**IN THE CIRCUIT COURT OF ST. LOUIS CITY,
STATE OF MISSOURI**

THE REVEREND TRACI BLACKMON, *et al.*,	)	
Plaintiffs,	)	
v.	)	**No. 2322-CC00120**
STATE OF MISSOURI, *et al.*,	)	**Div. 18**
Defendants.	)	

**DEFENDANT JEAN PETERS BAKER'S
CROSS-CLAIM PETITION FOR DECLARATORY JUDGMENT**

COMES NOW Cross-claim Plaintiff/Defendant Jean Peters Baker ("Peters Baker") in her official capacity as Prosecuting Attorney for Jackson County, Missouri, by and through undersigned counsel, pursuant to Rule 55.32(f), and asserts the following cross-claims against codefendants the State of Missouri and the Missouri Attorney General, Andrew Bailey, in his official capacity:

1. Pursuant to § 527.010, *et seq.*, Peters Baker, in her official capacity as Prosecuting Attorney for Jackson County, Missouri, seeks a declaration from this Court that the criminal provisions in Chapter 188 of the Revised Statutes of Missouri[1] violate the Missouri Constitution and are invalid.

[1] All statutory citations are to the Revised Statutes of Missouri unless otherwise indicated.

2. Jurisdiction and venue are proper in this Court as the parties are all located in the state of Missouri, and this case involves the interpretation of Missouri state law and statutes.

PARTIES

3. Cross-claim Plaintiff/Defendant Peters Baker is the duly elected Prosecuting Attorney for Jackson County, Missouri.

4. Cross-claim Defendants are the State of Missouri and Andrew Bailey in his official capacity as the Attorney General of the State of Missouri.

GENERAL ALLEGATIONS COMMON TO ALL COUNTS

A. <u>The Special Responsibility of the Public Prosecutor</u>

5. Our constitution begins by noting that "all political power is vested in and derived from the people; that all government of right originates from the people, is founded upon their will only, and is instituted solely for the good of the whole." Mo. Const. Art. I, § 1.

6. In Missouri, the people have chosen to establish a system in which the attorney who represents the people's interest in criminal cases is a locally elected prosecuting attorney. §§ 56.010, 56.060; *see also State ex rel. Griffin v. Smith*, 363 Mo. 1235, 1239, 258 S.W.2d 590, 593 (1953), overruled on other grounds by *State v. Honeycutt*, 96 S.W.3d 85, 89 (Mo. 2003) (The "public prosecutor is a responsible officer chosen for [her] office by the suffrage of the people.").

7. Prosecutors are unlike other lawyers in our adversarial system in that they have a special duty to seek justice. The responsibility of a prosecutor

consequentially differs from that of the usual advocate. She is not an advocate in the ordinary sense of the word but is the people's representative whose primary interest in a criminal prosecution is not to convict but to see that justice is done. *Bankhead v. State*, 182 S.W.3d 253, 258 (Mo. App. E.D. 2006) ("The State's fundamental interest in criminal prosecutions is not that it shall win a case, but that justice shall be done.") (internal quotations omitted).

8. This is because "[t]he prosecutor's role transcends that of an adversary: [s]he 'is the representative not of an ordinary party to a controversy, but of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done.'" *State v. Johnson*, 617 S.W.3d 439, 449 (Mo. 2021) (quoting *United States v. Bagley*, 473 U.S. 667, 675 n.6 (1985)).

9. The duty to seek justice as a representative of the sovereign goes beyond the requirement of fair process in the context of a single case or trial. An elected prosecutor has a duty as a "'minister[] of justice' to go beyond seeking convictions and legislatively authorized sentences in individual cases, and to think about the delivery of criminal justice on a systemic level, promoting criminal justice policies that further broader societal ends." R. Michael Cassidy, *(Ad)ministering Justice: A Prosecutor's Ethical Duty to Support Sentencing Reform*, 45 Loyola Univ. of Chicago L.J. 981, 983 (2014).

10. To this end, prosecutors are given "discretionary privilege[s] unmatched in the world" *State ex rel. Peters-Baker v. Round*, 561 S.W.3d 380, 387 (Mo. 2018) "to determine when, if, and how criminal laws are to be enforced" in their counties. *State*

v. Honeycutt, 96 S.W.3d 85, 89 (Mo. 2003); *see also McCleskey v. Kemp*, 481 U.S. 279, 311–12 (1987) ("The capacity of prosecutorial discretion to provide individualized justice is firmly entrenched in American law.").

11. The decision whether and how to bring charges is a critical component of the criminal justice system for no prosecutor has the resources and ability to prosecute every violation of the law, nor would doing so promote public safety or be an effective use of public resources. Instead, elected prosecutors—empowered by their community to carry out the duties of that job—make decisions every day about where and how limited resources are best expended, what cases merit entry into the justice system, and what charges and penalties to seek when the case does warrant criminal prosecution.

12. Accordingly, prosecutors wield discretion over whom to charge with crimes and can hold off based on factors that include the strength of an individual case, the severity of the offense, and sometimes, the prosecutor's view on the law's constitutionality. *See Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) (As "[i]n our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in [her] discretion."); *see also Lawrence v. Texas*, 539 U.S. 558, 569–70, 581 (2003) (noting that sodomy statutes were generally unenforced against consenting adults); *Minnesota RFL Republican Farmer Lab. Caucus v. Freeman*, 33 F.4th 985, 992 (8th Cir. 2022) (public officials declared they had no present intention to commence civil

or criminal proceedings against any person or entity for violating allegedly unconstitutional statute).

13. The Supreme Court of the United States has acknowledged that such broad prosecutorial discretion:

> . . . rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review. Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake. Judicial supervision in this area, moreover, entails systemic costs of particular concern. Examining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor's motives and decision making to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government's enforcement policy. All these are substantial concerns that make the courts properly hesitant to examine the decision whether to prosecute."
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> *Wayte v. United States*, 470 U.S. 598, 607–08 (1985).

14. The Supreme Court of Missouri has further attributed the "[t]he unparalleled authority of the American prosecutor . . . to the fact that district attorneys in the United States are elected, county-level officials. Prosecutorial power, in this view, is an outgrowth of the peculiar emphasis the United States places on local, democratic control[,]" *State ex rel. Peters Baker*, 561 S.W3d at 387, with a check on that power coming from the People of Missouri through direct elections. *McKittrick v. Wallach*, 182 S.W.2d 313, 319 (Mo. banc 1944).

15. Despite these traditional and long-standing principles, there is an unsettling trend nationwide to unlawfully interfere with prosecutorial discretion.

Particularly in the wake of the Supreme Court of the United States issuing its opinion in *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), which eliminated the constitutional right to abortion in the United States Constitution and resulted in several states enacting "trigger laws" banning abortions in their jurisdiction.

16. Missouri is one such state.

B. <u>Missouri Statutes Criminalizing Abortion</u>

17. Chapter 188 of the Revised Statutes of Missouri is titled "Regulation of Abortions" and contains a hodgepodge of numerous statutes regulating various aspects of abortions in the state, some of which provide criminal penalties. The criminal provisions came from two bills: S.B. 5 and H.B. 126.

18. The most recent of the two is H.B. 126, which the General Assembly passed in 2019 and includes the Right to Life of the Unborn Child Act (§ 188.017), the Missouri Stands for the Unborn Act (§§ 188.026, 188.056, 188.057, 188.058), and the Late-Term Pain-Capable Unborn Child Protection Act (§ 188.375).

19. In passing H.B. 126, the General Assembly knew each act was unconstitutional at the time, but nonetheless wanted to create an anticipatory statutory scheme regulating abortion at varying intervals in the early stages of pregnancy (twenty weeks or earlier) in the event *Roe v. Wade* was overturned or diluted. In doing so, however, the General Assembly enacted a series of laws that directly conflict with and contradict one another.

20. For instance, the Right to Life of the Unborn Child Act declares: "[n]otwithstanding any other provision of law to the contrary, no abortion shall be performed or induced upon a woman, except in cases of medical emergency. Any person who knowingly performs or induces an abortion of an unborn child in violation of this subsection shall be guilty of a class B felony . . . ." § 188.017.

21. Yet, the Missouri Stands for the Unborn Act (§§ 188.026, 188.056, 188.057, and 188.058) and the Late-Term Pain-Capable Unborn Child Protection Act (§ 188.375) permit abortions based on gestational age as follows:

a. Section 188.056.1 states: "[n]otwithstanding any other provision of law to the contrary, no abortion shall be performed or induced upon a woman at eight weeks gestational age or later, except in cases of medical emergency. Any person who knowingly performs or induces an abortion of an unborn child in violation of this subsection shall be guilty of a class B felony[.]".

b. Section 188.057 states: "[n]otwithstanding any other provision of law to the contrary, no abortion shall be performed or induced upon a woman at fourteen weeks gestational age or later, except in cases of medical emergency. Any person who knowingly performs or induces an abortion of an unborn child in violation of this subsection shall be guilty of a class B felony[.]".

c. Section 188.058 states: "[n]otwithstanding any other provision of law to the contrary, no abortion shall be performed or induced upon a woman

at eighteen weeks gestational age or later, except in cases of medical emergency. Any person who knowingly performs or induces an abortion of an unborn child in violation of this subsection shall be guilty of a class B felony[.]".

d. Section 188.375 states: "[n]otwithstanding any other provision of law to the contrary, no abortion shall be performed or induced upon a woman carrying [an unborn child at twenty weeks gestational age or later], except in cases of medical emergency. Any person who knowingly performs or induces an abortion of [an unborn child at twenty weeks gestational age or later] in violation of this subsection shall be guilty of a class B felony[.]" § 188.375.2–3.

22. By prefacing each statute with a "notwithstanding" clause, the General Assembly indicated that it meant for each statute to apply "in spite of" any other provision to the contrary. *See State ex rel. City of Jennings v. Riley*, 236 S.W.3d 630, 632 (Mo. 2007) (noting that "[a] conflict would be present, then, only if both statutes included a prefatory 'Notwithstanding' clause or if neither statute included such a clause."). In doing so, however, the legislature created an irreconcilable conflict as to when an abortion can be legally performed in the state of Missouri.

23. The irreconcilable conflict does not end there. Because none of the acts in H.B. 126 contain a repealing clause for previously enacted legislation, §§ 188.030 and 188.075, which the General Assembly passed in 2017 as part of S.B. 5, remain in full force and effect.

24. Section 188.030 governs abortions of viable unborn children and states:

> Except in the case of a medical emergency, no abortion of a viable unborn child shall be performed or induced unless the abortion is necessary to preserve the life of the pregnant woman whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself, or when continuation of the pregnancy will create a serious risk of substantial and irreversible physical impairment of a major bodily function of the pregnant woman. For purposes of this section, "major bodily function" includes, but is not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.
>
> § 188.030.1 (emphasis added).

25. Section 188.030 directs the physician, prior to performing an abortion, to determine the gestational age and viability of the unborn child using the "degree of care, skill, and proficiency commonly exercised by a skillful, careful, and prudent physician." § 188.030.2(1)&(2).

26. "If the physician determines that the unborn child is viable, the physician shall not perform or induce an abortion upon the woman unless the abortion is necessary to preserve the life of the pregnant woman or that a continuation of the pregnancy will create a serious risk of substantial and irreversible physical impairment of a major bodily function of the woman." § 188.030.2(4)(a).

27. Any person who knowingly performs or induces an abortion of a viable unborn child in violation of § 188.030, "is guilty of a class D felony, and, upon a finding of guilt or plea of guilty, shall be imprisoned for a term of not less than one year, and,

notwithstanding the provisions of section 558.002, shall be fined not less than ten thousand nor more than fifty thousand dollars."

28. It is unclear as to when a fetus is viable due to two competing definitions of viability in § 188.015. Section 188.015(11) defines "viability" to mean the "stage of fetal development when the life of the unborn child may be continued indefinitely outside the womb by natural or artificial life-supportive systems[,]" whereas § 188.015(12) defines "viable pregnancy" as "in the first trimester of pregnancy, an intrauterine pregnancy that can potentially result in a liveborn baby."

29. Moreover, what constitutes a "medical emergency" in § 188.030 conflicts with the definition of medical emergency in §§ 188.015(7)&(9) and 188.039.1.

30. Section 188.015(7) defines a medical emergency to mean "a condition which, based on reasonable medical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to [1] avert the death of the pregnant woman or [2] for which a delay will create a serious risk of substantial and irreversible physical impairment of a major bodily function of the pregnant woman[.]"

31. "Reasonable medical judgment" is defined as "a medical judgment that would be made by a reasonably prudent physician, knowledgeable about the case and the treatment possibilities with respect to the medical conditions involved[.]" § 188.015(9).

32. These statutory definitions of medical emergency and reasonable medical judgment impose an objective standard, and both definitions lack a scienter requirement.

33. Whereas the medical emergency exception delineated in § 188.030 for post-viable abortions is silent on any standard—subjective or objective—and similarly lacks a scienter requirement.

34. The confusion is further compounded by a third definition of medical emergency in § 188.039.1 which "means a condition which, on the basis of the physician's good faith clinical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create a serious risk of substantial and irreversible impairment of a major bodily function."

35. Section 188.075 imposes a criminal penalty of a class A misdemeanor, unless a different penalty is provided for in state law, for "[a]ny person who contrary to the provisions of sections 188.010 to 188.085 knowingly performs, induces, or aids in the performance or inducing of any abortion or knowingly fails to perform any action required by sections 188.010 to 188.085[.]" Like the other statutes, § 188.075 provides an exception for cases of medical emergency.

36. Indeed, in each statute, the General Assembly incorporated a medical emergency exception as part of the statutory definition of the crime of abortion:

a. ". . . no abortion shall be performed or induced upon a woman, **except in cases of medical emergency**." § 188.015 (emphasis added).

b. ". . . no abortion shall be performed or induced upon a woman at eight weeks gestational age or later, **except in cases of medical emergency**." § 188.056 (emphasis added).

c. ". . . no abortion shall be performed or induced upon a woman at fourteen weeks gestational age or later, **except in cases of medical emergency**." § 188.057 (emphasis added).

d. ". . . no abortion shall be performed or induced upon a woman at eighteen weeks gestational age or later, **except in cases of medical emergency**." § 188.058 (emphasis added).

e. ". . . no abortion shall be performed or induced upon a woman carrying [an unborn child at twenty weeks gestational age or later], **except in cases of medical emergency**." § 188.375 (emphasis added).

f. "**Except in the case of a medical emergency**, no abortion of a viable unborn child shall be performed or induced . . . ." § 188.030 (emphasis added).

37. It is a general guide to the interpretation of criminal statutes that when an exception is incorporated as part of the statutory definition of the offense, the burden is on the prosecution to plead and prove that the defendant is not within the exception.

38. "It would be highly anomalous for a legislature to authorize abortions necessary for life or health and then to demand that a doctor, upon pain of one to ten years' imprisonment, bear the burden of proving that an abortion he performed fell

within that category. Placing such a burden of proof on a doctor would be peculiarly inconsistent with society's notions of the responsibilities of the medical profession. Generally, doctors are encouraged by society's expectations, by the strictures of malpractice law and by their own professional standards to give their patients such treatment as is necessary to preserve their health." *United States v. Vuitch*, 402 U.S. 62, 70–71 (1971).

39. Nevertheless, in each statute, the General Assembly declared the medical emergency exception is purported to be an "affirmative defense" where the physician alleged to have performed or induced the abortion shall have the burden of persuasion that the medical emergency was "more probably true than not." §§ 188.017.3, 188.056.2, 188.057.2, 188.058.2, 188.375.4.

40. Cross-claim Defendants the State of Missouri and the Missouri Attorney General take the position that there is no conflict of laws in Chapter 188 because once the United States Supreme Court overruled *Roe v. Wade* on June 24, 2022, the Missouri Attorney General notified the Missouri Revisor of Statutes, which triggered the Right to Life of the Unborn Child Act as the law of the land in Missouri causing all other statutes regulating "elective abortions" to become "non-operative[.]" *See* State Defendants' Motion to Dismiss First Amen. Complaint for Failure to State a Claim which Relief can be Granted and Memo. In Support, pp. 1, 5, and 8; *see also* Missouri Attorney General Opinion Letter No. 22-2022 (June 24, 2022).

41. According to Cross-claim Defendants any "supposed conflict" between the statutes in Chapter 188 ". . . is imaginary, insubstantial, and non-existent[.]"

State Defendants' Motion to Dismiss First Amen. Complaint for Failure to State a Claim which Relief can be Granted and Memo. In Support, p. 8.

42. However, the phrase "elective abortion" appears nowhere in Chapter 188. Moreover, Cross-claim Defendants' position ignores an elementary and cardinal rule of statutory construction: ". . . it is presumed that the legislature intended every part and section of [ ] a statute, or law, to have effect and to be operative, and did not intend any part or section of such statute to be without meaning or effect . . . [and that] effect must be given, if possible, to every word, clause, sentence, paragraph, and section of a statute . . . so that no part, or section, will be inoperative, superfluous, contradictory, or conflicting, and so that one section, or part, will not destroy another." *Missouri Pac. R. Co. v. Kuehle*, 482 S.W.2d 505, 508 (Mo. 1972).

43. This rule of construction "applies with peculiar force to statutes passed at the same session of a legislative body" because in such a case "we have, in fact, the same minds acting upon the one subject. It is not to be presumed that the same body of men would pass conflicting and incongruous acts." *State ex rel. Karbe v. Bader*, 78 S.W.2d 835, 839 (Mo. 1934).

44. H.B. 126 is unique in that the General Assembly *intended* to pass conflicting laws (during the same session) so that one could survive the other in the event "one or more provisions, subsections, sentences, clauses, phrases, or words" of any section were found to be "unenforceable, unconstitutional, or invalid by a court of competent jurisdiction[.]"

45. As this case demonstrates, such a practice is unwise as it results in an incoherent statutory scheme, which poses serious concerns of fair notice to those who must follow the law and a lack of guidance to those who must enforce it.

46. Peters Baker has the authority to enforce the above criminal provisions and pursue prosecutions against the would-be physician defendant who violates the statutes cited above for which the penalties are severe.

47. The punishment for a class B felony includes a fine up to ten thousand dollars and a sentence of imprisonment for "a term of years not less than five years and not to exceed fifteen years[.]" § 558.002.1(1), § 558.011.1(2).

48. The punishment for a class D felony includes a fine up to ten thousand dollars and a sentence of imprisonment for "a term of years not to exceed seven years[.]" § 558.002.1(1), § 558.011.1(4).

49. The punishment for a class A misdemeanor includes a fine up to two thousand dollars and a sentence of imprisonment for "a term not to exceed one year[.]" § 558.002.1(1), § 558.011.1(2).

50. However, as an elected prosecutor, Peters Baker's primary duty is to seek justice within the bounds of the law, not merely to convict. Her goal is to protect the innocent and convict the guilty, to consider the interests of victims and witnesses, and to respect the constitutional and legal rights of all persons, including suspects and defendants. And it is the judgment of Peters Baker, in her official capacity as Prosecuting Attorney for Jackson County, Missouri that the criminal provisions found in the Right to Life of the Unborn Child Act (§ 188.017), the Missouri Stands

for the Unborn Act (§§ 188.026, 188.056, 188.057, 188.058), the Late-Term Pain-Capable Unborn Child Protection Act (§ 188.375), and §§ 188.030 and 188.075, conflict with the principles of due process and equal protection of the laws guaranteed by the Missouri Constitution, which she is sworn to protect.

51. Due process and equal protection are at the core of Missouri's Constitution and where United States Supreme Court precedent "dilute[s] these important rights" they receive state constitutional protections even more extensive than those provided by the federal constitution. *Weinschenk v. State*, 203 S.W.3d 201, 204 (Mo. 2006) (citing *State ex rel. J.D.S. v. Edwards*, 574 S.W.2d 405, 409 (Mo. banc 1978)). When the government fails to protect these basic constitutional guarantees it not only deprives individual defendants of their rights, but it also undermines the public confidence in the fundamental fairness of criminal justice systems across the country.

52. Therefore, bound by the ethics of her office Peters Baker in her official capacity as Prosecuting Attorney for Jackson County, Missouri invokes the equitable authority of this Court to construe, pursuant to § 527.010, *et al*, questions of construction and constitutional validity arising under the criminal provisions of Missouri's abortion laws found in Chapter 188 of the Revised Statutes of Missouri.

C. <u>Standing to Pursue Declaratory Judgment Action</u>

53. In an action seeking a declaratory judgment, "the criterion for standing is whether the plaintiff has a legally protectable interest at stake" in the outcome of the litigation. *St. Louis Cnty. v. State*, 424 S.W.3d 450, 453 (Mo. 2014). "A legally

protectable interest exists if the plaintiff is directly and adversely affected by the action in question or if the plaintiff's interest is conferred by statute." *Ste. Genevieve Sch. Dist. R II v. Bd. of Aldermen of City of Ste. Genevieve*, 66 S.W.3d 6, 10 (Mo. 2002).

54. As the Prosecuting Attorney for Jackson County, Missouri, Peters Baker has a statutorily conferred interest in ensuring the criminal laws she is tasked with enforcing provide explicit standards that allow her to determine who may be charged so as to prevent arbitrary and erratic arrests and convictions. § 56.060; *see also State v. Stokely*, 842 S.W.2d 77, 81 (Mo. 1992) (analyzing whether a criminal statute "gives a prosecutor sufficient guidance to determine who may be charged . . . .").

55. Indeed, the stated purpose of § 527.120 is to "afford relief from uncertainty and insecurity with respect to rights, status and other legal relations . . ." as well as "to reduce litigation" and to assure that "guidance, through explicit standards, will be afforded to those who must apply the statute, avoiding possible arbitrary and discriminatory application[.]" *Damon v. City of Kansas City*, 419 S.W.3d 162, 176 (Mo. App. W.D. 2013) (quoting *Planned Parenthood of Kansas v. Donnelly*, 298 S.W.3d 8, 13 (Mo. App. W.D. 2009)).

56. Further, Peters Baker is directly and adversely affected by the action in question. She seeks guidance from this Court on the constitutional validity of the criminal laws she is tasked with enforcing lest she face legal efforts seeking to interfere with her prosecutorial discretion to not enforce laws that are, in her view, unconstitutional. *See Crumbaker v. Zadow*, 151 S.W.3d 94, 96 (Mo. App. E.D. 2004)

("alleging a threatened or actual injury resulting from the challenged action" is enough to show standing).

CROSS-CLAIM COUNT I
DECLARATORY JUDGMENT AS TO WHETHER THE MEDICAL EMERGENCY AFFIRMATIVE DEFENSE IN CHAPTER 188 IMPROPERLY SHIFTS THE BURDEN OF PROOF ON AN ESSENTIAL ELEMENT OF THE CRIME OF ABORTION TO THE DEFENDANT IN VIOLATION OF THE PRESUMPTION OF INNOCENCE GUARANTEED BY THE DUE PROCESS CLAUSE IN MO. CONST. ART. I § 10

57. The paragraphs above are incorporated as if fully set forth herein.

58. Article I, § 10, of the Missouri Constitution guarantees that "no person shall be derived of life, liberty or property without due process of law."

59. Under the protections provided by the due process clause of the Missouri Constitution, a defendant in a criminal case is presumed innocent until proven guilty. Mo. Const. Art. I, § 10.

60. The presumption of innocence is a cornerstone of the American criminal justice system and is deeply rooted in our nation's history and tradition as to be ranked fundamental. Mo. Const. Art. I, § 10; *see also State v. Wilfong*, 438 S.W.2d 265, 266 (Mo. 1969) ("The presumption of innocence has been recognized as an essential of due process of law in criminal proceedings.*"); State v. Peacock*, 725 S.W.2d 87, 90 (Mo. App. S.D. 1987) ("It is elemental that due process includes the right to have a fair trial . . . ."); *State v. Hartman*, 479 S.W.3d 692, 698 (Mo. App. W.D. 2015) ("The presumption of innocence in favor of the accused is an essential component of a fair trial."); *In re Monnig*, 638 S.W.2d 782, 785 (Mo. App. W.D. 1982) ("In a criminal proceeding, the transcendent interest of an accused to personal liberty incurs the

demand of due process that to minimize the risk of error of the conviction of an innocent person, the other party prove guilt of the accused beyond a reasonable doubt.") (citing *Speiser v. Randall*, 357 U.S. 513, 525 (1958)).

61. As such, a prosecutor is required to prove beyond a reasonable doubt every element necessary to constitute the crime charged. *Tupper v. City of St. Louis*, 468 S.W.3d 360, 372 (Mo. 2015).

62. While it is within the power of the Government to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion, due process prohibits the Government from shifting the burden of production or persuasion to the defendant on an element of the crime charged because doing so offends "principle[s] of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Speiser v. Randall*, 357 U.S. 513, 523 (1958); *see also Tupper*, 468 S.W3d at 372–73.

63. Prior to the Supreme Court of the United States handing down its landmark decision in *Roe v. Wade*, establishing the constitutional right to abortion in the U.S. Constitution, Missouri criminalized abortions within the state except in cases of medical emergency. *See State v. De Groat*, 259 Mo. 364, 168 S.W. 702, 707 (1914); *State v. Goodson*, 299 Mo. 321, 252 S.W. 389, 392 (1923); *State v. Smith*, 344 Mo. 1129, 1134 (Mo. 1939); *State v. Stillman*, 301 S.W.2d 830, 832 (Mo. 1957); *State v. Sonner*, 161 S.W. 723, 725 (Mo. 1913).

64. Recognizing the safeguards of due process and the presumption of innocence afforded to the criminally accused, the Supreme Court of Missouri has

consistently held that when a medical emergency exception is part of the statutory definition of the crime of abortion, the burden is on the state to prove the abortion was not performed for a medical emergency. *De Groat*, 168 S.W. at 707 (". . . the burden is on the state to prove the nonnecessity of the abortion to save the life of the mother or the life of an unborn child."); *Goodson*, 252 S.W. at 392 (". . . it would devolve upon the state to show affirmatively that no abortion was necessary to save her life or that of the unborn child. The burden of proof devolves upon respondent to establish appellant's guilt beyond a reasonable doubt."); *Stillman*, 301 S.W.2d at 832 (it is "incumbent upon the state to prove that the operation for production of an abortion or miscarriage was not necessary in order to preserve the life of the woman or that of an unborn child, if performed by a licensed physician[.]"); *see also Vuitch*, 402 U.S. at 70–71 (1971).

65. Under the plain language of the Right to Life of the Unborn Child Act (§ 188.017), the Missouri Stands for the Unborn Act (§§ 188.026, 188.056, 188.057, 188.058), the Late-Term Pain-Capable Unborn Child Protection Act (§ 188.375), and §§ 188.030 and 188.075, the medical emergency exception is incorporated in the statutory definition of the crime of abortion.

66. Accordingly, the absence of a medical emergency is an element of the crime of abortion.

67. As an element of the crime, the burden is on the state to prove the abortion was not performed for a medical emergency.

68. The provisions of the Right to Life of the Unborn Child Act (§ 188.017), the Missouri Stands for the Unborn Act (§§ 188.026, 188.056, 188.057, 188.058), the Late-Term Pain-Capable Unborn Child Protection Act (§ 188.375), and §§ 188.030 and 188.075, which declare the medical emergency exception to be an affirmative defense constitutes a violation of Article I, § 10 of the Missouri Constitution, which prohibits the deprivation of life, liberty, or property without due process of law by establishing an unreasonable presumption of guilt and shifting the burden of proof on an essential element of the crime to the defendant.

WHEREFORE, Peters Baker in her official capacity as Prosecuting Attorney for Jackson County, Missouri requests that this Court enter judgment declaring that the provisions of the Right to Life of the Unborn Child Act (§ 188.017), the Missouri Stands for the Unborn Act (§§ 188.026, 188.056, 188.057, 188.058), the Late-Term Pain-Capable Unborn Child Protection Act (§ 188.375), and §§ 188.030 and 188.075, which declare the medical emergency exception to be an affirmative defense are void and unenforceable as violative of Mo. Const. Art. I, § 10. The absence of a medical emergency is an essential element of the offense of abortion, which the state bears the burden to prove beyond a reasonable doubt.

CROSS-CLAIM COUNT II
DECLARATORY JUDGMENT AS TO WHETHER THE CRIMINAL PROVISIONS IN CHAPTER 188 ARE VOID FOR VAGUENESS IN VIOLATION OF MO. CONST. ART. I, § 10

69. The paragraphs above are incorporated as if fully set forth herein.

70. The Due Process Clause of the Missouri Constitution bars enforcement of criminal statutes which are vague. Mo. Const. Art. I, § 10.

71. "Vagueness, as a due process violation, takes two forms. One is the lack of notice given [to] a potential offender because the statute is so unclear that men of common intelligence must necessarily guess at its meaning." *State v. Young*, 695 S.W.2d 882, 884 (Mo. banc 1985) (internal citations and quotations omitted).

72. "The second is that the vagueness doctrine assures that guidance, through explicit standards, will be afforded to those who must apply the statute, avoiding possible arbitrary and discriminatory application." *Young*, 695 S.W.2d at 882.

73. Vague criminal statutes are subject to heightened review, specifically those without scienter requirements, because the consequences of imprecision are more severe with statutes that impose criminal sanctions over civil ones. *State v. Shaw*, 847 S.W.2d 768, 774 (Mo. 1993) ("The possibility of criminal sanctions heightens the stakes and necessarily sharpens the focus of the constitutional analysis."); *see also Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939) ("[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids.").

74. Chapter 188 is no model of clarity. It contains numerous textual inconsistencies between statutes that preclude them from operating concurrently.

75. The Right to Life of the Unborn Child Act (§ 188.017), the Missouri Stands for the Unborn Act (§§ 188.026, 188.056, 188.057, 188.058), the Late-Term Pain-Capable Unborn Child Protection Act (§ 188.375), and § 188.030 criminalize the

act of performing an abortion based on different stages of pregnancy, and each statute applies "notwithstanding" any other provision to the contrary.

76. Further, although each statute provides an exception "in cases of medical emergency," §§ 188.015(7)-(9), 188.030, and 188.039 contain conflicting definitions of what constitutes a medical emergency, and it is unclear which definition should apply in any given scenario.

77. In addition to the conflicting definitions of medical emergency, each of definitions impose a different legal standard under which the physicians' medical determination will be judged.

78. Section 188.015(7) together with § 188.015(9) impose an objective standard under which the physicians' medical determination will be judged, and both definitions lack a scienter requirement.

79. Section 188.030.1 contains a separate definition of medical emergency in the context of post-viability abortions, which is silent on any standard—objective or subjective—and similarly lacks a scienter requirement.

80. And § 188.039.1 imposes a subjective standard based on the physician's "good faith clinical judgment."

81. Lastly, § 188.015 contains two definitions of viability that are at odds with one another. *See* § 188.015(11)-(12).

82. Numerous aspects of Chapter 188 are so vague as to make it impossible for physicians and prosecutors to interpret the law's parameters. A statute that

places physicians and prosecutors in the position of guessing what may or may not be prohibited is impermissibly vague.

WHEREFORE, Peters Baker in her official capacity as Prosecuting Attorney for Jackson County, Missouri requests that this Court enter judgment declaring that the criminal provisions of the Right to Life of the Unborn Child Act (§ 188.017), the Missouri Stands for the Unborn Act (§§ 188.026, 188.056, 188.057, 188.058), the Late-Term Pain-Capable Unborn Child Protection Act (§ 188.375), and §§ 188.030 and 188.075 fail to state explicitly and definitely what conduct is punishable, rendering the criminal provisions void and unenforceable as violative of Mo. Const. Art. I, § 10.

CROSS-CLAIM COUNT III
DECLARATORY JUDGMENT AS TO WHETHER THE CRIMINAL PROVISIONS IN CHAPTER 188 VIOLATE EQUAL PROTECTION OF THE LAWS GUARANTEED UNDER MO. CONST. ART. I, § 2

83. The paragraphs above are incorporated as if fully set forth herein.

84. Article 1, Section 2 of the Missouri Constitution provides "[t]hat all constitutional government is intended to promote the general welfare of the people; that all persons have a natural right to life, liberty, the pursuit of happiness and the enjoyment of the gains of their own industry; that all persons are created equal and are entitled to equal rights and opportunity under the law; that to give security to these things is the principal office of government, and that when government does not confer this security, it fails in its chief design."

85. In deciding whether a statute violates the Equal Protection Clause, Missouri courts engage in a two-part analysis. *Weinschenk v. State*, 203 S.W.3d 201, 210–11 (Mo. 2006). The first step is to determine whether the classification operates

to the disadvantage of some suspect class *or* impinges upon a fundamental right explicitly or implicitly protected by the Constitution. *Id.* If so, the classification is subject to strict scrutiny and the court must determine whether it is necessary to accomplish a compelling state interest. *Id.*

86. Here, the narrow definitions of medical emergency in the criminal provisions of Chapter 188 operate to the disadvantage of a suspect class—patients receiving reproductive healthcare (women)—and impinge upon the would-be physician defendant's right to "the enjoyment of the gains of their own industry"—a fundamental right explicitly protected by the Missouri Constitution. Mo. Const. art. I, § 2; *see also Missouri Corr. Officers Ass'n, Inc. v. Missouri Off. of Admin.*, 662 S.W.3d 26, 40 (Mo. App. W.D. 2022) ("A fundamental right . . . is a right explicitly or implicitly guaranteed by the Constitution.") (citation and internal quotations omitted).

87. The narrow definitions of medical emergency in the criminal provisions of Chapter 188 compel the would-be physician defendant to withhold or deny treatment that is necessary to preserve the health of their patients in disregard of their professional obligation and legal duty to provide such services under Missouri law.

88. In so doing, the law creates an unlawful distinction between physicians and patients who provide and receive reproductive healthcare services and those who do not, substantially interfering with the reproductive healthcare physician's fundamental right to enjoy the gains of their own industry and operating to the

disadvantage of a suspect class by substantially interfering with the healthcare of reproductive healthcare patients (women).

89. Specifically, under Missouri law, all physicians have a professional obligation and legal duty to provide evidence-based healthcare that is in the best interests of their patients and must conform to the standards of care set forth in Chapter 334 lest they face disciplinary action against their professional license and/or medical malpractice actions authorized under civil tort law.

90. In Missouri, all physicians are subject to discipline, including loss of their professional license, for "[a]ny conduct or practice which is *or might be* harmful or dangerous to the *mental or physical* health of a patient or the public; or incompetency, gross negligence or repeated negligence in the performance of the[ir] functions or duties[.]" § 334.100.2(5) (emphasis added); *see also Moheet v. State Bd. Of Registration for Healing Arts*, 154 S.W.3d 393, 404 (Mo. App. W.D. 2004) ("The theory of Section 334.100.2(5) is that the public is best protected by ensuring that physicians seek to protect against professional failure that *might* result in harm to patients.") (emphasis in original).

91. "'[R]epeated negligence' means the failure, on more than one occasion, to use that degree of skill and learning ordinarily used under the same or similar circumstances by the member of the applicant's or licensee's profession[.]" § 334.100.5(5);

92. The narrow definitions of medical emergency in the criminal provisions of Chapter 188 impose an insurmountable burden to physicians and patients

providing and receiving reproductive healthcare services by enshrining into Missouri law reproductive healthcare that is below the standard of care for the profession.

93. Each definition of "medical emergency" contained in Chapter 188 is irreconcilable with the physician's professional obligations and legal duty under Missouri law in that:

a. None of the medical emergency definitions permit physicians providing reproductive healthcare services to consider the mental, emotional, or phycological conditions of their patients in evaluating whether an abortion is medically necessary, which could result in a practice that is or might be harmful or dangerous to the patient and public;

b. None of the medical emergency definitions permit physicians providing reproductive healthcare services to consider whether an abortion is in the patient's best mental and physical interests, and/or medically necessary when the patient is pregnant because of rape or incest, which could result in a practice that is or might be harmful or dangerous to the patient and public;

c. None of the medical emergency definitions permit physicians providing reproductive healthcare services to perform an abortion on their patients who are carrying an unborn child diagnosed with fetal abnormalities incompatible with life, including but not limited to skeletal dysplasia, trisomy 13, 18, and 21, anencephaly, renal agenesis, gastric and cardiac defects, and molar pregnancy, all of which are

medically defined conditions where death of the fetus is predicated before or shortly after birth. By not permitting physicians providing reproductive healthcare to consider the impacts these diagnoses may have on the mental and physical health of the patient could result in a practice that is or might be harmful or dangerous to the patient and public;

d. None of the medical emergency definitions permit the physician providing reproductive healthcare services to perform an abortion on their patients in need of medical treatment or surgery due to a condition that does not yet pose a serious risk of substantial and irreversible physical impairment of a major bodily function, but could quickly create a life threatening situation including but not limited to infections with sepsis when the water has broken, hemorrhage in presence of a fetus, uterine infection, severe preeclampsia, and cancer diagnosis, which could result in a practice that is or might be harmful or dangerous to the patient and public; and

e. Each definition forces physicians to delay medical and/or deny surgical treatment to their patients until they are in life threatening situations. which would undoubtedly result in a practice that is harmful and dangerous to the patient and public.

94. The decision of whether a medical emergency necessitates the need to perform an abortion is a healthcare decision. *See* § 188.015(1) (definition of abortion).

95. The criminal provisions in Chapter 188 impose an insurmountable burden for the would-be physician defendant providing reproductive healthcare services to the exclusion of all other members of the physician class.

96. Such differential treatment subjects physicians providing reproductive healthcare services to a loss of customers, loss of good will, threats to the viability of their business, and threats of criminal prosecution all of which would no doubt impact their business and reputation, substantially interfering with the would-be defendant physician's ability to exercise their fundamental right to enjoy the gains of their own industry.

97. Such differential treatment would no doubt have a chilling effect on the number of physicians in the state of Missouri willing to specialize in reproductive healthcare, resulting in serious shortages of services and further placing patients and the public at harm.

98. While the government has an interest in respecting and preserving prenatal life and protecting maternal health and safety, the narrow definitions of medical emergency in the criminal provision of Chapter 188 are not narrowly tailored to achieve such interests.

99. To pursue criminal prosecutions against physician's who provide ethical, sound care in the best interests of their patients as recommended and approved by state and national standards does not fit within the concept of justice. To do so would not only deprive the would-be physician defendant of their fundamental right to enjoy

the gains of their own industry, but it would also operate to the disadvantage of a suspect class—patients receiving reproductive healthcare (women).

WHEREFORE, Peters Baker in her official capacity as Prosecuting Attorney for Jackson County, Missouri requests that this Court enter judgment declaring that the criminal provisions of the Right to Life of the Unborn Child Act (§ 188.017), the Missouri Stands for the Unborn Act (§§ 188.026, 188.056, 188.057, 188.058), the Late-Term Pain-Capable Unborn Child Protection Act (§ 188.375), and §§ 188.030 and 188.075 violate equal protection of the laws guaranteed under Mo. Const. Art. I, § 2.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on June 13, 2023, the foregoing was filed electronically with the Clerk of the Court by using the Missouri e-Filing System which will automatically send e-mail notification to all attorneys of record.

/s/ D. Ryan Taylor
D. RYAN TAYLOR