IN THE MISSOURI SUPREME COURT

No. SC100933

E.N., individually and as next friend and on behalf of her minor child N.N., et al.,

Appellants,

v.

Mike Kehoe, in his official capacity as Governor for the State of Missouri, et al.,

Respondents.

On Appeal from the Circuit Court of Cole County
Case No. 23AC-CC04530
Honorable R. Craig Carter

APPELLANTS' REPLY BRIEF

GILLIAN R. WILCOX, #61278
JASON ORR, #56607
ACLU of Missouri Foundation
406 West 34th Street, Ste. 420
Kansas City, Missouri 64111
Phone: (816) 470-9938
gwilcox@aclu-mo.org
jorr@aclu-mo.org

KRISTIN M. MULVEY, #76060
JONATHAN D. SCHMID, #74360
ACLU of Missouri Foundation
906 Olive Street, Suite 1130
St. Louis, Missouri 63101
Phone: (314) 652-3114
kmulvey@aclu-mo.org
jschmid@aclu-mo.org

NORA HUPPERT*
Lambda Legal Defense
and Education Fund, Inc.
3656 North Halsted Street
Chicago, Illinois 60613
(312) 663-4413
nhuppert@lambdalegal.org

OMAR GONZALEZ-PAGAN*
Lambda Legal Defense
and Education Fund, Inc.
120 Wall Street, 19th Floor
New York, New York 10005
(212) 809-8585
ogonzalez-pagan@lambdalegal.org

* Admitted *pro hac vice*

JAMES D. LAWRENCE, #53411
Bryan Cave Leighton Paisner LLP
One Kansas City Place
1200 Main Street, Suite 3800
Kansas City, Missouri 64105
(816) 374-3200
jdlawrence@bclplaw.com

J. BENNETT CLARK, #30907
MICHAEL E. ROWAN, #72992
TORI ANDREW, #76929
Bryan Cave Leighton Paisner LLP
One Metropolitan Square
211 North Broadway, Suite 3600
St. Louis, Missouri 63102
(314) 259-2000
ben.clark@bclplaw.com
michael.rowan@bclplaw.com

Attorneys for Appellants

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INTRODUCTION

Respondents retreat from defending many of the erroneous declarations of law and inferences of fact that they drafted below and which were adopted verbatim by the trial court. And what little they offer falters. Respondents negate Missourians' fundamental rights to medical autonomy and parental decision-making and seek to excise transgender people out of Missouri's equal protection guarantee. Defending the trial court's decision, which they wrote, Respondents rely on statements that do not support the challenged conclusions and continue mischaracterizing, exaggerating, and outright misstating the record evidence.

Heightened scrutiny applies to Appellants' claims. Yet, under any standard of review, the trial court's conclusion upholding the Act is against the weight of the evidence.

ARGUMENT

I. Appellants have standing to challenge the Medicaid Ban.

Provider Appellants have individual and third-party standing to challenge the Medicaid Ban.[1] OB, p.40.[2] Medical providers are not limited to asserting only a monetary injury from a lack of payment when challenging provisions such as the Medicaid Ban. *See, e.g.*, *Planned Parenthood of Kan. v. Nixon*, 220 S.W.3d 732, 737 (Mo. banc 2007); *State v. Loe*, 692 S.W.3d 215, 226 (Tex. 2024); *see also Diamond Alternative Energy, LLC v. EPA*, 145 S.Ct. 2121, 2139 (2025) (challengers not required to submit testimony by

[1] Appellants use the defined terms "Care Ban" and "Medicaid Ban" as defined in their Opening Brief.

[2] Appellants refer to their Opening Brief as "OB" and Respondents' Brief as "RB."

regulated party if regulated party's "predictable" reaction will injure non-regulated challenger).

Nonetheless, Provider Appellants did assert and prove individual injury, from lack of payment or otherwise, in the petition, D.2 ¶¶ 97, 168, 16; pre-trial brief, D.70 p.27; and at trial (including, contrary to the trial court's conclusion, testimony that Southampton *did* have GAMC patients on Medicaid prior to the Act). Tr.[3] 1016:3-9, 994:22-995:10; *see also*, *e.g.*, *Planned Parenthood of St. Louis Region v. Knodell*, 685 S.W.3d 377, 384 (Mo. banc 2024), *reh'g denied* (Apr. 2, 2024) (providers "clearly" have standing where state agencies would "refuse to pay … claims for [Medicaid] reimbursement of" provided "health care services"); *Singleton v. Wulff,* 428 U.S. 106, 112 (1976).

As to third-party standing, Respondents' "payment-treatment" distinction is not logically or legally supported: "an impecunious [patient] cannot easily secure [the regulated treatment] without the physician's being paid by the State" and therefore the patient's injury "is necessarily at stake" in the provider's challenge. *Singleton*, 428 U.S. at 117; *see also Planned Parenthood of Kan.*, 220 S.W.3d at 737. And if Medicaid reimbursement is denied by the State, patients must either pay out-of-pocket *or* be forced to forgo medically necessary care; either is a cognizable injury. Respondents also deny patient injury by claiming the testimony showed Southampton "would continue providing treatment to (hypothetically impacted) Medicaid recipients," but that does not matter. Because of the Ban, Provider Appellants' transgender patients would not receive the

[3] "Tr." refers to the trial transcript and "PI Tr." refers to the preliminary injunction hearing transcript.

coverage they are entitled to and Provider Appellants would not get reimbursed for the care. In any event, the cited testimony says otherwise: Dr. Donovan testified he would provide the care "[i]f this law were not in effect." RB, p.40 (citing Tr. 1019:5-16).

Member injury is also clearly established. D.2 ¶¶ 20, 199, 218. Respondents cite no authority to support their argument that PFLAG's testimony about a member was not sufficiently specific and ignore other testimony concerning PFLAG members receiving Medicaid. *E.g.*, PI Tr. 348:15-18, 339:3-24.

GLMA similarly demonstrated member injury—Provider Appellants are GLMA members, and GLMA discussed another member impacted by the Medicaid Ban. Tr. 994:16-996:10, 981:22-982:5. That is sufficient to confer associational standing. *See St. Louis Ass'n of Realtors v. City of Ferguson*, 354 S.W.3d 620, 624 (Mo. banc 2011).

II. Appellants pleaded and proved their challenge to the Medicaid Ban.

The Petition expressly challenges both the Care Ban and the Medicaid Ban and each use of the defined term "The Act" encompasses both provisions. OB, p.46; D2 ¶¶ 7, 6. Respondents do not meaningfully defend the trial court's contrary holding, despite that they drafted it. Rather, Respondents cite two cases, one concerning appellate briefing standards, not pleading standards, and another stating that pleadings must contain a "short and plain statement of the facts showing that the pleader is entitled to relief," which the Petition does. *Brown v. Brown*, 645 S.W.3d 75, 82 (Mo. App. W.D. 2022); *Gibson v. Brewer*, 952 S.W.2d 239, 245 (Mo. banc 1997); *see also* D.2.

Respondents complain that the Petition "contained no allegations that the State is without authority to constrain how it spends its limited pool of Medicaid dollars." RB, p.42.

This is not a factual allegation, nor an element of any of Appellants' claims. It also ignores the extensive allegations in the Petition concerning constitutional constraints on policies that determine access to medically necessary treatment or coverage. *E.g.*, D.2 ¶¶ 214-294. And it is well-established that the government may not "protect the public fisc by drawing an invidious distinction between classes" of persons. *Mem'l Hosp. v. Maricopa Cnty.*, 415 U.S. 250, 263 (1974).

Confusingly, Respondents speak in terms of a dismissal for failure to prosecute. That was not the grounds for denial of the claims in this case, nor could it have been, as failure to prosecute concerns a plaintiff who unnecessarily delays pressing claims to trial or otherwise fails to act to advance the case. *See*, *e.g.*, *City of Jefferson v. Cap. City Oil Co.*, 286 S.W.2d 65, 67 (Mo. App. 1956).

Respondents make no argument as to whether Appellants proved their Medicaid claim, other than to refer to their discussion of standing. RB, p.42.

III. The Act violates the fundamental rights to individual autonomy over health and welfare and parental decision-making.

Appellants assert two fundamental rights are implicated by the Act: parents' right to direct their children's medical care, and the individual right to autonomy in healthcare. OB, pp.41-45, 48-50; *see also Parham v. J.R.*, 442 U.S. 584, 585 (1979);[4] *Cruzan by Cruzan v. Harmon*, 760 S.W.2d 408, 416, 417 n.11 (Mo. banc 1988), *aff'd, Cruzan by Cruzan v. Dir., Missouri Dep't of Health*, 497 U.S. 261, 110 (1990).

[4] *Parham's* procedural nature does not limit the right it recognized. *Poe by & through Poe v. Labrador*, 709 F.Supp.3d 1169, 1195-96 (D. Idaho 2023).

These rights are distinct but overlapping: a minor possesses the autonomy right in *Cruzan*, but it "must be exercised for her, if at all, by some sort of surrogate." *Cruzan*, 497 U.S. at 280. And when the surrogate is a parent, interference with that parent's ability to make those decisions also burdens the parents' own right to parental decision-making. *Parham*, 442 U.S. at 604.

Respondents define these as "right[s] … to procedures and treatments that the State deems dangerous or harmful," but that is far too specific and ignores that Appellants do not assert new fundamental rights but rather violations of recognized fundamental rights. *See Bostic v. Schaefer*, 760 F.3d 352, 376 (4th Cir. 2014) ("*Glucksberg*'s analysis applies only when courts consider whether to recognize new fundamental rights."); *Kitchen v. Herbert*, 755 F.3d 1193, 1217 (10th Cir. 2014) (describing Respondents' approach as "too narrow"). Respondents' definition of the right incorporates the restriction itself, which nullifies the right. RB, p.63. But "the challenged classification cannot itself define the scope of the right at issue." *Kitchen*, 755 F.3d at 1217. In *Cruzan*, this Court spoke of a right to "autonomy over decisions relating to one's health and welfare," not of a "right to make decisions regarding artificial hydration and nutrition." 760 S.W.2d at 416. So, too, for the marriage cases, which spoke not of "'the right to interracial marriage,' 'the right of people owing child support to marry,' and 'the right of prison inmates to marry,'" *Bostic*, 760 F.3d at 376, but rather "about the right to marry in its comprehensive sense." *Obergefell v. Hodges*, 576 U.S. 644, 671 (2015).

Respondents emphasize that a state may, in some circumstances, ban a particular harmful practice across the board—for minors and adults. RB, pp.64, 67. And that there

are circumstances where the state may override parental decision-making under the state's *parens patriae* authority even though it may not have authority to do so for adults. RB, pp.63, 64. But that is not this case.

All sides agree that GAMC can be and is appropriate for adults, and the state offered no evidence to the contrary. Medical experts agreed that it is the only beneficial treatment for gender dysphoria and the risks are comparable to other forms of medical care. OB, pp.27-33. When the state bans care for minors that is not prohibited for adults, and where the state's only justifications for doing so are risks that would not justify prohibiting the care generally,[5] and that it feels minors must be protected from a choice that adults may make, RB, pp.65, 66, the state interferes with the minors' autonomy right, exercised by the parent, and with the parent's right to make medical decisions for their child. And when the state bans Medicaid coverage for care it agrees is appropriate and provides no evidence to support the decision, that action interferes with the right to medical autonomy, and as applied to coverage of care for minors, with the parental decision-making right. The trial court erred by declaring otherwise.

IV. *Skrmetti* and *Brandt* do not foreclose heightened scrutiny.

Respondents' authorities do not foreclose the application of heightened scrutiny, and even if the Act were found not to facially discriminate (it does), it is pretextual and motivated by purposeful discrimination.

[5] The closest the judgment comes to identifying a purported effect unique to minors is its claims about puberty blockers and neurological function. D.185 p.26. But these claims, derived from an unadmitted exhibit (OB, p.84), are not supported by the record. Tr. 837:1-841:8, 425:4-428:23, 429:1-2, 429:7-11, 337:17-19, 670:11-13; Ex.236.

a. Missouri's equal protection principles do not embrace Geduldig.

"Missouri's Constitution may contain additional protections" relative to the U.S. Constitution, which sets only a floor. *Comm. for Educ. Equal. v. State*, 294 S.W.3d 477, 490 (Mo. banc 2009). For purposes of the Missouri Constitution's equal protection guarantee, Missouri's courts look to decisions involving the federal cognate for guidance, but the jurisprudence is not identical in all instances. Mo. Const. art. I, § 2; U.S. Const. Amend. XIV; *see State ex rel. J.D.S. v. Edwards*, 574 S.W.2d 405, 409 (Mo. banc 1978) (Court "disinclined" to follow federal decision diluting equal protection and due process clauses); *Weinschenk v. State,* 203 S.W.3d 201, 212 n.17 (Mo. banc 2006) (collecting cases where Missouri courts diverged from federal constitutional decisions). Delegates to the 1945 constitutional convention explained that the phrase "equal rights and opportunities" is meant to express that the convention went "as far as in [the Section] as we can" to guarantee equality under the law. 5 *Debates of the 1943-1944 Constitutional Convention of Missouri* ("*Constitutional Convention*"), 1423-1424.

Midstate Oil Co. v. Missouri Commission on Human Rights, 679 S.W.2d 842 (Mo. banc 1984), illustrates this divergence. Respondents suggest that *Midstate Oil* did not reject *Geduldig* by name. But the dissent mentioned *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125 (1976), which applied *Geduldig* to Title VII. *Midstate Oil*, 679 S.W.2d n.1 (Blackmar, J., dissenting). It is notable that the court declined to adopt *Gilbert*'s reasoning despite its awareness, for Missouri courts generally decline to follow federal Title VII decisions only when there is some textual divergence. *See Brady v. Curators of Univ. of Missouri*, 213 S.W.3d 101, 113 (Mo. App. E.D. 2006). And there was no relevant textual difference at

the time *Gilbert* and *Midstate Oil* were decided. *See* 679 S.W.2d at 847 n.1. Thus, the only possible conclusion is that this Court rejected *Gilbert* and *Geduldig*, such that neither are part of Missouri's jurisprudence. The lower courts take this interpretation. *E.g.*, *Self v. Midwest Orthopedics Foot & Ankle, P.C.*, 272 S.W.3d 364, 369 (Mo. App. W.D. 2008).

The convention debates further reinforce that a medical condition that affects only one sex can serve as a proxy for sex discrimination under Missouri's Constitution. After adopting an amendment providing that "no person shall be disqualified from jury service on account of sex," the delegates debated a clause that would permit women to claim exemptions based on conditions only women experienced. 6 *Constitutional Convention*, at 1625-28. Delegates in favor of the clause argued that, because the initial amendment prohibited disqualification "on account of sex," the legislature could not provide for women to be exempted for any reason that men could not also claim. *Id.* 1630-31 ("any woman ought to have the right to be excused from jury service … because of any periodic sickness"), 1635 (noting prohibition of disqualification "on account of sex" would require women to serve "unless they can give some excuse as would be applicable to men"), 1803 (discussing giving birth as excuse from jury service). The exemption clause was ultimately adopted. Mo. Const. art. I, § 22(b). In other words, the *original meaning* of Missouri's Constitution *rejects* the reasoning of *Geduldig* and *Skrmetti*.

b. The Act facially discriminates despite Skrmetti and Brandt.

Even if *Geduldig* (as interpreted by *Skrmetti*) applied here, heightened scrutiny applies nonetheless. Unlike the statutes in *Skrmetti* and *Brandt*, the statute at issue here defines a class of treatments stated without regard to diagnosis or changing of

characteristics—most notably, "hormones or puberty blocking drugs." *Contrast* §§ 191.1720.5, .2(7), (2), *with* Tenn. Code Ann. § 68-33-103 and Ark. Code Ann. § 20-9-1501. The statute then conditions access to those treatments based on whether they are prescribed to those seeking "gender transition." *Id.* And "gender transition" itself as used by the statute is not a medical purpose, as the definition specifically includes "social" and "legal" changes. § 191.1720.5.1(4). Thus, unlike the Tennessee and Arkansas statutes, the Act classifies based not on medical use but rather "a class of *persons* identified on the basis of a specified characteristic." *Skrmetti*, 145 S.Ct. at 1834, n.3.

And while it is true that *Skrmetti* rejected an argument concerning the Tennessee law's alternative classification based on whether the treatment is to enable a minor to identify with or live as a different sex, it did so by finding that such alternative classification was meant as a restatement of the statute's primary classification based on diagnosis. *Skrmetti*, 145 S.Ct. at 1831. Here, the only determinant of whether a person is regulated is gender transition.

c. Pretext and animus

Even a classification that is facially neutral can be challenged if it is based on pretextual targeting of transgender people or is motivated by discriminatory purpose. *Skrmetti*, 145 S.Ct. at 1831.

Pretext is present here, and Respondents do not appear to argue otherwise. First, by targeting gender transition, the statute targets conduct "engaged in exclusively or predominantly by a particular class of people." *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993). And by painstakingly excepting every possible group other than

transgender people, the statute reinforces its goal to target *only* those seeking gender transition. §191.1720.5.8.

So, too, is a discriminatory purpose. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268 (1977). Respondents assert only one interest in this Court: "safeguarding the physical and mental well-being of a minor." RB, p.66. But the legislature enacted the Care Ban as part of a substitute bill that included the Medicaid Ban, which applies to adults and prohibited access to surgical GAMC for those incarcerated, and on the same day that it banned transgender minors from participating in any athletic competition according to their gender identity. *See* §§ 221.120.1, 163.048.1.

If the State's goal were truly to protect minors from medical care that is appropriate only for adults, that does not explain why it also banned Medicaid coverage for adults and surgical GAMC for incarcerated adults. And if the goal were purely to regulate medical care, not to regulate transgender people as a class, that would not explain why the then-Governor threatened to call a special session unless *both* the substitute bill containing the Act *and* the bill banning participation in sports made it through the legislature.[6] Only one possible answer explains each individual component of the substitute bill and its companion sports ban: that the State acted with a purpose to target transgender *people*. And

[6] Susan Szuch, *A St. Louis judge is slated to rule Monday on Missouri AG's transgender rule.* Springfield News-Leader (Apr. 30, 2023), https://www.news-leader.com/story/news/local/missouri/2023/04/30/what-to-know-about-lawsuit-over-missouri-ags-transgender-health-rule/70164567007/.

"no legitimate purpose overcomes the purpose and effect" of the Act "to disparage and to injure" transgender people. *United States v. Windsor*, 570 U.S. 744, 775 (2013).

d. Transgender people constitute at least a quasi-suspect class.

As Respondents acknowledge, a suspect class does not *require* immutability—the test requires "obvious, immutable or distinguishing characteristics." RB, p.55. And there can be no serious dispute that transgender status is a sufficiently distinguishing characteristic. Respondents' arguments to the contrary "raise the question of whether our caselaw has properly addressed questions around 'whiteness' as an immutable characteristic." *Lange v. Houston Cnty.*, 2025 WL 2602633, at *32 n.18 (11th Cir. Sept. 9, 2025) (Abudu, J., dissenting). Indeed, "[o]ur nation's history shows that not everyone considered 'white' today was always viewed that way" and that "the phenomenon of mixed-raced people 'passing' as white is well-documented." *Id.* Thus, not only are alienage and illegitimacy—both subject to heightened scrutiny—not obvious or immutable characteristics (OB, p.55), but perhaps race is not so obvious either. The small number of people who may later reidentify with their birth sex does not render transgender status ineligible for suspect class status, as being transgender cannot be voluntarily changed. Tr. 106:16-20, 364:24-365:4; *cf. Baskin v. Bogan*, 766 F.3d 648, 657 (7th Cir. 2014) (sexual orientation as quasi-suspect class because it cannot be *voluntarily* changed).

Respondents acknowledge "past and present governmental actions that discriminated against the transgender community," but protest that this history is "not longstanding." RB, p.57. This is not true.[7]

St. Louis was the first municipality in the country to adopt a cross-dressing ban in 1843. Note, *Drag Queens, the First Amendment, and Expressive Harms*, 137 Harv. L. Rev. 1469, 1476 (2024). For *143 years*, it proscribed "appear[ing] in any public place … in a dress not belonging to [one's] sex," rendering it illegal for transgender people to appear in public. It was not invalidated until 1986. *See D.C. v. City of St. Louis*, 795 F.2d 652 (8th Cir. 1986).

And in *J.L.S. v. D.K.S.*, 943 S.W.2d 766, 775 (Mo. App. E.D. 1997), a transgender woman challenged a condition for visitation and temporary custody of her child that she "shall not cohabit with other transsexuals," entered out of concern with "what conduct of a child a parent may foster by condonation." The condition was upheld, and transfer to this Court was denied. Respondents ignore the other instances of historical discrimination Appellants present. OB, pp.67, 68.

Finally, Respondents' attempt to demonstrate that "transgender individuals enjoy significant political and economic status" is mindbogglingly deficient. They cite testimony where counsel simply asks, "Do you recognize the name Jennifer Pritzker as … a transgender billionaire?" and the witness responds, "No, sir. I do not." Tr. 780:2-14.

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[7] This history includes the persecution of gender diverse Native Americans, exclusion of transgender immigrants, and firing and prosecuting gender nonconforming people during the "lavender scare." *See* James Casey Edwards, *Justifying the Margins*, 55 UIC L. Rev. 403, 417-23 (2022); *see also* 1952 U.S.C.C.A.N. 1653, 1701.

V. The weight of evidence does not support the trial court's finding that the Act survives scrutiny.

Respondents do not defend most of the factual errors Appellants have identified. The few defenses they offer, however, recast expressly excluded or nonexistent evidence as mere credibility or weight determinations, and rely on testimony that does not support the challenged conclusions nor contradict the evidence identified by Appellants. "[A] reviewing court need not [defer] where the disputed question is not a matter of direct contradictions by different witnesses." *Epperson v. Dir. of Revenue,* 841 S.W.2d 252, 255 (Mo. App. S.D. 1992).

a. Reliance on Non-Admitted Exhibits

In defending reliance on excluded exhibits (including the Cass Report),[8] Respondents do not argue that the trial court erred in excluding the exhibits but claim that it *could* have taken judicial notice of them.

Respondents never requested that the trial court take judicial notice of these exhibits. And prejudice is irrelevant because Appellants do not challenge an *improper admission* of evidence, but rather the fact that the Court went on to rely on evidence for its conclusions that it had *properly excluded*. Respondents cannot complain about the exclusion of evidence now. "[T]he opposing party who filed no appeal will not be heard to complain of any portion of the trial court's judgment adverse to him." *Cass Cnty. v. Dir. of Revenue*, 550 S.W.3d 70, 74 (Mo. banc 2018) (quotation omitted); *see also Hume v. Wright*, 274

[8] Respondents claim the Cass Report was admitted—it was **not** admitted for its truth, but taken as an offer of proof. Tr. 401:18-25, 2416:11-17.

S.W. 741, 744 (Mo. 1925) (judicial notice of things not put into evidence is improper). This particularly applies when the opposing party crafted the ruling in question itself. *Cf. State v. Bolden*, 371 S.W.3d 802, 806 (Mo. banc 2012).

Respondents cite *Whitmoor Realty*, which deals with a *trial court* taking judicial notice of "a matter of common knowledge [that] may be reliably determined" from newspapers—the Federal Reserve prime rate. *Whitmoor Realty, LLC v. Beckerle*, 588 S.W.3d 573, 579 (Mo. App. E.D. 2019). Judicial notice, however, is inappropriate as applied to disputed or controversial facts. *Id.* at 578.

Nor could the court have taken judicial notice of the Cass Report as a purportedly authoritative source (it is not). Respondents misread the authority they cite, which held that the trial court could have taken judicial notice that a treatise is authoritative for the purposes of cross-examination, not of the facts contained within (and moreover, judicial notice cannot be retroactive). *Kansas City v. Dugan*, 524 S.W.2d 194, 197 (Mo. App. 1975). Notably, the Cass Report is not peer-reviewed, received significant criticism from the scientific community, its author did not testify, and it does not fall within the learned treatise rule. *See Foster v. Barnes-Jewish Hosp.*, 44 S.W.3d 432, 438 (Mo. App. E.D. 2001); Tr. 149:9, 284:21-24, 618:3-11. That "multiple experts relied on" the Report does not support its admission either. RB, p.78. (Appellants' experts critiqued it.) Respondents' own authority makes clear *experts* can rely on learned treatises in testimony, not that *judges* can rely on those documents for their truth. *Coats v. Hickman*, 11 S.W.3d 798, 803 (Mo. App. W.D. 1999) ("learned treatises are hearsay and are not of themselves direct and independent evidence" (quotation marks omitted)). Neither are these documents admissible

as public records; they are not records kept by statute and no custodian testimony was presented.

b. Nonexistent evidence recast as credibility or weight determinations

Notwithstanding any deference, this Court's review "can neither supply [nonexistent] evidence nor ignore evidence binding on [the State], nor can [it] use the above principle [of deference] as a basis for unreasonable, speculative or forced inferences." *Adler v. Laclede Gas Co.*, 414 S.W.2d 304, 306 (Mo. 1967). By recasting serious factual errors as mere weight or credibility determinations, Respondents ask this Court to engage in precisely those tasks.

First, in defending their drafted conclusion that the trial court reviewed documents "suggesting that WPATH has suppressed research," Respondents say the court was *sub silentio* taking judicial notice of news articles not utilized at trial. That argument fails. For one, how can a trial court take judicial notice of articles not introduced or discussed at trial? For another, the same argument described above with respect to other exhibits, *supra* pp.21-22, applies with equal force. In addition, Respondents misread their own authority, which does *not* hold that facts contained in a newspaper are judicially noticeable, but rather that judicial notice turns on the notoriety and uncontroversial nature of the fact in question. *Whitmoor Realty*, 588 S.W.3d 573 at 578.

Next, Respondents defend the incorrect claim that Dr. Antommaria testified that "guidelines are supposed to be based on systematic reviews—but that WPATH's guidelines are not" by saying the court was merely weighing the evidence. But Respondents point to *no* testimony from which the court could have so inferred. They

acknowledge Dr. Antommaria testified it is unusual for guidelines to be based on systematic reviews but say he testified "it would be possible to" do so. Tr. 740:13-741:16, 774:7-9. These are not in tension, however.

Respondents claim Dr. Antommaria "conceded" that "using non-systemic methods compromises the validity and reliability of evidence to inform guideline recommendations." RB, p.84. But that was *Respondents' counsel reading that sentence off of an exhibit* and then asking, "That's what that sentence says?" to which Dr. Antommaria responded "Yes, sir." Tr. 775:23-776:5. To paint this as a "concession" is an unreasonable inference and gross mischaracterization. *See State v. Beatty*, 770 S.W.2d 387, 392 (Mo. App. S.D. 1989) (testimony "pertains only to evidence as is delivered by a witness").

Next, Respondents assert the factual errors concerning Jamie Reed that Appellants identified go to the credibility of her testimony. Not so. The errors all concern factual conclusions that Reed's testimony does not support. OB, pp.96-98. Respondents make no attempt to explain how any of the identified errors go to credibility. Where Appellants referenced conflicting testimony, it was to show incorrectness of the trial court's finding that her testimony was *unrebutted*, not to contest credibility. OB, p.97.

Respondents cite a portion of the judgment (concerning whether therapy for pre-pubescent children can "integrate their trans- or cross-gender feelings") which they say is quoting SOC8, but the quoted phrase appears nowhere in SOC8. Tr. 1663:21-22, 1665:4-15.[9] Respondents argue GAMC does not reduce suicidality despite the unrebutted evidence

[9] Respondents' counsel referred to SOC8 as Exhibit 1008; SOC8 was admitted as Exhibit 5.

to the contrary. RB, p.87; OB, pp.92-94; Ex.298. But that it "remains a risk" does not contradict that GAMC dramatically *reduces* the risk, and the trial court's finding was that Appellants presented "no evidence" that GAMC decreases the risk *at all.* D.185 p.29.

c. Remaining issues

Quality of Evidence. Respondents argue that unsupported conclusions concerning the quality of evidence go only to the trial court's deference to the legislature because of "uncertainty." RB, p.82. First, blind deference is not the law. *See S. Bay United Pentecostal Church v. Newsom*, 141 S.Ct. 716, 718 (2021) (Statement of Gorsuch, J.) ("Of course we are not scientists, but neither may we abandon the field when government officials with experts in tow seek to infringe a constitutionally protected liberty."). And Respondents' reliance on other countries' practices is misplaced. The record reflects that while the U.K. has expressed some caution, but still allows puberty blockers in clinical trials, and permits hormones at 16, and that the overwhelming majority of countries allows GAMC for minors. OB, p.34, 35; Ex.145.

WPATH. Respondents suggest it does not matter that the trial court's examples of WPATH's "limitations" have nothing to do with GAMC, because the trial court could have been using these as mere examples of an unenumerated, unstated category full of other "limitations." RB, p.84. Respondents ask this Court to use deference "as a basis for unreasonable, speculative or forced inferences." *Adler*, 414 S.W.2d at 306.

Fertility. Respondents cite several snippets of testimony which in no way contradict any of the erroneous conclusions identified. Respondents suggest that the *absence* of clear

evidence of fertility impairment supplies a rational basis—that suggestion is unsupported and unserious.

Increases in prevalence and bicalutamide. No waiver has occurred with respect to factual errors concerning the prevalence of gender dysphoria or bicalutamide—Respondents' authority does not suggest that every challenged conclusion must be pincited or else a point is waived, and the argument is clearly developed. *Cohen v. Cohen*, 73 S.W.3d 39, 52 (Mo. App. W.D. 2002); OB, pp.93, 94. Respondents' other arguments on this point are simply citations to testimony that do not contradict the challenged conclusions. *E.g.*, RB, p.88.

Surgery.[10] To rehabilitate the incorrect conclusion that experts agreed that *no* surgery was appropriate for someone under 18, Respondents suggest there is an unstated qualifier: that the experts agreed that *genital* surgery is generally inappropriate under 18. This is plainly at odds with the judgment that they drafted, which specifically includes masculinizing chest surgery within the category of surgical GAMC. D.185 p.13. This concession is also puzzling: Either the surgery conclusions addressed less than the issues present in the case and the trial court made no findings of fact or conclusions of law regarding chest surgery or the insertion of puberty blocker implants, ***or*** were based on unreasonable inferences by selectively conflating evidence concerning genital surgery with

[10] Respondents suggest the trial court was "within its discretion" to doubt the credibility of Dr. Olson-Kennedy but no credibility finding was made and the articles they cite post-date trial. RB, p.90 n.10.

other surgical GAMC. Respondents insist that the court's use of the phrase "safety and efficacy" refers only to "safety." It fails for the same reason. RB, p.90.

The Dutch Protocol. Respondents say only that conclusions based on "the Dutch Protocol" are minor and only involve the history of GAMC. RB, p.91. Respondents somehow miss the *four pages* of factual findings they drafted concerning purported differences between GAMC practice today and "the Dutch Protocol." D.185, pp.14-17; D.182, pp.8-12.

d. Reversal is appropriate.

Respondents have not pointed to any alternative evidentiary bases that support the trial court's conclusions, other than through "unreasonable, speculative or forced inferences." *Adler*, 414 S.W.2d at 306. And where Respondents *do* try to construct a narrative of factual support for the judgment, they continue their pattern of exaggeration and misstatement of the record that pervaded their proposed findings. For example, Respondents claim

- "Appellants' own expert witnesses acknowledged that there is no consensus in favor of" GAMC. Not true. The cited testimony merely acknowledges that some people have expressed a concern with one hypothetical effect of one medication, not specific to its use in gender dysphoria. Tr. 803:7-9.
- That "witnesses also conceded at trial that Appellants' view has been rejected by European health authorities, the World Health Organization, and the U.S. Department of Health and Human Services, among others." The cited passage concerns a *statement by Respondents' counsel* as part of a question, from an

unadmitted document by a Swedish entity. Tr. 457:17-458:2. No mention is made of the other organizations listed.

- That the Center's practitioners would ask parents: "'Do you want a dead son or a live daughter?'" RB, p.19. The cited testimony reflects that Respondents' witness, an intake worker, asked this; no testimony reflects that "practitioners" asked this. Tr. 1630:6-23.
- That the Center did not "ensure that children's parents or legal guardians consented" is plainly unsupported by the cited testimony, and the consent forms were admitted at trial. RB, p.20; Ex.349.
- That there are "perfunctory, check-the-box psychological evaluations," but Respondents' witness testified she had no personal knowledge of the assessments but felt the *letters documenting them* were insufficient. RB, p.29; Tr. 1616:11-22.
- That there are "devastating side effects" including "vaginal laceration," based only on an excluded hearsay statement. RB, p.29; Tr. 1670:4-6.
- That a witness "explained" or "conceded" something when, in fact, it was Respondents' counsel reading a statement and asking if it was read it correctly, without any accompanying concession or agreement. *E.g.*, RB, p.26; Tr. 631:6-18.
- Repeated citations to unsupported factual conclusions made in the judgment, rather than to record evidence.

These selected examples further demonstrate that the record does not support the challenged factual conclusions.

e. The Act does not survive heightened or rational basis scrutiny.

While heightened scrutiny applies to Appellants' claims, considering the sheer distance between the state's asserted interests and the facts, the Act fails even rational basis review.

The only state interest Respondents identify is "safeguarding the physical and mental well-being of a minor." RB, p.66. Respondents offer three arguments for why the Act serves that interest: first, practices at Washington University; second, detransitioner testimony; and third, the risks of GAMC.

Washington University. Even assuming the State's claims not based on unreasonable inferences were true, there is simply no rational connection between a purported lapse in practices at one clinic and a categorical ban on the form of medical care at issue. This is particularly true where other state mechanisms are already in place to remedy alleged practice outside the standards of care, such as medical malpractice. *See Edgerton v. Morrison*, 280 S.W.3d 62, 68 (Mo. banc 2009). Respondents' central claim that the Center fell short of what guidelines require, if true, does not rationally support prohibiting *anyone* from providing care according to the guidelines, as opposed to bringing those practices in line with the guidelines.

Detransitioner testimony. Respondents are "bound by the uncontradicted testimony of [their] own witnesses, including that elicited on cross-examination." *Simpson v. Johnson's Amoco Food Shop, Inc.*, 36 S.W.3d 775, 777 (Mo. App. E.D. 2001). Yet, Respondents fail to acknowledge their own experts' testimony that, once an adolescent reaches puberty, gender dysphoria is very unlikely to desist. Tr. 1883:1-7, 1964:22-1965:3;

Ex.399. The only non-anecdotal evidence Respondents point to in support of their claim of high regret rates is an *unadmitted* study referred to in passing by a witness who could not totally remember its details and a statement that "detransitioners are standing there" and "conceptually saying, This [sic] is not biologically dictated, you see." RB, p.60 (citing Tr. 1947:10-13, 2438:5-10). Neither supports any conclusion about high regrets. Dr. Moyer's testimony and actually admitted studies document that "less than one percent of people" regret ever initiating GAMC. Tr. 267:18-271:20; Ex.130.

Risks. Respondents write that GAMC "procedures are not safe and pose significant risks." RB, p.60. In support, Respondents point to Lappert's testimony concerning genital surgical GAMC, which is not provided to minors (Tr. 332:3-8; PI Tr. 70:2-7), and point to no facts concerning non-surgical GAMC. But Lappert was unqualified to offer this testimony. *See infra* p.31; OB, pp.111-113.

Uncontradicted evidence at trial demonstrated that the risks of puberty blockers and hormone therapy are well-documented, not unique to the use of those medications to treat gender dysphoria when compared to other conditions, and the benefits of the care outweigh the risks. *See generally* OB, pp.24-27. And critically, Respondents' experts generally agreed that psychotherapy alone is not effective treatment, and that denying care in at least some circumstances would do harm. Tr. 588:14-19, 750:13-22, 1796:8-10, 2468:10-15, 2480:2-7; PI Tr. 81:14-21, 666:12-16.

In sum, the weight of the evidence does not suggest that concerns about the Center, regret, or risks justify banning GAMC for minors, under any level of review, let alone banning Medicaid coverage for adults.

VI. Testimony from Drs. Curlin and Lappert was improperly admitted.

a. Curlin

Curlin testified far outside his expertise and qualifications. OB, pp.108-111. Respondents assert that he is experienced in ethics. But this is not the issue. What he supplied instead were far-ranging, sweeping opinions about the risks, benefits, safety, and efficacy of GAMC, which he is unqualified to offer.

The trial court relied on Curlin's testimony in concluding that "we are not at a point where we could find that child and adolescent gender treatment are in the minor's best interest." D185 pp.35-36. But Curlin conceded he has not reviewed this "data" and his opinion is simply a restatement of summaries supplied by others. Tr. 2401:5-11. Though experts can rely on hearsay "facts and data" in forming opinions, they cannot "testify about the [facts or data] to suggest that they were true." *K.B. v. Oasis Foot Spa & Massage, LLC*, 703 S.W.3d 606, 616 (Mo. App. E.D. 2024), *transfer denied* (Jan. 28, 2025). And Curlin has no clinical or research familiarity with GAMC from which to base his opinions. Tr. 2390-96; Ex.401. His conclusions strayed far outside his qualifications.[11]

It was also improper for the trial court to rely on Curlin's testimony for concluding there is no medical ethical consensus concerning GAMC. At trial, Curlin could recall only one non-peer-reviewed paper in support of such opinion but during cross-examination

[11] Appellants were granted a continuing objection and filed a motion *in limine* on these grounds. Tr. 2358:12-5; D.174.

conceded he had not read it and in fact it opposed his views of GAMC. RB, p.96; OB, p.110; Tr. 2400:8-19.[12]

b. Lappert

To note that Lappert considers adolescent GAMC a lie, a moral violation, a huge evil, and diabolical is not character assassination. RB, p.99. It simply pointing out *his own words*. And it is difficult to imagine what "context" might "rebut" the bias inherent in referring to GAMC as "diabolical." Tr. 2612:5-9. Seeking to rehabilitate Lappert's qualifications, Respondents regurgitate the opinions outside his expertise that he offered at trial. RB, pp.97-99. But Lappert has squarely conceded he has no expertise with respect to gender dysphoria. OB, pp.112, 113. He simply was not qualified to offer opinions about the risks and benefits of care he has no clinical or research experience with. *See State Bd. of Registration for Healing Arts v. McDonagh*, 123 S.W.3d 146, 156-57 (Mo. banc 2003).

VII. Appellants brought both facial and as-applied challenges.

Respondents claim that *only* a facial challenge was brought in this case because the label "as-applied challenge" is not affixed to the Petition.[13] But an "as-applied challenge" is not a question of shibboleth or magic phrases: "[t]he label is not what matters," and "the distinction goes to the breadth of the remedy provided, but not what must be pleaded in a

[12] Respondents cite a purported statement by the American Society for Plastic Surgeons, but their expert testified the ASPS supports GAMC and opposes legislation like the Act. Tr. 2606:21-2606:2.

[13] Of course, neither is the label "facial challenge." D.2.

complaint." *John Doe No. 1 v. Reed*, 561 U.S. 186, 194 (2010); *Bruni v. City of Pittsburgh*, 824 F.3d 353, 363 (3d Cir. 2016).

This is not a case where unregulated parties seek to stand in for the regulated group, nor one where state action is hypothetical or inchoate. Appellants pleaded and presented evidence of wide-ranging harm based on constitutional violations that are ongoing. *See Free Speech Coal., Inc. v. Att'y Gen. U.S.*, 974 F.3d 408, 422 (3d Cir. 2020) (describing nature of an as-applied claim). Thus, the Petition clearly encompasses claims against enforcement of the Act as it is being applied against Appellants, as the record also shows, in addition to Appellants' valid claim for facial relief against the Act. *See John Doe*, 561 U.S. at 194; D.2 p.49. And Respondents' reliance on case law interpreting Missouri's pleading standards goes to whether one states a claim, not whether that claim seeks facial or as-applied relief. *See Aldridge v. Hoskin*, 645 S.W.3d 101, 104 (Mo. App. S.D. 2022) (not analyzing scope of relief). Respondents never moved to dismiss on such a basis.

Respondents argue that *No Bans on Choice v. Ashcroft*, 638 S.W.3d 484 (Mo. banc 2022) applied *Salerno* and found that application needed to be unconstitutional in every circumstance, but the *No Bans* Court explained that "[a] law need not prevent every individual referendum effort from being successful" before facial relief is available. *Id.* at 492. This Court has applied the same approach in other cases. *See*, *e.g.*, *Weinschenk,* 203 S.W.3d at 215; *see also Berkley v. United States*, 287 F.3d 1076, 1090 n.14 (Fed. Cir. 2002) ("in equal protection cases involving facial challenges, the Supreme Court has thus far not discussed or applied the *Salerno* test"). The same approach should apply here. And if this

Court disagrees, at a minimum, the proper course is not to deny relief entirely but to fashion a narrower remedy. OB, pp.120, 121.

VIII. The trial court erroneously declared the law with respect to the Gains of Industry clause.

Respondents assert that the Gains of Industry clause targets only "workplace slavery" and not the State's authority to regulate medical care. But their own authorities contradict these assertions. *See Fisher v. State Hwy. Comm'n of Mo.*, 948 S.W.2d 607, 610 (Mo. banc 1997) (noting Court invalidated law that "prevented individuals from selling a lawful product"); *Moler v. Whisman*, 147 S.W. 985, 988 (Mo. 1912) (invalidating professional regulation due to lack of evidence "indicating that the public health will be promoted, protected, or safeguarded by" it). *Knese,* which dealt with a conflict between a local ordinance and a state statute, is inapplicable here. *State ex rel. Knese v. Kinsey*, 282 S.W. 437, 439 (Mo. 1926).

The trial court, in adopting nearly verbatim Respondents' proposed conclusions of law, failed to engage in any analysis, and simply stated that the clause was limited to workplace slavery. D.185 p.71; D.182 p.61. In doing so, it erroneously declared and applied the law.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the trial court and enter the judgment in favor of Appellants that the trial court should have entered.

Respectfully Submitted,

/s/ *Gillian R. Wilcox*

GILLIAN R. WILCOX, #61278
JASON ORR, #56607
ACLU of Missouri Foundation
406 West 34th Street, Ste. 420
Kansas City, MO 64111
Phone: (816) 470-9938
gwilcox@aclu-mo.org
jorr@aclu-mo.org

KRISTIN M. MULVEY, #76060
JONATHAN D. SCHMID, #74360
ACLU of Missouri Foundation
906 Olive Street, Suite 1130
St. Louis, Missouri 63101
Phone: (314) 652-3114
kmulvey@aclu-mo.org
jschmid@aclu-mo.org

JAMES D. LAWRENCE, #53411
Bryan Cave Leighton Paisner LLP
One Kansas City Place
1200 Main Street, Suite 3800
Kansas City, Missouri 64105
(816) 374-3200
jdlawrence@bclplaw.com

NORA HUPPERT*
Lambda Legal Defense and Education Fund, Inc.
3656 North Halsted Street
Chicago IL 60613
(312) 663-4413
nhuppert@lambdalegal.org

OMAR GONZALEZ-PAGAN*
Lambda Legal Defense and Education Fund, Inc.
120 Wall Street, 19th Floor
New York, NY 10005
(212) 809-8585
ogonzalez-pagan@lambdalegal.org

J. BENNETT CLARK, #30907
MICHAEL E. ROWAN, #72992
TORI ANDREW, #76929
Bryan Cave Leighton Paisner LLP
One Metropolitan Square
211 North Broadway, Suite 3600
St. Louis, MO 63102
(314) 259-2000
ben.clark@bclplaw.com
michael.rowan@bclplaw.com

Attorneys for Appellants

CERTIFICATE OF SERVICE AND COMPLIANCE

The undersigned hereby certifies that on September 18, 2025, the foregoing brief was filed electronically and a copy of it was served automatically on counsel for all parties.

The undersigned further certifies that pursuant to Rule 84.06(c), this brief: (1) contains the information required by Rule 55.03; (2) complies with the limitations in Rule 84.06; (3) contains 7,749 words, as determined using the word-count feature of Microsoft Office Word. Finally, the undersigned certifies that electronically filed brief was scanned and found to be virus free.

/s/ *Gillian R. Wilcox*