

SC95796

IN THE SUPREME COURT OF MISSOURI

ROBIN WRIGHT-JONES, and WRIGHT-JONES FOR MISSOURI;

Appellants,

vs.

MISSOURI ETHICS COMMISSION,

Respondent.

Appeal from the Circuit Court of St. Louis City, Missouri

The Honorable David M. Dowd, Division 2

Case No. 1422-CC09284

BRIEF OF RESPONDENT

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STATEMENT OF FACTS

Respondent Missouri Ethics Commission (“Ethics Commission”) is an agency of the State of Missouri established pursuant to Mo. Ann. Stat. § 105.955,¹ in part for the purpose of enforcing the provisions of Chapter 130, Mo. Ann. Stat., Missouri’s campaign finance and disclosure laws.

Appellant Robin Wright-Jones won election to the Missouri State Senate in the November 4, 2008, general election. (Resp. Supp. L. F. Vol. XVIII, p. 2075, ¶ 2). Wright-Jones served a term of four years representing District 5 from 2009 through 2012. *Id.* Wright-Jones was unsuccessful in the August 7, 2012, primary election for the Missouri State Senate. (Resp. Supp. L. F. Vol. XVIII, p. 2076, ¶ 3).

Wright-Jones for Senate was the name given the candidate committee formed by Robin Wright-Jones to support her candidacy in 2008 and future elections. (Resp. Supp. L. F. Vol. XVIII, p. 2076, ¶ 4). The name was changed to Wright-Jones for Missouri in July 2011. Rochelle Tilghman served as the treasurer of the Committee from 2007 to July 14, 2011. (Appl. Supp. L. F.² p.

¹ All references are to the Revised Missouri Statutes 2000, Cum. Supp. 2016, unless otherwise noted.

² Appellant’s Supplemental Legal File is designated “Appl. Supp. L.F.”, and Respondent’s Supplemental Legal File is designated “Resp. Supp. L. F.” herein.

9, ¶ 4). Tilghman became ill in 2009 and stopped filing reports with the Ethics Commission after January 16, 2010. Id. Angelia Elgin served as the Committee's treasurer from July 14, 2011 to March 16, 2012. (Appl. Supp. L. F. p. 9, ¶ 5).

Under the authority of Mo. Ann. Stat. § 105.961, the Ethics Commission's staff investigated the campaign finance records, bank statements, Ethics Commission reports, and other records of Wright-Jones and her campaign committee and reported investigative findings to the Ethics Commission. (Resp. Supp. L. F. Vol. XVIII, p. 2076, ¶ 5; Appx. Resp. Br. A 12-17). Based on the report of its staff, the Ethics Commission determined there were reasonable grounds to believe that violations of the law had occurred, and the Ethics Commission convened a hearing pursuant to Mo. Ann. Stat. § 105.961.3. (Resp. Supp. L. F. Vol. XVIII, p. 2076, ¶ 6; Appx. Resp. Br. A 12-17). On May 14, 2013, the Ethics Commission issued its Findings of Fact, Conclusions of Law, and Order, finding probable cause that Wright-Jones and her campaign committee violated Chapter 130, Mo. Stat. Ann. Reporting statutes (Resp. Supp. L. F. Vol. XVIII, p. 2076, ¶ 7). Wright-Jones and her campaign committee appealed this decision to the Administrative Hearing Commission under Mo. Stat. Ann. § 105.961. (Resp. Supp. L. F. Vol. XVIII, p. 2076, ¶ 8; pp. 2078-2079, ¶¶ 22-30). Ethics Commission argued eight separate counts against Wright-Jones. Id. Affirming the Ethics Commission's

order, the Administrative Hearing Commission imposed a fee totaling \$239,308.00 against Wright-Jones and Wright Jones for Missouri on Counts 1 through 4 and 6 (reporting violations) of the complaint from the Ethics Commission, permitting them to pay 10 % (or \$23,930.00) of that fee on certain conditions; a fee of \$14,414.00 for Count 5 (use of cash expenditures); a fee of \$14,069.00 for Count 7 (personal use); and a fee of \$3,789.00 for Count 8 (unauthorized use). (Appl. Supp. L. F. pp. 48-50).

At the administrative hearing, the Ethics Commission relied upon almost 2,300 pages of reporting and financial data in support of its findings against Wright-Jones and Wright-Jones for Missouri (Resp. Supp. L. F. Vol. XVIII, p. 2077-2080; also Vol. V-Vol. VXXVII inclusive). In addition, testimony from Wright-Jones' prior treasurer Rochelle Tilghman and the Ethics Commission's investigative supervisor Ron Getty was presented. Based on the evidence, the Administrative Hearing Commission found that Wright-Jones and Wright-Jones for Missouri had violated several provisions of Chapter 130 (App. Supp. L. F. pp. 9-50), which are summarized as follows:

- Wright-Jones and Wright-Jones for Missouri failed to timely amend the statement of committee organization when the official fund depository account changed. (Resp. Supp. L. F. Vol. XVIII, p. 2078, ¶ 23).

· Wright-Jones and Wright-Jones for Missouri failed to timely file campaign finance reports of contributions and expenditures, and filed reports with incorrect information. (Resp. Supp. L. F. Vol. XVIII, p. 2078, ¶ 24).

· Wright-Jones and Wright-Jones for Missouri did not timely, accurately, and sufficiently report contributions and expenditures, and improperly accepted anonymous contributions in excess of statutory limits. (Resp. Supp. L. F. Vol. XVIII, p. 2079, ¶¶ 25-26).

· Wright-Jones and Wright-Jones for Missouri made cash expenditures in excess of statutory limits. (Resp. Supp. L. F. Vol. XVIII, p. 2080, ¶ 27).

· Wright-Jones and Wright-Jones for Missouri failed to file a required independent contractor supplemental report pertaining to expenditures for certain services. (Resp. Supp. L. F. Vol. XVIII, p. 2080, ¶ 28).

· Wright-Jones and Wright-Jones for Missouri used campaign contributions to make expenditures for which Robin Wright-Jones was also reimbursed by the Missouri Senate. (Resp. Supp. L. F. Vol. XVIII, p. 2080, ¶ 30).

The Administrative Hearing Commission found that that the imposition of fees and the making of orders related to the violations were appropriate, and set out the specifics in its decision dated June 26, 2014. (Resp. Supp. L. F. Vol. XVIII, p. 2078-2080). The Administrative Hearing

Commission ordered the additional following actions be taken pursuant to Mo. Ann. Stat. § 105.961.4 in regards to the violations:

Count I: Ordered Wright-Jones and Wright-Jones for Missouri reprimanded for not filing an amended report, including depository account information, within 20 days of the reportable event/change. (Appl. Supp. L. F. p. 30; Resp. Supp. L. F. Vol. XVIII, p. 2078, ¶ 23).

Count II: Ordered Wright-Jones and Wright-Jones for Missouri to amend all outstanding reports/time periods not previously submitted; and imposed a \$1,000.00 fee for failure to timely file disclosure reports, and a \$1,000.00 fee for failure to account for the decrease in cash on hand from April 2010 and April 2011. (Appl. Supp. L. F. pp. 31-33; Resp. Supp. L. F. Vol. XVIII, p. 2078, ¶ 24).

Count III: Reprimanded that Wright-Jones and Wright-Jones for Missouri for contributions reported but not shown on official depository account records; ordered Wright-Jones and Wright-Jones for Missouri amend the report of contributions over \$100.00 to account for omitted contributions and to hereafter cease such violations by providing the name, address, and employer/occupation information for all campaign contributors that donate in excess of \$100.00 in the aggregate to any future campaign; and imposed a fee of \$1,000.00 for failure to report contributors' addresses; and ordered a fee of

\$69,092.00 for failure to report campaign contributions. (Appl. Supp. L. F. pp. 33-35; Resp. Supp. L. F. Vol. XVIII, p. 2079, ¶ 25).

Count IV: Ordered Wright-Jones and Wright-Jones for Missouri to amend reports to reflect previously unreported expenditures; ordered that they be reprimanded for expenditures of over \$100.00 improperly listed as campaign gas, food, parking and incidentals; and imposed a fee of \$1,000.00 for filing reports with no address information for campaign workers paid from campaign funds; and assessed a fee of \$146,839.00 for failure to report campaign expenditures. (Appl. Supp. L. F. pp. 35-41; Resp. Supp. L. F. Vol. XVIII, p. 2079, ¶ 26).

Count V: Imposed a fee of \$6,653.00 for improper cash expenditures of greater than \$50.00 each. (Appl. Supp. L. F. pp. 41-42; Resp. Supp. L. F. Vol. XVIII, p. 2080, ¶ 27).

Count VI: Imposed one fee of \$1,000.00 for listing expenditures as “consulting services” and other vague descriptors and failing to file supplemental independent contractor reports. (Appl. Supp. L. F. pp. 42-43; Resp. Supp. L. F. Vol. XVIII, p. 2080, ¶ 28).

Count VIII: Imposed fees of \$1,257.00 for travel expenses while the Senate was out of session; imposed a \$861.00 fee for travel expenses while the Senate was in session; and imposed a fee of \$262.00 for phone bill expenses (Appl. Supp. L. F. pp. 46-47; Resp. Supp. L. F. Vol. XVIII, p. 2080,

¶ 30). The total fees of \$229,964.00 required that 10% (\$22,996.00) were to be paid within 90 days of the date of the decision and the remainder of the fees stayed provided that Wright-Jones and Wright-Jones for Missouri timely paid the initial ten percent of the assessed fees, filed all required campaign finance disclosure reports and amendments as provided in the administrative decision within 90 days, and committed no further violations of the campaign financial disclosure laws under Chapter 130, during the two-year period beginning on the date of the decision. (Appl. Supp. L. F. 50).

Wright-Jones and Wright-Jones for Missouri were jointly and severally liable for all fees, responsible for all obligations imposed, and all fees were to be paid by check or money order directly to the Ethics Commission. Id.

Wright-Jones and Wright-Jones for Missouri jointly filed a Petition for Judicial Review with the St. Louis City Circuit Court on July 28, 2014. (Resp. Supp. L. F. Vol. I, pp. 8-12). The circuit court decided the issues on the briefs without oral argument. The circuit court held that Missouri's campaign reporting statutes did not place an impermissible burden on Wright-Jones' First Amendment right and the decision of the Administrative Hearing Commission was supported by substantial and competent evidence. (Resp. Supp. L. F. Vol. XVIII, p. 2085, ¶¶ 18-19). The Notice of Appeal from the circuit court's decision was filed with this Court on July 5, 2016. (Resp. Supp. L. F. Vol. XVIII, p. 2101).

SUMMARY OF THE ARGUMENT

Appellants, Robin Wright-Jones and her campaign committee, Wright-Jones for Missouri, argue that the \$229,964.00 in fees assessed against them by the Missouri Ethics Commission for campaign disclosure and reporting violations overstep its authority under law. Robin Wright-Jones further argues that the assessment of fees unconstitutionally burdens her rights of free speech as set forth in Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 130 S. Ct. 876 (2010). Robin Wright-Jones and Wright-Jones for Missouri further claim that the assessment and amount of fees by the Ethics Commission violates Mo. Const. art. I, § 31 by allowing an agency to impose a fine in its regulations, violates Missouri's Separation of Powers Doctrine by allowing an agency to issue a fine, violates the U.S. Constitution's 8th Amendment prohibition on excessive fines, and further implicates a violation of the United States Constitution.

Violations of Missouri's campaign reporting and disclosure statutes in this instance do not rise to the level of strict scrutiny required by Citizens United, or create a restriction on free speech rights. Missouri Ethics Commission's assessment of fees was within the scope of its authority and supported by the evidence before the Administrative Hearings Commission. No violations of Missouri's Constitution or the United States Constitution have occurred, and Wright-Jones' appeal should be rejected.

ARGUMENT

Standard of Review

Appellant Wright-Jones' ("Wright-Jones")³ appeal originates from the decision affirming Respondent Missouri Ethics Commission's ("Ethics Commission") determination that Wright-Jones violated several Missouri's campaign contribution and disclosure statutes. (Resp. Supp. L. F. Vol. XVIII, p. 2075-2085). The Ethics Commission prevailed at both the Administrative Hearing Commission ("AHC") and circuit court levels as to Wright-Jones' appeals of the determination and assessment of fees resulting from the violations. (Resp. Supp. L. F. Vol. XVIII, p. 2076, ¶¶ 7-8; pp. 2078-2080, ¶¶ 22-30). Regardless of whether this Court reviews the AHC's decision or the circuit court's judgment, the standard of review is the same for Wright-Jones' challenges to (1) review of the AHC decision itself, (2) challenges to the constitutionality validity of the statutes implicated here, and (3) the constitutionality and scope of the Ethics Commission's action.

³ Appellants, former State Senator Robin Wright-Jones and her campaign committee, Wright-Jones for Missouri, are collectively referred to herein as "Wright-Jones" for sake of convenience. Where specific claims relate to only one of the appellants, such distinction shall be noted. No disrespect to either appellant is intended by this shortened identification scheme.

Typically, in an appeal from an agency–tried case this Court reviews the decision of the agency and not the circuit court. Geier v. Missouri Ethics Comm'n, 474 S.W.3d 560, 564 (Mo. 2015), Garozzo v. Missouri Dep't of Ins., Fin. Institutions & Prof'l Registration, Div. of Fin., 389 S.W.3d 660, 663 (Mo. 2013). Utilizing this standard, as it must, this Court's inquiry is whether the agency's action

- (1) Violates constitutional provisions;
- (2) Exceeds the agency's statutory authority;
- (3) Is unsupported by competent and substantial evidence upon the whole record;
- (4) Is unauthorized by law;
- (5) Is made upon unlawful procedure or without a fair trial;
- (6) Is arbitrary, capricious or unreasonable; or
- (7) Involves an abuse of discretion.

Wright-Jones' challenge to the constitutional validity of Mo. Ann. Stat. § 105.961 and the Ethics Commission's interpretation and application of that statute are subject to *de novo* review. State v. Young, 32 S.W.3d 386, 390 (Mo. 2012); Algonquin Golf Club v. State Tax Comm'n, 220 S.W.3d 415, 418 (Mo. Ct. App. 2007). The person challenging the validity of a statute has the

burden of proving the act clearly and undoubtedly violates the constitutional limitations. Impey v. Missouri Ethics Comm'n, 442 S.W.3d 42 (Mo. 2014).

The standard of review for the Ethics Commission's action in assessing fees is not "strict scrutiny" as argued by Wright-Jones. The Ethics Commission determinations against Wright-Jones involved reporting and disclosure statutes which fall under the lower level of review of "exacting scrutiny" pursuant to Geier, 474 S.W.3d at 564. Exacting scrutiny is a balancing test requiring a substantial relation between disclosure requirements and a sufficiently important governmental interest. When the issues involved in this appeal are reviewed under the appropriate standards, the record supports the decision of the AHC and the Court should reject Wright-Jones' arguments on appeal.

I. Respondent Missouri Ethics Commission is authorized to assess fees under Mo. Ann. Stat. § 105.961(6), for violations of Chapter 130, Mo. Ann. Stat.; and such assessment does not violate Mo. Const. art. I, § 31. -Response to Appellant's Point 1.

To the extent that Wright-Jones has attempted to raise constitutional challenges, Wright-Jones has failed to raise sufficient points relied on and the Appellant's Brief should be dismissed. A mere "unadorned assertion" that the decision was deficient or incorrect without setting forth "wherein and why"

the decision was deficient fails, and this Court has no duty to “seine the argument ... to ferret out the ‘wherein and why’ of the claimed error.” State ex rel. Co-op. Ass'n No. 86 of Aurora v. Bd. of Zoning Adjustment of City of Aurora, Mo., 977 S.W.2d 79, 82–83 (Mo.App. W.D. 1998).

But even setting aside this defect in the Appellant’s Brief, Wright-Jones has consistently misconstrued the late fees imposed by the Ethics Commission as “fines” throughout prior appeals in the AHC, the St. Louis City Circuit Court, and now during the appeal to this Court. This Court’s cases and other authorities make clear that the fees assessed by the Missouri Ethics Commission are not “fines” under Article I, § 31 of the Missouri Constitution. .

a. The “fees” assessed against Wright-Jones are not “fines” as defined by law.

Wright-Jones challenges the Ethics Commission determination, and by extension, the AHC’s decision, under Mo. Const. art. I, § 31. Article I, § 31 states that “no law shall delegate to any commission, bureau, board or other administrative agency authority to make any rule fixing a fine or imprisonment as punishment for its violation”. Neither the Ethics Commission determination nor the AHC decision worked to “fix a fine” for violation of a rule promulgated by the Ethics Commission; instead the AHC assessed a late fee using the standard set by a statute passed by the Missouri

General Assembly. As argued, *supra*, this assessment does not implicate the prohibition of Mo. Const. art. I, § 31 as no “fine” was involved.

Wright-Jones consistently misconstrues the fee assessed against her to be fines defined under law. The Ethics Commission is required and authorized by Mo. Ann. Stat. § 105.955, to review Missouri campaign finance and disclosure statement for compliance with “timeliness, accuracy and completeness” requirements for content. (Appx. Resp. Br. A 7 at ¶ 14). If a violation is found, the Ethics Commission is authorized to hold a hearing and pursue remedies for violations of Chapter 130, Mo. Ann. Stat. Mo. Ann. Stat. §105.961.4–5. (Appx. Resp. Br. A 7 at ¶ 3). One of the remedies the Ethics Commission is authorized to pursue upon determination that campaign disclosure laws have been violated is the assessment of late fees for inaccurate or tardy reporting under Mo. Ann. Stat. § 105.963. (Appx. Resp. Br. A 18-19). By contrast, the United States Supreme Court has held that the word “fine,” as contained in the Excessive Fines Clause of the Eighth Amendment to the United States Constitution, means a payment to a sovereign as punishment for some offense. Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 109 S. Ct. 2909 (1989).

Punishment, not redress, is the difference between a fine and a fee under law. Historically, fines are punishment for criminal activity to retrieve ill-gotten gain from the perpetrator, and act as a deterrent to further criminal

conduct. “The distinction between a civil penalty and a criminal penalty is of some constitutional import.” United States v. Ward, 448 U.S. 242, 100 S. Ct. 2636 (1980). The focus of a fine is to punish the perpetrator; absent this factor of “punishment for punishment’s sake,” a fee imposed for missing deadlines or improper reporting should not be deemed the equivalent of a fine.

United States v. Ward is very instructive in this context. In Ward, the U.S. Supreme Court held that substantial monetary penalties assessed against polluters under the Federal Water Pollution Control Act constituted “civil penalties,” not criminal fines, and thus did not implicate the constitutional protections applicable in criminal proceedings. Ward, 448 U.S. at 244. The Court held that “the question whether a particular statutorily defined penalty is civil or criminal is a matter of statutory construction.” Id. at 248. The Court held that this determination involved a two-step inquiry: “First, we have set out to determine whether Congress, in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other.” Id. “Second, where Congress has indicated an intention to establish a civil penalty, we have inquired further whether the statutory scheme was so punitive either in purpose or effect as to negate that intention.” Id. at 248-49. “In regard to this latter inquiry, we have noted that only the clearest proof could suffice to establish the unconstitutionality of a

statute on such a ground.” Id. at 249. Applying these criteria, the Supreme Court concluded that the penalties in question were civil penalties, not fines, because it was “quite clear that Congress intended to impose a civil penalty,” since “importantly, Congress labeled the sanction authorized in § 311(b)(6) a ‘civil penalty.’” Id. Because Congress had labeled the sanctions a “civil penalty” and there was not “clearest proof” that the sanctions were “so punitive as to transform what was clearly intended as a civil remedy into a criminal penalty,” Id. (alterations and quotation marks omitted), the Court concluded that the penalties were not fines.

The same analysis applies here. In authorizing the Ethics Commission to assess fees for violations of the campaign finance laws, the General Assembly has consistently labeled those penalties as “fees,” not the “fines” prohibited by Article I, Section 31 of the Missouri Constitution. And Wright-Jones has not offered the “clearest proof” that these fees are “so punitive as to transform what was clearly intended as a civil remedy into a criminal penalty.” Id. On the contrary, she merely assumes that, because they involve monetary sanctions, they must be “fines”—thus implying that *any* monetary sanction must be a criminal “fine.” This is incorrect as a matter of law.

b. Fees, like those assessed by the Ethics Commission, are customary when dealing with deadlines.

The Ethics Commission, as a state agency, must follow the statutorily designated authority and responsibilities set out for it by the legislature. (Supp. App. 89-94). Concerning the assessment of fees for late or improper filings or violations of Missouri's campaign disclosure requirements, Missouri's legislature specifically designated that "[a]ll late filing fees collected pursuant to this section shall be transmitted to the state treasurer and deposited to the general revenue fund" pursuant to Mo. Ann. Stat. § 105.963. (Appx. Resp. Br. A 12-17). Put another way, should a late filing fee be imposed regarding Missouri's campaign reporting and disclosure laws as was here, that fee is returned to the people's bank account to facilitate the operation of their government in performing service; it does not go into the pocket of the agency assessing the fee as a monetary *quid pro quo* that penalizes Wright-Jones, or any other candidate or committee, for violations. Rather, imposition of fees supports the importance of deadlines necessary to Missouri's political process.

The Ethics Commission's vital interest is in the "gathering of data necessary to detect violations" of other campaign finance laws. Geier, 474 S.W.3d at 564. The Ethics Commission is specifically authorized and required by Mo. Ann. Stat. § 105.955 to review campaign finance disclosure reports and statements for "timeliness, accuracy and completeness" of content. (Appx. Resp. Br. A 7 at ¶ 14). "The [Ethics Commission] serves the public interest by

enforcing Missouri election law in a nonpartisan and transparent manner to provide the electorate with accountability as to the source of political speakers. The [Ethics Commission] has an interest in enforcing Missouri's campaign finance laws and providing the public with information and accountability about how money is spent in elections and on issue advocacy." Geier, 474 S.W.3d 560.

Missouri's campaign disclosure and reporting laws exist to facilitate the dissemination of information regarding the electorate to the public. As example, Mo. Ann. Stat. §130.046 sets forth, among other things, specific deadlines by which committees are to file disclosure reports covering an array of campaign activities before and after elections. (Appx. Resp. Br. A 21-24). Deadlines for submitting information from candidates and committees include reports on contributions or expenditures either in support or opposition to any candidate or ballot measure (§130.046.1); ballot measures qualified to be on the ballot by initiative petition or referendum petition, or a recall petition seeking to remove an incumbent from office (§130.046.2); when a candidate, treasurer, or deputy treasurer of a committee must report if less than five hundred dollars is involved in contributions (§130.046.3); and the necessity of cumulative reports reflecting total receipts and disbursements of the reporting committee for the entire election campaign in question (§130.046.4). (Appx. Resp. Br. A 21-24). The assessment of late fees is an

established practice to support ministerial actions when deadlines exist. Regardless of when campaign disclosure and reporting information is provided to the Ethics Commission, it is the Ethics Commission that still bears the burden of disseminating that information to the voting public under §105.955. (Appx. Resp. Br. A 7).

When, as here, the campaign information is not provided in a timely, accurate and complete manner, the Ethics Commission is burdened even more so than normal with its responsibility to provide information and accountability about how money is spent in elections to the populace. (Appx. Resp. Br. A 7, ¶7; A 10-11). By contrast, fines have historically been imposed in criminal proceedings to relieve the wrong-doers of ill-gotten gains. *See Alexander v. U.S.*, 509 U.S. 544, 113 S. Ct. 2766, (1993), *reh'g denied*, 510 U.S. 909, 114 S. Ct. 295, (1993); *Badders v. U.S.*, 240 U.S. 391, 36 S. Ct. 367, (1916), *Pervear v. Commonwealth of Massachusetts*, 72 U.S. 475 (1866); *United States v. Aleff*, 772 F.3d 508 (2014); *United States v. Moyer*, 313 F.3d 1082 (2002). Here, the Ethics Committee's findings did not constitute a prosecution of criminal activity, and as a result the fees assessed were not a punishment for punishment's sake but were one remedy authorized by the legislature under law. (Appx. Resp. Br. A 12-17). Wright-Jones' Point I is unsupported by the record and should be dismissed.

c. Wright-Jones' adjudication in a civil setting does not support a determination that the fees assessed are criminal fines.

Wright-Jones' violations such as failing to update the Ethics Commission about changes to the campaign committee's official depository account (Count 1) and using cash, instead of checks, to conduct committee business (Count 5), frustrate the Ethics Commission "in enforcing Missouri's campaign finance laws [by] providing the public with information and accountability about how money is spent in elections and on issue advocacy." Geier, 474 S.W.3d 560; (Resp. Supp. L. F. Vol. XVIII, pp. 2084-2085, ¶¶ 17, 18). On finding such a violation, the Ethics Commission is authorized to hold a hearing and pursue remedies for violations of Chapter 130 under Mo. Ann. Stat. § 105.961. (Appx. Resp. Br. A 12-17). Inherent in this process is the ability of the individual or entity at issue to provide rebuttal information and defend their actions against any charges of violating state reporting laws. If the Ethics Commission believes that criminal laws have been violated, then the matter is referred to the proper prosecutorial authority. (Appx. Resp. Br. A 12-13, ¶¶ 2-3). No such referral for prosecutorial action by the Ethics Commission occurred here. Wright-Jones defended the charges by the Ethics Commission before the AHC and a subsequent circuit court in a civil, not criminal, setting. Each one of Wright-Jones' violations was a violation of a

provision of Chapter 130, Mo. Ann. Stat., and a late filing fee was assessed as provided by law under Mo. Ann. Stat. § 105.961. (Appx. Resp. Br. A 12-17). In assessing the fees at issue here for violations, neither AHC nor the Ethics Commission acted outside of its statutory authority. The forums for the decisions against Wright-Jones imposed no penalties under criminal statutes at the Ethics Commission or the AHC, and those civil forums are not the equivalent to the criminal courts supporting the laws' definition of fines. *See Alexander v. U.S.*, 509 U.S. 544, 113 S. Ct. 2766, (1993), *reh'g denied*, 510 U.S. 909, 114 S. Ct. 295, (1993); United States v. Moyer, 313 F.3d 1082 (2002).

**d. The assessment of late fees does not implicate the
Separation of Powers Doctrine.**

Wright-Jones further challenges the assessment of any late fee as implicating the Separation of Powers Doctrine. Wright-Jones' reliance on State v Lovelace, 585 S.W.2d 507 (Mo.App. E.D. 1979) is misplaced for this premise. Lovelace is distinguishable as a criminal case and is not on point with the issues presented here. In any event, Lovelace simply found that the statutory scheme plaintiff asserted as violating the Separation of Powers Act (Chapter 195, the Narcotics Drug Act) was previously held to be constitutional in State v. Davis, 450 S.W.2d 168, 170 (Mo. 1970), so that case affords no support to Wright-Jones.

Likewise, City of Pleasant Valley v. Baker, 991 S.W.2d 725 (Mo.App.

W.D. 1991) is not on point, since the plaintiff's argument there concerning Mo. Const. art. I, § 31, failed on the facts to establish that defendant Pleasant Valley was an administrative agency prohibited by Mo. Const. art. I, § 31 from imposing fines. As argued above, the Ethics Commission exercised its authority under Mo. Ann. Stat. § 105.961 in assessing a late fee for disclosure and filing violations. (Appx. Resp. Br. A 12-17). No fine as contemplated by Mo. Const. art. I, § 31 was involved; therefore the argument that a "fine" was utilized as punishment fails to raise any question of the Separation of Powers Doctrine.

Missouri Courts have addressed the question whether the Separation of Powers Doctrine is violated by a determination of quasi-judicial entities such as the AHC or by determinations of agencies such as the Ethics Commission. An administrative agency may exercise "quasi-judicial" power, *See, e.g., State ex rel. State Highway Comm'n v. Weinstein*, 322 S.W.2d 778, 784 (Mo. 1959), which is not considered to be judicial power in a constitutional sense. *Chastain v. Chastain*, 932 S.W.2d 396, 398–99 (Mo. 1996) (statute providing for administrative modification of judicial child support orders did not transgress separation of powers principles because statute gave the executive agency none of the exclusively judicial functions of "judicial review and the power to decide issues and enforce judgments"). Here, the Ethics Commission's determination of violations and assessment of fees is not a final

judgment and is reviewable to the AHC and the circuit courts; both avenues were utilized by Wright-Jones in review of the issues. Mo. Ann. Stat.

§ 536.140. Review of the facts of this case evidence that no usurpation of judicial power exists in the administrative review process; therefore the Separation of Powers Doctrine is not involved where the AHC does not by its decision-making prevent the judiciary from its ability to decide issues and enforce judgment.

Mo. Ann. Stat. § 105.963(4), evidences the legislature's intent that the AHC act as an impartial mechanism for the resolution of disputes concerning the filing requirement. (Supp. App. 103-104). § 105.963(4) specifically endows the AHC with the authority to review the assessment of a late filing fee by the Ethics Commission. Missouri Ethics Comm'n v. Cornford, 955 S.W.2d 32 (Mo. Ct. App. 1997). The Cornford Court ultimately concluded, as a matter of law, that the legislature intended that the AHC have the authority to resolve disputes concerning the assessment of a late filing fee, including the propriety of the assessment. Missouri Ethics Com'n, 955 S.W.2d at 35.

Additionally, the Ethics Commission determination reserves for the judiciary the final word on the assessment of fees. The Ethics Commission's determination of fees does not transgress the separation of powers between the branches of government as the Ethics Commission must, under law, instigate an action in a circuit court to enforce the determination pursuant to

Mo. Ann. Stat. § 105.963. (Appx. Resp. Br. A 19 at ¶ 5). The AHC decision does not transgress its authority under Mo. Ann. Stat. § 105.963(4) in assessing fees; and the Separation of Powers Doctrine is not implicated by such a decision. The Court should uphold the decision of the Administrative Hearing Commission and dismiss Wright-Jones' appeal.

II. The Missouri Ethics Commission has the statutory

authorization to issue a fee under Mo. Ann. Stat. § 105.961, for violations of Chapter 130, Mo. Ann. Stat., and may do so by either a contractual agreement or by an action of the Missouri Ethics Commission.-Responding to Appellant's Point II.

Wright-Jones argues that fees may be assessed only through "reconciliation agreements" or judicial action under Section 105.961.4(6). This is incorrect. The statute authorizes the assessment of fees "[t]hrough reconciliation agreements or *action of the commission*," and the "commission" is defined by statute as the Missouri Ethics Commission. Accordingly, the Ethics Commission had statutory authority to assess fees "through action of the commission" without a reconciliation agreement, which is what the Commission did here.

a. "Commission," as utilized in the Statute's language, refers to the Ethics Commission.

As argued in response to Appellant's Point I above, the Ethics Commission had adequate authority from the legislature to impose fees pursuant to Mo. Ann. Stat. § 105.961, once a violation by Wright-Jones had been determined. (Appx. Resp. Br. A 12-17). Wright-Jones misreads the statute's Subsection 6 by misconstruing "commission" to mean that the "Administrative Hearing Commission" or a judicial court must take action prior to the imposition of late fees. Two specific reasons mandate that 'commission' in Mo. Ann. Stat. § 105.961 refers to the Ethics Commission's action and not the action of some other adjudicating body.

First, "commission" as used in §105.961 is defined at Mo. Ann. Stat. §105.450, which reads in pertinent part:

As used in sections . . . 105.955 to 105.963, unless the context clearly requires otherwise, the following terms mean:

(4) "Commission", the Missouri ethics commission established in section 105.955.

Mo. Stat. Ann. §105.450; (Appx. Resp. Br. A 1-3). Second, the context of § 105.961.4 supports that "commission" means the Ethics Commission rather than the AHC when read in conjunction with Mo. Ann. Stat. § 105.450's guidance.

The language of Mo. Ann. Stat. § 105.961 provides for action in the event that a disciplinary report issued to "the appropriate disciplinary

authority” fails to follow the “recommendations contained in the report” within sixty days of the report’s receipt; or if the commission determines, by a vote of at least four members “that some action other than referral for criminal prosecution or for action by the appropriate disciplinary authority would be appropriate.” (Appx. Resp. Br. A 13 at ¶ 4). Among those ensuing actions envisioned as being appropriate by the statute, the commission may (1) notifying the person to cease and desist violation of any provision of law which the report concludes was violated ; (2) notify the person of the requirement to file, amend or correct any report, statement, or other document or information required by sections §105.473, §105.483 to §105.492, or Chapter 130; (3) file the report with the executive director to be maintained as a public document; (4) issue a letter of concern or letter of reprimand to the person which would be maintained as a public document; and (5) seek judicial enforcement of commission’s decision. (Appx. Resp. Br. A 12-17).

Rules of statutory interpretation mandate that words in a statute are given their plain and ordinary meaning. Wolff Shoe Co. v. Dir. of Revenue, 762 S.W.2d 29, 31 (Mo. 1988). This Court’s “primary responsibility in statutory interpretation is to determine the legislative intent from the language of the statute and to give effect to that intent.” Balloons Over the Rainbow, Inc. v. Dir. of Revenue, 427 S.W.3d 815, 825 (Mo. 2014) (internal

quotation omitted). “If the intent of the legislature is clear and unambiguous, by giving the language used in the statute its plain and ordinary meaning, then we are bound by that intent and cannot resort to any statutory construction in interpreting the statute.” State ex rel. Union Electric Co. v. Public Service Commission of Missouri, 399 S.W.3d 467, 479–480 (Mo.App. W.D. 2013). “However, statutory provisions relating to the same subject matter are considered *in pari materia* and are to be construed together.” Crawford v. Div. of Employment Sec., 376 S.W.3d 658, 664 (Mo. 2012).

“Commission” as utilized in the statute at issue refers to the Ethics Commission. To determine otherwise renders an illogical result, as the AHC could not be the entity to recommend by a “vote of at least four members” that action is appropriate, let alone take any of the enumerated actions set forth if the appropriate disciplinary authority fails to act. (Appx. Resp. Br. A 13 at ¶ 4). As a result, it is an action of the Ethics Commission, as through a hearing, which is contemplated as a requirement to assess fees by the statute’s language, and such action occurred here. Wright-Jones’ Point II should be denied in its entirety.

b. Wright-Jones conflates the ability of the Missouri Ethics Commission to determine probable violations with the ability of the Administrative Hearing Commission to determine if fees are appropriate upon review.

Wright-Jones seems to confuse the ability of the Ethics Commission to determine *whether* a violation of campaign reporting and disclosure laws has occurred with the ability of the AHC *to reaffirm* the Ethics Commission's determination and assess late fees. It is "an action" of the Ethics Commission which may assess a fee after a hearing that is specifically contemplated and allowed by Mo. Ann. Stat. § 105.961.4(6). (Appx. Resp. Br. A 14 at ¶6). The statutory language does not require that an action must be coupled with a reconciliation agreement with the opposing party in order for the Ethics Commission to assess fees; rather a plain reading of the statute evidences that it is *either* a reconciliation agreement *or* an action, such as a hearing, by the Ethics Commission that may precipitate a determination that fees are warranted. (Appx. Resp. Br. A 12-17). "When interpreting statutes, courts do not presume that the legislature has enacted a meaningless provision." Edwards v. Gerstein, 237 S.W.3d 580, 581 (Mo. 2007). Here, Wright-Jones had such a hearing before the Ethics Commission. (Resp. Supp. L. F. Vol. XVIII, p. 2076, ¶¶ 5-8). Once evidence was adduced, the Ethics Commission rendered its determination. (Resp. Supp. L. F. Vol. XVIII, p. 2076, ¶ 7). Ethics Commission acted within its authority to determine violations after holding its hearing.

Wright-Jones then appealed the Ethics Commission's determination of violations to the AHC for further review. (Resp. Supp. L. F. Vol. XVIII, p.

2076, ¶ 8). The AHC, after receiving testimony and evidence, rendered its decision. (Resp. Supp. L. F. Vol. XVIII, p. 2078-2080, ¶¶ 9, 22-30). As argued in Ethics Commission's Section I and below in Section III, Ethics Commission and the AHC were within their authority to determine violations and assess fees up to double the amount involved in the violation against Wright-Jones. (Appx. Resp. Br. A 14 at ¶ 6). The AHC assessed fees of \$229,964.00 for the totality of violations; whereas an amount of twice that involved in connection with Wright-Jones' failure to timely and accurately report expenditures over \$100.00 each would have resulted in fees of almost \$300,000.00. (Resp. Supp. L. F. Vol. XVIII, p. 2078-2080, ¶¶ 22-30). The AHC assessment of fees was well within the range allowed by the legislature under Section 105.961.4(6). (Appx. Resp. Br. A 12-17). Both the Ethics Commission and the AHC were within their respective scopes of authority concerning the determination of violations and assessment of fees against Wright-Jones. Wright-Jones' Point II is in error and the AHC decision should be affirmed.

III. Missouri Ethics Commission was authorized to assess a fee of \$229,964.00 against Wright-Jones in the current case because Mo. Ann. Stat. § 105.961 allows for a fee assessed at either \$1,000.00 per violation or double the amount involved in the violation.- Responding to Appellant's Point III.

a. Missouri Ethics Commission acted within its statutory authority and jurisdiction set forth in Mo. Ann. Stat. § 105.961.

The argument contained in Section II above is applicable in response to Wright-Jones' assertion that the Ethics Commission was without authority under Mo. Stat. Ann. § 105.961.4 to assess fees. The language of the statute allows for imposition of either \$1,000.00 or double the amount involved in the violation. (Appx. Resp. Br. A 14 at ¶ 6). Review of the record evidences that neither the Ethics Commission nor the AHC abused their discretion in determining the amount of fees at issue; and the AHC decision was supported by the evidence as argued below in Section III (b).

b. The amount of fees assessed by the Administrative Hearing Commission's decision was based on competent and substantial evidence upon the whole record.

Wright-Jones does not appeal the actual determination of whether or not violations of Missouri's campaign reporting and disclosure laws occurred to this Court; rather Wright-Jones appeals the amount of fees as a repercussion to those violations. The Court defers to the Administrative Hearing Commission as fact finder if the conclusions are supported by competent and substantial evidence when considering the record as a whole.

State Bd. of Accountancy v. Integrated Fin. Sols., L.L.C., 256 S.W.3d 48, 51 (Mo. 2008). In reviewing the evidence presented to the AHC regarding Wright-Jones' violations of Missouri campaign and disclosure laws, the Court presumes that the AHC's decision is correct, and it must affirm that decision if it is supported by competent and substantial evidence. Melkowski v. Bd. of Police Comm'rs of Kansas City, 463 S.W.3d 400, 407 (Mo. App. W.D. 2015); Ballpark Lofts III, LLC v. City of St. Louis, 395 S.W.3d 588, 590 (Mo. App. E.D. 2013). By contrast, "[a]n agency's decision is unsupported by competent and substantial evidence only in the rare case when the decision is contrary to the overwhelming weight of the evidence." Miller v. Dunn, 184 S.W.3d 122, 124 (Mo. App. E.D. 2006) (quoting Lagud v. Kansas City Bd. of Police Comm'rs, 136 S.W.3d 786, 791 (Mo. 2004)). In evaluating whether competent and substantial evidence exists to support a finding, the Court should look to the record as a whole, and not merely evidence that supports the AHC's decision. Lagud, 136 S.W.3d at 791–92. This standard requires the Court to defer to the AHC on the credibility of witnesses. Phillips v. Schafer, 343 S.W.3d 753, 757 (Mo.App. W.D. 2011). If the evidence permits either of two opposed findings, the court should accept the findings of the administrative body. Fleming Foods of Missouri, Inc. v. Runyan, 634 S.W.2d 183, 192 (Mo. 1982). The Court grants deference to the commission's decision on questions of law. Id.

Here, Wright-Jones was found to have violated multiple disclosure and reporting campaign requirements by the Ethics Commission pursuant to Chapter 130, Mo. Ann. Stat. (Resp. Supp. L. F. Vol. XVIII, p. 2076, ¶¶ 5-8). The subsequent AHC decision found favorably for Wright-Jones on one of the eight separate groups of violations, and affirmed the other seven groups of violations argued by the Ethics Commission. (Resp. Supp. L. F. Vol. XVIII, p. 2078-2080, ¶¶ 22-30). Although Wright-Jones has failed to set forth “wherein and why” the evidence supporting the AHC’s findings is not competent and substantial, the Ethics Commission includes in this argument a condensed analysis of Wright-Jones’ violations of Chapter 130, Mo. Ann. Stat., and the evidence in the record supporting the AHC decision below⁴. See State ex rel. Co-op Ass’n No. 86 v. Bd. of Zoning Adjustment of City of Aurora, 977 S.W.2d 79, 82-83 (Mo. App. S.D. 1998). Wright-Jones was determined to have committed the following violations of Chapter 130, Mo. Ann. Stat.:

⁴ Although Wright-Jones failed to supply all of the records necessary to reach this issue in Appellant’s Legal File; Respondent’s Supplemental Legal File contains the exhibits utilized in the determination of violations and assessment of fees by the Administrative Hearing Commission and the St. Louis City Circuit Court for the Court’s convenience.

Count 1- Wright-Jones for Missouri failed to amend its statement of committee organization within twenty (20) days of changing the committee's official depository account. (Appl. Supp. L. F. pp. 30, 48-50).

Count 2- Wright-Jones failed to timely file campaign disclosure reports and filed campaign finance reports with incorrect reporting periods and incorrect cash on hand. (Appl. Supp. L. F. pp. 31-33, 48-50).

Count 3- Wright-Jones failed to timely and accurately report her campaign contributions received. (Appl. Supp. L. F. pp. 33-35, 48-50).

Count 4- Wright-Jones failed to timely and accurately report expenditures. (Appl. Supp. L. F. pp. 35-41, 48-50).

Count 5- Wright-Jones made cash expenditures in excess of \$50.00 each. (Appl. Supp. L. F. pp. 41-42, 48-50).

Count 6- Robin Wright-Jones reported expenditures to individuals as "consulting services" with no supplemental report that described the exact nature of the services provided. (Appl. Supp. L. F. pp. 42-43, 48-50).

Count 7-Determined by the Administrative Hearing Commission in favor of Robin Wright-Jones. (Appl. Supp. L. F. pp. 43-46, 48-50).

Count 8- Robin Wright-Jones used campaign contributions for unauthorized uses. (Appl. Supp. L. F. pp. 46-47, 48-50).

In affirming the Ethics Commission's determination that Wright-Jones had committed violations under Chapter 130, Mo. Ann. Stat., the AHC relied

on evidence provided by the Ethics Commission in reaching the decision from which this appeal originates. The AHC had benefit of 157 exhibits comprising almost 2,300 pages to support its findings of fact. Among these were the affidavit of Rochelle Tilgham, Wright-Jones' former treasurer, Exhibit 5. (Resp. Supp. L. F. Vol. V, p. 286). Likewise, the AHC had several business records to rely upon. Among these business records were Exhibits 1, 2 (Resp. Supp. L. F. Vol. V, pp. 282-283), and 13-33A, (Resp. Supp. L. F. Vol. V, pp. 292-377; Vols. VI and VII, inclusive), the business records of the Ethics Commission. The AHC was also able to rely on Exhibits 6-7 (Resp. Supp. L. F. Vol. V, pp. 288-289) and 34-81, (Resp. Supp. L. F. Vol. VIII, pp. 682-790; Vols. IX through XIV, inclusive), the business records of St. Louis Community Credit Union, the financial institution for Wright-Jones' reported official depository account. Records of the Missouri Senate, Exhibits 82-139 (Resp. Supp. L. F. Vol. XV, pp. 1785-1903; Vol. XVI, pp. 1905-1994), were also submitted during the AHC hearing.

Summaries of the Ethics Commission's investigative report were submitted as Exhibits 140-142 (Resp. Supp. L. F. Vol. XVII, pp. 1996-1998), 144-147 (Resp. Supp. L. F. Vol. XVII, pp. 1999-2020), 149-155 (Resp. Supp. L. F. Vol. XVII, pp. 2021-2068), and 157. (Resp. Supp. L. F. Vol. XVII, pp. 2069-2072). These documents were prepared under the supervision of Mr. Ron Getty, and admitted as a business record of the Ethics Commission under

Mo. Ann. Stat. § 536.010(10), and as summary evidence under Mo. Ann. Stat. § 536.070(11). Under Mo. Ann. Stat. § 105.959 and 105.961, the Ethics Commission is required to prepare an investigative report for the purpose of determining whether there is probable cause that a violation of law has occurred. (Appx. Resp. Br. A 10-11, 12-17). The Ethics Commission presented the testimony of Ron Getty, its investigative supervisor, regarding the Ethics Commission's investigation along with the investigative report. (Resp. Supp. L. F. Vol. II, p. 131:15 through Vol. III, pp. 159-215:10). Mr. Getty possessed 26 years of experience as a federal law enforcement agent with the Bureau of Alcohol, Tobacco, and Firearms at the time he testified before the AHC. (Resp. Supp. L. F. Vol. II, p. 132:2-6). In addition to that, Mr. Getty possessed over two (2) years of experience as the investigator supervisor with the Ethics Commission. (Resp. Supp. L. F. Vol. II, p. 131:20–25). Mr. Getty presented extensive testimony as to the measure of damages to the administrative hearing officer. Based on his experience, Mr. Getty was qualified to give such testimony. (Resp. Supp. L. F. Vol. II, p. 131:15 through Vol. III, pp. 159-215:10). Consequently, the investigative report, including the summaries contained at Exhibits 140–142 (Resp. Supp. L. F. Vol. XVII, pp. 1996-1998), 144–147 (Resp. Supp. L. F. Vol. XVII, pp. 1999-2020), 149–155 (Resp. Supp. L. F. Vol. XVII, pp. 2021-2068), and 157. (Resp. Supp. L. F. Vol. XVII, pp. 2069-2072), are “competent and substantial” evidence upon which

the Administrative Hearing Commission may base a decision. Lemay Bank and Trust Co. v. Oakville Bank and Trust Co., 518 S.W.2d 128, 130 (Mo. App. W.D. 1974).

The AHC, after reviewing the evidence by both parties, determined that Wright-Jones failed to timely file reports (Count 2); failed to timely and accurately report contributions (Count 3) and expenditures (Count 4); and failed to sufficiently identify the actual purpose of multiple expenditures, obfuscating the purposes of those expenditures (Count 6). (Resp. Supp. L. F. Vol. XVIII, p. 2080, ¶ 28; pp. 2082-2083, ¶10). Wright-Jones failed to keep the Ethics Commission updated about the committee's official depository account (Count 1) (Resp. Supp. L. F. Vol. XVIII, p. 2078, ¶ 23), and used cash, instead of checks, to conduct committee business (Count 5) (Resp. Supp. L. F. Vol. XVIII, p. 2080, ¶ 27). All in all, Wright-Jones' filed late reports with incorrect reporting periods, failed to timely and accurately report approximately \$70,000.00 in contributions, failed to timely and accurately report approximately \$150,000.00 in expenditures made, exceeded limits on cash expenditures, and used vague terms to describe the purpose of expenditures. (Resp. Supp. L. F. Vol. XVIII, p. 2078-2080, ¶¶ 22-30).

The Administrative Hearing Commission's decision reprimanded Wright-Jones for certain violations, ordered specific reports be amended, and

assessed fees. Id. Each aspect of the AHC determination was based on competent and substantial evidence. (Resp. Supp. L. F. Vol. XVIII, p. 2085, ¶ 19). The AHC determination of fees amounting to less than double the amount involved in the violations was authorized under Mo. Ann. Stat. §105.961 and rendered after a fair trial in which Wright-Jones pleaded her case through counsel and presented rebuttal evidence. The AHC determination was not arbitrary, capricious or unreasonable. Given the extent, severity, and scope of Wright-Jones' violations, the AHC decision was not an abuse of discretion and the Court should uphold the decision of the AHC and dismiss Wright-Jones' appeal.

IV. The Missouri Ethics Commission did not assess an excessive fee against Wright-Jones in violation of the Missouri Constitution or the United States Constitution.-Responding to Appellant's Point IV.

As argued *supra*, the Ethics Commission properly determined that violations of Chapter 130, Mo. Ann. Stat., had occurred and Ethics Commission's assessment of fees was authorized under Mo. Ann. Stat. § 105.961. (Appx. Resp. Br. A 12-17). The AHC decision affirming the assessment of late fees was also authorized under statute. Mo. Ann. Stat. § 536.140. Fees, not fines, were assessed in the case at bar. Mo. Ann. Stat. § 105.961 allows for the assessment of either \$1,000.00 per violation or up to

double the amount of the violations. (Appx. Resp. Br. A 14 at ¶ 6). Here, the AHC elected to impose an assessment based on an amount up to double the violations as allowed under law.

**a. The assessment of a late fee is not a criminal penalty
under the Excessive Fines Clause of the U.S.
Constitution, 8th Amendment.**

The focus of the Eighth Amendment is to guard against the potential for government abuse of prosecutorial power, as opposed to concern with the extent or purposes of civil damages. Browning-Ferris Industries of Vermont, Inc., 492 U.S. 257, see §§ 3, 6, 9. Fines are assessed in criminal actions rather than in private civil actions, as they have been historically since the inception of the Excessive Fines clause. Browning-Ferris Industries of Vermont, Inc., 492 U.S. 257, see §§ 3, 6, 9, *infra*.

The Supreme Court of the United States in United States v. Bajakajian, 524 U.S. 321, 118 S. Ct. 2028 (1998), held that a punitive forfeiture violates the Excessive Fines Clause of the Eighth Amendment to the United States Constitution only if it is grossly disproportional to the gravity of a defendant's offense. Bajakajian, 524 U.S. at 322. The Bajakajian Court considered two principles; first that judgments about the appropriate punishment for an offense belong to the legislature, and second, that judicial determinations regarding the gravity of a particular criminal offense will be

inherently imprecise. Bajakajian, 524 U.S. at 322-23. The touchstone of the constitutional inquiry under the Excessive Fines Clause, stated the Bajakajian Court, is the principle of proportionality. That is, the amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish. Id. The Bajakajian Court therefore adopted the standard of gross disproportionality articulated in its Cruel and Unusual Punishments Clause precedents. Id. at 322; *citing, e.g.,* Solem v. Helm, 463 U.S. 277, 103 S. Ct. 3001(1983); Rummel v. Estelle, 445 U.S. 263, 100 S. Ct. 1133 (1980).

Wright-Jones misunderstands the instruction of the Eighth Amendment to the facts of this case. The Eighth Amendment does not come into play in instances where, as here, the action of the Ethics Commission is not punitive in nature but is a ministerial requirement imposed by the Missouri legislature. (Appx. Resp. Br. A 1, 10-11, 12-17). The necessity of the filing and late fees, among other things, is to maintain transparency and full disclosure by political candidates and campaigns with Missouri's campaign laws by insuring that deadlines associated with campaign disclosure and reporting statutes are observed. (Appx. Resp. Br. A 1, 10-11, 12-17). The assessment of late filing fees is mandated by Mo. Ann. Stat. § 105.963 and 105.961, and does not serve as a punitive measure to disgorge "ill-gotten gains" from criminal activity as the determinations involved in U.S. v Moyer, 313 F.3d

1082 (2002), and U.S. v Aleff, 772 F.3d 508 (2014), cited in Appellant's Brief. Accordingly, because the Ethics Commission's fees are not criminal fines at all, *see supra* Part I, they do not implicate the Excessive Fines Clause of the Eighth Amendment.

But even if this Court elects to review the proportionality of the AHC assessment against Wright-Jones as compared to her violations of numerous sections of Chapter 130, Mo. Ann. Stat., under the reasoning of Bajakajian, the amount assessed by the AHC is less than twice the amount involved in the violations and within the range contemplated by Mo. Ann. Stat. § 105.961; therefore the fees assessed are not grossly disproportionate to Wright-Jones' offenses. (Appx. Resp. Br. A 14 at ¶ 6).

The amount of fees imposed as argued in Respondent's Section III, \$229,964.00, was within the authority granted by Mo. Ann. Stat. § 105.961, which authorizes fees up to twice the amount involved in any violation. (Appx. Resp. Br. A 14 at ¶ 6). Here, assessing fees that are twice the amount only in connection with Wright-Jones' failure to timely and accurately report expenditures over \$100.00 each would have resulted in fees of almost \$300,000.00. (Resp. Supp. L. F. Vol. XVIII, pp. 2078-2080). By comparison, the AHC assessed fees of \$229,964.00 for the totality of Wright-Jones' violations and provided Wright-Jones the option to pay only ten percent of that amount within ninety days, staying her obligation to pay the other 90

percent if she avoided engaging in future violations. (Appl. Supp. L. F. 50).

There was no gross proportionality of fees assessed to the violations involved in the case at bar; and the prohibition of the Excessive Fines Clause is not implicated in this case.

b. The assessment of fees does not have a chilling effect.

Wright-Jones makes a final argument that the Ethics Commission's actions violated constitutional rights of free speech and had a chilling effect. Wright-Jones as the party challenging the validity of Missouri's campaign contribution reporting statutes has the burden of proving the statutes clearly and undoubtedly violate constitutional limitations. Impey, 442 S.W.3d 42. Statutes are presumed constitutional and will be found unconstitutional only if they clearly contravene a constitutional provision. Id. To the extent that Wright-Jones relies on the holding in Citizens United to stand for the proposition that strict scrutiny is the appropriate standard of review and is invoked every time campaign funds are utilized, regardless of the context, and that such use challenges the constitutional right of free speech, that reliance is misplaced. Under Citizens United, disclaimer and disclosure requirements are subject to a lesser intermediate or "exacting scrutiny," and not strict scrutiny standard of review:

Disclaimer and disclosure requirements may burden the ability to speak, but they "impose no ceiling on campaign related

activities," [] and "do not prevent anyone from speaking," ... The Court has subjected these requirements to "exacting scrutiny," which requires a "substantial relation" between the disclosure requirement and a "sufficiently important" governmental interest.

Citizens United, 130 S. Ct. at 914–15. This reviewing Court, some five years after Citizens United was decided in 2010, revisited the standard of review in Geier, 474 S.W.3d at 564, for challenges surrounding the constitutionality of campaign disclosure and reporting requirements in Missouri. The Geier decision reiterated that “[d]isclosure and reporting requirements, on the other hand, are subject to ‘exacting scrutiny.’” Geier, 474 S.W.3d 560; *citing to* Citizens United at 366. “‘Exacting scrutiny’ is a lesser standard, requiring that the government establish a ‘substantial relation’ between the regulation and a ‘sufficiently important’ interest.” Id. To withstand exacting scrutiny, “the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights.” Geier, 474 S.W.3d 560, *citing to* John Doe No. 1 v. Reed, 561 U.S. 186, 196, 130 S. Ct. 2811(2010).

As in Geier, 474 S.W.3d 560, the circuit court was the first to rule on Wright-Jones’ constitutional claims because the AHC cannot declare a statute unconstitutional. State Tax Commission v. Administrative Hearing Commission, 641 S.W.2d 9, 75-76 (Mo. banc 1982). The standard of review

utilized in the circuit court's analysis was exacting scrutiny. (Resp. Supp. L. F. Vol. XVIII, p. 2084, ¶¶ 15-17). Exacting scrutiny is a balancing test requiring a substantial relation between disclosure requirements and a sufficiently important governmental interest. (Resp. Supp. L. F. Vol. XVIII, p. 2084, ¶¶ 15-16); *see also Geier*, 474 S.W.3d 564. The circuit court found no violations of constitutional rights. (Resp. Supp. L. F. Vol. XVIII p. 2085, ¶ 18).

Reviewing the AHC decision to determine if the threshold of exacting scrutiny was met, the record supports a substantial relation between Missouri's disclosure requirements and a sufficiently important governmental interest evidenced by Ethics Commission responsibilities. Wright-Jones violated multiple disclosure requirements. (Resp. Supp. L. F. Vol. XVIII, p. 2076-2080). They failed to timely file reports (Count 2); they failed to timely and accurately report contributions (Count 3) and expenditures (Count 4); and they failed to sufficiently identify the actual purpose of multiple expenditures, obfuscating the purposes of expenditures (Count 6). (Resp. Supp. L. F. Vol. XVIII, p. 2078-2080, ¶¶ 22-30). The remaining provisions of Chapter 130, Mo. Ann. Stat., that Wright-Jones violated relate to the Ethics Commission's vital interest in the "gathering of data necessary to detect violations" of other campaign finance laws. *Geier*, 474 S.W.3d 560. "The [Ethics Commission] serves the public interest by enforcing Missouri election law in a nonpartisan and transparent manner to

provide the electorate with accountability as to the source of political speakers. The [Ethics Commission] has an interest in enforcing Missouri's campaign finance laws and providing the public with information and accountability about how money is spent in elections and on issue advocacy.” Id. Failing to update the Ethics Commission about changes to a committee's official depository account (Count 1) and using cash, instead of checks, to conduct committee business (Count 5), frustrates that purpose. *See Id.* at 566. The Ethics Commission's interest meets the standard necessary for exacting scrutiny. No constitutional burden was placed on Wright-Jones' speech under the facts of this case.

Wright-Jones makes a passing argument that the actions of Respondent Ethics Commission had a chilling effect on speech. Although no citations to the record occur in Appellant's Brief, this allegation appears to concern “incorrectly placing information on an [Ethics Commission] form such as the special form used for ‘consulting services.’ ” Appellant's Brief, Argument, page 20. Wright-Jones appears to argue that she was punished by Ethics Commission for using the words “consulting services” and such punishment has a chilling effect on her use of such services. Id. This argument fails when the record is reviewed. Wright-Jones violated multiple disclosure requirements. (Resp. Supp. L. F. Vol. XVIII, p. 2078-2080, ¶¶ 22-30). Wright-Jones failed to sufficiently identify the actual purpose of multiple

expenditures, muddying the true purposes of those expenditures (Count 6). (Resp. Supp. L. F. Vol. XVIII, p. 2080, ¶ 28; p. 2082, ¶ 10). This vague disclosure of where campaign money was allocated, and for what purpose, obstructs Ethics Commission's vital interest in the "gathering of data necessary to detect violations" of other campaign finance laws. Geier, 474 S.W.3d 560. Failing to provide accurate and complete information removes accountability about how money is spent in elections and on issue advocacy. Id. The Ethics Commission was within its authority to determine that this was a violation of Missouri's campaign disclosure laws.

With regard to allegations that Ethics Commission "punished" Robin Wright-Jones for claims that she sought and received reimbursements from the State for expenditures to herself personally, Appellant's Brief, Argument, page 20, Robin Wright-Jones ignores the finding that such expenditures were not "necessary" and were not "ordinary" for purposes of Mo. Ann. Stat. § 130.034.2. (Resp. Supp. L. F. Vol. XVIII, p. 2080, ¶ 30). The reality is that with the exception of the unauthorized uses set forth in Count 8 against Robin Wright-Jones and her committee, Wright-Jones could use expenditures exactly as they did; they simply needed to report such actions timely and accurately as required by statute. (Appx. Resp. Br. A 12-17). To the extent that Wright-Jones challenges the constitutionality of any other unspecified provision of Chapter 130, Mo. Ann. Stat., Wright-Jones have failed to set

forth specific arguments identifying which sections and failed to explain how they are allegedly unconstitutional. Consequently, Wright-Jones has failed to preserve any other constitutional challenge. State ex rel. Co-op. Ass'n No. 86 of Aurora, 977 S.W.2d at 82–83. The Court should uphold the Decision of the Administrative Hearing Commission and dismiss Wright-Jones' appeal.

CONCLUSION

For the foregoing reasons, the judgment upholding the determination of the Missouri Ethics Commission and the assessment of fees against Wright-Jones should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that a true and correct copy of the foregoing was filed and served electronically via Missouri Case-Net on September 1, 2017, to:

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The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b) and that the brief contains 11,033 words.

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