IN THE MISSOURI SUPREME COURT

JOHN T. IMPEY,	)	
	)	
Plaintiff/Appellant,	)	
	)	
vs.	)	**Case No. SC93698**
	)	
MISSOURI ETHICS COMMISSION, et al.,	)	
	)	**Oral Argument Requested**
Respondents.	)	

APPEAL FROM THE COLE COUNTY CIRCUIT COURT, DIVISION NUMBER 1
THE HONORABLE JON BEETEM

APPELLANT'S AMENDED BRIEF

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JURISDICTIONAL STATEMENT

The "staff" of the Missouri Ethics Commission (hereinafter "MEC") investigated a complaint filed with the MEC and reported their findings to the MEC. (L.F. pg. 7, ¶ 10; pgs. 17 - 21; pg. 22, ¶ 3). The MEC decided there were reasonable grounds to believe John Impey (hereinafter "Impey") violated § 130.031.8 RSMo and in December of 2011 filed with itself a Complaint against Impey. (L.F. pg. 7, ¶ 11; pg. 22, ¶ 4; pg. 52, ¶s 1 & 2). The MEC on September 24, 2012 pursuant to § 105.961.3 RSMo conducted a "contested case" hearing and on September 28, 2012 entered Findings of Fact Conclusions of Law and Order, (hereinafter "Final Decision and Order") there was probable cause Impey violated § 130.031.8 RSMo and Ordered Impey to pay a fine of $100.00 to the MEC. (L.F. pg. 8, ¶s 14 & 17; pgs. 29 - 37; pg. 52, ¶s 3 - 5 & pgs. 57 - 67). Impey, on October 5, 2012, filed, in the Circuit Court of Cole County, Missouri, a Petition for Review of the Final Decision and Order of the MEC (hereinafter "Petition"). (L.F. pgs. 5 - 37). Impey served the Petition on the MEC, its executive director and commissioners. (L.F. pgs. 38 - 50). The MEC filed a Motion to Dismiss on October 30, 2012. (L.F. pgs. 51 - 67). The court conducted a hearing on January 29, 2013, without keeping a record, that consisted solely of argument by the attorneys. (L.F. pg. 78). On February 4, 2013 the court entered an Order requesting further briefing by the parties. (L.F. pgs. 79 - 81). The parties supplied the further briefing. (L.F. pgs. 82 - 101). The court conducted a telephone conference call with the parties on March 18, 2013, without keeping a record. (L.F. pgs. 102 - 104). On June 14, 2013, the court dismissed Impey's

Petition. (L.F. 105 - 107). Impey filed a Motion for a New Trial or to Vacate, Reopen, Correct, Amend, or Modify the Judgment or for Relief from Judgment on July 5, 2013 and an Amended Motion for a New Trial or to Vacate, Reopen, Correct, Amend, or Modify the Judgment or for Relief from Judgment (both Motions hereinafter collectively referred to as "Motion") on July 11, 2013. (L.F. pgs. 108 - 121). The MEC filed a response to Impey's Motion on August 19, 2013. (L.F. pgs. 131 - 142). The court conducted a hearing on August 23, 2013, and, a record was kept of the proceeding. (L.F. pgs. 122 -124). On September 17, 2013 the court denied Impey's Motion. (L.F. pgs. 143 - 144). Impey filed his Notice of Appeal on September 23, 2013. (L.F. pgs. 145 - 149).

On February 14, 2012 the Missouri Supreme Court in ***Legends Bank vs. State of Missouri, 361 S.W.3d 383 (Mo Banc 2012)***, ruled § 105.961 RSMo 2010 (S.B. 844) was unconstitutional, and, presumably § 105.961 RSMO 1997 (S.B. 16) went back into effect. § 105.961 RSMo 2010 (S.B. 844) provided an appeal from the MEC's Final Decision and Order was to the Circuit Court. § 105.961 RSMO 1997 (S.B. 16) provides an appeal from the MEC's Final Decision and Order is to the Administrative Hearing Commission (hereinafter "AHC"). Impey filed his Petition in the Circuit Court. (L.F. pgs. 5 - 37). The MEC filed a Motion to Dismiss alleging Impey failed to exhaust his administrative remedies for failing to appeal to the AHC. Impey contends § 105.961 RSMO 1997 (S.B. 16) is unconstitutional in that it violates Article V, § 18 of the Missouri Constitution which provides for direct judicial review of "[A]ll final decisions, findings, rules and orders" of the

MEC, and, § 130.031.8 RSMo, is unconstitutional because it deprives, interferes with, substantially Infringes upon, or heavily burdens Impey's fundamental right of free political speech protected by the First Amendment to the United States Constitution and Article I § 8 of the Missouri Constitution. Jurisdiction is in this court. ***Art. V, § 3 of the Missouri Constitution***.

STATEMENT OF FACTS

The School District of Houston Missouri placed on the ballot of the August 2, 2011, election a 2 issue proposal (hereinafter "school tax levy referendum"):

A. should the Houston School District (hereinafter "HSD") annex itself to the Ozark Technical College taxing district (hereinafter "OTC"); and

B. if so, would the voters approve a .15¢ real and personal property tax to pay for the HSD annexing itself to the OTC. (L.F. pg. 5, ¶s 1 & 1A; pg. 2 ¶ 1B; & pgs. 11 - 21).

Impey opposed the annexation of the HSD to the OTC taxing district and the real and personal property tax to pay for the annexation. So, acting on his own, he:

1. hand painted a home made sign opposing the school tax levy referendum, and, placed it in his yard; and

2. composed and typed up 2 different "leaflets or flyers" on his home computer handing out the "leaflets or flyers" door to door, at public and private events and through a mass mailing to the registered voters in Houston, Missouri. (L.F. pg. 6, ¶s 2, 3, 4A, 4B & 4C). There was nothing in the hand painted sign or the homemade "leaflets or flyers" that was false, misleading, or libelous. (L.F. pg. 7, ¶ 6). The school tax levy referendum on the ballot in the August 2, 2011 election was defeated. (L.F. pg. 7, ¶ 6). Impey did not identify himself as the painter of his homemade sign or the author of his homemade "leaflets or flyers". (L.F. pg. 7, ¶ 7). Joe Richardson (hereinafter "Richardson") filed a complaint

against Impey with the MEC because Impey did not identify himself as the painter of the sign or the author of the "leaflets or flyers" by putting "paid for by John Impey" on his sign, leaflets or flyers. (L.F. pgs. 11 - 16). Richardson did not suggest Impey's sign or his "leaflets or flyers" contained anything that was that was false, misleading, or libelous. (L.F. pgs. 11 - 16). The MEC conducted an investigation. (L.F. pgs. 17 - 21). The MEC filed a complaint with itself, against Impey, accusing him of violating § 130.031.8 RSMo because he didn't put "paid for by John Impey" on "his leaflets or flyers". (L.F. pgs. 22 - 28). Impey filed an Answer and asserted as an affirmative defense his right under the First Amendment to the United States Constitution and Article I, § 8 of the Missouri Constitution to free speech, in particular political speech based upon *McIntyre vs. Ohio, 514 U.S. 334, 115 S.Ct. 1511, 131 L.Ed.2d 426 (1995).* (L.F. pg. 7, ¶ 12). The MEC conducted a hearing in a contested case on September 24, 2012, and, rendered a Final Decision and Order there was probable cause to believe Impey knowingly violated § 130.031.8 RSMo, and, Ordered Impey to pay the MEC a fine of one hundred dollars ($100.00). (L.F. pgs. 29 - 37; pg. 52, ¶ 4; pgs. 57 - 67).

At the time Impey painted his sign and distributed his leaflets or flyers, § 130.031, RSMo provided in relevant part:

> 8. Any person publishing, circulating, or distributing any printed matter relative to any candidate for public office or any ballot measure shall on the face of the printed matter identify in a clear and conspicuous manner the

person who paid for the printed matter with the words "Paid for by" followed by the proper identification of the sponsor pursuant to this section. For the purposes of this section, "printed matter" shall be defined to include any pamphlet, circular, handbill, sample ballot, advertisement, including advertisements in any newspaper or other periodical, sign, including signs for display on motor vehicles, or other imprinted or lettered material; but "printed matter" is defined to exclude materials printed and purchased prior to May 20, 1982, if the candidate or committee can document that delivery took place prior to May 20, 1982; any sign personally printed and constructed by an individual without compensation from any other person and displayed at that individual's place of residence or on that individual's personal motor vehicle; any items of personal use given away or sold, such as campaign buttons, pins, pens, pencils, book matches, campaign jewelry, or clothing, which is paid for by a candidate or committee which supports a candidate or supports or opposes a ballot measure and which is obvious in its identification with a specific candidate or committee and is reported as required by this chapter; and any news story, commentary, or editorial printed by a regularly published newspaper or other periodical without charge to a candidate, committee or any other person.

…

(4) In regard to any printed matter paid for by an individual or individuals, it shall be sufficient identification to print the name of the individual or individuals and the respective mailing address or addresses, except that if more than five individuals join in paying for printed matter it shall be sufficient identification to print the words "For a list of other sponsors contact:" followed by the name and address of one such individual responsible for causing the matter to be printed, and the individual identified shall maintain a record of the names and amounts paid by other individuals and shall make such record available for review upon the request of any person. No person shall accept for publication or printing nor shall such work be completed until the printed matter is properly identified as required by this subsection.

…

11. It shall be a violation of this chapter for any person required to be identified as paying for printed matter pursuant to subsection 8 of this section or paying for broadcast matter pursuant to subsection 9 of this section to refuse to provide the information required or to purposely provide false, misleading, or incomplete information.

This section was declared unconstitutional in *Legends Bank v. State, 361 S.W.3d 383 (Mo. banc 2013)*, and, the version in effect at the time of Impey's hearing before the MEC provided in relevant part:

> 8. Any person publishing, circulating, or distributing any printed matter relative to any candidate for public office or any ballot measure shall on the face of the printed matter identify in a clear and conspicuous manner the person who paid for the printed matter with the words "Paid for by" followed by the proper identification of the sponsor pursuant to this section. For the purposes of this section, "printed matter" shall be defined to include any pamphlet, circular, handbill, sample ballot, advertisement, including advertisements in any newspaper or other periodical, sign, including signs for display on motor vehicles, or other imprinted or lettered material; but "printed matter" is defined to exclude materials printed and purchased prior to May 20, 1982, if the candidate or committee can document that delivery took place prior to May 20, 1982; any sign personally printed and constructed by an individual without compensation from any other person and displayed at that individual's place of residence or on that individual's personal motor vehicle; any items of personal use given away or sold, such as campaign buttons, pins, pens, pencils, book matches, campaign jewelry, or clothing, which is paid for

by a candidate or committee which supports a candidate or supports or opposes a ballot measure and which is obvious in its identification with a specific candidate or committee and is reported as required by this chapter; and any news story, commentary, or editorial printed by a regularly published newspaper or other periodical without charge to a candidate, committee or any other person.

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10. The provisions of subsection 8 or 9 of this section shall not apply to candidates for elective federal office, provided that persons causing matter to be printed or broadcast concerning such candidacies shall comply with the requirements of federal law for identification of the sponsor or sponsors.

11. It shall be a violation of this chapter for any person required to be identified as paying for printed matter pursuant to subsection 8 of this section or paying for broadcast matter pursuant to subsection 9 of this section to refuse to provide the information required or to purposely provide false, misleading, or incomplete information.

On February 14, 2012 the Missouri Supreme Court in ***Legends Bank vs. State of Missouri, 361 S.W.3d 383 (Mo Banc 2012)***, ruled § 105.961 RSMo 2010 (S.B. 844) was unconstitutional, and, presumably § 105.961 RSMo 1997 (S.B. 16) went back into effect. § 105.961 RSMo 2010 (S.B. 844) provided an appeal from the MEC's Final Decision and Order was to the Circuit Court. § 105.961.3 RSMo 1997 (S.B. 16) provides an appeal from the MEC's Final Decision and Order is to the Administrative Hearing Commission (hereinafter "AHC"). Impey filed his Petition in the Circuit Court. (L.F. pgs. 5 - 37). Impey served the Petition on the MEC, its executive director and commissioners. (L.F. pgs. 38 - 50). The MEC filed a Motion to Dismiss alleging Impey failed to exhaust his administrative remedies by filing the Petition in the Circuit Court instead of with the AHC. (L.F. pgs. 51 - 67). The court conducted a hearing on January 29, 2013, without keeping a record, that

consisted solely of argument by the attorney's. (L.F. pg. 78). On February 4, 2013 the court entered an Order requesting further briefing by the parties. (L.F. pgs. 79 - 81). The parties supplied the further briefing. (L.F. pgs. 82 - 101). The court conducted a telephone conference call with the parties on March 18, 2013, without keeping a record. (L.F. pgs. 102 - 104). On June 14, 2013, the court dismissed Impey's Petition. (L.F. 105 - 107). Impey filed his Motion on July 5, 2013 and July 11, 2013. (L.F. pgs. 108 - 121). The MEC filed a response to Impey's Motion on August 19, 2013. (L.F. pgs. 131 - 142). The court conducted a hearing on August 23, 2013, and, a record was kept of the proceeding. (L.F. pgs. 122 -124). On September 17, 2013 the court denied Impey's Motion. (L.F. pgs. 143 - 144). Impey filed his Notice of Appeal on September 23, 2013. (L.F. pgs. 145 - 149).

POINTS RELIED ON

POINT - I

THE TRIAL COURT ERRED IN DISMISSING IMPEY'S PETITION FOR REVIEW, BECAUSE IMPEY DID NOT FAIL TO EXHAUST HIS ADMINISTRATIVE REMEDIES, IN THAT § 105.961 RSMO 1997 (S.B. 16) VIOLATES IMPEY'S CONSTITUTIONAL RIGHT GUARANTEED BY ARTICLE V, § 18 OF THE MISSOURI CONSTITUTION PROVIDING FOR DIRECT JUDICIAL REVIEW OF ALL FINAL DECISIONS, FINDINGS, RULES AND ORDERS OF ANY ADMINISTRATIVE OFFICER OR BODY EXISTING UNDER THE CONSTITUTION OR BY LAW, WHICH ARE JUDICIAL OR QUASI-JUDICIAL AND AFFECT PRIVATE RIGHTS

Asbury vs. Lombardi, 846 S.W.2d 196 (Mo. Banc 1993).

Lederer v. Department of Social Services, 825 S.W.2d 858 (Mo.App.W.D.1992)

Hilburn v. Staeden, 91 S.W.3d 607, 611 (Mo. Banc 2002)

Percy Kent Bag Co. v. Mo. Comm'n on Human Rights, 632 S.W.2d 480 (Mo. banc 1982)

Article V, § 18 Missouri Constitution

§ 105.961.3, RSMo 1997 (S.B. 16)

§ 536.100 RSMo

POINT - II

THE TRIAL COURT ERRED IN DISMISSING IMPEY'S PETITION FOR REVIEW BECAUSE § 130.031.8, RSMO IS UNCONSTITUTIONAL IN THAT IT DEPRIVES, INTERFERES WITH, SUBSTANTIALLY INFRINGES UPON, OR HEAVILY BURDENS IMPEY'S FUNDAMENTAL RIGHT OF FREE POLITICAL SPEECH PROTECTED BY THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I § 8 OF THE MISSOURI CONSTITUTION

McIntyre vs. Ohio, 514 U.S. 334, 345-46, 115 S.Ct. 1511, 1518, 131 L.Ed.2d 426 (1995)

Citizens United vs. Federal Election Com'n, 558 U.S. 310, 130 S.Ct. 876, 175 L.Ed.2d 753 (2010)

Talley v. California, 362 U.S. 60, 65, 80 S.Ct. 536, 539, 4 L.Ed.2d 559 (1960).

Shrink Missouri Government PAC v. Maupin, 892 F.Supp. 1246, 1255-56 (D.C. E.D. Mo. 1995) affirmed 71 F.3d 1422, certiorari denied 116 S.Ct. 2579, 518 U.S. 1033, 135 L.Ed.2d 1094.

First Amendment to the United States Constitution

Article I § 8 of the Missouri Constitution,

§ 130.031.8, RSMo

POINT - III

THE TRIAL COURT ERRED IN DISMISSING IMPEY'S PETITION FOR REVIEW BECAUSE THE MISSOURI ETHICS COMMISSION DID NOT HAVE THE STATUTORY AUTHORITY TO IMPOSE A $100.00 FINE ON IMPEY IN THAT § 105.961 RSMO 2010 (S.B. 844) AND § 105.961 RSMO 1997 (S.B. 16) ARE BOTH UNCONSTITUTIONAL LEAVING § 105.961 RSMO 1991 (S.B. 262) IN EFFECT AND THE MISSOURI ETHICS COMMISSION DOES NOT HAVE THE AUTHORITY UNDER § 105.961 RSMO 1991 (S.B. 262) TO ORDER IMPEY TO PAY A $100 FINE

Trout v. State, 231 S.W.3d 140, 148 (Mo. Banc 2007)

State ex rel. Daily Record Co. vs. Hartmann, 253 S.W. 991, 994 (Mo. Banc 1923)

State ex rel. Unnerstall v. Berkemeyer, 298 S.W.3d 513, 517 (Mo. Banc 2009)

Fritzsche v. East Texas Motor Freight Lines, 405 S.W.2d 541, 545 (Mo.App. E.D. 1966)

105.961 RSMo, 1991 (S.B. 262)

POINT - IV

THE TRIAL COURT ERRED IN DISMISSING IMPEY'S PETITION FOR REVIEW BECAUSE IMPEY WAS AGGRIEVED BY THE MISSOURI ETHICS COMMISSION'S FINAL DECISION AND ORDER IN THAT IMPEY HAS A SPECIFIC AND LEGALLY COGNIZABLE INTEREST IN THE MISSOURI ETHICS COMMISSION'S FINAL DECISION AND ORDER WHICH HAS A DIRECT AND SUBSTANTIAL IMPACT ON IMPEY THAT OPERATES IMMEDIATELY, PREJUDICIALLY AND DIRECTLY UPON IMPEY'S PERSONAL AND PROPERTY RIGHTS OR INTERESTS

Davis v. St. Charles County, 250 S.W.3d 408, 412 (Mo.App. E.D. 2008)

State ex rel. St. Louis Retail Group v. Kraiberg, 343 S.W.3d 712, 716-17 (Mo.App. E.D. 2011)

Schweich v. Nixon, 408 S.W.3d 769, 774 fn. # 5 (Mo. Banc 2013)

Percy Kent Bag Co. v. Mo. Comm'n on Human Rights, 632 S.W.2d 480, 484 (Mo. banc 1982)

§ 105.961.3, RSMo 1997 (S.B. 16)

First Amendment to the United States Constitution

Article I § 8 of the Missouri Constitution

ARGUMENT - I

THE TRIAL COURT ERRED IN DISMISSING IMPEY'S PETITION FOR REVIEW, BECAUSE IMPEY DID NOT FAIL TO EXHAUST HIS ADMINISTRATIVE REMEDIES, IN THAT § 105.961 RSMO 1997 (S.B. 16) VIOLATES IMPEY'S CONSTITUTIONAL RIGHT GUARANTEED BY ARTICLE V, § 18 OF THE MISSOURI CONSTITUTION PROVIDING FOR DIRECT JUDICIAL REVIEW OF ALL FINAL DECISIONS, FINDINGS, RULES AND ORDERS OF ANY ADMINISTRATIVE OFFICER OR BODY EXISTING UNDER THE CONSTITUTION OR BY LAW, WHICH ARE JUDICIAL OR QUASI-JUDICIAL AND AFFECT PRIVATE RIGHTS

Standard of Review

The standard of review for constitutional challenges to a statute is *de novo.* ***City of Arnold v. Tourkakis, 249 S.W.3d 202, 204 (Mo. Banc 2008)***; ***Hodges v. City of St. Louis, 217 S.W.3d 278, 279 (Mo. banc 2007)***. A statute is presumed to be valid and will not be declared unconstitutional unless it clearly contravenes some constitutional provision. ***City of Arnold v. Tourkakis, 249 S.W.3d 202, 204 (Mo. Banc 2008)***; ***Doe v. Phillips, 194 S.W.3d 833, 841 (Mo. banc 2006)***. When a case is decided on a motion to dismiss, prior to answer and discovery, as in this case, the appellate court assumes the facts averred in the petition are true and are construed liberally in favor of appellant. ***Johnson v. Kraft General Foods, Inc.,***

885 S.W.2d 334, 335 (Mo. Banc 1994); Gibson v. Brewer, 952 S.W.2d 239, 243 (Mo. Banc 1997).

§ 105.961 RSMo was enacted in 1991, as a codification of Senate Bill 262 (hereinafter "S.B. 262"). § 105.961 RSMo was amended in 1997 by (S.B. 16). § 105.961 RSMo was again amended in 2010 by (S.B. 844). All of the portions of (S.B. 844) related to campaign finance, ethics and keys to the capitol dome, which included § 105.961 RSMo, were declared unconstitutional on February 14, 2012. ***Legends Bank v. State, 361 S.W.3d 383, 387 (Mo. Banc 2012)***. "An unconstitutional statute is no law and confers no rights. ***Trout v. State, 231 S.W.3d 140, 148 (Mo. Banc 2007)***. An unconstitutional amendment to a statute is no amendment and the statute remains as is. ***State ex rel. Daily Record Co. vs. Hartmann, 253 S.W. 991, 994 (Mo. Banc 1923)***. This is true from the date of its enactment, and not merely from the date of the decision so branding it. *State ex rel. Miller v. O'Malley,* 342 Mo. 641, 117 S.W.2d 319, 324 (Mo. banc 1938); *see also Norton v. Shelby County,* 118 U.S. 425, 442, 6 S.Ct. 1121, 30 L.Ed. 178 (1886). ***Trout v. State, 231 S.W.3d 140, 148 (Mo. Banc 2007)***. Therefore on September 24, 2012 when the MEC, pursuant to § 105.961.3 RSMo, conducted a "contested case" hearing, § 105.961 RSMo 1997 (S.B. 16) was clearly in effect, not § 105.961 RSMo 2010 (S.B. 844). § 105.961.3, RSMo 1997 (S.B. 16) provides:

> When the commission concludes, based on the report from the special investigator or based on an audit 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 7 of this section. After the commission determines by a vote of at least four members of the commission that probable cause exists that a violation has occurred, **and the commission has referred the findings and conclusions to the appropriate disciplinary authority over the person subject of the report**, the subject of the report **may appeal the determination of the commission to the administrative hearing commission**. Such appeal shall stay the action of the Missouri ethics commission. Such appeal shall be filed not later than the fourteenth day after

the subject of the commission's action receives actual notice of the commission's action. (Emphasis added).

This requires Impey to have his case heard first by the MEC and then again by the AHC. The Office of Administration is an administrative agency created by Article IV, § 12 of the Missouri Constitution. The MEC and AHC are administrative agencies under the Office of Administration. ***§ 105.955.1 & § 621.015, RSMo***.

All final decisions, findings, rules and orders on any administrative officer or body existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights, **shall be subject to direct review by the courts** as provided by law; and such review shall include the determination whether the same are authorized by law, and in cases in which a hearing is required by law, whether the same are supported by competent and substantial evidence upon the whole record. Unless otherwise provided by law, administrative decisions, findings, rules and orders subject to review under this section or which are otherwise subject to direct judicial review, shall be reviewed in such manner and by such court as the supreme court by rule shall direct and the court so designated shall, in addition to its other jurisdiction, have jurisdiction to hear and determine any such review proceeding. ***Article V, § 18 Missouri Constitution.*** (Emphasis added).

§ 105.961.3, RSMo 1997 (S.B. 16) violates Article V, § 18 of the Missouri Constitution. A state administrative agency can perform adjudicative functions, such as hearing contested cases, so long as the agency's decision is subject to "direct review" by the courts. ***Asbury vs. Lombardi, 846 S.W.2d 196, 200 (Mo. Banc 1993)***. Review by a second administrative agency, such as the AHC, is not "direct review by the courts". ***Id. at 200-201.***

> The quintessential power of the judiciary is the power to make *final* determinations of questions of law. *Marbury v. Madison,* 1 Cranch (5 U.S.) 137, 2 L.Ed. 60 (1803); *Howlett v. Social Security Comm'n,* 149 S.W.2d 806, 810 (Mo. banc 1941); *Lederer v. State Dept. of Social Servs.,* 825 S.W.2d 858, 863 (Mo.App.1992). This *power* is a nondelegable power resting exclusively with the judiciary. The legislature "has no authority to create any other tribunal and invest it with judiciary power." *State ex rel. Haughey v. Ryan,* 182 Mo. 349, 81 S.W. 435, 436 (1904). Thus, while the legislature may allow for judicial or quasi-judicial decision-making by legislative or executive (administrative) agencies, it may not preclude judicial review of those decisions. Nor may the legislature alter the principal power of the judiciary to make the *final* review. ***Id***.

§ 105.961.3, RSMo 1997 (S.B. 16) requires review of the Final Decision and Order of the MEC, by the AHC, thus precluding direct judicial review and is therefore unconstitutional as violating Art. V, § 18 of the Missouri Constitution of 1945. ***Id. at 201***.

> The term "direct review" is not defined in the Constitution. Under traditional rules of construction, undefined words are given their plain and ordinary meaning as found in the dictionary in order to ascertain the intent of lawmakers. *St. Louis Sewer Dist. v. Sanders,* 807 S.W.2d 87 (Mo. banc 1991); *Tannenbaum v. City of Richmond Heights,* 704 S.W.2d 227 (Mo. banc 1986); *Buechner v. Bond,* 650 S.W.2d 611 (Mo. banc 1983). Webster's International Dictionary of 1934 (rev.1945), was the dictionary in use at the time the provision was written. It defines the word "direct", when used as an adjective, as "[i]mmediate; marked by the absence of an intervening agency or influence." The more recent Webster's Third International Dictionary (1966) gives a similar definition. It defines "direct" as "operating without an intervening agency or step.". ***Id. at 202***.

The decision of the MEC is "final", and it must be immediately reviewed by the circuit court without an intervening level of review such as the AHC. ***Id***. The hearing before the MEC was a contested case. (See § 105.961.3, RSMo 1997 (S.B. 16) in bold above).

The court reasoned Impey was not "aggrieved" by the decision of the MEC because:

1. § 105.961.4, RSMo 1997 (S.B. 16) merely permits the MEC to:
    a. advise Impey of his obligation to pay the $100.00 fine;
    b. request Impey to comply by paying the $100.00 fine;

c. advise Impey he may be subject to judicial enforcement of the $100.00 fine; and

d. issue a letter of concern or reprimand to Impey; and

2. § 105.961.5, RSMo 1997 (S.B. 16) permits the MEC to seek judicial enforcement of the $100.00 fine. (L.F. 105 -106).

The court opined the probable cause determination by the MEC was just a condition precedent to judicial enforcement, but it did not determine the legal rights, duties or privileges of Impey.

> **Any person who has exhausted all administrative remedies provided by law and who is aggrieved by a final decision in a contested case, whether such decision is affirmative or negative in form, shall be entitled to judicial review** thereof, as provided in sections 536.100 to 536.140, unless some other provision for **judicial review** is provided by statute; provided, however, that nothing in this chapter contained shall prevent any person from attacking any void order of an agency at any time or in any manner that would be proper in the absence of this section. If the agency or any board, other than the administrative hearing commission, established to provide independent review of the decisions of a department or division that is authorized to promulgate rules and regulations under this chapter fails to issue a final decision in a contested case within the earlier of:

(1) Sixty days after the conclusion of a hearing on the contested case; or

(2) One hundred eighty days after the receipt by the agency of a written request for the issuance of a final decision,

then the person shall be considered to have exhausted all administrative remedies and shall be considered to have received a final decision in favor of the agency and shall be entitled to immediate judicial review as provided in sections 536.100 to 536.140 or other provision for judicial review provided by statute. In cases, whether contested or not, where the law provides for an independent review of an agency's decision by a board other than the administrative hearing commission and further provides for a de novo review of the board's decision by the circuit court, a party aggrieved by the agency's decision may, within thirty days after it receives notice of that decision, waive independent review by the board and instead file a petition in the circuit court for the de novo review of the agency's decision. **The party filing the petition under this section shall be considered to have exhausted all administrative remedies**. ***§ 536.100 RSMo***.

Chapter 536 implements Article V, § 18 of the Missouri Constitution and applies only to "contested cases in which legal rights, duties or privileges of specific parties are required by law to be determined after a hearing." ***Karzin v. Collett, 562 S.W.2d 397, 399***

(Mo.App.1978); ***Medley v. Missouri State Highway Patrol, 672 S.W.2d 169, 171 (Mo.App. E.D. 1984)***.

> Section 536.100, RSMo requires a final decision in a contested case before a person is entitled to judicial review. Section 536.100 reads, "Any person who has exhausted all administrative remedies provided by law and who is aggrieved by a *final decision* in a contested case ... shall be entitled to judicial review[.]" (Emphasis added.) An agency " 'decision is final if the agency arrived at a terminal, complete resolution of the case.' " ***Buchheit, Inc. v. Missouri Com'n on Human Rights, 215 S.W.3d 268, 274 (Mo.App. W.D. 2007)***.

A final reviewable decision is found when the agency arrives at a terminal, complete resolution of the case before it. ***Id.***; ***Dore & Assoc. Contr. v. Dept. of Labor, 810 S.W.2d 72, 75-76 (Mo.App. W.D.1990)***. An order lacks finality in this sense if it remains tentative, provisional or contingent, subject to recall, revision or reconsideration by the issuing agency. ***Id.*** ***Holigan Homes Missouri, Ltd. v. City of Jackson, 997 S.W.2d 109, 111 (Mo.App. E.D.,1999)***. We know the MEC's Final Decision and Order is a final decision of the MEC because the 1st line of their Final Decision and Order states, "[t]his is the final decision and order of the Missouri Ethics Commission following a hearing on a complaint filed by Petitioner, by and through counsel, pursuant to Section 105.961, RSMo, and, Chapter 536, RSMo." (L.F. 29, 1st sentence). The MEC entered a Final Decision and Order to Impey to

pay a $100.00 fine for exercising his right to political speech guaranteed by the 1st Amendment to the U.S. Constitution and Article I, § 8 of the Missouri Constitution. Unless Impey appeals the MEC's Final Decision and Order, the only thing left for the MEC is enforcement of their Order.

The power to render a judgment is the quintessential function of a court. ***Division of Classification and Treatment v. Wheat, 829 S.W.2d 581, 583 (Mo.App. W.D. 1992)***; ***Lederer v. Department of Social Services, 825 S.W.2d 858, 862 (Mo.App.W.D.1992)*** (reversed by ***Asbury vs. Lombardi, 846 S.W.2d 196, 200 (Mo. Banc 1993)*** but the court's discussion of the nature of, and differences between, administrative and judicial review remains good law, however; the Supreme Court has continued to cite this discussion post-*Asbury*. *See State ex rel. Hilburn v. Staeden,* 91 S.W.3d 607, 612 (Mo. banc 2002); *Murray v. Mo. Hwy. & Transp. Comm'n,* 37 S.W.3d 228, 234 (Mo. banc 2001); *Chastain v. Chastain,* 932 S.W.2d 396, 399 n. 15 (Mo. banc 1996) ***State Bd. of Registration for the Healing Arts v. Trueblood, 368 S.W.3d 259, 267 fn.# 6 (Mo.App. W.D. 2012)***). The AHC, however, has no power to render a judgment. ***Lederer v. State, Dept. of Social Services, Div. of Aging, 825 S.W.2d 858, 862 (Mo.App. W.D. 1992)***. That is the quintessential function of a court. ***Percy Kent Bag Co. v. Missouri Comm'n on Human Rights, 632 S.W.2d 480, 484 (Mo. banc 1982)***. A judgment is the *judicial* act of a *court.* ***Fleming v. Clark Township of Chariton County, 357 S.W.2d 940, 942[2–4] (Mo.1962)***. (emphasis added). The AHC is not a court, but "an adjunct executive agency", that exercises agency adjudicative power, a "power [that]

extends only to the ascertainment of facts and the application of existing law" to them. ***State Tax Comm'n v. Administrative Hearing Comm'n, 641 S.W.2d 69, 75 (Mo Banc 1982)***. The AHC simply performs the same role "as any administrative hearing officer authorized to hear contested cases within an agency". ***Lederer v. Department of Social Services, 825 S.W.2d 858, 862 (Mo.App.W.D.1992)***. The function intended by the legislature for the AHC is to render, on the evidence heard, the *administrative decision* of the agency. ***J.C. Nichols Co. v. Director of Revenue, 796 S.W.2d 16, 20[7] (Mo. banc 1990)*** (emphasis added). In that exercise, the AHC may discharge quasi-judicial, or even judicial powers, but only as incidents necessary to the discharge of the administrative function for which the law designed the administrative body. ***State Tax Comm'n v. Administrative Hearing Comm'n, 641 S.W.2d 69, 75 (Mo Banc 1982)***. The AHC cannot pronounce a judgment and carry it into effect. ***Lederer v. Department of Social Services, 825 S.W.2d 858, 862 (Mo.App.W.D.1992)***. Only a court can enforce an administrative order. ***Carr v. North Kansas City Beverage Co., 49 S.W.3d 205, 207 (Mo.App. W.D.,2001)***; ***Henry vs. Manzella, 356 Mo. 305, 201 S.W.2d 457, 460 (Mo. Banc 1947)***; ***Percy Kent Bag Co. v. Mo. Comm'n on Human Rights, 632 S.W.2d 480, 484 (Mo. banc 1982)***. If the MEC's administrative decision is not appealed, and Impey doesn't voluntarily comply, the MEC must obtain a judgment from a court to enforce its order. ***Percy Kent Bag Co. v. Mo. Comm'n on Human Rights, 632 S.W.2d 480, 484 (Mo. banc 1982)***; ***§ 105.961.5, RSMo 1997 (S.B. 16) or § 105.961.6, RSMo 2010 (S.B. 844)*** (depending upon which version of the statute you use).

> … this Court has previously recognized the distinction between judicial enforcement of an administrative decision and the attempted legislative authorization of non-judicial judgments. In *Henry v. Manzella,* 356 Mo. 305, 201 S.W.2d 457 (banc 1947), this Court held that a statutory provision that allowed an administrative order of assessment, upon filing in the circuit court, to be treated in all respects as a final judgment of the circuit court, did not authorize administrative entry of a circuit court judgment or constitute the unlawful grant of judicial power. *Id.* at 460. The Court reasoned that the provision merely permitted judicial enforcement of the order and that "[s]uch bare authority calls for no exercise of judicial power...." Id. *Accord* Div. of Employment Sec. v. Cusumano, 809 S.W.2d 113, 115 (Mo.App.1991).
>
> As in *Manzella,* the statutory grant of authority to enforce an administrative order by the same means used to enforce a judgment does not represent executive branch encroachment on the exclusive power of the judiciary. Only a court can enforce administrative orders so that they have the effect of a judgment. *See Percy,* 632 S.W.2d at 484. ***Hilburn v. Staeden, 91 S.W.3d 607, 611 (Mo. Banc 2002)***.

"Thus, administrative agencies do not exceed their constitutional authority by utilizing the court system as a means of enforcing such orders, provided that the orders are subject to direct review by the courts." ***Henry vs. Manzella, 356 Mo. 305, 201 S.W.2d 457, 460 (Mo.***

Banc 1947); ***Asbury v. Lombardi, 846 S.W.2d 196, 200 (Mo. banc 1993)***. ***State ex rel. Hilburn v. Staeden, 91 S.W.3d 607, 611 (Mo. Banc 2002)***.

A party aggrieved by an Administrative Order may obtain judicial review of that order pursuant to § 536.100 RSMo. ***Percy Kent Bag Co. v. Mo. Comm'n on Human Rights, 632 S.W.2d 480, 484 (Mo. banc 1982)***. After judicial review in the circuit court under Chapter 536, an administrative order becomes "a judgment from a court to be enforced." ***Division of Classification and Treatment v. Wheat, 829 S.W.2d 581, 583 (Mo.App. W.D. 1992)***; ***Percy Kent Bag Co. v. Missouri Comm'n on Human Rights, 632 S.W.2d 480, 484 (Mo. banc 1982)***. A judgment rendered after judicial review stands on equal footing with any other judgment. ***Id***. After judicial review, there is a judgment from a court to be enforced. ***Id***.

Impey was aggrieved by the MEC's Final Decision and Order. (See Argument IV, Infra.)

Since Impey is aggrieved by the MEC's Final Decision and Order, he is entitled to direct review of the Final Decision and Order in court without an intermediate review by the AHC. ***Article V, § 18 Missouri Constitution***. § 105.961, RSMo 1997 (S.B. 16) is unconstitutional.

ARGUMENT - II

THE TRIAL COURT ERRED IN DISMISSING IMPEY'S PETITION FOR REVIEW BECAUSE § 130.031.8, RSMO IS UNCONSTITUTIONAL IN THAT IT DEPRIVES, INTERFERES WITH, SUBSTANTIALLY INFRINGES UPON, OR HEAVILY BURDENS IMPEY'S FUNDAMENTAL RIGHT OF FREE POLITICAL SPEECH PROTECTED BY THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I § 8 OF THE MISSOURI CONSTITUTION

Standard of Review

§ 130.031.8, RSMo deprives, interferes with, substantially infringes upon, or heavily burdens Impey's fundamental right to free political speech protected by the First Amendment to the United States Constitution and Article I § 8 of the Missouri Constitution, and, therefore this court applies the test of strict, heightened or exacting scrutiny to determine whether § 130.031.8, RSMo is unconstitutional. ***Meyer v. Grant, 486 U.S. 414, 420, 108 S.Ct. 1886, 1891, 100 L.Ed.2d 425 (1988)***; ***McIntyre vs. Ohio, 514 U.S. 334, 345-46, 115 S.Ct. 1511, 1518, 131 L.Ed.2d 426 (1995)***; ***Shrink Missouri Government PAC v. Maupin, 892 F.Supp. 1246, 1249 (D.C. E.D. Mo. 1995)*** affirmed 71 F.3d 1422, certiorari denied 116 S.Ct. 2579, 518 U.S. 1033, 135 L.Ed.2d 1094; ***Herndon v. Tuhey, 857 S.W.2d 203, 209 (Mo. Banc 1993)***; ***San Antonio Independent School District v. Rodriguez, 411***

U.S. 1, 37–38, 93 S.Ct. 1278, 1299, 36 L.Ed.2d 16 (1973); ***Citizens United vs. Federal Election Com'n, 558 U.S. 310, 366-67 130 S.Ct. 876, 914, 175 L.Ed.2d 753 (2010)***. The standard of review for constitutional challenges to a statute is *de novo*. ***City of Arnold v. Tourkakis, 249 S.W.3d 202, 204 (Mo. Banc 2008)***; ***Hodges v. City of St. Louis, 217 S.W.3d 278, 279 (Mo. banc 2007)***. If a statute conflicts with one or more constitutional provisions, the Court must hold the statute invalid. ***State v. Kinder, 89 S.W.3d 454, 459 (Mo. banc 2002)***.

On April 27, 1988, Margaret McIntyre distributed leaflets to persons attending a public meeting at the Blendon Middle School in Westerville, Ohio to hear the superintendent of schools discuss an imminent levy on a proposed school tax levy. ***McIntyre vs. Ohio, 514 U.S. 334, 337, 115 S.Ct. 1511, 1514, 131 L.Ed.2d 426 (1995)***. The leaflets were not false, misleading, or libelous but expressed Mrs. McIntyre's opposition to the levy. ***Id***. Mrs. McIntyre composed and printed the leaflets on her home computer and paid a professional printer to make additional copies. ***Id***. Some of the handbills identified her as the author; others merely purported to express the views of "CONCERNED PARENTS AND TAX PAYERS." ***Id***. Except for the help provided by her son and a friend, who placed some of the leaflets on car windshields in the school parking lot, Mrs. McIntyre acted independently. ***Id***. The proposed school levy opposed by Mrs. Mcintyre was defeated at the next two elections, but it finally passed on its third try in November 1988. ***Id. at 338***. Five months later, a school official filed a complaint with the Ohio Elections Commission (hereinafter "commission")

charging that Mrs. McIntyre's distribution of unsigned leaflets violated § 3599.09(A) of the Ohio Code. ***Id***. The commission agreed and imposed a fine of $100. ***Id***.

Ohio Rev.Code Ann. § 3599.09(A) (1988) provided:

> No person shall write, print, post, or distribute, or cause to be written, printed, posted, or distributed, a notice, placard, dodger, advertisement, sample ballot, or any other form of general publication which is designed to promote the nomination or election or defeat of a candidate, or to promote the adoption or defeat of any issue, or to influence the voters in any election, or make an expenditure for the purpose of financing political communications through newspapers, magazines, outdoor advertising facilities, direct mailings, or other similar types of general public political advertising, or through flyers, handbills, or other nonperiodical printed matter, unless there appears on such form of publication in a conspicuous place or is contained within said statement the name and residence or business address of the chairman, treasurer, or secretary of the organization issuing the same, or the person who issues, makes, or is responsible therefor. The disclaimer 'paid political advertisement' is not sufficient to meet the requirements of this division. When such publication is issued by the regularly constituted central or executive committee of a political party, organized as provided in Chapter 3517. of the Revised Code, it shall be sufficiently identified if it bears the name of the

committee and its chairman or treasurer. No person, firm, or corporation shall print or reproduce any notice, placard, dodger, advertisement, sample ballot, or any other form of publication in violation of this section. This section does not apply to the transmittal of personal correspondence that is not reproduced by machine for general distribution.

The secretary of state may, by rule, exempt, from the requirements of this division, printed matter and certain other kinds of printed communications such as campaign buttons, balloons, pencils, or like items, the size or nature of which makes it unreasonable to add an identification or disclaimer. The disclaimer or identification, when paid for by a campaign committee, shall be identified by the words 'paid for by' followed by the name and address of the campaign committee and the appropriate officer of the committee, identified by name and title.

Neither Ohio's statute nor § 130.031.8, RSMo contain language limiting its application to fraudulent, false, or libelous statements. ***McIntyre vs. Ohio, 514 U.S. 334, 344, 115 S.Ct. 1511, 1517, 131 L.Ed.2d 426 (1995)***; ***Shrink Missouri Government PAC v. Maupin, 892 F.Supp. 1246, 1255-56 (D.C. E.D. Mo. 1995)*** affirmed 71 F.3d 1422, certiorari denied 116 S.Ct. 2579, 518 U.S. 1033, 135 L.Ed.2d 1094. The statutes can not be justified as a means to prevent the dissemination of untruths. ***Id***. Both statutes plainly apply even when there is no hint of falsity or libel. ***Id***.

Both states' statutes clearly apply only to unsigned documents designed to influence voters in an election. ***Id***. Both states' statutes are regulations of pure speech, applying evenhandedly to advocates of differing viewpoints, directly regulating the content of speech. ***Id. at 345 & 1518***. Every written document covered by both statutes must contain the name and residence or business address of … the person who paid for or is responsible therefor. ***Ohio Rev.Code Ann. § 3599.09(A) (1988) & § 130.031.8, RSMo***. The documents which must bear these identifying "paid for by" disclosures are defined by their content-only publications containing speech relative to an election. ***McIntyre vs. Ohio, 514 U.S. 334, 345, 115 S.Ct. 1511, 1518, 131 L.Ed.2d 426 (1995)***.

The speech regulated by both states' statutes is at the core of the protection afforded by the First Amendment which does not need to center on a political candidate for office. ***McIntyre vs. Ohio, 514 U.S. 334, 345 & 347, 115 S.Ct. 1511, 1518-19, 131 L.Ed.2d 426 (1995)***.

> Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order 'to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' Roth v. United States, 354 U.S. 476, 484 [77 S.Ct. 1304, 1308, 1 L.Ed.2d 1498] (1957). Although First Amendment protections are not confined to 'the

exposition of ideas,' Winters v. New York, 333 U.S. 507, 510 [68 S.Ct. 665, 667, 92 L.Ed. 840] (1948), 'there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs, ... of course includ[ing] discussions of candidates....' Mills v. Alabama, 384 U.S. 214, 218 [86 S.Ct. 1434, 1437, 16 L.Ed.2d 484] (1966). This no more than reflects our 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,' New York Times Co. v. Sullivan, 376 U.S. 254, 270 [84 S.Ct. 710, 721, 11 L.Ed.2d 686] (1964). In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation. As the Court observed in Monitor Patriot Co. v. Roy, 401 U.S. 265, 272 [91 S.Ct. 621, 625, 28 L.Ed.2d 35] (1971), 'it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office.' " Buckley v. Valeo, 424 U.S. 1, 14-15, 96 S.Ct. 612, 632, 46 L.Ed.2d 659 (1976) (per curiam). ***McIntyre vs. Ohio, 514 U.S. 334, 346-47, 115 S.Ct. 1511, 1519, 131 L.Ed.2d 426 (1995)***.

Issue based elections such as the school tax referendums that Mrs. McIntyre & Impey sought to influence through their handbills "is at the heart of the First Amendment's protection".

First Nat. Bank of Boston v. Bellotti, 435 U.S. 765, 776-777, 98 S.Ct. 1407, 1415-1416, 55 L.Ed.2d 707 (1978); McIntyre vs. Ohio, 514 U.S. 334, 347, 115 S.Ct. 1511, 1519, 131 L.Ed.2d 426 (1995). The speech in which Mrs. McIntyre & Impey engaged, handing out leaflets in the advocacy of a politically controversial viewpoint, is the essence of First Amendment expression. ***Id***.; ***International Soc. for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 677-78, 112 S.Ct. 2701, 2705, 120 L.Ed.2d 541 (1992); Lovell v. City of Griffin, 303 U.S. 444, 451-52, 58 S.Ct. 666, 669, 82 L.Ed. 949 (1938)***. Advocacy in the heat of a controversial referendum vote strengthens the protection afforded to Impey and Mrs. McIntyre's expression: Urgent, important, and effective speech can be no less protected than impotent speech, lest the right to speak be relegated to those instances when it is least needed. ***Id***.; ***Terminiello v. Chicago, 337 U.S. 1, 4, 69 S.Ct. 894, 895, 93 L.Ed. 1131 (1949)***. No form of speech is entitled to greater constitutional protection than Mrs. McIntyre's or Impey's. ***Id***.

When informing the electorate means nothing more than additional information that may either buttress or undermine the argument in a document, the identity of the speaker is no different from other components of the document's content that the author is free to include or exclude. ***McIntyre vs. Ohio, 514 U.S. 334, 348, 115 S.Ct. 1511, 1519, 131 L.Ed.2d 426 (1995).*** Providing voters with additional relevant information does not justify a state requirement that a writer make statements or disclosures they would otherwise omit. ***Id. at 1520***. § 130.031 contains requirements that all print or broadcast matter relating to

candidates or ballot issues contain a "paid for by" legend identifying the source of the matter. … The Court agrees that McIntyre calls into question the "paid for by" requirement … . ***Shrink Missouri Government PAC v. Maupin, 892 F.Supp. 1246, 1254-55 (D.C. E.D. Mo. 1995)*** affirmed 71 F.3d 1422, certiorari denied 116 S.Ct. 2579, 518 U.S. 1033, 135 L.Ed.2d 1094. States may not compel members of groups engaged in the dissemination of ideas to be publicly identified. ***Bates v. City of Little Rock, 361 U.S. 516, 522-25, 80 S.Ct. 412, 416-17, 4 L.Ed.2d 480 (1960); N.A.A.C.P. v. State of Alabama, 357 U.S. 449, 462, 78 S.Ct. 1163, 1171, 2 L.Ed.2d 1488 (1958)***. The reason for those holdings was that identification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance. ***Talley v. California, 362 U.S. 60, 65, 80 S.Ct. 536, 539, 4 L.Ed.2d 559 (1960)***. An identification requirement tends to restrict freedom to distribute information and thereby freedom of expression. ***Talley v. California, 362 U.S. 60, 64, 80 S.Ct. 536, 538, 4 L.Ed.2d 559 (1960)***. The First Amendment of the United States Constitution protects the right to engage in anonymous communication. ***Malibu Media, LLC v. John Does 1-16, 902 F.Supp.2d 690, 698 (E.D. Pa., 2012)***. The right to distribute pamphlets anonymously was recognized in *McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 115 S.Ct. 1511, 131 L.Ed.2d 426 (1995)*. ***Watchtower Bible and Tract Society of New York, Inc. v. Village of, 536 U.S. 150, 159, 122 S.Ct. 2080, 2086, 153 L.Ed.2d 205 (2002)***.

Our decision in *McIntyre v. Ohio Elections Comm'n,* 514 U.S. 334, 115 S.Ct. 1511, 131 L.Ed.2d 426 (1995), is instructive here. The complainant in

> *McIntyre* challenged an Ohio law that prohibited the distribution of anonymous campaign literature. The writing in question was a handbill urging voters to defeat a ballot issue. Applying "exacting scrutiny" to Ohio's fraud prevention justifications, we held that the ban on anonymous speech violated the First Amendment. See *id.,* at 347, 357, 115 S.Ct. 1511. ***Buckley v. American Constitutional Law Foundation, Inc., 525 U.S. 182, 199, 119 S.Ct. 636, 645-46, 142 L.Ed.2d 599 (1999)***.

If the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech. ***Citizens United vs. Federal Election Com'n, 558 U.S. 310, 349 130 S.Ct. 876, 904, 175 L.Ed.2d 753 (2010)***. When Government seeks to use its full power, including the criminal law, to command where a person may get his or her information or what distrusted source he or she may not hear, it uses censorship to control thought. ***Citizens United vs. Federal Election Com'n, 558 U.S. 310, 356 130 S.Ct. 876, 908, 175 L.Ed.2d 753 (2010)***. This is unlawful. ***Id***. The First Amendment confirms the freedom to think for ourselves. ***Id***. Congress may not abridge the "right to anonymous speech" based on the " 'simple interest in providing voters with additional relevant information,' " *id.,* at 276, 124 S.Ct. 619 (quoting *McIntyre v. Ohio Elections Comm'n,* 514 U.S. 334, 348, 115 S.Ct. 1511, 131 L.Ed.2d 426 (1995)). ***Citizens United vs. Federal Election Com'n, 558 U.S. 310, 480, 130 S.Ct. 876, 980, 175 L.Ed.2d 753 (2010)***.

Both Ohio' and Missouri's statutes infringe upon the freedom of speech protected by the First Amendment to the United States Constitution and Article I § 8 of the Missouri Constitution. ***McIntyre vs. Ohio, 514 U.S. 334, 356, 115 S.Ct. 1511, 1523, 131 L.Ed.2d 426 (1995).*** The Ohio and Missouri statutes prohibiting the distribution of anonymous campaign literature violate the first amendment. ***McIntyre v. Ohio Elections Commission, 514 U.S. 334, 115 S.Ct. 1511, 131 L.Ed.2d 426 (1995)***. The Court found that the State of Ohio could not justify its prohibition of anonymous handbills based on an interest in preventing fraud or libel or an interest in providing the electorate with relevant information. ***Id***. The Court noted that the Ohio statute would reach handbills that were not even arguably false or misleading and that if false or misleading advertisements were truly the target of the statute, it should have been more narrowly tailored to reach only those advertisements. ***Id***.

The U.S. District Court for the Eastern District of Missouri analyzed an earlier version of § 130.031.8, RSMo and said,

> There can be no doubt that the Missouri provision requires a speaker to "make statements or disclosures she would otherwise omit." The defendants argue that the Missouri statute at issue here is narrowly tailored to achieve a compelling state interest in deterring false statements by candidates for public office and making those candidates accountable for materials put out by their campaigns. The undersigned agrees with defendants that the State may legitimately wish to protect the public from the evil hypothesized, specifically,

that a candidate's campaign committee might make false statements about an opponent, which the candidate could then deny having approved. However, the Court finds that the State has failed to show either that this desire rises to the level of a compelling need or that this statute is narrowly tailored to meet that need. There has been absolutely no showing by the State that false advertising by campaign committees is a major electoral problem. The statute by its terms applies only to statements made by a candidate or a candidate's campaign committee. It does not apply to statements made by political action committees, industry lobbyists, "public interest" groups or others, anonymous or named, which are surely the source of most "deniable" negative campaigning. The State has provided no evidence of even a single instance where a campaign committee made a false statement which the candidate later disavowed. Nor has the state provided any evidence of an increase in false advertising or fraud in its political elections. It has simply decried "negative campaigning", in general, and while the Court might agree that negative campaigning is distasteful, that is not a sufficient basis for interfering with core first amendment rights. ***Shrink Missouri Government PAC v. Maupin, 892 F.Supp. 1246, 1255-56 (D.C. E.D. Mo. 1995)*** affirmed 71 F.3d 1422, certiorari denied 116 S.Ct. 2579, 518 U.S. 1033, 135 L.Ed.2d 1094.

Moreover, like the Ohio statute involved in *McIntyre,* and like the earlier California ordinance invalidated in *Talley v. California,* 362 U.S. 60, 80 S.Ct. 536, 4 L.Ed.2d 559 (1960), this statute "contains no language limiting its application to fraudulent, false, or libelous statements." *McIntyre,* 514 U.S. at ––––, 115 S.Ct. at 1517. To the extent Missouri seeks to justify this regulation as a means of preventing fraud and false statements, it must fail for the same reason that the Ohio statute did. As in *McIntyre,* this provision applies "even when there is no hint of falsity or libel." ***Id***.

… Although Missouri's statute is admittedly narrower than Ohio's, the undersigned can find no constitutional significance in this distinction, as the provision still is not narrowly tailored to meet the need. … In any event, if this statute is Missouri's "first line of defense" against fraud and false statements in political campaigns, it is unlikely to promote those goals. … The statute violates the first amendment and the Court will enter the injunctive relief requested. ***Shrink Missouri Government PAC v. Maupin, 892 F.Supp. 1246, 1255-56 (D.C. E.D. Mo. 1995)*** affirmed 71 F.3d 1422, certiorari denied 116 S.Ct. 2579, 518 U.S. 1033, 135 L.Ed.2d 1094.

ARGUMENT - III

THE TRIAL COURT ERRED IN DISMISSING IMPEY'S PETITION FOR REVIEW BECAUSE THE MISSOURI ETHICS COMMISSION DID NOT HAVE THE STATUTORY AUTHORITY TO IMPOSE A $100.00 FINE ON IMPEY IN THAT § 105.961 RSMo 2010 (S.B. 844) AND § 105.961 RSMo 1997 (S.B. 16) ARE BOTH UNCONSTITUTIONAL LEAVING § 105.961 RSMo 1991 (S.B. 262), IN EFFECT AND THE MISSOURI ETHICS COMMISSION DOES NOT HAVE THE AUTHORITY UNDER § 105.961 RSMo 1991 (S.B. 262) TO ORDER IMPEY TO PAY A FINE OF $100

Standard of Review

An appellate court reviews the decisions of the administrative agency, not the circuit court. ***Coffer v. Wasson-Hunt, 281 S.W.3d 308, 310 (Mo. Banc 2009); State Bd. of Registration for the Healing Arts v. McDonagh, 123 S.W.3d 146, 152 (Mo. banc 2003)***. The appellate court determines "whether the agency's findings are supported by competent and substantial evidence on the record as a whole; whether the decision is arbitrary, capricious, unreasonable or involves an abuse of discretion; or whether the decision is unauthorized by law." ***Coffer v. Wasson-Hunt, 281 S.W.3d 308, 310 (Mo. Banc 2009); Community Bancshares, Inc. v. Secretary of State, 43 S.W.3d 821, 823 (Mo. banc 2001)***. The Court must look to the whole record in reviewing the board's decision, not merely at that evidence that supports its decision. ***Coffer v. Wasson-Hunt, 281 S.W.3d 308, 310 (Mo.***

Banc 2009); Lagud v. Kansas City Bd. of Police Commissioners, 136 S.W.3d 786, 791 (Mo. banc 2004). If the evidence permits either of two opposing findings, deference is afforded to the administrative decision. ***Id***. When a case is decided on a motion to dismiss, prior to answer and discovery, as in this case, the appellate court assumes the facts averred in the petition are true and are construed liberally in favor of appellant. ***Johnson v. Kraft General Foods, Inc., 885 S.W.2d 334, 335 (Mo. Banc 1994); Gibson v. Brewer, 952 S.W.2d 239, 243 (Mo. Banc 1997)***.

1. Within thirty days after the filing of the petition or within such further time as the court may allow, the record before the agency shall be filed in the reviewing court. Such record shall consist of any one of the following:

(1) Such parts of the record, proceedings and evidence before the agency as the parties by written stipulation may agree upon;

(2) An agreed statement of the case, agreed to by all parties and approved as correct by the agency;

(3) A complete transcript of the entire record, proceedings and evidence before the agency. Evidence may be stated in either question and answer or narrative form. Documents may be abridged by omitting irrelevant and formal parts thereof. Any matter not essential to the decision of the questions presented by the petition may be omitted. The decision, order and findings of fact and conclusions of law shall in every case be included.

2. The record filed in the reviewing court shall be properly certified by the agency, and shall be typewritten, mimeographed, printed, or otherwise suitably reproduced. In any case where papers, documents or exhibits are to be made a part of the record in the reviewing court, the originals of all or any part thereof, or photostatic or other copies which may have been substituted therefor, may, if the agency permits, be sent to the reviewing court instead of having the same copied into the record.

3. In any case where any party fails or refuses to agree to the correctness of a record, the agency shall decide as to its correctness and certify the record accordingly. If any party shall be put to additional expense by reason of the failure of another party to agree to a proper shortening of the record, the court may tax the amount of such additional expense against the offending party as costs.

4. The record to be filed in the reviewing court shall be filed by the plaintiff, **or at the request of the plaintiff shall be transmitted by the agency directly to the clerk of the reviewing court and by him filed; provided, that when original documents are to be sent to the reviewing court they shall be transmitted by the agency directly, as aforesaid**. The court may require or permit subsequent corrections of or additions to the record. ***§ 536.130, RSMo***.

Impey requested the MEC prepare, and file with the Clerk of the Circuit Court, the record before the MEC. (L.F. 121). However, the MEC refused to prepare the record or provide any of the Record to Impey, and, the Circuit Court refused to compel them to do so. (Tr. pg. 5, lns. 13 - 17; pg. 10, lns. 22-25; pg. 11, lns. 1-8 & 22 - 25; pg. 12, lns. 1-19; pg. 13, lns. 5 - 11; pg. 16, lns. 17, 18, 24 & 25; pg. 17, lns. 1 - 25; pg. 18, lns. 1-4).

On February 14, 2012 the Missouri Supreme Court in ***Legends Bank vs. State of Missouri, 361 S.W.3d 383 (Mo Banc 2012)***, ruled § 105.961 RSMo 2010 (S.B. 844) was unconstitutional. § 105.961 RSMo 1997 (S.B. 16) is unconstitutional as set forth in Argument I Surpa. "An unconstitutional statute is no law and confers no rights." ***Trout v. State, 231 S.W.3d 140, 148 (Mo. Banc 2007)***. An unconstitutional amendment to a statute is no amendment and the statute remains as is. ***State ex rel. Daily Record Co. vs. Hartmann, 253 S.W. 991, 994 (Mo. Banc 1923)***. This is true from the date of its enactment, and not merely from the date of the decision so branding it. *State ex rel. Miller v. O'Malley,* 342 Mo. 641, 117 S.W.2d 319, 324 (Mo. banc 1938); *see also Norton v. Shelby County,* 118 U.S. 425, 442, 6 S.Ct. 1121, 30 L.Ed. 178 (1886). ***Trout v. State, 231 S.W.3d 140, 148 (Mo. Banc 2007)***. Therefore, § 105.961 RSMo 1991 (S.B. 262) was in effect throughout this case. Under § 105.961 RSMo 1991 (S.B. 262), the MEC has the authority to conduct a contested case hearing when the report of the special investigator or an audit reveal reasonable grounds to believe someone violated the law. ***§ 105.961.3 RSMo, 1991 (S.B. 262)***. However, if at the conclusion of the hearing at least 4 members of the MEC believe probable cause exists

it can only refer its findings and conclusions to the appropriate disciplinary authority. ***Id***. If the appropriate disciplinary authority fails to follow the MEC's recommendations then the MEC may only:

1. notify the person to cease and desist, and, the MEC may seek judicial enforcement;

2. notify the person of the requirement of the statute, and, the MEC may seek judicial enforcement; and

3. file a public administrative report. ***105.961.4 RSMo, 1991 (S.B. 262)***.

The MEC does not have the authority to levy fines or impose other monetary sanctions. ***105.961 RSMo, 1991 (S.B. 262)***. To impose any type of penalty upon an individual, the MEC must initiate formal judicial proceedings in the circuit court. ***105.961.5 & 6 RSMo, 1991 (S.B. 262)***.

The MEC overstepped its legal authority by ordering Impey to pay a $100 fine. The MEC's decision is arbitrary, capricious, unreasonable, is an abuse of discretion and unauthorized by law. A trial court abuses its discretion through the application of incorrect legal principles. ***Fritzsche v. East Texas Motor Freight Lines, 405 S.W.2d 541, 545 (Mo.App. E.D. 1966)***; ***State v. Taylor, 298 S.W.3d 482, 492 (Mo. Banc 2009)***. Here both the MEC and the Circuit Court abused their discretion by applying the wrong statute by assuming the MEC had the authority to levy a $100 fine. An abuse of discretion occurs when a court fails to follow applicable statutes. ***State ex rel. Unnerstall v. Berkemeyer, 298***

S.W.3d 513, 517 (Mo. Banc 2009)*; *State ex rel. City of Jennings v. Riley, 236 S.W.3d 630, 631 (Mo. banc 2007). Both the MEC and the Circuit Court abused their discretion by failing to apply the correct statute and assuming the MEC had the authority to levy a $100 fine. An abuse of discretion occurs when a court makes an erroneous finding and judgment which is clearly contrary to the facts and circumstances before the court which is described as a, "judicial act which is untenable and clearly against reason and which works an injustice." ***Beckman v. Beckman, 545 S.W.2d 300, 301 (Mo.App.1976), citing State v. LeTourneau, 515 S.W.2d 838, 844 (Mo.App.1974); Thummel v. Thummel, 609 S.W.2d 175, 183 (Mo.App. W.D. 1980)***. The court's finding and judgment was clearly against reason and worked an injustice for Impey. A court's refusal to exercise discretion because the court believed it lacked jurisdiction to do so is an abuse of discretion. ***State v. Wynne, 356 Mo. 1095, 1103, 204 S.W.2d 927, 931 (Mo. 1947)***. Here the Circuit Court assumed it lacked jurisdiction to grant Impey the relief he requested because Impey wasn't aggrieved, which is synonymous with standing, and without standing the court lacks justiciability, that is, the authority to address a particular issue. ***Schweich v. Nixon, 408 S.W.3d 769, 774 fn. # 5 (Mo. Banc 2013)***.

ARGUMENT - IV

THE TRIAL COURT ERRED IN DISMISSING IMPEY'S PETITION FOR REVIEW BECAUSE IMPEY WAS AGGRIEVED BY THE MISSOURI ETHICS COMMISSION'S FINAL DECISION AND ORDER IN THAT IMPEY HAS A SPECIFIC AND LEGALLY COGNIZABLE INTEREST IN THE MISSOURI ETHICS COMMISSION'S FINAL DECISION AND ORDER WHICH HAS A DIRECT AND SUBSTANTIAL IMPACT ON IMPEY THAT OPERATES IMMEDIATELY, PREJUDICIALLY AND DIRECTLY UPON IMPEY'S PERSONAL AND PROPERTY RIGHTS OR INTERESTS

Standard of Review

An appellate court reviews a dismissal for failure to state a claim or for lack of standing is *de novo.* ***State ex rel. Dep't of Soc. Servs., Family Support Div. v. K.L.D., 118 S.W.3d 283, 287 (Mo.App. W.D.2003)***; ***White v. White, 293 S.W.3d 1, 8 (Mo.App. W.D. 2009)***. When reviewing for failure to state a claim, the trial court treats the facts contained in the petition as true and construes them liberally in favor of the plaintiff. ***Id.*** The petition states a cause of action if it "sets forth any set of facts that, if proven, would entitle the plaintiffs to relief." ***Id.*** Appellate courts also "… determine standing as a matter of law on the basis of the petition, along with any other non-contested facts accepted as true by the

parties at the time the motion to dismiss was argued, and resolve the issue as a matter of law on the basis of the undisputed facts." ***Id***.

The trial court dismissed Impey's Petition on the basis he was not "aggrieved" by the Final Decision and Order of the MEC. (L.F. 105 -106). The court reasoned Impey was not "aggrieved" by the decision of the MEC because:

1. § 105.961.4, RSMo 1997 (S.B. 16) merely permits the MEC to:
    a. advise Impey of his obligation to pay the $100.00 fine;
    b. request Impey to comply by paying the $100.00 fine;
    c. advise Impey he may be subject to judicial enforcement of the $100.00 fine; and
    d. issue a letter of concern or reprimand to Impey; and
2. § 105.961.5, RSMo 1997 (S.B. 16) permits the MEC to seek judicial enforcement of the $100.00 fine. (L.F. 105 -106).

The court opined the probable cause determination by the MEC was just a condition precedent to judicial enforcement, but it did not determine the legal rights, duties or privileges of Impey.

To have standing to file a Petition for Review from an administrative decision in a contested case, a person must be "aggrieved" by the administrative decision. ***State ex rel. St. Louis Retail Group v. Kraiberg, 343 S.W.3d 712, 716-17 (Mo.App. E.D. 2011)***; ***Gold Cross Ambulance, Inc. v. Missouri Dept. of Health, 866 S.W.2d 473, 474-75 (Mo.App.***

W.D. 1993). Therefore, in this context the concepts of "standing" and "aggrieved" are synonymous. ***Id***. If a party seeking relief lacks standing (i.e., isn't "aggrieved"), the trial and appellate courts lack justiciability, that is, the authority to address a particular issue. ***Schweich v. Nixon, 408 S.W.3d 769, 774 fn. # 5 (Mo. Banc 2013)***.

To be aggrieved by the MEC's Final Decision and Order Impey must have a specific and legally cognizable interest in the subject matter of the Final Decision and Order which must have a direct and substantial impact on that interest. ***Davis v. St. Charles County, 250 S.W.3d 408, 412 (Mo.App. E.D. 2008); City of Eureka v. Litz, 658 S.W.2d 519, 522 (Mo.App.E.D.1983)***. Impey has a specific and legally cognizable interest in the subject matter of the administrative decision, his freedom of political speech protected by the 1st Amendment to the United States Constitution and Article 1 § 8 of the Missouri Constitution. The MEC's Final Decision and Order has a direct and substantial impact on Impey's freedom of political speech because the MEC Ordered Impey to pay a $100.00 fine for exercising that right. The Final Decision and Order must operate prejudicially and directly upon personal or property rights or interests and such must be immediate and not merely a possible remote consequence. ***Davis v. St. Charles County, 250 S.W.3d 408, 412 (Mo.App. E.D. 2008); St. Joseph's Hill Infirmary v. Mandl, 682 S.W.2d 821, 824 (Mo.App. E.D.1984)***. The MEC's Final Decision and Order operates immediately, prejudicially and directly upon Impey's personal right to political speech and his property rights because he was Ordered to pay a $100.00 fine for exercising his right to political speech, and, the MEC is now free to enforce

their Final Decision and Order through the circuit court. ***Henry vs. Manzella, 356 Mo. 305, 201 S.W.2d 457, 460 (Mo. Banc 1947)***; ***Percy Kent Bag Co. v. Mo. Comm'n on Human Rights, 632 S.W.2d 480, 484 (Mo. banc 1982)***; ***§ 105.961.5, RSMo or § 105.961.6, RSMo*** (depending upon which version of the statute you use). The right or interest must be one the law protects. ***Davis v. St. Charles County, 250 S.W.3d 408, 412 (Mo.App. E.D. 2008); St. Joseph's Hill Infirmary v. Mandl, 682 S.W.2d 821, 824 (Mo.App. E.D.1984)***. Political speech is a right protected by the First Amendment to the United States Constitution and Article I § 8 of the Missouri Constitution. The decision must have an effect on Impey's interests that is distinct from the effect on the general public. ***Davis v. St. Charles County, 250 S.W.3d 408, 412 (Mo.App. E.D. 2008); Palmer v. St. Louis County, 591 S.W.2d 39, 41 (Mo.App. E.D.1979)***. Ordering Impey to pay a $100.00 fine only affects Impey which is distinct from the effect on the general public. Therefore, Impey is aggrieved by the MEC's Final Decision and Order.

Conclusion

Wherefore, for the foregoing reasons, this court should reverse the trial court's dismissal of John Impey's Petition for Review, and, declare § 105.961 RSMo, 1997 (S.B. 16) unconstitutional because it violates Article V, § 18 of the Missouri Constitution, declare § 130.031.8, RSMo unconstitutional because violates the right to free Speech protected by the First Amendment to the United States Constitution and Article I § 8 of the Missouri Constitution, declare the Missouri Ethics Commission exceeded its statutory authority when it Ordered John Impey to pay a fine of $100, declare Impey is aggrieved by the Final Decision and Order of the MEC, award John Impey his costs and expenses, including his reasonable attorney's fees, remand this matter to the Circuit Court with directions to the Circuit Court to award John Impey his costs, expenses and attorney fees and for such other and further relief as the court deems just and proper.

CERTIFICATION

I hereby certify:

1. the claims, defenses, requests, demands, objections, contentions, or arguments contained herein are not presented or maintained for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; are warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law; the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support

after a reasonable opportunity for further investigation or discovery; and the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

2. the brief complies with the limitations contained in Rule 84.06(b) and the number of words in the brief is 13,261 according to the word count in WordPerfect X4 which is the word processing system used to prepare this brief.

3. The electronic copy of this brief filed with the court has been scanned for viruses and it is virus free.

Respectfully Submitted,

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Certificate of Service

I hereby certify that on the 18th day of February, 2014, I served Appellant's Amended Brief, electronically, on Matthew James Laudano, Assistant Attorney General, 207 West High Street, PO Box 899, Jefferson City, Missouri 65102, Attorney for Respondents by uploading it to the electronic case file.

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