No. 87321

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IN THE SUPREME COURT OF MISSOURI

PLANNED PARENTHOOD OF KANSAS AND MID-MISSOURI 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

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STATEMENT OF FACTS

This facial challenge to Section 188.250, RSMo., comes to the Court after the trial court denied Appellants' request for declaratory relief, upholding the constitutionality of the statute. (*See* Legal File (LF) at 97.) The Appellants, Planned Parenthood of Kansas and Mid-Missouri, Inc., et al., (hereinafter, "Appellants"), challenged the constitutionality of the statute on several grounds. The basis for those challenges included the following; (1) that the statute as interpreted by the trial court is constitutionally vague; (2) that the act violates the defendants' rights to free speech guaranteed under the First Amendment of the United States Constitution and under Article I Section 8 of the Missouri Constitution; (3) that the statute violates the Commerce Clause of the United States Constitution because of its extraterritorial impact on the otherwise lawful conduct of individuals residing beyond Missouri's borders; (4) that the act unconstitutionally burdens a Missouri minor's right to obtain an abortion; (5) that the statute violates the rights of Missouri Minors to interstate travel as guaranteed by the Privileges and Immunities clause of Article 4, Section 2 of the United States Constitution; and finally (6) that the act must be totally invalidated, as it has no possible constitutional application. (*App. Brief* at. 1-5). Given the constitutional nature of the challenges, the case was directly appealed to this illustrious Court.

The challenge at bar constitutes a wholly facial challenge, as there are no existing civil actions, pending under the act. Appellants challenged the statute both in State and Federal Court. In the federal case, which was styled, *Springfield Healthcare Center Inc. v. Jeremiah W. Nixon, et al*., No. WD#05-4296-CV-C-NKL (W.D. Mo. Sept. 15, 2005), Judge Nanette Laughrey issued a temporary restraining order, barring enforcement of the statute. However, the federal matter was subsequently dismissed and the temporary restraining order, (hereinafter, "TRO"), was dissolved. LF at 97-98.

In the case at bar, the Appellants brought this facial challenge via a declaratory judgment action and a request for a permanent injunction. On or about November 17, 2005, the trial court upheld the constitutionality of the act, denying the Appellants' request for declaratory judgment. However, the trial court issued an injunction, pending appeal of this matter, baring the Appellees from enforcing the provisions of the act. LF at 123-124.

The statute at issue in this case is Mo. Rev. Stat § 188.250. Subsection 1 of the act prohibits individuals from intentionally causing, aiding, or assisting a minor to obtain an abortion without the consent or consents required under Mo. Rev. Stat. § 188.028. The latter statute sets out the procedure by which a Missouri minor may obtain an abortion. These procedures include requiring the consent of at least one parent, or in the alternative an option for judicial bypass of the parental consent. Mo. Rev. Stat. § 188.028.

Subsection two, of the challenged statute, creates a civil cause of action against individuals that perform the acts prohibited by subsection 1. Mo. Rev. Stat. § 188.028.2. Those who intentionally cause, aid, or assist a minor in obtaining an abortion in violation of the Missouri parental consent procedures, are civilly liable to the minor, her parents, or any other person adversely affected by a violation of subsection 1. Mo. Rev. Stat. § 188.028. 2. Subsection 3 of the statute states that the fact that the abortion, "was performed or induced pursuant to consent to the abortion, given in a manner that is otherwise lawful, in the state or place where the abortion was performed or induced," provides no defense to a claim brought under the act. Mo. Rev. Stat. § 188.028. 3. Consequently, any individual who aids or assists a Missouri minor with the purpose of allowing that minor to obtain an abortion, in violation of the parental consent procedures required under Missouri law, is also civilly liable under the act regardless of whether the abortion was lawful in the jurisdiction where it was performed.

The trial court in this matter correctly upheld the statute, as a statute should not be invalidated unless said act clearly violates the constitution. Furthermore, the trial court properly construed the statute narrowly, allowing a constitutional interpretation of the statute to be adopted. The Appellants fail to establish that there is no possible constitutional interpretation of this statute and no possible set of facts where the act could be applied in a constitutionally permissible manner.

POINTS RELIED ON

I. The trial court properly upheld Section 188.250 RSMo., against Appellants' facial challenge that the statute, as interpreted by the trial court, is unconstitutionally vague, overbroad, and hence void. The act is not void for vagueness because the statute provides persons of ordinary intelligence sufficient warning as to what actions are proscribed by the act. Moreover the act is not overbroad, as its potential overbreadth is not legally substantial given the trial court's limiting construction of the statute.

Broadrick v. Oklahoma, 413 U.S. 601 (1973)

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

State v. Brown, 140 S.W. 2d 768 (Mo. banc 2003)

Virginia v. Hicks, 539 U.S. 113 (2003*)*

II. Sec 188.250 RSMo., does not violate Appellants' free speech rights under either the First Amendment of the United States Constitution, or Article I Section 8 of the Missouri Constitution, as the statute does not prohibit Appellants from disseminating information about the availability of out-of state abortions to Missouri minors.

BBC Fireworks v. State Highway & Transportation Commission,

828 S.W.2d 879 (Mo. banc 1992)

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

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

Police Department of Chicago v. Mosley, 408 U.S. 92, 95 (1972)

III. Sec 188.250 RSMo., does not violate the dormant component of the Commerce Clause enacted in Article I, Section 8, Clause 3, of the United States Constitution. The statute is constitutional because it does not directly regulate, or discriminate against interstate commerce, nor is its purpose to favor in-state economic interests at the expense of foreign economic interests.

Cotto Waxo Co., v. Williams, 46 F.3d 790 (8th Cir. 1995)

Schilling v. Human Support Services, 978 S.W.2d 368 (Mo. App. E.D.1998)

Pike v. Bruce Church Inc., 397 U.S. 137 (1970)

State Farm Mutual Auto Insurance Company, v. Campbell,

528 U.S. 408 (2003)

Mo. Rev. Stat. § 506.500

IV. The trial court properly decided that Sec 188.250 RSMo., does not pose an undue burden on a minor's right to choose an abortion, even though the act may have an incidental effect of making abortion more difficult to obtain or more expensive.

Planned Parenthood of Greater Iowa v. Atchison, 126 F.3d. 1042 (8th Circuit 1997)

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

Webster v. Reproductive Health Services, 492 U.S. 490 (1989)

Kan. Stat. Ann. § 65-6705

V. Sec 188.250 RSMo., does not interfere with or implicate the right of Missouri minors to travel to other states under the Privileges and Immunities Clause of Article IV, Section 2 of the United States Constitution. Furthermore, the Section 188.250 does not violate constitutional principals of equality as the act treats Missouri minors and out-of-state minors the same.

Doe v. Miller, 405 F.3d 700 (8th Cir. 2005)

Doe v. Bolton, 410 U.S. 179 (1973)

Sanez v. Roe, 526 U.S. 489 (1999)

VI. Section 188. 250 RSMO., is constitutionally valid in all its applications, as the trial court's narrowing construction limits the act's application to purposeful conduct that causes a Missouri minor to obtain an abortion in violation of Missouri's parental consent law. Alternatively, should this Court find that Section 188.250 is unconstitutional in some, but not all of its possible applications, the statute should still be upheld, but its application should be restricted to those constitutionally permissible applications that comport with the legislature's objective in enacting the statute.

Associated Industries of Missouri, v. Director of Revenue, 918 S.W.2d 780 (Mo. banc 1996)

Hodges v. Southeast Missouri Hospital Association, 936 S.W.2d 354 (Mo. App. W.D. 1998)

National Solid Waste Management Association v. Director of the Department of Natural Resources, 946 S.W.2d 818 (Mo. banc 1998)

Wallace v. Van Pelt, 969 S.W. 380 (Mo. App. W.D. 1998)

ARGUMENT

The trial court correctly upheld Section 188.250 RSMo., as constitutional, finding that the statute was not overbroad, nor vague. The statute is not unconstitutionally vague on its face because its language conveys a definite warning as to what conduct is proscribed by the statute. Although absolute standards of specificity are not required when determining whether the terms of an act are unconstitutionally vague, the trial court, through its strict construction of the act's scienter requirements only creates a civil cause of action against those defendants that act purposely or with the specific intent to violate Section 188.250 and Section 188.028, the Missouri parental consent provisions. More specifically, only those individuals that give a minor aid or assistance for the purpose of said minor obtaining an abortion, without the consents required under Missouri Law, would be subject to civil liabilities.

While the trial court denied the Appellants' request for declaratory judgment, upholding the constitutionality of the statute, the Supreme Court's review of this matter is "essentially *de novo*" as the trial court found that the statute was constitutional as a matter of law. *ITT Commercial Fin. Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2s 371, 276 (Mo. banc 1993).

I. The trial court properly upheld Section 188.250, RSMo., against Appellants' facial challenge that the statute, as interpreted by the trial court, is unconstitutionally vague, overbroad, and hence void. The act is not void for vagueness because the statute provides persons of ordinary intelligence sufficient warning as to what actions are proscribed by the act. Moreover the act is not overbroad, as its potential overbreadth is not legally substantial given the trial court's limiting construction of the statute.

The trial court correctly decided that Section 188.250 RSMo., has a proper constitutional application. The court properly framed the issue in this case as whether or not there was an applicable limiting construction that would cure the statute of any possible constitutional infirmities. The court clearly found that by narrowly construing the scienter requirement of the act it could remedy any hypothetical problems regarding the act's alleged vagueness or overbreadth. The trial court acted appropriately by resolving all doubt in favor of the act's legitimacy.

Furthermore, the trial court acted properly by making every reasonable interpretation to sustain the act's constitutionality. *Westin Crown Plaza Hotel v. King*, 664 S.W. 2d 2, 5 (Mo. banc 1984). In cases where an act is subject to both a constitutional and unconstitutional interpretation, the court has a duty to adopt the constitutional construction. *Asbury v. Lombardi*, 846 S.W.2d 196, 199 (Mo. banc 1993). The court's decision to narrowly interpret the act's scienter requirement,

saving it from any constitutional infirmities, was a reasonable exercise of the judicial power of statutory interpretation.

A. Section 188.250, RSMo., is not vague because, given the trial court's limiting construction, the act provides fair and adequate notice of the conduct proscribed by the statute. Consequently, the act is not susceptible to arbitrary and discriminatory enforcement. Moreover, the scienter provision of the statute employs language that has a well settled meaning under Missouri law, and therefore can not be void for vagueness.

In the case at bar, there are no existing civil actions pending under the act, hence the vagueness challenge made by Appellants is a wholly facial challenge. Ordinarily, a facial challenge of a law's constitutionality requires proof that there are no set of circumstances under which the challenged statute could be constitutionally applied. *Artman v. State Bd. of Registration,* 918 S.W.2d 247, 251 (Mo. banc 1996) (*citing U.S. v. Salerno,* 481 U.S. 739, 745, (1987)). This is a very difficult standard to establish. An "as-applied" challenge to a statute's constitutionality is easier for Appellants to establish. Under the as-applied rubric, Appellants would need to establish that the challenged statute would be unconstitutional under the specific circumstances in which the Appellants propose to act. In other words, the Appellants would need to prove that the statute is unconstitutional as applied to their particular actions, rather than establish that the act is unconstitutional in every conceivable circumstance. *Id* at 251.

However, there is a free speech exception to the requirement that statutory facial challenges exclude all constitutional applications of the challenged act. Where the challenged statute touches on a free speech concern, then the challenger may raise its vagueness or overbreadth as applied to some situation, without needing to establish that the act is unconstitutional in all conceivable situations. *Virginia v. Hicks*, 539 U.S. 113, 118-19 (2003). In the case at bar, the trial court conceded that the statutory language of Section 188.250 RSMo., has the potential of touching on protected speech. LF at 113. Consequently, Appellants are permitted to challenge vagueness or overbreadth of the statute without first establishing that the law cannot be constitutionally applied to any set of facts. If the law is found deficient in its application to a particular circumstance, then the law can not be applied to anyone, under any circumstance, including the Appellants.

Nevertheless, the United States Supreme Court has held that "a state statute should not be deemed facially invalid unless it is not readily subject to a narrowing construction by the State courts, (citation omitted), and its deterrent effect on legitimate expression is both real and substantial." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 216 (1975). This part of the Respondent's argument address the application of the narrowing construction by the trial court, and the issue of the substantiality of the act's impact on First Amendment rights is discussed in a subsequent section.

In the case at bar, the trial court has properly applied a narrowing construction of the scienter requirement of the act, saving it from any alleged constitutional infirmities, including vagueness. Under well-established case law, a statute may only be void for vagueness when the language in the statute fails to convey, to a person of normal intelligence, sufficient warning as to the conduct prohibited by the act when measured by common understanding and practices. *State v. Brown*, 140 S.W.3d 51, 54 (Mo. banc 2004). In this case, by strictly construing the act's scienter requirement, the statutory language makes it clear that a civil cause of action lies only with those defendants that act purposely or with the specific intent to violate Section 188.250 RSMo., and Section 188.028 RSMo.

The trial court acted appropriately by finding that the statutory use of the word of "intentionally" is the equivalent of acting "purposely" as defined in the Missouri criminal code. LF at 105. Under this construction of Section 188.250, RSMo., a person of ordinary intelligence would be on notice that they are subject to civil liability for providing aid or assistance to a Missouri minor for the purpose of said minor obtaining an abortion, without the consents required under Missouri Law. A putative defendant could not be held civilly liable under the act without proof that his intent or purpose in giving aid or assistance was that the minor obtain an abortion, not just mere information about abortion, and that the abortion be obtained without parental consent or judicial bypass as required under Section 188.028 RSMo.

Appellants argue that the trial court's construction of the mens rea requirement of the act amounts to an impermissible re-writing of the statute. *App. Brief at* 38. However, as previously noted, a court acts properly when making every reasonable interpretation to sustain an act's constitutionality. *Westin Crown Plaza Hotel*, 664 S.W.2d at 5. Moreover, courts do not review the constitutionality of an act in complete isolation; rather the court interprets the statute as a whole and with a strong presumption of the statute's validity. *State v. Shaw*, 847 S.W.2d 768, 776 (Mo. banc 1993). This assertion is particular important given that the challenged statute only provides for civil, and not criminal penalties. The level of constitutional scrutiny that Section 188.250 RSMo., must undergo is significantly more lax than the constitutional review applicable to criminal statutes. *Id*. at 775. In the context of vagueness, statutes imposing only civil penalties are held to a lower constitutional standard than criminal statutes, as the impact of the act's uncertainty is less severe. *Village of Hoffman Estates* v. *Flipside, Hoffman Estates Inc*., 455 U.S. 489, 499 (1982).

Assuming that the trial court erred in construing the statutory use of the word of "intentionally" as the equivalent of acting "purposely" in a criminal context, the statute still may not be found to be unconstitutionally vague. The scienter element of Section 188.250 RSMo., requires that an individual act "intentionally" in regards to causing, aiding, or assisting a Missouri minor to obtain an abortion in violation of the Missouri parental consent regulations. In the

challenged statute, the word "intentionally" modifies the conduct proscribed by the act, and conveys adequate and definite warning about the prohibited conduct.

Moreover, a vagueness challenge can not survive when the statute, as is the case at hand, employs words that have come to have a well-settled meaning within the law. *State v. Shaw*, 847 S.W.2d at 775. This Court has applied this reasoning when it reviewed and denied a vagueness challenge to Missouri's child-abuse reporting statute. *State v. Brown* 140 S.W.3d 51, 54 (Mo. 2004). In *Brown*, the statute at issue required health professionals to report suspected child abuse only when the reporter had "reasonable cause to believe" that a child had been abused. *Id*. at 54. This court found that the term "reasonable," was readily understandable by ordinary persons and provided fair notice of the conduct required under the statute. *Id*. at 54. Moreover, the court found that several Missouri statutes included the words "reasonable cause to suspect", and hence the meaning of the phrase was well-settled in the law of Missouri and could not be considered vague. *Id*. at 55.

Similarly, the words "intentional" or "intentionally" also have a well-settled meaning under Missouri law. See, e.g. *Khulusi v. Southwestern Bell Yellow Pages*, 916 S.W.2d 227 (Mo. App. W.D.1995) (discussing a contractual limit of liability provision when a tortfeasor's act is done "intentionally", that is in the absence of accident and with intent to cause harm to plaintiff.); *Crull v. Gleb*, 382 S.W.2d 17, 21(Mo. App. E.D. 1964) (discussing auto liability insurance provision excluding "intentional" damage. Intentional meaning deliberately, consciously

intending the acts… and intending that harm resulting from said acts.); *Cohen v. Metropolitan Life Insurance Co*., 444 S.W.2d 498, 505 (Mo. App. E.D. 1969) (discussing the scienter requirement to establish fraud in a civil case. Fraud requires that a false statement be made "intentionally" to deliberately deceive).

Clearly the word "intentionally" is precisely defined under Missouri law to mean acting with the purpose to cause a particular result. Consequently, only an individual acting "intentionally" in regards to causing, aiding, or assisting a Missouri minor to obtain an abortion, in violation of the Missouri parental consent law, could be found liable under Section 188.250 RSMo. Putative defendants simply providing minors with information about abortion, can not be said to be acting with the requisite intent that the minor undergo an abortion without parental consent. Consequently, Section 188.250 RSMo., is not void for vagueness. The statute's scienter requirement has a well settled meaning within Missouri law. Hence, the statutory language provides persons of ordinary intelligence sufficient warning as to what actions are prohibited under the act. Therefore, Section 188.250 RSMo., can not be found to be unconstitutional due to vagueness.

B. Section 188.250, RSMo., is not overbroad. Although the statute has the potential of limiting both protected and unprotected speech, its potential overbreadth is not legally substantial given the trial court's limiting construction of the act. Consequently, any possible unconstitutional applications of the act can be appropriately addressed by an "as applied

challenge" to the statute, rather than by the facial challenge currently brought before this Court by Appellants.

As discussed in the preceding Section of this Respondent's argument, statutory facial challenges, like the one brought by Appellants, are permissible when a challenged statute, touches on First Amendment rights of free speech. *City of Chicago v. Morales*, 527 U.S. 41, 55 (1999). In their brief to this Court, Appellants have argued that providing minors information about abortion choices could be construed as "aid" or "assistance". *App. Brief* at 44. Undoubtedly, the words "aid", or "assist" as employed in Section 188.250 RSMo., have the potential of infringing on protected speech and even conduct. Enactments, like the one at bar, that have the potential of prohibiting both protected and unprotected speech are appropriately addressed under the doctrine of overbreadth. A statute that proscribes unprotected speech, while simultaneously chilling a substantial amount of protected speech is unconstitutionally overbroad. *Ashcroft v. Free Speech Coalition*, 535 US 234, 244 (2002).

In order for a facial challenge to be successful, it is not enough for Appellants to merely show that statute is overbroad because it impacts protected speech or conduct. Instead, Appellants are required to show, not only that the statute has an impact on protected conduct, (in this case speech, in particular), but that the act actually prohibits a substantial amount of the protected activity. *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). This is something that Appellants have failed to do.

Section 188.250 RSMo., does not prohibit a substantial amount of protected speech, for example the provision of counseling and information regarding abortion to minors is permissible under the act. The statute does not proscribe this type of protected speech because it is excluded under the trial court's limiting instruction. By narrowly interpreting the enactment's scienter provision, the trial court's construction excludes these protected practices from the statute's purview entirely. The trial court's limiting construction prevents the enactment from substantially chilling the Appellants' First Amendments rights of free speech. Given the construction, the act's prohibitions are limited to that speech whose specific purpose or intent is solely to have a Missouri minor undergo an abortion in violation of the relevant Missouri parental consent regulations.

Moreover, in determining whether an enactment impermissibly prohibits a substantial amount of protected speech, a court should evaluate both the ambiguous and unambiguous scope of the law. *Village of Hoffman Estates* v. *Flipside*, 455 U.S. at 494. As previously argued, the language of Section 188.250 RSMo., viewed in conjunction with the trial court's limiting construction, can not be characterized as either vague or ambiguous. *See* Argument § I A *supra*. Even assuming that this Court adopted Appellants' characterization of the enactment as ambiguous, the act should not be struck down if it is subject to a reasonable limiting construction. *Broadrick v. Oklahoma*, 413 U.S. at 613. In the case at bar, the scienter requirement of Section 188.250 RSMo., has in fact been subjected to

the trial court's reasonable narrowing construction, eliminating any statutory ambiguity.

Cleary Appellants have failed to establish how Section 188.250 RSMo., chills a substantial amount of protected speech, when viewed in relation to the act's many clearly constitutional applications. *Virginia v. Hicks*, 539 U.S. at 118-19. The constitutional applications of the act include the State's legitimate and compelling interest in regulating Missouri minor's access to abortion, without the benefit of parental or judicial guidance. The Appellants point to other activities, besides speech, that maybe proscribed by the statute, including rendering "aid" or "assistance" by providing money to finance an abortion, or providing transportation to an abortion provider. LF at 17-18. These activities are properly defined as conduct, rather than pure speech. Furthermore, it is not entirely clear that these sorts of activities could even be characterized as expressive conduct such as picketing or demonstrating might be so characterized. Consequently, any potential constitutional infirmities in relation to these activities can be more appropriately dealt with as an "as-applied" challenge to the statute.

II. Sec 188.250 RSMo., does not violate Appellants' free speech rights under either the First Amendment of the United States Constitution, or Article I Section 8 of the Missouri Constitution, as the statute does not prohibit Appellants from disseminating information about the availability of out-of state abortions to Missouri minors.

A. Section 188. 250 RSMo., is a content-neutral, viewpoint-neutral, and subject matter neutral law that is designed to protect a substantial state interest.

The trial court properly analyzed the challenge to this act under the overbreadth doctrine, as the act had the potential of infringing on both constitutionally protected and unprotected conduct. In Section I of her argument, Respondent outlined the appropriateness of the trial court's review of the enactment based on the overbreadth doctrine. *See* Argument § I *supra*. Respondent emphasized how the trial court's narrow interpretation of the act's mens rea requirement, removes any protected speech from the statute's prohibitions. *See* Argument § I *supra*. The Respondent will not reiterate those arguments here, but will again note for this Court that under the trial court's narrow interpretation of this act, no free speech rights are implicated by the statutory language of Sec 188.250 RSMo.

Nevertheless, should this Court choose to analyze the statute under the rubric of First Amendment jurisprudence, the act would still pass constitutional muster. Respondent shares the Appellants' assertions that generally the State has no power to restrict expression because of its content, subject matter, or viewpoint. *Police Department of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). However, it must be noted that the right to free speech is not absolute, be it under the Missouri Constitution or the United States Constitution. *BBC Fireworks v. State Highway & Transportation Commission*, 828 S.W.2d 879, 881-82 (Mo. banc 1992);

(holding that a Missouri statute restricting the placement of an outdoor billboard was a constitutionally permissible regulation of speech and a legitimate exercise of the State's police powers). *Hustler Magazine v. Falwell*, 485 U.S. 46, 56 (1988); (holding that obscene speech is outside the purview of First Amendment protection).

Once again Respondent does not contend that the statutory language of Section 188.250 RSMo., implicates speech restrictions, but should this honorable Court adopt Appellants' position, arguably any such restriction is a valid exercise of the State's police power and a permissible infringement on expressive conduct.

The enactment at issue in this case is a constitutionally permissible, content-neutral law. The State may regulate expressive conduct, including speech, if the purpose of the regulation can be justified without reference to the content or subject matter of the speech that is being regulated. *Hill v. Colorado*, 530 U.S. 703, 719-20 (2000). Moreover, in order for a regulation to truly be content-neutral, it must be designed to serve a substantial state interest and provide reasonable alternative avenues of expression. *St. Louis County v. B.A.P. Inc*., 18 S.W.3d 397, 405 (Mo. App. E.D. 2000).

Despite Appellants' allegation, it is clear that Section 188.250 RSMo., can not be construed as content based restriction on Appellants' ability to disseminate information concerning the availability of out-of-state abortions. Content based prohibitions on speech are those that restrict speech because of its message or subject matter. *Bolger v. Youngs Drug Products Corp*., 463 U.S. 60, 65 (1983).

Generally, content based restrictions are constitutionally infirm, except in very limited circumstances, and true content or viewpoint based restrictions are always subject to strict constitutional scrutiny. *G.Q. Gentlemen's Quarters, Inc., v. City of Lake Ozark*, 83 S.W.3d 98, 101 (Mo. App. W.D. 2002). In order for a content based restriction to pass constitutional review under a strict scrutiny standard, the regulation must be narrowly tailored to promote a compelling government interest. *Id*. at 101.

In the case at bar, Section 188.250 RSMo., is merely subject to intermediate scrutiny because it restrictions on expression, if any, are content and viewpoint neutral. Consequently, the State need only produce evidence that the legislative motivations for enacting the statute were based on protecting substantial state interests rather than simply on suppressing protected speech. *United States v. O'Brien*, 391 U.S. 367, 377 (1968); *United States v Playboy Entertainment Group Inc*., 529 U.S. 803, 816-17 (2000).

In order to determine the legislative intent behind the statute a court may look to a number of sources including, the text of the statue itself, or documents relating to its legislative history. *G.Q. Gentlemen's Quarters, Inc*.,83 S.W.3d at 102. In the matter at hand, both sources clearly indicate that the legislature's purpose in passing Section 188.250 was simply to protect minors from having an abortion without the benefit of parental, or at least, judicial involvement. Respondent will not address the arguments relating to the legislative intent implicit in the statutory language, as that matter was discussed earlier in this

document. *See* Argument § I *supra*. Instead, this section will examine the legislative intent derived from a review of the statute's history.

A review of the relevant legislative history, clearly demonstrates that the driving force behind the enactment was not to prohibit Appellants from sharing information about the availability of out-of-state abortions. A summary of the committee version of the bill, passed by the Missouri House of Representatives, indicated that those in favor of the current version of the law believed that the act would prohibit individuals from aiding a minor to obtain an abortion in Illinois, without her parents' consent. (See Summary of Committee Version of Bill at www.house.mo.gov/bills053/bilsum/commit/sHB1c.htm). The proponents of the enactment do not cite any motivations pertaining to a prohibition on providing minors with information about a wide array of reproductive choices, abortion being one of these.

Section 188.250 RSMo., is similar to the statute at issue in *Hill v. Colorado*. In *Hill*, the challenged statute created a criminal penalty for any person knowingly approaching within eight feet of an individual, that was within one-hundred feet of a health care facility entrance, for the purpose of engaging in oral protest, education, or counseling unless the individual consented to the approach. *Hill*, 530 U.S. at 720. The act was passed in part due to the conduct of pro-life advocates protesting near abortion clinics. Four separate Colorado courts, including the Colorado Supreme Court, and ultimately the United States Supreme Court, found the statute to be a constitutional content-neutral regulation. *Id*. at 719.

In coming to its decision, the Supreme Court noted that the enactment was not passed because the legislature disagreed with the message of the protestors rather, it was adopted because it served the State's compelling interest in protecting access to healthcare facilities and privacy of healthcare patients. *Id.* at 719-20. Moreover, the *Hill* Court noted that the restrictions on demonstrators applied equally to everyone, regardless of the viewpoint encompassed in the oral protest, education, or counseling. The distance and consent for approach restrictions would apply even if an individual was protesting or counseling women in favor of getting an abortion.

The Supreme Court found the statute in *Hill* constitutional even though it was arguably possible, that in some instances, the actual content of an individual's speech would have to be reviewed to ascertain whether the actor was counseling or protesting in violation of the act, rather than simply engaging in everyday conversation within an individual entering a health facility. *Hill*, 530 U.S. at 720.

Section 188.250 RSMo., presents a much simpler decision for this Court, as it does not call for the Court to examine the content of an individual's speech in order to determine a violation of the act. The enactment simply does not prohibit speech, regardless of whether the speech pertains to out-of-state abortion or out-of-state adoption. The statute does not proscribe the dissemination of information about the availability of abortion services, either in this state or in others, nor the availability of crisis pregnancy services in Missouri or elsewhere. This statute like the one in *Hill*, does not proscribe expressive activity based on its viewpoint. The

only thing prohibited by the act is intentional or purposeful action that causes, aids, or assists a Missouri minor to actually undergo an abortion in violation of the Missouri parental consent law. Respondent can not conceive of any situation where providing information alone, could be construed as intentionally causing an abortion.

Furthermore, it can reasonably be argued that the State has a substantial interest in involving parents in the abortion decision of their minor daughters. Certainly the State has a important and vested interest in preserving family unity and in giving parents the opportunity to provide their daughters with guidance in regards to a decision that has substantial emotional, religious, and medical repercussions. The State recognizes that in most incidences it is the parents, who are most knowledgeable about the emotional/spiritual background of the minor, and it is they who are in the best position to guide the minor concerning an abortion decision, not the courts, or third parties. In those cases where family unity has already been irreparably broken, due to abuse or neglect of the minor, the State recognizes the need for judicial by-pass and provides such a mechanism. In the case at hand, it is clear that Section 188.250 RSMo., was enacted for the sole purpose of protecting the aforementioned substantial interests, and not for the mere purpose of restricting protected speech. Hence the enactment is constitutional under an intermediate standard of review.

III. Sec 188.250 RSMo., does not violate the dormant component of the Commerce Clause enacted in Article I, Section 8, Clause 3, of the United

States Constitution. The statute is constitutional because it does not directly regulate, or discriminate against interstate commerce, nor is its purpose to favor in-state economic interests at the expense of foreign economic interests.

A. Section 188. 250 RSMo., only has an indirect effect on interstate commerce, and the enactment serves a legitimate state purpose unrelated to economic protectionism. Furthermore, the State's legitimate purpose, protecting Missouri minors from abortions without parental consent, could not be served as well by any other means.

Under Article I, Section 8, Clause 3 of the United States Constitution, Congress has the power to regulate people or things involved in interstate commerce, and to regulate conduct that has a substantial impact on interstate commerce. *United States v. Lopez*, 514 U.S. 549, 559-60 (1995). Arguably, certain conduct, proscribed by Section 188.250 RSMo., could be considered conduct that has a substantial impact on interstate commerce. In at least one case involving abortion, the 8th Circuit Court of Appeals found that abortion clinics and their out-of-state patients are with the purview of Congress' commerce power. *United States v. Dinwiddie*, 76 F.3d 913, 919-20 (8th Cir. 1996).

Furthermore, the dormant component of the Commerce Clause prohibits the states from enforcing laws that unduly burden interstate commerce, due to the law's extraterritorial reach. *Cotto Waxo Co. v. Williams*, 46 F.3d 790, 793 (8th Cir. 1995). A statute has an unconstitutional extraterritorial reach when it directly

controls commerce occurring beyond the state's borders, or when its purpose is to discriminate against interstate commerce and curry favor for intrastate commerce. *Healy v. Beer Institute*, 491 U.S. 324, 336 (1989); *Cotto Waxo Co*., 46 F.3d at 793.

An enactment that directly burdens interstate commerce, or one enacted for a discriminatory purpose are subject to a strict scrutiny standard of review. *Id*. at 793. Such statutes violate the Commerce Clause unless the state can establish that the law serves a legitimate purpose and that said purpose is unrelated to a desire to protect intrastate economic interests. Moreover, the state must also show that its legitimate purpose could not be served as soundly by an alternative nondiscriminatory means. *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979).

The Court should note that the burden of establishing that a statute is in fact discriminatory to commerce lies with the party challenging the validity of the act. *Id*. at 336. However, if the statute does not directly burden interstate commerce or have a discriminatory impact, then it is subject to a balancing test, not strict scrutiny. *Pike v. Bruce Church Inc*., 397 U.S. 137, 142 (1970). When a statute, like the one at hand, regulates commerce in an even-handed manner, for the purpose of achieving a legitimate local interest, and its impact on interstate commerce is only indirect or incidental, the law will be upheld. It will only be deemed invalid if the burden it imposes on interstate commerce is clearly excessive when compared to the state's legitimate interests. *Id.* at 142.

If this Court determines that a legitimate local purpose for the regulation exists, then the Court must determine the degree of burden on interstate commerce that will be tolerated. This analysis will depend on the nature of the local interest involved, and on whether the interest could be promoted as effectively through other means having a lesser impact on interstate activities. *Pike*, 397 US at 142.

The statute at issue in this case, does not have an extraterritorial reach, as it does not require Appellants to conduct their abortion business solely according to Missouri's terms. The analysis employed by the 8th Circuit Court of Appeals in *Cotto Wax*, is helpful to our analysis of Section 188.250 RSMo. In *Cotto Wax*, the challenged law prohibited the sale of petroleum-based sweeping compounds. *Cotto Wax*, 46 F.3d at 792. Cotto Wax, an out of state seller of petroleum compounds, challenged the statute on three prongs: (1) the act's extraterritorial impact; (2) the act's discriminatory purpose and impact on interstate commerce; (3) the act's inability to survive the Court's application of a balancing test between the burden on interstate commerce, and the legitimate purpose of the act. Id. at 794-795. The *Cotto Wax* Court found in favor of the act's validity on all three prongs. Nevertheless, the Court of Appeals remanded the case for retrial on the issue of constitutionality, as there was insufficient evidence regarding the act's burden on interstate commerce and legitimate purpose to allow the Court to grant summary judgment on the issue.

Relying on the analysis employed in *Cotto Wax,* this honorable Court should also come to the conclusion that the act does not have an extraterritorial

impact. Section 188.250 RSMo., does not effect out-of-state commerce generally, although it does have an impact on Appellants' participation in interstate commerce.

Section 188.250 RSMo., is inapplicable to speech regarding the availability of abortions. *See* Argument §§ I-II *supra*. Consequently, the only activity that maybe proscribed by the act is specific conduct on the part of the Appellants. Appellants' current conduct of performing abortions on Missouri minors, could come within the purview of the act, if those abortions are performed with the intent that Missouri's parental consent laws be violated. It is this extreme set of circumstances that presents the act's most likely impact on interstate commerce. However, even under these extreme set of circumstances, the act still does not have an extraterritorial reach.

The statute itself is indifferent in its prohibition of non-parental consent abortions for Missouri minors, whether those abortions occur within Missouri or outside Missouri. Appellants may continue to perform out-of state abortions on minors from Illinois, Kansas, and other states where nothing or something less, than parental consent is all that is required. Appellants may continue to perform out-of-state abortions on out-of-state minors despite Appellants' relationship with Missouri and its minors. Consequently, the act does not have an extra territorial reach.

Secondly, the Court should not apply a strict scrutiny standard of review, as the act does not directly burden interstate commerce, as it was not passed for a

discriminatory purpose, and does not have a discriminatory impact on interstate commerce. Although the act may negatively affect the Appellants' ability to participate in interstate commerce with some Missouri minors, those that Appellants know will not comply with Missouri's parental consent requirements, that does not constitute a direct or discriminatory impact on interstate commerce.

The act itself provides no differential treatment for abortions performed by in-state abortion business or out of state abortion business. The act creates a legal cause of action against those that violate its terms regardless of where the abortion procedure was performed, and regardless of whether the abortion was performed by an in-state or out-of-state entity. Therefore, it can not be said the act directly burdens interstate commerce, or that it has a discriminatory impact on interstate commerce. Hence, strict scrutiny review of Section 188.250 RSMo., is not applicable.

Moreover, no discriminatory intent can be garnered from the statutory language of Section 188.50 RSMo. The statutory language of the act indicates that its purpose is to prevent minors from undergoing abortions in the absence of parental or judicial consent. Nothing in the statutory language conveys an ulterior motive of preferential treatment for in-state abortion businesses in contrast to out-of-state abortion businesses. Consequently, as the statute was not enacted for an obvious discriminatory purpose strict standard review does not apply.

Given that Section 188.250 RSMo., does not directly burden interstate commerce or have a discriminatory impact it is subject to the balancing test

analysis developed by the *Pike* Court. *Pike*, 397 U.S. at 142. Under the *Pike* balancing test Section 188.250 RSMo., clearly is constitutional. First, the act regulates in an even-handed manner, treating both in-state and out-of-state abortion business the same. Second, the purpose of the regulation achieves a legitimate local interest. That interest is the prevention of Missouri minors from obtaining abortions in the absence of parental consent. As previously discussed, there can be little doubt that parental involvement in a minor's abortion decision is legitimate and compelling interest. *See* Argument § II *supra*. Furthermore, the act's impact on interstate commerce is only indirect or incidental, as Appellants may be prevented from performing out-of-state abortions, in cases where they know the potential patient is a Missouri minor, and is unwilling to comply with parental consent regulations. Such a prohibition on Appellants conduct only represents an indirect impact on interstate commerce; consequently under the *Pike* balancing test the act is constitutional.

B. Section 188.250 RSMo., does not in and of itself violate due process rights guaranteed under the 14th Amendment of the United States Constitution, as Missouri Courts have a procedure by which to obtain personal general jurisdictions over non-resident Defendants that commit tortious acts outside Missouri.

Due process will not necessarily be violated simply because, as Appellants' hypothesize, an out-of-state abortion provider or its staff, are sued in Missouri for out-of-state conduct that is in violation of Section 188.250 RSMo. Whether or not

a suit of a particular individual or entity is proper will depend on an examination of the putative defendant's minimum contacts with Missouri, and whether plaintiff's cause of action arises under one of the enumerated acts in the Missouri long-arm statute. This will require the Court to make a case by case analysis of jurisdiction, but there is no evidence that without such an examination a suit under the act would automatically violate a defendant's due process rights.

In order to for a potential defendant to be subject to the jurisdiction of Missouri Courts, a potential plaintiff would have to first, establish that his or her claim arises out of one activities listed in the Missouri long-arm statute. *Longshore v. Norville*, 93 S.W. 3d 746, 751-52 (Mo. App. E.D. 2002). Furthermore, a putative plaintiff would also have to establish that any putative defendant had sufficient minimum contacts with Missouri, such that suing the defendant in Missouri would be fair and just. *Id*. at 752.

In determining whether a non-resident defendant had sufficient minimum contacts with Missouri to warrant an exercise of personal jurisdiction, Missouri Courts examine the following factors:

(1) the nature and quality of the contact;

(2) the quantity of contacts;

(3) the relationship of the cause of action to those contacts;

(4) the interest in Missouri in providing a forum for its residents; and

(5) the convenience or inconvenience to the parties.

Schilling v. Human Support Services, 978 S.W.2d 368, 371 (Mo. App. E.D. 1998). A putative plaintiff must also establish that jurisdiction is proper under the long-arm statute. Section 506.500 RSMo., states in relevant part as follows:

> Any…person whether or not a citizen of this state or resident of this state, … who in person or through an agent does any of the acts enumerated in this section, thereby submits such person …to the jurisdiction of the courts of this state as any cause of action arising from the doing any of the such acts:
>
> …
>
> (3) The commission of a tortious act within this state;

Section 506.500 (3) RSMo.

A Missouri Court would have to evaluate the specific circumstances surrounding a claim, in light of the factors discussed above before the question of jurisdiction could properly be decided. Arguably some individuals or entities may not have sufficient minimum contacts with Missouri to be subject to our jurisdiction. Entities that advertise in Missouri, or otherwise solicit patients for abortions or other reproductive services within Missouri are more likely to have the requisite minimum contacts. The same could be said of individual staff members that work at out-of-state abortion providers, but perhaps reside in Missouri.

In their Argument, Appellants misapply the principals of *State Farm Mut. Auto. Ins. Co. v. Campbell*, 528 U.S. 408, 422 (2003). The *State Farm* Court

found that the lower court's award, of unreasonably high punitive damages, was a violation of the defendant's due process rights. Appellants argue that the motivation for the High Court's decision was some prohibition against punishment for otherwise legal out-of state conduct. (*App. Brief.* at. 66-67). This is incorrect; in fact the *State Farm* Court clearly states that "lawful out-of-state conduct may be probative when it demonstrates the deliberateness and culpability of the defendant's action in the State where it is tortious, but that conduct must have a nexus to the specific harm suffered by the plaintiff". *Id*. at 422.

In *State Farm*, the Supreme Court rejected the punitive damage award because it was based on out-of-state conduct directed at other individuals, not the plaintiffs, and that conduct bore no relation to the harm suffered by the plaintiffs in the forum state. *State Farm*, 538, U.S. 408, at 419-23. Arguably there are circumstances in which an out-of-state abortion provider's conduct, of performing an abortion in violation of the act, would be evidence of the abortion provider's intent do that which is tortuous under the language of Section 188.250 RSMo. Furthermore, there would be a clear nexus between the conduct, the abortion, and the specific harm, for example emotional injury to the Missouri-resident parent of the minor.

Assuming that a particular out-of-state defendant had the requisite minimum contacts to be sued in Missouri, jurisdiction would also be proper under the long-arm statute. This is true in spite of the fact that the tortious conduct may have occurred outside Missouri. The Missouri long-arm statute's provision

regarding the "commission of torts" includes out-of-state tortious conduct that produces consequences within Missouri. *Longshore*, 93 S.W. 3d at 752. It is reasonable to suppose that a minor's out-of-state abortion, if performed in violation of Section 188.250 RSMo., could create negative consequences for the Missouri-resident parent of the minor.

Consequently, any exercise of Missouri's jurisdiction against out-of-state abortion providers, that satisfy the minimum contacts test and the relevant provisions of the Missouri long-arm statute is constitutional under the due process rights guaranteed by the 14th Amendment of the United States Constitution.

IV. The trial court properly decided that Sec 188.250 RSMo., does not pose an undue burden on a minor's right to choose an abortion, even though the act may have an incidental effect of making abortion more difficult to obtain or more expensive.

A. In some cases, a Missouri minor seeking an out-of-state abortion may be required to undergo two judicial bypass procedures in order to avoid violating Section 188.250 RSMo. However, this does not create a substantial obstacle in the path of a minor seeking an out-of-state abortion.

The essential purpose of Section 188.250 RSMo., is to promote parental or judicial involvement in a minor's abortion decision. Section 188.250 achieves this goal by creating a cause of action against those that purposefully cause a minor to obtain an abortion in violation of Section 188.028, Missouri's parental consent

law. There is no doubt that Missouri's parental consent law, which is referenced by Section 188.250 RSMo., is constitutional.

The United States Supreme Court has consistently ruled that parental consent regulations, which allow for judicial bypass, do not present an undue burden to minor's abortion right. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 899 (1992); *Belloti v. Baird*, 443 U.S. 622, 633 (1979); *Planned Parenthood Association of Kansas City* v. *Ashcroft*, 462 U.S. 476 (1983). This is the type of consent statute embodied by Section 188.028 RSMo. There is no doubt that these types of statutes have been found constitutional because the laws do nothing more than provide parents an opportunity to express their opinion in regards to their minor daughter's desire for an abortion. Laws mandating parental or state involvement in a minor's abortion decision, even if the regulation's intent is to persuade the minor to choose childbirth over abortion, are properly constitutional. *Casey*, 505 U.S.at 878. This is true, so long as the regulation does not have as its purpose, or effect, the creation of substantial obstacles in the minor's ability to obtain an abortion. *Id*. at 877. Statutes that create a substantial obstacle to abortion create an undue burden on the right to choose abortion and are unconstitutional. Id. at 877.

Appellants correctly argue that at least for Missouri minors desiring to obtain an abortion in Kansas, it is likely that these minors will need to engage in judicial bypass procedures both in Missouri and Kansas, in order to avoid violating Section 188.250 RSMo. The reason for this is that Kansas also has a

parental involvement statute, although it only requires notice and not consent, so it is a less stringent statute. (See Kan. Stat. Ann. §65-6705 (a)). Appellants contend that forcing a minor to litigate two separate judicial bypass proceedings presents a substantial obstacle to the abortion choice. (*App. Brief* at 70-73).

Appellants allege that undergoing two bypass procedures would force minors to travel hundreds of additional miles to obtain an abortion, increasing the minor's travel expenses, and possibly delaying the procedure, which would increase the risk and expense of the procedure itself. (*App. Brief* at. 1-72). Appellants also argue that litigation in two jurisdictions may deprive a minor of the presence of a caring adult at an abortion procedure, if the adult happens to be a Missouri resident. *Id*. at 73-74.

Many state regulations have an indirect or incidental effect of increasing the cost, or decreasing the availability of abortion. (See *Webster v. Reproductive Health Services*, 492 U.S. 490, 509 (1989)) (holding that Missouri's refusal to allow public employees to perform abortions in public hospitals is constitutional, as it leaves a pregnant women with the same choices as if Missouri had no public hospitals at all.) However, just because a law has the indirect effect of making abortion more expensive or even more difficult to obtain this is not sufficient to invalidate it, as creating an undue burden on the abortion right. *Casey*, 505 U.S. at 874.

So long as a state regulation, despite its incidental impact on abortion, serves a compelling state interest and is not designed simply to strike at the

abortion right itself, it may not be invalidated merely because it makes abortion more expensive or more cumbersome. *Planned Parenthood of Greater Iowa v. Atchison*, 126 F3d. 1042 (8th Cir. 1997). In the case at bar, Section 188.250 RSMo., may undoubtedly make abortion more cumbersome and more expensive. However, the regulation is not designed to proscribe or make abortion all but impossible. The act serves the compelling state interest of involving parents in the abortion decisions of minors whenever possible. Many of the difficulties relevant to obtaining an abortion described in the Appellants' argument, would still be present regardless of whether or not Section 188.250 RSMo., were actually enforced. By Appellants' own admission, many minors are already forced to travel hundreds of miles for an abortion because abortion services in central and western Missouri are extremely limited. LF at 14-15. Undoubtedly this travel increases the cost of the procedure. It is likely that many young women already have to undergo the abortion procedure alone, without the benefit of a trusting caring adult. This happens in spite of any restrictions proposed by the statute in question. Furthermore, in jurisdictions, such as Kansas, where the presence of an adult is required during an abortion, this need can be met by a counselor from an entity that is unaffiliated with the abortion provider. *See* Kan. Stat. Ann. § 65-6704(a).

Moreover, although undergoing two bypass procedures maybe cumbersome, minors undergoing these procedures are still given an effective opportunity for an abortion to occur. A Missouri minor who chooses to have an

abortion in Kansas could simultaneously engage in the bypass procedure in both states, thus expediting the matter altogether. In summary, none of the difficulties in obtaining abortion outlined in Appellants' argument could be said to rise to the level of an undue burden. These inconveniences are not undue burdens to abortion as they are not obstacles which the statute created for the purpose of depriving women a meaningful opportunity to obtain an abortion. Consequently, the act is constitutional even if it has the incidental effect of making abortion more expensive or difficult to obtain.

V. Sec 188.250 RSMo., does not interfere with or implicate the right of Missouri minors to travel to other states under the Privileges and Immunities Clause of Article IV, Section 2 of the United States Constitution. Furthermore, Section 188.250 does not violate constitutional principals of equality as the act treats Missouri minors and out-of-state minors the same.

The Appellants' argument regarding the right to travel and right to be treated the same as the citizens of other states under the Privileges and Immunities Clause, is improperly framed. The Appellants contend the Sec 188.250 RSMo., restricts Missouri minors' rights to travel to other states and obtain abortions there. (*App. Brief*. at 76). Furthermore, Appellants contend that the act impermissibly prevents Missouri minors from obtaining medical services on the same basis as the residents of the states to which they travel, resulting in discrimination of Missouri minors. *Id*. at 77. This scenario is a misstatement of the facts that are applicable in Privileges and Immunities cases.

The right to travel provides citizens of one state with the freedom to leave their home state and enter a sister state. Furthermore, the Privileges and Immunities Clause prohibits discrimination by the state against non-resident visitors. *Sanez v. Roe*, 526 U.S. 489, 500 (1999). For example, in *Doe v. Miller*, the 8th Circuit Court of Appeals analyzed an Iowa law that limited sex offenders from residing within two thousand feet of a school or child care facility. *Doe v. Miller*, 405 F.3d 700 (8th Cir. App. 2005). The plaintiffs', convicted sex offenders, challenged the act on the basis that the residency restriction interfered with their constitutional right to travel, as the law would deter out-of-state sex offenders from moving to Iowa. *Id*. at 711. The Court of Appeals found that the act did not constitute an obstacle for out-of-state sex offenders that desired to travel to Iowa. Furthermore, the Court found that since the act allowed the out-of-state offenders the freedom to come and go from Iowa's borders, it did not impair the right to interstate travel. *Id*. at 712. The *Doe* Court also noted that the statute did not implicate any principals of equality, in that it treated resident sex offenders of Iowa the same as non-resident sex offenders. *Id*.

Right to travel jurisprudence is always concerned with whether or not the non-resident citizen can enter a sister state, and whether, once there, he is treated the same as the citizens of that state. These were the circumstances surrounding the plaintiff in *Doe v. Bolton*, an abortion right to travel case. In *Doe v. Bolton*, an out-of-state traveler entered Georgia to obtain an abortion and was unconstitutionally denied the abortion, as under Georgia law only Georgia

residents could obtain abortions in Georgia medical facilities. *Doe v. Bolton*, 410 U.S. 179, 200 (1973).

The Supreme Court decided the issue under a Privileges and Immunities framework, finding that the constitution protects non-residents that travel and enter Georgia seeking medical services, in particular abortions, available within that state. *Id*. at 200. Although Appellants attempt to draw analogies between the facts at issue in this case, and those at work in *Doe v. Bolton* and *Doe v. Miller*, their analogies clearly miss the mark.

Section 188.250 RSMo., is a Missouri statute that applies to Missouri minors and to non-resident minors that enter Missouri for the purpose of obtaining an abortion. Missouri has a compelling interest in regulating the process by which its own resident minors obtain abortion services. Furthermore, the act subjects non-resident minors to the same requirements that Missouri minors are subject to. The case at bar, has nothing to do with a non-resident entering Missouri and being treated less favorably than Missouri residents. There is nothing about Section 188. 250 RSMo., that creates barriers to a minor's ability to leave Missouri and travel to other states for whatever purpose. There maybe some practical issues that may limit a minor's ability to travel, including financial means, or adequate transportation, but neither of these obstacles are a result of Section 188.250 RSMo.

In all cases, Missouri minors are free to go out-of-state and obtain abortions, although abortion providers may limit access based on the minor's

willingness to comply with Missouri's parental consent statute, and with whatever parental involvement law is applicable in the jurisdiction where the abortion is to be performed. Neither of these factors constitutes an infringement on the right to interstate travel nor discrimination based on residency status.

Consequently, Privileges and Immunities analysis is not the appropriate framework by which to analyze Section 188.250 RSMo., as the act does implicate the right to interstate travel, nor is it a regulation that discriminates based on traveler's out-of-state status.

VI. Section 188. 250 RSMO., is constitutionally valid in all its applications, as the trial court's narrowing construction limits the act's application to purposeful conduct that causes a Missouri minor to obtain an abortion in violation of Missouri's parental consent law. Alternatively, should this Court find that Section 188.250 is unconstitutional in some, but not all of its possible applications, the statute should still be upheld, but its application should be restricted to those constitutionally permissible applications that comport with the legislature's objective in enacting the statute.

Under the trial court's narrowing construction it is clear that Section 188.250 RSMo., does not infringe on any type of constitutionally protected speech, including the dissemination of information about out-of-state abortion services. The act does however, arguably restrict some conduct, if such conduct includes the requisite mens rea of assisting or aiding a minor with the purpose that

said minor undergo an abortion in violation of Section 188.028 RSMo., the Missouri parental consent statute. *See* Argument §§ I-II *supra*.

None of the conduct or activity which might be restricted by the statute is constitutionally protected under the Commerce Clause of the United States Constitution. *See* Argument § III *supra*. Furthermore, none of the activity proscribed by the act constitutes a constitutionally impermissible obstacle on a minor's right to obtain an abortion. *See* Argument § IV *supra*. Finally, the conduct prohibited by the statute does not in anyway infringe, or even implicate the right of a Missouri minor to travel from Missouri to other states to obtain an abortion. *See* Argument § V *supra*. Consequently, Section 188.250 RSMo., does not violate the constitutional rights of Appellants' or their clients, and must be declared constitutional in its entirety.

However, should this honorable Court find some of Appellants' arguments compelling, and determine that Section 188.250 RSMo., is unconstitutional in some of its applications, the act should not be stricken completely, but instead its applications should be severed and limited to circumstances where the act's application is constitutional and achieves its ascertainable legislative intent. *Hodges v. Southeast Missouri Hospital Association*, 936 S.W.2d 354, 358-359 (Mo. App. W.D. 1998).

The *Hodges* case is illustrative of the factors at issue in the case at bar. In *Hodges*, a portion of Missouri's medical malpractice statute of limitations, relating to time limits for minors to bring suit, had been found unconstitutional under the

Missouri Constitution in a prior case. Id. at 356-57. The existing medical malpractice statute of limitations established a two-year time limit, from the date of injury, to file suit in medical malpractice cases.

The statute had originally contained a provision that created an exception to the two-year rule for minors. The provision allowed minors that were injured, prior to their tenth birthday, until the age of twelve to file suit. Id. at 356. This provision was struck down by this Court in *Strahler v. St. Luke's Hospital*, 706 S.W.2d 7 (Mo. banc 1986); (holding that the act unconstitutionally barred a minor's right to seek redress in Missouri courts, and that the statute of limitations should be tolled for minors until they reach majority, at which time the two-year time limit begins to run). *Strahler*, 706 S.W. 2d at 11.

Plaintiff Hodges alleged that the two year statute of limitation, did not apply to him as he was a minor at the time of his injury, and that the act had been declared unconstitutional as to minors. *Hodges*, 936 S.W.2d at 355. However, this did not invalidate the statute as a whole, but merely made it inapplicable to minors. Mr. Hodges was, twenty-one when he filed suit, and as of his eighteenth birthday, he could not be considered a minor. Although the act was unconstitutional as applied to minors, the statute was still applicable to non-minors, like plaintiff Hodges. *Id*. at 357. *Hodges* stands for the proposition that an invalid *application*, (emphasis added), of a statute can be severed from the remaining constitutional applications of the law. *Id*.

Similarly, in the case at bar, a finding that one application of Section 188.250 RSMo., is unconstitutionally infirm, does not render the remaining applications of the act infirm as well. *Batek v. Curators of University of Missouri*, 920 S.W.2d 895, 898 (Mo. banc 1996). This Court has noted that common-law severability is appropriate in situations where the entire law is unconstitutional as to some, but not all possible factual applications. *Associated Industries of Missouri, v. Director of Revenue*, 918 S.W.2d 780, 784 (Mo. banc 1996). Clearly this same logic applies to the severability of the constitutional and unconstitutional applications of Section 188.250 RSMo. The fact that act is constitutionally deficient in one of its many applications, ought not render it invalid and unenforceable in every single set of circumstances to which it may properly apply.

In *Associated Industries*, the Court was dealing with a Missouri use tax, which the United States Supreme Court had found to be invalid as applied to certain Missouri districts where the local sales tax was lower than the proposed use tax. *Id.* at 784. The *Associated Industries* Court stated that "the act could be sustained but …must be restricted in application to those objectives within the jurisdiction of the legislature." 918 S.W.2d at 784. This Court ultimately struck down the entire act, not because its constitutional applications were incapable of severability from its unconstitutional ones, but rather because the act's permissible applications would not have been in line with the legislature's purpose in passing the tax act. *Id*. at 784-85.

The question of legislative intent is vital in the analysis of whether the unconstitutional applications of an act can be severed from proper applications. The heart of the matter is whether the General Assembly would have enacted the statute in question, given the fact, that the law is only enforceable under certain constitutionally permissible applications. *National Solid Waste Management Association v. Director of the Department of Natural Resources*, 946 S.W.2d 818, 822 (Mo. banc 1998). In regards to Section 188.250 RSMo., that question can be answered in the affirmative.

In order to ascertain the legislative intent of the General Assembly in enacting Section 188.250., RSMo., it necessary to look at the statutory language itself. The language states that "no person shall intentionally cause, aid, or assist a minor to obtain an abortion without the consent or consents required by section 188.028." The statutory language makes it clear that the legislative intent behind the act is to protect minors from obtaining abortions without the benefit of parental or judicial consultation. See. Argument § II *supra*. Moreover, in order to gain further insight into the legislature's motivation for passing the act, it necessary to examine the problems that the act sought to remedy and the circumstances existing at the time the law was passed. *Wallace v. Van Pelt*, 969 S.W. 380, 383 (Mo. App. W.D. 1998).

As discussed previously, the legislature passed the act in an attempt to discourage abortion providers from performing abortions on minors that did not have parental or judicial consent. There is evidence that the legislature wanted to

target abortion providers in Illinois in particular, as parental consent is not required there. (*See* Summary of Committee Version of Bill at www.house.mo.gov/bills053/bilsum/commit/sHB1c.htm).

The legal file also reflects that Plaintiff, Comprehensive Health, provides access to funds for low-income women and minors to obtain abortions. LF at 18. The legal file also reflects the concern that minors need travel assistance to reach an out-of-state abortion provider. *Id*. at 21. Consequently, it is clear that the circumstances surrounding the issue of out-of-state abortion by minors included the fact that abortion providers may provide funding and travel to assistance to said minors. Given the statutory language, the surrounding circumstances, and the available legislative history it is clear that the General Assembly's goal in enacting Section 188.250 RSMo., was to prohibit Missouri minors obtaining out-of-state abortions without parental or judicial consent.

Although the Court may find, that the act is not constitutionally viable in all its applications, it could be found proper in some, including much of the conduct described above. For example, this Court may find that the act is properly applied where an individual pays for the abortion of a Missouri minor, knowing that the abortion is without parental or judicial consent. Given the fact that statute's restricted application still comports with the General Assembly's intent, of protecting Missouri minors from abortions without parental consent, Section 188.250 RSMo., should be upheld to the fullest extent possible.

CONCLUSION

Respondent, Jennifer Joyce, Circuit Attorney of the City of St. Louis, respectfully requests this Court uphold the trial court's ruling and deny Appellants' request for judgment declaring Section 188.250 unconstitutional. Moreover, Respondent prays this Court lift the injunction issued by the trial court, and allow Section 188.250 RSMo., to be enforced as enacted.

Respectfully submitted,

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CERTIFICATION

I, Rebeca Navarro-McKelvey, counsel for Respondent Jennifer M. Joyce, pursuant to rule 84.06(c), 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 12,645 words according to the Word Count function of Microsoft Word 2003.
(4) the enclosed floppy disk has been scanned for viruses and is virus free.

_____
Rebeca Navarro-McKelvey

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and complete copy of the foregoing, along with a floppy disk containing the word processing file of the same, were mailed postage pre-paid, to the attorneys listed below, on the 12th day of May, 2006.

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