

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION**

RONALD CALZONE,)	
)	
Plaintiff,)	
)	
v.)	No. 2:16-cv-04278-NKL
)	
NANCY HAGAN, et. al,)	
)	
Defendants.)	

**DEFENDANTS’ SUGGESTIONS IN OPPOSITION TO PRELIMINARY
AND PERMANENT INJUNCTION**

COMES NOW Sara Harrison, Assistant Attorney General, State of Missouri, by and through Defendants, Nancy Hagan, the Missouri Ethics Commission, et al., and for its Suggestions in Opposition to Plaintiff’s Proposed Preliminary and Permanent Injunction states as follows:

Section 105.470 is Constitutional

Lobbyist disclosure seeks to know “who is being hired, who is putting up the money, and how much...to maintain the integrity of a basic governmental process.” *U.S. v. Harriss*, 74 S. Ct. 808, 816 (1954)(see *Burroughs v. U.S.*, 290 U.S. 534 (1934). While *Harriss* aptly describes the sui generis of lobbyist disclosure, the case itself is inapplicable in the matter at bar. *Id.* Federal lobbyists, paid or unpaid must register; such a requirement is constitutional and does not hinder free speech. *Harriss*, 74 S. Ct. at 815,

816. “The hazard of such restraint is too remote to require striking down a statute which on its face is otherwise plainly within the [state's] power and is designed to safeguard a vital...interest.” *Id.* at 816. The Supreme Court’s logic applies equally to Section 105.470, RSMo, just as it does to the federal law in *Harriss*. Section 105.470, RSMo is constitutional and does not infringe on Mr. Calzone’s or Missouri First, Inc.’s First Amendment rights.

Of course, requiring disclosure of any type of speech places a minimal burden on that speech, and that potentially raises First Amendment concerns. As the Supreme Court notes, “compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment.” *Buckley v. Valeo*, 424 U.S. 1, 64 (1976). But as Plaintiff concedes, such protection is not absolute: “...the Court, recognizing the lesser burdens that disclosure generally imposes on First Amendment interests, has upheld numerous statutes requiring disclosures by those endeavoring to influence the political system.” *National Association of Manufacturers v. Taylor*, 582 F.3d 1, 9 (D.C. Cir. 2009). In this case, the minimal requirement of registering as a legislative lobbyist under Section 105.470, RSMo is not a burden that outweighs the public interest in disclosure, *infra*. The language in Section 105.470, RSMo is not unconstitutional or vague.

Plaintiff Attempts to Improperly Shift the Burden of Proof

Plaintiff obfuscates the application of strict scrutiny and the

application of the four *Dataphase Systems, Inc. v. C L Systems, Inc.*, factors. 640 F.2d 109,114 (8th Cir. 1981). The *Dataphase*¹ factors determine whether or not the preliminary and permanent injunction shall issue. The primary issue before this Court is whether or not the Missouri Ethics Commission can be enjoined from investigating Mr. Calzone. And the burden to prove up the *Dataphase* factors lies squarely upon Plaintiff. *Bank One, Utah v. Guttau*, 190 F.3d 844, 847 (8th Cir. 1999). Raising strict scrutiny in such an analysis

¹“In *Minnesota Bearing Co. v. White Motor Corp.*, 470 F.2d 1323 (8th Cir. 1973), we enumerated four factors to be weighed by the district court in deciding whether to grant or deny preliminary injunctive relief: (1) whether there is a substantial probability movant will succeed at trial; (2) whether the moving party will suffer irreparable injury absent the injunction; (3) the harm to other interested parties if the relief is granted; and (4) the effect on the public interest. *Id.* at 1326. This statement of the standard, in particular the requirements of “substantial probability” and “irreparable injury,” has become known as the “traditional test.” *See, e. g., Young v. Harris*, 599 F.2d 870, 875-76 (8th Cir.), cert. denied sub nom. *Young v. Landrieau*, 444 U.S. 993, 100 S.Ct. 526, 62 L.Ed.2d 423 (1979); *Fennell v. Butler*, 570 F.2d 263, 264 (8th Cir.), cert. denied, 437 U.S. 906, 98 S.Ct. 3093, 57 L.Ed.2d 1136 (1978).” *Dataphase*, 640 F.2d at 112.

unnecessarily broadens the scope of the issue at bar, and conflates the facts to manufacture an improper burden shift.

Plaintiff Attempts to Improperly Bar the Commission from Future Lawful

Investigation of Plaintiff

The parties stipulated that Missouri First did not officially designate Mr. Calzone as a lobbyist on their behalf. Stipulations, Paragraph 6. But, given the present facts, an express corporate action is unnecessary. Mr. Calzone is inextricably a part of Missouri First, Inc. (director, incorporator, registered agent, and one of three members of the board), creating a reasonable inference that the corporation knew or should have known that Mr. Calzone was lobbying on its behalf despite no express action.

At oral argument, Plaintiffs suggested that if Missouri First has not officially designated Mr. Calzone a lobbyist and that he cannot be one and the Commission is barred from investigating further complaints of that nature. However, compliance with the statute at a given point in time does not guarantee compliance in the future, which is what would have to be shown for Plaintiff to win its requested remedy; immunity from investigation for violations of the Missouri Ethics statutes in perpetuity. Further, if Mr. Calzone is lobbying on behalf of Missouri First, Inc. without its knowledge, though improbable, this plays directly into the fraud prevention goal of lobbyist registration of preventing a third party from representing an

organization without its consent, another illegal practice that the Missouri Ethics Commission should not be enjoined from investigating. *Harriss*, 74 S. Ct. at 815.

It is true that the most recent complaint against Plaintiff was dismissed because after the required investigation, there was no evidence of unlicensed lobbying by Mr. Calzone within the meaning of Section 105.470, RSMo. This is exactly how the Missouri Ethics Commission is supposed to function. It receives complaints, and without prejudice or comment on the merits of a complaint, conducts an investigation and gives a ruling. The subject of the complaint has a right to respond or ignore the complaint. The Missouri Ethics Commission functions in the same manner as any other tribunal that hears complaints from petitioners or plaintiffs and provides a valuable service to the public by ensuring transparent and accountable government.

Mr. Calzone is the incorporator and Director, the registered agent, sole Officer, and one of three Board members for Missouri First, Inc. Given Mr. Calzone's presence within the organization, it is a reasonable inference that he could overstep his bounds despite the 2016 ruling. The injunction Mr. Calzone seeks should not issue because it would enable Mr. Calzone to overstep those bounds in the future without repercussion because the Missouri Ethics Commission would not be able to properly person its job.

Plaintiff is Unlikely to Succeed on the Merits

“Success on the merits has been referred to as the most important of the four factors.” *Roudachevski v. All-American Care Centers, Inc.*, 648 F.3d 701, 706 (8th Cir. 2001) (quoting, *Kai v. Ross*, 336 F.3d 650, 653 (8th Cir.2003)). Here, Plaintiff is unlikely to succeed on the merits. A facial challenge “can only succeed on its face [if the Missouri lobbyist statute] fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits.” *Reprod. Health Servs. of Planned Parenthood of the St. Louis Region v. Nixon*, 428 F.3d 1139, 1143 ((8th Cir. 2005)). Contrary to Plaintiff's claims, “designate” is not vague and does not present a constitutional challenge. Applying the plain meaning, dictionary definition of "designate," a person of ordinary intelligence is able to understand the language and intent of the statute. Because the definition has not been altered there is no complication and no grounds to challenge the application of §105.470, RSMo. As such, an as-applied constitutional challenge will also fail. Given Mr. Calzones involvement in the strategy of Missouri First, the “self-designate” language is a proper categorization of the actions of Missouri First and is not vague or unclear in any way under the law. Mr. Calzone and Missouri First are unlikely to succeed on the merits of this claim.

There is No Irreparable Harm to Plaintiff

Mr. Calzone is no longer facing any form of irreparable harm. “To succeed in demonstrating a threat of irreparable harm, “a party must show that the harm is certain and great and of such imminence that there is a clear and present need for equitable relief.” *Roudachevski*. 648 F.3d at 706 (quoting *Iowa Utils. Bd. v. Fed. Commc'ns Comm'n*, 109 F.3d 418, 425 (8th Cir.1996)).The 2016 investigation was dismissed. Plaintiff has shown no more than speculative harm. Plaintiff’s perceived “potential damages to his professional reputation do not justify a finding of a threat of irreparable harm sufficient to support the issuance of a preliminary injunction. “ *Baptist Health v. Murphy*, 365 S.W3d 800, 813 (Ar. 2006) (holding that the alleged harm to a physician’s reputation was speculative and insufficient to issue an injunction) The Missouri Ethics Commission should not be prevented from investigating Mr. Calzone in perpetuity because of an unclear and uncertain future harm. Plaintiff has not established a threat of immediate irreparable harm.

The Public Interest Far Outweighs Any Perceived Harm to Plaintiff

Lobbyist registration provides the public with transparency as to who is making efforts to influence the legislature. Without such disclosures, a democratic government structure would not exist and opportunity for fraud, corruption, and secrecy expands. The intent to influence legislation remains regardless of compensation and the public interest in knowing who is

influencing the legislature and how that is happening outweighs any perceived harm of the minimal requirements of registration and reporting placed on Mr. Calzone. Mr. Calzone in his individual capacity is still able to share his view with the General Assembly. He just cannot share those on behalf of Missouri First, Inc. without registering as a legislative lobbyist by paying a nominal fee and complying with reporting requirements. The nominal restrictions placed on Mr. Calzone do not outweigh the public interest in knowing who is lobbying the legislature or the Missouri Ethics Commission's ability to properly perform unbiased investigations.

Issuance of an Injunction is contrary to Public Interest

Issuance of the injunction sought by Plaintiff would bring substantial harm to the Missouri Ethics Commission. It would essentially bar the MEC from investigating credible complaints and would leave the State without a method to determine if an individual is lobbying or not complying with the law. The harm to Mr. Calzone is minimal. Again, he is still able to speak with legislators while acting in his individual capacity. He just cannot do so on behalf of Missouri First, unless he registers and reports under the law, a minimal requirement. Hindering the investigative abilities of the MEC holds a far greater weight and concern with regard to public interest. The injunction would do more harm than good as detailed above when compared to the perceived individual harm that Mr. Calzone alleges. As such, issuance

of the injunction is against the weight of public interest.

WHEREFORE, Mr. Calzone and Missouri First, Inc. have not met their burden and have not satisfied any of the *Dataphase* factors for a grant of an injunction. The Missouri Ethics Commission respectfully requests that the injunction not issue.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify on October 26, 2016, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent notification of such filing to the following and I hereby certify that I have emailed the same to:

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