IN THE SUPREME COURT OF MISSOURI

No. SC98619

ELAD GROSS,
Appellant,

v.

MICHAEL PARSON, et al.
Respondents.

Appeal from the 19th Judicial Circuit Court of Missouri
Case No. 16AC-CC00422
The Honorable Judge Patricia Joyce Presiding

BRIEF OF *AMICUS CURIAE* - MARK PEDROLI - ON BEHALF OF THE SUNSHINE AND GOVERNMENT ACCOUNTABILITY PROJECT - IN SUPPORT OF APPELLANT [1]

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[1] All parties have consented to the filing of this brief.

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Jurisdictional Statement

Amicus adopts the jurisdictional statement as set forth in Appellants' brief.

INTERESTS OF AMICUS CURIAE

Mark Pedroli is the founder of the *Sunshine and Government Accountability Project*, a St. Louis County, Missouri unincorporated association of people and lawyers dedicated to transparency and accountability in government. Mr. Pedroli, an attorney, frequently serves Sunshine requests and is involved in Sunshine litigation throughout the state, including but not limited to pending litigation against the Missouri Office of Governor regarding the use of the burner app *Confide*; the Missouri Attorney General's Office regarding the nonproduction of records requested and maintained on private servers; the Missouri House of Representatives regarding constituent redactions and the claimed 'First Amendment exception'; St. Louis County, Missouri regarding the non-production of public records related to the multiple jail deaths, and various counties and municipalities throughout Missouri for police body camera video and other public records. Typically serving a Sunshine request per week or more, Mr. Pedroli is acutely aware of the issues before this Court and has repeatedly faced inconsistent requests for payment for government lawyers.

STATEMENT OF FACTS

Amicus adopts the Statement of Facts as set forth in Appellants' brief.

SUMMARY OF ARGUMENT

Whereas burner app burns government records, charging attorneys' fees to produce records price the records out of the reach of ordinary requestors.[2] Whether burning records or pricing records beyond the reach of requestor, the result is the same, less government transparency. Across the state of Missouri, government entities are *inserting* government lawyers into the Sunshine process and often, deliberately escalating the cost of public records. Search, research or duplication time spent *procedurally* fulfilling a Sunshine request is not the same as government attorney time spent *substantively* closing or redacting records, charges for the former are allowed, and charges for the latter are unauthorized by statute.

[2] Undersigned attorney is counsel in Sansone v. Greitens, et al., 17AC-CC00635 better known as the "Confide litigation", *pending*.

ARGUMENT

Pursuant to § 610.026 RSMo, the government's ability to charge Sunshine law requestors is explicitly limited to 1) copy fees, 2) duplication time, and 3) search and research time, or time spent searching and collecting the actual records for inspection or copying. The law prohibits any other charge or fee, including attorney fees.

Government attorneys do not search for or collect records. Instead, government attorneys make substantive government decisions about whether records are open or closed. Closing records is a basic government function. There is no legal authority in support of the proposition that Sunshine requestors pay for the closing, redacting, or the determination of whether a record is open or closed. Closing records, whether by vote, the act of a government attorney, redactions, or nonproduction is a substantive function of the government and a prerequisite to complying with the Sunshine law.

Government attorneys are not allowed to search for, collect, or produce records and then charge attorney time. § 610.026.1(1) reads in part:

> ".. the public governmental body shall produce the copies ***using employees of the body that result in the lowest amount of charges for search, research, and duplication*** time.." § 610.026.1(1) RSMo [emphasis added]

Not only is the government barred from passing along the costs of closing or redacting records to those who request records, but the law *directs* the government to close, redact or separate open from closed records, if necessary, in response to a Sunshine request.

> "If a public record contains material which is not exempt from disclosure as well as material which is exempt from disclosure, ***the public governmental body shall separate*** the exempt and nonexempt material and make the nonexempt material available for examination and copying." § 610.024.1 RSMo [emphasis added]

The Sunshine law also strictly limits what the government can charge to produce public records. The allowed charges exclude government lawyers charging for making substantive decisions about whether to close or redact records. Statutorily allowed charges are procedural and directly related to the search, collection, and duplication of the records, see § 610.026.1(1) RSMo. In fact, fees related to searching government computers and producing government emails:

> "..shall include **only** the cost of copies, staff time.. required for making copies and programming, if necessary, and the cost of the disk, tape, or other medium used for the duplication." § 610.026.1(2) RSMo. [emphasis added]

"Staff time" is explicitly limited to the time required for 1) *making copies* and 2) *programming*, if necessary. Staff time is not attorney time. All other costs, including the costs of attorneys, are prohibited.

In *Swaine v. McCulloch*, No. 15SL-CC03842 (St. Louis County Circuit Court, Judgment, January 4, 2017), Judge Wallace ruled that the government, alone, bore the responsibility and the cost of redacting or closing records, the cost could not be passed on to the record requestor. In that case, the government unsuccessfully argued that attorney time should be considered "research time" under § 610.026.1(1) RSMo. Search, research or duplication time spent *procedurally* fulfilling a Sunshine request is not the same as attorney time spent *substantively* closing records, and the statute infers that when directing the government to produce records "using employees... that result in the lowest amount of charges for search, research, and duplication time." § 610.026.1(1) RSMo. The intent of the Missouri General Assembly was that search, research and duplication should be handled by lower level staff that will result in the least charge for the requestor, and all other time spent would be borne by the government. Now more than forty years after the Sunshine Law passed, the government is arguing that requestors of information should have to pay the highest-paid government attorneys to review the requested records, and close or redact them, even though charging for this substantive government obligation is not authorized, inferred or even contemplated by statute.

Government attorneys don't file, store, or look for records, Custodians and lower level staff do. "Search" and "research" time is time spent finding the records, wherever they may be. Redacting and/or closing records is different, it's a substantive legal determination made about the status of records generally. The closing of a record must occur by either vote or by substantive decision, § 610.021 RSMo. Just like the cost of

holding a vote to close or redact records cannot be charged to a record requestor, an executive or legal decision to close or redact records is not a "search" or "research" cost that can be passed on to a requestor. Votes to close or redact records and executive or legal decisions to close or redact records are not "searches" or "research" charges related to the fulfillment of a Sunshine request, they are essential functions of the government.

Only the cost of searching, researching, collecting, and copying responsive documents can be charged to a requestor, and only on a limited basis, see § 610.026 RSMo. If the government *chooses* to involve government attorneys in an effort to close or redact records after a Sunshine request is made, or review politically sensitive records, then the government's effort has moved beyond the fulfillment stage contemplated by the Sunshine law and veered into either the substantive government processes of closing or redacting records or the political process of reviewing sensitive documents. Either way, charging attorney review and redaction costs to requestors is unauthorized by statute. Increasing the cost of transparency by stacking attorney's fees on top of other search and duplication fees will be a useful tool for bad actors trying to dissuade Sunshine requests or price records out of the hands of ordinary residents.

RECORD REQUESTORS ARE TREATED UNEQUALLY

Under the government's theory, the person who first requests the public records bears the full cost of the government attorney for redacting, closing or otherwise reviewing the records sought. These prices can easily climb into the thousands of dollars and often do. However, the second person who requests the same records will obtain the same records

at the lesser cost of duplication, potentially hundreds if not thousands of dollars less than the first requestor. This is already happening throughout Missouri. Governments, especially statewide entities, like the Governor's Office, are routinely closing or redacting records, particularly emails, *after* they receive a Sunshine request. The first Sunshine requestor is forced to pay the government to do its job of determining if a record is open or closed, but not the subsequent requestors of the *same documents*. The legislature certainly didn't create a law to punish the first requestor with attorney fees. Instead, the legislature contemplated exactly what the law says, that each requestor would be charged the same amount to reproduce the same records.

Stacking attorney fees on top of searching and copying fees will become the final cudgel governments use to dissuade the release of public information. Records will be constructively closed to those without the money to pay government attorneys, and public records will only be available to those with the resources to pay for them.

CONCLUSION

The Sunshine law doesn't authorize and, Missourians don't want to live in a state where the government can constructively close records to people that can't afford government attorneys. Allowing governments to charge attorney's fees for records is the biggest threat to the Sunshine law since burner apps were introduced into state government. Bad government actors are either going to destroy records or price them out of reach.

Dated: December 23, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

The undersigned hereby certifies that on December 23, 2020, the foregoing amicus brief was filed electronically and served automatically on counsel for all parties. The undersigned further certifies that pursuant to Rule 84.06(c), this brief: (1) contains the information required by Rule 55.03; (2) complies with the limitations in Rule 84.06 and Local Rule 41; (3) contains 1,509 words, as determined using the word-count feature of Microsoft Office Word.

/s/ Mark Pedroli