Graves Bartle & Marcus LLC

Counselors and Attorneys at Law
• www.gravesbartlemarcus.com •

Todd P. Graves
tgraves@gravesbartlemarcus.com
Direct Dial (816) 256-3173
Fax (816) 817-0780

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VIA FACSIMILE & U.S. MAIL

Mr. Michael Kilgore, Esq.
The Law Offices of Tim Dollar
1100 Main Street, Suite 2600
Kansas City, MO 64105
Fax: (816) 221-8763

Mr. Brad Mitchell, Vice President
Bank of Washington, Missouri
200 W. Main Street
Washington, MO 63090
Fax: (636) 239-9548

Mr. Michael Dunard
Black & Associates, LLC
111 N. Lincoln Drive
Troy, MO 63379-1354
Fax: (636) 528-4321

John S. Pletz, Esq.
Pletz & Reed, PC
325 Jefferson Street
Jefferson City, MO 65109
Fax: (573) 634-3079

Elizabeth J. Ziegler, Esq.
Ethics Commission Counsel
3411-A Knipp Drive
Jefferson City, MO 65109
Fax: (573) 526-4506

Warren Neiburg, Ph. D.
Rural Route 4, Box 4255
Camdenton, MO 65020

Mr. Ken Legan
1901 E. 487th Road
Halfway, MO 65663-9281

Mr. Robert Simpson
Route 1, Box 1294
Potosi, MO 63664

Re: October 4, 2007 Meeting of the Missouri Ethics Commission

Dear Members of the Missouri Ethics Commission and Counsel:

We write regarding the Commission's recent publicly-reported proposals to take administrative action in the wake of the July 19, 2007, decision by the Missouri Supreme Court invalidating H.B. 1900 (the "Statute").

Effective January 1, 2007, the Statute had removed this state's previously-enacted contribution limits, and between January 1 and the Missouri Supreme Court's July 19 ruling, many Missouri contributors and candidates relied on the Statute in exercising their First Amendment rights of political speech and association. After invalidating the Statute, the Missouri Supreme Court subsequently declined to rule regarding the rights and obligations of these citizens, declaring in an August 27, 2007 decision that its July 19 ruling had retrospective effect only as to James Trout, the sole candidate-litigant.

That particular decision has sparked a wave of commentary in the media and by prominent candidates and others who are interested in extending the ruling's limited retrospective application to all Missouri candidates. In the process, many inaccurate statements

have been made about the current state of the law in Missouri and the duties of this Commission. Contrary to what many have written or said, no valid authority has delegated any role to the Commission in "equalizing" the campaign resources or contributions of Missouri candidates and citizens.

However, recent action by the Commission, including comments by some Commissioners and Commission staff, seem to indicate that the Commission may be preparing to act on an incorrect view of the law. Such action would not only exceed the Commission's statutory authority, it would also violate the clearly-established civil rights of many Missouri citizens. These rights are protected by the Fourteenth Amendment to the United States Constitution. Accordingly, we write on behalf of certain candidates who accepted over-the-limit contributions during the time when the Statute was in effect, as well as certain residents of this state who contributed money in excess of the now re-imposed limits. Please accept this letter as the attempt of affected citizens of this state to inform and engage the Commission in a discussion about the law, and not as a threat of civil litigation.

I. No Authority Has Tasked the Commission with Examining Contributions Made in Reliance on the Statute.

In its final decision (Trout v. State of Missouri, No. SC88476 (Aug. 27, 2007)), the Supreme Court held that any "remediation" of the status quo (i.e., the situation whereby some candidates hold campaign funds originating from contributions that are now apparently over the reimposed statutory limit) must be legislative. Further, the Court carefully refrained from ordering any other branch or organ of state government to alter the status quo. Accordingly, the Ethics Commission has not been given authority, and has certainly not been ordered, to take any action with respect to candidates or contributors who relied on the Statute.

A. Any Attempt to Alter the Status Quo Must Be Made by the Legislature.

The Court in Trout held that the issue for which the Ethics Commission now proposes to set policy –how or whether to deal with candidates and contributors who relied on the Statute—is legislative. The Court explained that the General Assembly has several options for dealing with the current situation:

> In the case of this particular statute, the balancing of hardships and the determination whether retroactive application would work an injustice is further complicated by the fact that this Court's July 19 decision does not preclude the legislature from again enacting legislation lifting limits on campaign contributions. The Court invalidated the statute at issue in this case solely because it could not be severed from the blackout period the trial court found to be unconstitutional, rather than because a bill lifting contribution limits is inherently unconstitutional. Nothing in the July 19 decision precludes the legislature from enacting, in general or special session, new legislation that constitutionally lifts campaign limits entirely. Alternatively, it could enact new legislation that effectively reaffirms that campaign limits are in place because of

> the lack of a blackout period. Indeed, it would not be precluded from adopting more novel approaches in an effort to even the playing field, such as by enacting much higher campaign contribution limits or by enacting legislation that would impose contribution limits on a candidate only at such time, if any, as that candidate had reached the same level of contributions over permissible contribution limits as had other candidates for that office prior to this Court's July 19 ruling.

Id. The Court concluded this discussion with an important insight: "The Missouri Constitution commits any such decision to the discretion of the legislative branch." Id.

The Ethics Commission is not part of the legislative branch. It is not a legislative body. It does not have the power to make law that it believes advances salutary policies like "equality," "fairness," or "free speech." It does not have the power to create new laws or regulations that alter the constitutional rights of Missouri citizens by making certain contributions or expenditures against the law. State v. Raccagno, 530 S.W.2d 699, 703-704 (Mo. 1975) (legislature could not delegate to Director of Revenue the power to make "necessary and reasonable" regulations for collection of tax, violations of which would be misdemeanors, because defining what acts constitute a crime is a non-delegable legislative power). Rather, like all other administrative agencies authorized by the Missouri Constitution, it has only the specific bundle of executive and quasi-judicial powers granted to it by statutes duly enacted by the General Assembly. Livingston Manor, Inc. v. Department of Social Services, 809 S.W.2d 153, 156 (Mo. App. W.D. 1991) ("A basic tenet of administrative law provides that an administrative agency has only such jurisdiction or authority as may be granted by the legislature... If an administrative agency lacks statutory power to consider a matter, the agency is without subject matter jurisdiction. The agency's subject matter jurisdiction cannot be enlarged or conferred by consent or agreement of the parties.") (internal quotations and citations omitted). As discussed in Section II, those specific executive and quasi-judicial powers do not trigger the Commission's jurisdiction in the specific case presented here.

B. The Supreme Court Did Not Order or Direct the Commission to Act.

Some editorial boards and prominent candidates for statewide office who stand to gain by limiting the quantity of their opponents' political speech have claimed that the Court actually granted the Commission the authority to consider this matter in a quasi-judicial or "enforcement" capacity. Not only does this argument ascribe to our Supreme Court a power of delegation that it does not have, it misreads the Court's opinion. The Court did not tell this Commission to begin enforcement proceedings against non-litigant Missouri candidates. It did not even tell the Commission that it must consider whether to begin enforcement proceedings against non-litigant candidates.

The "holding" of the Court's opinion (i.e., the part that has legal effect) was very precise. The Court held that: (1) its earlier decision was retroactive as to Mr. Trout; and (2) the Court had no jurisdiction to determine the rights of parties not before it, and that any decision as to those

parties could only be "dicta" (i.e., commentary by the Court that has no legal effect). In keeping with this approach, in dicta at the end of its opinion, the Court suggested that "[f]inally, and of key importance, is the fact that it is not this Court, but the Missouri Ethics Commission, that must initiate any enforcement action to require disgorgement of campaign contributions as to those not before this Court." Id. (emphasis added.)

The Court used no language indicating that it was vesting authority in the Commission, and undertook no analysis indicating it had completed a careful or even cursory review of the Commission's organic statutes (Chapters 105 and 130) to determine whether the Commission actually had jurisdiction to implement the "proceedings" it attempted to sketch in its opinion. Rather, the Court was simply attempting to support its broader point that the Court had no jurisdiction to make any holding with respect to non-litigant candidates, in part because the Court was ill-equipped to develop or review the factual circumstances of each non-litigant candidate. In this vein, it simply noted that the Commission would be better placed than the Court for gathering facts from non-litigant candidates and applying some set of standards akin to the retrospectivity analysis the Court had applied to the litigant before it.

The language the Court used leaves no doubt that this was the Court's intention. It is significant that the Court decided to employ the phrase "...must initiate any enforcement action..." The Court did not say the Commission "must now initiate enforcement actions" to require disgorgement of candidates' campaign funds. It did not even say that the Commission "must now decide whether to initiate enforcement actions." Rather, it chose language making clear that it was not holding that any enforcement action is required. In fact, it would have been remarkable if the Court had rendered such a holding, since the Commission did not (and was not asked to) present argument on its enforcement authority, and even issued a statement affirming that no counsel before the Court had represented its interests. Of those parties that were before the Court, none made any suggestion that the Commission should or could be tasked with deciding the issues before the Court. Thus, the context of the case and the language of the opinion make clear that the Court has not instructed the Commission to do anything.

After the limited holding regarding Mr. Trout and the suggestion that the Ethics Commission was better placed than the Court to address individual candidates' situations, the remainder of the Court's opinion is dicta. It merely suggests to the Ethics Commission what criteria it should use if it does decide whether to take enforcement action. A careful examination of this part of the opinion indicates that no part of it directs the Ethics Commission to do anything:

> "As to other candidates...it will be up to the Ethics Commission to weigh relevant factors, including those specified in this opinion, in determining whether to take enforcement action against other candidates..."
>
> "In any case in which an enforcement action is taken, those individuals or committees must be given the opportunity to present, as a defense to that action, their individual facts and circumstances..."

The Court did not need to phrase its dicta in this way. Having expended considerable effort to explain how the Commission could exercise its discretion, the Court had ample opportunity to simply order the Ethics Commission to decide whether to take enforcement action. It did not do so. It also had ample opportunity to order the Ethics Commission to actually take enforcement action. It did not do so. Instead, it limited itself to providing guidance to the Commission (albeit without the Commission's input and without any consideration of or citation to Chapters 105 or 130) in case the Commission should decide to move forward on its own.

Accordingly, the Commission cannot reasonably view the Missouri Supreme Court to have instructed it to do anything. Even assuming for a moment that the Court had actually ordered the Commission to exercise its enforcement discretion to compile factual records and rule on various candidates or candidate classes, it had no authority to do so. The Court does not have the power to order administrative agencies to initiate quasi-judicial proceedings or perform legislative functions reserved for the General Assembly. This is because the power to delegate quasi-judicial functions to agencies resides in the legislature, not in the courts. Livingston, 809 S.W.2d at 156. And in the first place, the decisions on what should be done with candidates and contributors whose past speech resulted in over-the-limit contributions, and on whether these individuals' actions should constitute a violation of the law, are legislative and not quasi-judicial. See Raccagno, 530 S.W.2d at 703-704. Thus, if the Commission wishes to take any action in this matter, it cannot claim that the Supreme Court's dicta commands or justifies it.

Instead, the Commission must look to the authority granted to it by the General Assembly in Chapters 105 and 130, RSMo. As discussed in Section II, below, the General Assembly has not in fact granted the Ethics Commission the authority to act in a matter such as this. Further, as discussed in Section III, the First and Fourteenth Amendments would have prohibited the General Assembly from giving the Ethics Commission such authority. If the Ethics Commission does act on this matter, it will abridge Missouri candidates' and citizens' First Amendment rights in violation of federal law.

II. The Commission Has No Authority to Call Candidates Before it to Explain Their Reliance on Contributions Gathered in Compliance with Prior Law.

In RSMo. §130.150, Missouri voters authorized exactly two procedures for rectifying over-the-limit contributions[1] through investigations and hearings. Neither procedure provides for anything like the *ad hoc* series of hearings and determinations proposed by some members or staff of the Ethics Commission. Both procedures require the initiative of an interested citizen. Only one of these two procedures even involves the Commission. Under that procedure, a person may file a complaint with the Commission, "which shall be acted on promptly by the

[1] Specifically, RSMo. §130.050 applies to the contribution limits enacted by Missouri voters in Proposition A.

commission in the same manner and with the same effect as other complaints over which the commission has jurisdiction." RSMo. §130.150(1).[2]

The procedure involving the Commission was enacted because previously, the Commission had not been granted jurisdiction to enforce the contribution limits by investigating complaints of over-the-limit contributions. See RSMo. §105.957.1 (not listing contribution limit complaints among specifically enumerated types of complaints). Similarly, the other way in which the Commission's investigation-and-hearing enforcement may be initiated–through review of campaign finance filings—also does not allow for investigation into over-the-limit contributions. See RSMo. §105.959. That section allows the Executive Director to review reports only for "completeness, accuracy, and timeliness." §105.959.1. The process does not continue unless the Executive Director has "reasonable grounds to believe" that the filings are not complete, accurate, or timely. Id.[3] Thus, like the original citizen complaint process set forth in RSMo. §105.957, the audit-investigation process simply does not give the Commission the authority to investigate and prosecute alleged contribution limit violations.

The exclusive mechanisms for conducting hearings and investigations into allegedly over-the-limit contributions, therefore, are the two procedures Missouri voters enacted in RSMo. §130.150. Under the express terms of this statute, a Missouri citizen, not the Commission,[4] must initiate action. Neither the General Assembly nor the voters of Missouri have given the Commission the authority or jurisdiction to call candidates and/or contributors before it in an *ad hoc* set of hearings to legislate the criteria to be applied to "over the limit" candidate-contributor speech, or to decide whether candidates and contributors' speech meets those criteria.

The Commission would be clearly acting outside its statutory authority and jurisdiction were it to attempt to initiate any such set of hearings. As discussed above, it cannot claim that it is relying on language from the Missouri Supreme Court, since that court's opinion did not direct the Commission to take any action, and in any event the portion dealing with the Commission was only dicta. Instead, the Commission is required to undertake its own study of

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[2] The complaint would then be handled pursuant to Chapter 105. RSMo. §105.957.1. gives the Commission jurisdiction to hear six types of complaints, but none of these involve over-the-limit contributions. (This is the reason RSMo. §130.150 provides that over-the-limit contributions shall be processed "in the same manner...as other complaints over which the commission has jurisdiction.") The procedure for processing all complaints is set forth in RSMo. §105.961. See RSMo. §105.957.5. An initial investigation is first conducted under §105.959.3. Under §105.961, the complaint is referred to a special investigator and proceed through a contested case. See generally RSMo. §105.961.1 through .5. The Commission may ultimately initiate formal judicial proceedings for possible forfeiture of over-the-limit contributions. RSMo. §105.961.5 and .6.

[3] The Commission must give its approval before the audit-investigation process becomes a formal investigation using a special investigation (RSMo. §105.959.5), and does not reach the Commission for a hearing unless the Commission finds "reasonable grounds" to believe a violation has occurred. RSMo. §105.961.

[4] RSMo. §130.032 makes committees who accept or give contributions "other than those allowed" subject to a surcharge equaling the illegal contribution plus $1,000. However, this provision applies only to the automatic and compulsory return of contributions that, on the face of the campaign finance reports, are "non-allowed." RSMo. §130.032. It does not apply to investigations and hearings by the Commission purporting to determine the criteria under which contributions will be "non-allowed," or whether specific contributions meet those criteria. As discussed above, no statute grants the Commission the authority or jurisdiction for legislating such criteria or conducting such hearings.

its authority and jurisdiction under Missouri law, and must satisfy itself that it is acting within that authority and jurisdiction. But its inquiry cannot stop there. As discussed in Section III below, the Commission also must ensure that it does not violate Missouri citizens' rights under the First and Fourteenth Amendments to the United States Constitution.

III. Any Commission Action to Investigate or Require the Disgorgement of Candidates' Campaign Funds Violates the First Amendment and Due Process Rights of Missouri Citizens.

While some have cast the Commission's action as a simple administrative fact finding that can be reviewed in due course by the circuit courts, the Commissioners' chosen course of action is still subject to constitutional scrutiny in federal court. This is not the relatively forgiving scrutiny applicable to a state license board. Because the Commission's action will have a substantial impact on the political speech and association of Missouri candidates and contributors, it will be subject to exacting scrutiny under long-established United States Supreme Court First Amendment case law. Where contributions and expenditures for political candidates are concerned, "[t]he First Amendment affords the broadest protection to such political expression in order to assure (the) unfettered interchange of ideas for the bringing about of political and social changes desired by the people." Buckley v. Valeo, 424 U.S. 1, 14 (1976) (internal citation and quotation omitted).

This case law clearly establishes the right of Missouri candidates and contributors not to have their past political speech and association undone, and their future political speech muzzled, by the Commission. For several reasons, the Commission cannot validly require any candidate or contributor to forfeit their political speech through the return of "over-contributions."

First, "disgorgement" at this late stage is not the same as the routine, forward-looking enforcement of contribution limits which are applied clearly and uniformly to all candidates and contributors. Instead, it limits campaigns' use of funds raised under ostensibly valid law, accepted by campaign treasurers, reported in campaign finance filings, and (in some cases) lawfully spent. Even short of an outright ban, restrictions on candidates' spending of such campaign funds (especially restrictions that amount of an outright forfeiture) are subject to the strictest of scrutiny. Shrink Missouri Government PAC v. Maupin, 71 F.3d 1422 (8th Cir. 1995) (applying strict scrutiny and striking down provision requiring "spend down" or forfeiture of funds in candidate campaign accounts). This is because expenditures are speech, and a limitation on a campaign's expenditure of funds is a direct limitation of speech:

> A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money. The distribution of the humblest handbill or leaflet entails printing, paper, and

> circulation costs. Speeches and rallies generally necessitate hiring a hall and publicizing the event. The electorate's increasing dependence on television, radio, and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech.

Buckley, 424 U.S. at 19.

After half a year of fundraising (and spending) under ostensibly valid law, there can be no question that "disgorgement" will now act as a spending limit. Worse, unlike a spending cap adapted in the last few months of an election, it will not and cannot be uniformly applied to all candidates. Instead, it will be applied solely based on a candidate's prior speech and association. The only Missouri citizens who will feel its bite are those candidates who garnered substantial political support from like-minded citizens, and those Missouri citizens who engaged in substantial political association, in early 2007. Expenditure limits are a direct limitation on political speech and have been clearly unconstitutional for three decades. See Buckley, 424 U.S. at 54-58 (1976); Maupin, 71 F.3d 1422 (invalidating "voluntary" spending limits).

This particular type of limit offends the constitution even more than the uniform expenditure limit on all candidates considered in Buckley and Maupin because it is designed to hit some candidates and not others.[5] An order of disgorgement against a Missouri candidate would unquestionably violate that candidate's First Amendment rights. Those rights are protected against abridgment by state agencies (including the MEC) under the Fourteenth Amendment. The Congress and federal courts have long viewed such civil rights violations as an extremely serious matter; they are redressable in civil actions brought pursuant to 42 U.S.C. §1983.

Even if Maupin is disregarded and barring candidates from spending money in their campaign accounts is viewed as nothing more than the late enforcement of a "contribution" limitation, no governmental interest justifies it.

First, the only permissible governmental interest that has ever justified contribution limits is limiting "corruption." Buckley, 424 U.S. at 28-29. For two reasons, however, that concern does not apply in this unique case. The contributions at issue here have already been made, disclosed, and widely discussed in the media. Candidates who received these contributions know that all eyes are on them, especially with respect to these contributions. The type of backdoor dealing that contribution limits were supposed to address cannot occur. The elected representatives of the state, to whom any court would look for confirmation of the

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[5] Courts will not humor the argument that disgorgement is not really a limitation on a candidate's expenditures because the forfeited campaign funds can be raised by stepped-up fundraising efforts later in the campaign. As a matter of law, the burden on core First Amendment rights of political speech and association is not mitigated by the ability to somehow recover or "make up for" lost speech or association somewhere else, with someone else, at a later point in time. See Meyer v. Grant, 486 U.S. 414, 414 (1988) (striking down Colorado's ban on paid petition circulators as an undue burden on speech, and rejecting argument that proponents could still use alternative means for promulgating their message by using millions of in-state volunteers.)

"state interest,"[6] would not argue otherwise. In fact, the General Assembly manifested the state's belief that the problem of corruption in Missouri does not require contribution limits—in fact, the deregulated contribution regime enacted by the General Assembly would still be the law in Missouri were it not for the Missouri Supreme Court's invalidation of the General Assembly's legislative policy based on another provision.

Second, the Eighth Circuit and Supreme Court have been very clear in stating that any interest in "equality" of campaign resources among different candidates (i.e., the purported interest in making sure that candidates who raised money under the no-limit regime cannot spend it against competitors who were late to the party) is constitutionally impermissible. Any attempt at "leveling" candidates violates the First Amendment:

> The state also argues that the expenditure limits are justified by its interests in (1) maintaining the individual citizen's participation in and responsibility for the conduct of government and (2) discouraging "the race toward hugely expensive campaigns, especially at the local level," State's Brief at 17-18. The state's interest in maintaining individual participation is what the District Court correctly described as an effort to " 'level[ ] the playing field' between the rich and the poor." Shrink Missouri Gov't PAC, 892 F.Supp. at 1253. The Supreme Court in Buckley, however, specifically held that the government may not "**restrict the speech of some elements of our society in order to enhance the relative voice of others,**" Buckley, 424 U.S. at 48-49, 96 S.Ct. at 649, and no subsequent decision of the Court has undermined that holding.

Maupin, 71 F.3d at 1426 (emphasis added). As the Eighth Circuit recognized in Maupin, Buckley v. Valeo is the final word on this issue. Id. The Buckley Court explained, in relevant part:

> It is argued, however, that the ancillary governmental interest in equalizing the relative ability of individuals and groups to influence the outcome of elections serves to justify the limitation on express advocacy of the election or defeat of candidates imposed by § 608(e)(1)'s expenditure ceiling. But the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed "to secure 'the widest possible dissemination of information from diverse and antagonistic sources,' " and " 'to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' " **The First Amendment's protection against governmental abridgment of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion.**

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[6] See Nixon v. Shrink Missouri Government PAC, et al., 528 U.S. 377, 393 (2000) (upholding Missouri contribution limits based on state's alleged concern with corruption, explaining that mere "conjecture" regarding corruption was insufficient to show need for limits, and turning to Missouri legislators for findings of fact necessary to demonstrate problem with corruption in Missouri and compelling interest in limiting it).

Buckley, 424 U.S. at 49 (internal citations omitted, emphasis added).

It is certainly one thing to insist on the equal application of the laws so that if a candidate has a lower level of popular support than an opponent, the candidate's difficulties in gathering funds and winning at the ballot box will reflect that fact. Two candidates campaigning and fundraising at the same time should be subject to the same rules at that time. However, it is entirely another thing to insist on laws imposing equality of outcome as a goal in its own right, regardless of popular or contributor support. Such laws effectively single out candidates based on their level of popular support (i.e., candidates the state knows have already been successful in fundraising) and then attempt to penalize them in an illusory quest for a fifty-fifty public debate between both candidates. Under Buckley v. Valeo, this is a flatly impermissible basis for limiting candidate expenditures or contributor donations, core First Amendment activities. The Commission will violate the First Amendment rights of both candidates and contributors if it orders disgorgement of campaign funds.

Finally, it should not be forgotten that contributors themselves engage in First Amendment speech when they give money to a candidate. Not only do they signal their support, but in many cases, they are giving the only thing they have to give: money. A contribution is no different than a donation of time or creative expertise. All of these actions are core political speech. Therefore, disgorgement would not only completely ban a candidate's core political speech (the spending of that money), it would also deprive the contributor of his or her speech. Once these contributors' speech is completed, it cannot retroactively be "unmade" by the Commission. The speech transaction is complete under the law and in fact, and "[t]here is a general presumption that a rule that would impair rights or obligations arising out of a completed transaction should not be applied retroactively." CJS Courts § 205. Thus, contributors have a continuing interest in making sure that the state does not step in to erase their prior speech.

If the Commission attempts to consider only candidate-specific factors and only hears candidates in its proposed ad hoc hearings, then it would have deprived contributors of their liberty interest in political speech and association without due process of law. This is a separate and very serious violation of the Due Process Clause of the Fourteenth Amendment. Like violations of the candidates' First Amendment rights (which also apply to the Ethics Commission through the Fourteenth Amendment), this civil rights violation is redressable against the Commission via 42 U.S.C. §1983.

Conclusion

We hope that this legal discussion has provided the Commission with useful guidance in sorting out its statutory and constitutional duties from the inflamed rhetoric that has engulfed Missouri's public square in the weeks since the Missouri Supreme Court's August 27, 2007 decision. We believe that if you carefully and conscientiously read the actual words chosen by the justices, rather than relying on wishful media spin, you will find that the Supreme Court has not directed the Commission to take any action with respect to its decision.

If anything, the Supreme Court has signaled that the legislature must act if it believes the status quo should not persist. The current situation began with legislative action and can only be altered with legislative action. Any attempt at "enforcement" will necessarily require the Commission to involve itself in value judgments and policy-making that are legislative. Despite the Commission's considerable expertise in running and policing Missouri's campaign finance system, it is neither equipped nor authorized for such a task. The Commission should decline any invitation to become unnecessarily and unconstitutionally entangled in this thicket. To venture into these woods would be a grave mistake, consuming valuable Commission resources, placing the Missouri citizens' First Amendment rights in jeopardy, and unnecessarily subjecting the Commission to legal proceedings in the federal courts. We strongly urge the Commission not to take action to "equalize" the campaign resources of Missouri candidates through disgorgement proceedings.

Sincerely,

Todd P. Graves, Esq.
Edward D. Greim, Esq.

GRAVES BARTLE & MARCUS LLC