

**IN THE
SUPREME COURT OF MISSOURI**

SC-91741

RICKY GURLEY,

Appellant,

v.

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

Respondents.

**Appeal from the Circuit Court of Cole County
The Honorable Paul Wilson, Judge**

BRIEF OF RESPONDENTS

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STATEMENT OF FACTS

From approximately 2002 to 2010, Appellant Ricky Gurley was licensed as a private investigator¹ through the city of Columbia, Missouri. (June 4, 2010 Transcript, p. 7). During this time, Gurley was also part-owner of Risk Management Research Investments, Incorporated, a company that was incorporated in July 2002. (June 4, 2010 Transcript, pp. 6-7). On November 20, 2009, Gurley published on an Internet blog titled “All About Mike Martin” personal information concerning Mr. Martin’s wife that Gurley obtained from state of Missouri driver records. (L.F. 58). On December 20, 2009, Gurley published on the same Internet blog personal information, which Gurley also obtained from state of Missouri driver records, that concerned an employee of the *Columbia Tribune* newspaper. (L.F. 58).

In 2007, the Missouri General Assembly passed House Bill 780 and enacted 25 new sections related to private investigators. Section 324.1102 created the Board of Private Investigator Examiners (“Board”). § 324.1102, R.S.Mo.² Section 324.1108 requires every “person desiring to be licensed in this state as a private investigator or private investigator agency” to submit an application to the Board. § 324.1108, R.S.Mo. Section 324.1104 states that it “shall be unlawful for any person to engage in the private

¹ The City of Columbia referred to them as “private detectives.” (Appx. A20).

² All citations are to Missouri Revised Statutes Cumulative Supplement 2010 unless otherwise noted.

investigator business in this state unless such person is licensed as a private investigator.
§ 324.1104, R.S.Mo.

On March 24, 2010, Gurley applied to the Board for licensure as a private investigator. (L.F. 58). On April 13, 2010, the Board denied Gurley's application for licensure based on grounds that Gurley had disclosed driver license information in violation of the Driver's Privacy Protection Act and that he had failed to disclose that he had been previously refused a bail bondsman's license. (L.F. 58).

On April 21, 2010, Gurley filed a complaint with the Administrative Hearing Commission ("AHC") challenging the Board's denial of his application for licensure. (L.F. 57). Thereafter, Gurley filed a Motion for Declaratory Judgment, Temporary Restraining Order, and Preliminary and Permanent Injunctions with the Circuit Court of Cole County, Missouri. (L.F. 6). As part of his declaratory action, Gurley sought an order or an injunction "forbidding the Board from taking any action against [him], his employees, or business associates for any actions taken before [Gurley] is allowed a constitutionally-sufficient hearing regarding his request for licensure." (L.F. 7). On June 11, 2010, the Circuit Court denied Gurley's motion for a temporary restraining order. (L.F. 25-32). On July 19, 2010, the City of Columbia repealed those portions of its City Code that related to private investigators and business licenses. (Appx. A20).

On December 14, 2010, the AHC issued its Decision and ruled that the Board did not have cause to deny Gurley's application on the grounds that he violated the Driver's Privacy Protection Act. (L.F. 57-62). The next day, Gurley filed a copy of the AHC's

Decision with the Circuit Court. (L.F. 56). On December 31, 2010, the Circuit Court issued its Final Judgment and granted the Board's motion to dismiss.

This appeal followed.

STANDARD OF REVIEW

The standard of review upon appeal is that the judgment of the trial court will be sustained unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law. *Murphy v. Caron*, 536 S.W.2d 30 (Mo. banc 1976). A constitutional challenge to a statute is reviewed *de novo*. *In re Brasch*, 332 S.W.3d 115, 119 (Mo. banc 2011). Article V, Section 3 of the Missouri Constitution confers exclusive jurisdiction over appeals that challenge the validity of a state statute in this Court. *F.R. v. St. Charles County Sheriff's Dept.*, 301 S.W.3d 56 (Mo. banc 2010).

Statutes enjoy a strong presumption of constitutionality. *Reproductive Health Services of Planned Parenthood of St. Louis Region, Inc. v. Nixon*, 185 S.W.3d 685, 688 (Mo. banc 2006). “A statute is presumed valid and will not be held unconstitutional unless it clearly contravenes a constitutional provision.” *Kansas City Premier Apartments, Inc. v. Missouri Real Estate Comm’n*, 344 S.W.3d 160, 166 (Mo. banc 2011), quoting *In re Brasch*, 332 S.W.3d at 119. The person challenging the statute’s validity bears the burden of proving the act clearly and undoubtedly violates the constitution. *Id.* The court will resolve all doubt in favor of the act's validity and may make every reasonable intendment to sustain the constitutionality of the statute. *Westin Crown Plaza Hotel v. King*, 664 S.W.2d 2, 5 (Mo. banc 1984). The court does not address the constitutionality of statutes in isolation and construes the whole statute in light of a strong presumption of a statute's validity. *State v. Shaw*, 847 S.W.2d 768, 776 (Mo. banc 1993).

ARGUMENT

I. Gurley’s numerous hypothetical challenges to the definition of “private investigator business” do not support an application of the overbreadth doctrine and fail as a matter of law. (Responds to Appellant’s Points I through IX).

Rather than view challenged areas of a law in a vacuum, this Court construes a whole statute in light of a strong presumption of the statute’s validity. *Shaw*, 847 S.W.2d at 776. Furthermore, this Court will resolve all doubt in favor of the statute’s validity and may make every reasonable intendment to sustain the constitutionality of the statute. *Westin Crown*, 664 S.W.2d at 5. Despite these principles, Gurley requests this Court to focus on one statutory definition and declare the term “private investigator business” unconstitutional pursuant to the First Amendment overbreadth doctrine. Remarkably, Gurley only presents as support for his request numerous hypothetical examples, which he argues meet the exacting standard for invalidating the statutory definition under the overbreadth doctrine. As the person challenging the statute’s validity, Gurley has failed to prove the definition of “private investigator business” clearly and undoubtedly violates the constitutions of the United States and this state. As a matter of law, Gurley’s challenges fail.

A. Read as a Whole, the Board Statute Supports the Constitutionality of the Term “private investigator business.”

Like many acts or statutes pertaining to a given area of law, the statute the General Assembly passed in regard to private investigators begins with a section containing

definitions for terms used throughout the private investigator law. § 324.1100, R.S.Mo. Gurley's dispute with the private investigator law is derived solely from that section.

Gurley attacks the definition of "private investigator business" as impermissibly overbroad in scope. "Private investigator business" is defined as:

the furnishing of, making of, or agreeing to make, any investigation for the purpose of obtaining information pertaining to:

- (a) Crimes or wrongs done or threatened against the United States or any state or territory of the United States;
- (b) 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;
- (c) The location, disposition, or recovery of lost or stolen property;
- (d) Securing evidence to be used before the court, board, officer, or investigating committee;
- (e) Sale of personal identification information to the public; or
- (f) The cause of responsibility for libel, losses, accident, or damage or injury to persons or property or protection of life or property.

§ 324.1100(11), R.S.Mo. If any analysis into the constitutionality of the private investigator law were to end here, perhaps Gurley's argument would hold some persuasion. But this Court does not address the constitutionality of statutory sections (or even subsections) in isolation; other sections pertaining to private investigators must also

be considered. *Shaw*, 847 S.W.2d at 776.

Among those sections are other definitions used in the private investigator law. In addition to the definition of “private investigator business,” § 324.1100 also defines “private investigator” as:

any person who receives any consideration, either directly or indirectly, for engaging in the private investigator business;

and “private investigator agency” as:

a person who regularly employs any person, other than an organization, to engage in the private investigator business[.]

§ 324.1100(9) and (10), R.S.Mo.

But obviously, the private investigator law consists of more than a set of definitions. It also addresses licensing and enforcement. Engaging in business as a private investigator or private investigator agency without a license is addressed in § 324.1104, which states:

Unless expressly exempted...

(1) 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;

(2) It shall be unlawful for any person to engage in business in this state as a private investigator agency unless such person is licensed under sections 324.1100 to 324.1148.

§ 324.1104, R.S.Mo.

Persons the General Assembly deemed to not be engaging in the private investigator business are listed in § 324.1106, which states:

- (1) A person employed exclusively and regularly by one employer in connection only with the affairs of such employer...
- (2) Any officer or employee of the United States...engaged in the performance of...official duties;
- (3) Any employee, agent, or independent contractor employed by any government agency...while working within the scope of employment...
- (4) An attorney performing duties as an attorney...
- (5) A certified public accountant performing duties as a certified public accountant...
- (6) A collection agency or an employee thereof while acting within the scope of employment...
- (7) Insurers and insurance producers licensed by the state, performing duties in connection with insurance transacted...
- (8) Any bank subject to the jurisdiction of the director of the division of finance...or the comptroller of currency of the United States;
- (9) An insurance adjuster. For purposes of sections 324.1100 to 324.1148, an "insurance adjuster" means any person who receives any consideration...for adjusting in the disposal of any claim...
- (10) Any private fire investigator whose primary purpose of employment is the determination of the origin, nature, cause, or calculation of losses

relevant to a fire;

(11) Employees of an organization...whose investigatory activities are limited to making and processing requests for criminal history records and other background information...

(12) Any real estate broker...salesperson, or...appraiser acting within the scope of his or her license;

(13) Expert witnesses who have been certified or accredited...

(14) Any person who does not hold themselves out to the public as a private investigator and is exclusively employed by or under exclusive contract with a state agency or political subdivision;

(15) Any person performing duties or activities relating to serving legal process when such person's duties or activities are incidental to the serving of legal process...

(16) A consumer reporting agency...and its contract and salaried employees.

§ 324.1106, R.S.Mo.

The process for licensure is addressed in § 324.1108, which, in pertinent part, states:

Every person desiring to be licensed in this state as a private investigator or private investigator agency shall make application therefor to the board of private investigator examiners.

§ 324.1108.1, R.S.Mo. Additionally, § 324.1108, R.S.Mo., requires an applicant to

provide a “verified statement of the applicant’s experience qualifications” and § 324.1110, R.S.Mo., requires an applicant to “pass a written examination as evidence of knowledge of investigator rules and regulations” or if such requirements have been met so that testing has been waived, qualification is dependent on a showing of “registration and good standing as a business in this state...and (t)wo hundred fifty thousand dollars in business general liability insurance” for the previous two years.

The primary rule of statutory construction is to ascertain the intent of the legislature from the language used, to give effect to that intent if possible, and to consider words used in the statute in their plain and ordinary meaning. *Howard v. City of Kansas City*, 332 S.W.3d 772, 779 (Mo. banc 2011). Under the terms of § 324.1104, it is unlawful to engage in the private investigator business absent a license as a private investigator and the same holds true for any private investigator agency. As noted above, a “private investigator” is defined in § 324.1100 as “any person who receives *any consideration...*for engaging in the private investigator business” (emphasis added). “Private investigator agency” is defined as “a person who regularly *employs* any other person...to engage in the private investigator business” (emphasis added). The plain and ordinary meaning of these words indicates that what the legislature intended the Board to regulate was the practice of private investigating in the context of a business for profit or compensation.

The plain and ordinary meaning of the words used for the sixteen different exemptions listed in § 324.1106 also show that the legislature intended to regulate the business of private investigating. The sixteen categories of persons listed in § 324.1106

are exempt from licensure as private investigators either because the public is not subject to their conduct (i.e. exclusive employees of the government or employees in connection only with the affairs of their employer) or they or their employer is already regulated under other regulatory laws (i.e. attorneys, certified public accountants, insurance producers, consumer reporting agencies, etc.). And consistent with the definition of “private investigator,” none of these exemptions apply to individuals acting outside the scope of employment.

Regulating the business of private investigating can also be seen in the requirements that applicants verify experience and complete an examination or otherwise show good standing as a business for the prior two years. Regulating a profession, whose members receive compensation for their actions, to ensure that professionals conduct their business competently is hardly unique to the practice of private investigators.

Protecting the public health and welfare is a primary purpose of professional licensing statutes. *State Bd. of Registration for the Healing Arts v. Boston*, 72 S.W.3d 260, 265 (Mo. App. W.D. 2002). For example, professional licensing for the practice of real estate protects “the public from the evils of fraud and incompetency.” *K.C.P.A.*, 344 S.W.3d at 166, *quoting Miller Nationwide Real Estate Corp. v. Sikeston Motel Corp.*, 418 S.W.2d 173, 176-77 (Mo. banc 1967). The practice of private investigating is no different and the legislature intended to address such evils by creating the licensing scheme for private investigators.

Courts have consistently affirmed the state’s ability to regulate professions. For example, the regulation of the practice of law is within a state’s “sphere of economic and

professional regulation.” *Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 459 (1978). The regulation of psychologists is a valid exercise of a state’s police power to protect the health and safety of its citizens. *Nat’l Ass’n for Advancement of Psychoanalysis v. California Bd. of Psychology*, 228 F.3d 1043, 1056 (9th Cir. 2000). The regulation of securities brokers is a legitimate exercise of a state’s regulatory power. *Underhill Associates, Inc. v. Bradshaw*, 674 F.2d 293, 296 (4th Cir. 1982). A state has an interest in assuring the public that only persons who have demonstrated their qualifications as certified public accountants and received a license can hold themselves out as certified public accountants. *Accountant’s Society of Virginia v. Bowman*, 860 F.2d 602, 605 (4th Cir. 1988). Even the regulation of interior designers is based on a compelling state interest to protect public safety. *Locke v. Shore*, 634 F.3d 1185, 1196 (11th Cir. 2011).

Regulations on entry into a profession are constitutional if they have a rational connection with the applicant’s fitness or capacity to practice the profession. *Lowe v. S.E.C.*, 472 U.S. 181, 228 (1985) (White, J., concurring) (quoting *Schware v. Board of Bar Examiners*, 353 U.S. 232, 239 (1957)). The modern state owes and attempts to perform a duty to protect the public from those who seek to obtain its money and when one does so through the practice of a calling, the state may have an interest, usually served by a licensing system, in shielding the public from the untrustworthy, the incompetent, or the irresponsible. *Thomas v. Collins*, 323 U.S. 516, 544 (1945) (Jackson, J., concurring). This is a distinction missed by Gurley when he claims that such extreme examples as reading newspapers, researching political candidates, doing fourth grade

assignments, and inquiring about a potential date on Facebook require private investigator licensure. Read as a whole, sections of Chapter 324 regarding private investigators do not regulate the examples proposed by Gurley. By focusing on the definition of “private investigator business” in isolation, Gurley ignores the overall licensing scheme created by the legislature and asks this Court to disregard the legitimate state interests in protecting the public health and welfare from fraudulent and incompetent private investigators.

B. Gurley’s Overbreadth Challenge Fails.

1. The standard for invalidating laws under the overbreadth doctrine has not been met.

Despite the vast majority of his case being premised on the overbreadth doctrine, Gurley fails in meeting “the exacting standard for invalidating laws under the doctrine.”³

³ In their Amici Curiae brief, the American Civil Liberties Unions of Eastern and Western Missouri and Kansas (“Unions”) argue that the Board failed in its burden to offer evidence establishing that the problem the Board identifies is real and that speech restriction will alleviate that problem to a material degree. Unions’ Brief, p. 14. The Unions’ argument is contrary to existing law (“The overbreadth claimant bears the burden of demonstrating, from the text of the law and from actual fact, that substantial overbreadth exists.” *Virginia v. Hicks*, 539 U.S. 113, 122 (2003) (internal quotations omitted); *see also K.C.P.A.*, 344 S.W.3d at 166). Additionally, the circuit court was presented, by Gurley himself, with a copy of the AHC Decision that included numerous

Locke, 634 F.3d at 1191. The overbreadth doctrine “permits the facial invalidation of laws that inhibit the exercise of First Amendment rights if the impermissible applications of the law are substantial when judged in relation to the statute’s plainly legitimate sweep.” *City of Chicago v. Morales*, 527 U.S. 41, 52 (1999). The overbreadth doctrine seeks to balance the harmful effects of invalidating a law that in some applications is perfectly constitutional against the possibility that the threat of enforcement of an overbroad law will deter people from engaging in constitutionally protected speech. *U. S. v. Stevens*, 130 S.Ct. 1577, 1594 (2010). If any impermissible applications exist in regard to the private investigator law, they are not substantial when judged in relation to the statutes’ plainly legitimate sweep of professional licensing. *See, Locke*, 634 F.3d at 1192. Gurley has failed to demonstrate that there exists a possibility that the threat of enforcement of the private investigator law will deter people from engaging in constitutionally protected speech.

In determining whether a statute’s overbreadth is substantial, a court considers a statute’s application to real-world conduct, not fanciful hypotheticals. *Stevens*, 130 S.Ct. at 1594. Before applying the strong medicine of overbreadth invalidation, such overbreadth must be substantial “not only in an absolute sense, but also relative to the scope of the law’s plainly legitimate applications.” *Hicks*, 539 U.S. at 119-120. The overbreadth claimant bears the burden of demonstrating from the text of the law and from actual fact that substantial overbreadth exists. *Stevens*, 130 S.Ct. at 1594, quoting *Hicks*,

findings of fact that illustrate why the legislature enacted the private investigator laws.

539 U.S. at 122. Here, Gurley has presented no actual facts and merely presented this Court with hypotheticals, which the circuit court correctly labeled as “worse-than-worst-case application” of the private investigator law.

“The mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge.” *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 800 (1984). “The bare possibility of unconstitutional application is not enough; the law is unconstitutionally overbroad only if it reaches substantially beyond the permissible scope of the legislative regulation.” *Id.* “(T)here must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds.” *Id.* at 801.

As already stated, the permissible scope of the private investigator law is to regulate the profession of private investigating. The law the legislature enacted in 2007 does not permit the Board to regulate, or a prosecutor to prosecute, conduct that merely includes a person reading the newspaper or a fourth grade student completing a research assignment. Such examples do not constitute business enterprises or ways in which compensation is received under the guise of private investigating expertise. While Gurley has conceived these examples, which he mistakenly believes support his constitutional challenge to the private investigator law, none of these examples are applications permitted under the statute. Consequently, Gurley’s worse-than-worst-case hypotheticals do not constitute a realistic danger the private investigator law will significantly compromise recognized First Amendment protections.

Professional regulation is not invalid, nor is it subject to First Amendment strict scrutiny, merely because it restricts some kinds of speech. *Ohralik*, 436 U.S. at 456-57. A statute that governs the practice of an occupation is not unconstitutional as an abridgment of the right to free speech, so long as any inhibition of that right is merely the incidental effect of observing an otherwise legitimate regulation. *Underhill*, 674 F.2d at 296. One who takes the affairs of a client personally in hand and purports to exercise judgment on behalf of the client in light of the client's needs and circumstances is properly viewed as engaging in the practice of a profession. *Bowman*, 860 F.2d at 604, quoting *Lowe*, 472 U.S. at 232. In such a situation, the professional's speech is incidental to the conduct of the profession and government regulation limiting the class of persons who may practice the profession cannot be said to have enacted a limitation of freedom of speech or the press subject to First Amendment scrutiny. *Id.*, see also, *Locke*, 634 F.3d at 1192.

Most if not all of the examples cited by Gurley are entirely outside of the private investigator profession. To the extent some of the examples are within the reach of the private investigator law, they are incidental to the conduct a private investigator. By advocating that the private investigator law is unconstitutional based on examples of speech outside the purview of the regulatory scheme, Gurley appears to miss this distinction.

There comes a point where the effect—at best a prediction—cannot, with confidence, justify invalidating a statute on its face and thereby prohibit a state from enforcing the statute against the conduct that is admittedly within its power to proscribe.

New York v. Ferber, 458 U.S. 747, 770 (1982). Even if there are marginal applications in which a statute would infringe on First Amendment values, facial invalidation is inappropriate if the remainder of the statute covers a whole range of easily identifiable and constitutionally proscribable conduct. *Ferber*, 458 U.S. at 770, n. 25.

2. The licensing scheme created by the Legislature enables this Court to construe the private investigator law to avoid constitutional problems.

When a court is dealing with a statute challenged as overbroad, it should construe the statute to avoid constitutional problems if the statute is subject to such limiting construction. *Ferber*, 458 U.S. at 769, n. 24; *see also Westin Crown Plaza Hotel*, 664 S.W.2d at 5. Laws of general application that are not aimed at conduct commonly associated with expression and do not permit licensing determinations to be made on the basis of ongoing expression or the words to be spoken, carry with them little danger of censorship. *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 760-761 (1988). Justification for the application of overbreadth analysis applies weakly, if at all, in the ordinary commercial context. *Bates v. State Bar of Arizona*, 433 U.S. 350, 380 (1977). Rarely, if ever, will an overbreadth challenge succeed against a law or regulation that is not specifically addressed to speech or to conduct necessarily associated with speech, such as picketing or demonstrating. *Hicks*, 539 U.S. at 124.

The private investigator law, in its general application of regulating a profession, is not aimed at conduct commonly associated with expression. Licensing determinations of applicants, discipline of licensees, or prosecutions for those acting without a license

are not made on the basis of ongoing expression or words to be spoken. These functions, within the overall licensing scheme of the private investigator law, do not target speech. As a result, there is no justification for applying the overbreadth doctrine in the ordinary commercial context of licensing private investigators.

Here, of course, the private investigator law is easily construed under a professional licensing construction. Facial invalidation is inappropriate because this statute, in regulating the private investigator profession, covers a whole range of easily identifiable and constitutionally proscribable conduct. By repeatedly stressing an application of the overbreadth doctrine, Gurley is asking this Court to seek, rather than avoid, constitutional problems in the private investigator law despite it being subject to a legitimate limiting construction of professional licensing. This Court should decline to interpret the private investigator law as Gurley requests.

C. To the Extent the Private Investigator Law Directly Restricts Speech, Those Provisions Survive Intermediate Scrutiny and Are Not Unconstitutional.

Despite having a legitimate and substantial interest in regulating certain professions, a state does not have unlimited power to directly restrict speech through the regulation of a profession. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 770 (1976). To the extent specific provisions of a regulatory scheme directly restrict speech, those provisions must survive the lesser standard of intermediate scrutiny since they are state regulations of commercial speech. *K.C.P.A.*, 344 S.W.3d at 168. As regulations of only commercial speech, the four-part intermediate

scrutiny test as described in *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 566 (1980), must be applied to the private investigator laws. *K.C.P.A.*, 344 S.W.3d at 168.

First, this Court must determine whether the expression is protected by the First Amendment. *Central Hudson*, 447 U.S. at 566. Commercial speech is protected by the First Amendment if it concerns lawful activity and isn't misleading. *Id.* Second, this Court must determine whether the asserted governmental interest is substantial. *Id.* Third, if the answer to the previous two inquiries is positive, this Court must determine whether the regulation directly advances the government interest asserted, and fourth, this Court must then determine whether the government regulation is not more extensive than is necessary to serve that interest. *Id.* If the restrictions on speech provide only ineffective or remote support for the government's purpose or if the governmental interest could be served by a more limited restriction on commercial speech, the excessive restrictions cannot survive review. *K.C.P.A.*, 344 S.W.3d at 169.

As already discussed, the private investigator law challenged by Gurley meets the requirement of directly advancing a substantial state interest. The requirements of licensure directly relate to the honesty and competency the legislature seeks to assure in those who practice private investigating in the state of Missouri. *See, K.C.P.A.*, 344 S.W.3d at 169. No one argues that interest is not substantial.

As explained before, the private investigator law is also not excessive as it extends only so far as the interest it serves. *Hudson*, 447 U.S. at 565. A state cannot reach beyond its interests and regulate speech that poses no danger to that state's interests. *Id.*

As previously explained, the private investigator law does not regulate fourth grade research assignments or individuals learning about potential dates on Facebook. The restrictions imposed by the private investigator law does not go beyond the State's interest in regulating private investigators and private investigator agencies as defined in § 324.1100(9) and (10). As a result, the private investigator law survives intermediate scrutiny, does not violate Gurley's freedom of speech, and is not unconstitutional.⁴

Consequently, the trial court correctly concluded that Gurley's case should be dismissed.

II. Gurley was afforded the due process he was entitled to as an applicant for licensure and his property rights were not deprived. (Responds to Appellant's Point X).

In his last point relied on, Gurley asserts that he "had a property right in his existing licensure and business...from the City of Columbia [and] he was not afforded an

⁴ This conclusion also applies equally to Gurley's claim that the private investigator law violates article I, section 8 of the Missouri Constitution. The right to free speech under article I, section 8 is subject to the state's inherent right to exercise its police power. *Missouri Libertarian Party v. Conger*, 88 S.W.3d 446, 447-48 (Mo. banc 2002). Because the private investigator law serves an important purpose and is a proper exercise by the State of its police powers, it does not violate the right to freedom of speech under article I, section 8 of the Missouri Constitution. *See, K.C.P.A.*, 344 S.W.3d at 170.

opportunity for a hearing before such right was taken away.” Gurley Brief, p. 43. Gurley also states in his last point relied on that the issue of whether he received proper due process is now moot because he has prevailed in his case before the AHC and has been issued a private investigator license from the Board. Gurley is correct that his claim regarding due process is moot. Gurley Brief, p. 43. Additionally, Gurley misconstrues his Due Process rights under the United States and Missouri constitutions. As a matter of law, Gurley’s argument is without merit.

A. Gurley’s Due Process Point Is Moot.

In general, a case becomes moot when the issues presented are no longer “live” or the parties lack a legally cognizable interest in the outcome. *Murphy v. Hunt*, 455 U.S. 478, 481 (1982). When an event occurs that makes a court’s decision unnecessary or makes it impossible for the court to grant effectual relief, the case is moot and should be dismissed. *In re Southwestern Bell Telephone Company’s Revision to General Exchange Tariff*, 18 S.W.3d 575, 577 (Mo. App. W.D. 2000).

As Gurley corrects states, the issue regarding him being deprived due process is moot. Gurley Brief, p. 43. This issue first became moot on July 19, 2010, when the City of Columbia ordained Ordinance 20688 that repealed Article VI of the City Code relating to private detectives and business licenses. (Appx. A20). As a result of this repeal, the City of Columbia no longer licenses private investigators. Additionally, Gurley’s due process argument is moot because he has been issued a private investigator license by the Board. As a result of these developments, Gurley lacks a legally cognizable interest in the outcome of this issue and any decision by this Court regarding Gurley’s due process

is unnecessary and should be dismissed.⁵

B. The Private Investigator Law and the Board Did Not Violate Any Due Process Rights.

Even if this Court concludes otherwise, the law does not support Gurley's position regarding due process for individuals who hold local licenses at the time the state creates a state-wide license. The general rule, and the rule in Missouri, is that absent a statutory requirement, notice and a hearing are not prerequisites to the exercise of discretionary authority to grant or deny a license. *State ex rel. Garrett v. Randall*, 527 S.W.2d 366, 371 (Mo. banc 1975). Section 324.1134, R.S.Mo., provides that the Board may suspend or refuse to renew any certificate of registration or authority, permit or license and the Board shall notify an applicant of "the reasons for the suspension or refusal" and advise the applicant of his or her rights to file a complaint with the AHC as provided in chapter 621. Section 621.045, R.S.Mo., provides that the AHC shall conduct hearings and make findings of fact and conclusions of law in cases when an agency, including the Board, refuses to issue a license for an applicant. There is no provision in the private investigator law, or even Chapter 621, that provides an applicant a hearing prior to the

⁵ Gurley's characterization that this is an issue capable of repetition yet evading review is not correct. Gurley Brief, p. 43. While Gurley's situation is moot because he ultimately received his license, this will not necessarily be the case for each applicant that applies for licensure from the Board. Others who will have been denied by the Board may not prevail before the AHC like Gurley did.

Board's decision to refuse to issue a license.

“When the purpose of an administrative determination is to decide whether a privilege [that] an applicant does not possess, such as a...license, shall be granted to him or withheld in the exercise of a discretion vested by statute, notice and hearing is not necessary in the absence of an express or implied statutory provision therefor.” *Peppermint Lounge, Inc. v. Wright*, 498 S.W.2d 749, 753 (Mo. banc 1973), quoting *Pinzino v. Supervisor of Liquor Control*, 334 S.W.2d 20, l.c. 27 (Mo. banc 1940). “Once a license has been obtained, the licensee will generally acquire a property right sufficient to require substantive and procedural due process before the license can be impaired, suspended, or revoked.” *Missouri Real Estate Commission v. Rayford*, 307 S.W.3d 686, 692 (Mo. App. W.D. 2010).

It may be that there would be less danger of arbitrary action if a hearing were made a prerequisite, but that is a matter for legislative consideration and the mere refusal to grant a licensure applicant a hearing prior to denial, when the statute does not require one, does not make the denial of an application arbitrary or capricious. *Garrett*, 527 S.W.2d at 370. And it is generally held that due process is not violated by refusal of a license without notice and hearing where no pre-denial notice or hearing is required by law. *Id.* at 371.

As these aforementioned cases and statutes reflect, Gurley did not have any property right in a state license prior to the Board's denial of his application for licensure. Simply put, Gurley did not have a state license nor any other state-granted right. Moreover, there was no express or implied statutory provision under which to provide

Gurley a hearing. Consequently, there was no substantive or procedural due process to provide Gurley prior to the Board's decision to deny him his application for licensure.

Gurley, of course, does not claim a pre-existing state license. He relies on the private investigator license he held from the City of Columbia and his ownership of a private investigator business there. Gurley's claim that the State owed him due process because he held a city license and owned a business for the past ten years is misplaced for several reasons.

First, the Board, in denying Gurley a state private investigator license, had no authority to affect Gurley's license from the City of Columbia or his business.⁶ An administrative agency is a creature of statute and enjoys only the authority delegated to it by the legislature. *King v. Div. of Employment Security*, 964 S.W.2d 832, 835 (Mo. App. W.D. 1997). There are no provisions in the private investigator laws granting authority for the Board to discipline or otherwise affect Gurley's license from the City of Columbia or his business.

Second, there is no evidence in this case that Gurley's "property right in his existing licensure and business...was taken away" by the Board. While Gurley may claim the Board's denial caused his business to wane, this is an indirect consequence of the procedure that the legislature provided and the Board followed. Because the Board was without authority to act against Gurley's city license or his business, the Board did

⁶ There is no evidence in the record that Gurley applied for a private investigator agency license in regard to his private investigator business.

not disturb either one. Throughout this process, Gurley maintained both his city license and his business. And now, of course, Gurley no longer possesses his city license because the City of Columbia no longer provides such licenses. Hence, Gurley has not been deprived of any property rights.

Lastly, as a matter of public policy, Gurley is not entitled to due process from the state simply because he possesses a license from a municipality or owns a business. While it may be true that his case is atypical in that he practiced with a city license for a period of time before the legislature decided to create a state license that superseded his city license, what Gurley seeks is some kind of super due process that extends to areas in which no life, liberty, or property has been deprived. “(N)o one has a vested right that the law will remain unchanged.” *Cannon v. Cannon*, 280 S.W.3d 79, 85 (Mo. banc 2009). Under Gurley’s argument, individuals with licenses from municipalities, counties, other states, and national associations are all entitled to additional due process simply because they possess a license or own a business prior to the state creating a new licensing scheme. No provision in Missouri law provides for such due process and Gurley has not provided this Court with any authority in support of his position. There is no element of estoppel against the state by virtue of the fact that an applicant previously obtained a city license or spent money in preparation for the operation of an enterprise. *Peppermint Lounge*, 498 S.W.2d at 754.

Consequently, the trial court correctly concluded that Gurley’s case should be dismissed.

CONCLUSION

For the foregoing reasons, this Court should affirm the trial court's judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that a true and correct copy of the foregoing was filed electronically pursuant to Rule 103 and Court Operating Rule 27 through Missouri Case Net, this 30th day of September 2011 to:

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The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b), and that the brief contains 6,573 words.

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