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JURISDICTIONAL STATEMENT

This appeal arises out of the trial court's denial of a motion for family access order filed pursuant to RSMo. § 452.400.3 and challenges the constitutionality of that statute on equal protection grounds. This Court has exclusive appellate jurisdiction over challenges to the constitutionality of state statutes. Mo. Const. Art. V, § 3.

The constitutional question has been properly preserved for review in this court inasmuch as Appellant raised it at the earliest possible opportunity, the chambers hearing in this matter, and when the trial court's initial judgment made no reference to her constitutional contentions, Appellant filed a motion for entry of amended judgment, and an amended judgment was entered setting out the trial court's analysis, and rejection of, her arguments. *See, e.g., E.M.R. and G.P.R. v. G.E.R.*, 431 S.W.2d 152, 153-154 (Mo. 1968).

Although during the pendency of this case, Appellant and Respondent have entered into a stipulation regarding parenting time and Respondent is not presently withholding access to Ms. Faulkner's daughter, this dispute is not moot. First, the trial court on remand could still grant effectual relief under § 452.400.6, such as an award of compensatory visitation time or a bond requirement to ensure future compliance with the court's judgment. Second, "[t]his issue is one of general public interest and importance, is capable of repetition and may evade appellate review if not decided in this proceeding." *State ex rel. Missouri Pub. Defender Comm'n v. Pratte*, 298 S.W.3d 870, 885 fn. 33 (Mo. banc 2009). In the present case, the issue is very literally capable of repetition, since the child at issue in the dispute is only five years old, and thus there will

be many more opportunities between now and her attainment of majority for future violations of the paternity judgment such as the one alleged in this case. Finally, the important nature of the constitutional violation in this case warrants appellate review in any event, and appears likely to evade such review otherwise (indeed, it has apparently evaded it so far since the enactment of the statute at issue in this case in 1998).

INTRODUCTORY STATEMENT

In Missouri, if a parent fails to comply with the terms of a visitation or custody decree, the child's other parent can file a simple *pro se* "motion for family access order" pursuant to RSMo. § 452.400.3 to remedy the violation, and in so doing, can obtain compensatory visitation time, a bond requirement to ensure future compliance, an order for counseling, and several other powerful types of relief. The system for filing family access motions is straightforward and expedited, and a parent can have access to his or her child restored, and other relief granted, quickly, inexpensively, and – perhaps most importantly – without the need to hire an attorney.

That is, unless the child is illegitimate.[1] Section 452.400.3, by its own terms, applies only to custody and visitation decrees contained in judgments of dissolution of

[1] The preferred term today is "nonmarital child." However, because the case law uses almost without exception the designation "illegitimate," Appellant will use that word in this brief for the sake of clarity.

marriage or legal separation and thus excludes paternity judgments.[2] Parents whose children are illegitimate and whose custody and visitation orders are contained instead in a judgment of paternity are disadvantaged and are forced to seek relief using different, slower, and more expensive means. As Appellant will argue, § 452.400.3 unconstitutionally discriminates on the basis of illegitimacy, which the United States Supreme Court has identified as a quasi-suspect class, and the statute cannot withstand constitutional scrutiny.

STATEMENT OF FACTS

On October 5, 2007, the Circuit Court of Henry County entered judgment in a paternity action, finding that the respondent herein, Bryant K. Blanks, is the natural father of appellant Stephanie A. Faulkner's daughter, Alyssa, age 5. L.F. at 5. The judgment set out a parenting plan that detailed the schedule by which Ms. Faulkner and Mr. Blanks would have custody and visitation. L.F. at 5.

On August 4, 2010, Ms. Faulkner filed a Motion for Family Access Order pursuant to § 452.400.3, in which she alleged that Mr. Blanks was in violation of the terms of the paternity judgment by having failed to return Alyssa after a two week visit

[2] Appellant recognizes that the majority opinion in *State ex rel. Sanders v. Sauer*, 183 S.W.3d 238 (Mo. banc 2006) suggests that a paternity judgment "legitimates" a child; however, under the applicable U.S. Supreme Court jurisprudence cited herein, the holding in *Sanders* does not alter whether a child is "legitimate" or not for Fourteenth Amendment purposes.

and refusing to let Ms. Faulkner take Alyssa home. L.F. at 3-4. The motion was filed on the approved preprinted form promulgated by the Office of State Courts Administrator, but for one key alteration: Ms. Faulkner had crossed out the words "dissolution, legal separation, or modification," and typed the word "paternity" instead. *See id.*

The trial court held a hearing in chambers on September 15, 2010 that was not on the record. L.F. at 2. Counsel for both Ms. Faulkner and Mr. Blanks were present at the hearing, and Ms. Faulkner argued that by excluding paternity judgments from the scope of family access relief in § 452.400.3, the statute violated the Equal Protection Clause of the Fourteenth Amendment. L.F. at 2, 5-6. The trial court did not reach the merits of Ms. Faulkner's motion and made no factual findings with regard to whether or not Mr. Blanks had violated the paternity judgment's terms; instead, the court simply denied the motion, finding that under the plain language of the statute, it lacked statutory authority to grant the relief requested. L.F. at 5-6. The court specifically addressed and rejected Ms. Faulkner's constitutional arguments in an Amended Judgment entered October 4, 2010. *Id.* This appeal followed. L.F. at 7-8.

POINT RELIED ON

I.

The trial court erred in denying Appellant's motion for family access order based on the court's finding that it lacked authority under § 452.400.3 to grant relief in a paternity case, because such application of the statute violates the Equal Protection Clause of the Fourteenth Amendment as applied to Appellant, in that the statute so interpreted excludes illegitimate children from its benefits.

Gomez v. Perez, 409 U.S. 535 (1973)

Landoll by Landoll v. Dovell, 752 S.W.2d 323 (Mo. banc 1988)

Morgan v. Gaeth, 273 S.W.3d 55 (Mo. App. 2008)

State ex rel. Sanders v. Sauer, 183 S.W.3d 238 (Mo. banc 2006)

RSMo. § 452.400

U.S. Const. Amend. XIV

ARGUMENT

I.

The trial court erred in denying Appellant's motion for family access order based on the court's finding that it lacked authority under § 452.400.3 to grant relief in a paternity case, because such application of the statute violates the Equal Protection Clause of the Fourteenth Amendment as applied to Appellant, in that the statute so interpreted excludes illegitimate children from its benefits.

The Fourteenth Amendment to the United States Constitution provides, in relevant part, that "No State shall […] deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV. The Equal Protection Clause requires that the government treat all similarly situated people alike. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). However, "equal protection of the laws must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons." *Doe v. Phillips*, 194 S.W.3d 833, 845 (Mo. banc 2006) (quoting *Romer v. Evans*, 517 U.S. 620, 631, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996)). Generally, a statutory classification will be held constitutional if it is rationally related to a legitimate end of government. *Romer*, 517 U.S. at 631. Yet "if the law disadvantages a suspect class or affects a fundamental right, a court must apply" a higher level of scrutiny. *Doe*, 194 S.W.3d at 845 (internal quotation marks omitted).

A. The Equal Protection Clause of the Fourteenth Amendment prohibits statutory distinctions based on a child's illegitimacy, such as those contained in RSMo. § 452.400.3, unless the statute is substantially related to a legitimate state purpose.

In a line of cases beginning with *Levy v. Louisiana*, 391 U.S. 68 (1968) and *Glona v. Am. Guar. & Liab. Ins. Co.*, 391 U.S. 73 (1968), the United States Supreme Court began using the Equal Protection Clause to strike down statutory distinctions that were based on a child's illegitimacy. Thus, "in recent years, the equal treatment of illegitimate and legitimate children has been required" by such decisions as *Levy* and *Glona*. *State ex rel. Sanders v. Sauer*, 183 S.W.3d 238, 242 (Mo. banc 2006) (Wolff, C.J., dissenting). The scrutiny to be applied to distinctions based on illegitimacy is "intermediate scrutiny," which lies "[b]etween [the] extremes of rational basis review and strict scrutiny." *Clark v. Jeter*, 486 U.S. 456, 461 (1988). Restrictions based on illegitimacy "will survive equal protection scrutiny to the extent they are substantially related to a legitimate state interest." *Mills v. Habluetzel*, 456 U.S. 91, 99 (1982). This "scrutiny is not a toothless one." *Trimble v. Gordon*, 430 U.S. 762, 767 (1977) (internal quotation marks omitted).

Section 452.400.3 explicitly applies only to decrees of child custody and visitation contained in a judgment of dissolution of marriage or legal separation. By definition, these children will be "legitimate." *See, e.g., Sanders*, 183 S.W.2d at 241 (Wolff, C.J., dissenting) (citing dictionary definition of "legitimate" as both noun and verb). However, where custody and visitation arrangements are spelled out instead in a judgment of paternity (i.e., in cases where the child is illegitimate), parents cannot seek family access

relief under § 452.400.3. This creates a distinction between two similarly situated groups and gives rise to an equal protection inquiry.

At first glance, it appears that a threshold question exists as to whose equal protection concerns are implicated here. The statute prohibits parents of illegitimate children from obtaining family access relief, and the United States Supreme Court has never held that *parents* of illegitimate children are a suspect or quasi-suspect class; therefore, it may at first appear that only rational basis review should apply. *See, e.g.*, *McQueen v. Hawkins*, 578 N.E.2d 539, 540 (Ohio App. 1989). However, although Appellant will argue *infra* that the statute fails even rational basis review, Appellant contends that the statutory distinction in this case is subject to intermediate scrutiny. In filing a motion for family access order, a parent is not seeking only to vindicate his or her own interests, but also those of the child. This is because "the pole-star consideration in every child custody matter [is] the best interests of the children," *Vollet v. Vollet*, 202 S.W.3d 72, 76 (Mo. App. 2006), and "the needs of the child for a frequent, continuing and meaningful relationship with both parents" are considered in determining what custody arrangement is in the best interest of the child. RSMo. § 452.375.2. It is the public policy of the State of Missouri to assure that a child has frequent and meaningful contact with both parents. *See In re C.N.H.*, 998 S.W.2d 553, 557 (Mo. App. 1999). The child custody and visitation provisions of a judgment, then, whether it be a judgment of dissolution of marriage or of paternity, are those that are in the child's best interest, and the parent who files a family access motion is seeking to protect not only his or own interests, but also the child's interest in a meaningful relationship with both parents.

Thus, irrespective of whether the case is analyzed from the viewpoint of the illegitimate child or its parent, the same equal protection analysis should apply.

B. Under the Equal Protection Clause, once the State has offered the substantial benefits of family access motions to legitimate children, it cannot constitutionally deny the same benefits to illegitimate children.

In the seminal case of *Gomez v. Perez*, 409 U.S. 535, 538 (1973), the Court held that "a State may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally. We therefore hold that once a State posits a judicially enforceable right on behalf of children […] there is no constitutionally sufficient justification for denying such […] right to a child simply because its natural father has not married its mother. For a State to do so is illogical and unjust." (Internal quotations omitted.) Thus, while there is no constitutional requirement that Missouri offer family access motions at all, once it has offered the benefits provided by such motions to legitimate children, it cannot constitutionally deny the same benefits to illegitimate children.

The benefits provided by the family access motion are not insubstantial. Unlike a motion for contempt, a family access motion is statutorily designed to be a *pro se* procedure. Section 452.400.3 provides in relevant part that, "The state courts administrator shall develop a *simple* form for *pro se* motions […] *Clerks* […] *shall explain to* aggrieved parties the procedures for filing the form. […] Such form for *pro se* motions *shall not require the assistance of legal counsel to prepare and file*." (Emphasis added.) Since legal assistance is not required, the only expense associated with filing the

motion is the filing fee, which presumably could be waived pursuant to Rule 77.03 in cases of indigency. By contrast, persons like Ms. Faulkner, who, because of the illegitimacy of their children, must instead have recourse to a motion for contempt to enforce the terms of a judgment, will likely need to hire an attorney, which can result in considerable expense. *See, e.g.*, *Held v. Held*, 231 S.W.3d 232 (Mo. App. 2007) (attorney's fees amounting to $2,500 in motion for contempt proceeding). This can present an insurmountable barrier to access to justice, in the form of access to their children, to indigent persons, a barrier needlessly erected by the underinclusive nature of the family access motion statute.

Additionally, unlike a contempt proceeding, there are statutory provisions requiring expeditious handling of family access motions, presumably because the Legislature recognized the emergency nature of restoring children to their parents. Section 452.400.4 requires the clerk to issue a summons within five days of the filing of the motion; a response to the summons is due within only ten days. Significantly, §452.400.4 provides that "service [of summons in family access motion cases] shall be served at the earliest time and shall take priority over service in other civil actions." Under § 452.400.8, disposition of the case must occur no later than 60 days after service of the motion. No such expedited procedures or time limitations are provided statutorily for dealing with motions for contempt. Thus, while the ultimate relief that may be awarded pursuant to § 452.400.6 is the same regardless of whether it is a motion for contempt or a motion for family access order, it is clear from the statutory text that family access motions are expressly favored in comparison to motions for contempt. *See also*

Morgan v. Gaeth, 273 S.W.3d 55, 60 (Mo. App. 2008) (noting that the "Family Access Act provides additional remedies for the denial of visitation when that denial does not rise to the level justifying contempt.") The important differences between contempt motions and family access motions contained in § 452.400 underscore the disparity in treatment between parents with judgments of paternity and those with judgments of dissolution of marriage: the former group must pay more, wait longer, and overcome a greater number of procedural hurdles to regain access to their children, compared with the latter group, who can have their custody and visitation rights vindicated within a matter of days and at virtually no cost. Such a disparity, given that the disparity is premised entirely on the legitimacy of the child, violates the Fourteenth Amendment and offends equal protection.

C. The present case is readily distinguishable from *Landoll by Landoll v. Dovell*, on which the trial court relied, since this case, unlike *Landoll*, involves a final judgment of paternity.

The trial court, in denying Ms. Faulkner's motion for family access order, relied upon this Court's decision two decades ago in *Landoll by Landoll v. Dovell*, 752 S.W.2d 323 (Mo. banc 1988). However, *Landoll* is readily distinguishable from the present case. In *Landoll*, the trial court held that § 452.315 violated the Equal Protection Clause of the Fourteenth Amendment by allowing for awards of support *pendente lite* in dissolution actions, but not in paternity cases. This Court reversed, finding no equal protection violation. However, while *Landoll* is undeniably similar in some ways to this case, it must be noted that its holding was premised on the fact that "the application of equal

protection relies on a final judgment of paternity." *Id.* at 326. "Absent a final judgment of paternity, there can be no discrimination against the illegitimate child, since the very relationship which creates the obligation of support is not finally determined." *Id.* *Landoll* seems to echo, then, the concerns of the United States Supreme Court that in some cases there are "lurking problems with respect to proof of paternity." *See, e.g.*, *Clark*, 486 U.S. at 461. Here, though, there is no such issue: paternity has been conclusively established in a final judgment of the circuit court. Therefore, to the extent that cases like *Landoll* reflect anxiety regarding the due process rights of putative fathers, that issue has no application in this case. In fact, read carefully, *Landoll* seems to indicate the proper outcome in the present case: "The distinction between paternity actions and dissolution actions provides the rationale for rejection of respondent's equal protection arguments. There is no question but that once paternity is firmly established, an illegitimate child is as entitled to support from his father as the legitimate child" (citing *R. v. R.*, 431 S.W.2d 152 (Mo. 1968)). Thus, the *only* "rationale" the Court gave for rejecting the equal protection argument was the fact that a final judgment of paternity had not been made. No such rationale exists in this case.

D. Section 452.400.3 is unconstitutional as applied to Appellant because the statute's restrictions premised on illegitimacy cannot survive any level of constitutional scrutiny.

The delineation § 452.400.3 draws between parents of legitimate children and those with illegitimate children cannot withstand intermediate scrutiny. As noted above, in order to survive constitutional scrutiny, the statute's distinction between these two

groups must be "substantially related to a legitimate state interest." *Mills*, 456 U.S. at 99. And, as the Supreme Court has cautioned, "[i]n a case like this, the Equal Protection Clause requires more than the mere incantation of a proper state purpose." *Trimble*, 430 U.S. at 769.

Although promotion of stable family relationships is a legitimate state concern, the U.S. Supreme Court has consistently held that restrictions premised upon illegitimacy do not further such an interest. *See, e.g., Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 173 (1972) ("regulation and protection of the family unit have indeed been a venerable state concern. We do not question the importance of that interest; what we do question is how the challenged statute will promote it.")

Similarly, the Court has decisively repudiated the contention that statutes can discriminate based upon illegitimacy in order to influence the behavior of parents. "[W]e have expressly considered and rejected the argument that a State may attempt to influence the actions of men and women by imposing sanctions on the children born of their illegitimate relationships." *Trimble,* 430 U.S. at 769. Thus, even if the Legislature's purpose in allowing parents of legitimate children, but not those of illegitimate children, to file family access motions was to encourage the begetting of children in wedlock, such a purpose would nonetheless be impermissible under the Supreme Court's jurisprudence, despite the State's incontestable interest in promoting stable family relationships.

Indeed, no legitimate state interest can be identified that would justify the distinction set out in § 452.400.3, let alone one that would survive intermediate scrutiny.

Even if the State's interest in promoting marriage and the rearing of children in wedlock were sufficient to justify the statutory provision here, § 452.400.3 still could not withstand intermediate scrutiny, nor even for that matter rational basis, since the purported aim bears no rational relationship to the method used to obtain it. *See, e.g., Glona, supra*, 391 U.S. at 75 ("[W]e see no possible rational basis […] for assuming that if the natural mother is allowed recovery for the wrongful death of her illegitimate child, the cause of illegitimacy will be served. It would, indeed, be farfetched to assume that women have illegitimate children so that they can be compensated in damages for their death"); *Weber*, 406 U.S. at 173 ("Nor can it be thought here that persons will shun illicit relations because the offspring may not one day reap the benefits of workmen's compensation.") Similarly, it cannot be plausibly contended that men and women will marry and have children in wedlock in order one day to be able to file family access motions after their marriage ends, nor, conversely, that men and women will refrain from extramarital intercourse out of fear that they may not be able to obtain expedited access to their illegitimate children some day through a family access motion.

In fact, upon close examination, it becomes apparent that not only does the State have no interest in barring parents of illegitimate children from filing family access motions; instead, it is substantially in the State's interest to allow such filings, for at least two reasons. First, the public policy of Missouri favors the fostering of bonds between all parents and their children – legitimate or illegitimate – and the ability to ensure compliance with custody and visitation arrangements contained in judgments furthers this interest. *See Sanders,* 183 S.W.3d at 241 (Wolff, C.J., dissenting) (citing RSMo.

§ 210.818: "[t]he parent and child relationship extends equally to every child and every parent, regardless of the marital status of the parents"); RSMo. § 1.092 ("The child welfare policy of this state is what is in the best interests of the child"). Second, the State has an interest in ensuring respect for, and compliance with, the judgments of its courts, regardless of whether those judgments be denominated "paternity" or "dissolution of marriage." In any event, the State cannot be said to have any interest in promoting disregard of court judgments by making it more difficult for unoffending parents to seek redress of such violations.[3]

Section 452.400.3 is unconstitutionally underinclusive in its failure to permit parents with final judgments of paternity to file motions for family access orders. In cases of underinclusiveness in statutes of this type, the U.S. Supreme Court has recognized two remedies: strike down the statute entirely, or expand its benefits to the excluded class. *See e.g.*, *Wauchope v. U.S. Dept. of State*, 985 F.2d 1407, 1416-1417 (9th Cir. 1993). In cases such as this one, the U.S. Supreme Court generally prefers extension

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[3] It is worth noting, at least in passing, that other states have statutory provisions nearly identical to Missouri's family access motion, except that theirs do not exclude paternity judgments. *See, e.g.*, Kan. Stat. Ann. § 23-701; 43 Okla. St. Ann. § 111.3. If the parent of an illegitimate child in one of these states obtained the equivalent of Missouri's family access order in his or her state, Missouri's courts would be obliged to enforce it under the full faith and credit provisions of the Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A, even though such relief is not available in Missouri.

of a statute to invalidation. *See, e.g., Califano v. Westcott*, 443 U.S. 76, 89 (1979). This is especially the case when extending the statute to cover the omitted class will further the legislative purpose of the enactment. *See Eubanks v. Wilkinson*, 937 F.2d 1118, 1123 (6th Cir. 1991) (citing *Califano*, 443 U.S. at 91-93). *See also Assoc. Indus. of Missouri v. Dir. of Revenue*, 918 S.W.2d 780, 784 (Mo. banc 1996) ("[T]he statute must, in effect, be rewritten to accommodate the constitutionally imposed limitation, and this will be done as long as it is consistent with legislative intent.")

Here, since the clear purpose of the statute is to facilitate the restoration of a parent's access to his or her child, or the remediation of a violation of a court order – aims that under the public policy of this state apply to all parents and children, regardless of marital status – this Court should construe the statute to include paternity judgments rather than strike it down in its entirety. The legislative preference for severing the unconstitutional part of a statute in order to save the remainder of it is expressed in RSMo. § 1.140, which states clearly that "[t]he provisions of every statute are severable." *See also Assoc. Indus.*, 918 S.W.2d at 784 (noting that § 1.140 "expresses the legislative intent that all statutes […] should be upheld to the fullest extent possible"). Were the Court to sever from the second sentence of § 452.400.3 the words "of dissolution or legal separation," the statute would be rendered constitutional.

CONCLUSION

Section 452.400.3 erects an unfair, unconstitutional, and for an indigent person like Ms. Faulkner, a financially insurmountable, barrier to ensuring access to her children and compliance with a trial court's custody and visitation orders. The statute cannot

survive even the most deferential rational basis scrutiny, since it furthers no legitimate state purpose, and, by contrast, actually works *against* important state interests.

As this Court and the United States Supreme Court have continually recognized over the past half-century, the Constitution forbids discrimination against illegitimate children like that which persists in Section 452.400.3, and this Court should not countenance it. Therefore, Appellant respectfully prays this Court to find the statute unconstitutional as applied to Appellant and to construe the statute to apply to judgments of paternity, to reverse the judgment of the trial court, and to remand this cause for a hearing on the merits of Appellant's family access motion.

Respectfully submitted,

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CERTIFICATION OF COMPLIANCE WITH RULE 84.06(c)

The undersigned hereby certifies that Appellant's Brief:

(1) Includes the information required under Rule 84.04(f).

(2) Complies with the limitations contained in Rule 84.06(b).

(3) Contains 4,643 words, excepting the cover, certificate of service, certificate of compliance with Rule 84.06(c), and signature block.

CERTIFICATION OF COMPLIANCE WITH RULE 84.06(g) AND CERTIFICATE OF SERVICE

The undersigned hereby certifies that the disk filed herein containing Respondent's Brief has been scanned for viruses and is virus-free and that one copy of a disk containing this Brief in Microsoft Word for Windows format, together with two copies of the foregoing in hard copy, were mailed via First Class United States mail, postage prepaid, this 22nd day of January, 2011, to:

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