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

REPLY BRIEF OF APPELLANT

BARNES & ASSOCIATES
Jay Barnes #57583
219 East Dunklin Street, Suite A
Ph: 573.634.8884
Fax: 573.635.6291
jaybarnes5@gmail.com

ATTORNEY FOR APPELLANT

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I. Statutes Which Restrain Speech and Impose Criminal Sanctions for Non-Compliance Are Not Due the Lenient Standard of Review Respondent Urges

Respondent argues the ordinary standard of review for challenges to the constitutionality of statutes applies in this case – that statutes enjoy a strong presumption of constitutionality; that the person challenging the statute's validity bears the burden of proving the act clearly and undoubtedly violates the constitution; and that courts should resolve all doubt in favor of a statute's validity. *Respondent's Brief* at 9. This, however, is not an ordinary case. It is a challenge to a statute that restricts speech and imposes criminal penalties for non-compliance.

Statutes restraining speech and criminal statutes affecting First Amendment rights are not due the same deference as ordinary statutes. Instead, as detailed in *Appellant's Brief*, they carry a "heavy presumption" against their constitutionality and must be "scrutinized with particular care." See *City of St. Louis v. Kiely*, 652 S.W.2d 694 (Mo. App. E.D. 1983) and *Houston v. Hill*, 482 U.S. 451, 459 (1987), citing *Winters v. New York*, 33 U.S. 507, 515 (1948) and *Kolendar v. Lawson*, 461 U.S. 352, 359 n. 8 (1983).[1]

[1] To comply with Rule 84.01(g), Appellant avoids the temptation to re-iterate in toto his argument on the proper standard of review. For a complete statement on the proper standard, however, Appellant points the Court back to *Appellant's Brief* at 17.

II. Respondent Essentially Asks This Court to Re-Write the Statutes in Question to Comport with the First Amendment

In overbreadth cases, a reviewing court must first determine the scope of the challenged statute. See *United States v. Williams*, 553 U.S. 285, 293 (2008). Thus, the first question the Court confronts in this case is one of basic statutory construction: what is the scope of the definition of a "private investigator business" as codified in §324.1100(11)(b), RSMo?

Respondent argues that the plain and ordinary meaning of the statute, when read in light of related provisions, indicates the "legislature intended the Board to regulate the practice of private investigating in the context of a business for profit or compensation." *Respondent's Brief* at 15. As proof, Respondent points to the definition of "private investigator" which includes a compensation element – and attempts to boot-strap the compensation element of 'private investigator' onto all provisions of the statute – including the definition of "private investigator business" in §324.1100(11)(b), RSMo.

Courts, however, are not permitted to re-write statutes. A court "may impose a limiting construction on a statute only if it is 'readily susceptible' to such a construction," it cannot "rewrite a…law to conform it to constitutional requirements." See *Reno v. American Civil Liberties Union*, 521 U.S. 844, 884 (1997). Where a statute's language is plain and unambiguous, "its constitutionality cannot turn upon a choice between one or several alternative meanings." *Hill* at 468. Rewriting such a law would constitute a "serious invasion of the legislative domain" and sharply diminish the legislature's "incentive to draft a narrowly tailored law in the first place." See *United States v.*

Treasury Employees, 513 U.S. 454, 479 (1995) and *Osborne v. Ohio*, 495 U.S. 103, 121 (1990). Thus, courts confronted with plain and unambiguous statutes must accept or reject the statutes on their face and are not permitted to draft new laws on their own.

In this case, Respondent asks this Court to ignore the clear and unambiguous definition of "private investigator business" in §324.1100(11)(b), RSMo. Instead, Respondent essentially asks the Court to combine the definitions of "private investigator business" and "private investigator." Despite Respondent's attempted conflation of the two terms, the plain and unambiguous definition of "private investigator business" has no for-profit qualifier.[2]

If the legislature had intended, as Respondent implies, to conflate the definitions of "private investigator business" and "private investigator," it would not have provided

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[2] Even if the Court accepts the Respondent's misreading of the statute, the definition in §324.1100(11)(b), RSMo is still unconstitutional because, when engaged in political speech, even for-profit businesses have abundant protections under the First Amendment. For example, political campaign consultants routinely engage in activity falling within the definition of "private investigator business" by conducting extensive research into persons and organizations involved in politics. Such research forms the basis for advertisements in political campaigns. Consultants charge money for their services. Yet, the First Amendment would still forbid the state from conditioning their exercise of basic First Amendment rights to conduct political research on application, payment of a fee, purchase of liability insurance, and submission to the moral judgment of the Respondent.

for separate definitions of the two. Moreover, it would not have used the two terms in different ways within the very same statute. For example, §324.1104, RSMo declares it "unlawful for any person to engage in the *private investigator business* in this state unless such person is licensed as a *private investigator*." *Emphasis added*. See §324.1104, RSMo. Reading §324.1104, RSMo, the Court should infer that the legislature intended to provide separate definitions for "private investigator business" and "private investigator" because the separate definitions serve to distinguish between licensed and un-licensed practice – and still allow the state to enforce the licensure regulations on unlicensed private investigators who "engage in the private investigator business."

The statutes are clear. There is no for-profit element in the definition of "private investigator business" and the definition of §324.1100(11)(b), RSMo reaches far beyond the private investigator profession. This Court is not permitted to make itself a substitute legislature to fix the constitutional infirmities of clear and unambiguous language. As such, the Court must reject Respondent's implied request to re-draft the statutes in question and strike the definition of "private investigator business" as unconstitutional.

III. Respondent Argues Against a Straw-Man: Appellant Does Not Challenge the State's Authority to Regulate Professions

Rather than respond directly to *Appellant's Brief*, Respondent attempts to re-direct the Court to a line of cases on the state's authority to regulate professions. As such, Respondent's brief focuses on the state's authority to regulate professions. See *Respondent's Brief* at 16-17.

Respondent argues against the scarecrow. Appellant does not challenge the state's authority to regulate professions. He concedes it. The question in this case is not whether the state can regulate professions. The question is whether the state can define a profession so broadly that it ensnares practically every Missourian and conditions the exercise of First Amendment rights on application, payment of a substantial fee, purchase of liability insurance, and submission to the moral judgment of an arm of the state. For the reasons outlined in *Appellant's Brief*, this Court must strike the statutes at question in this case as unconstitutional in violation of the First Amendment.

IV. The Cases Respondent Cites in Support of His Argument That This is a Professional Regulation Case Either (1) Illustrate Why This Case is Different than Ordinary Professional Regulation Cases; or (2) Support Appellant's Argument[3]

Respondent avoids detailed discussion of the underlying facts of any of the cases he cites in his brief. These bald statements of law are true enough when read in isolation. But when considered in light of the actual facts of the cases, Respondent's cases dealing with the state's authority to regulate professions only serve to either (1) illustrate the difference between 'regulation' cases and this case; or (2) support Appellant's argument.

[3] Appellant could use nearly every case cited by Respondent as an example in the body of this brief. In an effort to avoid putting the Court to sleep with a detailed analysis of every case, some of which would be repetitive, Appellant places short analyses of cases not cited in the body of this *Reply Brief* into Endnote 1 attached hereto.

A. Cases Illustrating the Differences Between Ordinary Professional Regulations and This Case

The following cases cited by Respondent are inapposite to this case except to the extent that they illustrate the difference between ordinary professional regulation arguably touching upon First Amendment rights and this case, which is solely about speech and not professional regulation:

i. Ohralik v. Ohio State Bar Association

Respondent cites *Ohralik v. Ohio State Bar Association* to show that the state can regulate attorneys. *Respondent's Brief* at 17. In *Ohralik* the Supreme Court upheld state regulations which prohibited attorneys from making uninvited in-person solicitations of potential clients. *Ohralik v. Ohio State Bar Association*, 436 U.S. 447 (1978). The facts of the case are ugly. The lawyer involved had visited the hospital room of a car accident victim, un-invited, soon after the accident, and while the victim was literally in traction. The lawyer was proposing a commercial transaction to a victim in a fragile psychological state who had not asked for his services. Thus, *Ohralik* was about conduct and advertising – specifically in-person solicitations, not essential First Amendment rights to conduct any research at all on any person or organization. Gurley concedes that the state could enact a nearly identical regulation to prohibit private investigators from soliciting business from car accident victims while in traction in a hospital room in the immediate aftermath of the accident. Rather than supporting Respondent's

ii. NAAP v. California Bd. of Pscyhology

Respondent cites *National Association for Advancement of Psychoanalysis v.*

California Board of Psychology to show that the state can regulate psychologists. *Respondent's Brief* at 17. In that case the Ninth Circuit Court of Appeals upheld the state's authority to regulate psychologists even when "speech" is involved because such regulations are more about public health than speech. *Nat'l Ass'n for Advancement of Psychoanalysis v. California Bd. of Psychology*, 228 F.3d 1043 (9th Circ 2000). The Ninth Circuit pointed out that the key function of a psychoanalyst was "the treatment of emotional suffering and depression, not speech." *Id*. at 1053. As such, it held that, "It is properly within the state's police power to regulate and license professions, especially when public health concerns are affected." *Id.*

Unlike psychoanalysis, the key component of private investigating is not "treatment" for a client. Respondent failed to present any evidence at trial that "public health" was a purpose of the private investigator statutes. If anything, *NAAP v. California Board of Psychology* tends to show that the state has a more substantial interest in regulating professions affecting "public health concerns" than professions like that of a private investigator, where public health is not an issue.

iii. *Underhill Associates, Inc. v. Bradshaw*

Respondent cites Underhill Associates, Inc. v. Bradshaw to show that the state can regulate securities brokers. *Respondent's Brief* at 17. In *Underhill Associates*, the Fourth Circuit upheld a Virginia statute regulating the activities of securities brokers, in particular advertisements from out-of-state securities brokers. *Underhill Associates, Inc. v. Bradshaw*, 674 F.2d 293 (4th Circ. 1982). The litigants in that case were registered brokers in other states who had advertised in Virginia but not registered with the state.

The petitioners claimed the state violated their "First Amendment rights to advertise." *Id.* at 296. Advertising, however, is not the issue in this case. Nor is the issue whether the state can regulate professions. Appellant concedes that the state could impose restrictions on advertising for the private investigator industry. As a result, the case is inapposite – except to show how the statute in question in this case is wholly different than the typical professional regulation challenged under the First Amendment.

iv. *Accountant's Society of Virginia v. Bowman*

Respondent cites *Accountant's Society of Virginia v. Bowman* to show that the 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." *Respondent's Brief* at 17. In *Accountant's Society of Virginia*, the Fourth Circuit upheld a statute forbidding non-CPA accountants from using certain terms to describe their services to clients. *Accountant's Society of Virginia v. Bowman*, 860 F.2d 602 (4th Circ. 1988). The purpose of the statute was to prevent non-CPAs from presenting themselves as able to do the same things as CPAs. The court explained that professional regulations were constitutional if it "has a rational connection with fitness or capacity to practice a profession." The speech in question in *Accountant's Society* was limited to terminology used in the accounting profession. Gurley concedes the state can constitutionally regulate the advertising practices and terminology of private investigators to some extent. This case, however, is different. The speech in question in this case is all research of persons or organizations by Missourians not exempt from the requirements of the private investigator statutes. Thus, the *Accountant's Society* case is

not applicable to Gurley's challenge, except to the extent that it illustrates Appellant's point that this case is not about ordinary professional regulations.

B. Cases Which Support Appellant's Argument

The following cases cited by Respondent provide direct support for Appellant:

i. Lowe v. Securities Exchange Commission

Respondent cites *Lowe v. Securities Exchange Commission* to show that "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." *Respondent's Brief* at 17. Gurley does not challenge any "regulations on entry" into the private investigator profession. He challenges the state's overly broad definition of "private investigator." Moreover, language adopted by the Fourth Circuit in the *Accountant's Society* case discussed above, helps explain the difference between professional speech subject to regulation and speech protected by the First Amendment. *Lowe v. S.E.C.*, 472 U.S. 181 (1985). In *Lowe*, in language adopted by the Fourth Circuit, Justice Whizzer White's concurring opinion defined a professional as one who "takes the affairs of a client personally in hand" and "purports to exercise judgment" on their behalf in light of their "individual needs and circumstances" is engaging in the practice of a profession. The speech of a professional, he wrote, is "incidental to the conduct of the profession." *Id.* at 232. But, White noted, where there is no "personal nexus between professional and client" and "a speaker does not purport to be exercising judgment on behalf of any particular individual with whose circumstances he is directly acquainted," the regulation "ceases to function as a legitimate regulation of professional practice with only incidental

impact on speech." *Id.* Instead, it is a "regulation of speaking or publishing. … subject to the First Amendment." *Id.*

Ignoring for the moment that the statute is overbroad, in this case, the definition of private investigator in §324.1100(11)(b), RSMo is also not rationally-related to one's fitness or capacity to practice as a private investigator because there is nothing in the definition pertaining to a "personal nexus" between professional and client. The definition does not require a client for a person to be considered engaging in the "private investigator business." Instead, the statute defines the "private investigator business" as the "furnishing of, making of, or agreeing to make, any investigation for the purpose of obtaining information" on any individual or person. One does not need a "client" with a "personal nexus" to "furnish" or "make" an investigation into another person or organization. As such, per *Accountant's Society* and *Lowe*, the statute at question in this case is a regulation of speaking or publishing subject to the First Amendment.

ii. Thomas v. Collins

Respondent cites *Thomas v. Collins* to assert that the state has an interest in "shielding the public from the untrustworthy, the incompetent, or the irresponsible" in the context of professional licensing. *Respondent's Brief* at 17. In *Thomas*, the Supreme Court struck a statute requiring union organizers to register with the Secretary of State before soliciting anyone for membership in a union organization. *Thomas v. Collins*, 323 U.S. 516, 557 (1945), footnote 1. Much like the Respondent has argued in this case, the state of Texas in the *Thomas* case argued the case was not really about the First Amendment, but instead the state's authority to "regulate business practices, like selling

insurance, dealing in securities, actions as commission merchant, pawnbroking, etc." *Id*. at 526. The Court rejected the state's argument, holding that "a requirement that one must register before he undertakes to make a public speech to enlist support for a lawful movement is quite incompatible with the requirements of the First Amendment." *Id*. at 540. In dicta, the Court also spoke to the issue of whether a state can ban "knowledge" – stating that "history has not been without period when the search for knowledge alone was banned. Of this we may assume the men who wrote the Bill of Rights were aware." *Id*. at 537.

Much like the statute in *Thomas*, the statutes in question in this case require non-exempt Missourians to make application, pay a fee, purchase liability insurance, and submit to the moral judgment of Respondent before conducting vital First Amendment-protected research on any person or organization. Just as in the Thomas case, the requirement that one must register as a private investigator before undertaking research vital to First Amendment speech is "quite incompatible with the requirements of the First Amendment." As such, this Court should strike the statutes in question as violating the First Amendment.

C. Reading Respondent's Cases Reveals Fatal Flaws in His Brief

Without going in-depth, one might believe the bald assertions of law pieced together by Respondent support his theory of the case. But, after examining the actual facts of the cases from which those assertions came, one finds they actually support Appellant. The cases cited justifying regulations of speech in other professions do not concern restrictions anywhere near as broad as the restriction contemplated by the definition of

private investigator in §324.1100(11)(b). Just as importantly, the underlying facts of *Thomas* and *Lowe*, and the Supreme Court's holdings in each, are strong support for Appellant's position that the definition of private investigator in §324.1100(11)(b), RSMo concerns activity which is not subject to constitutional professional regulation and for which it is not constitutional to require registration with the state. As such, this Court should reject Respondent's argument and strike the statutes in question as unconstitutional in violation of the First Amendment.

V. Respondent Misapplies the Overbreadth Doctrine by Expanding the Denominator in the Overbreadth Formula

Respondent claims, "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." *Respondent's Brief* at 19. In making this statement, Respondent misstates and misapplies the standard in overbreadth cases. As Respondent states in his own brief, the proper standard is whether the "impermissible applications of the law are substantial when judged in relation to the statute's plainly legitimate sweep." *Id*. at 19. Citing *City of Chicago v. Morales*, 527 U.S. 41 (1999).

Expressed as a mathematical equation, the proper standard for review under overbroadth is impermissible applications divided by the plainly legitimate sweep of the statute itself. Respondent's statement changes the denominator from the "statute's plainly legitimate sweep" to the "statute's plainly legitimate sweep of professional licensing." Of course, the result of this change is that the denominator is multiplied exponentially. There are thousands of valid professional licensing regulations in Missouri – but none of them

have anything to do with the statute in question in this case. Much like Respondent's argument about adding a compensation element onto the definition of "private investigator business," this Court should reject Respondent's effort to append an additional phrase onto a frequently litigated and well-explained formula for overbreadth.

VI. Appellant's Examples Consist of Common Everyday Acts Engaged in by Most Missourians and, As Such, Are Not "Fanciful Hypotheticals"

Respondent relies heavily on the bald legal assertion that, in determining overbroadth, "a court considers a statute's application to real-world conduct, not fanciful hypotheticals." *Respondent's Brief* at 19. Citing *U.S. v. Stevens*, 130 S.Ct 1577, 1594 (2010). In addition, Respondent states that, "the mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbroadth challenge." *Id*. at 20. Citing *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 800 (1984). As with the cases Respondent cited to support his bald assertions on professional licensing law, it is valuable to examine the actual cases cited to understand these points of law.

The following cases illustrate the meaning of the "fanciful hypotheticals" caveat to the overbreadth doctrine:

A. *United States v. Stevens*

In *United States v. Stevens*, the Supreme Court struck a federal criminal statute which forbade the commercial creation, sale, and possession of depictions of animal cruelty. See *Stevens*. The appellant Stevens had been convicted under the law for selling videos of pit-bull fights. His overbreadth challenge was premised on the claim that the

statute would prohibit the creation, sale, and possession of videos and magazines that depict hunting – a legal activity in most states. The *Stevens* Court recited the "fanciful hypothetical" language, but held, in effect, that hunting was not a 'fanciful hypothetical.' Indeed, hunting is an activity engaged in by millions of Americans every week and there are entire television networks dedicated to the hunting and outdoors industry. As a result, the Court struck the statute on First Amendment overbreadth grounds.

B. *City Council of Los Angeles v. Taxpayers for Vincent*

In *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, the Supreme Court rejected an overbreadth challenge to a city ordinance which forbade placing signs on any type of utility pole or structure. *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984). The Court noted that the appellant had "failed to identify any significant difference between their claim that the ordinance is invalid on overbroadth grounds and their claim it was unconstitutional as applied to political signs." *Taxpayers for Vincent* at 802. Having failed to identify any real-world examples other than those that applied directly to their own case, the appellants lost their overbreadth challenge.

C. *United States v. Williams*

In *United States v. Williams*, the Supreme Court upheld a federal child pornography statute attacked on overbreadth grounds. In rejecting the overbreadth challenge, the Court noted that the defendant challenging the statute had only provided the Court with "an endless stream of fanciful hypotheticals." *United States v. Williams*, 535 U.S. 285, 301-303 (2008). Williams and amici had offered the Court the following

examples of the statute's potential unconstitutional reach: (1) the statute might have criminalized a person offering non-pornographic pictures to a pedophile if the pedophile secretly expects the pictures to contain child pornography; (2) the statute could criminalize some advertisements for mainstream Hollywood movies, which the Court dismissed as 'implausible' because to be convicted a major distributor of such movies would have to believe the films contained 'actual children engaging in actual or simulated sex on camera;" (3) the statute could criminalize the act of turning child pornography over to police; (4) the statute could criminalize movies of war atrocities that included soldiers raping young children. *Id*. The Court noted that the atrocities example would be subject to an as applied challenge, but was not enough alone to make the statute subject to an overbreadth challenge. *Id*.

D. *New York v. Ferber*[4]

[4] Respondent cites *Ferber* for another bald legal proposition. "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 it is admittedly within its power to proscribe." *Respondent's Brief* at 21. Appellant reminds the Court that Ferber involved an attempt to invalidate a criminal child pornography law. The state's interest and power to proscribe the making and distribution of child pornography is infinitely greater than its interest in regulating the profession of private investigators through a broad definition that ensnares most Missourians.

In *New York v. Ferber*, the Supreme Court upheld a New York statute which prohibited persons from knowingly promoting sexual performances by children under the age of sixteen. *New York v. Ferber*, 458 U.S. 747 (1982). Ferber was a sex-shop operator who sold child pornography to two undercover police officers. On appeal, Ferber argued the statute was unconstitutionally overbroad because it could be applied to medical or educational books that "deal with adolescent sex in a realistic but non-obscene manner." *Id*. at 753. The Court rejected the argument, stating that while it was not certain "how often, if ever" it would be necessary to employ children for such a purpose, and that it "seriously doubt(ed) … [t]hat these arguably impermissible applications of the statute amount to no more than a tiny fraction of the materials within the statute's reach." *Id*. at 773.

E. Gurley's Examples Are Common Activities Engaged in by Most Missourians

Appellant's examples of overbreadth are more like the example of hunting given in *Stevens* than the non-existent or truly 'fanciful hypotheticals' given in *Taxpayers for Vincent*, *Williams*, and *Ferber*. To review, Gurley's examples of the statute's overreach consist of the following activities made criminal by the definition of private investigator business: (1) voters researching political candidates and parties; (2) political candidates researching opponents; (3) non-exempt reporters or bloggers researching any individual or organization for publication of a news article; (4) concerned citizens conducting research for purposes of writing Letters to the Editor of their local newspapers; (5) authors researching persons or organizations for the purpose of publishing a book; (6)

citizens investigating the history and beliefs of a religious organization or leader to determine whether they wish to join that organization; (7) voters researching political contributions to any political candidate or organization on the Missouri Ethics Commission website; (8) citizens reading a newspaper; (9) citizens doing a search for a person or organization on an Internet search engine; (10) citizens asking their neighbor what they did the night before; (11) a young person researching a potential paramour's affiliations on Facebook; (12) citizens reading any book on a person or organization; (13) citizens using Internet sites like Wikipedia or Google to learn more about any person or organization; (14) students and professors engaged in college-level research; and (15) elementary students completing typical research assignments. See *Appellant's Brief* at 22-24, 27, 29-30, and 39.

Like the hunting example in *Stevens*, Gurley's examples are not "fanciful hypotheticals." Instead, they consist of real-world conduct engaged in every day by the vast majority of Missourians. Unlike *Ferber*, Gurley's examples are not a "tiny fraction" of the activities within the statute's constitutional reach. By contrast, Gurley's examples dwarf the conduct of private investigators subject to constitutional regulation. As such, this Court should reject Respondent's argument that Appellant's examples are "fanciful hypotheticals," and should strike the statutes in question as unconstitutional in violation of the First Amendment.

VII. Respondent's "Worse-Than-Worst Case" Defense is But a Fig-Leaf for an Impermissible Noblesse Oblige Defense

Respondent claims "Gurley's worse-than-worst case hypotheticals do not constitute a realistic danger the private investigator law will significantly compromise recognized First Amendment protections." *Respondent's Brief* at 20. Respondent confuses 'fanciful hypotheticals' which may properly dismissed with "worse-than-worst case" examples which may not. As discussed above, the overbreadth doctrine ignores fanciful hypotheticals, but it does not ignore "worse-than-worst" case examples.

The "fanciful" adjective relates to the prevalence of the hypothetical in the real world. It does not matter whether or not a prosecutor might bring a charge based on violation of the statute. To determine if an activity is 'fanciful,' a court must ask if it really happens – not whether a prosecutor is likely to bring a case for violation. Appellant's examples happen in the real world every single day.

Respondent's "worse-than-worst" case argument more closely echoes the defenses offered by the federal government in the *Stevens* case than the fanciful hypothetical defense. To review, in *Stevens*, the federal government claimed the statute was unconstitutional because federal prosecutors had never and likely would not ever bring a claim against activity clearly protected by the First Amendment. *Stevens* at 1591. That defense was soundly rejected. "The First Amendment protects against the Government," the Court opined, "it does not leave us at the mercy of noblesse oblige." *Id*. This Court must follow *Stevens* and reject Respondent's implicit noblesse oblige argument.

VIII. The Intermediate Scrutiny Standard Urged by Respondent Does Not Apply to this Case. Even So, the Statutes Would Be Struck Under the Standard of Respondent's Choosing.

Respondent urges this Court to examine the statutes under the intermediate scrutiny standard. *Respondent's Brief* at 23-24. Respondent's argument assumes, however, that this case is about mere commercial speech. It is not. Instead, this case involves all speech – commercial, political, religious, academic, personal.

Nor is this case about garden-variety professional regulation for which Respondent's standard would be appropriate. This case involves statutes which restrict speech and a criminal statute which enforces those restrictions. As such, the statute is not afforded the typical deference described by the Respondent. Instead, the statutes bear a "heavy presumption" against their constitutionality and "must be scrutinized with particular care." As such, there are two standards of review under which this Court must evaluate Gurley's claims. As detailed in *Appellant's Brief*, those standards are zero tolerance and strict scrutiny.

Regardless, however, of whether the Court applies zero tolerance, strict scrutiny, or intermediate scrutiny, the statutes should be struck down. Even adopting the incorrect intermediate scrutiny standard one finds the statutes still do not comport with the constitution because they cannot satisfy the test's concluding determination of "whether the government regulation is not mere extensive than is necessary to serve (its) interest" in the law in question. *Central Hudson Gas and Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 566 (1980).

Respondent asserts that the state's interest in the statutes is the regulation of private investigators to protect the public. *Respondent's Brief* at 16-17 and 24. Accepting arguendo that this is true, this Court must then determine whether definition of "private

investigator business" contained in §324.1100(11)(b), RSMo and the criminal sanction enforcing it are "not more extensive than is necessary to serve" the government's interest.

There can be little doubt that the definition in §324.1100(11)(b), RSMo, is "more extensive" than necessary to serve the interest of protecting the public through regulation of private investigators. Rather than focusing narrowly on the private investigator industry, §324.1100(11)(b), RSMo defines "private investigator business" in a way that ensnares most Missourians – including school-children. Though the population of Missouri private investigators is relatively small, the population of Missourians who engage in activity which falls under the definition of private investigator business is in the millions. With such a dramatic ratio, it cannot be said that the definition is "not more extensive than necessary" to serve the government's interest. As a result, it cannot even satisfy the intermediate scrutiny test and must be struck as unconstitutional.

CONCLUSION

For the reasons stated in herein and in *Appellant's Brief*, this Court should strike the definition of private investigator business in §324.1100(11)(b) as unconstitutional in violation of the First and Fourteenth Amendments.

ENDNOTE 1

Respondent does not analyze any case cited in *Respondent's Brief* in details. Appellant contends that Respondent has not cited a single case that harms Appellant's arguments for why the statute is unconstitutional. Rather than leave a bald statement without evidence or further analysis, Appellant includes this Endnote to examine additional cases cited by Respondent and briefly explain why they are either not relevant to this case or tend to support Appellant's position.

State Bd. of Registration for the Healing Arts v. Boston

Respondent cites *Healing Arts v. Boston* to assert that, "Protecting the public health and welfare is a primary purpose of professional licensing statutes." *Respondent's Brief* at 16. Citing *State Board of Registration for the Healing Arts v. Boston*, 72 S.W.3d 260 (Mo. App. W.D. 2002). In the *Boston* case, the Western District held that a state statute prohibiting physical therapist assistants from taking the state's licensing exam more than three times could be applied retroactively. Thus, the statement that "public health" is a primary purpose of professional licensing statutes was given in the context of a case clearly involving public health concerns. As the Western District further opined, "Restrictions surrounding the practice of the medical profession are for the benefit of society, not the practitioner." *Id.* at 266. The present case does not involve a medical profession and there is no evidence to suggest the statutes were passed to protect "public health." Cases which justify medical profession licensing regulations, as they relate to public health, have no relevance to licensing regulations involving professions like the practice of law or private investigating.

Miller Nationwide Real Estate Corp. v. Sikeston Motel Corp.

Respondent cites *Miller Nationwide Real Estate Corp. v. Sikeston Motel Corp.* to show that the "professional licensing for the practice of real estate protects the public from the evils of fraud and incompetency." *Respondent's Brief* at 16. Citing *Miller Nationwide v. Sikeston Motel*, 418 S.W.2d 173, 176-177 (Mo. banc. 1967). In *Miller Nationwide*, out-of-state real estate agents sued the defendant Sikeston Motel Corporation for failing to pay brokers' commissions due from the lease of a hotel. The defendant refused to pay, citing the fact that the plaintiff's were not licensed to do business in Missouri. The defendant won. Appellant concedes the state could prohibit non-private investigators from collecting fees for engaging in the private investigator business – if and only if the state defined "private investigator business" in a constitutional manner.

Locke v. Shore

Respondent cites *Locke v. Shore* to show that "even the regulation of interior designers is based on a compelling state interest to protect public safety." *Respondent's Brief* at 17. Citing *Locke v. Shore*, 634 F.3d 1185, 1196 (11th Circ. 2011). Appellant concedes that *Locke* stands for that assertion. Appellant also points out that the *Locke* Court did not find that the regulation of interior designers was related to public health. Thus, Locke undercuts Respondent's citations to *State Board of Registration for the Healing Arts v. Boston* and *National Association for Advancement of Psychoanalysis v. California Board of Psychology* that protecting "public health" is a primary purpose of professional licensing statutes. See *Respondent's Brief* at 16-17. Some professional licensing statutes have protection of "public health" as their purpose. Others do not. As

with the *Locke* case, this case has nothing to do with public health. Private investigators are more like interior designers than doctors. Moreover, the statute in *Locke* was limited to interior designers practicing in commercial settings. Accordingly, it had little to no effect on fundamental First Amendment rights involving political, religious, or personal speech. As such, it does not apply to this case – which involves a statute affecting the speech rights of nearly every Missourian.

Schware v. Board of Bar Examiners

Respondent cites *Schware v. Board of Bar Examiners* for the assertion that "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." *Respondent's Brief* at 17. Citing *Schware v. Board of Bar Examiners*, 353 U.S. 232, 239 (1957). *Schware* was one of several "subversive activity" cases examined by the Court in the 1940s to 1960s. Schware had been a member of the Communist Party before law school. Upon his application for licensure as an attorney, the Board of Bar Examiners for New Mexico rejected him without a hearing. He appealed, and the Supreme Court eventually held that he had been deprived of due process. The full context of the quote pulled for Respondent's brief presents the case in its full light:

> A State can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law. Obviously an applicant could not be excluded merely because he was a Republican or a Negro or a member of a

particular church. *Id*. at 239.

Thus, *Schware* was about a requirement for licensure – not the definition of a profession that would have ensnared practically every citizen of the state of New Mexico. As such, it is inapposite to this case except to the extent that it illustrates that there is no rational connection between the definition of 'private investigator business' and an applicant's fitness or capacity to work as a private investigator.

Virginia v. Hicks

Respondent cites *Hicks* for the assertion that, "Before applying the strong medicine of overbreadth invalidation, such overbreadth must be substantial not only in the absolute sense, but also relative to the scope of the law's plainly legitimate applications." *Respondent's Brief* at 19. Citing *Virginia v. Hicks*, 539 U.S. 113 (2003). Appellant agrees that this point of law applies to this case. Indeed, he cites the same basic point from a separate case in his own brief. In *Hicks*, the appellant trespasser challenged the trespass policy of the Richmond Redevelopment and Housing Authority which gave the property manager of certain properties "unfettered discretion" over rights of entry for persons who had "no legitimate business or social purpose" to be on the property. *Id*. at 121-122. The appellant argued there was an unwritten requirement that a leaf-letter or other person engaged in speech would have to get express permission from the property manager before engaging in speech. *Id*. The Court opined, "The rules apply to strollers, loiterers, drug dealers, roller skaters, bird watchers, soccer players, and others not engaged in constitutionally protected conduct – a group that would seemingly far outnumber First Amendment speakers." *Id*. at 123. This case is different than *Hicks*

because Missouri's private investigator statutes affect far more persons engaged in First Amendment than persons not engaged in First Amendment conduct. As such, the statute is overbroad and should be struck as unconstitutional.

City of Lakewood v. Plain Dealer Publishing Co.

Respondent cites *City of Lakewood* to assert, "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." *Respondent's Brief* at 22. Citing *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988). In *City of Lakewood*, the Supreme Court struck a city ordinance which gave the mayor (1) discretion to deny any newspaper's permit to place newsracks on public property and (2) authority to condition permits on terms he deemed "necessary and reasonable." The Court found the ordinance was "directed narrowly and specifically at expression or conduct commonly associated with expression: the circulation of newspapers." *Id*. at 760. The statute in this case is also aimed at conduct commonly associated and inextricably intertwined with expression – namely research on persons and organizations. As such, just as in *City of Lakewood*, the statutes in question in this case should be struck.

Respectfully submitted,
BARNES & ASSOCIATES

/s/ Jay Barnes
Jay Barnes #57583
219 East Dunklin Street, Suite A
Jefferson City, MO 65101
Fax: 573.635.6291
Ph: 573.634.8884
jaybarnes5@gmail.com
Attorney for Appellant

CERTIFICATE OF SERVICE AND COMPLIANCE

The undersigned hereby certifies that a true and accurate copy of the foregoing was filed electronically pursuant to Rule 103 and Court Operating Rule 27 through Missouri CaseNet this 18th day of October 2011 to:

Kevin Hall
kevin.hall@ago.mo.gov
Attorney for Respondents

The undersigned further certifies that the foregoing brief complies with the limitations set forth in Rule 84.06(b) and contains 7,141 words.

/s/ Jay Barnes
Jay Barnes