No. _____

In The

Supreme Court of the United States

KEITH WILLISTON,

Petitioner,

v.

GAIL VASTERLING, et al.,

Respondents.

On Petition For Writ Of Certiorari To The Missouri Court Of Appeals, Western District

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. In *Richards v. Jefferson County*, this Court affirmed that *res judicata* can bar claims by parties in privity with former litigant; however, "there are clearly constitutional limits on the 'privity' exception." 517 U.S. 793, 798 (1996). The constitutional requirement is that "everyone should have his own day in court." *Id.* at 798. "[A] State may not deprive a person of all existing remedies for the enforcement of a right . . . unless there is, or was, afforded to him some real opportunity to protect it." *Id.* at 804 (*quoting Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 681-82 (1930)).

The question presented is:

a) When applying this standard, did the Missouri Court of Appeals err in finding that Petitioner "had his day in court" when the decisions included two adjudications excluding Petitioner?

II. In *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, this Court affirmed that compulsory inclusion of a message not of the speaker's choosing violates the First Amendment. 515 U.S. 557, 565 (1995). If the speaker intends to make a point, that speech is protected. *Id.* at 568. The message need not be "confined to expressions conveying a 'particularized message.'" *Id.* at 569. The content need not even be original to the speaker. *Id.* at 570.

QUESTIONS PRESENTED – Continued

The questions presented are:

a) When applying this standard, are professions expressive associations because they teach, instill and enforce different values, philosophies and codes of ethics?

b) When applying this standard, do Missouri's requirement(s) that Petitioner hire particular professions impermissibly interfere with his right to control both what he does and does not wish to express?

c) When applying this standard, does a state's compulsion that a party obtain permission from a particular profession deprive the speaker of control over his or her own speech and association?

PARTIES TO THE PROCEEDINGS

Petitioner is Keith Williston.

Respondents are Gail Vasterling, in her official capacity as the director of the Missouri Department of Health and Senior Services; Jeanne Serra, in her official capacity as the Director of the Division of Regulation and Licensure; Jeremiah Nixon in his official capacity as the Governor of Missouri; Dean Linneman; Lori Scheidt in her official capacity as the Executive Director of the Missouri Board of Nursing; Connie Clarkston in her official capacity as the Executive Director for the Missouri Board of Registration for the Healing Arts; Jefferey D. Carter; David E. Tannehill; James A. Direnna; Bradley D. Freeman; Jade D. James; Benjamin A. Lampert; John C. Lyskowksi; David A. Poggemeirer; The Missouri State Medical Association; The Missouri Association of Osteopathic Physicians and Surgeons; The American College of Obstetricians and Gynecologists; Teresa Generous.

Rhonda Shimmens; Mariea Snell; Alyson Speed; Roxanne McDaniel; Adrienne Fly; Lisa Green; Laura Noren; Marvin Teer.

Persons listed in the complaint but not made Parties: John O. Stanley; John Dogherty; Elaine Joslyn; Michael A. Montgomery; Lancer Gentry Gates; Michael Lynn O'Dell; James R. Blaine; Zachary Johnson; Daniel Pinheiro; Christina Litherland; Shacher Tauber; Robert Shaw Jr.; Alexander Hover Jr.; Jacob Edward

PARTIES TO THE PROCEEDINGS – Continued

Smith; Norman Knowlton III; David Barbe; James H. Petersen; Marc Hahn; Michael Tentori; Charles Norris; John D. Bentley; Sarner Cabbabe; Douglas Kiburz; Pranav Parikh; William Huffacker; James F. Conant; Lent Johnson; Ted Groshong; Kenneth E. Jones; Robert Scanlon III; Clara Lee Parks; Kevin Presley; and Does 1-9,967.

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JURISDICTION

The decision issued by the Missouri Court of Appeals on October 24, 2017 was rendered by the "highest court of a State in which a decision could be had." 28 U.S.C. § 1257(a). This requirement of § 1257(a) was satisfied because the Missouri Supreme Court Denied Application for Transfer on January 23, 2018, leaving no higher state court for Petitioner to appeal to. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

This case involves U.S. Const. amend. I, XIV, § 1; Mo. Rev. Stat. §§ 334.104, 335.015, 376.1753; 19 CSR 30-30.080 through 30-30.100; 20 CSR 2200-4.100 and 20 CSR 2200-4.200.

INTRODUCTION

This case presents a question regarding res judicata, as Missouri concluded Petitioner received *his* "day in court" when the State of Missouri successfully litigated to have Petitioner and his federal claims excluded. App. 43-45. The holding would modify the federal right to due process and a meaningful hearing from a personal right to a right that states could freely assign to other persons or objects, proceeding against that person or object without allowing the affected person any say in the litigation. This is a nightmare scenario that would open the door to manifest injustices and should be reviewed and corrected by this Court.

This case will determine whether federal constitutional protections apply to all persons and all enumerated rights, or whether constitutional protections only apply to certain classes of persons invoking favored constitutional principles. The policies and regulations at issue here are analogous to *Whole Woman's Health v. Hellerstedt*, with two important distinctions: (1) the fundamental right at issue is freedom of speech and association, and (2) these are administrative policies which must be supported by substantial evidence and statutory authority. 136 S.Ct. 2292 (2016), Mo. Rev. Stat. §§ 536.016.1, 536.014(1) (West 2016).[1] These factors should have raised Missouri's burden sufficiently to ensure that the policies in question were invalidated.

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[1] All statutory references are to Mo. Rev. Stat. (Westlaw 2016) unless otherwise indicated.

Missouri avoided the primary federal question on the grounds that the court was "not persuaded" Petitioner was really asserting the stated federal rights and ignored significant sections of the pleadings. App. 35-36. Missouri simply refused to consider Petitioner's federal claims, despite acknowledging that the questions were presented. App. 34-36.

This case is a decade in the making; and, barring intervention from this Court, it is years from being over. In 2007, the Missouri legislature passed the now infamous "Tocology Provision." Mo. Rev. Stat. § 376.1753. Tocology is a unique piece of legislation that does not grant "professional status" to any particular association, rather it establishes an objective standard of evidence that any association of persons could meet to prove competence. This new law led to administrative petitions, hearings and litigation that ended when Petitioner's prior business ran out of money and ceased to exist. *Williston v. Mo. Dept. of Health and Sr. Svcs.*, 461 S.W.3d 867, 869 (Mo. Ct. App. W.D. 2015). Respondents assert that the death of Petitioner's business should mean the end of his rights. However, Missouri is relitigating issues from this and the previous case against the other member of Petitioner's previous business, so litigation will only end if this honorable Court puts an end to it.

STATEMENT OF THE CASE

A. Statutory and Regulatory Background.

It is impossible to describe this case's statutory and regulatory background with certainty, as Missouri's rules and their interpretations constantly shift. State policy shifted multiple times in regard to Petitioner over the last decade. Some Missouri agencies have adopted directly contradictory interpretations of their own rules in different situations. Different agencies also have different interpretations of the same rules, and do not defer to the agency responsible for those regulations. The only consistent policy has been that Missouri will deny Petitioner his rights and privileges unless Petitioner either abandons his pursuit of operating a birth center or abandons Petitioner's right to control the ideological message of his facility. This is a violation of Petitioner's federal constitutional rights to due process, political speech, expressive speech and expressive association.

All the involved cases center on Missouri's regulations for birth centers but involve multiple interrelated and interoperative statutes. Missouri delegated regulation of birth centers to the Missouri Department of Health and Senior Services ("DHSS") in Mo. Rev. Stat. § 197.225. In 2009 and 2010, DHSS stated Petitioner's facility was a birth center, requiring licensure. In 2011 (and continuing through at least 2013), DHSS found that Petitioner's facility was not a birth center and did not require licensure. *Williston*, 461 S.W.3d at 868. The Missouri Board of Nursing ("BON"), however, won an administrative finding in 2018 that Petitioner's facility

was a birth center in 2013, regardless of DHSS' finding. And, while DHSS said that Petitioner could operate his facility without a license, Missouri barred Petitioner from even associating with unlicensed birth centers as a condition for granting Petitioner his license to practice law.

Regulation of professionals in a birth center is more confusing due to conflicts in statutory authority. DHSS requires that care be provided by either a physician or a Certified Nurse Midwife ("CNM") who has a Collaborative Practice Arrangement ("CPA")[2] with a physician on staff. 19 CSR 30-30.090(2)(B). All parties and the Missouri Appellate Court agree that this regulation was promulgated by DHSS regarding CPAs described in Mo. Rev. Stat. § 334.104. App. 17-21. DHSS does not have authority to promulgate such a rule, as only the BON and Missouri Board of Registration for the Healing Arts ("BOHA") have that authority. App. 21. Despite the clear interoperative nature of the statutes and regulations, the Missouri Court of Appeals held that Petitioner is not affected by Mo. Rev. Stat. § 334.104. App. 35-36.

BON and BOHA regulation of CNMs is also full of contradictions and shifting rules. The Missouri Court of Appeals held that the statute, regulations and policies permit CPAs, but do not require them. App. 35-36. However, shortly after the court of appeals decision, the BON obtained an administrative law ruling that

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[2] DHSS uses slightly different terms, but all parties agree that the terms are interchangeable.

the regulations do require CNMs to obtain CPAs. This decision came in a case against Petitioner's wife, who was the other owner of Petitioner's previous business and was also in privity with Petitioner and Petitioner's prior business.

The case against Petitioner's wife also exposes another inherent contradiction in Missouri's policy: the BON requires CNMs to obtain a CPA because the acts of CNMs are treated as both nursing and not nursing at the same time. The BON theory is that the acts of a CNM are "the practice of nursing" under Chapter 335 so the BON has authority to regulate, but the same acts by the same CNM must also not be "nursing" so they are not authorized under Chapter 335. Mo. Rev. Stat. § 334.155.2 is key here: "This chapter does not apply . . . to nurses licensed and lawfully practicing their profession within the provisions of chapter 335." The CPA statute is found at Mo. Rev. Stat. § 334.104, which is within Chapter 334 and so "would not apply" to a CNM if he or she is practicing nursing within the provisions of Chapter 335. Through some convoluted logic not understood by Petitioner, CNMs are and are not nurses and are both practicing nursing and not practicing nursing at the same time.

For the midwives Petitioner wishes to associate with, the law is clear but not followed. In 2007, the Missouri legislature took direct control of regulating midwives, authorizing midwives to practice "notwithstanding any law to the contrary" if the midwife met the legislature's standard of competency. Mo. Rev. Stat. § 376.1753 ("Tocology"); *Missouri State Med. Ass'n v.*

State, 256 S.W.3d 85 (Mo. banc 2008). The Missouri supreme court held that Tocology overrode the statutory provisions of Chapter 334 granting midwives' legal permission to practice that overrode any other statutory prohibition or limitation. *Id.* DHSS, BON and BOHA, however, continue to assert authority under their respective statutes, regulations and policies, arguing that DHSS and BON still have authority over midwives, specifically, the authority to compel midwives to associate with and have their legal rights and privileges decided by a local physician.

The summary of Respondents' policies is that Petitioner is in the same position as the nurses he wishes to hire and associate with: Petitioner's legal rights and privileges are determined by a local, private physician who will consider his or her own financial interests in deciding whether Petitioner gets to operate his business or not. Like the nurses, there is no legal standard the physician must follow, no body to appeal the physician's decision to, and no legal protections Petitioner could assert that a Missouri court will consider.

In Missouri, there is no rule of law. There is only state enforcement of the private, self-interested and arbitrary whims of local physicians through state power. And those physicians are seeking to impose their values and beliefs on Petitioner, which violates his First Amendment Rights.

B. Petitioner's Administrative Petitions.[3]

In 2009, Petitioner and other industry representatives interested in promoting midwifery petitioned DHSS to amend its regulations, invoking rights granted under Mo. Rev Stat. § 536.300 et seq., the Small Business Regulatory Fairness Act ("SBRFA"). Petitioner requested amendments to address unduly burdensome rules analogous to *Hellerstedt*: a requirement that birth centers employ a physician with admitting privileges at a local hospital (19 CSR 30-30.090(3)(D)) and ambulatory surgical center ("ASC") construction standards based on the National Fire Protection Association's ("NFPA") standards for ASCs (19 CSR 30-30.100). 136 S.Ct. 2292. Unlike *Hellerstedt*, the rules at issue were administrative, not statutory. *Id.* Missouri requires that administrative decisions be made based on substantial evidence on the record and not conflict with the statutes. Mo. Rev. Stat. §§ 536.016.1, 536.014(2). Under the SBRFA, DHSS was also required to consider whether the rules created an "undue burden" on affected businesses, notify the Small Business Regulatory Fairness Board ("SBRFB"), notify a legislative committee, and make a determination within 60 days of the petition. Mo. Rev. Stat. § 536.323.2.

DHSS followed none of the substantive or procedural requirements of the SBRFA. DHSS failed to

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[3] The judgment below was granted on motions to dismiss so the background description is "gleaned from" Petitioner's Complaint unless otherwise stated.

make a decision within 60 days. DHSS did not notify the legislative committee or SBRFB. DHSS eventually denied the petition because DHSS "felt that the proposed revisions were unnecessary," even though the only evidence on the record was that submitted by Petitioner in support of changes.

Petitioner then requested an appeal through the SBRFB, which held several hearings and determined that DHSS' rules did not comply with the act. DHSS agreed to work with Petitioner to see if waivers could be granted in order to bring the regulation of birth centers in line with the SBRFA. This was to be accomplished through Petitioner's business, which applied for a license and waivers. However, DHSS decided instead to grant no waivers and stopped attending hearings with the SBRFB. The SBRFB sent notice to then governor Nixon, who shuttered the SBRFB, effectively terminating Petitioner's appeal by closing down the agency that was supposed to process it.

Similarly, DHSS never issued a decision on the license application, determining instead that Petitioner's business was not a birth center, as defined by the statute. DHSS informed Petitioner that the business could be licensed but was not required to be. Having no final decision, Petitioner eventually appealed to Missouri's Administrative Hearing Commission ("AHC"), which determined that by failing to act on the application, DHSS had effectively denied it.

Petitioner also filed a petition with the BON to amend their regulations, arguing the same conclusion

that Petitioner alleged in ¶ 223 of his complaint and that the Missouri Court of Appeals ultimately reached: the statutes and promulgated regulations do not require nurses to obtain a CPA. App. 35-36. However, the BON decided not to make any changes, leaving individual physicians in control of nurses legal rights and privileges. The BON members explicitly refused to consider the constitutional implications of this policy.

Petitioner sought a review of both these administrative proceedings through his filing. Missouri has no clear procedure for requesting review of agency action on such petitions, as the statute has not been updated since the Missouri Supreme Court declared the procedure unconstitutional in *Missouri Coalition for the Environment v. Joint Committee on Administrative Rules*, 948 S.W.2d 125, 134 (Mo. banc 1997).

C. A Mother's Love Litigation.[4]

Petitioner filed the original appeal with the AHC following a logic similar to the Missouri Court of Appeals': since Petitioner was acting through his business, the license denial affected his rights, giving Petitioner standing to challenge the denial. App. 44-46. Over Petitioner's objections and argument, DHSS successfully argued that Petitioner's business, A Mother's Love Birthing Center, ("AML"), was the actual party in interest. DHSS did not argue that AML was an

[4] All the information here was incorporated into this case by the Missouri Court of Appeals when it took notice of the record of the previous case. App. 2.

indispensable party or seek to have AML joined. DHSS litigated to have Petitioner and his claims excluded. The AHC found that it lacked jurisdiction over Petitioner, his federal claims and petition to amend the regulations. For reasons not clear from the record, AML did not introduce any evidence for Petitioner's excluded claims, and the AHC later found that AML had "abandoned" them.

The only evidence introduced at AML's hearing was evidence on behalf of AML's application for a license, including requests for variances. The bulk of AML's alternatives were rejected without any evidence or finding of fact that they would not protect patients or pose any risk to anyone. AML introduced evidence that it had complied with NFPA standards, local city ordinances and safety standards, followed the guidance of the Centers for Disease Control ("CDC") and the Healthcare Infection Control Practices Advisory Committee, and the American Association of Birthing Centers. DHSS presented no substantial or competent evidence, nor did the AHC rely on any evidence or testimony from DHSS in its decision.

The AHC decision was not written by the Commissioner who presided over AML's hearing and had observed the witnesses. Then governor Nixon appointed a circuit court judge, Marvin Teer, who wrote the decision. After less than three months as Commissioner, Teer then accepted an appointment to the Nixon administration. Teer rejected AML's alternatives without any finding of fact that the alternatives would increase risk or not protect patients. Teer simply found the

guidance from the NFPA, local fire district, CDC and the national standards for birth centers to be "unpersuasive."

AML followed Missouri's administrative procedures and appealed but ceased to meaningfully exist before judgment was entered affirming the AHC's decision. The circuit court affirmed the decision, and Petitioner filed a motion to intervene, which was also effectively denied when the time for ruling on the motion passed. Petitioner attempted to appeal the denial, but failing to timely file, Petitioner's appeal was denied by the Missouri Court of Appeals.

D. The Current Case.

On November 10, 2015 Petitioner filed the case captioned *Williston v. Vasterling et al.*, challenging the staffing and facility construction portions of DHSS' birth center regulations,[5] nursing regulations and statutes and alleging three counts of conspiracy. Respondents filed motions to dismiss and a motion to transfer venue. Petitioner filed an amended complaint on February 23, 2016, and the court granted transfer to the Cole County Circuit Court on February 25, 2016.

Following transfer, the American College of Gynecologists filed a motion to dismiss on March 3, 2016, and a case management conference was held on March 10, 2016. Respondents Missouri State Medical

[5] For reasons unknown, the Missouri Court of Appeals' decision states that Petitioner did not challenge these regulations.

Association and Missouri Association of Osteopathic Physicians and Surgeons filed a joint motion to dismiss on March 28, 2016. At a second conference on April 1, the parties agreed to proceed to hearing on the filed motions to dismiss before joining all defendants and set a hearing date of April 20, 2016.

The night before the hearing, and without giving actual or legal notice to Petitioner, State Respondents also filed a motion styled as a motion to dismiss but with an attached exhibit, the judgment from the AML case. Petitioner objected to the inclusion of State Respondents' motion, on the grounds that Petitioner was provided with no notice of the motion. Petitioner further objected that Respondents had not complied with the rules for motions to dismiss in that they failed to assume all alleged facts to be true and had introduced evidence from outside the pleadings.[6] The court allowed State Respondents to proceed, giving Petitioner 20 days to respond to the motion, but not providing Petitioner an opportunity to present evidence.

The circuit court initially entered judgment in favor of Respondents on June 7, 2016.

Petitioner filed the appropriate after trial motions and timely appealed to the Missouri Court of Appeals, Western District. After hearing, the court entered its opinion October 24, 2017. Relevant to Petitioner's

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[6] Missouri allows evidence outside the pleadings to be introduced provided that the court gives the plaintiff notice that the court will proceed as if the motion were a motion for summary judgment and provides the plaintiff an opportunity to present evidence. Mo. R. Civ. P. 55.27(a).

petition for a writ from this Court, the Appellate Court upheld the decision on the following grounds:

> Petitioner's claim for conspiracy against his expressive and associational rights were bare and conclusory allegations and failed to allege specific acts establishing individual responsibility for Respondents.
>
> Petitioner's claim for conspiracy to interfere with political speech were bare and conclusory and failed to identify each defendant's personal conduct or involvement.
>
> Petitioner's claim for harm arising from Respondent's alleged conspiracy against nurses were bare, conclusory assertions, devoid of specificity.
>
> Petitioner lacked standing to bring his claims for declaratory relief regarding the policies and regulations of the BON and BOHA because Petitioner was not licensed by those boards and the court was "not persuaded" that Petitioner was invoking his rights under the federal constitution.
>
> Petitioner's claims for relief regarding the validity of DHSS' regulations were properly barred under the doctrine of res judicata, as Petitioner was in privity with AML and Missouri provided Petitioner "his day in court" when Missouri litigated against a party in privity with Petitioner.

Petitioner timely filed a motion for rehearing or transfer, which was denied November 21, 2017.

Petitioner subsequently filed a petition for transfer with the Missouri Supreme Court, which was denied on January 23, 2018.

In order to reach its holding, the Missouri Court of Appeals disregarded, dismissed or denied significant portions of Petitioner's pleadings. As non-exhaustive examples:

Petitioner pled that the BON requires CNMs to obtain a permission to practice from an individual physician through a CPA. Petition ¶¶ 83, 182-194, 223. The court seemed to affirm Petitioner's position when it concluded that the cumulative effect of the policies complained of is that "the [CPA] will define the APRN or RN's scope of practice." App. 21. This "scope of practice" includes the "offices or locations . . . where the collaborating physician authorized the advanced practice registered nurse to prescribe." Mo. Rev. Stat. § 334.104.3(2). As Petitioner alleged, if the physician will not authorize a CNM to work with Petitioner, then that CNM cannot associate with Petitioner. The court concluded, however, that "the APRN statutes, regulations and policies referenced in Williston's First Amended Complaint ***permit*** APRNs to have a collaborative practice agreement, they ***do not require*** the agreements." App. 35-36. The court's conclusion may, or may not, be correct in terms of whether a CNM may practice at all, but as long as the CPA determines the legal rights and privileges of a CNM, it also determines whether or not Petitioner may hire and associate with the CNM. Yet, somehow, the court concluded that Petitioner's impairment did not arise out of the statutes,

regulations and policies that give physicians power to deny Petitioner the ability to hire a CNM.

The Appellate Court unilaterally dismissed Petitioner's claims of harm. The court noted Petitioner pled and argued that his own rights to associate and speak were harmed but concluded that these claims could be dismissed because "We are not persuaded." App. 35. The court did not find that Petitioner failed to plead injury or a federal right, only that the court considered the persuasiveness of whether Petitioner "really meant" to raise his own rights. This is consistent with Missouri's treatment of Petitioner throughout all the cases and petitions below. His initial petition with DHSS appears to have not been taken seriously. He was dismissed from the AML litigation on the theory that it was not really about him. And now, his explicit claims have been dismissed on the grounds that the courts simply refuse to consider the possibility that Petitioner has a legitimate philosophical or ideological interest at stake. The courts, agencies and individuals simply refuse to hear or consider Petitioner's claims for violations of his federal rights.

The court below also concluded that Petitioner failed to plead sufficient facts to support his conspiracy claims. Petitioner's general allegations of fact alone took up 16 pages. As laid out in more detail below, at least one of the conspiracies alleged closely mirrors a prior conspiracy involving the medical profession. The court, which had already dismissed Petitioner's allegations that it did not find persuasive, simply ignored other fact-pleadings that interfered with the court's

desired outcome. This can be seen clearly where the court concludes that "[Petitioner] does not challenge facility requirements in his First Amended Petition, so we do not discuss those regulations." App. 19 n.14. The court notes that these requirements are found at 19 CSR 30-30.100 or 19 CSR 30-30.110, which Petitioner challenged as invalid in ¶¶ 303-310 of his complaint. As with so many other points, the Missouri Court of Appeals either overlooked or simply dismissed Petitioner's legal claims, theories and allegations of fact.

REASONS FOR GRANTING THE WRIT

A petition for a writ of certiorari may be granted where "a state court . . . has decided an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. Rule 10(c). This case meets this criterion, as the Missouri Court of Appeals actually considered and decided Federal Constitutional Issues related to Petitioner's right to due process. *Harlin v. Missouri*, 439 U.S. 459 (1979).

Part of the Missouri Court's decision asserted a violation of state procedural rules, but these rules are inadequate, not independent of Petitioner's Federal Claims and would wreak the manifest injustice of denying Petitioner "a reasonable opportunity to assert federal rights" if not corrected. *Staub v. City of Baxley*, 355 U.S. 313, 320 (1958); *Lee v. Kemna*, 534 U.S. 362, 375, 122 S.Ct. 877, 151 L.Ed.2d 820 (2002); 16B C. Wright, A. Miller, & E. Cooper, Federal Practice and

Procedure § 4027, p. 392 (2d ed. 1996). In this case, an extraordinary situation exists in that the Court of Appeals consciously and willfully refused to consider Petitioner's federal claims because the court was "not persuaded" that Petitioner was really asserting his own rights. App. 35.

All the constitutional questions in this case have one principle in common: Under the decision below, Petitioner's rights are not his to control and exercise; they are mere privileges that Missouri may control at whim. Petitioner "had his day in court" when Missouri litigated to exclude him and chose to proceed against his business over Petitioner's objections. Petitioner's freedom of expression and association is not violated because Missouri delegated control of those rights to private physicians. Petitioner did not allege the things he alleged in his complaint because Respondents and the court decided to waive or abandon those claims. A constitutional right, including "the right to be heard . . . has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." *Richards v. Jefferson County*, 517 U.S. 793, 799 (1996). The manifest injustice in this case is that Missouri wants the power to limit Petitioner's federal rights, and the power to control Petitioner's assertion of those rights. If the state can control Petitioner's power to choose for himself what rights to defend, then no citizen will have any rights at all.

I. CERTIORARI IS WARRANTED ON THE CONSTITUTIONAL QUESTIONS.

It is settled and a matter of public record that Petitioner, against his will, was removed from the prior case. *Williston*, 461 S.W.3d at 868-69. Missouri found that Petitioner received his federally protected "day in court" when Missouri forcibly removed him from the case, barred him from presenting evidence or argument and then denied his request to intervene when his business lost the legal and financial ability to defend itself. *Id.* App. 44-45. Review is warranted to prevent the manifest injustice of giving control of Petitioner's rights to the very government these rights are meant to protect him from. *Richards*, 517 U.S. at 799 ("the right to be heard ensured by the guarantee of due process has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest.") (internal quotation marks omitted).

The appellate court admitted that Petitioner alleged that Respondents violated Petitioner's right to associate with nurses and midwives in an attempt to express and promote a common philosophy and code of ethics. App. 35. Petitioner wishes to do so without interference from physicians, who were acting under color of law by willfully participating in a scheme that delegated regulation of other professionals to physicians. App. 35.[7] At this stage of litigation, the court was

[7] The Court below did not address arguments about whether the acts complained of can be considered state action, but Plaintiff alleged that Missouri delegated regulation of professionals to

bound to assume all pled facts to be true and grant Petitioner liberal inferences in his favor. *Smith v. Humane Soc'y*, 519 S.W.3d 789, 797 (Mo. banc 2017). "No attempt is made to weigh any facts alleged as to whether they are credible or persuasive." *Nazeri v. Mo. Valley Coll.*, 860 S.W.2d 303, 306 (Mo. banc 1993). However, the Missouri Appellate Court dismissed Petitioner's allegations related to Petitioner's federal rights because "We are not persuaded." App. 35. The court simply refused to consider Petitioner's federal claims and did so in violation of Petitioner's rights under state law. *Nazeri*, 960 S.W.2d at 306. On the face of the decision, Missouri denied Petitioner a reasonable opportunity to assert his federal rights.

A. The fundamental right to a person's "day in court" is a personal right.

This Court has jurisdiction over a federal-law issue that the state court actually considered and decided, whether a party raised it below and argued it or not. *Orr v. Orr*, 440 U.S. 268, 274-75 (1979); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 754, n.2 (1985). Here, the Missouri Appellate Court considered and decided that Petitioner "can be

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private physicians, meeting the "significant encouragement" test; *Blum v. Yaretsky*, 457 U.S. 991 (1982); and that the private actors operated as "willful participant[s] in joint activity with the State or its agents," *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 941 (1982); the delegation of a public function test; *West v. Atkins*, 487 U.S. 42 (1988); and the "entwined with governmental policies," or government is "entwined in [its] management or control" test; *Evans v. Newton*, 382 U.S. 296, 299, 301 (1966).

fairly considered to have had his day in court." App. 45. An individual's right to his or her day in court is a federal right secured under the constitution. App. 42, 45; *Richards*, 517 U.S. at 804. In most cases, "day in court" is appropriately stated in the singular, as "res judicata operates to bar any claim that was previously litigated between the same parties or those in privity with them." *Lauber-Clayton, L.L.C. v. Novus Props. Co.*, 407 S.W.3d 612, 618 (Mo. App. E.D. 2013) (internal quotations omitted).

The issue presented here is unique, narrow and important. The court below concluded that Petitioner's claim could be barred by litigation where Petitioner was specifically ejected on jurisdictional grounds. Where a party was barred from raising claims in one venue, res judicata bars relitigation of the question of jurisdiction, not all matters. *Sexton v. Jenkins & Assoc., Inc.*, 152 S.W.3d 270, 273-74 (Mo. banc 2004); *Durfee v. Duke*, 375 U.S. 106 (1963).

Petitioner sought to try all the causes of action together, but Missouri "split the cause of action." Petitioner attempted to avoid piecemeal litigation. Missouri excluded Petitioner from the prior case, proceeding against his business instead. *Williston*, 461 S.W.3d at 468-69. Petitioner initiated the case and argued that he should be kept in as a party. *Id.* But Missouri litigated to have Petitioner excluded and replaced. *Id.* DHSS even continued to litigate to prevent Petitioner from defending whatever rights he had after AML ceased to have the legal standing necessary to defend itself, or by extension Petitioner. *Id.*

Petitioner acted with diligence to bring whatever claims he had from the beginning, and even volunteered to enter and be bound by the decision when AML could no longer continue to defend itself. If Respondents had wanted an efficient end to litigation, they could have simply agreed to allow Petitioner to be a party at some point in the prior case. Since they fought to prevent Petitioner from defending his rights before, they should be compelled to live with the consequence of Petitioner being permitted to bring his own claims now. *See State ex rel. Nixon v. American Tobacco Company*, 34 S.W.3d 122, 128-30 (Mo. banc 2000) (parties whose interests could be impaired must be allowed to intervene to protect those interests, and only those whose rights are not impaired may be denied).

Missouri's decision is also fundamentally unjust in these circumstances, as res judicata is a penalty for splitting a cause of action or trying a case piecemeal. *King Gen. Contractors, Inc. v. Reorganized Church of Jesus Christ of Latter Day Saints*, 821 S.W.2d 495, 501 (Mo. banc 1991); *cf. Richards*, 517 U.S. at 797. Petitioner plainly made an effort to include himself and his claims in the prior action, and only "failed" to do so because Missouri fought vigorously to prevent it. It would be inequitable to penalize Petitioner because DHSS successfully argued that Petitioner and his claims should be severed.

The decision of the court below also works a manifest injustice, as it is inconsistent and contradictory. The court expounded at length how the rights of nurses were personal to the nurses and the petitioner could

not litigate on their behalf, even though Petitioner would clearly be "in privity" with his wife and any nurse he hired. App. 33-38. However, the same court concluded that Missouri could litigate Petitioner's rights against someone else over Petitioner's objections. App. 44-45. It may be that the decision could bar Petitioner's claims if Petitioner had not been barred, but Petitioner specifically sought to be included. And AML was legally and financially unable to defend itself or Petitioner when judgment was entered against it.

This Court's review is warranted as the decision, if let stand, would allow states to set up procedures to exclude persons from litigation, replacing them with parties who would fit an exception for res judicata purposes and thereby escape the constitutional requirements for due process.

B. The state grounds asserted in the opinion below are inadequate, not independent of Petitioner's Federal Claims and would wreak a manifest injustice.

Adequate state grounds are "firmly established and regularly followed" state rules that bar review of a federal claim. *Lee*, 534 U.S. at 376. Exceptional cases can render even these rules inadequate. *Id.*

Missouri is a fact-pleading state. *Jones v. St. Charles County*, 181 S.W.3d 197, 202 (Mo. App. E.D. 2005). The overall purpose of fact pleading is "to enable a person of common understanding to know what is intended." *M & H Enters. v. Tri-State Delta Chemicals,*

Inc., 984 S.W.2d 175, 181 (Mo. App. S.D. 1998) (internal citation omitted). A petition need not plead evidentiary facts showing entitlement to the relief sought. *Williams v. Barnes & Noble, Inc.*, 174 S.W.3d 556, 559-60 (Mo. App. W.D. 2005).

Petitioner alleged two conspiracies in Count I and Count IX of his complaint that are only slight variations on the American Medical Association's ("AMA") anti-trust conspiracy against chiropractors. *See Wilks v. AMA*, 895 F.2d 352 (7th Cir. 1990). Instead of targeting one profession, Respondent Associations target multiple professions. *Id.* at 355. Instead of working through the Committee on Quackery and AMA resolutions, Respondents made their plans through the Scope of Practice Partnership, which were carried out by the individual member physicians and enforced by state regulatory agencies. *Id.* at 355-56. Instead of using the market power of individual physicians to eliminate chiropractors, Respondent Associations lobbied to obtain the power to decide their competitors' legal rights. *Id.* This just changes the harm from being an anti-trust claim to a deprivation of rights under color of law pursuant to 42 U.S.C. § 1983 to any extent that it interferes with Petitioner's speech.[8] The conspiracy alleged by Petitioner is so nearly identical to one that the medical profession has already been found to have engaged in, makes the court's conclusions implausible.

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[8] Petitioner addresses the alleged interference below as the court did not uphold this portion of the decision on failure to allege harm to Petitioner's rights.

Petitioner also alleged a conspiracy by agents and employees of state agencies, the majority of which Petitioner must abandon in order to address more pressing points here. However, the court acknowledged that Petitioner pled that DHSS' former director and a deputy director caused DHSS to not consider the factors required by statute (as opposed to it occurring by negligence) and that these same persons "willfully, knowingly, and with evil intent, unlawfully presented, or caused to be presented, to the AHC legal arguments [they] knew to be specious, false, frivolous and baseless with the intent to have AML's license denied in order to defeat Williston's petition to amend DHSS' regulations." App. 30.

Review is warranted to assess the adequacy and independence of the state law grounds cited as justifying dismissal of Petitioner's federal claims. Fact-pleading is a firmly established and regularly followed rule; however, the court considered the persuasiveness of the pled facts and dismissed at least some well-pled facts in contravention to that same firmly established and regularly followed rule. App. 34-35.

C. Provision of Healthcare includes a recognized expressive element that is constitutionally protected.

In *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, this Court reaffirmed that speakers have a right to convey the message of their choosing, including the right to include the messages of aligned groups and exclude messages that they do not wish to

convey. 515 U.S. at 566, 569. The threshold question is whether the speaker seeks to convey an expressive message, which "carries with it a constitutional duty to conduct an independent examination of the record as a whole, without deference to the trial court." *Id.* at 567.

Petitioner filed this case identifying the professions' philosophies, theories and practices as the expressive message Petitioner wished to support, rebroadcast and express. Petitioner identified nursing and midwifery's values of compassion as part of the professional identity. Respondents have never addressed this argument, nor has there ever been a finding that there is no expressive message that Petitioner is attempting to convey. The circuit court pointed out that Respondents failed to address Petitioner's expression claims, but granted Respondents' motions anyway. The appellate court characterized Petitioner's claims as "childbirthing philosophies," but never made any explicit finding that Petitioner's claims lacked the element of expression for the purposes of the First Amendment.

The courts are unanimous in finding that Petitioner's claimed rights are subject to First Amendment scrutiny. *See Keefe v. Adams*, 840 F.3d 523, 529-30 (8th Cir. 2016) (and cases cited therein). Each profession has its code of ethics that the profession seeks to instill in and demand of the members. *Id.* These are "speech" subject to First Amendment protections. *Id.* The courts so far have only examined this issue from the context of students in a professional program, without considering the issue presented here: Petitioner wants to

express the viewpoints of the nursing and midwifery professions, and Petitioner wishes to exclude the viewpoints of the medical and osteopathic professions. *Id.* Just as the osteopathic association has managed to protect and promote its own philosophy, Petitioner seeks to protect and promote the values and ethics Petitioner believes in and happens to share with midwives and nurses. Petitioner's speech is protected by the First Amendment, and Respondents have not attempted to argue or prove that Missouri's policies meet any test for permissible interference with First Amendment rights.[9]

D. Compulsory inclusion or submission to physicians will interfere with Petitioner's rights because physicians are compelled to follow medical or osteopathic ethics.

Unlike *Hurley*, the identity of physicians and the expression of their message cannot be separated, so physician inclusion or control necessarily alters Petitioner's message. *Cf.* 515 U.S. at 572-73. In *Hurley*, this Court noted that exclusion of a group wanting to use the parade to express their own message was different than excluding protected individuals. *Id.* An individual might have a right to demand inclusion based on a protected status, but that right would still not grant a right to impose those individual's speech onto others. *Id.* This Court noted such inclusion "violates the

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[9] This is not to say that this is an absolute right, but neither Respondents nor Missouri's courts acknowledged Petitioner's claims.

fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message." *Id.*

We cannot separate inclusion of physicians from their code of ethics because the physicians are legally mandated to follow their code of ethics through state action. *Keefe*, 840 F.3d at 532. As long as the physician is functioning in that capacity, they bring the medical/osteopathic code of ethics with them. De minimis, employing a physician implies Petitioner endorses that physician and his or her profession's code of ethics. Petitioner's goal for his business is to express an endorsement of other codes of ethics and to exclude the medical/osteopathic codes. [T]he mere inclusion of [a physician] would impose [a] serious burden, affect in [a] significant way, or be a substantial restraint upon the . . . shared goals, basic goals, or collective effort to foster beliefs" inherent in Petitioner's business. *Dale*, 530 U.S. at 684.

The larger problem is that Missouri has delegated control over Petitioner's speech to these private individuals, and control of one's own speech is the heart of the right to free speech. *Hurley,* 515 U.S. at 575. Even if we ignore the DHSS regulations requiring Petitioner to hire a physician, the Missouri Supreme Court has aptly described the level of control physicians exert over Petitioner's expression thus: "if doctors cannot delegate the procedure to them, [CNMs] cannot perform [the] procedures." *Missouri Association of Nurse Anesthetists v. State Board of Registration for the Healing Arts*, 343 S.W.3d 348, 354 (Mo. banc 2011). It

is only one logical step from this observation to see that if doctors ***will not*** delegate authority, then the CNMs cannot act. This means that Petitioner can only hire or associate with CNMs that a local physician will permit to work with him. It is starker under DHSS' regulations, as whichever physician Petitioner hires will suddenly gain complete control of Petitioner's speech and associations; however, it is no constitutional benefit to Petitioner if there is some hypothetical other physician who might permit him to hire the CNMs of Petitioner's choosing.

E. There is no legitimate government interest in letting physicians interfere with Petitioner's speech.

Hurley particularly criticized the imposition as lacking any legitimate government interest, a criticism that can also be leveled here. 515 U.S. at 578. The standard for legitimate government interests in regulating healthcare providers has relied on the same basic principle for over a century: "the State [may] prescribe all such regulations as, in its judgment, will secure or tend to secure [the public] against the consequences of ignorance and incapacity as well as of deception and fraud." *Dent v. West Virginia*, 129 U.S. 114, 122 (1889). However, "when they have no relation to such calling or profession, or are unattainable by such reasonable study and application . . . that they can operate to deprive one of his right to pursue a lawful vocation." *Id.* The CPA requirement cannot, as a matter of law, have any relationship with a test of midwives or

nurses' competence, and they are unattainable through study, so they only operate to deprive citizens of their rights.

Before a CNM can even seek a CPA from a physician, the CNM must first prove that she is competent. App. 20-23. The CPA does nothing to "prove" competency, it merely defines the limits of the CNMs' legal privileges.[10] App. 21. That limit is set by the physician, a private person. And if the physician declines to grant any authority, the CNM is out of luck. There is no procedure whereby a CNM could ever claim to be "entitled" to have a CPA, and physicians cannot be compelled to grant them.[11] This means that the CPA has nothing to do with proving competence and cannot be attained by the CNM, only granted by the physician. This is a policy that can only have one purpose: restrict the rights of others. And it is being carried out on a day to day basis by a profession with a long, storied history of using power to attempt to eliminate or restrict anyone who does not want to join their group.

Review is warranted to address this constitutional issue that Missouri refused to consider. It is a question of significant public importance, as demonstrated in a

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[10] Similarly, a midwife who has complied with the requirements of Tocology has met the State standards to prove she is competent.

[11] No contract or other agreement shall require a physician to act as a collaborating physician for an advanced practice registered nurse against the physician's will. A physician shall have the right to refuse to act as a collaborating physician, without penalty, for a particular advanced practice registered nurse. Mo. Rev. Stat. § 334.104.11.

growing body of case law struggling with this subject. See *Keefe*, 840 F.3d at 529-30. While the court below cited state law grounds for upholding the decision, it first openly discarded Petitioner's claims for violations of his expressive and associational rights under the federal constitution.

II. CERTIORARI SHOULD BE GRANTED TO ADDRESS THE PROBLEM OF PROFESSIONAL ASSOCIATIONS USING STATE AUTHORITY TO HARM COMPETITORS IN THE MARKETPLACE OF IDEAS.

For decades, courts have refused to "define and draw that thin and elusive line that separates" the professions. *Sermchief v. Gonzalez*, 660 S.W.2d 683, 688 (Mo. 1983). Courts have been unable to draw that line because professions keep asking that the line be drawn by the acts performed by each profession, which would create a cascade of litigation. *Id.* But such a line cannot be honestly drawn in the first place. Missouri recognizes at least the four professions identified in this case as competent to provide maternity care, so scope of practice simply cannot define a profession.

But we could draw the line if we would recognize that each profession is an expressive association. In *Boy Scouts of America v. Dale*, this Court reaffirmed that where a regulation compels inclusion, the test is "whether the group engages in 'expressive association.'" 530 U.S. 640, 648-49 (2000). This Court further

explained that "expressive association is not reserved for advocacy groups . . . a group must engage in some form of expression, whether it be public or private." *Id.* Courts already recognize that professional codes of ethics touch on protected speech, so it is only a small step to officially recognize the expressive nature. *Keefe*, 840 F.3d at 529-30.

Keefe lays out all the points necessary to find that professions are expressive associations, the Court need only draw the line that connects them. 840 F.3d at 529-31. Professional codes of ethics and regulation impact protected speech. *Id.* The codes of ethics are created and maintained by the individual private associations. *Id.* The codes of ethics are instilled through the professions' training. *Id.* And the codes are then enforced by state agencies. *Id. Keefe* did not need to address whether each association was an expressive association because there was no issue between professions. *Id.* But the case law for expressive associations would affirm the Eighth Circuit's opinion: as an expressive association, nursing would be within their rights to exclude those who do not share their message or would harm the group's message. *Id.* at 526-28; *Dale*, 530 U.S. at 648-49.

Like the Boy Scouts, each profession instills its own set of values and beliefs in professionals. *Dale*, 530 U.S. at 648; *cf. Keefe*, 840 F.3d at 529-30. There are only two meaningful differences between the groups: 1) the Boy Scouts instill values through members' recreation while the professions install values through members' occupation; 2) the Boy Scouts use purely private

means, while states impose stiff financial sanctions to enforce professional codes. *Id.*

Recognizing each profession as an expressive association will also solve many of the disputes between professions. For example, no profession will be able to claim either a monopoly on or a fundamental right to any particular act or service. We would consider it ridiculous for a state to require all campers to join the Boy Scouts or get scouts' approval to go camping. It would also be ludicrous for the Boy Scouts to claim a "fundamental right to camp" or that scouts could be exempted from a state's fire safety laws because they were an expressive association. Just as we discern the expressive and non-expressive acts of Boy Scouts, courts have established rules for judging professional regulation based on its nature. *See, e.g., Beeman v. Anthem Prescription Mgmt., LLC*, 315 P.3d 71, 82-84 (Cal. 2013).

This would not infringe on states' authority to regulate the acts of professionals, just the ability of professions to hijack a state's authority for their own ends. States could still develop standards for proof of competency to perform certain tasks. *Dent*, 129 U.S. 114, 122. States would just have to implement rules of law that could be applied to more than one profession without giving one profession arbitrary authority over another. And rules such as Missouri's Tocology and the Courts' rules on expert testimony show that such rules already exist in one form or another. Mo. Rev. Stat. § 376.1753; Fed. Rule Evid. 702; *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993). Similarly, states could

still require certain values and ethics of all professions, such as honesty and compliance with anti-discrimination laws. *See Bob Jones University v. United States*, 461 U.S. 574 (1983). States would simply have to comply with the constitutional requirements for such requirements. *Id.* at 603-04.

As has so often been repeated, Petitioner is not a nurse, midwife or physician. Petitioner is merely someone who prefers the ethical values espoused by the nursing and midwifery professions over those mandated to the medical and osteopathic professions. If this Court would see its way to recognize that professional associations are expressive associations, then Petitioner could be free to associate with and promote the philosophies and ideologies he likes, so long as he otherwise follows the law.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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