

**IN THE SUPREME COURT OF MISSOURI**

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**No. SC92750**

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

**v.**

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

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

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

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-RESPONDENT SCHWEICH**

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## SUMMARY OF REPLY AND RESPONSE ARGUMENTS

The record is now clear on both the facts and the law:

(1) Prior to the beginning of Fiscal Year 2012 (FY2012), Respondent, Governor Jeremiah "Jay" Nixon, announced that he would not provide Missouri government entities \$172 million that had been appropriated and signed into law for the use of students, the elderly, the courts, the legislature and others;

(2) Respondent provided the state auditor *no* data to support these withholds;

(3) Actual revenues throughout FY2012, and at the end of the fiscal year, exceeded the consensus revenue estimate ("CRE")-- which is the only revenue estimate in the record;

(4) By the end of FY2012, 96% of the funds withheld before the fiscal year began (\$165M of the \$172M) had not been restored to those from whom it was withheld; some entities received \$0 of their appropriation;

(5) During FY2012, the governor transferred approximately \$20 million to disaster relief-- far more than the amount appropriated for that purpose, but far less than the amount withheld allegedly for that purpose;

(6) Respondent knowingly ignored the many lawful ways to fund disaster relief (which is always a multi-year proposition), including the use of the state's "Rainy Day" fund, calling a special session of the legislature for the purpose of obtaining a supplemental appropriation, or the use of his line item veto power in conjunction with the normal appropriations process; and

(7) From the record, it appears that Respondent is the first governor in Missouri history to withhold money before the start of the fiscal year as was done here, is the first governor to permanently withhold money when actual revenues have exceeded estimates, is the first governor to transfer money in excess of an appropriation, and is the first governor to claim he may do so with *no* auditable data to support his actions.

These actions constitute a flagrant and dangerous violation of Article IV, Section 27, of the Missouri Constitution. Should the Court uphold Respondent's actions, the governor will have unlimited power to rewrite the state budget; the legislature will become an advisory body at best; and future governors will have an unrestricted capacity to punish or even eliminate-- at their whim or for political purposes-- the lawfully appropriated activities of state agencies, courts, statewide office holders, the legislature, universities, and hundreds of other public entities in Missouri.

Appellant respectfully requests that the Court place limits on Respondent's claim of unbridled power. Very simply, Appellant asks that this Court hold:

(1) The capacity of this and future governors to fund appropriations at less than their appropriated amounts must be tied-- in an auditable manner-- to the cash flow situation in the state, as envisioned by Article IV, section 27; with these conditions met, the governor has wide discretion.

(2) Respondent may not transfer funds in excess of their appropriations; and

(3) Respondent must keep records that allow for an audit in compliance with established standards set by the Comptroller of the United States (i.e., the Government Auditing Standards, also known as the "Yellow Book").

These are reasonable, workable prayers for relief that may be easily accomplished within the language, meaning, and purpose of the Missouri Constitution. With these guidelines in place, the governor should have broad discretion in managing the state's budget, as envisioned by the constitution.

### **REPLY ARGUMENT**

**I. Contrary to Respondent's contention, Article IV, Section 27's, "control the rate" clause does not allow any actual reduction (whether "temporary" or permanent) in appropriations that have gone through the budget process and been signed into law by the governor. (Appellant's reply to Respondent's Points II and III).**

Respondent acknowledges in his brief that it would be unconstitutional for him to *permanently* withhold<sup>1</sup> appropriated funds if **actual** revenues do not fall short of the estimates upon which the budget is based. To permanently withhold funds requires meeting the strict requirement of the second clause of Article IV, Section 27, of the constitution that actual revenues be "less than the revenue estimates upon which the appropriations were based." Respondent adamantly denies that he acted under the second

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<sup>1</sup> As noted in Appellant's original brief, Respondent's budget director admits that "withholds" and "restrictions" have the same meaning. (Appellant's Brief p. 5; LF 431).

clause. (LF 78; Respondent's Brief pp. 26, 29-30, 33-34). Instead, Respondent argues that his actions were under the first clause ("control the rate" by allotment or other means) of Article IV, Section 27, (*Id.*), and that the withholds were "temporary." However, there are major flaws with this argument.

**A. Respondent's position is not consistent with the plain meaning of Article IV, Section 27, and Section 33.290, RSMo.**

"Controlling the rate" of expenditures is a cash flow management tool using allotments or other means that does not include a reduction in an appropriation, temporary or otherwise. The plain meaning of "controlling the rate" is to spread out approved appropriations over a fiscal year to match incoming revenue. "Control the rate" requires the appropriation to remain the same, even though Respondent may spread out the payment of the appropriation over four quarters. Put succinctly, the first clause of Article IV, Section 27, is designed to spread out the payment of the original, approved appropriations quarterly, as revenue comes in subject to the amount of those appropriations being reduced under the second clause of Article IV, Section 27, in the event actual revenue comes in less than the consensus revenue estimate upon which the budget and appropriations are based (see discussion on CRE below).

When one reads Section 33.290, RSMo, in its entirety, it is clear that, at the allotment stage, once the governor has approved the appropriations, the only issue is how to divide those appropriations for expenditure during the four quarters. No reduction in an appropriation can occur at the initial allotment. However,

[a]t the end of any quarterly period the governor may revise the allotments of any department, and 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 of appropriations from such fund to any department or departments so that the total of the allotments for the fiscal year will not exceed the total estimated revenue of the fund at any such time.

Section 33.290, RSMo.

As was discussed in our original brief, before the beginning of FY2012, Respondent reduced the amount of appropriated funds during the initial allotment 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. (See Appellant's Brief p. 23, fn 10, citing LF 440-444). This approach by Respondent was outside the scope permitted by the first clause of Article IV, Section 27, and in violation even of the second clause. But Respondent seeks to avoid this dilemma by playing word games, calling the withholds "temporary," and thereby implying that appropriations can be reduced under the first clause of Article IV, Section 27, based on a subjective revenue and expense standard created at the pleasure of the Respondent and without proper supporting documentation (see discussion below). But this word game allows Respondent, or any future governor, to circumvent the appropriation process

outlined in the constitution by saying he is acting to control the rate by "temporarily" reducing appropriations which he will not restore, as occurred here.

Furthermore, the withholds made by Respondent were not "temporary." As pointed out in Appellant's brief, Respondent withheld \$ 172.2 million in restricted (\$115.1 million) and general revenue (\$57.1 million) FY2012 appropriations before FY2012 started. (Appellant's Brief p. 5, LF 15-19, 414-416). In all, Respondent chose to restore only \$7.3 million (4%) of the \$172.2 million<sup>2</sup> withheld to its rightful and intended purpose. As of February 3, 2012, Respondent had released only \$2 million of the FY2012 withholds from appropriations supported by general revenue (LF 464-465), and, if the court chooses to take judicial notice of it, according to Respondent's official website, he only released another \$5.3 million on February 29, 2012 [\$3million from restricted funds and another \$2.3 million from general revenue].<sup>3</sup> Incredibly, all this money was withheld in a fiscal year when actual revenues not only exceeded the CRE, they exceeded the upwardly-revised CRE.

Respondent strives to hide behind "temporary" by arguing that the withholds allegedly contemplated the "possibility" of restoring the withheld appropriations as

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<sup>2</sup> Of the \$57.1 million in withheld general revenue supported appropriations, only 7.5 % was released.

<sup>3</sup> Press release of February 29, 2012,

[http://governor.mo.gov/newsroom/2012/Gov\\_Nixon\\_makes\\_available\\_more\\_than\\_5\\_million\\_in\\_additional\\_education\\_funds](http://governor.mo.gov/newsroom/2012/Gov_Nixon_makes_available_more_than_5_million_in_additional_education_funds)

revenue allowed. However, Respondent is disingenuous in suggesting that the withheld appropriations (including Appellant's \$ 300,000) would be or were released as revenue became available without providing any evidence of the same. In fact, Appellant did not receive any of the \$300,000 by the end of FY 2012. Further, it is significant that Respondent failed to provide any specific affirmative response and denial to Appellant's argument that only 7.5% of the General Revenue withholds were actually restored in spite of the facts that: (1) actual revenues never fell short of the original consensus revenue estimate upon which the FY2012 appropriations were based, (2) the FY2012 CRE was adjusted **upward** during FY2012 by agreement of Respondent and the General Assembly, (3) FY2012 revenue exceeded even this adjusted CRE (let alone the original CRE) upon which FY2012 appropriations were based. (See Appellant's Brief, pp. 33; 30, fn 16), and (4) as of February 2012, by Respondent's admission, at most \$20 million of the nearly \$57.1 million never-restored general revenue funds were spent on disaster relief. [LF 454-455, 466].

**B. Reading into the control the rate clause the power to "temporarily" reduce an appropriation renders meaningless the second clause which only allows a reduction in appropriations when actual revenues are coming in less than the revenue estimate upon which the appropriations were based.**

To argue that "control the rate" can include "temporarily" reducing an appropriation before actual revenues come in (and then never restoring it) would completely eviscerate the second clause of Article IV, Section 27. Contrary to the

argument in Respondent's brief (Respondent's Brief pp. 16-17), the authors of the 1945 Missouri Constitution clearly were aware of the language they used in drafting the first clause of Article IV, Section 27, and knew it to be compatible with the allotment statute, Section 33.290, RSMo. The authors used the wording of Section 33.290, RSMo, as the basis of the first clause of Article IV, Section 27, rather than having the clause supersede or make Section 33.290, RSMo, irrelevant. It is interesting to note that the Constitutional Convention added the word "actual" before "revenues" in the second clause before appropriations can be reduced, whereas Section 33.290, RSMo, just uses the word "revenues." By doing this, the convention took the step of providing an objective standard for determining when reductions in appropriations are permissible.

Respondent in his brief never directly denies the fact that in FY2012 he ended up permanently withholding over \$165 million in lawfully appropriated funds even though actual revenues exceeded the upwardly-revised CRE, which even Respondent concedes at this point is in direct contravention of Article IV, Section 27, of the Missouri Constitution. And, while in FY2012 he did this for the alleged purpose of transferring the bulk of it to the disaster relief line item, Respondent did the same thing in FY2011 when he permanently withheld \$210.8 million in lawfully appropriated funds even though actual revenues fell short of the CRE by only \$47 million, which was predictable long before the end of the fiscal year.

Finally, as noted in Appellant's original brief, the indicia at the time the withholds were made was that they would be permanent, especially when Respondent "zeroed" out

several appropriations of the \$57.1 million in general revenue withholds. (See Appellant's Original Brief, pp. 32-33). These programs received none of their appropriations: Alzheimer's Grants, Area Health Education Centers, Community Intervention, Firefighter Training, Air Search and Rescue, Community Development Corporations and Regional Port Authorities. (LF 16-17).

**C. Respondent's argument replaces an objective standard (the CRE) with an unauditible, unlimited subjective standard created by Respondent to determine when appropriations may be reduced under the constitution.**

Rather than responding directly to the CRE arguments made in Appellant's original brief, Respondent strives to divert attention by arguing that the CRE is not relevant in a discussion regarding the controlling the rate clause of Article IV, Section 27. Respondent argues that he is allowed to consider factors that arise outside the CRE, and, in fact, outside the boundaries of the actual budget process that resulted in the approved appropriations. (Respondent's Brief pp. 20, 24-25; Appellant's Original Brief p. 34). Such arguments contradict existing case law, are contrary to the Attorney General's prior position and, if allowed by this Court, would result in the total circumvention of the checks and balances provided in our constitution regarding appropriations and the separation of powers.

Furthermore, it must be noted that Respondent never addresses in any form the three controlling cases on this issue previously decided by this Court: *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); and *State ex re. Sikeston R-VI School District v. Ashcroft*, 828 S.W.2d 372, 376 (Mo. banc 1992). (See Appellant's Brief pp. 6, 31-32). In the *Missouri Mental Health Association* case, the following argument was made by the Missouri Attorney General defending Governor Holden's withholds :

The Governor and other state defendants, on the other hand, contend that over-all decreases in expected state revenues authorize the reduction that the Governor made in those payments. ***They argue that the only relevant estimate of revenues for constitutional withholding purposes is the consensus revenue estimate*** of general revenue and that the constitutional provision does not require fund-by-fund estimates upon which to base appropriations.

*Missouri Health Care Association v. Holden*, 89 S.W.3d at 510 (emphasis added). This Court went on to note:

The record shows that the entire process initiated by the Governor, enacted in appropriation bills by the General Assembly, and reviewed by the Governor after passage-was based, for purposes here, on the consensus revenue estimate.

*Missouri Health Care Association v. Holden*, 89 S.W.3d at 512.

Respondent seeks to argue that the CRE is irrelevant and he may consider a host of things (including events occurring after the budget appropriations were approved, such as unexpected expenditures) when making decisions under the first clause of Article IV,

Section 27, and that controlling the rate includes the power to "temporarily" reduce appropriations.

However, the reality is that the CRE is the determining factor for **any** constitutional reductions in approved appropriations. *Missouri Health Care Association v. Holden*, 89 S.W.3d at 510. As in the *Missouri Health Care Association v. Holden* case, the FY 2012 budget and appropriations were based on the CRE. (LF. 63, 129).

**D. Adopting Respondent's and the trial court's definition of "control the rate" by using "temporary" withholds based on Respondent's subjective standard creates an extra-constitutional gubernatorial power to totally avoid the checks and balances of a veto or line item veto, giving this and future governors unbridled power to control appropriations as they please- contrary to the constitutionally agreed to and authorized purposes specifically defined by the legislature and signed into law by the governor.**

To adopt Respondent's definition of "control the rate" would allow Respondent, under the guise of controlling the rate of expenditures, unfettered power to refuse to fully fund or not fund at all agencies or programs that he disapproves of, **without the check and balance of a legislative override**, despite the fact the legislature specifically authorized the expenditure of those funds and Respondent signed them into law. This makes veto and line item veto provisions meaningless.

We have already shown in our original brief that in FY2012 Respondent withheld \$172.2 million dollars (including \$50 million in general revenue supposedly for disaster

relief) (LF 20) and restored only 4% of those appropriations even though actual revenue came in higher than the CRE and even higher than the revised CRE. (Appellant's Original Brief pp. 32-34).

For FY2011 final revenues were only \$47 million below the consensus revenue estimate. (LF 63, 66, 430-431). However, Respondent had withheld \$210.8 million from FY 2011 appropriations. *Id.* This left \$163.8 million originally "restricted" by Respondent as available revenue to fund appropriations. *Id.* Respondent did not restore any of that available \$163.8 million to legislatively mandated programs, *Id.*, thereby permanently eliminating these lawful appropriations and giving the Respondent unrestricted extra-legislative "veto" power over items he did not desire to fund. (LF 63, 66).<sup>4</sup>

Respondent's actions violate Article IV, Section 27, and Section 33.290, RSMo, for the reasons discussed above. Once appropriations are enacted by the general assembly and signed into law by the governor, those appropriations must be honored up to the amount of revenue available. If revenue is the same or exceeds the CRE, then the full

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<sup>4</sup> Also, this experience from FY2011 is a further indicator of the permanence of the FY2012 restrictions/withholds since Respondent, following his supposed practice, will not have all the FY2012 numbers "finalized" until well after FY2012 ends, and the appropriation authority for those restricted/withheld funds will have conveniently expired. (See LF 430.)

appropriations must be available to be paid. If revenue comes in under the CRE, then the appropriations must be available to be paid up to the amount of revenue available. See Section 33.290, RSMo (appropriations may be reduced "so that the total of the allotments for the fiscal year will not exceed the total estimated revenue of the fund at any such time").

**E. Proper application of Respondent's cistern analogy supports Appellant's position that Respondent has acted in an unconstitutional manner to withhold FY2012 appropriations as approved by the legislature and signed into law by Respondent.**

In his brief, Respondent analogized the Missouri executive budget process to managing the water cistern for a building. He likened the people of Missouri to the owner of a building, the governor and his budget director to the building manager, the General Assembly to the leasing agent, and the agencies of the state to the building's tenants. Although his cistern is a good analogy of how the budget process works, Respondent got a few things wrong.

What Respondent omitted from his analogy was that at the beginning of each fiscal year the building manager and leasing agent must agree on how much water they expect will be provided for the year. Then the leasing agent agrees to provide each tenant a certain amount of water. The building manager may reduce these quantities if, and only if, water supplies fall short of expectations.

Continuing with Respondent's analogy, in FY2012 the building manager approved virtually all of the contracts but then immediately reneged, despite there being no water shortage. The building manager exercised unbridled discretion in restricting the flow of water to numerous tenants and completely and unnecessarily turning off the tap to others.

As the year progressed, and it became increasingly clear that water supplies would not only meet but would exceed expectations, the building manager still greedily deprived the disfavored tenants of their agreed upon water supply. The cistern was virtually bulging with the withheld water and the unanticipated excess, giving the building manager the opportunity to siphon off the excess for favored activities or to "sell it off" again to the tenants next year. The disfavored tenants, however, with their water supply choked off, were left to suffer or die thirsty.

**II. Respondent failed to provide basic accounting documentation, required when handling the people's money, to support his decisions made in regards to his FY2012 withholds. (Appellant's reply to Respondent's Point IV).**

Respondent feigns ignorance of an accounting standard that he must comply with when it comes to documenting decisions related to the state's budget, and, in particular, when it comes to determining whether he can exercise his power under either clause of Article IV, Section 27. This position of the Respondent is untenable for many reasons.

Respondent is fully aware of, and even partially complies with, the documented specificity concerning the budget and budget process required by the constitution. For example, see Article III, Section 31 (when vetoing a bill the governor shall return the

vetoed bill to the general assembly "**accompanied by his objections**"); Article IV, Section 27 (governor shall "submit to the general assembly a budget for the ensuing appropriation period, containing the estimated available revenues of the state **and a complete and itemized plan** of proposed expenditures of the state and all its agencies"); Article IV, Section 26 (when exercising a line item veto in an appropriation bill the governor "shall append to the bill a **statement of the items or portions to which he objects**"); Section 33.390, RSMo (requiring all allotment requests and allotments made to be in such detail, as required by the budget director, classifying expenditures for various purposes and expenditures for each quarter ).

For an example of the detail required by Respondent's budget director from state agencies and departments, simply look at her "Fiscal Year 2013 Budget Instructions." (LF 59-60). Note the requirement that budget items be submitted in a "preliminary list" (paragraph 3 a) (LF 59), and the requirement for submission of materials in written form (paragraph 4, 5, 11, 12, 14) (LF 60).

Respondent and his budget director fully understand the need to comply with basic accounting principles by providing detailed documents to support each decision made about how the people's money will be appropriated. This can be seen by the FY2012 budget submitted by Respondent. (LF 109-364).

It is baffling, then, that Respondent and his budget director believe that serious budget decisions about whether the need exists to exercise Respondent's power under either clause of Article IV, Section 27, of adjusting allotments or reducing approved

appropriations, can be made without any supporting documentation. Respondent could not provide Appellant's auditors with **any** supporting documentation- not even scratches on the back of a napkin. 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). Instead, all the auditors received was a rambling oral presentation with no supporting documentation. (LF 457-461). One can imagine the reaction of the Respondent and his budget director if a state agency or department just made an unauditible oral submission about the need to adjust its appropriation without any supporting documentation.

The need to provide documentation is self-evident and required by basic accounting principles, by the constitution, and for audit purposes. The accounting systems required by Appellant (and Appellant's predecessors through the years) have the ability and purpose of ensuring that proper documentation supporting all decisions related to the expenditure of public funds can be generated and audited. (Article IV, Section 13 and Section 29.235, RSMo.). Any audit conducted by Appellant must comply with 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."<sup>5</sup> This gives the Appellant the authority to demand from Respondent, and all agencies and departments of the state, documented evidence to support decisions made about the spending of public funds.

Finally, it is of note that Respondent does not address the case of *State ex rel. Knowles v. Reser*, 633 S.W.2d 450 (Mo. App. 1982) as presented in Appellant's brief. (Appellant's Original Brief pp 39-40). In Appellant's brief, it was noted that 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). 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

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<sup>5</sup> Government Auditing Standards, issued by the Comptroller of the United States, section 7.03 (July 2007).

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.

## RESPONSE ARGUMENT

**I. The trial court properly granted relief to Cross-Respondent on the unconstitutionality of the "E" appropriations and Cross-Appellant's transfers of funds under the "E" since Cross-Respondent has standing in his official capacity to bring this suit in order to enforce his constitutional and statutory duties to see that accounting systems are in place from which documentary evidence can be provided to ensure proper audits. (Cross-Respondent's response to Cross-Appellant's Point I, being his Point Relied On 1).**

The requirement for standing to bring a declaratory judgment action is whether the plaintiff has a legally protected interest at stake. In other words, that the plaintiff will be directly and adversely affected by the defendant's actions. *Battlefield Fire Protection District v. City of Springfield*, 941 S.W.2d 491 (Mo. banc 1997). Under this standard, Appellant has two legally protected interests at stake.

First, Cross-Respondent has a duty to establish appropriate systems of accounting for all public officials and a duty to audit all public officials, including Cross-Appellant. Article IV, Section 13, Missouri Constitution; Section 29.180, RSMo; Section 29.200, RSMo. That duty to audit includes the requirement that the audit complies with the

government auditing standards issued by the Comptroller of the United States, commonly referred to as the "Yellow Book." As discussed previously, the Yellow Book requires, "reasonable assurance that evidence is sufficient and appropriate to support the auditor's findings and conclusions."<sup>6</sup>

In a situation similar to this, this Court held:

If the Auditor merely has the power to establish an accounting system that the rest of state government is free to ignore, than no gain in uniformity is achieved. Implicit in the Auditor's power to establish an accounting system for state officials is the ability to enforce that system once it is established.

Because the Auditor has a constitutional duty to devise a system for calculating TSR and the revenue limit, that system is enforceable against other state officials.

*Kelly v. Hanson*, 959 S.W.2d 107, 110 (Mo. banc 1997).

Cross-Respondent in this case has the constitutional and statutory duty to establish accounting systems and perform audits as described above. As this Court found in *Hanson*, Cross-Respondent has the right and power to ensure that proper accounting is followed, which includes documentary evidence supporting budget and appropriation decisions in order to conduct an audit of Cross-Appellant.

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<sup>6</sup> Government Auditing Standards, issued by the Comptroller of the United States, section 7.03 (July 2007).

The second legally protected interest of Cross-Respondent is the \$300,000 appropriated by the General Assembly, which was permanently withheld by Cross-Appellant.(LF 16). This is a legally protectable interest conferred by statute (i.e., the appropriation passed by the General Assembly and approved by Cross-Appellant). *Battlefield Fire Protection District v. City of Springfield*, 941 S.W.2d 491 at 492.

Finally, there is nothing in Section 27.060, RSMo, or any of the cases cited by Cross-Appellant that stands for the proposition that **only** the attorney general may bring suit in cases like this that would infringe upon the authority and ability of other elected independent state officeholders to defend and enforce their constitutional authority and statutory duties. In fact, courts have held that state officers, including the Auditor, have standing to bring such claims. *Kelly v. Hanson*, 931 S.W.2d 816, 818 (Mo. App. 1996). "State officers have the capacity to bring suit to enforce their powers and duties under the Missouri Constitution." *Id* . This ability of the Auditor to bring suit to enforce his powers and duties makes sense, especially in light of the fact that conflicts of interest arise for the attorney general, as in this case, if he is the only one who can bring suit on behalf of the state. See *State v. Planned Parenthood of Kansa*, 66 S.W.3d 16 (Mo banc 2002).

Therefore, Cross-Appellant's request for relief under his first point relied on should be denied.

**II. The trial court properly ruled on the "E" appropriations because Cross-Respondent's petition did advise Cross-Appellant with reasonable certainty that the cause of action under Count II of the petition included a challenge of the**

**constitutionality of the use of the "E" in appropriations. (Cross-Respondent's response to Cross-Appellant's Point V, being his Point Relied on 2).**

The standard of review for sufficiency of a petition at this stage is:

A petition will be found sufficient after verdict if, after allowing reasonable inferences and matters necessarily implied from the facts stated, there is sufficient to *advise* defendant with reasonable certainty as to the cause of action it is called upon to meet and bar another action for the same subject matter.

*Green v. Penn-American Insurance Co.*, 242 S.W.3d 374, 380-381 (Mo. App. 2007)(citing various cases).

Cross-Respondent easily meets this liberal standard. Contrary to Cross-Appellant's argument, Cross-Respondent's petition did contain sufficient pleadings in support of the trial court's decision on the use of "E" appropriations.

Count II of the petition sought a declaratory judgment that Cross-Appellant unconstitutionally violated separation of powers by his actions in taking specifically appropriated funds and transferring them to other purposes. (LF 11-12). Paragraph 23 of the petition incorporated all preceding paragraphs of the petition, including paragraphs 10, 11 and 12. (LF 11). Paragraphs 10, 11 and 12 specifically state that Cross-Respondent advised the Cross-Appellant on August 18 and 19, 2011, that Cross-Appellant's withholds were unconstitutional for the reasons set out in Auditor Letter No. 2011-43, which includes on page three the fact that the use of the "E" is not provided for

under state law. (LF 3-4, 24). Auditor Letter No. 2011-43 was attached to the petition as Exhibit C and incorporated by reference into the petition. (LF 21-24).

As early as August 18, 2011, and certainly when the petition was filed on August 26, 2011, Cross-Appellant was *advised* of facts that the use of the "E" was being challenged under Count II. This is also reinforced by the fact Cross-Appellant's response to Count II was his reliance on the "E" appropriations. Cross-Appellant raised in his Motion for Summary Judgment. the use of the "E" as a defense to Cross-Respondent's petition alleging violation of separation of powers. (LF 78, 80, 90-96). Thus, not only was the issue of the "E" properly pleaded, but the use of it as a defense by Cross-Appellant entitled Cross-Respondent to rebut that defense.

Accordingly, this Court should deny Cross-Appellant's point and uphold the trial court's ruling that use of the "E" in appropriations is unconstitutional.

**III. The trial court properly ruled that the General Assembly did not have the power to transfer appropriation authority to Cross-Appellant by using "E" appropriations since Article IV, Section 23, of the Missouri Constitution only vests the power to appropriate specific amounts of money for specific purposes in the General Assembly. (Cross-Respondent's response to Cross-Appellant's Point VI, being his Point Relied on 3).**

Cross-Appellant finally advances the interesting argument that the General Assembly has the power to delegate to the executive branch its appropriation authority.

It has been repeatedly held that the General Assembly may not generally "legislate," i.e., create new authority, in an appropriation bill. *State ex rel. Gaines v. Canada*, 113 S.W.2d 783, 790 (Mo. banc 1937)(reversed on other grounds at 305 U.S. 337); *State ex rel. Davis v. Smith*, 75 S.W.2d 828, 830 (Mo. 1934); Article III, Section 23, Missouri Constitution; Attorney General Opinion Letter 1974-212. Cross-Appellant cannot point to any piece of general legislation authorizing the use of the "E" in appropriations. In any event, such a piece of general legislation, if passed, would be unconstitutional.

As the trial court properly found, Article IV, Section 23, of the Missouri Constitution only vests the legislature with the power to appropriate funds, and those appropriations have to be in **specific** amounts for specific purposes. (LF 487-488); (Appellant/Cross-Respondent's Appendix at A14). The ""E" is not a specific amount, and the power to appropriate cannot be delegated. Cross-Appellant admits that the "E" is only an *estimate*, not a specific amount. (LF 90, ¶ 21). Cross-Appellant acknowledges that "the amount of such ["E"] expenditures cannot be stated with any certainty at the time the appropriations are written.." (LF 90, ¶ 22). Cross-Appellant violated the constitutionally prescribed separation of powers when he unlawfully exceeded the disaster relief item by \$19,000,001 (LF 449-451, 454-455) at the expense of other line items and despite the availability of lawful means to adequately fund disaster relief.

This Court should also be aware that Cross-Appellant's argument here is contrary to previous opinions issued by the Attorney General's Office which have not been

rescinded. See Attorney General Opinion Letter No. 1974-190 (cannot use an appropriation bill to create new authority, plus the general assembly may not delegate authority to the executive branch to amend an appropriation other than for its stated purpose); Attorney General Opinion Letter No. 1974-331 (executive branch cannot shift appropriated money from one object purpose to another since that would be altering the appropriation, affirming Opinion No. 1974-190); Attorney General Opinion Letter No. 2004-87 (recognizes that "[t]he General Assembly has the power to enact any law not prohibited by the Missouri or United States Constitutions." The opinion also recognizes the Article IV, Section 23, limitation of the appropriation power to the legislature and refers to Attorney General Opinion Letter 1974-331 as still being valid).

As discussed above, there is no constitutional authority for Cross-Appellant to increase a specific appropriation since only the General Assembly is authorized to set the specific purpose and amount of an appropriation. Article, IV, Section 23, Missouri Constitution. This being the case, the "E" also cannot be used to increase an appropriation, contrary to Cross-Appellant's belief (i.e., "The E allows on--appropriations designated with an E, we can increase the appropriation authority, if we need to, for the designated purpose.")(LF 451).

For the foregoing reasons, Cross-Appellant's point relied 3 should be denied and the judgment of the trial court on the use of the "E" appropriation affirmed.

## CONCLUSION

For the foregoing reasons, this Court should reverse part of 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 when he made his withhold decisions for the fiscal year 2012 budget. However, the Court should affirm the trial's court's judgment that (1) Respondent violated the separation of powers doctrine as Article IV, Section 23, of the Missouri Constitution only vests the legislature with the power to appropriate funds, and those appropriations have to be in specific amounts for specific purposes, (2) the use of "E" appropriations specifically violates the constitutional requirement that each appropriation law shall distinctly specify the amount and purpose of the appropriation without reference to any other law to fix the amount or purpose, and (3) the use of the "E" appropriation permits the governor to amend the amount of an appropriation in violation of the constitutional budgeting scheme.

As stated in the summary of the argument, the Appellant respectfully requests that this Court hold:

(1) The capacity of this and future governors to fund appropriations at less than their appropriated amounts must be tied-- in an auditable manner-- to the cash flow situation in the state, as envisioned by Article IV, section 27; with these conditions met, the governor has wide discretion.

- (2) Respondent may not transfer funds in excess of their appropriations; and
- (3) Respondent must keep records that allow for an audit in compliance with established standards set by the Comptroller of the United States (i.e., the Government Auditing Standards, also known as the "Yellow Book").

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 6th day of February, 2013, 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 6,812 words [ 3,958 words attributable solely to the reply, 1,959 words attributable solely to the response and 895 words attributable to both (e.g., "Table of Contents," "Summary of the Argument," "Conclusion")].

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