IN THE MISSOURI COURT OF APPEALS

FOR THE WESTERN DISTRICT

WESTERN DISTRICT No. WD77744

16th CIRCUIT No. 1316-CC17491

ADMINISTRATIVE HEARING COMMISSION No. 12-2243 EC

GERALD GEIER, *et al.*, APPELLANTS

v.

MISSOURI ETHICS COMMISSION, *et al.*, RESPONDENTS

Appeal from the Circuit Court of Jackson County at Kansas City
16th Circuit, Division 9
Circuit Judge The Honorable Joel P. Fahnestock

INITIAL BRIEF OF APPELLANTS GERALD GEIER, *et al.*

Respectfully submitted,

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STATEMENT OF JURISDICTION

Respondent Missouri Ethics Commission investigated then brought an enforcement action against Appellant Stop Now!, a Missouri political action committee, and Appellant Gerald Geier, the committee treasurer. Respondent MEC found that Appellants had violated Missouri campaign finance statutes, but that the violations were unknowingly made. L.F. 24. MEC ordered that no further action be taken. L.F. 19, 24, 50.

Appellants appealed the MEC decision to the Administrative Hearing Commission.[1] The AHC affirmed the MEC on summary decision. L.F. 549-559.

Appellants filed a petition for judicial review in the Circuit Court of Jackson County at Kansas City, which is the venue where Appellant Geier resides. RSMo. 536.140.1; *see also* Mo. Const. Art. V § 18. In their petition, Appellants also brought 42 U.S.C. 1983 claims for declaratory and injunctive relief against Respondent MEC *and* Respondent MEC Commissioners in their official capacities. The Circuit Court granted summary judgment in favor of Respondents and against Appellants on all claims. L.F. 716.

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[1] Concomitant with Respondent MEC's enforcement action, Appellants filed for federal 42 U.S.C. 1983 relief in federal district court in Jefferson City. That court abstained under the Younger Doctrine, holding that Appellants had adequate opportunity to raise their constitutional claims through the state process. The Eighth Circuit affirmed abstention. *Geier v. Mo. Ethics Comm'n,* 715 F.3d 674 (8th Cir. 2013). Apdx. at A1.

Appellants timely filed this appeal. RSMo. 536.140.6. L.F. 717-721.

The Missouri Constitution gives the Court of Appeals "general appellate jurisdiction in all cases except those within the exclusive original jurisdiction of the Supreme Court" of the State of Missouri. Mo. Const. Art. V § 3.

The Missouri Constitution gives the Supreme Court of the State of Missouri "exclusive appellate jurisdiction over cases involving the validity of a treaty or statute of the United States, or of a statute or provision of the constitution of this state, the construction of the revenue laws of this state, the title to any state office and in all cases where the punishment imposed is death." Mo. Const. Art. V § 3.

This case does not involve any of those issues. Therefore, this Court of Appeals has jurisdiction.

STATEMENT OF FACTS

In 1991 Gerald Geier and other individuals formed a Missouri continuing committee (now considered a Missouri political action committee or "PAC") named Stop Now! to engage in independent issue advocacy to oppose Kansas City area ballot initiatives that would raise taxes, L.F. 111-113. Geier served as Treasurer of the PAC at all relevant times. L.F. 4, 47, 111-113. Geier has been a Missouri-licensed certified public accountant at all relevant times. L.F. 160-161. By 1999 Stop Now! was slowing down in its activity, L.F. 349-350, and by 2002 Stop Now! had a small bank balance but had ceased both receiving contributions and spending funds, L.F. 349-350. In 2004 or 2006 Stop Now!'s routine bank fees had depleted the bank account to zero and the bank closed the account, L.F. 48, 128-133.

For the next several years someone (not Geier) on behalf of Stop Now! filed quarterly reports titled "Committee Statements of Limited Activity", showing that Stop Now! had no money and was engaging in no activity. Such reports are for Committees whose activity has been less than $500, L.F. 117-119. At some point in 2010 those filings ceased. Geier received a notice in April 2011 stating that reports as to inactivity had to be filed. L.F. 209. Admittedly he did not at that point file a "Termination Report", the form used to formally end the existence of a PAC.

Starting around April 18, 2011 Respondent the Missouri Ethics Commission sent letters to Geier stating that a quarterly report due April 2011 had not been received, and threatening fines up to $3,000, L.F. 52, as well as late fees of $50 per day, L.F. 56. MEC also threatened to disqualify Geier from running for public office while such reports went

unfiled and fines unpaid. L.F. 52. The correspondence, in the form of letters and emails, continued monthly or so through September 2011. L.F. 52-59. At that time, MEC announced it was investigating Geier for failure to file reports. L.F. 60.

On January 13, 2012 Geier on behalf of Stop Now! filed quarterly reports for each of April, July and October 2011. Each report stated that the PAC had had no income or expenditures. The reports were on the routine forms for "Committee Statements of Limited Activity", L.F. 117-119. At the same time Geier filed a form which formally terminated the PAC. L.F. 120-124.

On April 2, 2012 the Missouri Ethics Commission brought a formal enforcement action alleging that Geier and Stop Now! failed to file certain limited activity reports required by Missouri's campaign finance statutes as to their total inactivity from October 2010 through June 2011, L.F. 21-24. Particularly, MEC alleged violations of RSMo. 130.046.1 [ongoing quarterly reports showing no activity]; RSMo. 130.021.4(1) [maintaining a bank account]; and RSMo. 130.021.7 [amending the statement of organization if the bank account is closed]. MEC sought significant fines that appear to have varied throughout the enforcement process; at the hearing itself, MEC sought $1,000, L.F. 201-202, but did not preclude itself from seeking additional penalties, L.F. 212-213. On December 7, 2012, three days after a December 4, 2012 hearing MEC found probable cause that Geier and Stop Now! had violated those statutes, albeit that the violations were not knowingly made, L.F. 24.

The hearing was held behind closed doors pursuant to RSMo. 105.961.3, but over Appellants' timely objection. L.F. 174-175.

In its December 7, 2012 ruling MEC ordered that no further action be taken. L.F. 19, 24, 50.

Appellants sought review before the Administrative Hearing Commission of the finding that the Committee and Geier had violated the law.

Geier swore an Affidavit that he feared harm to his personal and professional reputations, that he was incurring attorney's fees, and that the MEC enforcement made him fear the cost and burden of engaging in future political speech and advocacy. L.F. 160-161.

The parties filed cross-motions for summary decision, L.F. 67-548, and the AHC entered summary decision for MEC. L.F. 549-559.

Appellants filed a petition for judicial review in the Circuit Court of Jackson County at Kansas City, which is the venue where Appellant Geier resides. RSMo. 536.140.1.

In their petition, Appellants also brought civil rights claims under 42 U.S.C. 1983 for declaratory and injunctive relief against Respondent MEC Commissioners in their official capacities, and under 42 U.S.C. 1988 for attorney's fees and costs. L.F. 655-674. After cross-motions for summary judgment, L.F. 567-654, 675-699, the Circuit Court granted summary judgment in favor of Respondents and against Appellants on all claims. L.F. 700-716.

This appeal has followed.

POINTS ON APPEAL

POINT I: The Circuit Court erred in finding the State's interest in disclosure to be sufficient to justify a finding of violation of the law under a First Amendment exacting scrutiny analysis, because the State has no interest in reports after ten years of inactivity by an issue advocacy committee, in that a committee inactive for several years can neither corrupt nor appear to corrupt.

McCutcheon v. FEC, 134 S.Ct. 1434 (2014)

Citizens United v. FEC, 558 U.S. 310 (2010)

Minnesota Citizens for Life v. Swanson, 692 F.3d 864 (8th Cir. 2012)

POINT II: The Circuit Court erred in finding the closed-door hearing required by RSMo. 105.961.3 to be constitutional, because the First and Sixth Amendments require open courts and there need not be a record of someone being turned away, in that the State cannot show the closure is narrowly tailored to preserving an essential overriding interest since the State's rationale for the enforcement hearing itself is the value of public disclosure.

Press-Enterprise Co. v. Superior Ct., 478 U.S. 1 (1986)

Richmond Newspapers v. Virginia, 448 U.S. 555 (1980)

Globe Newspaper v. Superior Ct., 457 U. S. 596 (1982)

POINT III: The Circuit Court erred in denying Appellants summary judgment on their 42 U.S.C. 1983 and 42 U.S.C. 1988 claims against Respondents, because Appellants should have prevailed, the federal claims were properly brought,

and the federal courts exercised Younger abstention, in that Congress intended and Missouri has recognized the Circuit Court to be the proper and adequate forum for those claims.

Blackwell v. City of St. Louis, 778 S.W.2d 711 (Mo. App. E.D. 1989)

Felder v. Casey, 487 U.S. 131 (1988)

Howlett v. Rose, 496 U.S. 356 (1990)

POINT IV: The Circuit Court erred in finding Appellant Geier violated the law in his personal capacity, because RSMo. 130.058 and 105.963 are ambiguous both as to whether a Treasurer has any responsibility at all and as to whether if there is any such responsibility it shall be in the Treasurer's personal capacity or official capacity, in that these statutes must be strictly construed against the State and RSMo. 130.058 does not expressly make a committee treasurer responsible in his personal capacity for filing reports, and RSMo. 105.963 permits fines to be assessed only against committees.

Lincoln Industrial, Inc. v. Director of Revenue, 51 S.W.3d 462 (Mo. banc 2001)

Gash v. Lafayette County, 245 S.W.3d 229 (Mo. 2008)

APPELLANTS' ARGUMENT

Standard of Review

Under RSMo. 536.140.6, this Court's review of a case decided initially by the Administrative Hearing Commission is limited to a review of the AHC's decision, rather than the judgment of the circuit court. *Cocktail Fortune, Inc. v. Dir. of Liquor Control*, 994 S.W.2d 955, 957 (Mo. banc 1999), citing *Psychcare Management v. Department of Social Services*, 980 S.W.2d 311, 312 (Mo. banc 1998).

In this case, however, all the issues are of law not of fact and the AHC as an executive branch agency had no authority to rule on issues of law, *Cocktail Fortune*, 994 S.W.2d at 957. The Circuit Court, in turn, did rule on the issues of law.

Since the only bases for the circuit court's summary judgment were legal in nature—that is, judicial review of the statutes' constitutionality and their construction—then this Court reviews only the circuit court's judgment and not the underlying AHC decision. *Id.*

This Court reviews *de novo* the circuit court's review of the constitutionality of a statute. *City of Arnold v. Tourkakis*, 249 S.W.3d 202, 204 (Mo. banc 2008).

This Court reviews *de novo* the AHC's construction of a statute, which is a question of law and not a matter of agency discretion legally vested in the agency, *cf.* RSMo. 536.140.5. As such this Court owes no deference to the AHC decision. *State Bd. of Registration for the Healing Arts v. Boston*, 72 S.W.3d 260, 263 (Mo. App. 2002); *see also Whitman v. U.S.*, 574 U.S. __, No. 14-29 (Nov. 10, 2014) (statement of Scalia, J.

denying writ of certiorari) (a court owes no deference to an executive agency's interpretation of a law that contemplates both criminal and administrative enforcement since "legislatures, not executive officers, define crimes").

This Court also reviews *de novo* the circuit court's denial by summary judgment of Appellants' federal 42 U.S.C. 1983 claims. *Blackwell v. City of St. Louis*, 778 S.W.2d 711 (Mo. App. E.D. 1989).

This Court's standard of review for a circuit court's grant of summary judgment is *de novo*. *ITT Commercial Fin. Corp. v. Mid–Am. Marine Supply Co.*, 854 S.W.2d 371, 376 (Mo. banc 1993). "The propriety of summary judgment is purely an issue of law. As the trial court's judgment is founded on the record submitted and the law, an appellate court need not defer to the trial court's order granting summary judgment." *Id.* This Court reviews the record in the light most favorable to the party against whom judgment was entered. *Id.* Summary judgment is appropriate when the moving party has demonstrated that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 74.04(c)(6), *E. Missouri Coal. of Police, Fraternal Order of Police, Lodge 15 v. City of Chesterfield*, 386 S.W.3d 755, 764-65 (Mo. 2012).

Appellants believe that the parties agree that no material facts are in dispute (although the parties appear to differ on whether or not Appellants' speech was chilled). Instead Appellants assert that the circuit court erred first in granting summary judgment to Respondents, because Respondents are not entitled to judgment as a matter of law, and

the circuit court erred second in denying summary judgment to Appellants, because Appellants are entitled to judgment as a matter of law.

POINT I: The Circuit Court erred in finding the State's interest in disclosure to be sufficient to justify a finding of violation of the law under a First Amendment exacting scrutiny analysis, because the State has no interest in reports after ten years of inactivity by an issue advocacy committee, in that a committee inactive for several years can neither corrupt nor appear to corrupt.

McCutcheon v. FEC, 134 S.Ct. 1434 (2014)

Citizens United v. FEC, 558 U.S. 310 (2010)

Minnesota Citizens for Life v. Swanson, 692 F.3d 864 (8th Cir. 2012)

Argument

This is in part an as applied challenge based on the record of Respondent's enforcement action against Appellants. It is also necessarily a facial challenge to the statute for Appellants and other similarly situated inactive PACs and treasurers, given the special standing requirements that courts use in cases of chilling of First Amendment rights to core political speech.

The record is undisputed that Stop Now! engaged in no speech since 2002, L.F. 349-350, and that Stop Now!'s bank account was closed by the bank in 2006, L.F. 128-133. Further, the PAC engaged only in issue advocacy, particularly opposing tax increases in the Kansas City area, but did not endorse or oppose candidates (with an exception in 1995 when the PAC endorsed or opposed candidates based on their position on the issue of tax increases, L.F. 593).

Nevertheless, Respondents brought an enforcement action in 2012, ten years after any substantive activity and six or eight years after the bank account was closed, for (a)

failure to file limited activity reports in 2011 as to Appellants' non-activity, (b) failure to maintain a bank account, and (c) failure to file an amendment to its statement of organization so as to reflect no account, RSMo. 130.046., 130.021.4(1) and 130.021.7, respectively.

Standing and Mootness – Facial v. As Applied

Appellants have standing because Respondent MEC found probable cause that Appellants violated Missouri statutes. They are therefore directly and adversely affected by MEC's proceeding. *See, e.g., Manzara v. State* , 343 S.W.3d 656 (Mo. 2011). Thus, their prayer for declaratory relief and for 42 U.S.C. 1983 relief is an as applied challenge because Appellants suffered a discreet First Amendment harm insofar that they were investigated and adjudged for statutory violation by MEC pursuant to its enforcement power, including MEC's ability to refer a case to criminal prosecution.

Appellants also have standing to bring a facial challenge, in that they seek injunctive relief for themselves and all those similarly situated. *State v. Vaughn,* 366 S.W.3d 513, 518 (Mo. 2012).

(Appellants have not claimed taxpayer standing.)

In the context of a First Amendment chilling challenge to a statute, the standing requirement for Appellants is loosened because of a judicial assumption that the statute's existence may cause others not before the court to refrain from protected speech or expressive activity. *Vaughn,* 366 S.W.3d at 518, citing *Broaderick v. Oklahoma,* 413 U.S. 601, 610 (1973).

Citizens United instructs us that in the context of First Amendment chilling the facial versus as applied distinction is subtle and is material only to the remedies employed in granting relief:

> [T]he distinction between facial and as-applied challenges is not so well defined that it has some automatic effect or that it must always control the pleadings and disposition in every case involving a constitutional challenge. The distinction is both instructive and necessary, for it goes to the breadth of the remedy employed by the Court, not what must be pleaded in a complaint. The parties cannot enter into a stipulation that prevents the Court from considering certain remedies if those remedies are necessary to resolve a claim that has been preserved. Citizens United has preserved its First Amendment challenge … as applied to the facts of its case; and given all the circumstances, we cannot easily address that issue without assuming a premise … that is itself in doubt.
>
> *Citizens United*, *below*, 558 U.S. at 331.

This Court cannot review the as-applied challenge without turning to the text of the statute itself, and it is the premise of the text itself that is in doubt in light of *McCutcheon, Citizens United* and *Swanson* (each discussed below). By calling into question the constitutionality of the statutory text itself, Appellants' prayer for injunctive relief seeks as a remedy an enjoinment of enforcement, or threatening enforcement, of the constitutionally overbroad statutes not only as to Appellants but as to all other Missouri PACs and treasurers, and indeed any other speaker similarly situated as to filing

disclosure reports as to inactivity – that is, any speaker who has not engaged in speech by accepting or spending money in the past 10 years, and particularly not for and against a particularized candidate who can be corrupted.

To the extent that Appellants have not been subjected to penalties worse than a declaratory finding by MEC that they violated the law, nevertheless they can challenge the law's effect on free speech and association, both under the First Amendment chilling analysis but also under mootness exception doctrine, as enforcement actions related to PAC reports (1) are of general public interest, (2) are likely to recur, and (3) could evade review in future live controversies despite the First Amendment chilling effects of the enforcement action. *Gramex Corp. v. Von Romer*, 603 S.W.2d 521, 523 (Mo. banc 1980); *In re Dunn*, 181 S.W.3d 601, 604 (Mo.App. E.D. 2006).

Appellants also have standing because they have engaged with the administrative process contemplated by the statutes in question, *cf. Mills v. City of Springfield*, No. 2:10-CV-04036-NKL2010, WL 3526208, at *5-6 (W.D. Mo. Sept. 3, 2010), and because Appellants' interests are more than attenuated, slight, or remote. *St. Louis Ass'n of Realtors v. City of Ferguson*, 354 S.W.3d 620, 622-23 (Mo. banc 2011).

Exacting Scrutiny – Not Strict Scrutiny- Applies Here

Any First Amendment challenge to reporting requirement for a PAC is examined under heightened scrutiny: the Court applies either strict scrutiny or exacting scrutiny depending on the analysis. For example, limits on speech (that is, expenditures) to support a candidate or issue are subject to the former, meaning they must serve a

compelling governmental interest and be the least restrictive means of accomplishing that interest. *McCutcheon v. FEC*, 572 U.S. ___, 134 S.Ct. 1434, 1444 (2014).

Disclosure requirements such as activity reports, by contrast, are subject to exacting scrutiny. Under exacting scrutiny the State must demonstrate a sufficiently important interest and employ means closely drawn to avoid unnecessary abridgment of associational freedoms. *McCutcheon*, 134 S.Ct. at 1444; *Buckley v. Valeo*, 424 U.S. 1, 66 (1976) (exacting scrutiny is a "strict test" requiring more than a "legitimate governmental interest"). *See also Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377 (2000); *but see Minnesota Citizens Concerned for Life, Inc. v. Kelley*, 427 F.3d 1106 (8th Cir. 2005).

The record is undisputed that Appellants were investigated and found by Respondent MEC to have violated the statutes. L.F. 19, 24, 50. Further, Geier has testified that he has found the enforcement to burden and chill his speech. L.F. 160-161. Appellants' fear of future enforcement of the statutes is reasonable given the past enforcement, and thus Appellants have standing insofar as they have shown a chilling of their speech through prospective self-censorship. *See, e.g., Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 393 (1988) ("self-censorship" is "a harm that can be realized even without an actual prosecution").

In their briefing below, Respondents have articulated the following rationales for the reporting requirements.

1. Providing the electorate with information about the sources of election-related spending,

2. Providing the electorate with accountability as to the source of political speakers,

3. Preserving the integrity of the election process, and

4. Combating voter fraud.

L.F. 640-642.

In this case's context of inactivity none of these logically apply.

Also, as discussed below, it is no longer clear that the State's above rationales are even valid in light of recent Supreme Court case limiting the regulation of political speech to the prevention of only one evil: corruption or the appearance of corruption.

McCutcheon, Citizens United v. FEC, 558 U.S. 310 (2010), and its progeny *Minnesota Citizens for Life v. Swanson,* 692 F.3d 864 (8th Cir. 2012) are controlling as applied here, and determine the State's singular interest under exacting scrutiny to be the prevention of quid pro quo corruption or the appearance of quid pro quo corruption. The United States Supreme Court has rejected any other attempts to fine-tune campaign speech, no matter how well intentioned. *McCutcheon,* 134 S.Ct. at 1450.

The *Swanson* court discussed how Appellants' speech was chilled by the inactivity reports. The court compared those Appellants with two hypothetical farmers who own adjoining land and contemplate erecting a sign related to a candidate election. The farmers must first create and register a fund. Then, after the election, the farmers are faced with political filing requirements even if they do not continue to "speak". Should they wish to escape that ongoing burden, the farmers must file a termination statement. But in order to terminate, the farmers must first dispose of all fund assets and debts. If

they forget to file, or assume continued reporting is unnecessary, they are subject to significant fines and possible imprisonment. *Swanson*, 692 F.3d at 873. As the *Swanson* court noted rhetorically, no one could blame the farmers for not engaging in advocacy because of the sheer bother of the burdens. *Id.* In short, such burdensome regulatory requirements would chill First Amendment speech, and so such requirements violate the First Amendment.

The *Swanson* court noted two burdens in particular. The first is the threshold and daunting burden of deciphering what is required under the statutes. *N.C. Right to Life, Inc. v. Leake*, 525 F.3d 274, 296 (4th Cir. 2008) (noting campaign finance regulation has become "an area in which speakers are now increasingly forced to navigate a maze of rules, sub-rules, and cross-references in order to do nothing more than project a basic political message"). The second is that such requirements, even if decipherable, are too burdensome on speech and thus chill activity. *FEC v. Mass. Citizens for Life, Inc.* (MCFL), 479 U.S. 238, 255 (1988) (plurality opinion) ("Faced with the need to assume a more sophisticated organizational form, to adopt specific accounting procedures, to file periodic detailed reports . . . it would not be surprising if at least some groups decided that the contemplated political activity was simply not worth it.")

Appellants here suggest that in the context of reporting requirement for no activity, they are situated exactly like the two farmers in *Swanson* who wish to put up a billboard. In the face of overly burdensome *reporting* requirements as to core political speech even when no speech or other activity has occurred, "Why Bother?" *Swanson*,

692 F.3d at 873. This is particularly true since Missouri does not place similar inactivity requirements on non-PAC inactive speakers.

It is a dispositive fact here that Stop Now! as a PAC has no actual activity to report. Our First Amendment jurisprudence does not recognize a sufficiently important State interest in disclosure by a speaker *potentially* capable of speech but who has not *actually engaged* in any speech or other related activity by way of accepting contributions or making expenditures. *Swanson,* 692 F.3d at 874-7. None of the State's rationales for its regulatory burden—informed decisions by voters about political candidates and messages, or corporate accountability to shareholders for political expenditures—is logically connected to the mere potentiality of speech in the absence of actual speech.

As such, the Missouri statutory requirements are unconstitutionally burdensome and chilling both on their face and as applied here to Appellants by Respondents in the context of no activity, since Treasurer Geier and the dormant Stop Now! PAC have engaged in no speech nor have had any other activity to report (that is, receiving dollars or spending them). There is no potential for quid pro quo corruption.

Appellants also suggest here for two reasons that they need not delve here into the contours of what constitutes quid pro quo corruption. The first reason is that MEC cannot articulate any kind of actual or potential corruption by Appellants in the context of inactivity. The second reason is that Appellants engaged many years ago in ballot initiative advocacy, and so it is logically difficult to articulate even the barest of "governmental rewards" that Appellants could theoretically promise for their 2011

inactivity. *See, e.g.,* Order and Opinion granting Plaintiff's Motion for Temporary Restraining Order, *Missourians for Fiscal Accountability v. Klahr*, 2:14-cv-4287 [Doc. 9] (United States District Court for the Western District of Missouri, 11/02/2014) (Smith, Ortrie D., J.) Appdx. at A40.

MEC cannot articulate sufficient State interests by differentiating Stop Now! as a PAC and invoking the major purpose test to distinguish Appellants from *Swanson*, *above*, where the Plaintiffs were three associations as so defined at Minnesota law, Minn. State. 10.A.01, subdiv. 6 (two non-profit corporations and a one for-profit LLC). That is because as applied here there is no reason to distinguish between PAC and non-PAC speakers where the speakers are not engaged in speech. *Citizens United*, 558 U.S. at 340-341. The Court's focus should not be on the form: PAC v. Association, for example, but instead should be focused on the statutory reporting requirements themselves in the absence of speech (and related money) itself. Distinguishing the identity of a non-speaker as a PAC or a corporation or a person serves no logical end. As such *Swanson* is instructive despite the *dicta* noting that the Appellants there were not PACs. 692 F.3d at 877.

Of course, in some contexts, PACs are different than other speakers because they must first be created even to speak. Appellants are not challenging all assymetrical regulatory requirements that fall on PACs as opposed to other speakers. Rather, they are challenging the reporting requirements for reporting no activity whatsoever after many years have passed. Courts have found that a reporting requirement on PACs for no activity or modest activity (*i.e.,* "first dollar disclosure") violates the First Amendment by

excessively burdening the associational rights of individuals to band together to speak through expenditures, and by treating PACs disparately and more severely than individuals who spend money directly on speech or in political donations. *See, e.g., Vote Choice, Inc. v. DiStefano*, 4 F.3d 26 (1st Cir. 1993) (invaliding Rhode Island PAC reporting statute because it assymetrically burdened PACs with reporting requirements for *de minimis* contributions that individual donors did not have at state law).

Courts have also found PAC regulations to be overbroad if applied to any group of citizens acting together to engage in political activity that triggers a $250 or $500 reporting requirement. In December 2014 an Arizona federal district court handed down its declaratory judgment in *Galassini v. Town of Fountain Hills*, No. CV-11-02097-PHX-JAT, 2014 WL 6883063, at *1 (D. Ariz. Dec. 5, 2014). *Galassini* is instructive because that court found Arizona PAC requirements to be too broad as applied to a group of citizens who wished to hold a rally to oppose a ballot initiative that would have increased a town's indebtedness, and who wished to spend more than $250 to engage in advocacy (though did not actually do so). *See particularly Galassini, above* (Order on summary judgment motions, September 30, 2013), Apdx. at 48.

Appellants are not arguing that all Missouri statutory reporting requirements as to PACs are entirely and facially void. Rather, there needs to be a significant nexus between speech and financial activity (money in or out) for a reporting requirement to pass muster. *Cf. National Organization for Marriage v. McKee*, 669 F.3d 34 (1st Cir. 2012) (contributions or expenditures over $5,000 found constitutional); *State ex rel. Washington State Public Disclosure Comm'n v. Permanent Offense,* 136 Wash. App. 277

(Div. 1 2006) (disclosure requirement for expenditures held less burdensome than prohibiting speech by capping expenditures). The Court need not determine here all the contours of that nexus; that may be more properly a legislative determination. *Buckley v. Valeo*, 424 U.S. 1, 83 (1976). But the Court can simply say that inactivity has insufficient nexus to any reporting requirement after six or ten years of advocacy by receiving or spending money, and that such reporting requirements leave insufficient breathing room for First Amendment speech—particularly since there is no similar statutory requirement for inactive non-PAC speakers. *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 296 (1981).

In the context here of long-term inactivity, Stop Now!'s status as a PAC is also immaterial even if as a PAC its major purpose is distinguishable.[2] Here there is simply nothing to report that justifies *any* of the reporting burdens articulated by MEC in its enforcement of the statutes even given that Stop Now! is a PAC. The First Amendment does not distinguish amongst speakers, even if the speaker was created primarily to engage in political speech. *See, e.g., Citizens United*:

> Prohibited, too, are restrictions distinguishing among different speakers, allowing speech by some but not others. As instruments to

[2] Appellants note that they strongly deny that Stop Now!'s major purpose is to support or oppose candidates. It was formed to engage in independent issue advocacy against raising taxes. It only endorsed or opposed candidates once, in 1995, solely for the candidates' views on that issue. L.F. 593.0

> censor, these categories are interrelated: Speech restrictions based on the identity of the speaker are all too often simply a means to control content.
>
> Quite apart from the purpose or effect of regulating content, moreover, the Government may commit a constitutional wrong when by law it identifies certain preferred speakers. By taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker's voice. The Government may not by these means deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration. The First Amendment protects speech and speaker, and the ideas that flow from each.
>
> 558 U.S. 340-41 [internal citations omitted].

The *Citizens United* court observed the above even while making the observation that "PACs are burdensome", 558 U.S. at 337, and that in the context of corporations as speakers that "a corporation may not be able to establish a PAC in time to make its views known regarding candidates and issues in a current campaign" because "PACs … must exist before they can speak." 448 U.S. at 338-339.

Here, the record reflects that the Stop Now! PAC was created by a group of individuals, not corporations. L.F. 111-113. But, in the context of no activity, once a PAC is silent, how is it different from any other group of individuals or corporations, such as the two farmers in *Swanson*? It is not enough to say that the individuals who

formed the PAC already voluntarily subjected themselves to the "burdensome alternative[]" form of organization to speak that is "expensive to administer and subject to extensive regulations" simply because they "must exist before they can speak." *Citizens United*, 558 U.S. at 338-339. There can be in this context no waiver of First Amendment rights, and the burden of the State to meet exacting scrutiny is not diminished by the PAC form itself in the context of inactivity.

(It is worth noting too that many of the United States Supreme Court cases cited here addressed federal election laws, which of course govern only candidate and not ballot initiatives. The Court may wish to consider that the State has less interest in any PAC with a record of issue advocacy than a history of candidate advocacy, since there is no danger of quid pro quo corruption of an issue.)

It does not follow that since PACs are burdensome and complicated to create, then the State retains a broader interest in regulatory disclosure throughout their existence, even during periods of lengthy inactivity. As the *McCutcheon* court noted:

> In the First Amendment context, fit matters. Even when the Court is not applying strict scrutiny, we still require "a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is 'in proportion to the interest served,' . . . that employs not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective.
>
> 134 S. Ct. at 1456.

Exacting scrutiny requires a substantial relation between the disclosure requirement and a sufficiently important governmental interest. *Doe v. Reed*, 561 U.S. ___, 130 S.Ct. 2811, 2818 (2010). The speech of any inactive speaker is chilled by disclosure requirements for inactivity. *See Citizens United*, 558 U.S. at 334 ("As additional rules are created for regulating political speech, any speech arguably within their reach is chilled."). To withstand this scrutiny, the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights. *Doe*, 130 S.Ct. at 2818. Here, there is no State interest in inactivity, so there is no proportional fit between the regulation and a State objective. Nor is there is any similar inactivity reporting requirement on non-PAC entities.

This court should find that the statutory requirement of filing a limited activity report after ten years of inactivity violates the First Amendment.

POINT II: The Circuit Court erred in finding the closed-door hearing required by RSMo. 105.961.3 to be constitutional, because the First and Sixth Amendments require open courts and there need not be a record of someone being turned away, in that the State cannot show the closure is narrowly tailored to preserving an essential overriding interest since the State's rationale for the enforcement hearing itself is the value of public disclosure.

Press-Enterprise Co. v. Superior Ct., 478 U.S. 1 (1986)

Richmond Newspapers v. Virginia, 448 U.S. 555, 591 (1980)

Globe Newspaper v. Superior Ct., 457 U. S. 596 (1982)

Argument

RSMo. 105.961.3 requires that MEC enforcement hearings be closed. Over Appellants' objection the hearing in this case was closed, pursuant to that statute. In this Point Appellants assert that the statute is unconstitutional, and the enforcement of the statute during the hearing violated the civil rights of Appellants and the civil rights of the public and the press.

Appellants base their arguments first on the Sixth Amendment right of Appellants to have the hearing open upon timely objection and second on the First Amendment right of the public and the press to have access and knowledge.

Since the State's rationale for the hearing itself is the value of public disclosure, then the State has already conceded that it has no interest in closing the hearing to the public. There is a tremendous irony here as to MEC's enforcement action. MEC and its commissioners brought an enforcement action claiming a public disclosure interest in

compelling Appellants to file certain disclosure reports as to their inactivity. Nevertheless, MEC—retaining the power to find probable cause that a statutory violation has occurred, to issue civil penalties, and to refer Appellants for criminal prosecution—insists on enforcing a state statute that forces Appellant Stop Now! to defend its inactivity behind closed doors, away from the view of the public and the press. That denies all of us in a democratic society the right to know about the very campaign finance-related activity in which MEC claims the public has a disclosure interest. That is a logical quandary that MEC cannot square. (Appellants do not have the reciprocal quandary because they assert that no one has any interest in non-activity).

The logical quandary is particularly relevant in contested, adjudicatory hearings such as the MEC proceeding, which by statute charges MEC, among other things, with determining whether probable cause exists that a violation of statutes with penalties has occurred (that in MEC's determination may yet rise to the level of a crime), and that the accused committed it. RSMo. 105.961.3 states:

> When the commission concludes, based on the report from the special investigator or based on an investigation conducted pursuant to section 105.959, that there are reasonable grounds to believe that a violation of any law has occurred which is not a violation of criminal law or that criminal prosecution is not appropriate**, the commission shall conduct a hearing which shall be a closed meeting and not open to the public**. The hearing shall be conducted pursuant to the procedures provided by sections 536.063 to 536.090 and shall be considered to be a contested case for purposes of

> such sections. **The commission shall determine, in its discretion, whether or not that there is probable cause that a violation has occurred.** If the commission determines, by a vote of at least four members of the commission, that probable cause exists that a violation has occurred, the commission may refer its findings and conclusions to the appropriate disciplinary authority over the person who is the subject of the report, as described in subsection 8 of this section.

RSMo. 105.961.7 further states the disciplinary authorities to whom a report shall be sent, but notes that the list is not exhaustive in that it "shall include, but not be limited to" the enumerated authorities. It also is unclear whether Appellants can even today be referred to the authorities for criminal prosecution pursuant to RSMo. 105.961.2 and .7.

Appellants also note that as here when MEC makes a finding of wrongdoing but does not make a referral, the finding of wrongdoing remains a public record and a blot on the alleged wrong-doer's life and reputation.

Here, Appellants through counsel timely objected to the closed-door hearing pursuant to the requirements of RSMo. 105.961.3, and made that objection continuing, L.F. 174-175.

Appellants, as the accused persons in the enforcement hearing, had standing to challenge the ban.

An issue in the "close court room" line of cases is always whether the right is inherent in the public or whether there must have been a member of the public or the

press who sought entry. Appellants concede that there is no record herein that a member of the public or the press sought entry.

As the *Salazar* petition for certiorari cited below acknowledges, however, a record of a member of the general public or the press either wanting to enter or actually trying to enter is difficult to create from inside a courtroom or hearing room. It is rational under such circumstances to take notice as a matter of common sense and experience that someone without may have seen the hearing room's closed door and given up attempts to enter without further ado. Also, there may have been someone who wanted to attend but did not even try to do so because of their knowledge of the statute's mere existence. Although cases such as *Salazar* may invite a different conclusion as to open courts if no one actually demands to enter the courtroom, *Salazar* and its ilk have apparent frailties in light of the split between federal circuits and state supreme courts as to this Sixth Amendment question. *See Salazar v. Missouri*, ___ U.S. ___, No. 13-1166 (cert. denied June 30, 2014). The meaning of open courts continues to be a Missouri legal controversy generally. *Cf. Kilmer v. Mun*, 17 S.W.3d 545 (2000).

In any case, Appellants suggest that whether a member of the public or press attempted to enter the court room should be immaterial to the Court's analysis of this issue in the First Amendment context, as discussed below.

It is worth noting that the statutes contemplate mostly enforcement action against candidates itself. It seems from the plain language that the intent of the General Assembly was to attempt to keep the public uninformed about MEC's enforcement actions against politicians such as legislators who write the statutes and must stand for

election. Although it is not the record here, the Court can note that the closed door hearing does a *disservice* to the public interest as to those politicians.

Another issue in these "closed court room" cases is whether the tribunal is hearing a civil case or a criminal case. The Sixth Amendment begins: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." There are many cases applying the right to all phases of the trial, including, most recently, *State v. Davis*, ___ S.W.3d ___, No. SD32702 (Mo. App. S.D. June 9, 2014) (reversing conviction based on actual exclusion of persons during criminal voir dire). The right to an open civil trial is admittedly more uncertain, as will be discussed below.

Appellants here suggest to the court that the court need not reach the civil side of the equation, however, because even though a MEC proceeding appears civil, in reality it is not the name but rather the function that matters for constitutional analysis. In function, a MEC hearing is both a probable cause hearing and a hearing which on its own terms results in declaratory findings by the state. Accordingly, criminal procedure or quasi-criminal procedure applies. *Little v. Streater*, 452 U.S. 1, 10 (1981).

A finding of lawbreaking is stigmatic to any citizen. (Appellant Geier is particularly sensitive to this issue because, first, he is a licensed accountant subject to professional discipline for violating the law, and second as a professional person with a business reputation at stake he risks loss of business if clients find out he has violated the law).

Appellants thus first ask this court to conclude that the Sixth Amendment constitutional right to open courts of Stop Now! and Geier were violated by the enforcement of the statute closing the court room.

Appellants now turn to the First Amendment. That right belongs to the public and the press, indeed to all of us, and not to the accused. The United States Supreme Court has never held that for the First Amendment right of open courts to be implicated there must be a showing that a person or reporter was turned away. Rather, the United States Supreme Court has long held that the press and public have a right of access to criminal trials. *Richmond Newspapers v. Virginia*, 448 U.S. 555, 591 (1980) ("Public access to court proceedings is one of the numerous 'checks and balances' of our system, because 'contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power.'") That the public or press might come is its own check on arbitrary power.

The First Amendment right is broader than the Sixth Amendment right, in that it applies to situations where the Sixth Amendment may not apply. The procedures contemplated by RSMo. 105.961 for MEC to investigate and dispose of a complaint either by referring the complaint to other authorities or by simply finding a wrongdoing and then stopping appear to Appellants to be *sui generis* and not analogous to other criminal or civil disciplinary procedures.

Nevertheless, whether there is referral or not MEC's closed door hearing under RSMo. 105.961.3 is, among other things, a probable cause hearing. In that respect it is like a preliminary hearing in a criminal trial in which a court determines whether there is

probable cause that a statutory violation was committed by Defendant. Accordingly, public access is constitutionally required, particularly given the lack of a jury or other neutral citizen fact-finder. *See also Press-Enterprise Co. v. Superior Ct.*, 478 U.S. 1, 6-13 (1986):

> Public access to such preliminary hearings is essential to the proper functioning of the criminal justice system
>
> …
>
> This proper functioning is not made any less essential by the fact that a preliminary hearing cannot result in a conviction and the adjudication is before a magistrate without a jury. **The absence of a jury makes the importance of public access even more significant.** [emphasis added]

Such public access—even if barred by statute—is constitutionally required when the condemnation of the State is involved and important public interests are at stake, as is here. In such circumstances, neither the State nor the accused has a right to a private trial even by statutory mandate or consensual waiver (which is not the record here anyway). MEC cannot state this is a civil not a criminal proceeding to duck First Amendment problems with the statute and its application here. As the second *Press-Enterprise Co.* court noted[3], labels are not what matter: "the First Amendment question cannot be

[3] There are two relevant *Press-Enterprise* cases from the U.S. Supreme Court. Both concern First Amendment right of access to the courts and not the Sixth Amendment right of a criminal accused. The first held that voir dire must be open to the public and

resolved solely on the label we give the event, i.e., 'trial' or otherwise." 478 U.S. at 7. Rather the analysis of the First Amendment requirement for openness—which here is not only as applied but essentially a facial challenge to the mandatory closed- hearing requirements of RSMo. 105.961.3—rests on two considerations.

The first is whether there is a tradition of public access. *Globe Newspaper v. Superior Ct.*, 457 U. S. 596, 605-606 (1982). Unlike criminal trials themselves, which have ancient English origins[4], there is no ancient tradition of ethics commissions

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press (at least perhaps upon request). Closure can only be made if specific, on-the-record findings are made demonstrating that "closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Press-Enterprise v. Superior Ct.*, 464 U.S. 501, 510 (1984). The second held that a preliminary hearing must be open to the public even if no Sixth Amendment right applies at that stage. The First Amendment demands a showing of "substantial probability" that that right of the accused to a fair trial will be prejudiced by publicity that closure would prevent, and that reasonable alternatives to closure cannot adequately protect the right. *Press-Enterprise v. Superior Ct.*, 478 U.S. 1 (1986).

[4] One may also note the historic bifurcation between accusatory and trial juries since the Articles of Visitation in England (1194). All juries are historically a tradition of the people's bulwark against executive tyranny. A grand jury (accusatory jury), however, deliberates in secret—distinct from a preliminary hearing by a neutral magistrate which is presumptively open. *Press-Enterprise II*, 478 U.S. at 8. Appellants suggest that MEC's

enforcing campaign finance statutes. Our contemporary statutes appear to be passed in their earliest form in 1978. *See*, *e.g.*, RSMo. 130.046.1 (L. 1978 S.B. 839). MEC proceedings are *not* like a grand jury of citizens, not least insofar as they are heard by executive agency officials.

The intent of the very disclosure statutes enforced by the MEC proceeding is to ensure that the public has information about political speakers by inquiring who is funding and spending money to endorse or oppose candidates. There is no record here of a private interest at stake warranting closure, nor of Appellants demanding that the proceedings be closed in the interest of obtaining a fair hearing. Therefore, the First Amendment inquiry weighs heavily in favor of an open hearing and invaliding the statute.

The second analytical factor for an openness inquiry is the democratic accountability function of the purpose of openness itself:

> the right of access to criminal trials plays a particularly significant role in the functioning of the judicial process and the government as a whole. Public scrutiny of a criminal trial enhances the quality and safeguards the integrity of the factfinding process, with benefits to both the defendant and to society as a whole. Moreover, public access to the criminal trial fosters an appearance of fairness, thereby heightening public

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paid government officials function like neutral magistrates representing the State, and not like a panel of ordinary citizens.

> respect for the judicial process. And, in the broadest terms, public access to criminal trials permits the public to participate in and serve as a check upon the judicial process -- an essential component in our structure of self-government. In sum, the institutional value of the open criminal trial is recognized in both logic and experience. *Globe Newspaper*, 457 U. S. at 606.

Particularly because MEC maintains that it is the public information interest that is the government interest at stake here, the public's interest in the proceeding itself is not incidental. The First Amendment requires the hearing be open as it is a public forum where citizens can exercise their constitutional right to assemble so as "to listen, observe and learn." *Richmond Newspapers*, 448 U.S. at 578. The presence of the public and the press before a factfinder "historically has been thought to enhance the integrity and quality of what takes place." *Id.* This is particularly true as to the factfinding role of a trial, or here, by MEC:

> Proper factfinding is to the benefit of criminal defendants and of the parties in civil proceedings. But other, comparably urgent, interests are also often at stake. A miscarriage of justice that imprisons an innocent accused also leaves a guilty party at large, a continuing threat to society. Also, *mistakes of fact in civil litigation may inflict costs upon others than the plaintiff and defendant. Facilitation of the trial factfinding process, therefore, is of concern to the public as well as to the parties.*
>
> …

> 'open examination of witnesses viva voce, in the presence of all mankind, is much more conducive to the clearing up of truth, than the private and secret examination . . . where a witness may frequently depose that in private, which he will be ashamed to testify in a public and solemn tribunal.' 3 W. Blackstone, Commentaries 373.
>
> [emphasis added]
>
> *Richmond Newspapers*, 448 U.S. at 596-597

The statute as applied here to Appellants, and perhaps under any construction and thus on its face, violates the First Amendment right of the public and press to assemble to observe the proceedings, and the First Amendment right of the public and the press to be present to supervise the integrity of MEC's factfinding process. Unlike with the conflicting Sixth Amendment jurisprudence, there is no requirement under the First Amendment open court case law that there be a record of someone being shut out of the hearing. This Court can so declare and issue equitable relief both declaring the hearing of this case to have been unconstitutional, and prohibiting all future hearings from being closed.

This court should conclude that the closed hearing violated Appellants' rights under both the First and Sixth Amendments.

POINT III: The Circuit Court erred in denying Appellants summary judgment on their 42 U.S.C. 1983 and 42 U.S.C. 1988 claims against Respondents, because Appellants should have prevailed, the federal claims were properly brought, and the federal courts exercised Younger abstention, in that Congress intended and Missouri has recognized the Circuit Court to be the proper and adequate forum for those claims.

Blackwell v. City of St. Louis, 778 S.W.2d 711 (Mo. App. E.D. 1989)

Felder v. Casey, 487 U.S. 131 (1988)

Howlett v. Rose, 496 U.S. 356 (1990)

Appellants properly pleaded their 42 U.S.C. 1983 claims for relief in their petition as interlineated, L.F. 655-674, as well as their 42 U.S.C. 1988 claims for attorney's fees and costs. The Circuit Court did not discuss Appellants' 1983 claims in its opinion except in passing noting the failure of Appellants' 1983 challenge in the federal courts, L.F. 701, Apdx. at A24. Nevertheless, the Circuit Court explicitly issued a final and appealable judgment by denying the claims in its Conclusion at L.F. 716, Appendix. At A39:

> Plaintiff's Motion for Summary Judgment is DENIED and Defendants' Motion for Summary Judgment is GRANTED. Defendants are entitled to summary judgment as a matter of law on **all** of Plaintiff's claims. Judgment is entered in favor of Defendants and against Plaintiffs. [emphasis added]

The Circuit Court denied Appellants' federal claims presumably because the Court had rejected Appellant's arguments about requiring disclosure of no activity being unconstitutional and closing the court room. This Point presumes this court has reversed on at least one of these arguments.

Congress created a federal statutory right at 42 U.S.C. 1983 whereby citizens may bring claims as to violations of their constitutional rights in federal or state court. Indeed, Appellants' argument in their petition in part is that being forced to endure the enforcement process itself violated their civil rights. Hence the Circuit Court erred procedurally in entering summary judgment against Appellants' federal 1983 claims, given that the Circuit Court had jurisdiction. Missouri courts can grant relief on those claims, even when twinned with the more limited review of an administrative appeal.

Appellants acknowledge that this Court has a limited jurisdiction pursuant to RSMo. 536.140.6 in hearing a challenge to an AHC summary decision (or, in this case, a Circuit Court review of an AHC summary decision, since the AHC acknowledged it could not consider legal challenges to the statutes' constitutionality or construction, L.F. 555, 556, 558). But that limited scope review does not extend to federal 42 U.S.C. 1983 and 1988 claims in light of the Eighth Circuit's procedural holding (*Geier, above*) and since Congress has provided a statutory right and remedy and Missouri properly observes that the U.S. Supreme Court has held that the state courts are the procedural forum for adjudicating that statutory right and remedy. *See, e.g., Blackwell v. City of St. Louis,* 778 S.W.2d 711 (Mo. App. E.D., 1989), relying on *Felder v. Casey,* 487 U.S. 131 (1988).

The State cannot place procedural conditions barring the vindication of a federal right. *Id.*

The Supremacy Clause, Art. VI, §6, trumps here in favor of Appellants' ability to bring their 1983 claims even before there is a final judgment as to administrative review. *Blackwell, above,* 778 S.W.2d at 714; *Howlett v. Rose,* 496 U.S. 356, 358 (1990) ("There is no merit to [the] argument that a federal court has no power to compel a state court to entertain a claim over which it lacks jurisdiction under state law.").

Appellants' federal substantive rights in a Missouri Circuit Court of general jurisdiction thus go beyond what the Missouri legislature intended as to the limited judicial review of a final administrative decision in a contested state agency case under RSMo. 536.100 to 536.140. The federal statute expands the jurisdiction of the Missouri courts to hear federal 1983 claims against agencies and their individual commissioners, and related 1988 claims for attorneys' fees and costs, beyond the limited jurisdiction and process prescribed by the state statute.

This court should ground its rulings in 1983, and, presuming Appellants prevail, allow a 42 U.S.C. 1988 fee Petition. (Pursuant to local rule XXIX, Appellants will submit a separate motion with their fees in this court before submission).

POINT IV: The Circuit Court erred in finding Appellant Geier violated the law in his personal capacity, because RSMo. 130.058 and 105.963 are ambiguous both as to whether a Treasurer has any responsibility at all and as to whether if there is any such responsibility it shall be in the Treasurer's personal capacity or official capacity, in that these statutes must be strictly construed against the State and RSMo. 130.058 does not expressly make a committee treasurer responsible in his personal capacity for filing reports, and RSMo. 105.963 permits fines to be assessed only against committees.

Lincoln Industrial, Inc. v. Director of Revenue, 51 S.W.3d 462, 465 (Mo. banc 2001)

Gash v. Lafayette County, 245 S.W.3d 229, 232 (Mo. 2008)

Argument

Appellants' final point addresses whether, if there is to be a finding of wrong doing, whether the wrongdoing is to be attributable to the PAC alone or the PAC and the Treasurer, and, if the Treasurer is to be included, whether the Treasurer is to be responsible in his capacity as an individual or only in his capacity as a Treasurer. The AHC found both the PAC and Geier responsible, and made him responsible in his personal capacity, L.F. 557-558. So did the Circuit Court. L.F. 715-716.

These are questions of statutory interpretation. If the Court finds the statute on its face or as applied here to be unenforceable, then this question is moot. Otherwise it goes to the real world harms that Geier has suffered as a licensed accountant who has been found liable to have violated the state statute. L.F. 24, 50, 385-386, 593-594. (It also

goes to whether Geier would have been personally responsible to pay any fine, had a fine been imposed – or if he will be responsible for any fines should criminal process begin).

RSMo. 130.058 makes the "[t]he candidate or the committee treasurer of any committee … ultimately responsible for all reporting requirements under this chapter." Appellants concede that the reporting requirements of RSMo. 130.046.1, 130.021.4(1) and 130.021.7 are within Chapter 130, RSMo.

But that statement conflicts with the more specific language of RSMo. 105.963.1 allowing Respondent's executive director to assess fines only against a "committee" failing to follow RSMo. Chapter 130 reporting requirements.

In interpreting statutes, courts are instructed by the legislature to take the words in a statute in their plain and ordinary sense. The plain meaning of words, as found in the dictionary, will be used unless the legislature provides a different definition. *Southwestern Bell v. Director of Revenue,* 182 S.W.3d 226 (Mo. 2005) (Stith, J., dissenting), citing *Lincoln Industrial, Inc. v. Director of Revenue,* 51 S.W.3d 462, 465 (Mo. banc 2001) (citations omitted). The Court need not foray into canons of statutory interpretation if the plain and ordinary meaning of the statute will explain. *Gash v. Lafayette County,* 245 S.W.3d 229, 232 (Mo. 2008).

It is in RSMo. 105.963.1 where MEC finds its enforcement teeth, not RSMo. 130.058. The latter vests "responsibility" for committee reporting in the committee treasurer. The word "responsibility" means, *inter alia*, a duty or a task that the treasurer is required or expected to do. Merriam-Webster Dictionary, *available at* http://www.merriam-webster.com/dictionary/responsibility (accessed Dec. 21, 2014).

The word "responsibility" by contrast does not mean the statutory vestment of particularized legal liability for the failure to do that task, in the absence of particularized statutory vestment of that liability.

Further, although Respondents did not clarify whether they sought to hold Appellant Geier responsible individually or in his official capacity as Treasurer, nevertheless Appellant Geier suggests that the vestment of responsibility refers only to a vestment in the treasurer's official capacity and not individually as a person who is not otherwise referenced in the statutory text.

Accordingly, the specific enforcement reference in RSMo. 105.963.1 only to a "committee" and not to its treasurer (in either his individual capacity or official capacity as treasurer) trumps the general "responsibility" language of RSMo. 130.058. Neither the statutory text nor other modes of legislative interpretation apparently reconcile this ambiguity. That is, it is a true ambiguity and not a misreading against reasonableness or the clear intent of the General Assembly. Thus, the rule of lenity applies here in that a statute with criminal penalties (or, more precisely, a mixture of civil and criminal penalties) must be strictly construed against the State. *See, e.g., J.S. v. Beaird*, 28 S.W.3d 875, 876 (Mo. 2000) (ambiguity in a penal statute will be construed against the government or party seeking to exact statutory penalties and in favor of persons on whom such penalties are sought to be imposed); *but see State v. Rowe,* 63 S.W.3d 647, 650 (Mo. 2002) (driving with revoked Iowa license not violation of Missouri statutes proscribing that conduct "under the laws of this state"). It is important to note that the rule of lenity has long been applied even as to civil penalties. *See, e.g., Tiffany v. Nat'l Bank of*

Missouri, 85 U.S. 409, 410 (1873) (statutory penalty as to bank interest overcharge). Admittedly, however, courts employ greater tolerance of imprecise enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe. *State ex rel. Nixon v. Telco Directory Pub.*, 863 S.W.2d 596, 600 (Mo. banc 1993). That is not the case here where there are potential criminal as well as civil penalties.

Under a reasonable and proper statutory construction, neither Appellant Geier nor any other committee Treasurer can be held individually liable for violations of Chapter 130, RSMo. in either his personal capacity or his official capacity as PAC treasurer. In the alternative, if the Treasurer is liable, it should be in his official capacity only.

CONCLUSION

Respondents pray this Court to find, conclude and declare pursuant to RSMo. 536.140 and 42 U.S.C. §1983 that:

a. As applied to Appellants here in the context of no speech or activity for ten years or six years respectively, and to all similarly situated Missouri PACs and their treasurers, RSMo. 130.046.1 [ongoing quarterly reports], RSMo. 130.021.4(1) [maintain a bank account], RSMo. 130.021.7 [file an amendment of the initial statement of organization if the committee changes banks or its bank accounts], and RSMo. 130.021.8 [file a termination report] are unconstitutional,

b. As applied to Appellants here in the context of no speech or activity for six years respectively that Respondent MEC and its individual Respondent Commissioners' enforcement action was not substantially justified,

c. As applied to Appellants here, and to all similarly situated Missouri PACs and their treasurers, that Respondent MEC and its individual Respondent Commissioners' hearing, closed over timely objection pursuant to RSMo. 105.961.3, unconstitutionally violated Appellants' Sixth Amendment, Mo. Const. I §14, and RSMo. 476.170 right to open courts and the public and the press's First Amendment rights and Mo. Const. I §8 rights,

d. The findings of the AHC affirming Respondent MEC's enforcement action and declaratory action as to Appellants shall be reversed in full,

e. As applied to Appellants herein that if under RSMo. 105.961.3 there was a violation of the law no such violation may be attributed to Appellant Geier individually, either personally or in his official capacity as Treasurer of Petitioner Stop Now!,

f. Pursuant to RSMo. 536.087 and 42 U.S.C. §1988 that Appellants are awarded their reasonable attorney's fees and costs for their defense in all judicial forums as to Respondent MEC and individual Respondent Commissioners' enforcement action, and

g. For such other relief as may be just, meet and reasonable.

Respectfully submitted,

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RULES COMPLIANCE CERTIFICATION

This brief complies with the requirements of Rule 55,03 and limitations contained in Rule 84.06(b) and Local Rule XLI, because the brief's word count is less than 15,500, that is, the word count is 10,386.

The Brief has been scanned and is virus free.

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CERTIFICATE OF SERVICE

Undersigned counsel for Respondents hereby certifies that on January 8, 2015 (s)he delivered copies of this brief by the Missouri courts electronic filing system to:

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