No. SC87321

IN THE SUPREME COURT OF MISSOURI

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

v.

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

On Appeal from the Circuit Court of Jackson County, Missouri

APPELLANTS' REPLY BRIEF

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INTRODUCTION

Plaintiffs-appellants ("Plaintiffs")[1] file this reply to the briefs of Respondents Nixon and the Missouri Board of Registration for the Healing Arts ("State") ("State Br.") and Respondent Jennifer M. Joyce, Circuit Attorney for the City of St. Louis, in her official capacity ("City") ("City Br.") (together, the State and the City are called "Respondents"), and in further support of their request that this Court declare Mo. Rev. Stat. § 188.250 ("Act") unconstitutional under the Missouri and United States Constitutions.

The State and the City take very different views of the Act, but neither provides any persuasive basis for upholding it. Trying to avoid complete invalidation, the State takes a narrow view of what the Act actually prohibits. The City, on the other hand, pushes the Court to uphold the law even with the broad reach the Legislature intended. For example, the City admits the Act bans protected speech and admits the Act prohibits actions that take place entirely outside Missouri. It nonetheless argues that these censorial and extra-territorial effects are constitutional. The failure of these arguments is highlighted by the fact that the State does not even bother making them. Rather, the State appears to concede that if the Act bans speech – as the City agrees it does – it is unconstitutional. Likewise, the State appears to concede that if the Act applies

[1] The four Planned Parenthood Plaintiffs-Appellants are referred to herein as "Planned Parenthood."

extraterritorially – as the City agrees it does – it violates the Commerce Clause and due process.

Unlike the City, the State's main argument is that the Act neither bans speech nor regulates activities outside Missouri. Its assertions, though, are just that: the State offers no persuasive explanations for why the Court should read the Act's plain language as not prohibiting speech and not operating outside Missouri. The emptiness of the State's arguments is underscored by the fact that the City does not endorse its reading of the Act.

With respect to Plaintiffs' other claims, Respondents entirely miss the mark. Plaintiffs do not claim that the Act itself is vague; rather, they claim that the Trial Court's construction renders it vague. *See* Appellants' Brief ("Aplt. Br."), Argument § I, D. Plaintiffs agree that it is valuable for teens to involve their parents in their abortion decision, and encourage their clients to do so. (Aplt. Br. 27), but an abortion restriction with a well-meaning purpose still imposes an "undue burden" if in practice it creates substantial obstacles to an abortion, as the Act does. Finally, Plaintiffs do not claim that the Act violates the right to equal privileges and immunities of out-of-state teens. Rather, they claim that the Act impermissibly deprives Missouri teens having out-of-state abortions of their right to be treated like all other individuals having abortions in that state.

Because Respondents have not offered any persuasive rebuttal to Plaintiffs' claims, the Act must be declared unconstitutional and permanently enjoined.

I. PLAINTIFFS' CHALLENGE IS JUSTICIABLE

A. Plaintiffs' Claims Are Ripe

The State argues that Plaintiffs' claims are not ripe because "Plaintiffs have not alleged an attempted enforcement by the Attorney General, prosecutors, or individuals . . . ." State Br. 15. But Plaintiffs need not await enforcement for their claims to be ripe. The United States Supreme Court has explained that

> it is not necessary that [the plaintiff] first expose himself to [enforcement] to be entitled to challenge [the] statute that he claims deters the exercise of his constitutional rights . . . . When the plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder, he should not be required to await and undergo a criminal prosecution as the sole means of seeking relief.

Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 298 (1979) (citations and quotations omitted); *see also Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 62 (1976) (clinic and physicians had standing to challenge abortion statute although there had been no prosecution or threatened prosecution); *Doe v. Bolton*, 410 U.S. 179, 188 (1973) (same). It is irrelevant that the Act lacks criminal penalties. *See, e.g., Planned Parenthood of Cent. N. J. v. Farmer*, 220

F.3d 127 (3d Cir. 2000) (pre-enforcement challenge to abortion statute that carried only civil penalties); *Karlin v. Foust*, 188 F.3d 446 (7th Cir. 1999) (same).[2]

While Respondents have not "threatened" (State Br. 16) enforcement against Plaintiffs, they have not renounced their intention to do so. The State's case, *Tietjens v. City of St. Louis*, 222 S.W.2d 70 (Mo. banc 1949), is directly on point. There, this Court ruled that a challenge to a rent control ordinance was ripe even though the city was not prepared to enforce it, and the plaintiffs had not yet violated it, because the challengers "must assume the city will enforce its laws." 222 S.W.2d at 72. So, here, Plaintiffs "must assume" Respondents will enforce the Act. *Id*; *see also Farmer*, 220 F.3d at 148; *R.I. Med. Soc'y v. Whitehouse*, 66 F. Supp. 2d 288, 303-04 & n.5 (D.R.I. 1999) (facial challenge to criminal abortion ban ripe despite assertion that plaintiffs would not be prosecuted), *aff'd*, 239 F.3d 104 (1st Cir. 2001).

The State's case, *Missouri Health Care Ass'n v. Attorney General of the State of Missouri*, 953 S.W.2d 617 (Mo. banc 1997), confirms this case is ripe. There, the suit was ripe because the challenged statute, although not enforced, was affecting plaintiffs' business. 953 S.W.2d at 621. So, here, the Act is forcing Plaintiffs to restrict the information they give to teens, or risk significant liability.[3]

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[2] Because the Act has a chilling effect, the Court should reject the City's request to wait for an as applied challenge to decide Plaintiffs' claims.

[3] The State's case, *Missouri Soybean Ass'n v. The Missouri Clean Water*

(LF at 26, ¶ 8; LF at 29, ¶ 15; LF at 30-31; ¶¶ 18-20; LF at 7, ¶ 18; LF at 17, ¶ 18.) It is ripe for review.

B. Plaintiffs Have Standing To Bring All Of Their Claims

As discussed *supra*, Plaintiffs need not wait until they are injured by an enforcement action to have standing. *See, e.g., Singleton v. Wulff*, 428 U.S. 106, 112-13 (1976) (physicians have standing to challenge abortion statute when they have engaged in and, but for the statute, would continue to engage in prohibited conduct); *United Food & Commercial Workers Int'l Union v. IBP, Inc.*, 857 F.2d 422, 428 (8th Cir. 1988) (same).

Planned Parenthood also has standing to assert its minor patients' rights. The Supreme Court has held that "a physician [may] assert the rights of women patients as against governmental interference with the abortion decision . . . ." *Singleton*, 428 U.S. at 118. Furthermore, abortion providers have repeatedly been allowed to assert third party standing on behalf of their minor patients. *See, e.g., City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 439-41 (1983), *overruled on other grounds, Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992); *Planned Parenthood Ass'n of Kansas City, Mo., Inc. v.*

Comm'n, 102 S.W.3d 10 (Mo. banc 2003), is not to the contrary. While that case was not ripe because no relief would alleviate the harm from the challenged action, here, striking the Act would provide complete relief to Plaintiffs.

Ashcroft, 462 U.S. 476, 490-93 (1983); *see also Planned Parenthood, Sioux Falls Clinic v. Miller*, 63 F.3d 1452 (8th Cir. 1995).

The State suggests, citing no case law, that the Court should this ignore this precedent, because the interests of Planned Parenthood and their minor patients are "adverse." State Br. 19. Similar arguments have properly been rejected. *See Karlin v. Foust*, 975 F. Supp. 1177, 1202 (W.D. Wis. 1997), *aff'd in part & rev'd in part on other grounds*, 188 F.3d 446 (7th Cir. 1999); *Charles v. Carey*, 627 F.2d 772, 779 n.10 (7th Cir. 1980). Indeed, under the State's logic, Planned Parenthood could never assert its patients' rights because its patients always can bring a civil claim against them if, for example, a woman believed that the abortion was not within the standard of care. Yet abortion providers routinely represent the interests of their patients. *See supra*. So, Planned Parenthood may assert its patients' rights here.

II: RESPONDENTS' ARGUMENTS CONFIRM THAT THE ACT UNCONSTITUTIONALLY ABRIDGES FREE SPEECH

A. The City Admits The Act Bans Protected Speech And The State's Arguments To The Contrary Are Unavailing

The City admits the Act bans protected speech. *See* City Br. 18 (under the Act, one could be liable for speech if "his intent or purpose in giving aid or assistance was that the minor obtain an abortion"); *id*. at 22 ("[u]ndoubtedly, the words 'aid', or 'assist' as employed in Section 188.250 RSMo., have the potential of infringing on protected speech and even conduct"); *id*. at 21 ("the statute has

the potential of limiting . . . protected . . . speech"); *id*. at 23 (the [A]ct's prohibitions are limited to that speech whose specific purpose or intent is solely to have a Missouri minor undergo an abortion [without complying with Missouri's parental consent law]").

Although the State does not so concede, its argument based on the plain meaning of the terms "aid" and "assist" does not save the Act. The "ordinary dictionary definition[s]" from *Webster's Third New International Dictionary* (1993), relied on by the State, actually demonstrate that the Act bans speech.[4] State Br. 23. This dictionary defines "aid" as "helps or supports" or "assists." *Id*. Under any plain reading, if a teen calls a clergy counselor seeking abortion referral, and the counselor provides her with the name and contact information for an abortion provider in Illinois, the counselor is "help[ing]" or "assist[ing]" her. *See also* Aplt. Br. 39-40.

The State argues that "aid" and "assist" do not include providing information because the Legislature did not specifically enumerate "provid[ing] information" as prohibited. State Br. 23. This argument is specious. The

[4] The State's case, *Mikulich v. Wright*, 85 S.W.3d 117 (Mo. App. W.D. 2002), confirms that speech alone can create liability under the Act. There, the court affirmed liability for "induc[ing]" or "caus[ing]" a crime where defendants' conduct consisted entirely of speech. *Id*. at 120.

Legislature did not need to specify that "providing information" about abortion is prohibited because it is subsumed within the broader prohibition on "aid or assist[ance]." Taking the State's theory to its logical conclusion, if a non-parent adult drove a minor to Illinois for an abortion without parental consent, there would be no violation because the Legislature did not specify that "driving" or "transporting" a minor is prohibited.[5] But there can be little doubt that this conduct would be banned because it aided and assisted the teen to obtain the abortion without parental consent. So, too, is there little doubt that speech that aids and assists is banned by the Act.

Precisely because the Act is drafted in broad, open-ended terms, the canon of construction that "the express mention of one thing implies the exclusion of another" is inapplicable. The Act does not "express[ly] mention," *id.*, any particular form of "aid" or "assist[ance]." By using open-ended terminology, the Legislature ensured the ban would encompass "every possible [activity] which

[5] This is the same point made in the State's case, *State v. Smothers*, 523 S.W.2d 336 (Mo. App. W.D. 1975). There, the court found no error in a jury instruction that did not define "aid," because the open-endedness of the term meant "'[i]t would be virtually impossible to hypothesize . . . every possible fact which might constitute a means of help or assistance.'" 523 S.W.2d at 338 (quoting *State v. Present*, 344 S.W.2d 9, 13 (Mo. 1961)).

might constitute a means of help or assistance," *Smothers*, 523 S.W.2d at 338 – including speech.

B. Courts Cannot Construe Statutes Where The Language Is Clear – Even To Avoid Unconstitutionality

Nor should this Court follow the Respondents' suggestion that the Act's constitutional infirmities can be cured through a narrowing construction. Respondents' cases demonstrate that the canons of statutory construction Respondents invoke apply only to statutes that – unlike the Act – are ambiguous and susceptible of more than one meaning. *See Chamberlin v. Missouri Elections Comm'n*, 540 S.W.2d 876, 879 (Mo. banc 1976) (conflict between statutory sections that were "ambigu[ous]" when read together could be resolved through a limiting construction to which the statutes were "fairly susceptible"); *City of Jefferson v. Missouri Department of Natural Resources*, 863 S.W.2d 844, 847-48 (Mo. banc. 1993) (Court construed statutes that "[we]re not clear" and were "susceptible to more than one construction").

In two of Respondents' cases, this Court struck down laws that were not susceptible to a saving construction. In *M&P Enterprises, Inc. v. Transamerica Financial Services*, 944 S.W.2d 154 (Mo. banc 1997), this Court found that to follow the suggestion of the appellant in that case "would not be [a] construction of the statutes. It would be a judicial rewriting of the statutes. Given the plain meaning of the language used, the statues cannot reasonably be [so] interpreted . . . ." *Id.* at 159. In *Asbury v. Lombardi*, 846 S.W.2d 196 (Mo. banc 1993), this Court

found that "clear and unambiguous terms simply cannot be read out of the statute," even if those terms render the law unconstitutional. *Id*. at 202.

Indeed, the State admits that the Act's terms are not ambiguous. *See*, *e.g.*, State Br. 22 ("[t]he [t]erms of the Act [a]re [e]asily [u]nderstood and [c]onstitutionally [v]alid [u]nder [t]heir [o]rdinary [d]ictionary [d]efinitions"). Given the admitted lack of ambiguity in the terms of the Act, this Court should not resort to narrowing or limiting constructions – even to avoid unconstitutionality. *See Bd. of Educ. v. State*, 47 S.W.3d 366, 371 (Mo. banc 2001); *State v. Carpenter*, 736 S.W.2d 406, 408 n.1 (Mo. banc 1987); *see also M&P Enterprises*, 944 S.W.2d at 159 (refusing to rewrite statute to save it from unconstitutionality); *Asbury,* 846 S.W.2d at 202 ("clear and unambiguous terms simply cannot be read out of the statute," even if those terms render law unconstitutional).[6]

In any event, Respondents do not bother contesting that under the Trial Court's narrowing construction of the Act, some protected speech is banned. *See*

[6] Respondents also err in asking this Court to adopt a narrowing construction based on "possible constitutional infirmities." City Br. 15 (emphasis added). Before the Court can determine if a narrowing construction is necessary, it must determine if the Act is unconstitutional. *See Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975) (after determining that the ordinance was unconstitutional, Court looked to whether it could be saved by a limiting construction).

Aplt. Br. 48-50. Nor do Respondents contest that the Trial Court's construction has a chilling effect because the term "information and counseling regarding one's reproductive rights" (Appx. at A22), is vague.[7] Thus, even if this Court adopts the Trial Court's construction, the Act is unconstitutional.

C. The Term "Intentionally" Does Not Remove Protected Speech From The Act's Prohibition

Respondents' arguments regarding the Act's scienter requirement merely confirm that the Act bans protected speech. The City admits that the Act creates liability for giving information with the "intent or purpose . . . that the minor obtain an abortion . . . without parental consent or judicial bypass." City Br. 18. But, Plaintiffs often provide referrals to out-of-state health care facilities knowing that a teen will use that information to avoid obtaining parental consent to the abortion. Consider, for example, the case of a minor who tells her clergy

[7] Contrary to the impression given in Respondents' Briefs, on appeal, Plaintiffs' assertions regarding vagueness are limited to the argument that the Trial Court's "narrowing construction" is vague. *See* Aplt. Br. Argument I, D. Respondents err in asserting that Plaintiffs "bear[] a heavy burden of showing that the statute is impermissibly vague in all of its applications." State Br. 17. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982), clarifies that this standard applies only if – unlike here – the law "implicates no constitutionally protected conduct" or speech. *Id*. at 494-95.

counselor that she fears parental abuse if her parents learn of her abortion decision, asks how to obtain an abortion without parental involvement, and is given the contact information for abortion providers in Illinois who do not require parental consent. In this not-infrequent circumstance (*see* LF at 17-19, ¶¶ 19-22; LF at 4-8, ¶¶ 11, 13-16, 19-23; LF at 27-28, ¶¶ 9-12; LF at 70-72, ¶ 2 & Ex. 1), by providing the requested information, the clergy counselor intentionally aids or assists the minor to obtain an abortion without parental consent or a judicial bypass. This is particularly so given that under Missouri law, a person "intend[s] the natural and probable consequences of his intentional acts," and Plaintiffs often know that the inevitable result of referring teens to an out-of-state abortion provider is that the teen will not obtain parental consent to her abortion. *State v. Dixon*, 655 S.W.2d 547, 558-59 (Mo. App. E.D. 1983), *overruled on other grounds*, *State v. Carson*, 941 S.W.2d 518 (Mo. banc 1997). In sum, even under the Respondents' interpretation of the Act's scienter requirement, some speech would be banned.[8]

D. The Act Violates Free Speech Rights

Because the Act's plain language cannot be construed as excluding all protected speech, it abridges Plaintiffs' free speech rights. Aside from contesting

[8] Respondents' scienter arguments focus on their claim that the scienter provision cures the Act's vagueness. But, Plaintiffs have not argued on appeal that the Act is vague – only that the Trial Court's "narrowing construction" is vague. *See* note 7, *supra*.

that protected speech is in fact banned, the State does not object to Plaintiffs' free speech analysis. The State thus appears to concede that if the Act reaches protected speech, it violates free speech rights under the analysis in Appellants' Brief.

The City, on the other hand, asks this Court to adopt the Trial Court's flawed "overbreadth" analysis, claiming the Act has "the potential of prohibiting both protected and unprotected speech." City Br. 22. But, the City does not identify any unprotected speech that is prohibited by the Act – and, in fact, there is none. The Act does not target defamation, obscenity, incitement, or any category of unprotected speech. This case is thus completely distinguishable from the City's overbreadth cases. In *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 244 (2002), the statute banned unprotected child pornography, as well as protected speech with sexual content. In *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), the statute banned both "a substantial spectrum of conduct that is . . . manifestly subject to state regulation," as well as protected political expression. *Id*. at 616. In *Virginia v. Hicks*, 539 U.S. 113 (2003), the policy prohibited unprotected trespass, as well as restricting protected demonstrations and leafleting. Here, in contrast, the Act prohibits only constitutionally protected speech and conduct.

Nor is the overbreadth doctrine appropriate on the theory that the Act targets conduct, and only incidentally reaches speech. Even if that were true – and there is no evidence it is – any ban on conduct that aids or assists minors to obtain abortions or abortion-related information violates the constitutional rights of

Plaintiffs' minor patients by unduly burdening their abortion right, denying them equal privileges and immunities, and violating their right to travel interstate. *See* Aplt. Br. Argument §§ IV-V; Argument §§ IV-V, *infra*. Because the Act has no constitutional applications, overbreadth analysis is inapplicable.

Overbreadth is also inapplicable because it typically applies only where a person seeks to invalidate the law because it could violate someone else's rights. This is apparent from the City's cases. *See Broadrick*, 413 U.S. at 609-10 (the challengers' conduct was admittedly not protected); *Hicks*, 539 U.S. at 118 (challenger did not purport to have engaged in protected conduct). Here, in contrast, Plaintiffs routinely engage in the protected activities the Act bans. *See* LF at 17-19, ¶¶ 19-22; LF at 4-8, ¶¶ 11, 13-16, 19-23; LF at 27-28, ¶¶ 9-12; LF at 70-72, ¶ 2 & Ex. 1.

In any event, even if overbreadth analysis applied here, the Act would still be "substantially overbroad," and therefore unconstitutional, because a significant part of Plaintiffs' professional practices consists of speech the Act bans. *See* LF at 17-19, ¶¶ 19-22; LF at 4-8, ¶¶ 11, 13-16, 19-23; LF at 27-28, ¶¶ 9-12; LF at 70-72, ¶ 2 & Ex. 1.

The City further errs in arguing that even under a direct free speech analysis, the Act is constitutional. Recognizing that the Act cannot survive if it imposes a content-based restriction, the City argues that the Act's speech ban is content and viewpoint-neutral because it was enacted for the purpose of protecting parents' interests, "and not for the mere purpose of restricting protected speech."

City Br. 30. But just because a law is well-meaning, does not make it content-neutral. In *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), the Court struck down an ordinance banning certain bias-motivated crimes, although the banned conduct was "reprehensible." 505 U.S. at 396. *See also Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997) (ban on internet transmission of "indecent" or "patently offensive" communications was unconstitutional, although goal was to protect minors from sexually explicit material on the internet); *Interactive Digital Software Ass'n v. St. Louis County, Mo.*, 329 F.3d 954 (8th Cir. 2003) (ban on sale of graphically violent videos to minors was unconstitutional, although goal was protecting minors from psychological harm).

Hill v. Colorado, 530 U.S. 703 (2000), is not to the contrary. That statute prohibited knowingly approaching another person, without consent, for the purpose of engaging in <u>any speech</u>. This, by definition, is a content-neutral restriction. The Act, in contrast, only prohibits certain speech. Because the Act bans <u>only</u> speech that aids and assists minors to obtain abortions outside Missouri, it is unconstitutional.

III: IF THE ACT APPLIES EXTRA-TERRITORIALLY IT VIOLATES THE COMMERCE CLAUSE AND DUE PROCESS

The State's only response to Plaintiffs' claim that the Act's extra-territorial reach violates the Commerce Clause and Due Process, is to assert the Act has no extra-territorial effect. State Br. 27-28. If this Court agrees with the State's interpretation, Plaintiffs agree that their extra-territoriality-based claims are moot.

However, absent a definitive interpretation from this Court, Plaintiffs take no solace in the State's litigation-inspired reading of the Act.

This is especially so because the City disagrees with the State's reading. The City recognizes that the Act "creates a legal cause of action against those that violate its terms regardless of where the abortion procedure was performed, and regardless of whether the abortion was performed by an in-state or out-of-state entity," City Br. 35 (emphasis added). *See also* City Br. 36 ("Appellants may be prevented from performing out-of-state abortions, in cases where they know the potential patient is a Missouri minor, and is unwilling to comply with parental consent regulations.") (emphasis added). Indeed, the City acknowledges that: "There is evidence that the legislature wanted to target abortion providers in Illinois in particular, as parental consent is not required there." City Br. 51-52 (emphasis added).

Significantly, the City never even attempts to argue that the Act is permissible under the dormant Commerce Clause despite its extraterritorial application. Nor could it. If the Court agrees with the City that the Act "prevents [Plaintiffs and others] from performing out-of-state abortions" in certain cases, City Br. 36, it must conclude that the Act violates the Commerce Clause *per se*. *See* Aplt. Br. 63-65.

Likewise, if the Act's prohibition on "caus[ing]" an abortion without parental consent applies to abortions performed outside Missouri, the Act violates the due process rights of non-Missouri abortion providers. The City's main

response is that the "minimum contacts" *in personam* jurisdiction requirement obviates any due process problem with liability under Missouri law for out-of-state conduct. *See, e.g.*, City Br. 39 ("[a]ssuming that a[n] . . . out-of-state defendant had the requisite minimum contacts to be sued in Missouri, jurisdiction would also be proper under the long-arm statute [even if] the tortious conduct may have occurred outside Missouri"). But this is simply not the law. Irrespective of minimum contacts: "[a] State cannot punish a defendant for conduct that may have been lawful where it occurred." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 421 (2003) (emphasis added). That lawful out-of-state conduct may sometimes be "probative" of tortious in-state conduct, *State Farm*, 538 U.S. at 422, hardly means that a State may proscribe the out-of-state conduct. Indeed, the Supreme Court specifically admonishes that a "jury must be instructed . . . that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred." *Id.*

In sum, Respondents offer no convincing rebuttal to Plaintiffs' claim that if the Act punishes out-of-state conduct, it violates the Commerce Clause and due process.

IV: THE ACT IMPOSES AN UNDUE BURDEN ON PLAINTIFFS' CLIENTS

Even if the Court agrees that the Act does not apply extraterritorially, it still compels some Missouri minors to seek a judicial bypass in two states.[9] If a Missouri minor wants assistance in accessing an out-of-state abortion from someone who lives in Missouri (be it a clergy person, grandmother, or other trusted adult), she could only do so if she first obtained a judicial bypass order from a Missouri court, in addition to a judicial bypass order from a court in the state where the abortion is being performed (if it requires parental involvement). Thus, the State's interpretation does not resolve the undue burden imposed on minors who seek the accompaniment and assistance of trusted adults when they seek out-of-state abortions.

Respondents claim that the Act's burdens are justified by its purpose; that the Act does not ban abortion; and that any burdens are not created by the State. These assertions are legally irrelevant. In *Casey*, 505 U.S. 833, the Court held that

> a finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus. A statute with this purpose is invalid because the means

[9] Although the State questions whether two bypasses would be required even if the Act applies extraterritorially, *see* State Br. 32 n.4, the City confirms that Plaintiffs are "correct[]" that the Act would require some minors to engage in judicial bypass procedures in two separate states. City Br. 41.

> chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it. And a statute which, while furthering the interest in potential life or some other valid state interest, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends.

505 U.S. at 877 (emphasis added). *Casey* makes clear that the "purpose" and "effect" analyses are distinct: A statute with an illegitimate "purpose" is unconstitutional even if in practice it does not impose a substantial obstacle on the abortion right. And, conversely, if a statute has the "effect" of placing a substantial obstacle in the path of a woman's choice, it is unconstitutional even if it serves a beneficial purpose. Thus, in *Casey*, although the twenty-four-hour mandated delay and counseling law had a worthwhile purpose, the Court assessed whether the law "is nonetheless invalid because in practice it is a substantial obstacle to a woman's choice to terminate her pregnancy." *Id*. at 885. So, here, even if the Act has a salutary purpose, it is unconstitutional because "in practice it is a substantial obstacle to a woman's choice to terminate her pregnancy." *Id.*

In addition, contrary to the City's arguments, the Act imposes an undue burden even though it does not ban all abortions or make abortions virtually impossible to obtain. In *Casey*, the spousal notice requirement was unconstitutional even though for most women it did not create a substantial obstacle. 505 U.S. at 894 (95% of married women voluntarily tell their husbands

of their abortion). In striking down this provision, the Court focused on married women who do not wish to notify their husbands of their abortion. Because the law operated as a substantial obstacle to a "large fraction" of those women, it was an undue burden and invalid. 505 U.S. at 895. So, here, because the Act would operate as a substantial obstacle to a large fraction of young women in Missouri who need to go through two judicial bypass procedures to obtain an out-of-state abortion without parental involvement, it is an undue burden and invalid.[10]

It is also irrelevant that some of the burdens imposed by the Act are not of the State's making. In *Casey*, the Court spousal notice requirement was unconstitutional based on its impact on battered women, although the fact that some married women are battered is not a situation created by the state. 505 U.S. at 893-95. Also, the *Casey* Court considered whether the twenty-four-hour delay imposed an undue burden by looking at its impact on women who are poor, who must travel long distances, who must keep their abortions confidential, and who will be exposed to harassment by anti-abortion protestors. 505 U.S. at 886. None of these considerations were created by state law.

[10] It is irrelevant that some minors already voluntarily obtain abortions without adult accompaniment. City Br. 43. The state may not deprive teens of adult assistance and accompaniment, even if some minors choose to have abortions that way. *See Casey* (although most married women voluntarily tell spouses about their abortions, mandated notice is unconstitutional).

In arguing that the Act does not impose an undue burden, the State mischaracterizes *Fargo Women's Health Org. v. Shafer*, 18 F.3d 526 (8th Cir. 1994). There, the Eighth Circuit, consistent with the statutory language, construed a twenty-four hour waiting period law as allowing women to receive the mandated pre-abortion information by telephone such that women did not have to make two trips to a clinic to obtain an abortion. *Id.*, 18 F.3d at 533. Because the law did not require any additional travel, nor did it impose any new burdens on women's ability to travel, the Court upheld the law "under these circumstances." *Id.*

Unlike the law held in *Fargo*, the Act imposes additional burdens on minors that would not otherwise be there. For minors living in the western part of Missouri whose parents will not consent to their abortion, the Act forces them to choose between traveling to St. Louis where they can obtain an abortion after going through a single judicial bypass proceeding, or going through two separate judicial bypass proceedings, and then obtaining the abortion without extensive travel out-of-state.[11] In addition, for any minor seeking an out-of-state abortion whose parents will not consent to the abortion, the Act imposes obstacles by depriving them of any assistance from trusted adults.

[11] While the State is correct that no court has found a double-bypass requirement unconstitutional, that is only because no other state has ever attempted to pass a law that would impose such an onerous requirement.

It strains credulity for the City to argue that the burdens the Act imposes on minors' ability to obtain abortions outside Missouri are merely "incidental" or "indirect." City Br. 42, 44. There is no doubt that the very purpose of the Act is to make it harder for minors to obtain abortions outside Missouri without first involving their parents, by penalizing anyone who attempts to assist the minor. State Br. 31-32; *see* City Br. 40-41.

Requiring minors to seek two judicial bypass orders in two court systems is irrational, and serves no purpose other than making it harder for minors to obtain abortions. This is impermissible. As the Eighth Circuit held in *Planned Parenthood of Greater Iowa v. Atchison*, 126 F.3d 1042 (8th Cir. 1997): "Where a requirement serves no purpose other than to make abortions more difficult, it strikes at the heart of a protected right, and is an unconstitutional burden on that right." 126 F.3d at 1049. That is precisely the case here.

V: THE ACT DENIES PLAINTIFFS' CLIENTS THE RIGHT TO EQUAL PRIVILEGES AND IMMUNITIES, AND THE RIGHT TO TRAVEL INTERSTATE

A. The Act Violates The Rights Of Plaintiffs' Clients Under The Equal Privileges And Immunities Clause

The State is wrong in arguing that "[t]here is no claim here of another state depriving Missouri minors of rights that are available to that other state's own citizens." State Br. 38. To the contrary, that is precisely what Plaintiffs claim. The denies Missouri teens the right to travel to another state for an abortion and be

treated like that state's own citizens. Because of the Act, Missouri minors having abortions in Illinois, for example, would have to obtain parental consent or receive a judicial bypass from a Missouri court. But non-Missouri minors having abortions in Illinois would have to do neither. Likewise, non-Missouri minors whose parents were not involved in their abortion decision could pay for the procedure with funds borrowed from a trusted adult, or could be transported to the health care facility by a trusted adult, without obtaining a judicial bypass – but Missouri minors could not do so.

Indeed, the City admits that Missouri minors will be treated differently than citizens of other states when they seek abortions outside Missouri: "Missouri minors are free to go out-of-state [for] abortions, although abortion providers may limit access based on the minor's willingness to comply with Missouri's parental consent statute . . . ." City Br. 46-47. In putting Missouri minors in the position that out-of-state physicians may refuse to perform an abortion unless they comply with Missouri law, the Act deprives them of the right to be "upon the same footing with citizens of other States" when they have abortions out-of-state. *Paul v. Virginia*, 8 Wall. 168, 180 (1869).

B. The Act Violates The Rights Of Plaintiffs' Clients To Travel Interstate

The State argues that even if a minor has to obtain a Missouri judicial bypass order in order to receive the assistance of a trusted adult in having an out-of-state abortion, the impediment on the right to travel "is a small one," State Br.

36, or, at least, that the burden on the abortion right is justified by the State's compelling interest in preserving parental rights. *Id*. at 43-44.

The Act unconstitutionally impairs the right to travel even if it does not ban it outright. Aplt. Br. 77-79. Moreover, regardless of the severity of the burden, the Act violates the right to travel because its very purpose is to prevent minors from having out-of-state abortions.[12] *Cf*. City Br. 51-52 (the purpose of the Act was to prevent Missouri minors from having abortions in Illinois without parental or judicial consent). A state law abridges the right to travel not only when it actually deters such travel, but also when – as with the Act – "impeding travel is its primary objective." *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 903 (1986), *citing Zobel v. Williams*, 457 U.S. 55, 62, n.9 (1982); *Shapiro v. Thompson*, 394 U.S. 618, 629 (1969), *overruled in part on other grounds*, *Edelman v. Jordan*, 415 U.S. 651 (1974) ("the purpose of inhibiting migration . . . is constitutionally impermissible").

Because the Act's "primary objective" is to deter minors from traveling outside Missouri for an abortion where they will not have to involve their parents, the Act is an unconstitutional infringement on the right to travel. *Soto-Lopez*, 476 U.S. at 903; *Zobel*, 457 U.S. at 62, n. 9 (1982); *Shapiro*, 394 U.S. at 629. This

[12] The State's case, *Cramer v. Skinner*, 931 F.2d 1020, 1031 (5th Cir. 1991), is thus inapplicable because that law served a valid interest that neither impeded travel nor limited access to constitutionally-protected medical services.

fundamental right cannot be trumped by an interest in promoting parental rights. *Cf. Interactive Digital Software Ass'n*, 329 F.3d at 960 (government cannot justify violating fundamental right "by wrapping itself in the cloak of parental authority").[13]

VI: THE ACT IS NOT SEVERABLE

The Act violates Plaintiffs' constitutional rights in all its applications and therefore must be declared unconstitutional and enjoined in its entirety. Even if the Act has constitutional applications, they cannot be severed from the unconstitutional ones. To sever applications from a single unified provision, like the Act, would require inserting words into the statute to limit its scope, as opposed to severing separate, unconstitutional provisions. This Court has recognized that it cannot undertake such a judicial rewriting: "The statutory doctrine of severability permits one offending provision of a law to be stricken and

[13] *Veronia School District 47J v. Acton*, 515 U.S. 646 (1995), is inapplicable because it involves the right of *parents* to control their children, not the right of the *state* to control minors' travel rights. "Minors' lack of rights *vis-à-vis* parents does not necessarily show that they lack those rights *vis-à-vis* the state." *Nunez v. City of San Diego*, 114 F.3d 935, 945 (9th Cir. 1997). Moreover, given the constitutional protection for the abortion right, minors seeking abortion services have an even stronger right to freedom of movement in order to effectuate that right than the litigants there.

the remainder to survive. It has never allowed courts to insert words in a statute which were not placed there by the Legislature." *Akin v. Director of Revenue*, 934 S.W.2d 295, 300 (Mo. banc 1996) (emphasis added).

The State concedes this point, agreeing that if the Act has any constitutional applications, they cannot be severed. Rather, the State argues that if banning "aid" and "assist[ance]" is unconstitutional, the Court should strike those terms, leaving a ban only on intentionally "causing" a minor to obtain an abortion without first complying with Mo. Rev. Stat. § 188.028. But such a result is impermissible because it would contravene the Legislature's intent. Moreover, a ban on "causing" a minor to obtain an abortion would still be unconstitutional, at least as applied to out-of-state health care providers. *See* Aplt. Br. Argument § III; *supra* at Argument § III.

Unlike the State, the City urges the Court to sever the Act's constitutional applications.[14] The City correctly acknowledges that at the heart of the severability question is legislative intent. But as to that, the City claims merely that the Legislature intended to ensure that Missouri minors cannot have abortions anywhere without parental consent or judicial authorization. This says nothing

[14] The City's sole legal support is the court of appeals ruling, *Hodges v. Southeast Missouri Hospital Ass'n*, 963 S.W.2d 354 (Mo. App. W.D. 1998). But this ruling has never been followed or cited by any court, and thus appears to be anomalous.

about the Legislature's intent with respect to severability, and fails to provide the Court with "assurance" that the Legislature would have passed the Act if it prohibited only certain types of aid or assistance, or merely prohibited "caus[ing]" an abortion without parental consent or Missouri judicial bypass. *State ex rel. City of Ellisville v. St. Louis County Bd. of Election*, 877 S.W.2d 620, 624 (Mo. banc 1994), *superseded on other grounds by constitutional amendment*, Mo. Const. art. 6, § 8.

Moreover, the City does not respond to any of Plaintiffs' arguments for why severing applications here contravenes the Legislature's intent. Aplt. Br. 86-88. For example, it says nothing about the Legislature's rejection of an amendment that would have limited the Act's prohibition to "transporting" minors. *Id*. at 86-87. Likewise, it says nothing about the fact that the Legislature purposely used the broad open-ended terms "aid" and "assist," rather than specifying and "segregat[ing]" the particular forms of aid or assistance, some of which potentially could have been upheld, even if others were stricken. *Akin*, 934 S.W.2d at 301 (citing the lack of segregation into separate parts as evidence that the legislature did not mean the law at issue there to be severable); *see generally* Aplt. Br. 87-88.

This Court must conclude that it "cannot say with any degree of assurance" and thus should not "speculate that the Legislature would have approved" the Act if it were limited to only some applications of "aid" or "assist[ance]," or if the terms "aid" and "assist" were severed altogether. *Associated Industries of*

Missouri v. Dir. of Revenue, 918 S.W.2d 780, 785 (Mo. banc. 1996).

Accordingly, none of the Act's terms or applications can be severed.

CONCLUSION

For the foregoing reasons, Plaintiffs urge the Court to declare the Act unconstitutional in its entirety and permanently enjoin its enforcement.

Dated: June 5, 2006

Respectfully submitted,

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CERTIFICATION

Pursuant to Rule 84.06(c), I hereby certify that this brief (1) includes the information required by Rule 55.03; (2) complies with the limitations contained in Rule 84.06; and (3) contains 7,618 words. Moreover, the enclosed floppy disk has been scanned for viruses and is virus-free.

_____
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CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the foregoing, along with a floppy disk containing the word processing file of the same, was sent by United States mail, first class postage prepaid, this 5th day of June, 2006, to:

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