

IN THE SUPREME COURT OF MISSOURI
No. SC91741

RICKY GURLEY,
APPELLANT,

v.

MISSOURI BOARD OF PRIVATE INVESTIGATOR EXAMINERS, ET AL.,
RESPONDENTS.

On Appeal from Circuit Court for Cole County, Cause No. 10AC-CC00375

Brief of American Civil Liberties Union of Eastern Missouri and
American Civil Liberties Union of Kansas and Western Missouri
as *Amici Curiae* in Support of Appellant

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STATEMENT OF JURISDICTION

Amici adopt the jurisdictional statement as set forth in Appellant's brief filed with the Court in this case.

STATEMENT OF INTEREST OF AMICUS CURIAE

The American Civil Liberties Union (ACLU) is a nationwide, non-partisan organization of more than 500,000 members dedicated to defending the principles embodied in the Bill of Rights. The ACLU of Eastern Missouri is an affiliate of the ACLU based in St. Louis with over 2,500 members in Eastern Missouri. The ACLU Foundation of Kansas and Western Missouri is an affiliate of the ACLU based in Kansas City, Missouri, with approximately 1,500 members in Western Missouri. In furtherance of its mission, the ACLU engages in litigation, by direct representation and as *amicus curiae*, to encourage the protection of rights guaranteed by the federal and state constitutions. The ACLU has a particular interest in promoting First Amendment freedoms and is actively involved in multiple cases involving restrictions on speech. For example, the ACLU appeared as *amici* in this Court in *Smith v. Pace*, 313 S.W.3d 124 (Mo. 2010). Because this case raises important questions of who has standing to raise a First Amendment overbreadth challenge and whether the government carries the burden of proof in First Amendment cases, amici file this brief to highlight the significant constitutional questions that the Court will need to address.

STATEMENT OF FACTS

Amici adopt the statement of facts as set forth in the Appellant's brief.

SUMMARY OF ARGUMENT

Amici American Civil Liberties Union of Eastern Missouri and American Civil Liberties Union Foundation of Kansas and Western assert that the circuit court's decision in this case, which adopted by reference the arguments advanced by Respondents, failed to properly analyze Appellant's First Amendment claim. First, under the overbreadth doctrine, Appellant has standing to maintain a claim on behalf of hypothetical third parties not before the court. Second, Respondents failed to meet their burden of proving the statutes are constitutional. The circuit court did not utilize the two-step process required to evaluate a claim of overbreadth in that it neither construed the law nor determined whether the law burdens a substantial amount of protected speech in relation to its legitimate scope. The circuit court further ignored that restrictions of speech, and in particular prior restraints, are presumptively unconstitutional. In any event, it was impossible for the circuit court to conduct the second step of overbreadth analysis because Respondents bore the burden of proof and they failed to present any evidence. For these reasons, the judgment of the circuit court should be reversed.

I. Appellant has standing to maintain his overbreadth claim.

Appellant has standing to maintain his claim that the statutes at issue are overbroad in violation of the First Amendment.¹ In the case *sub judice*, Respondents argued that Appellant cannot advance an overbreadth claim on behalf of third parties not before the Court. They suggested he lacked standing and that third parties who believed their First Amendment rights have been violated should bring their own lawsuits. The circuit court ruled against Appellant by reference to Respondents' arguments. Those arguments are contrary to the law.

This Court has explained,

Usually, a person lacks standing to attack the validity of a statute on grounds of how it applies to someone else. But challenges based upon the First Amendment are sometimes an exception. Such a challenge asserts that, while a narrowly drawn statute could prohibit his activity, the challenged statute is so overbroad as to include speech that is constitutionally protected.

Criminal statutes require particularly careful scrutiny,

¹ The First Amendment is applied to the State of Missouri by the Due Process Clause of the Fourteenth Amendment. *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 489, fn.1 (1996).

and “those that make unlawful a substantial amount of constitutionally protected conduct may be held facially invalid even if they also have legitimate application.”

State v. Moore, 90 S.W.3d 64, 66 (Mo. 2002)(internal citations omitted).

Because he raises a First Amendment overbreadth challenge, Appellant has standing to challenge the statutes on behalf of third parties by raising hypothetical cases showing that the statute is overbroad. Overbreadth claims like this one are an exception to the traditional prudential standing requirement that a party cannot raise the rights of third parties not before the court. *See Get Outdoors II, LLC v. San Diego*, 506 F.3d 886, 891 (9th Cir. 2007); *Prime Media, Inc. v. City of Brentwood*, 485 F.3d 343, 349 (6th Cir. 2007); *CAMP Legal Defense Fund, Inc. v. Atlanta*, 451 F.3d 1257, 1270 (11th Cir. 2006). In this case, Appellant can challenge the statute not only because his own rights have been violated, but also because the statute’s existence “may cause others not before the court to refrain from constitutionally protected speech or expression.” *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973).²

² As the Supreme Court noted in *Sec’y of State of Md. v. Joseph H. Munson Co., Inc.*, “The requirement that a statute be ‘substantially overbroad’ before it will be struck down on its face is a ‘standing’ question only to the extent that if the plaintiff does not prevail on the merits of its facial challenge and cannot

The ability of parties before a court to advance overbreadth claims on behalf of third parties is essential to the continued protection of our cherished First Amendment rights. Parties such as Appellant may bring overbreadth claims on behalf of third parties because the threat of enforcement of an overbroad law will chill the constitutionally protected speech of others not before the court, especially when criminal sanctions are threatened. *See Virginia v. Hicks*, 539 U.S. 113, 119 (2003); *Massachusetts v. Oaks*, 491 U.S. 576, 581 (1989); *Bd. of Airport Com'rs of City of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569, 574 (1987). Rather than running the risk of criminal sanctions and the burden of vindicating rights in litigation, people might instead refrain from constitutionally protected speech altogether. *New York v. Ferber*, 458 U.S. 747, 768 (1982). In addition to harming the individual refraining from speech, an overbroad law also harms society as a whole, which is “deprived of an uninhibited marketplace of ideas.” *Hicks*, 539 U.S. at 119.

This is a classic case for consideration of an overbreadth claim. Appellant claims that the statutes make it a misdemeanor for Appellant and others not before

demonstrate that, as applied to it, the statute is unconstitutional, it has no ‘standing’ to allege that, as applied to others, the statute might be unconstitutional.” 467 U.S. 947, 959 (1984).

the court to investigate candidates for public office without a license from the government. Even if the statutes would be constitutional as applied to the investigations of the type Appellant undertakes, third parties might be chilled from engaging in protected conduct because of the statutes. In this situation, Appellant can advance an overbreadth claim on behalf of third parties not before the court who will be chilled from exercising their First Amendment rights without regard to Appellant's own conduct. *See United States v. Stevens*, 130 S.Ct. 1577, 1589-90 (2010); *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 244 (2002); *Reno v. ACLU*, 521 U.S. 844, 878-80 (1997). *Stevens* is particularly illustrative of the principle. In *Stevens*, the defendant ran a business and website through which he sold videos of pit bulls engaging in dogfights and viciously attacking other animals, including a domestic farm pig and a wild boar. 130 S.Ct. at 1583. The Supreme Court declined to decide whether a hypothetical criminal "statute limited to crush videos or other depictions of extreme animal cruelty would be constitutional," because the statute at issue went way beyond that. *Id.*, at 1592.

Once it is established that Appellant has standing to make an overbreadth claim, the application of the statute to him is not important. "In a facial constitutional challenge, individual application facts do not matter. Once standing is established, the plaintiff's personal situation becomes irrelevant." *Ezell v. City of Chicago*, 10-3525, 2011 WL 2623511, *9 (7th Cir. July 6, 2011). Thus, there is

no merit to Respondents' argument below that Appellant is deprived of standing because he provides services to others. There is no professional-licensing exception to the overbreadth doctrine. There are conflicting opinions about whether licensing regulations are subject to strict or intermediate scrutiny. *See Kansas City Premier Apartments, Inc. v. Missouri Real Estate Comm'n*, SC91125, 2011 WL 2848191, *4-*6 (Mo. July 19, 2011); *Id.* at *9-*14 (Wolff, J., dissenting); *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2663-67 (2011); *Id.* at 2673-79 (Breyer, J., dissenting). There are no cases, however, that permit an overbroad restriction on speech to stand simply because it comes in the form of a licensing restriction.

The circuit court failed to consider whether the statutes are substantially overbroad. Instead it adopted, by reference, Respondents' reasoning, which asserted Appellant lacked standing. L.F. 63-64. Because Appellant does have standing to maintain an overbreadth challenge, the judgment of the circuit court should be reversed.

II. Respondents failed to meet their burden of proof.

The circuit court granted summary judgment to Respondents and denied Appellant summary judgment, without analysis of the First Amendment claims. Instead, the circuit court simply referred to the arguments advanced by Respondents. Respondents' arguments and evidence, however, were insufficient as a matter of law to meet their burden as to Appellant's overbreadth claim. In addition to relying on the erroneous premise that Appellant lacked standing to maintain an overbreadth claim, Respondents –and, thus, the circuit court as well– failed to properly employ the two-step analysis for overbreadth claims. The court also failed to presume that the statutes are unconstitutional and did not require Respondents to meet their burden with actual evidence of a government interest served by the statutes and that the statutes are appropriately tailored to meeting that interest without burdening too large an amount of protected speech.

A. Two-step analysis.

Determining whether a statute is overbroad requires a two-step process. In the first step, the court must construe the statutes to determine what they cover. *United States v. Williams*, 553 U.S. 285, 293 (2008). In the second step the court considers whether the statutes, as construed, criminalize a substantial amount of protected First Amendment activity. *Stevens*, 130 S.Ct. at 1589-90; *Williams*, 533 U.S. at 297. A statute is facially overbroad if a substantial number of its

applications will be unconstitutional as compared to the statute's plainly legitimate applications. *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450 (2008); *Hicks*, 539 U.S. at 119-20; *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789,799-801 (1984). It is well-established that the government cannot suppress lawful speech in order to prevent unprotected speech. *Ashcroft*, 535 U.S. at 255.

The circuit court did not engage in the required analysis. It did not construe the statutes to determine what speech is, or is not, restricted by the statutes. Because the court failed to undertake even this initial analysis, it was impossible for the court to determine that statutes survive overbreadth analysis. Accordingly, the judgment of the circuit court should be reversed.

B. Presumption that speech restrictions are unconstitutional.

Statutes that restrict speech are presumptively unconstitutional. This is particularly true where, as here, the statutes act as a prior restraint.

“Any government regulation that limits or 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, 697 (Mo. Ct. App. 1983) (citations omitted). A prior restraint exists when the enjoyment of protected expression is “contingent upon the approval of government officials.” *Dream Palace v. County of Maricopa*,

384 F.3d 990, 1001 (9th Cir. 2004)(citing *Near v. Minnesota*, 283 U.S. 697, 711-13 (1931)). “First Amendment standards ... ‘must give the benefit of any doubt to protecting rather than stifling speech.’” *Citizens United v. Fed. Election Comm’n*, 130 S.Ct. 876, 891 (2010) (quoting *Fed. Election Comm’n v. Wis. Right To Life, Inc.*, 551 U.S. 449, 469 (2007) (opinion of Roberts, C.J.)).

Prior restraints on speech constitute “the most serious and least tolerable infringement on First Amendment rights,” and are “presumptively unconstitutional.” *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 558-59 (1976); *see also Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558-59 (1975). A prior restraint on speech carries with it “a heavy presumption of unconstitutionality.” *Bowman v. White*, 444 F.3d 967, 980 (8th Cir. 2006); *see also Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963)(“Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity”).

Respondents advanced no arguments or evidence to overcome the presumption that the prior restraint of which Appellant complains is unconstitutional. Quite to the contrary, they sought to impose the burden on Appellant to prove the statutes are unconstitutional –exactly the opposite of what is required by the First Amendment. The circuit court did not address the presumption either, simply referring to Respondents’ arguments as the basis for its

rejection of Appellant's First Amendment claim. Accordingly, the judgment of the circuit court should be reversed.

C. Respondents bore the burden of proof, which they were required to support with real evidence.

The burden is on the government to prove that statutes that interfere with free speech are constitutional. *See Zauderer v. Office of Disciplinary Counsel of Supreme Court*, 471 U.S. 626, 647 (1985); *City of Cincinnati v. Discovery Network*, 507 U.S. 410, 416 (1993); *Board of Trustees of State University of New York v. Fox*, 492 U.S. 469, 480 (1989). “[W]hen a regulation allegedly infringes on the exercise of first amendment rights, the statute’s proponent bears the burden of establishing the statute’s constitutionality.” *Ass’n of Cmty. Orgs. for Reform Now v. City of Frontenac*, 714 F.2d 813, 817 (8th Cir. 1983); *see also Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) (proponent “carries a heavy burden of showing justification” for restriction). The correctness of this statement can hardly be doubted. *See Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 294 fn. 5 (1984); *Heffron v. Int’l Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640, 658 (1981) (Brennan, J., concurring).

In the circuit court, Respondents offered no evidence, or even argument, that would support the circuit court’s implicit conclusion that the statutes do not prohibit a substantial amount of protected activity in relation to its legitimate

applications. *See Williams*, 553 U.S. at 303; *Hicks*, 539 U.S. at 123-24. First, there is no basis for Respondents' conclusion, which the circuit court adopted by reference, that the statutes advance a compelling government interest. Second, besides not identifying what the government interest is, Respondents failed to provide any evidence in support of any interest they might conjure. The government's burden is not satisfied by mere speculation or conjecture; it must offer evidence establishing that the problem it identifies is real and that the speech restriction will alleviate that problem to a material degree. *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993); *see also United States v. Playboy Entm't Grp.*, 529 U.S. 803 (2000). Neither citation to judicial opinions nor to common sense alone meet the government's burden to justify a substantial government interest. *Illusions--Dallas Private Club, Inc. v. Steen*, 482 F.3d 299, 313 (5th Cir. 2007) ("accepting citations ... to judicial opinions as alone sufficient to justify a substantial governmental interest would be inconsistent with [the] requirement that 'some evidence' be produced to justify a substantial governmental interest. The same is true of accepting 'common sense' alone as sufficient to justify a substantial governmental interest." (emphasis in original)); *see also Pagan v. Fruchey*, 492 F.3d 766, 778 (6th Cir. 2007) ("It is [the government's] obligation to provide *something* in support of its regulation, and we do not find ourselves free to hold

that obligation has been discharged based on principles of *common sense* or *obviousness*[.]” (emphasis in original)).

With no evidence to support a government interest, Respondents could not possibly prove that the statutes are sufficiently tailored and not overbroad. Even so, Respondents offered no evidence to support any finding of a nexus between the speech restrictions and whatever government interest they might purport to advance.

Because the circuit court, in adopting the arguments of Respondents by reference, did not place the burden on Respondents or make any evidentiary showing that would overcome the burden, its judgment should be reversed.

CONCLUSION

Based on the foregoing *amici* ACLU of Eastern Missouri and ACLU of Kansas & Western Missouri urge this Court to reverse the judgment of the circuit court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that pursuant to Rule 84.06(c), this brief:

(1) contains the information required by Rule 55.03; (2) complies with the limitations in Rule 84.06; (3) contains 3,357 words, as determined using the word-count feature of Microsoft Office Word 2010. The undersigned further certifies that the accompanying disk has been scanned and was found to be virus-free.

/s/original signed

CERTIFICATE OF SERVICE

The undersigned hereby certifies that two copies of this brief and a copy of the brief on disk were served upon the counsel identified below by United States

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