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July 31, 2007

HAND DELIVERY

Thomas F. Simon, Clerk
Missouri Supreme Court
Supreme Court Building
207 West High Street
Jefferson City, MO 65102

FILED
JUL 31 2007
Thomas F. Simon
CLERK, SUPREME COURT

Re: James Trout v. State of Missouri, et al., Missouri Supreme Court Case No. SC88476

Dear Mr. Simon:

On July 19, 2007, the Missouri Supreme Court issued an opinion in the above-referenced case and entered an order inviting letter briefs “concerning the effect of the invalidity of section 130.032, RSMo Supp. 2006 on campaign contributions collected in reliance on that section.” The Missouri Republican State Committee (MRSC) is submitting this letter brief in response to that order. Please present this brief to the members of the Court for their consideration.

I. Introduction

As a preliminary matter, this Court can avoid the need to consider retrospectivity or prospectivity of its decision by re-examining the severability analysis in its non-final, slip opinion at the request of the Attorney General or on its own motion. See Part III. In the alternative, this Court should apply its decision prospectively to prevent injustice to hundreds of citizens, public servants, and candidates who relied in good faith on the law in exercising their First Amendment rights. See Part IV.

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II. Factual Background

House Bill 1900 was enacted with strong bipartisan support. L.F. 455. Only one Senator voted against the senate substitute version that added the provisions that are the subject of this lawsuit. Id. Before House Bill 1900 was enacted, § 130.032 contained provisions limiting contributions to candidates. § 130.032, RSMo 2000. Individual and committee contributions to candidates were subject to limits ranging from \$325 to \$1,275, depending on the office sought and after indexing for inflation. § 130.032.1, RSMo 2000. There are potentially 362 political party committees for each party in Missouri. § 115.603, RSMo 2000.¹ Every political party committee is subject to separate limits for monetary and in-kind contributions made to candidates. § 130.032.4, RSMo 2000. These separate limits allow it to contribute approximately twenty times more than an individual for each election. Moreover, every continuing committee (Missouri's version of a generic political action committee) has its own limit for contributions made to candidates. Multiple continuing committees may be established by a single entity. Mo. Ethics Advisory Op. No. 97.11.106 (copy attached as Exhibit 1). Political party committees and continuing committees have no limit on the amount that they can accept as contributions.

Under this system, the candidate contribution limits frustrated rather than promoted the most important purpose of any campaign finance system – full public disclosure. Contributors who had contributed the maximum to a candidate donated freely to other committees, which could then contribute to candidate committees or other committees. Money flowed from and between independent committees – and particularly political party committees – before ultimately finding its way to the campaigns. Money is fungible and few if any ways exist to determine the original source of the money that candidates received, aside from speculation and conjecture.

¹ The permissible committees for each political party committee are: one state committee, nine congressional district committees, 167 legislative district committees, 34 senate district committees, 46 judicial district committees, and 115 county committees (which includes the St. Louis City committee).

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In House Bill 1900, the General Assembly determined that the system was broken, and fixed it by making two changes to the law. First, it repealed the limits on contributions to candidates. With this change, contributors could give directly to support candidates who shared their beliefs and policy positions, and were not relegated to contributing to other groups after contributing the maximum amount allowed to candidate committees. In a provision codified as new § 130.032.1, House Bill 1900 also banned political party committees from making monetary contributions to other types of committees. They can still make in-kind contributions, which are contributions in a form other than money (e.g., donated goods or services). But, by banning monetary contributions, the General Assembly intended to encourage direct contributions to candidates rather than to other groups. Together, these two provisions were enacted to restore transparency to Missouri's campaign finance system, which was plagued by counter-productive incentives.

In addition, House Bill 1900 added the black-out provision – to be codified in § 130.032.2 – with an entirely different purpose. Such provisions are not intended to promote public disclosure. Rather, the black-out provision completely prohibits contributions to certain candidates and officeholders during the legislative session to decrease opportunities for corruption of public officials and/or to free officeholders from the demands of fundraising to allow them to focus on their official duties. See, e.g., Shrink Mo. Govt. PAC v. Maupin, 922 F.Supp. 1413, 1420 (E.D. Mo. 1996); Kimble v. Hooper, 164 Vt. 80, 91 (1995); State v. Alaska Civil Liberties Union, 978 P.2d 597, 630 (Alaska 1999). The black-out provision has a completely separate purpose and operates independently from the repeal of the contribution limits and the ban on monetary contributions by political party committees.

Plaintiff Trout filed suit on January 2, 2007, one day after House Bill 1900 took effect. L.F. 1. One of his objects was to undo the legislature's repeal of the contribution limits and return to the pre-existing system of limits. Id. at 10, 11. He tried to accomplish this end by lodging clear title, single subject, and original purpose challenges to House Bill 1900. Id. at 10. The trial court found that the repeal of the contribution limits was procedurally valid, and refused to invalidate it on those grounds. Id. at 491-96. The trial court also found that the black-out provision violated the First Amendment. Id. at 496-98.

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On appeal, this Court also rejected Plaintiff's procedural constitutional challenges, finding that the General Assembly had observed the constitutional procedures in passing House Bill 1900. Slip op. 6-9. Regarding the black-out provision, the Attorney General did not brief its validity on appeal. See State's First Br. 61-69. Accordingly, this Court's opinion does not consider the constitutionality of the black-out provision. Slip op. 11. The Court considered whether the black-out provision was severable from the other changes to § 130.032. *Id.* 10-12. The Court identified one vote taken in the Senate as pivotal. *Id.* 11. The repeal of the limits was proposed along with the black-out provision (and other changes in the law). *Id.* 11; L.F. 443. An amendment was offered to remove the black-out provision. Slip. op. 11; L.F. 443. Twenty-five Senators voted against removing the black-out provision and only eight Senators voted in favor of removing it. L.F. 443.

From the vote on this failed amendment, the Court concluded that the black-out provision and repeal of the limits were non-severable. Slip op. 11. The Court did not consider whether the repeal of the limits and the black-out provision were intended to fix different problems. *Id.* It did not consider whether they had different purposes. *Id.* It did not consider whether the two provisions could function separately. *Id.* Its sole focus was the one failed amendment in the Senate. *Id.* The Court concluded that "because the black-out period was declared invalid (and no appeal followed from that part of the trial court's judgment) the repeal of the campaign contribution limits is also invalid." *Id.* Thus, the Court's severability analysis granted Plaintiff Trout the relief that he had sought all along – return to the old campaign finance system.

III. The Black-out Provision Is Severable

The weighty matter of overturning an admittedly constitutional enactment of the legislature based on the (assumed) unconstitutionality of another provision in the same bill is before this Court. The MRSC appreciates the opportunity to submit letter briefs concerning the effect of the holding that § 130.032 is invalid. Preparing that brief and analyzing the basis for that holding required the MRSC to review the slip opinion. From that review, MRSC believes that the slip opinion misconstrued the legislative history of House Bill 1900, and incorrectly invalidated all of § 130.032. The slip opinion is not yet

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final, and this Court still has jurisdiction to reconsider the analysis and make any necessary modifications. Because of the importance of deciding the case correctly and the upheaval that will occur in the regulated community regardless of how the current decision is applied, this Court is presented with an especially compelling case for re-examination of the slip opinion before it becomes final. Cf. Independence-Nat'l Educ. Ass'n v. Independence Sch. Dist., 223 S.W.3d 131, 137 (Mo. banc 2007).

As of the filing of this letter brief, neither Plaintiff nor the State has moved to modify the opinion or requested a rehearing. They have until Friday, August 3 to do so. Rule 84.17. Plaintiff prevailed, and has little incentive to move to modify. The Attorney General, on the other hand, is charged with defending the validity of state statutes on behalf of the people of the State and their elected representatives in the General Assembly. He can and may intend to request rehearing or modification to uphold the validity of the statute. See Rule 84.17. But, in his July 25 letter brief, the Attorney General embraces the Court's decision, and does not indicate that he will be seeking further review of the opinion. If the Attorney General declines to request modification or rehearing, MRSC respectfully requests that this Court re-examine its opinion on its own motion and provides this analysis to assist in that inquiry.²

A. General Principles of Severability Analysis

The General Assembly intends for “[t]he provisions of every statute [to be] severable.” § 1.140, RSMo 2000. Statutory provisions are presumed to be severable, and

² The Attorney General accepted numerous over-limit contributions after House Bill 1900 went into effect. Motion for Leave to File Amicus Curiae Brief Out of Time, Ex. A (June 14, 2007). He has at least a million dollar pecuniary interest in the resolution of the issue before this Court and knows the relative positions of himself, his potential rivals in the Democratic primary, and his potential rivals in the general election. Id. His zealous representation of the interests of the people of the State cannot be assumed. See MRSC's Amicus Curiae Br. 7-18. Independent review by this Court is especially important, because of the breakdown in the adversarial process. State v. Planned Parenthood of Kan. and Mid-Mo., 66 S.W.3d 16, 20 (Mo. banc 2002).

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provisions other than the void provision should be invalidated only in rare cases. See, e.g., Akin v. Dir. of Revenue, 934 S.W.2d 295, 300-01 (Mo. banc 1996). In repetitive, emphatic language, § 1.140 declares that the remaining provisions of a statute must be retained unless they are: (1) “so essentially and inseparably connected with, and so dependent upon, the void provision that it cannot be presumed the legislature would have enacted the valid provisions without the void one” or (2) “incomplete and . . . incapable of being executed in accordance with the legislative intent” standing alone. Id. (emphasis added). See also § 130.096, RSMo 2000 (the provisions of Chapter 130, RSMo, are severable if they can be given effect without the invalid provision).

A part, section, sentence, or clause of a statute may be held constitutionally invalid without affecting the remainder. State ex rel. Enright v. Connett, 475 S.W.2d 78, 81 (Mo. banc 1972) (quoting State ex rel. Harvey v. Wright, 158 S.W. 823, 826 (Mo. banc 1913)). When evaluating the viability of an excised statute, the Court must determine whether the valid remainder reflects the legislative intent and furnishes sufficient details of a plan by which that intention may be effectuated. § 1.140, RSMo 2000; Labor’s Educ’l & Political Club Indep. v. Danforth, 561 S.W.2d 339, 350 (Mo. banc 1978); State ex rel. Enright v. Connett, 475 S.W.2d 78, 82 (Mo. banc 1972). The Court cannot presume that the legislature would have declined to enact the valid provisions had it known of the defect. Ryan v. Kirkpatrick, 669 S.W.2d 215, 219 (Mo. banc 1984); State ex rel. Public Defender Comm’n v. County Court of Greene County, 667 S.W.2d 409, 414 (Mo. banc 1984). “All statutes should be upheld to the fullest extent possible.” Gen. Motors Corp. v. Dir. of Revenue, 981 S.W.2d 561, 568 (Mo. banc 1998). See also Associated Indus. of Mo. v. Dir. of Revenue, 918 S.W.2d 780, 784 (Mo. banc 1996).

B. This Court incorrectly construed the drafting history of House Bill 1900.

This Court based its severability analysis on one proposed amendment that was rejected by the Senate. Slip op. 11. That proposed amendment to House Bill 1900 presented the members of the Senate with this choice: (1) pass a repeal of contribution limits and ban contributions during the legislative session, or (2) only repeal contribution limits. A bipartisan majority of the members of the Senate chose to pass the bill with a repeal of contributions and a black-out period. L.F. 443. Only eight Senators favored

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removing the black-out provision. *Id.* This choice reflects that the members of the Senate preferred to pass the bill with a black-out provision. No inference can be drawn from this vote regarding whether the repeal of contribution limits would have passed on its own. *Cf. United States v. Craft*, 535 U.S. 274, 287 (2002) (noting that failed amendments are a dangerous basis upon which to base statutory interpretations because several equally tenable inferences can be drawn from inaction). The Senate did not have to make an either/or choice. It could (and did) decide that both provisions were independently meritorious and should be included in the bill.

In its severability analysis, the opinion states: “That the two provisions were inseparably connected and dependent upon each other is conclusively proven by the fact that the Senate amendment to decouple the provisions failed.” Slip op. 11. That is, since the Senate preferred both to repeal contribution limits and impose a black-out period, the repeal of the limits and the black-out period were an all-or-nothing proposition. But, that conclusion is incorrect because the Senate was not choosing between the repeal of limits with a black-out period or nothing at all. It was merely deciding whether it wanted to keep the black-out provision in the bill.

The opinion continues: “Conversely, the failure of that amendment conclusively disproves respondents’ allegation that the General Assembly would have abolished campaign contribution limits even in the absence of the unconstitutional black-out period.” *Id.* That is, the Senate’s preference for both provisions shows that it would not have enacted the repeal of the limits without the black-out period. But, that conclusion is incorrect because the Senate’s preference to keep the black-out provision does not provide any indication of what the Senate would have done if it had known the black-out provision would be held unconstitutional.

An analogy from life will illustrate the error. After dinner, a waiter offers dessert to a restaurant customer: a slice of pie with or without ice cream. The customer chooses ice cream and pie. The waiter then goes to the kitchen and finds that the restaurant is out of ice cream. Should the waiter infer that the customer does not want pie because the customer previously chose ice cream and pie over pie alone? Of course not. The customer preferred to have both ice cream and pie. If faced with the choice between a slice of pie or nothing, the customer would very likely choose the pie.

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In § 1.140, the General Assembly has expressly directed the courts to presume that, in effect, it wants both pie and ice cream anytime it makes such a choice, but it will take pie or ice cream if it cannot have both. From the voting history, no inferences can be made about whether the black-out period or the repeal of the contribution limits would have passed standing alone. Ryan, 669 S.W.2d at 219; County Court of Greene County, 667 S.W.2d at 414. Given the presumption in favor of severability, the only permissible conclusion is that the black-out period should be severable.

C. The slip opinion departed from the analytical framework that this Court has established for evaluating severability.

This Court determines the legislature's intent from the plain text of the legislation. See, e.g., United Pharmacal Co. v. Mo. Bd. of Pharmacy, 208 S.W.3d 907, 909-10 (Mo banc 2006). Individual legislators have their own intent, their own motivations, and their own ideas about what the vote means. Without debate transcripts, supporting or opposing statements, and committee reports, courts cannot ascertain why certain amendments were proposed, what was said about them, and what factors the legislators actually considered during debate. Thus, this Court generally refuses to consider statements of individual legislators and other types of legislative history in interpreting statutes. See, e.g., Pipe Fabricators, Inc. v. Dir. of Revenue, 654 S.W.2d 74, 76 (Mo. banc 1983) (stating “[t]he court is bound by the express written law, not what may have been intended by an enactment”). When severability is at issue, the Court consults the plain text to determine whether the remaining legislation will function effectively after the void provision is severed. Akin, 934 S.W.2d at 300-01.

The Court's slip opinion cites a law review article by Professor Martha Dragich for the proposition that legislative intent should be determined “by reference to the substantive legislative history, or drafting history, of the bill.” Slip op. 11. The opinion, however, misreads the article. Professor Dragich has argued that legislative history may need to be analyzed in determining a remedy for a procedural constitutional violation. Martha J. Dragich, State Constitutional Restrictions on Legislative Procedure: Rethinking the Analysis of Original Purpose, Single Subject, and Clear Title Challenges, 38 Harv. J. Legis. 103, 156-57 (2001). She believes that it may be necessary to wrestle

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with the “problematic” nature of legislative history and the related “thorny questions” in matching remedies to procedural constitutional violations. Id. For example, in a log-rolling case, severing the unrelated provision without regard for the voting history might reward the very conduct that the constitutional provisions were intended to prevent. Id. at 160-62, 163. By definition, a log-rolled bill includes provisions that could not have passed on their own. Id. See also Hammerschmidt v. Boone County, 877 S.W.2d 98, 101-02 (Mo. banc 1994). If the bill could not have passed without log-rolling, Professor Dragich argues that the whole bill should be voided. Dragich, Legislative Procedure, at 160, 163. But, in this case, the Court rejected the Plaintiff’s procedural challenges. Slip. op. 6-9. No log-rolling was involved. The Court engaged in a severability analysis only because the trial court found that the black-out period violated the First Amendment and the Attorney General did not appeal that decision. Such questions of substantive invalidity do not raise questions about the process by which the bill was enacted. The only relevant question is whether the remainder of the statute can function after the void provision is removed. § 1.140, RSMo 2000.

Returning to the pie and ice cream analogy, one might interject that the choice involved two good things, and thus implicitly favors severability. What if the choice had involved two complimentary items like shoes and shoe laces? But, that objection exactly highlights how the slip opinion went wrong. The Court should consider whether the repeal of the limits and the black-out provision are more like pie and ice cream or shoes and shoe laces. Section 1.140 prescribes just such a functional analysis to determine severability.

Applying a functional analysis in this case, the black-out provision is severable from the remainder of § 130.032. The black-out provision is intended to protect officeholders

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from the threat of public corruption during the legislative session.³ See, e.g., Maupin, 922 F.Supp. at 1420; Kimball, 164 Vt. at 91. The repeal of the contribution limits addresses an independent problem – lack of transparency from a contribution limit system that encourages many untraceable donations. The sections have different purposes. They function independently. Either section could be implemented without the other. The black-out provision is severable. See, e.g., Alaska Civil Liberties Union, 978 P.2d at 631, 633-34 (invalidating and severing multiple provisions of a campaign finance law, including a ban on contributions during the legislative session); Russell v. Burris, 146 F.3d 563, 573 (8th Cir. 1998) (severing unconstitutional campaign finance restrictions from the remainder of the bill). This Court should modify its opinion to so hold.

IV. The Trout Opinion Should Apply Prospectively

This Court embraces the “modern view” that a decision should apply prospectively “to the extent that it causes injustice to persons who have acted in good faith and reasonable reliance upon a statute later held unconstitutional.” State ex rel. Cardinal Glennon Mem’l Hosp. for Children v. Gaertner, 583 S.W.2d 107, 118 (Mo. banc 1979). Prospective application is appropriate when parties have reasonably relied on the statute and find the “‘carpet’ suddenly pulled from beneath them by reason of the change in the law.” Hill v. Boles, 583 S.W.2d 141, 149 (Mo. banc 1979). See also State ex rel. May Dep’t Stores Co. v. Haid, 38 S.W.2d 44, 53 (Mo. banc 1931).

³ Courts presume the General Assembly is aware of decisions interpreting the law. See, e.g., Cook Tractor Co. v. Dir. of Revenue, 187 S.W.3d 870, 873 (Mo. banc 2006). Between the federal district court’s 1996 decision in Maupin and the 2006 legislative session, federal campaign finance jurisprudence became significantly more deferential to legislatures. See, e.g., Nixon v. Shrink Mo. Govt. PAC, 528 U.S. 377, 391 (2000); McConnell v. Federal Election Comm’n, 540 U.S. 93, 137-38 (2003). The General Assembly apparently believed the black-out provision would be constitutional under the new standards. Since the issue was not appealed by the Attorney General, the General Assembly has been deprived of this Court’s analysis of whether the ban is constitutional and, if not, in what ways.

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In his letter brief, the Attorney General recognizes that the public has relied in good faith on § 130.032 as amended by House Bill 1900 and that it would be unjust to apply this Court's decision retrospectively. State's Letter Br. 6-8. But, he argues for retrospective application of the decision to one group of persons – candidates in future elections.⁴ *Id.* 4-5. The brief claims that the Court can use a “balancing test” to selectively pick who wins and who loses from its decision among non-parties who are not before it, who have not had an opportunity to defend themselves, and who may be in diverse individualized circumstances. See id.

To the contrary, courts generally have three options when they declare statutes void: (1) make the decision retrospective, (2) make the decision prospective, (3) make the decision selectively prospective. See generally O'Dell v. Sch. Dist. of Independence, 521 S.W.2d 403, 421-22 (Mo. banc 1975) (Finch, J., dissenting) (noting the three general options in the context of a change in decisional law). If the decision is retrospective, the statute never had any effect. Carmack v. Mo. Dep't of Agric., 31 S.W.3d 40, 48 (Mo. App. W.D. 2000) (quoting State ex rel. Public Defender Comm'n v. County Court of Greene County, 667 S.W.2d 409, 413 (Mo. banc 1984)). If the decision is prospective, the statute is void from the date of the decision going forward only and individuals who relied on the statute in good faith are protected. See, e.g., State ex rel. Cardinal Glennon, 583 S.W.2d at 1181; State ex rel. Coker-Garcia v. Blunt, 849 S.W.2d 81, 84, 86-87 (Mo. App. W.D. 1993) (en banc) (holding, in an election law case, that the Court's prior interpretation of the statute was unconstitutional and that its decision would apply to future cases). If the decision is selectively prospective, it applies prospectively to everyone but the litigant(s). In re Extension of Boundaries of Glaize Creek Sewer Dist.

⁴ The Attorney General claims that he is advocating for a general rule of retroactivity, with exceptions for elections in the past, candidates who have closed their committees, and even candidates retiring debts from past elections held under the old limits. State's Letter Br. 6-8 & n. 3. This list of exceptions encompasses everyone except candidates actively campaigning for future elections. Thus, the Attorney General's position is more accurately and simply stated as favoring prospective application, except as to candidates for future elections such as himself.

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of Jefferson County, 574 S.W.2d 357, 364 (Mo. banc 1978) (invalidating the election at issue in the current case, but refusing to apply the decision retroactively to other elections); Parker v. St. Louis County, 104 S.W.2d 371, 379 (Mo. 1937) (making a decision holding a statute invalid “prospective only and not retroactive, except as to plaintiff”). Selective prospectivity ensures that the litigant – who bore the burden and cost of litigation – may obtain effective relief. Id.

Courts do not generally make their decisions retrospective as to some and prospective as to others. Except for the litigant, the law should be the same for everyone. There should not be one law for one group of persons, and another law for another group of persons. When courts feel that a more particularized evaluation is needed, they determine whether the decision should be prospective or retrospective on a case-by-case basis as decisions come before them. Sumners v. Sumners, 701 S.W.2d 720,723 (Mo. banc 1985) (noting that, in the decisional context, courts may decide retrospectivity or prospectivity “based on the merits of each individual case”) (quoting Keltner v. Keltner, 589 S.W.2d 235, 239 (Mo. banc 1979)). When a case-by-case approach is taken, only the parties to the lawsuit are bound by the court’s decision. Norman J. Singer, Sutherland Statutory Construction § 2:7 (6th ed. 2001).

Plaintiff Trout is the only party before this Court. He did not file this lawsuit as a class action, and has only represented his own personal interests. To the extent this Court makes any special exceptions, they should only be made for Plaintiff Trout. Thus, in Beatty v. Metropolitan St. Louis Metropolitan Sewer District, the sewer district asked this Court to declare whether other district customers who were not parties to the lawsuit were entitled to relief. 914 S.W.2d 791, 800 (Mo. banc 1995). This Court noted that the plaintiffs in that lawsuit did not request to be and were not certified as class representatives. Id. It then held that “it would be improper to adjudicate the rights of individuals to money damages or credit-refunds who are not represented in this lawsuit.” Id. This Court should likewise reject the Attorney General’s suggestion to create a patchwork system by adjudicating disputes that are not before it.

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A. Candidates, members of the public, and political party committees have relied on the statutory language in House Bill 1900 in good faith.

Section 130.032 as amended by House Bill 1900, clearly and unambiguously removed the limits on contributions to candidates in Missouri. The change in the law was widely publicized. A bipartisan coalition of legislators approved of the change and the Governor signed it into law. Plaintiff Trout made no objections to the substantive validity of the repeal. He challenged the repeal on procedural constitutional grounds, which this Court rejected. Slip op. 6-9. The repeal of the limits was held invalid only after the Attorney General failed to appeal the constitutionality of the black-out provision, leaving the Court to determine severability assuming the provision was unconstitutional.

Until this Court ruled, the only person who thought the limits should be reinstated was the Plaintiff. The Cole County Circuit Court never suggested that the repeal of the contribution limits was invalid. Rather, its judgment upheld the repeal of the contribution limits. L.F. 489-99. In response to an advisory opinion request concerning a debt service committee, the Missouri Ethics Commission stated that “[e]ffective January 1, 2007, there are no aggregate contribution limits in chapter 130 RSMo.” Mo. Ethics Advisory Op. No. 06-12,105-4 (Dec. 12, 2006) (copy attached as Exhibit 2).⁵ In his court filings, the Attorney General avowed that the repeal of the contribution limits was effective. See, e.g., State’s First Br. 61-68. By his personal conduct in accepting numerous contributions that exceeded the old contribution limits, the Attorney General further demonstrated that the repeal of the contribution limits was effective. Motion for Leave to File Amicus Curiae Brief Out of Time, Ex. A.

In this case, members of the regulated community and public followed the statutory enactment which had repealed the contribution limits. Now, because an unrelated, independent provision was held unconstitutional by the trial court, the question is

⁵ The Ethics Commission declined to give the MRSC an opinion concerning whether it would enforce the black-out period. Letter from R. F. Connor to Robert L. Hess II (Feb. 13, 2007). That letter did not address the separate repeal of the limits.

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whether members of the public and candidates should be exposed to potential sanctions. Members of the public reasonably and justifiably relied on the duly enacted law of the General Assembly in exercising their First Amendment rights and this Court's unexpected decision should be applied prospectively.

B. Retrospective application of the Trout opinion will create an enforcement quagmire in which candidate committees, contributors, vendors, and the Missouri Ethics Commission become embroiled in a long and complicated process for determining the effect of this decision to follow the law.

A retrospective decision by this Court will raise more questions than it answers. Since House Bill 1900 went into effect on January 1, 2007, elections have already been held and significant fundraising activity has been undertaken for future elections. Municipal general elections were held on April 3, 2007. § 115.121.3, RSMo. Supp. 2006. February 6, March 6, and June 5 were also available for local elections. § 115.123.1, RSMo Supp. 2006. Local candidates raised money in connection with those elections without any limits. They have presumably spent all or most of that money. Accordingly, they are not in a position to return that money. In such circumstances, they may be subject to penalties double the amount involved. §§ 105.961.4(6), 130.032.7, RSMo 2000. Such draconian liability for persons running for local office is unfathomable.

Vendors may have raised funds for candidates under contractual provisions that compensated them based on a percentage of funds raised. Such arrangements are common in political contracts. Committees and their vendors proceeded in reasonable reliance on the law. A retrospective decision would create serious uncertainty under their contractual provisions, lead to litigation, and unfairly deprive the committee or the vendor of compensation for services actually rendered.

For future elections, candidates may have already raised and spent the money or may have made commitments in reliance on those funds. The Attorney General argues that limits should be retrospectively imposed on candidates for future elections such as

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himself to ensure a “level playing field.” State’s Letter Br. 2. Such speech equalization arguments cannot be used to support the application of contribution limits: “The concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment . . .” Buckley v. Valeo, 424 U.S. 1, 48-49 (1975). See also Randall v. Sorrell, 126 S.Ct. 2479, 2488-91 (2006) (reaffirming that Buckley remains good law). Interestingly, the very same opinion that the Attorney General relied on to abandon his defense of the black-out provision specifically rejected this argument: “The State’s governmental interest in providing a ‘level playing field’ was clearly rejected as a ‘compelling state interest’ by the Buckley court.” Maupin, 922 F.Supp. at 1420. The constitutional purpose for limits is to prevent corruption or the appearance of corruption of public officials. See, e.g., McConnell, 540 U.S. at 136. Large donations may legitimately raise questions in the mind of the public regarding donor influence. One way to combat this perception is to enact limits. Id. Another way is to require a transparent system where all such donations are subject to public scrutiny. See Louis D. Brandeis, Other People’s Money and How the Bankers Use It 92 (1914) (“Sunlight is said to be the best of disinfectants”). The contributions have already been made and a retroactive order would have no effect on the potential for corruption. That bell has been rung and cannot be unring.

Moreover, even if the amount of money to be raised were relevant, neither system limits the amount that candidates can accept. Candidates were not inhibited in the amount of fundraising under the old system. The money just flowed from multiple sources that made it difficult to trace. Thus, the opponents of the Senator referenced in the Attorney General’s brief need not fear. State’s Letter Br. 4. By merely identifying four political party donors (combined monetary and in-kind limits of \$12,800 each) who are willing to support them, those opponents can readily overtake the Senator who accepted the \$40,000 contribution. By starting fundraising earlier, those prospective candidates could have voluntarily abided by the old limits and would have amassed their own campaign funds. Candidates who started early benefited chiefly from the extra time spent fundraising – not the absence of limits.

Contributors would also potentially be on the hook for draconian penalties. Under § 130.032.7, the Missouri Ethics Commission may pursue penalties against a person or entity who accepts or makes the contribution. After contributors made their

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contributions, they lost control over those funds. Thus, if refunds are ultimately required by the Ethics Commission, contributors will have no say in whether their contributions are refunded. If candidates cannot or will not refund their contributions, those contributors may face liability solely because the candidate spent their funds or believes that a valid legal or factual basis exists for contesting the Ethics Commission's determination.

Nobody had a crystal ball that would have let them predict the final outcome of this lawsuit. Prospective application of the Court's opinion is needed to ensure consistent rules for everyone, and that the public is not penalized for simply following the law.

C. This Court only has authority to determine whether its decision shall operate prospectively or retrospectively, and cannot enforce the law by purporting to require refunds.

This Court's order of July 19 invited letter briefs concerning whether its decision should operate prospectively or retrospectively. Such consideration is proper. Courts can and sometimes do expressly undertake such considerations. The Attorney General, however, poses the issue as whether this Court should "requir[e] refunds" asking the Court to both declare and enforce the law. State's Letter Br. 8. The Attorney General's suggestion is totally inappropriate, disregards separation of powers, solicits an advisory opinion, and would deny due process of law to hundreds of Missouri candidates and contributors. Such an opinion would surely spawn further litigation in state or federal courts, and be held to have no effect or worse.

James Trout was the only plaintiff in this lawsuit. No other private party was involved. This Court can only adjudicate and finally determine James Trout's dispute. This case was not a class action lawsuit. This Court cannot bind the entire regulated community or require them to make refunds. Beatty, 914 S.W.2d at 800. Its decision will operate generally as precedent, but precedents are limited to the facts and issues presented in the case. See, e.g., Southwestern Bell v. Dir. of Revenue, 94 S.W.3d 388, 390-91 (Mo. banc 2002) (prior decisions of Supreme Court will be followed according to doctrine of stare decisis).

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A decision purporting to require non-parties to make refunds would violate their right to due process of law, as guaranteed by the state and federal constitutions. Mo. Const. art. I, § 10; U.S. Const. amend. XIV. Non-parties are entitled to due process rights before being ordered to disgorge property expressly collected for First Amendment activities. It would also deprive them of other rights to which they are entitled. See, e.g., § 130.032.7, RSMo 2000 (ethics commission must notify recipients of overlimit contributions and provide a 10 day window to refund before seeking to recover any penalties).

A decision ordering non-parties to make refunds would also violate separation of powers. Mo. Const. art. II, § 1. Courts do not enforce the laws. They adjudicate disputes between the enforcement authorities and the public. A court order requiring refunds by non-parties would be an executive enforcement order beyond the scope of this Court's constitutional authority. Rather, enforcement is the duty of the Ethics Commission. § 105.955.14, RSMo 2000 (listing the enforcement powers of the Ethics Commission). This Court's role is confined to declaring the law on the facts of this case and adjudicating the dispute before it.

Finally, a decision by this Court regarding how its decision should apply to different groups or subsets of the regulated community would be advisory only. Those parties are not before this Court. They cannot defend themselves, and the Court should not predict how it will rule on a future set of facts. By doing so, this Court would be rendering a prohibited advisory opinion. See, e.g., Schottel v. State, 159 S.W.3d 836, 841 n.4 (Mo. banc 2005); State v. Self, 155 S.W.3d 756, 761 (Mo. banc 2005) (“it is not this Court's prerogative to offer advisory opinions on hypothetical issues that are not necessary to the resolution of the case before it”).

If the Court determines that its decision has retrospective effect, the Ethics Commission should determine whether and how it will enforce the law. If the Ethics Commission determines that refunds are required, § 130.032.7 provides that it cannot impose penalties until it has provided “notification of such nonallowable contribution by the ethics commission, and after the candidate has had ten business days after receipt of notice to return the contribution to the candidate.” § 130.032.7, RSMo 2000. If a candidate cannot (because funds are lacking) or will not (because the Commission's

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determination is disputed) return a contribution, the Ethics Commission must notify the individual of its intent to take enforcement action, which notice may be appealed to the Administrative Hearing Commission. § 105.961.5, RSMo 2000. At the AHC, the violator will be entitled to an independent hearing.

In any enforcement action, candidates would be entitled to raise issues not decided by this lawsuit. Most notably, they could argue that the black-out provision was constitutional and that the contribution limits have been repealed. Because the constitutionality of the black-out provision was not argued to this Court, its decision is not precedential on that point. Further, any person who has relied on an advisory opinion from the Ethics Commission is exempt from enforcement: “[N]o person shall be liable for relying on the opinion and it shall act as a defense of justification against prosecution.” § 105.961.16(1), RSMo 2000. Also, under the patchwork proposal of the Attorney General, equal protection challenges are likely. Because the decision involves First Amendment activity, heightened or strict scrutiny would be required, making those claims much more likely to succeed.

As this brief review of legal issues shows, this Court cannot determine whether any person should be legally required to make refunds, without a specific dispute before it. The Attorney General’s invitation for this Court to require refunds should not be accepted. The appropriate procedure is for this Court to issue its final decision, with an explanation of whether the decision is retrospective or prospective. Based on this Court’s determination of what the law was and when, the Ethics Commission should then exercise its executive discretion to determine how the law should be enforced.

V. Conclusion

At the request of the Attorney General or on its own motion, this Court should modify its opinion to correct the severability analysis. When a case is wrongly decided, it should be modified to avoid perpetuating the error. See, e.g., Independence Nat’l Educ. Ass’n, 223 S.W.3d at 137. In the alternative, if this Court adheres to its original decision, the Court should apply that decision prospectively. The chain of events that has resulted in the repeal of contribution limits being struck down and the prior system being reinstated could not have been predicted. Candidates and members of the public and

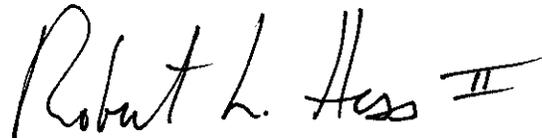
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political parties have reasonably relied on the duly enacted law in exercising their First Amendment rights. Such law-abiding behavior should be encouraged and not disciplined. Prospective application of this Court's decision is the only choice that makes sense.

Sincerely,

HUSCH & EPPENBERGER, LLC



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MEC
OPINION NO.

97.11.106

STATE OF MISSOURI
MISSOURI ETHICS COMMISSION
P. O. BOX 1254
JEFFERSON CITY, MISSOURI 65102

573/751-2020
1-800/392-8660

December 3, 1997

COPY

The Missouri Ethics Commission, at its November 18, 1997 meeting, discussed your request for an opinion. The following is the Commission's responses to your questions:

1. *Is our trade association in violation of Missouri statutes if the trade association establishes a separate PAC for each of the regions of the association?*

From the facts presented, the Commission stated the establishment of multiple continuing committees by an association would not, in and of itself, be a violation of the sections of the law over which the Commission has jurisdiction.

2. *Currently, one of our senior vice presidents is the treasurer of the trade association's state PAC. Is it appropriate for this vice president, or another employee of the trade association, to be the treasurer of each of the regional PACs?*

It is not within the purview of the Commission to determine if it is "appropriate" for a particular individual to serve as treasurer of a committee established pursuant to Chapter 130. Section 130.021, RSMo states: "Every committee shall have a treasurer who, except as provided in subsection 10 of this section shall be a resident of this state."

3. *The trade association's staff is responsible for all of the accounting and record-keeping for the trade association's state PAC. With the establishment of the regional PACs, can those functions still be performed by our staff or should an outside source perform those functions?*

NOTICE

Anyone examining this advisory opinion should be careful to note that an opinion of the Missouri Ethics Commission deals only with the specific request to which the opinion responded and only as to the law as it existed at the date of the response and cannot be relied upon for any other

EXHIBIT 1

Pursuant to section 130.058, RSMo, the candidate or the committee treasurer of any committee is ultimately responsible for all reporting requirements pursuant to this chapter. The delegation of functions is an internal matter.

4. *What restrictions or guidelines exist regarding who may contribute to each regional PAC?*

Restrictions and limitations on contributions may generally be found in section 130.031, RSMo. However, you should be aware that federal law, over which the Commission does not have jurisdiction, prohibits some contributions from specifically identified sources.

5. *Is there any limitation on the distribution of monies from our trade association's state PAC to our trade association's regional PACs?*

Contributions from one committee to another are permitted. Committees should be aware of the restrictions and limitations on contributions found in section 130.031, RSMo.

6. *Is there any reason our trade association would be prohibited from dissolving the regional PACs and returning to one statewide PAC?*

The termination of a continuing committee may be accomplished pursuant to sections 130.021.8 and 130.046.7, RSMo.

7. *What are the defining characteristics that allow multiple state PACs for a single state trade association?*

The definition of a committee is found in section 130.011(7), RSMo; the definition of a continuing committee is found in section 130.011(10), RSMo; and the procedure to establish a continuing committee is found in section 130.021, RSMo.

8. *Is there any statutory reference that would allow our trade association to rely on an administrative agency's written opinion in a court of law? Do you have any cites to Missouri court decisions that uphold your opinions? Has anyone been convicted of violating this law who received a contrary opinion from the Commission?*

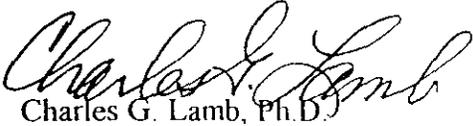
Section 105.955(16), RSMo, states:

"Any advisory opinion issued by the ethics commission shall act as legal direction to any person requesting such opinion and no person shall be liable for relying on the opinion and it shall act as a defense of justification against prosecution."

Our office is not aware of any court decision involving a written opinion of this Commission.

If you have any further questions, please feel free to contact this office.

Sincerely,


Charles G. Lamb, Ph.D.
Executive Director

MCR:bd

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MEC
OPINION NO.

06.12.105--4

STATE OF MISSOURI

MISSOURI ETHICS COMMISSION
P. O. BOX 1254
JEFFERSON CITY, MISSOURI 65102

573/751-2020
1-800/392-8660

December 12, 2006

At the December 12, 2006 meeting of the Missouri Ethics Commission, your request for an opinion was discussed. The following is the Commission's Response to your questions:

Once a candidate committee has been converted into a debt service committee, can the debt service committee accept contributions while the Missouri Legislature is in session?

Effective January 1, 2007, Section 130.032.2 applies a blackout period for the acceptance of "contributions" by "any candidate for the office of state representative, the office of state senator, or a statewide elected office" from the first Wednesday after the first Monday in January through the first Friday after the second Monday of May of each year at 6:00 p.m. Section 130.011 (3) defines "Candidate" as "an individual who seeks nomination or election to public office." Section 130.011(9) authorizes a candidate to form a committee to retire past debt which shall not engage in any other activities in support of the candidate for which the committee was formed. The plain language of Section 130.032.2 RSMo refers to candidates for future office and does not refer to candidate committees that have been converted to a debt service committee.

If a debt service committee can accept contributions while the Missouri Legislature is in session, are there any limitations related to making, accepting or soliciting these contributions?

Effective January 1, 2007, there are no aggregate contribution limits in Chapter 130 RSMo related to the aggregate amount of contributions from a person that may be accepted by a debt service committee.

Sincerely,


R.F. Connor
Executive Director
RFC: ez

NOTICE

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