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IN THE SUPREME COURT OF MISSOURI

Appeal No. SC95171

PROGRESS MISSOURI, INC., et al.

Plaintiffs/Appellants

v.

MISSOURI SENATE, et al.

Defendants/Respondents

Appeal from the Circuit Court of Cole County, Missouri
The Honorable Jon E. Beetem, Judge

APPELLANTS' REPLY BRIEF

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INTRODUCTION

Defendants build their defense around a strawman. They suggest that Plaintiffs seek unfettered access to Senate chambers so they may snap "selfies." This is a distortion of Plaintiffs' claims and an injustice to the important principles at stake, including open government and the dissemination of information crucial to the free discussion of governmental affairs.

Plaintiffs seek accountability. The Senate is bound by the Sunshine Law, which expressly applies to the Senate, and which requires the Senate to allow Plaintiffs to record committee meetings so long as they are not being disruptive. Plaintiffs are not asking to waltz around the Senate floor. Rather, they wish to film committee meetings from the same spots in rooms as members of the Missouri Capitol News Association, so they may educate the public about important statewide issues.

Defendants cannot avoid the Sunshine Law by a Senate rule. No Missouri court has held that one house of the General Assembly may amend or repeal a law by internal action. Rather, the General Assembly must follow the process for passing a law as enshrined in the Constitution. Holding Defendants to this requirement is not a political question, but the duty of this Court to interpret the Constitution.

Furthermore, Defendants fail to adequately respond to Plaintiffs' constitutional claim. They confuse the issue by arguing that Plaintiffs are pursuing a theory that they are not. Plaintiffs' constitutional claim is based on accepted free speech and association principles. There are important First Amendment interests in information gathering. And, once the government grants a right or access, as here, the state cannot deny it based

on arbitrary or content-based criteria. Accordingly, Plaintiffs' constitutional claim states a claim.

ARGUMENT

POINT I: Plaintiffs' Sunshine Law Claim and the Political Question Doctrine.

A. Defendants mischaracterize the record and fail to accept Plaintiffs' allegations as true, as required on a motion to dismiss.

To begin with, Defendants misrepresent the record. They acknowledge that Plaintiffs were denied permission to record various committee meetings, but then erroneously insinuate that Senate Communications films every meeting. (Resp'ts' Br. at 1, 15, 16, 42.)

Plaintiffs' Petition sets forth three instances, over just three weeks, where Senate Communications failed to record some or all of a committee meeting. Senate Communications failed to record the second half of the February 24, 2015 hearing before the Senate Seniors Committee, chaired by Senator Sater. (L.F. 12, Pet. ¶ 29.) Senate Communications failed to record any of the March 4 hearing before the Senate Seniors Committee, chaired by Senator Sater. (L.F. 12, Pet. ¶ 30.) And, Senate Communications failed to record portions of the March 10 hearing before the Senate Small Business Committee, chaired by Senator Parson. (L.F. 12, Pet. ¶ 35.)

In support of their contention that Senate Communications records all meetings, Defendants cite Senator Sater's statement that, at his request, Senate Communications records every committee hearing. (Resp'ts' Br. at 3; L.F. 11, Pet. ¶ 27.) This is what Senator Sater wrote; but, as specifically alleged in the Petition, this is not what happens.

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Most surprisingly, Senator Sater made this statement to Plaintiffs the day before the February 24 meeting of the Seniors Committee in response to Progress Missouri's request to film that meeting, (L.F. 11 & 23; Pet. ¶¶ 26 & Ex. 3); but, Senate Communications then failed to record the second half of that meeting and, a week later, another meeting of the same Committee. There is no explanation for this transgression in the record, and it is hard to imagine one in the face of Progress Missouri's specific request.

Defendants also state that members of the Missouri Capitol News Association are allowed to record Senate committee hearings. (Resp'ts' Br. at 15.) But, Plaintiffs allege that on one occasion Defendants denied all persons, including any member of the News Association, the opportunity to record a meeting. On March 10, before the Senate Small Business Committee, Senator Parson announced: "Everybody with cameras and everything just put them up. . . . No cameras." (L.F. 12, Pet. ¶ 33.)

On a motion to dismiss, the Court is to accept as true all alleged facts and reasonable inferences therefrom. *Weber v. St. Louis County*, 342 S.W.3d 318, 321 (Mo. 2011). For purposes of assessing Plaintiffs' claims, this Court must assume that Defendants denied Plaintiffs permission to record, that Senate Communications fails to record committee meetings, and that Defendants have exercised their discretion to deny members of the News Association the opportunity to record, regardless of any disruption, at least once. This Court should not consider arguments by Defendants based on mischaracterizations of the record. If anything, if Senate Communications failed to record portions of three meetings in three weeks, it is reasonable to infer that Senate Communications has failed to record other meetings.

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B. The Missouri Senate does not allow for the recording of open meetings in accordance with the Sunshine Law.

In Section I.A. of their brief, Defendants note that Section 610.020.3 of the Sunshine Law provides that public bodies "may establish guidelines regarding the manner in which such recording is conducted so as to minimize disruption," and that the Senate "has done just that" by establishing guidelines in Senate Rule 96 to "control the potential chaos and disruption of committee meetings." (Resp'ts' Br. at pp. 16-17.) But, if this is the case, then contrary to Defendants' contention that their actions against Plaintiffs involve a political question, a court should determine whether Defendants are properly applying Rule 96 and whether Plaintiffs' efforts to record meetings are disruptive.[1] It is entirely inconsistent for Defendants to contend that Rule 96 is

[1] The record shows that Defendants are not acting in accordance with their own rule. Defendants suggest that Rule 96 only allows members of the News Association to record committee meetings. But, the rule is not so limited. It states: "Persons with cameras, flash cameras, lights, or other paraphernalia may be allowed to use such devices at committee meetings with permission of the Chairman so long as they do not prove disruptive to the decorum of the committee." (L.F. at 63.) The word "persons" means more than the press. If the Senate meant to limit recording to the press, then it would have used the word "press" as it does elsewhere in Rule 96. Additionally, the record shows that Plaintiffs are not disruptive. (L.F. 10 & 15, Pet. ¶¶ 16 & 56.)

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authorized by the Sunshine Law, but at the same time argue that Plaintiffs' claim is not subject to judicial review and that Defendants cannot be held to that Law.

Moreover, Defendants' interpretation of the Sunshine Law is wrong. Section 610.020.3, R.S.Mo., states that a "public body shall allow for the recording by audiotape, videotape, or other electronic means of any public meeting." Contrary to Defendants' contention, a public body does not "allow" for the recording of a meeting when it only allows a certain type of person, like a reporter, to record a meeting, but denies that opportunity to other persons. In that case, it is prohibiting the recording of a meeting. Likewise, a public body is not allowing for the recording of a meeting when it makes its own recording of that meeting. In that case, it is not allowing anything under any normal understanding of the verb "allow." If the General Assembly had intended that a public body need only make its own recording of a meeting, then it would have written the Sunshine Law differently, to state that a "public body shall record any public meeting." But, instead, the General Assembly used the verb "allow" and further listed various ways to record a meeting, indicating that citizens should be allowed to record meetings themselves by the means of their choice.

The Sunshine Law is not interpreted in the way which Defendants propose. Sections 610.011, 610.022, and 610.023, R.S.Mo., require that meetings, records and actions of governmental bodies be open to the public. No one could argue with a straight face that a public body may limit access to an open meeting or to open records to certain citizens. Does only the press have a right to make a Sunshine request? Defendants' interpretation is contrary to this state's public policy in favor of openness and the

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Sunshine Law's express instruction that its sections be "liberally construed and their exceptions strictly construed to promote this public policy." § 610.011.1, R.S.Mo. It does not advance openness for a public body to allow only news reporters in a particular organization to film meetings. Rather, it serves openness and public accountability for citizens to be allowed to record meetings on their own.

Equally unavailing is Defendants' suggestion that allowing members of the News Association, but not other persons, to record meetings will prevent "chaos." While the Sunshine Law permits a public body to establish guidelines "regarding the manner in which such recording is conducted so as to minimize disruption," § 610.020.3, R.S.Mo., a fair reading of this clause, and the word "manner," is that a public body may set parameters on conduct that tends to interfere with a meeting. For example, a governmental body may limit the number of persons seeking to film a meeting if cameramen are impeding ingress or obstructing views. But, the law does not allow the state to assume that persons other than members of the News Association will be disruptive. In fact, the record shows that Plaintiffs were not disruptive. (L.F. 10 & 15, Pet. ¶¶ 16 & 56.)

Defendants cite rules from the U.S. House of Representatives regarding recording. Defendants also cite Missouri Supreme Court Operating Rule 16. These are red herrings. For one, the Sunshine Law applies to the Senate and specifically provides for the right to record committee meetings. By contrast, the Freedom of Information Act does not cover Congress and does not include a right to record. *See* 5 U.S.C. §§ 551-552. Likewise, the

Sunshine Law only covers judicial entities "when operating in an administrative capacity." § 610.010(4), R.S.Mo.

Additionally, neither the rules of the U.S. House of Representatives nor Supreme Court Operating Rule 16 give as cramped a definition of "press" as the Missouri Senate. Notably, the U.S. House does not define "press" as a member of a private organization as in this case. Rather, it appears from the materials in Respondents' Appendix that Congress controls the Radio-Television Correspondents Galleries. (Resp'ts' App. at A22.) Further, those materials indicate that persons will be credentialed if they are not engaged in lobbying; and, Plaintiffs have not alleged that they are lobbyists.

Supreme Court Operating Rule 16.01(d) defines "media coverage" to include electronic recording for the purpose of "gathering and disseminating news to the public or for the purpose of education." (Resp'ts' App. at A18.) This is what Plaintiffs do. The Petition alleges that Plaintiffs use recordings of committee meetings "to report on developments in legislation and to educate the public." (L.F. at 10, Pet. ¶18.) It may very well be that a court would allow Plaintiffs to record a judicial proceeding. At the least, there is nothing in the record from which to conclude that a court would treat Plaintiffs differently than the established press.

C. Plaintiffs' Sunshine Law claim does not invoke a political question.

The crux of Defendants' defense is that Plaintiffs' Sunshine Law claim raises a political question. However, Defendants fail to address important aspects of the claim that clearly make it subject to judicial review.

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1. Defendants fail to explain how Plaintiffs' Sunshine Law claim invokes a political question when it is the duty of the judiciary to determine the constitutionality of the Sunshine Law as applied to the Senate.

Defendants do not dispute that their position, that Senate Rule 96 trumps the Sunshine Law, puts at issue the constitutionality of Section 610.020.3, R.S.Mo., as applied to the Senate. But, Defendants make no response to the principle cited in Appellants' Brief that it is the duty of the judiciary, and not the legislature, to decide the constitutionality of a law. As this Court has held, "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, 132 (Mo. 1997). Further, the courts have the power, indeed the responsibility, to determine whether another political branch, including the legislature, is acting beyond its constitutional authority. *Rolla 31 School Dist. v. State*, 837 S.W.2d 1, 3-4 (Mo. 1992) ("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.").

In invoking the political question doctrine, Defendants are arguing that the Missouri Senate alone has the power to decide the constitutionality of the Sunshine Law in the face of Senate Rule 96. But, this is a decision for the courts, not for Defendants. *See INS v. Chadha*, 462 U.S. 919, 941-942 (1983) ("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.").

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Defendants may argue that Section 610.020.3 of the Sunshine Law, on the recording of public meetings, impermissibly intrudes on the Senate's powers. But, this is a different question from whether Plaintiffs' claim is non-justiciable on the basis of the political question doctrine. Since the question here is whether the Sunshine Law's provision on recording is unconstitutional as applied, Plaintiffs' Sunshine Law claim does not invoke a political question, and the trial court was wrong to dismiss on that ground.

2. Defendants fail to explain how Plaintiffs' Sunshine Law claim invokes a political question when Defendants' application of Senate Rule 96 violates important rights and affects persons other than members of the Senate.

Another aspect of this case distinguishes it from others involving the political question doctrine. The U.S. Supreme Court has long 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)). Where the "construction to be given the rules affects persons other than members of the Senate, the question presented is of necessity a judicial one." *Id; see also Yellin v. United States*, 374 U.S. 109, 113 (1962) ("it has been long settled, of course, that rules of Congress and its committees are judicially cognizable"); *Christoffel v. United States*, 338 U.S. 84, 89 (1949).

Defendants ignore the important rights at stake in this case. Certainly, the Senate cannot avoid judicial review where it uses a Senate Rule to deny the constitutional rights of citizens, like freedom of speech or the right of suffrage. Nor should Defendants be able to avoid judicial review where they rely on a Senate Rule to deny important rights

which the General Assembly has granted to citizens by law. No Missouri case has held that the legislature may avoid judicial review of a violation of a citizen's statutory right by drafting an internal rule.

State ex info. Danforth v. Banks, 454 S.W.2d 498, 500 (Mo. 1970), cited by Defendants, is distinguishable. In *Banks*, the Attorney General sought to oust State Representative Jet Banks from office, for allegedly residing in a different district, after the House had given him the oath of office. *Id.* at 499. Banks claimed the matter was a political question, and objected to the court's jurisdiction, because Article III, Section 18 of the Constitution makes the House the "sole judge" of the qualifications of its own members. *Id.* at 500. Notably, the underlying controversy – the House's decision to seat Banks -- implicated the House's power over one of its members. If a dispute arose between the House and Banks, they could resolve it internally. In addition, the text of the Constitution made the House the "sole judge" of Banks' qualifications, indicating that no one else, including a court, could judge his residency.

Here, by contrast, the affected persons are not members of the General Assembly. Defendants have violated Plaintiffs' rights under the Sunshine Law. Yet, Plaintiffs cannot seek to amend Rule 96 and cannot resolve their dispute with the Senate through internal proceedings. Their only recourse is to the courts. In addition, Article III, Section 18 does not state that each house of the General Assembly is the "sole judge" of its rules of proceedings, let alone the sole judge of whether its rules trump laws. The applicable text does not preclude judicial review.

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Defendants cite cases from other states holding that a legislature's authority to establish internal rules is a political question. (Resp'ts' Br. at 23-24 & n.3.) But, in many of these cases, the plaintiffs were asking a court to interpret or enforce a house or senate rule. *Cf. Abood v. League of Women Voters of Alaska*, 743 P.2d 333 (Alaska 1987) (failure to follow rule is not matter of judicial inquiry); *State ex rel. LaFollette v. Stitt*, 338 N.W.2d 684 (Wis. 1983) (dismissing suit by legislators that state law was enacted in violation of house rules). Other cases are distinguishable because they do not involve a statutory right or the court found that the state's sunshine or open records law did not apply. *See, e.g.*, *Moffit v. Willis*, 459 So.2d 1018, 1022 (Fla. 1989) ("We are not confronted with whether a statute applies, rather we are asked to allow the courts to determine when and how legislative rules apply to members of the legislature."); *Coggin v. Davey*, 211 S.E.2d 708 (Ga. 1975) (in suit by two legislators claiming that they were unlawfully excluded from committee meetings, court finds that state Sunshine Law does not cover General Assembly).

By contrast, other courts have held that their state's open meetings laws do not conflict with state constitutional provisions authorizing the legislature to establish its own rules. *See Wilkins v. Gagliardi*, 556 N.W.2d 171 (Mich. Ct. App. 1996); *Cole v. State*, 673 P.2d 345 (Colo. 1983). The Michigan Court of Appeals specifically noted in *Wilkins* the judiciary's responsibility to interpret its state's open meetings law and its applicability to the legislature in light of the constitution. 556 N.W.2d at 176.

This case would be different if Plaintiffs were merely claiming that Defendants were not following their own rules. It may not be the province of the court in such a case

to act as a super parliamentarian. But, here, Defendants are denying citizens a statutory right by an internal rule. This is a dispute a court should decide.

D. Even if Plaintiffs' Sunshine Law claim implicates the political question doctrine, Defendants fail to recognize that Article III, Sections 18, 21 and 31 place identifiable textual limits on the Senate's authority to determine the scope of its power to establish rules of proceedings.

Courts may find a claim to involve a political question where there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department." *Banks*, 454 S.W.2d at 500 (quoting *Baker v. Carr*, 369 U.S. 186 (1962)). Defendants claim that Article III, Section 18 makes a textually demonstrable commitment to the Senate to determine the "rules of its own proceedings." But, this statement merely repeats back Article III, Section 18. Before deciding whether Plaintiffs' claim invokes a political question, the court must do more – it must interpret the language of the Constitution and consider whether any "separate provision of the Constitution could be defeated" by allowing the Senate final authority to determine that its rules trump other obligations. *See Nixon v. United States*, 506 U.S. 224, 237 (1993); *see also Powell v. McCormack*, 395 U.S. 486, 521 (1969).

1. The phrase "rules of its own proceedings" in Article III, Section 18 cannot be read broadly.

Defendants first contend that the term "proceedings" should be interpreted broadly. Webster's Dictionary defines the term to mean "a particular way of doing or accomplishing something" and "a particular course of action." (Resp'ts' Br. at 26.) But,

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this definition begs the question: a particular way of doing what or accomplishing what? A "phrase under consideration must be evaluated in light of the context in which it is used." *Mo. Prosecuting Attys. v. Barton County*, 311 S.W.3d 737, 742 (Mo. 2010). The context here is Article III and the legislature's power to make law. Accordingly, "proceedings" means a particular way of passing or accomplishing laws.

As noted in Appellant's opening Brief, whether a citizen, as opposed to a reporter or someone from Senate Communications, is filming a committee meeting does not affect the particular way a law is passed. The identity of the photographer does not alter how the bill is styled, or change who speaks in its favor, or control when it is amended. A rule on the use of cameras is therefore not a rule of proceeding.

Defendants cite several cases from other states purporting to interpret the term "proceedings" broadly. Notably, neither *State ex rel. Johnson v. Hagemeister*, 73 N.W.2d 62 (Neb. 1955), nor *Witherspoon v. State ex rel. West*, 103 So. 134 (Miss. 1925), involved restrictions placed on the public. Rather, they involved rules relating to motions to reconsider a vote and actions by the legislature unto itself.

Defendants also cite *Des Moines Register and Tribune Co. v. Dwyer*, 542 N.W.2d 491 (Iowa 1996), which concerned a policy of the Iowa Senate to give the public access to legislators' telephone records except for call detail information. The Iowa Supreme Court held that "part of the procedure of the senate as a whole is to communicate on matters of legislation with the public" and thus the senate's policy constituted a "rule of proceeding." *Id.* at 499. Plaintiffs submit this holding is incorrect, for the same reasons articulated by the justices who dissented in this closely decided case. How individual

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members communicate with the public has nothing to do with the processing of a bill. *Id.* at 505-506 (Harris, J., dissenting). Furthermore, the majority in *Dwyer* was concerned about the chilling effect disclosure of private call details could have on free and open communication. *Id.* at 499. That concern does not apply here. Plaintiffs seek only to record public meetings, which Defendants say are already recorded. One more camera in a committee room will not create a chilling effect.

Defendants also contend that the term "proceedings" cannot be limited to actions necessary to processing a bill, because these details are already spelled out in provisions of the Constitution on the drafting of bills, amendments, readings, and the like. (Resp'ts' Br. at 29.)[2] However, these provisions are general. They set forth restrictions or requirements with little detail. Accordingly, the House and Senate need rules to particularize the process for passing a bill. For example, Article III, Sections 24 and 27 refer to amendments to bills, but do not explain when a motion to amend may be made, how the Senate should consider a bill amended in the form of a substitute, who is entitled to speak first on a pending amendment, and whether any Senator may move for reconsideration of a vote to amend. Contrary to Defendants' contentions, the language in Article III, Section 18 authorizing each house to determine the rule of its proceedings

[2] Defendants also note that the 1941 version of the Senate Rules includes a provision giving reporters access to a table on the Senate floor. But, Plaintiffs are not seeking special access to chambers. They sit and stand in the same areas of committee rooms as other members of the public. In addition, there was no Sunshine Law in 1941.

must not mean something more. Rather, rules drafted pursuant to Article III, Section 18 detail and effectuate the requirements set forth in the other provisions of Article III. Considering the provision in context, rules of "proceedings" mean rules relating to the processing of bills.

Defendants cite other state constitutions with provisions like Article III, Section 18. (Resp'ts' Br. at 31-32.) Undoubtedly, many states have adopted similar provisions, most likely based on Article I, Section 5 of the U.S. Constitution. But the ubiquity of this language shows its utility, not that every case involving an internal House or Senate rule invokes a political question. As already noted, the U.S. Supreme Court reviews actions taken by the U.S. House or Senate pursuant to an internal rule which contravene important rights. *See, e.g., Yellin*, 374 U.S. at 123 (Yellin should be permitted the opportunity for judicial review when his rights have been violated by congressional committee's failure to follow its rules); *Christoffel*, 338 U.S. at 90. This Court should do the same.

2. Other provisions of the Constitution, including Article III, Section 31, limit the scope of the Senate's power to determine its own rules.

Defendants' other major argument is that constitutionally authorized Senate Rules control over constitutionally enacted statutes. (Resp'ts' Br. at 35-36.) But, Defendants ignore the basic point that both the House and Senate are bound by the Sunshine Law until they both repeal or amend it with approval of the Governor or over his veto. Defendants do not cite any Missouri case for the proposition that one house of the General Assembly may nullify a law as applied to it. Instead, Missouri courts have long

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held that the General Assembly is bound by a law that it makes on itself. *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 "may be restrained by . . . some express law made unto itself").

Article III, Section 21 of the Missouri Constitution states that "No law shall be passed except by bill;" and, Section 31 provides that "[e]very bill which shall have passed the house of representatives and the senate shall be presented to and considered by the governor," and within 15 days returned to the house in which it originated either "endorsed with his approval or accompanied by his objections." Notwithstanding, Defendants would create a second, previously unidentified process to create law – one house may promulgate an internal rule. This renders meaningless the process set forth in the Constitution. It cannot be that the Senate and House may debate a bill like the Sunshine Law, draft it to apply to the General Assembly and its committees, and obtain the Governor's approval, but then one house may negate the law's effect by promulgating a rule giving individual chairmen the discretion to ignore it.

Defendants' argument is not limited to the Sunshine Law. It has far reaching consequences. For example, the General Assembly is currently considering a law banning lobbyist gifts such as free food and travel expenses. Under Defendants' argument, whatever restriction the General Assembly may pass and the Governor may approve, after much debate and perhaps compromise between the House and Senate,

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could be modified by an internal rule. The Senate could simply claim that part of the procedure of the Senate is receiving gifts from lobbyists in the course of communicating with them about pending legislation and that its rule trumps the law.[3] The Court should not interpret the Constitution in a way that leads to such absurd results.

Defendants rely on *State ex info. Danforth v. Cason*, 507 S.W.2d 405 (Mo. 1973). But, the Court there specifically held that Article III, Section 18 expressly limits the right of each house to determine the rules of its own proceedings by "providing that such authority is subject to exceptions in the Constitution." *Id.* at 413. The exception in *Cason* was Article IV, Section 10, which makes the lieutenant governor presiding officer of the Senate. The exceptions here are Article III, Sections 21 and 31, which set forth the process for passing, amending, or repealing a law.

Nor does the Sunshine Law generally recognize the authority of rules of proceeding. The only mention of Article III is in Section 610.015, which pertains to how votes are taken. There is no mention of Article III in Section 610.020 on open meetings. The specific provisions of Section 610.020.3 therefore govern the right to record.

Defendants' analogy to a conflict between a Supreme Court rule and a statute fails. The Court's rules prevail in such circumstances because Article V, § 5 states that the "supreme court may establish rules relating to practice, procedure and pleading for all

[3] The Senate could adopt such a rule. For example, the U.S. House of Representatives has a rule on the acceptance of gifts. *See* Rule XXV of the Rules of the House of Representatives of the 114th Congress, http://clerk.house.gov/legislative/house-rules.pdf.

courts and administrative tribunals, *which shall have the force and effect of law*." By contrast, Article III, Section 18 does not state that the Senate's rules of proceedings "shall have the force and effect of law." The implication is that the Senate may not by a rule avoid rights afforded to citizens by a law. Furthermore, it makes sense to give the Court's rules the force of law, when the Court cannot participate in the passing of a law. By contrast, the Senate can propose new laws and seek to amend and repeal existing ones. And, it can always protect its internal rules by refusing to pass a bill that a majority of its members disagree with. The Senate could have done so with regard to the Sunshine Law. Instead, it passed the Law's provision on the recording of public meetings.

In the end, Defendants mischaracterize the conflict at issue. It is not between an internal rule and a statute, but between the process to determine internal rules and the process to pass laws. Article III, Section 18 does not set forth any particular right or outcome with regard to rules. Rather, the provision is procedural – it confirms a process to make rules. Article III, Sections 21 and 31 also set forth a process – how to make laws. Allowing the Senate final authority to say that its rules trump a law, and that its actions in this case are immune from judicial review, defeats Article III, Sections 21 and 31 and undermines the enshrined process for passing laws.

POINT II: Plaintiffs' Free Speech and Association Claim.

A. Defendants ignore First Amendment case law and well accepted free speech and free association principles.

Defendants spend much of their brief arguing that there is no independent First Amendment right to videotape or photograph public meetings. It cites various federal

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Courts of Appeals cases, including *Rice v. Kempker*, 374 F.3d 675 (8th Cir. 2004). (Resp'ts' Br. at pp. 39-40.)[4] But, none of these cases address the circumstances here, namely a policy of allowing members of one particular, private news organization to film open meetings but not members of the public. The plaintiffs in *Rice* did not argue that they were denied the right to record executions while other organizations were given permission. Rather, it appears the state maintained a blanket prohibition against the use of cameras. Likewise, in *Westmoreland v. Columbia Broad Sys., Inc.*, 752 F.2d 16 (2d Cir. 1984), a news network sought special permission to record a trial. The Second Circuit disagreed, finding that television representatives have only the rights of the general public to be present in the courtroom.

Defendants contend, without citation to case law, that there is no constitutional violation associated with allowing only credentialed media access to record open public meetings. Defendants fail to acknowledge the many cases in Appellants' Brief on this very point. Courts have repeatedly held that, once the government has granted access to some outside person, it may not deny access to others based on arbitrary or content-based criteria and may not discriminate in classifying certain persons as "media" but exclude others from the definition based on the content of their publications or viewpoint. *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

[4] In relying on federal case law, Defendants acknowledge that Missouri's Constitution provides at least the same level of free speech protection as the First Amendment.

the type of media coverage); *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); *American Broadcasting Cos. v. Cuomo*, 570 F.2d 1080 (2d Cir. 1977) ("[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"); *United Teachers of Dade v. Stierheim*, 213 F. Supp.2d 1368 (S.D. Fla. 2002) (school board may not attempt to limit the access of certain reporters merely because they advocate a particular viewpoint); *Belcher v. Mansi*, 569 F. Supp. 379 (D.R.I. 1983) (having allowed its meetings to be recorded, public body assumed "an obligation to justify its discrimination and exclusions under applicable constitutional norms"); *Quad-City Community News Service, Inc. v. Jebens*, 334 F. Supp. 8 (S.D. Iowa 1971) (once defendants expose police reports to some media, they may no longer withhold the same reports from other persons on the basis that they are not an "established" newspaper).

Plaintiffs are acting like media. Defendants cannot distinguish recording and reporting by Plaintiffs from that of the Kansas City Star, or Missouri Times, or Fox News, or Mother Jones magazine, except on the basis of the content of their publications or with whom they associate, which is impermissible because it risks the government influencing the type of coverage public events receive. Since the Senate has opened meetings to some news entities to record, it cannot deny Plaintiffs access to record.

Defendants' citations to Supreme Court Operating Rule 16 and Congress' rules on media coverage are unavailing. The existence of such rules does not mean that

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Defendants may apply Rule 96 to deny Plaintiffs access based on "arbitrary or content-based criteria." *Sherrill*, 569 F.2d at 129 (First Amendment prohibits "arbitrary or content-based criteria for press pass issuance").

B. Defendants wrongly contend that Plaintiffs have not claimed that they are being restricted from recording in violation of the freedom of speech.

Defendants contend that nowhere in Plaintiffs' Petition is there any indication that Plaintiffs are being restricted from recording because of their speech. This is incorrect.

Defendants fail to recognize the free speech interests at stake. In *Branzburg v. Hayes*, the U.S. Supreme Court stated that "news gathering is not without its First Amendment protections." 408 U.S. 665, 707 (1972). And, in *Houchins v. KQED, Inc.*, the Court noted that there is "an undoubted right to gather news 'from any source by means within the law.'" 438 U.S. 1, 9 (1977) (citing *Branzburg*, *supra*, at 680).

Information gathering is protected by the First Amendment because the dissemination of news and opinion to the public is essential to the "free discussion of governmental affairs" and ultimately self-governance. *Burson v. Freeman*, 504 U.S. 191, 196 (1992); *Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011) ("Gathering information about government officials in a form that can readily be disseminated to others serves a cardinal First Amendment interest in protecting and promoting the "free discussion of governmental affairs."). It is not only Plaintiffs, but also citizens, who benefit from information about public officials. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 491 (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

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upon the press to bring to him in convenient form the facts of those operations"). Moreover, this freedom is not for the established press alone. It is also for the "lonely pamphleteer who uses carbon paper or a mimeograph," *Branzburg*, 408 U.S. at 704, and, one may assume, the lonely blogger who posts videos to a webpage. *See ACLU v. Alvarez*, 679 F.3d 583, 595 (7th Cir. 2012) ("Audio and audiovisual recording are media of expression commonly used for the preservation and dissemination of information and ideas and thus are 'included within the free speech and free press guaranty of the First and Fourteenth Amendments.'")

To be sure, there is no unrestrained right to videotape. Plaintiffs are not arguing that the right of free speech allows persons to go anywhere they want to record public officials. But, it is a completely different matter when the state, as here, grants access to some and denies it to others.

As noted, courts have long recognized that it is a violation of free speech to selectively deny a right or access to a forum, which the state has voluntarily opened, based on content-based criteria or viewpoint. *Police Department of the City of Chicago v. Mosley*, 408 U.S. 92 (1972); *Widmar v. Vincent*, 454 U.S. 263, 269 (1981) (having created a forum for use through its policy of accommodating meetings, university violates the rights of free speech and association by discriminating against users based on religious nature of meeting); *Sherrill*, 569 F.2d at 129. Any discriminations among First Amendment activity must be narrowly tailored to serve a substantial or compelling governmental interest. *Mosley*, 408 U.S. at 97; *Widmar*, 454 U.S. at 270.

Plaintiffs' Petition states a claim under these accepted principles.

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- First, Plaintiffs allege that they use recordings of committee hearings to "report on developments in legislation and to educate the public from a progressive point of view." (L.F. at 10, Pet. ¶ 18) This is a form of speech activity. It is news gathering vital to the free discussion of governmental affairs.

- Second, Plaintiffs allege that they have been allowed in the past to record open meetings, but that they were denied access recently, while members of the News Association were granted access, under Senate Rule 96. (L.F. 913, 17-18, Pet. ¶¶ 14, 16, 19, 23, 27-28, 32, 33, 37, 68-72.) This shows discrimination among users that limits the collection of information. This denial of access also demonstrates that individual legislators are exercising broad discretion to permit news gathering activity in violation of constitutional norms.

- Third, Plaintiffs allege that members of the News Association must be independent of any interest group and that Plaintiffs do not wish to join the News Association because they would be required to cease their advocacy activities. (L.F. at 17, Pet. ¶¶ 64-65.) This establishes that Defendants are enforcing a content-based, if not viewpoint based, exclusion against Plaintiffs' speech-related activity. Under Defendants' application of Rule 96, persons who associate with an interest group and, as part of their associational activities, report from a progressive (or conservative) point of view are prohibited from recording an open meeting. The exclusion is based on the subject matter of the reporting. If you are "objective" or established media, you are given access to record. But, if you report from a particular point of view, you are denied access.

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Defendants confuse the issue by arguing that Plaintiffs' constitutional claim is dependent on the Sunshine Law. Certainly, this state's policy in favor of open government buttresses Plaintiffs' interest in gathering information for dissemination. But, Plaintiffs' claim is not dependent on a statutory right. Rather, the focus is on Defendants' exclusion of Plaintiffs based on arbitrary and content based criteria.

Defendants make little effort to argue that Rule 96 is narrowly tailored to serve a substantial or compelling interest. Defendants claim an interest in avoiding disruption. But, Rule 96 is not narrowly drawn to achieve that end. If Defendants wished to avoid disruption, they could remove unruly reporters from hearing rooms or ban bright lights. Defendants cannot meet their "heavy burden" to justify their application of Rule 96 based on the assumption that persons who associate with an interest group will disrupt the decorum of a hearing. *Healy v. James*, 408 U.S. 169, 184 (1972) (state has "heavy burden" to show that safeguarding against disruption justifies particular restraint). In reality, Defendants allow members of the public, including ideologues and lobbyists, to attend hearings. If they can attend without Defendants assuming that they will be disruptive, then Defendants cannot assume that Plaintiffs will be disruptive.

Defendants further claim that alternative channels are available for communication. First, the record evidence shows the opposite. Plaintiffs allege that Senate Communications did not record every committee hearing. (L.F. 12-13, Pet. ¶¶ 29, 30, 35.) Second, it is not appropriate to consider alternative channels of communication in cases that involve content-based restrictions such as here. Courts have repeatedly held that content-based restrictions are unconstitutional regardless of whether they leave open

alternative channels of communication. *Cincinnati v. Discovery Network*, 507 U.S. 410, 430 (1993). The fact that speech can occur elsewhere cannot justify such a restriction and is irrelevant. *Denver Area Educ. Telcoms. Consortium v. FCC*, 518 U.S. 727, 809 (1996). Defendants' reliance on *BBC Fireworks, Inc. v. State Highway and Transp. Comm'n*, 828 S.W.2d 879 (Mo. 1992), is misplaced. That case dealt with a content-neutral time, manner, and place restriction, and not a content-based restriction.

C. Defendants wrongly contend that Plaintiffs have not claimed that they are being restricted from recording in violation of the freedom of association.

Defendants also argue that nowhere in Plaintiffs' allegations is there any indication that Plaintiffs are being restricted for reason of their association. As with Plaintiffs' speech claim, Defendants' contention is incorrect.

In *Widmar v. Vincent*, the United States Supreme Court found that a university's decision to deny access to a religious student group, but permit other groups to use its otherwise open facilities, violated the First Amendment rights of speech and association. 454 U.S. at 269. The government was discriminating against the students based on their associational activities.

The same applies here. Plaintiffs allege that Defendants have denied them access to record because they are not members of the News Association. (L.F. at 17-18; Pet. ¶¶ 69-71.) In doing so, Defendants are discriminating against Plaintiffs based on their associational activities, namely their decision to associate with an interest group that advocates from a point of view.

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It is no defense that Defendants have delegated to the News Association the decision on whom to admit to membership and thus who has the right to record. If anything, it is more questionable. Rather than apply to Defendants for credentials, Plaintiffs are forced to join a private organization and subject themselves to that group's bylaws, which require Plaintiffs to cease their associational activity including support for progressive issues. This is contrary to First Amendment case law going back decades, finding that the government cannot condition a right or benefit on a person becoming a member of a private organization, which forces them to censor their speech or to modify their support for political causes. *See Rutan v. Republican Party*, 497 U.S. 62, 74 (1990) (government may not use patronage system to make employment decisions because it imposes penalties on "employees who do not compromise their beliefs"); *NLRB v. General Motors*, 373 U.S. 734 (1963).

If the Senate adopted a rule that a person seeking to record a hearing must be a member of the Democratic or Republican Party or even the Optimists, no one would think such a restriction constitutional. Likewise, a requirement that a person be a member of the News Association, and independent of any interest group, is unconstitutional.

CONCLUSION

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 7,297 words in this brief.

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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of January 2016, a copy of Plaintiffs/ Appellants' Brief was served via the Court's eFiling system upon:

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