IN THE SUPREME COURT OF MISSOURI

Case No. SC88783

MISSOURI STATE MEDICAL ASSOCIATION, et al.,

Respondents,

v.

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

Appellants.

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

REPLY BRIEF OF APPELLANTS FRIENDS OF MISSOURI MIDWIVES, ET AL.

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ARGUMENT

I.

(Replies to Summary of Argument & Point I of Respondents' Brief)

In Point I of their brief, Respondents address the clear title challenge to HB 818. Their position is that the bill's title was underinclusive in violation of Article III, Section 23 of the Missouri Constitution.

A.

As an initial matter, Respondents attempt to attach significance to the fact that other sources outside the four corners of §376.1753 must be consulted to determine its meaning and effect. Brief of Respondents at 29. They also deem it significant that Appellants Friends of Missouri Midwives and the individual parties who practice as certified midwives do not refer to themselves as "tocologists" or as practitioners of "tocology," referring to themselves as midwives or practicing midwives. Brief of Respondents at 29. The problem with this argument is twofold.

First, Respondents overlook that it is Respondents who has made this case one about midwives and midwifery. Both Respondents and Appellants agree on the dictionary definition of "tocological" and "tocology" as not being limited solely to midwifery but to refer to "obstetrics or midwifery." Brief of Respondents at 29 (quoting Webster's New Twentieth Century Dictionary Unabridged at 1917); Brief of Appellants Friends of Missouri Midwives at 38 (*citing* The American Heritage College Dictionary (Houghton Mifflin Co. 1993) at

1422) (defining the term as "[t]he science of childbirth; midwifery or obstetrics"). While the term used by the Legislature in §376.1753 encompasses more than the practice of midwifery, it was Respondents who defined the scope of this lawsuit. They chose to designate the provision being challenged as the "midwife provision" throughout their petition. L.F. 6. This designation is repeated a multiplicity of times throughout. L.F. 6-19. Respondents' argument for standing is premised on their fear that §376.1753 will require them to interact with "unlicensed individuals holding themselves out as midwives." L.F. 8. In their description of HB 818 and the provisions of §376.1753, Respondents refer to the provision as "allow[ing] laypersons to practice midwifery in Missouri." L.F. 12. Respondents can hardly complain about the use of the terms midwives and midwifery throughout this case when they are the ones that have sought to make this case center on a subset of the broader term "tocological" in §376.1753.

Second, and more significant, the Respondents fail to show what legal significance there is to the argument that Respondents had to consult a dictionary to determine what "tocological" means or that there may be a great majority of people that would have to do the same. Respondents cite to no constitutional provision or case law which requires the Legislature to use the most simplified and basic language available. Nor do they cite to any constitutional requirement or case law which prohibits the Legislature from referencing other statutes, federal or state, as a means of designating the scope of what it being legislated.

These factors have nothing to do with the issue under consideration in a clear title challenge under Art. III, §23. The focus is not on what type of language is used and whether a construction of the provision being considered requires looking to other sources. The focus is on the purpose and effect of the provision and what relationship that purpose and effect have to the title of the bill. It is simply misguided and misleading to suggest, as Respondents do, that whatever methods of statutory construction might be called upon to interpret the meaning of a statute affects whether the subject of the bill is clearly expressed in its title.

B.

The greatest shortcoming in the Respondents' position, also adopted by the trial court, is the insistence that the purported procedural infirmities with the enactment of HB 818 stem from a substantive failure to provide for a level of regulation that satisfies the physicians who make up the associational parties to this lawsuit.

The physicians and their associations have clearly established their passion for regulation. As Respondents argue with respect to the clear title challenge:

> Section 376.1753 did not effect any change in the law other than exempting non-nurse midwives and ministers from legal regulation when providing pregnancy related services. It did not provide for licensure or oversight of such persons. It did not change the licensure laws for physicians or exempt them from professional discipline for coordinating care with such persons. It did not

> mandate insurance coverage for tocological services. It did not prohibit insurers from discriminating among providers of pregnancy related services. None of these details were addressed. Section 376.1753 is strictly limited to one narrow purpose and does not purport to address how it will relate to existing public health or health insurance laws.

Brief of Respondents at 30.

It should be apparent that Respondents are attempting to disguise what would be a mixed federal Fourteenth Amendment substantive due process and equal protection claim as a pure state law challenge to the procedural aspects of the enactment of HB 818. The defining issue is neither whether HB 818 satisfies the physicians and their associations as to the level of regulation they believe should be imposed on the provision of tocological services or on the practice of midwifery in the state or on the insurance companies providing health insurance nor whether the legislature could have enacted more comprehensive provisions or regulated tocology in a different manner. The defining issue is whether the title indicated in a general way the kind of legislation being enacted. *Nat'l Solid Waste Mgmt. Ass'n v. Dir. of the Dept. of Natural Res.*, 964 S.W.2d 818, 820 (Mo. banc 1998). Stated differently, whether the title, acting as a guideboard, indicates the general contents of the bill. *Edwards v. Bus. Men's Assurance Co.*, 168 S.W.2d 82, 92 (1942).

Respondents' apparent contention that the clear title requirement of Art. III, §23, imposes a mandate that the Legislature must regulate comprehensively or not at all flies in the face of the overarching principle of judicial review of actions of the Legislature, i.e., that the Legislature may choose to address matters of legislative concern in whatever increments or to whatever extent it deems advisable. *See, e.g., City of St. Louis v. Liberman*, 547 S.W.2d 452, 457 (Mo. banc 1977)(in deciding on the exercise of the police power, the Legislature "determine[s] both *what* areas will be regulated in the public interest, and to *what extent* such regulation can go")(emphasis in original); *Collins v. Dir. of Revenue*, 691 S.W.2d 246, 250 (Mo. banc 1985) (citing, *Katzenbach v. Morgan*, 384 U.S. 641, 656-57, 86 S.Ct. 1717, 1726-27 (1966)) (the Legislature may choose to take one step at a time and address itself to the phase of the problem which seems most acute to it at the moment); *State v. Davis*, 685 S.W.2d 907, 912 (Mo. banc 1984) (citing *Williamson v. Lee Optical of Okla.*, 348 U.S. 483, 488-89, 75 S.Ct. 461, 464-65 (1955)) (Legislature not left with choice of dealing with legislative issue in its entirety or not at all). This authority is in direct contrast to the argument of Respondents that the Legislature's only choice for making health insurance coverage available to insureds for the full range of tocological services, including the assistance of certified midwives, was to mandate such coverage or to prohibit insurers from discriminating against allied health care professionals such as certified midwives in the coverage provided under their policies of insurance.

Again Respondents show their misunderstanding of the subject of health insurance. Health insurance, like all insurance, is as much contractual in nature as it is dictated by statutes of the Legislature. It is concerned with the rights and obligations as between the insured and the insurer, with those rights defined under the contract of insurance by the subject matter of the insurance, the risk or contingency insured against, the amount of the coverage afforded, the duration of the risk and the premium paid for the coverage. *Burkhardt v. Gen. Am.Life Ins. Co.*, 534 S.W.2d 57, 64-65 (Mo. Ct. App. 1975). As this Court noted almost fifty years ago, "A contract of insurance is a voluntary contract and 'as long as the terms and conditions made therefore are not unreasonable or in violation of legal rules and requirements, the parties may make it on such terms, and incorporate such provisions and conditions, as they see fit to adopt.'" *State Farm Mut. Auto. Ins. Co. v. Ward*, 340 S.W.2d 635, 640 (Mo. 1960). In their zeal to impose regulation for the sake of regulating, Respondents miss the point that the Legislature did not have to mandate insurers provide health insurance for services of a midwife in relation to a pregnancy covered under the policy nor did it have to prohibit discrimination against insurance for these allied health care services. The Legislature was entirely free to decide that it would deal with the public policy of health insurance coverage for the services provided by certified midwives and other allied health services professionals covered by the term tocological or ministerial by simply enabling insurers and insureds to voluntarily contract for

such services by incorporating coverage for those services as a provision of the policy where previously the public policy of the state prevented such coverage.

For purposes of the clear title challenge, the issue is not whether the Legislature imposed a full level of regulation but whether the measures adopted for dealing with the problem, regardless of the level, are indicated in a general way by the title of the bill. As Respondents have pointed out, it has been "longstanding Missouri law" that certified midwives who are not also licensed as physicians or nurses may not provide their services in Missouri. Brief of Respondents at 37 (citing *State ex rel. Mo. State Bd. of Registration for the Healing Arts v. Southworth*, 704 S.W.2d 219 (Mo. banc 1986)). Pursuant to the general rule stated in *State Farm Mutual Automobile Insurance Co. v. Ward*, 340 S.W.2d 635, 640 (Mo. 1960), an insurer and an insured could not voluntarily contract for these services under a policy of health insurance because such a clause would violate both the law and public policy of the state. Following the enactment of HB 818 with its inclusion of §376.1753, parties to an insurance contract may now voluntary contract for these services. It is also notable that the Legislature achieved this result of enabling coverage through an amendment to the insurance code of the state. It bears repeating what was said in Appellants' opening brief – the Legislature chose the most direct and simplest route to accomplish its end of enabling insurers to provide health insurance coverage for the care provided by the allied health services professionals covered by §376.1753 in the course of an otherwise covered pregnancy. Prior to the enactment of §376.1753, health

insurers could not provide coverage for these services because it violated the law and public policy of the state. Following the enactment of §376.1753, health insurers could provide coverage for these services because the public policy impediment was lifted. If the Court were to affirm the trial court's judgment and if §376.1753 were declared invalid, health insurers could no longer provide coverage for these services because it would again violate the law and public policy of the state. Clearly, given the direct effect on the ability of health insurers to provide health insurance coverage for the health care services and costs covered by §376.1753, the title "relating to health insurance" includes a provision which enables health insurance coverage for those services.

C.

Respondents rely principally on *National Solid Waste Management Ass'n v. Director of the Department of Natural Resources*, 964 S.W.2d 818 (Mo. banc 1998), in support of their position. Reliance on that case is misplaced.

National Solid Waste involved a title that descended to particulars, i.e., it limited itself to "solid waste management" both by designation and by the list of statutory provisions being repealed. 964 S.W.2d at 821. The problem with the title, the Court noted, was that solid waste management and hazardous waste management (the provision in the bill being challenged) were mutually exclusive subjects as defined by the Legislature in the regulatory measures enacted by it. *Id.* at 820. In other words, a provision relating to hazardous waste management could in no way advance the cause of solid waste management. It was this mutual

exclusivity which led the Court to label the title as "affirmatively misleading" because "the phrase 'relating to solid waste management' erroneously implies that the bill does not relate to any other kind of waste management[.]" *Id.* at 821.

In contrast to *National Solid Waste*, the title to HB 818 does not descend to particulars as it concerns "health insurance" and does not attempt to join provisions that are mutually exclusive of one another. There is nothing affirmatively misleading about the inclusion of §376.1753 in HB 818. The purpose and effect of §376.1753 was to enable health insurers and their insureds to voluntarily contract for health insurance coverage for the designated allied health care services that related to pregnancies otherwise covered under policies of health insurance. Section 376.1753 is in no way mutually exclusive to the overarching purpose of health insurance but, rather, is directly supportive of it. In addition, unlike *National Solid Waste*, where hazardous waste statutes and solid waste provisions were separately and distinctly organized in the statutes, §376.1753, which directly effectuates health insurance coverage, is contained not just in the state's insurance code but in the chapter relating to health insurance. Ch. 376, RSMo., *Life, <u>Health</u> & Accident Insurance* (underlining added).

It is not by accident or oversight that Respondents nowhere attempt to define what is "health insurance," address its component elements, or recognize that health insurance is as much or more a voluntary contractual undertaking as it is a means for licensing and regulating insurance companies. Constrained by their self-imposed blinders, viewing §376.1753 as simply exempting midwives from

legal regulation when providing pregnancy related services, Respondents fail to see or address the very direct impact that §376.1753 has on insurance coverage being provided in the state. As Respondents would concede, though, if the "overarching purpose" of a bill can be gleaned from its title and the component parts are related to and directly carry out that overarching purpose, there is no clear title violation because the components of the bill conform to the title. Brief of Respondents at 30 (discussing the holding in *National Solid Waste*). The overarching purpose of HB 818 was to effectuate health insurance. As noted under subsection B, *supra*, §376.1753 directly effectuated health insurance coverage for the pregnancy-related services identified in the section. Prior to the enactment of §376.1753, health insurers could not provide coverage for these services because it violated the law and public policy of the state. Following the enactment of §376.1753, health insurers could provide coverage for these services because the public policy impediment was lifted. If the Court were to affirm the trial court's judgment and if §376.1753 were declared invalid, health insurers could no longer provide coverage for these services because it would again violate the law and public policy of the state.

D.

Respondents also points out that Appellants offered no independent explanation for the inclusion of the reference to ministerial certifications in §376.1753. Brief of Respondents at 29. Respondents apparently forget that it is Respondents who brought the lawsuit to challenge §376.1753 and it was

Respondents who defined what the scope of their challenge would be. It is also Respondents' burden, and a heavy one as case law makes clear, to demonstrate that the statute under attack clearly and undoubtedly violates constitutional limitations. *See, e.g., McEuen v. Mo. State Bd. of Educ.*, 120 S.W.3d 207, 209 (Mo. banc 2003). Nowhere in its petition defining the issues in this case do Respondents reference the word ministerial or ministry except in their quotation of §376.1753. L.F. 6-19. Even their quotation of the section is qualified by their indication that they are concerned solely with the "tocological certification" language in the section without even a hint that they are also concerned with the reference to "ministerial" certifications. L.F. 12. As also noted in subsection A, *supra*, Respondents' petition is permeated with references solely to midwives and midwifery. Further, the trial court pointed out that Respondents agreed that the term "ministerial" in §376.1753 was part of and inseparable from the term "midwife" or "midwives" for purposes of the judgment. L.F. 592. If Appellants did not offer an "independent explanation" for the existence of this term in §376.1753, it was because there was no reason to do so. It was Respondents' burden to raise the issue; Respondents did not see fit to challenge the term when it defined the issues for the case in their petition; and Respondents agreed the term had no independent existence from the terms midwife and midwives.

E.

Finally, Respondents argue, "After House Bill 818 was passed, its handler in the Senate was removed from his committee chairmanship. When similar

legislation was plainly worded during the 2007 legislative session, it could not pass the Senate. When similar sections were offered as an amendment to another bill relating to health insurance, they were determined to be non germane." Brief of Respondents at 33 (citations omitted). Exhibit 16, as it relates to Senator Loudon, merely states "This is to inform you that Senator John Loudon has been relieved of the chairmanship of the Senate Small Business, Insurance and Industrial Relations Committee until further notice. Please do not hesitate to contact me if you have any questions regarding this matter." Ex. 16 at 1528. Given the absence of an explanation for the removal in the record, it is not surprising that the trial court did not find this fact relevant or material to its decision. L.F. 589-609.

It should be clear to the Court that what Respondents are attempting to do by referencing this fact is to hope the Court will make some connection between the fact and other information outside the record, such as media reports. Clearly, Respondents labor under a belief that the Court can or will decide this case on matters outside the record. Appellants do not.

On this issue, as Respondents also point out in their response to an argument raised by the State in its original brief, "innuendo and speculation about the motivations of legislators should never be sufficient evidence to invalidate any piece of legislation." Brief of Respondents at 49. Even if the Court were inclined to consider what the Respondents appear to be tacitly suggesting, the problem with material of this type is twofold. First, one would have to believe that media

reports are always infallible and that they tell the entire story. Second, if courts are going to allow parties to delve into collateral issues concerning the motivations of individual legislators, then the motivation of President Pro Tempore Gibbons in removing Senator Loudon also becomes fair game for litigation. Nothing would prevent the parties from garnering potential evidence of contacts by lobbyists, associations, and individuals interested in the issue which preceded the removal of Senator Loudon or of campaign contributions by such persons to the legislator taking the action. The courts have rightfully held that they are not going to consider these collateral issues. *Pipe Fabricators, Inc. v. Dir. of Revenue*, 654 S.W.2d 74, 76 (Mo. banc 1983); *Missourians for Honest Elections v. Mo. Elections Comm'n*, 536 S.W.2d 766, 774-75 (Mo. Ct. App. 1976).

Respondents are also wrong in their belief that other bills considered during the legislative session which included midwife provisions show a lack of relationship between §376.1753 and health insurance. The other provisions were comprehensive regulatory systems for the licensure and oversight of midwife practice by a Board of Direct Entry Midwives. The fact that the Legislature might not have passed this comprehensive regulatory scheme says only that this particular comprehensive regulatory scheme did not have sufficient support in the legislature to pass. The fact that this comprehensive regulatory scheme enacting provisions that were to be placed in chapter 324 of the state code were determined to be non-germane to a bill on health insurance organized under chapter 376 of the state code says only that this particular comprehensive licensing and regulatory

scheme was not deemed germane to health insurance. As Respondents so quickly and vociferously point out, §376.1753 was not a comprehensive licensing and regulatory system assigned to a newly created board. The correlation between the two sets of bills (the comprehensive regulatory schemes and §376.1753) that Respondents wish to draw does not exist.

II.

(Replies to Summary of Argument & Point II of Respondents' Brief)

Point II of Respondents' brief addresses its single subject challenge to HB 818 under Mo. Const. Art. III, §23. Respondents appear to agree in their argument that the subject expressed in the title to HB 818 is not amorphous and, therefore, it is not necessary to undertake the type of analysis indicated in *Carmack v. Director*, 945 S.W.2d 956, 960 (Mo. banc 1997) (looking to the contents of the bill and the constitutional departments to which those contents might be assigned as the means for identifying the subject of the bill). Brief of Respondents at 35. Respondents also agree that the test for whether the single subject requirement is met in the context of this case is whether the provisions of HB 818 all fairly relate to health insurance, are naturally connected to health insurance, or is an incident or a means for accomplishing health insurance. Brief of Respondents at 35-36.

Given what even Respondents concede is the test for compliance with the single subject requirement, it is difficult to perceive how HB 818 and §376.1753 (the provision being challenged) fail to meet that test. To repeat what was said in Point I, *supra*, prior to the enactment of §376.1753, health insurers could not

provide coverage for these services because it violated the law and public policy of the state. Following the enactment of §376.1753, health insurers could provide coverage for these services because the public policy impediment was lifted. If the Court were to affirm the trial court's judgment and if §376.1753 were declared invalid, health insurers could no longer provide coverage for these services because it would violate the law and public policy of the state. It is patently obvious that §376.1753 fairly relates to health insurance, is naturally connected to health insurance, or is an incident or a means for accomplishing health insurance. The single subject requirement is satisfied.

A.

Respondents cite *Missouri Health Care Ass'n v. Attorney General*, 953 S.W.2d 617 (Mo. banc 1997), and *SSM Cardinal Glennon Children's Hospital v. State*, 68 S.W.3d 412 (Mo. banc 2002), as the principal support for their position and the action of the trial court. Both cases are readily distinguishable from the instant one.

In *Missouri Health Care Ass'n*, the subject as limited by the title was "the department of social services." To satisfy the single subject requirement, the Court stated that "every provision of the [bill] must fairly relate to, have a natural connection with, or be a means of accomplishing the work of the department of social services," and it further noted that a violation of the requirement would occur if the provision being challenged had "too tenuous connection with the programs administered by the department of social services[.]" 953 S.W.2d at

622. The provisions challenged in that case amended the state's merchandising practices act to create new violations relative to long-term health care facilities. Since the department of social services did not enforce, oversee or have any administrative duties respecting the newly created merchandising practice violations, the challenged provision constituted a separate subject from "the department of social services." *Id.* at 623. The Court also addressed the argument that a sufficient nexus existed between the contents of the bill and its title because the merchandising practice act provisions applied to long-term care facilities which were regulated in turn in other respects by the Department of Social Services. It is in response to this argument that the Court stated, "The single subject limitation requires that the contents of the bill, not the entities affected by the bill, fairly relate to the subject expressed in the title of the act." *Id.*

Unlike the title in *Missouri Health Care Association*, the title to HB 818 does not limit itself to the Department of Insurance or to the regulation of health insurance by that Department. Rather, it concerns itself with the broader subject of health insurance and all that it encompasses, including the subject matter of the insurance (the health of the insured) and the risk or contingency insured against (various health-related conditions and the health care treatments and services related to those conditions). *Burkhardt v. Gen. Am. Life Ins. Co.*, 534 S.W.2d 57, 64-65 (Mo. Ct. App. 1975) (stating the elements of a contract of insurance). The issue in this case is not whether the Department of Insurance enforces, oversees or

has any administrative duties relative to §376.1753 because the title to HB 818 did not limit itself to the Department of Insurance or its programs.

Further, Respondents argument and application of *Missouri Health Care Ass'n* violates this Court's principle that it is the contents of the bill and not the entities affected by it that is dispositive of the issue. Respondents ignore that the subject of health insurance includes the health insurance policy issued by the insurer in a largely voluntary contractual arrangement. They further ignore the content of §376.1753 and the effect it has on broadening what can be voluntarily agreed to between the parties to a health insurance contract. Instead, they focus solely on the entities involved: "It permits non-nurse midwives and ministers with certification to provide pregnancy related services," Brief of Respondents at 37; "Section 376.1753 would exempt certain practitioners from legal regulation in providing certain health services." Brief of Respondents at 38. It is Respondents' view and the trial court's decision that improperly focus on the entities affected by §376.1753 rather than on its content and effect.

In *SSM Cardinal Glennon*, the focus of single subject analysis is on the contents of the bill and not those affected by it. 68 S.W.3d at 417. As a second reason for its decision, the Court noted:

> [H]ospitals previously the sole beneficiaries of the hospital lien law are not subject to professional licensure by the division of professional registration. They are subject to licensing under their own specific provisions mandated by the department of health under

> chapter 197, RSMo. Even under the state's argument, there is no relationship between professional licensing and the hospital lien law prior to the attempt to amend it.

Id. In this instance, however, it is those persons who are insured under a policy of health insurance that are the beneficiaries of the state's health insurance laws. It is those same persons – the insureds who desire to utilize the allied health services designated by §376.1753 in a pregnancy covered by their health insurance policy and who would prefer to have the costs of those covered and paid by their health insurer – who are benefited by the enactment of §376.1753 and the effect it has on enabling health insurers to insure these allied health care services and the costs associated with them.

B.

Respondents also disagree with the characterization by Appellants of §376.1753 as a "freedom of choice" and "any willing provider" provision. It is Respondents, however, who unduly constrain the concepts that these terms express. As this Court recognized, these freedom of choice and any willing provider provisions refer to measures that extend health insurance coverage by providing for a broadened freedom of choice among available health care providers and which positively affect coverage for health care services and providers which might otherwise be excluded from health insurance policies. *Blue Cross Hosp. Serv., Inc. of Mo. v. Frappier*, 681 S.W.2d 925, 930 (Mo. banc 1984) (*vacated on other grounds*, 472 U.S. 1014, 105 S.Ct. 3471, 87 L.Ed.2d 608

(1985), *on remand*, 698 S.W.2d 326 (Mo. banc 1985)). *See, also, Am. Drug Stores, Inc. v. Harvard Pilgrim Care, Inc.*, 973 F. Supp. 60 (D. Mass. 1997) (freedom of choice and/or any willing provider provision is one which affects the substantive terms of the policy by broadening the range of providers that an insured may choose).

It does happen that the freedom of choice and any willing provider provisions involved in the cases above and in the statutes cited by Appellants in their opening brief (Brief of Appellant Friends of Missouri Midwives at 40-41) did involve state imposed mandates to insurers to provide expanded coverages for specified health care services and providers. However, there is nothing in those authorities which indicate that the concept of freedom of choice and any willing provider is limited to those instances in which the state mandates insurers to do something. It should be abundantly clear from the discussion in Point I.B of this brief, *supra*, that the Legislature could deal with the problem of an absence of freedom of choice among covered health care services and providers for the services and providers designated under §376.1753 as it saw fit. It did not have to deal with the problem with a state-mandated comprehensive system of regulation or not at all. It could deal with it in a manner that facilitated freedom of choice through the normal working of the marketplace and the voluntary agreement of the parties to the insurance contract.

C.

The arguments advanced by Respondents in favor of their three constitutional challenges and the record in this case exhibit a fundamentally flawed understanding on Respondents' part of the burden in a case of this type and of the nature of the legislative process. The basic theme underlying all three of the facial challenges to §376.1753 is a simplistic one: the section can have no meaningful relationship to health insurance if the words "health insurance" or "insurance" don't appear in the section, if the section doesn't mandate health insurance companies to do something, and if it doesn't assign duties and Responsibilities to the Department of Insurance to carry out relative to health insurance companies. Respondents' simplistic word search approach ignores the content of the challenged section, its effect on the availability of health insurance for the designated allied health care services and the context in which the section is placed.

Respondents also jump to factually unsupported conclusions about the purpose of the inclusion of §376.1753 and comment on what Appellants have failed to explain away or what evidence Appellants failed to produce. Clearly, Respondents wish to side-step the burden placed on them to prove the invalidity of the sections involved, an evasive maneuver which the trial court accommodated in its judgment. With respect to challenges of the nature that Respondents have made, the enactment does not just have a presumption of validity, it has a strong presumption in its favor. *Jackson County Sports Complex Auth. v. State*, 226

S.W.3d 156, 160 (Mo. banc 2007). This strong presumption in favor of validity and the disfavor with which such challenges are held "reflects not just this Court's traditional respect for the legislative branch and the accompanying presumption that its enactments are constitutional, but also a reluctance to strictly apply procedural rules in a way that might interfere with the functioning of the legislature." *Drury v. City of Cape Girardeau*, 66 S.W.3d 733, 737 (Mo. banc 2002). The Court's treatment of these issues has long been guided by principles of comity, sound policy and legislative convenience such that a liberal construction of the title and subject matter of an enactment are dictated. *Id.* at 737-38. In furtherance of these principles of comity and legislative convenience the Court has recognized that single subject, clear title and original purpose challenges are not intended to inhibit the normal fluid and often chaotic legislative processes that includes the combination and addition of provisions into a single enactment. *McEuen v. Mo. State Bd. of Educ.*, 120 S.W.3d 207, 209-10 (Mo. banc 2003). These three procedural challenges were never intended to be wielded, as Respondents would do, as some fundamental right that mandates the Legislature to adopt and follow procedures that accord a level of due process and notice that approaches that accorded in the judicial arena. The effect of Respondents' and the trial court's approach to these types of challenges is not only to inhibit the normal process of legislation but also to open the door to judicial activism.

Consideration of the presumptions in favor of validity and the strong burden on the party challenging the validity of legislation on procedural grounds

in enacting it are often stated in the cases without actually considering what these principles mean. These principles should receive at least the same, if not a more robust, application in the procedural context as they do in the context of substantive challenges to the constitutionality of legislation. In enacting legislation, the Legislature acts on the basis of "legislative facts" not evidence produced in a judicial-type setting or pursuant to strict rules of evidence and manner of presentation. *See, e.g., Blaske v. Smith & Entzeroth, Inc.*, 821 S.W.2d 822, 829 (Mo. banc 1992) (constitutional challenge is to the legislative facts on which the legislation is based). Because legislative facts are involved, the burden that must be borne by the party challenging an enactment is to negate every conceivable basis that might support it. *E.Mo. Laborers' Dist. Council v. City of St. Louis*, 5 S.W.3d 600, 604 (Mo. App. 1999). If there are any state of legislative facts that can be conceived to justify the enactment, it should be sustained. *Id.* *See, also, Collins v. Dir. of Revenue*, 691 S.W.2d 246, 250 (Mo. banc 1985); *Blaske*, 821 S.W.2d at 829. In terms of the procedural challenge by Respondents here, the burden on Respondents was to clearly negate the existence of any conceivable state of legislative facts by which it could be concluded that there was a sufficient nexus between what §376.1753 accomplished and the subject of health insurance.

Respondents give lip service to the burden on them as the challengers to the validity of §376.1753, but their argument shows they would completely shift the burden and would have such challenges proceed on the basis that §376.1753 was

invalid and that it was incumbent on those defending the enactment to establish otherwise. In contrast to Respondents' proffered approach, what is important for meeting the true burden in a challenge of this nature is not what evidence Appellants produced or what they explained or failed to explain. The important question is: what did Respondents do to clearly negate the existence of any conceivable state of legislative facts that would support the nexus the Legislature drew between the challenged provisions and the subject of the bill as expressed in its title. Respondents' simplistic word search for the terms "health insurance" or "insurance" in the provision it challenges falls well short of the burden it was required to bear.

III.

(Replies to Summary of Argument & Point III of Respondents' Brief)

The "original purpose violation" arguments made by Respondents in Point III of their brief are adequately refuted by the argument in the Brief of Appellants Friends of Missouri Midwives. Appellants would only add the following comments to that argument.

The fatal flaw in Respondents' argument is that they focus solely on the title of HB 818 as originally enacted to define its original purpose. Brief of Respondents at 43-44. They ignore the well-settled principles applicable to original purpose challenges under Art. III, §21, that the bill's original purpose is not limited to what is stated in the bill's title as enacted but, rather, the clause is concerned with the general or overarching purpose of the bill. *Jackson County*

Sports Complex Auth. v. State, 226 S.W.3d 156, 160 (Mo. banc 2007). The overarching purpose of HB 818 was not limited to portability and accessibility of health insurance but to health insurance in general. For all the reasons stated in Brief of Appellants Friends of Missouri Midwives and Points I and II of this brief, *supra*, the amendment of HB 818 through the addition of §376.1753 falls squarely within this overarching purpose.

IV.

(Addresses Remainder of Respondents' Brief and Amicus Brief of the AMA)

The standing arguments made by Respondents in Point V of their brief are adequately refuted by the argument in the Brief of Appellants Friends of Missouri Midwives and the Brief of Appellant filed by the State of Missouri. Further reply by this brief is unnecessary.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF ATTORNEY

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

(A) It contains 7,235 words, as calculated by counsel's word processing program;

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

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

_____
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CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the above and foregoing Reply Brief of Appellants Friends of Missouri Midwives, et al. were sent by U.S. Mail, postage prepaid, this 19th day of February, 2008, to:

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