

**IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
AT KANSAS CITY**

COMPREHENSIVE HEALTH SERVICES OF PLANNED PARENTHOOD GREAT PLAINS, on behalf of itself, its staff, and its patients; REPRODUCTIVE HEALTH SERVICES OF PLANNED PARENTHOOD OF THE ST. LOUIS REGION, INC., on behalf of itself, its staff, and its patients; DAVID L. EISENBERG, MD, MPH, on behalf of himself and his patients; and COLLEEN P. MCNICHOLAS, DO, MSCI, on behalf of herself and her patients,

Plaintiffs,

v.

JOSHUA D. HAWLEY, Attorney General of Missouri, in his official capacity; JEAN P. BAKER, Prosecuting Attorney for Jackson County, in her official capacity; KIMBERLY M. GARDNER, Circuit Attorney for the City of St. Louis, in her official capacity; DANIEL K. KNIGHT, Prosecuting Attorney for Boone County, in his official capacity; MISSOURI BOARD OF REGISTRATION FOR THE HEALING ARTS; DAVID A. POGGEMEIER, MD, President of Board of Registration for the Healing Arts, in his official capacity; JADE D. JAMES, MD, Secretary of Board of Registration for the Healing Arts, in her official capacity; JAMES A. DIRENNA, DO, Board Member of Registration for the Healing Arts, in his official capacity; DAVID E. TANNEHILL, DO, Board Member of Registration for the Healing Arts, in his official capacity; and SARAH MARTIN-ANDERSON, PhD, MPP, MPH, Public Board Member of Registration for the Healing Arts, in her official capacity,

Defendants.

Case No.

Division No.

**PETITION
(Temporary Restraining Order - EG; Injunctive Relief - EC)**

Plaintiffs, by and through their undersigned attorneys, bring this Petition against the above-named Defendants, their employees, agents, and successors in office, and in support thereof state the following:

I. INTRODUCTION

1. This is an action for declaratory and injunctive relief challenging the constitutionality of portions of Senate Bill 5, 99th General Assembly, 2nd Extraordinary Session (2017 Mo.) (“S.B. 5”), to be codified at Mo. Rev. Stat. § 188.027.6 (“the Act”), which is scheduled to take effect on October 24, 2017. See Mo Const. art III, § 29. A copy of S.B. 5, as truly agreed to and finally passed, is attached hereto as Exhibit A.

2. The Act seeks to impose on Missouri women and their physicians an extreme and unprecedented set of requirements that unduly restrict women’s ability to access an abortion in the state. On top of existing law, which forces all women in the state to make a medically unnecessary trip to a health center at least 72 hours before they can obtain an abortion, the Act adds another extremely burdensome and medically unnecessary restriction by mandating that the physician or physicians who will “perform or induce” a woman’s abortion must be the same person(s) to, orally and in person and at least 72 hours in advance of her procedure, describe certain state-mandated information to her (hereinafter “same-physician requirement”). The same-physician requirement will impose extreme burdens on physicians who provide abortion services in Missouri, some of whom will not be able to comply at all. As a result of the requirement, the Act will impose significant delays, greater medical risks, and other serious harms on patients, some of whom will be unable to access abortion at all.

3. The Act does not mandate imparting any new information to abortion patients and in fact conflicts with other provisions of existing Missouri law and additional amendments made

by S.B. 5 that—consistent with accepted medical practice—provide for the same, state-mandated information to be given to the patient by a physician who is to perform or induce the abortion, *or* by a referring physician, *or* by certain licensed, qualified professionals. As a result of the conflicting requirements, it is unclear what the Act requires and allows. Noncompliance with the Act imposes criminal, licensing, and other penalties.

4. The Act will irreparably harm Plaintiffs and their patients by violating Plaintiffs' and their patients' rights under the Missouri Constitution, and by imposing significant burdens on patient care such that, for whole categories of patients, abortion care would no longer be available, and for virtually all other abortion patients, it would be either unavailable or so delayed that they would experience increased medical risk and financial costs. The Act thus violates the due process guarantees of the Missouri Constitution.

5. The Act is also unenforceable because it violates article III, section 21 of the Missouri Constitution, which prohibits legislative changes to a bill that are unrelated to the original purpose of a bill. The passage of the Act, and other provisions in S.B. 5, have resulted in a bill that unconstitutionally deviates from the original (and sole) purpose of S.B. 5, as it was introduced, which was to expand the Attorney General's jurisdiction, but now enacts a diverse set of unrelated changes to Missouri's code.

6. Accordingly, Plaintiffs seek judicial relief declaring the Act unconstitutional and granting a temporary restraining order and a preliminary injunction, as well as a permanent injunction, enjoining the Act's enforcement.

II. PARTIES

Plaintiffs

7. Plaintiff Comprehensive Health Services of Planned Parenthood Great Plains (“Comprehensive Health”) is a not-for-profit corporation organized under the laws of Kansas and registered to do business in Missouri. Comprehensive Health operates two health centers in the state of Missouri: one is the Midtown-Kansas City Center in Kansas City, Missouri, and the other is the Columbia Center in Columbia, Missouri. The Midtown-Kansas City Center provides medication abortion. After having been granted a license on October 3, 2017, Plaintiff Comprehensive Health will begin this month offering medication abortion, as well as surgical abortion services through 14 weeks 6 days from the first day of the woman’s last menstrual period (“Imp”). Until recently, Comprehensive Health was unable to offer abortion services in Missouri due to onerous legal restrictions, which are being challenged by Comprehensive Health and are currently enjoined in a separate, ongoing lawsuit. Plaintiff Comprehensive Health brings this action on its own behalf and on behalf of its physicians and its patients.

8. Plaintiff Reproductive Health Services of Planned Parenthood of the St. Louis Region, Inc. (“RHS”) is a not-for-profit corporation organized under the laws of Missouri. RHS provides abortion services at a health center in St. Louis, Missouri. The St. Louis Center provides abortion services and other related services, including contraceptive counseling and sexually transmitted disease testing and treatment, for abortion patients. It currently offers surgical abortion up to 21 weeks 6 days Imp, and medication abortion up to 10 weeks Imp.

9. Plaintiff RHS also wishes to offer abortion services at Planned Parenthood health centers in Springfield and Joplin, Missouri. Both health centers provide general reproductive health care, including family planning services, testing and treatment for sexually transmitted

infections, cervical and breast cancer screening services, pregnancy testing, and all-options counseling. RHS does not currently provide abortion services at either health center due to restrictions in Missouri law, which RHS is challenging in separate, ongoing litigation. However, patients who live in the Springfield and Joplin areas are able to meet with a qualified, licensed professional at the Springfield health center to receive certain state-mandated information at least 72 hours before an abortion, as required by law, so that a patient can avoid making two lengthy trips to a health center that provides abortions. Plaintiff RHS sues on its own behalf and on behalf of its physicians and its patients seeking abortions.

10. Plaintiff David L. Eisenberg, MD, MPH, is a board-certified obstetrician-gynecologist. He is Associate Professor in the Department of Obstetrics and Gynecology at the Washington University School of Medicine and an Attending Physician and Director of the Benign Gynecology Resident Service at Barnes-Jewish Hospital. Dr. Eisenberg also serves as the Medical Director of RHS.

11. As part of his varied patient care, Dr. Eisenberg provides abortions at RHS and in an ob/gyn specialist group practice. Dr. Eisenberg will be subject to the requirements of the Act, if it takes effect, and to the serious penalties available for any non-compliance. Dr. Eisenberg joins this suit in his individual capacity, and not on behalf of Washington University. Dr. Eisenberg sues on his own behalf and on behalf of his patients seeking abortions.

12. Plaintiff Colleen P. McNicholas, DO, MSCI, is a board-certified obstetrician-gynecologist. She is Assistant Professor in the Department of Obstetrics and Gynecology at the Washington University School of Medicine, Director of the Ryan Residency Training Program, and Attending Physician at Barnes-Jewish Hospital.

13. As part of her varied patient care, Dr. McNicholas provides abortions at RHS and in an ob/gyn specialist group practice. She has in the past provided abortions at Plaintiff Comprehensive Health's Columbia Center and plans to resume providing there starting this month. Dr. McNicholas will be subject to the requirements of the Act, if it takes effect, and to the serious penalties available for any non-compliance. Dr. McNicholas joins this suit in her individual capacity, and not on behalf of Washington University. Dr. McNicholas sues on her own behalf and on behalf of her patients seeking abortions.

Defendants

14. Joshua D. Hawley is the Attorney General of the State of Missouri. He is charged by law with defending the interests of the State in civil tribunals, including this Court. Under S.B. 5, Attorney General Hawley has original jurisdiction throughout the state to prosecute violations of the Act, including the ability to seek injunctive relief. He is sued in his official capacity.

15. Jean Peters Baker is the Prosecuting Attorney for Jackson County. She is authorized by law to prosecute violations of the Act performed in Jackson County, and to seek injunctive relief. She is sued in her official capacity.

16. Kimberly M. Gardner is the Circuit Attorney for the City of St. Louis. She is authorized by law to prosecute violations of the Act performed in the City of St. Louis, and to seek injunctive relief. She is sued in her official capacity.

17. Daniel K. Knight is the Prosecuting Attorney for Boone County. He is authorized by law to prosecute violations of the Act performed in Boone County, and to seek injunctive relief. He is sued in his official capacity.

18. The Missouri Board of Registration for the Healing Arts (“Board”) is responsible for the licensure of Plaintiff physicians and other physicians that perform abortions at RHS and Comprehensive Health. See Mo. Rev. Stat. § 334.120.1 (establishing “board to be known as ‘The State Board of Registration for the Healing Arts’ for the purpose of registering, licensing and supervising all physicians and surgeons . . . in this state); see also Mo. Code Regs. Ann. tit. 20, § 2150-1.010.

19. David A. Poggemeier, MD, President, Jade D. James, MD, Secretary, James A. DiRenna, DO, David E. Tannehill, DO, and Sarah Martin-Anderson, PhD, MPP, MPH, are members of the Board. The Board operates at the direction of the Defendant Members, who have the power and duty to initiate investigations, to determine if a physician has engaged in unprofessional conduct, and to discipline licensed physicians. See Mo. Rev. Stat. § 334.100. Each member is sued in his or her official capacity.

III. VENUE AND JURISDICTION

20. Venue is proper in this Court pursuant to Missouri Revised Statutes Section 508.010.

21. This Court has jurisdiction to consider this Petition under Missouri Revised Statutes Sections 526.010, 527.010.

IV. FACTUAL ALLEGATIONS

Abortion Background

22. Legal abortion is one of the safest procedures in contemporary medical practice.

23. Approximately one in three women in this country will have an abortion by age forty-five. Women decide to terminate a pregnancy for a variety of reasons, including familial, medical, financial, and personal reasons. Some women have abortions because they conclude

that it is not the right time in their lives to have a child or to add to their families; some to preserve their life or their health; some because they receive a diagnosis of a severe fetal medical condition or anomaly; some because they have become pregnant as a result of rape; and others because they choose not to have biological children.

24. Both surgical and medication (*i.e.*, nonsurgical) abortion options are available to women in Missouri seeking to terminate their pregnancy.

25. Medication abortion is a method of terminating an early pregnancy by taking medications that cause expulsion of the pregnancy in a manner similar to an early miscarriage. Medication abortion is available through the first ten weeks of pregnancy measured from the first day of the woman's last menstrual period ("lmp"). Each of the Plaintiffs, provides these early medication abortions to their patients.

26. Plaintiffs also perform surgical abortions, including suction abortion and, starting early in the second trimester, dilation and evacuation. Surgical abortions early in the second trimester are performed as a one-day procedure, but in Missouri, by 18 weeks lmp, two appointments on consecutive days are required.

27. Plaintiffs already struggle to provide adequate abortion access to Missouri women. None of the physicians who provide abortion services at RHS or Comprehensive Health or the individual physician Plaintiffs do so every day of the week, and instead are able only to provide abortion care for much more limited periods.

28. Specifically, Plaintiff RHS is able to provide abortion care to patients through a network of physicians, all of whom have one or more other jobs providing health services at other facilities, including facilities out of state, and therefore can only devote a limited number of hours to providing abortion care at RHS. These providers' schedules are also set several months

in advance and cannot be easily rearranged, if at all, and certainly not without compromising care to their other patients.

29. Plaintiff Comprehensive Health has one physician who provides medication abortion once a week at the Midtown-Kansas City Center, but also provides care at health centers in Kansas as well. Once the Columbia Center resumes abortion services this month, a different physician will begin providing abortions there but due to other professional obligations, including providing care at several other health centers in and out of state, will only be able to travel to Columbia to provide abortion services two to three times a month, and only for one day each time.

30. The Plaintiff individual physicians function as part of an ob/gyn specialist group. These are practices that provide care to patients as a group, as is typical in modern medicine, with coverage rotations and care organized to most efficiently serve patients. Their schedules are set as a group, months ahead of time, and these practitioners / professors have their time organized in half-day or full-day segments that vary day to day and week to week.

31. Separate from the legal requirements discussed below, and consistent with their ethical duty, prior to inducing or performing an abortion, Plaintiffs each ensure that their patients receive all information necessary for them to fully understand the risks and benefits of abortion and alternatives to abortion, so that they are able to give informed and voluntary consent, if they choose to terminate their pregnancy. In addition, Plaintiffs and their staff give their patients multiple opportunities to ask questions and discuss any concerns prior to the abortion being induced or performed.

Existing Regulatory Framework/Informed Consent in Missouri

32. Existing Missouri law states that a physician may not proceed with an abortion unless she or he has received the woman's voluntary and informed consent. Mo. Rev. Stat. § 188.027; see also Mo. Rev. Stat. § 188.039. And, separate from the challenged Act, Missouri already has in place extensive requirements that must be met in order for a woman's consent to an abortion to be considered legally sufficient. See Mo. Rev. Stat. §§ 188.027, 188.039.

33. Under existing law, in order for a woman's consent to be considered "voluntary and informed and given freely and without coercion" under law, the woman must go to a health center to receive certain state-mandated information orally and reduced to writing, and in a private setting, at least 72 hours in advance of having an abortion. Mo. Rev. Stat. § 188.027.1, 2. Existing law allows the information to be provided to the woman *either* by the physician who is to induce or perform the abortion *or a qualified health professional*. Mo. Rev. Stat. § 188.027.1.

34. A "qualified professional" is defined to include physicians, physician assistants, registered nurses, licensed practical nurses, psychologists, licensed professional counselors, or licensed social workers provided that they are acting under the supervision of the physician performing or inducing the abortion, and acting within the course and scope of their authority as provided by law. Mo. Rev. Stat. § 188.027.9.

35. Missouri Revised Statute Section 188.027.1 outlines the information that must be given to the woman at least 72 hours before an abortion may be performed. Among the information a patient must receive is: a description of the "immediate and long-term medical risks to the woman associated with the proposed abortion method" and the "immediate and long-term medical risks to the woman . . . in light of the anesthesia and medication that is to be administered [and other factors]." Mo. Rev. Stat. § 188.027.1(1)(b)b-c.

36. Furthermore, existing Section 188.039 states that at least 72 hours before an abortion can be performed *either* the physician who is to perform or induce the abortion *or* a qualified professional must discuss with the woman “indicators and contraindicators, and risk factors . . . for the proposed procedure and the use of medications . . . in light of her medical history and medical condition . . . which would predispose [her] to or increase the risk of experiencing one or more adverse physical, emotional, or other health reactions . . . in either the short or long term . . .” Mo. Rev. Stat. § 188.039.2-.3. The Missouri Supreme Court has stated that § 188.039 codifies the duty to obtain informed consent from a patient prior to an abortion. Reprod. Health Servs. of Planned Parenthood of St. Louis Region, Inc. v. Nixon, 185 S.W.3d 685, 690 (Mo. 2006).

37. All of this information must be provided orally, in person, and in a private setting with the patient. If the woman chooses to proceed with the abortion, the patient must certify, on a written checklist, that she has received the state-mandated information, and *either* the physician who is to perform or induce the abortion *or a qualified professional* and the patient must sign a written statement that the woman gave her informed consent freely and without coercion. Section 188.039 also states that—to satisfy that section’s requirements—“[o]nly one such conference shall be required for each abortion.” Mo. Rev. Stat. § 188.039. 2.

38. In accordance with the current law, Plaintiffs have qualified professionals (as defined by law) provide all required information orally and in writing, answer any questions she may have, and obtain the written checklist and consent from the patient, if she decides to proceed. These professionals are trained and well-versed in this role. These professionals, as is common across many areas of modern medical practice, also undertake similar counseling and consenting roles for non-abortion procedures.

39. Plaintiffs fully comply with the numerous, existing legal requirements.

S.B. 5 Same-Physician Requirement

40. The Act amends the existing requirements for abortion to state that “the physician who performs or induces an abortion” must provide certain information to the woman at least 72 hours in advance of the abortion procedure.

41. Specifically, the Act amends Missouri Revised Statutes Section 188.027, and adds a new subsection 6 that mandates that the physician who is to perform or induce an abortion personally provide to the patient, 72 hours in advance of the procedure, the “immediate and long-term medical risks to the woman associated with the proposed abortion method” and the “immediate and long-term medical risks to the woman. . . in light of the anesthesia and medication that is to be administered [and other factors].” Ex. A at 8, to be codified at Mo. Rev. Stat. § 188.027.6.

42. This exact information *verbatim* is already required to be given to the woman under subsection 1 of Section 188.027. See ¶ 39. Moreover, S.B. 5 leaves unchanged the ability of a *qualified professional* to provide a woman with the exact same information under subsection 1 of Section 188.027. See Ex. A at 3.

43. In addition, S.B. 5 *loosens* the requirements of Section 188.027 by amending subsection 1 to also allow a *referring physician*—someone not necessarily under the supervision of the physician performing or inducing the abortion, as required for qualified professionals— to provide the exact same information.

44. One result of S.B. 5, therefore, is two conflicting subsections of Section 188.027.

45. Furthermore, S.B. 5 continues to allow a qualified professional to, *and adds* that a referring physician (in addition to the physician who is to perform or induce the abortion) may,

be the person to provide the woman, at least 72 hours before the abortion, other state-mandated information, including a description of the proposed abortion method, § 188.027 1.(1)(b)(a.), the gestational age and anatomical characteristics of the embryo or fetus, § 188.027 1.(1)(f)-(g), and the indicators, contraindicators, and risk factors of the proposed procedure in light of her medical history and condition, § 188.039 2, 3. See Ex. A at 13-14. Section 188.039 continues to state that only one pre-procedure conference for purposes of providing information and obtaining informed consent is necessary for a given abortion.

46. Any person who performs an abortion in violation of the Act commits a class A misdemeanor, Mo. Rev. Stat. § 188.075, under penalty of imprisonment of up to one year, id. § 558.011(6), and loss of a physician’s license to practice medicine, id. § 188.065.

Effects of the Challenged Restriction

47. By requiring that the same physician who will induce or perform the abortion also provide specified information to the woman, *and* that the physician do so at least 72 hours before performing the abortion, the Act will bar certain procedures, create insurmountable obstacles for some women, and impose extreme and medically unnecessary delays for the other many women who seek abortion care in this state.

48. These denials and delays imposed by the Act will result from the diminished number of physicians available to perform abortions due to inability to devote more hours to abortion care and/or conform their schedules with the strict requirements of the Act; the impossibility of knowing for many patients which physician will “perform or induce” ahead of a prospective patient’s initial state-mandated appointment; physician unavailability due to unforeseen circumstances such as a medical emergency with another patient, and/or the woman’s inability to return to the facility when the physician is next scheduled due to difficulty arranging

transportation and time off from work and child-care obligations; physicians' increased time spent on state-mandated informational appointments rather than abortion procedures; and the need for women to duplicate initial appointments to try to comply with the law if their first attempt with a given physician does not work.

49. A same-physician requirement for counseling and performance of the abortion would be literally impossible to fulfill for induction abortions and lead to outright denial of that care, which necessarily entails multiple physicians caring for a woman over multiple shifts.

50. The requirement would also severely cripple the provision of abortion services in Missouri, which is already severely restricted, and it is foreseeable that it will routinely cause delays of *two to four weeks* for some patients, if compliance is possible at all, a length of time that certainly increases the risk of the procedure.

51. As one example of delays caused by the Act, Plaintiff Dr. McNicholas can provide abortions at the Columbia Center only two to three times a month due to the myriad of other professional and personal obligations she has. Thus, some women would have to wait *at least* two weeks between their initial appointment at which they must receive the state-mandated information and their actual abortion procedure, not to mention the front-end delays that will occur when women first call to schedule their initial visit with Dr. McNicholas, who may not next be in the Columbia Center for weeks, let alone have available appointments when that day comes.

52. The extreme delays caused by the Act will result in some women losing access to medication abortion, which allows patients to end a pregnancy at the earliest stages without undergoing a surgical procedure, and other women will be prevented from obtaining an abortion

in the state altogether, because the delay will push them past the point in pregnancy at which abortions are available.

53. Women seeking an abortion will also be forced to attempt to travel much farther distances because they cannot receive timely care at a health center that only provides abortions up to a certain point in pregnancy, such as the Columbia Center, which only provides abortions less than 15 weeks imp.

54. In addition, currently, some of Plaintiffs' patients are able to go to a health center closer to their home to meet with a licensed, qualified professional at least 72 hours before an abortion to receive the state-mandated information, which can save a woman the extra costs, time, and burden of having to travel hundreds of miles. For example, women seeking an abortion who live in the Southwest corner of Missouri, near RHS's Springfield or Joplin health centers, are able to complete the state-mandated information visit at a RHS health center closer to home, rather than the health center in St. Louis. However, under the Act these patients will be forced to attempt to make *two* lengthy round trips to St. Louis, each trip amounting to 430 miles: one trip to receive the state-mandated information and a second trip, which must be at least 72 hours later, to have an abortion.

55. Low-income women will have the most difficulty in rearranging inflexible work schedules at low-wage jobs; arranging and paying for child-care; paying the travel costs for an additional trip to the clinic; foregoing lost wages for missed work; paying for any increased costs associated with a later procedure; and saving up the money required to cover any or all of these additional expenses.

56. The Act's harms are exacerbated by the lack of any apparent medical emergency exception and by the lack of any other type of exigent circumstances exception.

57. The Act will pose particular harms to other especially vulnerable populations: victims of domestic violence and those whose pregnancy is the result of rape or other forms of abuse; those who face medical risks from pregnancy; and those whose pregnancies involve a severe fetal anomaly.

58. The same-physician requirement conflicts with prevailing standards of medical practice. It is standard, accepted and ethical practice for a physician to perform a procedure for a patient whose preliminary “work-up” for the procedure, including providing information to patients about the risks of a medical procedure, has been done by a qualified professional other than the physician who will ultimately perform the procedure. It is also common practice for physicians (including those in obstetrics and gynecology) to work in group practices, in which the responsibilities for patients’ care are shared among different physicians according to a coverage schedule. The Act interferes with these common, accepted and ethical practices.

59. The Act singles out abortion patients and their providers for different and more burdensome treatment than all other patients or health care providers regulated by the state.

60. The differential treatment and special burdens imposed by the Act on physicians providing abortions include, but are not limited to precluding a physician from relying on a qualified professional to provide patients with medical risk information, and severely limiting a physician’s ability to manage his or her medical practice by requiring the physician to personally undertake, at designated time intervals, tasks that in other areas of medical care would be delegable and done on a schedule dictated by medical need and by the care givers and patient, rather than the state. These medically unnecessary restraints on the timely and efficient delivery of health care place significant obstacles in the path of women’s access to abortion.

61. The Act's differential treatment of abortion care as compared to all other health care is not rationally related to the promotion of women's health or to any other important or legitimate governmental interest, especially in light of how safe abortion is compared to other medical procedures. Indeed, the Act leaves unchanged the ability of qualified professionals to provide various pieces of information during the initial state-mandated information visit, including medical risk information.

62. The Act will also significantly, and unjustifiably, increase the costs of providing and obtaining lawful abortion services, thereby further reducing women's access to those services. Requiring that a single physician undertake (personally and in person) the host of steps that the Act requires at least 72 hours in advance of an abortion procedure will greatly undermine the efficiencies of time, costs, and scheduling that currently exist in the limited and strained Missouri abortion practice settings, to the detriment of providers and their patients.

63. The Act imposes vague and conflicting requirements as to who is allowed to provide a woman with certain information, orally and in-person, during the state-mandated information visit. The Act adds subsection 6 to Missouri Revised Statutes Section 188.027, which requires the physician who is to perform or induce the abortion to provide the woman (at least 72 hours before her abortion) the mandated information about "the immediate and long term risks to the woman," Ex. A at 8, yet subsection 1 allows a referring physician, *or* a qualified professional, *or* the physician who is to induce or perform the abortion to provide this information, *id.* at 3. Thus, it is unclear exactly what the Act requires and allows.

64. There is also lack of clarity about what conduct constitutes "performing" or "inducing" an abortion, and whether, in the context of abortion methods that often involve

multiple steps, days, and/or providers, more than one physician must participate in providing the specified information to the patient, in person, at least 72 hours before the start of the procedure.

65. If enforced the Act will cause irreparable harm, including by infringing on constitutional rights for both providers and patients, and denying or imposing extreme delays on patients' abortion care.

Facts Related To Original Purpose Challenge

66. S.B. 5 was introduced by Senator Andrew Koenig with the title "An Act [t]o repeal section 188.075, RSMo, and to enact in lieu thereof one new section relating to the jurisdiction of the attorney general to enforce state abortion laws, with penalty provisions." A copy of S.B. 5, as introduced, is attached hereto as Exhibit B.

67. As introduced, the two-page bill sought solely to alter § 188.075, the law which sets forth the criminal penalty for knowing violations of the state's abortion laws. The amendment proposed in S.B. 5 as introduced gave the Missouri Attorney General original jurisdiction, concurrent with that of each prosecuting or circuit attorney in the state, to prosecute violations of other, existing state laws. Ex. B. The bill also sought to empower the Attorney General and each prosecuting or circuit attorney to seek "injunctive or other relief" as necessary in such prosecutions. Id.

68. S.B. 5 was heard in the Senate's Seniors, Families, and Children Committee on June 13, 2017, and passed out of the committee in its original form.

69. The content of S.B. 5 underwent multiple, extensive changes thereafter, becoming a 40-page mix of enactments instead of a two-page change to the Attorney General's powers. First, the Senate passed a floor substitute to the bill on June 14, 2017, entitled: "An Act [t]o repeal sections 188.030, 188.047, 188.075, 192.665, 192.667, 197.150, 197.152, 197.158,

197.160, 197.162, 197.165, 197.200, 197.205, 197.215, 197.220, 197.225, 197.230, 197.235, 197.240, 197.285, 197.287, 197.289, 197.293, 197.295, and 595.027, RSMo, and to enact in lieu thereof twenty-seven new sections relating to abortion, with penalty provisions and an emergency clause.”

70. The House Children and Families Committee then took up S.B. 5 and voted a substitute version out of committee. On June 20, 2017, the House passed the House Committee’s Substitute to the Senate Substitute for Senate Bill 5 with two additional amendments. One of these included amendments altered § 188.027 to add the same-physician restriction challenged here.

71. On July 25, 2017, the Senate took up the House’s amended version of S.B. 5. Without going to conference with the House to resolve the differences between the two forms of S.B. 5 they had passed, the Senate approved a “previous question” motion, cutting off debate in that chamber.

72. The bill as truly agreed to and finally passed on July 25, 2017, and later signed by Governor Greitens, repealed twenty-eight sections of the the Revised Statutes and “enact[ed] in lieu thereof thirty-one new sections relating to abortions” See Ex. A.

73. In fact, the Legislature repeatedly deviated from the original purpose of S.B. 5 and enacted a diverse set of changes to the portions of the Missouri Code that do not relate to broadening the Attorney General’s jurisdiction. The final bill includes provisions which instead relate to *inter alia*: preemption of the lawmaking powers of political subdivisions, state-mandated information for patients, whistleblower protections, abortion facility licensing, and a new offense of interfering with medical assistance. S.B. 5 runs afoul of the legislative accountability and transparency constitutionally guaranteed to Missouri citizens.

Count I – Substantive Due Process

74. Plaintiffs hereby incorporate by reference paragraphs 1 through 73 above.

75. The Act’s same-physician requirement imposes an undue burden on women’s access to abortion and, therefore, violates Article I, Section 2 and Article I, Section 10 of the Missouri Constitution.

Count II – Vagueness

76. Plaintiffs hereby incorporate by reference paragraphs 1 through 73 above.

77. Because the Act fails to give adequate notice of the conduct it proscribes, and encourages arbitrary and discriminatory enforcement, it is impermissibly vague, in violation of the due process clause of Article I, Section 10, of the Missouri Constitution.

Count III – Original Purpose

78. Plaintiffs hereby incorporate by reference paragraphs 1 through 73 above.

79. Because S.B. 5 was amended to include changes to the bill, including the same-physician requirement, that were unrelated to the original purpose of the bill, the Act violates Article III, Section 21 of the Missouri Constitution.

Count IV – Equal Protection

80. Plaintiffs hereby incorporate by reference paragraphs 1 through 73 above.

81. The Act violates the rights of Plaintiffs and their patients under the equal protection clause of Article I, Section 2, of the Missouri Constitution by treating them differently than providers and patients of all other medical services in the state without any legitimate basis.

Count V – Substantive Due Process

82. Plaintiffs hereby incorporate by reference paragraphs 1 through 73 above.

83. The 72-hour mandatory delay imposed on all patients seeking an abortion, codified at Missouri Revised Statutes Sections 188.027 and 188.039, imposes an undue burden on women's access to abortion and, therefore, violates Article I, Section 2 and Article I, Section 10 of the Missouri Constitution.

WHEREFORE, Plaintiffs ask this Court:

- A) To enter judgment declaring the Act violates the Missouri Constitution.
- B) To issue injunctive relief preventing Defendants, their employees, agents, and successors in office from enforcing the Act, to be codified at Mo. Rev. Stat. § 188.027.6, and the 72-hour mandatory delay, codified at Mo. Rev. Stat. §§ 188.027, 188.039, against facilities and physicians that provide abortion.
- C) To grant such other and further relief as this Court should find just, proper, and equitable.

Dated: October 10, 2017

Respectfully submitted,
ARTHUR BENSON & ASSOCIATES

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** Pro hac vice motion forthcoming*