IN THE MISSOURI SUPREME COURT

MISSOURI STATE MEDICAL ASSOCIATION, et al.,	)	
Respondents,	)	
v.	)	Case No. SC88783
STATE OF MISSOURI, et al.,	)	
Appellants.	)	

Appeal from the Circuit Court of Cole County

The Honorable Patricia S. Joyce

Brief of Respondents

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JURISDICTIONAL STATEMENT

This Court has jurisdiction because the Physician Associations challenge the constitutionality of § 376.1753 of House Bill 818. Mo. Const. art. V, § 3.

STATEMENT OF FACTS

The statements of facts in Appellants' briefs are incomplete and do not accurately or completely summarize the facts relevant to the questions presented for determination. Rule 84.04(c). Accordingly, Respondents set forth their own statement of facts. Rule 84.04(f).

The Missouri State Medical Association, Missouri Association of Osteopathic Physicians and Surgeons, Missouri Academy of Family Physicians, and the St. Louis Metropolitan Medical Society (collectively Physician Associations) have challenged the constitutionality of § 376.1753 of House Bill 818 in this lawsuit. J.S. ¶¶ 2-6.[1] The Physician Associations are the leading associations of licensed medical and osteopathic physicians and surgeons in Missouri. J.S. ¶¶ 2-5; P. Exs. 8-11 ¶ 2.[2] Their members include family practitioners and physicians specializing in obstetrics/gynecology

[1] The record on appeal consists of a legal file (L.F.) and a Stipulation in Lieu of Transcript filed on October 22, 2007. In addition, the parties have deposited exhibits with this Court: Joint Exhibits (J. Ex.), Plaintiff's Exhibits (P. Ex.), and Defendant-Intervenors' Exhibits (D. Int. Ex.). Before hearing, the parties entered a Joint Stipulation to Facts and Exhibits and Procedure for Presentation of Issues. It was identified as Joint Exhibit A and is cited as J.S. in this brief. All other joint exhibits are cited as J. Ex.

[2] Plaintiffs submitted four affidavits on behalf of the associations as Plaintiffs' Exhibits 8-11. The affiants were Charles W. Van Way III, M.D., Jeffery A. Kerr, D.O., David Campbell, M.D., and, Stephen G. Slocum, M.D.

(OB/GYN). J.S. ¶¶ 2-5; P. Exs. 1-7 ¶ 1.[3] These physicians treat pregnant women and deliver their babies. P. Exs. 1-7 ¶ 1.

The State of Missouri, acting through the Missouri General Assembly, enacted House Bill 818. J.S. ¶ 7. Defendant-Intervenors are non-nurse midwives, people or businesses who would use non-nurse midwives, and associations representing non-nurse midwives (collectively Midwives). J.S. ¶¶ 8-15. The Midwives would – if the law is allowed to go into effect – begin providing pregnancy related services in the state without any regulation or administrative oversight. See J.S. ¶¶ 12, 15.

A. Section 376.1753 of House Bill 818

§ 376.1753 of House Bill 818 provides:

> 376.1753. Notwithstanding any law to the contrary, any person who holds current ministerial or tocological certification by an organization accredited by the National Organization for Competency Assurance (NOCA) may provide services as defined in 42 U.S.C. 1396r-6(b)(4)(E)(ii)(I).

[3] Plaintiffs submitted seven affidavits on behalf of individual physicians who were members of the Physician Associations as Plaintiffs' Exhibits 1-7. The affiants were Ralph O. Boling, D.O., Robert E. Ferris, M.D., Gordon M. Goldman, M.D., Ken V. Holt, D.O., Ravi Johar, M.D., Debra Olson McCaul, M.D., and David L. Redfern, M.D.

J.S. ¶ 44; J. Ex.6. When § 376.1753 was added, the title to House Bill 818 indicated it was repealing and enacting specified sections "relating to health insurance." J. Ex. 6. The substituted bill did not broaden the "relating to" clause of the title. Compare J. Ex. 5, with J. Ex. 6.

On its face, the meaning of § 376.1753 is not clear. It permits certain person to provide certain services exempt from "any law to the contrary," but the identities of those persons and the types of services that they will be providing is not apparent. Its meaning must be established by reference to other sources.

Ministerial means "of ministry, a minister, or ministers collectively." Webster's New Twentieth Century Dictionary Unabridged 1146 (2d ed. 1979). "Tocology" means "obstetrics or midwifery." Id. at 1917. Thus, in common usage, the reference to "tocological" may be understood as a proxy term for "midwifery." The "services defined in 42 U.S.C. 1396r-6(b)(4)(E)(ii)(I)" are: "services related to pregnancy (including prenatal, delivery, and post-partum services)." J.S. ¶ 45; J. Ex. 9. Also, under existing law, licensed physicians and registered nurses may practice midwifery subject to regulation by and oversight of their respective licensing boards. See, e.g., § 334.010, RSMo 2000 (defining the practice of medicine to include engaging in midwifery); 20 CSR 2200-4.100(4)(A) (recognizing nurse midwives and certified nurse midwives as specialized types of advance practice nurses).

Taken together, these sources reveal that the practical effect of § 376.1753 is to exempt ministers and non-nurse midwives with certification from any law restricting

them from providing pregnancy related services. Section 376.1753 did not effect any other change in the law.

B. Legislative History of House Bill 818 and § 376.1753

Representative Doug Ervin originally introduced House Bill 818 in the House of Representatives on February 8, 2007. J. Ex. 1. House Bill 818 did not include § 376.1753 at that time. Id. As originally introduced, House Bill 818's title stated that it was deleting and enacting sections "relating to portability and accessibility of health insurance." J.S. ¶ 27. The House Special Committee on Health Insurance, its Rules Committee, and the general House membership all voted to pass House Bill 818. J.S. ¶¶ 32-34. House Bill 818 then moved to the Senate, and the Senate's Health and Mental Health Committee voted to pass it. J.S. ¶ 38. When it moved to the Senate, the title was changed to state that it was repealing and enacting sections "relating to health insurance." J.S. ¶ 39. As House Bill 818 worked its way through the process, various changes were made and proposed to its contents. J.S. ¶¶ 30, 33, 38. In all material respects, House Bill 818 remained substantially similar during this process.

Senator John Loudon handled House Bill 818 in the Senate. L.F. 13, 562, 569; P. Ex. 20. On May 10, 2007, House Bill 818 came up for debate on the floor of the Senate. J.S. ¶ 42. A Senate substitute bill had been proposed for House Bill 818. J.S. ¶ 40. That bill was withdrawn and a second substitute was offered by Senator Loudon. J.S. ¶ 42; L.F. 13, 562, 569; P. Ex. 20.

When the first Senate substitute bill was withdrawn and replaced with the second Senate substitute bill, § 376.1753 was inserted for the first time. Compare J. Ex. 6 with

J. Exs. 1 - 5 (previous versions of the bill). The relating to clause of the title was not changed when § 376.1753 was added to it. The final version of the bill's title stated that it was intended:

> To repeal sections 103.085, 143.121, 143.782, 313.321, 376.426, 376.776, 376.960, 376.961, 376.964, 376.966, 376.986, 376.989, 379.930, 379.936, 379.938, 379.940, 379.942, 379.943, 379.944, and 379.952, RSMo, and to enact in lieu thereof forty-nine new sections relating to health insurance, with an effective date for certain sections.

J. Ex. 6 (emphasis added).

Section 376.1753 was not specifically identified in the title.

Having received no notice of a change in the scope of the bill's subject, the Senate passed the second Senate substitute on May 10, 2007. J.S. ¶ 42. On the following day, May 11, 2007, the second Senate substitute passed the House of Representatives. J.S. ¶ 46. The Governor approved it as law on June 1, 2007. Id. ¶ 48.

C. Other Provisions of House Bill 818

As demonstrated by its legislative titles, House Bill 818 began as a bill relating to portability and accessibility of health insurance and ended as a bill relating to health insurance. J. S. ¶¶ 27, 43; J. Exs. 1, 6. Almost all of the provisions of House Bill 818 are enforced or implemented by the Department of Insurance, Financial Institutions and Professional Registration (Department of Insurance). J. Ex. 6.

The majority of the changes to House Bill 818 are to be codified in Chapter 376 of the Revised Statutes. J. Ex. 6. Chapter 376 concerns "life, health and accident insurance." Chapter 376, RSMo. The Department of Insurance is responsible for implementing Chapter 376. The contents of House Bill 818 also relate to health insurance. For example, §§ 376.450 to 376.454 implement provisions to be known as the Missouri Health Insurance Portability and Accountability Act. J. Ex. 6. Under House Bill 818, "health insurance coverage offered in connection with the small group market, the large group market and the individual market shall comply" with certain provisions. J. Ex. 6 § 376.450.1. As another example, "[t]he board of directors of the state health insurance pool is hereby directed to conduct a study regarding the financing of the state health insurance pool." J. Ex. 6 § 376.990. Sections 376.1500 – .1532 pertain to discount medical plans. J. Ex. 6 §§ 376.1500-.1532.

Arguably, several provisions in House Bill 818 other than § 376.1753 have little apparent relationship to health insurance. They have not been challenged and are not at issue in this lawsuit.

D. Related Legislative Actions

After the second Senate substitute of House Bill 818 was passed with § 376.1753, President Pro Tem Michael Gibbons relieved Senator John Loudon of his chairmanship of the Senate Small Business Insurance and Industrial Relations Committee until further notice. P. Ex.16 at 1528.

During the 2007 legislative session, the Senate was presented with other bills relating to midwifery. Senate Bill 303 would have allowed the practice of midwifery

with licensure and administrative oversight of those persons. P. Exs. 18, 19. It did not pass the Senate.

After House Bill 818 was passed, the Senate also brought up for debate Senate Substitute for House Committee Substitute for House Bill 364. P. Ex. 15 at 1753-59. That bill included health insurance provisions substantially similar to those in House Bill 818. P. Ex. 17. The title of that bill stated that it would repeal and enact certain sections "relating to health insurance." Id. at 1759. Senator Loudon moved to add midwifery provisions – referred to by name and with provisions for licensure and state oversight – by amendment to that bill. P. Ex. 15. Senator Kevin Engler objected that the proposed amendment was not germane to that health insurance bill. Id. at 1759. The President Pro Tem agreed and refused the amendment. Id.

E. Effect of § 376.1753 on Physicians and their Patients

The purpose of each Physician Association is to represent, protect, and pursue the interests of its member physicians before the state legislature, state agencies, and state courts. J.S. ¶¶ 2-5. Since § 376.1753 allows non-nurse midwives to generally provide pregnancy related services, it effectively allows them to practice medicine without obtaining a license. P. Exs. 1-7 ¶ 2. By affidavit, seven representative members of those associations have testified that they are very concerned that their medical licenses will be disciplined if they coordinate care, have treatment discussions with, or other participate in the care of a patient who is also receiving pregnancy care from a § 376.1753 provider. Id. ¶ 4. All seven of these physicians practice obstetrics and/or gynecology (OB/GYN). Id. ¶ 1. They treat pregnant women and deliver babies. Id. They are all members of at

least one of the Physician Associations. Id. Professional discipline would negatively affect their professional reputations and economic livelihoods. Id. ¶ 4. Executive officers of each of the Physician Associations have testified that they share the same concerns for all of their members' professional licenses. P. Exs. 8-11 ¶ 3.

These physicians are also concerned about mothers and children who do not receive care from a licensed and competent physician. P. Exs. 1-7 ¶ 3. "Serious medical complications may arise during pregnancy requiring the skill and care of a physician." Id. Medical care is essential to the health of both mother and child. Id. ¶ 1. Without it, the health of mother and child will be jeopardized. Id. ¶ 3. But, providing that care to a patient who is also receiving services from an unlicensed, non-nurse midwife would subject those physicians to professional discipline. Id. ¶¶ 2, 4.

POINTS RELIED ON (RESPONSES)

I. The Circuit Court properly held that § 376.1753 violated Article III, § 23 of the Missouri Constitution because the legislative title of House Bill 818 was underinclusive in that it was limited to legislation "relating to health insurance" and § 376.1753 does not relate to health insurance. (Responds to State's Fifth Point Relied On and Midwives' Third Point Relied On)

Mo. Const. art. III, § 23

Nat'l Solid Waste Mgmt. Ass'n v. Dir. of the Dep't of Natural Resources, 964 S.W.2d 818 (Mo. banc 1998)

II. The Circuit Court properly held that § 376.1753 violated Article III, § 23 of the Missouri Constitution because it added a different subject to House Bill 818. (Responds to State's Fourth Point Relied On and Midwives' First Point Relied On)

Mo. Const. art. III, § 23

SSM Cardinal Glennon Children's Hosp. v. State, 68 S.W.3d 412 (Mo. banc 2002)

Mo. Health Care Ass'n v. Attorney Gen., 953 S.W.2d 617 (Mo. banc 1997)

III. The Circuit Court properly held that § 376.1753 violated Article III, § 21 of the Missouri Constitution because its original purpose was health insurance and the addition of § 376.1753 changed that purpose. (Responds to State's Third Point Relied On and Midwives' Second Point Relied On)

Mo. Const. art. III, § 21

Mo. Ass'n of Club Executives, Inc. v. State, 208 S.W.3d 885 (Mo. banc 2006)

IV. The State's Second Point Relied On preserves nothing for judicial review. (Responds to the State's Second Point Relied On)

Hancock v. Shook, 100 S.W.3d 786 (Mo. banc 2003)

Slankard v. Thomas, 912 S.W.2d 619 (Mo. App. 1995)

V. The Physician Associations have standing to challenge the constitutionality of House Bill 818, because § 376.1753 would subject their members to professional discipline and expose their patients to harm. (Responds to State's First Point Relied On and Midwives' Fourth Point Relied On)

Mo. Health Care Ass'n v. Attorney Gen., 953 S.W.2d 617 (Mo. banc 1997)

Mo. Bankers Ass'n v. Dir. of the Mo. Div. of Credit Unions, 126 S.W.3d 360 (Mo. banc 2003)

Planned Parenthood of Kansas v. Nixon, 220 S.W.3d 732 (Mo. banc 2007)

ARGUMENT

The Missouri Constitution promotes an orderly legislative decision-making process by limiting the subjects of bills and requiring legislative titles that will fairly apprise the public and legislators of the bills' contents. Stroh Brewery Co. v. State, 954 S.W.2d 323, 325-26 (Mo. banc 1997). Article III, § 21 provides in relevant part: "[N]o bill shall be so amended in its passage through either house as to change its original purpose." Article III, § 23 provides in relevant part: "No bill shall contain more than one subject which shall be clearly expressed in its title." These sections impose mandatory procedural limitations on the legislative process. Hammerschmidt v. Boone County, 877 S.W.2d 98, 101 (Mo. banc 1994). This Court has recognized three separate obligations arising from these sections:

1. The bill's original purpose cannot change.
2. The bill must have a single subject.
3. The bill's single subject must be clearly expressed in its title.

Id. (citing Mo. Const. art. III, §§ 21, 23).

The single subject and original purpose requirements limit the subject matter of bills to promote intelligent discussion. Id. They also prevent logrolling – the practice of adding unrelated provisions to a bill that could not pass on their own. Id. Further, these constitutional provisions defeat surprise. Id. A clever legislator should not be able to take advantage "of his or her unsuspecting colleagues by surreptitiously inserting unrelated amendments into the body of a pending bill." Id. Finally, they protect the Governor from being presented with a take-it-or-leave-it ultimatum regarding unrelated

pieces of legislation. Id. at 102. The Governor's line item veto authority only extends to appropriation legislation and, without these limitations, the General Assembly could frustrate the Governor's veto authority by combining unrelated legislation that he did not favor with other legislation that he did support. Id.

The clear title requirement similarly ensures that legislators and the public are apprised of the subject of the legislation. St. Louis Health Care Network v. State, 968 S.W.2d 145, 147 (Mo. banc 1998). The title must indicate in a general way the kind of legislation being enacted. Nat'l Solid Waste Mgmt. Ass'n v. Dir. of the Dep't of Natural Resources, 964 S.W.2d 818, 820 (Mo. banc 1998). When the title includes restrictions like a "relates to" clause, the title affirmatively misleads the reader when it includes provisions not encompassed by that clause. Id. at 821.

Section 376.1753 of House Bill 818 violates both article III, § 21 and § 23, and the Cole County Circuit Court so held. L.F. 607. The State and Midwives have appealed that decision. Their specific errors are refuted below. But, their arguments are also pervaded by a common error: they both effectively treat the subjects "health insurance," "health services," and "health" as synonymous.

For its part, the State broadly casts House Bill 818 as an omnibus health care bill, alternately identifying its purpose and/or subject as:

- "increasing public access to health services," State's Br. 33;
- "increasing the availability and affordability of health services," State's Br. 35, 37, 41;
- "health," State's Br. 36;

- "health services," State's Br. 38, 43, 46-47; and
- "health and increasing the availability of health services," State's Br. 40.

The State admits that § 376.1753 "does not directly affect health insurance laws." State's Br. 7, 11. But, the State argues that § 376.1753 still relates to health services, because health services and health insurance are synonymous terms. State's Br. 32, 40 ("health services and health insurance constitute a single subject").

The Midwives are less forthright, but their arguments are the same. They acknowledge that § 376.1753 concerns the regulation of health services and health practitioners. Midwives' Br. 38 ("[section 376.1753] refers to both health care services and the practitioners providing those services"). The Midwives argue that the subjects "health services" and "health practitioners" in turn relate to the subject of "health insurance." Id. 31-32, 36, 38-44. By their reasoning, the fact that a law affects health services or health practitioners also establishes an effect on health insurance. Id. 36 ("the substance of health insurance encompasses both health care services and health care providers").

Thus, the State and the Midwives equate "health insurance," "health services," and "health," and argue that anything that relates to the one relates to the other. On its face, the argument strains credulity. Health insurance and health services are not interchangeable terms. The State and the Midwives emphasize the common adjective "health" and ignore the very different nouns "services" and "insurance." But, of course, the noun identifies the subject area, and the adjective only modifies and further restricts it. The midwife provision might have some relationship to health, but it has no

relationship to health insurance. See SSM Cardinal Glennon Children's Hosp. v. State, 68 S.W.3d 412, 417 (Mo. banc 2002) (holding that the use of the gerund form of the word "license" in the title "relating to professional licensing" demonstrated that the contents of the bill related to "the act of licensing" and did not include " 'professional licensees', those who are licensed"). Moreover, this Court has repeatedly held that an unrelated amendment cannot be saved by fabricating indirect connections to the subject expressed in the title. See, e.g., id.; Mo. Health Care Ass'n v. Attorney Gen., 953 S.W.2d 617, 623 (Mo. banc 1997) (holding that a de minimis connection was insufficient and that "the contents of the bill, not the entities affected by the bill, [must] fairly relate to the subject expressed in the title of the act"); Nat'l Solid Waste Mgmt. Ass'n, 964 S.W.2d at 821 (holding that the contents of the bill must be directly connected to the subject expressed in the bill's title). To the contrary, such unrelated additions are constitutional only if the title of the bill is broadened to include the new subject matter. Nat'l Solid Waste Mgmt. Ass'n, 964 S.W.2d at 821. When § 376.1753 was tucked into House Bill 818, the title of the bill was not broadened, and the public and other legislators were not notified of the change in the bill's scope.

Accordingly, this case can be resolved by simply reading the constitutional language: "No bill shall contain more than one subject which shall be clearly expressed in its title." Mo. Const. art. III, § 23 (emphasis added). The subject clearly expressed in the title of House Bill 818 was health insurance. Any legislation not relating to that subject is unconstitutional, because it contains multiple subjects and an unclear title.

Section 376.1753 does not relate to health insurance, and its addition to House Bill 818 violated article III, § 23 of the Missouri Constitution.

I. The Circuit Court properly held that § 376.1753 violated Article III, § 23 of the Missouri Constitution because the legislative title of House Bill 818 was underinclusive in that it was limited to legislation "relating to health insurance" and § 376.1753 does not relate to health insurance. (Responds to State's Fifth Point Relied On and Midwives' Third Point Relied On)

A. Standard of review

Whether a bill complies with article III, §§ 21 and 23 is a question of law. Statutes, of course, are presumed to be constitutional. Hammerschmidt, 877 S.W.2d at 102. Where the enactment clearly contravenes the constitution and is not susceptible of any reasonable construction that would be constitutional, it must be invalidated. See, e.g., Home Builders Ass'n of Greater St. Louis v. State, 75 S.W.3d 267, 269 (Mo. banc 2002). This Court has regularly invalidated legislation when individual legislators or groups of legislators joined to pass bills that did not comply with the constitutional limitations. See, e.g. Carmack v. Dir. of Mo. Dep't of Agric., 945 S.W.2d 956, 961 (Mo. banc 1997); Mo. Health Care Ass'n, 953 S.W.2d at 622-23; Nat'l Solid Waste Mgmt Ass'n, 964 S.W.2d at 821-22; St. Louis Health Care Network v. State, 968 S.W.2d 145, 149 (Mo. banc 1998); SSM Cardinal Glennon Children's Hosp., 68 S.W.3d at 416-17; Home Builders Ass'n of Greater St. Louis, 75 S.W.3d at 272; Rizzo v. State, 189 S.W.3d 576, 580-81 (Mo. banc 2006). As these cases show, when one or a few legislators introduce legislation without abiding by §§ 21 and 23, judicial review by this Court is a necessary check to protect other legislators and the public from the effects of

unconstitutional legislation of which they had no notice or, at the very least, insufficient notice.

For the State's third, fourth, and fifth Points Relied On, the Argument section of the Brief does not conform to Rule 84.04(e). That Rule provides that the Argument shall substantially follow the points relied on and that each point relied on shall be restated at the beginning of the Argument section discussing that point. Rule 84.04(e). The State's brief sets forth its third, fourth, and fifth Points Relied On at pages 32-33, and then follows with Argument relating to all three of those points on pages 33-47. While the Points Relied On are not restated at the beginning of the various Argument sections, the Physician Associations believe that section III.A on pages 33-40 relates to the original purpose argument (State's third point relied on), that section III.B on pages 40-44 relates to the single subject argument (State's fourth point relied on), and that section III.C on pages 44-47 relates to the clear title argument (State's fifth point relied on). Accordingly, in their response to each of the State's Points Relied On, the Physician Associations have treated the above-referenced pages as the relevant argumentative material.

B. Section 376.1753 does not relate to health insurance.

A bill must have "one subject which shall be clearly expressed in its title." Mo. Const. art. III, § 23. This Court recognizes two types of clear title violations: overbroad and underinclusive titles. An overbroad title is so general that it fails to give notice of the general subject matter of the bill. See, e.g., St. Louis Health Care Network, 968 S.W.2d at 147-48. Conversely, an underinclusive title fails to cover all of the provisions in a bill. Nat'l Solid Waste Mgmt. Ass'n, 964 S.W.2d at 821. When a title includes a restrictive

"relating to" clause, every provision must be encompassed within that clause. Id. at 820-21. A relating to clause can be attached to a bill that is narrower than the broadest subject or purpose that may be conceived for the bill. Id. at 821. Thus, a bill may violate the clear title requirement, even if it satisfies the single subject and original purpose requirements. Id. To show that a title is underinclusive, the challenger must demonstrate that the provision does not directly relate to the subject identified in the title. Id. A provision that does not relate to the subject in the title is unconstitutional, even if it conceivably could relate to a broader subject that could have been expressed in the title or relates to another subject that in turn has some relation to the subject expressed in the title. Id.

The subject of House Bill 818 as expressed in its title was health insurance. Any provision of House Bill 818 that does not relate to health insurance violates the clear title requirement and is unconstitutional. Section 376.1753's legal effect is to exempt non-nurse midwives and certified ministers from legal regulation in providing pregnancy related services. It does not relate to health insurance and is therefore unconstitutional.

1. By its plain text, § 376.1753 only exempts non-nurse midwives and ministers from regulation.

The section provides:

> 376.1753. Notwithstanding any law to the contrary, any person who holds current ministerial or tocological certification by an organization accredited by the National Organization for Competency Assurance (NOCA) may

provide services as defined in 42 U.S.C. 1396r-6(b)(4)(E)(ii)(I).

To determine its meaning and effect, other sources must be consulted. The reference to "tocological" is the first important term that must be deciphered. It is derived from the Greek word "tokos" and refers to "obstetrics or midwifery." Webster's New Twentieth Century Dictionary Unabridged 1917. The term is not in common usage. Some dictionaries do not even include a definition for it. See, e.g. Merriam Webster's Collegiate Dictionary 1239 (10th ed. 1993). The Midwives do not identify themselves as "tocologists" or as practitioners of "tocology." Nor have they adopted that language for purposes of this lawsuit. In their pleadings and brief filed with this Court, they have always referred to themselves as midwives practicing midwifery. Midwifery is the phrase that the General Assembly has used to refer to such practices in previous legislation. §§ 334.010, 334.190, 334.260, RSMo 2000. It is also the term that the Board of Nursing has used to recognize advanced practice specialties for "nurse midwifes" and "certified nurse midwifes." 20 CSR 2200-4.100(4)(A).

Section 376.1753 also references persons with "ministerial" certification. But, no apparent reason exists for why the legislature would have authorized someone certified as a minister to provide pregnancy related services. Neither the State nor the Midwives has offered any independent explanation for the existence of this term in the statute. It appears to be a red herring that was inserted to further disguise the meaning and purpose of § 376.1753.

The services that may be provided are not described in the section. Rather, the interpreter of § 376.1753 must refer to 42 U.S.C. 1396r-6(b)(4)(E)(ii)(I) to discover that ministers or tocologists with certification can provide "services related to pregnancy (including prenatal, delivery, and post-partum services)." J. Ex. 9.

Collectively, these sources reveal that § 376.1753 permits ministers and non-nurse midwives with certification to provide pregnancy related services and exempts them from "any law to the contrary." It does not relate to health insurance.

2. Section 376.1753 did not effect any change in the law relating to health insurance.

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.

The constitutionality of an unrelated amendment cannot be salvaged by establishing a de minimis or indirect relationship to the subject expressed in the title. To the contrary, the bill's title should be amended when the unrelated amendment is added, notifying the public and other legislators that the scope of the legislation is being

broadened. Thus, in National Solid Waste Management Association v. Director of the Department of Natural Resources, the title stated that the bill would repeal and enact sections "relating to solid waste management." 964 S.W.2d at 820. The bill included a section pertaining to hazardous waste management. Id. The State argued that a hazardous waste management section was constitutionally related to the bill's subject, because the subject was not only "solid waste management" but "all matters 'relating to' solid waste management." Id. at 821. This Court rejected that contention. Id. It noted that the solid waste management and hazardous waste management provisions could potentially be reconciled as part of a broader subject such as environmental control or waste management. Id. However, the legislature had not identified either of those broad subjects in the title of the bill. Id. To the contrary, the legislative title was limited to hazardous waste management. Id. If legislators and the public must search for the overarching purpose from an extrinsic source, the title does not clearly express the subject of the bill. Id. When there are sections in the bill that pertain to a subject not identified in the title, the "lack of conformity makes the title affirmatively misleading." Id.

The clear title provision does not unduly inhibit the legislative process. The legislature "routinely" expands legislative titles "to reflect the commonality of all the subjects contained in the bill" and the Court has "consistently approved" of that practice. Id. By making that change, the legislature clearly gives notice of the entire subject matter of the bill, as required by article III, § 23. Id. See also Mo. State Med. Ass'n v. Dep't of Health, 39 S.W.3d 837, 839 (Mo. banc 2001) (upholding legislation where the title was

changed from "relating to insurance coverage for cancer early detection" to "relating to health services" and properly reflected the broadened scope of the bill).

In the present case, the State recognizes that the subject identified in House Bill 818 – health insurance – is too narrow to encompass the midwife provision. State's Br. 7 (conceding that § 376.1753 "does not directly affect health insurance laws"). Therefore, as in National Solid Waste Management Association, it argues for a much broader purpose: increasing public access to health services and the affordability of those services. Compare State's Br. 41, 43, with Nat'l Solid Waste Mgmt. Ass'n, 964 S.W.2d at 820 (arguing that the bill's purpose was not limited to solid waste management but instead was the broader purpose of environmental control). The State argues that the title – which is clearly limited to health insurance – is acceptable because health services and health insurance are related. Compare State's Br. 40, 42-43, with Nat'l Solid Waste Mgmt. Ass'n, 964 S.W.2d at 821 (arguing that "a title stating that the bill relates to solid waste management encompasses not only solid waste management, but also everything that is related to solid waste management"). This Court has previously recognized that such arguments are fatally flawed because the broad purpose attributed to the bill is not clearly expressed in its title. Nat'l Solid Waste Mgmt. Ass'n, 964 S.W.2d at 821-22. Thus, members of the public and legislators were not on notice of the subject matter of the legislation.

Though the trial court's judgment specifically relied on National Solid Waste Management Association in finding a clear title violation, the State and the Midwives do not discuss or even cite it in their briefs. L.F. 603. Its analysis directly refutes their clear

title argument, and they have not attempted to distinguish it from this case. On the other hand, the State's primary authority – Missouri State Medical Association v. Department of Health – is readily distinguishable because the title of that legislation was changed from "relating to health insurance coverage for cancer early detection" to "relating to health services." 39 S.W.3d at 839. That change clearly put legislators and the public on notice that the bill broadly covered health services. Id. Accordingly, the Supreme Court in that case only considered whether the title was so broad and amorphous that it failed to give notice of the bill's contents. Id. at 841.

By way of contrast, this case concerns a narrow "relating to" clause that was not amended when § 376.1753 was added. J.S. ¶¶ 41, 43; J. Ex. 6. The title failed to give notice, and the addition of that unrelated section cannot be considered the product of informed debate or decisionmaking. The failure to amend the title was exacerbated by the section's obscure language. The words "midwife" and "pregnancy" appears nowhere in § 376.1753. J.S. ¶ 44; J. Ex. 6, § 376.1753. Rather, midwives are identified as holding "tocological" certification, and they are allowed to provide "services as defined in 42 U.S.C. 1396r-6(b)(4)(E)(ii)(I)." Id. In addition, the word "ministerial" was included in the section with no apparent effect. Section 376.1753 was not added to House Bill 818 until the last vote was taken in the Senate. J. Ex. 6. After House Bill 818 was passed, its handler in the Senate was removed from his committee chairmanship. P. Ex. 16. When similar legislation was plainly worded during the 2007 legislative session, it could not pass the Senate. P. Exs. 18, 19. When similar sections were offered as an amendment to another bill relating to health insurance, they were determined to be non-germane.

P. Exs. 15, 17. Section 376.1753 is a textbook example of the kind of unrelated, surreptious amendment that article III, § 23 was intended to prevent.

The Missouri Constitution expressly recognizes that the legislative process depends on the mutual good faith of legislators. The drafters of the constitution wisely included protections to prevent legislators from taking unfair advantage of their colleagues. See, e.g., Hammerschmidt, 877 S.W.2d at 101-02 (deriding "surreptitious[]" amendments); Nat'l Solid Waste Mgmt. Ass'n, 964 S.W.2d at 820 (invalidating a "last-minute amendment about which even the most wary legislators could hardly have given their considered attention and about which concerned citizens likely had no input"); Mo. Ass'n of Club Executives, Inc., 208 S.W.3d at 888 (severing unconstitutional provisions that constituted "a textbook example of the legislative log-rolling that section 21 is intended to prevent"). Section 376.1753 was an unrelated amendment that was inserted into House Bill 818 without a corresponding change to the title of the legislation. The Circuit Court properly held that its addition violated the clear title provision of article III, § 23 of the Missouri Constitution.

II. The Circuit Court properly held that § 376.1753 violated Article III, § 23 of the Missouri Constitution because it added a different subject to House Bill 818. (Responds to State's Fourth Point Relied On and Midwives' First Point Relied On)

A. Standard of review

The standard of review for this argument is the same as the standard for the clear title argument (as set out in section I above).

B. Section 376.1753 did not relate to the subject expressed in the title of House Bill 818.

A bill must have "one subject." Mo. Const. art. III, § 23. All provisions of a bill must fairly relate to the same subject, be naturally connected with that subject, or be incidents or means to accomplish the bill's purpose. See, e.g., Rizzo v. State, 189 S.W.3d 576, 578-579 (Mo. banc 2006). Since the one subject must be clearly expressed in the bill's title, the test focuses on the subject expressed in the title. Id. If the subject expressed in the bill's title is amorphous and no clear title violation is alleged, the bill's contents and the constitutional department to which it was assigned may also be consulted to determine its single subject. Carmack v. Director, 945 S.W.2d 956, 960 (Mo. banc 1997).

In this case, a clear title violation has been alleged, and the subject of the bill should be determined from the title of the final version of the bill. That title identified House Bill 818's subject as "health insurance." Section 376.1753 does not comply with the single subject requirement unless it fairly relates to health insurance, is naturally

connected to health insurance, or is an incident or means to accomplishing health insurance.

In Missouri Health Care Association v. Attorney General, the title of the bill identified its subject as the Department of Social Services. 953 S.W.2d at 622. The plaintiffs challenged a provision in the bill that prohibited certain practices of long term care facilities and was enforced by the Attorney General. Id. at 622-23. The State argued that the provision related to the subject of the Department of Social Services, because it regulated long term care facilities which "in turn, are under the jurisdiction of the department of social services." Id. at 623. The Court held that such an indirect connection was "at best" de minimis and, if allowed to define the single subject, would "render it meaningless." Id. The bill's contents must fairly relate to its subject, and it does not suffice to establish a common link between the bill's subject and entities affected by the challenged provision in the bill. Id.

In SSM Cardinal Glennon Children's Hospital v. State, the title stated that the bill repealed and enacted sections "relating to professional licensing." 68 S.W.3d at 416-17. A hospital lien provision in the bill was challenged. Id. at 417. The State argued that the hospital lien provision would allow liens by entities that are professionally licensed, and therefore was related to professional licensing. Id. This Court disagreed. It reasoned that the use of the gerund "licensing" meant that the subject of the bill was the act of licensing, and not " 'professional licensees,' [i.e.,] those who are licensed." Id. Even assuming the hospital lien provision related to professional licensees, it was still unconstitutional because "professional licensees" is a different subject from "professional

licensing." Id. The Court again noted that the contents of the bill, "not the entities affected by the bill," must be related to its single subject. Id. (quoting Mo. Health Care Ass'n, 953 S.W.2d at 623).

Section 376.1753 does not have any relationship to health insurance. It permits non-nurse midwives and ministers with certification to provide pregnancy related services. It does not mandate insurance coverage for those services. It does not prohibit insurance companies from discriminating among providers of pregnancy related services. Section 376.1753's purpose was to exempt non-nurse midwives and ministers with certification from longstanding Missouri law requiring midwifery services to be provided by individuals trained and licensed as physicians and nurses. § 334.010, RSMo 2000; State ex rel. Mo. State Bd. of Registration for the Healing Arts v. Southworth, 704 S.W.2d 219 (Mo. banc 1986). That subject had nothing to do with health insurance.

The State concedes that § 376.1753 relates to the subject of House Bill 818 only if a broad "overarching purpose . . . [such as] health and increasing the availability and affordability of health services" is attributed to it. State's Br. 41. To that end, the State argues that "[h]ealth services and health insurance constitute a single subject." State's Br. 40-42. That argument is implausible on its face. The nouns "services" and "insurance" identify different subjects, further restricted by the common adjective "health." This Court has held that "professional licensing" and "professional licensees" are different subjects. SSM Cardinal Glennon Children's Hosp., 68 S.W.3d at 416-17. Likewise, "health services" and "health insurance" are not synonymous. In equating those two terms, the State misinterprets Missouri State Medical Association v.

Department of Health. In that case, the Court held that the subjects "[h]ealth insurance, medical records, and standard information" were are all related to the broader subject "health services" that had been identified in the bill's title. Mo. State Med. Ass'n, 39 S.W.3d at 841. The State suggests this holding means that all of these terms may be used interchangeably. State's Br. 42. Following this reasoning to its logical conclusion, a bill "relating to medical records" or "relating to standard information" could also mandate health insurance coverage for a particular health service. The single subject requirement would be meaningless. See Hammerschmidt, 877 S.W.2d at 102 (noting that the single subject requirement cannot be interpreted so broadly that it "becomes meaningless"); Mo. Health Care Ass'n, 953 S.W.2d at 623 (same). To the contrary, in Missouri State Medical Association, the health insurance provision at issue required health insurance coverage for certain health services. 39 S.W.3d at 839-40. Thus, the provision was directly related to the subject identified in the bill's title. Id. at 841. Conversely, in this case, a similar link to the subject of the bill is missing. Section 376.1753 would exempt certain practitioners from legal regulation in providing certain health services, but there is no mandate or other requirement relating to health insurance for those services. Accordingly, § 376.1753 might relate to the broader subject of health services, but it bears no relation to health insurance. Even if a broader subject such as "health" or "health services" can be conceived for House Bill 818, § 376.1753 still violates the single subject rule, because that broader subject was not identified in the title to House Bill 818.

Though the Midwives state as a matter of fact that insurance coverage will now exist for these services, neither the Midwives nor the State introduced evidence of any

insurance policy that would cover the services identified under § 376.1751. The State could have enacted a provision mandating coverage of the services at issue or prohibiting discrimination among providers of these service. Section 376.1753 does neither. The possibility of insurance coverage is entirely speculative. State's Br. 7 ("[section 376.1753] does not directly affect health insurance laws"); id. 42 ("It remains to be seen whether removing legal barriers to the services of certified midwives is sufficient to get insurers to cover the service."). The only relationship to health insurance that the Midwives can conceive is that § 376.1753 relates to a health service provided by a health practitioner, which services may in turn become the subject of a health insurance. Midwives' Br. 31-44. This relationship does not make § 376.1753 germane or naturally connected to health insurance. This Court has previously held that germaneness cannot be based on the individuals affected by § 376.1753 (non-nurse midwives and ministers) and the services they provide. SSM Cardinal Glennon Children's Hosp., 68 S.W.3d at 417; Mo. Health Care Ass'n, 953 S.W.2d at 623. Such de minimis connections would make the single subject requirement meaningless. Id. See also Hammerschmidt, 877 S.W.2d at 102.

The Midwives also attempt to redefine § 376.1753 as a "freedom of choice" or "any willing provider" provision. Midwives' Br. 36-44. Such laws require insurers to cover specific services when provided by any provider. They prohibit insurers from discriminating among providers and are intended to ensure that insureds may choose among recognized providers of a service and still be covered by their health insurance. Section 376.1753, by way of contrast, does not require insurance companies to cover any

service, does not prohibit them from discriminating among providers, and does not ensure individuals any freedom of choice under their health insurance policies. The examples of "freedom of choice" provisions cited in the Midwives' brief aptly demonstrate that § 376.1753 does not related to health insurance. Midwives Br. 40. In contrast to § 376.1753, those statutes either mandate coverage of midwifery services or prohibit discrimination among providers of midwifery services. Alaska Stat. § 21.36.090 (2007) (prohibiting discrimination); Cal Ins. Code § 10354 (West 2005) (mandating coverage); Conn. Gen. Stat. Ann. § 38a-499 (West 2008) (mandating coverage); Del. Code. Ann. tit. 18, § 3553 (2007) (prohibiting discrimination); Fla. Stat. Ann. § 627.6406 (West 2007) (mandating coverage); Me. Rev. Stat. Ann. tit. 24, § 2332-k (2007) (prohibiting discrimination); Md. Code Ann., Ins. § 15-709 (West 2007) (mandating coverage); Mich. Comp. Laws Ann. § 550.1416d (West 2007) (mandating an offer of coverage); N.H. Rev. Stat. Ann. § 415:18-q (2008) (mandating coverage); N.J. Stat. Ann. § 17:48a-34 (West 2008) (prohibiting discrimination); N.M. Stat. Ann. § 59A-22-40 (West 2007) (mandating coverage of human papillomavirus screenings by certified nurse midwives); R.I. Gen. Laws § 27-18-31 (2007) (mandating coverage); Tenn. Code. Ann. § 56-7-2407 (West 2007) (prohibiting discrimination); Wash. Rev. Code Ann. § 48.42.100 (West 2007) (mandating coverage); W. Va. Code Ann. §§ 33-15-14, 33-16-10, 33-24-43, 33-25A-31 (West 2007) (prohibiting discrimination). Section 376.1753 merely exempts a particular act from legal regulation. Unlike the statutes cited in the Midwives' brief, § 376.1753 does not affect health insurance laws.

Since § 376.1753 is not a freedom of choice provision, the Midwives' reliance on Blue Cross Hospital Service Inc. of Missouri v. Frappier is misplaced. 681 S.W.2d 925 (Mo. banc 1984). That case analyzed the constitutionality of amendments to § 375.936(11)(b), RSMo – the section prohibiting discrimination among insurance providers. That section defines "unfair discrimination" as:

> Making or permitting any unfair discrimination between individuals of the same class and of essentially the same hazard in the amount of premium, policy fees, or rates charged for any policy or contract of accident or health insurance or in the benefits payable thereunder, or in any of the terms or conditions of such contract, or in any other manner whatever, including any unfair discrimination by not permitting the insured full freedom of choice in the selection of any duly licensed physician, surgeon, optometrist, chiropractor, dentist, psychologist, pharmacist, pharmacy, or podiatrist; except that the terms of this paragraph shall not apply to health maintenance organizations licensed pursuant to chapter 354, RSMo.

§ 375.936(11)(b), RSMo 2000 (emphasis added).

As the emphasized text shows, a true freedom of choice provision directly relates to health insurance. Moreover, it bears noting that non-nurse midwives are not one of the

types of providers that insurance companies are prohibited from discriminating among. Nothing in § 376.1753 changed that.

The addition of the midwife provision to House Bill 818 resulted in the addition of an unrelated subject to the bill. The bill's single subject was health insurance. Section 376.1753 is not germane to, naturally connected to, or an incident or means to health insurance. See, e.g., SSM Cardinal Glennon Children's Hosp., 68 S.W.3d at 416-17; Mo. Health Care Ass'n, 953 S.W.2d at 623. Therefore, it also violates the single subject requirement in article III, § 23.

III. The Circuit Court properly held that § 376.1753 violated Article III, § 21 of the Missouri Constitution because its original purpose was health insurance and the addition of § 376.1753 changed that purpose. (Responds to State's Third Point Relied On and Midwives' Second Point Relied On)

A. Standard of review

The standard of review for this argument is the same as the standard for the clear title argument (as set out in section I above).

B. Section 376.1753 was not consistent with House Bill 818's original purpose.

A bill cannot be amended in a way that changes its original purpose. Mo. Const. art. III, § 21. The addition of the midwife provision changed the original purpose of House Bill 818. A bill's original purpose is determined from its original title and contents. See, e.g., Mo. Ass'n of Club Executives, Inc., 208 S.W.3d at 888. House Bill 818's original title concerned health insurance portability and accessibility. J. Ex. 1. Its contents also concerned health insurance portability and accessibility. In the original version of the bill, §§ 376.961, 376.962, 376.964, and 376.989 were amended. J. Ex. 1. Those sections concern the Missouri Health Insurance Pool – a non-profit entity of which all health insurers are members. Id. In addition, §§ 376.1800-.1839 were added to establish the Missouri Health Insurance Portability and Accessibility Act. Id. § 376.1800. Thus, as originally introduced, the bill proposed changes in the law to make health insurance more portable and more accessible. Stated generally, its original

purpose was health insurance regulation. Section 376.1753 was not related to that original purpose.

In its original purpose argument, the State also notes that the federal Health Insurance Portability and Accountability Act (HIPAA) was not merely concerned with health insurance, but had a much broader purpose. State's Br. 36. The State's citation to federal law actually supports the position of the Physician Associations. Unlike the Missouri Constitution, the federal constitution does not include clear title, single subject, or original purpose restrictions. Federal bills can include multiple subjects and can change in their purposes. HIPAA could and did include a diverse array of topics that a state bill could not. While the Missouri legislature might have generally passed a bill to address "health" or "health services," it would have been required to state those subjects in the bill's title. House Bill 818's title was never amended to identify it as a general health bill and its scope was required to be much more limited than the HIPAA by the Missouri Constitution.

The addition of § 376.1753 changed the original purpose of House Bill 818 and thus violated Article III, § 21. The Circuit Court's decision on this point should be affirmed.

IV. The State's second Point Relied On preserves nothing for judicial review. (Responds to the State's Second Point Relied On)

The State has alleged, as a separate Point Relied On, that the Circuit Court "considered" irrelevant matters:

> The circuit court erred because it improperly considered matters beyond the legislative history of HB 818, in that only the text of the various versions of HB 818 are relevant to a procedural challenge under Art. III, Sec. 21 and 23.

State's Br. 27.

In challenging the "relevance" of matters "considered" by the Circuit Court, the State appears to be objecting to the Circuit Court's admission of certain evidence. The State's second Point Relied On, however, does not identify the evidence that was improperly admitted, and fails to articulate whether or how the consideration of that evidence affected the outcome of the case. In fact, the Circuit Court's evidentiary rulings were proper and within its discretion. The State has failed to preserve its allegation of trial court error for judicial review and this Point Relied On should be denied.

A. Standard of review

When reviewing trial court evidentiary rulings, an appellate court reviews those rulings for an abuse of discretion. Hancock v. Shook, 100 S.W.3d 786, 795 (Mo. banc 2003). Trial courts are given broad latitude in controlling the trial and ruling upon evidentiary matters. Id. A trial court abuses its discretion only if its ruling is clearly

against the logic of the circumstances and is so unreasonable and arbitrary that it shocks the sense of justice and indicates a lack of careful, deliberate consideration. Id.

B. The State has not preserved its allegation of trial court error for judicial review.

To preserve a claim of error in admitting evidence, a party must object at trial and state the basis for its objection when the evidence is offered. Concord Publ'g House, Inc. v. Dir. of Revenue, 916 S.W.2d 186, 195-96 (Mo. banc 1996). On appeal, that party's Point Relied On must specify the evidence that was improperly admitted and the reason why the trial court erred. Rule 84.04(e); Gerdel v. Broccard, 428 S.W.2d 493, 496 (Mo. 1968); Pruellage v. De Seaton Corp., 380 S.W.2d 403, 405 (Mo. 1964). The objection to the admission of the evidence must be included in the record on appeal. Slankard v. Thomas, 912 S.W.2d 619, 628-29 (Mo. App. 1995). Failure to include that record leaves the appellate court with nothing to review. Id.

The State's second Point Relied On preserves nothing for judicial review. It complains of "matters beyond the legislative history of HB 818" that should not have been considered. State's Br. 27. It never specifically identifies these "matters," noting only that they "include allegations about both the manner of passage and other actions taken by the General Assembly. Decision, Appendix at pp. 8-10." Id. 29. The State never affirmatively states the specific items of evidence to which it is objecting in its Point Relied On or in the Argument section of its brief.

Moreover, no trial court record exists of the State's objection or the trial court's response. The parties jointly agreed to submit this case without a transcript of the trial

court hearing, instead tendering a Joint Stipulation In Lieu of Transcript itemizing the evidence admitted by the trial court at hearing. Neither that stipulation nor anything else in the record on appeal provides any record of the State's objections, if any, or of the trial court's rulings. Without such a record, there is nothing for this Court to review.

C. The State has not alleged that the "consideration" of the unspecified matters changed the outcome of the case.

The State's Point Relied On is further flawed in that it does not allege that the consideration of the unspecified matters affected the trial court's ruling. Rule 84.13(b); Brown v. Hamid, 856 S.W.2d 51, 54-55 (Mo. banc 1993); Lewis v. Wahl, 842 S.W.2d 82, 84-85 (Mo. banc 1992). In fact, it alleges only that the Court "considered" them, and not that they were dispositive or affected the final outcome. Since the State has not specifically identified the matters of which it complains, the Physician Associations cannot respond to them in more detail. However, in its judgment, the trial court found that the Senate had refused to pass other legislation related to midwifery when it was plainly and directly presented to it. L.F. 597-98. Judge Joyce specifically noted that she made each of those findings "[t]o the extent it is relevant," clearly noting that the findings were not dispositive, but simply additional probative evidence that tended to support her ultimate conclusion. L.F. 597-98. In sum, the State has completely failed to demonstrate that the mere consideration of some unspecified matters may have affected the outcome.

D. The evidence considered by the Circuit Court was relevant.

Though the Physician Associations cannot ascertain with certainty the specific evidence to which the State objects, they have endeavored to respond to the gist of the State's legal argument. Plaintiffs' and Defendant-Intervenors' evidence before the Circuit Court included legislative history maintained by the House and Senate (House and Senate Journals and bills). See Stipulation in Lieu of Transcript. In deciding a challenge pursuant to §§ 21 and 23, the State argues that a court may only consider the legislative history of the bill at issue, and must limit its inquiry in considering even that evidence. State's Br. 28-29. Specifically, the State argues that the legislative history of the bill at issue cannot be reviewed to determine the circumstances surrounding passage of the legislation. Id. The State is mistaken.

Sections 21 and 23 limit the subject and purpose of bills and require that the title of the bill provide clear notice of that subject for the purpose of preventing surprise, log-rolling, and surreptious, unrelated amendments. See, e.g., Mo. Ass'n of Club Executives, Inc., 208 S.W.3d at 888 (invalidating "next-to-last day" amendments that "were not remotely with the original purpose of the bill"); Nat'l Solid Waste Mgmt. Ass'n, 964 S.W.2d at 820 (rejecting "a last-minute amendment about which even the most wary legislators could hardly have given their considered attention and about which concerned citizens likely had no input"). Accordingly, a bill's legislative history may be analyzed to determine whether an amendment is unrelated and surreptious, and therefore violates both the letter and the spirit of the law. Of course, innuendo and speculation about the motivations of legislators should never be sufficient evidence to invalidate any piece of

legislation. Extra-judicial statements in media reports or even sworn testimony in courts have limited, if any, role to play in the process of determining the constitutionality of a piece of legislation. See Pipe Fabricators, Inc. v. Dir. of Revenue, 654 S.W.2d 74, 76 (Mo. banc 1983) (affirming the rejection of an individual Senator's affidavit in a statutory interpretation dispute). When a germane amendment is added to a bill, this Court has rightly held that such legislation cannot be overturned by merely impugning the circumstances regarding passage. Corvera Abatement Techs., Inc. v. Air Conservation Comm'n, 973 S.W.2d 851, 862 n.8 (Mo. banc 1998). By the same token, when unrelated legislation is passed and it is clear from the legislative record that both the letter and the spirit of the Constitution were being violated, this Court has not put on blinders to the technical and substantive violations at issue, but has rather noted that the Constitutional lawmaking process is not served by attempts to surreptitiously insert unrelated legislation into a pending bill. See, e.g., Mo. Ass'n of Club Executives, Inc., 208 S.W.3d at 888.

For example, in SSM Cardinal Glennon Children's Hospital, the Court considered all of the following legislative history:

- the history of Missouri's hospital lien law dating back to 1941,
- three other bills that were introduced during the same legislative session and that would have created a new hospital lien law in 1999;
- the fact that "[n]one of these bills garnered enough support to pass;"
- the legislative history of the specific bill at issue; and

- a constitutional objection filed by a Senator while the Governor's approval was pending, noting that the bill as passed was unconstitutional because it did not comply with article III, sections 21 and 23.

68 S.W.3d at 414-416.

Legislative records of the specific bill at issue and other related legislative actions are proper for the court to consider.

The Circuit Court in this case considered the legislative history of House Bill 818 which showed that § 376.1753 was only added to the final version of the bill when a new floor substitute bill replaced a previous version, that the title was not amended when § 376.1753 was added to the bill, and that § 376.1753 was worded to obscure its meaning. Senate Bill 303 was relevant because it showed that a plainly worded section to license and regulate non-nurse midwives could not pass the Senate. P. Exs. 18, 19. The Senate Substitute for House Committee Substitute for House Bill 364 and the accompanying Senate Journal pages were relevant to show that the Senate specifically ruled that midwifery provisions were non-germane to a similar health insurance bill. P. Exs. 15, 17. Finally, the Senate Journal pages noting Senate Loudon's removal from his committee chairmanship were relevant because he was the Senate handler of House Bill and he was removed soon after he replaced the first Senate substitute version of the bill with the second substitute bill (which included § 376.1753). P. Ex. 16. All of this evidence is relevant, because it shows that the legislature did not knowingly add § 376.1753 to House Bill 818 out of any desire to effect a change in health insurance laws. These actions (and lack thereof) were part of the legislative record, and the trial

court did not commit reversible error by considering them or noting them in her judgment. Her review did not unduly intrude on the legislative process, but rather reflects the discharge of the trial judge's constitutional duty by reference to the legislature's records of its activities.

Finally, the State responds to its disagreement with the trial court's ruling by asking the Court to take notice of non-record material that was never presented to the trial court. State's Br. 29-30 n.4. The suggestion is inappropriate, especially since the State has not preserved its claim for review and it lacks merit. To the extent the Court does consider the non-record material cited to it by the State, it is of limited probative value, because it shows only that Senate Bill 303 had received two favorable committee votes, and provides little or no support for the contention that Senate Bill 303 could have passed the full Senate and the House. Further, if this Court does consider legislative materials from outside of the record on appeal, there is a far more probative piece of legislative history not mentioned by the State. On December 4, 2007 (the second day for pre-filing legislation for the 2008 legislative session), Senator Loudon introduced Senate Bill 870 "to repeal section 376.1753, RSMo, relating to the practice of midwifery," thereby acknowledging (1) the inappropriateness of that section, and (2) that its subject is the practice of midwifery and not health insurance. Senate Bill 870 (2008), available at http://www.senate.mo.gov/08info/BTS_Web/Bill.aspx?SessionType=R&BillID=378. Though such non-record materials should not be considered, if this Court accepts the State's invitation to look outside the record on appeal, that proposed legislation is far

more relevant than any inference that could be shown from the committee votes cited by the State.

V. The Physician Associations have standing to challenge the constitutionality of House Bill 818, because § 376.1753 would subject their members to professional discipline and expose their patients to harm. (Responds to State's First Point Relied On and Midwives' Fourth Point Relied On)

Standing is the legal concept that ensures plaintiffs in a lawsuit have a sufficient interest in a matter in order to be entitled to relief. Farmer v. Kinder, 89 S.W.3d 447, 451 (Mo. banc 2002). Standing does not depend on the merits of plaintiffs' claims. Healthcare Services of the Ozarks, Inc. v. Copeland, 198 S.W.3d 604, 612 (Mo. banc 2006); Buchanan v. Kirkpatrick, 615 S.W.2d 6, 13 n.8 (Mo. banc 1981). Rather, to establish standing in a declaratory judgment action, the plaintiffs must show that they have a legally protectable interest that will be affected by the outcome of the lawsuit. Ste. Genevieve Sch. Dist. R-II v. Bd. of Aldermen of the City of Ste. Genevieve, 66 S.W.3d 6, 10 (Mo. banc 2002). The interest does not have to be direct or grave. An "attenuated, slight, or remote" interest will suffice. Id.

An association may represent the interests of its members. Associational standing exists when the members would have standing in their own right, the suit seeks to protect interests germane to the organization's purpose, and the claim does not require participation of individual members. Mo. Health Care Ass'n, 953 S.W.2d at 620; Mo. Bankers Ass'n v. Div. of the Mo. Div. of Credit Unions, 126 S.W.3d 360, 363 (Mo. banc 2003). Concerning the interests of members, the lawsuit does not need to impact the interests of every member of the association. Ferguson Police Officers Ass'n v. City of Ferguson, 670 S.W.2d 921, 924 (Mo. App. 1984) (quoting Warth v. Seldin, 422 U.S. 490,

511 (1975)). Rather, the association has standing if one of its members will be impacted. Warth, 422 U.S. at 511 (an association must allege injury to "its members, or any one of them").

In this case, all parties stipulated that each of the Physician Associations is a professional membership organization that represents the interests of licensed physicians and surgeons. J.S. ¶¶ 2-5. The parties further stipulated that the organizations were responsible for representing their members' interests before the state legislature, state agencies, and state courts. Id. By agreement of the parties, the specific interests of the Physician Associations were set forth by affidavit. Id. ¶ 1. The State and the Midwives had full notice of the affidavits and the opportunity to submit counter-affidavits. Id. They introduced no evidence relating to standing. Seven individual physicians – members of the Physician Associations – submitted affidavits describing their specific concerns. P. Exs. 1-7. The physicians noted that they provided care to pregnant women and their babies. Id. ¶ 1. Under § 376.1753, they will be presented with requests to provide care to women who have also worked with an unlicensed, non-nurse midwife. Id. ¶¶ 3-4. Section 334.010, RSMo, specifically defines the practice of medicine to include midwifery: "It shall be unlawful for any person not now a registered physician within the meaning of the law to practice medicine or surgery in any of its departments, … or engage in the practice of midwifery in this state." This statute is not unconstitutionally vague, and has been held to prohibit the practice of lay midwifery. Southworth, 704 S.W.2d at 223-24. Physicians who "in any way" assist, enable, aid, procure, advise or encourage any other person to violate chapter 334, RSMo, are subject

to discipline. § 334.100.2(10), RSMo Supp. 2006. The legislature has specifically considered when doctors should be allowed to cooperate with other professionals in providing health care: "No physician or pharmacist licensed in this state shall be subject to discipline for authorizing, assisting or cooperating with other health care professionals licensed by this state who are practicing their profession within the scope of their license." § 191.228, RSMo 2000 (emphasis added). Thus, physicians can only cooperate with licensed health care professionals. Cooperation with unlicensed persons is not allowed.

Accordingly, if licensed physicians coordinate patient treatment decisions with unlicensed midwives, those physicians and surgeons will be subject to professional discipline. § 334.100.2(10), RSMo Supp. 2007. Their medical license may be put on probation, suspended, restricted, or even revoked. § 334.100.4, RSMo Supp. 2007. The Board of Registration for the Healing Arts may publicly or privately reprimand them or require them to attend continuing educational courses. Id.

Section 376.1753 does not purport to change the definition of the practice of medicine or to provide for licensure, registration, or any other regulation of non-nurse midwives. Accordingly, all seven physicians noted under the plain and unambiguous terms of their licensing statutes they would be subject to discipline for working with an unlicensed midwife. P. Exs. 1-7 ¶ 4. By affidavit, executive officers of all four Physician Associations stated that they shared the same concerns for all of their members' licenses. P. Exs. 8-11 ¶ 3. Thus, the Physician Associations established by unrefuted evidence that they are professional organizations of licensed professionals and

that the challenged law, if allowed to go into effect, would expose their members to professional discipline. This evidence clearly established that the Physician Associations were acting to protect an interest of their members (practicing medicine free from the threat of professional discipline) that was germane to their purposes and which they were an appropriate party to represent. Mo. Health Care Ass'n., 953 S.W.2d at 620 ("The interest in doing business free from the constraints of an unconstitutional law is entitled to legal protection.").

In their affidavits, the seven individual physicians further noted that they were concerned about the effect of § 376.1753 on the health and safety of mothers and their unborn babies. P. Exs. 1-7 ¶ 3. The physicians stated that: "I am concerned that this provision will adversely affect the health of my patients. Without the care of a licensed and competent physician, the health of both mother and child will be jeopardized. Serious medical complications may arise during pregnancy requiring the skill and care of a physician." Id. This evidence of the health and safety risks of allowing unlicensed, unregulated persons to hold themselves out to the public as midwives was also unrebutted. Courts have recognized that doctors have the ability to advocate for the health and safety of their patients in these circumstances. Planned Parenthood of Kansas v. Nixon, 220 S.W.3d 732, 737-38 (Mo. banc 2007). Accordingly, the Physician Associations also had thirty party standing. Id.

Neither the State nor the Midwives denies that the physicians have personal interests at stake generally. Indeed, they both concede that the physicians could initiate a declaratory judgment action to interpret § 376.1753. State's Br. 33; Midwives' Br. 62-

63. But, they inconsistently argue that a declaratory judgment action (such as this one) to have § 376.1753 declared unconstitutional is not proper. But, of course, if the interpretation of § 376.1753 affects the Physician Associations sufficient to confer standing, an action to determine that statute's constitutionality implicates the exact same interests.

The Physician Associations' members have an interest in their licenses. That interest is not speculative or hypothetical. To the contrary, it is a property interest protected by the federal and state constitutions. See, e.g., Larocca v. State Bd. of Registration for the Healing Arts, 897 S.W.2d 37, 42 (Mo. App. E.D. 1995) ("Doctor had a property interest in his license to practice medicine protected by both procedural and substantive due process as prescribed in § 334.100, R.S.Mo. 1994."). As noted above, the State and Midwives argue that physicians might not be disciplined for coordinating care with midwives. They, however, offer no interpretation of the statutes to support their supposition. As laid out above, the statutes are clear and explicit that midwifery is the practice of medicine and that physicians may be disciplined for assisting, aiding, procuring, advising, or encouraging "in any way" an unlicensed person to practice as a midwife. § 334.010.1, RSMo 2000; § 334.100.2(10), RSMo Supp. 2007. Section 376.1753 does not purport to change the definition of the practice of midwifery or the acts for which a physician may be disciplined. Of course, if it had gone into such details, other legislators would have been much more likely to detect the intent and effect of the amendment being surreptitiously inserted into House Bill 818 and it would not have passed. Section 376.1753 does not provide a safe harbor for physicians and the issue is

not fairly debatable. Moreover, in seeking declaratory relief, it is well established that a party need not wait for an enforcement action to challenge the constitutionality of a statute. Mo. Health Care Ass'n, 953 S.W.2d at 621-22. Rather, unconstitutional laws such as § 376.1753 put plaintiffs in the very kind of dilemma that declaratory judgment acts are intended to resolve. Id. at 622. Finally, any lawsuit alleging a procedural defect in the enactment in the law must be brought before the next legislative session adjourns. § 516.500, RSMo 2000. If the Physician Associations were required to wait for further action as the State and Midwives suggest, the limitations period for their procedural challenge could have run.

The other two elements of associational standing were likewise satisfied. The Physician Associations are each professional organizations of licensed medical providers charged with representing their members' interests before the legislature, state agencies, and state courts. Representing those members in the courts of this state regarding an unconstitutional piece of legislation that would subject their members to professional discipline of their licenses is clearly germane to their organizational purposes. Appellants' citation to Missouri Growth Association v. Metropolitan St. Louis Sewer District is inapposite. 941 S.W.2d 615 (Mo. App. 1997). In that case, the associations had general purposes of promoting the interests of real estate developers, real estate dealers, and community and condominium associations. Id. at 621-22. They brought suit to challenge certain wastewater charges on behalf of their members. Id. The Court of Appeals held that the associations did not have standing because their members did not pay sewer bills and/or because the payment of sewer bills was not germane to their

general organizational interests. Id. at 621-22. This holding is unremarkable and does not affect the standing of the Physician Associations. The Court of Appeals effectively decided that trade and business associations are not proper parties to challenge the utility bills of their individual members. Likewise, if the Physician Associations were challenging utility charges for their members, such a challenge might not be within their organizational purposes. That is not the case here. Rather, the Physician Associations are asserting the interests of their licensed members in practicing medicine free from the threat of professional discipline and the chilling effect of an unconstitutional law. Such interests are clearly germane to the purposes of the professional organizations. Mo. Health Care Ass'n, 953 S.W.2d at 620; Home Builders Ass'n of Greater St. Louis, Inc. v. City of Wildwood, 32 S.W.3d 612, 615 (Mo. App. 2000).

Finally, associations are proper parties to an action for declaratory or injunctive relief. Mo. Bankers Ass'n, 126 S.W.3d at 363; Home Builders Ass'n of Greater St. Louis, Inc., 32 S.W.3d at 616. By way of contrast when damages are sought, it may be proper to require individuals to be parties to the action. Id. By their Petition, the Physician Associations sought a declaration that § 376.1753 was unconstitutional and ancillary injunctive relief. This case is exactly the kind of case that associations have standing to bring. Id. The State (but not the Midwives) suggests a potential for disagreement may exist among physicians as evidenced by Dr. Allemann's alignment with the Midwives and argues that such potential for disagreement divested the Physician Associations of standing. State's Br. 25-26. First, there was no evidence that she was a member of any Physician Association, much less of all four associations. Second, this

argument is not consistent with the law. Association standing exists if even one member of the Physician Associations would be personally affected by the law. Ferguson Police Officers Ass'n, 670 S.W.2d at 924; Warth, 422 U.S. at 511. At least one member of each Physician Association has submitted an affidavit describing his or her concerns. P. Exs. 1-7. Even if Dr. Allemann has a desire to see the law go into effect to further the economic interests of herself and her clinic, the private pecuniary interests of a non-member cannot deprive the Physician Associations of standing to challenge the law and protect against the threat of discipline of their members' licenses.

CONCLUSION

Section 376.1753 is a textbook example of the kind of unrelated legislation that article III, §§ 21 and 23 prohibits. The Circuit Court properly declared that section to be unconstitutional, severed it from the remainder of House Bill 818, and enjoined its enforcement.

The Physician Associations request that this Court AFFIRM the judgment of the Cole County Circuit Court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 84.06(g)

The undersigned certifies:

1. That this Brief complies with Rule 84.06(g) of this Court; and that this Brief contains 13,483 words according to the word count feature of Microsoft Word 2003 SP2 software with which it was prepared.

2. That the disks accompanying this Brief have been scanned for viruses, and to the best of his knowledge are virus-free.

3. That this Brief meets the standards set out in Mo. Civil Rule 55.03.

CERTIFICATE OF SERVICE

The undersigned does hereby certify that two copies of the foregoing Brief and a diskette with the text of the Brief were served on this 25th day of January, 2008, by hand-delivery, facsimile transmission, certified mail, electronic mail and/or United States mail, postage prepaid, to the following parties of record:

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