QUESTION PRESENTED

Whether, when considering a First Amendment challenge to a law that regulates a profession carried out, in part, by speech, a court may presume the law's constitutionality and require the party being regulated to prove that the law "clearly and undoubtedly violates the constitution."

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The Attorney General of Missouri opposes the Petition for a Writ of Certiorari to review the decision of the Missouri Supreme Court in this case, issued July 19, 2011, reproduced in the Appendix to the petition ("Pet. App.") at 1-37, and reported at *Kansas City Premier Apartments, Inc., v. Missouri Real Estate Comm'n,* 344 S.W.3d 160 (Mo. banc 2011). The trial court's judgment is reprinted at Pet. App. 38-44.

STATEMENT OF THE CASE

Missouri, like all fifty states, requires people who practice the profession of real estate brokerage to hold a license under terms defined by state law. Missouri law defines a real estate broker as "any person ... or corporation ... who, for another, and for a compensation or valuable consideration, ... assists or directs in the procuring of prospects, calculated to result in the sale, exchange, leasing or rental of real estate." MO. REV. STAT. § 339.010(7).[1]

Petitioner Kansas City Premier Apartments ("KCPA") is a company in the business of assisting property owners in the procurement of prospects for leasing or rental of real estate. KCPA is not compensated for "sharing information"; it is compensated for producing prospects. As the Missouri Supreme Court stated:

> KCPA's business model is built on entering into non-exclusive performance-based agreements with property

[1] All Missouri statutory references are to the Revised Statutes of Missouri, Cum. Supp. 2010.

> owners. The property owners agree to pay a fee to KCPA for each new tenant who submits to the property owner a card verifying that he or she was referred to the property by KCPA. KCPA offers a $100 gift card to each prospect who gives a property owner a card that results in a payment to KCPA.

Pet. App. 2.

In order to locate and attract the prospects whose rental transactions generate its income, KCPA operates a website, www.kcpremierapts.com, at which it offers a number of features similar to those employed by a real estate agency working with rentals. These features include a searchable database of rental listings provided by property owners and the option of direct, interactive contact with KCPA contractors described by KCPA as "rental advisors." These rental advisors respond to questions asked by prospects, recommend which properties to investigate, and contact property owners to arrange appointments. The record shows that 80% of prospects who work with KCPA use the services of KCPA's rental advisors. None of the principals of the company nor its rental advisors hold any kind of Missouri real estate license. Pet. App. 2.

After hearing, the trial court issued an injunction that prohibited KCPA from performing any act that requires real estate licensure under Missouri law, and specifically enjoined it from two activities:

> 1. Entering into contracts to receive compensation from property owners

> in return for referring prospective tenants who rent properties; and
>
> 2. Paying an incentive or reward to tenants for informing landlords that they were directed to the property through KCPA's services.

Pet. App. 3-4. The basis for the prohibition on incentives or rewards to tenants was a state statute that prohibits real estate brokers from "using prizes, money, gifts or other valuable consideration as inducement to secure customers or clients ... lease ... property when the awarding of such prizes, money, gifts or other valuable consideration is conditioned upon the ... lease." MO. REV. STAT. § 339.100.2(13).

The Missouri Supreme Court made clear that its decision did not apply to the advertising or "information sharing" aspects of KCPA's business:

> The findings and conclusions of the circuit court indicate that KCPA did much more than provide information and, in fact, crossed over the line into activities limited to those that the legislature has determined require a real estate license. These determinations are supported by substantial evidence and should be given due deference. In fact, many of these activities were not denied by KCPA.

Pet. App. 10. KCPA was not enjoined from operating its website or database or providing advertising services to property owners, but only from entering into contracts that reward KCPA for procuring

prospects, which is explicitly within the definition of "real estate brokerage" established by MO. REV. STAT. § 339.010(7).

REASONS FOR DENYING THE PETITION

The Missouri Supreme Court correctly described the scope of Petitioner KCPA's challenge to Missouri law: "KCPA essentially asserts that the State should not be able to license and regulate people who choose to perform real estate activities in Missouri." Pet. App. 9. The theory of Petitioner's case in the state courts was that so long as a profession is performed using speech – oral or written – the State has little if any ability to regulate it.

This Court has, of course, long recognized the ability of the states to regulate professions: "We have given consistent recognition to the State's important interests in maintaining standards of ethical conduct in the licensed professions." *Edenfield v. Fane,* 507 U.S. 761, 770 (1993). *See also, Connick v. Thompson*, 131 S.Ct. 1350, 1361-1362 (2011). The decision of the Missouri Supreme Court upholding Missouri's statute regulating those engaged in bringing buyers and sellers or lessors and lessees together for a commission was not a novel application of this Court's precedents, but a common application of a law that sets standards for a profession – albeit a profession that often involves written or oral speech.

1. In its Petition for Writ of Certiorari, Petitioner lists one "question presented," based on the premise that the Missouri Supreme Court decided the First Amendment issues raised by Petitioner based either on a presumption of constitutionality or on a failure to meet a burden of showing that the challenged

statute was "clearly and undoubtedly" unconstitutional. The holding of the Missouri Supreme Court was not based on such a presumption, nor on any alleged failure of Petitioner KCPA to meet any burden.

The Missouri Supreme Court did mention a presumption – in a boilerplate "Standard of Review" paragraph. Pet. App. 4. There, the court did not differentiate among Petitioner's different claims. And Petitioner does not argue with the application of the presumption to its equal protection (Pet. App. 16-19), "special law" (Pet. App. 19), and vagueness (Pet. App. 20-21) claims – nor even to its free speech claims under the Missouri constitution (Pet. App. 15-16).

That the court made such a general statement before addressing Petitioner's constitutional claims does not constitute a holding as to Petitioner's First Amendment claims. Nor does it provide a basis for granting certiorari. Thus, it is not surprising that the body of the Petition spends little time actually addressing the general issue of a "presumption," but moves quickly to who bears what burden – the second part of the "question presented" – which Petitioner characterizes as the manifestation of this Court's rejection of the presumption of constitutionality in First Amendment cases. *See* Petition at 8; *see also* Petition at 13. But Petitioner's emphasis on "burdens," like its condemnation of a "presumption," is misplaced.

The Missouri Supreme Court did find that Petitioner failed to meet its burden – but with regard to construction of the statute, not its First Amendment claim. Pet. App. 7. The court never

said that the State was relieved of a burden to justify its restriction of Petitioner's speech. Nor did the court say that Petition had, nor that Petitioner failed to meet, a burden of proving that there was no such justification.

Rather than rely on presumptions or burdens, the Missouri Supreme Court's analysis of Petitioner's First Amendment claim proceeded in two steps.

The first was to look specifically at this Court's precedents with regard to professional licensing – most notably the licensing of attorneys, who, like real estate brokers, perform their professional work largely through the use of language. Thus, the court cited and relied on the line of cases proceeding from *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978). The court observed that this Court in *Ohralik* and courts considering professions such as psychologists (*National Ass'n for the Advancement of Psychoanalysis v. California Bd. of Psychology*, 228 F.3d 1043 (9th Cir.2000)), securities broker-dealers (*Underhill Assoc., Inc. v. Bradshaw*, 674 F.2d 293 (4th Cir. 1982)), accountants (*Accountant's Soc'y of Virginia v. Bowman*, 860 F.2d 602 (4th Cir.1988)), and interior designers, *Locke v. Shore*, 634 F.3d 1185 (11th Cir. 2011)), have held that restrictions on speech that are incidental to professional regulation are permitted by the First Amendment. Pet. App. 11. Is that a statement about presumptions or burdens? Only to the extent that the court was suggesting that settled law is presumed to be correct, and that there is thus a considerable burden on one asking for a contrary holding. That is hardly a novel conclusion that merits this Court's attention.

The Missouri Supreme Court next recognized that despite those precedents affirming the states' power to regulate even professions that involve the use of speech, that power is not "unlimited." Pet. App. 11. And it looked to *Central Hudson* for both the criteria on which to decide the level of scrutiny to be given to the regulation and how to apply that scrutiny. *Id.* at 12, (citing *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 562 (1980)).

Petitioner, of course, endorses the use of *Central Hudson*. Petition at 10. Petitioner then cites *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173 (1999), for the conclusion that under *Central Hudson*, "the Government bears the burden of identifying a substantial interest and justifying the challenged restriction." 527 U.S. at 184, *quoted* at Petition at 10. The Missouri Supreme Court found such an interest: "The governmental interest behind the challenged provisions is to protect the public from fraud and incompetence." Pet. App. 13, (citing *Miller Nationwide Real Estate Corp. v. Sikeston Motel Corp.*, 418 S.W.2d 173 (Mo. 1967)). Other than citing its own longstanding precedent specifically addressing the legislative basis for the regulation of the real estate sales profession, the court simply did not address the question that Petitioner poses, *i.e.*, who bore what burden with regard to that interest.

Even in this Court, Petitioner does not provide guidance as to what additional steps it demands that Missouri courts take when they decide a First Amendment case challenging a type of law consistently upheld by this Court and others. Nowhere in the Petition is there even a hint that the state's

interest in protecting the public from fraud and incompetence is not "substantial" – and it seems obvious that the interest is *at the least* "substantial." Nowhere in the Petition is there an explanation for why the regulation at issue – requiring licensure before engaging in bringing, for a fee, buyers/lessees to sellers/lessors – does not serve that interest. And it seems apparent that licensure does serve that interest – and that to require the State to put on affirmative evidentiary proof each and every time someone claims that in their circumstance it does not serve that interest would be neither justified nor required by this Court's current precedents.

Here, moreover, the Missouri Supreme Court had before it an evidentiary record. Thus, the majority stated, "The findings and conclusions of the circuit court indicate that KCPA did much more than provide information and, in fact, crossed over the line into activities limited to those that the legislature has determined require a real estate license." Pet. App. 10. Those activities included entering into contracts for compensation contingent on producing prospects, referring prospects to unlicensed and essentially unsupervised "rental advisors," dispensing advice and recommendations to prospects, setting up appointments, serving as a channel of communications between prospects and potential landlords, and paying rewards to prospects who rented apartments through the service. The focus of the Missouri Supreme Court's decision was not on prohibiting the Petitioner from communicating with the public, but on Petitioner's conduct in carrying out a business that was, in essence, that of a conventional, rental-focused real estate agency – but without the qualification and accountability provided by professional licensure. The Missouri

courts acted on this evidence, not on a basis that Petitioner had failed to meet a burden. The Missouri Supreme Court concluded that the effect on much of the speech conducted by the Petitioner through its agents, such as their interactive communications with particular prospects about particular properties, is merely incidental to the legislature's unquestioned power to establish a regulatory structure for the conduct of certain professions, including those carried out largely through speech and communication.

Again, this is not a case decided by failure to meet a burden; it is a case where the State submitted substantial evidence in support of its position where there was pertinent precedent from this and many other courts, and where the court relied on that evidence and precedent. This is not a case in which a court declared that a person challenging a statute on First Amendment grounds had or failed to meet a burden, nor a case in which a court ignored its obligations in *Central Hudson* and acted based on a general presumption of constitutionality. Properly read, the decision of the Missouri Supreme Court simply does not raise the "question presented" in the Petition.

2. Nor does this case present a conflict with decisions by other federal or state courts. To create such a division, Petitioner selected language out of various opinions on widely divergent facts to create an illusion that there are two schools of thought, when the real difference is merely different authors applying the same principles to different facts.

Most of the federal cases Petitioner cites, including *Pagan v. Fruchey,* 492 F.3d 766 (6th Cir.

2007), *Z.J. Gifts D-4, L.L.C. v. City of Littleton*, 311 F.3d 1220 (10th Cir. 2002), *Pursley v. City of Fayetteville*, 820 F.2d 951 (8th Cir. 1987), and *Tygrett v. Washington*, 543 F.2d 840 (D.C. Cir. 1974), were decided on summary judgment – unlike this case, which was litigated for nearly three years and over two days of trial. This case does not involve evaluation of the burden on the moving party, under a summary judgment rule.

Another one of Petitioner's federal cases, *Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908 (9th Cir. 2004), was an abortion rights case in which the court stated, "That [presumption of constitutionality] gives way, however, in at least two circumstances: the First Amendment doctrine of overbreadth and the constitutional standards applicable to abortion cases." 376 F.3d at 920. The case was decided on the latter and involved no free speech issues. Its inclusion on Petitioner's list of precedents illustrates how Petitioner's argument that there is a division among the circuits is an illusion created by the selection of a useful line or two out of disparate cases, even if dicta.

So does *Startzell v. City of Philadelphia*, 533 F.3d 183 (3rd Cir. 2008). That case involved an injunction entered against an anti-gay group demonstrating at a gay pride festival for which the organizers held a permit. Petitioner presumably is referring to this language: "The burden is on the City to demonstrate the constitutionality of its actions." *Id.* at 201. The court then observed that the trial court had placed the burden on the wrong party – but held that in the context of that case, it did not matter: "Although the District Court incorrectly placed that burden on Appellants, that

error was without consequence." *Id.* The court of appeals proceeded to uphold the injunction, although on a different analysis than used by the district court.

As in *Startzell*, the most that can be said here is that the Missouri Supreme Court did not differentiate the standard of review for the First Amendment count. Even if that was error, it was an error without consequence, as the court did not rely on any presumption, but proceeded to examine the facts of the case in detail and to look to the *Central Hudson* case for standards and other guidance in deciding the First Amendment issues. Nothing about that examination departs so far from holdings in other federal courts as to justify granting the Petition.

Perhaps most notable among the state cases Petitioner cites is *Denver Pub. Co. v. City of Aurora*, 896 P.2d 306 (Col. 1995). That decision contains a detailed discussion of the nature and effect of the presumption of constitutionality that is far more nuanced than the headcounting that led Petitioner to impress the Colorado court into its claimed band of supporters. The court's conclusion about the significance of the presumption is telling:

> Here, we conclude that the presumption attached to a content-neutral ordinance attacked on free speech grounds requires the introduction of competent evidence that the regulation burdens speech. Such evidence need not be substantial, but merely sufficient, for the court to determine that a free speech right is indeed infringed.

896 P.2d at 319. The Colorado court correctly observed that a presumption is merely a starting point, and that where an evidentiary record has been assembled, as here, the court should not decide the case on presumptions but should proceed to whether the record shows that the government has demonstrated the elements of the applicable test, and whether the restricted party has shown a burden on speech. That is what the Missouri courts did. In following that pattern, the Missouri Supreme Court neither created nor exacerbated a conflict among the lower courts that might justify this Court's attention.

CONCLUSION

For the foregoing reasons, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,
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