IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI

RONALD JOHN CALZONE Plaintiff, v. NANCY HAGAN, et. al Commissioners and officers of the Missouri Ethics Commission in their official capacities thereof, Defendants.	)	Civil Action No. 16-4278

PLAINTIFF'S SUGGESTIONS IN REPLY IN SUPPORT OF INJUNCTIVE RELIEF

"Lobbying is of a course a pejorative term, but another name for it is petitioning for the redress of grievances. It is under the express protection of the First Amendment." *United States v. Finance Comm. to Re-Elect the President*, 507 F.2d 1194, 1201 (D.C. Cir. 1974).

In this case the Defendants, commissioners and officers of the Missouri Ethics Commission ("MEC" or "Ethics Commission"), have attempted to impose upon Mr. Calzone the same registration and reporting requirements levied against *bona fide* professional legislative lobbyists. They do this despite conceding that he has neither been paid for his activism nor officially designated as a lobbyist by the nonprofit corporation they claim as his principal. Defendants' efforts to justify these burdens, however, are not supported by the facts or the case law, and their attempt to explain away the First Amendment's protection of Mr. Calzone's core speech and petitioning activity accordingly fails. This Court ought to issue the requested injunctive relief.

STANDARD OF REVIEW

"The standard for issuing a preliminary or permanent injunction is essentially the same, excepting one key difference. A permanent injunction requires the moving party to show actual

success on the merits, rather than the fair chance of prevailing on the merits required for a standard preliminary injunction." *Oglala Sioux Tribe v. C & W Enters.*, 542 F.3d 224, 229 (8th Cir. 2008). The parties have jointly stipulated as to the relevant facts and admissible evidence, ECF Nos. 17 and 28, and the Commission has provided no evidence or information outside those stipulations. Consequently, and given the critical First Amendment right at issue here—a citizen's ability to freely engage in policy discussions with his elected representatives—permanent relief is appropriate.

ARGUMENT

I. The Commission Has Not Demonstrated That Its Intended Application Of § 105.470(5)(c) Is Narrowly Tailored To A Vital And Compelling Governmental Interest

Statutes that compel registration and reporting for the First Amendment activities implicated here are subject to strict scrutiny. *United States v. Harriss*, 347 U.S. 612, 626 (1954) (finding Federal Regulation of Lobbying Act "designed to safeguard a vital national interest"); *Minn. State Ethical Practices Bd. v. Nat'l Rifle Ass'n*, 761 F.2d 509, 511 (8th Cir. 1985) (requiring lobbyist registration and reporting statute to "serve a compelling state interest") (quotation marks and citation omitted). Unless the government demonstrates that § 105.470(5)(c), RSMo is narrowly tailored to meet a vital and compelling state interest, it is unconstitutional. *Republican Party v. White*, 416 F.3d 738, 749 (8th Cir. 2005) ("The strict scrutiny test requires the state to show…"). The Commission has not presented any authority to the contrary, nor has it offered an alternative standard of scrutiny.

Instead, the Commission suggests that the familiar four-factor test for "preliminary and permanent" relief is inherently inconsistent with the application of strict scrutiny. Def. Sugg. in Opp'n to Prelim. and Perm. Inj. at 3 ("Opp'n") ("And the burden to prove the *Dataphase* factors

lies squarely upon Plaintiff. Raising strict scrutiny in such an analysis unnecessarily broadens the scope of the issue at bar, and conflates the facts to manufacture an improper burden shift"). Of course, this is not so; the proper standard of constitutional review is an inherent component of any merits analysis. *Entm't Software Ass'n v. Swanson*, 519 F.3d 768 (8th Cir. 2008) (affirming district court's application of strict scrutiny in granting a permanent injunction). The evidence before the Court and the Commission's interpretation and application of § 105.470(5)(c), RSMo demonstrate that Mr. Calzone remains at risk of investigations and enforcement actions. He has demonstrated that his First Amendment rights are threatened with infringement, and so the government bears the burden of justifying that threat under strict scrutiny.

The application of strict scrutiny requires the government to articulate and demonstrate a compelling governmental interest. "Such an analysis requires, first, a clear understanding" of whatever interest the government is asserting; "[c]larity on this point is essential." *Republican Party*, 416 F.3d at 750 (quotation marks and citation omitted). The only compelling governmental interest that any government has thus far properly identified in the context of citizens' conversations with their elected officials is disclosure of "who is being hired, who is putting up the money, and how much," in order to reveal "those who for hire attempt to influence legislation and who collect or spend funds for that purpose." *Harriss*, 347 U.S. at 625.

The Commission appears to agree that this is the proper interest, Opp'n at 1, but contends that *Harriss* is inapplicable because "[f]ederal lobbyists, paid or unpaid[,] must register." *Id.* This is a misrepresentation of both the *Harriss* opinion and federal law. The *Harriss* Court explicitly rebuffed the federal government's attempt to stretch the Federal Regulation of Lobbying Act to reach unpaid people—that is precisely why the governmental interest in that case was cabined to information concerning "who is being hired, who is putting up the money, and how much."

Harriss, 347 U.S. at 625. To this day, unpaid persons are not lobbyists within the meaning of the United States Code. 2 U.S.C. § 1602(10) ("The term 'lobbyist' means any individual who is employed or retained by a client for financial or other compensation for services that include more than one lobbying contact…"); 2 U.S.C. § 1601 ("The Congress finds that…responsible representative Government requires public awareness of the efforts of paid lobbyists to influence the public decisionmaking process in both the legislative and executive branches of the Federal Government").

Having cleared up the Commission's misunderstanding, we are left with its statement that "[t]he Supreme Court's logic applies equally to Section 105.470, RSMo, just as it does to the federal law in *Harriss*." Opp'n at 2. Mr. Calzone agrees, insofar as the Commission has already stipulated that "[n]o natural or artificial person pays Plaintiff in exchange for sharing his views on policy with members of the General Assembly." ECF No. 28 at 1, ¶ 2. Thus, requiring Mr. Calzone to carry the burdens of registration and reporting for his activities will do nothing to advance the State's interest in publicizing information about *paid* lobbyists. *Cf. SpeechNow.org v. Fed. Election Comm'n*, 599 F.3d 686, 695 (D.C. Cir. 2010) (*en banc*) ("[S]omething…outweighs nothing every time") (quotation marks and citation omitted, ellipsis in original).

To the extent that the government seeks to proffer other interests beyond the one identified in *Harriss*, it does so by mere assertion.[1] The government may not invoke a compelling

[1] The Commission posits that Plaintiff does not have standing because he risks only "speculative harm" to his "'professional reputation.'" Opp'n at 7 (quoting *Baptist Health v. Murphy*, 226 S.W.3d 800, 813 (Ark. 2006). Of course, in the First Amendment context, pre-enforcement challenges are permitted. *Va. v. Am. Booksellers Ass'n*, 484 U.S. 383, 393 (1988) ("We are not troubled by the pre-enforcement nature of this suit. The State has not suggested that the…law will not be enforced, and we see no reason to assume otherwise"). Nor is the harm speculative—Plaintiff has already undergone enforcement before and has been ordered to register as a lobbyist and pay a fine. ECF No. 1-2, Ex. D. And the harm does not go merely to Mr. Calzone's desire that he not be labelled a lobbyist. The harm is submission to the registration and reporting

governmental interest by simple incantation. *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 392 (2000) ("We have never accepted mere conjecture as adequate to carry a First Amendment burden"); *United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 475 (1995) ("[W]hen the Government defends a regulation on speech as a means to…prevent anticipated harms, it must do more than simply posit the existence of a disease sought to be cured. It must demonstrate that the recited harms are real, not merely conjectural…") (citation and quotation marks omitted, punctuation altered); *Bates v. City of Little Rock*, 361 U.S. 516, 525 (1960) ("[G]overnmental action does not automatically become reasonably related to the achievement of a legitimate and substantial governmental purpose by mere assertion…."); *Republican Party*, 416 F.3d at 749 ("The strict scrutiny test requires *the state to show* that the law that burdens the protected right advances a compelling state interest...") (emphasis supplied); *also Sherbert v. Verner*, 374 U.S. 398, 407 (1963) (noting, in *dicta*, that mere suggestion of "a possibility" of fraud with "no proof whatever to warrant such fears of…deceit as those which the [government] now advance[s]" does not rise to a compelling governmental interest).[2]

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regime—which requires filing fourteen reports a year with the Commission, twelve under penalty of perjury—and running a real risk of significant financial penalties and jail time for even technical errors. ECF No. 28 at 4, ¶¶ 26-30 ("A person who violates, *in any way*, a provision of the lobbyist registration regime *shall be punished* as follows…") (emphasis supplied).

[2] While *Sherbert v. Verner* discussed the application of strict scrutiny in the free exercise cases prior to *Employment Division v. Smith*, 494 U.S. 872 (1990), which limited the application of strict scrutiny in such cases until the passage of the Religious Freedom Restoration Act, it still sheds light on the standard governments must meet in proffering a compelling governmental interest. *Christians v. Crystal Evangelical Free Church (In re Young*), 141 F.3d 854, 858 (8th Cir. 1998) ("Congress enacted RFRA to restore the compelling interest test as set forth in *Sherbert v. Verner*, and *Wisconsin v. Yoder*") (citation and quotation marks omitted); *McDonough v. Anoka Cnty.*, 799 F.3d 931, 942 (8th Cir. 2015) ("[F]ederal courts are bound by the Supreme Court's considered *dicta* almost as firmly as by the Court's outright holdings") (citation and quotation marks omitted).

In any event, in advancing a novel justification, the government takes on a still greater burden as to tailoring. *Shrink Mo. Gov't PAC*, 528 U.S. at 391 ("The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised"); *Republican Party*, 416 F.3d at 750 ("A clear indicator of the degree to which an interest is 'compelling' is the tightness of the fit between the regulation and the purported interest: where the regulation fails to address significant influences that impact the purported interest, it usually flushes out the fact that the interest does not rise to the level of being 'compelling'"). The Commission has baldly insisted that without the registration of Mr. Calzone and similarly situated unpaid individuals, "opportunity for fraud, secrecy, and corruption expands" and a "democratic government structure would not exist." Yet, the Commission has not even hinted at (much less proved) a *single instance* where unpaid citizen activism has led to fraud or caused Missouri to abandon its republican form of government.[3] Absent a properly articulated, and appropriately narrow, interest, the government is left with the interest in monetary disclosure articulated in *Harriss*, an interest that is simply not implicated here.

II. The Injunctive Relief Requested Will Not Hobble The Ethics Commission's Ability To Enforce The Law.

The Commission fundamentally mischaracterizes the effect of the requested injunction, suggesting that Plaintiff seeks "immunity from investigation for violations of the Missouri [e]thics statutes in perpetuity," Opp'n at 4, and that injunctive relief would cripple "the Missouri Ethics

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In any event, Defendants must demonstrate that the state interest is of the "'highest order,'" *Republican Party*, 416 F.3d at 749 (quoting *Wisc. v. Yoder*, 406 U.S. 205, 215 (1972)), and not an "improbable" one, Opp'n at 4.

[3] Indeed, given that the federal government does not regulate unpaid lobbying, the Commission's contention is especially audacious. To its credit, however, the Commission concedes that its suggested interest in preventing fraud is "improbable." Opp'n at 4. An improbable interest cannot possibly be compelling within the meaning of strict scrutiny.

Commission's ability to properly perform unbiased investigations." Opp'n at 8. To the contrary, Mr. Calzone "asserts no right to absolute immunity from state investigation, and no right to disregard [Missouri]'s laws." *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 463 (1958). Rather, as regards his as-applied claim, Mr. Calzone simply asks that the Ethics Commission be required to determine that an individual was paid before it brands that person as an unregistered lobbyist. Mr. Calzone would be happy to rebut any future allegation that he is being paid for his activism—as he has, in fact, done here. ECF No. 28 at 1, ¶ 2; Ex. I (bank records regarding sole account of Missouri First, Inc.). Nor does Mr. Calzone challenge the validity of any other provisions of the Missouri ethics statutes or seek to limit the Commission's ability to enforce those statutes.

Thus, the requested relief would not render the Commission incapable of conducting "unbiased investigations." Opp'n at 8. Missouri law already prohibits the Commission from opening an investigation "unless the complaint alleges facts which, if true, fall within the jurisdiction of the commission." § 105.957(2), RSMo. To trigger future investigations, complaints would merely have to allege that an accused legislative lobbyist is paid for his work. *Cf.* ECF No. 1-2, Ex. A, Complaint of Mr. Michael C. Reed ("While testifying he consistently indentifies [*sic*] himself as a director of Missouri First, and then declares that he is not a registered lobbyist, and doesn't need to be <u>because he does not get paid</u>") (emphasis original). The rest of the Commission's business would proceed unhindered.

Indeed, it is the *Commission's* understanding of the law that forces the MEC down an improper path. The Commission claims that "Mr. Calzone in his individual capacity is still able to share his view with the General Assembly," Opp'n at 8, but in the same breath contends that Mr. Calzone is so "inextricably a part of Missouri First, Inc," Opp'n at 4, that even though "[t]he board of directors of Missouri First, Inc. has never taken official action to name [him] as the legislative

lobbyist for Missouri First, Inc," ECF No. 28 at 2, ¶ 6, Mr. Calzone nevertheless has independent authority to silently declare himself the lobbyist for that same corporation. "This 'heads I win, tails you lose' approach cannot be correct," and poses a classic trap for the unwary. *Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 471 (2007) (Roberts, C.J., controlling op.).

After all, no reasonable person would assume that when the government stipulates that a corporation did not officially act to "designate" a person as its legislative lobbyist, the government would nevertheless contend that same person named herself the lobbyist for that same corporation, especially where it cannot clearly explain how she did so. § 355.316(2), RSMo ("Except as provided in this chapter, all corporate powers shall be exercised by or under the authority of, and the affairs of the corporation managed under the direction of, its board"). The Commission's admission that this alleged self-designation is why Mr. Calzone's activity triggers registration and reporting *is* Mr. Calzone's vagueness claim, which he continues to advance in the alternative. Opp'n at 6 ("[T]he 'self-designate' language is a proper categorization of the actions of Missouri First…"). Perhaps, "[a]pplying the plain meaning[] dictionary definition," the word "designate" is not vague—but that definition is clearly not the one the government is using.[4] Opp'n at 6.

Nevertheless, granting Mr. Calzone's as-applied claim would also resolve this case, while cleanly comporting with the untouched, six-decade old precedent of *Harriss*. *Morse v. Frederick*, 551 U.S. 393, 431 (2007) (Breyer, J., concurring in part and dissenting in part) ("'if it is not necessary to decide more, it is necessary not to decide more'") (quoting *PDK Labs, Inc. v. U.S. Drug Enforcement Admin.*, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring in part and concurring in judgment).

[4] The Commission's inability to provide *any* case law in support of its theory is particularly telling.

CONCLUSION

Sixty-three years ago, the federal government sought to use a lobbying registration and reporting statute to cover the activities of unpaid individuals. The Supreme Court, applying what we would today recognize as strict scrutiny, rebuffed that effort. This court ought to do the same. Permanent injunctive relief should issue.

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* Admitted *pro hac vice*

Date: May 8, 2017

CERTIFICATE OF SERVICE

I hereby certify that on the 8th of May, 2017, I caused a copy of the forgoing to be delivered to this Court and to counsel for the Defendants via the CM/ECF system.

/s/ Zac Morgan
Attorney for Petitioner

Dated: May 8, 2017