SC95171

IN THE SUPREME COURT OF MISSOURI

PROGRESS MISSOURI, INC., et al.,

Plaintiffs/Appellants,

vs.

MISSOURI SENATE, et al.,

Defendants/Respondents.

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

RESPONDENTS' BRIEF

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STATEMENT OF FACTS

For purposes of an appeal from a motion to dismiss, this Court must accept all properly pleaded facts as true, and " 'determine if the facts alleged meet the elements of a recognized cause of action, or of a cause that might be adopted in that case.' " *Bromwell v. Nixon*, 361 S.W.3d 393, 398 (Mo. 2012) (quoting *State ex rel. Henley v. Bickel*, 285 S.W.3d 327, 329 (Mo. 2009)). Here, the alleged facts relate to the recording of committee hearings in the Missouri Senate.

A. The Recording of Senate Committee Hearings.

According to the Petition, Plaintiffs ("Progress Missouri") were informed that "Senate Communications records every committee hearing and copies of those recordings can be requested." (LF 11, Petition ¶ 27; *see also* Petition ¶ 23). They were further informed that members of the "Missouri Press Corps" or the "Missouri Capitol News Association" are allowed to record Senate committee hearings. (LF 11 & 14, Petition ¶¶ 23 & 43). And even "Progress Missouri and its representatives have filmed hearings before various House and Senate Committees." (LF 9-10, Petition ¶ 14).

The Petition, however, identifies four Senate committee hearings that although entirely "open to the public" (LF 13, Petition ¶ 39), and recorded, Progress Missouri was not permitted to separately record.

February 3rd committee hearing

On February 2, 2015 Progress Missouri requested "to videotape the next Senate Commerce Committee meeting." (LF 10, Petition ¶ 20). A representative of Progress Missouri showed up to personally videotape the hearing and the chair of the committee announced at the start of the meeting:

- "[I]f you're a member of the Missouri press corps you can get with our office before the meetings start . . . to allow videotaping."
- "[Y]ou're welcome to attend any meetings that you want to. But videotaping is only allowed for press corps members with previous permission and Senate Communications."

(LF 11, Petition ¶¶ 22-23).

Plaintiffs make no allegation that the February 3rd Senate Commerce Committee hearing was not recorded and made available to them by Senate Communications, as with other committee hearings.

February 24th committee hearing

Progress Missouri sent an e-mail requesting to personally record the Senate Seniors, Families, and Children Committee on February 24, 2015. (LF 11, ¶ 26). In response, the chair of the committee stated:

- "[V]ideo recording is prohibited unless you are a member of the media as recognized by the Missouri Capitol News Association."
- "The committee's policy on recording remains unchanged and is consistent with Senate Rule 96 and with the Senate's policy on recording on the Senate floor."
- "Senate Communications records every committee hearing and copies of these recordings can be requested from their office."

(LF 11 & 23, Petition ¶ 27 & Ex. 3). Plaintiffs apparently requested and obtained the recording from Senate Communications, because they allege that "Senate Communications failed to record the second half of the February 24 hearing before the Senate Seniors Committee." (LF 12, Petition ¶ 29).

March 10th committee hearing

Progress Missouri sent an e-mail on March 2, 2015 requesting to separately "film an upcoming hearing before the Senate Small Business Committee." (LF 12, Petition ¶ 31). According to the Petition, at the committee hearing that occurred on March 10th the chair of the committee announced that "*all* cameras were prohibited . . . 'Everybody with cameras and everything just put them up.' " (LF 12, Petition ¶ 33).

Again, the committee hearing was recorded by Senate Communications. Plaintiffs apparently requested and obtained copies of the recording because they allege in the Petition that "Senate Communications failed to record portions of the March 10 hearing . . . due to technical issues. Senate Communications missed portions of the hearing while its representatives were replacing data storage devices in its cameras." (LF 12-13, Petition ¶ 35).

March 31st committee hearing

In the last hearing complained of in the Petition – another hearing of the same Senate Small Business Committee held on March 31, 2015 – representatives of Progress Missouri were instructed again "not to film the hearing." (LF 13, Petition ¶ 37). Plaintiffs make no allegation that the hearing was not recorded and made available to them by Senate Communications. In fact, this was the same committee that Senate Communications previously recorded and made available to Plaintiffs.

On the basis of these allegations Plaintiffs claim that being denied requests to separately record Senate committee hearings violates their rights under Missouri's "Sunshine Law," §§ 610.010, *et seq.*, RSMo (2013 Cum.

Supp.),[1/] and the Missouri Constitution, Mo. Const., Art. I, § 8.

B. The Plaintiffs' Claims are Dismissed.

After briefing by the parties and a hearing, the Circuit Court of Cole County, Judge Beetem, dismissed the Plaintiffs' claims. (LF 109-17). The circuit court recognized that the Missouri Constitution authorizes the Missouri Senate to "determine the rules of its own proceedings." Mo. Const., Art. III, § 18. In 2015, the Senate adopted Rule 96, as it had done so in every General Assembly for many years:

> 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.

(LF 63).

The circuit court held that determining the rules of Senate committee hearings, including the recording of hearings under Senate Rule 96, invokes the "political question doctrine" and is, therefore, non-justiciable in this case. (LF 111-17 (citing *State ex info. Danforth v. Banks*, 454 S.W.2d 498 (Mo.

[1/] All references to the Revised Statutes of Missouri will be to the 2013 Cumulative Supplement unless otherwise noted.

1970)). The circuit court also held that the Plaintiffs' constitutional claims failed, and dismissed the case accordingly. (LF 116-17).

SUMMARY OF THE ARGUMENT

Imagine the Missouri Senate meeting in session to debate legislation when a group of junior high students walks down an aisle of the Senate chambers taking pictures and snapping selfies – doing it quietly, mind you. This is merely hypothetical, of course. Why? Because there are Senate Rules restricting access to the Senate chambers as well as Senate Rules providing who and where pictures and recordings of Senate proceedings can be made. These rules are not only necessary for the orderly administration of the legislature, but they are constitutionally authorized, and have been from the beginning of statehood.

In the very first constitution of the State of Missouri, as with the current Constitution, the People of Missouri explicitly recognized the authority of the legislature to "determine the rules of its own proceedings." Mo. Const., Art. III, § 18. One such rule relates to the use of cameras and recording during Senate committee hearings. Senate Rule 96 provides that: "Persons with cameras, flash cameras, lights, or other paraphernalia may be allowed to use such devices at the committee meetings with the permission of the Chairman as long as they do not prove disruptive to the decorum of the committee." Here, Progress Missouri complains that this rule for legislative proceedings, and its application in four hearings to restrict recording to

media and Senate Communications, violates Missouri's Sunshine Law or the Missouri Constitution's free speech and association provisions. It does not.

The Sunshine Law requires that public bodies "allow for the recording" of meetings – which is exactly what Senate Rule 96 provides, and what was done in the four hearings at issue. § 610.020.3 (emphasis added). The Sunshine Law does not require that every person be allowed to record a meeting at any time and in any manner. In fact, even the Sunshine Law recognizes that "[a] public body may establish guidelines" for the recording of meetings. § 610.020.3.

What is more, rules for legislative proceedings, including the application of those rules, constitute "political questions" that are solely the province of the legislative branch. As is widely established, "[a] state legislature is authorized to establish rules governing its own proceedings, and so long as those rules do not violate some other provision of the constitution, it ordinarily is not within a court's prerogative to approve, disapprove, or enforce them." 16 C.J.S. Constitutional Law § 338; *see* 9 ALR 6th 177. Rules of legislative proceedings under Art. III, § 18, such as Senate Rule 96, are just such political questions. *See State ex info. Danforth v. Banks*, 454 S.W.2d 498, 500 (Mo. 1970) (noting that it was "obvious" that Art. III, § 18 involved a political question). And there is no violation of other provisions of the Constitution.

The Sunshine Law, while an important law, is not a constitutional provision. Nor was there any violation of free speech or association rights. As such, Senate Rule 96, and its application in this case, is constitutional. "[N]either the public nor the media has a First Amendment right to videotape, photograph, or make audio recordings of government proceedings that are by law open to the public," as the Plaintiffs admit. *Rice v. Kempker*, 374 F.3d 675, 678-79 (8th Cir. 2004).

Moreover, Progress Missouri was not singled out for different treatment because of the content of their message. Instead, recording of committee hearings was limited to media and Senate Communications. Restricting the recording of legislative hearings to the media is quite common. Even Congress limits recording to media and requires permission before doing so. That is because it is not only content neutral but also because "conducting orderly, efficient, and dignified meetings and in preventing the disruption of those meetings is a significant governmental interest." *Scroggins v. City of Topeka, Kan.*, 2 F.Supp.2d 1362, 1372-73 (D. Kan. 1998). There were also ample alternatives available to Progress Missouri. The committee hearings were recorded by Senate Communications and made available to anyone, including Progress Missouri.

Restrictions on the recording of official government proceedings is not limited to Congress or legislatures. The judiciary also restricts cameras in the

courtroom. In Supreme Court Operating Rule 16, the judiciary provides for the media and recording of judicial proceedings, and requires that "[p]ermission first shall have been expressly granted by the judge." Supreme Court Operating Rule 16.02(a). Not only is prior permission required, but the judge, like the Missouri Senate (and as recognized by the Sunshine Law) "may prescribe such conditions of coverage." *Id.*

Now imagine oral argument before this Court, and in the midst of argument a group of fifth graders walks in – quietly, mind you – and begins taking pictures and recording the arguments. Again, this cannot be, because the judiciary has passed rules for its proceedings that are not only committed to the judiciary, but are consistent with Missouri's Sunshine Law and the Missouri Constitution.

The circuit court correctly dismissed this case, recognizing both a political question and a failure to state a claim. Accordingly, this Court should affirm.

ARGUMENT

Standard of Review

"The trial court's grant of a motion to dismiss is subject to *de novo* review." *Nickell v. Shanahan*, 439 S.W.3d 223, 226 (Mo. 2014). A primary consideration in any case, as it is here, is justiciability. *Foster v. State*, 352 S.W.3d 357, 359 (Mo. 2011). Indeed, an actual, justiciable controversy is a "fundamental, underlying requisite." *Glick v. Allstate Ins. Co.*, 435 S.W.2d 17, 20 (Mo. App. W.D. 1968). And cases involving "political questions" are non-justiciable so long as 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)). This is just such a case.

The Missouri Constitution expressly provides that the Senate "may determine the rules of its own proceedings." Mo. Const. Art. III, § 18. The Senate has exercised its constitutional authority, adopting rules that allow for the recording of committee proceedings. *See* Senate Rule 96. As such, Plaintiffs' claim for violation of the Missouri Sunshine Law is subject to dismissal as non-justiciable, as well as for a failure to state a claim. Similarly, Plaintiffs' claim for a violation of free speech and association rights under the Missouri Constitution fails and was properly dismissed.

I. The Missouri Senate Allows For the Recording of Committee Proceedings In Accordance with the Sunshine Law and Its Constitutional Authority to Determine the Rules of Its Own Proceedings – Responding to Appellants' Point I.

Like most state constitutions, the Missouri Constitution establishes the separation of powers as a fundamental principle of government:

> The powers of government shall be divided into three distinct departments—the legislative, executive and judicial—each of which shall be confided to a separate magistracy, and no person, or collection of persons, charged with the exercise of powers properly belonging to one of those departments, shall exercise any power properly belonging to either of the others, except in the instances in this constitution expressly directed or permitted.

Mo. Const., Art. II, § 1; *see* 1820 Mo. Const., Art. II.

Along with the separation of powers, the Missouri Constitution describes the various powers of government, including those of the legislature. Article III relates specifically to the "legislative department" and provides as follows:

> Each house shall appoint its own officers; shall be sole judge of the qualifications, election and returns of its own members; may determine the rules of its own proceedings, except as herein provided; may arrest and punish . . . any person not a member, who shall be guilty of disrespect to the house by any disorderly or contemptuous behavior in its presence during its sessions; may punish its members for disorderly conduct; and, with the concurrence of two-thirds of all members elect, may expel a member . . . .

Mo. Const., Art. III, § 18 (emphasis added).

This provision, which is at the center of the dispute in this case, recognizes the Senate's authority to "determine the rules of its own proceedings," and was adopted with the 1945 Constitution. But it was not new to the 1945 Constitution. Its origins are in the very first constitution of the State of Missouri. The original 1820 Constitution provided, as the Missouri Constitution does today, that "[e]ach house may determine the rules of its proceedings." 1820 Mo. Const., Art. III, § 18. The Missouri Constitution also provides that "[e]ach house of the general assembly may provide by rule for such committees of that house as it deems necessary to meet to consider bills or to perform any other necessary legislative function." Mo. Const., Art.

III, § 22.

Furthermore, this Court has repeatedly recognized the "plenary power" of the legislature. *See, e.g.*, *State Auditor v. Joint Committee on Legislative Research*, 956 S.W.2d 228 (Mo. 1997); *Bd. of Educ. of City of St. Louis v. City of St. Louis*, 879 S.W.2d 530 (Mo. 1994). The "powers and privileges" of the legislature, therefore, "are derived not from the Constitution; on the contrary, they arise from the very creation of a legislative body." *Bohrer v. Toberman*, 227 S.W.2d 719, 723 (Mo. banc 1950) (quoting *Cushing,* Law and Practice of Legislative Assemblies, p. 221). "[H]ence an express enumeration of legislative powers and privileges in the Constitution cannot be considered as the exclusion of others not named unless accompanied by negative terms." *Id.*; *see also Lowe v. Summers*, 69 Mo. App. 637, 652 (Kan. City Ct. App. 1897) (rejecting the maxim *expressio unius, exclusio alterius* as applied to legislative power).

A. Senate Rules Allow for the Recording of Committee Proceedings, Consistent with the Sunshine Law.

Pursuant to its plenary and constitutional authority, the General Assembly has, from its inception in 1820, adopted a number of rules, including rules relating to the proceedings of its various committees. There are currently more than 100 rules governing the Senate's proceedings, as well as more than 100 rules governing the House's proceedings. (LF 55-62).

In 1983, the Senate adopted Senate Rule 96, which provided as follows: "[p]ersons 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 don't prove disruptive to the decorum of the committee." (LF 63). On January 12, 2015, the nearly identical Senate Rule 96 was readopted: "Persons with cameras, flash cameras, lights, or other paraphernalia may be allowed to use such devices at the committee meetings with the permission of the Chairman as long as they do not prove disruptive to the decorum of the committee." (LF 7).

Senate Rule 96 is also similar to Missouri House Rule 99, which provides: "Tape recorders, portable phones, video equipment, television equipment, photography equipment, or any other electronic recording devices are not authorized for use on the floor of the House or in any gallery of the House unless permission has been granted by the Speaker and notice has been given to the body." house.mo.gov/billtracking/bills15/rules/rules.pdf.

According to the Petition, the Senate allows for the recording of its committee proceedings – Senate Communications records all committee hearings. (LF 11). In addition, members of the Missouri Capitol News Association or the Missouri Press Corps are allowed by the Senate to record committee hearings. (LF 7, 11 & 23). Yet, Plaintiffs allege a violation of Missouri's Sunshine Law because they have not been allowed to separately

and personally record certain committee hearings; four meetings, specifically.

In 1973, the Missouri legislature passed the Sunshine Law. *See* §§ 610.010, *et seq.* Since then, the law has been amended several times. One such amendment occurred in 2004 when the legislature added the following relevant provision:

> A public body shall allow for the recording by audiotape, videotape, or other electronic means of any open meeting. A public body may establish guidelines regarding the manner in which such recording is conducted so as to minimize disruption to the meeting. …

§ 610.020.3 (emphasis added).

The Sunshine Law thus requires that a public body shall "allow for" recording. By rule and practice, and by admission of the Plaintiffs, the Missouri Senate has done just that – it has allowed for the recording of committee hearings. Plaintiffs, after all, admit in their Petition that the Missouri Senate allows members of the Missouri Capitol News Association and the Missouri Press Corps to record committee hearings. Most importantly, Senate Communications records all committee hearings, and anyone can obtain a copy of the recordings.

What is more, the Sunshine Law itself provides that a public body "may

establish guidelines" for recording "so as to minimize disruption to the meeting." § 610.020.3. Again, there is no dispute that the Missouri Senate has done just that. The Missouri Senate has established guidelines in Senate Rule 96 regarding the manner in which recording is conducted and has done so in an effort to minimize disruption. Plaintiffs, nevertheless, argue for a broader right to personally and separately record any hearing at any time without permission. But that is not what Missouri's Sunshine Law provides. And it is not hard to imagine the disruption that would result for hearings in which witnesses are called and testimony received.

Instead of permitting any and all persons with a camera or a phone to record whenever and in whatever manner they desire, the Missouri Senate has established reasonable guidelines to control the potential chaos and disruption of committee hearings. Allowing members of the Missouri Capitol News Association or the Missouri Press Corps to record the hearings as well as allowing Senate Communications to record all hearings and make those recordings available through Senate Communications are not only reasonable guidelines to minimize disruption, they are consistent with the Sunshine Law.

Furthermore, allowing for the recording of meetings while still providing guidelines and limitations is certainly not unusual to Missouri or the Missouri Senate. Congress itself has similar limitations and guidelines.

For example, the United States' House of Representatives has rules and limitations on recording proceedings, including who may do so, where they may do so, and what organization they must be a part of to do so. *See* radiotv.house.gov/for-gallery-members/covering-committee-hearings (noting further that "[e]ach committee has its own coverage rules").

Each congressional committee has its own rules regarding recording of committee hearings. *See, e.g.,* naturalresources.house.gov/info/faq.htm ("With the exception of credentialed members of the press . . . video and flash photography are prohibited once the Committee meeting begins."); finance.senate.gov/about/faq/ (providing that "[o]nly credentialed members of the press may use video recorders"); sbc.senate.gov/public/index.cfm?p=Rules#332aee4b-dd28-4b13-8c3d-07803a9555ad ("At the discretion of the Chair, public meetings of the Committee may be televised, broadcasted, or recorded in whole or in part by a member of the Senate Press Gallery or an employee of the Senate.").

These same principles and limitations are not merely applied by the legislature. The judiciary has likewise adopted rules for its own "judicial proceedings," including rules that allow for recording while still providing guidelines, including the prior permission of the court. Missouri Supreme Court Operating Rule 16, for example, provides that:

> Broadcasting, televising, recording, and photo-

> graphing will be permitted in the courtroom under the following conditions:
>
> (a) Permission first shall have been expressly granted by the judge, who may prescribe such conditions of coverage as provided for in this Court Operating Rule No. 16 . . . .

Plaintiffs' complaint in this case, however, is not that the Missouri Senate does not allow recording; instead, Plaintiffs argue that everyone should be permitted to record any hearing at any time, in any manner, and without prior permission. (*See* LF 70 ("But, even if Senate Communications recorded every meeting, Plaintiffs would still have the right to film them too.")). The plain language of the Sunshine Law does not provide for personal and separate recording of open meetings at any time without permission. If it did, then the law might have provided, at a minimum, that a "public body shall allow [any person to] record[] by audiotape, videotape, or other electronic means." It does not. *See also* § 610.020.3 (providing for "such recording," not "such recordings"). As such, Plaintiffs' Sunshine Law claim fails as a matter of law and was properly dismissed.

B. A Claim Challenging The Senate's "Rules of Proceedings" is a Non-Justiciable Political Question.

Plaintiffs purport to pit Missouri's Sunshine Law, §§ 610.010, *et seq.*, against Missouri Senate rules, which are expressly authorized by the Missouri Constitution.[2/] It is no real contest, however, as the Missouri Constitution, and the rules authorized thereby, prevail over statutes, even important statutes like the Sunshine Law. The Missouri Constitution commits to the Senate the authority to "determine the rules of its own proceedings," and that determination – so long as it does not conflict with another constitutional provision – is a political question that is non-justiciable. Mo. Const. Art. III, § 18.

The Sunshine Law, of course, is a set of statutory provisions. Passed in 1973 for the first time, the provisions carry no constitutional imprimatur. While they "reflect the state's commitment to openness in government," they must yield to other provisions of law, and in particular to constitutional interests and limitations. *See News-Press and Gazette Co. v. Cathcart*, 974 S.W.2d 576, 578 (Mo. App. W.D. 1998) (citing *MacLachlan v. McNary*, 684

[2/] Like the Court in *Johnson v. State*, 366 S.W.3d 11, 22 (Mo. 2012), we assume without conceding that the Sunshine Laws apply to the General Assembly.

S.W.2d 534, 537 (Mo. App. E.D. 1984) and § 610.011).

When a constitution authorizes a coordinate branch of government to control its own proceedings, the exercise of that authority is not subject to judicial inquiry. *See* 16 C.J.S. Constitutional Law § 338 ("[I]t is entirely the prerogative of a legislature to make, interpret, and enforce its own procedural rules . . . ."). Even "the legislature's disregard of a rule of procedure is not a subject for judicial inquiry." 16 C.J.S. Constitutional Law § 338.

1. Legislative "rules of proceedings" are non-justiciable political questions.

"A state legislature is authorized to establish rules governing its own proceedings, and so long as those rules do not violate some other provision of the constitution, it ordinarily is not within a court's prerogative to approve, disapprove, or enforce them." 16 C.J.S. Constitutional Law § 338; *see* 9 ALR 6th 177 (There are certain "areas reserved for the legislature and executive."). For example, it is well settled that "[i]nternal procedural aspects of the legislative process . . . and rules of procedure are not subject to judicial control or revision." 16 C.J.S. Constitutional Law § 338. This is what courts uniformly call a "political question."

"The political question doctrine establishes a limitation on the authority of the judiciary to resolve issues, decidedly political in nature, that are properly left to the legislature." *Bennett v. Mallinckrodt, Inc.*, 698 S.W.2d

854, 863-64 (Mo. App. E.D. 1985). In fact, the "political question doctrine" requires more than just the recognition of legislative authority over the matter. If a case involves "the resolution of a political question, the matter is immune from judicial review." *Id.* at 864 (emphasis added). As a consequence, the appropriate remedy is "dismissal for nonjusticiability on the basis of a political question's presence." *Id.*

This Court has recognized and follows the "political question doctrine," where there is found "'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)). The doctrine is understandably rooted in separation of powers principles. *Id.* at 502 (quoting 16 C.J.S. Constitutional Law § 106, p. 491) ("'The legislative function, except as limited by state or national constitutions, is equal and not subordinate to the judicial function, and the legislature is the ultimate guardian of the liberties and welfare of the people in quite as great degree as the courts.'").

But what constitutes "a textually demonstrable constitutional commitment of the issue to a coordinate political department"? We need not go far to answer this question. In *Banks*, 454 S.W.2d at 500, this Court considered the very same article and section of the Missouri Constitution that is at issue in this case – Art. III, § 18. *Id.* "As is obvious by Art. III, Sec. 18, of the Constitution of Missouri, the people of this state have

specifically made a 'textually demonstrable constitutional commitment' to its house of representatives power to be the 'sole judge' of the qualifications of its own members. That fact is not debatable." *Banks*, 454 S.W.2d at 500.

Of course, one might argue that the Court in *Banks* merely considered the "sole judge" provision of Art. III, § 18 to be a political question, and not the provision relating to the Missouri Senate's authority to "determine the rules of its own proceedings." The same analysis, however, is equally applicable to legislative rules of proceeding, for which the "people of this state have specifically made a 'textually demonstrable constitutional commitment.' " *Banks*, 454 S.W.2d at 500. It is a commitment that goes back to the very first constitution of the State of Missouri, wherein the people provided that "[e]ach house may determine the rules of its proceedings." 1820 Mo. Const., Art. III, § 18. That same commitment is fully in force today.

Moreover, courts and authorities from around the country recognize that a state legislature's authority to establish rules governing its own proceedings is a political question not subject to judicial review. *See, e.g., Des Moines Register and Tribune Co. v. Dwyer*, 542 N.W.2d 491 (Iowa 1996) ("It is a firmly-established principle that when a challenge to a legislative action involves a 'political question,' the judiciary may not intervene or attempt to adjudicate the matter.") (citing *Abood v. League of Women Voters of Alaska*, 743 P.2d 333 (Alaska 1987), *Moffitt v. Willis*, 459 So.2d 1018 (Fla. 1984),

State ex rel. LaFollette v. Stitt, 338 N.W.2d 684 (Wis. 1983), *Opinion of the Justices*, 381 So.2d 183 (Ala. 1980), *Coggin v. Davey*, 211 S.E.2d 708 (Ga. 1975), *State ex rel. Todd v. Essling*, 128 N.W.2d 307 (Minn. 1964), *Opinion of the Justices*, 170 A.2d 657 (Me. 1961), *State ex rel. Johnson v. Hagemeister*, 73 N.W.2d 625 (Neb. 1955), and *Witherspoon v. State ex rel. West*, 103 So. 134 (Miss. 1925)).[3/] And so it is in this case.

[3/] *See also* 16 C.J.S. Constitutional Law § 338 ("[I]t is entirely the prerogative of a legislature to make, interpret, and enforce its own procedural rules . . . [which are] not a subject for judicial inquiry.") (citing *Bd. of Trustees of Judicial Form Retirment Sys. v. Attorney General of Com.*, 132 S.W.3d 770 (Ky. 2003), *LeRoux v. Secretary of State*, 640 N.W.2d 849 (Mich. 2002), *State ex rel. Grendell v. Davidson*, 716 N.E.2d 704 (Ohio 1999), *State ex rel. Masariu v. Marion Superior Court No. 1*, 621 N.E.2d 1097 (Ind. 1993), *Application of Forsythe*, 450 A.2d 594 (N.J. App. Div. 1982), *judgment aff'd*, 450 A.2d 499 (N.J. 1982), *Lewis v. Klein*, 383 N.E.2d 872 (N.Y. 1978), and *Schwab v. Ariyoshi*, 564 P.2d 135 (Haw. 1977)); 9 ALR 6th 177, § 26 ("[T]he judiciary should not intrude into areas reserved for the legislature and executive.") (citing *Hughes v. Speaker of the N.H. House of Representatives*, 876 A.2d 736 (N.H. 2005), *Dintzis v. Hayden*, 606 A.2d 660 (Pa. Commw. Ct. 1992), and *Mayhew v. Wilder*, 46 S.W.3d 760 (Tenn. App. 2001)).

2. The plain language of the Constitution in this case is broad, not narrow.

In an attempt to buttress their claims, Plaintiffs argue that the constitutional language at issue – "determine the rules of its own proceedings" – is narrow; limited only to "rules relating to the processing of bills." Appellants' Brief, p. 27. "Processing bills" is Plaintiffs' invention, not constitutional language. And the Plaintiffs' narrow interpretation is not consistent with the plain language, definitions, case law, or surrounding provisions.

As with any provision of law, the first step to determine the intent and scope of the law is to look at the plain language. And in the absence of any definition provided in the law, courts typically turn to the dictionary for the meaning of words. *See Derousse v. State Farm Mut. Auto. Ins. Co.*, 298 S.W.3d 891, 895 (Mo. 2009). Here, the dictionary provides broad (and numerous) definitions for both "rules" and "proceedings":

> **Rule 1 a :** a prescribed, suggested, or self-imposed guide for conduct or action : a regulation or principle . . . **c :** an accepted procedure, custom, or habit having the force of a regulation . . . **e :** a regulation or bylaw governing procedure in a public or private body (as a legislature or club)

> or controlling the conduct of its members <a ~ for limiting debate> <a ~ against insulting language> <a ~ for the admission of new members> . . . .
>
> **Proceeding 2 a :** a particular way of doing or accomplishing something . . . **b :** a particular action or course of action . . . **:** a particular way of acting . . . **c :** a particular step or series of steps adopted for doing or accomplishing something . . . **d** proceedings *pl* **:** doings, goings-on **(1) :** the course of procedure in a judicial action or in a suit in litigation : legal action . . . **(2) :** a particular action at law or a case in litigation . . . **f :** a particular thing done . . . **3** proceedings *pl* **:** an official record or account <as in a book of minutes> of things said or done . . . .

Webster's Third New International Dictionary, 1807 & 1986 (1993). In no way do these definitions suggest a narrow interpretation, much less one limited in the legislative context to only those actions necessary to pass a bill. A "rule," after all, can be a guide for both conduct and actions, and it can be a

procedure, custom, or habit. Likewise, "proceedings" is broadly defined to include any doings or goings-on.

Courts have routinely determined that this very same constitutional language – "determine the rules of its own proceedings" – is intended to be, and is, broad. *See, e.g., Dwyer*, 542 N.W.2d 491. In *State ex rel. Johnson v. Hagemeister*, 73 N.W.2d 625, 628-29 (Neb. 1955), for example, the Nebraska Supreme Court, considering the very same language, concluded that "[i]t will be observed that this authority does not limit itself to any particular power which the Legislature has or is given but is broad and unlimited in its scope."

Likewise, in *Witherspoon v. State ex rel. West,* 103 So. 134, 138 (Miss. 1925), the Mississippi Supreme Court called these same words "as broad and comprehensive as the English language contains." *Id.* (holding that "this court is without the right to in graft any limitation thereon") *quoted in Hagemeister*, 73 N.W.2d at 628-29; *see also Crawford v. Gilchrist*, 59 So. 963, 968 (Fla. 1912) (concluding that the provision that each house "'shall determine the rules of its proceedings' does not restrict the power given to the mere formulation of standing rules, or to the proceedings of the body in ordinary legislative matters; but in the absence of constitutional restraints . . . such authority extends to the determination of the propriety and effect of any action as it is taken by the body as it proceeds in the exercise of any power, in the transaction of any business, or in the

performance of any duty conferred upon it by the Constitution").

Plaintiffs' identical argument – that the constitutional authority is narrow – was made and rejected by the Iowa Supreme Court. *See Dwyer*, 542 N.W.2d at 495 (arguing that the trial court erred because it "interpreted 'rules of proceedings' too broadly").[4/] As the court in *Dwyer* concluded, "[w]hen faced with similar issues, courts have described legislative rules of proceedings as follows: (1) 'rules which govern the internal workings of the legislature'; (2) statutes which relate 'solely to the internal organization of the legislature'; (3) rules which apply to a 'branch of government itself' rather than to 'members of [that] body'; (4) 'internal rules' which govern 'acts that occur in the regular course of the legislative process'; and (5) 'internal operating procedures.' " *Id.* (internal citations omitted).

[4/] The Iowa Supreme Court in *Dwyer* also distinguished and rejected the decision in *Watson v. Fair Political Practices Comm'n*, 217 Cal. App. 3d 1059 (Cal. App. 2d Dist. 1990), cited by Plaintiffs for support in this case. Missouri Attorney General Opinion No. 192-94 was also issued before the Iowa Supreme Court's decision in *Dwyer*, and the opinion did not involve any analysis or consideration of Mo. Const. Art. III, § 18.

3. The constitutional and historical context supports the broad language.

Not only is the plain language at issue broad, but the constitutional and historical context supports that very same conclusion. Yet, according to the Plaintiffs, rules of proceedings must mean only actions relating to "drafting, referral to committee, appropriating funds, amendments, readings, publications, and votes." (LF 76). These same details, however, are already provided for in separate sections of Article III of the Missouri Constitution. Indeed, drafting of bills is addressed, in part, in § 21, referral to committee in § 22, appropriating funds in § 36, amendments in §§ 24 & 27, readings in § 21, publication in § 24, and votes in § 26. Accordingly, the separate provision in the Missouri Constitution authorizing the General Assembly to determine the rules of its own proceedings must mean something more. *See Middleton v. Missouri Dept. of Corrections*, 278 S.W.3d 193, 196 (Mo. 2009).

Though the General Assembly's authority to "determine the rules of its own proceedings" can be applied to other sections detailing the work of the legislature, it is not limited to those provisions alone. By constitutional mandate, for example, bills are to be referred to committees. Mo. Const., Art. III, § 22. And there must be rules relating to the operation and conduct of

those committees, including committee hearings.[5/] The legislature, in fact, is under constitutional obligation to keep a record of its committee proceedings in addition to the votes of the members of the committee. *Id.* As courts have repeatedly concluded, this very authority "extends to the determination of the propriety and effect of any action as it is taken by the body as it proceeds in the exercise of any power, in the transaction of any business, or in the performance of any duty conferred upon it by the Constitution." *Dwyer*, 542 N.W.2d at 498; *State ex rel. Hartman v. Thompson*, 627 So.2d 966, 971 (Ala. Civ. App. 1993); *Moffitt*, 459 So.2d at 1022; *Opinion of the Justices No. 185*, 179 So.2d 155, 158 (Ala. 1965); *Hagemeister*, 73 N.W.2d at 629; *Opinion of the Justices*, 40 So.2d 623, 626 (Ala. 1949); *Gilchrist*, 59 So. at 968.

The historical context supports the same conclusion. The current Missouri Constitution was adopted in 1945. But before the current

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[5/] Plaintiffs further argue that applying the plain language of the Missouri Constitution would produce absurd results. *See* Appellants' Brief, p. 35. But that is not the case. Committee meetings are constitutionally recognized legislative proceedings, and from the very beginning the legislature has made rules relating to the decorum and order of legislative proceedings, including the recording of those proceedings.

constitution was adopted, there were already broad Senate Rules, including rules relating to media and recording. In the 1941 version of the Senate Rules, for example, Rule 16 provided that "stenographers and reporters wishing to take down the debates and proceedings of the Senate may be admitted by the President to the reporters' table on the floor of the Senate for that purpose, and under such further regulations as the Senate may prescribe." (LF 106-07). Thus, the Missouri Senate has long recognized and exercised its authority to determine the rules of its own proceedings, including the recording of it proceedings.

4. The legislative authority to "determine the rules of its own proceedings" is universal.

The making, interpreting, and enforcing of similar rules for legislative committees in other states and by the United States Congress should come as no surprise. After all, the nearly identical constitutional provision appears in the United States Constitution. *See* U.S. Const., Art. I, § 5 ("Each House may determine the rules of its proceedings . . . .").

The same broad constitutional authority is also contained in the constitutions of every single state that borders Missouri, to say nothing of the many other state constitutions throughout the nation. *See, e.g.,* Ark. Const., Art. V, § 12 ("Each house shall have power to determine the rules of its proceedings . . . ."); Ill. Const., Art. IV, § 6(d) ("Each house shall determine

the rules of its proceedings . . . ."); Iowa Const., Art. III, § 9 ("Each house shall . . . determine its rules of proceedings . . . ."); Kan. Const., Art. II, § 8 ("Each house shall . . . determine the rules of its proceedings, except that the two houses may adopt joint rules on certain matters and provide for the manner of change thereof."); Ky. Const., § 39 ("Each House of the General Assembly may determine the rules of its proceedings . . . ."); Neb. Const., Art. III, § 10 ("the Legislature shall determine the rules of its proceedings . . . ."); Okl. Const., Art. V, § 30 ("Each House may determine the rules of its proceedings . . . ."); Ten. Const., Art. II, § 12 ("Each house may determine the rules of its proceedings . . . .").

With this broad constitutional authority, state legislatures have uniformly enacted rules for their own proceedings, including rules relating to recording, electronic devices, and much else. *See, e.g.,* kslegislature.org/li_2014/m/pdf/senate_rules.pdf ("The use of video recorders or other video equipment in the galleries is prohibited."); legis.iowa.gov/DOCS/ChamberRules/HouseRules.pdf ("Photo-graphs or video recordings of the voting boards shall not be taken . . . ."); nebraskalegislature.gov/FloorDocs/103/PDF/Rules/RuleBook.pdf ("The use of any mobile, portable, or wireless communication device, other than those authorized by the Legislative Council is prohibited in legislative hearing rooms during a meeting of a legislative committee, unless allowed

by the committee chairperson.").

With such universal adoption of legislative rules on broad and diverse topics, including the recording of legislative proceedings, it cannot be said that Missouri's constitutional provision for determining the rules of its own proceedings is narrow or limited only to "actions necessary to pass a bill." (LF 76). The recording of proceedings, as well as decorum and order, have always been an essential part of legislative proceedings, including committee hearings. Indeed, if the recording of committee proceedings is so unimportant then why is it so pervasive in Congress and state legislatures; why has it been a rule for so long; and, why does the judiciary also consider recording an essential determination and part of its proceedings with extensive rules and restrictions.

The Missouri Senate has broad authority to determine the rules of its own proceedings. It did so properly in this case.

C. The Missouri Senate Constitutionally Established Rules Applicable in This Case.

In accordance with the constitutional authority provided to the legislature, the Missouri Senate has routinely adopted rules for its own proceedings. *See* Mo. Const. Art. III, § 18. As of 2015, there are more than 100 Senate Rules governing Senate proceedings, including rules that apply in this case. *See* senate.mo.gov/15info/rules/RuleBook.pdf. These rules are not

unlike the rules of civil procedure governing the proceedings of the judiciary. *See Banks*, 454 S.W.2d at 502.

Beginning as early as 1983, and continuing to the present, Senate Rule 96 has continuously provided that "[p]ersons with cameras, flash cameras, lights, or other paraphernalia may be allowed to use such devices at the committee meetings with the permission of the Chairman as long as they do not prove disruptive to the decorum of the committee." The current Senate Rule 96 is essentially identical to the 1983 version and allows for the recording of committee hearings with the permission of the committee chair.

The Senate committee chairs in this case have allowed members of the Missouri Capitol News Association or Missouri Press Corps, as well as Senate Communications, to record committee hearings. *See Des Moines Register and Tribune Co.*, 542 N.W.2d at 496 ("It is entirely the prerogative of the legislature, however, to make, interpret, and enforce its own procedural rules, and the judiciary cannot compel the legislature to act . . . .") (rejecting *Watson v. Fair Political Practices Comm'n*, 217 Cal. App. 3d 1059 (Cal. App. 2d Dist. 1990) and the supposed distinction between "activities engaged in by individual legislators" and "activities by which the Legislature as a whole conducts its business").

Senate rules are no small matter for either the Missouri Senate or for courts applying the rules. The decision in *State ex info. Danforth v. Cason*,

507 S.W.2d 405, 413-14 (Mo. banc 1973), aptly demonstrates the importance of Senate rules. In *Cason*, this Court considered a significant conflict between the Missouri Lieutenant Governor and the Missouri Senate. Apparently, the Senate was attempting to remove, by rule, the Lieutenant Governor's authority to preside over the Senate. The Court ultimately held in favor of the Lieutenant Governor, but only because there was a specific constitutional provision that made the Lieutenant Governor "president of the senate," and therefore entitled to preside over the body.[6/] *Id* at 416.

In the course of its decision, the Court in *Cason* noted that "Art. III, § 18 does confer on the senate the right to establish its own procedural rules" and the only exceptions to those rules must be "in the Constitution itself." *Id.* at 413. The Court further concluded that the Lieutenant Governor, despite being the constitutionally authorized president and presiding officer of the Senate "must conform to procedural rules of the senate authorized and adopted pursuant to Art. III, § 18." *Id.* at 413-14.

Courts have a "duty and obligation to protect the right of the legislative department . . . to exercise those powers specifically delegated to it" and

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[6/] Plaintiffs suggest there is a similar conflict in this case with Article III, §§ 21 and 31. Appellants' Brief, pp. 34-35. There is not. In *Cason* the conflict was in the constitution. Here, a conflict, if any, is in a statute.

"[r]efusal to do as much would constitute an encroachment upon the legislature . . . and do violence to that separation of powers so fundamentally vital to our form of government." *Banks*, 454 S.W.2d at 500 (citing Art. II, Sec. 1, Constitution of Missouri, 1945). Here, the Missouri Senate has exercised the power delegated to it, and it is incumbent upon the judiciary to protect the exercise of that power.

D. Constitutionally Authorized Senate Rules Control Over Statutes.

Although no Missouri court has been called upon to consider whether Missouri Senate Rules control over conflicting provisions of state statutes, and although, as set forth above, there is no conflict in this case, the result should easily follow from the controlling authority concerning political questions and the Constitution. Indeed, the issue is not unlike controlling authority that provides: "if there is a conflict between [the Supreme] Court's rules and a statute, the rule always prevails if it addresses practice, procedure or pleadings." *State ex rel. Union Elec. Co. v. Barnes*, 893 S.W.2d 804, 805 (Mo. 1995) (citing *Reichert v. Lynch*, 651 S.W.2d 141, 143 (Mo. 1983)).

Yet, Plaintiffs argue, without citation, that "Constitutionally adopted rules do not trump constitutionally adopted laws" or alternatively that "Senate Rule 96 is not an exception to Missouri's Sunshine Law and does not

allow Defendants to deny permission to Plaintiffs to videotape hearings in the absence of evidence that such recordings will prove disruptive." (LF 16, Petition, ¶ 57). Senate Rule 96 is certainly not an "exception" to the Sunshine Law; but, Senate Rule 96 does control over the Sunshine Law if there is a conflict. Appellants' Brief, p. 17. Even the Sunshine Law recognizes the authority of "rules authorized pursuant to Article III of the Missouri Constitution." § 610.015. As the Missouri Supreme Court said in *Cason*, the only exceptions to the Senate Rules must be "in the Constitution itself." *Cason*, 507 S.W.2d at 413. That is not the case here.

Courts outside of Missouri have also concluded that rules governing legislative proceedings govern over Sunshine Laws. *See, e.g., Des Moines Register and Tribune Co.*, 542 N.W.2d 491 (Iowa 1996). In *Des Moines Register and Tribune Co.*, for example, the Iowa Supreme Court considered this very conflict and held:

> The Open Records Statute, does not, nay cannot precede our authority and duty to first determine what rights are exclusively given to the legislature by our Constitution. Were it otherwise, we could always preempt a consideration of a constitutional question involving the legislature's exclusive domain where a statute could be interpreted to apply to the

legislature itself.

Des Moines Register and Tribune Co., 542 N.W.2d at 496.

The Missouri Senate's constitutional authority to establish the rules of its own proceedings is also both first in time and most recent. Indeed, Article III, § 18 was part of the Missouri Constitution passed in 1945, and predates that constitution going back to statehood in 1820. In contrast, Missouri's Sunshine Law was originally passed in 1973. It has been amended several times since then. In 2004 it was amended to include that "[a] public body shall allow for the recording by audiotape, videotape, or other electronic means of any open meeting. A public body may establish guidelines regarding the manner in which such recording is conducted so as to minimize disruption to the meeting." § 610.020.3.

Article III, § 18 has remained in force during the entire span of time that the Sunshine Law has been in force. As have the Senate Rules, and in particular Senate Rule 96. Indeed, Senate Rule 96 was most recently readopted in January 2015. As such, Senate Rule 96 controls in this case and the dismissal of Plaintiffs' claim as a non-justiciable political question should be affirmed.

II. Missouri Senate Rule 96 Does Not Violate Free Speech or Association Rights – Responding to Appellants' Point II.

In the alternative, Plaintiffs allege a Missouri constitutional "violation of the rights of freedom of speech and association." (LF 16-19, Petition, ¶¶ 60-78 (citing Mo. Const., Art. I, § 8)). There is, however, no constitutional right, either under free speech or association, to record (whether video or audio) open public meetings. And there is no dispute that all meetings were open to the public. (LF 13, Petition, ¶ 39 ("Hearings before Senate Committees are open to the public, including the hearings noted above.")).

Instead of asserting free speech and association rights under the United States Constitution, Plaintiffs claim only free speech and association rights under the Missouri Constitution. "'While provisions of our state constitution may be construed to provide more expansive protections than comparable federal constitutional provisions, analysis of a section of the federal constitution is strongly persuasive in construing the like section of our state constitution.'" *Kansas City Premier Apartments, Inc. v. Missouri Real Estate Comm'n*, 344 S.W.3d 160, 170 (Mo. 2011) (quoting *Doe I v. Phillips*, 194 S.W.3d 833, 841 (Mo. 2006)). Here, the relevant federal authority is on point and dispositive.

In *Rice v. Kempker*, 374 F.3d 675 (8th Cir. 2004) the Eighth Circuit made abundantly clear with respect to a Missouri media policy that "we hold

that neither the public nor the media has a First Amendment right to videotape, photograph, or make audio recordings of government proceedings that are by law open to the public." *Id.* at 678-79 (citing *Whiteland Woods, L.P. v. Twp. of West Whiteland*, 193 F.3d 177, 184 (3rd Cir. 1999) (holding that the public has no right to videotape Planning Commission meetings that were required to be public); *United States v. Kerley*, 753 F.2d 617, 621 (7th Cir. 1985) (holding that the public has no right to videotape trial even when the defendant wishes it to be videotaped); *Westmoreland v. Columbia Broad. Sys., Inc.*, 752 F.2d 16, 23 (2nd Cir. 1984) ("There is a long leap, however, between a public right under the First Amendment to attend trials and a public right under the First Amendment to see a given trial televised."), *cert. denied*, 472 U.S. 1017, 105 S.Ct. 3478, 87 L.Ed.2d 614 (1985); *United States v. Hastings*, 695 F.2d 1278, 1284 (11th Cir. 1983), *cert. denied*, 461 U.S. 931, 103 S.Ct. 2094, 77 L.Ed.2d 303 (1983) (holding that the press had no right to videotape criminal trials); *cf. Nixon v. Warner Commc'ns Inc.*, 435 U.S. 589, 609, 98 S.Ct. 1306, 55 L.Ed.2d 570 (1978) (holding that no First Amendment right existed to publish or copy exhibits displayed in court); *United States v. McDougal*, 103 F.3d 651, 659 (8th Cir. 1996), *cert. denied*, 522 U.S. 809, 118 S.Ct. 49, 139 L.Ed.2d 15 (1997) (holding that First Amendment right of access does not extend to videotaped deposition testimony of then-President Clinton)).

The foundation of Plaintiffs' claim is the alleged prohibition on "videotaping open meetings" or "filming open meetings." (LF 6-7, Petition, ¶¶ 1 & 2). Yet, without a constitutional right to record open meetings, there can be no infringement of either free speech rights or freedom of association rights. Moreover, not only were the committee meetings open to the public in this case, including Plaintiffs, but Plaintiffs had reasonable access to recordings. It follows that if there is no free speech or association right to record open public meetings, there is certainly no right to personally and separately record meetings already open to the public and recorded.

Plaintiffs now concede that there is no independent constitutional right, either under free speech or association, to record (whether video or audio) open public meetings. Appellants' Brief, p. 37. Instead, Plaintiffs' constitutional claims are apparently dependent on the creation of a statutory right – under the Sunshine Law. *Id.* As set forth above, those claims fail. The Sunshine Law provides that an entity subject to the law shall "allow for" recording – which is exactly what the Missouri Senate does. What is more, even the Sunshine Law authorizes public bodies to "establish guidelines regarding the manner in which such recording is conducted so as to minimize disruption to the meeting." § 610.020.3. In order to avoid the chaos and disruption to committee hearings the Senate has established guidelines allowing for media to record the hearings as well as Senate Communications,

which then makes the recordings available to anyone.

Moreover, a fundamental precept of First Amendment caselaw is whether alternative channels are available for the communication. *See BBC Fireworks, Inc. v. State Highway and Transp. Comm'n*, 828 S.W.2d 879, 881 (Mo. 1992) (noting that restrictions must meet a three part test: "it must be content-neutral, serve a significant governmental interest, and leave alternative channels open for communication of the information"); *see also Scroggins v. City of Topeka, Kan.*, 2 F.Supp.2d 1362, 1372-73 (D. Kan. 1998) (holding that "conducting orderly, efficient, and dignified meetings and in preventing the disruption of those meetings is a significant governmental interest"). Here, there is no dispute that the Senate committee hearings are recorded and made available to anyone. Indeed, based on their allegations, Plaintiffs unquestionably obtained recordings of Senate committee hearings, and, therefore, cannot articulate a cognizable constitutional claim.

Fundamentally, Plaintiffs' theory would elevate a statutory provision over constitutional authority. This cannot be. The Senate, in fact, has constitutional authority to determine the rules of its own proceedings, and it has done so in this case. To the extent there is a conflict between those rules and state law (which there is not), the constitution and separation of powers prevails. Thus, "it is entirely the prerogative of [the Senate] to make, interpret, and enforce its own procedural rules." 16 C.J.S. Constitutional Law

§ 338; *see also Dwyer*, 542 N.W.2d at 500; *Moffitt*, 459 So.2d at 1022.

Additionally, there is no constitutional violation associated with allowing only credentialed media access to record open public meetings. Congress, and the judiciary routinely limit recording to the media. And it is not as though Plaintiffs were not permitted to record while other non-media members were allowed to record. Plaintiffs do not allege they are "media" and a distinction is routinely made, in this regard, with respect to the media. For example, the Rules of Electronic Media Coverage for Congress include the following:

- "Gallery credentials are required for news coverage inside the Capitol or on the Capitol grounds."
- "Congress requires that all members of the electronic media covering news events on Capitol Hill be accredited by the Radio-Television Correspondents Galleries."
- "Rules of Congress prohibit Gallery members from engaging in lobbying, advertising, publicity or promotion work for any individual, corporation, organization or government."
- "You may not shoot live or recorded video images

> in the following areas: In the House and Senate chambers. Anywhere Congressional regulations prohibit video coverage . . . ."

radiotv.house.gov/for-gallery-members/rules-for-electronic-media-coverage-of-congress.

Moreover, Plaintiffs are not being restricted from recording, as they argue, "for reason of their speech, beliefs, or association," or "based on who they are and how they intend to use material." Appellants' Brief, p. 39. Nowhere in the Plaintiffs' allegations is there any indication that Plaintiffs are being restricted for reason of their speech, beliefs, or association. Uniformly, the allegations indicate that everyone other than media and Senate Communications are restricted from recording. The policy is that media are permitted to record, and the only allegation is that no media have ever been denied permission to record. (LF 11 & 23, Petition ¶ 27).

Similar rules apply for judicial proceedings. Indeed, "judicial proceedings" are defined as "hearings, or other proceedings in a trial or appellate court for which media coverage is requested." Supreme Court Operating Rule 16.01(b). There is neither provision, nor authorization for, anyone other than the media to broadcast, photograph, or record judicial proceedings, and even then it is only under the condition that "[p]ermission first shall have been expressly granted by the judge, who may prescribe such

conditions of coverage." Supreme Court Operating Rule 16.02.

In the end, this case presents a non-justiciable political question, and does not violate either the Sunshine Law or the Missouri Constitution. As such, the circuit court's judgment should be affirmed. *See Bennett v. Mallinckrodt, Inc.*, 698 S.W.2d 854, 863-64 (Mo. App. E.D. 1985) (rendering the matter "immune from judicial review" and subject to dismissal).

CONCLUSION

For the foregoing reasons, the Court should affirm the decision of the circuit court.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that a true and correct copy of Respondents' Brief and Appendix were served electronically via Missouri CaseNet e-filing system on the 4th day of January, 2016, to:

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The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b) and that the brief contains 10,477 words.

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