

**IN THE CIRCUIT COURT
OF PLATTE COUNTY AT PLATTE CITY
STATE OF MISSOURI**

KANSAS CITY PREMIER)

APARTMENTS, INC.,)

)

Plaintiff,)

)

v.)

Case No. 07AE-CV01240

)

MISSOURI REAL ESTATE)

COMMISSION,)

)

Defendant.)

PLAINTIFF'S TRIAL BRIEF

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INTRODUCTION

The facts of this case call into question constitutional principles of the utmost importance: the freedom of expression, equal protection of the laws, and due process to which every citizen is entitled. While the Plaintiffs contend that the statutory provisions at issue do not apply to their business activities, those provisions do make it a criminal offense for citizens to share truthful information with each other, despite an utter lack of evidence that the information poses any threat to the physical or economic well-being of its recipients. These provisions also create a privileged class of persons and businesses who are permitted to communicate specific information, while denying similarly situated persons and businesses the freedom to communicate precisely the same information. Additionally, these provisions lack clear definitions and objective standards to govern their application, leaving citizens uncertain as to the limits of their lawful behavior, chilling their freedom of expression, and subjecting their liberties to the unfettered discretion of a regulatory authority. These statutory provisions impermissibly infringe upon some of the most cherished freedoms that citizens have secured to themselves under the U.S. and Missouri Constitutions, and for the reasons explained in this Trial Brief the Plaintiffs respectfully ask the court to find the challenged provisions unconstitutional and void.

FACTS

The essential facts of this case are not disputed. In 2001, after several years working for a licensed real estate broker, Tiffany Lewis founded a business of her own, Kansas City Premier Apartments (“KCPA”). The evidence will show that before KCPA

began business operations, Ms. Lewis asked a representative of the MREC if her proposed business model would require her to obtain a license. Ms. Lewis was told that the contemplated business activities constituted a “grey area”, and the MREC offered no further clarification. Ms. Lewis opted not to obtain a license and KCPA began business operations.

KCPA is an internet-based service with several components, including:

- An online forum in which owners of rental properties may advertise the availability of rental units;
- A search function that allows prospective renters to limit the display of available properties to only those meeting certain criteria selected by the prospective renter;
- Access to personnel who can provide potential renters with additional useful information regarding available rental properties;
- An online roommate matching service;
- An online forum in which those interested in the Greater Kansas City rental community may communicate with each other on a wide variety of topics;
- A collection of useful information about the advantages of living in the Kansas City area; and
- A blog and other social media outlets that allow for the communication of information about rental properties.

In June 2004, the Missouri Real Estate Commission (“MREC”) notified Ms. Lewis that her former employer had filed a complaint that KCPA was unlawfully engaging in real estate activities. (Plaintiffs’ Exhibit A). In December 2006, the MREC announced its determination that KCPA was, in fact, violating the law. (Plaintiffs’ Exhibit B). While the letter did not advise KCPA what, in particular, they were doing

wrong, the MREC demanded that KCPA cease violating the law. KCPA continued to operate. In March 2007, the MREC sent another letter, indicating its opinion that KCPA was violating the statutory prohibitions against “listing” real estate information, assisting or directing in “the procuring of prospects” for real estate transactions, and charging an advance fee to promote the sale of an unlicensed person’s real estate. (Plaintiffs’ Exhibit D). The letter further advised that KCPA’s actions constituted a criminal offense, and stated the MREC’s intent to notify “all applicable prosecuting authorities.” *Id.*

KCPA filed this lawsuit, seeking a declaratory judgment that the MREC cannot lawfully enforce the provisions of Chapter 339 against them based on KCPA’s current business activities. While the MREC initially claimed the lawsuit was premature, one year ago it filed for an injunction that would prevent KCPA from what it claimed were violations of §§ 339.010.1(3), (4), (7), (8), and (10) (to which the Plaintiffs shall collectively refer as, “the speech-infringing provisions of Chapter 339”). KCPA denies that its current business activities violate these sections, but also argues that these provisions, both facially and as applied by the MREC, violate both the U.S. and the Missouri Constitutions.

The MREC has stipulated a number of facts:

- The requested injunction seeks to prevent KCPA from engaging in future communications or publications. (MREC Stip. ¶ 4).
- It would prevent KCPA or its rental advisors from publishing or otherwise communicating the availability of real estate for rent. (MREC Stip. ¶ 7).

- The MREC neither alleges nor has any evidence to demonstrate that the KCPA website has published false or misleading rental property advertisements. (MREC Stip. ¶¶ 15, 16).
- The MREC neither alleges nor has any evidence to demonstrate that KCPA’s rental advisors have conveyed false or misleading information about specific rental units. (MREC Stip. ¶¶ 17, 18).
- The MREC neither alleges nor has any evidence to demonstrate that the KCPA website has published any rental property advertisements prepared by anyone other than a licensed broker or the rental property’s owner. (MREC Stip. ¶¶ 13, 14).
- Aside from the communications and publications it seeks to enjoin, the MREC does not allege and does not intend to offer proof that it would be illegal for a member of the public to rent or lease any of the properties advertised on the KCPA website. (MREC Stip. ¶¶ 21, 22).
- The MREC has not defined many of the terms used in the speech-infringing provisions of Chapter 339, including what is involved in the process of “negotiation” (MREC Stip. ¶ 32), what it means to “list” real estate for sale, lease, rental or exchange (MREC Stip. ¶ 25), what it means to “procure a prospect calculated to result in the sale, exchange, leasing or rental of real estate” (MREC Stip. ¶ 28), what it means to negotiate “any transaction calculated or intended to result in the sale, exchange, leasing or rental of real estate” (MREC Stip. ¶ 30), what it means for a person not licensed by the MREC to be “retained to manage real property by, for, or on behalf of the agent or the owner of any real estate” (MREC Stip. ¶ 36), or what it means for the advertising of real estate to be “incidental” to the operation of a “newspaper, magazine, periodical, Internet site, Internet communications, or any form of communications regulated or licensed by the Federal Communications Commission” (MREC Stip. ¶ 38).

The Plaintiffs believe that testimony at trial will show no evidence that any person who has used KCPA’s informational services has suffered physical or economic injury as a result of that information. The Plaintiffs also believe the testimony will show that the speech-infringing provisions of Chapter 339 are not supported by any evidence of any injury likely to result in their absence that could not be addressed by prohibitions on

false, misleading, or fraudulent communications or a requirement that speech about real estate be accompanied by a disclaimer clarifying the speaker's licensure status.

I. **STATE LAW ISSUES**

A. **KCPA Qualifies for the Exemption Set Forth in § 339.010.6(5).**

The MREC contends that KCPA's business activities violate several parts of §339.010.1. KCPA disputes this contention and will address it at trial, but for the purposes of this brief will restrict itself to arguing that it is exempt from the application of Chapter 339 because it is "retained to manage real property by, for, or on behalf of the agent or the owner" of certain real estate and its actions are limited to "(d) conveying information prepared by a broker or owner about a rental unit, a lease, an application for a lease, or the status of a security deposit, or the payment of rent, by any person;" and "(e) assisting in the performance of brokers' or owners' functions, administrative, clerical or maintenance tasks". Mo. Stat. § 339.010.6(5).

As the MREC points out in its own petition for injunction, "KCPA enters into agreements with landlords under which the landlords submit properties to be listed on KCPA's website." (MREC Petition for Injunction at ¶ 17(a)). The common meaning of "retain" is "to engage the services of another to manage a cause". The MREC has stipulated that it has not published a definition regarding this word's use. In the absence of a published definition to the contrary, this court should hold that the rental property owners that post advertisements to KCPA's website have, in fact, "employed or retained" the KCPA. Furthermore, the MREC has stipulated that it has no evidence that the

advertisements posted to KCPA's website were prepared by anyone other than a "broker or owner." Thus, KCPA qualifies for the exemption set forth in § 339.010.6(5) and therefore the MREC has no proper jurisdiction over its business activities.

B. Section 339.010.1 Infringes Upon the Freedom of Speech.

The MREC contends that § 339.010.1 prohibits anyone but licensed real estate professionals and others exempted by § 339.010.6 from providing the public with information about the availability of rental opportunities. The statutes in question restrict:

- Negotiating or offering or agreeing to negotiate the sale, exchange, purchase, rental, or leasing of real estate. Mo. Stat. § 339.010.1(3).
- Listing or offering or agreeing to list real estate for sale, lease, rental, or exchange. Mo. Stat. § 339.010.1(4).
- Assisting or directing in the procuring of prospects calculated to result in the sale, exchange, leasing or rental of real estate. Mo. Stat. § 339.010.1(7).
- Assisting or directing in the negotiation of any transaction calculated to result in the sale, exchange, leasing or rental of real estate. Mo. Stat. § 339.010.1(8)
- Performing any of the above on behalf of the owner of real estate for compensation. Mo. Stat. § 339.010.1(10)

The MREC has stipulated that the injunction it is requesting, which is based on the application of these provisions, would prevent KCPA from engaging in future communication or publications. (MREC Stip. ¶¶ 4, 7). Thus, it is clearly the position of the MREC that these provisions require the suppression of speech. As a result the question this court must answer is whether the restrictions required by these provisions violate the state and federal constitutional provisions that citizens have adopted to protect their liberties from governmental interference.

II. STATE CONSTITUTIONAL ISSUES

A. Missouri Courts Must Apply Strict Scrutiny to the Speech-Infringing Provisions of Chapter 339.

Article I, § 8, of the Missouri Constitution forbids any legislative body in the state to pass any law impairing the freedom of speech and also guarantees “that every person shall be free to say, write or publish, or otherwise communicate whatever he will on any subject, no matter by what means communicated.” “Anything which makes the exercise of a right more expensive or less convenient, more difficult or less effective, impairs that right.” *Ex parte Harrison*, 110 S.W. 709, 710 (Mo. 1908). As the Missouri Supreme Court has stated, “[l]anguage could not be broader, nor prohibition nor protection more amply comprehensive.” *Marx & Haas Jeans Clothing Co. v. Watson*, 67 S.W. 391 (Mo. banc 1902).

Of particular importance in this case is the Missouri Constitution’s guarantee that every person has the right to communicate “whatever he will *on any subject*”. The MREC has stipulated that the injunction it has requested would prevent KCPA and its rental advisors from communicating or publishing information related to the sale, rental, leasing, or exchange of real estate. (MREC Stip. ¶ 7). While the MREC has insisted that the real estate information restricted by Chapter 339 merely constitutes “commercial speech”, the plain language of Article I, § 8, does not permit Missouri courts to apply a lesser level of scrutiny to restrictions on speech based on the subject of that speech. To the extent that the First Amendment permits a lower level of scrutiny for “commercial speech,” the Missouri Constitution’s own protections for expressive freedom are more

extensive than those provided in the U.S. Constitution. Thus, Missouri courts are required to apply strict scrutiny to any law, regulation, order, or decree that would impair or limit communication, regardless of the communication's subject.¹

It is also vital to note that the prohibitions cited in the MREC's petition for injunction are backed up by criminal penalties of up to six months' imprisonment. Mo. Stat. § 339.170; § 558.011.1(6). "Criminal statutes require particularly careful scrutiny, and those that make unlawful a substantial amount of constitutionally protected conduct may be held facially invalid even if they also have legitimate application." *State v. Moore*, 90 S.W.3d 64, 66 (Mo. banc 2002) (quoting *City of Houston v. Hill*, 482 U.S. 451, 459 (1987)). The MREC asserts that these prohibitions must be enforced even though it has also stipulated that it does not challenge the truthfulness of the real estate advertisements published on KCPA's website or the information provided by KCPA's rental advisors. (MREC Stip. ¶¶ 15-18). Thus, taking § 339.170 with the rest of the provisions cited by the MREC in its petition for injunction, the General Assembly has passed a law that criminalizes the communication of truthful, harmless information in the form of real estate advertisements or other communications intended to inform interested members of the public about the availability of real estate for rent. The government

¹ KCPA notes that a number of the Missouri Supreme Court's first decisions applying Article I, § 8, determined that while speech could be punished based on some harm it caused to an individual or society at large, the provision's plain language did not permit the courts to *enjoin* even potentially harmful communications. See *State v. Van Wye*, 37 S.W. 938 (Mo. 1896); *Marx & Haas Jeans Clothing Co. v. Watson*, 67 S.W. 391 (Mo. banc 1902); *Ex parte Harrison*, 110 S.W. 709 (Mo. 1908); *Wolf v. Harris*, 184 S.W. 1139 (Mo. 1916). KCPA specifically seeks to have the reasoning of this early line of cases reinvigorated.

should bear an extraordinarily heavy burden in any attempt to justify such a restriction on Missourians' expressive liberties.

Where, as here, strict scrutiny applies, the law or policy “will only be upheld if it is necessary to a compelling state interest and narrowly drawn to protect that interest.” *In re Coffman*, 225 S.W.3d 439, 445 (Mo. banc 2007). Importantly, the Missouri Supreme Court recently held that “combating perceptions of voter fraud” was not a sufficiently compelling interest to justify interference with fundamental liberties, stating that “[t]he protection of our most precious state constitutional rights must not founder in the tumultuous tides of public misperception.” *Weinschenk v. State*, 203 S.W.3d 201, 218-19 (Mo. banc 2006). The MREC has asserted only one governmental interest advanced by the speech restrictions of Chapter 339: assuring the public that all persons who perform the services defined in § 339.010.1 will be licensed and regulated by the MREC. (MREC Response to Plaintiffs' First Set of Interrogatories ¶ 12). For the court to consider this interest “compelling”, at a minimum the government ought to produce evidence that the communicative services defined in that section pose a threat to the physical or financial health of the public, or that the people of Missouri have been suffering some damaging crisis of faith regarding individuals or companies that provide those services. It is KCPA's understanding that the MREC neither has nor intends to produce such evidence. Thus, this court should not consider the interest the MREC has asserted in support of the speech-restrictive provisions to constitute a “compelling government interest.”

Even if this court did consider it to be such, strict scrutiny requires the restriction on speech to represent the “least restrictive means” of accomplishing that interest. Where

the General Assembly easily could have specifically targeted false, misleading, or fraudulent speech, rather than prohibiting even truthful and harmless communication about real estate, it demonstrably failed to utilize the “least restrictive means” of addressing its interest. Because the speech-infringing provisions of Chapter 339 fail to satisfy the requirements of strict scrutiny, the court should strike them down as a violation of Article I, § 8, of the Missouri Constitution. Furthermore, regardless of its holding regarding the non-criminal enforcement of the speech-infringing provisions of Chapter 339, the court should hold that § 339.170 cannot constitutionally be applied to punish the communication of truthful, harmless information.

B. The Government’s “Police Power” Cannot Justify the Restriction of Truthful, Harmless Communication.

Despite the unambiguous, sweeping, and comprehensive protection of free expression articulated in Article I, § 8, recent decisions by the Missouri Supreme Court have stated that the freedom of speech may be limited by the state’s exercise of its “police power.”² See *Missouri Libertarian Party v. Conger*, 88 S.W.3d 446, 448 (Mo. banc 2002). The state’s police power, however, has a limited, defined purpose; it is not absolute. “The function of the police power has been held to promote the health, welfare and safety of the people by regulating all threats harmful to the public interest... Statutes enacted under the police power for the protection of public health or safety are valid so long as they bear a *reasonable and substantial* relationship to the public health, welfare

² KCPA specifically seeks to have the Missouri Supreme Court reconsider the validity of this principle insofar as it appears to be incompatible with the will of the people as expressed in the plain language of Article I, §8, of the Missouri Constitution.

or safety.” *State ex rel. Koster v. Olive*, 282 S.W.3d 842, 847 (Mo. banc 2009) (emphasis added). Where, as in this case, the government’s asserted interest has *no* relationship to the public health, welfare or safety, much less a “reasonable and substantial” relationship to those goals, the police power may not be invoked to prohibit Missouri citizens from communicating truthful, harmless information.

The plain language of Article I, § 8, makes clear that governmental action impairing or punishing the freedom of speech, may only be justified where that person or entity has “abused” their liberty. To hold that a government may invoke the “police power” to “protect” its citizens from the “dangers” of truthful, harmless information would make a mockery of the constitutional provision the citizens of Missouri adopted to protect their expressive freedoms. If Missouri’s courts determine that the government may suppress truthful, harmless information under the guise of the “police power,” then there will remain no principled constitutional limit to the government’s authority to pass laws that impair the freedom of speech, nor could any person seriously contend that the people of this state truly remain “free to say, write or publish, or otherwise communicate whatever [they] will on any subject.” Because the speech-infringing provisions of Chapter 339 have no “reasonable and substantial” relationship to the protection of the health, safety, or welfare of the people, this court should strike down the speech-infringing provisions of Chapter 339 as being beyond the power of the state to enact.

III. FEDERAL CONSTITUTIONAL ISSUES

A. The First Amendment Protects the Rights of Speakers and the Rights of Interested Listeners.

The First Amendment, made applicable to the states through the Fourteenth Amendment, protects not only the rights of speakers, but also the rights of those interested in hearing what those speakers have to say. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 756 (1976); see also *Citizens United v. FEC*, 130 S. Ct. 876, 908 (January 21, 2010). It is no defense for the government to argue that the citizen might receive the same information from another source. *Virginia State Board of Pharmacy*, 425 U.S. at 757, fn 15. “The Government may not... deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration. The First Amendment protects speech and speaker, and the ideas that flow from each.” *Citizens United* at 899. The court should hold that neither the Missouri General Assembly nor the MREC may constitutionally deprive the general public of their right to receive truthful, harmless information from KCPA.

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

According to the MREC’s interpretation of Chapter 339, the General Assembly has reserved the privilege of communicating real estate information to those holding a license from the MREC and a number of others excepted from the chapter’s prohibitions. Restrictions distinguishing among different speakers, allowing speech by some but not others, are prohibited under the First Amendment. *Citizens United v. FEC*, 130 S. Ct.

876, 898 (January 21, 2010) (citing *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 784 (1978)). "[A] law or policy permitting communication in a certain manner for some but not for others raises the specter of content and viewpoint censorship." *City of Lakewood v. Plain Dealer*, 486 U.S. 750, 763 (1988). "Even under the degree of scrutiny [the U.S. Supreme Court has] applied in commercial speech cases, decisions that select among speakers conveying virtually identical messages are in serious tension with the principles undergirding the First Amendment." *Greater New Orleans Broadcasting Ass'n, Inc. v. U.S.*, 527 U.S. 173, 193-94, (1999). Because the speech-infringing provisions of Chapter 339 allow a few government-approved speakers to communicate precisely the same truthful, harmless information that the provisions forbid others to share, this court should strike down the speech-infringing provisions of Chapter 339 as a violation of the First Amendment.

C. The Speech-Infringing Provisions of Chapter 339 are Not Permissible Restrictions of "Commercial Speech."

The MREC has suggested that the communication prohibited by the speech-infringing provisions of Chapter 339 constitutes "commercial speech" and, as such, is entitled to a lesser degree of constitutional protection.³ Under current First Amendment precedent, laws that regulate commercial speech are measured under the four-part *Central Hudson* test. *Central Hudson*, 447 U.S. at 561-66. The first part of the test asks whether the commercial speech at issue is either misleading or related to unlawful

³ KCPA specifically seeks to have the United States Supreme Court reconsider whether the First Amendment properly allows varying degrees of judicial scrutiny to be applied based on the subject matter of the restricted speech.

activity, such as false advertising. *Id.* at 563-64. If so, the speech is not protected by the First Amendment, and the government may regulate or even prohibit it entirely. If, however, the commercial speech is neither misleading nor related to unlawful activity, it merits protection by the First Amendment, and the government may regulate it only if three additional standards are satisfied: 1) the government interest in doing so is substantial; 2) the regulation directly advances that interest; and 3) a more limited restriction on speech will not serve that interest. *Id.* at 564.

Again, the MREC does not allege that the real estate information communicated by KCPA or its rental advisors is either false or misleading. (MREC Stip. ¶¶ 15-18). The MREC has also stipulated that it has no evidence that the commercial activity proposed by these advertisements, namely an agreement between a property owner and a member of the public to sell, rent, lease, or exchange real estate or an interest therein, is itself illegal. (MREC Stip. ¶¶ 21, 22). Thus, the MREC must bear the responsibility of asserting a “substantial government interest”, must demonstrate that the restriction on speech directly advances that interest, and also must demonstrate that the restriction on speech is no more extensive than necessary to serve the asserted interest.

As noted above, the MREC has asserted only one governmental interest advanced by the speech restrictions of Chapter 339: assuring the public that all persons who perform the services defined in § 339.010.1 will be licensed and regulated by the MREC. (MREC Response to Plaintiffs’ First Set of Interrogatories ¶ 12). Again, the MREC has not even suggested that these restrictions are intended to protect the health or safety of the public or that there is any evidence to support their necessity. The court should hold

that this cannot qualify even as a “substantial” government interest and that the speech-infringing provisions of Chapter 339 must be struck down as violations of the First Amendment.

Even if the court finds that the state’s interest in “assuring the public that all persons who perform the services defined in § 339.010.1 will be licensed and regulated” *is* substantial, however, the restrictions should still fail. The exemptions found in § 339.010.6 permit a great number of unlicensed persons to share the very information that, in the understanding of the MREC, the speech-infringing provisions of Chapter 339 prohibit KCPA from communicating. Thus, the restrictions plainly *cannot* “assure the public that all persons who perform the services defined in § 339.010.1 will be licensed and regulated by the MREC.” Because the speech-infringing provisions of Chapter 339 do not directly advance the interest asserted by the government, they should be struck down as violations of the First Amendment.

And finally, the restrictions on speech proposed by the MREC are far more extensive than necessary to advance any *legitimate* interest that the government might have in protecting the health, safety, and welfare of Missouri’s citizens. If the General Assembly’s real interest was in this sort of protection, that interest could have been met by requiring disclaimers announcing that the unlicensed speakers are not and should not be mistaken for licensed real estate brokers, or establishing punishments for false or misleading information about real estate. Thus, the court should hold that the speech-infringing provisions of Chapter 339 cannot survive scrutiny under the First Amendment’s protections for “commercial speech.”

IV. MIXED CONSTITUTIONAL ISSUES

A. The Speech-Infringing Provisions of Chapter 339 are Unconstitutionally Overbroad.

The speech-infringing provisions of Chapter 339 violate the principles of due process as protected under the Fourteenth Amendment and Article I, §§ 2 and 10, of the Missouri Constitution because they are unconstitutionally overbroad, prohibiting or otherwise chilling a range of speech that falls within the protection of the First Amendment and Article I, § 8, of the Missouri Constitution. “A statute that is substantially overbroad may be invalidated on its face.” *State v. Carpenter*, 736 S.W.2d 406, 407 (Mo. banc 1987). “Criminal statutes require particularly careful scrutiny, and those that make unlawful a substantial amount of constitutionally protected conduct may be held facially invalid even if they also have legitimate application.” *State v. Moore*, 90 S.W.3d 64, 66 (Mo. 2002). Even if the court determines that *some* of KCPA’s business activities are justifiably prohibited under Chapter 339, the statute’s prohibitions apply to or threaten a substantial range of speech—both for KCPA and for the great majority of Missouri citizens—that must be protected under the First Amendment and Article I, § 8, of the Missouri Constitution. As such, the court should strike down the speech-infringing provisions of Chapter 339 as unconstitutionally overbroad.

B. The Speech-Infringing Provisions of Chapter 339 are Unconstitutionally Vague.

The speech-infringing provisions of Chapter 339 are unconstitutionally vague because they force persons of common intelligence to guess at the meaning of a criminal law. “Due process requires that all be informed as to what the State commands or

forbids, and that men of common intelligence not be forced to guess at the meaning of the criminal law.” *Smith v. Goguen*, 415 U.S. 566, 574 (1974). The U.S. Constitution is “designed to maximize individual freedoms within a framework of ordered liberty. Statutory limitations on those freedoms are examined for substantive authority and content as well as for definiteness or certainty of expression.” *Kolendar v. Lawson*, 461 U.S. 352, 357 (1983). “[E]ven if an enactment does not reach a substantial amount of constitutionally protected conduct, it may be impermissibly vague because it fails to establish standards... that are sufficient to guard against the arbitrary deprivation of liberty interests.” *City of Chicago v. Morales*, 571 U.S. 41, 52 (1999) (citing *Kolendar*, 461 U.S. at 358). “Where a statute’s literal scope, unaided by a narrowing state court interpretation, is capable of reaching expression sheltered by the First Amendment, the doctrine demands a greater degree of specificity than in other contexts.” *Goguen*, 415 U.S. at 573.

The evidence will show that the MREC has no standard definition for many of the terms utilized in the sections cited in its petition for injunction. Indeed, the MREC has consistently taken the position that it cannot and will not predict how the commission will vote to apply the law under any given set of facts – meaning that a member of the public will have little or no forewarning that any particular communication or publication they might make regarding real estate would ultimately be determined to constitute a criminal offense. In essence, people such as Tiffany Lewis and Ryan Gran must “pay their money and take their chances,” hoping that the MREC will vote in their favor if anyone should ever challenge the propriety of their communications.

A set of very specific examples illustrate the uncertainty presented by the MREC's approach to applying these statutes. The evidence will show that when KCPA's principals first contacted the MREC about the need for licensure, they were told that the business model they proposed occupied "a gray area" in which it was not certain how the speech-infringing provisions of Chapter 339 would be applied. Similarly, while § 339.010.6(9) *clearly and unequivocally* exempts from the requirements of Chapter 339 any Internet site "whereby the advertising of real estate is incidental to its operation", in discovery the MREC refused to admit the chapter's inapplicability to such an Internet site, instead stating that "it has not voted on or determined any position as to whether" the law's restrictions would apply. (MREC Response to Plaintiffs' First Set of Interrogatories ¶ 17). When a similar question was asked regarding attorneys-at-law, who are specifically exempted by § 339.010.6(2), the government responded that "the MREC has not been presented with and determined this precise issue." (MREC Response to Requested Stipulations ¶ 46, 47). Because the speech-infringing provisions of Chapter 339 leave Missouri citizens in doubt as to whether their speech or actions might subject themselves to criminal liability, the court must rule that these provisions are unconstitutionally vague and therefore violate the Due Process rights secured by the Fourteenth Amendment and Article I, §§ 2 and 10, of the Missouri Constitution.

C. The Speech-Infringing Provisions of Chapter 339 Create Unconstitutional Classifications.

Regardless of what this court determines regarding the application of the First Amendment to the speech-infringing provisions of Chapter 339, by arbitrarily dividing a

natural class of persons (all those not holding a license issued by the MREC) and applying the law differently to segments of that class (exempting certain groups from the requirements and restrictions of the statute), the statute violates the substantive due process and equal protection guarantees of the Fourteenth Amendment, Article I, §§ 2 and 10, of the Missouri Constitution, as well as Article III, § 40(30) of the Missouri Constitution, which prohibits the General Assembly from passing a special law where a general law can be made applicable. Specifically, despite the fact that the *only* state interest the MREC has claimed in support of Chapter 339 is “assuring the public that all persons who perform the services defined in § 339.0101.1 will be licensed and regulated,” § 339.010.6 entirely exempts *twelve* categories of citizens and organizations from the requirements and restrictions of Chapter 339.

If a classification created by the government impinges on a fundamental right, the classification is subject to strict scrutiny and will be upheld only “if it is necessary to a compelling state interest and narrowly drawn to protect that interest.” *In re Coffman*, 225 S.W.3d at 445. “Freedom of speech and freedom of the press... are among the fundamental personal rights and liberties which are protected by the Fourteenth Amendment from invasion by state action.” *Lovell v. Griffin*, 303 U.S. 444, 450 (1938). Likewise the principles of Due Process protected under the Fourteenth Amendment and Article I, § 10, of the Missouri Constitution ensure citizens’ fundamental rights to contract and to earn a livelihood; Article I, § 2, of the Missouri Constitution ensures the natural right to “the pursuit of happiness and the enjoyment of the gains of their own industry” and “equal rights and opportunity under the law”. The speech-infringing

provisions of Chapter 339 implicate all of these fundamental rights. Thus, the court should apply strict scrutiny to Chapter 339's distinction among persons not holding a license issued by the MREC.

Where a statute contains an unconstitutional classification, if “after separating that which is invalid, a law in all respects complete and susceptible of constitutional enforcement is left, which the legislature would have enacted if it had known that the excised portions were invalid”, the remaining parts of the statute may continue in effect. *Weinschenk*, 203 S.W.3d at 219. Because the speech-restrictive provisions of Chapter 339 violate all of the fundamental rights listed above, this court should apply strict scrutiny to and strike down the classification as it pertains to these portions of the statute.

Even if the court decides that the classifications created by Chapter 339 are only subject to “rational basis” scrutiny, there is no rational basis for the General Assembly's creation of legal differences between businesses for whom the advertisement of real estate is only an “incidental” part of their operations and businesses for whom the advertisement of real estate is more than an “incidental” part of their operations. The Missouri Supreme Court has long held that the legislature is not permitted to arbitrarily divide a natural class so that different rules of law would apply to each part of that class, particularly if the law creates a distinction on the basis that certain activities constitute “the major portion” of a business's operation. *See Petitt v. Field*, 341 S.W.2d 106, 109 (Mo. 1960).

Regarding Chapter 339, the General Assembly requires licensure for companies for whom real estate advertising is more than an “incidental” part of their operations, but it exempts businesses for whom such advertising fails to meet this threshold. There is no rational reason that the law should treat differently two companies that both engage in the business of real estate advertising, simply because that activity is more prevalent in one company than it is in the other. Indeed, if any difference were to be justified, the rational approach would be to exempt the business whose profitability and continued existence *depends* on its reputation for providing high-quality information.

Compounding the arbitrary nature of this distinction, the MREC has admitted that not only has it published no definition for what it means for real estate advertising to be an “incidental” part of a business, it has “no specific process” for making such a determination. As there is an utter lack of any objective element to this evaluative process, the MREC enjoys virtually unlimited discretion to prevent or punish a business’s activities, including communicative activities. Thus, the court should rule that the classification made in Chapter 339 violates the Fourteenth Amendment, Article I, §§ 2 and 10, of the Missouri Constitution, and Article III, § 40(30).

CONCLUSION

For the foregoing reasons, the Plaintiffs respectfully ask the court to declare:

- 1) KCPA is exempt from the restrictions and requirements of Chapter 339 because it has been “retained to manage real property” and its actions are limited to “conveying information prepared by a broker or owner about a rental unit, a lease, an application for a lease, or the status of a security deposit, or the payment of

rent, by any person” and “assisting in the performance of brokers’ or owners’ functions, administrative, clerical or maintenance tasks”. Mo. Stat. § 339.010.6(5).

- 2) Sections 339.010.1(3), (4), (7), (8), (9), and (10) are facially unconstitutional because they infringe upon the freedom of expression protected by Article I, § 8, of the Missouri Constitution.
- 3) Sections 339.010.1(3), (4), (7), (8), (9), and (10), as applied to KCPA, violate Article I, § 8, of the Missouri Constitution because they infringe upon its freedom of expression without first demonstrating that KCPA has “abused” that freedom.
- 4) Sections 339.010.1(3), (4), (7), (8), (9), and (10) are facially unconstitutional under the First Amendment because they “deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration.”
- 5) Sections 339.010.1(3), (4), (7), (8), (9), and (10) are facially unconstitutional because they cannot survive First Amendment scrutiny under the *Central Hudson* test.
- 6) Insofar as § 339.010.6 is applied to distinguish among speakers, allowing some to communicate information that others are forbidden to communicate, it is unconstitutional under the First Amendment.
- 7) Sections 339.010.1(3), (4), (7), (8), (9), and (10) are unconstitutionally overbroad because they prohibit or chill a range of speech that falls within the protection of the First Amendment and Article I, § 8, of the Missouri Constitution.

- 8) Sections 339.010.1(3), (4), (7), (8), (9), and (10) are unconstitutionally vague because they “fail to establish standards... sufficient to guard against the arbitrary deprivation of liberty interests” as protected by the Fourteenth Amendment and Article I, §§ 2 and 10, of the Missouri Constitution.
- 9) Section 339.010.6 is facially unconstitutional because it creates an arbitrary distinction that impinges on fundamental rights and applies the law differently to similarly-situated citizens, violating the substantive due process and equal protection guarantees of the Fourteenth Amendment, Article I, §§ 2 and 10, of the Missouri Constitution, and Article III, § 40(30) of the Missouri Constitution.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing was served by email, on June 22, 2010, addressed to:

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