IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

PLANNED PARENTHOOD OF THE HEARTLAND, Plaintiff, vs. DAVE HEINEMAN, Governor of Nebraska, in his official capacity; JON BRUNING, Attorney General of Nebraska; in his official capacity; KERRY WINTERER, Chief Executive Officer, and DR. JOANN SCHAEFER, Director of the Division of Public Health, Nebraska Department of Health and Services, in their official capacities; and CRYSTAL HIGGINS, President, Nebraska Board of Nursing, and BRENDA BERGMAN-EVANS, President, Nebraska Board of Advanced Practice Registered Nurses, in their official capacities; Defendants.	No. 4:10-cv-03122-LSC-FG3 **MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* OF EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND, COALITION ON ABORTION/BREAST CANCER, STUDENTS FOR LIFE OF AMERICA & CREIGHTON STUDENTS FOR LIFE IN SUPPORT OF DEFENDANTS**

Amici curiae Eagle Forum Education & Legal Defense Fund ("Eagle Forum"), Coalition on Abortion/Breast Cancer, Students for Life of America, and Creighton Students for Life file this brief pursuant to the accompanying motion. For the reasons set forth below, *amici curiae* have a direct and vital interest in the issues before this Court. The state defendants consented to the filing of the accompanying *amici* brief. Plaintiff Planned Parenthood of the Heartland ("PPH") requested to

review the brief before it could consent, and the shortness of time did not allow an opportunity to provide an advance copy.

INTEREST AND IDENTITY OF *AMICI CURIAE*

Eagle Forum, an Illinois nonprofit corporation founded in 1981 and headquartered in St. Louis, has consistently defended federalism and supported the States' autonomy from the federal government in areas (like public health) that are of predominantly local concern under the Constitution. Eagle Forum has a longstanding interest in protecting unborn life and in adherence to the Constitution as written.

Coalition on Abortion/Breast Cancer is a nonprofit coalition of breast cancer advocates headquartered in Hoffman Estates, Illinois. The Coalition's mission is to protect the health and save the lives of women by educating and providing information on abortion as a risk factor for breast cancer.

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Creighton Students for Life is a nonprofit volunteer organization of students at Creighton University in Omaha, Nebraska. As its name implies, Creighton Students for Life is dedicated to educating its members, the Creighton campus, and the community about the value of every human life.

AUTHORITY TO FILE *AMICI* BRIEF OF EAGLE FORUM ET AL.

Unlike the federal appellate rules, the Federal Rules of Civil Procedure do not address the filing of *amici* briefs. Nonetheless, the federal District Courts often allow interested parties to seek and obtain *amicus* status. *See, e.g., Cachil Dehe Band of Wintun Indians of Colusa Indian Community v. California,* 2009 WL 2971547, 1 (E.D. Cal. 2009). Particularly in light of the abbreviated briefing schedule and heightened significance of a motion for a preliminary injunction, the filing of an *amici* brief will enable fuller consideration of the issues. *See, e.g., Salt Lake Tribune Publ'g Co., LLC v. Mgmt. Planning, Inc.,* 2007 U.S. Dist. LEXIS 31425, *10 (D. Utah Apr. 27, 2007) (granting motion for leave to file an amicus brief in considering a motion for a preliminary injunction, and then declining to grant the preliminary injunction).

Motions under Appellate Rule 29(b) must explain the movant's interest and "the reason why an *amicus* brief is desirable and why the matters asserted are relevant to the disposition of the case." FED. R. APP. P. 29(b). The Advisory Committee Note to the 1998 amendments to Rule 29 explain that "[t]he amended rule [Rule 29(b)] … requires that the motion state the relevance of the matters asserted to the disposition of the case." The Advisory Committee Note then quotes Sup. Ct. R. 37.1 to emphasize the value of *amicus* briefs that bring a court's attention to relevant matter not raised by the parties:

> An *amicus curiae* brief which brings relevant matter to the attention of the Court that has not already been brought to its attention by the parties is of considerable help to the Court.

Id. (*quoting* Sup. Ct. R. 37.1). "Because the relevance of the matters asserted by an *amicus* is ordinarily the most compelling reason for granting leave to file, the Committee believes that it is helpful to explicitly require such a showing."

As now-Justice Samuel Alito wrote while serving on the U.S. Court of Appeals for the Third Circuit, "I think that our court would be well advised to grant motions for leave to file *amicus* briefs unless it is obvious that the proposed briefs do not meet Rule 29's criteria as broadly interpreted. I believe that this is consistent with the predominant practice in the courts of appeals." *Neonatology Assocs., P.A. v. Comm'r*, 293 F.3d 128, 133 (3rd Cir. 2002) (citing Michael E. Tigar and Jane B. Tigar, *Federal Appeals -- Jurisdiction and Practice* 181 (3d ed. 1999) and Robert L. Stern, *Appellate Practice in the United States* 306, 307-08 (2d ed. 1989)). Now-Justice Alito quoted the Tigar treatise favorably for the statement that "[e]ven when the other side refuses to consent to an *amicus* filing, most courts of appeals freely grant leave to file, provided the brief is timely and well-reasoned." 293 F.3d at 133. As explained in the next section, the Eagle Forum ELDF's brief will aid this Court by addressing issues of subject-matter jurisdiction not raised by the state defendants, but which the state defendants cannot waive. Indeed, this Court has the independent duty to consider subject-matter jurisdiction, even if the parties do not, and the amici brief will aid the Court's effort.

FILING THE *AMICI* BRIEF OF EAGLE FORUM *ET AL.* WILL AID THE COURT

For the specific substantive reasons set forth below, the accompanying *amici* brief will aid this Court by raising several issues that the state defendants did not

have sufficient time to address, including jurisdictional aspects of standing, ripeness, and the *Ex parte Young* exception to sovereign immunity. Of course, this Court has an independent obligation to consider subject-matter jurisdiction, even if the parties do not. *See FW/PBS, Inc. v. City of Dallas,* 493 U.S. 215, 231 (1990) (every federal appellate court has a special obligation to satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review, even though the parties are prepared to concede it") (interior quotations omitted). For that reason alone, the Eagle Forum ELDF brief will aid the Court's resolution of this matter.

The accompanying *amici* brief provides valuable information to this Court concerning and rebutting medical claims asserted by PPH in its memorandum. The timing of PPH's own filing caused an expedited briefing schedule that made it difficult for a responding party to fully address the medical claims contained in PPH's brief. The accompanying *amici* brief provides essential information to Court in response and rebuttal to the medical assertions of PPH. The relief sought by PPH is sufficiently important to the public to allow submission of this *amici* brief for the benefit of this Court in considering the matters raised.

CONCLUSION

Movants respectfully submit that this Court grant leave to file the accompanying *amici* brief.

Dated: July 9, 2010

Respectfully submitted,

/s/ Lawrence J. Joseph

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CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of July, 2010, I electronically filed the foregoing document with the Clerk of the Court for the U.S. District Court for the District of Nebraska via the CM/ECF system and thereby electronically served the counsel listed below:

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CORPORATE DISCLOSURE STATEMENT

I, the undersigned counsel of record for *amici curiae* Eagle Forum Education & Legal Defense Fund ("Eagle Forum"), Coalition on Abortion/Breast Cancer ("CABC"), Students for Life of America ("SLA"), and Creighton Students for Life ("CSL") certify that, to the best of my knowledge and belief, Eagle Forum, CABC, SLA, and CSL are nonprofit corporations or associations with no parent companies, subsidiaries, or affiliates that have outstanding securities in the hands of the public. These representations are made in order that the Court may determine the need for recusal.

Dated: July 9, 2010

Respectfully submitted,

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IDENTITY, INTEREST AND AUTHORITY TO FILE

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the community about the value of every human life.

STATEMENT OF THE CASE

In this facial challenge, there are no significant facts in dispute about the parties themselves, but the parties dispute the meaning, relative merit, and supported conclusions of various peer-reviewed journal articles that appear in the medical literature. *Amici* discuss the scientific disputes in the sections of this brief that rebut the critique by plaintiff Planned Parenthood of the Heartland ("PPH") of peer-reviewed literature on several risk factors associated with induced abortions.

Constitutional Background

Under Article III, courts "presume that federal courts lack jurisdiction unless the contrary appears affirmatively from the record." *Renne v. Geary,* 501 U.S. 312, 316 (1991). Parties cannot grant jurisdiction by consent or waiver, *FW/PBS, Inc. v. City of Dallas,* 493 U.S. 215, 231 (1990), "[a]nd if the record discloses that the lower court was without jurisdiction [an appellate] court will notice the defect" and dismiss the action. *Id.* As relevant here, Article III imposes two criteria relevant to justiciability: standing and ripeness.

Standing presents a tripartite test: cognizable injury to the plaintiffs, causation by the defendants, and redressable by a court. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561-62 (1992). A plaintiff with standing can assert the rights of absent third parties only if the plaintiff and the absent third parties have a "close" relationship and some "hindrance" presents the rights-holders' protecting their own interests. *Kowalski v. Tesmer,* 543 U.S. 125, 128-30 (2004) (*citing Powers v. Ohio,* 499 U.S. 400, 411 (1991)). Plaintiffs need to establish standing for each

claim raised and form of relief requested: "standing is not dispensed in gross." *Lewis v. Casey,* 518 U.S. 343, 358 n.6 (1996). Plaintiffs must establish standing on the merits to support injunctive relief, *Summers v. Earth Island Institute,* 129 S.Ct. 1142, 1151 (2009), which applies equally to preliminary injunctive relief. *City of Los Angeles v. Lyons,* 461 U.S. 95, 99-100 (1983).

The ripeness doctrine seeks "[t]o prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Abbott Laboratories v. Gardner,* 387 U.S. 136, 148 (1967), *abrogated on other grounds, Califano v. Sanders,* 430 U.S. 99, 105 (1977); *Citizens for Equal Protection v. Bruning,* 455 F.3d 859, 863 (8th Cir. 2006) (same). Like standing, "[t]he ripeness doctrine flows both from the Article III 'cases' and 'controversies' limitation and also from prudential considerations for refusing to exercise jurisdiction." *Nebraska Pub. Power Dist. v. MidAmerican Energy Co.,* 234 F.3d 1032, 1037 (8th Cir. 2000); *Johnson v. Missouri,* 142 F.3d 1087, 1090 n.4 (8th Cir. 1998) ("standing and ripeness are technically different doctrines, [but] they are closely related in that each focuses on whether the harm asserted has matured sufficiently to warrant judicial intervention") (interior quotations omitted). Indeed, standing and ripeness can "perhaps overlap entirely." *Johnson,* 142 F.3d at 1090 n.4. Moreover, as with standing, lack of ripeness is a jurisdictional defect, *Pub. Water Supply Dist. No. 8 v. City of Kearney,* 401 F.3d 930, 932 (8th Cir. 2005), which courts must evaluate *sua sponte. Thomas v. Basham,* 931 F.2d 521, 522-24 (8th Cir. 1991); *James Neff Kramper Family Farm Partnership v. IBP, Inc.,* 393 F.3d 828, 830 (8th Cir. 2005).

In *Planned Parenthood of Southeastern Pennsylvania v. Casey,* 505 U.S. 833 (1992), the U.S. Supreme Court majority held that informed-consent statutes do not generally pose an "undue burden" on abortion under *Roe v.* Wade, 410 U.S. 113 (1974). *See Casey,* 505 U.S. at 882.

Statutory Background

On April 13, 2010, Nebraska's Governor signed L.B. 594, 101st Leg. Reg. Sess. (Neb. 2010), to be codified within Neb. Rev. Stat. §§ 28-325, 28-340, 38-2021, 28-101, 28-326, 28-327, 28-327.01, 28-327.03, 28-327.04 (hereinafter, the "Act") into law, effective on July 15, 2010. The Act has a severability clause. Act, §17.

As relevant here, the Act amended NEB. REV. STAT. §28-327 to include additional provisions on informed consent for abortions. In particular, the Act supplemented §28-327's criteria for voluntary and informed abortions to include evaluating the pregnant woman at least one hour prior to the abortion for any "risk factors associated with abortion," *id.* §28-327(4)(b), and informing the pregnant woman and the physician who will perform the abortion of the evaluation's results in writing, including (at a minimum) a checklist that identifies the positive and negative results for each such risk factor. *Id.* §28-327(4)(c). The Act defines "risk factors associated with abortion" as follows:

> any factor, including any physical, psychological, emotional, demographic, or situational factor, for which there is a statistical association with one or more complications associated with abortion such that there is less than a five percent probability ($P < .05$) that such statistical association is due to chance. Such information on risk factors shall have been published in any peer-reviewed journals indexed by the United States National Library of Medicine's search services (PubMed or

> MEDLINE) or in any journal included in the Thomson Reuters Scientific Master Journal List not less than twelve months prior to the day preabortion screening was provided[.]

NEB. REV. STAT. §28-326(11). The Act also provides for a civil cause of action for wrongful death of an unborn child under NEB. REV. STAT. §30-809 for intentional, knowing, or negligent failures to comply with §28-327's provisions. Act, §6. In such an action, the omission of information under §28-327 nonetheless qualifies for an affirmative defense if a statistically validated survey of the general population of women of reproductive age, conducted within three years of the contested abortion, demonstrates that less than five percent of women would consider the contested information relevant to an abortion decision. Act, §10(5).[1]

Compliance with §28-327(4) and §28-327(7) creates a rebuttable presumption of a physician's compliance with §28-327, NEB. REV. STAT. §28-327.04, and failure to comply with §28-327 create a rebuttable presumption that the pregnant woman would not have undergone the abortion had the physician complied with §28-327. Act, §10(1). The Act provides that §28-327 does not define a standard of care for any medical procedure other than induced abortions, Act, §11(2), and that violating §28-327(4)-(6) does not provide grounds for any criminal action, disciplinary action, or revocation of a license to practice medicine and surgery pursuant to Nebraska's

[1] Because the statute of limitations for wrongful-death actions under NEB. REV. STAT. §30-809 is two years, *see* NEB. REV. STAT. §30-810, the three-year allowance for surveys apparently enables those who ignored relevant risk factors to defend their actions via a survey *after* the commencement of a wrongful-death action.

Uniform Credentialing Act. Act, §11(3). Section 10(4) of the Act provides that physicians advertising services in Nebraska are deemed to be transacting business in Nebraska for purposes of the State's long-arm statute, NEB. REV. STAT. §25-536, and are subject to §28-327's provisions. Act, §10(4).

SUMMARY OF ARGUMENT

Preliminary injunctions are extraordinary relief that courts do not grant without the movants' meeting all criteria for relief, and Section I demonstrates that PPH meets *none* of the criteria. Jurisdictionally, Section **Error! Reference source not found.** demonstrates that this Court lacks jurisdiction over various aspects of PPH's claims because PPH lacks third-party standing to assert its patients' rights, cannot assert a ripe claim based on its fear of future litigation under the Act's civil-remedy provisions, and does not even assert injury from anything other than §28-327(4)(b)-(c)'s risk-factor provisions and §28-327's purportedly extraterritorial application through Act, §10(4).

On the merits, Section III.A.1-.3 rebuts each of PPH's arguments against §28-327(4)(b)-(c) as baseless, and Section III.A.1-.3 rebuts PPH's factual arguments, with a particular emphasis on abortion's correlation with breast cancer and with mental-health issues. Finally, Section IV demonstrates that the Act is not extraterritorial in its application but instead merely provides for a civil action, with or without appropriate rebuttable presumptions, to the full measure allowed by constitutional minimum-contacts analysis.

ARGUMENT

I. PPH CANNOT ESTABLISH ENTITLEMENT TO INTERIM RELIEF

"[A] party seeking a preliminary injunction of the implementation of a state statute must demonstrate … that the movant is likely to prevail on the merits." *Planned Parenthood Minnesota, North Dakota, South Dakota v. Rounds,* 530 F.3d 724, 731-32 (8 Cir. 2008) (*en banc*) (internal quotations omitted). "If the party with the burden of proof makes a threshold showing that it is likely to prevail on the merits, the district court should then proceed to weigh the other *Dataphase* factors." *Rounds,* 530 F.3d at 732. Those additional factors are "(1) the threat of irreparable harm to the movant; (2) the state of the balance between this harm and the injury that granting the injunction will inflict on other parties litigant; … and [3] the public interest." *Dataphase Systems, Inc. v. C L Systems, Inc.,* 640 F.2d 109, 113 (8th Cir. 1981) (*en banc*). PPH cannot make any of the required showings.

First, as explained in Section **Error! Reference source not found.**, III, and IV, *infra,* PPH is not likely to succeed on the merits. ***Second,*** PPH's delay in bringing this suit and its failure to attempt to resolve this dispute with the defendants prior to its last-minute lawsuit and request for a temporary restraining order and preliminary injunction disqualify PPH from interim relief. *Citibank, N.A. v. Citytrust,* 756 F.2d 273, 276 (2d Cir. 1985) (delay in bringing suit "may still indicate the absence of the kind of irreparable harm required to support a

preliminary injunction" even if it does not rise to laches);[2] *Quince Orchard Valley Citizens Ass'n, Inc. v. Hodel,* 872 F.2d 75, 80 (4th Cir. 1989) (same); *see also Gelco Corp. v. Coniston Partners,* 811 F.2d 414, 420 (8th Cir. 1987) (party has not shown irreparable financial harm if its alleged injuries can be remedied). ***Third,*** as explained in Section III.B, *infra,* PPH and its affiliates in the abortion industry have consistently denied and attempted to conceal the risks associated with abortion, which demonstrates the need for informed-consent laws such as the one Nebraska has enacted on behalf of its citizens. ***Fourth,*** it does not serve the public interest for PPH's to perform abortions without informed consent and avoid civil liability to patients victimized by PPH's conduct.

II. JURISDICTION IS LACKING HERE

The Court must deny injunctive relief because PPH cannot meet its burden of establishing this Court's jurisdiction.

A. PPH Lacks Standing

To the extent that PPH contends that the Act is arbitrary and will cost PPH unnecessary expense, PPH might have standing to challenge the Act as arbitrary government action. *Village of Arlington Heights v. Metro. Housing Development Corp.,* 429 U.S. 252, 263 (1977). But PPH itself does not have access to abortions under *Roe* or *Casey,* and there is no basis for PPH to assert the interests of women who might want to receive an abortion without the Act's informed consent. *Tesmer,*

[2] PPH delayed its filing so late that the state defendants did not even have the 14 days to prepare a response that NECivR 7.0.1(b)(1)(B) provides.

543 U.S. at 128-30; *Powers,* 499 U.S. at 411. Only if the Act would completely shut down PPH and any other abortion providers in Nebraska – a factual showing that PPH has not even attempted to make[3] – could the Act's informed consent provisions somehow burden a woman under *Roe* or *Casey*.

Even assuming *arguendo* that PPH has a justiciable case or controversy, the scope of that case or controversy – and thus the scope of any injunctive relief – concerns only §28-327(4)(b)-(c) and the alleged extraterritorial application of §28-327. *See* PPH Br. at 11-33 (§28-327(4)(b)-(c)'s risk-factor provisions), 34-37 (§28-327's "extraterritorial" application). Consequently, PPH's request that this Court enjoin the entire Act, PPH Br. at 1-3, is overbroad. PPH does not establish any injury from the balance of the Act, and "standing is not dispensed in gross." *Lewis,* 518 U.S. at 358 n.6. Accordingly, even if PPH prevails upon this Court to grant interim relief, the Court lacks jurisdiction to enjoin the entire Act.

B. PPH Lacks a Ripe Claim

In addition to a lack of standing, PPH's claims also are unripe. The Act merely clarifies a cause of action by post-abortive women to sue PPH. PPH does not attempt to quantify its litigation risk, either before or after the Act's effective date. Of course, doubling or tripling PPH's litigation from post-abortive women would still amount to zero if no post-abortive women file suit against PPH. But even if

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[3] By failing to raise this argument in its opening brief, PPH has waived the issue for purposes of its motion for interim relief. *See U.S. v. Greene,* 513 F.3d 904, 906 (8th Cir. 2008) (collecting cases); NECivR 7.0.1(a)(1)(A) ("[a] party's failure to brief an issue raised in a motion may be considered a waiver of that issue").

PPH's litigation risk is non-zero, the Eighth Circuit has affirmed that "[t]he mere possibility of being named a defendant … does not constitute the actual controversy which is required." *Gopher Oil Co. v. Bunker,* 84 F.3d 1047, 1050 (8th Cir. 1996). In *Gopher Oil,* the plaintiff brought its lawsuit "in expectation that it would be named a defendant" in another lawsuit, which the Eighth Circuit held did not meet Article III's minimal jurisdictional requirements. *See also Shain v. Veneman*, 376 F.3d 815, 818 (8th Cir. 2004) (rejecting the notion that "any plaintiff who conceivably could be harmed by a defendant's conduct would possess standing to sue in federal court").

C. Federal Courts Do Not "Determine the Constitutionality of State Laws in Hypothetical Situations"

Jurisdiction is also lacking here because federal courts do not decide the constitutionality of state laws in hypothetical situations like that presented here. PPH's action here is an impermissible attempt to declare a state law unconstitutional based on hypothetical arguments. The Supreme Court has rejected such a role for federal courts; district courts lack power to enjoin state laws in the abstract. In reversing an injunction against enforcement of a state law to the extent it was not preempted by federal law, the Supreme Court held that the district court "disregarded the limits on the exercise of its injunctive power." *Morales v. TWA,* 504 U.S. 374, 382 (1992) (Scalia, J.). The Court explained:

> In suits such as this one, which the plaintiff intends as a "first strike" to prevent a State from initiating a suit of its own, the prospect of state suit must be imminent, for it is the prospect of that suit which supplies the necessary irreparable injury. *See Public Serv. Comm'n of Utah v. Wycoff Co.,* 344 U.S. 237, 240-241, 97 L. Ed. 291, 73 S. Ct. 236 (1952). *Ex parte Young* thus speaks of enjoining state officers "who threaten and are about to commence

> proceedings," 209 U.S. at 156 (emphasis added); *see also id.,* at 158, and we have recognized in a related context that a conjectural injury cannot warrant equitable relief, *see O'Shea, supra,* at 502. Any other rule (assuming it would meet Article III case-or-controversy requirements) would require federal courts to ***determine the constitutionality of state laws in hypothetical situations where it is not even clear the State itself would consider its law applicable***. This problem is vividly enough illustrated by the blunderbuss injunction in the present case, which declares pre-empted "any" state suit involving "any aspect" of the airlines' rates, routes, and services. As petitioner has threatened to enforce only the obligations described in the guidelines regarding fare advertising, the injunction must be vacated insofar as it restrains the operation of state laws with respect to other matters.

Morales, 504 U.S. at 382-83 (emphasis added). *See also O'Shea v. Littleton,* 414 U.S. 488, 502 (U.S. 1974) (dismissing a claim for lack of ripeness, holding that "if any of the respondents are ever prosecuted and face trial, or if they are illegally sentenced, there are available state and federal procedures which could provide relief from the wrongful conduct alleged").

III. NEBRASKA'S INFORMED-CONSENT PROVISIONS ARE FULLY CONSTITUTIONAL

Perhaps sensing the brittleness of its statutory interpretations, PPH uses "read literally" or "taken literally" over 25 times in its brief. In three distinct but ultimately similar ways, PPH complains that it must acknowledge peer-reviewed literature with which it disagrees, in over 40 different languages, with varying degrees of electronic searchability, spanning 100 years, even if temporally, geographically, or culturally different from abortions at PPH facilities in Nebraska in 2010. In the following two sections, *amici* first rebut PPH's three legal bases for

its facial challenge to the Act and then rebut PPH's various factual complaints.

Read sensibly and consistently with its purpose and text, the Act merely addresses the informed consent that applies to any medical procedure in the absence of the abortion issue's politicization by groups like PPH and its affiliates. Lanfranchi Affidavit. ¶¶22-25, 28-31; Orient Affidavit, ¶¶37-38; Coleman Affidavit, ¶¶6, 22. By its terms, the Act provides a civil remedy to injured patients for violations of that informed-consent standard. Act, §6. Moreover, the Act gives physicians a statutory safe harbor to protect themselves in such civil actions, NEB. REV. STAT. §28-327.04; Act, §10(1), and the safe harbor lacks enforcement consequence outside an injured patient's civil action. Act, §11(2)-(3). Under the circumstances, and notwithstanding PPH's contrived parade of horribles,[4] this Court must read the Act consistent with this plainly lawful purpose: "it is a common principle of statutory interpretation that statutes should be construed to avoid raising serious constitutional issues." *Hatfield v. Bishop Clarkson Memorial Hosp.,* 679 F.2d 1258, 1264 (8th Cir. 1982) (*citing In re Shirley's Estate,* 162 Neb. 613, 76 N.W.2d 749, 752 (1956)); *Gillis v. City of Madison,* 248 Neb. 873, 877, 540 N.W.2d 114, 117 (Neb. 1995) ("[w]hen an ordinance is susceptible of two constructions, under one of which it is clearly valid, while under the other its validity may be doubtful, that construction which makes the ordinance clearly valid will be given"); *I.N.S. v. St. Cyr,* 533 U.S. 289, 299 (2001) (courts "are obligated to construe the

[4] As explained in Section III.B, *infra,* PPH's parade of horribles is not actually horrible.

statute to avoid [constitutional] problems" if it is "'fairly possible'" to do so). With that backdrop, *amici* now rebut PPH's legal and factual claims against §28-327(4).

A. PPH's Facial Challenge Cannot Succeed under Any of PPH's Asserted Legal Bases for Relief against §28-327

PPH brings a facial challenge, before the Act has been applied against anyone, much less against PPH. Under one strand of authority, courts may uphold facial challenges to abortion-related statutes if, "in a large fraction of the cases in which [the statute] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion." *Casey,* 505 U.S. at 895.[5] Here, the Act will not operate as an obstacle to any women's ***informed*** choice to undergo an abortion, although the information provided under the Act may convince some women that abortion would be an unwise choice.

In any event, PPH does not sue to enforce women's access to abortions under *Roe* and *Casey* because the Act does not even purport to restrict that access. Instead, PPH sues to enforce its own "right to be free of arbitrary or irrational government actions." *Village of Arlington Heights,* 429 U.S. at 263. Under the circumstances, the traditional rational-basis test applies in place of the *Casey*

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[5] On the other hand, "[i]t would indeed be undesirable for [courts] to consider every conceivable situation which might possibly arise in the application of complex and comprehensive legislation…. For this reason, [a]s-applied challenges are the basic building blocks of constitutional adjudication." *Gonzales v. Carhart,* 550 U.S. 124, 167-68 (2007) (internal citations and quotations omitted). Because PPH fails even if allowed to bring a facial challenge, the Court need not decide the issue of whether the abortion context provides an exception to otherwise-applicable restrictions on facial challenges. *See id.,* 550 U.S. at 167 (declining to resolve inconsistency in Court's jurisprudence on facial challenges in abortion context).

undue-burden or substantial-obstacle tests for abortion-related restrictions:

> It is well settled that where a statutory classification does not itself impinge on a right or liberty protected by the Constitution, the validity of classification must be sustained unless "the classification rests on grounds wholly irrelevant to the achievement of [any legitimate governmental] objective."

Harris v. McRae, 448 U.S. 297, 322 (1980) (rational-basis test applies to abortion-funding restrictions notwithstanding the exclusive effect on women in an abortion-related context). In the end, the level of scrutiny does not matter because the Act readily survives any potentially applicable level of scrutiny.

1. The Act Does Not Require the Impossible

For a host of factual excuses that *amici* refute in Section III.B, *infra,* PPH argues that the Act's risk-factor provisions impose an impossible burden on abortions. *See* PPH Br. at 11-12. Leaving PPH's factual errors aside until Section III.B, *infra, amici* focus here on PPH's equally glaring legal errors.

First, PPH complains only of the risk-factor provisions in §28-327(4)(b)-(c). See PPH Br. at 11-20. The Act does not tie those provisions to any enforcement mechanism. *See* Act, §11(3). Instead, the provisions relate solely to the availability of certain rebuttable presumptions in subsequent litigation over abortions. *See* NEB. REV. STAT. §28-327.04; Act, §10(1). The Act imposes nothing impossible on PPH.

Second, nothing in the Act requires or contemplates the interference with women's access to abortions under *Roe* and *Casey*. If PPH could establish that the Act would drive all abortion providers out of business, that would at least demonstrate an impact on women's access to abortions under *Roe* and *Casey,* but

PPH has not made any such showing here. Moreover, even if the Act did restrict access to abortions, PPH would lack standing to assert those third-party claims.

Third, the Act does not require a competent abortion provider to read every article published in the last hundred years in forty languages. Instead, PPH physicians (and their counsel) could have prepared the risk-factor checklists contemplated by §28-327(4)(b)-(c) in considerably less time than they took to create their various filings and affidavits in this litigation. As PPH itself notes, its physicians are familiar with the medical literature through their professional work. PPH Br. at 7-8; *see also* Orient Affidavit, ¶¶15, 25. Experienced physicians know the issues that they need to address to comply with §28-327(4)(b)-(c), and they already have an obligation to report these issues in order to obtain informed consent:

> The Act codifies a straightforward standard for informed consent by clarifying that a practitioner must provide the patient with full information about adverse consequences from an operation.... Physicians already have a professional duty to disclose possible adverse consequences to the patient before he or she gives consent to the operation. This professional duty exists with or without the Act.

Orient Affidavit, ¶¶12-13; *see also id.* ¶¶14-22 (explaining the congruence between the Act's informed consent and the informed consent within physician's professional duties). PPH may prefer to retain the Act's benefits while withholding information from PPH patients. But the Act applies only to statistically significant risk factors, with no obligation for PPH to agree with those factors. That is neither unlawful nor impossible.

2. The Act, which Clarifies Civil Remedies, Is Not "Void for Vagueness"

PPH's argument that the Act is somehow "void for vagueness" is baseless. PPH Br. 21-25. The Act does not impose any criminal penalties, or any "quasi-criminal" penalties, and thus the "void for vagueness" analysis is inapplicable.

In rejecting such an argument in another abortion case, the U.S. Supreme Court reiterated that the "void for vagueness" argument applies only to criminal or criminal-like penalties:

> "As generally stated, the void-for-vagueness doctrine requires that a ***penal*** statute define the ***criminal offense*** with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."

Gonzales v. Carhart, 550 U.S. 124, 148-149 (2007) (*quoting Kolender v. Lawson,* 461 U.S. 352, 357 (1983) *and also citing Posters 'N' Things, Ltd. v. United States,* 511 U.S. 513, 525 (1994)) (emphasis added). There are no criminal or quasi-criminal penalties imposed by the Act, and PPH cites no such penalties in its argument. Accordingly, the "void for vagueness" argument has no applicability whatsoever to the Act.

Moreover, even if the Act were somehow deemed to impose criminal-like penalties, PPH's argument would still fail. PPH attempts to create a vagueness issue in inventing sixteen speculative questions, see PPH Br. 22-24, but the U.S. Supreme Court has expressly rejected that litigate-by-hypothetical approach, and sharply criticized the Eleventh Circuit for allowing it:

> [The Eleventh Circuit's] basic mistake lies in the belief that the mere fact that close cases can be envisioned renders a statute vague. ***That is not so.*** Close cases can be imagined under virtually any statute.

United States v. Williams, 553 U.S. 285, 305-06 (2008) (emphasis added).

PPH cites only one relevant precedent on vagueness that even ***relates*** to the abortion context, taken from the Fifth Circuit. PPH Br. at 21 (citing *Women's Med. Ctr. v. Bell*, 248 F.3d 411 (5th Cir. 2001)). Upon scrutiny both *Bell* and its progeny in this Circuit require rejection of PPH's argument here. That decision enjoined on vagueness grounds provisions of "licensing regulations." *Bell,* 248 F.3d at 423. No such issue is presented here. *See* Act, §11(3). In addition, *Bell* reiterated that:

> "speculation about possible vagueness in hypothetical situations not before the Court will not support a facial attack on a statute when it is surely valid 'in the vast majority of its intended applications.'"

Id. at 422 n.36 (*quoting Hill v. Colorado,* 530 U.S. 703 (2000), *quoting United States v. Raines,* 362 U.S. 17, 23 (1960)).

The Eighth Circuit, in citing *Bell,* ***reversed*** much of a preliminary injunction because it "went beyond what was needed" and "the district court abused its discretion … in failing to clarify that the State is not enjoined from enforcing the 'informed consent' requirement upheld in *Casey*." *Reprod. Health Servs. of Planned Parenthood of the St. Louis Region, Inc. v. Nixon,* 428 F.3d 1139, 1145 (8th Cir. 2005).

The Act, which consists of clarifying informed consent and codifying civil remedies for failing to provide it, is not void for vagueness.

3. The Act Does Not Require PPH to Dispense False, Misleading, or Irrelevant Information

Although PPH contends that the Act requires it to dispense false, misleading, and irrelevant information to its patients, PPH Br. at 25-33, that simply is not true. Before rebutting PPH's claims about specific risk factors in Section III.B, *infra,* *amici* first emphasize that Nebraska "can use its regulatory authority to require a physician to provide truthful, non-misleading information relevant to a patient's decision to have an abortion." *Rounds,* 530 F.3d at 735; *Casey,* 505 U.S. at 882. Significantly, PPH bears the burden of proof:

> Planned Parenthood cannot succeed on the merits of its claim that [the challenged section] violates a physician's right not to speak unless it can show that the disclosure is either untruthful, misleading or not relevant to the patient's decision to have an abortion.

Rounds, 530 F.3d at 735. As explained in Section III.B, *infra,* PPH has not and cannot meet that burden as a matter of fact. Perhaps even more fatal to this litigation, however, PPH cannot meet that burden as a matter of law.

The Act merely provides for physicians' disclosing risk factors that correlate to the five-percent level of significance that researchers in various fields commonly use to reject weak correlations that result from chance. Orient Affidavit, ¶¶14, 41-42. The Act even includes an escape valve for dismissing irrelevant materials, based on statistically significant surveys. Act, §10(5). In pertinent part, the Act concerns only the disclosure of statistically significant correlations from peer-reviewed medical journal articles, and nothing in the Act forbids anyone's qualifying that disclosure with caveats about their own views. Indeed, the Act does not so much

compel statements as deny or impose rebuttable presumptions to those who refuse to make and document the statements. *See* NEB. REV. STAT. §28-327.04; Act, §10(1).

Under the circumstances, there is nothing false, misleading, or irrelevant about disclosures under the Act. Moreover, the politicization of the abortion industry and its trade allies and associations demonstrate the need for the Act's disclosures. *See* Section III.B, *infra.* As PPH's own brief demonstrates, women will not get a straight answer from PPH without the Act.

B. Nebraska's Informed-Consent Law Reasonably Regulates PPH to Ensure Women's Health

Through a combination of economic self interest and political zealotry, PPH asks this Court to void the informed consent that its patients deserve. As countless pro-choice physicians can attest, however, there is nothing ***legitimate*** about being "pro-choice" that precludes being "pro-information."

> Some readers may consider that the calculation made by Brind and colleagues of possible numbers of breast cancers following – conceivably caused by – induced abortion is alarmist. … However, in the light of recent unease about appropriate but open communication of risks associated with oral contraceptive pills, it will surely be agreed that open discussion of risks is vital and must include the people – in this case the women – concerned. I believe that if you take a view (as I do), which is often called "pro-choice," you need at the same time to have a view which might be called "pro-information" without excessive paternalistic censorship (or interpretation) of the data.

Stuart Donnan, M.D., Editor in Chief, *Abortion, Breast Cancer, and Impact Factors – in this Number and the Last,* 50 J. EPIDEMIOLOGY & COMMUNITY HEALTH 605 (1996). Insofar as true choice presupposes the information needed to make the

choice, PPH is plainly pro-abortion and pro-profit, but not pro-choice.

Unfortunately, organizations like PPH and its affiliates, the American Congress of Obstetricians and Gynecologists ("ACOG"), the American Psychological Association Task Force on Abortion and Mental Health ("APA Task Force"), and government agencies have political agendas and economic conflicts of interest that affect their objectivity on issues. Lanfranchi Affidavit. ¶¶22-25, 28-31; Orient Affidavit, ¶¶37-38; Coleman Affidavit, ¶¶6, 22. Indeed, it was recently reported that Elena Kagan, then of the Clinton White House Counsel's Office, prevailed on ACOG to change its views on the partial-birth abortion procedure for political purposes. Orient Affidavit, ¶¶37-38. Accordingly, notwithstanding PPH's appeal to authoritative sources, PPH Br. at 26, 29-31, this Court should find that informed consent requires that PPH advise its patients of risk factors under §28-327(4)(b)-(c).

As explained in Section III.A.1, *supra,* physicians already must keep informed about developments in their practices, and they already know (or should know) the issues that they must cover under the Act. As such, PPH's arguments about tens of thousands of ancient, foreign, and unsearchable articles is makeweight. Similarly, PPH's argument that studies get added constantly is likewise irrelevant because, if and only if such studies add a new risk factor would those studies alter PPH's operations under the Act. In the event that a newly available study – whether searchable or not, whether in English or not – indeed is relevant to PPH's practice, the media, professional groups and academics, and the trade press would plainly address it. PPH's complaints about temporally,

geographically, and culturally inapposite abortion risk factors easily compress to the requirement to a risk factor of using out-of-date materials or methods, for which PPH (presumably) always would report only positive evaluation results under §28-327(4)(c).

More importantly, as evidenced by the specific discussions of pregnancy and mental-health issues below, the Nebraska Legislature plainly is correct in its finding that the current standards for preabortion screening are not always adequate to protect women's health. NEB. REV. STAT. §28-325(6). Groups like PPH have a political agenda about abortion that drives their behavior – whether consciously or not – to reject statistically valid data that physicians readily would accept in a politically neutral context. Orient Affidavit, ¶¶12-22. The Act is needed to bring balance (and informed consent) to politicized abortion practices like PPH.

1. PPH's Submissions on Induced Abortions' Correlation with Breast Cancer Do Not Reflect Scientific Research

PPH's claim that "[t]he national professional organizations with specialized expertise in cancer and reproductive health have flatly rejected any association between abortion and breast cancer" may be true enough, PPH Br. at 26, but only because those national professional organizations have not adequately analyzed the issue or, rather, have analyzed it through a political rather than a scientific lens. As Dr. Lanfranchi explains, "[t]here is a well-documented history of denial by professional organizations of well-established causes of cancer." Lanfranchi Affidavit, at ¶25. For example, with cigarettes, the National Cancer Institute ("NCI") minimized the danger of lung cancer for decades under political pressure

from tobacco-state legislators, Lanfranchi Affidavit, at ¶28, and the same pressure exists from legislators who favor unrestricted abortions. *Id.* By contrast, the Chief of the Hormonal and Epidemiology Branch at NCI's Division of Epidemiology and Genetics reported that "induced abortion, and oral contraceptive use were associated with an increased risk for breast cancer" in her own work. Lanfranchi Affidavit, at ¶29 (*citing* Dolle J, et al. CANCER EPIDEMIOL BIOMARKERS PREV. 2009; 18(4)1157-1166). In the case of ACOG, its practitioner-members could face malpractice suits from lack of disclosure if they admitted a correlation between induced abortions and breast cancer. Lanfranchi Affidavit, at ¶32. "The professional duty to obtain informed consent is not dependent on political views or financial interests." Lanfranchi Affidavit, at ¶30. Accordingly, PPH cannot defer the answer to "national professional organizations" just because they are "national professional organizations." Instead, the correlation between induced abortion and breast cancer is a scientific question that requires a scientific answer.

As Dr. Lanfranchi explains, and unlike many statistical correlations, "[t]he physiology of why abortion increases the risk of breast cancer is well-understood." Lanfranchi Affidavit, at ¶13. Specifically, in response to estrogen and progesterone produced by the ovaries and by the fetal-placental unit in response to fetal-placental secretion of human chorionic gonadotropin, the pregnant woman's amount of cancer-prone Type 1 and Type 2 lobules in the breast increase, *id.* ¶16, and during the course of a full-term pregnancy, these lobules convert to cancer-resistant Type 3 and Type 4 lobules. *Id.* ¶14. As a consequence, a woman who has never been

pregnant remains with her initial, lower amount of Type 1 and Type 2 lobules, and a woman who delivers a child benefits from the conversion to cancer-resistant lobules. But a woman who arrests her pregnancy before 32 weeks, "increases her breast cancer risk proportionally to the length of gestation, roughly 3% for each week's gestation." *Id.* ¶16.

Moving to the data, "[t]he vast majority of peer review studies confirm that abortion increases the risk of breast cancer," and many "studies predate the modern political controversy concerning abortion" or were "conducted in nations where abortion is less politicized than in the United States." Lanfranchi Affidavit, at ¶10; *see also id.* ¶¶11, 26-27 (describing four recent studies from the United States, China, Turkey, and Sri Lanka that show elevated incidence of breast cancer of up to 240% increases). As Dr. Lanfranchi concludes, "the science is unmistakable that abortion increases the risk of breast cancer, and the medical duty of informed consent properly includes disclosure of this fact to women considering having an abortion." *Id.* ¶33.

2. PPH's Submissions on Induced Abortions' Correlation with Mental Health Do Not Reflect Scientific Research

As with breast cancer, PPH would have this Court defer to a politically motivated report on induced abortion's correlation with mental-health issues. PPH Br. at 29-31. Notwithstanding the APA Task Force, data in the published literature establish "that abortion substantially increases risk of anxiety, depression, substance use, suicide ideation, and suicide." Coleman Affidavit, ¶5. Indeed, "[t]here is consensus among most social and medical science scholars that a minimum of 10

to 30% of women who abort suffer from serious, prolonged negative psychological consequences." *Id.,* ¶9. To achieve the opposite conclusion, the APA Task Force used differential standards systematically to exclude and downplay negative mental-health impacts and to include and play up the opposite. *Id.,* ¶¶16-17, 14 (excluding unfavorable Swedish study for cultural reasons), ¶19 (placing exclusive emphasis on less rigorous but more pro-abortion British study without regard to cultural issues); *see also id.,* ¶20 (outlining flaws in British study).

A recent Norwegian study showed highly elevated rates of substance use (nicotine dependence: 400% increased risk; alcohol problems: 180% increased risk; Cannabis use: 360% increased risk: and other illegal drugs: 670% increased risk) compared to other women after statistical controls were applied for social background, parental and family history, smoking, alcohol and drug use, conduct problems, depression, schooling, and career variables. *Id.,* ¶24. Based the many deviations from accepted values and methods of science that characterized the process and conclusion of the APA Task Force along with the results of sophisticated, large-scale studies conducted by independent research groups in recent years, Dr. Coleman concludes that the ATA Task Force's "conclusions … are grossly inaccurate." *Id.,* ¶31.

IV. PROVIDING A CAUSE OF ACTION AND PERSONAL JURISDICTION IN NEBRASKA DOES NOT CONSTITUTE EXTRA-TERRITORIALITY

PPH also challenges the purportedly extraterritorial application of the Act to abortions performed in its Iowa offices on Iowans who never set foot out of Iowa, much less in Nebraska. PPH Br. at 34. Assuming *arguendo* that PPH could assert a

ripe claim now to avoid the potential of getting sued later, *but see* Section **Error! Reference source not found.**, *supra,* PPH's claims under the Due Process Clause and Commerce Clause are fanciful. ***First,*** the Act does not impose punitive damages or criminal penalties, which distinguishes the Due Process decisions that PPH cites. ***Second,*** the Act's safe harbors and rebuttable presumptions in no way regulate conduct outside Nebraska, which distinguishes the Dormant Commerce Clause decisions that PPH cites. ***Third,*** given §10(4)'s focus on long-arm jurisdiction, the Act obviously is concerned with expanding jurisdiction to the fullest constitutional reach permitted by the "minimum contacts" analysis required under the Due Process Clause. *Wells Dairy, Inc. v. Food Movers Intern., Inc.,* 607 F.3d 515 (8th Cir. 2010) (collecting cases). Minimum contacts, plus choice-of-law and venue provisions, independently prevent the Act's reaching beyond what the Act constitutionally may reach.

CONCLUSION

The Court should deny PPH's request for interim injunctive relief.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of July, 2010, I electronically filed the foregoing document with the Clerk of the Court for the U.S. District Court for the District of Nebraska via the CM/ECF system and thereby electronically served the counsel listed below:

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