BEFORE THE SUPREME COURT OF MISSOURI

SC-91741

RICKY GURLEY,

Plaintiff-Appellant

v.

MISSOURI BOARD OF PRIVATE INVESTIGATOR EXAMINERS, et. al.,

Respondents

On Appeal from the Circuit Court of Cole County
The Honorable Paul Wilson

APPELLANT'S BRIEF

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JURISDICTIONAL STATEMENT

This case is an appeal of a judgment entered by the Circuit Court of Cole County, Missouri in favor of the Defendant Missouri Board of Private Investigator Examiners on December 31, 2010. Pursuant to Article V, Section 3 of the Missouri Constitution, the Supreme Court has exclusive jurisdiction because this case involves the validity of a statute of this state under both our federal and state constitutions. Appellant Ricky Gurley makes facial challenge to the statutory definitions of "private investigator business" in §324.1100(11)(b) and "private investigator" in §324.1100(9). Those definitions are further regulated in §324.1100 – §324.1148, RSMo, and 20 CSR 2234-1.050 – 20 CSR 2234-7.010. In particular, Gurley claims these statutes and rules violate the First Amendment; Article I, Section 8 of the Missouri Constitution; and the substantive due process clause of the Fourteenth Amendment.

In addition, Gurley requests that this Court set forth a standard on procedural due process rights for Missouri professionals with pre-existing, duly-licensed, and legally operating businesses in fields previously unregulated by the state that, by virtue of a new statute, become subject to compliance with a new state licensing regime. Gurley concedes this second issue is now moot in his own case as a result of his victory against Respondents before the Administrative Hearing Commission. However, he respectfully requests the Court to consider his appeal on this point under the "public interest" exception to the mootness doctrine.

STATEMENT OF FACTS

In the spring of 2010, Ricky Gurley made application to the Missouri Board of Private Investigators for state licensure, but was denied. *Id*. at 17. Gurley subsequently appealed the Board's denial of licensure to the Administrative Hearing Commission and nearly simultaneously filed an eight-count petition against the Board alleging the constitutional and statutory infirmity of the Board's statutes and regulations. *L.F.* at 6-35. Of the eight counts, Gurley won one,[1] voluntarily dismissed one,[2] and lost six – four of which he now appeals in this case.

At a June 4, 2010 hearing before the Circuit Court of Cole County, Gurley testified that he owned and operated RMRI, Inc., a private investigator business, from July 2002 until the spring of 2010. *Transcript of June 4, 2010 Hearing* at 7. From 2003 to 2010, he maintained licensure as a private investigator through the City of Columbia. *Id*. at 6-8. As of a June 4, 2010 hearing in this case, Gurley's Columbia license was valid until September 30, 2010. *Id*. To maintain his Columbia license, Gurley testified that he paid

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[1] Count III of Gurley's Petition alleged that provisions of the Board's Code of Conduct promulgated in 20 C.S.R. 2234-7.010 were invalid because they conflicted with and were not authorized by the Board's enabling legislation. *L.F.* at 7. Gurley prevailed on an identical claim before the AHC, thereby rendering the count moot in the opinion of the Circuit Court. *L.F.* at 56-64.

[2] Gurley voluntarily dismissed Count II's charge that the Board's rules were invalid for failure to file small business impact statements. *L.F.* at 7 and 62.

dues and an insurance bond. *Id*. at 8. In addition, he believed his City of Columbia license would be valid until September 30, 2010. *Id*. Gurley testified his company had a "sound" business reputation before the Board took action against him and had "a lot of attorney [clients] that had a lot of good things to say about work we do." *Id*. at 8. After the Board took action against him, Gurley testified his company did not receive any calls for work. *Id*. at 9. Gurley credited the lack of calls to an allegation by the Board that he had violated a federal law. *Id* at 9.

In particular, Gurley appeals the Circuit Court's judgment relating to Counts V and VI, which are facial challenges to the Board's statutes and regulations under the First Amendment; Article I, Section 8 of the Missouri Constitution; and the substantive due process clause of the Fourteenth Amendment.

Gurley also appeals the Circuit Court's judgment relating to Counts I and IV, which requested a declaratory judgment and temporary restraining order striking the Board's statutes and rules as unconstitutional because they permitted the Board to deprive him and others in his situation of liberty, property, and the gains of his own industry without due process of law. In regards to these procedural due process claims, Gurley notes that the licensing regime at issue in this case failed to establish a grandfather clause for private investigator license applicants who had been lawfully working in the field prior to creation of the licensing regime through legislation in 2007. See §324.1100 through §324.1148, RSMo regarding the lack of a grandfather clause.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS

- The First Amendment provides, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press; or the right of the people peaceably to assembly, and to petition the Government for a redress of grievances."
- Article I, Section 8 of the Missouri Constitution provides, in pertinent part, "That no law shall be passed impairing the freedom of speech, no matter by what means communicated: that every person shall be free to say, write or publish, or otherwise communicate whatever he will on any subject, being responsible for all abuses of that liberty."
- Section 1 of the Fourteenth Amendment to the United States Constitution provides, in pertinent part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law."
- The "private investigator business" is defined in §324.1100(11)(b), RSMo as "the furnishing of, making of, or agreeing to make, any investigation for the purpose of obtaining information pertaining to….the identity, habits, conduct, business, occupation, honesty, integrity, credibility, knowledge, trustworthiness, efficiency, loyalty, activity, movement, whereabouts, affiliations, associations, transactions, acts, reputation, or character of any person."
- "Person" is defined in §324.1100(8), RSMo as "an individual or organization."

- "Private investigator" is defined in §324.1100(9), RSMo as "any person who receives any consideration, either directly or indirectly, for engaging in the private investigator business."
- Section 324.1106, RSMo creates exceptions for 15 classes of citizens, none of which include ordinary citizens exercising First Amendment rights. The exempt classes include: (1) persons employed by one employer investigating the affairs of that employer; (2) public employees performing official duties; (3) state government contractors working within the scope of their contract; (4) attorneys and their employees; (5) collection agencies and their employees; (6) insurers and insurance producers; (7) banks; (8) insurance adjusters; (9) private fire investigators; (10) employees of non-profits doing criminal record checks from state, federal, or local databases; (11) real estate brokers and appraisers within the scope of their license; (12) expert witnesses "accredited by a national or state association associated with the expert's scope of expertise," (13) persons not holding themselves out to the public as private investigators but under contract with a state agency or political subdivision; (14) persons performing service of legal process when the investigation is incidental to the serving of process; and (15) consumer reporting agencies and their employees as defined by federal law.
- Section 324.1104(1), RSMo declares, "It shall be unlawful for any person to engage in the private investigator business in this state unless such person is licensed as a private investigator under sections 324.1100 to 324.1148."

- Section 324.1148, RSMo establishes criminal penalties for unlicensed practice in the "private investigator business," to wit, "Any person who violates section 324.1100 to 324.1148 is guilty of a class A misdemeanor. Any second or subsequent violation of sections 324.1100 to 324.1148 is a class D felony."
- Section 324.1108, RSMo requires that applicants for licensure obtain liability insurance of at least $250,000 and worker's compensation insurance.
- 20 C.S.R. 2234-1.050 sets the fees for private investigator applicants. The application fee is $500. License renewal fees are $300.

POINTS RELIED ON

I. The trial court erred in failing to strike on First Amendment grounds the statutory definition of private investigator business in §324.1100(11)(b), RSMo because the definition of private investigator business is overly broad judged in relation to its plainly legitimate scope in that it enacts such a sweeping ban on research of persons so integral to free speech that no conceivable governmental interest would justify such an absolute prohibition on speech. In addition, as discussed in further points, the definition (1) places a tax on knowledge; (2) criminalizes receiving information; (3) criminalizes core political speech; (4) restricts core political speech to a tiny class of licensed professionals; (5) impairs freedom of speech in violation of Article I, Section 8 of the Missouri Constitution by making it more expensive, less convenient, more difficult, and less effective for Missouri citizens to exercise free speech rights; and (6) criminalizes academic research.

First Amendment to the United States Constitution

Article I, Section 8 of the Missouri Constitution

Bd. of Airport Commissioners of L.A. v. Jews for Jesus, Inc., 482 U.S. 569 (1987)

Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442 (2008)

State v. Moore, 90 S.W.3d 64 (Mo. banc. 2002)

United States v. Stevens, 130 S.Ct. 1577 (2010).

II. The trial court erred in failing to strike the statutory definition of private investigator business on First Amendment grounds because the definition, when combined with the other statutes discussed herein, imposes a tax on knowledge in that, in order to conduct any investigation into any person or organization, a citizen must either be exempt by statute or make application, carry insurance, and pay fees to the state of Missouri for a private investigator license.

First Amendment to the United States Constitution

Murdock v. Pennsylvania, 319 U.S. 105 (1943)

Grossjean v. American Press Co., 297 U.S. 233 (1936)

III. The trial court erred in failing to strike the definition of private investigator business on First Amendment grounds because the definition, when combined with the other statutes and rules discussed herein, criminalizes receiving information in that it makes it a class A misdemeanor for persons not exempt and not licensed as private investigators to read newspapers, surf the Internet, or read emails if such documents relate in any way to the catch-all statutory definition of private investigator business in §324.1100(11)(b), RSMo and the other statutes and rules discussed herein.

First Amendment to the United States Constitution

Board of Education v. Pico, 457 U.S. 853 (1982)

First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978)

Martin v. City of Struthers, 319 U.S. 141 (1943)

IV. The trial court erred in failing to strike the statutory definition of private investigator business on First Amendment grounds because the definition, when combined with the other statutes discussed herein, criminalizes core political speech in that it declares the investigation of any political officeholder, candidate, party, or organization a criminal act unless the investigator is either exempt by statute or has made application, carries insurance, and paid fees to the state of Missouri for a private investigator license.

First Amendment to the United States Constitution

New York Times Co. v. Sullivan, 376 U.S. 254 (1964)

Burson v. Freeman, 504 U.S. 191 (1992)

Mills v. Alabama, 384 U.S. 214 (1966)

Roth v. United States, 354 U.S. 467 (1957)

V. The trial court erred in failing to strike the statutory definition of private investigator business on First Amendment grounds because the definition, when combined with the other statutes discussed herein, restricts core political speech to a tiny class of licensed professionals in that it limits the investigation of political officeholders, candidates, parties, and organizations to a tiny class of persons either exempt by statute or licensed as private investigators.

First Amendment to the United States Constitution

Meyer v. Grant, 486 U.S. 414 (1988)

Perez-Guzman v. Puerto Rico, 346 F.3d 229 (1st Circ. 2003)

Lerman v. Bd. of Elections in the City of N.Y., 232 F.3d 135 (2nd Circ. 2000)

Krislov v. Rednour, 226 F.3d 851, 860 (7th Circ. 2000)

VI. The trial court erred in failing to strike the definition of private investigator business as unconstitutional under Article I, Section 8 of the Missouri Constitution because the definition, when combined with the other statutes and rules discussed herein, impairs freedom of speech by making it more expensive, less convenient, more difficult, and less effective for citizens to exercise free speech rights, in that, under the statutes, citizens wishing to exercise free speech rights must either be exempt by statute or make application, purchase insurance, and pay fees to the state of Missouri for licensure as a private investigator.

First Amendment to the United States Constitution

Article I, Section 8 of the Missouri Constitution

Marx & Haas Jeans Clothing Co. v. Watson, 67 S.W. 391 (Mo. 1902)

Ex Parte Harrison, 110 S.W. 709 (Mo. 1908)

KCPA v. Missouri Real Estate Commision, No. SC91125 (Mo. 2011)

Missouri Libertarian Party v. Conger, 88 S.W. 3d 446 (Mo. 2002)

The American Heritage Dictionary, Fourth Edition, 2000

VII. The trial court erred in failing to strike the definition of private investigator business on First Amendment grounds because the definition, when combined with the other statutes discussed herein, criminalizes ordinary academic research into persons or organizations in that the clear language of the statute criminalizes all research on persons or organizations unless the researcher is either exempt by statute or licensed as a private investigator by the state of Missouri.

First Amendment to the United States Constitution

Sweezy v. New Hampshire, 354 U.S. 234 (1957)

Keyishian v. Board of Regents, 385 U.S. 589 (1967)

VIII. The trial court erred in failing to strike the definition of private investigator business on substantive due process grounds because the definition, when combined with the other statutes and rules discussed herein, infringe upon a remarkable variety of fundamental rights, including the rights to freedom of speech, religion, the press, association, and the right to petition government, and are not narrowly tailored to serve a compelling governmental interest in that the state did not present evidence of a compelling governmental interest in the catch-all definition contained in the statutes and regardless of the governmental interest asserted, the definition makes such a vast array of common activities of a free people illegal that it cannot be considered narrowly tailored.

First Amendment to the United States Constitution

Snyder v. Massachusetts, 291 U.S. 97 (1934)

Deaton v. State, 705 S.W. 2d 70 (Mo. App. E.D. 1985)

Palko v. Connecticut, 302 U.S. 319 (1937)

IX. The trial court erred in failing to strike the statutory definition of private investigator business on First Amendment grounds because noblesse oblige is not a defense to a statute's constitutional infirmity in that the United States Supreme Court has clearly stated that the government's promise not to use a statute in an unconstitutional manner does not save that statute from legitimate claims of overbreadth.

First Amendment to the United States Constitution

United States v. Stevens, 130 S.Ct. 1577 (2010).

Whitman v. American Trucking Associations, Inc., 531 U.S. 457 (2001)

X. The trial court erred in denying Petitioner's procedural due process claim because Petitioner had a property right in his existing licensure and business in that he had a legitimate claim of entitlement to his licensure from the City of Columbia and his good name, reputation, honor, and integrity was put at stake by the Board's actions but he was not afforded an opportunity for a hearing before such rights were taken away. In addition, though this point is now moot in Gurley's own case due to his victory before the AHC, his claim of error falls under the "public interest" exception to the mootness doctrine because the issue is (1) of public interest; (2) will recur; and (3) will evade appellate review in future live controversies.

Fourteenth Amendment to the United States Constitution

Article I, Section 2 of the Missouri Constitution

Article I, Section 10 of the Missouri Constitution

City of Manchester v. Ryan, 180 S.W.3d 19 (Mo. 2005)

Board of Regents v. Roth, 408 U.S. 564 (1972)

Larocca v. Healing Arts, 897 S.W.2d 37, 42 (Mo. App. E.D. 1995)

Jamison v. Dep't of Social Services, 218 S.W.3d 399 (Mo. 2007)

STANDARD OF REVIEW

The constitutionality of a statute is a question of law subject to de novo review. *Planned Parenthood of Kansas v. Nixon*, 220 S.W.3d 732, 737 (Mo. banc 2007). Statutes that restrict speech are presumptively unconstitutional. "Any government regulation that…conditions in advance the exercise of First Amendment activity constitutes a form of prior restraint, and any such restraint bears a 'heavy presumption against its constitutional validity." *City of St. Louis v. Kiely*, 652 S.W.2d 694 (Mo. App. E.D. 1983).

In claims of substantial overbreadth, a plaintiff must show that a substantial number of the law's applications are unconstitutional as compared to the law's plainly legitimate sweep. *Wash. St. Grange v. Wash. St. Republican Party*, 552 U.S. 442, 449 (2008). Criminal statutes alleged to be substantially overbroad are to be examined with particular care, and "those that make unlawful a substantial amount of constitutionally protected conduct may be held facially invalid even if they also have legitimate application." *Kolender v. Lawson*, 461 U.S. 352, 359 (1983).

Gurley's allegations of error regarding his First Amendment claims fall under two standards: zero tolerance and strict scrutiny. The zero-tolerance standard governs his allegations of error touching upon (1) complete bans on First Amendment activity, (2) taxes on knowledge, and (3) criminalizing receiving harmless information. The strict scrutiny standard governs his allegations of error relating to (4) criminalizing core political speech; (5) limiting such speech to a tiny class of licensed professionals; (6) Article I, Section 8 of the Missouri Constitution; (7) academic freedom; and (8) substantive due process.

OVERVIEW OF FIRST AMENDMENT CLAIMS

Gurley brings this facial challenge to the statutes creating the Board of Private Investigator Examiners because they are overly broad and criminalize conduct clearly protected by the First Amendment. Citizens of a free society should not and cannot be required to take tests and pay fees in order to legally conduct research on persons or organizations – but most particularly candidates for public office or religious authorities. But that's exactly what the Board's authorizing statutes require. The statutes criminalize practically all investigations of persons or organizations unless the researcher is either licensed or exempt by statute. The statutes thus make illegal a startling array of activities in which citizens of a free society should be free to participate without the oversight of government.

In particular, the statutes violate both the First Amendment to the United States Constitution and Article I, Section 8 of the Missouri Constitution because they: (1) enact what amounts to a complete ban on First Amendment activity relating to speech about persons or organizations; (2) place a tax on knowledge; (3) criminalize receiving information; (4) criminalize core political speech; (5) restrict core political speech to a tiny class of licensed professionals; (6) impair freedom of speech in violation of Article I, Section 8 of the Missouri Constitution by making it more expensive, less convenient, more difficult, and less effective for Missouri citizens to exercise free speech rights; and (7) criminalize academic research.

I. THE STATUTES ARE UNCONSTITUTIONALLY OVERBROAD BECAUSE THEY ENACT A SWEEPING BAN ON RESEARCH VITAL TO THE EXERCISE OF FIRST AMENDMENT RIGHTS

The trial court erred in failing to strike on First Amendment grounds the statutory definition of private investigator business in §324.1100(11)(b), RSMo because the definition of private investigator business is overly broad judged in relation to its plainly legitimate scope in that it enacts such a sweeping ban on research of persons so integral to free speech that no conceivable governmental interest would justify such an absolute prohibition on speech. In addition, as discussed in further points, the definition (1) places a tax on knowledge; (2) criminalizes receiving information; (3) criminalizes core political speech; (4) restricts core political speech to a tiny class of licensed professionals; (5) impairs freedom of speech in violation of Article I, Section 8 of the Missouri Constitution by making it more expensive, less convenient, more difficult, and less effective for Missouri citizens to exercise free speech rights; and (6) criminalizes academic research.

Under the First Amendment overbreadth doctrine, a plaintiff may challenge a statute on its face even if their own speech or conduct may be constitutionally prohibited if the statute in question threatens others not before the court. *Board of Airport Commissioners of City of Los Angeles v. Jews for Jesus, Inc*., 482 U.S. 569, 573 (1987). The overbreadth doctine was created to protect "the transcendent value" of free speech to all society by allowing third parties to act on behalf of persons whose constitutionally-

protected expression might be suppressed for fear of criminal sanctions. *Gooding v. Wilson*, 405 U.S. 518, 520-521 (1972).

Under the overbreadth doctrine, a law regulating or proscribing speech "may be invalidated as overbroad if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Washington State Grange* at 449 (2008). Criminal statutes, "require particularly careful scrutiny, and those that make unlawful a substantial amount of constitutionally protected conduct may be held facially invalid even if they also have legitimate applications." *State v. Moore*, 90 S.W.3d 64, 66 (Mo. banc. 2002).

THE OVERBROAD TEST

To determine whether a statute is unconstitutionally overbroad, courts must make a two-step analysis. First, the Court must determine the statute's scope. *United States v. Williams*, 553 U.S. 285, 293 (2008). Second, the Court must determine whether the statute reaches a substantial number of constitutionally protected activities compared with its plainly legitimate scope. See *United States v. Stevens*, 130 S.Ct. 1577 (2010). If found to reach a substantial number of constitutionally protected activities judged in relation to its plainly legitimate scope, the offending statute must be struck. *Id*.

SHOCKINGLY BROAD SCOPE: THE STATUTES IN THIS CASE COVER NEARLY ALL RESEARCH ON PERSONS OR ORGANIZATIONS

Section 324.1100(11)(b) is shockingly broad in its scope. It defines the "private investigator business" as:

> the furnishing of, making of, or agreeing to make, any investigation for the purpose of obtaining information pertaining to…the identity, habits, conduct, business, occupation, honesty, integrity, credibility, knowledge, trustworthiness, efficiency, loyalty, activity, movement, whereabouts, affiliations, associations, transactions, acts, reputation, or character of any person" or organization. See *§324.1100(11)(b), RSMo* (defining "private investigator business), *§324.1100(8), RSMo* (defining "person").

When combined with corresponding statutes, the statutes require citizens to either expend substantial time and money to become licensed as a private investigator or face criminal charges if they furnish, make, or agree to make any investigation of any person. Though fifteen exceptions to the definition of "private investigator business" are created in §324.1106, RSMo, there is no exception for speech or conduct protected by the First Amendment. See *§324.1106, RSMo* (setting forth 15 exceptions but no exception for First Amendment activities).[3]

[3] Corresponding statutes make it unlawful and a criminal offense to engage in the private investigator business without holding a private investigator license or falling into a statutory exception. See *§324.1104(1), RSMo*(declaring it unlawful); *§324.1148, RSMo* (class A misdemeanor for first-time offenders and class D felony for repeat offenders). To become licensed, private investigators must pay the Board an initial application fee of $500 and renewal fees of $300. See *20 CSR 2234-1.050*. In addition, they must carry liability insurance and worker's compensation insurance. See *20 CSR 2234-2.010*.

Though the statutes do not expressly ban speech, they infringe upon research – an activity vital to the exercise of First Amendment rights and also protected by the Constitution. The First Amendment protects not only "individual self-expression" but also "public access to discussion, debate, and the dissemination of information and ideas." *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978), quoted in *Board of Education v. Pico*, 457 U.S. 853 (1982)(plurality opinion). It also "protects the right to receive information and ideas" because such right is "an inherent corollary of the rights to free speech and press that are explicitly guaranteed by the Constitution." *Pico* at 866. To put it more succinctly, the State may not "contract the spectrum of available knowledge." *Pico* at 866. (Quoting *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965))

The First Amendment means nothing if ordinary citizens cannot legally conduct investigations into persons or organizations. After all, one cannot speak with authority on any person or organization without doing at least cursory investigation into the "identity, habits, conduct, business, occupation, honesty, integrity, credibility, knowledge, trustworthiness, efficiency, loyalty, activity, movement, whereabouts, affiliations, associations, transactions, acts, reputation, or character of" of that person or organization. See *§324.1100(11)(b), RSMo* (defining "private investigator business).

The catch-all definition of "private investigator business" ensnares and, in conjunction with corresponding statutes, criminalizes several constitutionally-protected activities, including, but not limited to (1) voters researching political candidates and parties; (2) political candidates researching opponents; (3) reporters or bloggers researching any individual or organization for publication of a news article; (4) concerned

citizens conducting research for purposes of writing Letters to the Editor of their local newspapers; (5) authors researching persons or organizations for the purpose of publishing a book; (6) citizens investigating the history and beliefs of a religious organization or leader to determine whether they wish to join that organization; and (7) voters researching political contributions to any political candidate or organization on the Missouri Ethics Commission website. As a result, the ultimate effect of the statute is to prohibit all non-exempt, non-licensed citizens from exercising First Amendment rights to speak about any person or organization. With its shockingly broad ban on research of persons or organizations, the statute may just as well have defined the "private investigator business" as "the speaking, writing, or thinking about any person or organization" and had the same effect.

A STATE MAY NOT BAN ALL FIRST AMENDMENT ACTIVITY

After determining a statute's scope, the Court must next determine whether it is overly broad in relation to its plainly legitimate sweep. See *Stevens*. In this case, the statute's scope is unlimited in its effect on First Amendment rights. If one cannot speak on issues without, at some point, doing some investigation of persons or organizations, then the statute can be said to reach all speech related to persons or organizations.

This is not the first time a governmental body has tried to ban practically all speech. In *Board of Airport Commissioners of City of Los Angeles v. Jews for Jesus, Inc.*, the Supreme Court struck a rule which explicitly banned all First Amendment activities at the Los Angeles International Airport. *Jews for Jesus* at 571. The relevant government edict declared that the Central Terminal Area of the Los Angeles International Airport was

"not open for First Amendment activities by any individual and/or entity." *Id*. In a short and unanimous decision, the Court created a zero-tolerance rule for complete bans on First Amendment activity, holding that, "no conceivable governmental interest would justify such an absolute prohibition of speech." *Id*. at 575. Emphasis added.

In *Houston v. Hill*, a similar case, the Supreme Court struck an ordinance which criminalized interrupting a police officer "by verbal challenge during an investigation." *Houston v. Hill*, 482 U.S. 451, 454 (1987). In holding the ordinance unconstitutional, the Court declared that it was not narrowly tailored and expounded on the danger of overbroad statutes. Such statutes, the Court warned, are "dangerous" because they "set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large." *Id*. at 456.

Just as with the complete ban in *Jews for Jesus*, the plain language of the private investigator statutes make Missouri a First Amendment-free zone except for those citizens either covered by an exemption or those who go through the time and expense of becoming licensed as private investigators. In addition, the statutes create the precise danger the Court warned of in the *Houston* case, in that every citizen in our state has violated them at some point. Many, if not all, Missouri citizens violate the private investigator statutes every single day by either reading a newspaper, doing a search for a person or organization on an Internet search engine, or simply asking their neighbor what they did the night before. Yet it is left to the discretion of police, prosecutors, and the courts as to which violations are subject to arrest and which are not.

As in *Jews for Jesus* and the *Houston* case, this Court must strike the definition of

private investigator business and its corresponding statutes as unconstitutional because they effectively enact a complete ban on First Amendment research activity and do so in a "dangerous" way that leaves enforcement at the complete whim of police, prosecutors, and courts.

II. THE STATUTES IMPOSE AN UNCONSTITUTIONAL "TAX ON KNOWLEDGE" VIA REGULATORY FEES AND REQUIREMENTS

The trial court erred in failing to strike the statutory definition of private investigator business on First Amendment grounds because the definition, when combined with the other statutes discussed herein, imposes a tax on knowledge in that, in order to conduct any investigation into any person or organization, a citizen must either be exempt by statute or make application, carry insurance, and pay fees to the state of Missouri for a private investigator license.

"States may not impose taxes or regulatory fees on the exercise of a privilege guaranteed by the Constitution." *Murdock v. Pennsylvania*, 319 U.S. 105, 113 (1943). In a line of cases from the 1930s, the United States Supreme Court set a zero-tolerance standard for statutes imposing "taxes on knowledge" – taxes or regulatory fees imposed on citizens merely for the act of exercising First Amendment rights. Per this line of Supreme Court cases, there is no justification strong enough to save the constitutionality of a "tax on knowledge." Rather than prescribing a balancing test, the Court instead set forth an absolute prohibition on legislation which would compel a citizen to pay a "license fee or license tax" to exercise a "privilege freely granted by the Constitution." *Id*. at 114.

For example, in *Grossjean v. American Press Company*, the Supreme Court struck a Louisiana law which exacted a special tax on large newspaper publishers. *Grossjean v. American Press Co.*, 297 U.S. 233 (1936). In *Grossjean*, the Court explained that "taxes on knowledge" were central to the American Revolution. In the Court's opinion, our Revolution actually began in 1765 with massive colonial protests against the Stamp Act and newspaper duties, which were commonly characterized as "taxes on knowledge" at the time. *Id*. at 248. As the Court pointed out, the phrase was "used for the purpose of describing the effect of the exactions and at the same time condemning them." *Id*.

The Court adopted the words of Judge Cooley, who wrote that it was "impossible to believe" that the First Amendment was not designed to prohibit "such modes of restraint as were embodied in [a stamp tax and an advertising tax]." *Id*. Cooley further explained that the evils to be prevented by the First Amendment were not mere censorship of the press, but also "any action of the government…which…might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens." *Id*. at 250.

Seven years later, the Court applied the same logic to a series of cases striking local government ordinances which required the payment of fees to exercise First Amendment rights. In *Murdock v. Pennsylvania*, the Court struck a regulatory scheme which required Jehovah's Witnesses to pay licensing fees for door-to-door sales on books sold while proselytizing. *Murdock* at 105. The Court held, "A person cannot be compelled to purchase, through a license fee or license tax, [a] privilege freely granted by the Constitution." *Id*. at 114.

The statutes in this case enact a similar "tax on knowledge." Their plain language requires ordinary non-exempt citizens to obtain a state-issued license to conduct any research on any person or organization. See *§324.1100(11)(b), RSMo* (defining "private investigator business). Thus, under the statutes, voters must obtain a license to research candidates for office. Bloggers and non-exempt reporters must obtain a license to research stories. Citizens considering whether to join a particular church must obtain a license to research the church's pastor or history. A young man considering asking a girl out on a date must obtain a license to research the potential paramour's affiliations on Facebook.

To obtain such a license, a citizen must fill out an application, pay a $500 application fee, and obtain liability and worker's compensation insurance.[4] The $500 application fee and insurance requirements are steep taxes on knowledge which impermissibly condition constitutionally-protected First Amendment rights on payment of regulatory fees. As a result, and as with the decisions in *Grossjean* and *Murdock,* this Court must strike the statutes at issue as unconstitutional.

III. THE STATUTES ENACT A COMPREHENSIVE CRIMINAL BAN ON RECEIVING HARMLESS INFORMATION ABOUT PEOPLE

The trial court erred in failing to strike the definition of private investigator

[4] Private investigators must pay the Board an initial application fee of $500 and renewal fees of $300. See *20 CSR 2234-1.050*. In addition, they must carry liability insurance and worker's compensation insurance. See *20 CSR 2234-2.010*.

business on First Amendment grounds because the definition, when combined with the other statutes and rules discussed herein, criminalizes receiving information in that it makes it a class A misdemeanor for persons not exempt and not licensed as private investigators to read newspapers, surf the Internet, or read emails if such documents relate in any way to the catch-all statutory definition of private investigator business in §324.1100(11)(b), RSMo and the other statutes and rules discussed herein.

The First Amendment protects not only "individual self-expression" but also "public access to discussion, debate, and the dissemination of information and ideas." *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978), quoted in *Board of Education v. Pico*, 457 U.S. 853 (1982)(plurality opinion). Implicit in the First Amendment is the right to receive information and ideas. As explained by the Supreme Court, the right to "receive information and ideas" is "an inherent corollary of the rights to free speech and press that are explicitly guaranteed by the Constitution." *Pico* at 866. Accordingly, the State may not "contract the spectrum of available knowledge" by banning merely offensive material. *Id.*

As with laws enacting blanket-bans on First Amendment activity and laws imposing "taxes on knowledge," laws that ban ordinary citizens from receiving any information about any person or organization are subject to zero-tolerance review. There is no justification possible to save a statute that bans receiving all information anytime, anyplace. As stated by the Supreme Court, the "freedom to distribute information to every citizen wherever he desires to receive it is so clearly vital to the preservation of a

free society, that putting aside reasonable police and health regulations of time and manner of distribution, it must be fully preserved." *Martin v. City of Struthers*, 319 U.S. 141, 146-147 (1943)(Striking a municipal ordinance making it unlawful to knock on any resident's door or ring any resident's doorbell for the purpose of distributing literature.)

In *Pico*, the Supreme Court struck a school board's decision to remove books from school libraries based on content. *Id*. at 872. In striking the effort at censorship, the Court held, "Local school boards may not remove books from school library shelves simply because they dislike the ideas contained in those books and seek by their removal to prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion." *Id*.

The statutes in this case go far beyond the school board's policy in *Pico*. The school board in *Pico* took action to remove books deemed offensive from the school library. In this case, the statutes criminalize the reading of any book with details regarding any person or organization's "identity, habits, conduct, business, occupation, honesty, integrity, credibility, knowledge, trustworthiness, efficiency, loyalty, activity, movement, whereabouts, affiliations, associations, transactions, acts, reputation, or character." See §324.1100(11)(b), RSMo. If, under the First Amendment, government is forbidden from restricting access to allegedly "offensive" books, then so too is it forbidden from criminalizing the reading of all books on persons or organizations.

In *Martin v. City of Struthers*, another similar case, the Supreme Court struck a city's blanket ban on distribution of literature through door-to-door activities. By defining "private investigator business" in §324.1100(11)(b), RSMo with the broadest stroke

possible, the state has effectively done the same thing for research in the state of Missouri – making it a criminal act for an ordinary citizen to use Internet sites like Wikipedia or Google to learn more about any person or organization. This impacts not only the speech rights of the speaker by preventing research vital for making cogent public arguments, it also impacts the rights of the receiver, who, under the *Martin* case, must have his right to receive information "fully preserved." *City of Struthers* at 147.

Because the statutes go far beyond the book-banning activities of the school board in *Pico* and closely resemble the door-knocking ban of the city government in *Martin*, this Court should strike the statutes as unconstitutional in violation of the First Amendment's prohibition against the criminalization or regulation of receiving harmless information.[5]

IV. THE STATUTES CRIMINALIZE "CORE" POLITICAL SPEECH

The trial court erred in failing to strike the statutory definition of private investigator business on First Amendment grounds because the definition, when combined with the other statutes discussed herein, criminalizes core political speech

[5] Gurley notes that the Appellant in *KCPA v. Missouri Real Estate Commission* argued that the Missouri real estate statutes violated their First Amendment rights to distribute truthful, harmless information. The *KCPA* case, however, is inapposite in this context. That case involved a limited subset of commercial speech – namely information regarding apartment rentals in the Kansas City metro area. This case involves all speech – commercial, political, religious, academic, personal – involving any person or organization.

in that it declares the investigation of any political officeholder, candidate, party, or organization a criminal act unless the investigator is either exempt by statute or has made application, carries insurance, and paid fees to the state of Missouri for a private investigator license.

The First Amendment was designed to ensure the "unfettered interchange of ideas" on politics and social mores. *Roth v. United States*, 354 U.S. 467, 484 (1957). More narrowly, a "major purpose" of the First Amendment was to "protect the free discussion of governmental affairs…of course, including discussions of candidates." *Mills v. Alabama*, 384 U.S. 214, 218 (1966). This "reflects our profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times. Co. v. Sullivan*, 376 U.S. 254, 270 (1964). Thus, the First Amendment "has its fullest and most urgent application precisely to the conduct of campaigns for political office." *Id*.

Where a law directly regulates core political speech, courts review First Amendment claims against it under strict scrutiny. To survive the strict scrutiny test, legislation must be narrowly tailored to serve a compelling governmental interest. *Burson v. Freeman*, 504 U.S. 191 (1992). In this case, the state failed to present evidence at trial of any compelling government interest in the catch-all definition of private investigator business found in §324.1100(11)(b). Appellant Ricky Gurley should prevail for that reason alone. However, regardless of the asserted "compelling governmental interest" that Respondent attaches to the statutes and rules in question in this case, they are not narrowly tailored because they criminalize even the most basic political investigations and conversations.

Consider the case of the voter who merely wants to learn more about the candidates for a particular office. Such a voter would likely seek to inquire of the "identity, habits, conduct, business, occupation, honesty, integrity, credibility, knowledge, trustworthiness, efficiency, loyalty, activity, movement, whereabouts, affiliations, associations, transactions, acts, reputation, or character of" the candidates for office. But, under the Board's statutes and regulation, to legally conduct such an investigation, a voter would either have to fall under an exception or invest time and money to obtain a private investigator license. By the time he obtained a license, the election likely would have passed and the voter would have been forced into the ballot box with no meaningful information about the candidates.

Under the statutes, Missouri voters face the choice of either making a willfully ignorant vote or committing a class A misdemeanor by investigating candidates for public office without a license. Any law which makes it a criminal act to make basic investigation into candidates for public office must fail the strict scrutiny test. Such a law cannot be seen to be narrowly tailored to serve a compelling governmental interest. As such, this Court must strike the Board's statutes and rules as unconstitutional.

V. THE STATUTES IMPERMISSIBLY RESTRICT CORE POLITICAL SPEECH TO A TINY CLASS OF LICENSED PROFESSIONALS

The trial court erred in failing to strike the statutory definition of private investigator business on First Amendment grounds because the definition, when combined with the other statutes discussed herein, restricts core political speech to a tiny class of licensed professionals in that it limits the investigation of political

officeholders, candidates, parties, and organizations to a tiny class of persons either exempt by statute or licensed as private investigators.

A state may not restrict political activity to a tiny professional class. See *Meyer v. Grant*, 486 U.S. 414, 422-423 (1988), *Lerman v. Bd. of Elections in the City of N.Y.*, 232 F.3d 135, 146 (2nd Circ. 2000), and *Krislov v. Rednour*, 226 F.3d 851, 860 (7th Circ. 2000). In cases involving election issues, the Supreme Court has adopted the same "exacting" or strict scrutiny as applied elsewhere. *Meyer* at 420. As stated earlier, where a law burdens core political speech, it may only be upheld if "it is narrowly tailored to serve an overriding state interest." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995).

In *Meyer v. Grant*, the Supreme Court struck a Colorado law which prohibited payment to petition circulators collecting signatures for statewide ballot initiatives. *Meyer v. Grant*, 486 U.S. 414 (1988). After applying the strict scrutiny test, the Court struck the law because it (1) limited the number of voices available to convey a political message, and (2) limited the ability of citizens to make a ballot issue the focus of statewide discussion. *Id*. at 423. Thus, under *Meyer*, states cannot limit First Amendment rights to mere volunteers.

The First Circuit Court of Appeals later struck a similar Puerto Rican election law that required a lawyer-notary to verify every signature on petitions for the formation new political parties. *Perez-Guzman v. Puerto Rico*, 346 F.3d 229 (1st Circ. 2003). Following the logic of *Meyer*, the First Circuit struck the law because it "preclude[d] the candidate from utilizing a large class of potential solicitors to convey his message," and instead

restricted such vital political activity to a small class of lawyer-notaries. *Id*.

The statute in this case goes much further than those struck in *Meyer* and *Perez-Guzman*. In this case, the statutes ban all investigations into any person running for office unless the investigator is either exempt or licensed as a private investigator. This dramatically narrows the availability of persons capable of engaging in the "core" political speech of researching candidates for public office. As such, the statutes violate the principles enunciated in *Meyer*, making it more difficult for lesser candidates to engage in the electoral process by conducting research on opponents or ballot issues. As with the offensive legislation in *Meyer* and *Perez-Guzman*, the statutes in this case are not narrowly tailored. As a result, this Court must strike the Board's authorizing statutes as unconstitutional because they restrict the class of persons who may lawfully conduct political research to a tiny licensed professional class.

VI. THE STATUTES IMPAIR FREEDOM OF SPEECH IN VIOLATION OF ARTICLE I, SECTION 8 OF THE MISSOURI CONSTITUTION

The trial court erred in failing to strike the definition of private investigator business as unconstitutional under Article I, Section 8 of the Missouri Constitution because the definition, when combined with the other statutes and rules discussed herein, impairs freedom of speech by making it more expensive, less convenient, more difficult, and less effective for citizens to exercise free speech rights, in that, under the statutes, citizens wishing to exercise free speech rights must either be exempt by statute or make application, purchase insurance, and pay fees to the state of Missouri for licensure as a private investigator.

Article I, Section 8 of the Missouri Constitution is broader than the First Amendment. The First Amendment prohibits government actions "*abridging* the freedom of speech." Article I, Section 8 provides that "no law shall be passed *impairing* the freedom of speech, no matter by what means communicated." *Emphasis added*. See *Art. I, Sec. 8, Missouri Constitution*.

The drafters of Article I, Section 8 of our state constitution must be presumed to have been aware of the language of the First Amendment at the time of drafting. Missouri courts oft presume the same with legislation. "When the legislature enacts a statute referring to terms which have had other judicial or legislative meanings attached to them, we presume that the legislature acted with knowledge of that judicial or legislative act." *Leiser v. City of Wildwood*, 49 S.W.3d 597 (Mo. App. E.D. 2001). The drafters of Article I, Section 8 purposely chose not to adopt the exact words of the First Amendment. Instead, they chose broader language.

There is significant difference between "abridge" and "impair." To abridge is "to cut short." *The American Heritage Dictionary of the English Language*, Fourth Edition, 2000. To "impair" is merely "to cause to diminish." *Id*. Accordingly, the Missouri Constitution gives greater protections to speech than the First Amendment and the Missouri Supreme Court has, in the past, given broad interpretation to Missouri's special protections on speech. As a result, Missouri courts should, at the very least, apply a strict scrutiny standard to any state or municipal law challenged under Article I, Section 8's.

The Missouri Supreme Court has previously recognized the difference between "impair" and "abridge." In describing Article I, Section 8 at a time closer to the actual

drafting of the provision, the Missouri Supreme Court explained in 1902 that, "Language could not be broader, nor prohibition nor protection more amply comprehensive." *Marx & Haas Jeans Clothing Co. v. Watson*, 67 S.W.391 (Mo. 1902). Under Missouri's free speech provision, the Court explained, "there are no exceptions…the language….stands as an affirmative prescription against any exception being made thereto." *Id.*

Six years later, in *Ex Parte Harrison*, the Court struck a statute which made it a criminal offense to print or publish reports on the character or fitness of candidates for public office without also printing the facts on which such report was based. *Ex Parte Harrison*, 110 S.W. 709 (Mo. 1908). The Court struck the statute as unconstitutional under Article I, Section 8, reasoning that, "Anything which makes the exercise of a right more expensive or less convenient, more difficult or less effective, *impairs* that right." *Id.*

To be clear, Gurley does not argue that Article I, Section 8 creates a zero tolerance rule. As stated recently by this Court, "the right to free speech (remains) subject to the state's inherent right to exercise its police power." *Kansas City Premier Apartments, Inc. v. Mo. Real Estate Commission*, No. SC91125, Slip Opinion at 13 (Mo. 2011). Further, "Article I, Section 8 has never been held to give an absolute right to communicate ideas at all times and under all circumstances." *Missouri Libertarian Party v. Conger*, 88 S.W. 3d 446, 447 (Mo. 2002). However, even though it does not create an unfettered right to communicate anything at any time, Article I, Section 8 indisputably contains stronger language protecting the right to free speech than the competing language in the First Amendment.

Where strict scrutiny applies, laws "will only be upheld if…necessary to a

compelling state interest and narrowly drawn to protect that interest." *In re Coffman*, 225 S.W.3d 439, 445 (Mo. banc 2007). Regardless of what interest the state asserts is compelling in this case, the statutes in question are not narrowly drawn to protect such an interest. Instead of being narrowly drawn, the statutes capture all investigations into any person or organization. This research is integral to the exercise of First Amendment rights because one cannot speak or write credibly on any person or organization without having first done at least some research. Under the statutes, in order to fully and effectively exercise their First Amendment rights, a Missouri citizens must either be exempt or licensed as a private investigator, an action requiring significant investments of time and money.

This case is analogous to *Ex Parte Harrison* because the Board's authorizing statutes require anyone not licensed or exempt to hire a Missouri-approved private investigator to research any person or organization. This requirement makes exercising Article I, Section 8 rights "more expensive, less convenient, more difficult, and less effective" for Missouri citizens. It is "more expensive" because it requires ordinary citizens to pay for research from a licensed professional that they could otherwise perform themselves. It is "less convenient" because the ordinary citizen must go through the time and trouble of finding a licensed professional to conduct the research. It is "more difficult" because, rather than simply turning on their computer, an ordinary citizen must negotiate a deal with a licensed professional to obtain the same or similar information. Finally, it is "less effective" because it hangs bureaucratic hoops between the ordinary citizen and the exercise of First Amendment rights. Thus, the statutes are not narrowly

drawn to protect any compelling governmental interest and clearly violate Article I, Section 8 of the Missouri Constitution. As a result, this Court should strike them as unconstitutional.

VII. THE STATUTES CRIMINALIZE BASIC ACADEMIC RESEARCH

The trial court erred in failing to strike the definition of private investigator business on First Amendment grounds because the definition, when combined with the other statutes discussed herein, criminalizes ordinary academic research into persons or organizations in that the clear language of the statute makes essentially all research of persons or organizations a criminal act regardless of purpose unless the researcher is either exempt by statute or licensed as a private investigator by the state of Missouri.

Academic freedom, though not a specifically enumerated constitutional right, has long has been viewed as a special concern of the First Amendment. *University of California Regents v. Bakke*, 438 U.S. 265 (1978). The Supreme Court has stated that the importance of academic freedom is "almost self-evident." *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957). It is "of transcendent value to all of us and not merely to the teachers concerned." *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967). "Teachers and students must always remain free to inquire, to study and to evaluate…otherwise our civilization will stagnate and die." *Sweezy* at 250. Thus, "the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Shelton v. Tucker*, 364 U.S. 479, 487 (1960).

In *Keyishian v. Board of Regents* the Supreme Court effectively adopted a strict

scrutiny standard for academic freedom – in regrettably clear-as-mud language for defenders of academic inquiry. *Keyishan* at 602. In striking a statute requiring loyalty oaths for state university professors, the Court held that the "legitimate and substantial" state interest in "protecting its education system from subversion" could not be "pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Id*.

In this case, the Board's authorizing legislation and rules make it a class A misdemeanor for non-exempt professors and students to make any investigation into any person or organization without first obtaining a license from the Board. By its plain reading, the statute criminalizes not just college-level research, but also typical assignments for elementary school students. No matter what Respondents claim the government's purported "legitimate and substantial" interest is in this case, the state cannot criminalize typical fourth grade research assignments without running afoul of the First Amendment. As such, this Court must strike the statutes creating the Board as unconstitutional because they infringe on academic freedom.

VIII. THE STATUTES INFRINGE ON A REMARKABLE VARIETY OF FUNDAMENTAL FIRST AMENDMENT RIGHTS AND ARE NOT NARROWLY TAILORED TO SERVE A COMPELLING GOVERNMENTAL INTEREST

The trial court erred in failing to strike the definition of private investigator business on First Amendment grounds because the definition, when combined with the other statutes and rules discussed herein, infringe upon a remarkable variety of

fundamental rights, including the rights to freedom of speech, religion, the press, association, and the right to petition government, and are not narrowly tailored to serve a compelling governmental interest in that the state did not present evidence of a compelling governmental interest in the catch-all definition contained in the statutes and regardless of the governmental interest the definition makes such a vast array of common activities of a free people illegal that it cannot be considered narrowly tailored.

The Fourteenth Amendment to the United States Constitution provides that no state shall "deprive any person of life, liberty, or property, without due process of law." The United States Supreme Court has interpreted the Fourteenth Amendment's Due Process clause to apply to any law passed by states affecting "fundamental rights," or, in the words of the Court, those rights "rooted in the traditions and conscience of our people." *Snyder v. Commonwealth of Massachusetts*, 291 U.S. 97, 105 (1934). As explained by the Missouri Supreme Court, "Under substantive due process analysis, a law which impinges upon a 'fundamental right' is subject to the 'strict scrutiny' test, which requires that the law be narrowly tailored to serve some compelling state interest." See *Deaton v. State*, 705 S.W.2d 70 (Mo. App. E.D. 1985)(quoting *Roe v. Wade*, 410 U.S. 113, 155 (1973)).

Thus, the first question in a substantive due process case is whether the law infringes on a fundamental right. The second question is whether such a law is narrowly tailored to serve a compelling governmental interest.

THE BOARD'S STATUTES AND RULES INFRINGE

UPON A REMARKABLE VARIETY OF FIRST AMENDMENT RIGHTS

A fundamental right may be derived either from our federal Bill of Rights or from a right to privacy "implicit in the concept of ordered liberty." *Palko v. Connecticut*, 302 U.S. 319, 325 (1937). The First Amendment rights to freedom of speech, religion, the press, association, and the right to petition government are "fundamental" rights by virtue of the fact that they are included in the First Amendment.

The statutes and rules at issue in the instant case infringe on a remarkable variety of First Amendment rights. They infringe upon freedom of speech for the reasons outlined in Sections I through VII of Petitioner's Brief. They infringe on the right to freedom of religion in that they criminalize religious research and instruction, including research to determine whether or not to join a specific church. They infringe on the right to a free press in that they require every journalist, blogger, and Letter to the Editor author not covered by an exception to obtain a license to conduct research. They infringe on the right to freedom of association in that they criminalize research to determine which organizations a person might join. They similarly criminalize efforts by organizations and associations to identify and recruit new members. Finally, they infringe on the right to petition government by criminalizing research necessary for persons or organizations to create compelling arguments to change governmental policy.

THE BROAD SCOPE OF THE RULES AND REGULATIONS RENDERS ANY CLAIMED "COMPELLING INTEREST" IRRELEVANT

Regardless of any "compelling interest" the state may assert to justify the Board's rules and authorizing statutes, those rules and statutes must fail because they are not

narrowly tailored. No rule or statute that infringes on so many fundamental rights under the First Amendment can pass the strict scrutiny test. As a result, this Court must strike all such statutes and rules.

IX. NOBLESSE OBLIGE CANNOT SAVE A STATUTE

The trial court erred in failing to strike the statutory definition of private investigator business on First Amendment grounds because, despite the trial court's ruling, noblesse oblige is not a defense to a statute's constitutional infirmity in that the United States Supreme Court has clearly stated that the government's promise not to use a statute in an unconstitutional manner does not save that statute from legitimate claims of overbreadth.

Where a statute is overbroad, it is not a defense to say that overbroad applications have never or would never be brought by prosecutors. The Supreme Court will not uphold an unconstitutional statute on the mere promise that a government will "use it responsibly." *Whitman v. American Trucking Associations, Inc.*, 531 U.S. 457, 473 (2001). In *United States v. Stevens*, the federal government used the noblesse oblige argument to defend a federal statute which criminalized films depicting violence against animals. *United States v. Stevens*, 130 S.Ct. at 1591 (2010). The government's argument was dead on arrival. In clear language, the Court declared that the government's "but we'd never use it for an unconstitutional purpose" argument had no merit, holding, "The First Amendment protects against the Government; it does not leave us at the mercy of noblesse oblige." *Id.*

In this case, the State cannot prevail by arguing that no prosecutor would ever bring a

charge under the offending statutes. It is not enough for the state to promise leniency in the enforcement of a statute that offends the First Amendment. The right to free speech must never be left to the discretion and assured beneficence of government officials. As such, this Court must reject any argument made by the Respondents that the statute should survive constitutional scrutiny because Missouri prosecutors would be unlikely to ever bring a charge suppressing speech under the statute.

X. THE STATE CANNOT CREATE A NEW LICENSING REGIME WITHOUT MAKING PROVISION TO PROTECT THE PROCEDURAL DUE PROCESS RIGHTS OF PRIOR PRACTITIONERS

The trial court erred in denying Petitioner's procedural due process claim because Petitioner had a property right in his existing licensure and business in that he had a legitimate claim of entitlement to his licensure from the City of Columbia and his good name, reputation, honor, and integrity was put at stake by the Board's actions but he was not afforded an opportunity for a hearing before such right was taken away. In addition, though this point is now moot as to Gurley's own case due to his victory before the AHC, his claim of error falls under the "public interest" exception to the mootness doctrine because the issue is (1) of public interest; (2) will recur; and (3) will evade appellate review in future live controversies.

Gurley admits this allegation of error has been rendered moot as to his own case by the fact that he prevailed at a hearing before the Administrative Hearing Commission, and, as a result, has been granted his state license to practice as a private investigator. However, because this allegation of error involves significant but seldom-litigated

constitutional issues regarding the property rights of licensed professionals in the transition between pre- and post-licensing regimes, Gurley asks this Court to consider this issue under the "public interest" exception to the mootness doctrine. Under the public interest exception, an appellate court may determine an otherwise moot point if the issue is (1) of public interest, (2) will recur, and (3) will evade appellate review in future live controversies. *City of Manchester v. Ryan*, 180 S.W.3d 19 (Mo. 2005).

The facts of this case fit the public interest exception because (1) new licensing schemes of professions is of public interest; (2) the issue is likely to recur because the General Assembly is likely to continue creating licensing schemes; and (3) the issue will likely evade appellate review because, as in Gurley's case, an AHC hearing will ordinarily moot the issue before it can be reviewed by an appellate court.

GURLEY HAD A CONSTITUTIONALLY-PROTECTED PROPERTY INTEREST IN (1) HIS CITY OF COLUMBIA P.I. LICENSE; (2) THE "ENJOYMENT OF THE GAINS OF HIS OWN INDUSTRY" AND (3) THE GOOD NAME AND REPUTATION OF HIMSELF AND HIS BUSINESS

The Fourteenth Amendment to the United States Constitution provides, in pertinent part, that, no state shall "deprive any person of life, liberty, or property, without due process of law." The Missouri Constitution contains essentially the same provision, declaring in Article I, Section 10 that "no person shall be deprived of life, liberty or property without due process of law."

To determine what process is due before depriving a person of life, liberty, or property, a Court must determine whether a plaintiff has a protectable property or liberty

interest. *Ky. Dep't of Corrections v. Thompson*, 490 U.S. 454, 460 (1989). A "property interest" is something to which a person has "more than an abstract need or desire for (or)…unilateral expectation of", but instead, a "legitimate claim of entitlement." *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972). Property interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law – rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Id*. In the licensing context, Missouri courts have consistently held that licensed professionals have a constitutionally-protected property interest in their license. *Larocca v. Bd. of Registration for Healing Arts*, 897 S.W.2d 37, 42 (Mo. App. E.D. 1995).

Gurley cited three sources of state law, rules, and understandings to support his claim that he had constitutionally-protected due process rights to his business and profession as a private investigator.

First, Gurley maintained a City of Columbia license to operate as a private investigator. At the time of the hearing before the Circuit Court, Gurley's license was valid until September 30, 2010. Gurley testified that he believed this license would be valid until its due date and that he had paid dues and obtained an insurance bond to be granted the license. *Transcript of June 4, 2010 Hearing* at 8.

Second, Article I, Section 2 of the Missouri Constitution guarantees that all persons have a "natural right to life, liberty, the pursuit of happiness and the *enjoyment of the gains of their own industry*." Gurley testified that he owned his own business for nearly eight years before applying for licensure from the Board. *Id*. This business, by virtue of

that Gurley owned it, was the "gain of his own industry."

Third, Gurley has a liberty interest in the good name and reputation of both himself and his business. Federal and state due process rights protect more than mere property rights. They also explicitly protect the rights to life and liberty. According to the Supreme Court, "The right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).

"The right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference" implicates constitutionally protected liberty interests." *Green v. McElroy*, 360 U.S. 474, 492 (1959). Thus, "where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971). Stigma alone, however, is not enough. "For state action resulting in stigmatization to rise to the level of a constitutionally protected interest, a person must also show that the state action affects some other tangible liberty or property interest." *Jamison v. Department of Social Services*, 218 S.W.3d 399 (Mo. 2007).

In *Jamison*, the Missouri Supreme Court struck a practice of the Missouri Department of Social Services to place names of accused child abusers on the state Central Registry before giving the accused an opportunity for hearing. The petitioners in that case asserted their constitutional right to a hearing before placement on the list – and prevailed. The Missouri Supreme Court held that the petitioners had shown "stigma-plus" because their

listing on the Central Registry effectively precluded them from obtaining employment in the child care profession.

In this case, Gurley testified that that his own and his company's reputations suffered grievously after the Board's denial of his request for licensure. In particular, Gurley testified that his injury was made worse by the fact that the Board informed him that it denied his application based on an alleged violation of an allegedly criminal federal law. *Transcript of June 4, 2010 Hearing* at 9. Gurley further testified that he did not receive a single call for work between his initial denial on April 13, 2010 and the hearing before the Circuit Court on June 4, 2010. *Id*. As with the petitioners in *Jamison*, Gurley suffered significant injury to his and his company's reputation accompanied by tangible financial injury, thus satisfying the "stigma-plus" test for establishing a constitutionally-protected liberty interest subject to due process of law.

AT A MINIMUM, PROCEDURAL DUE PROCESS REQUIRES NOTICE AND A MEANINGFUL OPPORTUNITY TO BE HEARD, BOTH OF WHICH WERE DENIED TO GURLEY

After establishing that a petitioner has a constitutionally-protected property or liberty interest, courts must determine what process is due. Under both the federal and state constitutions, "the fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Armstrong v. Manzo,* 380 U.S. 545, 552 (1965). The "root requirement" of procedural due process is "that an individual be given an opportunity for a hearing before he is deprived of any significant property interest." *Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532, 542 (1985). This

"pre-deprivation" notice must provide "enough information to be able to defend the allegations and to present conflicting evidence in a timely manner." *Division of Family Services v. Cade*, 939 S.W.2d 546, 554 (Mo. App. W.D. 1997).

In *Jamison*, the petitioners were not given formal notice of the charges against them. Instead, they were interviewed by an investigator from the division and were listed on the Central Registry before having an opportunity to respond to the specific charges. In that case, the Court held that "the investigation alone…(was) plainly insufficient to support the loss of liberty that accompanies the listing in the Central Registry (because) although (they) responded to an investigator's queries, they were not afforded specific notice of the allegation being investigated." *Jamison* at 408. As explained by the Eighth Circuit Court of Appeals, "No matter how elaborate, an investigation does not replace a hearing." *Winegar v. Des Moines Ind. Cmty. School Dist*., 20 F.3d 895, 901 (8th Circ. 1994).

As with the petitioners in *Jamison*, Gurley was not formally presented with notice of the charges lodged against him. Indeed, there was no dispute between the parties at the June 4, 2010 hearing before the Circuit Court that Gurley was not afforded a formal hearing. *Transcript of June 4, 2010 Hearing* at 4-5.

Though a decision on this allegation of error is now moot, Gurley requests this Court render an opinion on the issue under the "public interest" exception to the mootness doctrine. In particular, Gurley asks the Court to explain the procedural due process protections which must be afforded to Missouri professionals who own or operate pre-existing duly-licensed and legally operating businesses and occupations impacted by new state regulations requiring state licensure for the first time. The licensing procedure

for these already practicing professionals more closely resembles traditional disciplinary proceedings than licensing applications. As such, these professionals have a constitutional right to procedural due process which, unfortunately, was not afforded to Gurley in this case. To prevent future deprivations of constitutional rights of Missourians in Gurley's situation, this Court should set forth a clear rule requiring that new state-based licensing statutes make provision to protect the procedural due process rights of persons already practicing in the newly-licensed profession.

CONCLUSION

It is difficult to imagine a statute drafted with more constitutional infirmities than the definition of "private investigator business" codified in §324.1100(11)(b), RSMo. In its quest to ensure that no investigation or investigator ever escaped the grasp of state regulators, the legislature ensnared and criminalized common constitutionally protected activities like researching candidates for office and reading books about people. A plain reading of the definition reveals that the vast majority of Missourians commit a class A misdemeanor every day by engaging in the "private investigator business" with neither licensure nor exemption. This Court cannot allow such a law to stand and must strike it as offensive to the First Amendment; Article I, Section 8 of the Missouri Constitution; and the substantive due process clause of the Fourteenth Amendment.

In creating the new private investigatory regulatory scheme, the legislature declined to make provisions to protect the property and liberty interests of private investigators already in business at the time of the Board's creation. Though Gurley's procedural due process claim is moot as to his own case due to his victory at the AHC, he requests this

Court issue a ruling under the "public interest" exception to the mootness doctrine to protect future Missourians who find themselves faced with the situation Gurley faced in 2010 regarding his ability to continue practicing his profession and running his business. In particular, he asks this Court to clarify that new schemes of professional regulation must allow for contested hearings before denying licensure of Missourians already engaged in the profession in question.

Respectfully submitted,
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RULE 84.06(c) CERTIFICATION

The undersigned certifies that this brief includes all information required by Rule 55.03, complies with the limitations contained in Rule 84.06(b), and contains 11,717 words.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was hand-delivered mailed to Assistant Attorney General Kevin Hall at Supreme Court Building, P.O. Box 899, Jefferson City, MO 65102 on this 16th day of August 2011.

_____
Jay Barnes