IN THE SUPREME COURT OF MISSOURI

Appeal No. SC95171

PROGRESS MISSOURI, INC., et al.

Plaintiffs/Appellants

v.

MISSOURI SENATE, et al.

Defendants/Respondents

APPELLANTS' BRIEF

SCHUCHAT, COOK & WERNER

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JURISDICTIONAL STATEMENT

The jurisdiction of the Trial Court was invoked pursuant to Section 610.027, R.S.Mo., in that Plaintiffs seek to enforce rights under Missouri's Sunshine Law. The Trial Court also had jurisdiction under Section 527.010, R.S.Mo., in the Plaintiffs seek a declaration of rights.

The Supreme Court has jurisdiction over this appeal pursuant to Article V, Section 3 of the Missouri Constitution in that it involves the validity of Missouri's Sunshine Law as applied to the Missouri Senate, certain Committees of the Missouri Senate, and the Chairmen of those Committees. The Trial Court's holding -- that Defendants may bar Plaintiffs from filming open Senate Committee meetings on the basis of Senate Rule 96 governing the use of cameras at committee meetings -- rests on the political question doctrine and the opinion that Plaintiffs' claims are immune from judicial review because Article III, Section 18 of the State Constitution gives each house of the General Assembly the authority to determine the "rules of its own proceedings." Plaintiffs challenge this interpretation of the Constitution and the Senate's purported power to invalidate the Sunshine Law by a unilaterally promulgated rule. Hence, this case involves the "validity of a statute and interpretation of a provision of the Constitution of this State," and lies within the Supreme Court's exclusive jurisdiction. *Asbury v. Lombardi,* 846 S.W.2d 196, 198 (Mo. 1993).

This appeal also involves the constitutionality of Senate Rule 96. Defendants' position is that persons must be members of the Missouri Capitol News Association in order to exercise the right created by Defendants and Senate Rule 96 to film committee

hearings and that Defendants are free to grant or deny persons permission to use cameras. Plaintiffs allege that Defendants' position violates Plaintiffs' rights of freedom of speech and association because it compels them to join a private organization, which would require Plaintiffs as a condition of membership to give up their advocacy activities, in order to exercise an important right. Plaintiffs further allege that Senate Rule 96 unconstitutionally grants Chairmen of Senate Committees unfettered discretion to allow the use of cameras and therefore permits public officials to act as censors. Because Plaintiffs challenge the validity of Senate Rule 96, this Court has jurisdiction under Article V, Section 3, just as the Court has jurisdiction in cases challenging the constitutionality of a state statute. *See Rodriguez v. Suzuki Motor Corp.*, 996 S.W.2d 47, 51 (Mo. 1999) (Supreme Court will entertain appeal if constitutional challenge is real and substantial); *see also State ex rel. Danforth v. Cason*, 507 S.W.2d 405, 408 (Mo. 1973) (Supreme Court agrees to consider a case involving the constitutionality of Senate Rule 11 in view of the desirability of resolving the question prior to reconvening of General Assembly).

STATEMENT OF FACTS[1]

A. Senate Rule 96 concerning the use of cameras.

Defendants are the Missouri Senate; the Missouri Senate Commerce Committee, Small Business Committee, and Seniors Committee; and, the Chairmen of the three Committees, Senators Mike Kehoe, David Sater, and Mike Parson. (Legal File at 008-009) (hereinafter "L.F. at ___").

The Missouri Senate has adopted internal rules on various matters, including the time of meeting, the order of business, standing committees, decorum, voting procedures, the form of questions, and motions. (L.F. at 055-063, 110.) According to the Trial Court's findings, the Senate first adopted Rule 96 in 1983. (L.F. at 110.) It readopted the Rule in January 2015 and provides that: "Persons with cameras, flash cameras, lights, or other paraphernalia may be allowed to use such devices at committee meetings with the permission of the Chairman as long as they do not prove disruptive to the decorum of the committee." (L.F. at 011-012, 110-111.)

B. Plaintiffs' history of recording Senate Committee meetings.

Plaintiff Progressive Missouri, Inc. is a progressive advocacy organization that works to engage citizens around issues of state-wide concern. (L. F. at 008.) It is a

[1] Because this case was decided on a motion to dismiss, the Court must assume that all of Plaintiffs' allegations set forth in the Petition are true and give Plaintiffs all reasonable inferences arising out of the allegations. *See Weber v. St. Louis County*, 342 S.W.3d 318, 321 (Mo. 2011).

taxpayer to the State. (L.F. at 008.) Plaintiff Sean Soendker Nicholson is Progress Missouri's Executive Director. (L.F. at 008.) He is a Missouri citizen and taxpayer. (L.F. at 008.)[2]

For years, Progressive Missouri and its representatives have filmed hearings before state House and Senate Committees without incident, including hearings before the Senate Judiciary Committee, the Senate Education Committee, and the Senate Appropriations Committee. (L.F. at 009-010.) Hearings before House and Senate Committees are open to the public and include discussion and testimony about state policy matters and pending legislation. (L.F. at 010, 013.)

Progress Missouri uses recordings of Committee hearings to monitor the views of elected officials and to inform the public about policy matters from a progressive point of view. (L.F. at 010.) For example, on January 27, 2015, Progressive Missouri filmed a meeting of the House Telecommunications Committee held at the Jefferson City Country Club in order to report on the practice of legislators holding off-site committee meetings and dining on lobbyist funded meals. (L.F. at 010.) Progress Missouri often posts recordings of meetings on its website and sometimes live streams hearings. (L.F. at 010.)

[2] Nicholson resigned from his position of Executive Director in late September 2015. He remains an aggrieved person, and a citizen of, and taxpayer to, this State within the meaning of Section 610.027.1, R.S.Mo.

C. Defendants prohibit Plaintiffs from recording certain Senate Committee meetings.

On February 2, 2015, a representative of Progress Missouri notified Senator Kehoe by e-mail that it intended to videotape the next Senate Commerce Committee meeting. (L.F. at 010, 021.) In response, a representative of Senate Kehoe's office called Progress Missouri and stated that it could not record the meeting. (L.F. at 010.) Progress Missouri went anyway. (L.F. at 011.) There, Senator Kehoe announced that "videotaping is only allowed for press corps members with previous permission." (L.F. at 011.)

On February 23, Progress Missouri notified Senator Sater by e-mail that it intended to film a February 24 hearing before the Senate Seniors Committee. (L.F. at 011, 022.) Senate Sater informed Plaintiffs by response e-mail that videotaping is prohibited unless you are a member of the media as recognized by the Missouri Capitol News Association. (L.F. at 011, 023.) Senator Stator stated that at his request Senate Communications records every meeting. (L.F. at 011, 023.) He also stated that his policy is consistent with Senate Rule 96. (L.F. at 011, 023.)

Plaintiffs continued to attempt to film committee meetings without success. (L.F. at 012-013.) On March 10, Senator Parson stated at a hearing before the Small Business Committee that "all cameras were prohibited" and "everybody with cameras and everything just put them up. Put 'em up. No cameras." (L.F. at 012.) Senator Parson did not communicate any exception for the press. (L.F. at 012.) On March 31, a representative of Progress Missouri who was in the process of setting up a camera to film

another hearing before the Small Business Committee was instructed by a Senate doorkeeper, with two police officers nearby, that he could not film the hearing. (L.F. at 013.)

In each instance, Defendants prohibited Plaintiffs from videotaping committee hearings which Plaintiffs wished to film. (L.F. at 016.) In no instance were Plaintiffs disruptive. (L.F. at 016.) In the past, Plaintiffs have filmed meetings without blocking ingress or egress, interfering with proceedings, or otherwise proving disruptive to the decorum of a hearing. (L.F. at 010.)

Notwithstanding Senator Sater's statement that Senate Communications records every committee meeting, Senate Communications failed to record the second half of the February 24 hearing before the Seniors Committee and failed to record any of the March 4 hearing before that Committee. (L.F. at 012.) Senate Communications also failed to record portions of the March 10 hearing before the Senate Small Business Committee. (L.F. at 012-013.)

D. Plaintiffs do not wish to join the Missouri Capitol News Association and cease their advocacy activities.

The Missouri Capitol News Association, also called the press corps, is a private organization with its own by-laws. (L.F. at 017.) Among other things, the News Association requires its members to be editorially independent of any lobbying entity or interest group. (L.F. at 017.)

Progress Missouri is not a member of the News Association. (L.F. at 011.) Plaintiffs do not wish to join the News Association because they are not editorially

independent of any interest group and would be required to cease their advocacy activities as a condition of membership. (L.F. at 017.)

COURT'S DECISION BELOW

Plaintiffs filed a two count Petition in Cole County Circuit Court on April 15, 2015. (L.F. at 001.) Count I of the Petition alleges a violation of Missouri's Sunshine Law and seeks an order requiring Defendants to allow Plaintiffs to record hearings before Senate Committees. (L.F. at 014, 016.) Count II alleges a violation of Plaintiffs' rights of freedom of speech and association and seeks a declaration of rights and an injunction. (L.F. at 016, 019.)

By Judgment dated June 30, 2015, the Trial Court granted Defendants' Motion to Dismiss both Counts I and II. (L.F. at 109.) The Court found that Plaintiffs' Sunshine Law claims in Count I invoked political questions immune from judicial review and, with respect to Count II, that Plaintiffs failed to allege facts establishing a deprivation of a right recognized either under the Missouri or United States' constitutions. (L.F. at 117.) Plaintiffs timely filed this appeal. (L.F. at 118.)

POINTS RELIED ON

I. The Trial Court erred in granting Defendant's Motion to Dismiss Count I because Plaintiffs' statutory claims do not invoke political questions immune from judicial review in that the Sunshine Law binds the Senate, the constitutionality of the Sunshine Law as applied to the Senate is a question for this Court to decide, and Defendants' actions transgress identifiable textual limits in the Constitution.

INS v. Chadha, 462 U.S. 919, 944 (1983)

Powell v. McCormack, 395 U.S. 486 (1969)

United States v. Smith, 286 U.S. 6 (1932)

State ex info. Danforth v. Banks, 454 S.W.2d 498 (Mo. 1970)

Mo. Const. Art. III, § 18

Mo. Const. Art. III, § 31

Section 610.015, R.S.Mo.

Section 610.020, R.S.Mo.

II. The Trial Court erred in granting Defendants' Motion to Dismiss Count II because Plaintiffs' Petition states a claim for violation of freedom of speech and association in that Defendants have granted the right to record open meetings and have denied Plaintiffs that right in an unconstitutional manner.

Widmar v. Vincent, 454 U.S. 263 (1981)

Elrod v. Burns, 427 U.S. 347 (1976)

Police Dep't of the City of Chicago v. Mosley, 408 U.S. 92 (1972)

Sherrill v. Knight, 569 F.2d 124 (D.C. Cir. 1977)

Mo. Const. Art. I, § 8.

ARGUMENT

Introduction

Missouri's General Assembly enacted the Open Records and Open Meetings Law, a/k/a "the Sunshine Law," to "reflect the state's commitment to openness in government." *News-Press and Gazette Co. v. Carthcart*, 974 S.W.2d 576, 578 (Mo. App. W.D. 1998). It is ironic, then, that Defendants, the Missouri Senate and certain state Senators, seek to excuse themselves from following the law and argue for a right to limit if not prohibit the public's right to record meetings. The General Assembly is the state's most important policy-making body. Committee meetings are where "the sausage gets made," so to speak.[3] It harms the public's faith in political institutions and weakens government accountability if citizens cannot record committee meetings.

The Trial Court's holding that Plaintiffs' Sunshine Law claims invoke a political question and are immune from judicial review flouts a basic constitutional principle -- that one house of a bicameral legislative body cannot suspend a statutory obligation without the State as a whole first repealing that law. The Senate's right to make "rules of

[3] The origin of the phrase that links politics to sausage-making is not clear. Fred Shapiro, a writer for the New York Times, attributes it to "lawyer-poet" John Godfrey Saxe, who is reported to have said: "Laws, like sausages, cease to inspire respect in proportion as we know how they are made." Posting of Fred Shapiro to Freaknomics Blog, http://freakonomics.com/2009/03/05/our-daily-bleg-uncovering-more-quote-authors/ (March 5, 2009, 3:45 p.m.).

its own proceedings," under Article III, Section 18, does not give it permission to unilaterally excuse itself from complying with a law that applies to it and which benefits the public and affords important rights to citizens. Moreover, the political question doctrine is not a bar to judicial review. The issue in this case is one of constitutional interpretation: Is the Sunshine Law constitutional as applied to the Senate? And, may the Senate suspend application of a law, which is binding on the Senate, by a rule? The Trial Court erred because the political question doctrine is not implicated in cases involving the constitutionality of a law. Furthermore, the Trial Court failed in its responsibility, in the first instance, to interpret the Constitution and determine the meaning of Article III, Section 18 and the term "proceedings" and whether the Senate truly has final authority for deciding the scope of its own authority.

Plaintiffs' Petition also states a claim for violation of freedom of speech and association. Contrary to the Trial Court's ruling, Plaintiffs are not arguing that they have a stand-alone constitutional right to personally record open public meetings. Rather, Plaintiffs contend that Defendants themselves have created a right to record meetings by the Sunshine Law, practice, and Senate Rule 96, and Defendants cannot now deny that right contrary to constitutional norms. Having allowed cameras in committee meetings in the past and having given access to some persons to film, Defendants violate Plaintiffs' rights of free speech and association by: (1) giving unfettered discretion to Chairmen to deny the use of cameras; (2) drawing an unprincipled distinction between the press and interested members of the public; (3) forcing Plaintiffs to join a private news organization

to get the same access as others; and, (4) failing to follow their own rule allowing cameras at committee meetings.

Standard of Review

The Supreme Court of Missouri reviews dismissals for failure to state a claim *de novo* without any deference to the circuit court decision. *Weber v. St. Louis County*, 342 S.W.3d 318, 321 (Mo. 2011) (citing *Huch v. Charter Communications, Inc.*, 290 S.W.3d 721, 724 (Mo. banc 2001)). This Court "assumes that all of the plaintiffs' averments are true, and liberally grants to plaintiff all reasonable inferences therefrom." *Id*.

I.

The Trial Court erred in granting Defendant's Motion to Dismiss Count I because Plaintiffs' statutory claims do not invoke political questions immune from judicial review in that the Sunshine Law binds the Senate, the constitutionality of the Sunshine Law as applied to the Senate is a question for this Court to decide, and Defendants' actions transgress identifiable textual limits in the Constitution.

Section 610.020.3 of the Sunshine Law provides that a "public body shall allow for the recording by audiotape, videotape, or other electronic means of any public meeting." § 610.020.3, R.S.Mo. Plaintiffs allege that the Missouri Senate and its committees are public bodies, that hearings before Senate committees are open meetings, and that Defendants did not allow them to record public meetings. (L.F. at 010-013, 015.)

Notwithstanding, the Trial Court did not consider whether the Sunshine Law had been violated. (See footnote 1 to Trial Court's Judgment, L.F. at 113.) It relied on the political question doctrine, and determined that, in Article III, Section 18, the people of the state "specifically made a textual demonstrable constitutional commitment" to the Senate to "determine the rules of its own proceedings." (L.F. at 114.) It therefore found the matter non-justiciable. (L.F. at 116-117.)

The Trial Court's reliance on the political question doctrine ignores a basic constitutional principle – that one house of the General Assembly cannot absolve itself from complying with a law without the State, as a whole, first repealing that law. The Senate, having enacted the Sunshine Law, along with the House and the Governor, must comply with the law. It cannot subsequently excuse itself from the binding effect of its own enactment by adopting an internal rule. This is confirmed by the text of the Sunshine Law itself. It is also confirmed by any fair reading of the term "proceedings" and by Article III, Section 31 on how a bill becomes a law. The Senate's actions contravene identifiable textual limits in the Constitution and if upheld would lead to absurd if not dangerous results.

A. The Sunshine Law clearly applies to and binds Defendants.

To begin with, Missouri's Sunshine Law undoubtedly applies to the Missouri Senate and its committees. The law defines "public governmental body" as "any legislative, administrative, or governmental entity created by the constitution" and specifically includes "any committee appointed by or at the direction of any of the entities." § 610.010(4). The Missouri Senate, created by Article III of the Constitution,

and its committees fall under this definition. So do individual legislators when they act as Chairmen in the name of their committees.

Governor Jay Nixon, when he was Attorney General, issued an Opinion Letter specifically finding the General Assembly subject to the Sunshine Law. (L.F. at 088-090.) He opined that telephone billing records of an individual member of the House are "public records" as defined by the Sunshine Law and must be made available for copying and inspection. Opinion Letter No. 192-94 (August 25, 1994). Notably, in footnote 1 of that Letter, the Attorney General distinguished an earlier ruling in the Iowa case cited by the Trial Court -- *Des Moines Register and Tribune Co. v. Dwyer*, 542 N.W.2d 491 (Iowa 1996) – stating that, due to differences in the various state's constitutions, statutes, and polices, the case was not applicable to the determination of the issue in Missouri.

A specific provision in the Sunshine Law further shows that it applies to and binds the Senate notwithstanding internal rules to the contrary. Section 610.015, R.S.Mo., governs how votes by governmental bodies, including cities, counties, and the state legislature, should be taken and recorded. In doing so, it explicitly references the General Assembly and its right to make rules under the Missouri Constitution. It provides:

> "Except as provided in Section 610.021, rules authorized pursuant to Article III of the Missouri Constitution and as otherwise provided by law, all votes shall be recorded, and if a roll call is taken, as to attribute each "yea" and "nay" vote, or abstinence if not voting, to the name of the individual member of the public governmental body. . . . All votes take by roll call in meetings of a public governmental body consisting of members

> who are elected, except for the Missouri general assembly and any committee established by a public governmental body, shall be cast by members of the public governmental body who are physically present and in attendance at the meeting or who are participating via videoconferencing."

§ 610.015, R.S.Mo. (emphasis added).

The above language confirms that the Sunshine Law applies to the General Assembly and to House and Senate committees; otherwise, there would be no need to reference the General Assembly and committees. This provision further confirms that the Senate is bound by the requirements of the Sunshine Law except in one circumstance where it may follow internal rules to the contrary. The phase "rules authorized pursuant to Article III," refers to internal House and Senate rules adopted pursuant to Article III, Section 18. The only exception in the Sunshine Law with respect to internal rules is for how votes shall be recorded and, if a roll call is taken, how they should be attributed. The House and Senate may follow their own rules, and not the Sunshine Law, when it comes to how votes are recorded and attributed. Otherwise, the Law does not make an exception for internal rules. More specifically, Section 610.020.3 of the Sunshine Law, stating that public bodies "shall allow for the recording" of meetings, makes no reference to and makes no exception for rules authorized by Article III.

A common rule of statutory interpretation is that the expression of one thing excludes another. *Schudy v. Cooper*, 824 S.W.2d 899 (Mo. 1992) ("The General Assembly necessarily excludes commercial leasing as a "revenue producing enterprise"

by expressly including certain residential leasing as such an enterprise); *see also Kansas City v. J.I. Case Threshing Mach. Co.*, 87 S.W.2d 195, 205 (Mo. 1935). Here, the General Assembly, by expressing that internal Senate rules are an exception to one section of the Sunshine Law on how votes are recorded, necessarily excluded Senate rules as an exception to the Sunshine Law's requirement that public bodies allow for the recording of open meetings.

The Senate and the House first passed the Sunshine Law with the Governor's approval in 1973. The provision allowing the recording of meetings was added in 2004. S.B. 1020, 92d Gen. Assem., 2d Reg. Sess. (Mo. 2004). The Senate and House knew their power to determine rules for their own proceedings, but did not include in the Law any exception for internal rules relating to the use of cameras at open committee meetings. Defendants may argue that this Court must interpret the law in light of the power to determine rules. But, if so, why did Senate make itself subject to the law? And, why did it agree to one exception for internal rules with respect to how votes are recorded, but not include other exceptions? The better interpretation is that the plain language of the Sunshine Law requires Defendants to allow Plaintiffs to record and film committee meetings notwithstanding any internal rule to the contrary.

The State – the Senate, the House, and the Governor, combined – enacted the Sunshine Law. The Senate, one part of the State, must now comply with its provisions. The General Assembly "has all the powers and privileges which are necessary to enable it to exercise in all respects, in a free, intelligent, and impartial manner, its appropriate functions, except so far as it may be restrained by the express provisions of the

Constitution, or by some express law made unto itself, regulating and limiting the same." *Bergman v. Mills*, 988 S.W.2d 84, 89 (Mo. App. W.D. 1999) (the General Assembly lacks the power to draft a summary for a referendum where it has given that power to the Secretary of State). As detailed further below, the Senate cannot exempt itself from the law without the State – the Senate, the House, and the Governor -- first repealing that law. *See State ex rel. First Nat'l Bank v. Holliday*, 61 Mo. 229 (Mo. 1875) (law fixing salary of House clerks is binding on the House; "It was a general law and could not be repealed or disregarded by either house. It could only be modified, changed or done away with by the law-making power, viz: the concurrent action of the two houses and the approval of the executive."). Accordingly Defendants, like other public bodies, must follow the Sunshine Law and allow Plaintiffs to record committee meetings.

B. Plaintiffs' claims do not invoke political questions because the constitutionality of the Sunshine Law as applied to the Senate is a question for this Court to decide and because the Constitution places identifiable textual limits on the Senate's authority to adopt rules.

The crux of this case is the Trial Court's holding that the Senate's authority to "determine the rules of its own proceedings," under Article III, Section 18, gives it the authority to excuse itself from complying with a constitutionally adopted law. The reasoning fails for three reasons. First, the Trial Court failed to properly analyze the issue. Because Defendants contend that the Sunshine Law is unconstitutional as applied to them, this case does not raise a political question. Further, it is the Court's responsibility to interpret the Constitution and to determine whether Article III, Section

18 grants or denies the Senate final authority to decide the nature and scope of its own power. Second, by any fair understanding of the term, Senate Rule 96 on the use of cameras is not a rule of "proceeding." It has no bearing or effect on how the Senate passes a law. Third, the state Constitution, at Article III, Section 31, prescribes one process for making law -- by concurrent action of the House and Senate and approval of the Governor or passage over his veto. The Senate cannot bypass that process, and essentially write a new exemption into a law, by a rule of proceeding. Accordingly, separately and together, Article III, Sections 18 and 31 provide identifiable textual limits on the Senate's authority, and the Court is not barred from reviewing Plaintiffs' claims.

1. This Court must decide the constitutionality of the Sunshine Law as applied to the Senate, and it is the Court's duty is to interpret the Constitution and determine what powers it confers on the Senate.

The political question doctrine is a limitation on the judiciary to decide issues that are decidedly political in nature. *Maryland Heights Leasing, Inc. v. Mallinckrodt, Inc.*, 706 S.W.2d 218 (Mo. App. 1985). A court may find a claim non-justiciable -- that is, to involve a political question -- where there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department." *State ex info. Danforth v. Banks*, 454 S.W.2d 498, 500 (Mo. 1970) (quoting *Baker v. Carr*, 369 U.S. 186 (1962)); *see also Bennett v. Mallinckrodt, Inc.*, 698 S.W.2d 854 (Mo. App. E.D. 1985).

The "political question" label does not obviate the need to make a close examination of an issue. As the U.S. Supreme Court has noted, the political question doctrine requires analysis of the "the precise facts and posture of the particular case" and

precludes "resolution by any semantic cataloguing." *Baker*, 369 U.S. at 217. The doctrine is a function of the separation of powers and restrains the judiciary from inappropriately interfering in the business of other branches of government. *Id.*; *see also Banks*, 454 S.W.2d at 500. But, that does not mean that all judicial interference is inappropriate. "The courts cannot reject as 'no law suit' a bona fide controversy as to whether some action denominated 'political' exceeds constitutional authority." *Baker*, 369 U.S. at 217; s*ee also INS v. Chadha*, 462 U.S. 919, 944 (1983) ("Questions may occur which we would gladly avoid; but we cannot avoid them. All we can do is, to exercise our best judgment, and conscientiously to perform our duty.") (citing *Cohens v. Virginia*, 6 Wheat. 264, 404 (1821)).

Further, and more pertinent to the issue at hand, the U.S. Supreme Court has held that courts should intervene in cases where the legislature by rules of its own proceedings "ignore[s] constitutional restraints or violate[s] fundamental rights." *United States v. Smith*, 286 U.S. 6, 33 (1932) (citing *United States v. Ballin*, 144 U.S. 1, 5 (1892)). It is the court's duty to protect citizens from legislative over-reach. Where the "construction to be given the rules [of a legislative body] affects persons other than members of the [body], the question presented is necessarily a judicial one." *Id.*; *see also Yellin v. United States*, 374 U.S. 109, 143-144 (1963) (court may review whether U.S. House obeyed its own rules in requiring citizen to answers questions about his Communist Party activities).

The precise facts and the posture of this particular case demonstrate that it is suitable for judicial resolution. Essentially, Defendants' position is that the Sunshine Law is unconstitutional as applied to the Senate and its committees because it intrudes

upon powers committed to the Senate under Article III, Section 18 to determine the "rules of its own proceedings." But, this contention does not implicate the political question doctrine or a separation of powers concern. No precedent stands for the proposition that another branch of government, such as the Senate or the Executive, can decide the constitutionality of a statute that affords important rights to citizens. That is a decision for the courts.

On a number of occasions, the United States Supreme Court has held that the political question doctrine is not implicated in cases involving the constitutionality of a statute. For example, in *INS v. Chadha*, 462 U.S. 919 (1983), the plaintiff, a deportable alien, challenged the authority of the U.S. House under a federal statute to invalidate by resolution, and without passing a law and without the agreement of the Senate, a decision by the Attorney General to allow him to remain in the United States. The U.S. House argued the matter was a political question because the plaintiff's claim attacked the House's legislative authority. *Id.* at 941. The Court disagreed. Indeed, the plaintiff was arguing that one House of Congress cannot constitutionally veto the Attorney General's decision to allow him to remain in the country. *Id*. But, the Court ruled that it should decide the constitutionality of the statute and the House's actions. "No policy underlying the political question doctrine suggests that Congress or the Executive . . . can decide the constitutionality of a statute; that is a decision for the courts." *Id*. at 941-942. *See also Zivotofsky v. Clinton*, __ U.S. __, 132 S. Ct. 1421, 1427-1428 (2012) (political question doctrine is not implicated by claim that federal statute requires Secretary of State to list child's birthplace on passport as Israel as opposed to Jerusalem; argument by Secretary of

State that statute intrudes on power of the Executive is a claim about the constitutionality of the statute, which is a decision for the courts).

Similarly, the Missouri Supreme Court has held that "it is emphatically the province and duty of the judicial department to say what the law is" and to determine the constitutionality of statutes. *Missouri Coalition for the Env't. v. Joint Comm. on Admin. Rules*, 948 S.W.2d 125 (Mo. 1997) (citing *Marbury v. Madison*, 5 U.S. 137 (1803)). And, this Court has repeatedly held that courts have the power, indeed the responsibility, to determine whether another political branch, including the legislature, is acting beyond its constitutional authority or in contravention to the text of the state Constitution. *Rolla 31 School Dist. v. State*, 837 S.W.2d 1, 3-4 (Mo. 1992) (court may review legislative action involving appropriations, even though legislature has constitutional power to make appropriations; "we reject the contention that courts do not have jurisdiction to decide constitutional issues in areas in which the legislature is entitled to supremacy by reason of the separation of powers doctrine."); *State ex rel. Cason v. Bond*, 495 S.W.2d 385 (Mo. 1973) (court is not denied jurisdiction by separation of powers doctrine to determine whether governor exceeded his veto authority under Article IV, Section 26 in striking words from bill but leaving appropriations standing).

Here, if the Sunshine Law intrudes upon the Senate's power to adopt internal rules, then the law is invalid as applied to the Senate. On the other hand, if the Sunshine Law is binding on the Senate, and if the Constitution limits the authority of the Senate to override a constitutionally adopted law by a rule, then the Senate must be ordered to allow Plaintiffs to record committee hearings. But, in either case, the political question

doctrine is not implicated. This Court must determine whether the Sunshine Law is constitutional as applied to the Senate. The political question doctrine does not allow the Senate to make that decision itself. *See Zivotofsky*, 132 S. Ct. at 1428 (the Constitution makes no commitment to other branches of the government to decide the constitutionality of a statute; the judicial branch exercises that authority).

Notwithstanding, the Trial Court simply pronounced that Article III, Section 18 makes a "textually demonstrable commitment to its [senate] to determine the rules of its own proceedings." (L.F. at 114.) The Trial Court should have reviewed the issue more closely. Even if the political question doctrine is implicated, the Court is not absolved of its responsibility to determine whether there actually has been a textual constitutional commitment of an issue to another branch of government. It is the Court's duty to first examine the text and structure of the Constitution to determine what power its provisions confer on the Senate, before determining to what extent, if any, that power is subject to judicial review.

A well-known United States Supreme Court decision, cited by the Missouri Supreme Court in *State ex info. Danforth v. Banks*, *supra*, makes this very point. In *Powell v. McCormack*, 395 U.S. 486 (1969), the U.S. House argued that the courts could not consider Congressman Adam Powell's claim that the U.S. House had unconstitutionally excluded him from taking his seat upon his election because Article I, Section 5 of the U.S. Constitution gives the U.S. House the power to "be the Judge of Qualifications of its own Members." *Id.* at 519. The respondents contended the case presented a political question in that Article I, Section 5 makes a "textually demonstrable

constitutional commitment" to the U.S. House to decide an elected official's qualifications. *Id.* The U.S. Supreme Court disagreed. The Court held that it must resolve, in the first instance, "whether there has been a textual commitment to another branch and the scope of such commitment;" and, in order to do so, it must interpret the Constitution. *Id.* at 520. For, "deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution." *Id.* at 521 (citing *Baker v. Carr*, *supra*). The Court proceeded to interpret the meaning of the phrase "be the Judge of the Qualifications of its own Members." Among other things, it considered the language of Article I, Section 5, historical materials, and other constitutional provisions. The Court ultimately concluded that the Constitution left the House without authority to exclude any person, duly elected by his constituents, who meets the requirements expressly prescribed in the Constitution, and that the political question doctrine did not bar a court from adjudicating Powell's claim. *Id.* at 522 & 546.

The United States Supreme Court continues to follow this approach in political question cases. The "courts must, in the first instance, interpret the text in question and determine whether and to what extent the issue is textually committed." *Nixon v. United States*, 506 U.S. 224, 228 (1993). In doing so, the Court will look at the language and structure of the provision at question and the meaning of the words. *Id.* at 229-232. It will also consider if there is any "separate provision of the Constitution that could be

defeated by allowing" another branch of the government, such as the Senate, "final authority" to determine the scope of its powers itself. *Id*. at 237. Ultimately, the issue in the political question doctrine is not whether a constitutional provision gives another political branch exclusive control over a function. The legislature has the power to do many things – tax, pay debts, promulgate laws for the welfare of the people – subject to court review. Rather, the issue is whether the Constitution gives another branch "final authority" to determine the meaning of its powers and interpret the scope of its power without judicial review. *Id*.; *see also id.* at 240 (White, J., concurring) ("the issue is whether the Constitution has given one of the political branches "final responsibility for interpreting the scope and nature of such a power.")

The leading Missouri case on the political question doctrine -- *State ex info. Danforth v. Banks*, 454 S.W.2d 498 (Mo. 1970) -- demonstrates that the Trial Court failed to properly analyze the issue in this case. There, the attorney general sought to oust state representative Jet Banks from office because he did not reside in the district from which he was elected. *Id.* at 499. The Court held the matter was non-justiciable because Article III, Section 18 makes the state House the "sole judge" of the qualifications of its members. *Id*. at 500. Specifically, the Court observed that another provision of the Constitution, Article III, Section 4, made residency a standing qualification for office, and following U.S. Supreme Court precedent found that the state Constitution committed to the state House the power to finally determine whether an elected person is a resident of his district. *Id.*

The Trial Court failed to make the same type of analysis as the Court did in *Banks*. The Judgment makes no effort to interpret the word "proceedings" in Article III, Section 18. Nor does the Judgment consider other constitutional provisions, such as Article III, Section 31, that would be defeated by allowing the Senate final authority to interpret the word "proceedings" to allow it to exempt itself from a binding law. Rather, the Trial Court simply notes that Article III, Section 18 gives the Senate the power to determine its rules, and concludes that a claim involving a rule invokes a political question. This is the very type of "semantic cataloging" which the U.S. Supreme Court in *Baker v. Carr* counseled against. *Baker*, 369 U.S. at 217. The Trial Court failed to undertake an interpretation of the Constitution.

State ex info. Danforth v. Cason, 507 S.W.2d 405 (Mo. 1973), also cited by the Trial Court, is more supportive of Plaintiffs' position than Defendants'. The issue in *Cason* was the constitutionality of Senate Rule 11, and whether Article IV, Section 10 of the state Constitution confers on the lieutenant governor the right to preside over the senate, or whether Article III, Section 18 confers on the senate the right to specify by rule that the president pro tempore may assume the chair and displace the lieutenant governor. *Id*. at 407. The Court ruled in favor of the lieutenant governor, relying on language in the Constitution that makes him the president of the senate. *Id*. at 416. Notably, the Court made no mention of the political question doctrine. It did what the Trial Court failed to do here – it interpreted the Constitution by looking at its language and structure and comparing and reconciling conflicting provisions. In particular, the Court held that the Senate's right to establish its own rules "is subject to exceptions provided in the

Constitution." *Id*. at 413. The same is true here. As detailed more fully below, one of those exceptions is established in Article III, Section 31, which sets forth the process for passing, amending, and repealing a law. The Senate cannot by rule alter a law or exempt itself from a law contrary to this process.

Finally, the Trial Court relies on cases from other states concerning a legislature's authority to determine the rules of its proceedings. Obviously, this Court is not bound by these cases. In addition, differences in the Sunshine Law and in Missouri's Constitution make them distinguishable. For instance, in *Moffit v. Willis*, 459 So.2d 1018 (Fla. 1989), the Florida Supreme Court expressly stated that it was "not confronted with whether a statute applies," and noted that "[w]hile the judiciary certainly has the power to determine what effect a statute has and to whom it applies as well as its constitutionality, that is not the issue before us today." *Id.* at 1021-1022. The particular problem *Moffit* was whether the Florida House and Senate had violated their own internal rules. By contrast, the Court here is confronted by a statute which clearly applies to the Senate, requires public bodies to allow for the recording of open meetings, and does not make an exception for the Senate to exempt itself from this specific requirement by a rule. Plaintiffs are not simply claiming that Defendants are not obeying their own rules. Plaintiffs are claiming that Defendants' actions violate an important right afforded to citizens under a binding law. The question presented is, therefore, a judicial one. *Smith*, 286 U.S. at 33.[4]

[4] Several of the other cases cited by the Trial Court were also decided over vigorous dissents. *See Des Moines Register and Tribune Company v. Dwyer,* 542 N.W.2d 491,

2. Article III, Section 18 is limited to rules relating to the processing of bills, and Senate Rule 96 is not a rule of "proceeding."

The Trial Court made no effort to interpret the word "proceedings" in Article III, Section 18. Any fair reading of the term indicates that it is limited to efforts to pass a bill, and does not extend to matters unrelated to the Senate's legislative functions.

In construing the Constitution, the Court ascribes "to words the meaning which the people understood them to have when the provision was adopted." *State ex rel. Danforth v. Cason*, 507 S.W.2d 405, 408 (Mo. 1973). The Court gives the words used "their ordinary and usual meaning." *Id.* at 409 (citing *Household Finance Corporation v. Schaffner*, 203 S.W.2d 734, 737 (Mo. 1974)).

The provision in the Missouri Constitution giving the legislature the power to determine its rules of proceedings was first adopted in 1820. Mo. Const. Art. III, §18 (1820). The Oxford English Dictionary notes use of the word "proceedings" around that time to relate to "the carrying on of an action or series of actions." Oxford English Dictionary, http://www.oed.com/view/Entry/151779?redirectedFrom=proceedings#eid (last visited October 13, 2015). Webster's Third International Dictionary defines

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502-506 (Iowa 1996) (Harris, J., dissenting) (legislature cannot excuse itself from the binding effect of open records law by adopting a rule a proceeding); *Abood v. League of Women Voters*, 743 P.2d 333, 342-344 (Alaska 1982) (Compton, J., dissenting) (court should not decline to decide whether open meetings law applies to state legislature because rights of persons who are not members of the legislature are involved).

"proceedings" as "an official record of things said or done at a meeting." Merriam-Webster.com, http://www.merriam-webster.com/dictionary/proceedings (last visited Oct. 16, 2015).

With regard to a legislature, the carrying on of action or a record of things said or done at a meeting means actions and steps taken at a meeting to pass a bill. By every reasonable understanding, the term "proceedings" means the actions or process necessary to pass a bill – drafting, referral to committee, appropriating funds, amendments, readings, speeches, motions, and voting. The Constitution gives the legislature the power to pass laws and provides the framework and the parameters. The rules fill in and spell out the details – how questions are put, the order of daily business, the duties of committees, the style of amendments, etc.

This focused interpretation of the term is consistent with Article III as a whole. That portion of the Constitution sets forth the powers of the legislature, the election of officials, and the process for making law. The Senate's rules serve those functions. They should not go beyond them.

A focused interpretation is also confirmed by how the term "proceedings" is used in other provisions of the Constitution. Article III, Section 22 states: "Each committee shall keep such record of its proceedings as is required by rule of the respective houses and this record and the recorded vote of the members of the committee shall be filed with all reports on bills." Mo. Const. Art. III, § 22. Similarly, Article III, Section 26 provides: "Each house shall publish a journal of its proceedings." Mo. Const. Art. III, § 26.

The purpose of keeping a record or journal of proceedings is to document the official actions of the House and Senate and its committees and in particular actions germane to bills – style, introduction, referral to committee, printing, amendment, and passage. Proceedings are actions taken by legislators in this process. Notably, a delegate offered this very definition at the 1943-1944 Missouri constitutional convention, when language that would become Article III, Section 22, requiring each committee to keep a "record of its proceedings," was being debated. Delegate Crane, a supporter of the provision, was asked what he would want a committee to record. In response, he explained, "not, of course to require a complete transcript . . . but, as you referred to in your last inquiry, simply a record of the changes made in the bill and different motions that came up in connection with it and, of course, the final action of the committee and the action on the different changes." Debates of the 1943-1944 Constitutional Convention of Missouri, Volume 16, at p. 4864, http://digital.library.umsystem.edu/cgi/t/text/pageviewer-idx?c=mcd;cc=mcd;sid=0a65c1922b6f409a26fa1abcb23b75e0;q1=record%20of%20its%20proceedings;rgn=full%20text;idno=mcd194516;view=image;seq=19 (last visited Oct. 16, 2015) (emphasis added) (App. at A30). He and other delegates understood the term "proceedings" to mean actions on a bill and things that are said and done by legislators with regard to a bill, and nothing more.

The Sunshine Law also supports a focused definition of "proceedings." As noted, Section 610.015, R.S.Mo., makes a specific exception for rules authorized by Article III with regard to the recording of votes. This provision is acknowledgment by the General

Assembly that rules of proceeding are confined to actions necessary to passing legislation. This is the only provision in the Sunshine Law referencing the Senate's powers under Article III and it is limited to a specific step in the legislative process and concerns a specific action by an individual legislator necessary to passing a bill.

Senate Rule 96 purports to give a Chairman of a Senate committee the power to deny any person the opportunity to film an open meeting: "Persons with cameras, flash cameras, lights, or other paraphernalia may be allowed to use such devices at committee meetings with the permission of the Chairman . . . ." (L.F. at 063.) Obviously, actions taken by individual legislators in committee meetings are important, including what questions they may ask and how they may vote. But, a Chairman's decision to grant or deny a person the opportunity to use a camera, pursuant to Rule 96, is not an integral part of the process of the legislature. Whether a citizen, as opposed to a member of the News Association or someone from Senate Communications, is filming a meeting does not affect when or whether a legislator offers an amendment, what information a committee may gather about a bill, making a speech, voting, or any other step taken in the orderly processing of a bill. In addition, filming a meeting does not require a legislator to take action. Rather, a member of the public makes the recording for his or her own purposes. In fact, a committee will take the same actions, even if no one is filming. Legislators will still gather information, consider changes to a bill, and take final action. Accordingly, a rule on the use of cameras at committee meetings is not a rule of proceeding. *See Watson v. Fair Political Practices Commission*, 217 Cal. App. 3d 1059 (Cal App. 2d Dist. 1990) (term "rules of proceedings" relates to manner in which legislature draft rules,

appropriates funds, and chooses officers, and does not extend to matters that affect citizens of the state); *see also United States v. Brewster*, 408 U.S. 501, 518 (1972) (U.S. House's right to determine the rules of its proceedings and punish its members does not equip it to regulate behavior "loosely and incidentally related to the legislative process").

In sum, the plain language of Article III, Section 18 places a textual limit on the Senate's power to make rules. Article III, Section 18 is at most a textually demonstrable commitment to the Senate to adopt rules relating to the orderly processing of bills. Since Rule 96 extends to acts unrelated to the legislative process, and affects persons who are not members of the Senate, Rule 96 is not a rule of proceeding; and a court may review whether the actions by Defendants pursuant to this Rule violate the Sunshine Law.

3. Article III, Section 31 is a limit on the Senate's authority to adopt rules of proceedings, and the Senate cannot by a rule excuse itself from a law without the State first repealing or amending that law.

The Trial Court also erred in not considering other provisions in the Constitution that concern the Senate's authority. Article III, Section 18 cannot be read in a vacuum. The Court must consider whether other provisions of the Constitution would be defeated by giving the Senate final authority to determine the scope and power of its rules. *See Nixon*, 506 U.S. at 228 (considering if there is any "separate provision of the Constitution that could be defeated by allowing" another branch of the government "final authority" to determine the scope of its authority).

Article III, Section 21 of the Missouri Constitution states in relevant part: "No law shall be passed except by bill." Mo. Const. Art. III, § 21. Article III, Section 31 provides for how a bill becomes a law and states in full:

> Every bill which shall have passed the house of representatives and the senate shall be presented to and considered by the governor, and, within fifteen days after presentment, he shall return such bill to the house in which it originated endorsed with his approval or accompanied by his objections. If the bill be approved by the governor it shall become a law. When the general assembly adjourns, or recesses for a period of thirty days or more, the governor shall return within forty-five days any bill to the office of the secretary of state with his approval or reasons for disapproval. If any bill shall not be returned by the governor within the time limits prescribed by this section it shall become law in like manner as if the governor had signed it.

Mo. Const. Art. III, § 31.

The Missouri Constitution sets forth only one process for passing a law and repealing a law – by concurrent action of the House and Senate and approval of the Governor (or passage over his veto). The Senate, House, and Governor enacted the Sunshine Law by this process. Neither the Senate nor the House nor the Governor can change or modify it except by this constitutionally required process.

Here, though, the Senate seeks to exempt itself from the Sunshine Law by Rule 96. As already noted, the Sunshine Law covers the Senate and states that it shall allow

for the recording of open meetings. If the General Assembly wished to exempt the Senate from this legal requirement, then it could have done so by enacting an exemption for the recording of meetings in the Sunshine Law based on internal rules as it did for the how votes are recorded. Or, the General Assembly could have drafted the definition of "public body" to exclude the Senate and the House, as it did to exclude the judiciary in most cases. However, the General Assembly chose not to draft such exemptions.

Missouri law is clear. Until the Senate and House pass a new bill, with approval of the Governor, they are bound by the existing Sunshine Law. *See State ex rel. First Nat'l Bank v. Holliday*, 61 Mo. 229 (Mo. 1875) (general law "could not be repealed or disregarded by either house. It could only be modified, changed or done away with by the law-making power, viz: the concurrent action of the two houses and the approval of the executive."); *Bergman v. Mills*, 988 S.W.2d 84, 89 (Mo. App. W.D. 1999) (the General Assembly has all the powers necessary to enable it to exercise in all respects its appropriate functions "except so far as it may be restrained by the express provisions of the Constitution, or by some express law made unto itself, regulating and limiting the same.") The Senate cannot by an internal rule alter or modify or repeal portions of an existing law. Constitutionally adopted rules do not trump constitutionally adopted laws. It makes a mockery of the Constitution and Article III, Section 31 if the Senate, one half of one branch of the government, can subsequently exempt itself from a law, passed by it and the House and approved by the Governor, by unilateral action. *See also Missouri Coalition for the Env't. v. Joint Comm. on Admin. Rules*, 948 S.W.2d 125, 134 (Mo. 1997) (Article III, Sections 21 and 31 prohibit legislative action by a committee or one

house of the General Assembly to amend, modify rescind, or supplant an administrative rules that has force of law, unless the legislature follows bill passage requirements).

A careful analysis of Article III, Section 18 does not belie the contrary. Article III, Section 18 merely provides the Senate the right to adopt internal rules necessary to the orderly processing of bills. The provision does not give the Senate the power to nullify constitutionally adopted laws. Essentially, in asking the Court to hold that its power to promulgate rules is unreviewable, the Senate wants the Court to find that Senate rules may have legislative effect. By Rule 96, the Senate is taking action in this case that has the purpose and effect of altering the legal rights of persons, including Plaintiffs, who are not members of the Senate. The Court should not give the Senate such power. Plaintiffs have the right to record and Defendants have the obligation to allow them to record open meetings under the law. The General Assembly and the Governor gave that right to Plaintiffs by enacting the Sunshine Law. The Senate cannot, on its own, take away that right. Rather, it must pass a new law with an exemption, with the agreement of the House and approval of the Governor.

In addition, Article III, Section 18 states that the Senate "may determine the rules of its own proceedings, except as herein provided." Mo. Const. Art. III, § 18. That language, when read in full, "expressly limits that right by providing such authority is subject to exceptions provided in the Constitution." *Cason*, 507 S.W.2d at 413. Two such exceptions are established by Article III, Sections 21 and 31, which require concurrent action of the Senate and House, and presentment to the Governor, to pass, amend, or repeal a law. The effect of this limitation is to provide a constitutional

exception to the right of the Senate to adopt rules that are contrary to valid, general laws. The Senate may make rules. But, it cannot specify by rule who may (or may not) record an open meeting if that rule contravenes existing law. It may not by rule circumvent the constitutionally enshrined process for passing, amending, and repealing laws.

Defendants' argument gives the Senate a dangerous amount of power. If the Senate can adopt a rule against the use of cameras, then under Defendants' view it could adopt a rule denying the use of pen and paper to take notes at meetings. Or, it could deny permission to the press corps to use cameras. Or, it could limit access to meetings to just a few people and effectively thwart public scrutiny. Beyond matters relating to the Sunshine Law, under Defendants' view the Senate could adopt rules with the effect of exempting it from other laws. For instance, the Senate could adopt rules relating to the hiring and employment of male or female interns that violate the Missouri Human Rights Act. Or, it could adopt a rule stating the Senators taking contributions on the Senate floor are not required to report that money under Missouri's Campaign Finance Law. Or, it could adopt a rule allowing it to pay clerical staff below the state minimum wage rate. In any such a case, the Senate could simply state that it is adopting a rule of proceeding and argue the matter is a political question. Nothing under the Constitution sanctions such an absurd result. *Humane Soc'y of the United States v. State*, 405 S.W.3d 532, 537 (Mo. 2013) (Court should avoid interpretation that produces absurd results) (citing *Rourke v. Holmes St. Ry. Co.*, 166 S.W. 272, 275 (Mo. banc 1914)).

The better interpretation is that Article III, Sections 21 and 31 place identifiable textual limits on the scope of the Senate's power to determine the rules of its own

proceedings. The Senate has the power to draft internal rules concerning the legislative process. But, it cannot by Rule 96 excuse itself from the binding effect of existing law, including the Sunshine Law.

C. The alleged facts, accepted as true, state a claim for violation of the Sunshine Law.

As noted above, because of the political question doctrine, the Trial Court did not determine whether the alleged facts stated a claim for violation of the Sunshine Law. (See footnote 1 to the Trial Court's Judgment, L.F. at 113.) This Court should find the Plaintiffs' Petition states a claim.

Section 610.020.3 of the Sunshine Law provides that a "public body shall allow for the recording by audiotape, videotape, or other electronic means of any public meeting." § 610.020.3, R.S.Mo. Plaintiffs allege that the Missouri Senate and its committees are public bodies and that committee hearings are open meetings within the meaning of the Sunshine Law. (L.F. at 014-015.) Plaintiffs allege that they sought access to committee meetings to film hearings. (L.F. at 010-013.) And, Plaintiffs allege that Defendants did not allow them to record meetings and prohibited them from filming meetings. (L.F. at 010-013, 015.)

The alleged facts, accepted as true, are sufficient to state a Sunshine Law claim. There is no evidence that Plaintiffs would be disruptive. Rather, Plaintiffs have alleged that they have recorded hearings without incident and will not be disruptive. Plaintiffs have not blocked ingress or egress at meetings, interfered with proceedings, or otherwise proved disruptive to the decorum of hearings which they have filmed. (L.F. at 010.)

Accordingly, the Court should find that Plaintiffs have stated a Sunshine Law claim, and remand this matter to the Trial Court for further proceedings.

II.

The Trial Court erred in granting Defendants' Motion to Dismiss Count II because Plaintiffs' Petition states a claim for violation of freedom of speech and association in that Defendants have granted the right to record open meetings and have denied Plaintiffs that right in an unconstitutional manner.

The Trial Court found that Plaintiffs' constitutional claims failed because there is no constitutional right to personally records open public meetings. (L.F. at 116.) The Trial Court misconstrued the nature of Plaintiffs' constitutional claims. Plaintiffs are not relying on any free-standing, constitutional right to record. Rather, Plaintiffs' theory is that once a state grants a right – in this case, access to record committee meetings -- it cannot deny that right in a discriminatory or unconstitutional manner. This theory is based on years of free speech and free association jurisprudence and follows well-known U.S. Supreme Court precedent. Accordingly, the Trial Court erred in dismissing Plaintiffs' constitutional claims for failure to state a claim.

A. Defendants have created a right to record meetings by statute, by allowing persons to record open meetings, and by Rule 96, and cannot deny that right in an unconstitutional manner.

Article I, Section 8 of the Missouri Constitution provides: "That no law shall be passed impairing the freedom of speech, no matter by what means communicated: that

every person shall be free to say, write or publish, or otherwise communicate whatever he will on any subject, being responsible for all abuses of that liberty." Mo. Const. Art. I, § 8. The right to free speech under the Missouri Constitution is like that granted by the First Amendment. *Mo. Libertarian Party v. Conger*, 88 S.W.3d 446 (Mo. 2002). The Missouri Supreme Court recognizes that the right of free association is "closely allied" to freedom of speech. *Williams v. School Dist.*, 447 S.W.2d 256, 263 (Mo. 1969); *see also Elrod v. Burns*, 427 U.S. 347 (1976) ("there can no longer be any doubt that freedom to associate with others for the common advancement of political beliefs and ideas is a form of 'orderly group activity' protected by the First and Fourteenth Amendments.") (citing *NAACP v. Button*, 371 U.S. 415 (1963)).

Plaintiffs' constitutional claim is based on the established proposition that once the state grants a right, it cannot deny that right in a discriminatory or unconstitutional manner. Government may not grant opportunities or the use of a forum to some people but deny it to others based on their message or views. *See Police Department of the City of Chicago v. Mosley*, 408 U.S. 92, 96 (1972) (ordinance may not allow labor picketing but prohibit other peaceful picketing). Courts condemn such discrimination among different users. *Id.* Similarly, "because of their potential use as instruments for selectively suppressing points of view," courts condemn licensing schemes and policies that "lodge broad discretion in a public official to permit speech-related activity." *Id.; see also Widmar v. Vincent*, 454 U.S. 263 (1981) (having created a forum for use through its policy of accommodating meetings, university cannot discriminate against users based on religious nature of meeting).

Defendants' discrimination against Plaintiffs must also be considered against the free speech principles at stake. "The maintenance of the opportunity for free political discussion . . . is a fundamental principle of our constitutional system." *Stromberg v. California*, 283 U.S. 359, 369 (1931). There is "practically universal agreement" that the freedom of speech is "to protect the free discussion of governmental affairs. For speech concerning public affairs is more than self-expression: it is the essence of self-government." *Burson v. Freeman*, 504 U.S. 191, 196 (1992) (citations omitted). For this reason, courts closely scrutinize legislative acts that burden political speech and the gathering and dissemination of public information. *Id*. at 197; *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) ("in a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations"); *see also Smith*, 286 U.S. at 33 (legislature "may not by its rules ignore constitutional restraints or violate fundamental rights.")

Here, the State has granted a right. The Sunshine Law sets a public policy in favor of openness and gives the public the right to record open meetings. §§ 610.011.1 & 610.020.3, R.S.Mo. In addition, the Senate has created a right by Rule 96 – stating that persons may use cameras at committee meetings – and by its actions – granting permission to the press and even Plaintiffs in the past to record meetings. Accordingly, the Senate cannot discriminate among people, including Plaintiffs, who seek to record meetings in an unconstitutional manner, including for reason of their speech, beliefs, or association, and based on who they are and how they intend to use material.

Plaintiffs have been unable to identify a Missouri case on the exact issue presented. But, federal courts have ruled in favor of plaintiffs making similar arguments. Because Missouri's constitutional provisions on free speech and association are similar to the First Amendment, this Court may look to those cases for guidance. *Kansas City Premier Apartments, Inc. v. Missouri Real Estate Comm'n*, 344 S.W.3d 160, 170 (Mo. 2011) ("analysis of a section of the federal constitution is strongly persuasive in construing a like section of our state constitution").

In *Belcher v. Mansi*, 569 F. Supp. 379 (D.R.I. 1983), the plaintiffs were denied permission to tape record a public school committee meeting. The district court found it unnecessary to decide if they had a First Amendment right to record the meetings. *Id.* at 384. Rather, the district court noted that the state open meetings law (like Missouri's Sunshine Law) expressed a policy in favor of openness and the accountability of public institutions, thus triggering constitutional principles. *Id.* In addition, the district court noted that the defendants had adopted a policy allowing its meetings to be taped, thereby creating a right. *Id.* Having allowed its meetings to be recorded, the district court held, the Committee assumed "an obligation to justify its discrimination and exclusions under applicable constitutional norms." *Id.* (citing *Widmar*, 545 U.S. at 267). The district court then held that the defendants' policy on videotaping was unconstitutional because it granted "unbridled discretion to Committee members to decide whether leave to record public meetings will be granted." *Id.* at 385. Such broad discretion violates constitutional norms because it permits a public official to act as censor. *Id.*

Federal courts have also held that, once the government has created a right, it may not discriminate in classifying certain persons as "media" but excluding others from the definition based on viewpoint or the content of their publications. "[O]nce there is a public function, public comment, and participation by some of the media, the First Amendment requires equal access to all of the media or the rights of the First Amendment would no longer be tenable." *American Broadcasting Cos. v. Cuomo*, 570 F.2d 1080 (2d Cir. 1977). Similarly, once the government voluntarily provides access to a space, it violates the First Amendment to deny it to certain persons based on "arbitrary or content-based criteria." *Sherrill v. Knight*, 569 F.2d 124 (D.C. Cir. 1977) (once White House has voluntarily decided to establish press facilities, the First Amendment requires that access not be denied arbitrarily or for less than compelling reasons); *see also United Teachers of Dade v. Stierheim*, 213 F. Supp.2d 1368 (S.D. Fla. 2002) (school board's attempts to define media to exclude from press room a reporter for a teacher's union newspaper violates the First Amendment; school board may not attempt to limit the access of certain reporters merely because they advocate a particular viewpoint or based on the content of the newspaper they work for).

These same principles apply in this case. Defendants have created a right of access to record, and they cannot discriminate against Plaintiffs in denying that right. Defendants cannot give themselves unfettered discretion to grant or deny permission to use cameras, cannot arbitrarily exclude Plaintiffs from the definition of the press, and cannot force Plaintiffs to conform to Defendants' view of the press and by extension how recordings should be used.

B. Defendants have denied Plaintiffs' the opportunity to film meetings in an unconstitutional manner in four different ways, including by conditioning the right to film on their abandoning their right to free speech.

Plaintiffs' Petition sets forth in detail how Defendants have violated their freedom of speech and association. In a nutshell, Plaintiffs' have alleged that Defendants have unconstitutionally denied them the right to film open meetings by: (1) giving individual Senators unfettered discretion to deny Plaintiffs permission to record, (2) drawing an arbitrary distinction between certain members of the press and others, (3) requiring them to join a private organization, and (4) failing the follow the plain language of Rule 96.

First, Defendants are exercising unfettered discretion in permitting and denying persons to use cameras in violation of fundamental constitutional principles. Rule 96 does not set forth a precise standard by which a Chairman must base a decision to permit someone to film a meeting. This is unconstitutional. Such discretion may be used to discriminate against persons, including Plaintiffs, on the basis of their speech and association – how they intend to use the recordings, their progressive stance, or who they assist. *See Shuttlesworth v. Birmingham*, 394 U.S. 147, 151 (1969) (requirements for permission or license without "narrow, objective, and definite standards" is unconstitutional); *Belcher v. Mansi*, 569 F. Supp. 379 (D.R.I. 1983) (defendants' policy on videotaping was unconstitutional because it granted "unbridled discretion to Committee members to decide whether leave to record public meetings will be granted."); *see also St. Louis v. Kiely*, 652 S.W.2d 694, 701 (Mo. App. E.D. 1983)

(ordinance is unconstitutional because it vests licensing discretion in public official "without requisite, precise, definite standard").

If anything Rule 96 favors the use of cameras at meetings. It states that "persons" may use cameras and does not limit these persons to the press. And, the Rule is phrased in a manner to allow persons to use cameras, except where they prove disruptive to decorum. Yet, Defendants are interpreting the Rule to deny Plaintiffs' permission to film. This shows that Defendants believe that they have unfettered discretion to apply the Rule no matter the circumstances.

Defendants may argue that Senators base their decisions on whether the recording will be disruptive to the decorum of the committee. They may also claim that they may assume that members of the News Association will not be disruptive. But, Plaintiffs' allegations, which must be taken as true, refute this. Senators have sometimes granted and have sometimes denied Plaintiffs permission to record, even though the Petition makes clear that Plaintiffs have not proven disruptive. (L.F. at 009-013, 015.) Senator Parson also barred all cameras, including the press, at least once. (L.F. at 012.) In addition, Plaintiffs are not seeking preferred access or any special accommodation. They sit or stand in the same areas of rooms, and conduct themselves in the same manner, as reporters and other members of the public present at hearings.

Accepting the allegations in the Petition as true, Defendants are not relying on any definite standards. Rather, Defendants' decisions are based on the complete discretion given to Senators to grant or deny permission to record meetings and are seemingly made on a whim. This is unconstitutional.

Second, Defendants draw an arbitrary and unprincipled distinction between the press and the public. Defendants define the press as members of one particular private news organization. They do not afford the same recognition to members of other news organizations or to Plaintiffs or to citizens who write articles, blog, and post messages about policy matters. There may be no difference between a professional journalist who is a member of the News Association and a citizen journalist in what they write (although there may be a difference in their opinions). And, they both sit in the same committee room, perhaps next to each other. But, the Senate allows one to record and not the other. This is completely arbitrary and unconstitutional. *Sherrill*, 569 F.2d at 129 (access cannot be denied "arbitrarily or for less than compelling reasons")

It may be that Defendants think that members of the News Association are more professional or objective. But, this is an unconstitutional distinction based on viewpoint and the content of speech. It targets a particular kind of speech – reporting versus opinion. *Anderson v. Cryovac, Inc*., 805 F.2d 1, 9 (1st Cir. 1986) (court may not selectively grant access to one media entity but not another because it allows the government to influence the type of media coverage); *Sherrill*, 569 F.2d at 129; *United Teachers of Dade*, 213 F. Supp.2d at 1373 (S.D. Fla. 2002) (public body's definition of media to exclude reporter for union newspaper is unconstitutional because it attempts to limit access based on content and viewpoint). Defendants may also claim that giving access to the News Association is a simple means to prevent too many people from filming at one time. But, that explanation is not narrowly tailored to the supposed problem. It is not based on how many people may attend a hearing and whether the

manner in which any person will record a meeting will be disruptive. In addition, Plaintiffs allege that members of the News Association did not attend every meeting in the time period covered by the Petition and that Plaintiffs were not and would not be disruptive. Plaintiffs may be the only persons seeking to record a particular committee meeting. Not allowing them to do so because they do not work for a certain type of newspaper or TV station is content-based and viewpoint discrimination.

Third, Plaintiffs contend that Defendants are conditioning the right to record open committee meetings on Plaintiffs joining a private news organization. The Petition alleges that Defendants have stated that videotaping is prohibited, unless you are a member of the Missouri Capitol News Association. (L.F. at 011.) The Petition further alleges that members of the News Association must be editorially independent of any interest group. (L.F. at 017.) But, Plaintiffs advocate for progressive causes and assist progressive organizations. They are not editorially independent of an interest group. To join the News Association, so they could film meetings, Plaintiffs would have to give up their advocacy activities and censor their speech. They do not want to do this. Nor should they have to. Courts have long held that government cannot compel citizens to become members of a private organization and force them to censor themselves or to support political speech they do not wish to support. *See Rutan v. Republican Party*, 497 U.S. 62, 74 (1990) (state government may not use patronage system to make employment decisions because it imposes penalties on "employees who do not compromise their beliefs"); *Elrod v. Burns*, 427 U.S. 347 (1976) (employee cannot be compelled to join political organization); *NLRB v. General Motors*, 373 U.S. 734 (1963) (worker cannot be

compelled to join a union as a member and subject himself to union's rules under its constitution); *Lathrop v. Donohue*, 367 U.S. 820 (1960) (lawyer cannot be compelled to fund the bar association's political speech). Likewise, Defendants may not require Plaintiffs to join the News Association, subject themselves to that group's rules, and give up their advocacy activities, as a condition to the right to record meetings.

Fourth, Defendants are not following the plain language of Rule 96 and are thereby acting in an arbitrary manner. The Rule does not limit the right to record to the press. Rather, it allows "persons" to use cameras. Defendants' application of the Rule to bar Plaintiffs and others from recording, even when Plaintiffs have been allowed to record in the past, is unreasonable and bears no relation to the goal to be obtained -- proper decorum.

For any of the above reasons, Plaintiffs' Count II states a claim. The Trial Court therefore erred in dismissing Plaintiffs' constitutional claims.

C. The Trial Court mistakenly construed Plaintiffs to be arguing for a constitutional right to personally record open meetings.

As noted, the Trial Court granted Defendants' motion to dismiss Count II because there is no constitutional right to record open public meetings. But, as explained above, this is not the theory of Plaintiffs' case.

Rice v. Kempker, 374 F.3d 675 (8th Cir. 2004), on which the Trial Court relied, is distinguishable. In contrast to Plaintiffs' claims, it does not appear that the plaintiffs in *Rice* made any claim that the public body at issue – that Missouri Department of Corrections -- had granted a right to videotape executions in the past. Nor was there any

claim that state law allowed the videotaping of executions. Nor was there any claim that the Department of Corrections had placed conditions on plaintiffs but not others in videotaping executions. In fact, it appears that the defendants in *Rice* had promulgated a blanket policy against cameras. The plaintiffs' only argument in that case was that they had a free-standing constitutional right to record executions. Since Plaintiffs here rely on a different theory – that Defendants are violating constitutional norms in denying them the right to record – the Trial Court's reliance on *Rice* was misplaced.

CONCLUSION

For the foregoing reasons, this Court should reverse the Trial Court's judgment for Defendants on Counts I and II and find that Plaintiffs' Petition states claims for violation of the Sunshine Law and for violation of the rights of freedom of speech and association. Plaintiffs request this Court to remand the matter to the Trial Court for further proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 84.06

The undersigned certifies that:

(1) this brief contains the information required by Rule 55.03;

(2) this brief complies with the limitations contained in Rule 84.06(b);

(3) there are 13,690 words in this brief.

/s/ Christopher N. Grant
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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of October 2015, a copy of Plaintiffs/ Appellants' Brief was served via the Court's eFiling system upon:

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