SUPREME COURT OF MISSOURI

SC90323

THE SCHOOL DISTRICT OF KANSAS CITY, MISSOURI, REV. CHARLES J. BRISCOE, RICHARD SEXTON and DR. JULIA HILL,
Appellants,

v.

STATE OF MISSOURI, MISSOURI STATE BOARD OF EDUCATION, MISSOURI DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION, and CHRIS NICASTRO as Commissioner of Education,
Respondents,

MISSOURI CHARTER PUBLIC SCHOOL ASSOCIATION,
Intervenor.

Appeal from the Honorable Richard G. Callahan,
Circuit Court of Cole County, Missouri, Division II

RESPONDENT'S BRIEF

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Background/prelude

The history leading to this case goes back to 1977, when suit was brought in Kansas City alleging discrimination and segregation among schools in and around Kansas City. The first steps were described briefly by the U.S. Supreme Court:

> This litigation began in 1977 as a suit by the Kansas City Missouri School District (KCMSD), the school board, and the children of two school board members, against the State of Missouri and other defendants. The plaintiffs alleged that the State, surrounding school districts, and various federal agencies had caused and perpetuated a system of racial segregation in the schools of the Kansas City metropolitan area.

Missouri v. Jenkins, 491 U.S. 274, 276 (1989). Though the KCMSD began as a plaintiff, it was appropriately realigned as a defendant. As the Eighth Circuit described:

> The [district] court recognized a potential conflict between the interests of students seeking to demonstrate the existence of segregative conditions in

> the area, and those of the KCMSD, which would resist the introduction of incriminating evidence concerning its own past or present actions.

Jenkins v. State of Mo., 807 F.2d 657, 681, 684 (8th Cir. 1986). Thus the district court "realigned the KCMSD as a defendant and converted the suit into a class action, making a plaintiff class of all present and future KCMSD students." *Jenkins v. KCMSD*, 516 F.3d 1074, 1976 (8th Cir. 2008). At that point, it was clear that the litigation was to protect the rights of the children living in the then-boundaries of KCMSD, not to protect the entity itself.

After a trial, the district court held in 1984 "that the KCMSD and the State had not met their affirmative obligations to remove all vestiges of [a] dual school system." *Id.* at 1077. Over the next few years, the district court issued a series of orders, including those creating "a $187 million 'long-range capital improvement plan aimed at eliminating the substandard conditions present in the KCMSD schools.'" *Id.* (internal citation omitted). The district court also ordered a higher property tax levy. *Id.* On appeal, the court's ability to lift the State limit on raising property tax levies was affirmed, though the task of actually setting the higher levy was left to the KCMSD itself. *Id.* Pursuant to that authority, the KCMSD set its levy at $4.96 per $100 of assessed valuation. *Id.* Despite the higher local levy, during the 12 years after the district court's

liability ruling the State, "contributed almost $1.2 billion to the KCMSD. The KCMSD used much of that to build new facilities and remodel old ones." *Jenkins v. Missouri*, 959 F.Supp. 1151, 1172 (W.D. Mo. 1997).

The end of the involvement of the courts began in 1996. The Eighth Circuit recently described what happened:

> In April 1996, the State filed a motion asking the District Court to declare the District unitary, to dissolve all injunctions, and to relinquish jurisdiction in the case. Less than a month later, the State and the KCMSD entered into an agreement … whereby the State agreed to pay $314 million (later increased to $320 million) in desegregation funding to the KCMSD over a three-year period. The Agreement provided that upon final payment by the State and approval of the Agreement by the District Court, the State would be entitled to an order releasing it from further desegregation obligations and the jurisdiction of the court. … The American Federation of Teachers Local 691 ("AFT"), an intervener in the case, joined the Agreement, but the plaintiffs did not. The State then

> filed a second motion asking the District Court to approve the 1996 Agreement and dismiss the State from the case. After a hearing on the motions, the District Court denied the motion for unitary status except with respect to extra-curricular activities. … The District Court approved the Agreement, however, stating that it was reasonable to expect the KCMSD to be unitary within three years–around the time that the State would be making final funding payments. … We affirmed ….

516 F.3d at 1978 (citations and footnote omitted).

In approving the 1996 agreement, the district court made a number of findings that foreshadowed the evidence in this case. For example,

- "adjusting for regional cost of living differences, the KCMSD spends more per pupil than any of the largest 280 school districts in the United States" (959 F.Supp. 1170);
- "ten high schools have seats for 15,969 pupils, but enroll only 7,680 pupils" (*id.* at 1171);

- "the KCMSD occupies a better position than many school districts with respect to capital improvements" and "a major portion of the KCMSD's capital expenditures have been paid 'out of pocket'" (*id.*);
- "the Court cannot fail to see excess expenses in the top-heavy administration in the KCMSD" (*id.* at 1173) and "the sheer size of the administrative budget appears lavish" (*id.* at 1175); and
- "The KCMSD … appears to simply throw large sums into various accounts, allowing departments to either exceed the budgeted amount by a huge sum, or not use significant portions in that account" (*id.* at 1174).

The district court did not declare the KCMSD "unitary" so as to end federal court supervision. By delaying that step, the district court ensured that the KCMSD could continue to impose the $4.96 levy – though the court ordered the KCMSD to "plan on being entirely self-sufficient" within the three years in which the State would make its settlement payments – "even if that means regressing to a $2.75 levy." *Id.* at 1179.

Over the next three years, the State made the required payments – the last of them in December 1998. *Id.* During that period, the State and the

KCMSD continued to be involved in litigation with the plaintiff class regarding the settlement. And the State reached an agreement to settle the St. Louis desegregation case.

In 1998, both the Kansas City and St. Louis desegregation settlements came to a head in the legislature. The legislature appropriated funds for the last of the Kansas City payments. It also placed on the ballot a proposition to amend the Missouri Constitution to allow the KCMSD to impose a property tax levy near the one imposed by judicial authority, without having to comply with the voter approval requirements of the Hancock Amendment. That constitutional amendment was passed in April 1998; it is Article X, § 11(g).

But making the final settlement payment appropriation and placing the amendment on the ballot were not the only steps that the 1998 legislature took. That same General Assembly passed S.B. 781, which the Revisor appropriately labeled, "Revises provisions relating to school desegregation, school funding and urban schools." 1998 Mo. Laws at 1372. That bill included a variety of measures intended to benefit the students living in the KCMSD and the St. Louis Public Schools – among them authority to create and a mechanism to fund charter schools (pp. 1426-35), the statute (later amended) that the KCMSD and the individual plaintiffs challenge here.

The charter schools

The Revisor codified the laws regarding charter schools as §§ 160.400 – .420, RSMo 2000. Under those laws, discussed in section I of the Argument, the first charter schools in the KCMSD opened in the 1999-2000 school year. Beginning that year and continuing through the 2003-04 school year, the KCMSD itself sponsored two charter schools – Westport Charter and the Kansas City Career Academy. Tr. I, pp. 73-74. Charters have operated continuously in the District for more than 10 years. Tr. I, p. 33; Tr. II, p. 20.

Changes in and condition of the KCMSD

For the 1981 fiscal year, the KCMSD's total assessed valuation was $1.1 billion dollars, and has risen during the existence of charter schools, reaching $3.2 billion in fiscal year 2008. Tr. I, pp. 84-86; Pltfs' Exhibits 13-21. The KCMSD had a $3.82 total levy for all funds for fiscal year 1981, and has had a levy of $4.95 since 2000. Tr. I, p. 86; Pltfs' Exhibit 13.

While the assessed valuation and tax revenue in the KCMSD increased, enrollment declined. In the 1980-81 school year, the KCMSD had 38,000 pupils. By 2007-08, that had declined to 25,000 pupils. Tr. II, p. 17. In fact, the number of eligible pupils in the KCMSD has gone down every year since 1999. Tr. I, p. 114.

But there has not been a corresponding decrease in expenditures. For example, in the 1980-81 school year, the KCMSD paid to keep 74 buildings open and serving children. In 2008-09, the KCMSD still operated 65 buildings, despite losing seven to another school district because of annexation. Tr. II, pp. 18-19; Defs' Exhibit C.

The decline in enrollment combined with the increased assessed valuation and the continued use of the maximum available levy – plus increases in state funds – has resulted in steadily increasing per-pupil expenditures. In 1989, the District spent approximately $8,000 per pupil; in 2007, it spent approximately $13,000 per pupil. Tr. I, p. 116.

This case

This case was brought by the Kansas City Missouri School District (KCMSD) and by three individuals: Rev. Charles Briscoe, Richard Sexton, and Dr. Julia Hill (collectively, "individual plaintiffs"), all taxpayers who reside in Jackson County, Missouri. They sued the State of Missouri, the State Board of Education, the Department of Elementary and Secondary Education, and Dr. Kent King, in his official capacity as the Commissioner of Education (collectively, "the State"). The Missouri Charter Public School Association intervened to defend the State's funding mechanism for charter schools.

KCMSD and the individual plaintiffs challenged the State's charter

schools law, §§ 160.400 – .420, RSMo Supp. 2009[1], as being unconstitutional. They asserted that the law directing state funds to the charter schools violates both the provision allowing the KCMSD to maintain a high levy without voter approval, Article X, § 11(g), and the Hancock Amendment provision addressing unfunded state mandates, Article X, § 21.

The circuit court found that the KCMSD lacked standing to assert the Hancock Amendment claim. The circuit court ruled against the KCMSD and the individual plaintiffs on the § 11(g) claim, and against the individual plaintiffs on the Hancock claim. All of the plaintiffs appealed, but the KCMSD has not challenged on appeal the finding that it lacked standing on the Hancock Amendment claim, leaving the individual plaintiffs to make that claim on their own.

[1] At the outset, it was unclear whether the plaintiffs challenged the original or the amended version of the charter school statutes. Before the trail court ruled, however, plaintiffs restricted their challenge to the amended version. Thus citations hereinafter to the charter school law are to the amended version, found in the 2009 supplement, unless otherwise indicated.

ARGUMENT

The Court must give a strong presumption of constitutionality to Missouri statutes. *Etling v. Westport Heating & Cooling Svs., Inc.*, 92 S.W.3d 771, 773 (Mo. banc 2003). This strong presumption requires a court to resolve "all doubt" concerning § 160.415 in favor of its validity. *Westin Crown Plaza Hotel Co. v. King*, 664 S.W.2d 2, 5 (Mo. banc 1984) (courts resolve "all doubt" in favor of validity).

I. The charter school law.

Like typical public schools, charter schools "shall enroll" resident pupils of the school district, as well as nonresident pupils eligible to attend a district's school under an urban voluntary transfer program. § 160.410.1(1) and (2). Charter school pupils are counted as the school district's pupils: "For the purposes of calculation and distribution of state school aid under section 163.031, RSMo, pupils enrolled in a charter school shall be included in the pupil enrollment of the school district within which each pupil resides." § 160.415.1. Like typical public schools, charter schools may neither charge tuition, nor impose any fee that a school district may not impose. § 160.415.10. And a charter school may not accept any grant, gift, or donation if it is subject to a "condition contrary to law applicable to the charter school or other public schools[.]" § 160.415.13.

Charter schools are required to participate in typical activities of a school district: to administer statewide student assessments and distribute an annual report card; to comply with laws and regulations of the state relating to health, safety, and minimum educational standards; to be non-sectarian in their programs, admission policies, employment practices, and all other operations; and to assure that needs of special education children are met. § 160.405. But charter schools are not subject to some laws regulating public school districts, such as the State's statutory minimum teacher salaries. Tr. I, p. 88.

The charter school law establishes a working relationship between a school district and a charter school. A school district may, for example, sponsor a charter school; object to a charter sponsor's application; convert up to five percent of its public schools to charter status; review charter school audits; keep charter employees on the district's payroll subject to reimbursement by the charter school; and contract with a charter school to provide the charter students' transportation. §§ 160.400 – .420.

Under the charter school law as originally enacted, payments to charter schools were made through a school district, which acted as the disbursal agent. § 160.415.2(4), RSMo 2000. Payments to charter schools were calculated to approximate the total per-pupil amount from both local funds and state foundation formula funds that are allocated generally to school districts rather

than to individual pupils. *See* § 160.415.2(1), RSMo 2000. "The district of residence of a pupil attending a charter school shall also pay to the charter school any other federal or state aid that the district receives on account of such child." § 160.415.2(2), RSMo 2000. Neither the KCMSD nor the individual plaintiffs challenged that statute, and the KCMSD paid the charter schools under it throughout the period the statute was in effect.

KCMSD and the individual plaintiffs challenged the amended, current version of the charter school law, which permits a charter school to declare itself a local educational agency (LEA). *See* § 160.415.2(1) and (2), and .4 . If a charter school has declared itself an LEA, the school district no longer acts as the disbursal agent. Instead,

> the department of elementary and secondary education shall, upon notice of the declaration, reduce the payment made to the school district [by the department] by [the amount of aid payments specified under the statute] and pay directly to the charter school the annual amount reduced from the school district's payment.

§ 160.415.4. When charter schools are LEAs, the State pays to the charter schools directly approximately the same per-pupil amount that the school

district did under the original law. The state then reduces by an equivalent amount the State payments to the regular school district. Tr. I, p. 156. All charter schools within the KCMSD are now, like the KCMSD itself, LEAs. Tr. I, p. 35.

As originally enacted, the basic calculation for charter school payments contained in § 160.415 was based on the Line 1 foundation formula calculation. Tr. I, p. 150. That calculation takes state aid and local effort into account. *Id.* Line 1 was a combination of the District's tax rate of $4.95, times a variable called the guaranteed tax base, which was a state-wide constant, times the total eligible pupils for the district including charters, times a proration factor to accommodate the appropriation provided by the General Assembly. That generated an amount, which was divided by the eligible pupil count from the first part of the calculation, which yielded a per-pupil amount to pass onto charter schools. Tr. I, pp. 151-152. The calculation resulted in a sharing of the tax money collected from all taxpayers, across all public schools in the district. Tr. I, pp. 153-154.

For fiscal year 2006, the variables in the calculation of charter school payments changed because the whole foundation formula changed, but the concept of determining a per-pupil amount of state and local money remained the same. Tr. I, p. 155. So today, the state (1) calculates the amount set by the

foundation formula for the KCMSD, including students enrolled in both KCMSD and charter schools; (2) makes a per-pupil calculation of the combined state and local funds for pupils enrolled in schools – district-operated or charter – in the KCMSD; (3) multiplies the per-pupil amount by the number of students in each charter school; (4) sends that total to the charter schools; and (5) sends the remainder to the KCMSD. The state does not collect from nor give to any charter school any funds collected by the KCMSD pursuant to its tax levy. The result (setting aside any possible impact of changes in the state foundation formula) is to put the charter schools and the KCMSD in the same relative position they were in when the KCMSD itself made the payments to the charter schools.

This approach is not unique to funding charter schools. It is similar to that long used to pay for students who are placed outside the district. Tr. II, p. 15. In both instances, the money follows the student; funds that the district had available to pay for educating the student in the district flow to the school where the child is placed.

II. Article X, § 11(g) does not deprive the legislature of authority to allocate state funds so as to make payments directly to charter schools serving students who are entitled to an education in the Kansas City public schools. (Responds to Appellants' Point I.)

The first claim made by KCMSD and the individual plaintiffs is that the state cannot reduce its payments to the KCMSD and make payments to the charter schools to educate KCMSD-resident students because of the language of Article X, § 11(g). As discussed above, § 11(g) was enacted to allow a property tax levy well above that otherwise allowed without voter approval under the Hancock Amendment. Section 11(g) provides:

> Section 11(g). The school board of any school district whose operating levy for school purposes for the 1995 tax year was established pursuant to a federal court order may establish the operating levy for school purposes for the district at a rate that is lower than the court-ordered rate for the 1995 tax year. The rate so established may be changed from year to year by the school board of the district. Approval by a majority of the voters of the district voting thereon shall be

> required for any operating levy for school purposes equal to or greater than the rate established by court order for the 1995 tax year. The authority granted in this section shall apply to any successor school district or successor school districts of such school district.

The need for § 11(g) – other than simply as an element facilitating the final resolution of the Kansas City desegregation suit[2] – is evident from the decision of the U.S. District Court in 1997. Although that court suggested that the KCMSD should and could learn to live within its then-authorized means (a $2.75 levy, *see* 959 F.Supp. at 1179), the court agreed that "removal of the [$4.96 court-ordered levy] would result in 'fiscal chaos'" (959 F.Supp. at 1154).

But the real purpose of § 11(g) was not to protect the KCMSD as an entity. That is evident from the language of the amendment itself, which was written to survive changes in the structure, geography, or composition of the district. And it is evident from the preexisting statutory scheme, which § 11(g) did not even hint was being changed – a scheme under which the KCMSD could be

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[2] Although the State left the case before 1998 (contingent, of course, on continued payments through 1998), the KCMSD was not declared "unitary" and thus relieved of federal court supervision until 2003. *See Jenkins v. KCMSD*, 516 F.3d at 1076.

reorganized, restructured, divided, or even abolished. *See*, *e.g.*, §§ 162.071, 162.081, 162.171, and 162.825. It should thus be evident that the real purpose of § 11(g) was to protect the school children who lived in the area covered, in 1998, by the KCMSD. The Court should reject the KCMSD's effort to use § 11(g) to override the General Assembly's contemporaneous policy determination that those children are best served by a combination of public schools operated by school districts and public schools operated under the charter schools law.

Of course, analysis of the validity of the charter school law must begin from the premise that the legislature could act as it did. This Court has often and recently recognized that courts are "not free to add limitations on the legislature's authority regarding taxation and revenue that are not enumerated in the Missouri Constitution or United States Constitution." *Franklin Co., Missouri ex rel. Parks v. Franklin Co. Comm'n,* 269 S.W.3d 26, 31 (Mo. banc 2008) ("*Parks*"). Section 11(g) contains no such limitation.

The KCMSD exercises taxing authority from two sections of the Missouri Constitution. Article X, § 11(b), available to all schools, provides that school districts may impose a tax of up to $2.75 per one-hundred dollars of assessed valuation.[3] Article X, § 11(g) then provides (with language referring to past

[3] Section 11(c) allows school districts to impose high levies – but only with voter approval. Apparently, the KCMSD has not used that authority.

court supervision and orders, rather than expressly stating the result) that the KCMSD (or its successors) may establish a levy up to $4.95 without voter approval. The KCMSD's tax resolutions and its witnesses testimony at trial demonstrated that since at least 1999-2000, the district has collected each year an amount for operations under § 11(b), and then an additional amount for desegregation or § 11(g), totaling the $4.95 maximum levy.

The amount caused to be transferred to the charter schools in any given school year has never exceeded the amount of funds received by the KCMSD pursuant to the first component of the total property tax levy – the operating levy – in that year. Tr. II, p. 121; Defs' Exhibit MM, p. 12, No. 32. Likewise, the amount caused to be transferred to the charter schools in any given school year has never exceeded the amount of funds received by the KCMSD pursuant to the second component of the total property tax levy – the desegregation levy or operating levy increment – in that year. Tr. II, p. 121; Defs' Exhibit MM, p. 12, No. 33. So when the KCMSD paid the charters itself, it never had to pay even $1 of local tax money, much less of the § 11(g) levy, to the charters. And now, no local money, whether raised pursuant to § 11(b), (c), or (g), flows directly from the KCMSD to the charters or through the State to the charters.

In the absence of a constitutional prohibition, the General Assembly has plenary legislative power, *Fust v. Attorney General,* 947 S.W.2d 424, 430

(Mo. banc 1997), that is "'unlimited and practically absolute,'" *Parks*, 269 S.W.3d at 31 (*quoting Kansas City v. Fishman,* 241 S.W.2d 377, 380 (Mo. banc 1951)). Using that power, the General Assembly can reallocate funds among the state's political subdivisions. The General Assembly's authority to manage distribution of monies collected by local levy is supported by this Court's long-standing recognition that monies collected by local governments for a public purpose are not the private property of such entities at all. "[M]oney acquired by the state or county by taxation is not the private property of any county or school district, but is the property of the state, which may be used for any public purpose the Legislature may deem wise." *State ex rel. Clark v. Gordon,* 170 S.W. 892, 895 (Mo. banc 1914). *See also State ex rel. Applegate v. Taylor,* 123 S.W. 892, 913 (Mo. banc 1909) (same; money allocated to drainage district); and *City of Hannibal v. County of Marion,* 69 Mo. 571, 1879 WL 8201 *3 (Mo. 1879) (same; bridge tax and poor tax). Notably, *Clark* involved redistribution of taxes to a new type of school district created by the legislature in 1913. 170 S.W. at 897. In upholding the funding mechanism, this Court remarked that the new law was "progressive and in keeping with the forward movement of the state and country at large[.]" *Id.*

Working from the factually false assumption that the charter school law takes dollars raised locally and gives them to charter schools, the plaintiffs claim

that § 11(g) had a specific purpose that prohibits the KCMSD from transferring any amount collected under that levy to charter schools (again, despite the KCMSD's years of sending money to charters itself). Petition, ¶39 (*citing Horsefall v. Sch. Dist. of Salem,* 128 S.W. 33, 34 (Mo. App. 1910)). The plaintiffs read § 11(g) in a hyper-technical and narrow manner that is antithetical to how Missouri courts treat provisions of the Missouri Constitution.

The fundamental purpose of constitutional construction is to give effect to the intent of the voters who adopted the amendment. *DeMere v. Missouri State Highway and Transp. Comm'n*, 876 S.W.2d 652, 655 (Mo. App. W.D. 1994) (emphasis added), citing *Keller v. Marion County Ambulance Dist.*, 820 S.W.2d 301, 302 (Mo. banc 1991) and *Boone County Court v. State*, 631 S.W.2d 321, 324 (Mo. banc 1982). In determining the intent and purpose of a constitutional provision, "the construction should be broad and liberal rather than technical" – a "constitutional provision should receive a broader and more liberal construction than" a statute. *DeMere*, 876 S.W.2d at 655 (*citing State Hwy. Comm'n v. Spainhower*, 504 S.W.2d 121, 125 (Mo. 1973)).

This Court has already had occasion to address construction of part of the phrase that plaintiffs' invoke from § 11(g), "for school purposes," as those words are used in § 11(c). The Court refused to read a limitation into the phrase where none appeared in the "express terms or plain intendments of the constitutional

provision." *Rathjen v. Reorganized School Dist.*, 284 S.W.2d 516, 527 (Mo. banc 1955). The Court said that it was required "to give effect to an express provision rather than an implication." *Id.* "For school purposes" had been construed narrowly, *e.g.,* to exclude school building purposes, when that construction was required by then-existing "express constitutional or statutory provision." *Id.* at 526. But when *Rathjen* was decided, no such limitation existed with respect to § 11(c).

Moreover, the term was not technical: "Technical words are those 'of or pertaining to the useful or mechanical arts, or any science, business, profession or sport, or the like.'" *Id.* at 529 (*quoting* WEBSTER'S NEW INTERNATIONAL DICTIONARY, 2d edition). Therefore, the Court emphasized, it was required to give the phrase its plain and ordinary meaning. *Id.* at 529 (*citing State ex inf. Rice ex rel. Allman v. Hawk*, 228 S.W.2d 785, 788 (Mo. 1950)).

Article X, § 11(g) displays no manifest intent to depart from the plain and ordinary meaning of the words used therein, *i.e., "*for school purposes for the district." The section contains no definitions and refers to no definitions contained elsewhere. The section does not exclude any purposes to which the levy can be put. The words are not technical and the phrase is a broad one. It must be read in a broad fashion. *DeMere*, 876 S.W.2d at 655. Applying local levy monies to provide a free public education to resident pupils of the KCMSD

is manifestly a "school purpose for the district," whether that education is provided by a school operated by the district or by a charter school.

Nor does the charter school statute enacted contemporaneously with § 11(g) establish any limitations on the phrase "for school purposes for the district." To the contrary, the statute emphasizes the breadth of the phrase. For example, under § 160.400, "[c]harter schools may be operated only in a metropolitan school district or in an urban school district containing most or all of a city with a population greater than three hundred fifty thousand inhabitants and may be sponsored by any of the following ...." Section 160.415.1 provides that charter pupils be counted among District pupils: "For the purposes of calculation and distribution of state school aid under section 163.031, RSMo, pupils enrolled in a charter school shall be included in the pupil enrollment of the school district within which each pupil resides." The charter schools are required to participate in typical activities of the District: statewide student assessments and distribution of an annual report card; to comply with laws and regulations of the state relating to health, safety, and minimum educational standards; to be non-sectarian in all operations; and to assure that needs of special education children are met. § 160.405.

Further, the charter school law establishes a working relationship between the school district and charters. The school district could, for example,

sponsor a charter; object to a charter sponsor's application; convert up to five percent of its public schools to charter status; review charter school audits; and keep charter employees on the district's payroll subject to reimbursement by the charter. §§ 160.400 – .420.

If the foregoing was not sufficient to demonstrate that the plaintiffs' interpretation of Article X, § 11(g) is wrong, there are two judicially-acknowledged extrinsic sources for interpretation of a constitutional provision. One is the administrative interpretation lent a constitutional provision by the public officers charged with its execution. The other is contemporaneous legislative enactment. In this case, both demonstrate that the plaintiffs' construction is wrong.

With respect to the former, "[t]he administrative interpretation given a constitutional or statutory provision by public officers charged with its execution, while not controlling, is entitled to consideration, especially in case of doubt or ambiguity." *State ex rel. Curators of Univ. of Mo. v. Neill,* 397 S.W.2d 666, 670 (Mo. banc 1966), citing *Foremost Dairies, Inc., v. Thomason*, 384 S.W.2d 651, 659 (Mo. banc 1964); *England v. Eckley*, 330 S.W.2d 738, 743-744 (Mo. banc 1960); and *Rathjen v. Reorganized School Dist. R-II*, 284 S.W.2d 516, 526 (Mo. banc 1955). In *Neill,* for example, the Court lent weight to the "admitted fact that for more than twenty-five years the Curators have been

providing parking facilities on its campuses," in concluding that a parking facility was a structure that the Curators were lawfully permitted to construct on University property. 397 S.W.2d at 670.

Here, the evidence showed that after enactment of the charter school law, the KCMSD began distributing payments to the charter schools that opened in the following school year. Not only did the KCMSD do so without protest from 1999 until 2006, it was even among the first entities to sponsor a charter school, and eventually sponsored two charter schools – including the largest charter in the district – over the course of five school years. The KCMSD's administrative interpretation of § 11(g), as demonstrated by its behavior, well reveals the construction that applies to § 11(g): "school purposes for the district" covers charter schools serving district residents.

A contemporaneous legislative construction is also entitled to and will be given serious consideration. *Stemmler v. Einstein,* 297 S.W.2d 467, 478 (Mo. banc 1957) (*citing Rathjen v. Reorganized School Dist. R-II*, 284 S.W.2d at 526). As discussed above, the same General Assembly placed § 11(g) on the ballot and enacted the charter school law. The enactment of the charter school law, including the funding mechanism of § 160.415.2(1), contemporaneously with the adoption of Article X, § 11(g) is entitled to and must be given serious consideration. That enactment displays the broad intendment of the General

Assembly to give students living in the KCMSD the benefits of both the high tax levy and the choices that charter schools make possible. By enacting those provisions together, the General Assembly indicated that "school purposes of the district" cannot be given an interpretation that is more protective of the school district as an entity than it is of the students the district is obliged to serve.

But the Court need not engage in a lengthy analysis of intent, for, again, a simple reason: no local money flows to the charter schools under the current scheme. Thus the plaintiffs object to what the closing sentence of their § 11(g) point calls the obligation "to shift its local tax revenue to cover costs previously covered by the unreduced State aid in violation of the Hancock Amendment." That statement is telling: it implicitly concedes that not a word in § 11(g) even hints at the possibility that it deprived the legislature of authority to allocate state funds in light of the extraordinary ability of the KCMSD to apply a high levy without voter approval – and the charter school law as amended allocates *only* state funds. What makes § 11(g) meaningful is the authority it gives the KCMSD to impose a tax levy without voter approval. Section 11(g) retains that meaning, regardless of whether the legislature permits charter schools, or otherwise takes into account the extraordinary ability and resources of the KCMSD or any other district when it decides how to allocate the State's limited funds among the public schools across Missouri. To read § 11(g) otherwise, and

then apply that narrow reading to § 11(c), could essentially bar the state from taking local tax levies and collections into account in its formula for distributing state funds to public schools, a step that would remove a key criteria in both current and past funding formulas.

III. The Hancock Amendment does not bar the legislature from redirecting state funds so as to ensure that students who attend charter schools in a district receive support comparable to that given to students who attend schools operated by the school district itself.

A. The scope and purpose of the Hancock Amendment.

This Court has often cited its explanation of the purpose and method of the Hancock Amendment: "to protect taxpayers from government's ability to increase the tax burden above that borne by the taxpayers on November 4, 1980." *Fort Zumwalt School Dist. v. State*, 896 S.W.2d 918, 921 (Mo. banc 1995). The focus of any application, then, of the Hancock Amendment must be consistent with the objective of protecting taxpayers.

Consistent with that purpose, this Court has held school districts do not have standing to sue under Article X, § 23 MO CONST. *Fort Zumwalt,* 896 S.W.2d at 921. Thus the circuit court dismissed the KCMSD Hancock claims (Appellant's Appendix at A2); the KCMSD has not appealed from that dismissal.

The portion of the Appellants' Brief that addresses the Hancock Amendment is necessarily, then, an argument made solely by the individual plaintiffs and not by the KCMSD.

The individual plaintiffs rely on Article X, § 21 – the "unfunded mandate" provision of the Hancock Amendment. This Court has described the two parts of that section:

> …Section 21 prohibits unfunded mandates. To the extent that the state required local governments to perform activities and provided some funding of those activities on November 4, 1980, the first sentence of Section 21 prohibits the state "from reducing the state financed proportion of the costs" of the mandated activity. The second sentence of Section 21 prohibits the state from requiring local government to begin a new mandated activity or to increase the level of a previously mandated activity beyond its 1980-81 level unless the General Assembly appropriates sufficient funds to finance the cost of the new or increased activity.

Fort Zumwalt, 896 S.W.2d at 921. As discussed below, the individual plaintiffs

(and, for that matter, the KCMSD) did not and cannot establish that the charter school law violated either prohibition.

B. The charter school laws did not add to KCMSD's obligation to make a free public education available to all children within its boundaries. (Responds to Appellant's Point II.)

To make a claim under the new mandate portion of § 21, a plaintiff must show: (1) that a new or increased activity or service is required, and (2) that the local entity has increased, but unfunded costs in performing that activity or service. *See City of Jefferson v. Missouri Dept. of Natural Resources*, 916 S.W.2d 794, 795 (Mo. banc 1996). But here, the plaintiffs have not demonstrated a new activity, let alone an unfunded one.

To prove such a claim, plaintiffs must identify a new or expanded activity required by state law, establish with "specific proof" that the new mandated activity increases their costs, and prove that the State does not provide funding for the activity. *Brooks v. State of Missouri,* 128 S.W.3d 844, 848-49 (Mo. banc 2004) (*quoting Miller v. Director of Revenue,* 719 S.W.2d 787, 789 (Mo. banc 1986)) ("these elements cannot be established by mere 'common sense,' or 'speculation and conjecture'"). *See also Division of Employment Security v. Taney County District R-III,* 922 S.W.2d 391, 395 (Mo. banc 1996) (plaintiffs

must make a "specific factual showing" of increased costs associated with a new or expanded activity), and *City of Jefferson v. Missouri Dept. of Natural Resources,* 863 S.W.2d 844, 848 (Mo. banc 1993) (courts will not presume increased costs based solely on evidence of a requirement of an expanded activity). The plaintiffs must also carefully show that the alleged new or increased activity is in fact "required" by the State. *Miller,* 719 S.W.2d at 788; *Citizens for Rural Preservation, Inc. v. Robinett,* 648 S.W.2d 117, 131 (Mo. App. W.D. 1982) (county was not "required" to maintain surfaced roads without full state funding because the county could choose whether to grant a permit to surface a road and, if it did, whether to assume the responsibility to maintain the road or require a developer to do so. "Having so chosen, the county cannot be said to have been *required* to undertake 'new or expanded activities.'").

To state it in a generalized but appropriate way, the only activity that the State requires of the KCMSD is to educate the children who live in the district and choose to attend publicly-funded, rather than private, schools. The State has imposed that duty on the KCMSD since its creation more than 100 years ago. The KCMSD's obligation extends to the pupils who enroll in charter schools; they are KCMSD pupils no less than are those who go to KCMSD-managed schools.

The funds made available from local and state taxes follow the student, *i.e.*, they are given to the entity that is undertaking to educate the student, rather than being retained by the entity that set the levy and was the recipient of the tax revenues. The concept that school funding begins with a calculation that gathers state and local funds, and generates some type of a per-pupil unit for payment to the schools, existed long before the charter school funding mechanism was enacted, and at least since Hancock was enacted. The same payment concept has long applied when a school district sends a child (perhaps pursuant to court order) to another district to be educated. Extending the "money follows the student" payment concept is nothing new to charter school students and is not a new mandate of the sort that threatens the individual plaintiffs with higher taxes – again, the interest that the Hancock Amendment protects.

C. The plaintiffs cannot establish a violation of the Hancock Amendment bar on the State reducing its portion of the cost of state-mandated programs. (Responds to Appellants' Point III.)

1. The standard.

The individual plaintiffs argue that if the State did not impose a new obligation or program, it nonetheless reduced the portion it was paying for existing state-mandated programs, invoking this language from § 21: "The state is hereby prohibited from reducing the state financed proportion of the costs of any existing activity or service required of counties and other political subdivisions." Under the plain language of that provision, the plaintiffs must identify some act by the State "reducing" what it pays for a state-mandated activity or service.

The claim under the change in proportion prong of § 21 fails as a matter of law. As noted above, since long before the adoption of the Hancock Amendment the State has funded elementary and secondary education on a per-pupil basis. Thus the question that would appropriately be posed under this prong of § 21 is whether the charter school law "reduced" the state's support for pupils living in the KCMSD. It did not. Rather than make a distinction based on the student's choice of public school, the State's formula for allocating funds ensures that a

student will not be discouraged or prevented from choosing to attend a public school operated by a charter rather than one operated by a school district because the resources are retained by the entity that levies and receives local taxes. Per-pupil payments are calculated the same for all Kansas City students. In other words, the state-financed proportion paid per pupil is the same with or without the charter school law.

But equally important, the individual plaintiffs' reduced-proportion claims fail as a matter of fact: as the circuit court correctly concluded, the plaintiffs did not meet the evidentiary requirements for making such a claim. In *Fort Zumwalt*, this Court held that Hancock plaintiffs must do much more that what the plaintiffs here managed to do: they "must present evidence to establish the program mandated by the state in 1980-81 and the ratio of state to local spending for the mandated program in that year," and further prove "the costs of the mandated program in each subsequent year and the ratio of state to local spending for the mandated program in each subsequent year." 896 S.W.2d at 922. The calculation of a mandated program's costs may not include "any discretionary expenditures a district undertook that went beyond the state mandate" and requires that plaintiffs clearly distinguish "resources directly committed to the state mandates …from those not so dedicated." *Id.* The Court noted that "[p]roving these factors for 1980-81 and each subsequent year will

require sophisticated budgetary evidence and economic expertise." *Id.* at 923. Here, the plaintiffs did not make – and it is apparent that they cannot make – the showings required by *Fort Zumwalt*.

2. Mandates.

Generally, state mandates are to be found in state statutes. But there are few specific mandates pertinent here. In fact, the only one with a notable impact on the fiscal analysis required under § 21 is the State's teacher salary requirement, discussed below at pp. 41-42.

Much of the plaintiffs' case, then, was based on standards set by the Department of Elementary and Secondary Education ("DESE"). In 1980-81, those standards were found in what was called the "AAA classification system." But the plaintiffs never showed what those standards were. Nor did they drill into the KCMSD's 1980-81 budget and tie costs or expenditures to AAA criteria. They merely showed what the school district spent on certain activities during that year, activities that the plaintiffs deemed to have been state-mandated.

The AAA criteria could be characterized as "mandates" only to the extent they were tied into accreditation. The State has had accredited schools since at least 1980-81, when the AAA system was set out in the "Handbook for Classification and Accreditation of Public School Districts in Missouri." The AAA system included standards to be met by all school districts, such as

standards for administration, budgets and accounting, salary schedules, secretarial personnel, school health services, school food service, transportation services, building standards, instructional times, high school credit and graduation requirements, evaluation of school programs, professional development, standardized testing, and special education. Tr. I, pp. 89-90; Pltfs' Exhibit 11, pp. 8-13. Again, the plaintiffs put on no evidence quantifying costs associated with AAA compliance.

Nor did the plaintiffs adequately address the changes since 1980-81. Today, we use the Missouri School Improvement Program (MSIP) standards to evaluate school districts. MSIP has both resource and performance standards. Resource standards include student-teacher ratios and classroom sizes, but DESE does not consider those standards to be requirements. Rather, they are considered best practices and good guidance for improved instruction. But the bottom line for school district accreditation is a school district's performance measures, *i.e.,* test scores, graduation rates, attendance rates, and college placement. Tr. II, p. 26. A school could fail to meet resource standards, but still perform sufficiently on its performance measures to maintain its accreditation. Tr. II, p. 26. In fact, the KCMSD has in the past missed one of its MSIP standards and maintained its accreditation. Tr. I, p. 126.

Again, the plaintiffs did not specify the costs of meeting any MSIP standard, nor compare any difference between the costs of meeting AAA rather than MSIP standards. Rather, they argued generally that compliance with all MSIP resource measures (teacher ratios, etc.) is mandatory for purposes of maintaining accreditation. But the evidence showed that resource measures do not drive accreditation – performance measures do.

Moreover, the plaintiffs did not attempt to distinguish between state mandates and federal ones – *i.e.*, standards that the KCMSD must meet in order to be a recipient of federal funds that greatly contribute to the district's budget each year. The plaintiffs continue that approach here, never even mentioning the "No Child Left Behind Act" (23 U.S.C. §§ 6310-6578) or any other federal requirement. Ultimately, it was impossible for the circuit court to determine, from the evidence plaintiffs presented, what KCMSD costs are the result of state mandates and what costs incurred for other reasons. Given the scope of the federal requirements, the absence of testimony or other evidence identifying areas where the MSIP standards go beyond federal requirements, the amount of KCMSD revenue that is dependent on meeting those requirements, and the absence of even a hint that the KCMSD would or could give up that revenue, it seems apparent that the financial effect of MSIP is actually quite limited. And

the Hancock Amendment addresses *only* those costs that are incurred by state mandate.

3. Cost evidence.

But perhaps most important, the plaintiffs consistently failed to adequately calculate what it costs the KCMSD to meet the requirements that they did identify. Their evidence was based not on what it cost to provide state-required services, but on what the KCMSD spent in providing such services. Their evidence was thus replete with discretionary spending, for purposes of Hancock analysis. The discretionary nature of the KCMSD's spending is also borne out by the fact that even though through the period from 1980-81 to 2007-08 the KCMSD's enrollment drastically declined, as state and local revenue rose the, per-pupil expenditures increased from $8,000 in 1989 to $13,000 in 2007 – by 62%.

At trial, the KCMSD and its expert witness reviewed some of the district's expenditures. Without any specific factual analysis, they classified some expenditures as "mandatory," *i.e.*, as required by state law. Tr. I, p. 90. For example, the KCMSD's witness testified that the district's school board must have a secretary and treasurer. Although state law does not require that those be paid positions, the plaintiffs included salaries for the positions as mandatory expenditures merely because, its witness testified, the functions are performed.

Tr. I, p. 94. Similarly, the district must have a superintendent, but it does not require the superintendent be paid the quarter-million dollar salary that the plaintiffs' expert insisted must be included, in its entirety, in the calculation of state-mandated costs. Tr. I, p. 96. And though the state requires schools, it does not require more expensive magnet schools, that is, non-neighborhood schools. Tr. I, pp. 87-88. Though the increased costs of operating non-neighborhood schools constitute discretionary spending, the plaintiffs did not quantify the cost of operating these non-neighborhood schools, compared to the cost of operating neighborhood schools.

The most telling failures in plaintiffs' proof are in the area of teachers' salaries, buildings, and transportation.

Teachers. The only level of spending that the State mandates by statute is minimum teacher salaries. For new teachers, from fiscal years 1995 through 2007, the minimum teacher salary was $18,000; in 2008, it was $22,000 and rises $1,000 every year thereafter until the minimum reaches $25,000 for 2010 and each subsequent year. For teachers with 10 years of experience and a master's degree, from 1995 through 2007, the minimum was $24,000; in 2008, it was $30,000 and rises $1,000 every year thereafter until the minimum reaches $33,000 for 2010 and each subsequent year. § 163.172, (RSMo Supp. 2009). There is a teacher's union in the KCMSD. Each year when the teacher's union

requested salary increases, the KCMSD compared its salary schedules to surrounding school districts to see if they were comparable. Tr. I, p. 71. The plaintiffs did not back out of any part of the resulting $131 million in salaries in excess of the statutory minimum salary. Tr. I, p. 121. That method and the resulting amount may be appropriate as a policy matter. But neither the method nor the amount is state-mandated. The Hancock Amendment simply cannot be read to say that if the KCMSD raises its teacher salaries in response to increased salaries in Johnson County, Kansas, the State of Missouri has "reduced" its share of Missouri-mandated spending, demanding action to protect Missouri taxpayers.

Of course, the number of teachers and other personnel is a large (perhaps the single largest) contributor to expenditures. But the plaintiffs made no effort to determine how many teachers were actually required to fulfill state mandates. Indeed, they did not attempt to back out any excess number of teachers, because they believed it was enough that the KCMSD's pupil/teacher ratio was within MSIP guidelines. Tr. I, pp. 120-121. The plaintiffs did not even explain whether the KCMSD ratio was in the high or low end of the guidelines – and if in the high end, why that could be deemed to be mandated by the State.

Salaries are not the only expense for teachers; the KCMSD also chooses to pay benefits of various kinds. But State law does not mandate any particular

level of spending for benefits for teachers and other employees. Tr. II, pp. 23-24. Nor does State law require spending for FICA and Medicare payments. Tr. II, p. 24. Yet the district made no effort to remove district-chosen benefits and federally-mandated spending from the calculation of state-mandated costs.

Buildings. Plaintiffs classified the KCMSD's school buildings as state-mandated – but not just some, or even most buildings, but *all* buildings in the district. Tr. I, p. 121. Again, they ignored the seemingly obvious impact of reduced enrollments.

The plaintiffs included the cost of debt service on bonds issued for building construction and improvement as mandatory expenditures, on the theory that "the State requires that the District erect buildings and maintain the buildings in order to educate its students." Tr. I, pp. 121-122. But the plaintiffs did not attempt to differentiate debt incurred as a result of federal court decrees. In fact, much of the debt service included in the district's calculation was the result of bonds issued pursuant to a federal court order, to fund building projects mandated by the federal court. Tr. I, p. 122.

And the plaintiffs ignored the potential for selling or leasing underutilized buildings – curious, considering the KCMSD's own experience, selling buildings to two charter schools, Lafayette Academy and Gordon Park, and using the proceeds of those sales to repay revenue bonds or to pay debt service on those

buildings, Tr. I, pp. 75-76, and its lease of another building to another charter school, Southwest, Tr. I, p. 76.

The plaintiffs' failure to adequately account for excess building capacity was especially odd in light of the district's own 2006 facility utilization and planning study, which found that the KCMSD had excess building capacity and an average utilization rate for its buildings of around 70%. Tr. I, p. 123; Exhibit I-202, pp. KCMSD 24677 – KCMSD 246778. Again, in light of its purpose – to protect Missouri taxpayers – the Hancock Amendment cannot be read to require state spending to rise because of a school district's determination to continue using dozens of underutilized school buildings.

Transportation. State law requires transportation for those pupils who live over 3.5 miles from school. § 167.231.1. DESE calculates efficiency of a school district's transportation services and even if DESE determines that a school district is inefficient, the district may still be reimbursed for its operations, up to a point. Tr. II, pp. 24-25; *see* § 163.161.2. But no state statute requires school districts to provide transportation to students who live closer to school, as the KCMSD has chosen to do.

Recognizing that choice, the KCMSD did back out of its transportation cost calculation the amounts it spends to provide transportation to students who live within the 3.5 mile radius. But the KCMSD stopped there. It did not even

attempt to determine whether the remaining transportation expenditures were actually state-mandated. Indeed, what the individual plaintiffs now argue, in part IV.B of their brief, is that they did not have to provide such proof. In the individual plaintiffs' view, the KCMSD can send a separate bus to pick up each KCMSD student– thus minimizing the student's travel time – and still count the entire cost as a state-mandated expense. It is hardly surprising that the plaintiffs are unable to cite a single authority to support that proposition.

* * *

Again, the individual plaintiffs did not accurately demonstrate what reduction in state funding, if any, the KCMSD suffered as a result of the charter school law because, as noted above, the plaintiffs included non-mandatory expenditures in their calculation. That the plaintiffs in a few instances separated some discretionary spending from mandatory expenditures does not mean that they met their evidentiary burden.

But again, the Court need not rest its decision on the plaintiffs' evidentiary failures. At most, what the charter school law does is to redistribute revenue. And the redistribution, or reallocation of revenue, including local revenue, is not the shifting of an unfunded tax burden from the state to a local entity. *County of Jefferson v. Quicktrip Corp.,* 912 S.W.2d 487, 491 (Mo. banc 1996) (*citing Berry v. State,* 908 S.W.2d 682, 685 (Mo. 1995)). The Court should

refuse the individual plaintiffs' request to convert § 21 from a protection for taxpayers into a protection for local governmental entities that want to collect, retain, and spend tax money.

D. The individual plaintiffs seek no relief available under Article X, § 21.

This Court has observed that Article X, § 21 is not a wavier of sovereign immunity and cannot be used to compel the payment of additional funds from the State. *Fort Zumwalt,* 896 S.W.2d at 923. The available remedy, when the State imposes an unfunded mandate, is to excuse the local government from that mandate to the extent the State has not paid for it. *Id.* Because neither this nor any other court has yet to find a reduced-proportion violation (and, as discussed above, the Court should not do so here), no one has set out the appropriate remedy for such a violation. But any remedy must be consistent with the taxpayer-protection purpose of the Hancock Amendment.

In every successful § 21 case, the remedy has been to excuse a state mandate, and thus to save taxpayers from additional expense. Here, the individual plaintiffs have not suggested such a remedy. Instead, they ask the Court to declare "the charter schools funding formula … unconstitutional" in its entirety. App. Br. at 44. In doing so, they provide not a word of explanation – perhaps because they have no basis for suggesting that they or other taxpayers

of the KCMSD pay even $1 more in taxes as a result of the State's decision to allow those living in the KCMSD to attend charter schools and to have existing funding follow them.

CONCLUSION

For the reasons stated above, the Court should affirm the decision of the circuit court.

Respectfully submitted,

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CERTIFICATION OF SERVICE AND OF

COMPLIANCE WITH RULE 84.06(b) and (c)

The undersigned hereby certifies that on this 18th day of March, 2010, one true and correct copy of the foregoing brief, and one disk containing the foregoing brief, were mailed, postage prepaid, to:

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The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b), and that the brief contains 9,856 words.

The undersigned further certifies that the labeled disk, simultaneously filed with the hard copies of the brief, has been scanned for viruses and is virus-free.

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