

No. _____

**In The
Supreme Court of the United States**

—◆—

KANSAS CITY PREMIER APARTMENTS, INC.,
Petitioner,

v.

MISSOURI REAL ESTATE COMMISSION,
Respondent.

—◆—

**On Petition For A Writ Of Certiorari
To The Supreme Court Of Missouri**

—◆—

PETITION FOR WRIT OF CERTIORARI

—◆—

FREEDOM CENTER OF MISSOURI
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QUESTION PRESENTED

Whether a court considering a First Amendment challenge to a law that restricts protected speech may presume the law's constitutionality and require the party whose speech is being restricted to prove that the law "clearly and undoubtedly violates the constitution."

PARTIES TO THE PROCEEDING

The Petitioner is Kansas City Premier Apartments, Inc. The Respondent is the Missouri Real Estate Commission.

CORPORATE DISCLOSURE STATEMENT

Petitioner Kansas City Premier Apartments, Inc., is not a publicly traded corporation, it issues no stock, and has no parent corporation. There is no publicly held corporation with more than a 10% ownership stake in Kansas City Premier Apartments, Inc.

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OPINIONS BELOW

The opinion of the Missouri Supreme Court (App. 1-37) is reported at 344 S.W.3d 160. The trial court's Judgment is reprinted at App. 38-44.



JURISDICTION

The judgment of the Missouri Supreme Court was entered on July 19, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).



CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution provides, in pertinent part, that “Congress shall make no law . . . abridging the freedom of speech.” Relevant portions of the Missouri Statutes regulating the communication of information about real estate, Mo. Stat. §§ 339.010, 339.020, 339.170, and 339.180, are reprinted in the Appendix. App. 45-54.



STATEMENT

Petitioner is an internet-based service that helps members of the public by providing them with information about living and renting apartments in the Kansas City area. The business has several

components, including an online database of apartment advertisements, a search function that allows visitors to view properties that match criteria of their own choosing, an online roommate-matching service, a collection of information about the advantages of living in Kansas City, a blog, and other social media outlets that help rental property owners keep prospective renters informed about their complexes. App. 40. Using these tools, Petitioner provides people who may not be familiar with the area easy access to a variety of factual information that can help them decide where they want to rent. Petitioner also hires independent contractors that prospective renters can speak to if they want assistance setting appointments to visit properties, getting directions to those properties, or if they have specific questions about the Kansas City area and its various rental options. App. 2-3. Petitioner's services are free to the public.¹ It does not collect rents or security deposits for property owners, nor does it handle tenant complaints for the properties. App. 40. It does not prepare, review or execute contracts or other legal documents. App. 40-41. It does not "show" apartments, and no one associated with the company holds themselves out as a licensed real estate broker or salesperson. App. 41. All Petitioner does is communicate useful information to people interested in receiving it.

¹ If a renter tells a property owner that they found that property through Petitioner, the property owner gives Petitioner a percentage of the first month's rent. App. 40.

The Missouri Real Estate Commission is the Government agency responsible for enforcing Missouri's statutes regulating real estate brokers and salespersons. App. 39. Those statutes make it unlawful for citizens to negotiate the rental or leasing of real estate (Mo. Stat. § 339.010.1(3)); to assist in the negotiation of any transaction intended to result in the leasing or rental of real estate (Mo. Stat. § 339.010.1(8)); to list real estate for lease or rent (Mo. Stat. § 339.010.1(4)); or to assist in the "procuring of prospects" that might result in the leasing or rental of real estate (Mo. Stat. § 339.010.1(7)), unless the State has granted permission for them to do so. See Mo. Stat. §§ 339.020 (unlicensed practice unlawful), 339.010.7 (establishing twelve categories of citizens exempted from the licensure requirements). Any violation of these provisions is a Class B misdemeanor, Mo. Stat. § 339.170, and may also result in a civil action initiated by the MREC. Mo. Stat. § 339.180.

Before Petitioner began operating, its president contacted the State and asked if the business model required licensure; she was told that her proposed activities occupied a "grey area" of the law, but was given no further guidance. App. 41. Petitioner began operating without a license. *Id.* Acting on a complaint from a licensed realtor who formerly employed Petitioner's president, the State sent letters to inform Petitioner that it was unlawfully operating as an unlicensed real estate agent; the letters threatened legal action – including criminal prosecution – against the

company's staff if they continued to violate the law. *Id.* The State's letters did not identify any specific aspect of Petitioner's activities it found to be unlawful. App. 42. Petitioner responded to the State's threat by initiating this case, arguing in part that Mo. Stat. §§ 339.010.1(3), (4), (7), (8), and 339.010.7 restricted speech within the protections of the First Amendment.

After a bench trial, the court found that Petitioner had performed "acts which require licensure under Chapter 339, RSMo." App. 43. The trial court also found that the State had failed to prove that any of the information Petitioner and its independent contractors provide about rental properties is either false or misleading. App. 40. Despite this finding, the trial court ruled that the challenged provisions did not violate the First Amendment. App. 42. The trial court did not explain how Petitioner had violated the statute's prohibitions or the reasoning used to resolve the constitutional questions. App. 29. The trial court issued an order enjoining Petitioner from receiving compensation from property owners and from engaging in "any act requiring real estate licensure" under Missouri law. App. 43-44.

At the Missouri Supreme Court, five of the seven judges voted to affirm the trial court's judgment. In regard to Petitioner's First Amendment claims, the majority began by presuming the speech restrictions' validity, stating that Petitioner could only prevail if it proved that the restrictions "clearly and undoubtedly" violated the constitution. App. 8-9. The majority

acknowledged that the challenged statutory provisions restricted Petitioner's speech, but determined that the only speech at issue in the case was commercial speech.² App. 12. The majority then purported to apply the four-part test this Court adopted in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York*, 447 U.S. 557 (1980), to evaluate the constitutionality of restrictions on commercial speech, but the majority's application of the test was deeply flawed. Conceding that Petitioner's speech is truthful and nonmisleading, the majority moved to *Central Hudson's* second prong, the question of whether the State had asserted a substantial interest in restricting that speech. The majority agreed with the State that the statutes' restrictions were intended to protect the public against fraud and incompetence, finding that this was a substantial Government interest.³ App. 13. Moving to the third prong of *Central Hudson*, which asks whether the speech restrictions

² This is inaccurate; much of Petitioner's speech goes beyond its own economic interests and those of its listeners. Even if Petitioner's speech were conceded to be commercial in nature, the challenged provisions target speech based on its subject-matter and the identity of the speaker. This Court held in *Sorrell v. IMS Health Inc.*, 131 S.Ct 2653, 2663-64 (2011), that such a restriction warrants heightened scrutiny.

³ Because the majority presumed the constitutionality of the speech restrictions, it did not require the State to present any evidence substantiating the alleged threat of fraud or incompetence among those who discuss real estate.

directly advance the asserted interest, the majority stated that the challenged speech restrictions “directly relate to the honesty and competency that the legislature seeks to assure in those who practice real estate.”⁴ App. 14. Regarding the fourth *Central Hudson* prong, whether the asserted Governmental interest could be served as well by more limited restrictions on speech, the majority held that the challenged speech restrictions do not go beyond the State’s interest in regulating real estate brokers.⁵ App. 15. The majority concluded that Petitioner had “failed to demonstrate that the challenged provisions are unconstitutional.” App. 21. The majority affirmed the trial court’s judgment; it declined to modify the injunction against Petitioner or to explain what steps Petitioner could take to avoid violating the law.

Chief Justice Teitelman and Judge Wolff dissented, emphasizing that the challenged provisions and the trial court’s injunction unjustifiably prevent Petitioner from conveying truthful, nonmisleading speech. App. 24. Noting that the Missouri Supreme

⁴ Because the majority presumed the constitutionality of the speech restrictions, it did not require the State to present any evidence suggesting that the alleged threats of fraud or incompetence could be alleviated to a material degree by restricting truthful, nonmisleading speech about rental properties.

⁵ Because the majority presumed the constitutionality of the speech restrictions, it did not require the State to explain why less-restrictive solutions, such as merely prohibiting false or misleading communications about real estate, would not adequately address the Government’s asserted interests.

Court's responsibility is to apply the principle of the U.S. Supreme Court's precedents, "not to pay homage to them while disregarding them," App. 23, the dissent argued that because the speech restrictions at issue targeted both content (speech on the subject of real property) and speaker (prohibitions only apply to those the Government has not given permission to speak), the speech restrictions warranted heightened scrutiny. App. 24. The dissent proceeded to apply the *Central Hudson* test, citing *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 71 (1983), for the proposition that "[t]he party seeking to uphold a restriction on commercial speech carries the burden of justifying it." App. 33. The dissent agreed with the majority that the State might have a substantial interest in preventing fraud and incompetence, but it emphasized that the State had not shown "any studies or anecdotal evidence illustrating that having a license prevents fraud and deception." App. 34. The dissent noted that the State could have met its interest simply by banning all false or deceptive advertising. *Id.* The dissent concluded that the challenged provisions and the injunction impose broad restrictions on Petitioner's truthful, nonmisleading speech and cannot be squared with the First Amendment. App. 36-37.

The Missouri Supreme Court overruled Petitioner's motion to modify its opinion and this petition timely followed.



REASONS FOR GRANTING THE PETITION

The Petition for a Writ of Certiorari should be granted for two reasons:

First, the Missouri Supreme Court's decision flatly conflicts with this Court's precedents which require Government to bear the burden of justifying its restrictions on speech protected by the First Amendment.

Second, the Missouri Supreme Court's opinion exposes and deepens a persistent split among courts at both the state and federal level as to whether courts may presume the constitutionality of laws that are acknowledged to burden protected speech; if left unresolved, this divide among the lower courts raises serious concerns that citizens across the country could be deprived of meaningful First Amendment protection.

I. THE MISSOURI SUPREME COURT'S RULING DIRECTLY CONFLICTS WITH THIS COURT'S PRECEDENT.

Many courts observe the general rule that a law should not be held to violate the constitution unless the party challenging the law's validity clearly demonstrates a deficiency that cannot be alleviated by a narrowing construction. This rule has given rise to the idea that courts afford duly enacted laws a presumption of constitutionality. This Court, however, has repeatedly affirmed that where a party asserts that a law infringes on speech protected by the First

Amendment, courts are required to deviate from the presumption of constitutionality. “When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions.” *U.S. v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 816 (2000).

In *Playboy Entertainment Group*, this Court considered a First Amendment challenge to a federal law that limited the hours during which cable television operators could provide channels “primarily dedicated to sexually-oriented programming.” Because the restriction at issue targeted television programming defined by its content and the restriction only applied to certain channels, the law was subjected to strict scrutiny. *Id.* at 813. This Court explained at length that free speech plays a vital role in citizens’ lives and that the First Amendment exists to ensure that “even the mandate or approval of a majority” may not authorize Government to unduly control or interfere with the marketplace of ideas. *Id.* at 817-18. For these reasons, a content-based restriction on speech cannot be justified unless the Government provides significant evidence proving both the existence of an actual danger that Government seeks to ameliorate, *id.* at 822-23, and the ineffectiveness of any plausible, less restrictive alternatives that might be used to avoid the danger asserted. *Id.* at 826. Observing that the Government had introduced only minimal anecdotal evidence in support of its arguments, this Court held that more substantial proof was

required to justify restrictions on protected speech and that the law violated the First Amendment.

In *Greater New Orleans Broadcasting Ass'n v. U.S.*, 527 U.S. 173, 183 (1999), this Court held that the Government's responsibility to justify speech restrictions extends even to limitations on commercial speech. In that case this Court evaluated a First Amendment challenge to a federal law that restricted some advertisements about gambling, but permitted others. The parties agreed that the advertisements at issue in the case constituted commercial speech, and that the restriction of that speech must be subjected to the *Central Hudson* test. *Id.* at 184. This Court affirmed that under *Central Hudson* "the Government bears the burden of identifying a substantial interest and justifying the challenged restriction." *Id.* at 183. The Court also held that although the Government identified substantial interests in reducing social costs associated with gambling and assisting States that limited gaming within their borders, the challenged provisions were "in serious tension with the principles undergirding the First Amendment" because they prohibited certain speakers from conveying "virtually identical messages" to those that the Government allowed other speakers to share. *Id.* at 193-94. Holding that the evidence and argument presented in that case could not overcome "the presumption that the speaker and the audience, not the Government, should be left to assess the value of accurate and nonmisleading information about lawful

conduct,” this Court ruled that the speech restrictions violated the First Amendment. *Id.* at 195.

This Court has also stated that the First Amendment requires Government to justify content-neutral restrictions governing the time, place, and manner in which citizens may engage in protected speech. In *Edenfield v. Fane*, 507 U.S. 761 (1993), the Court considered a First Amendment claim challenging a Florida regulation that prohibited accountants from making direct, in-person, uninvited phone calls to potential clients. The challenger in that case asserted that his speech was constitutionally protected because he wished to communicate “no more than truthful, non-deceptive information proposing a lawful commercial transaction,” *id.* at 765, but the Government responded that its solicitation restriction was entitled to deference because it was a reasonable, content-neutral restriction on the manner in which accountants were permitted to contact prospective clients. Without conceding that the challenged restriction *was* a content-neutral time, place, or manner restriction on speech, this Court nonetheless made clear that even if it was, the Government would still be required to demonstrate that its speech restriction served “a substantial state interest in a direct and effective way.” *Id.* at 773 (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 800 (1989)). While the Court allowed that the Government has a legitimate interest in ensuring the accuracy of commercial information, it noted that many states address this concern by “forbidding solicitation by

CPA's only under circumstances that would render it fraudulent, deceptive, or coercive," so ensuring that truthful and nonmisleading information would not be "snared along with fraudulent or deceptive commercial speech." *Id.* at 768-69. Because the Government had not shown that the ends sought by the state were advanced by the challenged speech restriction, the Court ruled that the restriction violated the First Amendment.

In the opinion below, a majority of the Missouri Supreme Court's judges acknowledged that the challenged statutes restrict speech entitled to First Amendment protection. App. 12. Thus, in light of this Court's established precedents, regardless of whether the restriction was content-based, content-neutral, or applied to commercial speech, the majority should have engaged in a rigorous analysis in which the Government was required to bear the burden of justifying its restriction of Petitioner's speech. Instead, it ruled that the party whose speech was being restricted had "the burden of proving the act clearly and undoubtedly violates the constitution." App. 8-9. The ensuing application of the *Central Hudson* test was irredeemably skewed because the majority did not require the Government to support any of its assertions with the sort of evidence this Court's precedents have required.

The Missouri Supreme Court's holding directly conflicts with this Court's relevant decisions regarding the First Amendment and it warrants this Court's review. *See* S. Ct. R. 10(c) (noting that certiorari is

appropriate where “a state court . . . has decided an important federal question in a way that conflicts with relevant decisions of this Court”).

II. LOWER COURTS ARE DEEPLY DIVIDED AS TO WHETHER THEY MAY PRESUME THE CONSTITUTIONALITY OF LAWS THAT RESTRICT PROTECTED SPEECH.

Despite this Court’s precedents, there remains a stunning and persistent divide among federal circuit courts and state courts of last resort on the question of whether judges may presume the constitutionality of laws infringing upon speech protected by the First Amendment. At least six federal courts of appeals (the Third, Sixth, Eighth, Ninth, Tenth, and District of Columbia Circuits) and five state supreme courts (Colorado, Georgia, Minnesota, Virginia, and Wisconsin) have embraced this Court’s determination that even if courts may *generally* presume the constitutionality of duly enacted laws, when a party challenges the validity of a law that infringes on speech protected by the First Amendment the Government must bear the burden of justifying the infringement. *See Starzell v. City of Philadelphia*, 533 F.3d 183, 201 (3rd Cir. 2008); *Pagan v. Fruchey*, 492 F.3d 766, 771 (6th Cir. 2007); *Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908, 920 (9th Cir. 2004); *ZJ Gifts D-4, LLC v. City of Littleton*, 311 F.3d 1220, 1231 (10th Cir. 2002), *rev’d on other grounds*, 541 U.S. 774 (2004); *Pursley v. City of Fayetteville*, 820 F.2d 951, 956 (8th Cir. 1987); *Tygrett v. Washington*, 543 F.2d 840, 849 (D.C. Cir. 1974); *State v. Café Erotica, Inc.*,

500 S.E.2d 574, 576 fn. 4 (Ga. 1998); *Denver Publishing Co. v. City of Aurora*, 896 P.2d 306, 319 (Colo. 1995); *State v. Casino Marketing Group, Inc.*, 491 N.W.2d 882, 885-86 (Minn. 1992); *State v. Janssen*, 580 N.W.2d 260 (Wisc. 1998).

Despite this Court's guidance and the examples of these other lower courts, however, at least one federal circuit court (the First Circuit) and nine state supreme courts (Arkansas, Delaware, Montana, Maine, Nebraska, Pennsylvania, Tennessee, South Carolina, and South Dakota) have upheld laws implicating protected speech without requiring the Government to justify the infringements. See *Naser Jewelers, Inc. v. City of Concord*, 513 F.3d 27, 33 (1st Cir. 2008); *State v. Rabourn*, 693 N.W.2d 291, 296 (Neb. 2005); *State v. Asmussen*, 668 N.W.2d 725, 728 (S.D. 2003); *Purple Orchid, Inc. v. State Police*, 813 A.2d 801, 805 (Pa. 2002); *McDade v. State of Delaware*, 693 A.2d 1062, 1065 (Del. 1997); *Laudan v. State*, 907 S.W.2d 131, 133 (Ark. 1995); *City of Beaufort v. Baker*, 432 S.E.2d 470, 474-75 (S.C. 1993); *City of Helena v. Krautter*, 852 P.2d 636, 638 (Mont. 1993); *State v. Cropley*, 544 A.2d 302, 304 (Me. 1988); *WRG Enterprises, Inc. v. Crowell*, 758 S.W.2d 214, 215-16 (Tenn. 1988).

In *Naser Jewelers, Inc. v. City of Concord*, 513 F.3d 27 (1st Cir. 2008), the First Circuit Court of Appeals reviewed a First Amendment challenge to the validity of an ordinance that banned electronic signs, which the court concluded was a content-neutral regulation of protected speech. The district

court below had required the Government to bear the burden of justifying the ordinance's constitutionality, but the First Circuit disagreed, stating that this Court had not stated a clear opinion on the question in *Hill v. Colorado*, 530 U.S. 703 (2000), or in *Rock Against Racism*, and that even where other cases addressing content-neutral speech restrictions had suggested that the Government must justify those restrictions, those opinions had cited content-based cases. *Naser Jewelers*, 513 F.3d at 33. The *Naser Jewelers* court ultimately avoided the issue by stating that it was not important because the purpose of a content-neutral speech restriction and the reasons for it are frequently expressed in the law itself, obviating the need for the Government to show any further proof on those questions. *Id.*

Several state courts have presumed the constitutionality of restrictions that very plainly affected First Amendment concerns. In *Laudan v. State*, two people were convicted of distributing religious handbills in violation of a city ordinance, even though they had argued that the law violated their First Amendment rights to free speech and religious liberty. The Arkansas Supreme Court held that the ordinance was presumed to be constitutional and that the challengers had not proven otherwise. *Laudan*, 907 S.W.2d at 133. In *City of Beaufort v. Baker*, several street preachers challenged their convictions under an ordinance that prohibited people from making "loud and unseemly noises." Responding to the preachers' First Amendment challenge, the South Carolina

Supreme Court held that ordinances would be presumed constitutional “even where the ordinance allegedly violates First Amendment rights.” *Baker*, 432 S.C. at 474. In *WRG Enterprises, Inc. v. Crowell*, the Tennessee Supreme Court considered a challenge to a law regulating charitable solicitors. The court acknowledged that “restriction of First Amendment rights is subject to exacting judicial review” and that a burden on speech “must be justified by a compelling State interest,” and it ultimately ruled that the speech restriction was unconstitutional – but the court still explicitly rejected the idea that the proponent of a statute alleged to infringe First Amendment rights has any responsibility to demonstrate the law’s legitimacy. *WRG Enterprises*, 758 S.W.2d at 215-16.

While the question of which party carries the burden in a First Amendment challenge may not always determine the outcome of a case, there will certainly be cases in which that question is the deciding factor. This point is highlighted by the Virginia Supreme Court’s consideration of *Black v. Commonwealth*, 553 S.E.2d 738 (Va. 2001).⁶ That case involved a law that made it a criminal offense to burn a cross with the intent to intimidate others. The four-judge majority held that while some of the speech

⁶ This Court would eventually review this case as *Virginia v. Black*, 538 U.S. 343 (2003), vacating the lower court’s holding because the challenged statute was found to prohibit only an especially virulent type of threat which is not within the First Amendment’s protection.

prohibited by this statute might not be protected by the First Amendment, the statute was unconstitutional because it improperly targeted a specific message and because its prohibitions would also reach speech within the protections of the First Amendment. *Id.* at 746. The three-judge dissent, however, strenuously argued that Virginia law required every act of the legislature to be upheld “except where it appears beyond doubt that it contravenes some provision of the State or Federal Constitution,” and that “this presumption is one of the strongest known to the law.” *Id.* at 750. The dissent considered it “inexplicable” that the majority would ignore what it deemed to be a “fundamental principle,” even though it acknowledged this court’s holding in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), that the First Amendment may apply even to a law that targets unprotected speech. *Id.* at 751. The dissent emphasized the importance of presuming the law’s constitutionality because it recognized that such a presumption would preserve a range of speech restrictions that might be invalidated if the Government were forced to prove their justification. The sharp divide among the judges in *Black v. Commonwealth* – and the similar divide between the majority and the dissent below – illustrates not only the confusion that still exists on this question, it shows that many citizens’ First Amendment rights will continue to be uncertain until this Court definitively resolves the remaining ambiguity. The Court should review the instant case because it provides an opportunity to resolve the lower courts’ confusion. *See*

S. Ct. R. 10(b) (noting that certiorari is appropriate where a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals).



CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,
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