, if one of the Plaintiffs intentionally overcame the will of, directed, commanded, or forced a minor to obtain an abortion without parental consent, the entity could be liable. But, the mere provision of information is not contemplated within the term.

2. "Aid" and "Assist" Mean More Than Information

The term "aid" means "helps or supports," or "assists." *Diamond Game Enterprises, Inc. v. Reno,* 230 F.3d 365, 369-370 (D.C. Cir. 2000), quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 44 (1993). And as noted in *State v. Smothers,* 523 S.W.2d 336, 339 (Mo. App. K.C.D. 1975), "aid" and "assist" are not words of a technical nature but are "words of common usage" that could not confuse a jury. "Aid" and "assist" are not synonymous with "provide information." Neither of these terms suggest that mere passive action and the mere provision of information is actionable under the new statute.

3. "Inform" Is Not in the Statute

Glaringly absent from the new statute is the term "inform," which means "to impart information or knowledge." WEBSTER'S UNIVERSAL ENCYCLOPEDIC DICTIONARY 944 (2nd ed. 2002). The General Assembly's deliberate choice of more limited language shows that it did not intend to forbid any speech, including the provision of information regarding abortions. A standard canon of statutory construction is that "the express mention of one thing implies the exclusion of another." *Yellow Freight Systems, Inc. v. Mayor's Comm'n*, 791 S.W.2d 382, 387 (Mo. banc 1990). The Plaintiffs' attempt to include some meaning in the statute which is clearly absent from the plain language must fail.

B. The Term "Intentionally" Clarifies Statute

The Consent to Assist Act authorizes civil suits for damages and injunctive relief only against persons who "*intentionally* cause, aid, or assist a minor to obtain an abortion without the [required] consents." § 188.250.1 (emphasis added). The use of "intentionally" and its placement at the beginning of the short sentence makes it plain that something more than mere passive conduct must occur. *See Blue Cross & Blue Shield of Kansas City, Inc. v. Nixon*, 26 S.W.3d 218, 233-34 (Mo. App. W.D. 2000) (common sense interpretation controls over other doctrines of statutory construction). Thus, a taxi driver who transports a minor across state lines could not be subject to a civil suit or injunction if the taxi driver did not have the requisite intent to cause, aid, or assist the minor in obtaining an abortion without parental consent or court order.

Outside the abortion context, the Missouri Supreme Court and Missouri Courts of Appeal have looked to scienter or mens rea requirements in finding statutes constitutional. The presence of such requirements in either a civil or criminal statute can cure an otherwise vague statute. "[A] scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.,* 455 U.S. 489, 499 (1982). *See also State v. Lee Mechanical Contractors, Inc.,* 938 S.W.2d 269 (Mo. banc 1997) (upholding statute providing for

the "willful" violation of the prevailing wage law); *State v. Shaw,* 847 S.W.2d 768, 776 (Mo. banc 1993) (scienter element sufficiently cures any uncertainty as to the meaning of "unfair practices"); *State v. Foster,* 838 S.W.2d 60 (Mo. App. E.D. 1992) (statutes defining offense of promoting child pornography are not unconstitutionally vague as they required some element of scienter); *State v. Mahurin,* 799 S.W.2d 840, 842 (Mo. banc 1990) ("substantial risk" is not vague term under child endangerment statute since statute required defendant to act knowingly). Thus, there is no question the inclusion of the term "intentionally" clarifies any purported vagueness in the statute challenged in this case.

The Plaintiffs' argument that the circuit court impermissibly construes the term "intentionally" to mean "purposely" also fails. Even in the legal context these words are synonyms. *Compare* Black's Law Dictionary 727-28 ("intention" defined as "Determination to act in a certain way or to do a certain thing. Meaning; will; purpose; design" *with* Black's Law Dictionary 112 ("purpose" defined as "That which one sets before him to accomplish; an end, intention, or aim, object, plan, project") (5th ed. 1979). *See also State v. Goebel*, 83 S.W.3d 639, 644 (Mo. App. E.D. 2002) ("[b]oth 'willful' and 'purposely' are defined as 'intentional' ").

Contrary to the Plaintiffs' argument, the circuit court did not indulge in judicial rewriting of the Consent to Assist Act. The Act did not need to be "rewritten." By its plain terms, the Act does not abridge free speech rights. Even if there were some reasonable alternative construction of the Act, a "general canon of statutory construction is that ambiguous statutes that are susceptible to more than one

construction should be construed in a manner consistent with the constitution. *See, e.g.*, *City of Jefferson v. Missouri Dep't of Natural Resources*, 863 S.W.2d 844, 848 (Mo. banc 1993); *M & P Enters., Inc. v. Transamerica Fin. Servs.*, 944 S.W.2d 154, 159 (Mo. banc 1997). Because the Act here can be construed as not forbidding the provision of advice and information to minors inquiring about abortions, it should be construed in that manner to avoid constitutional infirmity.[3]

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[3]In a related First Amendment argument, twelve religious and religiously-affiliated organizations that have joined in a amicus brief asserting that the Consent to Assist Act infringes their members' free exercise of religion rights in that it interferes with religious counseling of Missouri minors who have neither parental

consent or judicial authority to obtain an abortion. This assertion fails for the same reason as does that of the Plaintiffs. The Consent to Assist Act does not forbid or regulate any speech, including religious counseling regarding abortion.

Moreover, no claim was raised before the circuit court regarding free exercise of religion. LF 102-03. As an issue not presented to or decided by the circuit court, it is not preserved for review. *State ex rel. Nixon v. American Tobacco Co.*, 34 S.W.3d 122, 129 (Mo. banc 2001).

III.

The Consent to Assist Act regulates only conduct occurring within Missouri and does not apply to actions occurring beyond the borders of Missouri and, because it does not have such an extra-territorial reach, it is consistent with the Commerce Clause and the Plaintiffs' due process rights. (Response to the Plaintiffs' Point Relied On III.)

The Consent to Assist Act does not even suggest an application beyond Missouri's borders. It provides simply that "[n]o person shall intentionally cause, aid, or assist a minor to obtain an abortion without the consent or consents required by section 188.028." It is no more extra-territorial in reach than any other Missouri statute that regulates conduct, even though neither the Consent to Assist Act nor these other conduct-regulating statutes do not specifically add the phrase "with regard to conduct occurring within Missouri."

The non-Missouri Plaintiff's concerns regarding an extra-territorial enforcement of the Act are unfounded. The administrator of Plaintiff Comprehensive Health sets out his "fear" that Missouri law enforcement officers could try to enforce the Act in Missouri courts against Comprehensive Health, a Kansas corporation that operates a Kansas-licensed surgery center in Kansas that performs abortions (among other services), because the corporation treats Missouri residents and contracts with some Missouri businesses. LF 2-3 (¶ 5), pp. 10-11 (¶ 27). The treatment of Missouri residents in Kansas, however, is not an activity that would

permit jurisdiction of Missouri courts under Missouri's long-arm statute. *See* § 506.500, RSMo. None of the activities permitting long-arm jurisdiction in Missouri include conduct occurring outside of Missouri. While contracting with Missouri businesses could subject Comprehensive Health to long-arm jurisdiction on a cause of action arising from those contracts, *see* § 506.500.1(1) and (2), such contracting activity would not subject it to long-arm jurisdiction for its operations relating to provision of abortions to Missouri residents that occurred wholly in Kansas. This is so because no acts as described in the long-arm statute would have occurred in Missouri that would give rise to a cause of action. *See Davis v. Baylor Univ.*, 976 S.W.2d 5, 14 (Mo. App. W.D. 1998) (long-arm jurisdiction over plaintiff's claims arising from Baylor's contacts in Missouri, but not over plaintiff's claims against Baylor that did not arise from Baylor's contacts in Missouri); *Fairbanks Morse Pump Corp. v. ABBA Parts, Inc.*, 862 F.2d 717, 719-20 (8th Cir. 1988) (long-arm jurisdiction valid only if the claim arises from the acts of the defendant that occurred in Missouri).

Because the Consent to Assist Act does not reach out to regulate conduct in other states, it neither affects interstate commerce nor unfairly governs non-Missourians for their acts outside of Missouri in violation of the due process clause.

IV.

The Consent to Assist Act does not place any undue burden on the right to an abortion of Missouri minors in that they have access to abortions with parental consent or, if that cannot be obtained, through judicial authorization. (Response to the Plaintiffs' Point Relied On IV.)

As the United States Supreme Court held in *Planned Parenthood v. Casey*, 505 U.S. 833, 874 (1992), only regulations imposing an "undue burden" on a woman's ability to choose an abortion violate the Constitution. An undue burden is one that poses a "substantial obstacle to a woman's choice to undergo an abortion" in a "large fraction of the cases in which [the regulation] is relevant." 505 U.S. at 895. Only those regulations that exceed the undue burden threshold in a large fraction of relevant cases are unconstitutional for unduly infringing upon protected conduct. Accordingly, the question is whether Missouri's newly-enacted law that supports a parent's right to consent to their child's abortion, reaches "into the heart of the liberty protected by the Due Process Clause" such that it constitutes an undue burden. 505 U.S. at 874. Nothing in Missouri's statute suggests such a draconian result; it decidedly does not pose an "undue burden."

A. The Statute Promotes Constitutional Parental Involvement

There is no question that a state may require a minor who seeks an abortion to first obtain the consent of a parent or guardian, provided there is an adequate judicial by-pass provision. *Casey*, 505 U.S. at 899. Such requirements allow

parents an opportunity to consult with their daughter in private and to "discuss the consequences of her decision in the context of the values and moral or religious principles of their family." 505 U.S. at 899 - 900. The Consent to Assist Act creates a prophylactic rule, designed to preserve parental influence. Such a rule is a vindication of the principle, deeply rooted in this nation's history and tradition that a parent's natural bonds of affection will lead the parent to act in the best interest of his or her children. *Parham v. J. R.*, 442 U.S. 584, 602 (1979), and that parents have a substantial measure of authority over their children. This tradition of parental authority is consistent with our tradition of individual liberty because restrictions on minors, especially if supportive of the parental role, promote a child's chances for "full growth and maturity that make eventual participation in a free society meaningful and rewarding." *Bellotti v. Baird,* 443 U.S. 622, 639-40 (1979). *See also Prince v. Massachusetts,* 321 U.S. 158, 166 (1944) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."); *Parham,* 442 U.S. at 602 ("Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course"). The Act's purpose is consistent with the Supreme Court's declaration that, because "immature minors often lack the ability to make fully informed choices that take account of both immediate and long-range consequences, a State reasonably may determine that

parental consultation often is desirable and in the best interest of the minor." *Bellotti,* 443 U.S. at 640.

Parental consultation does not, of course, mean that parents may exercise arbitrary veto power over a minor's decision to terminate a pregnancy. *See Planned Parenthood v. Danforth*, 428 U.S. 52, 90-91 (1976). But courts have never challenged a state's reasonable judgment that a minor's decision to abort should be made after notification to and consultation with a parent. *Hodgson v. Minnesota,* 497 U.S. 417, 445 (1990) (op. of Stevens, J., joined by O'Connor, J.). Rather, the Supreme Court has consistently recognized that a state "furthers a constitutionally permissible end by encouraging an unmarried pregnant minor to seek the help and advice of her parents in making the very important decision whether or not to bear a child." *Danforth,* 428 U.S. at 91.

Given that a state may constitutionally require a minor to notify and consult a parent prior to obtaining an abortion (unless the minor is able to obtain judicial authorization), a state must also be constitutionally able to enact a law that supports that procedure and allow parents to a legal remedy against those who intentionally interfere with their parental rights. As noted in *Ginsberg v. New York,* 390 U.S. 629, 639 (1968), under our Constitution, a "legislature could properly conclude that parents . . . who have this primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility." Missouri's new Consent to Assist Act does nothing more than aid parents in the discharge of their responsibility for their daughters' well-being. This Act merely gives parents a

tool – a civil cause of action for damages and injunctive relief – against persons who have deliberately interfered with the family relationship and have sought to hamper the discharge of the parents' responsibilities toward their daughters, irrespective of whether parental consent is required where the abortion occurs.

B. Potential that a Minor May Have to Obtain Judicial Authorization Twice Does Not Impose an Undue Burden

The Plaintiffs contend that the obligation of the Consent to Assist Act to obtain parental consent or judicial authorization before intentionally causing, aiding, or assisting a minor in obtaining an abortion imposes an undue burden on the minor's right to an abortion by "effectively" curtailing her opportunity to obtain the abortion because of the possibility that this would result in the minor needing to go through a judicial by-pass procedure twice. Even if application of the Act results in a need to go through judicial by-pass twice, however, that would not result in the Act placing an undue burden on the right to an abortion.

The Act requires a person who wishes to assist a Missouri minor in obtaining an abortion to obtain consent. In the absence of parental consent (or an emancipated minor), this requires judicial authorization in Missouri under § 188.028. Then, if this minor to be assisted chooses to obtain an abortion in another state that

also requires judicial authorization in the absence of parental consent or notice, the minor will need to comply with that other state's judicial by-pass law as well.[4]

Plaintiffs urge this as a real possibility in that abortions are not currently available in Missouri anywhere other than Columbia or the St. Louis area. Thus, a Platte County minor's abortion options, for example, include complying with Missouri consent law and then either (1) traveling to Columbia or, if beyond the gestational limit of the facility there, to St. Louis for the abortion, or (2) traveling into Kansas (where abortions are available not far across the border) for the abortion. Kansas law requires either parental notice or judicial authorization before a minor may obtain an abortion. Kan. Stat. Ann. § 65-6705. The Plaintiffs think neither of these options reasonable or effective because the first requires long distance travel and the second requires a minor to face the "intimidating" prospect of going through two judicial by-pass procedures.

The obstacles the Plaintiffs see, however, are not of the Consent to Assist Act's making. Neither the relative location of clinics providing abortions, nor the requirements of other states' law are due to the Act or other Missouri state law. It would be a perverse standard of decision that invalidates a state's law based on

[4] It has not been shown that the judicial by-pass laws of other states will not be satisfied by judicial authorizations entered Missouri.

geographical happenstance or the decisions of another state's legislature. *See Fargo Women's Health Organization v. Schafer*, 18 F.3d 526, 533 (8th Cir. 1994) (burdens to abortion set out by plaintiffs – distance necessary to travel and limited days on which abortions provided at clinic – were not the results of the state regulation and did not constitute an undue burden).

In any event, the availability of abortion services in Missouri, regardless of the distance that must be traveled by any particular minor, negates the Plaintiffs' undue burden argument. The court in *Schafer* explicitly concluded that the distance a woman must travel to obtain an abortion did not constitute an undue burden, "whatever the distance to the medical facility." 18 F.3d at 533. *See also Casey*, 505 U.S. at 886 (24-hour waiting period did not constitute undue burden, even though it would be "particularly burdensome" for "women . . . who must travel long distances . . ."). The Plaintiffs admit that minors have abortion options available within Missouri. Thus, minors, with or without the assistance of others, may obtain abortion services without having to go through two judicial by-pass procedures. Even if they must travel across the state to obtain the abortion, this necessity is not, under *Schafer* and *Casey*, an undue burden on their right to an abortion.

The alternative option of going to another state for an abortion is still available. The possibility of this option requiring two judicial by-passes cannot constitute an undue burden when there is an in-state option that is not unduly burdensome.

Moreover, the Plaintiffs have not offered any case law supporting the premise of their argument – that two judicial by-pass procedures actually constitute an undue

burden. When a minor chooses to go out of state for an abortion, there are, of course, two states involved. It is not unreasonable that both would be entitled to fulfillment of their respective laws. To strike § 188.250, RSMo, as violative of a minor's right to abortion as the Plaintiffs request, would be to turn one's back on the legal tradition this nation has long recognized, the rights and responsibilities of parents, and to disregard the constitutionally permitted parental notification and consent laws.

V.

The Consent to Assist Act does not infringe on the right to travel between states because it imposes no restrictions or burdens on interstate travel and the Act does not violate the privileges and immunities clause because it does not deprive nonresidents of any privilege or immunity possessed by Missouri residents. (Response to the Plaintiffs' Point Relied On V.)

A. Right to Travel Not Infringed

The "right to travel" under the Fourteenth Amendment to the United States Constitution embraces three different components: 1) for those travelers who adopt a new permanent residence in another state, the right to be treated the same as other citizens of that state; 2) the right to be treated as a welcomed visitor in another state; and 3) the right of a citizen of one state to enter and to leave another state. *Saenz v. Roe*, 526 U.S. 489, 500 (1999). The Consent to Assist Act interferes with none of these components of the right to travel.

Missouri's new law has nothing to do with travelers who make a new permanent residence in this or any other state. Neither does this statute result in any differential treatment of visitors to Missouri. If a minor from another state traveled to Missouri to obtain an abortion, the Consent to Assist Act would not add requirements to the visitor's receipt of an abortion that did not equally apply to

Missouri resident minors. And obviously, as a Missouri law, the Act does not have any impact on how another state may treat its visitors.

With regard to the right to enter and leave states freely, the Act imposes no burden on such interstate travel. Minors are not forbidden to travel to other states to obtain an abortion. The Plaintiffs, however, assert that the requirement that a person wishing to assist a minor to travel to another state for an abortion first obtain either parental consent or judicial authorization to do so amounts to a constitutionally impermissible obstacle to the minor's right to travel. Plaintiffs' argument seems to be based on the premise that the minor may be deterred from traveling to another state if not accompanied by an adult. But the minor is not prevented from having the company of an adult in her interstate travel. Rather the minor may still be assisted by the adult as long as the minor obtains parental consent or judicial authorization. To whatever extent this requirement may be viewed as an impediment to interstate travel, it is a small one. Minor restrictions on a person's right to travel do not deny her fundamental right to travel. *Cramer v. Skinner*, 931 F.2d 1020, 1031 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 298 (1991). Parental consent can be directly requested, or if the minor feels she cannot involve her parents, she may go through the well-defined statutory process for obtaining judicial authorization. Such minor impediments to a person's right to travel do not deny her fundamental right to travel. *See id.*

Even if this Court determines that the requirements of the Consent to Assist Act amount to a significant burden on the minor's right to travel, they are well

justified, even under strict scrutiny, by Missouri's compelling interest in preserving parental involvement in the actions of their children. *See Schleifer v. City of Charlottesville*, 159 F.3d 843, 848-49 & 855 (4th Cir. 1998) (states have compelling interest in fostering parental responsibility for their children), *cert. denied*, 526 U.S. 1018 (1999); *Planned Parenthood League v. Bellotti*, 868 F.2d 459, 468 (1st Cir. 1989) (states have compelling interest in encouraging parental involvement in abortion decision of their children). The requirements of the Consent to Assist Act are also essential to the fulfillment of this compelling state interest in maintaining parental involvement. No course short of actually obtaining parental consent for another to assist their child in obtaining an abortion or, in those cases in which the child feels she cannot involve her parents, of seeking judicial authority for such assistance will adequately preserve the important parental role in the abortion decision.

Moreover, the Supreme Court has rejected the idea that minors enjoy a fundamental "right to come and go at will." *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 654 (1995). Minors are subject, even as to their physical freedom, to the control of their parents or guardians. *Id.* "[J]uveniles, unlike adults, are always in some form of custody." *Reno v. Flores,* 507 U.S. 292, 302 (1993) (quoting *Schall v. Martin,* 467 U.S. 253, 265 (1984)). Concomitantly, parents have a liberty interest in the care, custody, control of the children – "perhaps the oldest of the fundamental liberty interests recognized by this Court." *Troxel v. Granville,* 530 U.S. 57, 65 (2000). *See also Santosky v. Kramer,* 455 U.S. 745, 754 (1982) (discussing "[t]he

fundamental liberty interest of natural parents in the care, custody, and management of their child").

Nothing in American jurisprudence suggests that unemancipated minors have a right to cross state lines without their parent's permission, particularly when the purpose of the trip is to circumvent the abortion regulations in their own state of residence.

B. Right to Equal Privileges and Immunities Does Not Apply

Article IV, § 2, cl. 1, of the United States Constitution provides that: "Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." This constitutional guarantee "was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy." *Toomer v. Witsell*, 334 U.S. 385, 395 (1948). *See also Supreme Court of Va. V. Friedman*, 487 U.S. 59, 64 (1988). Or, to state this in a slightly different way, the privileges and immunities clause requires a state to provide the same privileges and immunities to visitors from other states as that state provides to its own citizens. But this is not the situation in this case. There is no claim here of another state depriving Missouri minors of rights that are available to that other state's own citizens. The privileges and immunities clause simply does not apply.

VI.

If there were a basis for invalidating a portion or an application of the Consent to Assist Act, this Court should sever so as to preserve the rest of the Act. (Response to the Plaintiffs' Point Relied On VI.)

The Consent to Assist Act, as shown above, is a constitutionally valid exercise of the legislative discretion. Thus, there is no reason to reach the question raised of severability raised in this point.

If this Court were to conclude that there are constitutional deficiencies in the Act, however, severance of offending provisions may be an appropriate consideration. The Plaintiffs' challenges here largely revolve around feared applications of the words "aid" and "assist" in the Act, or results from those feared applications. If this Court determines that these words somehow do offend the United States or Missouri Constitutions, then it may sever out the words "aid" and "assist" to remedy the constitutional problems.

According to the Missouri's severance statute, "the provisions of every statute are severable." § 1.140, RSMo. This Court has also held that "all statutes . . . should be upheld to the fullest extent possible." *National Solid Waste Mgt. Ass'n v. Director of Dept. of Natural Resources*, 964 S.W.2d 818, 822 (Mo. banc 1998) (citing *Associated Indus. v. Director of Revenue*, 918 S.W.2d 780, 784 (Mo. banc 1996)). An entire statute is not to be invalidated unless:

> the court finds the valid provisions of the statute are so essentially and inseparably connected with, and so dependent upon, the void provision that it cannot be presumed the legislature would have enacted the valid provisions without the void one; or unless the court finds that the valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent.

§ 1.140.

If the words "aid" and "assist" in the Act did present constitutional problems, this Court could sever them out, while retaining the statutory prohibition on a person "caus[ing] a minor to obtain an abortion without the consent or consents required by section 188.028." This prohibition on "caus[ing}" a minor to obtain an abortion without the appropriate consent is not so essentially and inseparably connected with and dependent on the prohibition on "aid[ing]" or "assist[ing]" a minor in obtaining an abortion without the proper consent that aid and assist portion of the statute should be deemed not severable. If it is necessary to strike the words "aid, or assist" from the Consent to Assist Act, the remaining words of the Act – "[n]o person shall intentionally cause a minor to obtain an abortion without the consent or consents required by section 188.028" – are complete and capable of being executed in accordance with the legislative intent to provide a civil action against those trying to undermine constitutionally sound consent laws.

CONCLUSION

For the foregoing reasons, Defendant-Respondents Nixon and Board of Registration for the Healing Arts urge this Court to affirm the judgment of the Jackson County Circuit Court entered in their favor upholding the constitutionality of the Consent to Assist Act, § 188.250, RSMo, and to vacate the injunction entered by the circuit court pending this appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND OF COMPLIANCE WITH RULE 84.06(b) AND (c)

I hereby certify that one true and correct copy of the foregoing brief, and one disk containing the foregoing brief, were mailed, postage prepaid, this 12th day of May, 2006, to:

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I also certify that the foregoing brief complies with the limitations contained in Rule 84.06(b) and that the brief contains 9,482 words, excluding the cover, signature block, and this certificate.

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

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