SC91125

IN THE SUPREME COURT OF MISSOURI

KANSAS CITY PREMIER APARTMENTS, INC.,

Plaintiff-Appellant,

v.

MISSOURI REAL ESTATE COMMISSION,

Defendant-Respondent.

APPEAL FROM THE CIRCUIT COURT OF PLATTE COUNTY

The Honorable Abe Shafer, Judge

REPLY BRIEF OF APPELLANT

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INTRODUCTION AND SUMMARY

The U.S. Supreme Court has ruled that the First Amendment's protections for free speech are so vast that governments may not prohibit nude dancing, the publication of classified documents, Ku Klux Klan marches, simulated child pornography, the burning of the American flag, or depictions of animals being crushed to death. Yet in this case the Missouri Real Estate Commission ("MREC") argues that it may silence truthful, harmless speech about rental property if the legislature has defined that speech as the practice of a licensed profession. This assertion is contrary to the overwhelming weight of U.S. Supreme Court rulings, and it is contrary to common sense.

The MREC brief complained about KCPA's repeated references to "truthful, harmless information," but it is of paramount importance to keep in mind that, according to the MREC's own stipulations, the testimony of its own expert witness, and the judgment of the trial court, that is what is at issue in this case. To rule in favor of the MREC, this Court would have to find that Missourians have no constitutional protection against laws that criminalize the communication of factual information that threatens no demonstrable public harm. As KCPA has shown, such a ruling would fly in the face of numerous U.S. Supreme Court holdings to the effect that the government may not impose restrictions on speech without demonstrating the existence of a danger that can only be adequately addressed by imposing the proposed speech restrictions — and even then the restrictions may not burden substantially more speech than is necessary to fulfill the law's purpose.

KCPA is seeking a very narrow remedy. Missouri's laws regulating real estate

professionals comprise seventy major sections of Chapter 339. KCPA has challenged one and a half of those sections — the five subparts of section 339.010.1 that unconstitutionally criminalize truthful, harmless information and section 339.010.7, which creates unconstitutional classifications among citizens.[1] The relief KCPA seeks would eliminate these constitutional deficiencies without disturbing the vast majority of the real estate licensing scheme. This Court should grant that relief.

ARGUMENT

I. The government bears the burden of justifying restrictions on speech regardless of the court considering the case.

KCPA cited *U.S. v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 816 (2000), which states that where a law imposes a restriction on speech, the government bears the burden of justifying that restriction. The MREC suggested (without citation to any source) that this Court should disregard the U.S. Supreme Court's pronouncement because it merely establishes the government's burden at trial and "does not alter the level of deference to be accorded to statutes… on appeal." (Resp. Brief at 7.) The MREC could *only* make such an argument by ignoring the litany of cases — several of which Justice Kennedy cited in support of his statement in *Playboy Entertainment Group, Inc.* — in which the U.S. Supreme Court has confirmed this basic principle of First

[1] This Court could even preserve these provisions by adopting a limiting construction that would prevent them from being applied to truthful speech that is unlikely to harm its listeners. *See State v. Moore*, 90 S.W.3d 64 (Mo. banc 2002).

Amendment law. *See, e.g., Thompson v. Western States Medical Center*, 535 U.S. 357 (2002); *Greater New Orleans Broadcasting Assn., Inc. v. U.S.*, 527 U.S. 173 (1999); *Reno v. ACLU*, 521 U.S. 844 (1997); *Edenfield v. Fane*, 507 U.S. 761 (1993); *Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469 (1990); *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985); *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983); *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503 (1969). These cases make absolutely clear that, regardless of the court considering the case, the MREC has the burden of justifying the speech restrictions challenged in this case.

II. KCPA is engaged in precisely the sort of property management exempted by Section 339.010.7(5).

Property owners and brokers retain KCPA and its rental advisors to share information about their properties precisely because KCPA has demonstrated a high degree of skill in reaching a wide range of potential renters. Once the property owners and brokers have provided the actual advertisements, KCPA manages the dissemination of that information via their online searchable database to people looking for apartments. KCPA's business practices fit squarely within the definitions the MREC provided in its brief.[2]

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[2] The MREC's brief was the first time at any point in this litigation in which the MREC suggested that KCPA did not qualify for exemption under 339.010.7(5) because they had not been retained to "*manage*" the conveyance of information prepared by a broker or

The MREC asserts that the purpose of section 339.010.7(5) is to allow property owners to attend to the operation of their own rental properties without having to hire licensed brokers for the performance of "routine functions."[3] (Resp. Brief at 12.) This interpretation, however, would make redundant the exemption provided in section 339.010.7(1), which permits property owners and "the regular employees thereof" to perform any act defined as real estate brokerage "with reference to property owned or leased by them." Properly understood, section 339.010.7(5) represents the legislature's recognition that certain tasks falling within the broad definition of real estate brokerage do not pose the same risks as other tasks, such as preparing and executing legal documents, haggling to bring buyers and sellers to an agreement on the terms of a real estate transaction, or arranging for or performing home inspections. In order to ensure that property owners could choose trusted, unlicensed persons to perform these low-risk tasks, the legislature carved out this exemption with the express understanding that the unlicensed persons would be restricted to the limited range of harmless responsibilities laid out within that subsection—including conveying information prepared by a broker or property owner about rental properties.[4] This is the role that KCPA plays and,

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owner about rental property.

[3] It is not at all clear from the MREC's argument why, if KCPA's activities *would not* be considered "managing," a property owner's employee performing the sort of "routine functions" the MREC describes *would* be considered "managing."

[4] Under the interpretation of this exemption urged by the MREC, an unlicensed person

particularly in light of the rule of lenity, the MREC has not demonstrated any reason that KCPA does not qualify for the exemption provided in section 339.010.7(5).

III. The MREC misstated both the facts and the law in its discussion of the *Central Hudson* test.

A. The challenged provisions clearly implicate free speech.

The MREC has asserted that speech falling within the scope of a professional licensing regulation is not entitled to the protection of the First Amendment. (Resp. Brief at 22.) In support of this position, the MREC cites a single U.S. Supreme Court case, *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978), and a smattering of cases from various federal circuits — none of which engage in the rigorous analysis that the U.S. Supreme Court has mandated where the government imposes a burden on speech.

In the thirty years since it was decided, the U.S. Supreme Court has made quite clear that *Ohralik* had a very narrow holding and that speech does not lose its constitutional protection simply because a legislature chooses to regulate it—even if the regulation is part of an occupational licensing statute. *See, e.g., Tennessee Secondary School Athletic Ass'n v. Brentwood Academy*, 551 U.S. 291, 297 (2007) ("*Ohralik* identified several evils associated with direct solicitation distinct from the harms presented by conventional commercial speech…. We have since emphasized that

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might legally share information with a prospective renter about a single rental unit, but would violate a criminal law if they shared information about different apartments within the same complex. See Resp. Brief at 13.

Ohralik's narrow holding is limited to conduct that is inherently conducive to overreaching and other forms of misconduct.") (internal quotes and citations omitted); *Edenfield*, 507 U.S. at 776 ("*Ohralik* in no way relieves the State of the obligation to demonstrate that it is regulating speech in order to address what is in fact a serious problem and that the preventative measure it proposes will contribute in a material way to solving that problem.") (internal quotes and citations omitted); *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 475 (1988) (stating that *Ohralik* turned on the fact that face-to-face attorney solicitation is "a practice rife with possibilities for overreaching, invasion of privacy, the exercise of undue influence, and outright fraud.") (citations omitted); *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 637 fn. 11 (1980) ("Unlike the situation in *Ohralik*… charitable solicitation is not so inherently conducive to fraud and overreaching as to justify its prohibition.").

In addition to the fact that none of the federal appellate decisions cited by the MREC is binding on this Court, none of them supports the MREC's contention that states may ignore the First Amendment in restricting truthful, harmless speech that might be defined as the practice of a profession.

In *National Ass'n for Advancement of Psychoanalysis v. California Bd. of Psychology*, 228 F.3d 1043 (9th Cir., 2000), the plaintiffs did not argue that the speech in which they wanted to engage was factual, the government had not stipulated that the speech at issue was truthful, and the government's expert witness had not testified that any of the information the plaintiffs intended to provide was not likely to harm its recipients. The Ninth Circuit may have reached an appropriate conclusion in rejecting the

plaintiff's claims, but the court's opinion should have explained why speech by would-be psychologists presents an unusual risk of harm to its recipients and then used that demonstrated danger as the basis for upholding the restriction.

Underhill Associates, Inc. v. Bradshaw, 674 F.2d 293 (4th Cir., 1982), predates many subsequent U.S. Supreme Court cases clarifying the extent of the First Amendment's protection for commercial speech (which is what the plaintiffs in that case argued their speech to be), and it offers no substantive analysis whatsoever of the First Amendment claim. The sum total of the Fourth Circuit's First Amendment reasoning in this case consists of two sentences: "[T]he registration provisions… neither regulate commercial speech nor prohibit the appellants from advertising. The appellants are free to advertise in Virginia and any inhibition of that right is merely the incidental effect of observing an otherwise legitimate regulation." *Id.* at 296. This can hardly be considered to support the MREC's argument.

Accountant's Soc. of Virginia v. Bowman, 860 F.2d 602 (4th Cir., 1988), dealt with non-CPA accountants who wished to use certain terms in the documents they prepared for their clients, but the legislature had reserved those terms for use only by CPAs. There are three salient points to be made about the Fourth Circuit's ruling in this case. First, the entirety of its First Amendment reasoning relied upon Justice White's concurring opinion in *Lowe v. S.E.C.*, 472 U.S. 181 (1985), which was only joined by two other justices and cannot be considered in any way authoritative. Second, the facts of *Lowe* clearly indicate that the regulation at issue in that case was very carefully crafted to address concerns about "fraud, deception, and overreaching" while ensuring that the communication of

factual information and general commentary remain unrestricted. *See id*. at 210. And third, the Fourth Circuit determined that the speech at issue in *Bowman* could constitutionally be restricted because it was inherently misleading.[5] *Bowman*, 860 F.2d at 605. The record in this case is devoid of any evidence that KCPA's speech is "inherently misleading" because there is no proof whatsoever that anyone has mistaken KCPA to be licensed real estate professionals. To the contrary, the only testimony offered on this point came from Alex Gamble, a member of the public who had previously used KCPA's services, who said that he never believed that KCPA had a real estate license "and honestly it wouldn't have been relevant to me whether they did or not." (Tr. at 122.)

The MREC also cites *Lawline v. American Bar Ass'n*, 956 F.2d 1378 (7th Cir., 1992), which concerned a facial challenge to the state of Illinois' prohibitions related to the unauthorized practice of law. The Seventh Circuit rejected the facial challenge (without providing any substantive constitutional analysis), but explicitly refused to consider whether the restrictions could survive an as-applied challenge. This case

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[5] The Fourth Circuit may not have had the benefit of considering *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988), which was handed down just one week before *Bowman* was argued and ruled that in the context of the legal profession the government "may not place an absolute prohibition on certain types of potentially misleading information if the information may also be presented in a way that is not deceptive, unless the State asserts a substantial interest that such a restriction would directly advance." *Id.* at 479. (internal quotes omitted).

provides no support for the MREC's position.

The final case the MREC cited for the idea that the First Amendment is irrelevant where professional licensing laws impose an "incidental" burden on otherwise protected speech is *Locke v. Shore*, ___ F.3d ___, 2011 WL 692238 (11th Cir., 2011). In that case the Eleventh Circuit failed to discuss the nature of the speech being restricted, failed to identify any government interest served by the speech restrictions, failed to explain how the speech restriction advanced any government interest, failed to offer any indication that the legislature had taken care to guard against excessive restriction of protected speech, and failed to cite any majority opinion of the U.S. Supreme Court. This Court should not find *Locke* in any way persuasive.

The U.S. Supreme Court has recently rejected an argument that it should recognize an additional category of unprotected speech. In *U.S. v. Stevens*, ___ U.S. ___, 130 S.Ct. 1577 (2010), the government argued that "depictions of animal cruelty" constituted a category of speech unworthy of the First Amendment's protection. *Id.* at 1585. Chief Justice Roberts, writing for seven of the other justices, rejected this argument, stating: "The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits. The First Amendment itself reflects a judgment by the American people that *the benefits of its restrictions on the Government outweigh the costs*." *Id*. (emphasis added).

The MREC has asked this Court to do exactly what the government was asking in *Stevens*: to declare a category of speech beyond the reach of First Amendment protection. The Court may not grant this request.

B. The MREC misapplied the first prong of the *Central Hudson* test.[6]

The first prong of the *Central Hudson* test questions whether the commercial speech at issue is either false or concerns illegal activity. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York*, 447 U.S. 557, 563-64 (1980). The trial court in this case made quite clear that the MREC had failed to prove that any of the real estate information being provided by KCPA or its rental advisors was false or misleading (L.F. at 143) and the MREC conceded in its brief that "the rentals KCPA promotes are not unlawful," (Resp. Brief at 26). Nevertheless, the MREC continues to insist that KCPA fails the first prong of *Central Hudson* because certain statements on its website promote its own services, which the MREC contends are unlawful. The tautology thus created is that, because a statute purportedly makes KCPA's speech unlawful, KCPA is not permitted to challenge the constitutionality of the statute that purportedly makes KCPA's speech unlawful. The MREC's position also suggests that if it can demonstrate that *any* part of KCPA's speech might be unprotected (i.e., just the speech used to promote KCPA's services, as opposed to the actual speech comprising those services), *all* of KCPA's speech can be restricted — a position the U.S. Supreme Court has thoroughly rejected by insisting that "the free flow of commercial information is valuable enough to

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[6] KCPA does not concede that the *Central Hudson* test is the appropriate standard by which to evaluate the speech restrictions challenged in this case. As KCPA argued in its initial brief, the challenged provisions restrict speech based on its subject matter, which warrants strict judicial scrutiny.

justify imposing on would-be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful." *Zauderer*, 471 U.S. at 646. Even if the record had shown that some part of KCPA's speech was false or misleading, only that part of KCPA's speech would fail the first element of the *Central Hudson* test.

C. The MREC misapplied the second prong of the *Central Hudson* test.

The MREC utterly failed to meet *Central Hudson*'s requirement that the government assert a substantial interest to be served by the speech restrictions being challenged. Rather than focusing on the provisions that KCPA alleges to be unconstitutional, the MREC offered a meandering discussion of occupational licensing laws in general, including a statement that none of the general goals of licensing are met when services are performed by unlicensed persons.[7] In its discussion the MREC listed requirements established by parts of the real estate licensing statutes that KCPA *has not* challenged,[8] but it offered no evidence to suggest that the types of speech restricted by the provisions *at issue in this case* pose an unusual threat to the public.

In its effort to establish the legislature's interest in regulating real estate professionals, the MREC asserted that this Court had in previous cases held that the

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[7] This point is contradicted by the fact that section 339.010.7 explicitly permits a great many unlicensed persons to perform services that would generally require licensure.

[8] KCPA rebuts the MREC's assertions about the importance of these requirements in section III-G, below.

purpose of Chapter 339 "to protect the public from the evils of fraud and incompetency." (Resp. Brief at 31.) But none of the cases cited — *Gilbert v. Edwards*, 276 S.W.2d 611 (Mo.App. 1955), *Schoene v. Hickam*, 397 S.W.2d 596 (Mo. banc 1966), and *Miller Nationwide Real Estate Corp. v. Sikeston Motel Corp.*, 418 S.W.2d 173 (Mo. banc 1967) — considered whether the real estate licensing requirements violated the Constitution and none of them provided any evidence in support of the above statement about the law's purpose. In *Gilbert*, the source of later courts' assertions that real estate licensing is a valid exercise of the police power, the St. Louis Court of Appeals was addressing a *contract dispute* and had to determine whether the Real Estate Agents and Brokers Law was "a revenue measure or a police regulation" before it could proceed with its legal analysis. *See Gilbert*, 276 S.W.2d at 616. That case never mentions the Constitution and it never discusses any evidence concerning a general threat of fraud and incompetency in the real estate industry, much less evidence related to the speech restrictions at issue in the instant case. This Court's decision in *Schoene* is even less relevant because in addition to never mentioning the Constitution, that case addressed the application of *Arizona's* real estate law, not Missouri's. *See Schoene*, 397 S.W.2d at 602-3. And in *Miller Nationwide*, as in *Gilbert*, this Court neither addressed the constitutional validity of restrictions on speech, nor did it interpret the law in light of the rule of lenity. The MREC's suggestion that the mere citation of these cases meets the requirements of *Central Hudson*'s second prong is entirely unwarranted.

D. The MREC misapplied the third prong of the *Central Hudson* test.

The third prong of *Central Hudson* states that if the government has demonstrated

a sufficiently important interest to justify restricting speech, it must then show that the restriction directly advances that interest. *Central Hudson*, 447 U.S. at 569. In this case, if the MREC had shown evidence that communication about real estate had a tendency to be fraudulent or dishonest, its burden would then be to demonstrate that the challenged provisions directly reduced the likelihood of fraud or dishonesty.

The MREC did nothing of the sort. Instead, its argument focused on Chapter 339's *general* licensing requirements – which are not at issue in this case. To the extent that the MREC addressed the challenged provisions at all, it argued that the government decided the speech restrictions are required "based on experience with the kinds of harm members of the public were exposed to in their dealings with realtors." (Resp. Brief at 30.) Nothing in the record of this case supports this claim. The MREC presented no evidence whatsoever that persons sharing real estate information are unusually likely to engage in fraud or dishonesty, nor did it produce any evidence that the legislature adopted the challenged provisions in response to the sorts of findings suggested, nor did it demonstrate that the challenged provisions directly address concerns about fraud or dishonesty.

E. The MREC misapplied the fourth prong of the *Central Hudson* test.

The proper inquiry under the fourth prong of the *Central Hudson* test is whether the speech restrictions that KCPA has challenged are more extensive than is necessary to address the governmental concern that allegedly justifies those restrictions. The only argument the MREC offered to this regard was another tautology: speech restrictions resulting from the legislature's definition of the practice of real estate brokerage are no

more extensive than necessary because the only speech restricted has been defined as the practice of real estate brokerage. (Resp. Brief at 33.)

KCPA has offered multiple alternatives that would ensure the free flow of truthful information while still addressing whatever legitimate dangers the government hopes to avoid. For the MREC to meet its burden under *Central Hudson*, it must have demonstrated that those proposals would fail to stave off the dangers the government intends to address. Instead, it made no effort whatsoever to offer such an explanation. Thus, this Court must find that the MREC has failed to satisfy the fourth element of the *Central Hudson* test.

F. The MREC misconstrued both KCPA's argument and the facts regarding the way in which the challenged provisions permit the government to pick and choose who may share the same information.

The MREC contends that because a great many citizens can choose to undergo the process of obtaining a real estate license, the MREC does not "pick and choose" who is permitted to share information related to real estate. While its own brief makes clear that the MREC does, in fact, have wide discretion in deciding who may lawfully share this information and who may not,[9] it also tries to dodge the larger, plainer point that the *licensing scheme itself* represents the legislature's picking and choosing who will be

[9] The MREC has the authority to waive certain requirements, see Resp. Brief at 4, and it determines whether unlicensed persons qualify for the exemptions under section 339.010.7.

permitted to communicate about real estate. The challenged provisions generally limit unlicensed citizens' ability to engage in one of their most precious constitutional freedoms — but certain governmentally-approved *unlicensed* citizens may lawfully share the same information that would generate criminal liability if shared by unlicensed citizens who have not met with the government's approval. Furthermore, to the extent that the MREC argued that any First Amendment concerns could be eased by the fact that a person denied a license had access to administrative and judicial review, the U.S. Supreme Court explicitly rejected this contention in *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 771 (1988).

The MREC attempts to distinguish some of the cases the KCPA cited on this point, but does so ineffectively. The MREC argues that *Citizens United v. FEC*, ___ U.S. ___, 130 S.Ct. 876 (2010), is inapplicable because that case "dealt with a restriction on pure expressive speech that no corporation could overcome by any means." (Resp. Brief at 36.) To the contrary, the law at issue in that case dealt with corporate expenditures and broadcast electioneering communications within a limited time period prior to an election — not "a restriction on pure expressive speech that no corporation could overcome by any means" or "a barrier that an aspiring party can never surmount." Furthermore, *Citizens United* expressly rejected the idea that merely establishing a lower barrier to speech could "alleviate the First Amendment problems" with the restrictions at issue in that case, pointing out that even if corporations could communicate through political action committees the regulatory requirements would impose an unconstitutional burden on speech. *Citizens United*, 130 S.Ct. at 897-98. When *Citizens United* addressed the

problem of the government distinguishing among speakers, it announced a matter of general constitutional principle unbounded by the particular facts of that case. The U.S. Supreme Court did not equivocate in saying that the First Amendment protects not only the rights of speakers but the right of the public "to determine for itself what speech and speakers are worthy of consideration," and the fact that the court cited a range of exceptions to this general rule that dealt with fact patterns beyond the context of political speech supports the idea that the principle applies in any situation where speech is constitutionally protected. *Id.* at 899.

The MREC took umbrage at KCPA's suggestion that the U.S. Supreme Court means what it has said in holding that courts must apply strict scrutiny to laws that would subject certain persons to criminal liability for communicating precisely the same information that could lawfully be shared by those granted special permission from the government. It attempted to twist KCPA's argument into the notion that *anyone* must be permitted to practice real estate and that the government may only prohibit specific acts of dishonesty or harm. (Resp. Brief at 35.) To the contrary, KCPA's position is that the First Amendment clearly does allow the imposition of licensure requirements that might restrict speech. But if the government believes that speech on a certain topic is so susceptible to acts of fraud and dishonesty that speech on that topic must be criminalized unless the speaker has governmental approval, the First Amendment requires the government to show evidence that the proposed restrictions are sufficiently justified and that the restrictions are no broader than necessary to deal with the asserted threat to the public good. The MREC had its opportunity to make such a showing in this case; that it

failed to do so means the challenged provisions must be struck down.

G. The MREC argued a government interest in ensuring "competence," but neither defined the term, nor offered evidence to support its assertion that harm is likely to result from "incompetent" communication of truthful, harmless information about rental properties.

Despite its inability to prove that in the seven years of KCPA's operation even one person has suffered injury as a result of the information the company provides, in section II-E of its brief the MREC conjures up a handful of "concerns," all of which are completely contradicted by the testimony of its own expert witness. The MREC specifically notes five issues: the use of private phone lines in communicating with apartment seekers; the use of private emails in communicating with apartment seekers; a lack of education in the principles of real estate brokerage; the specter of "traps" due to lack of knowledge;[10] and no administrative recourse for injured apartment seekers. In regard to the first two concerns, the testimony of Mr. Banks speaks for itself:

> Q: As a real estate professional with management experience in the management of licensed and non-licensed personnel, would you have any concern with KCPA allowing its rental advisors to communicate

[10] The MREC never explains what these "traps" might be, how they might occur in the context of KCPA's communication with apartment seekers, or what harm it considers likely to result.

with prospects and property owners through their own e-mail and cell phone accounts without broker or KCPA supervision?

A: I wouldn't have a problem with that. My experience has been that our agents and leasing personnel do use cell phones. They do use personal e-mail to communicate with prospects. I wouldn't have a problem with that. (Tr. at 250.)

In regard to the third, fourth, and fifth concerns, the MREC's expert witness again offered revealing testimony. Mr. Banks acknowledged that that the information KCPA provides consists almost exclusively of rental availability, rental rates, the location of properties, amenities provided at those properties, floor plans, information about the communities in which the properties exist, and contact information for the properties. (Tr. at 271-72.) He testified that none of these types of information is particularly complex. (Tr. at 272-275.) He testified that it "wouldn't necessarily require special training" for someone to communicate those ideas. (Tr. at 276-77.) And, most importantly, he testified that he could think of no circumstances where someone could be harmed from receiving such information. (Tr. at 278.)

It is also important to note the ways that the MREC misuses the evidence in section II-E of its brief. The MREC implies, without any citation or evidence, that KCPA owes a fiduciary duty to the apartment complexes that provide advertisements for its website. KCPA is not a real estate brokerage, nor does it wish to become one; the MREC has absolutely no basis for imposing its assumptions about client-broker relationships on the agreements that KCPA makes to share information about rental properties. KCPA

agrees to share information that property owners provide to it, but it does not agree and has no obligation to try to steer prospective renters to any particular complex that provides advertisements for the website.[11] As Tiffany Lewis testified, KCPA's primary goal is to make it easier for people looking for apartments to find a place to live. (Tr. at 59-60.) In fact, Ms. Lewis testified that KCPA has taken pains to ensure that its rental advisors focus on providing the information that will be most useful to the prospective renters, and that the organization would not tolerate rental advisors recommending properties for any reason other than a true belief that the prospective renter would be interested in them. (Tr. at 59.) The testimonials in Respondent's Exhibit 6 speak to the fact that KCPA has proven effective in accomplishing its goal.

The MREC's argument about the alleged dangers of incompetence raises a couple of additional issues. As an initial matter, the implication of the MREC's argument is that if it can show *just one* instance of someone connected to KCPA saying or doing something ill-advised, it is justified in demanding that *all* of KCPA's speech be silenced. This sort of all-or-nothing approach bears no resemblance to the U.S. Supreme Court's requirement that even where there is a substantial government interest to be served, regulations must take care to distinguish "the truthful from the false, the helpful from the

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[11] KCPA notes that because it does not charge any advance fees and because its agreements to share information about rental properties are not exclusive, the MREC has not demonstrated that KCPA owes any "fiduciary duty" to the property owners that provide information for KCPA to share.

misleading, and the harmless from the harmful." *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 646 (1994).

Additionally, the MREC ignores the most glaring loophole in its entire argument—the law plainly permits *anyone* to engage in these "dangerous" real estate activities as long as they cannot be said to have received "valuable consideration" for doing so. Where most criminal laws prohibit specific actions that have been deemed so inherently dangerous or harmful they warrant the threat of fines or imprisonment in order to dissuade people from engaging in them, the provisions at issue in this case target communications that are only subject to penalty if one accepts compensation for making them. Under the current law, anyone with enough time on their hands—such as a retired person or a home maker—could lawfully set up a perfect mirror-image of KCPA's organization, offering precisely the same information and creating precisely the same "dangers," so long as they did not receive "valuable consideration" for doing so. If the legislature was truly concerned about any likely harm from the communications themselves, it would not have made the acceptance of compensation the litmus test for the criminal law's applicability. That it chose to do so, combined with the MREC's failure to describe the nature of the harms asserted, severely undercuts the claim that the types of speech restricted by the challenged provisions pose any significant threat to Missourians' health, safety, or welfare.

IV. The MREC ignored the plain text of Article I, Section 8, of the Missouri Constitution.

In the five pages the MREC dedicated to discussing Article I, Section 8 of the

Missouri Constitution, not once did it address the text that the people of this state adopted to prevent governmental intrusion on their freedom of speech. Instead, the MREC demonstrated an alarming ignorance of the function of a state's bill of rights in our federal constitutional system. While in many instances state constitutional provisions so closely parallel their federal counterparts that state courts treat them as coextensive, there are many other instances in which the language of a state constitution establishes a more robust protection for a particular liberty than is afforded under the U.S. Constitution. The U.S. Bill of Rights establishes a baseline of freedom that all states are required to afford their citizens, but it absolutely does not limit the states' ability to set a higher bar. *See, e.g., Kelo v. New London*, 545 U.S. 469, 489 (2005) ("[N]othing in our opinion precludes any State from placing further restrictions on its exercise of the takings power. Indeed, many States already impose 'public use' requirements that are stricter than the federal baseline.")

Particularly in the area of free speech, Missouri's citizens chose to impose a much more thorough limitation on their government's power, and this choice has been reaffirmed in each of Missouri's constitutions. The constitutional language regarding free expression has actually been *strengthened* since this Court pronounced that it "could not be broader, nor prohibition nor protection more amply comprehensive," with the clarification that free expression must be protected "no matter by what means communicated." Mo. Const. Art. I, § 8. The MREC has not cited any case in which the Court overturned its early interpretations of this provision's expansive language — but it *has* invited the Court to hold that the words of Article I, Section 8, no longer have

meaning and that the people of Missouri are powerless to adopt speech protections beyond those that federal courts find in the First Amendment.[12] It is an invitation that this Court must decline.

V. The MREC mischaracterizes the exemptions provided under Section 339.010.7 and misstates and misapplies the law regarding Article III, section 40(30) of the Missouri Constitution.

Attempting to lessen the arbitrariness of the exemptions provided under section 339.010.7, the MREC tried to shoehorn them into four categories. The resulting characterizations of these exemptions are demonstrably inaccurate. The first category it tries to establish is "persons and concerns acting on their own behalf, with regard to property under their legal control." (Resp. Brief at 52.) The MREC includes the exemptions for property managers and neighborhood associations in this category. But according to the statute, neither property managers nor neighborhood associations are required to have legal control over the properties in regard to which they are allowed to engage in unlicensed speech! In fact, the exemption for neighborhood associations explicitly permits them to share information about properties "in *and near* the association's neighborhood." § 339.010.7(12).

More important is the exemption that KCPA has emphasized, which allows

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[12] KCPA notes the irony that the MREC has insisted on the primacy of the federal courts' application of the First Amendment, yet fought so hard to avoid the standard of review the U.S. Supreme Court has determined to be required in cases involving free speech.

unlicensed media outlets to communicate the very same information that KCPA wishes to communicate, as long as the advertising of real estate is "incidental" to its operation. § 339.010.7(9). Rather than address KCPA's substantive contention that there can be no rational basis for distinguishing between businesses for whom real estate advertising is an incidental part of their operation and those for whom real estate advertising is more than incidental, the MREC appears to have challenged KCPA's *standing* to raise this issue. (Resp. Brief at 55.) In addition to the fact that the MREC has long since missed its opportunity to raise the issue of standing, it also appears not to have understood that KCPA is arguing that this particular exemption is *facially* unconstitutional.

The MREC also evidenced a failure to appreciate the difference between a statute that is a "special law" on its face and one that is a "special law" by virtue of its application, each of which is prohibited under Article III, Section 40(30), of the Missouri Constitution. This Court recognized this distinction in *Doe v. Phillips*, 194 S.W.3d 833 (Mo. banc 2006), where plaintiffs alleged that a law dealing with sex offenders constituted a special law because it excluded certain offenders from its operation, but did not exclude the plaintiffs. The Court reaffirmed that under Article III, Section 40(30) "laws that apply to less than all persons who are similarly situated are prohibited unless the members of a given class of such persons are treated alike and the classification is reasonable." *Id.* at 849. The Court also stated that "the test for special legislation involves the same principles and considerations that are involved in determining whether the statute violates equal protection in a situation where neither a fundamental right nor a

suspect class is involved, i.e., where a rational basis test applies."[13] *Id.* (internal quotes omitted). The primary difference between the application of Article III, Section 40(30), and the equal protection provisions of the Fourteenth Amendment and Article I, Section 2 of the Missouri Constitution is that Article III, Section 40(30), explicitly states that the matter is "a judicial question to be judicially determined without regard to any legislative assertion on the subject," whereas courts applying general equal protection principles are permitted to defer to governmental assertions.

In trying to establish that a law can only be considered "special" if its requirements apply only to a closed set of persons, organizations, or communities, the Commission cites cases dealing with *local* laws, a particular variety of special law in which the legislature passes statutes whose application depends on geopolitical factors, such as location or population. In those cases this Court properly stated that the test for that particular type of a special law — as well as for a law that is "facially special" — focuses on whether it applies to an open- or closed-set. But nothing in the cases cited by the MREC repudiates or indicates the Court's intention to abandon decades' worth of precedents[14] in which this Court has applied Article III, Section 40(30) to strike down

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[13] In light of this Court's own words, KCPA is baffled by the MREC's argument that KCPA misstated the meaning of the term and "attempt[ed] to remake it into a second equal protection clause." (Resp. Brief at 55.)

[14] Particularly *Petitt v. Field*, 341 S.W.2d 381 (Mo. 1960), which is *precisely* on-point in regard to section 339.010.7(9) and its distinction between businesses for whom the

laws creating arbitrary or irrational classifications.

VI. The MREC urges the incorrect approach to determining whether statutory language is unconstitutionally vague.

The MREC's approach to analyzing the challenged provisions for vagueness is to suggest that a reasonable person might believe that KCPA's business activities violate the laws. This *is not* the proper standard. The question of vagueness is a *facial* challenge and, as demonstrated in Appellant's Brief, the test is whether a person of common intelligence would be forced to guess at the meaning of a criminal law, or whether the law makes clear what the State commands or forbids.

KCPA's initial brief before this Court illustrated the confusion caused by many of the terms used in the challenged provisions, and specifically indicated a number of important questions that cannot be answered simply by reading the statutory language. Not only did the Brief for Respondent fail to offer guidance in regard to any of those questions, it raised at least one more! The MREC argued that the term "valuable consideration" clearly and unambiguously applies to "compensation having value that is given for something acquired or promised," but then it immediately deemed "preposterous" the idea that purchasing something of value (in the provided example, a cup of coffee) in gratitude for someone's assistance would be considered "valuable consideration." (Resp. Brief at 66-67.) If it is "preposterous" to think that a cup of coffee

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advertising of real estate is "incidental" and those for whom the advertising of real estate is more prevalent.

might be considered "valuable consideration," how is a person of ordinary intelligence to know where the MREC will draw the line between the permissible and the criminal? That these questions cannot be answered by reading the plain language of the challenged provisions makes clear that they are unconstitutionally vague and this Court must either give them a limiting construction or strike them down.

CONCLUSION

KCPA reiterates the plea for relief stated in its initial brief.

Respectfully submitted,

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RULE 84.06(c) CERTIFICATION AND CERTIFICATE OF SERVICE

I hereby certify that this brief complies with the type-volume limitation of Rule 84.06(b) of the Missouri Rules of Civil Procedure. This brief was prepared in Microsoft Word 2003 and contains no more than 7,644 words, excluding those portions of the brief listed in Rule 84.06(b) of the Missouri Rules of Civil Procedure (less than the 7,750 limit in the rules). The font is Times New Roman, double-spacing, 13-point type. A CD-ROM (which has been scanned for viruses and is virus free) containing the full text of this brief has been served on each party separately represented by counsel and is filed herewith with the clerk.

I hereby certify that one true and correct copy of the foregoing and a CD-ROM containing the same was mailed, postage prepaid, this 29th day of April, 2011, addressed to the following:

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