No. 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

BRIEF FOR DEFENDANT-RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Regulations

Other Authorities

STATEMENT OF FACTS

A. Nature of KCPA Business

Kansas City Premier Apartments, Inc. ("KCPA") is in the business of assisting owners of rental property to locate prospects for rental [Petition, Paragraph 23, L.F. 20]. KCPA's business model is built on entering into nonexclusive performance-based agreements with property owners [Petition, Paragraph 29, L.F. 21]. The property owners agree to pay a fee to KCPA for each new tenant who submits to the property owner a card verifying that he or she was referred to the property by KCPA [Petition, Paragraph 29, L.F. 21]. In order to encourage renters to submit the card that triggers KCPA's claim to compensation, KCPA offers a $100 gift card to each renter who gives a property owner a card that results in a payment to KCPA [Defendant's Exhibit 6, Appendix to Respondent's Brief, Page A-39].

KCPA's initial point of contact with prospective renters through a website, www.kcpremierapts.com, containing a searchable database of rental listings provided by client property owners [Respondent's Exhibit 6, Appendix to Respondent's Brief A-35]. KCPA does not handle any funds or participate in the actual execution of lease documents [Petition, Paragraph 27, L.F. 21]. KCPA staff generally do not show prospects properties, although the chief executive of the company testified that she did accompany prospects to properties on approximately fifty (50) occasions [Tr. 110].

Through its website, KCPA offers prospective renters the option of direct interactive contact with personnel it describes as "Rental Advisors" [Tr.56-57]. Rental Advisors are independent contractors whose duties include responding to questions and

inquiries submitted by prospective tenants, suggesting possible rentals supplied by KCPA's clients, making contact with property owners to arrange appointments, conveying questions posed by prospective renters and responses from property owners, and other functions [Tr. 56-57]. In 2008, approximately 80% of the prospects passing through KCPA's system requested the services of a Rental Advisor [Tr. 111-112]. The President of KCPA admitted in her testimony that Rental Advisors give advice to prospective renters [Tr. 82]. Samples of notes of Rental Advisor contacts with prospective tenants in Defendant's Exhibits 7C and 7D show instances when the Rental Advisor expressed personal opinions about properties listed on the website and rendered advice to prospective tenants about how they should approach negotiation with property owners. [Appendix to Respondent's Brief, Pages A-47, A-59].

The President of KCPA testified that she does not do criminal, disciplinary, or background checks when she hires Rental Advisors [Tr. 60, 124]. There is no written job description, formal training or orientation program for Rental Advisors [Tr. 83]. The only orientation to fair housing laws consists of giving Rental Advisors a printout from a government website on the subject [Tr. 84]. Rental Advisors log on to the KCPA website and select which inquires they will respond to, and make contact with the prospect through email or telephone [Tr. 86-88]. The management of KCPA has access to emails sent by Rental Advisors only if she is copied on the email or if the Rental Advisor makes a note on the system [Tr. 89-90].

KCPA produced notes documenting the email correspondence Rental Advisors carried out with 35 clients chosen at random [Defendant's Exhibit 7]. That small sample

of documents showed that in at least two cases, KCPA Rental Advisors gave prospective renters advice and personal opinions about the advantages and character of rental properties [Defendant's Exhibits 7C, 7D, Respondent's Appendix, Page A-47, A-59]. The President of KCPA admitted that in the communications in those documents, Rental Advisors gave prospective tenants personal advice that she considered inappropriate [Tr. 96-98].

The background of the President of KCPA in real estate prior to starting the company consisted of approximately a year and a half in the employment of a licensed real estate broker, performing similar apartment search functions [Tr. 80]. She had no educational background specific to real estate and never applied for a real estate license [Tr. 81]. She was unable to define or explain the terms "agency" and "fiduciary" in her testimony [Tr. 107-108].

B. MREC Regulation of Real Estate Profession

Janet Carder, the Executive Director of the Missouri Real Estate Commission (MREC) testified as to the approach of the MREC to licensing of real estate professionals. She stated that there are two categories of individual real estate licenses issued in the state of Missouri, real estate broker and real estate salesperson [Tr. 191-192]. She testified that she knew of no reason why the KCPA principals, Tiffany Lewis and Ryan Gran, could not apply for salesperson licenses [Tr. 199]. To qualify for a broker's license, one would need two years experience as a salesperson, a requirement subject to waiver although waivers are rarely granted [Tr. 199-200].

Stephen Banks, the MREC's expert witness, is a licensed real estate broker who works extensively in the area of rentals, and who supervises a company specializing in leasing and property management [Tr. 231]. He testified that he began working in the field of property management without a license, but underwent the licensure training course when he discovered he had to be licensed in Missouri. He testified that the greatest benefit he gained from the coursework he took was to learn the seriousness and weight of the responsibility of complying with the real estate laws, particularly regarding agency [Tr. 233-234]. He noted that licensed realtors are required to disclose who they represent by giving contacts a brochure called Choices Available to You at their earliest opportunity in the relationship [Tr. 235]. He testified that the same responsibilities attach to working on both sales and leasing transactions [Tr. 235-236]. He testified that nonlicensed people can be employed in the business, but that they require a greater level of supervision as a business practice [Tr. 241-243]. He testified that many of the activities performed by KCPA's Rental Advisors would not be appropriate without oversight by a broker [Tr. 247-251].

C. MREC Action on KCPA Complaint

The MREC began looking into KCPA in 2004 based on a complaint by Ann Carroll, a licensed real estate broker who was Tiffany Lewis's employer before Lewis left to found KCPA [Legal File 35].

After a vote by the MREC, Janet Carder, Executive Director of the MREC, sent Tiffany Lewis a letter stating "Through the course of the investigation it was determined

that you are conducting real estate activity without a Missouri real estate license. Such activity is in violation of Missouri law and must cease immediately." [Legal File 37, Defendant's Exhibit 3].

KCPA, through its counsel Timothy J. Thompson, responded to the MREC's letter, taking issue with the MREC's conclusions and expressing the view that KCPA's activities did not violate Missouri law [Legal File 39, Defendant's Exhibit 4].

Kimberly Grinston, Counsel to the MREC, wrote a letter to Mr. Thompson stating that the MREC had reviewed KCPA's website, and that "the MREC hereby officially demands that Kansas City Premier Apartments, Inc., immediately cease and desist from operating as a real estate broker or salesperson in the state of Missouri without the required Missouri real estate license" [Legal File 42, Defendant's Exhibit 5].

KCPA sought declaratory judgment in the Circuit Court for Platte County [Legal File 15]. Over two years later, the MREC filed in the Circuit Court for Platte County a Petition for Preliminary Injunction and Permanent Injunction, seeking an injunction barring KCPA from performing several specific activities [Legal File 73]. The two cases were consolidated for trial before the Honorable Abe Shafer, Judge. The case was tried on June 23-24, 2010 [Transcript].

On June 30, 2010, Judge Shafer entered his Judgment [Legal File 141] granting an injunction against KCPA.

ARGUMENT

Standard of Review

The standard of review upon appeal is that the judgment of the trial court will be sustained unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law. *Murphy v. Caron*, 536 S.W.2d 30 (Mo. banc 1976). Review of questions of law is de novo. *Planned Parenthood of Kansas v. Nixon,* 220 S.W.3d 732, 737 (Mo. banc, 2007). Article V, Section 3 of the Missouri Constitution confers exclusive jurisdiction over appeals that challenge the validity of a state statute in this Court. *F.R. v. St. Charles County Sheriff's Dept.,* 301 S.W.3d 56 (Mo. banc, 2010).

Statutes enjoy a strong presumption of constitutionality. *Reproductive Health Services of Planned Parenthood of St. Louis Region, Inc. v. Nixon,* 185 S.W.3d 685, 688 (Mo. banc, 2006). The burden to prove a statute unconstitutional rests upon the party bringing the challenge. *Suffian v. Usher*, 19 S.W.3d 130, 134 (Mo. banc 2000). The Court will not invalidate a statute unless it clearly and undoubtedly contravenes the constitution and plainly and palpably affronts fundamental law embodied in the constitution. *Suffian v. Usher*, 19 S.W.3d at 134 The Court will resolve all doubt in favor of the act's validity and may make every reasonable intendment to sustain the constitutionality of the statute. *Westin Crown Plaza Hotel v. King*, 664 S.W.2d 2, 5 (Mo. banc 1984). The Court construes the whole statute in light of a strong presumption of a statute's validity. *State v. Shaw*, 847 S.W.2d 768, 776 (Mo. banc 1993).

In its discussion of the standard of review, KCPA attempts to avoid Missouri's longstanding rule that statutes enjoy a presumption of validity on appeal by reference to language in *U.S. v. Playboy Entertainment Group,* 529 U.S. 803, 816 (2000). The discussion in that case addresses the government's burden of proof at trial. It does not alter the level of deference to be accorded to statutes as a matter of standard of review on appeal.

I. KCPA is not exempt from the requirements of Chapter 339, RSMo, as it is not engaged in property management. [Responds to Appellant's Point I]

Sections 339.010 through 339.180, RSMo,[1] to which we will refer as "Chapter 339," is an exercise of the police power of the state, intended to protect the public from individuals who may engage in fraud or incompetence in the brokerage of real estate transactions. The Court of Appeals stated in *Gilbert v. Edwards,* 276 S.W.2d 611 (Mo.App. 1955):

> It was the evident intention of the Legislature to protect the public against fraud and incompetency in real estate transactions. It has also been held that laws such as we are considering, in addition to giving protection to the public, give protection to the ethical members of the profession under scrutiny, who, having complied with the law in letter and spirit, would, under any other interpretation, be subjected to compensation by persons who had violated the law, both in letter and in spirit. This is merely an incidental protection.

276 S.W.2d at 616.

The Supreme Court of Missouri quoted and reinforced this language in *Miller Nationwide Real Estate Corp. v. Sikeston Motel Corp.,* 418 S.W.2d 173 (Mo. banc, 1967):

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[1] Statutory references are to RSMo 2000 and the Cumulative Supplement 2010.

> One purpose of Chapter 339 was to set apart the business of the real estate broker or salesman as distinct from occupations which by general acquiescence are pursued of common right without regulation or restriction, and to make illegal acts of the unlicensed in the real estate broker's filed. In our judgment the legislative objective in closing the courts of this state to unlicensed brokers was to establish a policy so strong that neither a contract nor the unlawful efforts in its pursuit, nor its fruits, could provide the basis of pecuniary benefit to such broker.

418 S.W. 2d at 177.

Section 339.010.1 defines a "real estate broker" as any person or corporation who, for compensation or valuable consideration, does or attempts to do any of ten actions, among which are:

> (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; . . .
>
> (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 339.010.1(3)(4)(7)(8)(10), RSMo.

Section 339.010.7 states that the provisions of Sections 339.010 through 339.180, dealing with licensed real estate brokers, salespersons, and entities, do not apply to twelve classes of persons.

KCPA argues that it is exempt from the licensing requirements of Chapter 339 under the exception stated in Section 339.010.7(5)(d), RSMo[2]:

(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:

* * *

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[2]Appellant's brief and Appendix refer to this section as Section 339.010.6, which was its numbering when the Judgment was rendered in June 2010. Section 339.010 was amended effective August 28, 2010. The amendment added a new definition Section 339.010.3, resulting in this section being renumbered as 339.010.7. Section 339.010.7 was amended to include limited partnerships, limited liability companies, and professional corporations to the definition, but the substantive provisions were unchanged. This brief will refer to the statutory exception by its current numbering, Section 339.010.7.

(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; . . .

This Court has held that the provisions of Chapter 339 are for the protection of the public and are an exercise of the police power of the state, and therefore that parties claiming exemption under the provisions of the act "must present a clear case, free from all doubt, as such provision, being in derogation of the primary purpose of the Real Estate Agents and Brokers Law, must be strictly construed against the person claiming the exemption and in favor of the public." *Miller Nationwide Real Estate Corp. v. Sikeston Motel Corp.,* 418 S.W.2d at 177. The claim of KCPA to be exempt under this section argues an interpretation so expansive the exception swallows the rule.

KCPA devotes much of its argument to defining the term "employed or retained." The proper focus is on the word "manage." The most applicable definitions of the word "manage" at the Merriam-Webster Collegiate Dictionary, Eleventh Edition (2003), are:

1 : to handle or direct with a degree of skill . . .

1a : to exercise executive, administration, and supervisory direction of <~ a business> . . .

Black's Law Dictionary, Fourth Edition 1968, defined "manage" as follows:

> [T]o control and direct, to administer, to take charge of. To conduct; to carry on the concerns of a business or establishment. Generally applied to affairs that are somewhat complicated and involve skill and judgment.

The exemption in Section 339.010.7(5) allows property owners to attend to the operation of their own rental businesses without having to employ licensed realtors for such routine functions as handling tenant inquiries, performing paperwork, collecting rent payments, and other functions outlined in the listed activities. In choosing this language the legislature balanced the interest of property owners in being able to engage in their own business with Chapter 339's overarching purpose of providing that persons engaged in the business of marketing properties and securing prospects for sale or rental must be licensed. KCPA is not engaged in the controlling, directing, or administering of rental properties and does not "exercise executive, administration, and supervisory direction" of rentals. They are not property managers.

This Court has said:

> [S]tatutory provisions are not read in isolation but [are] construed together, and if reasonably possible, the provisions will be harmonized with each other. Exemptions are interpreted to give effect to the General Assembly's intent, using the plain and ordinary meaning of the words.

Brinker Missouri, Inc. v. Director of Revenue, 319 S.W.3d 433, 437 (Mo. banc, 2010) [citations omitted].

The exception in Section 339.010.7(5)can be harmonized with the definition of real estate brokers as a regulated class in Section 339.010.1 only if the exception is

construed strictly, to apply only to true property managers actually employed or retained for the purpose of management of a facility. This is the subject of the exception, rather than extending to all persons and concerns who may be retained by a property owner to perform any sort of functions related in any way to the ownership or operation of the business. The fact that the language the legislature chose is cast rather emphatically in the singular – conveying information "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" – indicates strongly that the exception was only intended to apply to a manager working one-on-one with a particular tenant or applicant about a particular unit, and was not intended to encompass the kind of complex-wide marketing activities KCPA performs.

In addition, the evidence shows that KCPA's agents do far more than "convey information prepared by a property owner." KCPA rental advisors select units out of those available from various property owner clients to market to prospective tenants, advise tenants on communities in general, complexes as a whole, and on apartment search strategies and approaches, often in their own words and explicitly drawing on their own experience. In fact, KCPA promotes that kind of assistance on its website. KCPA's home page at www.kcpremierapts.com promises,

> Our Free Rental Advisors can help assess your needs and suggest possible Kansas City apartment matches that fit exactly what you are looking for. With the highest customer service rating (Resident Testimonials) you can be assured you have a Rental Advisor standing by

to help make finding the perfect selection of Kansas City apartments, lofts or homes a snap.

[Respondent's Exhibit 6, Respondent's Appendix, Page A-35]

On its "How We Work" page, KCPA states, "We have FREE Personal Rental Advisors waiting to assist you that are experts in the Kansas City apartment & rental market and can help you target the perfect place in minutes." [Respondent's Exhibit 6, Respondent's Appendix, Page A-38].

On its "10 Reasons Why You Should Use Kansas City Premier Apartments page, KCPA states, "Renters on the prowl for great places to live can sit back, relax and let us do the legwork for them. That's right. We'll do the hunting; you do the relaxing. No kidding!" Further down on the same page, the website states, "We are the Kansas City apartment shopping experts. We only hire highly educated apartment shoppers who know their stuff (and Kansas City) and know how to treat people right." [Respondent's Exhibit 6, Respondent's Appendix, Page A-40]

These services as provided and advertised by KCPA bear more resemblance to the functions of a real estate brokerage as defined in Section 339.010.1 than the limited role for property managers sharply delineated in Section 339.010.7(5).

The definition in Section 339.010.7(5) states that a person comes within its exemption only "if the person is limited to one or more of the following activities . . . ." KCPA is not limited to the listed activities, and performs services outside the scope of the in-house management functions contemplated by the exception. Under the standard of

strict construction mandated by *Miller Nationwide Real Estate Corp.,* KCPA is not exempt under the terms of Section 339.010.7(5).

II. The real estate licensing provisions of Chapter 339 do not violate Appellant's free speech rights. [Responds to Appellant's Points II and III]

In this appeal, KCPA argues an extraordinary proposition: that the First Amendment to the United States Constitution forbids a state to regulate or require licensure for the performance of a profession or occupation, to the extent that profession is performed through speech or expression. No appellate or federal court anywhere in the United States has ever reached this conclusion. KCPA takes bricks from many cases in an effort to construct an edifice that will support the weight of this claim, but not one of those cases does what KCPA asks this Court to do: strike down a professional licensing law on the basis that the actions of the profession are carried out through speech.

A. Professional licensing statutes address conduct, not speech. [Responds to Appellant's Point III-B].

The general rule of constitutional scrutiny is that statutory classifications are valid if they bear a rational relation to a legitimate governmental purpose. Statutes are subjected to a higher level of scrutiny if they seek to limit the exercise of a fundamental right, such as freedom of speech, or employ a suspect classification, such as race. *Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 547 (1983); *Mahoney v. Doerhoff Surgical Services, Inc.,* 807 S.W.2d 503, 511 (Mo. banc, 1991). The first question that must be determined in this appeal is whether the challenged statutes are respecting speech at all.

Certain professions – physicians, lawyers, accountants, architects, counselors, psychologists, social workers, appraisers, realtors, and many others – conduct their business primarily or substantially through communication, speech, and writing with their clients, with members of the public, with interested third parties, and with tribunals. Yet each of these professions is licensed and regulated in most if not all fifty states, as well as by federal and other governmental entities. Most of these licensing laws also prohibit unlicensed persons from performing those duties identified as the practice of a profession, including those involving speech and communication. Yet no appellate state or federal court has ever concluded this is all unconstitutional, as KCPA now asserts.

In contrast, there are many cases in which courts have held the exact opposite of KCPA's contention: the First Amendment does not forbid states to set licensing requirements for individuals who hold themselves out to the public as qualified to perform certain skilled professions, even if the business of those professions is carried out through speech.

The United States Supreme Court has held that the First Amendment does not bar states from regulating professional conduct that takes the form of speech. In *Ohralik v. Ohio State Bar Ass'n,* 436 U.S. 447 (1978), the plaintiff lawyer was disciplined for personally soliciting auto accident victims for professional employment. Ohralik argued, as KCPA does here, that his conduct was an exercise of his free speech rights, and that it could not be curtailed in the absence of proof that it actually caused a specific harm. The Supreme Court noted that it had recently begun addressing the First Amendment parameters of commercial speech in cases such as *Virginia State Bd. of Pharmacy v.*

Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976), and *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977). The Court made it clear that "We have not discarded the 'common-sense' distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech." 425 U.S. at 455-456. The Court quoted *Giboney v. Empire Storage & Ice Co*., 336 U.S. 490, 502 (1949), a case arising out of Missouri, in saying "it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." 425 U.S. at 456. The Court noted that speech as part of a business transaction differs from pure expressive speech:

> In-person solicitation by a lawyer of remunerative employment is a business transaction in which speech is an essential but subordinate component. While this does not remove the speech from the protection of the First Amendment, as was held in Bates and Virginia Pharmacy, it lowers the level of appropriate judicial scrutiny.

425 U.S. at 456. The Court then concluded that such speech is not entitled to the same level of protection as expressive speech:

> A lawyer's procurement of remunerative employment is a subject only marginally affected with First Amendment concerns. It falls within the State's proper sphere of economic and professional regulation. While entitled to some constitutional protection, appellant's conduct is subject to regulation in furtherance of important state interests.

425 U.S. at 459 [citation omitted]. The Supreme Court upheld the restriction against Ohralik's First Amendment challenge, and specifically rejected his claim that proof of actual harm was required:

> Under our view of the State's interest in averting harm by prohibiting solicitation in circumstances where it is likely to occur, the absence of explicit proof or findings of harm or injury is immaterial. The facts in this case present a striking example of the potential for overreaching that is inherent in a lawyer's in-person solicitation of professional employment. They also demonstrate the need for prophylactic regulation in furtherance of the State's interest in protecting the lay public.

425 U.S. at 459. In this last sentence, the United States Supreme Court confirmed that the First Amendment does not restrict legislatures to punishing the effects of harmful speech after the fact; they may take a preventive approach to defining certain kinds of speech that may be prohibited in advance.

There have been several efforts to exempt unlicensed people from licensing laws under the First Amendment rubric, but the courts have universally held that the First Amendment does not abrogate the power of states to protect the public by limiting the performance of professions to licensed individuals.

National Ass'n for Advancement of Psychoanalysis v. California Bd. of Psychology, 228 F.3d 1043 (9th Cir., 2000), was a case brought by three psychoanalysts not licensed in California. They brought an action for declaratory and injunctive relief under 42 U.S.C. § 1983, alleging that California's mental health licensing laws regulating

the practice of psychology and other professions, restricted their First and Fourteenth Amendment rights. Specifically, they alleged that because psychoanalysis is the "talking cure," it deserves special First Amendment protection because it is "pure speech." Citing *Ohralik,* the court rejected the idea that psychoanalysis is immune from professional regulation because it consists of speech. The court held that because the licensing regulation was neutral as to the content of speech, it was not subject to strict scrutiny analysis, and concluded, "Although some speech interest may be implicated, California's content-neutral mental health licensing scheme is a valid exercise of its police power to protect the health and safety of its citizens and does not offend the First Amendment." 228 F.3d at 1056.

In *Underhill Associates, Inc. v. Bradshaw,* 674 F.2d 293 (4th Cir., 1982), securities broker-dealers who did not qualify for registration in Virginia brought an action challenging the constitutionality of a provision of the Virginia Securities Act prohibiting persons not registered in Virginia from transacting business as a broker-dealer in the state as a restriction of their rights of freedom of speech. The court rejected this claim on the basis that the restriction was a legitimate exercise of the state's regulatory power, and any inhibition of the plaintiffs' free speech rights was "merely the incidental effect of observing an otherwise legitimate regulation." 674 F.2d at 296.

In *Accountant's Soc. of Virginia v. Bowman,* 860 F.2d 602 (4th Cir., 1988), accountants who were not certified public accounts brought an action challenging a statute that restricted the use of certain accounting terms and the title "public accountant" to certified public accountants. They contended that their communications with clients

and others were free speech that was abridged by the statute. The court noted that the accountants attempted to portray the preparation of financial reports by non-CPAs as analogous to speech or publications addressing the general public. However, the court found that since the accountants communicated directly with clients and prepared reports that were relied upon by others, the communications in question were related to the concerns of protecting the public to which the statute was addressed. Citing *Ohralik* and other cases, the court found that the statute in question did not violate the plaintiffs' First Amendment rights, and held that the restrictions on the use of certain terms in the work product of non-CPAs were the permissible regulation of a profession, not an abridgment of speech protected by the first amendment.

In *Lawline v. American Bar Ass'n,* 956 F.2d 1378 (7th Cir., 1992), the plaintiff was a group organized to use law students, paralegals and lawyers to answer legal questions from the public without charge over the telephone and to assist them in representing themselves in routine legal matters. They brought a challenge to the American Bar Association, the justices of the Illinois Supreme Court, and members of its Committee on Professional Responsibility and Attorney Registration and Disciplinary Commission ("ARDC"), alleging that the implementation of the Rules of Professional Conduct prohibiting lawyers from assisting in the unauthorized practice of law violated their freedom of speech. Citing *Ohralik* and *Bowman,* the court stated, "Any abridgment of the right to free speech is merely the incidental effect of observing an otherwise legitimate regulation." While reserving the possibility that there may be free speech

issues in the implementation of the rules, the court found that they were not facially invalid.

Locke v. Shore, ___ F.3d ___, 2011 WL 692238 (11th Cir., 2011) [Appendix to Respondent's Brief, Page A-63], was a challenge to a provision in Florida's licensing laws for interior designers requiring interior designers to hold a license in order to practice nonresidential commercial interior design, while unlicensed persons may perform residential design. A group of interior designers doing residential work brought suit challenging the restriction on commercial work, alleging, among other claims, that it violated their rights under the First Amendment. The court rejected the claim, citing *Ohralik, Lawline,* and *Bowman,* and saying, "Because the license requirement governs occupational conduct, and not a substantial amount of protected speech, it does not implicate constitutionally protected activity under the First Amendment." 2011 WL 692238 at 8 [Appendix to Respondent's Brief, Page A-70].

These cases establish that professional licensing laws requiring licensure of persons who engage in activities defined as the practice of a profession do not violate the First Amendment rights of unlicensed persons, even when the conduct of that profession involves speech. Professional licensing laws are about conduct, rather than expressive speech.

To the extent that the conduct of a profession is carried out through communication, such conduct does not enjoy special protection under the First Amendment that other activities central to the profession do not. An unlicensed person cannot break out some of the duties of a regulated profession and state that since she

performs only those duties, she is not subject to the legislature's definition of the profession. A paralegal who is not admitted to the bar cannot say that she will not appear in court, but has a protected right to advise clients and draft legal documents because those activities involve communication. A nurse not licensed as a physician cannot promise not to perform surgery, but proceed to diagnose patients' conditions and advise them of the remedies they should pursue, as those activities consist of speech. A legislature's power to define an activity as the practice of a licensed profession applies to activities of the profession based on speech as much as any other.

The threshold question is whether the injunction imposed by the court below is one concerning speech at all. KCPA's brief argues speech claims at great length, but under the logic of the cases cited above, the focus of professional licensing laws is on conduct, some of which may take the form of speech. Many aspects of KCPA's business model – its compensation structure, the referral of inquiries from members of the public to unlicensed and unsupervised independent contractors, the dispensing of gift cards to prospects in exchange for their cooperation in securing a fee – have nothing to do with speech.

The specific terms of the injunction prohibited KCPA from two specific activities – entering into contracts with property owners to receive fees for the referral of prospects, and dispensing rebate cards to tenants, neither of which constitute speech. The fact that these practices are central to KCPA's business model supports the conclusion that the licensing requirement enforced in the injunction is based on conduct, including the

procurement of prospects for rental for valuable consideration, rather than on the speech KCPA uses as a means to that end.

B. To the extent the challenged provisions restrict KCPA's commercial speech rights, the proper level of scrutiny is the intermediate scrutiny test of *Central Hudson.* [Responds to Appellant's Point III-C]

For the reasons set forth in Subsection A, above, the licensing requirements of Chapter 339 concern the conduct of practicing the profession of real estate brokerage, and any restriction of speech is incidental and does not raise First Amendment concerns.

To the extent that any provisions of Chapter 339 impose restrictions on commercial speech directly, rather than incidentally, its constitutionality under the First Amendment are properly examined under the intermediate scrutiny standard of *Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York,* 447 U.S. 557 (1980).

In that case, an electrical utility brought suit in New York State court to challenge the constitutionality of a regulation of the New York Public Service Commission that completely banned promotional advertising by the utility. The ban, applied to utilities that held monopolies on service, was intended to promote energy conservation by prohibiting advertising intended to increase overall energy use. The Court attempted to balance the public's interest in the informational value of advertising, noted in *Virginia Board of Pharmacy,* with the power of government to regulate conduct that takes the form of speech, as affirmed in *Ohralik.*

The Court defined commercial speech as "expression related solely to the economic interests of the speaker and its audience." 447 U.S. at 562. To the extent that KCPA's marketing activities involve speech, it is commercial speech within the definition of *Central Hudson.* KCPA's advertising of apartment listings on its website and the communications its representatives carry out with prospective renters are not pure speech, intended to express a point of view, but are solely related to the economic interests of KCPA and the prospects – i.e., to facilitate the rental of apartment units by the prospects, giving rise to KCPA's claim for compensation. To the extent there are any speech issues at all in the application of licensing laws to KCPA's business model, they concern commercial speech subject to intermediate scrutiny as defined by *Central Hudson*, not strict scrutiny as would apply to pure expressive speech.

The Supreme Court examined the precedents and concluded that the analysis for application of restrictions to commercial speech is a four-step process:

> In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

447 U.S. at 566.

C. The licensing provisions of Chapter 339 do not violate KCPA's rights under the *Central Hudson* test. [Responds to Appellant's Point III-C]

1. KCPA's free speech claim fails at the first step of the *Central Hudson* test, as KCPA's real estate marketing activities are not lawful activity.

The Supreme Court began its analysis in *Central Hudson* with an observation that commercial speech is protected only to the extent that it addresses lawful activity:

> There can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity. The government may ban forms of communication more likely to deceive the public than to inform it.

447 U.S. at 564.

The first question to be addressed under the *Central Hudson* test is whether the activity involves activity that is lawful and not misleading. The rentals KCPA promotes are not unlawful, nor is there evidence that the content of their presentation of those rental opportunities to the public is false or misleading. However, KCPA's undertaking the marketing of those opportunities is unlawful, and their representations that they are authorized to provide assistance to prospects in searching for apartments and their claims of expertise in the rental market ("We are the apartment shopping experts") are false and unlawful.

If KCPA has no right to engage in the marketing of real estate sales or rentals in the first place, its First Amendment challenge fails at the first step of the *Central Hudson* test. This Court found that a free speech challenge to a provision of Chapter 339 did not

meet the first step of the *Central Hudson* test in *Coldwell Banker Residential Real Estate Services, Inc. v. Missouri Real Estate Com'n,* 712 S.W.2d 666 (Mo. banc, 1986). *Coldwell Banker* involved a free speech challenge to the prohibition of what was then Section 339.100.2(12) [now 339.100.2(13)] on offering inducements to buyers. This Court examined the *Central Hudson* test and concluded,

> Commercial speech is protected only if it deals with lawful activity. If the discount program is contrary to law the plaintiff has no greater right to advertise it than to advertise a chicken fight or a house of prostitution.

712 S.W. 2d at 670 [citations omitted].

Section 339.020, RSMo, prohibits unlicensed persons from performing the duties of a real estate broker, a term that is defined in Section 339.010.1(7), RSMo, to include "assists or directs in the procuring of prospects, calculated to result in the sale, exchange, leasing or rental of real estate." Assisting in the procuring of prospects calculated to result in the leasing or rental of real estate is exactly what KCPA does. KCPA is not paid to share information; KCPA is paid to procure prospects for rental of real estate. This business has been defined by the General Assembly of Missouri as real estate brokerage, a profession whose minimum qualifications the KCPA principals and Rental Advisors do not meet. "Information sharing," in the sense of KCPA's dissemination of advertising and the things its Rental Advisors say to prospects to get them interested in clients' properties, is the means, not the end, of KCPA's business. In this sense, the Supreme Court's description of such "information sharing" function as "incidental" to the practice

of a profession subject to licensing fits exactly. For these reasons, KCPA's free speech claims fail at the gate of the first point of the *Central Hudson* test.

2. The licensing provisions of Chapter 339 serve a substantial government interest in preventing fraud and incompetence by persons engaged in the marketing of real estate.

The second point of the *Central Hudson* test is whether the measure at interest serves a substantial government interest.

The licensing provisions of Chapter 339 fit a template that broadly describes most of the professional licensing statutes under Title XXII, Occupations and Professions, of the Revised Statutes of Missouri. More than 40 professions are regulated under this title, and under statutory schemes more or less similar in structure to Chapter 339, including, among many others, accountants, architects, engineers, land surveyors, funeral directors, dentists, physicians, nurses, psychologists, counselors, social workers, appraisers, and veterinarians. All of these licensing laws have the same basic characteristics: the creation of a board to license, prescribe rules for, and discipline licensees; a disciplinary process involving determination of cause by the Administrative Hearing Commission; a prohibition on unlicensed persons performing the defined duties of the profession; and the authorization of certain remedies for unauthorized practice, including in almost all chapters provisions for injunctions against unlicensed practice and setting criminal penalties for unlicensed conduct.

The goals of professional licensing laws are to protect the public in three distinct ways:

- First, to assure that persons who perform professional services meet initial standards of qualification, in terms of education, preparation, and character.
- Second, to oblige professionals to keep current with developments in their field and to continue to develop their skills through continuing education requirements;
- Third, to assure accountability through the disciplinary process.

None of these goals are met when services are performed by unlicensed persons.

Initial qualification, the first of these goals, is not difficult or burdensome to meet in the real estate profession. Under the terms of Section 339.040.1, RSMo, applicants must show that they are persons of good moral character, that they bear a good reputation for honesty, integrity, and fair dealing, and that they are competent to transact the business of a broker or salesperson in such a manner as to safeguard the interest of the public. The character inquiry generally involves checking criminal and disciplinary background. [Tr. 199]. Applicants must also meet educational requirements and pass an examination. Unlike some professions such as law and medicine, the educational requirements for real estate licensees are measured in hours rather than years. For a real estate salesperson's license, the applicant must complete a 24-hour "Missouri Real Estate Practice Course" and a 48-hour "Salesperson Pre-Examination Course," then pass the state and national portions of an examination. 20 CSR 2250-3.010(4)(A) [Appendix to Respondent's Brief, Page A-16]. To qualify for a broker's license, the applicant must complete an additional 48-hour "Broker Pre-Examination Course" and pass a broker's examination. In addition, an applicant for a broker's license must have two years of

experience as a salesperson or a license in another state. 20 CSR 2250-3.010(5)(A) [Appendix to Respondent's Brief, Page A-16]. Any person who meets these requirements and pays the application fee is eligible for a license.

The second goal in this three-point plan of protection of the public, the requirement of continuing education, is established by Section 339.040.8, RSMo [Appendix to Respondent's Brief, Page A-6], which requires that each licensee show proof of 12 hours of continuing education every two years, subject to certain distribution requirements in 20 CSR 2250-10.100 [Appendix to Respondent's Brief, Page A-34].

The third goal, accountability, is met by the disciplinary process through which the MREC enforces the standards set in Section 339.100.2, RSMo. This section lays out 26 grounds for discipline of a realtor's license, ranging from criminal convictions to fairly detailed restrictions relating to advertising, misstatements or dishonesty, fees and commissions, and the handling of money. Each of these requirements was adopted by the legislature based on experience with the kinds of harm members of the public were exposed to in their dealings with realtors. Section 339.120.1, RSMo, also authorizes the MREC to adopt rules and regulations to deal with more complex questions such as the maintenance of escrow accounts, the preparation and signing of brokerage and property management agreements, the use of forms, record retention, and other practical considerations that arise in the practice of real estate. The standards for business conduct and practice adopted by the MREC are set forth at length in Chapter 8 of the MREC regulations, 20 CSR 2250-8.010 et seq. [Appendix to Respondent's Brief, Page A-18].

The Missouri courts have long held that the licensing of real estate brokers and agents is an exercise of the legislature's police power for the purposes of protecting the public. *Gilbert v. Edwards,* 276 S.W.2d 611 (Mo.App. 1955), arose from a suit by an unlicensed brokers to recover a commission, which has long been prohibited by Missouri law, as it currently is by Section 339.160, RSMo, cited by the trial court below in denying KCPA the right to recover on its agreements with property owners. The Court of Appeals stated, "It was the manifest intention of the Legislature of our state in enacting the provisions of Chapter 339 RSMo 1949, V.A.M.S., to protect the public from the evils of fraud and incompetency." 276 S.W.2d at 617. The Court further found that the limitation on compensation was intended to protect the public "by insuring the honesty and good behavior of brokers and agents." 276 S.W.2d at 617. This language was quoted with approval and adopted by this Court in *Schoene v. Hickam,* 397 S.W.2d 596, 601 (Mo. banc, 1966) and *Miller Nationwide Real Estate Corp. v. Sikeston Motel Corp.,* 418 S.W.2d 173, 176 (Mo. banc, 1967).

3. The licensing provisions of Chapter 339 meet the intermediate scrutiny test of Central Hudson and do not violate KCPA's commercial speech rights.

Since the licensing requirements of Chapter 339 serve a substantial government interest, the next questions is whether they meet the intermediate scrutiny test of *Central Hudson.* Intermediate scrutiny was defined in *Central Hudson* as follows:

> Compliance with this requirement may be measured by two criteria.
>
> First, the restriction must directly advance the state interest involved; the

> regulation may not be sustained if it provides only ineffective or remote support for the government's purpose. Second, if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive.

447 U.S. at 564.

The licensing provisions of Chapter 339 meet the criterion of directly advancing the state interest. The state interest involved, as identified in *Gilbert* and *Miller,* is to protect the public by insuring the honesty and good behavior of brokers and agents. All of the requirements for licensing – education, passage of a test, character, experience – are directly related to the qualities of honesty and competence the legislation seeks to assure. Since the provisions challenged do not go beyond the goals the legislature has identified, the statute directly advances the state interest in compliance with the second element of the *Central Hudson* test.

The Supreme Court further defined the final part of the *Central Hudson* test, that the statute be narrowly drawn, as requiring that "the regulatory technique may extend only as far as the interest it serves. The State cannot regulate speech that poses no danger to the asserted state interest." The requirement that the statute be "narrowly drawn" does not dictate that it must be the narrowest possible remedy. As the United States Supreme Court stated in *Board of Trustees of State University of New York v. Fox,* 492 U.S. 469 (1989):

> We uphold such restrictions so long as they are "narrowly tailored" to serve a significant governmental interest, a standard that we have not

> interpreted to require elimination of all less restrictive alternatives. Similarly with respect to government regulation of expressive conduct, including conduct expressive of political views. In requiring that to be "narrowly tailored" to serve an important or substantial state interest, we have not insisted that there be no conceivable alternative, but only that the regulation not "burden substantially more speech than is necessary to further the government's legitimate interests." And we have been loath to second-guess the Government's judgment to that effect.

492 U.S. at 478 [citations omitted].

The restrictions on professional conduct, including speech, imposed by Chapter 339 do not burden substantially more speech than is necessary to further the government's legitimate interests. In fact, Chapter 339 has no applicability to speech that does not fit within the definition of real estate brokerage set forth in Section 339.010.1. Any restrictions on speech imposed by Chapter 339 in general and by Section 339.020 in particular are only the incidental result of the legislature's determination that the brokerage and promotion of real estate transactions should only be carried out by persons who have demonstrated their competence and honesty, and are accountable for their conduct through professional discipline.

The provisions of Chapter 339 are substantially similar to and no more restrictive than the licensing laws that govern more than 40 professions in Missouri, and to those pertaining to real estate agents in all fifty states. If all these laws are so irrational and overbroad as to violate the United States Constitution, certainly KCPA would be able to

cite a decision somewhere, in some state or Federal appellate court anywhere in the United States, invalidating such a law. The fact that they can cite no such case demonstrates that laws such as Chapter 339 requiring that persons practicing skilled professions do not abridge the First Amendment rights of the unlicensed.

D. The licensing provisions of Chapter 339 do not allow government to pick and choose speakers, as the class of persons licensed to practice real estate brokerage is self-selected by the members of the class according to objective, published standards. [Responds to Appellant's Point II-B]

KCPA argues in its Point II-B that the government may not "pick and choose" among speakers. However, licensing boards such as the MREC do not "pick and choose" who receives professional licenses. Licensing statutes and the regulations promulgated by licensing boards establish fixed, objective, neutral standards for qualification to perform professional duties. Individuals make the choice as to whether they will expend the effort and undertake the responsibilities to meet those qualifications. Once an individual meets those objective, published standards, he or she has a legal right to licensure, that the government may not deny without cause. If the licensing agency makes a decision, within the limited and defined scope of its authority, to deny a license, the license applicant has the right to administrative and judicial review of that decision.

As noted in Subsection II(C)(2), above, Chapter 339 provides specific requirements a person must meet to be licensed as a real estate broker. Any person who meets these requirements and pays the application fee is eligible for a license. Under the

terms of Section 339.080, RSMo, the MREC may only deny a license to a person who meets these qualifications if he or she has committed misconduct that would be grounds for imposing discipline on a licensee under Section 339.100.2, RSMo. Any person who is denied a license under this provision is entitled to administrative review before the Administrative Hearing Commission, Section 339.080.2, RSMo, and judicial review beyond that. Section 621.045, RSMo. The government does not "pick and choose" who is licensed; licensees self-select by taking the steps to meet the standards laid out in the law, upon which the government is required to grant them a license.

KCPA asserts that only the least restrictive means of protecting these compelling governmental interests may be employed, and suggests that the only permissible means of enforcing the legislature's concern with assuring the honesty and competence of real estate practice is by allowing anyone to practice real estate, and prohibiting only specific acts of dishonesty or other harm. This argument ignores the fact that this Court has stated that the Missouri Real Estate Practice Act is aimed not just at dishonesty, but at competence as well. The Missouri structure addresses the issue of competence by requiring applicants to demonstrate their competence through education and passing an examination. KCPA's proposed alternative leaves the public at risk of harm at the hands of people who think they are competent, but are not. Both this Court and the United States Supreme Court have approved the approach of averting harm through preventive measures, rather than punishing it after the fact.

In support of its claim that the Missouri scheme allows government to "pick and choose" among "government approved speakers," KCPA cites only Federal cases, all

taken out of context and inapposite. It cites *Virginia State Board of Pharmacy,* which, as noted above, did not question the proposition that only licensed pharmacists should be allowed to advertise or dispense prescription drugs.

KCPA cites *Citizens United v. FEC,* ___ U.S. ___, 130 S.Ct. 876 (2010), which upheld a challenge by a corporation against a federal campaign finance law that barred corporations from funding certain campaign activities within 30 days before a general election. *Citizens United* dealt with a restriction on pure expressive speech that no corporation could overcome by any means. In contrast, the Missouri statutory scheme is concerned only with commercial activity, and it does not erect a barrier that an aspiring party can never surmount, as did the law challenged in *Citizens United.* Rather, it sets forth an entirely achievable course of action that any citizen may take to qualify for the right to engage in the business activity in question. This course is objective, content-neutral, and rationally related to the legislative goals it is intended to serve. Thus it meets constitutional muster, and nothing in *Citizens United* suggests otherwise.

KCPA cites *City of Lakewood v. Plain Dealer,* 486 U.S. 750, 763 (1988), in which a newspaper challenged a local ordinance that gave the mayor unlimited discretion to determine where newsracks could be placed. At the cited point, the Court states:

> Therefore, even if the government may constitutionally impose content-neutral prohibitions on a particular manner of speech, it may not condition that speech on obtaining a license or permit from a government official **in that official's boundless discretion.**

486 U.S. at 763 [emphasis added]. The Court later noted that "the face of the ordinance itself contains no explicit limits on the mayor's discretion." 486 U.S. at 770.

Chapter 339, RSMo, does not give the MREC "boundless discretion" to determine who receives a Missouri real estate license. The standards for licensing are very explicitly laid out, and the grounds under which the MREC may deny a license are defined by statute and subject to administrative and judicial review. Chapter 339 does not authorize the MREC to "pick and choose government approved speakers"; it allows the MREC to carry out the legislature's determination that real estate marketing holds too much potential for abuse to be left to unqualified and unaccountable people.

E. KCPA's business is not limited to communication of "truthful, harmless information." [Responds to Appellant's Point III-A]

KCPA repeats the term "truthful, harmless information" like a mantra. However, there is no assurance that the information published and disseminated by KCPA is either truthful or harmless. First, KCPA has no way of knowing whether the information it disseminates is truthful. KCPA does not investigate or confirm the information provided to it by landlords; they assume its accuracy. The leadership of KCPA has no way of knowing whether its "Rental Advisors" are passing on truthful information or not; there is no supervision structure for what Rental Advisors say over the telephone, and KCPA's computer setup does not assure that emails generated by Rental Advisors will be accessible to or reviewed by KCPA management [Tr. 87-89].

Truth is only one of the goals of the legislature's concern with real estate marketing. The cases make clear that the real estate licensing laws are intended to protect the public not only from fraud, but from incompetency as well. Neither the leadership nor the Rental Advisors of KCPA have any education in the principles of real estate brokerage. They have no background in the subtleties of agency, conflicts, fiduciary duties, fair housing laws, discrimination issues, and other questions in which licensed real estate professionals are trained. None of them has taken and passed the examination that every licensed real estate professional must pass. The President of KCPA was unable, in her testimony, to define or explain key concepts of brokerage such as agency and fiduciary responsibility [Tr. 107-108]. Not only do the KCPA representatives not know the law of real estate marketing; they are unaware of the traps they can get into due to their lack of knowledge. The risk of harm through incompetency is considerable.

The evidence showed that KCPA's "Rental Advisors" do far more than communicating truthful, harmless information. The choice of the term "Rental Advisor" contains an inference and representation that these KCPA representatives give advice to prospective tenants – advice they have no qualification to give and for the results of which they have no accountability. The very idea that someone is giving advice to a participant in a commercial transaction raises issues of duty and conflicts which KCPA's representatives are not trained to understand, much less to explain. KCPA touts their "expertise" and education on its website, stating, "We are the Kansas City apartment shopping experts. We only hire highly educated apartment shoppers who know their stuff (and Kansas City) and know how to treat people right." [Respondent's Exhibit 6,

Respondent's Appendix, Page A-40] The tiny slice of KCPA's communications the MREC obtained through discovery – the release of notes on 35 files out of thousands – revealed multiple occasions when KCPA's Rental Advisor gave advice and opinions to a prospective tenant that went far beyond the mere passing along of information from property owners.

On Page 4 of Exhibit 7C, Rental Advisor Andrea Huff responds to a question from prospective tenant Edward Christiansen by saying:

> I have a few favorites . . . I really like Sandstone Creek with Enclave and The Crescent to be my last choices for the overland park area . . . they're fine, just not quite as new and updated as the others.

Appendix to Respondent's Brief, Page A-50. Huff expressed her personal opinion with the effect of steering the prospect to the properties of one of her potential clients at the expense of others. Her lack of familiarity with fiduciary principles is evident in this exchange.

On Page 7 of Exhibit 7C, Edward Christiansen expresses concerns about whether his dog will meet the weight limits of a complex, to which Andrea Huff replies, "No, they don't weigh them, its really more a matter if you're ok with saying she weighs slightly less than she does." [Appendix to Respondent's Brief, Page A-53]. This comment illustrates that KCPA and its agents, due to their lack of education in real estate marketing, do not have even the most basic understanding of fiduciary responsibility. The "Rental Advisor" is here advising the prospective tenant to lie to the property owner, her client, in order to get around the property owner's conditions. A licensed realtor

would face discipline for counseling a prospect to lie to her client, the owner. This comment illustrates both KCPA's lack of qualification to perform the professional duties of real estate marketing, and their lack of accountability for harm caused by their misconduct, whether from intention or ignorance.

On Page 3 of Exhibit 7D, prospective tenant Jason Betts asked Rental Advisor Andrea Huff whether he should stop payment on a check given to a complex that had not responded to his inquiries. Huff replied,

> I would hang tight, don't stop payment, sometimes the process to get an applicant approved takes a while. Lets call them tomorrow, find out whats happening. . . . I imagine it's a communication issue, and they are just waiting until they have news to call you. Ill call them as soon as they open in the morning, and we'll try and get this straightened out.

Appendix to Respondent's Brief, Page A-61. This comment demonstrates that Huff was not only advising the prospective tenant, but also engaging in the negotiation of the transaction. KCPA has no structure in place to supervise or even monitor such communications by the Rental Advisors, even if anyone in the leadership structure were qualified to do so.

These incidents illustrate that the information disseminated by KCPA is not "truthful and harmless." Through many years of experience and countless cases, the real estate profession has learned how simple communications can go wrong and how many traps lie for the unwary, and this experience is incorporated into the legislative foundations and the professional standards adopted by the MREC. KCPA may think

their communications are "harmless," but this is only because they do not know how hazardous the waters they seek to navigate can be.

Moreover, as set forth in the MREC's argument under Point II, the legislature has a legitimate concern that those who engage in the marketing of real estate be not only honest and competent, but also accountable through a disciplinary process. KCPA asks this Court to take it on faith not just that everything they say is truthful and harmless, but that it will always be so. The legislature has determined that this is not good enough; it has created a process by which those who violate the numerous concerns it has about abusive practices in real estate marketing can be called to account. KCPA has no such accountability. The only remedy a consumer or property owner misled or harmed by KCPA's conduct would have is to hire a lawyer and file a civil action, hoping that if they can win a judgment KCPA will have corporate assets to cover it at the end. The legislature is justified in concluding that this is not an adequate remedy, and that a higher level of accountability through professional discipline is needed.

The evidence established that KCPA does much more than communicate "truthful, harmless information." It places untrained and unqualified persons in positions of direct contact with the public, markets itself to the public with representations of their expertise, and does nothing to supervise or monitor the communication such untrained and unqualified persons have with the public. As the United States Supreme Court has made clear in *Ohralik* and other decisions, the legislature may take a prophylactic or preventive approach to the risk of harm posed by turning loose untrained, unqualified, and

unaccountable people to do real estate marketing. It has done so by the adoption of Chapter 339, RSMo.

F. The First Amendment does not create a right of prospective customers to receive professional services from unlicensed persons. [Responds to Appellant's Point II-A]

KCPA argues that Missouri's real estate licensing laws violate the rights of prospective renters to receive the information that KCPA offers. The same argument could be tendered against many provisions of professional licensing laws.

In many ways, unlicensed persons have a competitive advantage over licensed professionals. It is common knowledge that unlicensed persons can often undercut licensed professionals in rates, or offer services or incentives that licensed professionals cannot. For instance, a key feature of KCPA's business model in offering prospective tenants a $100 rebate card as an incentive [Defendant's Exhibit 6, Appendix to Respondent's Brief, Page A-39], which would be illegal for a licensed broker to do. Section 339.100.2(13), RSMo. Unlicensed persons do not have the to incur the expense and effort of the professional education required for licensure; they do not bear the burdens of compliance with continuing education and professional accountability requirements; they do not face the risk of professional discipline for conduct in violation of professional standards. All of this may translate to an opportunity to offer services to members of the public at lower cost or without the constraints imposed by professional accountability. Nonetheless, the benefits of this corner-cutting have never been found by

courts to undermine the basis of the legislature's prohibition of unlicensed practice of professions.

The cases cited by KCPA do not support the conclusion that there is an independent right of members of the public to receive communications from unlicensed persons where such communications are part of the practice of a profession that the legislature has determined should be licensed.

The case most directly addressing this issue is *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748 (1976). This challenge to a professional licensing law was brought not by an affected professional or unlicensed aspirant, but by a consumer group that sought to gain the benefit of the practice prohibited by the statute. 425 U.S. at 753. The prohibition in question was a content-based restriction: it prevented licensed pharmacists from communicating particular facts, i.e., the advertisement of the price of any prescription medication. 425 U.S. at 752. Because only licensed pharmacists could dispense the medications, the Court found that the statute effectively denied the public access to any information about the price of prescription medications. 425 U.S. at 770.

The situation presented in *Virginia State Board of Pharmacy* is not in any way analogous to that presented by this case. The plaintiffs' challenge in that case did not deal with who may present information, but rather on a content-based restriction on what information could be presented. There was no suggestion either on the part of the plaintiffs or in the decision of the Supreme Court that professional standards for who is qualified to dispense medications should be relaxed in any way, or that consumers have

any right to the publication of drug prices by anyone other than licensed pharmacists. If the state of Missouri were to attempt to ban the publication of rental advertisements in the particular way that KCPA does it, the speech concerns articulated in *Virginia State Board of Pharmacy* might come under consideration.

However, the challenged subsections of Section 339.010.1, RSMo, are completely content-neutral. By restricting the right to engage in the practices listed for valuable compensation, they do not dictate or prohibit any particular content or mode of the communication of information about real estate or rental listings.

KCPA's reliance on *Virginia State Board of Pharmacy* assumes the questionable contention, not supported in the evidence or the findings of the court below, that the format in which KCPA offers its apartment rental listings is somehow different from or more convenient than those offered by licensed real estate brokers, or that such a distinction has any relationship to its unlicensed status. This contention has no bearing on the underlying issue whether KCPA's course of conduct – including nonexpressive conduct such as accepting fees for referrals, offering rebates to prospects, and as employing untrained and unlicensed "Rental Advisors" to engage in direct personal interaction with prospects – is conduct meeting the definition of real estate brokerage under the Missouri statute. The contention that KCPA's manner of communicating of rental listings is somehow unique and offers consumers value they cannot get elsewhere is also at odds with its contention under Point I that all it does is pass along information provided by property owners.

III. Article I, Section 8 of the Missouri Constitution does not establish a different level of protection for speech than the First Amendment to the United States Constitution. [Responds to Appellant's Point III-D]

In Point III-D, KCPA argues that that the licensing provisions of Chapter violate Article I, Section 8 of the Missouri Constitution.[3] This argument turns on the assumption that Section 339.020, RSMo, governs speech and not conduct, which has been analyzed at length under Points II and III and need not be repeated here. KCPA contends that Article I, Section 8 imposes limitations on the power of the legislature beyond what the First Amendment requires, a premise this Court has not accepted in modern times. Article I, Section 8 of the Missouri Constitution is phrased in broader terms than the First

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[3] KCPA begins its discussion of its Point III with an extended complaint about the lack of specificity in the injunction as applied to various activities of KCPA. If KCPA is unable to determine whether the injunction applies to various activities, the proper remedy is to apply to the court below for clarification of its order. This is a different issue than KCPA's attack on Missouri licensing laws, which has not been identified as a point for review, and is not properly before this Court for determination. KCPA also mixes into Point III several First Amendment arguments, which have been addressed under Point II. For purposes of clarity, this brief argues all First Amendment issues under Point II and reserves Point III for discussion of Article I, Section 8 of the Missouri Constitution.

Amendment, but the difference in language has not been interpreted by the Missouri Courts as affording a different level of prohibition.

KCPA's brief cites a few century-old cases that employ broad language in describing the reach of Article I, Section 8, including *Marx & Haas Jeans Clothing Co. v. Watson*, 168 Mo. 133, 67 S.W. 391 (1902), and *Ex parte Harrison*, 212 Mo. 88, 110 S.W. 709 (1908). These cases were decided before the United States Supreme Court ruled in *Gitlow v. New York*, 268 U.S. 652 (1925), that the First Amendment applied to the states through the incorporation doctrine. At the time *Marx* and *Harrison* were decided, Article II, Section 14, as the section was then designated, was the only language protecting free speech rights applicable in Missouri. The First Amendment to the United States Constitution was not even mentioned in *Marx* or *Harrison.* Those early cases did not examine the relationship of the Missouri constitutional guarantee to the First Amendment, because at that time the First Amendment was not considered applicable to the states. This Court specifically held that it did not apply in 1920, five years before *Gitlow*: "Referring to the constitutional guaranties invoked by defendants, we remark that the First Amendment to the national Constitution is a restraint on congressional action only, and has no bearing on the rights of defendants in this case." *Hughes v. Kansas City Motion Picture Machine Operators, Local No. 170,* 282 Mo. 304, 221 S.W. 95, 100 (Mo. banc, 1920), certiorari denied 41 S.Ct. 7, 254 U.S. 632, 65 L.Ed. 448 (1920), error dismissed 42 S.Ct. 184, 257 U.S. 621, 66 L.Ed. 401 (1922).

Since the incorporation doctrine embedded First Amendment jurisprudence into state law, however, this Court has repeatedly declined requests to extend the reach of

Article I, Section 8 beyond the level of protection afforded by the First Amendment. This Court has made it clear that the right of freedom of speech is not absolute and does not override the police power of the legislature. This Court rejected Article I, Section 8 challenges on this basis in cases involving obscenity, *State v. Smith,* 422 S.W.2d 50 (Mo. banc, 1967), and prostitution, *State v. Roberts,* 779 S.W.2d 576 (Mo. banc, 1989).

In *BBC Fireworks, Inc. v. State Highway and Transp. Com'n,* 828 S.W.2d 879 (Mo. banc, 1992), this Court considered a challenge to Missouri's Billboard Law, Section 226.520, RSMo 1986, in which the sole point on appeal was a claim that the law violated Article I, Section 8. This Court examined the expansive language of such early cases as *Marx* and *Harrison,* and without overruling them, declined to read them as establishing the proposition KCPA here argues – that Article I, Section 8 establishes a higher level of protection for speech than that afforded by the First Amendment. This Court distinguished the cases on the ground that unlike the Billboard Law, the measures they challenged imposed content-based restrictions. 828 S.W. 2d at 881. This Court concluded,

> Further, later cases have acknowledged that even under our Missouri constitutional provision . . . the right of free speech is not an absolute right at all times and under all circumstances. The right of freedom of speech is subject to the state's right to exercise its inherent police power.

828 S.W.2d at 882. After examining the legislative purposes and history of the Billboard Act, this Court concluded: "We find § 226.520 is a legitimate exercise of the police powers of the State of Missouri and thus does not unconstitutionally impair BBC's right

to freedom of expression." 828 S.W.2d at 882. The statutes challenged here, like the Billboard Law, are not content-based, and thus *Marx* and *Harrison* do not apply.

Later, this Court again addressed and rejected a contention that the protection of Article I, Section 8 is broader than that of the First Amendment in *Missouri Libertarian Party v. Conger,* 88 S.W.3d 446 (Mo. banc, 2002). The Missouri Libertarian Party brought action to challenge the limitation of Section 130.032.4, RSMo 2000 on amounts that political party committees may contribute to candidates. Because the appellants conceded that established law under the First Amendment did not support the result they sought, the only issue on appeal was whether Article I, Section 8 created a broader right to freedom of speech than the First Amendment. This Court summed up the issue concisely:

> Appellants contend that the right to free speech granted by article I, section 8 is broader than that granted under the First Amendment to the United States Constitution and that it gives them an absolute right to communicate their support for a particular candidate by contributing any amount they wish to that candidate, without restriction. This Court disagrees.

88 S.W.3d at 447. This Court cited *BBC Fireworks* in reaching its conclusion:

> The right to free speech, even in a political context, is necessarily subject to the state's inherent right to exercise its police powers to protect the public from corruption and the appearance of corruption. The restriction in section 130.032.4 at issue here serves that purpose and, so, is a proper

> exercise of the state's police power and does not violate article I, section 8 of Missouri's constitution.

88 S.W.3d at 447.

Unlike the pure expressive speech at issue in *Missouri Libertarian Party,* KCPA's claims apply to commercial speech subject to a lesser level of protection, if it is speech at all. The interest of the legislature in protecting the public from fraud and incompetence in real estate transactions is firmly within the police power reaffirmed by this Court in *Missouri Libertarian Party.* KCPA's claims that Article I, Section 8 imposes restrictions beyond what the First Amendment allows lack merit in the aftermath of *Missouri Libertarian Party v. Conger.*

IV. The definition of the practice of real estate under Section 339.010.1, RSMo, subject to the exceptions in Section 339.010.7, is not a special law and does not violate KCPA's equal protection rights. [Responds to Appellant's Point IV]

This Court has stated that the equal protection guarantees of the Fourteenth Amendment and of Article I, Section 2 of the Missouri Constitution are essentially similar. *Committee for Educational Equality v. State,* 294 S.W.3d 477, 489 (Mo. banc, 2009). This Court went on to explain the standard of review applicable to claims that a statutory classification violates either guarantee of equal protection:

> What constitutes adequate justification for treating groups differently depends on the nature of the distinction made. Where a law impacts a "fundamental right," this Court applies strict scrutiny, determining whether the law is necessary to accomplish a compelling state interest. But, where this Court finds that a fundamental right is not impacted, this Court gives an equal protection claim rational-basis review, assessing whether the challenged law rationally is related to some legitimate end.

294 S.W.3d at 489-490. No suspect classification is involved here, and there is no fundamental right to engage in the profession of real estate brokerage, so the rational basis test applies.

The United States Supreme Court has made it clear that the application of the rational review test to statutory classifications does not empower courts to substitute their

judgment for that of the legislature. The test is not whether a distinction is obvious or inarguable, but whether there is any rational justification for it at all:

> Whether embodied in the Fourteenth Amendment or inferred from the Fifth, equal protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices. In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.

F.C.C. v. Beach Communications, Inc., 508 U.S. 307, 311 (1993).

The Supreme Court went on to note that courts are commanded to respect the task the legislature faces in drawing distinctions based on human experience, and in making difficult decisions regarding the rights of individuals and the need to allocate state resources effectively:

> These restraints on judicial review have added force where the legislature must necessarily engage in a process of line-drawing. Defining the class of persons subject to a regulatory requirement – much like classifying governmental beneficiaries – inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line, and the fact that the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration.

508 U.S. at 315-316 [citations omitted].

It is not a violation of equal protection for the legislature to set priorities in the regulation of a field. "The legislature may select one phase of one field and apply a remedy there, neglecting the others. The prohibition of the Equal Protection Clause goes no further than the invidious discrimination." *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483, 488 (1955) [citation omitted].

KCPA's equal protection challenge is based on twelve exceptions to the definition of a real estate broker provided in Section 339.010(7). These exemptions fall into four general classifications:

- Persons and concerns acting on their own behalf, with regard to property under their legal control. These include owners and their employees (Subsection 1); auctioneers (Subsection 3) and property managers retained by owners (Subsection 5); railroads (Subsection 6) and banks (Subsection 7); developers (Subsection 10); and neighborhood associations (Subsection 12);
- Attorneys at law (Subsection 2);
- Persons clothed with the authority of law to deal in land transactions, such as receivers, trustees, guardians and executors (Subsection 4); federal, state, or local government officers (Subsection 6); and employees of nonprofit organizations engaged in economic development (Subsection 11); and
- Communications media offering advertising of real estate incidental to their operation (Subsection 9).

Each of these distinctions is rational and proper under equal protection.

The self-help exception recognized in the first group is an acknowledgement by the legislature that people retain control of their own property and the right to do certain things for themselves, either personally or through supervised employees. KCPA energetically attempts to work itself under this exemption, but cannot do so for the reasons discussed in Point I. It is not irrational for the legislature to allow people the freedom to handle their affairs themselves without resorting to the employment of professionals. Justice Stevens defended such a distinction in his concurrence in *F.C.C. v. Beach Communications:*

> Government may reasonably decide to regulate the distribution of electricity or television programs to paying customers in the open market without also regulating the way in which the owner of the antenna, or the windmill, distributes its benefits within the confines of his own property. In my opinion the interest in the free use of one's own property provides adequate support for an exception from burdensome regulation and franchising requirements . . .

508 U.S. at 322.

Attorneys at law are subject to regulation by this Court rather than the legislature, and hold a professional license with even higher educational and professional responsibility thresholds than realtors, and they are often called upon to deal with land transactions in the process of representing their clients. It is rational for the legislature to determine that the licensing and disciplinary schemes that govern attorneys provide the

same protections against fraud and incompetency that the legislature seeks through the licensing of realtors.

The exception for governmental employees and others acting in official capacity is rational in deference to the authority of law and the protections in place against the abuse of governmental authority. It is rational for the legislature to presume that governmental and public authorities are not going to take advantage of real estate transactions they facilitate in their public role for personal profit.

The only exception on which KCPA focuses particular attention is that in Section 339.010.7(9) for communications media engaged in advertising. This exception allows newspapers and other communications media to accept real estate advertising, as they have traditionally done. KCPA seeks to portray itself as engaged in the transmission of "truthful, harmless information," as though it were nothing more than an electronic version of the classified ads. If all KCPA did was sell advertising space on its electronic database to property owners on a fee for service basis, it might have a basis to challenge the restriction of the exemption to publications whose acceptance of advertising is "incidental."

KCPA's operations, including its performance-based contracts, its payment of incentives to prospects, and its employment of "Rental Advisors" to provide person-to-person advice and communication to prospects, take it far outside the scope of the exception in Section 339.010.7(9), RSMo. KCPA's operations bear much more resemblance to a conventional real estate agency than they do to a media outlet that merely sells advertising space to owners with property to rent or sell. Under the mandate

for strict construction of exceptions set forth under Point I, above, KCPA does not come close to qualifying for an exception under Section 339.010.7(9). Thus it is not similarly situated to newspapers and other media benefiting from that exception. Someday some party may be in a position to raise an equal protection challenge to the "incidental" limitation of Section 339.010.7(9), but KCPA is not that party, and this is not that case.

KCPA also contends that the exceptions make Chapter 339's licensing requirements a "special law" in violation of Article III, Section 40(30) of the Missouri Constitution. This provision states:

> 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 that subject.

In trying to characterize the distinctions drawn in Section 339.010.7 as a "special law," KCPA misstates the meaning of the term and attempts to remake it into a second equal protection clause. "Special law" is defined in Black's Law Dictionary, Fourth Edition, as "One relating to particular persons or things; one made for individual cases or for particular places or districts; one operating upon a selected class, rather than upon the public generally." This Court has stated the distinction in these terms:

> This Court has long recognized that a general law is a statute which relates to persons or things as a class. By contrast, a statute which relates to particular persons or things of a class is special.

City of Springfield v. Sprint Spectrum, L.P., 203 S.W.3d 177, 187 (Mo. banc, 2006) [citations omitted]. In that case, the city challenged a statute that imposed limitations on business taxes for wireless telecommunications, but exempted certain cities from its coverage. This Court agreed that this was a special law because it applied unequally to specific cities. This Court elaborated on the distinction between special and general laws:

> When dealing with laws regarding taxation or powers of political subdivisions, this Court has recognized that whether a law is special or general can most easily be determined by looking to whether the categories created under the law are open-ended or fixed, based on some immutable characteristic. A law is general or "open-ended" if "the status of a political subdivision under [the] classification could change." "Legislation that is not open-ended typically singles out one or a few political subdivisions by permanent characteristics" And, "[c]lassifications based on historical facts, geography, or constitutional status focus on immutable characteristics and are therefore facially special laws."

203 S.W.3d at 187 [citations omitted].

In *Alderson v. State,* 273 S.W.3d 533 (Mo. banc, 2009), this Court reiterated that a classification is not a special law if it creates an open-ended class, from which individuals may come and go. In that case, county juvenile office employees filed suit against the state and the County Employees' Retirement Fund (CERF) asserting that the statutory

exclusion of juvenile office personnel from membership in CERF was a special law in violation of Article III, Section 40(30). This Court's analysis proceeded:

> This Court first asks if the challenged laws create an open-ended class, entitling the classification to a presumption of constitutionality. Here, employees come and go from the eligible class as they are hired and fired; this is an open class because eligibility turns on their relationship to their employer. Therefore, the Court must simply determine if this open-ended classification is reasonable.

273 S.W. 3d at 538 [quotation and citation omitted]. This Court noted that it had already determined that the classification was rational for equal protection purposes, and held that the creation of the open-ended class was reasonable and not a special law.

The licensing requirement with exceptions set forth in Sections 339.010.7 and 339.020, RSMo, is a general law. The classifications created by the exceptions under Section 339.010.7 are open-ended classes. They apply to all members of the public who meet their criteria, and are not based on any "immutable characteristics." Individuals may enter and leave the class entirely by their own choice as to what occupational qualifications they choose to meet and what business relationships they enter into. The classifications are rational and reasonable for the legislative rationale set forth in the equal protection analysis above. KCPA's claims that these distinctions are a "special law" are without basis and should be denied.

V. The definitions of the practice of real estate under Section 339.010.1, RSMo, are not so vague as to implicate due process rights. [Responds to Appellant's Point V]

The thrust of KCPA's Point V is that the legislative definition of the practice of real estate brokerage is vague and denies KCPA due process because the meaning of the terms in the statute are not precisely defined. KCPA cites no Missouri cases in support of this argument.

Given the vast range of human behavior that the legislature must address, it is impossible for the legislature to precisely define every word it uses to the point where no one could have any doubt about its meaning. If it were to do so, the statutory code would so verbose as to be unreadable. The fact that it is possible to quibble over the meaning of words does not establish a violation of due process.

This Court has established guidelines for the evaluation of vagueness claims as follows:

> In reviewing vagueness challenges, the language is to be evaluated by applying it to the facts at hand. A valid statute provides a person of ordinary intelligence a reasonable opportunity to learn what is prohibited. The prohibition against vagueness ensures that laws give fair and adequate notice of proscribed conduct. In addition, the void-for-vagueness doctrine protects against arbitrary and discriminatory enforcement. A statute can be void for vagueness if its prohibitions are not clearly defined.

State v. Entertainment Ventures I, Inc., 44 S.W.3d 383, 387 (Mo. banc, 2001) [citations omitted].

This Court has not required that statutes be worded with such precision that their meaning is obvious beyond doubt. This Court has held that "if the law is susceptible of any reasonable and practical construction which will support it, it will be held valid, and ... the courts must endeavor, by every rule of construction, to give it effect." *State v. Duggar*, 806 S.W.2d 407, 408 (Mo. banc, 1991) "If the terms or words used in the statute are of common usage and are understandable by persons of ordinary intelligence, they satisfy the constitutional requirement as to definiteness and certainty." *State v. Williams*, 473 S.W.2d 382, 385 (Mo.1971); *Prokopf v. Whaley*, 592 S.W.2d 819, 824 (Mo. banc, 1980).

The words used in Section 339.010.1 have common, everyday meanings, and are not vague or difficult to understand. "Negotiating" is certainly a term in everyday parlance whose general definition is known to all educated adults. The Merriam-Webster Collegiate Dictionary, Eleventh Edition (2003), offers the following definitions of the term "negotiate":

> [verb intransitive]: to confer with another so as to arrive at the settlement of some matter;
>
> [verb transitive] – 1 a : to deal with (some matter or affair that requires ability for its successful handling) b : to arrange or bring about through conference, discussion, and compromise.

Although reasonable people could debate the point at which an inquiry into a potential transaction turns into a "negotiation," there is reason for any person to anticipate that KCPA's activities may meet this definition.

"Listing" is a term that has a meaning well known to people of common intelligence when used in the real estate context. The most applicable definition of "list" in Merriam Webster's Collegiate Dictionary, Eleventh Edition, is "to become entered in a catalog with a selling price." Although there may be different legal and professional ideas of when the publication that a property is available for sale or rental technically becomes a "listing," persons of ordinary intelligence can discern that there is a substantial probability that KCPA's listing of rental properties with their rental prices meet this definition.

"Assisting or directing in the procurement of prospects for rental" is as simple, direct, and elegant a description of the business of KCPA as one could craft.

"Valuable consideration" is defined in Merriam-Webster's as "an equivalent or compensation having value that is given for something acquired or promised . . ." The payments from property owners to KCPA have value and are given for something acquired, i.e., the referral of a tenant. This Court has held that a term employing the construction "valuable consideration" is clear and unambiguous. *Jones v. Director of Revenue,* 832 S.W.2d 516, 517 (Mo. banc, 1992). It is preposterous to suggest that it applies "if someone buys a friend a cup of coffee in gratitude for helping find an apartment" [Appellants' Brief, Footnote 24]. If one can conduct a business, make a profit, and earn a living based on the consideration one receives, one is receiving

"valuable consideration." A term is not rendered unconstitutionally vague because its applicability may have to be determined under the facts of the case.

The prohibitions of Chapter 339 are easily understood and give notice to persons of ordinary intelligence what conduct is prohibited. It is abundantly clear that KCPA is in the business of "assisting or directing in the procurement of prospects for rental" without a license, and that the trial court had grounds for enjoining them from doing so.

CONCLUSION

The judgment of the trial court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF ATTORNEY

I hereby certify that the foregoing Respondent's Brief complies with the provisions of Rule 55.03 and complies with the limitations contained in Rule 84.06(b) and that:

(A) It contains 16,158 words and 1,475 lines, as calculated by counsel's word processing program;

(B) A copy of this brief is on the attached compact disk; and that

(C) The disk has been scanned for viruses by counsel's anti-virus program and is free of any virus.

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CERTIFICATE OF SERVICE

I certify that today, April 13, 2011, I served two copies of the foregoing Brief for Defendant-Respondent upon David Roland, counsel for Appellant, along with a CD-Rom containing a copy of the brief in Word format, by mailing them to him at the following address:

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