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

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

Respectfully submitted,

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Statutes

Constitutional Provisions

REPLY TO RESPONDENTS' JURISDICTIONAL STATEMENT

Since Appellants' Points on Appeal argue that certain statutes violate constitutional provisions, particularly the First Amendment and Mo. Const. Art. I §8, then Appellants agree with Respondents' Jurisdictional Statement (Resp. Brief at 1-2) that the Missouri Supreme Court has jurisdiction over this appeal. Accordingly, the entire case must be transferred. Mo. Const. Art. V §3; *Bone v. Dir. of Revenue*, 404 S.W.3d 883, 886 (Mo. banc 2013).

Appellants acknowledge that they should have filed the appeal in the Missouri Supreme Court in the first place. Concurrent with this Reply brief, Appellants are filing a motion for pre-disposition transfer to the Missouri Supreme Court on jurisdictional grounds.

Appellants apologize to this Court and to Respondents for the false start.

Appellants withdraw their argument as to this Court's jurisdiction offered in their Initial Brief. (App. Init. Brief at 1-2).

REPLY TO RESPONDENTS' STATEMENT OF FACTS

Appellants make no reply to Respondents' Statement of Facts.

APPELLANTS' REPLY ARGUMENT

Appellants here will only reply to certain issues raised by Respondents but do not reargue points raised in the Initial Brief. Rule 84.04(g).

A. Reply to Respondents' Standard of Review

Appellants make no reply.

B. Reply to Respondents' First Amendment Arguments as to the Reporting Statutes

1. Appellants' equitable claims are ripe, and just as with standing, the Court's analysis is relaxed in the context of First Amendment chilling

Appellants agree with Respondents that they need show standing and ripeness for relief on their equitable claims for declaratory and injunctive relief. They disagree, however, that their claims for prospective relief are not ripe, because Respondents ignore that the United States Supreme Court has relaxed standing and ripeness requirements in First Amendment cases.

Even where a First Amendment challenge could be brought by one actually engaged in protected activity, there is a possibility that, rather than risk punishment for his conduct in challenging the statute, such a person will refrain from engaging further in the protected activity. Society as a whole would then be the loser. Thus, when there is a danger of chilling free speech, the concern that constitutional adjudication be avoided whenever possible may be outweighed by society's interest in having the statute

challenged. *Secretary of State of Md. v. Joseph H. Munson Co., Inc.*, 467 U.S. 947, 956 (1984).

In First Amendment cases, the injury-in-fact element is commonly satisfied by a sufficient showing of "self-censorship, which occurs when a claimant is chilled from exercising h[is] right to free expression." *See, e.g., Cooksey v. Futrell*, 721 F.3d 226, 235 (4th Cir. 2013), quoting *Benham v. City of Charlotte*, 635 F.3d 129, 135 (4th Cir. 2011). A party "must face a credible threat of present or future prosecution under the statute for a claimed chilling effect to confer standing to challenge the constitutionality of a statute that both provides for criminal penalties and abridges First Amendment rights." *Iowa Right to Life Comm., Inc. v. Tooker*, 717 F.3d 576, 584 (8th Cir. 2013), quoting *Zanders v. Swanson*, 573 F.3d 591, 593 (8th Cir.2009).

Here, Appellant Stop Now! has terminated itself as a PAC rather than continue to exist in a dormant mode and face *ad infinitem* reporting requirements, and Appellant Geier has indicated that as a private citizen and as a licensed certified public accountant he fears engaging in future political speech because he fears (a) future enforcement by MEC of the challenged statutes, and (b) loss of personal and professional reputation. The Court may observe that there is a logical nexus between being a licensed CPA with a good reputation in the community and volunteering as a PAC treasurer, because a licensed CPA would be able to use his professional skills to help advocate for his First Amendment political beliefs.

Much like standing, ripeness requirements are also relaxed in First Amendment cases because of the threat of "inhibiting chill." *See New Mexicans for Bill Richardson v. Gonzales*, 64 F.3d 1495, 1500 (10th Cir.1995).

Appellants suggest that MEC's cited cases[1] do not involve the "special need to protect against any inhibiting chill" relevant to a heightened First Amendment analysis. Nor would relief from this Court interfere with administrative action or factual development, because Appellants here have already undergone a formal enforcement proceeding and are not merely under speculative threat. *Cf. Nat'l Right to Life PAC v. Connor*, 323 F.3d 684, 692-93 (8th Cir. 2003).

Appellants' injuries were undergoing the enforcement proceeding itself, and then the probable cause determination that Appellants violated the statutes. The cause was MEC's decision to enforce the statutes against Appellants. The equitable relief sought would redress those injuries. *Id.* at 689.

Appellants have suffered an injury-in-fact, and they have standing to bring their claims, which are ripe because the presence of the statutes itself requires Appellants "to adjust [their] conduct immediately." *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 891 (1990); *see also Abbott Labs. v. Gardner*, 387 U.S. 136, 153 (1967).

Here, Appellants can show that there is a likelihood that their future conduct will face sanctions under the statutes should they continue to engage in conduct similar to that

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[1] *E.g., Schweich v. Nixon*, 408 S.W.3d 769, 773 (Mo. banc 2012)

for which MEC brought its enforcement action. *Cf. Wersal v. Sexton*, 674 F.3d 1010, 1019 (8th Cir. 2012). Particularly, Geier has chilled his political speech and future activity as a PAC treasurer insofar as he would serve as a treasurer for any future PAC that would exist but be dormant and inactive for a time. By contrast, the Stop Now! PAC itself has terminated itself out of existence rather than remain merely dormant because of the chilling effect of the enforcement action itself. This Court does not require evidence of other particularized PACs undergoing similar enforcement by MEC to infer that a statute that chills political speech will apply to other PACs and treasurers similarly situated to Appellants. There is already a record of chilling. In the First Amendment context, that is sufficient. As such, Appellants' equitable claims are ripe. Accordingly, this Court can clarify what non-speech and non-activity Appellants, and similarly situated PACs and their treasurers, can engage in under the statutes without the threat of MEC enforcement.

Appellants submit that the reporting statutes to the extent that they require PACs through their treasurers to report on inactivity after many years of activity are unconstitutional on their face under exacting scrutiny.[2] As the case law cited by

[2] Appellants decline to state a particularized year at which the statutes' reporting requirements become unconstitutional on their face, and other courts have invalidated reporting requirements while declining to fix on a time period. Appellants only state that

Respondents holds, "[i]n the First Amendment context … th[e U.S. Supreme] Court recognizes 'a second type of facial challenge,' whereby a law may be invalidated as overbroad if 'a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.'" *United States v. Stevens*, 559 U.S. 460, 472 (2010), quoting *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449, n. 6 (2008). The overbreadth doctrine may be "strong medicine," *United States v. Williams*, 553 U. S. 285, 293 (2008), but it allows a party to whom the law may constitutionally be applied to challenge the statute on the ground that it violates the First Amendment rights of others. *See, e.g., Board of Trustees of State Univ. of N. Y. v. Fox*, 492 U.S. 469, 483 (1989) ("Ordinarily, the principal advantage of the overbreadth doctrine for a litigant is that it enables him to benefit from the statute's unlawful application to someone else"); *see also Ohralik v. Ohio State Bar Assn.*, 436 U. S. 447, 462, n. 20 (1978) (describing the doctrine as one "under which a person may challenge a statute that infringes protected speech even if the statute constitutionally might be applied to him").

As *Stevens* explains, "[t]he first step in overbreadth analysis is to construe the challenged statute; it is impossible to determine whether a statute reaches too far without

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6 or 10 years is too long. *See, e.g., Sampson v. Buescher*, 625 F.3d 1247, 1249 (10th Cir. 2010), as discussed below.

first knowing what the statute covers." *Stevens*, 559 U.S. at 472, quoting *United States v. Williams*, 553 U.S. 285, 293 (2008).

What speech, then, do the challenged statutes cover?

RSMo. 130.046.1 requires all PACs to file quarterly reports on their contributions and expenditures (their speech) *even if* no such activity (that is, no speech) related to any candidate let alone a ballot measure has occurred – all without time limitation.

RSMo. 130.021.7 requires all PACS to notify MEC promptly as to any change in their depository account, *even if* the PAC (or the bank) has closed the account for inactivity because there is no money.

RSMo. 130.021.8 requires all PACs to file a termination statement to escape the ongoing reporting requirements, *even if* the PAC would rather merely remain dormant for many years and otherwise free of reporting obligation to MEC in the absence of any speech or related activity, and *even if* there is has been no activity for many years.

Together, these statutes are overbroad and substantially burden any PAC and its treasurer even if they engage in no speech or activity. Under the exacting scrutiny analysis, the test is not whether the State's interests are merely legitimate but rather whether the burdens are substantially related to a sufficiently important government interest. *Citizens United v. FEC*, 558 310, 366-67 (2010); *Buckley v. Valeo*, 424 U.S. 1, 66 (1976). To withstand exacting scrutiny, "the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights." *Doe v. Reed*, 561 U.S. ___, 130 S.Ct. 2811, 2818 (2010). "[W]e must look to the extent of the

burden that they place on individual rights." *Valeo,* 424 U.S. at 68. Reporting or disclosure requirements (Appellants use these two terms interchangeably insofar as both ordinarily mean an affirmative burden on a speaker) have been upheld against facial challenges in the context of *candidate-related spending* under the public information rationale, *Valeo*, 42 U.S. at 66; *McConnell v. FEC,* 540 U.S. 93, 197 (2003). But the Court also reasoned that such disclosure requirements were subject to as applied challenges. *McConnell,* 540 U.S. at 198, quoting *Buckley,* 424 U.S. at 74; *see also Sampson, below,*625 F.3rd at 1249.

Here, MEC asserts that reporting requirements have broadly been upheld because they are substantially related to the State interests of (1) providing the electorate with information, (2) deterring actual corruption and avoiding appearance thereof, and (3) gathering the data to necessary to enforce more substantive electioneering restrictions. *McConnell,* 540 U.S. at 196.

Appellants suggest that the underlying rationale for all three restrictions is the deterrence of corruption by the application of sunshine. As such, the anti-corruption rationale is similar if not the same as that undergirding more strictly scrutinized regulations such as caps on campaign contributions. *See, e.g., McCutcheon v. FEC,* 134 S.Ct. 1434, 1441 (2014).

In the context of ballot initiative PACs, moreover, legitimate reasons for regulating candidate campaign as to disclosure apply only partially (or perhaps not at all).

Sampson, 625 F.3d at 1255. Certainly donation caps on ballot initiative PACs patently violate the First Amendment.[3]

Appellants now turn and review MEC's rationales in turn.

Our First Amendment jurisprudence soundly rejects MEC's second and third rationales for regulation of ballot initiative PACs. The second (anti-corruption) is irrelevant because *quid pro quo* corruption cannot arise in a ballot-issue campaign. The third (facilitating the detection of violations of contribution limitation) is mooted by the prohibition on contribution limitations in the ballot-issue context. *Sampson*, 625 at 1256.

That leaves only the first rationale: public information. But it is not clear that the public has an interest in who donates to ballot initiative PACs. The U.S. Supreme Court has never upheld a disclosure provision for ballot-issue campaigns that has been presented to it for review; it has, however, suggested the limits of the public interest in disclosure in the ballot-issue context. In *McIntyre v. Ohio Elections Comm'n*, 514 U.S.

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[3] Limits on contributions to ballot-issue committees are unconstitutional because of the absence of any risk of quid pro quo corruption. *See McIntyre*, 514 U.S. at 352 n. 15 (1995); *Citizens for Rent Control v. City of Berkeley*, 454 U.S. 290, 296-300 (1981); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 790 (1978) ("The risk of corruption perceived in cases involving candidate elections ... simply is not present in a popular vote on a public issue.").

334, 353-56 (1995), the Court distinguished its precedents affirming disclosure requirements in candidate elections as it overturned a fine for distributing anonymous pamphlets opposing a school tax levy, and the Court appeared to side enthusiastically against disclosure. *Id.* at 348 n. 11; *cf. Bellotti*, 435 U.S. at 777 ("the inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual."). Even in *Reed*, 130 S.Ct. at 2819, the Court affirmed a state law requiring disclosure of referendum petition signatures without relying on the state's proferred interest in providing information to the electorate.

Even if, however, this Court finds that public information is a sufficiently important state interest, nevertheless it is unclear why reporting is required *when* there is no speech or related activity to report. [4]

The Maine statutory scheme cited by MEC, partially invalidated by the First Circuit against a PAC challenge, actually *supports* Appellants' contention that PAC reporting requires a nexus to thousands of dollars in activity. *Nat'l Org. for Marriage v. Mckee*, 649 F.3d 34, 42 (1st Cir. 2011) (Notably, Maine can waive reporting if reporting

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[4] The Rhode Island case previously cited in Appellants' Initial Brief at 20 also supports the requirement of a nexus between reporting and activity, and that PACs not be burdened more than other speakers. *Vote Choice, Inc. v. DiStefano*, 4 F.3d 26 (1st Cir. 1993).

is more burdensome than the public benefit of the updated information. *Id.* at §1052-a(1)(c).)

MEC cannot rely on *Nt'l Org. for Marriage v. Roberts*, 753 F.Supp.2d 1217 (N.D. Fla. 2010) because that PAC wanted to spend over $5,000 on candidate ads in the 60 days before an election. Same for *Nt'l Assoc. for Gun Rights v. Murry*, 969 F.Supp.2d 1262 (D.Mont. 2013) ($6 million PAC wanted to spend $20,000 on mailers shortly before the 2012 general election).

2. The State's reporting interest in a decade of inactivity is insufficient as applied to this particular PAC and its treasurer Geier

Should the Court decline to subject the statutes to exacting scrutiny on their face, nevertheless the Court can invalidate their application to Appellants here. (Appellants concede that even in the First Amendment context that sometimes an overbreadth issue need not be decided unnecessarily—that is, before it is determined that the statute would or would not be valid as applied. *Fox*, 492 U.S. at 484–485; *Accord, New York State Club Assn., Inc. v. City of New York*, 487 U.S. 1, 11 (1988); *see also Broadrick v. Oklahoma*, 413 U. S. 601, 613 (1973). Appellants nevertheless assert that the statutes' overbreadth is substantial, not only in an absolute sense, but also relative to the statute's sweep. *Williams*, 553 U.S. at 292; *see also Ferber*, 458 U.S. at 773; *Houston v. Hill*, 482 U. S. 451, 466–467 (1987).) It is undisputed here that Appellants engaged in no election-related activity in which the State has a sufficiently important interest between 2002 and 2011, the year in which Appellants failed to file reports. Further, the record is undisputed

Appellants engaged in ballot initiative advocacy related to taxes. The State cannot show that enforcing reporting requirements on nothing is substantially related to any of (1) the integrity of the election process, since the PAC has not been active (2) informing the public about the sources of election related spending, since the PAC has not spent any funds, or (3) political corruption, since the PAC has bestowed no "gifts" that could corrupt or appear to corrupt.

Campaign finance laws counter a perceived threat that a tiny minority of speakers (superrich bogeymen) may exercise disproportionate influence over the political process. That is the evil that disclosure requirements as to candidate advocacy are meant to mitigate if not cure. That is not the evil presented with ballot initiative PACs.

"A citizen voting on a ballot initiative is not concerned with the merit, including the corruptibility, of a person running for office, but with the merit of a proposed law or expenditure, such as a bond issue. As a result, the justifications for requiring disclosures in a candidate election may not apply, or may not apply with as much force, to a ballot initiative." *Sampson v. Buescher*, 625 F.3d 1247, 1249 (10th Cir. 2010) (invalidating Colorado's interest in disclosure from a ballot initiative committee that raised less than $1,000).[5]

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[5] *Sampson* is not the only recent case where PAC disclosure requirements and definitions have been successfully challenged for overbreadth. The Seventh Circuit recently sustained in part an applied challenge by an active PAC engaged in spending on

Here, however, it is undisputed that the PAC was merely a group of citizens opposed to tax increases in the Kansas City area, and so banded together to advocate with limited funds as to ballot initiatives prior to 2003. *Cf. Sampson*, 625 at 1254 ("It would take a mighty effort to characterize the [PAC's] expenditure of $782.02 for signs, a banner, postcards, and postage as an exercise of a disproportionate level of influence over the political process by a wealthy group that could unfairly influence the outcome of an election."). As discussed above, and given the record here, of the State's three interests in reporting, only the third—public information—applies here since a ballot initiative cannot lead to *quid pro quo* corruption of a candidate, nor are campaign finance caps implicated. *Sampson*, 625 F.3d at 1256.

What MEC's enforcement action as to the reporting requirements did constitute, however, was a burden—one that Appellants eventually shrugged off because "life goes on, people have things to do, and no activity occurred." L.F. 608, 692. As such, MEC's enforcement action as applied to Appellants' failure to disclose their inactivity on a

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electioneering on overbreadth and vagueness grounds. *Wisconsin Right To Life, Inc. v. Barland*, 751 F.3d 804 (7th Cir. 2014). *See also New Mexico Youth Organized v. Herrera*, 611 F.3d 669 (10th Cir. 2010); *South Carolina Citizens for Life v. Krawcheck*, 759 F.Supp.2d 708 (D.S.C. 2010). Wisconsin's overly broad PAC disclosure requirements even as to active PACs have been permanently enjoined. *Hatchett v. Barland*, 816 F.Supp.2d 583 (E.D. Wisc. 2011).

"Committee Statement of Limited Activity" seems particularly silly because none of the State's interests apply to the longtime inactivity; that is, Appellants' inactivity is not substantially related to any of the State's "sufficiently important" interests. Appellants suggest that the only interest that could be held legitimate as to a dormant, ballot-initiative PAC—the need to gather data to enforce campaign finance law, *Buckley*, 424 U.S. at 67—is too attenuated, too "below the line" (*cf. Sampson*, 625 F.3d at 1261), to be constitutional in its burdensomeness.

Of course, MEC contends that filing a quarterly one-page form is "hardly burdensome" (Resp. Brief at 25). This misapprehends the analysis for burdens on First Amendment political speech. The State's interests are substantially related to money raised and spent by a PAC. The State's interests are not substantially related to inactivity. The information sought by the State—to be reported *ad infinitem* until the PAC terminates itself rather than remain dormant—has no value to the political process. The U.S. Supreme Court has long recognized that "detailed record-keeping and disclosure obligations impose administrative costs that many small entities may be unable to bear." *FEC v. Mass. Citizens for Life*, 479 U.S. 238, 254 (1986). As such, and as applied to Appellants based on the record of no activity, the statutes as enforced by MEC cannot survive First Amendment exacting scrutiny.

Appellants concede that they do not suggest a bright line where disclosure becomes substantially related to the State's interests. The Court is not presented with a record of tens of millions of dollars in spending where the argument for disclosure is

stronger. *Cf. Sampson*, 625 F.3d at 1261; *Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1105 (9th Cir. 2003). Just as with the two farmers fearful to erect a billboard in *Minnesota Citizens for Life v. Swanson*, 692 F.3d 864, 876-77 (8th Cir. 2012), the State can accomplish its disclosure interests as this PAC and its treasurer through less burdensome measures such as requiring reporting only when money is spent. Just because the *Swanson* plaintiffs were not a PAC, and thus the Eighth Circuit's holding did not apply to Minnesota PACs, MEC cannot articulate why inactive PACs are so different from other speakers so as to defeat *Swanson*'s analysis.

3. **Appellants' equitable claims on behalf of similarly situated PACs and treasurers are proper under relaxed First Amendment analysis because of the statute's chilling effects on society**

Under a First Amendment analysis, society as a whole is the loser when political speakers chill their speech rather than risk punishment. *Joseph H. Munson Co., Inc.*, 467 U.S. at 956. For the reasons discussed above in Section A as to standing and ripeness, Appellants properly seek relief not only for themselves but for other similarly situated inactive PACs and treasurers. Since MEC here has brought an enforcement action against Appellants, there is no need for this Court to speculate and engage in hypotheticals as to whether or not the statutes as enforced by MEC fail exacting scrutiny in their burdensomeness on *any* similarly dormant PAC and its treasurer. The record shows that MEC enforces the statutes under such facts. As such injunctive relief is warranted.

C. The closure of the hearing unconstitutionally violated the rights of Appellants, the public and the press

After MEC reviewed its special investigator's report and determined it believed that there were reasonable grounds that Appellants violated the statutes, RSMo. 105.961.1, then MEC held its hearing. That hearing, pursuant to 105.961.3, was closed to the public. Appellants objected to the closing of the hearing and the objection was continuing, L.F. 174-175.

That hearing was the *only contested, evidentiary hearing on the merits* which Appellants have ever had before any commission or court in this long saga.

An analysis of whether the hearing may be closed begins with the nature of the hearing. Appellants contend that even if the MEC order is not a final order until appealed to the AHC for purposes of judicial review, *Impey v. MEC,* 442 S.W.3d 42, 44 & n.4 (Mo. banc 2014), nevertheless the MEC order is a finding of probable cause for lawbreaking by the State against Appellants. (Appellants acknowledge that they were unable to create a record of persons outside the room either being turned away by MEC or turning themselves away because of the statute's plain language.) Following MEC's initial investigation that formed MEC's "reasonable belief" that Appellants violated the statutes, Appellants then suffered the stigma of undergoing the hearing itself and the Order. In that sense, the hearing was like any other probable cause hearing where public access is required by the First Amendment, particularly given the lack of a jury (and there is no grand jury here). *Press-Enterprise Co. v. Superior Ct.,* 478 U.S. 1, 6-13 (1986). As

MEC recognizes, this right of access has even been ordered in hybrid criminal-civil proceedings such as a contempt hearing. *In re Iowa Fredom of Info. Council*, 724 F.2d 658, 671 (8th Cir. 1983). Appellants suggest that the MEC hearing is a hybrid proceeding.

If it is investigatory, then it is also adjudicatory. That is because the statute contemplates the probable cause hearing to occur only after an investigation is completed. Under the language of the statute the purpose of the hearing it to determine probable cause and to refer the matter to an appropriate disciplinary authority.[6]

The public has a First Amendment informational interest in such a hybrid proceeding for two reasons: first, to check any abuse of power by MEC that naturally flows from a lack of public access, *Richmond Newspapers v. Virginia*, 448 U.S. 555, 578 (1980) and second, because it is precisely the public's informational interest that MEC cites in the enforcement of the disclosure statutes themselves. Further, Appellants have a right of public access to any State process that results in a stigmatic order against them.

The parties agree that the Sixth Amendment applies only to defendants afforded criminal due process rights. But it is an open question whether the MEC hearing is

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[6] As such it is different than a closed investigatory hearing to revoke a license, *Artman v. State Bd. of Registration for Healing Arts*, 918 S.W.2d 247, 251 (Mo., 1996), or an non-adjudicative, purely investigative fact-finding process, *Hannah v. Larche*, 363 U.S. 420, 440 (1960).

quasi-criminal proceeding in nature because Appellants are subpoenaed and exposed to potential referral to criminal prosecution. RSMo. 105.961 is ambiguously constructed as to when and how MEC refers a matter to a criminal prosecutor, and RSMo. 105.961.3 does not prohibit or preclude MEC from referring a subject for prosecution following a probable cause hearing. Any ambiguity in a penal statute should be construed strictly against the State and in favor of the defendant. *See, e.g., J.S. v. Beaird*, 28 S.W.3d 875, 876 (Mo. 2000). That rule of lenity is true even for statutes with civil penalties. *See, e.g., Tiffany v. Nat'l Bank of Missouri,* 85 U.S. 409, 410 (1873).

Since Appellants faced potential referral for criminal prosecution at MEC's probable cause hearing, the only State interest in the proceeding was disclosure of information to the public, and indeed it was Appellants' only contested hearing in which they could put on evidence, then the First Amendment requires that the hearing be open.

D. Appellants' federal claims are admittedly predicated on a finding and conclusion of unconstitutional enforcement by MEC, but are otherwise properly brought here

The parties agree that Appellants' 42 U.S.C. 1983 and 1988 claims are properly before this court. *See Blackwell v. City of St. Louis,* 778 -S.W.2d 711, 714 (Mo. App. 1989). Appellant concede that to prevail on their 1983 claims they must obtain a determination that the statutes on their face or as enforced by MEC against them are unconstitutional. But that does not mean that the claims themselves fail to state a claim. Appellants note they seek their attorney's fees pursuant to both federal law (Section

1988) and state law (RSMo. 536.087). Indeed they are properly brought. *See, e.g., Sampson, above*, 625 F.3d at 1253-54.

E. Geier cannot be liable in his personal capacity for either the liabilities of this particular PAC or its treasurer in his official role

Under the First Amendment law regarding standing already briefed in Section A, Geier has standing to challenge the MEC's finding of probable cause that he violated the statutes. As such, since MEC brought an enforcement action against him, he can properly raise the issue of whether MEC can target PAC treasurers for individual liability in his personal capacity as opposed to his official capacity as treasurer when investigating a PAC's compliance with campaign finance statutes. Although the statutes hold a PAC treasurer responsible for reporting requirements, *see, e.g.,* RSMo. 130.058, the penal statutes prescribe that MEC can issue penalties only against the PAC itself, RSMo. 105.963.1. Thus Geier contends that under statutory construction and the rule of lenity that he cannot be held individually liable as treasurer. In the alternative, if Geier is individually liable, then Geier is liable for violating the statutes only his official capacity as PAC treasurer and not in a personal capacity. To the extent this is a question of first impression, Geier suggests this Court be guided by federal election law that holds a PAC treasurer liable only his official capacity and not personal capacity. *Combat Veterans for Congress PAC*, 983 F.Supp.2d at 13-14.

CONCLUSION

Appellants have amended their prayer to particularize that they seek both facial and as-applied relief, and the relief they seek as to Geier's liability.

Appellants Stop Now! and Gerald Geier pray this Court to find, conclude and declare pursuant to RSMo. 536.140 and 42 U.S.C. §1983 that:

a. On their face and as applied to Appellants here in the context of no speech or activity for ten 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 ten or 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 then only the Appellant committee Stop Now! can be liable, and that no liability shall vest in Appellant Geier; or in the alternative, should Geier be liable, that he shall not be liable personally but only in his official capacity as treasurer of Stop Now!,

f. Pursuant to RSMo. 536.087 and 42 U.S.C. §1988 that Appellants shall be 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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CERTIFICATION OF COMPLIANCE

This brief complies with the requirements of Rule 55.03 and limitations contained in Rule 84.06(b) and W.D. Local Rule XLI, because the brief's word count is less than 5,155, that is, the word count is 5,081.

The Brief has been scanned and is virus free.

/s/ W. Bevis Schock .
W. Bevis Schock, MBE # 32551

CERTIFICATE OF SERVICE

Undersigned counsel for Appellants hereby certifies that on April 17, 2015 (s)he delivered copies of this brief by the Missouri courts electronic filing system to:

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