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IN THE SUPREME COURT OF MISSOURI
REPRODUCTIVE HEALTH SERVICES OF PLANNED PARENTHOOD OF
THE ST. LOUIS REGION, INC. et al., Appellants

v.

JEREMIAH W. NIXON, Attorney General of Missouri, in his official capacity, et
al., Respondents

**RESPONDENT’S BRIEF for JENNIFER M. JOYCE, Circuit Attorney for
the City of St. Louis, in her official capacity**

R. Scott Ingram #47900
Asst. Circuit Attorney
St. Louis Circuit Attorney’s Office
1114 Market, Room 401
St. Louis, MO 63101
Telephone: 314-622-4941
Facsimile: 314-613-3105
ingrams@stlouiscas.org

**Attorney for Respondent
Jennifer Joyce**

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STATEMENT OF FACTS

This facial challenge to Section 188.039.2, RSMo., comes to the Court after the trial court upheld the statute finding that it was not void for vagueness. (*See* Legal File (LF) at 9,487.) The Appellants, Reproductive Health Services of Planned Parenthood of the St. Louis Region, Inc. and Comprehensive Health Services of Planned Parenthood of Kansas and Mid-Missouri, Inc. (collectively, “Planned Parenthood”), also challenged the statute on grounds that it overly burdens a woman’s right to choose an abortion. *Id.* at 9. The trial court also denied this challenge. *Id.* at 487. Due to the challenge to the statute’s constitutionality, the case was appealed directly to this Court.

At present no prosecutions are pending for violating this statute meaning that the only “facts” for this case is its procedural history and the terms of the challenged statute. Planned Parenthood initially brought this facial challenge via a declaratory judgment action because the federal courts abstained from deciding the United States constitutional issues until the Missouri courts had the opportunity to interpret the statute. LF at 16-17. In their state court action, Planned Parenthood asserted two reasons for the statute’s unconstitutionality. First, it claimed the statute was void for vagueness. *Id.* at 9. Second, it claimed the statute unconstitutionally burdened a woman’s right to choose an abortion. *Id.* After cross-motions for summary judgment, the trial court granted Jeremiah W. (Jay) Nixon as Attorney General of the State of Missouri, Jennifer M. Joyce, Circuit Attorney for the City of St. Louis, and Kevin Crane, Prosecuting Attorney for

Boone County (collectively, “Defendants”) motions for summary judgment and finding Section 188.039.2, RSMo, constitutional on its face. *Id.* at 487.

The statute requires doctors to evaluate and confer with women seeking an abortion at least twenty-four hours prior to performing an abortion. Mo. Rev. Stat. §188.039. Subsection two describes the conference that must take place between the doctor and the woman. They must discuss “the indicators and contraindicators, and risk factors including any physical, psychological, or situational factors for the proposed procedure and the use of medications, ..., in light of her medical history and medical condition.” Mo. Rev. Stat. §188.039.2 Subsection three describes the evaluation a doctor must perform on the woman prior to performing an abortion. The physician must evaluate the woman “for indicators and contraindicators, risk factors including any physical, psychological, or situational factors which would predispose the patient to or increase the risk of experiencing one or more adverse physical, emotional or other health reactions to the proposed procedure or drug or drugs in either the short or long term as compared with woman who do not possess such risk factors.” Mo. Rev. Stat. §188.039.3 Once the doctor has conferred with and evaluated the woman for these things, pursuant to subsection four, the doctor and the woman both sign a form indicating that the evaluation and conference have taken place and that the woman consents to the procedure. Mo. Rev. Stat. §188.039.4. Once these steps have been completed a women may have the abortion.

Doctors who knowingly fail to comply with these provisions face criminal and administrative penalties. Pursuant to Section 188.075, anyone who knowingly performs or aids in the performance of an abortion in contravention of sections 188.010 to 188.085 commits a class A misdemeanor. Mo. Rev. Stat. §188.075. Pursuant to Section 188.065, anyone who willfully and knowingly violates the provisions between sections 188.010 and 188.085 becomes subject to revocation of their professional license. Mo. Rev. Stat. §188.065.

When read in conjunction, these statutes subject those who knowingly perform abortions, without first conferring with and evaluating the women seeking them, to criminal liability. Criminal liability does not arise if the doctor, in good faith, evaluates the woman seeking an abortion and confers with her more than twenty-four hours before the procedure. This results from the fact doctors must know they are violating the terms of the statute in order to be held criminally liable. Therefore, unless the doctor acts with the specific intent to perform an abortion without conferring with the woman or evaluating her, the doctor cannot suffer criminal penalty for performing the abortion.

POINTS RELIED ON

I. The trial court properly upheld Section 188.039, RSMo., against Appellant's facial challenge that the statute is void for vagueness because the statute provides a definite warning of what conduct is prohibited and does not lend itself to arbitrary and discriminatory enforcement.

Mo. Rev. Stat. § 188.039

Hill v. Colorado, 530 U.S. 703 (2000)

State v. Brooks, 128 S.W.3d 844 (Mo. 2004)

State v. Lee Mechanical Contractors, 938 S.W.2d 269 (Mo. 1997)

Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489 (1982)

Connally v. General Construction Co., 269 U.S. 385 (1926)

State v. Brown, 140 S.W.3d 51 (Mo. 2004)

State v. Hatton, 918 S.W. 2d 790 (Mo. 1996)

State v. Shaw, 847 S.W.2d 768 (Mo. 1993)

Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992)

II. The trial court correctly decided the twenty-four hour waiting period between the conference and evaluation and having the abortion does not pose an undue burden on a woman's right to choose an abortion because the waiting period allows for thoughtful and informed consideration of options.

Mo. Rev. Stat. §188.039

Roe v. Wade, 410 U.S. 113 (1973)

Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992)

State v. Baker, 103 S.W. 3d 711 (Mo. 2003)

State ex rel. Sullivan v. Cross, 314 S.W.2d 889 (Mo. banc 1958)

State v. Hester, 801 S.W.2d 695 (Mo. banc 1991)

ARGUMENT

The trial court ruled correctly denying Planned Parenthood's constitutional challenge to Section 188.039 of the Revised Statutes of Missouri because the law

is not unconstitutionally vague on its face and does not unduly burden a woman's right to choose an abortion. The statute is not unconstitutionally vague on its face because it provides adequate notice regarding its prohibitions and because it is not susceptible to arbitrary enforcement. Neither does the statute unduly burden a woman's right to choose an abortion because the United States Supreme Court has decreed that a twenty-four hour wait to obtain an abortion does not offend the United States Constitution, and Missouri's Constitution provides no greater protection than the United States Constitution.

While the trial court granted summary judgment upholding the statute, the Supreme Court's review of the statute is "essentially *de novo*" as the trial court ruled that the statute was constitutional as a matter of law. *ITT Commercial Fin. Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 276 (Mo. 1993) (en banc).

I. The trial court properly upheld Section 188.039, RSMo., against Appellant's facial challenge that the statute is void for vagueness because the statute provides a definite warning of what conduct is prohibited and does not lend itself to arbitrary and discriminatory enforcement.

The trial court correctly decided that the language used in Section 188.039, RSMo, on its face, properly warns people of prohibited conduct and prevents arbitrary and discriminatory enforcement. By challenging the statute through a declaratory judgment action, Planned Parenthood makes a facial challenge to the statute, asserting that there is no conceivable fact situation where the statute can be

applied constitutionally. This places a heavy burden upon Planned Parenthood because properly enacted statutes are presumed constitutional and must be viewed with every doubt resolved in favor of constitutionality. *State v. Pike*, 162 S.W. 3d 464, 469-70 (Mo. 2005). For a court to find a statute unconstitutionally vague, the statute must fail to properly warn of the prohibited conduct or to prevent arbitrary and discriminatory enforcement. *State v. Shaw*, 847 S.W.2d 768, 774 (Mo. 1993). Statutes meet these criteria when they provide objective standards by which a person can measure their conduct. *Id* at 775. Section 188.039, RSMo., provides objective criteria by using terms that have a settled meaning, requiring doctors to evaluate and confer with their patients about risk factors present in the specific patient, requiring the State prove in a criminal case that the person charged knew performing the abortion violated the waiting period and/or the evaluation and conference requirements, and having a woman seeking an abortion sign a form indicating she has been informed of the risk factors involved in the procedure. As it currently stands, Section 188.039, RSMo., properly provides a warning as to the conduct it prohibits, properly prevents arbitrary and discriminatory enforcement, and contains a scienter provision.

A. Without facts to apply, any challenges to Section 188.039, RSMo, as vague must be facial challenges, requiring proof that the law cannot be applied to any set of facts.

As there are no facts to apply to Section 188.039, RSMo., the vagueness challenge made by Planned Parenthood must be a facial challenge requiring proof that the

law cannot be applied to any set of facts. Those making facial challenges to a law on vagueness grounds must demonstrate that the law fails to give a person of ordinary intelligence a reasonable opportunity to understand the conduct the law prohibits or that the law lends itself to arbitrary and discriminatory enforcement. *See e.g., State v. Lee Mechanical Contractors, Inc.* (938 S.W. 2d 269, Mo. 1997) and *State v. Hatton* (918 S.W.2d 790, Mo. 1996). Both the Missouri and United States Supreme Courts have decided that vagueness challenges must be resolved based on the facts of the case, unless First Amendment protections are involved. *Id. See also, Village of Hoffman Estates v. Flipside* (455 U.S. 489, 1975). When vagueness challenges lack factual situations to apply to the statutory terms, these challenges are considered facial challenges and are to be upheld unless the statutory terms cannot be constitutionally applied to any fact situation. As no prosecution has commenced to provide facts for this challenge and there are no First Amendment protections at issue, Planned Parenthood's challenge to Section 188.039, RSMo., must be a facial challenge.

Unconstitutionally vague statutes fail to provide adequate notice of their prohibitions and lend themselves to arbitrary and discriminatory enforcement and violate the due process clause as a result. *Hill v. Colorado*, 530 U.S. 703, 732 (2000). Vague statutes offend the due process clause because they cause people to face criminal conviction without knowing what conduct violated the law. The United States Supreme Court has held statutes unconstitutionally vague for either of two reasons. First, a statute fails the vagueness test if it "fails to provide people

of ordinary intelligence a reasonable opportunity to understand what it prohibits.”

Id. Second, a statute is unconstitutionally vague “if it authorizes or encourages arbitrary and discriminatory enforcement.” *Id.* Planned Parenthood claims Section 188.039, RSMo., fails both tests.

To determine whether the statute has failed to meet either test, courts look to the facts of the case to determine whether the statute is vague as applied to those facts. This Court and the United States Supreme Court have asserted this position. Recently this Court re-asserted its commitment to this principle in *State v. Brooks* (128 S.W.3d 844 (Mo. 2004)) by upholding Missouri’s concealed weapons law against a facial challenge. The United States Supreme Court also subscribed to this position in its 1982 ruling in *Village Of Hoffman Estates v. Flipside, Hoffman Estates, Inc.* (455 U.S. 489 (1982)) by stating that unless First Amendment protections are implicated, “the case must be examined based on the facts of the case at hand.” at 495 n.7 (quoting *United States v Mazurie*, 419 U.S. 544 (1975)).

When a vagueness challenge is made and there are not facts to examine, the challenge is a facial challenge and the court reviews the statute to determine if there are any circumstances upon which it can be upheld. Courts must examine the statute as a whole and give it a strong presumption of validity. *State v. Lee Mechanical Contractors*, 938 S.W.2d 269, 272 (Mo. 1997). *Lee Mechanical Contractors* involved a criminal prosecution for paying employees in violation of the prevailing wage law. *Id.* at 270. The company filed a motion to dismiss arguing the statute was unconstitutional. *Id.* The trial court granted the motion. *Id.*

During its review, this Court treated the case as a facial challenge to the statute because no facts had yet been developed in the case. *Id.* at 271. This Court, in its analysis, said that for the company to prevail it had to demonstrate the statute “proscribe[d] no comprehensible course of conduct and [could not] be applied to any set of facts.” *Id.*

When this Court decided *Lee Mechanical Contractors*, it drew on principles enunciated by the United States Supreme Court in the case of *Village of Hoffman Estates*, 455 U.S. 489 (1982). 938 S.W.2d at 271. *Village of Hoffman Estates* involved a business seeking a declaratory judgment that a town’s ordinance prohibiting the sale of products “marketed for use” with controlled substances was unconstitutionally vague. 455 U.S. at 491. The Court began stating the statute should be upheld unless it is impermissibly vague in all of its applications. *Id.* at 495. After concluding the statute implicated no First Amendment protections, the Court decided that the statute was not unconstitutionally vague because the business challenging the statute did sell items that had no other use than as drug paraphernalia. *Id.* at 497. *Village of Hoffman Estates* demonstrates that so long as the challenged statute constitutionally applies to a fact situation, the facial challenge fails.

The reasoning in *Lee Mechanical Contractors* and *Village of Hoffman Estates* applies equally to the challenge made by Planned Parenthood to Section 188.039, RSMo. Just like *Village of Hoffman Estates*, Planned Parenthood has challenged the statute despite the fact that no prosecutions have occurred for

violating Section 188.039, RSMo. Therefore, there is no fact situation to which the statute can be applied. Also like *Village of Hoffman Estates*, this case does not implicate constitutionally protected conduct. Although a woman has a constitutional right to an abortion, measures taken to ensure informed consent on the part of the woman do not unduly restrict the right to choose an abortion.

Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 871 (1992) citing *Roe v. Wade*, 410 U.S. 113. The challenged statute regulates the doctor's activity prior to an abortion. It requires the doctor to confer with the woman regarding her risk factors and evaluate her based on those risk factors. The statute does not prevent a woman from seeking or having an abortion.

Similarly, the United States Supreme Court found in *Village of Hoffman Estates* that the ordinance restricted what the business could sell and had minimal impact on its communication of information. Therefore, like the commercial speech in *Village of Hoffman Estates*, the statute challenged in this case does not implicate constitutionally protected conduct so, in order to find the statute unconstitutionally vague, Planned Parenthood must demonstrate the statute cannot be applied constitutionally to any set of facts.

Without facts at hand in this case, the Court must consider Planned Parenthood's challenge to Section 188.039, RSMo., as a facial challenge. As demonstrated, there is no constitutionally protected conduct at issue. There are no criminal charges pending for violating the statute. Therefore, Planned Parenthood

must show that the challenged statute cannot be applied constitutionally to any set of facts; something they have failed to do.

B. Section 188.039, RSMo., informs those subject to its provisions what conduct on their part renders them liable for the civil and criminal penalties because the statutory language provides a standard by which to measure a person's compliance.

By providing a standard for doctors to measure their compliance against, Section 188.039, RSMo., informs them what conduct on their part renders them criminally liable. Statutes providing such a standard pass constitutional scrutiny. When statutes lack such a standard, those who may be prosecuted for violating it must guess at what conduct constitutes a violation. Section 188.039, RSMo., provides a standard for doctors to measure their conduct because the statute requires doctors evaluate and confer with their patients twenty-four hours prior to performing an abortion on them. Only when doctors knowingly disregard this requirement will they be held criminally liable. Furthermore, women who decide to have an abortion must complete a form indicating the doctor has made them aware of the risk factors for an abortion. By requiring a knowing violation of the provisions and requiring a woman to confirm in writing that she has been advised of the risk factors associated with her having an abortion, Section 188.039, RSMo., adequately informs people of what conduct it prohibits.

People are adequately informed what conduct a statute prohibits when that statute has an objective criterion against which conduct can be measured. The

1926 United States Supreme Court case of *Connally v. General Construction Co.* (269 U.S. 385 (1926)) reviewed the history of evaluating vagueness challenges to statutory enactments and found that statutes meeting one of three criteria were routinely upheld. at 391. First, if the statute used words or phrases with some technical or specialized meaning that allowed clear application, then the statute had the requisite objective standard. *Id.* Second, the statute had an objective standard if the words employed by the legislature had a settled common-law meaning. *Id.* Finally, statutes would pass scrutiny if the statutory language itself provided a standard for measurement. *Id.* Statutes lacking all of these criteria failed the vagueness test.

This Court has applied much of the same reasoning when it has reviewed vagueness challenges to statutes. In *State v. Brown* (140 S.W.3d 51 (Mo. 2004)) this Court denied a vagueness challenge to Missouri’s child-abuse reporting statute. The statute required health professionals to report suspected child abuse only when the person has “reasonable cause to believe” the child had been abused. at 54-55. “Reasonable,” according to this Court, has a settled common-law meaning that gave the statute an objective standard. *Id.* at 55. This Court used the same rationale when deciding *State v. Hatton* (918 S.W.2d 790 (Mo. 1996)) and concluding the term “public housing” was not unconstitutionally vague when used in connection with drug sales. at 793. To reach this conclusion the Court stated that “public housing” has a common and easily-understood meaning. *Id.*

Section 188.039, RSMo., presents this Court with a statute similar to those in *Brown* and *Hatton* because it provides an objective standard and uses easily-understood terms. The statute provides an objective standard because when the doctor evaluates the woman and then confers with her about the risk factors for the procedure, the doctor need only discuss risk factors particular to that woman. It states, in relation to the risk factors discussed at the conference: “...in light of her medical history and medical condition.” Mo. Rev. Stat. §188.039.2 Likewise, the statute states the risk factors considered in the evaluation are those possessed by the woman and in comparison to “women who do not possess such risk factors.” Mo. Rev. Stat. §188.039.3 The statute also uses terms easily understood by medical professionals. Health professionals routinely evaluate and confer with patients. In these conferences they discuss the risk factors for the procedure and the factors that are unique to the individual. When determining the best course for the patient, health professionals will evaluate the patient’s options based on risk factors peculiar to the patient. To further assist health professionals, the statute breaks down the risk factors into physical, psychological, and situational factors. Rather than rendering the statute vague, as Planned Parenthood claims, these terms provide further definition to the statute and make it more precise. By providing objective criteria and using easily-understood terminology, Section 188.039, RSMo., is not unconstitutionally vague.

Beyond the terms of Section 188.039, RSMo., the statute that subjects those who violate Section 188.039, RSMo., to criminal penalties adds further objective

criteria by requiring violators to “knowingly” violate Section 188.039, RSMo. When statutes require “knowing” violations, they have been found constitutional. This Court found Missouri’s unlawful merchandising practices statute constitutional because it contained a similar requirement. *State v. Shaw* (847 S.W.2d 768 (Mo. 1993)). In *Shaw*, the defendant challenged the constitutionality of the statute claiming the term “unfair practices” failed to provide adequate warning of its prohibitions. *Id.* at 773. In its review, this Court first looked at the other terms used in the statute and found each had clear common-law meanings. *Id.* at 775. “Unfair practices” was the exception. *Id.* Had the legislature punished all unfair practices then it would most likely fail constitutional scrutiny. *Id.* However, the legislature, in order for a criminal violation to occur, required the State to prove defendants knowingly engaged in the unfair practice. *Id.* at 776. This requirement, according to the Court, cured any potential vagueness problem because “punishment is restricted to acts done with knowledge that they contravene the statute...” *Id.* (quoting *American Communications Assoc. v. Douds*, 339 U.S. 382, 412-413 (1950)). By requiring a knowing violation of the statute, as in *Shaw*, the legislature has provided another objective criterion for determining compliance with the statute.

Planned Parenthood’s claims that the “knowing” requirement does not resolve the vagueness issue miss the mark because this is a facial challenge to the statute. They state: “A ‘knowing’ requirement does not clarify how far physicians must go to comply with [Section 188.039] or to what extent they can, if at all,

exercise their medical judgment under [Section 188.039].” *App. Brief* at 22.

Physicians comply with the statute when they evaluate their patients for risk factors the patients possess and then confer with the patients about those risk factors. Exactly what must be said to the patient will vary on a case-by-case basis because each patient is different and presents different risk factors. Had Planned Parenthood waited to challenge the statute until a prosecution had been initiated, their argument would carry more weight. As this is a facial challenge, so long as the statute can be applied constitutionally to a fact situation, the statute must be upheld.

In addition to requiring the State to prove the health professional knowingly performed an abortion without the requisite evaluation and conference, the statute protects health professionals by requiring the woman seeking an abortion to complete a form indicating that she has been advised of the risk factors for the procedure. Mo. Rev. Stat. §188.039.4. By placing this form in the file, those involved in the abortion procedure know that the statutory requirements have been met. If the form is not in the file, the health professionals will be on notice that there is a high likelihood that the requisite evaluation and conference has not taken place. This requirement provides the people performing the abortion a defense to the “knowledge” element if the form is in the patient’s file.

By employing terminology with settled meanings, providing objective criteria and requiring the State prove knowledge, Section 188.39, RSMo., sufficiently places people on notice as to what conduct it prohibits. Medical

professionals understand what it means to evaluate and confer with a patient and know what risk factors are present in which patient. The statute also details the contents of the evaluation and conference and requires medical professionals to assess the risk factors based on the patient presenting to them. This means there is an objective criterion upon which to assess the medical professional's conduct in any given case. Additionally, the state must prove the medical professional knew, at the time the abortion was performed, that a doctor had not evaluated and conferred with the woman twenty-four hours prior to the procedure. Finally, if the woman's file has her signature on a form indicating the doctor conferred with her about the risk factors specific to her regarding the procedure, then the medical professional knows the requirements of the law have been fulfilled. All of these criteria provide an objective means for determining whether a medical professional has violated Section 188.039 when performing an abortion and therefore adequately informs people what the statute prohibits.

II. The trial court correctly decided the twenty-four hour waiting period between the conference and evaluation and having the abortion does not pose an undue burden on a woman's right to choose an abortion because the waiting period allows for thoughtful and informed consideration of options.

Requiring doctors to wait twenty-four hours after advising women of the risk factors particular to them in having an abortion does not unduly burden their right to have an abortion. While women possess the right to have an abortion, a

state may impose restrictions on the process in the interest of the health and safety of the viable fetus and the woman. One method used by states to protect everyone involved in the abortion procedure is a twenty-four hour waiting period between the initial consultation with the doctor and the performance of the procedure. The waiting period allows a woman to carefully consider her options in light of the risk factors particular to her case while only imposing a mild inconvenience associated with multiple trips to the location where the procedure will be performed. The United States Supreme Court has ruled such waiting periods do not offend the United States Constitution. Likewise, Missouri courts have held routinely that the Missouri constitution provides no greater protection than the United States Constitution. Therefore, this Court should follow the lead of the United States Supreme Court and determine that the twenty-four hour wait required by Section 188.039, RSMo., does not unduly burden a woman's right to choose have an abortion.

A woman's right to choose an abortion may be regulated based on a state's interest in protecting the mother's health and the life of a viable fetus. *Roe v. Wade* established this right based on the due process clause of the Fourteenth amendment to the United States Constitution. 410 U.S. 113 (1973). Despite challenges, this right remains. Through these challenges however, the United States Supreme Court has decided that states may regulate the procedures surrounding abortions. *See e.g. Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). While states unduly burden a woman's right to

choose an abortion by placing substantial obstacles in her way, the United States Supreme Court has decided that a twenty-four hour waiting period between a woman's initial conference and evaluation and having the procedure performed is a proper regulation. *Casey* at 887.

The United States Supreme Court determined the twenty-four hour waiting period did not pose an undue burden on a woman's right to choose an abortion when deciding *Planned Parenthood of Southeastern Pennsylvania v. Casey*. 505 U.S. 833 (1992). In that case Planned Parenthood challenged Pennsylvania's abortion statutes that imposed several restrictions on when abortions may be performed, including a twenty-four hour waiting period between the conference and evaluation and the procedure. *Id.* at 879. Seven Justices agreed the wait did not unduly burden a woman's choice. *Id.* at 887, 969. Justice O'Connor stated "[r]egulations which do no more than create a substantial mechanism by which the State...may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose." *Id.* at 869. When applying this principle to the twenty-four hour waiting period, Justice O'Connor wrote, "...while the waiting period does limit a physician's discretion, that is not, standing alone, a reason to invalidate it. In light of the construction given the statute's definition of medical emergency, we cannot say that the waiting period imposes a real health risk. ... Hence, in the record before us, and in the context of this facial challenge, we are not convinced that the 24-hour waiting period constitutes an undue burden." *Id.* at 886-7. Likewise, Chief

Justice Rehnquist wrote, "...the provision in no way prohibits abortions, and the ... waiting period requirements do not apply in the case of a medical emergency. We are of the view that ... the waiting period reasonably furthers the State's legitimate interest in maternal health and in the unborn life of the fetus." *Id.* at 969. Based on this decision, Missouri's law, which imposes an identical restriction, does not pose an undue burden on a woman's Fourteenth amendment right to choose an abortion.

As the statute passes United States constitutional scrutiny by not placing an undue burden on a woman's right to choose, the Missouri constitution is not violated because Missouri's constitution does not provide greater protection than the United States constitution. On numerous occasions, this Court has been called upon to compare the protections of the Missouri constitution versus the United States Constitution. Routinely this Court has stated Missouri's constitution affords no greater protection. In *State v. Baker* (103 S.W. 3d 711 (Mo. 2003)), this Court began its analysis of an alleged violation of Article 1, Section 15 of the Missouri constitution by stating the Missouri constitution provides no greater protection than the Fourth Amendment to the United States Constitution. at 717. Similarly, this Court held Article I, Section 10 of the Missouri Constitution provides the identical protection as the Sixth Amendment to the United States Constitution. *State v. Hester*, 801 S.W.2d 695, 697 (Mo. 1991). Finally, in *State ex rel. Sullivan v. Cross*, while discussing Missouri's long-arm statute, this Court stated "...if the statute does not infringe the due process requirements of the

Federal Constitution, there is no reason why it should be held to infringe (sic.) the same provisions of the Missouri Constitution.” 314 S.W.2d 889, 893 (Mo. Banc 1958). The decisions of this Court indicate that the Missouri constitution provides no greater protection for its citizens than the similar provisions of the United States Constitution.

Due to the fact Missouri’s constitution equates with the United States Constitution, this Court should reach the same conclusion regarding whether the twenty-four hour waiting period between the evaluation and conference and the abortion unduly restricts a woman’s right to choose an abortion. The United States Supreme Court has decided that the minimal wait protects the State’s interest in the health of the mother and life of the fetus while not unduly restricting the mother’s ability to have an abortion. As a result, Planned Parenthood’s claim that the twenty-four hour wait unduly restricts abortions is without merit and was rejected properly by the trial court.

Conclusion

The trial court correctly ruled in this case that Section 188.039, RSMo., is not vague on its face and does not unduly restrict a woman’s right to have an abortion. For its first point, Planned Parenthood claims the statute’s provisions requiring a doctor to evaluate a woman for risk factors particular to her and then to confer with her about her risk factors for the procedure is unconstitutionally vague. The claim succeeds only if the statute cannot be applied constitutionally to any set of facts. Due to the objective criteria provided in the statute—namely

requiring the State to prove knowledge, requiring the woman to sign a form stating she has been advised of the risk factors and limiting the factors to consider to those unique to the patient—Section 188.039, RSMo., adequately informs those subject to its provisions what it requires. For its second point, Planned Parenthood asserts the twenty-four hour waiting period between the evaluation and conference and the procedure unduly burdens a woman’s right to choose an abortion. This assertion has been refuted by the United States Supreme Court and, because the Missouri constitution affords no greater protection, should similarly be refuted by this Court. Therefore, the trial court correctly granted summary judgment to the Defendants in this case and the Circuit Attorney respectfully requests this Court to affirm the trial court’s ruling.

Respectfully submitted,

R. Scott Ingram #47900
Asst. Circuit Attorney
City of St. Louis
1114 Market, Rom 401
St. Louis, MO 63101
Phone: 314-622-4941
Fax: 314-613-3105
Email: ingrams@stlouiscas.org
5674 words

Certification Pursuant to Rule 84.06(c)

I, Scott Ingram, counsel for Respondent Jennifer M. Joyce, hereby certify that this brief for the Respondent:

- (1) contains the information required pursuant to Rule 55.03;
- (2) complies with the limitations of Rule 84.06(b);
- (3) contains 5674 words according to the Word Count function of Microsoft Word 2003.

Certificate of Service

The undersigned hereby certifies that a true and complete copy of the foregoing was mailed, postage pre-paid, to the below attorneys, on the 23rd day of August, 2005 and further certifies that an electronic version was sent via electronic mail to the below counsel and that the file was scanned for viruses and was virus free.

Arthur Benson
4006 Central Avenue
PO Box 119007
Kansas City, MO 64171-9007

Roger Evans
Mimi Liu
Planned Parenthood Federation of America
434 W. 33rd Street
New York, New York 10001

Victorine Mahon
P.O. Box 899
Jefferson City, MO 65102-0899