IN THE SUPREME COURT OF MISSOURI

PEGGY STEVENS McGRAW,	)	
	)	
and	)	
	)	
SAMUEL C. JONES,	)	
	)	
on behalf of themselves and all others similarly situated,	)	
	)	
Appellants,	)	
	)	
v.	)	No. SC95271
	)	
STATE OF MISSOURI, et al.	)	
	)	
Respondents.	)	

Appeal from the Nineteenth Judicial Circuit Court
Cole County, Missouri
The Honorable Frank Conley, Judge

BRIEF OF APPELLANTS

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JURISDICTIONAL STATEMENT

This is a proposed class action brought on behalf of active and retired Missouri judges under Article XIII, § 3 of the Missouri Constitution and the 2010 Schedule of Compensation for Missouri judges. Appellants allege that Respondents improperly paid Missouri judges between July 1, 2012 and June 30, 2014 under the 2010 Schedule of Compensation.

Article XIII, § 3 of the Missouri Constitution establishes the Missouri Citizens' Commission on Compensation. The Citizens' Commission published the 2010 Schedule of Compensation on November 24, 2010. During the 2011 legislative session, the Missouri Legislature did not disapprove the 2010 Schedule. Thus, under Article XIII, § 3, the 2010 Schedule became "effective" and it is "published by the revisor of statutes as a part of the revised statutes of Missouri." Mo. Const. art. XIII, § 3(8). Accordingly, the 2010 Schedule is a Missouri statute.

In the trial court, the Missouri State Employees' Retirement System ("MOSERS") asserted that the 2010 Schedule of Compensation violated the Missouri Constitution. Specifically, MOSERS asserted that the 2010 Schedule of Compensation: (1) violated Article XIII, § 3 of the Missouri Constitution because it did not adequately "fix" the compensation of Missouri's judges, and (2) violated Article III, § 1 of the Missouri Constitution because it unlawfully delegated the state legislature's authority to determine judicial salaries to the federal government.

In its order of dismissal, the trial court did not explicitly consider the

constitutional challenges raised by MOSERS nor did it delineate which arguments it was accepting and/or rejecting. Under Missouri law, "[w]here, as here, the trial court does not indicate why it dismissed the petition, the Court presumes it was for some reason stated in the dismissal motion." *Costa v. Allen*, 274 S.W.3d 461, 462 (Mo. banc 2008); *see also Foster v. State*, 352 S.W.3d 357, 359 (Mo. banc 2011) ("In reviewing the propriety of the trial court's dismissal of the petition, this Court considers the grounds raised in the defendant's motion to dismiss and does not consider matters outside the pleadings."). Thus, because the trial court did not specifically accept or reject the constitutional challenges raised by MOSERS, the appellate courts will assume that the trial court's order adopted those constitutional challenges.

In this respect, the trial court's decision involves the validity of a Missouri statute. Accordingly, under Article V, § 3 of the Missouri Constitution, the Missouri Supreme Court has exclusive appellate jurisdiction over this appeal.

STATEMENT OF FACTS

The compensation of Missouri judges is indexed to the compensation of federal judges, with Missouri judges' salaries fixed at either 69% or 73% of the pay received by their federal counterparts. *See* Schedule of Compensation, Missouri Citizens' Commission on Compensation for Elected Officials (Nov. 24, 2010) ("2010 Schedule") at G-40; LF 10. The 2010 Schedule took effect on July 1, 2012, and remains in effect today.

In a series of decisions, federal courts have held that federal judges were not paid their correct salary for several years. As a result of those decisions, federal judges have received their corrected compensation in the form of backpay and pension enhancements. But Missouri judges have not received commensurate compensation for the time period between July 1, 2012 and June 30, 2014. This suit seeks to remedy that disparity.

A. The Federal Litigation

Federal judicial compensation is governed in part by the Ethics Reform Act of 1989 ("the 1989 Act"). *See* LF 11-12. Under the 1989 Act, federal judges are entitled to automatic, annual base salary cost-of-living adjustments ("COLAs") to maintain their real wages according to a fixed formula. *See Beer v. United States*, 696 F.3d 1174, 1181 (Fed. Cir. 2012); LF 11-13.

Despite this statutory mandate, Congress withheld cost-of-living adjustments from federal judges from 1995-1997, 1999, 2007, and 2010, with the result that federal judicial compensation was unlawfully diminished in those years.

LF 11. Moreover, federal judicial compensation in all subsequent years was unlawfully diminished because it was calculated based on incorrect prior base salaries. LF 11-13.

In January 2009, a group of federal judges filed suit against the United States, seeking to collect the salaries (and corresponding retirement benefits) prescribed by the 1989 Act as back wages. *Beer*, 696 F.3d at 1174; LF 11-13. In October 2012, the U.S. Court of Appeals for the Federal Circuit found that Congress' withholding of COLAs violated the 1989 Act and the Compensation Clause of the U.S. Constitution. LF 11. The court held that the judges were "entitled to monetary damages for the diminished amounts they would have been paid if Congress had not withheld the salary adjustments mandated by the [1989] Act," and remanded the case to the trial court to "calculate these damages as the additional compensation to which appellants were entitled since January 13, 2003" by incorporating "the base salary increases which should have occurred in prior years had all the adjustments mandated by the 1989 Act had actually been made." *Beer*, 696 F.3d at 1186-87; LF 11-12.

On remand, the trial court awarded each judge net back pay for the difference between the actual wages they had received since 2003 and the correct base salaries prescribed by the 1989 Act. *Beer v. United States*, 111 Fed. Cl. 592, 601 (2013), *appeal dismissed* (Nov. 8, 2013); LF 12-13.

Later that year, in response to a class action filed in 2012, the Court of Federal Claims found that **all** Article III judges "were improperly denied [COLAs]

promised by the [1989 Act]," and were therefore "entitled to receive COLAs as set forth in *Beer*, and to have those COLAs reflected in their pay records." Order in *Barker, et al. v. United States*, No. 12-826 (Fed. Cl. Dec. 10, 2013); LF 13. Moreover, judges who had retired during the relevant window were entitled to receive benefits based on the salary that they should have been receiving at the time they retired. *Id*.

In addition to awarding judges back pay for salary already accrued but not yet paid, *Beer* and subsequent litigation ordered corrections to federal judicial pay going forward, as mandated by the 1989 Act. LF 13. As a result, on January 1, 2014, the federal government began correctly paying its judges their full salaries in accordance with the Act. *Id*.

B. Judicial Compensation in Missouri

Peggy Stevens McGraw served as a Circuit Court Judge in the Sixteenth Judicial Circuit from 2001 until October 2013, when she retired. LF 7, 15. Prior to her appointment to the Circuit Bench, Judge McGraw served as an Associate Circuit Judge in the Sixteenth Judicial Circuit from 1995 to 2001. LF 7. Samuel C. Jones served an Associate Circuit Judge in the Thirty-Ninth Judicial Circuit from 1992 to 1998, and again from January 2011 to November 2014. LF 7.

In November 2010, while Judges McGraw and Jones were serving, the Citizens' Commission issued a proposed Schedule of Compensation which provided "that each state judge's salary shall be indexed to the commensurate judicial position in the federal system." LF 10-11. By indexing state judicial pay to

federal compensation levels, the Citizens' Commission hoped to achieve "a lasting solution to the problem of inadequate judicial compensation in this state and, therefore, provide the means to attract and retain the best possible judges to the bench." 2010 Schedule at G-41; LF 10. Therefore, the Citizens' Commission adopted the following "Official Schedule of Judicial Salaries" to take effect July 1, 2012 (the first day of Fiscal Year 2013):

Chief Justice	**Supreme Court Judge**	**Court of Appeals**	**Circuit Judge**	**Associate Circuit Judge**
69% of federal chief justice salary	69% of federal Supreme Court associate justice salary	73% of federal circuit court of appeals judge salary	73% of federal district court judge salary	73% of federal magistrate salary

See 2010 Schedule at G-40; LF 10.

During the 2011 legislative session, the Missouri General Assembly considered the 2010 Schedule and did not disapprove it. LF 11. Therefore, the 2010 Schedule became "effective," and now "appl[ies] and represent[s] the compensation for each affected person [….]"). Mo. Const. art. XIII, § 3(8).[1]

[1] The 2010 Schedule continues to be the operative compensation plan for Missouri judges. *See* Schedule of Compensation, Missouri Citizens' Commission

Despite the clear requirements of the 2010 Schedule, Missouri judges' salaries and retirement benefits were not adjusted in October 2012, when the Federal Circuit ordered adjustments and back pay according to the formula laid out in the 1989 Act. LF 11-14. Nor were Missouri judges' paid the appropriate percentage of federal judge salaries as precisely calculated and credited in the *Beer* trial court's June 2013 opinion. *See Beer*, 111 Fed. Cl. at 601; LF 12-14. Likewise, Missouri judges' pay remained stagnant despite the application of *Beer* to all Article III judges in *Barker* (and its subsequent extension to non-Article III judges in further litigation). LF 12-14.

Finally, Missouri judges failed even to receive the prescribed percentage of federal judge salaries as due, and paid, beginning January 1, 2014. LF 14. Indeed, Missouri did not begin to properly compensate Missouri judges according to the 2010 Schedule until July 1, 2014 – some six months after their federal counterparts received their salary adjustments. LF 14.

C. The Instant Case

In December 2014, Judges McGraw and Jones filed suit in the Circuit Court of Cole County against the Missouri State Employees' Retirement System (MOSERS) and the State of Missouri. In March 2015, they amended their Petition

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on Compensation for Elected Officials (Nov. 25, 2014) ("2014 Schedule") at 4 ("This schedule specifically authorizes a compensation structure identical to the recommendation in the 2010 report."); LF 11.

to add the Missouri State Treasurer and the Missouri Commissioner of Administration (the "individual defendants") as additional defendants. LF 7.

On behalf of themselves and all similar situated judges, Appellants seek back pay and retirement benefits due under the 2010 Schedule, according to the federal judicial salaries mandated by the 1989 Act. LF 17; 21-22. MOSERS moved to dismiss the suit, arguing that the 2010 Schedule was unconstitutional and that MOSERS had correctly calculated retirement benefits. LF 40-43.

The State of Missouri, the Treasurer, and the Commissioner (collectively, "State Defendants") also moved to dismiss, arguing that no claims had been pleaded against the Treasurer and Commissioner in their individual capacities, that sovereign immunity barred the suit, and that the 2010 Schedule had not been violated. LF 60-67.

The trial court granted the motion to dismiss, stating that no individual capacity claims had been pleaded, that sovereign immunity barred the action, and that the 2010 Schedule had not been violated. LF 189-192.

Judges McGraw and Jones timely appealed, and this Court has jurisdiction. Mo. Const. art. V, § 3. For the reasons set forth herein, Appellants respectfully submit that the trial court erred, and that this Court should reverse the trial court's judgment.

POINTS RELIED ON

I. THE TRIAL COURT ERRED IN DISMISSING APPELLANTS' CLAIMS BECAUSE THE STATE WAIVED SOVEREIGN IMMUNITY WITH RESPECT TO CLAIMS UNDER MO. CONST. ART. XIII, § 3, IN THAT: (1) THE GENERAL ASSEMBLY AND CITIZENS OF MISSOURI HAVE EXPRESSLY EXEMPTED COMPENSATION UNDER ART. XIII, § 3 FROM SUBJECTION TO FURTHER APPROPRIATION; (2) JUDICIAL SALARIES ARE AN AUTHORIZED FINANCIAL OBLIGATION; AND (3) THE STATE IS LIABLE FOR BACK PAY.

Weinstock v. Holden, 995 S.W.2d 411 (Mo. banc 1999)

V. S. DiCarlo Const. Co. v. State, 485 S.W.2d 52 (Mo. 1972)

State ex rel. Zevely v. Hackmann, 254 S.W. 53 (Mo. banc 1923)

Crain v. Missouri State Employees' Ret. Sys., 613 S.W.2d 912 (Mo. App. W.D. 1981)

II. THE TRIAL COURT ERRED IN DISMISSING APPELLANTS' CLAIMS BECAUSE THE DEFENDANTS VIOLATED THE 2010 PAY SCHEDULE BY UNDERPAYING MISSOURI'S JUDGES, IN THAT THE COMPENSATION PROVIDED TO MISSOURI JUDGES FROM JULY 1, 2012 TO JUNE 30, 2014 WAS UNLAWFUL AT THE TIME IT WAS PROVIDED.

Beer v. United States, 696 F.3d 1174 (Fed. Cir. 2012)

Beer v. United States, 111 Fed. Cl. 592 (2013)

V. S. DiCarlo Const. Co. v. State, 485 S.W.2d 52 (Mo. 1972)

Schedule of Compensation, Missouri Citizens' Commission on Compensation for Elected Officials (Nov. 24, 2010)

III. THE TRIAL COURT ERRED IN DISMISSING APPELLANTS' CLAIMS BECAUSE THE 2010 PAY SCHEDULE IS CONSTITUTIONAL, IN THAT: (1) THE SCHEDULE DOES NOT UNLAWFULLY DELEGATE STATE LEGISLATIVE POWER TO THE FEDERAL GOVERNMENT; (2) IT ADEQUATELY FIXES MISSOURI STATE JUDICIAL COMPENSATION; (3) IT DOES NOT CONFLICT WITH THE APPROPRIATIONS PROCESS SET FORTH IN MISSOURI'S CONSTITUTION; AND (4) IT WILL NOT RESULT IN UNLAWFUL RETROACTIVE COMPENSATION.

MO. CONST. art. XIII, sec. 3 (1996)

Schedule of Compensation, Missouri Citizens' Commission on Compensation for Elected Officials (Nov. 24, 2010)

ARGUMENT

Standard of Review

"The Supreme Court of Missouri reviews dismissals for failing to state a claim *de novo* without any deference to the circuit court decision." *Weber v. St. Louis Cnty.*, 342 S.W.3d 318, 321 (Mo. banc 2011). The Court "assumes that all of the plaintiff's averments are true, and liberally grants to plaintiff all reasonable inferences therefrom." *Id*. (quoting *Huch v. Charter Commc'ns, Inc.*, 290 S.W.3d 721, 724 (Mo. banc 2009)).

Moreover, "a motion to dismiss for failure to state a cause of action is solely a test of the adequacy of the plaintiff's petition." *Reynolds v. Diamond Foods & Poultry, Inc.*, 79 S.W.3d 907, 909 (Mo. banc 2002). "A court reviews the petition 'in an almost academic manner, to determine if the facts alleged meet the elements of a recognized cause of action, or of a cause that might be adopted in that case.'" *City of Lake Saint Louis v. City of O'Fallon*, 324 S.W.3d 756, 759 (Mo. banc 2010) (quoting *Nazeri v. Missouri Valley Coll.*, 860 S.W.2d 303, 306 (Mo. banc 1993)). And in so doing, the Court "will not weigh the credibility or persuasiveness of facts alleged. *Id*.

I. THE TRIAL COURT ERRED IN DISMISSING APPELLANTS' CLAIMS BECAUSE THE STATE WAIVED SOVEREIGN IMMUNITY WITH RESPECT TO CLAIMS UNDER MO. CONST. ART. XIII, § 3, IN THAT: (1) THE GENERAL ASSEMBLY AND CITIZENS OF MISSOURI HAVE EXPRESSLY EXEMPTED COMPENSATION UNDER ART. XIII, § 3 FROM SUBJECTION TO FURTHER APPROPRIATION; (2) JUDICIAL SALARIES ARE AN AUTHORIZED FINANCIAL OBLIGATION; AND (3) THE STATE IS LIABLE FOR BACK PAY.

The State of Missouri is not entitled to sovereign immunity on Appellants' claims. In the trial court, the State asserted that it must give its "explicit" consent to be sued, and Appellants' claims must fail because Article XIII, § 3(8) contains no explicit waiver of sovereign immunity. The State is incorrect.

"Nothing in the statutes or case law requires that certain magic words must be used in order to waive sovereign immunity." *Bachtel v. Miller County Nursing Home Dist.*, 110 S.W.3d 799, 804 (Mo. banc 2003). Indeed, **"[t]he State's intent to allow itself to be sued must be express although the language reflecting that intent need not be express."** *State ex rel. Missouri State Highway Patrol v. Atwell*, 119 S.W.3d 188, 191 (Mo. App. W.D. 2003) (citing *Bachtel*, 110 S.W.3d at 803-04) (emphasis added). Here, several factors point to one conclusion: the

State intended to waive its sovereign immunity under § 3(8).

Additionally, MOSERS does not enjoy sovereign immunity because its enabling statute expressly acquiesces to suit: "The Missouri state employees' retirement system may sue and be sued in its official name..." RSMo § 104.530.

Similarly, the individual defendants are not entitled to immunity as their actions were purely ministerial in that such actions were "of a clerical nature…, in obedience to the mandate of legal authority, without regard of his own judgment or opinion concerning the propriety of the act to be performed." *Southers v. City of Farmington*, 263 S.W.3d 603, 610 (Mo. banc 2008). Moreover, these same defendants were endorsed as proper defendants in a holding of *Crain v. Missouri State Employees' Retirement System*, 613 S.W.2d 912, 916 (Mo. App. W.D. 1981). There, the Court held "[t]here can be no question that when an issue arises concerning the benefits due under the sections of the statute relating to judicial or other retirement benefits which are to be administered by the Missouri State Employees' Retirement System, the defendants named in this suit [state treasurer and commissioner of administration] are the proper parties." *Id.* The Court should reject Respondents' sovereign immunity arguments.

A. The State Has Expressly Consented to Suit for Enforcement of the Compensation Schedule.

The State has directly expressed its intent that the 2010 Schedule and other comparable schedules of compensation create binding legal rights that are enforceable through legal action.

Missouri voters originally adopted Article XIII, § 3(8) of the Missouri Constitution in 1994. The relevant language of the section originally stated:

> The schedule shall, **subject to appropriations**, apply and represent the compensation for each affected person beginning on the first day of July following the filing of the schedule.

Mo. Const. art. XIII, § 3(8) (1994). In *Weinstock v. Holden*, 995 S.W.2d 411 (Mo. banc 1999), a retired judge filed suit to enforce the compensation schedule that was in effect at the time, and the Supreme Court considered the significance of the "subject to appropriations" language in § 3(8). The Court rejected the judge's claim and held:

> The practical value of any "schedule of compensation" to an affected person, however, may be somewhat minimal. Although the schedule establishes the appropriate level of compensation for each position and the relationship of the compensation amounts for all of the positions relative to each other, we must allow the words "subject to appropriations" to have their full meaning. **Those words allow the legislature to choose, in each of the two years covered by the schedule, whether to fund the "schedule of compensation" in whole or pro rata part . . . Only**

> **after the appropriation does the schedule become "the compensation for each affected person" in the sense that it is legally enforceable.**

Weinstock, 995 S.W.2d at 418 (emphasis added).

Thus, under *Weinstock*, the words "subject to appropriations" functioned as a contingency, and it meant that no individual could enforce his or her rights under the section without an appropriation. Therefore, Judge Weinstock "had no enforceable right to any corresponding increase in his individual compensation" or retirement benefits. *Id*. This Court affirmed the trial court's grant of summary judgment. *Id*.

Several years later, Missouri voters deleted a portion of Article XIII, § 3 – a deletion that materially impacts the instant case. In 2006, the General Assembly jointly resolved, and the citizens of Missouri adopted by statewide vote, an amendment to Article XIII, § 3, which deleted the phrase "subject to appropriations" from the text. MO. LEGIS. H.J.R. 55 (2006); LF 79. Thus, Missouri deleted the operative language – "subject to appropriations" – that had previously shielded the State from liability and maintained its sovereign immunity.[2]

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[2] Apart from a provision disqualifying public officials convicted of felonies from receiving a state pension, the deletion of "subject to appropriations" was the

Weinstock is consistent with other Missouri cases that have considered the import of the phrase "subject to appropriations." For example, in *State ex rel. Kansas City Symphony v. State*, 311 S.W.3d 272 (Mo. App. W.D. 2010), the court held that the State had not waived its sovereign immunity because the enabling statute and relevant agreement contained the phrase "subject to appropriation." According to the court, because the phrase allowed the Legislature to withhold appropriations, then the duty was not mandatory. *Id.* at 276 ("Because the transfer of funds . . . was subject to appropriation, compliance with the statute was discretionary and not mandatory.").

But this case is different. Here the original "subject to appropriations" language of § 3(8) was construed by the Supreme Court as preserving the State's immunity and blocking any claims against the State under § 3(8). *See Weinstock*, 995 S.W.2d at 418. Then, with full knowledge of *Weinstock* and its significance, the legislature passed a resolution to delete that language – an amendment that voters adopted in November 2006. Viewed in its totality, this conduct expresses an unequivocal intention to waive the State's sovereign immunity for claims arising under § 3(8).

The conduct of the General Assembly and Missouri voters in deleting the phrase "subject to appropriations" must be viewed in light of *Weinstock* and its

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only substantive change in the 2006 Amendment, which has been the only amendment to Article XIII, § 3 in its history. MO. LEGIS. H.J.R. 55 (2006).

holding. Indeed, under Missouri law, it is well settled that:

> In construing statutes to ascertain legislative intent **it is presumed the legislature is aware of the interpretation of existing statutes placed upon them by the state appellate courts, and that in amending a statute or in enacting a new one on the same subject, it is ordinarily the intent of the legislature to effect some change in the existing law.** If this were not so the legislature would be accomplishing nothing, and legislatures are not presumed to have intended a useless act.

Kilbane v. Dir. of Dep't of Revenue, 544 S.W.2d 9, 11 (Mo. banc 1976) (emphasis added).

Presuming, as this Court does, that the General Assembly acts with knowledge of the interpretations given to existing language by courts, and that amendments are intended to change the law, there is only one reasonable conclusion: the State intended to waive its sovereign immunity for claims arising under section 3(8) when it deleted the phrase "subject to appropriations" in 2006 from Article XIII, § 3. Accordingly, sovereign immunity does not bar Appellants' claims and the Court should reverse the trial court's judgment.

B. <u>The State Consents to Suit for Actions to Enforce Authorized Financial Obligations.</u>

Even outside the specific context of compensation schedules promulgated under Art. XIII, § 3, this case would be authorized by the State's waiver of sovereign immunity from suit to enforce specific financial obligations. For non-tort actions,[3] the principle that the state cannot be subjected to suit without its consent – and the crucial question of what constitutes consent – has been developed over more than a century of case law addressing different claims in different contexts. *See, e.g., Merchants' Exch. of St. Louis v. Knott*, 111 S.W. 565, 574 (Mo. banc 1908); *Kleban v. Morris*, 247 S.W.2d 832, 836 (Mo. 1952). In the context of discreet financial obligations to specific private parties, this Court in *V. S. DiCarlo Const. Co., Inc. v. State*, 485 S.W.2d 52 (Mo. 1972) squarely held that an obligation to a private party, authorized by an act of the General Assembly, was enforceable against the State in a suit for damages. *DiCarlo*, 485 S.W.2d at 57.

The facts and conclusions of *Dicarlo* demonstrate why sovereign immunity does not bar this case. In *DiCarlo*, the General Assembly passed a statute appropriating money to the Division of Planning and Construction for construction of a government building. Subsequently, the Director of that Division executed a contract on behalf of the State with a private builder. Thereafter, the builder filed suit against the State seeking recovery of "extra compensation for rock excavation above the elevation at which the specifications stated rock would commence," for

[3] Actions in tort against the State are governed by RSMo § 537.600 *et seq*.

"extra work which plaintiff was required to perform but which it says was not its obligation under the contract," and for "extra expense caused by a change in sequence of the work directed by the State." *Id*. at 53.

The trial court dismissed on sovereign immunity grounds. This Court reversed, finding that "when the State enters into a validly authorized contract, it lays aside whatever privilege of sovereign immunity it otherwise possesses and binds itself to performance, just as any private citizen would do by so contracting." *Id.* at 54; *see also Kubley v. Brooks*, 141 S.W.3d 21, 28 (Mo. banc 2004) ("immunity from suit is waived when the State enters into an express contract.").

Importantly, the Court found that State had waived sovereign immunity, not by the Director's execution of a contract, but by the General Assembly's authorization for the State to be obligated. *DiCarlo*, 485 S.W.2d at 55. Under such circumstances, "the waiver is implied rather than express because the nature of the transaction authorized necessarily contemplates mutual and reciprocal obligations on the part of the citizen and the State, all of which the General Assembly reasonably intends and expects to be fulfilled." *Id*. at 56.

Also, the Court roundly rejected the State's argument that suit could not be maintained for recovery of funds authorized under an expired appropriation. "Only if and when a judgment is rendered is attention given as to whether the judgment is collectible," the Court reasoned, and it had "no reason to believe that the General Assembly would not recognize as an obligation of the State any judgment

finally rendered as a result of such litigation." *Id*. at 57.

As in *DiCarlo*, here the General Assembly waived sovereign immunity by authorizing the State to incur a legal obligation, necessarily consenting to suit for the enforcement of that obligation. Indeed, the legislature's acceptance of the 2010 Schedule, the Schedule's publication in the Revised Statutes of Missouri, and subsequent appropriations for judicial salaries present even stronger evidence of intent to be obligated than the appropriation found sufficient in *DiCarlo*. In this case, the terms of the obligation were known to the legislature at the time it authorized them, and were ultimately codified with the force of law. And although, as discussed below, the obligation was not contingent on any special or further appropriation; appropriation was indeed made, further demonstrating the State's consent to the obligations prescribed in the Schedule.

To rule otherwise "would be to assume bad faith on the part of the General Assembly," *DiCarlo*, 485 S.W.2d at 55, to deprive State obligees of legal entitlements, and ultimately to disable the State from making mutually binding, beneficial commitments to private parties in anticipation of their services.[4]

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[4] As this Court stated in *DiCarlo*:

> The very antithesis of responsibility by government would be to say that it may contract with a citizen and assume obligations under the contract and then be permitted to disavow and say to the citizen that the

This Court's reasoning in *Fort Zumwalt Sch. Dist. v. State*, 896 S.W.2d 918 (Mo. banc 1995) – a case relied on by Respondents before the trial court – confirms that the present suit is proper. There, in the dissimilar context of taxpayer litigation under the Hancock Amendment, this Court declined to "infer or imply that a waiver of sovereign immunity extends to remedies **that are not essential to enforce the right in question**." *Fort Zumwalt*, 896 S.W.2d at 923 (emphasis added). In that case, the right in question was the taxpayers' right not to have the state "reduce the state financed proportion of the cost of special education in each school district in violation of [Mo. Const. art. X, § 21]." *Id*. at 922. Accordingly, the Court found that "a declaratory judgment relieving a local government of the duty to perform an inadequately funded required service or activity is an adequate remedy." *Id*. at 923.

No such alternate adequate remedy exists here. Appellants were denied their rightful salaries. A judgment for back wages, in the amount of the salaries

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> State has breached the contract but you can't do anything about it because the government has not expressly consented to the maintenance of the suit.

DiCarlo, 485 S.W.2d at 57. Not only would such a policy erode public confidence in the government, it would undermine the State's very ability to contract, jeopardizing its power to buy, sell, build, employ, provide services, or function generally.

owed, is the only adequate remedy to enforce this right. Defendants have suggested no alternate adequate remedy, nor could they. The state's waiver of sovereign immunity extends to the remedy sought here.

C. Public Officers Can Sue the State for Back Pay.

Where a public officer's compensation is established by law, the officer may sue for (and win) payment in full of the compensation owed, regardless of whether and in what amount appropriation was made for such payment. *State ex rel. Zevely v. Hackmann*, 254 S.W. 53, 54-55 (Mo. banc 1923) (ordering State Auditor to pay state equalization board member compensation due under statute, without regard to appropriation); *see also State v. Walker*, 10 S.W. 473, 475 (Mo. banc 1889) (ordering State Auditor to pay state equalization board member for services rendered). Thus, Appellants can sue and maintain this case for unpaid wages.

D. MOSERS is Not Immune from Suit.

MOSERS lacks immunity from the present action because its enabling statute expressly subjects it to suit. "The Missouri state employees' retirement system may sue and be sued in its official name." RSMo § 104.530.

"Statutory authority to sue and be sued is sufficient consent to suit to waive the doctrine of immunity of the sovereign from suit without its consent." *Kubley*, 141 S.W.3d at 31; *accord Bush v. State Highway Comm'n of Missouri*, 46 S.W.2d 854, 856 (Mo. 1932); *DiCarlo*, 485 S.W.2d at 56 ("general enabling acts, conferring broad authority for those agencies to sue and be sued [….] provide a

continuing waiver of sovereign immunity as to those agencies"). The authority to sue and be sued under § 104.530 constitutes a waiver of sovereign immunity with respect to MOSERS. *Crain*, 613 S.W.2d at 917 (noting that, over and above RSMo § 104.530, "when a statute provides a benefit or awards a contract, the requisite waiver of immunity from suit to enforce the benefit or contract is inferred").

E. The Individual Defendants are Not Immune from Suit.

The question of whether the individual defendants may be sued to enforce a specific financial obligation of the state has been addressed in a closely analogous case. In *Crain*, 613 S.W.2d at 916, a class of active and retired Missouri judges sued MOSERS, the Treasurer, and the Commissioner of Administration for benefits they claimed were due under Missouri statute. The court there found "no question that when an issue arises concerning the benefits due under the sections of the statute relating to judicial or other retirement benefits which are to be administered by [MOSERS], **the defendants named in this suit are the proper parties**." *Crain*, 613 S.W.2d at 916 (emphasis added). The court further stated that "when a statute provides a benefit or awards a contract, the requisite waiver of immunity from suit to enforce the benefit or contract is inferred." *Id.* at 917. As in *Crain*, here there is no question that the individual defendants are properly named parties to this suit.

Moreover, from a broader view, the principle that the State is not subject to suit without its consent simply does not apply to individual public officers. Strictly

speaking, even the doctrine of sovereign immunity in tort does not apply to individuals such as the Treasurer and the Commissioner of Administration. *Southers*, 263 S.W.3d at 610. It is true that the separate, but related, doctrine of official immunity "protects public employees from liability for alleged acts of negligence committed during the course of their official duties for the performance of discretionary acts." *Id*. But this doctrine is inapposite here.

First, this is not a suit for negligence. If the allegations in the Amended Petition are accepted as true, as they must be, the plaintiffs' basis for recovery is not the unreasonableness of the Treasurer and Commissioners' actions, but the legal right of the judges to their proper compensation under the 2010 Schedule. Neither the facts alleged nor the Counts charged – violations of the 2010 Schedule, Unjust Enrichment, and a request for Declaratory and Injunctive Relief – suggest any claim of negligence. Rather, as discussed above, these claims sound in contract and are appropriately subject to adjudication. *See Gavan v. Madison Mem'l Hosp.*, 700 S.W.2d 124, 126 (Mo. App. E.D. 1985) ("The doctrine of sovereign immunity and the related doctrine of official immunity have no application to suits for breach of contract.").

Second, even if this were a suit for negligence, the Treasurer and Commissioner would not be immune because the duties they violated were ministerial, not discretionary. As clearly alleged in the Amended Petition, the named officials "failed to correctly carry out their ministerial duty to calculate salaries based upon the 2010 Schedule of Compensation." This characterization

fully comports with this Court's articulation in *Southers*:

> A discretionary act requires the exercise of reason in the adaptation of means to an end and discretion in determining how or whether an act should be done or course pursued. A ministerial function, in contrast, is one "of a clerical nature which a public officer is required to perform upon a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to his own judgment or opinion concerning the propriety of the act to be performed."

Southers, 263 S.W.3d at 610. As discussed above, Article XIII, § 3 vests all authority for the determination of covered compensation in the Citizens' Commission, save the legislature's power to formally disapprove a proposed schedule. *See Weinstock*, 995 S.W.2d at 417. After the 2006 Amendment, no discretion is afforded even the General Assembly – much less individual public officers – in funding or applying a duly codified Schedule. The trial court's failure to recognize this allegation of a particular ministerial act was error.

Finally, unlike the State itself, a public official does not enjoy blanket immunity from suit without his or her consent, or the consent of the State. Officials are not sovereign. *See Merchants' Exch. of St. Louis*, 111 S.W. at 574 (rejecting state officers' claim that suit, "to all intents and purposes, is against the

state"). As this Court has repeatedly stated, the immunity afforded officials is confined to the context of negligence in discretionary acts. *Southers*, 263 S.W.3d at 610; *Davis v. Lambert-St. Louis Int'l Airport*, 193 S.W.3d 760, 763 (Mo. banc 2006). The Treasurer and Commissioner are not immune from suit for their failure to correctly calculate and pay Missouri's judges according to the 2010 Schedule.

II. THE TRIAL COURT ERRED IN DISMISSING APPELLANTS' CLAIMS BECAUSE THE DEFENDANTS VIOLATED THE 2010 PAY SCHEDULE BY UNDERPAYING MISSOURI'S JUDGES, IN THAT THE COMPENSATION PROVIDED TO MISSOURI JUDGES FROM JULY 1, 2012 TO JUNE 30, 2014 WAS UNLAWFUL AT THE TIME IT WAS PROVIDED.

The ultimate question in this matter is whether Missouri judges are entitled to the full amount of their salary or only a partial amount. Respondents urge that Missouri judges receive only a partial salary based on the federal government's failure to properly pay federal judges. Judges McGraw and Jones, on behalf of all Missouri judges, urge a finding that Missouri judges are entitled to the full amount of their salary as reflected by the proper payment of federal judicial pay as required under the 1989 Act.

In construing the 2010 Schedule, the Missouri Supreme Court "interprets statutes in a way that is not hyper-technical, but instead, is reasonable and logical and gives meaning to the statute." *Ben Hur Steel Worx, LLC v. Director of Revenue*, 452 S.W.3d 624, 626 (Mo. banc 2015) (citing *Ivie v. Smith*, 439 S.W.3d 189, 202 (Mo. banc 2014)). "The primary rule of statutory construction is to ascertain the intent of the legislature from the language used, to give effect to that intent if possible, and to consider the words used in their plain and ordinary meaning." *Wolff Shoe Co. v. Director of Revenue*, 762 S.W.2d 29, 31 (Mo. banc 1988). "Construction of statutes should avoid unreasonable or absurd results, and

the Court has no authority to read into a statute a legislative intent contrary to the intent made evident by the plain language." *Reichert v. Board of Educ. of City of St. Louis*, 217 S.W.3d 301, 305 (Mo. banc 2007) (internal citations omitted).

In this case, the plain language of the 2010 Schedule – as interpreted and applied by federal courts in analogous cases – dictates that the Court should reverse the judgment.

A. Defendants Paid Missouri Judges' Wages Based on Federal Judge Wages that Violated Federal Law and the U.S. Constitution at the Time, Contravening Precise and Definite Federal Obligations in Effect Since 1989.

Missouri's judicial compensation from July 1, 2012 to June 30, 2014 was incorrect and unlawful at the time it was provided, because it was based on federal judges' compensation that was incorrect and unlawful at the time it was provided. The 2010 Schedule sets forth a basic multiplication equation that has two components: (1) the percentage contained in the 2010 Schedule, and (2) the federal judicial salaries. In this case, the latter component as it existed between 2012 and 2014 violated federal statutes and the U.S. Constitution. Because the second component of the 2010 Schedule's calculation was incorrect, so too is the product of that calculation – in this case, the compensation for Missouri judges.

The legal obligation pursuant to which federal judges were paid for their services from 2012 to 2014 was incurred in 1989. *Beer v. United States*, 696 F.3d 1174, 1187 (Fed. Cir. 2012) (ordering that federal judges be awarded back pay in

accordance with the compensation "mandated by the 1989 [Ethics Reform] Act"). The federal government's failure to pay these wages was unlawful at the time. *Id.* This unlawful deficiency was remedied by an award of "the additional compensation to which appellants were entitled since January 13, 2003—the maximum period for which they can seek relief under the applicable statute of limitations." *Id.* at 1186-87.

Respondents' efforts to characterize the relief requested here – and granted in *Beer* and its progeny – as a "retroactive pay increase" are misguided.[5] An award of back pay is not a salary "increase," but a recognition of pay already earned, due and unlawfully withheld.

This concept was abundantly clear in *Beer* and the ensuing federal litigation. On remand from the Federal Circuit, the Court of Federal Claims laid out in detail – even appending precise charts – each portion of compensation owed and the year in which it was earned and due, with interest calculated and annuity contributions deducted effective from that year. *Beer v. United States*, 111 Fed. Cl. 592, 602 (2013). The Court there (like the Federal Circuit before it) repeatedly and consistently characterized the money owed as salary for the years in which it had been earned. *See, e.g.*, *Beer*, 111 Fed. Cl. 597 ("the government improperly

[5] The trial court's reliance on such characterization and evinced by the court's conclusion that "salaries of state judges were based upon the appropriate percentage of federal salaries" was error.

withheld salary in the past"); *Beer*, 696 F.3d at 1177 ("the 1989 Act provided for self-executing and non-discretionary cost of living adjustments ("COLA") to protect and maintain a judge's real salary.")[6]

That the back wages were salary for the years in question was further emphasized by the litigation in *Barker, et al. v. United States*, No. 12-826 (Fed. Cl.), which extended the outcome of *Beer* to the class of all federal judges. There, the Court of federal claims ordered that class plaintiffs were "entitled to receive COLAs as set forth in *Beer*, and to have those COLAs reflected in their pay records." Order in *Barker, et al. v. United States*, No. 12-826 (Fed. Cl. Dec. 10, 2013). Retirement benefits were also enhanced according to the correctly calculated salary at the time of each judge's retirement. *Id*. Finally, the Court ordered the Administrative Office of the United States Courts to "correct its pay

[6] Although the Federal Circuit opinion does, at times, refer to the adjustments as "increases," the Court explicitly held that "the 1989 Act COLA provisions were not an increase in judicial pay," but that "the statute ensured that real judicial salary would not be reduced in the face of the elimination of outside income and the operation of inflation." *Beer*, 696 F.3d at 1182-83. The characterization of a back pay award as "retroactive pay increase" is thus doubly erroneous: the mandate of automatic COLAs was not even a *prospective* pay increase when it was adopted in 1989, but rather a guarantee that judicial salaries would not be diminished over time.

records accordingly." *Id.*

Like class plaintiffs in *Barker*, Missouri judges are entitled to have their salary and benefits calculated according to the "correct" federal judicial salaries for 2012-2014. Missouri judges did not, as Respondents contend, receive accurate or correct pay between 2012 and 2014 because, as set forth above and as recognized by numerous federal courts, the second component of the compensation equation was wrong and in violation of federal law. The Court should reject Respondents' argument and reverse the trial court's judgment.

B. Analogous Cases and the Plain Language of the 2010 Schedule Support Plaintiffs' Claims.

1. Cases Applying Similar Statutes Support Appellants.

Every court that has considered claims brought by other categories of judges whose pay is indexed to federal judges has reached the same conclusion urged by Appellants.

For example, like Missouri judges under the 2010 Schedule, the compensation due to federal bankruptcy judges is a fixed percentage of the "salary" of their Article III counterparts. 28 U.S.C. § 153 ("Each bankruptcy judge shall serve on a full-time basis and shall receive as full compensation for his services, a salary at an annual rate that is equal to 92 percent of the salary of a judge of the district court of the United States."). After *Beer*, federal bankruptcy judges initiated litigation very similar to the instant cause, seeking the full salaries and retirement benefits they are entitled to under the law.

In *Cornish v. United States*, 112 Fed. Cl. 801 (Fed. Cl. 2013), the court found that an individual bankruptcy judge was entitled to back pay under the applicable statute. The court noted that the judge's cause of action was "a perfectly straightforward statutory claim" that was governed by "a plain reading of the controlling statutes." *Id.* at 805-06. The court found in favor of the bankruptcy judge and granted him net backpay and an adjusted salary going forward.

After *Cornish*, additional active and retired bankruptcy judges filed a class action to apply the holding from *Cornish* to all bankruptcy judges. In November 2014, the court entered judgment in favor of the plaintiffs, and directed the United States to make class-wide payments consistent with the holding in *Cornish*. *See* Judgment in *Houser v. United States*, Case No. 13-607C (Fed. Cl. Nov. 20, 2014).[7]

Similarly, in *Miller, et al. v. United States of America*, federal magistrate judges achieved a similar result under 28 U.S.C. § 634. During a status conference with the Court, counsel for the United States indicated that the government intended to include magistrates and other non-Article III judges in a claims process that was consistent with the holding in *Beer*. *See* Transcript [Doc. # 19] in *Miller, et al. v. United States of America*, Case No. 13-629 (Fed. Cl.).[8]

In addition to the federal bankruptcy and magistrate judges, comparable

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[7] LF 106.

[8] LF 133.

state-level judges whose pay is indexed to the federal standards also have prevailed in litigation. *Duncan-Peters, et al. v. United States of America*, Case No. 13-01888 (D.C.). Judges in the District of Columbia are paid "at the rate prescribed by law for judges of United States district courts." D.C. Code Ann. § 11-904. After *Beer* and *Barker*, a class of retired D.C. judges filed suit to have their retirement benefits adjusted based on the correct salary guidelines. The parties settled the litigation in favor of the plaintiffs.[9]

All told, more than half a dozen categories of judges whose pay is tied to that of Article III judges have sued for back pay and/or benefits pursuant to the correct federal calculations, and all have prevailed or reached a resolution favorable to the judges seeking compensation:

- *Cornish v. United States*, 112 Fed. Cl. 801 (Fed. Cl. 2013) – federal bankruptcy judges;
- *Houser v. United States*, No. 13-607C (Fed. Cl. Nov. 20, 2014) – federal bankruptcy judges (class action);
- *Miller v. United States*, No. 13-629 (Fed. Cl.) – federal magistrate judges;
- *Duncan-Peters v. United States*, No. 13-01888 (D.C.) – judges for the District of Columbia;
- *Smith v. United States*, No. 13-583 (Fed. Cl.) – judges of the Court of

[9] *See also* Zoe Tillman, *Retired D.C. Judges Settle Suit Over Pay*, The National Law Journal (Oct. 3, 2014). LF 144.

Federal Claims;

- *Baker v. United States*, No. 13-774 (Fed. Cl.) – judges of the U.S. Court of Appeals for the Armed Forces;
- *Gustafson, et al. v. United States*, Case No. 13-625 (Fed. Cl.) – judges of the U.S. Tax Court; and
- *Munson v. United States*, No. 13-1028 (Fed. Cl.) – judges of the Commonwealth of the Northern Mariana Islands, the Virgin Islands, and the Territory of Guam.[10]

Thus, every court that has considered a claim that is analogous to Appellants' claims in this case has reached the same conclusion: that the right to a fixed percentage of the federal judicial salaries is the right to a percentage of the full, *correct* salaries, mandated by law – not merely the deficient pay actually provided at the time in violation of the government's legal obligations.

Under the latter theory, advanced by Respondents before the trial court, Missouri judges would only be entitled to 69% or 73% of what federal judges were paid even if the federal government miscalculated federal judicial salaries to be one dollar. This is precisely the sort of "hyper-technical" construction that this

[10] For the Court's convenience, a chart of these cases, including the statutory basis for each, is included in the Appendix to this Brief at A62. To Appellants' knowledge, the judges of Missouri and the District of Columbia are the only non-federal judges whose compensation is indexed to Article III judges' compensation.

Court rejects. *Ben Hur Steel*, 452 S.W.3d at 626 (citing *Ivie*, 439 S.W.3d at 202).

Thus, federal and state judges who are paid under an index that uses similar language to the 2010 Schedule have prevailed in closely analogous litigation. Given that Missouri courts "may consider statutes with similar or related subject matter in determining a statute's meaning," the Court should reach a similar result here. *Maxwell v. Daviess County*, 190 S.W.3d 606, 611 (Mo. App. W.D. 2006) (citing *Cantwell v. Douglas County Clerk*, 988 S.W.2d 51, 55 (Mo. App. S.D. 1999)).

2. The Plain Language of the 2010 Schedule Supports Appellants' Claims.

Respondents' argument further confuses two concepts: (1) compensation owed for services with (2) the compensation paid during a given historical period.

The former is salary. *See* SALARY, Black's Law Dictionary (10th ed. 2014) ("An agreed compensation for services — esp. professional or semiprofessional services — usu. paid at regular intervals on a yearly basis, as distinguished from an hourly basis"); SALARY, Webster's Third New International Dictionary Unabridged (1961) ("fixed compensation paid regularly (as by the year, quarter, month, or week) for services"; or "remuneration for services given"); *see also* ACCRUED SALARY Black's Law Dictionary (10th ed. 2014) ("A salary that has been earned but not yet paid").

The latter, if anything, is income. *See* INCOME, Black's Law Dictionary (10th ed. 2014) ("The money or other form of payment that one receives, usu.

periodically, from employment, business, investments, royalties, gifts, and the like.").

Income is not relevant to this case because the 2010 Schedule speaks only of salary. The Schedule provides that, "for fiscal 2012 and 2013," Missouri circuit judges like Judge McGraw shall receive "73% of federal district court judge **salary**." 2010 Schedule at G-40 (emphasis added). It is undisputed that federal district judges have – after prevailing in their litigation – received salary for their services between 2012 and 2014. Thus, Missouri judges also are entitled to their full salary for the services they performed between 2012 and 2014.

Likewise, *Beer* speaks only of salary. As *Beer* makes clear, the payments owed to federal judges for 2012 and 2013 were agreed compensation under the 1989 Act. The Court there explained that the 1989 Act

> promised, in precise and definite terms, *salary* maintenance in exchange for prohibitions on a judge's ability to earn outside income. The 1989 Act set a clear formula for calculation and implementation of those maintaining adjustments. Thus, all sitting federal judges are entitled to expect that their real *salary* will not diminish due to inflation or the action or inaction of the other branches of Government [….]

Beer, 696 F.3d at 1184 (emphasis added). As the "agreed compensation for services" rendered in fiscal 2012 and 2013, there is no question that the federal

judicial salaries recognized in *Beer* are the salaries according to which Missouri judges' compensation should be calculated.

These federal salaries were owed under federal law (1) when the Commission proposed the Schedule in 2010; (2) when the Schedule became law in 2011; and (3) when Missouri judges began receiving payment under the 2010 Schedule in July 2012. Thus, the Court should reverse the trial court's judgment.

C. Defendants' Failure to Pay Plaintiffs Correctly from January 1, 2014 to June 30, 2014 Refutes Their Arguments for Dismissal.

In moving to dismiss, Respondents insisted that the 2010 Schedule was not violated because Missouri judges were correctly paid at the time based on the wages being paid to federal judges at the time. LF 40, 68. But federal judges received adjusted salary payments on January 1, 2014 – six months before Missouri implemented correct salaries for its judges.

Respondents' claim that the state government is incapable of implementing salary adjustments on any date other than July 1 of each year is unsubstantiated. Moreover, the 2010 Schedule makes no reference to the salaries of federal judges on July 1 of each year, but rather refers to the salaries of both state and federal judges on the fiscal year basis. In other words, the Schedule mandates that state judges receive, for fiscal years 2013 and beyond, a fixed percentage of what federal judges receive for fiscal years 2013 and beyond. Yet Missouri judges were not and still have not been paid the required percentage of the federal salaries due and paid from January 1 to June 30, 2014 – the second half of fiscal year 2014.

D. The Fiscal Year Schedule Does Not Bar Plaintiffs' Claims.

The trial court also erred in concluding that the State "has applied the 2010 pay schedule, consistent with the fiscal year system required by the Constitution." LF 191. Implicit in that conclusion is that because those fiscal years and the appropriations attached to them have expired, the State is constitutionally unable to provide back pay to Missouri's judges, and the case should be dismissed on the merits. This conclusion would appear to prohibit recovery even if the State admitted that back pay was owed under the 2010 Schedule.

In *DiCarlo*, this Court considered and rejected a similar argument. First, the Court noted that in the context of contracts, "[u]sually – perhaps always – an appropriation and authorization will have lapsed before a breach occurs and litigation can take place and be consummated." 485 S.W.2d at 57. Indeed, the same could be said for virtually all litigation against the State – under the State's theory, there would never be money available to satisfy judgments or pay claims against it.

Second, *DiCarlo* rejected the argument because it goes to collectability of a judgment – not whether suit may be brought in the first place. The Court stated:

> Courts usually to [sic] not examine the pocketbook of the defendant to determine whether a suit may be maintained. If a cause of action is stated and all necessary prerequisites to maintenance of such suit exist, the case is heard. Only if and when a judgment is

> rendered is attention given as to whether a judgment is collectible. The same should be true here.

Id. at 57. This analysis applies squarely to this case. As in *DiCarlo*, the Court should reject this argument and reverse the trial court's dismissal.

III. THE TRIAL COURT ERRED IN DISMISSING APPELLANTS' CLAIMS BECAUSE THE 2010 PAY SCHEDULE IS CONSTITUTIONAL, IN THAT: (1) THE SCHEDULE DOES NOT UNLAWFULLY DELEGATE STATE LEGISLATIVE POWER TO THE FEDERAL GOVERNMENT; (2) IT ADEQUATELY FIXES MISSOURI STATE JUDICIAL COMPENSATION; (3) IT DOES NOT CONFLICT WITH THE APPROPRIATIONS PROCESS SET FORTH IN MISSOURI'S CONSTITUTION; AND (4) IT WILL NOT RESULT IN UNLAWFUL RETROACTIVE COMPENSATION.

Though the trial court did not explicitly hold that the 2010 Schedule was unconstitutional, it is presumed to have ruled based on grounds raised in the motion to dismiss. *See Costa*, 274 S.W.3d at 462. Moreover, "[i]n reviewing the propriety of the trial court's dismissal of the petition, this Court considers the grounds raised in the defendant's motion to dismiss and does not consider matters outside the pleadings." *Foster*, 352 S.W.3d at 359.

In its motion to dismiss, MOSERS argued that the 2010 Schedule violated the Missouri Constitution because it (1) improperly delegated legislative authority to the federal government, and (2) did not adequately "fix" judicial salaries. The Court should reject both arguments.

MOSERS' constitutional arguments fail because even as it argues the 2010

Schedule is unconstitutional, MOSERS simultaneously asserts that payments to Missouri judges from 2012 to 2014 were lawful because they complied with the 2010 Schedule. MOSERS' position would also strip the Citizen's Commission of its power under Article III, § 3 to determine official compensation and thwart the express purpose of § 3 "to ensure that the power to control the rate of compensation of elected officials of this state is retained and exercised by the tax paying citizens of the state." Mo. Const. art. XIII, § 3.1.

MOSERS' reliance on the non-delegation doctrine is equally misplaced because it does *not* apply to the determination of judicial compensation, which is granted exclusively to taxpayers – not the legislature – in Article XIII, § 3. However, even if the doctrine did apply, it has **never** been invoked in Missouri to invalidate the kind of fiscal indexing contained in the 2010 Schedule.

Similarly, MOSERS' argument that the 2010 Schedule did not properly "fix" the compensation of judges rests upon a strained construction of the term "fix". Under MOSERS' logic, compensation is not "fixed" unless it is expressed as a discrete whole number that cannot change after the date the Schedule is fixed. LF 41. However, neither the history of compensation schedules nor any relevant definition or precedent support such a definition. A much more plausible interpretation is that a "fixed" rate of compensation is one that is definite, known, and precisely calculable at any given time – not only at the moment the Schedule is filed.

Finally, if there is a conflict between a compensation schedule and any

other provision or law, the compensation schedule prevails. Article XIII, § 3 – the enabling provision for the 2010 Schedule – states that it operates "notwithstanding" other provisions of the Missouri Constitution that may conflict with it. Even the Missouri Attorney General's Office – counsel of record for some Respondents – has endorsed this interpretation. See Opinion No. 76-2011, 2011 WL 1112865 (Mo. A.G. March 21, 2011). While the 2010 Schedule was not applied correctly, it was constitutional, lawful and enforceable, and Appellants are entitled to maintain their suit for relief.

A. MOSERS Has Not Met Its Burden to Prove the Schedule Unconstitutional.

"Statutes are presumed to be constitutional. Because of the presumption of constitutionality, the burden to prove a statute unconstitutional is upon the party bringing the challenge. [Courts] will not invalidate a statute 'unless it clearly and undoubtedly contravenes the constitution and plainly and palpably affronts fundamental law embodied in the constitution.'" *Lewis v. Gibbons*, 80 S.W.3d 461, 466 (Mo. banc. 2002) (quoting *In re Marriage of Kohring*, 999 S.W.2d 228, 231 (Mo. banc 1999)).

In evaluating a statute's constitutionality, courts "avoid the effect of unconstitutionality, if it is reasonably possible to do so" because "[i]t is a well-accepted canon of statutory construction that if one interpretation of a statute results in the statute being constitutional while another interpretation would cause it to be unconstitutional, the constitutional interpretation is presumed to have been

intended." *State ex rel. Union Elec. Co. v. Public Service Comm'n of State*, 399 S.W.3d 467, 481-82 (Mo. App. W.D. 2013) (internal citations omitted).This standard governs review of the 2010 Schedule, which is codified in the Revised Statutes of Missouri.

MOSERS cannot satisfy this substantial burden by arguing on one hand that the payments made to Missouri's judges from 2012 to 2014 were lawful because they complied with the 2010 Schedule, and on the other hand asserting that the 2010 Schedule is unconstitutional. "[U]nconstitutional law is the same as no law at all," *Merchants' Exch. of St. Louis*, 111 S.W. at 573, and compliance with the 2010 Schedule cannot refute further obligation if the Schedule itself is void.[11]

Moreover, as discussed below, the 2008 Schedule possesses the same attributes with which MOSERS finds constitutional fault in the 2010 and 2014 Schedules. Thus, if the Court adopts MOSERS' arguments, then all efforts of the Citizen's Commission to exercise their constitutional power over official

[11] MOSERS' constitutional challenges to the 2010 Schedule are not presented as "alternative" grounds for dismissal, but rather as points in support of the argument that it had correctly paid Missouri's judges based on the partial wages paid federal judges at the time.

compensation since the 2006 Amendment would be eviscerated.[12] It is this prospect, rather than the error charged, which "palpably affronts fundamental law embodied in the constitution." *Lewis*, 80 S.W.3d at 466.

B. The 2010 Schedule Does Not Improperly Delegate Legislative Power to the Federal Government.

Before the trial court, MOSERS argued that the 2010 Schedule improperly delegated the legislative power to determine judicial compensation to the federal government. However, the non-delegation doctrine does not apply to the power to determine judicial compensation because that power is granted exclusively to taxpayers in Article XIII, § 3.

The doctrine that the legislature cannot delegate its legislative power to

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[12] Article XIII, § 3 contains no provision for the last Schedule that MOSERS would deem constitutional – perhaps either the 2006 or 2008 Schedule – to be reinstated. Furthermore, the section contains no provision for the parts of the 2010 Schedule with which MOSERS takes issue – those that deal with judicial pay – to be severed from the parts of the Schedule providing for legislative and executive compensation. Thus, it is unclear how official compensation for the last seven to nine years, and the next two to three, would be determined if the Court strikes down the 2010 Schedule. MOSERS has not suggested a resolution for this question. To date, the Commission and the General Assembly have expressed nothing but approval for the 2010 Schedule.

other branches or bodies of government applies, by its very terms, to the legislature. Under Article III, § 1 of Missouri Constitution, the legislative power of the state of Missouri is vested in the General Assembly.

By contrast, "the power to control the rate of compensation of elected officials of this state" is granted to the Citizens' Commission under Article XIII, § 3. Therefore, it is not a legislative power that is subject to the non-delegation doctrine. That this power was once exercised by the legislature does not make it a "legislative power;" in fact, the adoption and operation of Article XIII, § 3 suggests the opposite. By that act, the citizens of Missouri amended their Constitution to remove the power from the legislature and confer it upon the Commission.

Thus, under Missouri law, the power to set compensation for state officers is no more inherently legislative than the power to commission state officers granted to the governor. *See* Mo. Const. art. IV, § 5. In both cases, such authority is not conferred by the General Assembly, is not governed by Article III, and is not exercised by the legislature. Thus, it is not a "legislative power."[13] The non-

[13] That the legislature retains the authority to reject a Compensation Schedule under Article XIII, § 3.8 underscores this conclusion. This constitutional "check" precisely defines the extent to which legislative power can be exercised in the compensation process. The General Assembly is wholly without power to propose, amend, condition, or decline to fund the terms of official compensation. Like the

delegation doctrine simply does not apply.

But even if the non-delegation doctrine did apply to a non-legislative body exercising non-legislative power, it would not invalidate the 2010 Schedule. Simply put, Missouri courts have never applied the non-delegation doctrine to invalidate the kind of fiscal indexing employed in the 2010 Schedule.

In *State v. Thompson*, 627 S.W.2d 298, 299-300 (Mo. banc 1982), the Supreme Court succinctly discussed the difference between relying on a federal benchmark versus improperly delegating authority:

> The legislature cannot delegate its power to make a law, **but it can make a law to delegate a power to determine some fact or state of things upon which the law makes**, or intends to make, its own action depend. To deny this would be to stop the wheels of government.

Id. at 303 (emphasis added).

In its motion to dismiss, MOSERS cited three Missouri cases holding that the challenged legislative actions did **not** unlawfully delegate legislative power. *See* LF 43-44; *Carter v. Dir. of Revenue, State of Mo.*, 805 S.W.2d 154, 159 (Mo.

Governor exercising the *executive* power to sign or veto a bill, this legislative check balances – because it is distinct from – the Commission's power to determine compensation in the first place.

banc 1991) (finding no delegation); *Thompson*, 627 S.W.2d at 302 (same); *Prof'l Houndsmen of Missouri, Inc. v. Cnty. of Boone*, 836 S.W.2d 17, 21 (Mo. App. W.D. 1992) (same).[14] While these cases discuss the non-delegation doctrine, none of them strike down the provisions at issue on that basis, and to do so here would be an unprecedented step in Missouri.

Thus, MOSERS has not cited a single Missouri decision invalidating a statute under the non-delegation doctrine. Given this Court's admonition that courts should, if possible, give statutes a constitutional interpretation, the Court should reject MOSERS' argument and uphold the 2010 Schedule. *See Missouri Prosecuting Attorneys v. Barton Cnty.*, 311 S.W.3d 737, 741 (Mo. banc 2010) ("Courts will enforce a statute unless it plainly and palpably affronts fundamental law embodied in the constitution," and "[d]oubts will be resolved in favor of the constitutionality of the statute.") (internal citations omitted).

This is particularly true where the Schedule is consistent with several Missouri statutes that incorporate federal benchmarks. The most closely analogous provision sets Missouri legislators' compensatory per diem at "eighty percent of

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[14] MOSERS' cases also are distinguishable because they involved police power, and "[t]he right to exercise police power cannot be delegated to private persons." *Prof'l Houndsmen*, 836 S.W.2d at 21 (concerning delegation in an ordinance to a private trade group) (internal quotation omitted); *Thompson*, 627 S.W.2d 298 (concerning delegation in a criminal statute).

the federal per diem established by the Internal Revenue Service for Jefferson City." RSMo § 21.145. Section 21.145 has never been challenged on non-delegation grounds, but was discussed favorably by this Court in *Weinstock*, 995 S.W.2d at 419, and found to comport with various constitutional provisions.

In addition to section 21.145, other federal standards that are incorporated in Missouri laws include:

- the sale of generic drugs, *see* RSMo § 338.056.1 (permitting the sale of generic drugs as determined by the FDA);
- coverage for medical expenses, *see* § 376.429.3 (requiring coverage for FDA approved drugs and devices);
- funding for non-profit organizations, *see* § 188.335 (establishing program and authorizing matching funds for certain organizations "exempt from income taxation pursuant to the United States Internal Revenue Code");
- eligibility for militia service, *see* § 41.050 (defining the organized militia to include all persons meeting the federal standards for membership);
- traffic safety regulations, *see* § 70.429 ("All interstate and intrastate United States Department of Transportation safety rules and regulations shall apply to all operations of the bi-state development transit system"); and
- the state minimum wage, *see* § 290.502.2 (prescribing adjustments to the state minimum wage according to the Consumer Price Index "or successor index as published by the U.S. Department of Labor or its successor

agency.").

Many of these provisions incorporate significantly more qualitative, discretionary standards than the federal judicial salaries indexed in the 2010 Schedule.[15]

Thus, if the Court strikes down the 2010 Schedule under the non-delegation doctrine – a move that would be unprecedented – that ruling would call into question numerous longstanding provisions of Missouri law and effect countless Missouri citizens. Accordingly, the Court should decline to expand the non-delegation doctrine to invalidate the 2010 Schedule.

MOSERS also objected to the indexing system because judicial salaries may change "without any further approval by the Commission, the General Assembly, or any other part of state government accountable to Missouri citizens." LF 47. Not so.

Under § 3(8), the Commission meets every two years to "review and study the relationship of compensation to the duties of all elected state officials" and

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[15] This is especially true considering that the "changes" in federal judicial salaries for fiscal years 2012 and 2013 were made according to the "mechanical, automatic process" and "clear formula for calculation and implementation" of COLAs set out in the 1989 Act. The only "prospective" variable in such calculations is the Employment Cost Index – hardly a matter of legislative determination.

"shall file its initial schedule of compensation" for consideration by the General Assembly.

If the Commission and the General Assembly fail to exercise oversight, there is yet another avenue for oversight because voters retain control over the Commission and its schedules of compensation. Under Article XIII, § 3(11), "Schedules filed by the commission shall be subject to referendum upon petition of the voters of this state in the same manner and under the same conditions as a bill enacted by the general assembly." Thus, even if the Commission and the legislature fail to fulfill their oversight role under the Constitution, Missouri voters retain the ability to exercise their oversight.

This, of course, demonstrates that Missouri has not "delegated" its authority to the federal government. To the contrary, it has retained its "power to make a law" – the standard articulated by this Court in *Thompson*. 627 S.W.2d at 299-300. The Court should reverse the trial court's judgment.

C. The 2010 Schedule Adequately "Fixes" Judicial Compensation.

1. The Commission Met Its Obligation Under Art. XIII, § 3.

In moving to dismiss, MOSERS also argued that the 2010 Schedule violated the Commission's duty under Article XIII, § 3 to "fix" the compensation of judges and other officials. This argument rests upon a strained construction of the term "fix," under which compensation is not "fixed" unless it is expressed as a discrete whole number that cannot change after the date the schedule is filed. LF 41. Neither the history of compensation schedules under Article XIII, § 3, nor any

relevant definition or precedent support this reading.

Since Article XIII, § 3 was approved by voters in 1994, the Citizens' Commission has filed eight schedules of compensation for public officials. 2010 Schedule at G-54. According to MOSERS' motion to dismiss, each schedule but those filed in 2010 and 2014 "proposed to fix judicial salaries at increased, specific amounts." LF 33; *see also* LF 42 ("In compliance with [Article XIII, § 3.8], the Commission set judicial salaries at definite and firm amounts in its prior schedules of compensation from 1996 to 2008.").

But the six schedules filed prior to 2010 have not expressed judicial salaries as a discrete whole number that did not change from the filing of the schedule to the date judges were paid. Three of the schedules – those filed in 1996, 2006, and 2008 – recommended that total judicial salaries vary according to the COLAs subsequently appropriated and approved either for judges specifically (1996) or for state workers generally (2006 and 2008). 2010 Schedule at G-54-55. Thus, in these years, the respective schedules did not even purport to establish absolute, permanent figures that would not change after the schedule was filed. *Id*..

In two other years, 2000 and 2002, the Commission recommended percentage (2000) or incremental (2002) increases, but the General Assembly disapproved the schedules and did not grant any COLAs, despite granting them to other state workers. *Id*.. In 1998, the schedule – the only one that consisted of "definite and firm amounts" and was not disapproved – the legislature appropriated funding at a rate less than that recommended. *Id*.. Thus, in each of

these years, the Commission's schedule did not reflect the salaries actually paid Missouri's judges.

In light of this history, the more plausible interpretation of § 3.8 is that it empowers the Commission to establish a rate of compensation that is definite, known, and precisely calculable at any given time – not only at the moment the schedule is filed. Under this reading, compensation from 1996-2008 was still "fixed" by the Schedules even if it remained subject to legislative modification or adjustments – in many cases, it was "fixed" to average state worker COLAs. *See Id*. at G-55. Likewise, compensation under the 2010 and 2014 Schedules is "fixed" even though it will predictably vary according to mandatory federal COLAs.

This interpretation comports with relevant definitions of "fix." "Fix" may be defined as "to make firm, stable, or stationary," or "to set or place definitely: establish," *see* FIX, Merriam-Webster's Collegiate Dictionary (11th ed. 2012), or to "[a]djust or regulate; determine; settle; make permanent," where the "[t]erm imports finality; stability; certainty; definiteness," *see* FIX Black's Law Dictionary 637 (6th ed. 1990).

Thus, compensation that is firmly, definitely, certainly pegged to a known quantity is "fixed." Indeed, one of the Commission's express purposes in tying state to federal judicial salaries was to devise "a more permanent means of determining judicial salaries in Missouri." 2010 Schedule at G-39.

That the Court of Federal Claims, in reviewing a closely analogous claim under a nearly identical statute, chose the word "fixed" to describe the salaries at

issue only underscores the point. *See Cornish*, 112 Fed. Cl. at 803 ("the salary of bankruptcy judges is ***fixed*** by statute to be 'equal to 92 percent of the salary of a judge of the district court of the United States'") (emphasis added). The Commission fulfilled its duties under Article XIII, § 3, and the 2010 Schedule is constitutional.[16]

2. The 2010 Schedule is Adequately Definite for the Appropriations Process.

Finally, Respondents' argument that a compensation schedule lawfully promulgated under Article XIII, § 3 remains unconstitutional because it conflicts with the appropriations provisions of the Constitution must fail.

MOSERS' argument reflects a misunderstanding of the appropriations process in Missouri because the process is, by definition, based on estimates. The budget process begins with the Governor's proposed budget, which is presented to

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[16] Like Article XIII, § 3, numerous Missouri statutes and the rules of this Court use the term "fix" in conjunction with setting compensation. *See* Supreme Court Rule 7.09 ("The Board of Governors shall **fix** the salary of the Executive Director."); RSMo § 27.020 ("The attorney general . . . shall **fix** the compensation of such assistants within the limits of the amount appropriated by the general assembly."); RSMo § 477.005 ("The supreme court . . . shall **fix** the compensation of persons thus employed within the limits of the amount appropriated by the general assembly for such purpose.").

the General Assembly. *See Missouri Health Care Ass'n v. Holden*, 89 S.W.3d 504, 507 (Mo. banc 2002). The proposed budget is based on "an estimate of revenues" that the State anticipates receiving during the upcoming fiscal year. *Id.* The estimate includes "the major portions of the general revenue fund **expected** to be available for appropriation." *Id.* (emphasis added). The money that is appropriated based on the estimates "is money that is expected, not money actually in the treasury. State finances, and its budget, are a dynamic process [and] corrections need to be made as actual revenues differ from estimates." *Id.* at 508. Thus, the entire budgeting and appropriation process is "dynamic" that is in no way undermined by the 2010 Schedule and its index to the federal salary benchmarks.[17]

Additionally, MOSERS' argument fails to consider the manner in which funds are appropriated. They are not, as MOSERS implies, a line by line appropriation that require a precise calculation for every judge or judicial position. Rather, funds are appropriated in large swaths for officeholders or agencies. For example, in the appropriations bill for Fiscal Year 2016 that the General Assembly is considered earlier this year, the judiciary's budget is expressed as a series of large transfers from a variety of funds – not as specific line items for particular

[17] Similarly, before each legislative session, each state department must submit the "**estimates** of its requirements for appropriations for the year . . ." RSMo. 33.220 (emphasis added).

judges or specific judicial positions. *See* House Bill No. 12 (98th General Assembly), sections 12.300 through 12.330.[18]

Considering the appropriations for the Auditor's Office – appropriations that are closely analogous to the judiciary's – courts have held that "[t]he appropriation itself is a general one, not limited to use for any particular program." *Schweich v. Nixon*, 408 S.W.3d 769, 778 (Mo. banc 2013). "Once appropriated, unless otherwise restricted by law, it is within the discretion of the office holder or agency to use the appropriation within the broad categories allowed by the bill." *Id.*

Because the judiciary's appropriation is general in nature, and because all Missouri appropriations are based on estimates, MOSERS' argument fails and the 2010 Schedule is sufficiently definite so as to give the legislature an adequate basis for preparing the State's budget. Before the trial court, MOSERS did not cite any cases or statutes to the contrary, and the Court should reject its argument.

Thus, any argument that the plain terms of the 2010 Schedule – or the payment of back wages pursuant to it – is invalid or impracticable under the constitutional appropriations process is erroneous.

D. Appellants' Claims Will Not Result in Unlawful Retroactive Compensation.

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[18] LF 147.

Without citing any authority, the State asserted before the trial court that enforcing the 2010 Schedule would violate Article III, § 39(3) of the Missouri Constitution, which states:

> The general assembly shall not have power [] to grant [] any extra compensation, fee or allowance to a public officer, agent, servant or contractor after service has been rendered . . .

On its face this provision applies only to the General Assembly – it does not limit the power of a court in the litigation context to issue an award in favor of an individual who has been denied her rightful compensation. Also, it applies only to "extra" compensation, and it does not implicate those situations where a governmental body has violated an already-existing compensation scheme.

The cases interpreting § 39(3) reflect why it is not applicable here. *See Sihnhold v. Missouri State Employees' Ret. Sys.*, 248 S.W.3d 596 (Mo. banc 2008) (refusing to apply a statute that lowered the ALJ retirement age to a former ALJ who left service before the statute was enacted); *State ex rel. Cleaveland v. Bond*, 518 S.W.2d 649 (Mo. 1975) (refusing to award benefits to a retired judge who sought benefits under a statute enacted after his retirement); *Police Ret. Sys. of Kansas City v. Kansas City*, 529 S.W.2d 388 (Mo. 1975) (rejecting a case filed by retired police officers under a statute enacted after they retired).

These cases clearly are distinguishable. In the case at bar, the method for calculating judicial salaries was in effect during the relevant time period, and the

proposed classes are limited to those individuals who rendered service during the relevant time period. This is not an effort by individuals to take advantage of a new or enhanced compensation plan; instead, it is an effort to enforce the compensation plan that was in place during their service.

E. Article XIII, § 3 Prevails Over Any Conflicting Constitutional Provisions.

Furthermore, even if there were a conflict between the 2010 Schedule and another provision of the Constitution, the former would prevail. Article XIII, § 3 – the enabling provision for the 2010 Schedule – states that it operates "notwithstanding" other provisions of the Missouri Constitution that may conflict with it. Phrases like "notwithstanding any other provision of law to the contrary" mean that the section containing it "overrides all provisions that would otherwise be applicable" and "eliminates conflict . . . because no other provisions of law can be held in conflict with it." *Kidde America, Inc. v. Director of Revenue*, 242 S.W.3d 709, 711-12 (Mo. *banc*. 2008) (quoting *State ex rel. City of Jennings v. Riley*, 236 S.W.3d 630, 632 (Mo. banc. 2007)).

In an Opinion Letter, the Missouri Attorney General's Office ("AGO") reinforced this concept, specifically as it related to Article XIII, § 3. In its Letter, the AGO considered whether a schedule of compensation adopted by the Commission violated another provision in the Missouri Constitution concerning mid-term increases in compensation for public officials. *See* Opinion No. 76-2011, 2011 WL 1112865 (Mo. A.G. March 21, 2011). The AGO opined that because

Article XIII, § 3 begins with the phrase "[o]ther provisions of this constitution to the contrary notwithstanding," then it controls over any other provision of the Constitution that conflicts with it.[19]

Because Article XIII, § 3 prevails over any conflicting constitutional provision, no purportedly conflicting provision could render the 2010 Schedule invalid. The Schedule is lawful and enforceable, and plaintiffs are entitled to maintain their suit for relief pursuant to it.

CONCLUSION

For the foregoing reasons, the judgment of the trial court should be REVERSED and the cause remanded for further proceedings.

DATED: October 22, 2015

Respectfully submitted,

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[19] The AGO also noted that because Article XIII, § 3 was enacted after the other provisions, it also would control. Opinion No. 76-2011, 2011 WL 1112865 at note 2 (citing *South Metropolitan Fire Protection Dist. v. City of Lee's Summit*, 278 S.W.3d 659, 666 (Mo. banc 2009) (where two provisions conflict, the latter is considered an exception to the earlier)). In this case, Article XIII, § 3 was enacted in 1994 – well after the other provisions that purportedly conflict with it. Thus, Article XIII, § 3 controls because it is the later-enacted provision.

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CERTIFICATE OF COMPLIANCE

I hereby certify that I have signed an original copy of this brief, to be maintained by me for a period of not less than the maximum allowable time to complete the appellate process, in compliance with Rule 55.03(a).

This brief complies with the limitations contained in Rule 84.06(b). This brief contains 14680 words.

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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of October 2015, the foregoing was sent by electronic mail and filed electronically with the Clerk of Court to be served by operation of the Court's filing system upon the following:

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