

IN THE SUPREME COURT OF MISSOURI

No. SC92750

**THOMAS A. SCHWEICH,
Missouri State Auditor,
Appellant/Cross-Respondent**

v.

**JEREMIAH W. NIXON,
Governor of the State of Missouri,
Respondent/Cross-Appellant**

**Appeal from the Circuit Court of Cole County, Missouri
The Honorable Jon E. Beetem, Judge**

**BRIEF OF APPELLANT/CROSS-RESPONDENT
THOMAS A. SCHWEICH**

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....1

JURISDICTIONAL STATEMENT.....4

STATEMENT OF FACTS.....5

POINTS RELIED ON.....12

SUMMARY OF THE ARGUMENT.....15

ARGUMENT.....21

I. The Trial Court Erred When It Held Respondent Could Rely Upon the "Control the Rate of Expenditures" Clause of Article IV, Section 27, of the Missouri Constitution, to Permanently Withhold Lawfully Appropriated Funds Before the Start of the Fiscal Year and While Actual Revenues Exceeded Estimates, In That the "Rate of Control Clause" of Article IV, Section 27, Is Intended as a Cash Flow Device to Control the Spending of Appropriations Over the Four Quarters of the Fiscal Year Without Reducing the Total Amount of the Appropriation Unless Actual Revenues for the Fiscal Year Come in Less Than the Revenue Estimates Upon Which the Budget is Based21

II. The Trial Court Erred in Ruling That Respondent Could Permanently Reduce FY 2012 Appropriations Under the Second Clause of Article IV, Section 27, of the Missouri Constitution Because There Was No Showing

by Respondent That Actual Revenues for FY 2012 Were Less Than Revenue Estimates for FY 2012 at the Time He Made the Reductions on June 10, 201131

III. The Trial Court Erred in Ruling That the Respondent Is Allowed to Follow Any Standard He Desires When Determining If There Is a Decrease of Revenue as Described in Article IV, Section 27, of the Missouri Constitution and Then Choosing Which Appropriations Are Reduced and the Amount of Those Reductions, In That Article IV, Section 13, of the Missouri Constitution and Sections 29.180, 29.200, and 29.235.1, RSMo, Require That Any Determination Respondent Makes That Actual Revenues for a Fiscal Year Are Less Than Budgeted Must Be Made and Documented with Specificity and in Accordance with Accounting and Audit Standards Established by Appellant and in Compliance with the Explicit and Implicit Requirements of the Budget Process as Provided in Article IV, Sections 23, 24, 25, 26, and 27, of the Missouri Constitution. [Addressing the trial court's ruling number 3 on page 2 of the judgment (LF 486-487) and its related ruling on page 4 of the judgment concerning Respondent's failure to follow Appellant's accounting systems (LF 488)] 35

CONCLUSION.....40

CERTIFICATE OF SERVICE AND COMPLIANCE42

TABLE OF AUTHORITIES

CASES

<i>Akin v. Missouri Gaming Commission,</i> 956 S.W.2d 956 S.W.2d 261(Mo. banc 1997)	25
<i>Barnes v. Bailey,</i> 706 S.W.2d 25 (Mo banc 1986).....	21, 26
<i>City of Jefferson v. Missouri Department of Natural Resources,</i> 863 S.W.2d 844 (Mo. App. 2002)	25
<i>Kelly v. Hanson,</i> 959 S.W.2d 107 (Mo. banc 1997).....	37
<i>Missouri Department of Highway and Transportation v. Missouri Department of Revenue,</i> 672 S.W.2d 953 (Mo. banc 1984)	25
<i>Missouri Health Care Association v. Holden,</i> 89 S.W.3d 504 (Mo. 2002).....	6, 11, 31
<i>State v. Mullenix,</i> 73 S.W.3d 32 (Mo. App. 2002)	7, 30
<i>State v. Beine,</i> 162 S.W.3d 483 (Mo. banc 2005).....	21
<i>State v. Toberman,</i> 250 S.W.2d 701 (Mo. banc 1952).....	21, 26, 31

State ex inf. Ashcroft ex rel. Bell v. City of Fulton,
642 S.W.2d 617 (Mo. banc 1982).....21

State ex inf. Dalton v. Dearing,
364 Mo. 475, 263 S.W.2d 381 (Mo. banc 1954).....21, 25, 26, 27

State ex rel. Knowles v. Reser,
633 S.W.2d 450 (Mo. App. 1982)39

State ex rel. Liberty School District v. Holden,
121 S.W.3d 232 (Mo. banc 2003).....31

State ex re. Sikeston R-VI School District v. Ashcroft,
828 S.W.2d 372 (Mo. banc 1992).....32

StopAquila.org v. City of Peculiar,
208 S.W.2d 895 (Mo. banc 2006).....25

STATUTES

§ 29.180.....36

§ 29.200.....9, 38

§ 29.235.1.....36, 37, 38

§ 33.290.....23, 39

Art. III, § 31, Mo. Const.26

Art. III, § 32, Mo. Const.27

Art. IV, § 13, Mo. Const.9, 36, 38

Art. IV, § 23, Mo. Const.5, 20, 24, 36, 40

Art. IV, § 24, Mo. Const.20, 36, 37, 38, 40

Art. IV, § 25, Mo. Const.20, 36, 37, 38, 40

Art. IV, § 26, Mo. Const.20, 27, 36, 37, 38

Art. IV, § 27, Mo. Const.passim

Art. IV, § 27(b), Mo. Const.....5

OTHER AUTHORITIES

Government Auditing Standards, issued by the Comptroller of the United States,
 section 7.03 (July 2007).....38

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JURISDICTIONAL STATEMENT

The case before the Court involves the interpretation and application of Article IV, Section 27, Missouri Constitution, in examining the constitutionality of the actions of Respondent in ordering withholds from the fiscal year 2012 state budget. Therefore, this Court has exclusive jurisdiction of the case pursuant to Article V, § 3 of the Missouri Constitution.

STATEMENT OF FACTS

On June 10, 2011, before fiscal year 2012 (hereinafter "FY 2012") began,¹ Respondent Governor issued an order withholding² over \$172.2 million dollars from the FY 2012 budget. (Legal File "LF" 15-19). On that day, Respondent exercised one line item veto of \$30,000 from general revenue, (LF 19, 416) but he signed into law the \$172.2 million at issue in this case. Respondent reallocated some of the withheld funds amongst other line items.³ (LF 15-17, 20, 463). Although FY 2012 had not yet started and revenue estimates had not changed (LF 422), Respondent withheld these funds, and the Missouri legislature had no opportunity to override Respondent's decision. (LF 66, ¶ 8).

¹ Article IV, Section 23, Missouri Constitution.

² "Withholds" and "expenditure restrictions" have the same meaning. (LF 431).

³ The \$172.2 million withheld was comprised of \$57.1 million in general revenues and \$115.1 from other specified non-general funds restricted for specific purposes. (LF 15-19, 414-416). In addition, another restriction from general revenue was made for the facilities maintenance and reserve fund (Article IV, Section 27b, Missouri Constitution) in the amount of \$56.3 million. (LF 17, 464). Thus total restrictions on general revenue were approximately \$113 million. For purposes of clarity and simplicity in this brief, Appellant focuses on the \$172.2 million in withholds depicted in the chart on LF 15-19.

As required by the Missouri Constitution, Respondent presented a draft budget to the legislature on January 19, 2011. (LF 110). This draft budget was based in large part upon a Consensus Revenue Estimate ["CRE"], which the legislature developed in conjunction with the governor and the Office of Administration. *Missouri Health Care Association v. Holden*, 89 S.W.3d 504, 507-508 (Mo. 2002); (LF 63, ¶ 3; LF 408). Respondent's budget director has acknowledged that the CRE is critical to the development of the budget. (LF 402-403). The FY 2012 CRE projected general revenue growth of 1.7% over FY 2011.⁴ Based upon this CRE, the legislature appropriated funds to various line items and voted to approve the FY 2012 budget before sending it to Respondent for approval or veto, as envisioned by Missouri law. (LF 63). As noted above, on June 10, 2011, Respondent vetoed one line item and signed the FY 2012 budget into law. (LF 415-416). That same day, Respondent announced his intent to withhold the \$172.2 million in appropriated funds. *Id.*

Although Missouri law allows the Governor to withhold appropriated funds when actual revenues fall short of revenue estimates, on June 10, 2011, the date Respondent announced the withholds, FY 2012 had not begun, and actual revenues from 2012 had not fallen short of revenue estimates. (LF 420-421). Moreover, during the first quarter of FY 2012, general revenue growth was 1.9% over FY 2011, in excess of the 1.7% projected by the FY 2012 CRE. (LF 58, ¶ 17; LF 64, ¶ 7; and LF audio exhibit D2), and on

⁴ This CRE was later revised to project a general revenue growth of 2.6%. (LF 404).

February 3, 2012, Respondent's budget director testified that she believed the upwardly-revised FY 2012 CRE would be met by the end of FY 2012.⁵ (LF 455-456).

Respondent failed to restore the vast majority of the FY 2012 appropriations he withheld, and the affected line items were not funded in accordance with the approved and enacted FY 2012 budget. For example, some line items received no funding at all in FY 2012, such as the Community Intervention Program, Area Education Centers, Alzheimer's Grants, (LF 16), while other line items were subjected to substantial reductions, such as \$700,000 from Domestic Violence Grants, \$800,000 from Crisis Care Services, \$ 1.6 million from Children's Treatment Services, \$2.5 million from Parents As Teachers (LF 15-16), \$1.9 million from Community Colleges/Linn State, \$14.9 million from four year college/university institutions and \$6 million from the courts. (LF 15-16).

When Respondent withheld the \$172.2 million in appropriated funds, he made his intent to make the withholds permanent and transfer this money to other line items clear in public statements. Respondent announced that he would "reserve \$25 million from

⁵ Appellant requests this Court take judicial notice that, according to the Office of Administration's website, final actual revenues for FY 2012 exceeded the revised CRE of 2.6% by approximately \$44 million (for a growth of 3.2%), as allowed by *State v. Mullenix*, 73 S.W.3d 32 (Mo. App. 2002) (Missouri courts have broad discretion in taking judicial notice and may take judicial notice of matters of common knowledge).

next year's budget to be used to address the immediate needs from the deadly tornado."⁶ Respondent further noted that this \$25 million was in addition to the \$25 million he had already "reserved" for flood disaster recovery.⁷ Respondent released an official statement saying, the "[m]oney for emergency response and cleanup will come from Missouri's FY 2012 budget, which begins on July 1."⁸

In fact, the amount spent by the state in FY 2012 for disaster relief fell far short of the withheld amount. According to the Respondent's budget director, by February 2012 there were still \$111 million in general revenue withholds for FY 2012 being held (LF 464-465), and only \$20 million had been spent in Joplin and other areas of the state for disaster relief. (LF 454, 466). Although Respondent publicly claimed this \$111 million was attributed to disaster relief, his budget director admitted the funds could be attributed to "a whole host of things". (LF 463).

Similarly, Respondent permanently withheld funds in Fiscal Year 2011. FY 2011 final revenues were only \$47 million below the consensus revenue estimate, leaving \$163.8 million in available revenue to fund appropriations though originally "restricted"

⁶ Office of Administration News, May 27, 2011.

http://oa.mo.gov/co/releases/2011/Gov_Nixon_Reserves_25_Million_for_Joplin_Tornado_Recovery (LF 20).

⁷ *Id.*

⁸ *Id.*

by Respondent. (LF 63, ¶ 4; LF 66, ¶ 7; LF 430-431). However, the Defendant did not restore those withheld funds of \$163.8 million to legislatively mandated programs, *Id.*

On June 27, 2011, Appellant began a regularly scheduled, constitutionally and legislatively mandated audit of the office of Respondent under Missouri Constitution Article IV, Section 13, and Section 29.200, RSMo. (LF 57, ¶ 12; LF 61, ¶ 3). As part of this process, Appellant's auditors met with Respondent's budget director on July 27, 2011, and asked for any and all documentation (e.g., in the form of spread sheets, cost analysis, revenue analysis and projections) that would provide a basis for Respondent's FY 2012 withholds and reallocations. (LF 57, ¶ 13; LF 62, ¶ 5). The budget director told the auditors that there was no formal documented withholding calculation and that no formula was used to establish withholding amounts. (LF 57, ¶ 14; LF 62, ¶ 5, LF). In the budget director's own words, she "did not provide any documents" related specifically to the FY2012 withholds. (LF 460; LF 106, ¶57).

The budget director also advised the auditors that there were no "figures" to support the reallocation of \$150 million for disaster relief. (LF 57, ¶ 14). The budget director also did not present to the auditors an estimate of the timing of the state's disaster relief obligations. (LF 57, ¶ 15). Nor did the budget director provide any documentation which indicated that FY 2012 revenue would be lower than the revenue estimates used as the basis for the FY 2012 budget which was enacted into law. (LF 62, ¶ 7).

Appellant drafted a letter report to Respondent (Auditor No. 2011-43) which raised constitutional and accounting concerns relative to Respondent's withholds and

reallocations for FY 2012. (LF 62, ¶ 17). In particular, the auditors noted concerns that Respondent had not complied with Article IV, Section 27 of the Missouri Constitution, which allows withholding only when actual revenues fall below projected revenues. *Id.* In the letter, Appellant encouraged Respondent to work with the legislature to resolve the constitutional and accounting issues presented by the withholds. (LF 24).

On August 18, 2011, Appellant's auditors met with Respondent's budget director and other representatives and reviewed this letter, and, on the next day, August 19, 2011, Appellant delivered his letter to Respondent. (LF 21-24). Respondent's reaction to the concerns expressed in the letter was that it is his "responsibility to balance the budget." (LF 62, ¶ 7).

Once it became clear that Respondent would not take corrective action in regards to the withholds, Appellant filed this declaratory judgment action on August 26, 2011, seeking a determination of the important constitutional issues raised in this matter. (LF 1, 6-24).

On June 28, 2012, the trial court agreed with Appellant in ruling that the Respondent has no authority to transfer withheld funds to other line items, but it ruled Respondent had the right to withhold funds under the "controlling the rate" clause of Article IV, Section 27. (LF 485-489). Appellant is appealing the portion of the court's split decision that held Respondent could withhold funds regardless of revenue estimates, along with Appellant's claim raised in the court below that Respondent cannot withhold funds prior to the start of a fiscal year since revenues had not, at that point, gone below

the CRE, and that Respondent's withholds were arbitrary and capricious since he failed to provide Appellant with any documentation in support of his withholds. (LF 490-495).

POINTS RELIED ON

- I. The Trial Court Erred When It Held Respondent Could Rely Upon the "Control the Rate of Expenditures" Clause of Article IV, Section 27, of the Missouri Constitution, to Permanently Withhold Lawfully Appropriated Funds Before the Start of the Fiscal Year and While Actual Revenues Exceeded Estimates, In That the "Rate of Control Clause" of Article IV, Section 27, Is Intended as a Cash Flow Device to Control the Spending of Appropriations Over the Four Quarters of the Fiscal Year Without Reducing the Total Amount of the Appropriation Unless Actual Revenues for the Fiscal Year Come in Less Than the Revenue Estimates Upon Which the Budget is Based.**

State v. Toberman,

250 S.W.2d 701, 705 (Mo. 1952)

State ex inf. Dalton v. Dearing,

263 S.W.2d 381, 385 (Mo. 1954).

StopAquila.org v. City of Peculiar,

208 S.W.2d 895, 902 (Mo. banc 2006)

II. The Trial Court Erred in Ruling That Respondent Could Permanently Reduce FY 2012 Appropriations Under the Second Clause of Article IV, Section 27, of the Missouri Constitution Because There Was No Showing by Respondent That Actual Revenues for FY 2012 Were Less Than Revenue Estimates for FY 2012 at the Time He Made the Reductions on June 10, 2011.

Missouri Health Care Association v. Holden,

89 S.W.3d 504 (Mo. 2002)

State ex rel. Liberty School District v. Holden,

121 S.W.3d 232 (Mo. banc 2003)

State ex re. Sikeston R-VI School District v. Ashcroft,

828 S.W.2d 372, 376 (Mo. banc 1992)

III. The Trial Court Erred in Ruling That the Respondent Is Allowed to Follow Any Standard He Desires When Determining If There Is a Decrease of Revenue as Described in Article IV, Section 27, of the Missouri Constitution and Then Choosing Which Appropriations Are Reduced and the Amount of Those Reductions, In That Article IV, Section 13, of the Missouri Constitution and Sections 29.180, 29.200, and 29.235.1, RSMo, Require That Any Determination Respondent Makes That Actual Revenues for a Fiscal Year Are Less Than

Budgeted Must Be Made and Documented with Specificity and in Accordance with Accounting and Audit Standards Established by Appellant and in Compliance with the Explicit and Implicit Requirements of the Budget Process as Provided in Article IV, Sections 23, 24, 25, 26, and 27, of the Missouri Constitution. [Addressing the trial court's ruling number 3 on page 2 of the judgment (LF 486-487) and its related ruling on page 4 of the judgment concerning Respondent's failure to follow Appellant's accounting systems (LF 488)].

Kelly v. Hanson,

959 S.W.2d 107 (Mo. banc 1997)

State ex rel. Knowles v. Reser,

633 S.W.2d 450 (Mo. App. 1982)

§ 29.180, RSMo

SUMMARY OF THE ARGUMENT

The governor may control the rate at which any appropriation is expended during the period of appropriation by allotment or other means, and may reduce the expenditures of the state or any of its agencies below their appropriations whenever the actual revenues are less than the revenue estimates upon which the appropriation is based.

Article IV, Section 27, Constitution of Missouri (emphasis added).

On its face, Article IV, Section 27, is a simple, but important, cash flow device for the state of Missouri. The first clause allows the governor to allocate resources during the fiscal year to ensure that there are sufficient funds available for the programs authorized by the legislature and signed into law by the governor. The second clause allows the governor to reduce appropriations permanently when actual revenues come in below estimates.⁹ In this way, the governor may ensure that the state remains solvent throughout the fiscal year, and that the state budget remains in balance at the end of the fiscal year. Appellant does not dispute the need for the governor of Missouri to have such authority.

⁹ Reductions may also be temporary under this clause. In the event actual revenues "catch up" during the fiscal year and ultimately meet or exceed estimates, the withheld funds should be restored, as the necessary condition of actual revenues falling short of revenue estimates would no longer be met.

However, Respondent Governor Jeremiah W. "Jay" Nixon, has severely distorted the plain language and purpose of this provision to justify selective and permanent withholds of lawfully appropriated funds, regardless of actual revenues, and then to transfer those funds to other programs in excess of their lawful appropriations. In effect, Respondent claims he has unchecked authority to rewrite the Missouri budget. Nothing in the constitutional language cited above permits such actions, and no other governor has ever attempted this unlawful usurpation of the constitutional powers of the Missouri legislature. Specifically, in fiscal year 2012 (hereinafter, "FY 2012"), Respondent violated the Missouri Constitution, Article IV, Section 27, by permanently eliminating nearly \$170 million lawfully appropriated by the Missouri legislature (and signed into law by the governor) for students, the elderly, children, the judiciary, the legislature, the state auditor, and others. Respondent eliminated these appropriations before the fiscal year began—when there were no "actual revenues"—and then refused to restore the funds when actual revenues were exceeding estimated revenues—a further violation of Article IV, Section 27. The governor ran afoul of the Missouri Constitution yet again when he attempted to transfer the funds he eliminated from lawful appropriations to other budget line items—in excess of the lawfully appropriated amounts. Finally, Respondent further violated the Missouri Constitution by failing to provide any data to support his budgetary decisions.

The trial court concluded that the first set of actions—permanent withholds regardless of actual revenues—was lawful, but that the second set of actions—transfers in

excess of appropriated amounts—was unlawful and unconstitutional. Appellant contends that all of Respondent's actions with respect to these withholds were unconstitutional. Permitting these actions to stand would render the legislature an advisory body, destroying the separation of powers in Missouri. It would also give the governor unlimited authority to eliminate programs and appropriations he does not like without vetoing them, thereby depriving the legislature of its constitutional ability to override a veto. Finally, upholding Respondent's interpretation of Article IV, Section 27, would permit him to defund other branches of government, including the judiciary, the legislature, and the state auditor—all of which had lawfully appropriated funds eliminated in FY 2012—even when actual revenues came in above estimates. To allow a governor—now or in the future— unlimited authority to rewrite the Missouri budget and "zero out" or reduce other branches of government—regardless of revenue—would set a very dangerous precedent.

The theory by which Respondent attempts to justify his unconstitutional actions is both simple and simply flawed. He claims that the first clause of Article IV, Section 27, which authorizes him to "control the rate at which any appropriation is expended," means that he can eliminate any expenditure he wants and reallocate it to another budget item without the limitation that actual revenues be less than estimates. He believes this right exists independent of the second clause of Article IV, Section 27, which ties permanent reductions to revenue shortfalls. The flaws in this argument are obvious:

First, if the governor may "control the rate" of expenditure of an appropriation down to zero, he is no longer controlling the "rate", he is eliminating the appropriation. The word "rate" becomes meaningless. As discussed more fully in the argument below, Courts will not read a statute or constitutional provision in a manner that renders a word meaningless.

Second, if he can "control the rate" permanently and without limitation (i.e., without regard to actual revenues), the second clause of Article IV, Section 27—which ties permanent reductions to revenue shortfalls—also becomes meaningless. Courts will also not read a statute or constitutional provision in a manner that renders entire clauses meaningless.

Third, if the governor can simply eliminate an appropriation after he signs it into law, he has unlawfully circumvented the legislative process, rendering his veto power unnecessary, and, more importantly, preventing the legislature from exercising its constitutional authority to override a veto. Why would a governor veto anything when he can simply withhold all the funds and avoid the possibility of an override?

Fourth, such an imbalance of power in favor of a governor, would give him complete authority to punish other branches of government without any recourse for the affected entities. In the present case, for example, the legislature appropriated FY 2012 funds for the elderly, students, the University of Missouri, the judiciary, the legislature, and the state auditor. The governor—prior to the start of the fiscal year and with no

actual revenues upon which to judge the fiscal condition of the state—withheld millions of dollars from these entities, but, ironically, withheld no funds from his own office. He never restored these withheld funds, even when there was sufficient revenue to do so. The potential for abuse is obvious and disturbing.

Fifth, the governor claimed he needed to withhold the sums to pay for disaster relief—in excess of appropriated sums for this purpose. As the trial court correctly held, nothing in Article IV, Section 27, permits the governor to **exceed** a lawful appropriation any more than he can eliminate one. There exist numerous other lawful means to fully fund disaster relief (e.g., special appropriations, the Rainy Day fund).

Sixth, it is factually undisputed that the governor failed to use most of the withheld FY 2012 monies for disaster relief, and yet he still refused to restore the withheld funds—giving him an extra-legislative "slush fund" with no associated appropriation. He did exactly the same thing in fiscal year 2011.

As discussed more fully below, this Court has addressed the issue of withholds in the past and upheld them only when actual revenues came in below estimates. In short, this Court has recognized that Article IV, Section 27, is a crucial cash flow device for the governor—but nothing more. Appellant asks only that the Court reaffirm these important limitations on the power of the governor, and that this Court uphold the delicate balance of powers provided for in our Constitution.

Finally, the trial court erroneously ruled that the governor may use any standard he desires in reducing appropriations that have been passed by the legislature and approved, not vetoed, by the governor. While the governor may choose which appropriations to reduce when actual revenue does come in less than estimated, the trial court only vaguely addressed the precise issue raised by Appellant—that Respondent must follow generally accepted accounting principles and audit standards set by Appellant under Sections 29.180 and 29.235.1, RSMo, and in compliance with the implicit requirements of specificity and detail required under Article IV, Sections 23, 24, 25, 26, and 27, in making and documenting those choices. Respondent's failure to follow those accounting principles and audit standards and comply with the constitutional requirements for specificity and detail in making the withholds was an arbitrary, capricious, and unconstitutional exercise of his discretion.

For all these reasons, the trial court's rulings that Respondent could: (1) withhold funds under the rate of control clause regardless of revenue estimates, (2) withhold funds prior to the start of a fiscal year even if revenues had not, at that point, gone below revenue estimates, and (3) make these withholds without following accepted fiscal principles and with no documentation in support of his withholds, should be reversed.

ARGUMENT

Standard of Review

As with any court-tried case involving interpretation of a constitutional provision, "[t]his Court reviews the trial court's interpretation of the Missouri Constitution de novo. *State v. Beine*, 162 S.W.3d 483, 490 (Mo. banc 2005). In general, constitutional provisions are subject to the same rules of construction as other laws, except that constitutional provisions are given a broader construction due to their more permanent character. *State ex inf. Ashcroft ex rel. Bell v. City of Fulton*, 642 S.W.2d 617, 620 (Mo. banc 1982). "[C]onstitutional provisions are to be construed as mandatory unless, by express provision or by necessary implication, a different intention is manifest." *State ex inf. Dalton v. Dearing*, 263 S.W.2d 381, 385 (Mo. 1954).

Additionally, clauses in a constitutional provision must be read together and in a complementary fashion, *State v. Toberman*, 250 S.W.2d 701, 705 (Mo. 1952); *Barnes v. Bailey*, 706 S.W.2d 25, 28 (Mo. banc 1986), so as not to render one part of the sentence meaningless, or have it be subsumed by the other. *Id.*

I. The Trial Court Erred When It Held Respondent Could Rely Upon the "Control the Rate of Expenditures" Clause of Article IV, Section 27, of the Missouri Constitution, to Permanently Withhold Lawfully Appropriated Funds Before the Start of the Fiscal Year and While Actual Revenues Exceeded Estimates, In That the "Rate of Control

Clause" of Article IV, Section 27, Is Intended as a Cash Flow Device to Control the Spending of Appropriations Over the Four Quarters of the Fiscal Year Without Reducing the Total Amount of the Appropriation Unless Actual Revenues for the Fiscal Year Come in Less Than the Revenue Estimates Upon Which the Budget is Based.

Article IV, Section 27, of the Missouri Constitution provides the governor with two necessary and distinct means to ensure the state does not expend more than it actually receives in revenues. It provides:

The governor may control the rate at which any appropriation is expended during the period of appropriation by allotment or other means, and may reduce the expenditures of the state or any of its agencies below their appropriations whenever the actual revenues are less than the revenue estimates upon which the appropriation is based.

Article IV, Section 27, Missouri Constitution.

The first clause of Article IV, Section 27, gives the governor the ability to manage one type of cash flow issue—liabilities incurred in advance of receiving revenues. Legislatively authorized appropriations signed into law by the governor (i.e., not vetoed) are akin to accrued liabilities to be paid before the end of the fiscal year. As a good financial manager, the governor then distributes appropriated funds at a rate that ensures

adequate cash is available. He may do this by "allotment or other means."¹⁰ Otherwise, agencies could spend all of their appropriated funds at the beginning of the fiscal year, long before some of the expected revenues have actually materialized.

The second clause of Article IV, Section 27, authorizes the governor to address a separate cash flow issue—a situation where actual revenues are coming in below estimates and a real risk exists that actual revenues may fall short at year-end. As the fiscal year progresses, the governor monitors actual revenues received, and, if actual

¹⁰ In recognition of this need, the legislature enacted Section 33.290, RSMo, outlining the allotment process. This statute provides that allotments are to be made on a quarterly basis and that the governor may only reduce an allotment after the first quarter of the fiscal year: "if it shall appear that revenues in any fund for the fiscal year will fall below the estimated revenues for such fund to such extent that the total revenues of such fund will be less than the appropriations from such fund, then and in such case, the governor shall reduce the allotments." In other words, the full appropriation must be divided into four quarters and these allotments can only be reduced if, after the first quarter of the fiscal year, it appears actual revenues will fall short of estimates. In the present case, however, Respondent withheld appropriated funds before even calculating the allotments for each quarter and long before first quarter revenues were reported, though his budget director purports to rely upon the allotment statute. (LF 440-444).

revenues fall short of revenue estimates, the governor may permanently reduce the amount of some appropriations, commonly referred to as "withholding." (LF 431).

As written, and as intended,¹¹ the two provisions of Article IV, Section 27, are critical tools to keep Missouri solvent and keep Missouri's budget balanced. However, in the present case, it is Respondent Governor Jeremiah W. "Jay" Nixon's application that has flagrantly misused these provisions to circumvent the legislature and rewrite a budget he signed into law. Appellant respectfully requests that this Court prevent this violation of the Missouri Constitution.

The trial court held that Respondent has unlimited authority to withhold appropriations regardless of actual revenues but that he may not transfer the withheld funds to anything else.¹² In effect, the trial court has held the governor may seize any

¹¹ See *Missouri Health Care Association v. Holden*, *supra* at 506 (citing Constitutional Convention discussion of Article IV, Section 27, as a budgetary control device).

¹² Specifically, the trial court found Respondent could not transfer funds to "E" appropriations in excess of the numerical amount specified, as that would "amend the amount of the appropriation in contravention of the constitutional scheme for budgeting," which requires "[e]ach appropriation law shall distinctly specify the amount and purpose of the appropriation..." Article IV, Section 23. (LF 487-488). It follows that transferring funds to a non-"E" appropriation in excess of its specified numerical amount would likewise unconstitutionally "amend the amount of the appropriation."

sum of appropriated monies and do nothing with the funds. This cannot be the law. *See StopAquila.org v. City of Peculiar*, 208 S.W.2d 895, 902 (Mo. banc 2006), *citing Akin v. Missouri Gaming Commission*, 956 S.W.2d 956 S.W.2d 261, 263 (Mo. banc 1997), *quoting State ex inf. Dalton v. Dearing, supra* at 385 (holding that every word in the Constitution is to be "expounded in its plain, obvious, and **common-sense** meaning.") (emphasis added).

More specifically, if the trial court's ruling is upheld, the word "rate" has been effectively excised from the Missouri Constitution. Respondent relies on the "control the rate" provision to eliminate appropriations, and, in fiscal year 2012 (hereinafter "FY 2012"), he eliminated several programs by "controlling the rate" to zero. For example, the Community Intervention Program, Area Education Centers, and Alzheimer's Grants received none of their FY 2012 appropriations because of Respondents unlawful withholds. (LF 16).

Words used in the Constitution are to be given their plain and ordinary meaning, and each word is to be given some meaning. *City of Jefferson v. Missouri Department of Natural Resources*, 863 S.W.2d 844, 850 (Mo. App. 2002); *Missouri Department of Highway and Transportation v. Missouri Department of Revenue*, 672 S.W.2d 953 (Mo. banc 1984). The word "rate" is synonymous with "a fixed ratio" of payment over time. Merriam Webster, Online, Available: <http://dictionary.reference.com/browse/rate?s=t> [20 Nov. 2012]. As such, the governor is authorized to control the pace or progress of expenditures.

Allowing the governor to "control the rate of expenditures" to zero, functionally excises the word "rate" and allows the governor to completely "control expenditures." "[C]onstitutional provisions are to be construed as mandatory unless, by express provision or by necessary implication, a different intention is manifest," *State ex inf. Dalton v. Dearing, supra* at 385, and courts will not read a statute or constitutional provision in a manner that renders a word meaningless. The trial court's ruling, and Respondent's position on appeal, however, functionally eliminates the word "rate" from Article IV, Section 27.

Moreover, if the governor can "control the rate" of an appropriation to zero, then there is no need for the second provision of Article IV, Section 27. By holding that the governor can rely upon the first clause of Article IV, Section 27, to permanently withhold an appropriation, even when actual revenues meet or exceed estimates, the trial court conflates the two provisions of Article IV, Section 27, rendering the second provision superfluous. It is well-settled that clauses in a constitutional provision must be read together and in a complementary fashion, *State v. Toberman, supra* at 705; *Barnes v. Bailey, supra* at 28, so as not to render one part of the sentence meaningless, or have it be subsumed by the other. *Id.* Yet, the trial court's ruling does just that.

Not only does the trial court's interpretation render a word and a clause moot, it guts the legislature's constitutional duty to approve the budget and prevents it from exercising its constitutional right to override a gubernatorial veto. Pursuant to Article III, Section 31, Missouri Constitution, the legislature approves the budget and sends it to the

governor for approval. Once approved by the legislature, the governor has two choices: (1) sign the budget into law, or (2) veto some or all of the various appropriations and sign the remainder into law. Article IV, Section 26. If the governor vetoes one or more line items, the legislature has the ability to override the veto(es) if it can muster at least a 2/3 majority. Article III, Section 32. As noted above, constitutional provisions are mandatory, *State ex inf. Dalton v. Dearing, supra* at 385, yet the trial court has handed the governor an end-run around these checks and balances. If the trial court's ruling is allowed to stand, no governor, now or in the future, is going to risk a legislative veto override when he can "control the rate of expenditures" to permanently rewrite the budget with impunity.

"Let me issue and control a nation's money and I care not who writes the laws," said Mayer Amschel Rothschild.¹³ Hailed as the "founding father of international finance," Mayer Rothschild understood that the ability to control the funds of a sovereign is the ability to control the sovereign.¹⁴ Yet the trial court's ruling gives the current governor, and all future governors, carte blanche singlehandedly to fund or defund

¹³The Money Masters, Online, 2012. Available: <http://www.themoneymasters.com/the-money-masters/famous-quotations-on-banking/> [20 Nov. 2012].

¹⁴Forbes, Online, 2012. Available: <http://www.forbes.com/sites/karstenstrauss/2012/06/18/the-greatest-early-startups-teams-ever-part-1/2/> [20 Nov. 2012].

offices, agencies and programs at will, and, therefore, the power singlehandedly to control the state.

If Respondent's actions are upheld, the current and future governors will be able to punish other branches of government, political rivals, and disfavored programs in any way that suits them. If the state auditor determines a comparative audit would be beneficial to the state, and the legislature agrees, the governor can singlehandedly squelch it; if the court determines it needs a new document management system, and the legislature agrees, the governor can unilaterally prevent it; if the treasurer determines he needs a new unclaimed property tool, and the legislature agrees, the governor can still thwart it if he so chooses; if the University of Missouri needs a higher appropriation, and the legislature agrees, the governor can singlehandedly reduce it to punish the University for raising tuition against his will.

In FY 2012, Respondent curtailed the activities of several offices, withholding more than \$600,000 from the legislature, \$300,000 from Appellant's office, and \$6 million from the Missouri judiciary—approximately 3.5% of its budget, but he withheld nothing from his own office's budget or those of statewide-elected officials belonging to Respondent's political party. (LF 16-17; LF 55-57, ¶ 3-11; LF 64, ¶ 8). Likewise, Respondent punished many educational and social services programs by withholding FY 2012 funds from: Parents as Teachers, Bright Flight College Scholarships, Access Missouri Scholarships, community colleges, state universities, Medicaid, Domestic

Violence Grants, Alzheimer's grants, Missouri Department of Transportation (MoDOT), school transportation, Office of Child Advocate, Area Agency on Aging Grants, and Children's Treatment Services. (LF 15-17, 67-70).

While the trial court correctly held Respondent cannot transfer the withheld funds to other appropriations, its ruling enables Respondent to continue his practice of amassing extra-legislative "slush funds." This is unworkable. According to the trial court, the governor can restrict any amount of any or all appropriations, but he cannot transfer the funds to other appropriations—leaving the governor with a large pot of money not attributed to any appropriation. In FY 2012, he withheld over \$170 million and did not restore it even though actual revenues were on target to meet or exceed the Consensus Revenue Estimate (hereinafter, "CRE")¹⁵—even the upwardly-revised CRE.¹⁶

¹⁵ Respondent withheld \$57.1 million from the General Revenue Fund and \$115.1 million from various restricted funds. (LF 15-19, 414-416). Respondent "restricted" another \$56.3 million in general revenue from the facilities and maintenance reserve fund. (LF 17, 464). Respondent released only approximately 4% of the announced \$172.2 million in FY 2012 withholds. As of February 3, 2012, Respondent had released only \$2 million of the FY 2012 withholds (LF 464-465), and, if the court chooses to take judicial notice of it, according to his official website, he released another \$5.3 million on February 29, 2012.

Likewise, in fiscal year 2011 (hereinafter, "FY 2011"), Respondent withheld and never restored \$163.8 million more than was needed to balance the budget (LF 63, ¶ 4; LF 66, ¶ 7). The trial court's ruling allows the current and future governors to amass huge sums of public monies with no oversight and outside the purview of the legislature. Missouri law neither contemplates nor condones such authority, and this Court should not allow it. Respondent's permanent withholding of lawfully appropriated funds, and his failure to restore those funds even though actual revenues were not less than the revenue estimates, under the guise of "controlling the rate of expenditures" violated Article IV, Section 27. Therefore, the trial court's holding should be reversed.

http://governor.mo.gov/newsroom/2012/Gov_Nixon_makes_available_more_than_5_million_in_additional_education_funds.

¹⁶ In *State v. Mullenix*, 73 S.W.3d 32 (Mo. App. 2002), the Court of Appeals noted that Missouri courts have broad discretion in taking judicial notice and may take judicial notice of matters of common knowledge. As such, Appellant requests this Court take judicial notice that, according to the Office of Administration's website, final actual revenues for FY 2012 exceeded the revised CRE of 2.6% by approximately \$44 million (for a growth of 3.2%), yet Respondent did not restore nearly \$170 million in FY 2012 withholds.

II. The Trial Court Erred in Ruling That Respondent Could Permanently Reduce FY 2012 Appropriations Under the Second Clause of Article IV, Section 27, of the Missouri Constitution Because There Was No Showing by Respondent That Actual Revenues for FY 2012 Were Less Than Revenue Estimates for FY 2012 at the Time He Made the Reductions on June 10, 2011.

Respondent's actions are also unconstitutional under the second clause of Article IV, Section 27. The second clause of Article IV, Section 27, allows the governor to permanently withhold appropriated funds, but it limits this power to situations when "**actual** revenues are less than the revenue estimates upon which the appropriations were based." (emphasis added). The framers of the 1945 Constitution clearly established a condition that must be met before the governor can permanently withhold funds, and, where the spirit and intent of the instrument can be clearly ascertained, that effect should be given to it. *State v. Toberman, supra* at 705.

This Court has upheld such permanent withholds by governors of both parties in past years, but only in cases involving actual revenues coming in below the CRE for that fiscal year. *See State ex rel. Liberty School District v. Holden*, 121 S.W.3d 232, 233 (Mo. banc 2003) ("The parties do not dispute that actual revenues are less than the estimates."); *Missouri Health Care Association v. Holden, supra* at 512 ("In January 2002, during fiscal year 2002, the Governor and the General Assembly developed a new

consensus revenue estimate for that current fiscal year of \$6.419 billion, approximately \$400 million less than the earlier consensus revenue estimate." at page 510. "By various measures- over-all revenue as well as the state's general revenue fund- the state's revenues were less than anticipated." at page 512); *State ex re. Sikeston R-VI School District v. Ashcroft*, 828 S.W.2d 372, 376 (Mo. banc 1992) ("In this case the parties have stipulated that the state had received \$1,612,500,000 in general revenue by November 30, 1991, and that the revenue expected by that date was \$1,736,700,000, a short-fall of \$124,200,400.").

It was clear from the outset that Respondent's decision to withhold over \$170 million had nothing to do with "actual" revenues. Respondent announced his permanent withholds for FY 2012 **before the start of the fiscal year**, when "actual" revenues cannot, by definition, be less than estimates. (LF 420-421). On June 10, 2011, the same day Respondent signed the FY 2012 budget into law, he announced his intention to "restrict" over \$170 million lawfully appropriated funds. (LF 5-19, 415). At the same time, Respondent clearly evidenced his intention to make these restrictions permanent in the "Comments" section of Exhibit A of Respondent's "FY 2012 Budget Expenditure Restriction/Line Item Vetoes."¹⁷ Likewise, Respondent made clear that these reductions

¹⁷ E.g., "returns funding to 7% decrease"; "restriction returns funding to \$0"; "provides same level of funding as in FY11"; "net reduction to the House of Representatives and Senate 4.6 %." (LF 15-19).

were permanent in two subsequent pronouncements. On July 15, 2011, the Office of Administration, Division of Budget and Planning issued the Fiscal Year 2013 Budget Instructions to state agencies which said "[D]epartments need to submit budget requests that **make permanent their June expenditure restriction amounts for Fiscal Year 2012.**" (emphasis added) (LF 58-59). Later, during a media interview, Respondent's budget director stated that she hoped there would be **no further** FY 2012 budget restrictions since revenue was coming in on target for the first quarter of the fiscal year. (LF 58, ¶ 17; LF audio exhibit D2). Respondent's intent to make these restrictions permanent from the outset is further evidenced by the more than \$163.8 million he withheld and then failed to restore in FY 2011. (LF 63, ¶ 4; LF 66, ¶ 7; LF 430-431).

Revenue collections for the first quarter of FY 2012 showed a growth of 1.9%, as acknowledged by the Office of Administration. (LF 58, ¶ 17; LF 64, ¶ 7). Moreover, while the original agreed-upon CRE for FY 2012 at the time the budget was passed was 1.7% growth over FY 2011, as the governor and legislature worked on the FY 2013 budget in late 2011 and early 2012, long after FY 2012 began, they agreed to revise the FY 2012 CRE upward to 2.7% growth over FY 2011. (LF 404, 455).¹⁸

Respondent claimed he needed to withhold these appropriated funds in order to address the costs of recovery from several natural disasters, including the tornado that

¹⁸ Even the upwardly-revised CRE was surpassed by the end of FY 2012, as noted in footnote 16.

decimated Joplin, Missouri on May 22, 2011. (LF 20). Like all Missourians, Appellant agrees disaster relief must be fully funded; however, there are many lawful ways to accomplish this important objective. No matter how noble the reason Respondent gives for his permanent withholds, he cannot overcome the fact that the Missouri Constitution only allows him to permanently withhold appropriations when actual revenues are below the revenue estimates. It does not say a governor can reduce expenditures below appropriations when there is an increase in unbudgeted, un-appropriated expenditures to state government.¹⁹ Respondent can no more lawfully add phrases to the Constitution than he can lawfully delete them. In order for Respondent to withhold appropriations, "actual" revenues must be less than revenues estimates, and this surely cannot happen before the start of a fiscal year.

Moreover, despite permanently withholding nearly \$170 million in appropriated funds and publicly declaring that \$50 million was being diverted for disaster relief (LF 20), as late as February 2012, only \$20 million had been spent in Joplin and other areas of the state for disaster relief. (LF 454, 466). So, FY 2012 revenue growth exceeded the highest CRE, and disaster relief expenditures totaled only \$20 million, yet Respondent did not restore the withheld appropriations.

¹⁹ There are lawful means to address unbudgeted expenditures during a fiscal year, including the special appropriations process and the use of the Rainy Day Fund. (LF 23).

As discussed more fully in section I above, if a governor can simply eliminate an appropriation after he signs it into law via a withhold with no regard to actual revenues, he violates the separation of powers, circumvents the legislative appropriations process, and deprives the legislature of its constitutional authority to override a veto. To allow a governor—now or in the future—unlimited authority to rewrite the budget and "zero out" other branches of government—regardless of revenue—would set a dangerous precedent.

Respondent's elimination of appropriations before the fiscal year began when there were no "actual revenues" and his refusal to restore those funds when actual revenues exceeded estimated revenues demonstrates that Respondent violated Article IV, Section 27. Therefore, the trial court's holding should be reversed.

III. The Trial Court Erred in Ruling That the Respondent Is Allowed to Follow Any Standard He Desires When Determining If There Is a Decrease of Revenue as Described in Article IV, Section 27, of the Missouri Constitution and Then Choosing Which Appropriations Are Reduced and the Amount of Those Reductions, In That Article IV, Section 13, of the Missouri Constitution and Sections 29.180, 29.200, and 29.235.1, RSMo, Require That Any Determination Respondent Makes That Actual Revenues for a Fiscal Year Are Less Than Budgeted Must Be Made and Documented with Specificity and in Accordance with Accounting and Audit Standards Established by

Appellant and in Compliance with the Explicit and Implicit Requirements of the Budget Process as Provided in Article IV, Sections 23, 24, 25, 26, and 27, of the Missouri Constitution. [Addressing the trial court's ruling number 3 on page 2 of the judgment (LF 486-487) and its related ruling on page 4 of the judgment concerning Respondent's failure to follow Appellant's accounting systems (LF 488)].

The trial court ruled that when actual revenues are less than revenue estimates, Respondent has the sole discretion to choose which appropriations to reduce and the amounts of those reductions. (LF 485-487). The trial court found Respondent's actions were not arbitrary and capricious manner in this case. *Id.* However, the trial court entirely sidestepped Respondent's failure to follow generally accepted accounting principles and audit standards set by Appellant under Sections 29.180 and 29.235.1, RSMo, and in compliance with the implicit requirements of specificity and detail required under Article IV, Sections 23, 24, 25, 26, and 27, in making and documenting those choices. (LF 13-14). Respondent's failure to follow those accounting principles and audit standards and comply with the constitutional requirements for specificity and detail in making the withholds was an arbitrary, capricious, and unconstitutional exercise of his discretion.

Under Article IV, Section 13, of the Missouri Constitution and Sections 29.180 and 29.235.1, RSMo, Appellant is charged with the responsibility of establishing accounting standards for the state and auditing according to specified standards, which includes the nature and manner of accounting for, and the documentation needed to support, decisions made under Article IV, Section 27. This Court discussed and affirmed Appellant's duty and power to establish and enforce proper accounting standards for state officers and agencies *Kelly v. Hanson*, 959 S.W.2d 107, 110 (Mo. banc 1997). Pursuant to this authority, Respondent is required to follow "generally accepted accounting standards" in making and documenting budget decisions.

It is also clear from reading Article IV, Sections 23, 24, 25, 26, and 27, that the framers of the Missouri Constitution carefully crafted a system in which budget decisions would be rationally based, properly documented and specific, and subject to checks and balances between the executive and legislative branches. For example, Article IV, Section 23, requires each appropriation law to "**distinctly specify** the amount and purpose of the appropriation..." (emphasis added). Article IV, Section 24, of the Constitution requires the governor to submit a budget to the general assembly that contains "a **complete and itemized** plan of proposed expenditures of the state and all its agencies..." (emphasis added). The requirement for detailed specifics regarding the budget of the state, combined with the requirement of following general accounting standards set by Appellant, make it clear that in matters regarding the budget, decisions must be properly documented with detailed specificity subject to audit.

Section 29.235.1, RSMo, requires that Appellant follow the government auditing standards issued by the Comptroller of the United States, commonly referred to as the "Yellow Book," when conducting audits. The Yellow Book requires, "reasonable assurance that evidence is sufficient and appropriate to support the auditor's findings and conclusions."²⁰ In this case, on June 27, 2012, Appellant began an audit of Respondent's office. (LF 57, ¶12; L 61, ¶ 3). As part of this audit process, Appellant's career auditors attempted to review Respondent's basis for the FY 2012 withholds, so as to meet their Yellow Book obligations. (LF 57, ¶ 13; LF 61, ¶ 4). Respondent, however, failed to provide Appellant with *any* documents or other data showing why and how the Respondent decided to withhold over \$172 million dollars, including \$57.1 dollars from general revenue. (LF 57, ¶ 14; LF 62, ¶ 5; LF 106, 460).

Respondent's budget director readily admitted that no detailed specific documentation existed showing any calculations or formula based on objective data used to base Respondent's decisions to withhold for disaster relief from the FY 2012 budget. (LF 57, ¶ 15; LF 62, ¶¶ 5 & 6; LF 460).

Respondent's failure to follow *any* accounting standard, let alone those established and published by Appellant (LF 460-461), to make and document a rational decision on whether actual revenues for FY 2012 were less than budgeted, and which appropriations

²⁰ Government Auditing Standards, issued by the Comptroller of the United States, section 7.03 (July 2007).

would accordingly be reduced, places Respondent in violation of Article IV, Sections 24, 25, 26, and 27, of the Constitution. Moreover, Respondent's actions thwart the ability of Appellant to perform his constitutional and statutory duty under Article IV, Section 13, and Sections 29.200 and 29.235.1, RSMo, to properly audit Respondent's office.

While no direct Missouri Supreme Court case law exists on this issue, an opinion issued by the Western District Court of Appeals supports Appellant's position that there must be some data provided in support of executive branch budget decisions made under our Constitution and Section 33.290, RSMo. In *State ex rel. Knowles v. Reser*, 633 S.W.2d 450 (Mo. Ct. App. 1982), the court of appeals stated:

In projecting an appropriation shortage, **based upon mathematical computation**, respondent was justified in laying off appellant (along with three or four other employees) to stay within the department's budget. No bad faith or improper motive is shown in that action, other than appellant's claims that any projected shortage of funds was due to the department overhiring, and that there were, in fact, surplus funds at the end of the fiscal year, which claims are insufficient as a basis for reversal.

State ex rel. Knowles v. Reser, supra at 453 (emphasis added). To rule otherwise would allow Respondent to carry his position to its natural yet absurd conclusion—if revenues are but \$1 short of estimates (or not short as happened in FY 2012), Respondent can

withhold billions of dollars of lawfully appropriated public funds without need of mathematical computations or accounting rationale.

Whether laying off employees or withholding approved appropriations, the Missouri Constitution provides for checks and balances between the executive and legislative branches when handling the people's money. Data justifying budget decisions made by Respondent must exist and be subject to audit to ensure that the checks and balances built into the Constitution under Article IV, Sections 23, 24, 25, 26, and 27, are complied with by governors now and in the future.

The trial court's decision should be reversed and a finding made by this Court that Respondent must follow generally accepted accounting principles and audit standards set by Appellant when making budget decisions, including those under Article IV, Section 27, and document them with specificity and detail such that they may be subject to audit by the State Auditor.

CONCLUSION

For the foregoing reasons, this Court should reverse the trial court's judgment by finding that Respondent violated Article IV, Section 27, Missouri Constitution, in acting contrary to both clauses of Article IV, Section 27, and in failing to follow generally accepted accounting principles and audit standards, as set by Appellant, when he made the withhold decisions for the fiscal year 2012 budget. Further, the Court should enjoin Respondent from repeating this conduct.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

The undersigned hereby certifies that a copy of the foregoing brief was filed electronically with the Clerk of the Court on this 21st day of November, 2012, to be served by operation of the Court's electronic filing system, Missouri CaseNet, on all counsel of record as follows:

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The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule 84.06(b) and that the brief contains 8,922 words.

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