IN THE SUPREME COURT OF MISSOURI

NATIONAL COUNCIL OF TEACHERS QUALITY, INC., Appellant,	)	
v.	)	SC94520
CURATORS OF THE UNIVERSITY OF MISSOURI, Respondent.	)	

SUGGESTIONS IN SUPPORT OF APPELLANT'S APPLICATION FOR TRANSFER

Come now The Student Press Law Center ("SPLC"), The Reporters Committee for Freedom of the Press ("RCFP"), and The Society of Professional Journalists ("SPJ") (or, collectively, "Amici"), and for their Suggestions in Support of the Appellant's Application for Transfer, state the following:

1. In this case the Court is presented with an opportunity to determine that the Missouri Sunshine Law, Ch. 610, RSMo Supp., will continue to provide access to documents from public governmental entities in the state, and that access includes the right to obtain copies of documents disclosed under the Sunshine Law, with appropriate payment for those copies.

2. The import of the decision of the Court of Appeals is that if documents whose disclosure is required by the Sunshine Law are protected in any way by federal copyright law, copies of the documents may not be provided to the requesting party. That result is not only inconsistent with the letter and spirit of the Sunshine Law, it will also jeopardize the ability of professional journalists in Missouri to cover the activities of all levels of government in the state. The Court

should order transfer of the case and examine, on the merits, whether the copyright protections that would exist in vast quantities of documents held in public files in the state do in fact supersede the rights created by the Sunshine Law.

A. The Ability to Obtain and Copy Public Records is Essential to Investigative Watchdog Journalism

3. While the Appellant in this case is not a news-media organization, the ruling below casts a dark shadow over the ability of all journalists, researchers and citizen watchdogs to effectively oversee the operation of their government. The business of government is dependent on documents, in all formats: memoranda, letters, notes, applications, bids, proposals, emails, and text messages, to name but a few. Copyright is a creature of federal law, and its protection subsists in all intellectual property from the moment it is recorded in a tangible medium. The decision of the Court of Appeals provides that copies of all materials in which copyright protection subsists may not be produced to the requesting party under the Sunshine Law. Copies of documents may not be provided, unless, presumably, the consent of the copyright holder is obtained.

4. The Court of Appeals correctly noted that this is an issue of first impression in Missouri, although many other states that have considered this issue have found in a manner inconsistent with the decision below. No doubt the courts in other states recognized the novelty and, ultimately, falsity of the argument that copyright law should trump the Sunshine Law.

5. The SPLC, RCFP, and SPJ are national organizations of journalists. The membership of the RCFP and the SPJ largely consists of working journalists, and the SPLC's members are high school and college journalism teachers and students. At all levels of the profession of journalism,

the members of these organizations are vitally interested in the work of investigative journalism. In today's world, investigative journalism increasingly depends on the ability of "computer-assisted reporters" to analyze and make sense of mountains of government data. Much of that data comes from private sources provided to the government in many ways.

6. Journalists spend hours wading through reams of government documents produced pursuant to Sunshine Law requests. Journalists are able to use spreadsheets and modern computing power to spot trends and make connections that eluded the naked eye a generation ago. Indeed, the "open data" movement has been hailed as a democratizing influence promoting ease of citizen engagement in governance. The ruling below will reverse this democratizing trend by enabling hidebound government agencies to simply cry "copyright" whenever a request is made for copies of databases – even databases created on the public dime that rightfully belong to the citizens. Such is the case here: the University of Missouri has, for whatever reason, chosen to give its faculty employees the intellectual property in their course syllabi. As a result of that decision, the University now maintains that because third parties – the faculty – hold the copyright in the syllabi they created as employees of the University, for the courses given to students who pay tuition to the University (not to the faculty), copies of the syllabi may not be produced in response to a legitimate request under the Sunshine Law.

7. If this order is allowed to stand, working journalists will find it increasingly difficult to engage in investigative journalism. Simple disclosure of requested documents is not enough. If the documents are in the thousands, or take the form of computerized databases, it is simply impossible to perform the comprehensive review and analysis necessary to find the "needle in the haystack" or the trend hidden in the numbers that will be proof of government or public

officials not acting in the interests of the governed, if the disclosure does include the right to copy.

B. The Copyright Act is so Broad that Almost any Public Record could be Deemed Off-limits to Copying under the Ruling Below.

8. Copyright subsists in a document at the moment the ideas contained therein are recorded. There is no need for any action by the copyright holder until a suit for infringement might be contemplated. Only at that point must the copyright be registered. But full copyright lies in the document from the moment of its creation. And copyright extends to all manner of expression, regardless of its so-called value. The documents at issue in this case, course syllabi created by faculty employees of the University of Missouri, were readily located in the University's files. The question becomes whether the copyright protection in those documents, which the University has transferred to the faculty authors, precludes production of copies under the Sunshine Law.

9. As noted by the Court of Appeals, the Sunshine Law is to be liberally construed in favor of access and, consequently, exemptions are to be applied narrowly. The ruling below does the opposite – it creates such a broad and easily abused exemption that copies of virtually any document (beyond a bare list of numbers) could be withheld as copyright-protected. The exception risks completely swallowing the rule. The provision of the Sunshine Law allowing for exceptions from disclosure, 610.021(14), simply states that "…a public governmental body is authorized to close .. records.. to the extent they relate to the following:..[R]ecords which are protected from disclosure by law." The Court of Appeals took this vaguely worded provision and turned it into an exception as wide as Interstate 70. But the exception is not for disclosure;

indeed the Court's decision allows for disclosure. The decision just doesn't allow copies to be made.

10. Congress amended the Copyright Act in 1976 to dispense with the formality of registration, and since at least March, 1989, neither registration nor even notice has been a prerequisite for copyright to attach to an original piece of creative work published in the United States. As a result of this broadening of copyright protection, essentially any work containing a modicum of originality – a letter, a study, a report, a memo – could be subject to a claim of copyright ownership. This might include, for example, an analysis of a county's budgetary needs attached to the agenda of a school board meeting, but a citizen attending the meeting might be refused a copy of the analysis on copyright grounds. And, by extension, a reporter covering the meeting and later wishing to review the analysis in detail for any "holes," will also be denied a copy. That denies the reading public the benefit of the reporter's story showing where the county's budgetary analysis falls short.

11. Even if a requester eventually were to prevail over an unfounded claim of copyright protection (e.g., as to entries on a calendar or numbers on a spreadsheet), just introducing this degree of confusion and uncertainty into the law will, as a practical matter, erect insurmountable barriers to access. Few requesters have the time and money to mount a multi-year battle against a well-funded institution such as the University of Missouri, and because of the time-sensitive nature of public records, years of delay is often the functional equivalent of denial.

C. The Ruling Below Forecloses the Possible Resort to a Fair Use Defense

12. While the Court of Appeals is correct that fair use functions as an affirmative defense to a claim of copyright infringement once the rights-holder makes a prima facie case of an infringing

use, the ruling below forecloses the possibility of ever raising that defense. Since the copy will never be made, the alleged infringement will never occur. Hence, no court will ever have the opportunity to test the common-sense proposition that a single government-furnished duplicate – particularly for the educational, artistic, critical or editorial commentary uses to which Amicis' members routinely put public records – constitutes a defensible "fair use." Short-circuiting the workings of the Copyright Act through operation of state law offends basic federalism principles, since determining whether a copyright-infringing use has occurred is the exclusive province of the federal courts.

13. Moreover, it is simply contrary to public policy to enable a government agency to manipulate copyright law in this way. The party crying "copyright" in this case is also the party resisting public oversight of government affairs. A government agency rarely will have an economic interest in the exclusivity of public records of the kind that the Copyright Act was meant to protect, and indeed there is no evidence in this case that the University intended to publish and sell the requested syllabi or that it feared the NCTQ would begin selling them in "competition" with the University. Rather, the government's interest in withholding public records is typically one of self-serving concealment, and that is not the interest the Copyright Act was intended to serve, nor is it a legitimate interest for which the Copyright Act should be employed.

14. If not reversed, the ruling below will produce bizarre "mini-trials" in state court on the applicability of the Copyright Act (a matter of exclusive federal jurisdiction) to particular documents – but with the requester litigating with one hand tied behind his back. Not only will the requester be unable to argue that duplication of records is a fair use, he often will not have in

court as a party the most important participant in an actual federal copyright proceeding: the rights-holder.[1]

15. The ruling below will force litigants who need copies of documents to litigate each document's copyright status in state courts that have neither the expertise nor the statutory jurisdiction to pass on whether particular documents are genuinely copyright-protected. For example, a table of data may or may not have the sufficient "originality" or "creativity" to pass the statutory threshold for copyright protection. The risks of confusion – e.g., of conflicting rulings from state and federal courts as to the copyright status of the very same document – counsel strongly against putting state courts into the copyright business.

16. Rights-holders have a fully adequate remedy if, upon receiving a copy from a state agency, a requester then exploits the document commercially in a way that undermines the owner's investment. It is at that point that resort to the remedies of the Copyright Act may be proper. But the government entity from which the document is sought may not assume that the requester will infringe by taking commercial advantage of the allegedly copyrighted material. The Court below wrongly assumes that such infringement will occur.

17. Finally, the ruling simply makes no practical sense. A requester with a photographic memory or a quick hand on the notepad could create and reproduce a verbatim copy of a document simply by spending a long time inspecting it (a right that the ruling below appears to leave intact, although the Court carefully states that the question of simple disclosure was not at issue). Again, it is at that point that the Copyright Act would properly come into play and potentially limit the commercial exploitation of the document in derogation of the owner's rights. As to the vast majority of documents that are, with sufficient effort, reproducible by note-taking,

[1] A government agency may be merely the holder of a document that is actually "owned" by a third party who cannot be haled into court in a Sunshine Law case – for example, a developer who sends the Missouri Department of Natural Resources a study about the impact of his development on wetlands.

all the ruling below accomplishes is to place smaller-staffed requesters (or those suffering under a physical disability, such as a visual impairment) at a competitive disadvantage vis-à-vis requesters with the manpower to hand-create their own duplicates.

Wherefore, the Student Press Law Center, The Reporters Committee for Freedom of the Press, and The Society of Professional Journalists respectfully request that the Court consider the points raised in these Suggestions, and that the Court grant the Application for Transfer of this case to the Court for a full consideration on the merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by electronic mail on this 15th day of October, 2014, on the following:

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