SC91125

IN THE SUPREME COURT OF MISSOURI

KANSAS CITY PREMIER APARTMENTS, INC.,

Plaintiff-Appellant,

v.

MISSOURI REAL ESTATE COMMISSION,

Defendant-Respondent.

APPEAL FROM THE CIRCUIT COURT OF PLATTE COUNTY

The Honorable Abe Shafer, Judge

APPELLANT'S BRIEF

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INTRODUCTION AND SUMMARY

The facts of this case call into question constitutional principles of the utmost importance: the freedom of expression, equal protection of the laws, and due process, to which every citizen is entitled. While KCPA contends that the statutory provisions at issue do not apply to its business activities, it is also challenging the constitutionality of those provisions because they criminalize the communication of truthful, non-misleading, and harmless information based solely on the subject of the speech and the identity of the speaker. The provisions that the MREC has used to silence the Appellant also create a privileged class of persons and businesses whom the law permits to share specific information, while denying similarly situated persons and businesses the freedom to communicate precisely the same information. Additionally, these statutory provisions impose criminal penalties for their violation, yet they lack clear definitions and objective standards to govern their application, leaving citizens uncertain as to the limits of their lawful behavior, chilling their freedom of expression, and subjecting their liberties to the unfettered discretion of a regulatory authority. Thus, these statutory provisions impermissibly infringe upon some of the most essential freedoms that citizens have secured to themselves under the United States and Missouri Constitutions, and for the reasons given in this brief the Appellant respectfully asks the court to find the challenged provisions unconstitutional and void.

JURISDICTIONAL STATEMENT

This is an appeal of a judgment of the Circuit Court of Platte County in favor of Defendant, MREC, against Plaintiff, KCPA, entered on June 30, 2010. Among the issues resolved in that judgment and raised in this appeal is whether certain sections of Chapter 339, RSMo., are valid in light of the First and Fourteenth Amendments of the U.S. Constitution and Article I, Sections 2, 8, and 10, and Article III, section 40(30) of the Missouri Constitution. Appellant is also contesting the trial court's ruling that KCPA did not fall within any of the statutory exemptions set out in section 339.010.6, which allow individuals or organizations that do not hold a license from the Missouri Real Estate Commission to lawfully share information about real estate with the public. Appellants filed their Notice of Appeal to this Court on August 4, 2010. The Court's jurisdiction to hear this appeal arises under Article V, section 3 of the Missouri Constitution.

STATEMENT OF FACTS

A. About KCPA

KCPA is an internet-based service which provides members of the public with information about living and renting real estate in the Kansas City area. Transcript ("Tr.") at 47. The business has several components, including an online database of real estate advertisements, a search function that allows interested members of the public to view only those properties that match criteria they select themselves, an online roommate matching service, a collection of useful information about the advantages of living in the Kansas City area, a blog, and other social media outlets that allow owners or managers of rental properties to notify prospective renters of the availability of special offers that might otherwise escape the renters' notice. Legal File ("L.F.") at 142. KCPA enters into written agreements with owners and managers of rental property to post on its website advertisements prepared and submitted by the property owners, managers, or brokers working on their behalf. L.F. at 142-43. KCPA does not alter these advertisements once they have been provided by the properties. L.F. at 143. KCPA does not collect rents or security deposits for owners, it does not accept money directly from renters or prospective renters and does not handle tenant complaints for owners or managers of rental properties, it does not "show" properties to prospective renters through in-person inspection, it does not advertise or hold itself out as a licensed real estate broker or salesperson, and it does not charge or accept advance fees for advertisements appearing on the KCPA website. L.F. at 143.

Tiffany Lewis and Ryan Gran founded KCPA in 2001, after Ms. Lewis had spent

a couple of years working for a licensed real estate broker named Ann Carroll. Tr. at 80. Before KCPA began business operations, Ms. Lewis asked a representative of the MREC if her proposed business model would require her to obtain a license, and Ms. Lewis was told that the contemplated business activities constituted a "grey area" of the law, but was offered no further clarification. L.F. at 143. Believing that a real estate license was not necessary, Ms. Lewis opted not to obtain one and KCPA began business operations. Id. Neither Ms. Lewis nor Mr. Gran has ever held a license issued by the MREC. L.F. at 142.

B. The Relevant Statutes[1]

Section 339.180 makes it "unlawful for any person or entity not licensed under [Chapter 339] to perform any act for which a real estate license is required."

Section 339.010.1 defines "real estate broker" as "any person, partnership, association, or corporation… who, for another, and for valuable consideration, does, or attempts to do, any or all of the following:

(3) Negotiates or offers or agrees to negotiate the sale, exchange, purchase, rental or leasing of real estate;

(4) Lists or offers or agrees to list real estate for sale, lease, rental or exchange;

(7) Assists or directs in the procuring of prospects, calculated to result in the sale, exchange, leasing or rental of real estate;

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[1] The full text of each of these statutes is in the Appendix filed with this brief.

(8) Assists or directs in the negotiation of any transaction calculated or intended to result in the sale, exchange, leasing or rental of real estate;

(10) Performs any of the foregoing acts on behalf of the owner of real estate, or interest therein, or improvements affixed thereon, for compensation.

Section 339.010.6 establishes a wide range of exemptions from Chapter 339's requirements and prohibitions, including:

(5) Any person employed or retained to manage real property by, for, or on behalf of the agent or the owner of any real estate shall be exempt from holding a license, if the person is limited to one or more of the following activities:

(d) Conveying information prepared by a broker or owner about a rental unit, a lease, an application for lease, or the status of a security deposit, or the payment of rent, by any person;

(e) Assisting in the performance of brokers' or owners' functions, administrative, clerical or maintenance tasks;

(9) Any newspaper, magazine, periodical, Internet site, Internet communications, or any form of communications regulated or licensed by the Federal Communications Commission or any successor agency or commission whereby the advertising of real estate is incidental to its operation;

Section 339.170 makes the violation of any provision of sections 339.010 to

339.180 a Class B misdemeanor.

C. Warning Letters and Legal Action

In June 2004, the MREC notified Ms. Lewis that her former employer had filed a complaint alleging that KCPA was unlawfully engaging in real estate activities. L.F. at 35, 144. In December 2006, in a letter signed by Janet Carder, the Executive Director of the MREC, the Commission announced its determination that KCPA was "conducting real estate activity without a Missouri real estate license" and demanded that KCPA "cease immediately" and obtain a license "before conducting any further real estate activity in this state." L.F. at 37. Ms. Carder's letter did not advise KCPA as to which of its business activities the MREC believed to constitute unlawful "real estate activity." Id.

On January 25, 2007, an attorney for Ms. Lewis and Mr. Gran sent the MREC a letter explaining why they believed the law did not require KCPA or its officers to obtain real estate licenses. L.F. 39-40. They explained the sort of information that KCPA provides to the public, described the limited agreements the company had to post advertisements provided by property owners, and noted that KCPA fell within the exemption provided for in section 339.010.6(5)(d) and (e). L.F. at 39. They also pointed out that KCPA does not enter into exclusive listing agreements with property owners. L.F. at 40. Confident that their business activities were acceptable under the relevant statutes, the company continued to operate.

In March 2007, Kimberly Grinston, an attorney for the MREC, sent another letter to KCPA. L.F. at 42-43. Ms. Grinston's letter did not address the points KCPA had raised in its letter, but once again insisted that KCPA was "illegally operating as a real

estate broker in this state… without the required license." L.F. at 43. Ms. Grinston's letter quoted section 339.010.1, specifically emphasizing subsections (4), (7), and (9), by placing these provisions in bold and italic font,[2] but the letter did not specify any of KCPA's business activities that it believed to violate these provisions. L.F. at 144. The letter did, however, threaten to direct the matter to the attention of "all applicable prosecuting authorities for official and immediate legal action." Id.

On April 16, 2007, KCPA filed a lawsuit requesting declaratory judgment that section 339.010.1 does not encompass its business activities, that section 339.010.6 exempts KCPA from the licensure requirements of Chapter 339, and that the MREC's interpretation of these statutes denies KCPA's freedom of speech, its right to due process, and the equal protection of the laws as secured by the United States and Missouri Constitutions. L.F. at 15-43, 142. The MREC filed a motion to dismiss. L.F. 51-70. The trial court dismissed KCPA's procedural due process claims, but allowed the rest of its claims to proceed. L.F. at 71. On June 24, 2009, the MREC filed a Petition for Preliminary Injunction and Permanent Injunction, invoking sections 339.010.1(3), (4), (7), (8), and (10)[3] in asking the court to prohibit KCPA from continuing any of its business activities that constituted performing real estate activities without a license. L.F. at 73-90. In its petition, the MREC alleged that KCPA was violating the challenged

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[2] Janet Carder's trial testimony revealed that the MREC had not instructed Ms. Grinston to emphasize these provisions. L.F. at 144.

[3] KCPA will refer to these sections collectively as "the challenged provisions."

provisions by (1) agreeing to post advertisements on its website, L.F. at 79; (2) posting advertisements on its website so they can be searched by prospective tenants, id.; (3) providing prospective tenants with contact information for properties that appear on the website, L.F. at 80; (4) making property owners aware that KCPA will post their advertisements on its website, id.; making prospective tenants aware that rental advisors are available if the prospective tenant would like additional information, id.; (5) claiming or representing that KCPA staff has knowledge of the Kansas City apartment market that will be useful to prospective tenants, L.F. at 81; (6) employing "rental advisors" to provide assistance to prospective tenants who request it, id.;[4] (7) calling landlords to gather information about properties available for rent, L.F. at 82; (8) communicating with prospective tenants regarding their needs, specifications, and in which dwellings the tenant might have interest, id.; (9) identifying properties that might meet prospective tenants' interest and bringing them to the prospective tenants' attention, L.F. at 82-83; and (10) sharing information about amenities, policies, and other characteristics of prospective dwellings. L.F. at 83. The two actions were consolidated, L.F. at 135, and they went to trial on June 23-24, 2010. L.F. at 141.

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[4] The KCPA website plainly states that "Rental Advisors cannot assist [prospective renters] with the Application Process or Lease Negotiation and will never ask for deposits or collect rent." L.F. at 82.

D. Stipulations and Testimony Presented at Trial.

The MREC stipulated that it sought to prevent KCPA from engaging in a range of future communication or publications. MREC Stip. ¶¶ 4, 7, 9, 10, 11.[5] At trial, the MREC failed to show that any of the property advertisements on the KCPA website were false or misleading, and it did not prove that KCPA's rental advisors had conveyed any false or misleading information about specific rental units. L.F. at 143. Despite alleging in its Petition for Preliminary and Permanent Injunction that KCPA's business operations were causing "irreparable harm," the MREC also could not identify any person who has suffered harm as a result of KCPA's communications. See Tr. at 361-63. The MREC's expert witness testified that the types of information provided by KCPA did not require any special training, Tr. at 277, and that consumers would not be harmed by receiving that information. Tr. at 278. Nevertheless, on June 30, 2010, the Trial Court issued an injunction prohibiting KCPA from "contracting with property owners to receive compensation in return for referring prospective tenants," and from "any act requiring real estate licensure pursuant to the terms of Cja[ter [sic] 339 RSMo."[6] L.F. at 146. The injunction remains in place.

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[5] The MREC's Stipulations, introduced at trial as Plaintiff's Exhibit #6, are included in the Appendix at A30-A51.

[6] Once again, the trial court did not offer any explanation as to which of KCPA's business activities required real estate licensure.

POINTS RELIED ON

I. The Trial Court Erred In Ruling That KCPA Is Not Exempt From The Restrictions And Requirements Of Chapter 339, Because KCPA Qualifies For Exemption Under Section 339.010.6(5), In That The Plain Meaning Of The Word "Retained" Encompasses A Company Hired To Perform Specified Services On Behalf Of Another And Testimony From Tiffany Lewis Showed That KCPA Is Retained By Property Owners To Convey Information Prepared By A Broker Or Owner About Rental Units And To Assist In The Performance Of Owners' Functions, Administrative, Or Clerical Tasks.

Section 339.101.6(5), RSMo.

Black's Law Dictionary (6th Edition, 1990)

II. The Trial Court Erred In Ruling That Sections 339.010.1(3), (4), (7), (8), And (10) Are Not Facially Unconstitutional Under The Missouri Or United States Constitutions, Because These Sections Are Unconstitutionally Overbroad, In That They Infringe Upon A Wide Range Of Speech Protected By The First Amendment And Violate The Public's Right To Determine For Itself What Speech And Speakers Are Worthy Of Consideration..

First Amendment to the U.S. Constitution

Section 339.101.1, RSMo.

Citizens United v. FEC, 130 S. Ct. 876 (January 21, 2010)

III. The Trial Court Erred In Ruling That Sections 339.010.1(3), (4), (7), (8), And (10), Are Not Unconstitutional Under The Missouri Or United States Constitutions As The MREC Has Applied Them To KCPA, Because These Sections Impair The Freedom Of Speech Protected By The First Amendment And Article I, Section 8, Of The Missouri Constitution, In That They Prohibit The Communication Of Information The Evidence Showed To Be Truthful And Harmless, And Which Could Lawfully Be Communicated By Speakers Who Had Received Special Approval From The Government.

First Amendment to the U.S. Constitution

Article I, Section 8 of the Missouri Constitution

Section 339.101.1, RSMo.

Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York, 447 U.S. 557, (1980)

U.S. v. Playboy Entertainment Group, Inc., 529 U.S. 803 (2000)

Marx & Haas Jeans Clothing Co. v. Watson, 67 S.W. 391 (Mo. banc 1902)

Ex parte Harrison, 110 S.W. 709, 710 (Mo. 1908)

IV. The Trial Court Erred In Ruling That Section 339.010.6 Is Not Facially Unconstitutional Under The Missouri Or United States Constitutions, Because This Section Violates The Equal Protection Clauses Of The Fourteenth Amendment And Article I, Section 2, Of The Missouri Constitution, And The Special Law Prohibition Of Article III, Section 40(30) Of The Missouri

Constitution, In That It Exempts Certain Groups From The State's Real Estate Licensing Requirements Based On Factors Not Rationally Related To The Law's Underlying Purpose.

Petitt v. Field, 341 S.W.2d 106 (Mo. 1960)

Section 339.010.6(9), RSMo

Fourteenth Amendment to the U.S. Constitution

Article I, Section 2 of the Missouri Constitution

Article III, Section 40(30) of the Missouri Constitution

Merrifield v. Lockyer, 547 F.3d 978, (9th Cir. 2007)

V. The Trial Court Erred In Ruling That Sections 339.010.1(3), (4), (7), (8), And (10) And 339.010.6 Are Not Unconstitutionally Vague, Because They Violate The Due Process Protections Of The Fourteenth Amendment And Article I, Section 10, Of The Missouri Constitution By Failing "To Establish Standards… Sufficient To Guard Against The Arbitrary Deprivation Of Liberty Interests" And Forcing Persons Of Common Intelligence To Guess At The Meaning Of A Criminal Law, In That Testimony At Trial Showed That Citizens Could Not Be Sure That Certain Acts Or Communications Are Lawful Until The MREC Has Taken A Vote On The Matter.

Fourteenth Amendment to the U.S. Constitution

Article I, Section 10 of the Missouri Constitution

Smith v. Goguen, 415 U.S. 566, 574 (1974)

STANDARD OF REVIEW

The interpretation of a statute is a question of law, and appellate review is de novo. *Nelson v. Crane*, 187 S.W.3d 868, 869 (Mo. banc 2006). The constitutionality of a statute is a question of law, the review of which is *de novo*. *Planned Parenthood of Kansas v. Nixon*, 220 S.W.3d 732, 737 (Mo. banc 2007). This Court reviews a trial court's interpretation of the Missouri Constitution *de novo*. *StopAquila.org v. City of Peculiar*, 208 S.W.3d 608, 611 (Mo. banc 2006). Normally, where the constitutionality of a statute has been challenged the statute enjoys a presumption of validity, *State v. Richard*, 298 S.W.3d 529, 531 (Mo. banc 2009), but where, as in this case, a law imposes a restriction on speech, the government bears the burden of justifying that restriction. *U.S. v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 816 (2000). Additionally, in reviewing a lower court's judgment after a bench trial involving a First Amendment claim, the reviewing court has a responsibility to "make a fresh examination of those facts that are crucial to the First Amendment inquiry." *Doe v. Pulaski Co. Special School Dist.*, 306 F.3d 616, 621 (8th Cir. 2002).

ARGUMENT

I. The Trial Court Erred In Ruling That KCPA Is Not Exempt From The Restrictions And Requirements Of Chapter 339, Because KCPA Qualifies For Exemption Under Section 339.010.6(5), In That The Plain Meaning Of The Word "Retained" Encompasses A Company Hired To Perform Specified Services On Behalf Of Another And Testimony From Tiffany Lewis Showed That KCPA Is Retained By Property Owners To Convey Information Prepared By A Broker Or Owner About Rental Units And To Assist In The Performance Of Owners' Functions, Administrative, Or Clerical Tasks.

Section 339.010.6(5) exempts from the operation of sections 339.010 to 339.180 "[a]ny person employed or retained to manage real property by, for, or on behalf of the agent or the owner of any real estate" as long as they are limited to one or more of a set of activities, including: "(d) conveying information prepared by a broker or owner about a rental unit, a lease, an application for a lease, or the status of a security deposit, or the payment of rent, by any person; [and] (e) assisting in the performance of brokers' or owners' functions, administrative, clerical or maintenance tasks." § 339.010.6(5). Section 339.010.1 is a *criminal* statute because its violation would be a Class B misdemeanor. § 339.170. This being the case, the rule of lenity applies and dictates that if there is any ambiguity in the terms of this statute, it must be resolved against the government. *United Pharmacal Co. of Missouri, Inc. v. Missouri Bd. of Pharmacy*, 208 S.W.3d 907, 913 (Mo. banc 2006) (invoking lenity to construe occupational licensing statute in such a way that criminal penalties could not attach to the unlicensed sale of

veterinary drugs).

The statute does not define what it means for a person to be "employed or retained to manage real property," although the context suggests that these terms would properly apply to any formal understanding between "the agent or the owner of any real estate" and a person whose duties in regard to that real estate are limited to one of the categories laid out in subsections (a)-(f). "When a statutory term is not defined by the legislature, courts apply the ordinary meaning of the term as found in the dictionary." *In re Coffman*, 225 S.W.3d 439, 444 (Mo. banc 2007).

Black's Law Dictionary (6th Ed., 1990), defines "retain" as "to engage the services of an attorney or counsellor to manage a cause." It is but a small step from this specialized legal definition to a more general understanding that one could be considered "retained to manage real property" if one's services have been engaged to handle a specified set of tasks related to that property. Evidence presented at trial further confirms the reasonability of this definition, in that the testimony of the MREC's expert witness indicated that there was nothing unusual about using the word "retained" in the context of a company that had entered an agreement to perform specified services on behalf of another.[7] *See* Tr. at 286-89.

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[7] When questioned as to the meaning of the statutory phrase "employed or retained," Janet Carder, the Executive Director of the MREC, testified that both of the words in the phrase referred to one who was "an employee of the owner." Pressed to explain the statute's use of the word "retained" in *addition* to the word "employed," Carder

As the MREC pointed out in its own petition for injunction, "KCPA enters into agreements with landlords under which the landlords submit properties to be listed on KCPA's website." L.F. at 79. Testimony from Tiffany Lewis showed that property owners reach agreements with KCPA to convey information prepared by a broker or owner about certain rental units, L.F. 142-43, and any additional information that KCPA provides regarding any particular property could be considered "assisting in the performance of owners' functions, administrative, or clerical tasks" — another phrase that the statute does not define. See Tr. at 58. Thus, the evidence showed that the exemption provided in section 339.010.6(5) easily encompasses the arrangements that KCPA enters with property owners. As such, KCPA qualifies for that exemption and the restrictions and requirements of sections 339.010 to 339.180 do not apply to KCPA's business activities.

II. The Trial Court Erred In Ruling That Sections 339.010.1(3), (4), (7), (8), And (10) Are Not Facially Unconstitutional Under The Missouri Or United States Constitutions, Because These Sections Are Unconstitutionally Overbroad, In That They Infringe Upon A Wide Range Of Speech Protected By The First Amendment And Violate The Public's Right To Determine For Itself What Speech And Speakers Are Worthy Of Consideration.

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suggested that "retained" *must* mean "employed" because "otherwise it's like you could have anybody retained and never have… everybody would be exempt, which would be illogical to me." Tr. at 218.

The First Amendment's protections for speech[8] are sweeping and governments are only permitted to limit so much speech as fits within a few "well-defined and narrowly-limited classes" – obscenity, defamation, fraud, incitement, and speech integral to criminal conduct. *U.S. v. Stevens*, 130 S.Ct. 1577, 1584 (April 20, 2010) (citations omitted) (striking down law criminalizing depictions of illegal acts of animal cruelty). Even if it is assumed that section 339.010.1 is intended to protect the public against the dangers of false or misleading speech, its plain language criminalizes a broad swath of unlicensed communication about real estate without taking any precautions to ensure that citizens remain free to share truthful information and honest opinion. See MREC Stip. ¶ 9. "The Constitution gives significant protection from overbroad laws that chill speech within the First Amendment's vast and privileged sphere." *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 244 (2002). It cannot tolerate a law that heedlessly disregards the possibility that its restrictions or punishments might be brought to bear on constitutionally-protected speech.

A. The Challenged Provisions Impair the First Amendment Rights of Speakers *and* the Rights of Interested Listeners.

It is important to add that the broad scope of section 339.010.1 affects not only the First Amendment rights of unlicensed persons who would like share their knowledge about real estate, but also the rights of those interested in hearing what the unlicensed

[8] Made applicable to the States through the Fourteenth Amendment.

speakers have to say. *U.S. v. Nat'l Treasury Employees Union*, 513 U.S. 454, 470 (1995) (forbidding certain government speakers from accepting honoraria "also imposes a significant burden on the public's right to read and hear" what would have been written or said); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 756 (1976) ("[W]here a speaker exists… the protection afforded is to the communication, to its source and to its recipients both."); *Stanley v. Georgia,* 394 U.S. 557, 564 (1969) (the "right to receive information and ideas, regardless of their social worth . . . is fundamental to our free society.") (citations omitted); see also *Citizens United v. FEC*, 130 S. Ct. 876, 908 (January 21, 2010) (First Amendment forbids government "to command where a person may get his or her information or what distrusted source he or she may not hear.").

This point is highlighted by the fact that at trial two members of the public, Ms. Tara Hall and Mr. Alex Gamble, offered uncontroverted testimony that they had previously taken advantage of the information provided by KCPA and they hoped to do so again. Tr. at 115-17, 119-20. Both testified that KCPA made their apartment searching process much easier by bringing a variety of information related to rental properties into one convenient place. Id. at 115, 119. The challenged provisions, however, mean that Ms. Hall, Mr. Gamble, and any of the hundreds of thousands of other citizens who have gotten information about real estate from unlicensed sources such as KCPA, are only permitted to get such information from government-approved sources that may or may not offer the same range or quality of information, may package it in a less-convenient way, or may even charge prospective renters for the service. The Court

should find the challenged provisions unconstitutional because they dramatically impair the ability of a great many unlicensed persons to share their knowledge about real estate and, concomitantly, they also limit potential renters' ability to receive that knowledge.

B. The First Amendment Forbids the Government to Pick and Choose Which Citizens May Share the Same Truthful, Harmless Information.

The challenged provisions have no defense in the idea that the restrictions they impose leave citizens free to seek out the same information from another source. *Virginia State Board of Pharmacy*, 425 U.S. at 757, fn 15. "The Government may not… deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration." *Citizens United*, 130 S. Ct. at 899. If citizens are willing to receive information from those who may not have obtained government-mandated credentialing, the First Amendment only permits the government to deny them that choice upon a showing that such a restriction is the least restrictive means of addressing a compelling government interest.

By enacting the challenged provisions, the General Assembly has reserved the privilege of communicating real estate information to those holding a license from the MREC and a select group of others exempted from the chapter's prohibitions. The absurd result of this law was displayed at trial when Janet Carder testified that, in regard to a simple, generic real estate advertisement, certain people with governmental approval would be permitted to share that information with the public, but anyone outside of one of the government's pre-approved groups could face criminal penalties for sharing the exact same information. Tr. at 177-80. Restrictions distinguishing among speakers,

allowing speech by some but not others, are prohibited under the First Amendment. *Citizens United*, 130 S. Ct. at 898 (citing *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 784 (1978)). "Even under the degree of scrutiny [the U.S. Supreme Court has] applied in commercial speech cases, decisions that select among speakers conveying virtually identical messages are in serious tension with the principles undergirding the First Amendment." *Greater New Orleans Broadcasting Ass'n, Inc. v. U.S.*, 527 U.S. 173, 193-94, (1999). "[A] law or policy permitting communication in a certain manner for some but not for others raises the specter of content and viewpoint censorship." *City of Lakewood v. Plain Dealer,* 486 U.S. 750, 763 (1988). Because the challenged provisions allow a few government-approved speakers to communicate precisely the same truthful, harmless information that would generate criminal liability if shared by unapproved speakers, this Court should strike down the challenged provisions as a violation of the First Amendment.

III. The Trial Court Erred In Ruling That Sections 339.010.1(3), (4), (7), (8), And (10), Are Not Unconstitutional Under The Missouri Or United States Constitutions As The MREC Has Applied Them To KCPA, Because These Sections Impair The Freedom Of Speech Protected By The First Amendment And Article I, Section 8, Of The Missouri Constitution, In That They Prohibit The Communication Of Information The Evidence Showed To Be Truthful And Harmless, And Which Could Lawfully Be Communicated By Speakers Who Had Special Approval From The Government.

Section 339.010.1 prohibits Missouri citizens from communicating real estate

information with the public unless they fall with in one of several specially-favored groups established by the government. The prohibited forms of communication include:

- Negotiating or offering or agreeing to negotiate the sale, exchange, purchase, rental, or leasing of real estate.[9] § 339.010.1(3).
- Listing or offering or agreeing to list real estate for sale, lease, rental, or exchange.[10] § 339.010.1(4).

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[9] At trial, there was much conflicting testimony as to what constitutes "negotiation." Testimony from Tiffany Lewis indicated KCPA's belief that "negotiation" entailed an effort to persuade one party to modify their position in regard to the terms under which they are willing to enter into a transaction. Tr. at 58, 84. Even the Executive Director of the MREC initially implied a similar understanding of the word "negotiation," Tr. at 174-75, although she confirmed her opinion that there is no clear definition of the word as used in the statute, Tr. at 176, and still later implied that *any involvement* of a third-party could be considered "negotiation" under section 339.010.1(3). Tr. at 210-14. The MREC's expert witness, Steve Banks, testified that while the word "negotiation" generally meant to "help two people come together on a price," it carries a "different weight" in the context of a real estate broker "negotiating a rental property on behalf of an owner." Tr. at 265-67.

[10] Although the term "listing" is not statutorily defined, the MREC's promulgated regulations describe the rules for "listing agreements," which anticipate legal relationships *far* more intricate than the simple advertising arrangements desired by

- Assisting or directing in the procuring of prospects calculated to result in the sale, exchange, leasing or rental of real estate. § 339.010.1(7).
- Assisting or directing in the negotiation of any transaction calculated to result in the sale, exchange, leasing or rental of real estate. § 339.010.1(8).
- Performing any of the above on behalf of the owner of real estate for compensation. § 339.010.1(10).

While the trial court did not provide a definition for any of these activities, it issued an injunction preventing KCPA from engaging in them. Because the trial court did not specify which of KCPA's informational services fell within these prohibitions, KCPA has had to infer that the injunction applies to any and all of its expressive activities for which it might receive compensation. While KCPA has continued to share information about Kansas City, Missouri, and rental properties located within Missouri, the trial court's injunction has forced KCPA to reincorporate in the state of Kansas and to cease accepting any compensation for communications related to the state of Missouri. This has been a tremendous financial burden on the company; unless this Court vindicates KCPA's right to free speech, the company may have to cease operations altogether.

KCPA and the properties that want to advertise on its website, indicating that the sort of "listing" addressed by 339.010.1(4) is an entirely different creature and cannot fairly be applied to KCPA's activities. 20 CSR 2250-8.090.

A. The Challenged Provisions Restrict the Communication of Truthful, Harmless Information.

The U.S. Supreme Court has made clear that for the purposes of First Amendment analysis a restriction on the acceptance of compensation for speech is the same as restricting the speech itself. In *Riley v.Nat'l Federation of the Blind*, 487 U.S. 781 (1988), the U.S. Supreme Court struck down licensing requirements for charitable solicitors, stating, "It is well settled that a speaker's rights are not lost merely because compensation is received; a speaker is no less a speaker because he or she is paid to speak." *Id.* at 801. Similarly, in *U.S. v. Nat'l Treasury Employees Union*, 513 U.S. 454 (1995), the U.S. Supreme Court struck down a statute that prohibited certain government officials from accepting compensation for speeches—even though the statute "neither prohibit[ed] any speech nor discriminate[d] among speakers"—because the "prohibition on compensation unquestionably imposes a significant burden on expressive activity." *Id*. at 468-69; *and see Grosjean v. American Press Co.*, 297 U.S. 233 (1936) (striking down state statute that required licensure for certain entities receiving compensation for publishing advertisements).[11]

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[11] *See also Simon & Schuster, Inc. v. New York State Crime Victims Bd.*, 502 U.S. 105 (1991) (striking down a statute that would discourage speech by denying criminals the first five years' worth of compensation for books discussing their crimes); *Meyer v. Grant*, 484 U.S. 414 (1988) (striking down prohibition on paid petition circulators); *Speiser v. Randall*, 357 U.S. 513 (1958) (ruling that financial penalty of denying tax

Thus, the challenged provisions plainly implicate the First Amendment and Article I, Section 8, of the Missouri Constitution even if this Court deems the challenged provisions merely to restrict the acceptance of compensation rather than expressive freedoms.

In any event, the MREC has unambiguously taken the position that the challenged provisions prohibit the communication of information and opinions, "regardless of the truth or accuracy of that information or the sincerity of those opinions." MREC Stip. ¶¶ 4, 7, 9-11. The MREC sought the enforcement of these provisions against KCPA even though it did not challenge the truthfulness of the advertisements published on KCPA's website or the information provided by KCPA's rental advisors. MREC Stip. ¶¶ 15-18. It is also vital to reiterate that the challenged provisions are backed up by criminal penalties of up to six months' imprisonment. *See* §§ 339.170; 558.011.1(6). Thus, the challenged provisions criminalize KCPA's communication of truthful, harmless information simply because the government has reserved this subject matter for a pre-approved set of speakers.

"When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions." *Playboy Entertainment Group*, 529 U.S. at

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exemption based on exercise of free speech violated First Amendment); *Thomas v. Collins*, 323 U.S. 516 (1945) (rejecting the notion that First Amendment freedoms may be disregarded on the basis that one "exercising these rights receives compensation for doing so.").

816 (citations omitted). "Criminal statutes require particularly careful scrutiny." *State v. Moore*, 90 S.W.3d 64, 66 (Mo. banc 2002) (quoting *City of Houston v. Hill*, 482 U.S. 451, 459 (1987)). As a result, the question before this Court is whether the MREC has met the burden of proof necessary for those restrictions to survive the appropriate level of scrutiny required by the First Amendment and Article I, Section 8, of the Missouri Constitution. It has not.

B. The Challenged Provisions Cannot Survive Strict Scrutiny.

KCPA comprises a group of individuals who simply want to share truthful, harmless information to others who are eager to receive that information. If KCPA wanted to provide information about sports, restaurants, garage sales, schools, or traffic conditions, it would be free to do so without regulation. But because KCPA has chosen to share information about rental properties, its officers have been threatened with criminal prosecution and the business has been subjected to a crippling injunction. The challenged provisions clearly impose a content-based restriction on KCPA's freedom of speech, thus requiring this Court to apply strict scrutiny in reviewing the provisions' constitutionality. *Playboy Entertainment Group*, 529 U.S. at 813.[12]

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[12] *See also Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622, 641 (1994) ("[T]he First Amendment, subject only to narrow and well-understood exceptions, does not countenance governmental control over the content of messages expressed by private individuals."); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) ("Content-based regulations are presumptively invalid."); *Arkansas Writers' Project, Inc. v. Ragland*, 481

Where, as here, strict scrutiny applies, the law or policy "will only be upheld if it is necessary to a compelling state interest and narrowly drawn to protect that interest." *In re Coffman*, 225 S.W.3d at 445. The MREC has asserted only one governmental interest advanced by the challenged provisions: assuring the public that all persons who perform the services defined in section 339.010.1 will be licensed and regulated by the MREC. The government introduced no evidence to suggest that its asserted interest is in any way "compelling." For the court to consider this interest to be compelling, at a minimum the government ought to produce evidence that the communications restricted by the challenged provisions pose a threat to the physical or financial health of the public, or that the people of Missouri have been suffering some damaging crisis of faith regarding

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U.S. 221, 231 (1987) (in order to justify content-based regulation of speech "the State must show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end."); *Regan v. Time, Inc.*, 468 U.S. 641, 648-49 (1984) ("Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment."); *Minneapolis Star and Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 592-93 (1983) (a regulation "that singles out the press, or that targets individual publications within the press, places a heavy burden on the state to justify its action."); *Consolidated Edison Co. of New York, Inc. v. Public Service Commission of New York*, 447 U.S. 530, 537 (1980) ("The First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic.").

individuals or companies that provide those services.[13] In fact, only one witness offered any testimony as to whether the public desires assurance that persons providing real estate information should be "licensed and regulated by the MREC," and he said that he neither believed that KCPA held such a license, nor did he care. Tr. at 122. Because the government failed to demonstrate that its content-based restriction on speech is supported by a compelling government interest, the restriction violates the First Amendment.

Even if this Court found the government's asserted interest to be compelling, the government must prove that the legislature's decision to criminalize KCPA's communication of truthful, harmless information about rental properties is the least-restrictive means of advancing this interest.[14] "When a plausible, less restrictive alternative is offered to a content-based restriction, it is the Government's obligation to

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[13] KCPA in no way concedes that even undisputed evidence of such a crisis in faith might rise to the level of a "compelling" state interest for the purposes of strict scrutiny analysis; this Court recently held that "combating perceptions of voter fraud" was not a sufficiently compelling interest to justify interference with fundamental liberties, stating that "[t]he protection of our most precious state constitutional rights must not founder in the tumultuous tides of public misperception." *Weinschenk v. State*, 203 S.W.3d 201, 218-19 (Mo. banc 2006).

[14] Any legislative determination that the regulation represents the least restrictive means of advancing a governmental interest is not entitled to judicial deference. *Sable Communications of California, Inc. v. F.C.C.*, 492 U.S. 115, 129 (1989).

prove that the alternative will be ineffective to achieve its goals." *Playboy Entertainment Group*, 529 U.S. at 816. For example, in this case the legislature could have limited Chapter 339's prohibitions and penalties to false, misleading, or fraudulent communications about real estate. If the legislature believed that citizens were likely to be harmed as a result of unlicensed communication of real estate information, it could have specifically authorized a civil cause of action that would allow any injured citizen to recover damages suffered as a result of such unlicensed communication. And if the legislature was concerned that members of the general public might mistakenly confuse a service like KCPA with a real estate brokerage, the government could have simply required unlicensed speakers to post a disclaimer clarifying that they did not hold a real estate license. *See, e.g., Citizens United*, 130 S.Ct. at 915. Any one of these solutions would be less restrictive of speech than the current law's outright criminalization of communication that the evidence showed is neither false, nor misleading, nor likely to harm its recipients.

An additional factor for this Court's analysis should be the fact that the exemptions included in section 339.010.6 belie the MREC's stated interest in assuring the public that all persons who perform the services defined in section 339.010.1 will be licensed and regulated by the MREC. In fact, section 339.010.6 permits at least ten broad categories of citizens lawfully to provide precisely the same information at issue in this case, all without being licensed or otherwise regulated by the MREC.

The U.S. Supreme Court has previously noted that similar "underinclusiveness" in statutory restrictions undermine governmental justifications of "compelling" government

interests.[15] In the instant case, the fact that the law explicitly permits a great range of persons not licensed by the MREC to share information about real estate completely invalidates the MREC's lone asserted interest of assuring the public that such information can only be conveyed by those holding licenses from the Commission.

Because the challenged provisions criminalize the communication of KCPA's truthful, harmless information based on its content, and the MREC has failed to assert a compelling government interest in doing so, and the government could have addressed any legitimate concerns it might have with regulations far less restrictive, the provisions may not constitutionally be applied to prohibit or punish KCPA's communications.

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[15] *See, e.g., Republican Party of Minnesota v. White*, 536 U.S. 765, 779-80 (2002) (asserted interest in insuring open-mindedness of judicial candidates unsupported where speech restrictions only applicable during period of candidacy); *City of Ladue v. Gilleo*, 512 U.S. 43, 52 (1994) (exemptions from a regulation of speech "may diminish the credibility of the government's rationale for restricting speech in the first place."); *F.C.C. v. League of Women Voters of California*, 468 U.S. 364, 396 (1984) (asserted interest in preventing partisan opinions from being aired on noncommercial radio unsupported where law permitted commentators or guests to share partisan opinions); *Carey v. Brown*, 447 U.S. 455, 465 (1980) (asserted interest in residential privacy unsupported where law permitted labor picketing but prohibited nonlabor picketing); *Bellotti*, 435 U.S. at 792-93 (asserted interest in protecting shareholders unsupported where law only restricted corporate lobbying on ballot measures, while permitting other forms of lobbying).

C. The Challenged Provisions Cannot Survive Intermediate Scrutiny Under *Central Hudson*.

While it is true that the U.S. Supreme Court has determined that "expression related solely to the economic interests of the speaker and its audience"[16] is generally not entitled to the same protection afforded to non-commercial speech, the Court has also made clear that the lesser scrutiny is warranted out of a concern that commercial speech might be inaccurate, confusing, or deceptive.[17] In a case such as this, where the facts clearly show no threat that the communications at issue are false, misleading, or potentially harmful, the First Amendment will not permit a law to impinge on citizens' freedom of expression. *See Stevens*, 130 S.Ct. at 1585 ("The Constitution is not a document prescribing limits, and declaring that those limits may be passed at pleasure.") (citing *Marbury v. Madison*, 1 Cranch 137, 178 (1803)).

If KCPA's truthful, harmless information is to be given the lower degree of scrutiny frequently accorded to commercial speech, the MREC's application of the

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[16] *Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York*, 447 U.S. 557, 561 (1980).

[17] *See, e.g., Ibanez v. Florida Dept. of Business and Professional Regulation, Bd. of Accountancy,* 512 U.S. 136, 142 (1994); *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 638 (1985); *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 69 (1983); *Central Hudson*, 447 U.S. at 563; *Va. Bd. of Pharmacy*, 425 U.S. at 771-72 (1976).

challenged provisions must be evaluated under the four-part *Central Hudson* test. *Central Hudson*, 447 U.S. at 561-66.

The first part of the *Central Hudson* test asks whether the commercial speech at issue is either misleading or related to unlawful activity, such as false advertising. *Id.* at 563-64. If it is not, the government may regulate it only if three additional standards are satisfied: 1) the government interest in doing so is substantial; 2) the regulation directly advances that interest; and 3) a more limited restriction on speech will not serve that interest. *Id.* at 564.

The MREC an only prevail under the *Central Hudson* test by asserting a "substantial government interest," demonstrating that the challenged provisions' restriction on speech directly advances that interest, and that the restriction on speech is no more extensive than necessary to serve the asserted interest.[18] "The State's burden is not slight; the free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful." *Ibanez*, 512 U.S. at 143 (citing *Zauderer*, 471 U.S. at 646) (internal quotations omitted).

As noted above, at trial the MREC failed to establish that the real estate information communicated by KCPA or its rental advisors is either false or misleading. L.F. at 143. It offered no evidence suggesting that the owners of properties advertised

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[18] "The party seeking to uphold a restriction on commercial speech carries the burden of justifying it." *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 71, n. 20 (1983).

by KCPA could not lawfully rent or lease those properties to members of the public. Prior to trial, the MREC asserted only one governmental interest advanced by the challenged provisions: assuring the public that all persons who perform the services defined in section 339.010.1 will be licensed and regulated by the MREC. At trial, it did not offer any evidence that Missourians are likely to suffer harm as a result of unlicensed persons sharing information about real estate or that the challenged provisions restrictions on speech would alleviate any such harms that *might* result. "This burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfield v. Fane*, 507 U.S. 761, 771 (1993) (citations omitted).

Even if the court finds that the state's interest in "assuring the public that all persons who perform the services defined in section 339.010.1 will be licensed and regulated" *is* substantial, however, the restrictions should still fail. As explained above, the exemptions found in section 339.010.6 permit a great number of unlicensed persons to share the very information that — by the MREC's understanding —KCPA is prohibited from communicating. Thus, the restrictions plainly *cannot* "assure the public that all persons who perform the services defined in section 339.010.1 will be licensed and regulated by the MREC." Furthermore, the fact that the challenged provisions have been interpreted to permit the silencing of truthful, non-misleading, and harmless speech demonstrates that the government has failed in its obligation to distinguish "the truthful from the false, the helpful from the misleading, and the harmless from the harmful."

Ibanez, 512 U.S. at 143.

And finally, even if the MREC had demonstrated an interest sufficient to warrant this Court's advancement to the fourth prong of the *Central Hudson* test, the MREC failed to demonstrate that prohibiting unlicensed persons from sharing truthful, harmless information about real estate is necessary to advance that interest. If the legislature was concerned that members of the public might be given false or misleading information about real estate, it could have limited its prohibition to false or misleading information. *See Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 637 (1980) (rather than broadly restricting speech, legitimate interest in preventing fraud could be addressed by prohibiting misrepresentations or the use of penal laws to punish such conduct). Alternatively, it could have required unlicensed speakers such as KCPA to offer disclaimers announcing that they are not and should not be mistaken for licensed real estate brokers. Any of these solutions would more directly address any legitimate interest the government had in protecting the public, and they would do so while preserving citizens' constitutional right to share truthful, harmless information. Because the government utterly failed to satisfy any of the four prongs of the *Central Hudson* test, the challenged provisions violate the First Amendment and must be struck down.

D. Article I, Section 8, of the Missouri Constitution Provides More Extensive Protections for Speech Than the First Amendment.

The First Amendment differs significantly from the free speech protections the people of Missouri adopted as part of their state constitution. In what is now Article I,

Section 8, of the Missouri Constitution,[19] the people of this state have erected a formidable bulwark against governmental intrusion upon their liberty, forbidding laws that impair the freedom of speech and guaranteeing "that every person shall be free to say, write or publish, or otherwise communicate whatever he will on any subject, no matter by what means communicated." This Court recognized the scope and significance of this constitutional limit on government, stating that "[l]anguage could not be broader, nor prohibition nor protection more amply comprehensive," *Marx & Haas Jeans Clothing Co. v. Watson*, 67 S.W. 391 (Mo. banc 1902), and clarifying that "[a]nything which makes the exercise of a right more expensive or less convenient, more difficult or less effective, impairs that right." *Ex parte Harrison*, 110 S.W. 709, 710 (Mo. 1908).

The power of Article I, Section 8, is confirmed by looking to the first decisions applying that section, in which this Court repeatedly determined that while speech could be punished based on any harm it caused to an individual or society at large, the provision's plain language did not permit the courts to *enjoin* even potentially harmful communications. *See State v. Van Wye*, 37 S.W. 938 (Mo. 1896); *Marx & Haas Jeans Clothing Co.*; *Ex parte Harrison*; *Wolf v. Harris*, 184 S.W. 1139 (Mo. 1916). When this Court eventually did permit the prior restraint of speech, in *Hughes v. Kansas City Motion Picture Machine Operators*, 221 S.W. 95 (Mo. banc 1920), the evidence showed that the picketing enjoined had relied upon both "repeated untrue statements" about the

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[19] Prior to the ratification of Missouri's current constitution, this protection was found in Article II, Section 14, of the Missouri Constitution of 1875.

targeted business and intimidation of its patrons, *id.* at 97-98, and thus created "a nuisance that worked irreparable injury." *Id.* at 99. And even in issuing that injunction, this Court reaffirmed its holding in *Marx & Haas Jeans Clothing Co.* that the Missouri Constitution does not even permit courts to enjoin slander or libel "where there is nothing else to the case." *Id.* at 320.

In 1954, free speech law under this Court's jurisprudence underwent an unheralded revolution. That year the Court issued its opinion in *State v. Becker*, 272 S.W.2d 283 (Mo. 1954), a case which questioned the extent to which obscenity could be proscribed under constitutional protections for free speech. This case is not so remarkable for its ruling that laws restricting obscenity were permissible — this had been the rule in Missouri since at least *Van Wye* — but rather for its failure to cite either Article I, Section 8, or any precedent based on that provision, and for its *literally unprecedented* assertion that "the right of freedom of speech is subject to the state's right to exercise its inherent police power." *Becker*, 272 S.W.2d at 288-89. This was an entirely novel concept in Missouri constitutional jurisprudence, and it is starkly at odds with the plain text of Article I, Section 8. In the decades that followed, this Court abandoned any substantive analysis of Missouri Constitution's unique, broad, and comprehensive protections for speech, relying almost exclusively on precedents interpreting and applying the First Amendment when called upon to evaluate free speech claims.[20] Indeed, it was not until this Court considered *State v. Roberts*, 779 S.W.2d 576

[20] *See, e.g., Heath v. Motion Picture Operators Union*, 290 S.W.2d 152 (Mo. 1956);

(Mo. 1989), that it appears to have given any serious thought to the question of the Missouri Constitution's distinctive protections of free speech — although the Court declined to address the question in the context of that case.

BBC Fireworks, Inc. v. State Highway and Transp. Com'n, 828 S.W.2d 879 (Mo. banc 1992), marks the first recent case in which this Court gave substantive attention to Article I, Section 8, and the precedents interpreting and applying its language. The Court noted that its early cases, such as *Marx & Haas Jean Clothing Co.* and *Ex parte Harrison*, evaluated what sorts of expression could be considered abuses that would permit punishment under the constitutional provision's language, but the Court also invoked the suggestion introduced in *Becker*, that the freedom of speech is subject to the state's exercise of its police powers. *BBC Fireworks, Inc.*, 828 S.W.2d at 881-82.

Since *BBC Fireworks, Inc.*, this Court has determined that the unique language of Article I, Section 8, did not exempt political contributions from regulation, *Missouri Libertarian Party v. Conger*, 88 S.W.3d 446 (Mo. banc 2002), but it has not addressed the question of whether the plain language of Article I, Section 8, would require an

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Pfitzinger Mortuary, Inc. v. Dill, 319 S.W.2d 575 (Mo. 1958); *Baue v. Embalmers Federal Labor Union*, 376 S.W.2d 230 (Mo. banc 1964); *State v. Vollmar*, 389 S.W.2d 20 (Mo. 1965); *State v. Smith*, 422 S.W.2d 50 (Mo. banc 1967); *Howe v. City of St. Louis*, 512 S.W.2d 127 (Mo. banc 1974); *Henry v. Halliburton*, 690 S.W.2d 775 (Mo. banc 1985); *State v. Carpenter*, 736 S.W.2d 406 (Mo. banc 1987); *State v. Simmer*, 772 S.W.2d 372 (Mo. banc 1989).

independent analysis and application in a case in which First Amendment precedent affords lesser levels of protection for speech based on its content or subject matter. Similarly, this Court has not had the opportunity to reconsider its previous rulings that Missourians' constitutional freedom "to say, write or publish, or otherwise communicate whatever [they] will on any subject, no matter by what means communicated" is generally limited by the state's exercise of its police powers.[21] If this Court determines that KCPA's communication of truthful, harmless information about real estate is subject to anything less that strict scrutiny for the purposes of First Amendment analysis, the facts of this case will squarely present these issues, and KCPA asks this Court to address them.

The lower level of scrutiny that the First Amendment affords to "expression related solely to the economic interests of the speaker and its audience," is incompatible with the Missouri Constitution's guarantee of citizens' right to communicate "whatever [they] will *on any subject*," so long as the communication is not an "abuse of that liberty." This Court's early cases interpreting this provision recognized that the state *could* "enact penal statutes and prescribe civil remedies" that would be consistent with Article I, Section 8, but also unambiguously stated that "[i]f a publication is neither

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[21] KCPA suggests that a proper analysis of the limits of free speech under Article I, Section 8, would be rooted in the question of whether those limits address individuals' "abuse of that liberty," rather than the government's desire to achieve a particular policy objective.

blasphemous, obscene, seditious or defamatory, then under the Constitution of this State, no court has the right to restrain it, nor the Legislature the power to punish it." *Ex parte Harrison*, 110 S.W. at 710 (striking down ordinance penalizing improper reports regarding political candidates). Later, in *Hughes*, this Court determined that the passing of false information and the use of speech to intimidate others could also be considered abuses of the freedoms secured by Article I, Section 8. Thus, there is no reason that this provision should prohibit governments in this state from restricting or punishing expressive behaviors that cause injury to others, but the burden must be on the state to prove why the expression to be restricted or punished constitutes an "abuse" — it cannot be sufficient merely to invoke the state's "police power," because this power might be invoked to justify broad restrictions on liberty without requiring the government to demonstrate any likelihood of harm. *See, e.g., BBC Fireworks, Inc.*, 828 S.W.2d 879 (Mo. banc 1992) ("aesthetic consideration alone" may suffice for exercise of police power); *Bellerive Country Club v. McVey*, 284 S.W.2d 492 (Mo. banc 1955) (peaceful picketing may be enjoined due to improper *objective*, even if not a nuisance).

In the instant case, Article I, Section 8, requires the MREC to demonstrate why KCPA's communication of information about rental properties should be considered an "abuse" of its expressive freedoms. At trial, the MREC not only failed to demonstrate that the information communicated by KCPA is false, misleading, or in any way likely to lead to the injury of Missourians' health, safety, or welfare, *it argued that it had no responsibility to do so*. Thus, KCPA cannot be considered to have abused its freedom to communicate this information and the government must not be permitted to prohibit or

punish KCPA's further communications until it has been shown in some way to have abused its freedom.

Even if this court chose to maintain its position that the freedoms established in Article I, Section 8, are constrained by the government's exercise of its police power, KCPA should still prevail under its state constitutional claim. The state's police power is not absolute; it has a limited, defined purpose: "The function of the police power has been held to promote the health, welfare and safety of the people by regulating all threats harmful to the public interest… Statutes enacted under the police power for the protection of public health or safety are valid so long as they bear a *reasonable and substantial* relationship to the public health, welfare or safety." *State ex rel. Koster v. Olive*, 282 S.W.3d 842, 847 (Mo. banc 2009) (emphasis added). Where, as in this case, the government's asserted interest has *no* relationship to the public health, welfare or safety, much less a "reasonable and substantial" relationship to those goals, the police power cannot be invoked to prohibit Missouri citizens from communicating truthful, harmless information.

To hold that a government may invoke the "police power" to "protect" its citizens from the "dangers" of truthful, harmless information would make a mockery of the constitutional provision the citizens of Missouri created to shield their expressive freedoms. If Missouri's courts determine that the government may suppress truthful, harmless information under the guise of the "police power," then there will remain no principled constitutional limit to the government's authority to pass laws that impair the freedom of speech, nor could any person seriously contend that the people of this state

truly remain "free to say, write or publish, or otherwise communicate whatever [they] will on any subject." Mo. Const. Art. I, § 8. Because the MREC has neither claimed nor proven that restrictions on speech imposed by the challenged provisions have any "reasonable and substantial" relationship to the protection of the health, safety, or welfare of the people, this court should strike down the challenged provisions as being beyond the power of the state to enact.

IV. The Trial Court Erred In Ruling That Section 339.010.6 Is Not Facially Unconstitutional Under The Missouri Or United States Constitutions, Because This Section Violates The Equal Protection Clauses Of The Fourteenth Amendment And Article I, Section 2, Of The Missouri Constitution, And The Special Law Prohibition Of Article III, Section 40(30) Of The Missouri Constitution, In That It Exempts Certain Groups From The State's Real Estate Licensing Requirements Based On Factors Not Rationally Related To The Law's Underlying Purpose.

Both the Fourteenth Amendment and Article I, Section 2, of the Missouri Constitution guarantee that citizens shall enjoy the equal protection of the laws; Article III, section 40(30), of the Missouri Constitution states that "The General Assembly shall not pass any local or special law… where a general law can be made applicable, and whether a general law could have been made applicable is a judicial question to be judicially determined without regard to any legislative assertion on the subject." As this Court has held, "[t]he basis of sound legislative classification is similarity of situation or condition with respect to the feature which renders the law appropriate and applicable."

State ex inf. Barrett ex rel. Bradshaw v. Hedrick, 241 S.W. 402, 420 (Mo. banc 1922). Pursuant to this constitutional restriction, "a law may not include less than all who are similarly situated." *State ex rel. Bunker Resource Recycling and Reclamation, Inc. v. Mehan*, 782 S.W.2d 381, 385 (Mo. banc 1990).

In *Petitt v. Field*, 341 S.W.2d 106 (Mo. 1960), this Court specifically applied these principles to strike down a law that treated corporations differently solely on the basis that certain practices made up "the major portion" of certain businesses' activities. *Petitt* came to the Court because the Missouri General Assembly had passed a law that made it illegal for anyone to sell or issue certain financial instruments unless they first obtained a license from the state. *Id.* at 107. The statute specifically prohibited the issuance of a license to "any business the major portion of which involves the processing, manufacture or purchase and sale of commodities or articles of tangible personal property." *Id.* The plaintiffs, whose business involved the purchase and sale of commodities or articles of tangible personal property, contended that the law created an arbitrary and unreasonable classification in violation of the constitutions' equal protection guarantees and the Missouri Constitution's prohibition on the passage of special laws. This Court agreed, ruling that because the law made eligibility for licensure available to persons for whom 49% of their business was buying and selling goods, yet denied eligibility to persons for whom buying and selling goods comprised 51% of their business, the law had was arbitrary and had "no reasonable basis." *Id.* at 109. The Court held that "it is arbitrary discrimination violating the Equal Protection Clause of the 14th Amendment to make exclusions not based on differences reasonably related to the purposes of the act." *Petitt*,

341 S.W.2d at 109.

At least one aspect of the instant case is directly on point with *Petitt*: section 339.010.6(9) creates a distinction between businesses for whom the advertisement of real estate is only an "incidental" part of their operations and businesses for whom the advertisement of real estate is more than an incidental part of their operations.[22] In addition to the broad discretion that this term gives the MREC, this Court's holding in *Petitt* shows that there is simply no rational reason that the law should treat differently two companies engaged in the business of real estate advertising, simply because that activity may be more prevalent in one company than it is in the other.[23] This Court should reaffirm its holding in *Petitt* and rule that the classification made in Chapter 339 violates the Fourteenth Amendment, Article I, Sections 2, of the Missouri Constitution, and Article III, section 40(30).

Under the rational basis test, an equal protection challenge will fail if the Court finds a "reasonably conceivable state of facts that could provide a rational basis for the challenged law." *Merrifield v. Lockyer*, 547 F.3d 978, 989 (9th Cir. 2007) (citation

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[22] Section 339.010.6(9) is arguably even more egregious because, in the absence of any definition for the word "incidental," the statute confers upon the MREC unfettered discretion to decide whether or not a person or business qualifies for the exemption.

[23] Indeed, if any difference were to be justified, the rational approach would be to exempt the business whose profitability and continued existence *depends* on maintaining its reputation for providing high-quality information.

omitted). The state is not required "to verify *logical* assumptions with statistical evidence… and rational distinctions may be made with *substantially less than mathematical exactitude*." *Id.* (emphasis in original). However, "while a government need not provide a perfectly logical solution to regulatory problems, it cannot hope to survive *rational* basis review by resorting to irrationality." *Id*. at 991. (emphasis in original).

In *Merrifield*, the Ninth Circuit was evaluating California's occupational licensing requirements for pest controllers, which exempted "persons engaged in the live capture and removal or exclusion of vertebrate pests, bees, or wasps from a structure without the use of pesticides." *Id.* at 981-82. The definition of "vertebrate pests" included "bats, raccoons, skunks, and squirrels" but did not include "mice, rats, or pigeons". *Id.* at 982. The plaintiff's business focused on the pesticide-free removal or exclusion of rodents and pigeons, and he contended that there was no rational basis for exempting one group of non-pesticide using pest controllers while denying such an exemption to the plaintiff. The Ninth Circuit agreed with the plaintiff and ruled that the legislature's limited exclusion violated the Equal Protection Clause, finding that the *exempted* subset of non-pesticide-using pest controllers were, in fact, more likely than the plaintiff to find themselves in a situation that endangered public health or safety. *Id.* at 991. Where the government had attempted to justify its general licensing scheme as necessary for the protection of the public health and safety, it was not then permitted to create an exemption in favor of those engaging in more dangerous practices while denying a similar exemption to those engaging in less dangerous practices.

While the reasoning in *Merrifield* is not binding on this Court, it demonstrates how legislative enactments that arbitrarily deny equal protection of the laws should be rejected. In the present case, the lone interest the MREC has advanced is assuring the public that those sharing information about real estate would be licensed by the MREC. Even if this Court determines that this is a legitimate government interest, the exemptions established by section 339.010.6 *directly contradict* that interest by allowing twelve different categories of persons, not licensed by the MREC, to engage in communications that would otherwise constitute the "practice of real estate" under section 339.010.1. It is clear from *Merrifield*, that even the lenient rational basis standard cannot justify the enforcement of a law whose exemptions undercut its stated purpose.

Even if this Court assumes that the applicable governmental interest behind the real estate licensing requirements is to protect the public from fraud or incompetence in communications regarding real estate, there is absolutely no reason to believe that a company for whom the advertising of real estate is "incidental to its operation" presents a lower risk of fraud or incompetence than a company for whom the advertising of real estate is *not* "incidental." The exemptions also apply to certain groups – such as neighborhood associations or organizations whose purpose is to promote specific communities and their economic advancement – that might have powerful motives to offer biased or misleading information about real estate in those neighborhoods or communities.

Not only is there a complete lack of evidence that KCPA or similar organizations are inclined to offer false or misleading information about real estate, Ms. Lewis testified

that KCPA takes precautions to ensure that rental advisors will not show bias toward either particular properties or prospective renters. Tr. at 59-60. The classifications created under section 339.010.6 are arbitrary and irrational given the overall purpose of Chapter 339; this Court should rule that they violate the equal protection provisions of the Fourteenth Amendment and Article I, Sections 2 and 10, of the Missouri Constitution, as well as the prohibition on special laws established in Article III, Section 40(30) of the Missouri Constitution.

V. The Trial Court Erred In Ruling That Sections 339.010.1(3), (4), (7), (8), And (10) And 339.010.6 Are Not Unconstitutionally Vague, Because They Violate The Due Process Protections Of The Fourteenth Amendment And Article I, Section 10, Of The Missouri Constitution By Failing "To Establish Standards… Sufficient To Guard Against The Arbitrary Deprivation Of Liberty Interests" And Forcing Persons Of Common Intelligence To Guess At The Meaning Of A Criminal Law, In That Testimony At Trial Showed That Citizens Could Not Be Sure That Certain Acts Or Communications Are Lawful Until The MREC Has Taken A Vote On The Matter.

"Due process requires that all be informed as to what the State commands or forbids, and that men of common intelligence not be forced to guess at the meaning of the criminal law." *Smith v. Goguen*, 415 U.S. 566, 574 (1974). The U.S. Constitution is "designed to maximize individual freedoms within a framework of ordered liberty. Statutory limitations on those freedoms are examined for substantive authority and content as well as for definiteness or certainty of expression." *Kolendar v. Lawson*, 461

U.S. 352, 357 (1983). "[E]ven if an enactment does not reach a substantial amount of constitutionally protected conduct, it may be impermissibly vague because it fails to establish standards… that are sufficient to guard against the arbitrary deprivation of liberty interests." *City of Chicago v. Morales*, 571 U.S. 41, 52 (1999) (citing *Kolendar*, 461 U.S. at 358). "Where a statute's literal scope, unaided by a narrowing state court interpretation, is capable of reaching expression sheltered by the First Amendment, the doctrine demands a greater degree of specificity than in other contexts." *Goguen*, 415 U.S. at 573.

The challenged provisions prohibit a number of activities that are not defined in the statute, including "negotiating the sale, exchange, purchase, rental or leasing of real estate;" "listing real estate for sale, lease, rental or exchange;" and "assisting or directing in the procuring of prospects, calculated to result in the sale, exchange, leasing or rental of real estate."[24] At trial, Tiffany Lewis offered uncontroverted testimony that after reading the statutes she did not believe KCPA's activities to fall within any of these prohibitions. Tr. at 125-29, 143. She had also contacted a representative of the MREC to

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[24] Even the statute's prohibition on "compensation or valuable consideration" is not clear. Does the amount of compensation make a difference? See Tr. at 212. Does the statute prohibit "in kind" compensation, such as if someone buys a friend a cup of coffee in gratitude for helping find apartments? See Def's Ex. 13. Janet Carter's testimony at trial indicated that there was no clear or easy way for citizens to get answers to these questions. See Tr. at 176, 189.

find out if KCPA required a license and was told that her proposed activities occupied a "grey area" of the law. L.F. at 143. The MREC stipulated that is has no standard definition for the terms utilized in the sections cited in its petition for injunction. See MREC Stip. ¶¶ 25, 28, 30, 36, 38. When the MREC sent its letters demanding that KCPA cease-and-desist violating these sections, neither communication identified which of KCPA's business practices were thought to violate the law. L.F. at 37, 42-43, 144. The MREC's Executive Director testified that KCPA could not know simply from reading the cease-and-desist letters sent by the MREC which sections of the law KCPA was thought to be violating. Tr. at 155. She went on to testify that for some of the terms there was no clear way to know when they would apply. Tr. at 176. In fact, Ms. Carder testified that if a citizen wanted to know how the challenged provisions of the law might be applied, the MREC would refuse to offer an interpretation and that, instead, the citizen would have to rely on the advice of their attorneys. Tr. at 189. Of course, as this case has shown, even attorneys cannot predict how the MREC will choose to apply these words.

The repercussions of the statute's vagueness have been compounded since Judge Shafer's injunction offered no additional guidance as to what KCPA must *refrain from doing*. KCPA has struggled to discern: 1) whether the statute's prohibition on accepting compensation for its services forbid KCPA to sell ad space on its website or to accept voluntary donations in support of its work; 2) whether the statute's prohibitions only apply to direct communication between humans, or do they also forbid an unlicensed company to develop and operate software that will help prospective renters access information about available properties; 3) which of the services KCPA provides *are*

legal, even if no one in the company holds a license from the MREC?

The statute's ambiguous wording — and the absence of any clarification from the MREC — means that members of the public have little or no forewarning that any particular communication or publication they might make regarding real estate is a criminal offense. In essence, the statute requires citizens such as Ms. Lewis and Mr. Gran to guess at the meaning of these phrases and hope that the MREC will vote in their favor if anyone should ever challenge the propriety of their communications. Ultimately, the only way KCPA could feel reasonably certain that it was complying with Judge Shafer's order not to do "any act requiring real estate licensure pursuant to the terms of Cja[ter [sic] 339 RSMo" was to reincorporate in the state of Kansas.

Because the challenged provisions leave Missouri citizens in doubt as to whether their speech or actions might subject themselves to criminal liability, the court must rule that these provisions are unconstitutionally vague and therefore violate the Due Process rights secured by the Fourteenth Amendment and Article I, Sections 2 and 10, of the Missouri Constitution.

CONCLUSION

For all the reasons above, this Court should reverse the trial court's order granting injunctive relief and should rule that KCPA is exempt from the restrictions and requirements of Chapter 339 because it has been "retained to manage real property" and its management actions are limited to either "conveying information prepared by a broker or owner about a rental unit, a lease, an application for a lease, or the status of a security deposit, or the payment of rent, by any person" or "assisting in the performance of

brokers' or owners' functions, administrative, clerical or maintenance tasks"; that sections 339.010.1(3), (4), (7), (8), and (10) are facially unconstitutional under the First and Fourteenth Amendments of the U.S. Constitution, under Article I, Sections 2, 8, and 10, of the Missouri Constitution, and under Article III, section 40(30) of the Missouri Constitution; and that sections 339.010.1(3), (4), (7), (8), and (10) are unconstitutional as applied to KCPA under the First and Fourteenth Amendments to the U.S. Constitution, and under Article I, Section 8, of the Missouri Constitution. This Court should vacate the judgment of the trial court, dissolve the injunction against KCPA, award KCPA its costs and fees for this litigation, and remand this case to the trial court for determination of monetary damages KCPA has suffered as a result of the improper deprivation of its constitutional rights during the pendency of the trial court's injunction.

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RULE 84.06(c) CERTIFICATION

AND CERTIFICATE OF SERVICE

I hereby certify that this brief complies with the type-volume limitation of Rule 84.06(b) of the Missouri Rules of Civil Procedure. This brief was prepared in Microsoft Word 2003 and contains no more than 14,481 words, excluding those portions of the brief listed in Rule 84.06(b) of the Missouri Rules of Civil Procedure (less than the 31,000 limit in the rules). The font is Times New Roman, double-spacing, 13-point type. A CD-ROM (which has been scanned for viruses and is virus free) containing the full text of this brief has been served on each party separately represented by counsel and is filed herewith with the clerk.

I hereby certify that one true and correct copy of the foregoing and a CD-ROM containing the same was mailed, postage prepaid, this 11th day of March, 2011, addressed to the following:

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