No. SC87321

In the Supreme Court of Missouri

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

Plaintiffs-Appellants,

vs.

JEREMIAH W. (JAY) NIXON, et al.,

Defendants-Respondents.

Appeal from the Circuit Court of Jackson County, Missouri
Case No. 0516-CV25949
The Honorable Charles Atwell, Judge Presiding

BRIEF OF THE AMERICAN JEWISH COMMITTEE AND ELEVEN OTHER ORGANIZATIONS LISTED ON THE INSIDE COVER AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS

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MARCH 24, 2006

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STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici are twelve religious and religiously-affiliated organizations committed to preserving religious freedom for all persons and to protecting a woman's right to carry or terminate her pregnancy in accordance with her religious beliefs and values.[1] Amici have a shared interest in the right of a woman of any age to make reproductive choices in accordance with her individual conscience and free from governmental interference. Further, amici submit that access to religious counseling is an important part of the free exercise of religion, and that minor women should be able to obtain access to religious counseling when making the difficult decision of whether to terminate a pregnancy. Amici recognize that there are many divergent theological perspectives regarding abortion and contend that clergy should be free to provide counseling on reproductive choices without governmental interference.

SUMMARY OF ARGUMENT

Mo. Rev. Stat. § 188.250(1) (the "Teen Assistance Ban" or the "Act") – which creates civil liability for persons who "intentionally cause, aid, or assist" minors in obtaining abortions without parental consent – is an unconstitutional infringement of the Free Exercise Clause of the First Amendment of the United States Constitution, which applies to Missouri through the

[1] Amici submit this brief amici curiae with the consent of the parties to this appeal. A letter confirming this consent has been filed with the Court.

Fourteenth Amendment of the United States Constitution, and Section 5 of Article I of the Bill of Rights in the Missouri Constitution. The First Amendment provides in relevant part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. Const., Amend. I. Section 5 of the Missouri Bill of Rights provides in relevant part "that no human authority can control or interfere with the rights of conscience . . . ." Mo. Const., Art. I, §5.

The broad language of the Teen Assistance Ban exposes a member of the clergy who provides religious counseling to a Missouri minor woman to civil liability if such counseling includes information about terminating her pregnancy and if she does not have parental or judicial consent to have an abortion. This restriction on religious counseling of minors concerning abortion rights is an undue burden on the Free Exercise rights of both the clergy and young women who seek out their counsel, as well as a violation of the Missouri Constitution. Religious doctrine and beliefs about abortion are varied and clergy often are called upon to communicate to congregants religious beliefs on that subject. Such counseling is a protected religious act which is substantially burdened by the Teen Assistance Ban.

Because the Act implicates the right to free speech in addition to religious freedom, it should be subjected to heightened scrutiny by this Court. The

legislature has not provided a compelling state interest that it seeks to further with the Teen Assistance Ban. As a result, the Act must be declared unconstitutional.

ARGUMENT

The Teen Assistance Ban Unconstitutionally Infringes Upon the Free Exercise of Religion.

A. The Teen Assistance Ban Prohibits Pro-Choice Religious Counseling of Missouri Minors Who Lack Parental or Judicial Consent

The Teen Assistance Ban prohibits any person – without exception – from "intentionally caus[ing], aid[ing] or assist[ing]" Missouri minors to obtain abortions without first complying with Missouri's parental consent abortion law. Mo. Rev. Stat. § 188.250(1).[2] The Act thus broadly prohibits speech that provides information about or support to Missouri minors who seek to have an abortion without parental or judicial consent. Of particular importance to amici is that the Act effectively bans counseling about abortion – including by clergy – of Missouri

[2] The Teen Assistance Ban provides in relevant part:

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

"2. A person who violates subsection 1 of this section shall be civilly liable to the minor and to the person or persons required to give the consent or consents under section 188.028 . . .

"3. It shall not be a defense to a claim brought under this section that the abortion was performed or induced pursuant to consent to the abortion given in a manner that is otherwise lawful in the state or place where the abortion was performed or induced."

minors who do not have parental or judicial consent. Indeed, the Act purports to prohibit such counseling of a Missouri minor even as to obtaining abortions in the neighboring states of Illinois and Kansas, where it is lawful for a minor to have an abortion without parental consent.

B. The Teen Assistance Ban Should Be Subjected to Heightened Scrutiny Because It Interferes with Religious Counseling, a Religiously Motivated Action that Combines Free Exercise and Free Speech Rights

The Teen Assistance Ban should be subjected to heightened scrutiny by this Court. The Act is not, on its face, directed at restricting religious exercise; rather, it is a facially neutral law that has the effect of burdening religious exercise. In general, such laws are subjected to rational basis scrutiny. This Court, however, should apply a heightened or intermediate level of scrutiny in assessing the constitutionality of the Teen Assistance Ban because it implicates both freedom of religion and free speech. *Employment Div.* v. *Smith*, 494 U.S. 872, 881-82 (1990).

Rigorous judicial review must be applied to laws that impinge upon religious speech to ensure that "no official, high or petty, can prescribe what shall be orthodox in . . . religion . . . or force citizens to confess by word or act their faith therein." *W. Va. Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 642 (1943). The United States Supreme Court has broadly held that facially neutral laws that burden "religiously motivated action[s]" and unduly infringe upon free exercise

rights "in conjunction with other constitutional protections, such as freedom of speech . . ." – so called "hybrid rights" – should be struck down as unconstitutional. *Smith*, 494 U.S. at 881 (citing, *inter alia*, *Cantwell* v. *Connecticut*, 310 U.S. 296, 304-07 (1940) and *Murdock* v. *Pennsylvania*, 319 U.S. 105 (1943)). *See also Chalifoux* v. *New Caney Indep. Sch. Dist.*, 976 F. Supp. 659, 671 (S.D. Tex. 1997) (holding that "heightened level of scrutiny" applies to "religion-plus-speech cases" and applying heightened judicial review in declaring unconstitutional a school safety regulation that prohibited wearing of Catholic rosary beads because "plaintiffs' causes of action combine free exercise of religion and free speech claims . . . . [and] the regulation places an undue burden on Plaintiffs, who seek to display the rosary . . . as a sincere expression of their religious beliefs"); *First Covenant Church of Seattle* v. *City of Seattle*, 840 P.2d 174, 181-83, 185 (Wash. 1992) (holding that a zoning law which required a religious organization to obtain government permission to alter the outside of a church "impermissibly infringes on the religious organization's right to free exercise and free speech" because the state did not show that the law limiting religious speech had used the "least restrictive means" to further a "compelling state interest").

Although *Smith* indicates that hybrid rights are entitled to a higher level of scrutiny than rational basis review, it does not specify whether such rights are entitled to intermediate or strict scrutiny. Subsequent cases suggest, however,

that the appropriate level of scrutiny is at least intermediate; that is, in order to sustain a burden on Free Exercise rights, "the government must demonstrate more than merely a reasonable relation" to a compelling state interest. *Chalifoux,* 976 F. Supp at 671. *See also Watchtower Bible & Tract Soc'y* v. *Vill. of Stratton*, 536 U.S. 150, 168-169 (2002) (intermediate scrutiny applied to ordinance that prohibited door-to-door canvassing without a license on the basis that the ordinance implicated both free exercise and free speech). Because the Teen Assistance Ban interferes with counseling by clergy – a practice that implicates both free speech and free exercise – an intermediate level of heightened scrutiny should be applied.

C. Religious Beliefs About Abortion Are Protected by the Free Exercise Clause of the United States Constitution and by the Bill of Rights of the Missouri Constitution

Individual beliefs rooted in religion are protected by the Free Exercise Clause. *Cantwell*, 310 U.S. at 303; *Sherbert* v. *Verner*, 374 U.S. 398, 402 (1963). Similarly, the Bill of Rights of the Missouri Constitution protects "the rights of conscience." Mo. Const., Art. I, §5. The United States Supreme Court has used an expansive approach in defining what qualifies as a religious belief. *Thomas* v. *Review Bd.*, 450 U.S. 707, 714 (1981) ("religious beliefs need not be acceptable, logical, consistent or comprehensible to others in order to merit First Amendment protection"); *Hobbie* v. *Unemployment Appeals Comm'n*, 480 U.S. 136, 144 (1987) (newly adopted religious views are fully protected). This Court

has also broadly construed the Free Exercise Clause, holding that it protects "the right to believe and profess whatever religious doctrine one desires." *Oliver* v. *State Tax Comm'n*, 37 S.W.3d 243, 248 (Mo. 2001).

Religious groups in our country disagree profoundly about abortion. *See Roe* v. *Wade*, 410 U.S. 113, 160-61 (1973). Religious doctrine on abortion varies widely among faiths, as well as among denominations of the same religion and among even clergy people of the same denomination. For many, beliefs about abortion are sincerely held and deeply religious. *See, e.g.*, *Rigdon* v. *Perry*, 962 F. Supp. 150, 161 (D.D.C. 1997) (holding that anti-abortion views of military clergy were sincerely held religious beliefs).

Some religions have issued formal declarations on the subject of abortion to guide congregants. The Roman Catholic Church has declared that life begins at conception and that consequently, abortion is an "immoral" act. *See Congregation for the Doctrine of the Faith, Declaration on Procured Abortion* (Nov. 18, 1974).[3] Many Protestant theologians and scholars, on the other hand, maintain that "human personhood . . . does not exist in the earlier phases of pregnancy," *McRae* v. *Califano*, 491 F. Supp. 630, 701 (E.D.N.Y. 1980), *rev'd on*

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[3] Although at least one Catholic organization, Catholics for a Free Choice, has stated that there "is much in the Catholic tradition that supports the pro-choice position." Frances Kissling, *Prayerfully Pro-Choice: Resources for Worship* 112 (Religious Coalition for Reproductive Choice 1999).

other grounds sub nom. *Harris* v. *McRae*, 448 U.S. 297 (1980), and as a result some Protestant denominations believe that abortion is permitted in many circumstances.[4] Other Protestant denominations recognize that there is a diversity of views within their own membership and as a result oppose governmental restriction on abortion.[5] Within the Jewish tradition, there is considerable

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[4] *See, e.g.*, *Resolution No. 1994-AO54: Reaffirm General Convention Statement on Childbirth and Abortion*, Journal of the 71st General Convention of The Episcopal Church, 323-25 (1994) (expressing "unequivocal opposition to any legislative, executive or judicial action on the part of local, state or national governments that abridges the right of a woman to reach an informed decision about the termination of pregnancy or that would limit the access of a woman to safe means of acting on her decision"); *United Church of Christ General Synod Statements and Resolutions Regarding Freedom of Choice: 12th General Synod 1979* (1979) (affirming "abortion may sometimes be considered," and that "God calls us when making choices, especially as these relate to abortion, to act faithfully"); United Methodist Church, *The Book of Discipline of the United Methodist Church* 65 (English ed. 1996) (expressing equal belief in the "sanctity of unborn human life," and "the sacredness of the life and well-being of the mother, for whom devastating damage may result from an unacceptable pregnancy"); Evangelical Lutheran Church in America, *What We Say About Public Life: Abortion* (1991) (stating that "there can be sound reasons for ending a pregnancy through induced abortion. We recognize that conscientious decisions need to be made in relation to difficult circumstances that vary greatly").

[5] *See, e.g.*, American Baptist Churches USA, *Resolutions: Abortion (Concerning, and Ministry in the Local Church)* (adopted, June 1988, modified, March 1994) ("Recognizing that each person is ultimately responsible to God, we encourage women and men [considering abortion] to seek spiritual counsel as they prayerfully and conscientiously consider their decision. … Many of our membership seek legal safeguards to protect unborn life. Many others advocate for and support family planning legislation, including legalized abortion as being in the best interest of

(Footnote continued…)

consensus that the fetus is not a person before birth, and that abortion is permitted, and may even be required in situations where the life of the mother is threatened. David M. Feldman, *Marital Relations, Birth Control, and Abortion in Jewish Law*, 271-84 (1986); *see also* Hayim Halevy Donin, *To Be a Jew* 140-41 (1972) ("All halakhic scholars agree that therapeutic abortions – namely, abortions performed in order to preserve the life of the mother – are not only permissible but mandatory").[6]

The religious significance of abortion has also been recognized by the courts. *See, e.g., Planned Parenthood* v. *Casey*, 505 U.S. 833, 852 (1992) (holding that "the abortion decision ... is more than a philosophic exercise. Abortion is a unique act [that is] fraught with consequences"); *Greenville Women's Clinic* v. *Commission*, 317 F.3d 357, 364 (4th Cir. 2002) (noting that the

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(Footnote Continued…)

women in particular and society in general."); *Covenant and Creation: Theological Reflections on Contraception and Abortion*, Minutes of the 195th General Assembly of the Presbyterian Church 369 (1983) ("pluralism of beliefs . . . leads us to the conviction that the decision regarding abortion must remain with the individual, to be made on the basis of conscience and personal religious principles, and free from governmental interference.").

6 There is disagreement among different branches of Judaism about the legal and moral status of non-therapeutic abortions and about the circumstances under which they are permitted. *See, e.g.*, Feldman, *supra*, at 284-94; Immanuel Jakobovits, "Jewish Views on Abortion," and J. David Bleich, "Abortion in Halakhic Literature," in Jewish Bioethics 118, 134 (Fred Rosner & J. David Bleich eds., 1979).

availability of religious counseling about the abortion decision is important "because of the gravity of a woman's right to make the abortion decision"); *Roe* v. *Wade*, 410 U.S. at 116 ("One's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitudes towards life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to color one's thinking and conclusions about abortion.")

D. The Teen Assistance Ban Substantially Burdens Clergy's Free Exercise Rights by Interfering with Religious Counseling of Missouri Minors Who Do Not Have Parental or Judicial Consent to Obtain an Abortion

Because to many abortion is a religious issue, and counseling on religious issues is a religious exercise, providing counseling on abortion is a religious exercise. *Greenville Women's Clinic* v. *Commission*, 317 F. 3d 357, 364 (4th Cir. 2002). The Teen Assistance Ban's prohibition of religious counseling of pregnant minors who lack parental consent or judicial sanction to obtain an abortion is a state-imposed burden on this fundamental exercise of a religious right.

The right to obtain or to offer religious counsel uninhibited by government interference is protected by the Free Exercise Clause of the First Amendment to the United States Constitution and by the Bill of Rights of the Missouri Constitution. Courts have recognized the importance of religious

counseling as a protected religious exercise in several contexts. *See, e.g.*, *Scott* v. *Hammock*, 870 P.2d 947, 951-54 (Utah 1994) (recognizing a clergy-communicant privilege and noting that "compelling a priest to breach the confidentiality of the confessional would violate the constitutional right to the free exercise of religion"); *Mockaitis* v. *Harcleroad*, 104 F.3d 1522, 1530 (9th Cir. 1997) (holding that taping a prisoner's religious confession to a Catholic priest "substantially burdened [the priest's] exercise of religion as understood in the First Amendment"); *Rigdon* v. *Perry*, 962 F. Supp. 150, 164 (D.D.C. 1997) (holding that an administrative regulation prohibiting military chaplains from "advocat[ing] what they believe to be appropriate religious conduct" was unconstitutional because it "muzzl[ed] religious guidance").

At least one court has also held that religious counseling on abortion is protected by the First Amendment. In *Greenville Women's Clinic* v. *Commission*, a South Carolina regulation requiring abortion clinics to make available religious counselors was challenged as a violation of the Establishment Clause of the First Amendment. The Court of Appeals for the Fourth Circuit held that the regulation did not violate the Establishment Clause, noting that, "[r]ather than establishing religion, [it] would appear at most to require a clinic to accommodate the requests of patients to exercise religion, a right also protected by the First Amendment." *Greenville Women's Clinic* v. *Commission*, 317 F. 3d at 364. The court also observed that religious counseling is particularly appropriate

"because of the gravity of a woman's right to make the abortion decision." *Id.* Similarly, in *Rigdon*, 962 F. Supp. at 164, the United States District Court for the District of Columbia held that a military regulation which prohibited anti-abortion clergy from counseling congregants to write letters to their Congressmen supporting a ban on "partial-birth" abortions was an undue burden on free exercise.

Here, Missouri has prohibited clergy from providing religious counseling about abortion to pregnant Missouri teens who do not have parental or judicial consent to obtain an abortion. The statute restricts the content of religious counseling by prohibiting clergy from providing information to a minor who lacks consent that could aid or assist her in obtaining an abortion outside of the state of Missouri, where it is lawful to do so. In particular, if a clergy member provided information about abortion clinics in Illinois and Kansas, that advice could expose him or her to civil liability under the Teen Assistance Ban, Mo. Rev. Stat. 188.250(2), even though it would be legal for the Missouri minor to obtain an abortion without parental consent in, and under the laws of, those states. The clergy members of amici who provide religious counseling on abortion issues, as well as the clergy counselors of plaintiff-appellant Missouri Coalition for Reproductive Choice, often provide this type of information to pregnant minors and as a result will be restricted in the counsel they can provide by the Teen Assistance Ban. ROA 0027-8 (Turner Aff. ¶¶9-10).

E. The Teen Assistance Ban Unduly Burdens Free Exercise Because There Is No Compelling State Interest

Where a sincere religious belief is substantially burdened by government action, the state must show that the burden is justified by some compelling state interest. *Sherbert* v. *Verner*, 374 U.S. 398, 406 (1963); *see also People* v. *Woody*, 394 P.2d 813 (Cal. 1964) (holding unconstitutional the conviction of American Indians for the religious use of peyote because it did not meet the compelling state interest requirement); *Rigdon*, 962 F. Supp. at 162 (holding that maintenance of a politically neutral military is not a sufficiently compelling objective to justify the burden on free exercise from prohibition on religious counseling on abortion).

In enacting the Teen Assistance Ban, our Legislature has not provided or even suggested any such compelling state interest. Judge Atwell, in the trial court, noted that "[i]t is reasonable to believe that the majority of the Missouri Legislature felt that regulating or restricting abortions for minors constitutes a legitimate and compelling state interest." *Planned Parenthood of Kansas and Mid-Missouri* v. *Nixon*, Case No. 0516-CV25949 at 21 (Cir. Ct. Jackson County 2005). The state is not entitled to the benefit of an inference that the impugned legislation protects some unidentified compelling state interest. Rather, the state must affirmatively demonstrate a compelling state interest that is being furthered. *Sherbert*, 374 U.S at 406. Where intermediate scrutiny applies,

"the Court ordinarily does not supply reasons the legislative body has not given." *Watchtower Bible & Tract Soc'y of N.Y., Inc*. v. *Vill. of Stratton*, 536 U.S. 150, 170 (2002) (Breyer, J., concurring). Given the absence of any articulated compelling state interest, the Teen Assistance Ban must be declared unconstitutional under the First Amendment of the United States Constitution and the Bill of Rights of the Missouri Constitution.

CONCLUSION

For the foregoing reasons, as well as those advanced by the Plaintiff-Appellants, this Court should declare the Teen Assistance Ban unconstitutional as violative of the Free Exercise Clause of the First Amendment to the United States Constitution and Section 5 of the Bill of Rights of the Missouri Constitution.

Respectfully submitted,

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March 24, 2006

RULE 84.06(C) CERTIFICATION

I hereby certify that this brief complies with the type-volume limitations of Rule 84.06(b) of the Missouri Rules of Civil Procedure. This brief was prepared in Microsoft Word 2002 and contains 3959 words, excluding those portions of the brief listed in Rule 84.06(b) of the Missouri Rules of Civil Procedure. The font is Times New Roman, proportional spacing, 13-point type. A 3 ½ inch computer diskette (which has been scanned for viruses and is virus free) containing the full text of this brief has been served on each party separately represented by counsel and is filed herewith with the clerk.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing brief and a diskette containing the brief were mailed, postage prepaid, this 23rd day of March 2006, addressed to the following:

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