

SC91283

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IN THE SUPREME COURT OF MISSOURI

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WEHRENBURG, INC.,

Appellant,

vs.

DIRECTOR OF REVENUE,

Respondent.

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On Petition for Review From  
The Administrative Hearing Commission,  
The Honorable Sreenivasa Rao Dandamudi, Commissioner

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RESPONDENT'S BRIEF

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## STATEMENT OF FACTS

Appellant Wehrenberg, Inc., operates 12 movie theaters in the state of Missouri, and is seeking a refund in the amount of \$1,342,031.44 on sales taxes collected for concession items. (Legal File “LF” 7, 9). The requested refund is for the tax periods February 2006 through December 2008. (LF 9). The Director denied the refund because “food sold at movie theatres does not qualify for the reduced food tax rate under section 144.014.” (Resp’t Ex. B). The Administrative Hearing Commission upheld the Director’s decision, concluding that “Wehrenberg is not entitled to a refund of sales tax on its concession sales.” (LF 15).

At each of its 12 movie theaters, Wehrenberg sold admission tickets and made separate concession sales, offering, among other items, popcorn, fountain drinks, and candy for consumption at the theater. (LF 7-8). Four of the theaters had expanded menu items, including hotdogs, hamburgers, cheeseburgers, pizza, French fries, ravioli, and hot wings. (LF 7).

Wehrenberg uses separate cash registers for its box office sales and its concession sales. (Transcript “Tr.” 64). The box office sales receipts and the concession sales receipts are kept separate when entered into a centralized computer system used to track box office sales and concession area sales. (Tr. 64). Theater admission sales are made at the box office at the front of

theaters; concession sales are made at stands located in the lobby. (Tr. 71-72). Food stamps are not accepted for concession sales. (Tr. 12).

The movie auditorium has seating with armrests and flip-up chair seats. (Tr. 105-06). Each seat has a cup holder that fits the drinks sold at the concession stands. (Tr. 105-06). Except for the four locations that serve restaurant-style food, there are no chairs in the lobby or surrounding area by the concession stands. (Tr. 104, 113). Although Wehrenberg's concession stand employees do not ask where the customer intends to consume the concessions, available data shows that these items were consumed at Wehrenberg's theaters. (Tr. 41, 61, 105).

Popcorn is Wehrenberg's biggest profit item. (Tr. 110). The popcorn is prepared in poppers located at concession stands. (LF 7). The cooked popcorn is then moved to the popcorn conditioning units in front of the concession stands. (LF 7; Tr. 85). The conditioner is both a display and a conditioning unit. (Tr. 86). It holds the cooked popcorn, and allows air to flow through and around the popcorn. (Tr. 86). This dries the excess oil and humidity out of the popcorn to get the maximum crunch and texture. (LF 7; Tr. 86). The popcorn poppers are operated while movie patrons are present because Wehrenberg (like every theater operator) wants to introduce the

sight, sound, and most importantly, the smell of popping popcorn to the movie patron. (Tr. 97, 107-108).

Wehrenberg also sells pretzels and nachos at its concession stands. (LF 7). The pretzels arrive frozen and are either microwaved or put into a pretzel display prior to sale. (LF 8). The pretzel display has a heating unit and a water reservoir that humidifies and heats the pretzel. (Tr. 97). Employees pull the preheated pretzel from the display, or microwave the frozen pretzel, before giving it to the patron. (Tr. 99). For nachos, employees take an empty tray with two cheese reservoirs and pour melted cheese in each. Prepackaged chips are placed on top and served to the patron. (LF 8; Tr. 100).

Wehrenberg also sells candy at its concession stands. As an example of the pricing of candy, Wehrenberg sells chocolate raisins for \$3.25 a package. (Tr. 107; Pet. Ex. 21). Consentino's Price Chopper, a grocery store located in Blue Springs, Missouri, sells the same chocolate raisins for \$1.09 plus tax. (Tr. 107, Pet. Ex. 8).

During the tax period at issue, Wehrenberg derived 32% of its total revenue from concession sales, 64% from box office ticket sales, and the remainder from game rooms, theater rentals, and advertising. (LF 8). Of the total concession sales, more than 80% were prepared by Wehrenberg for

immediate consumption. (LF 13). The concession items were “not intended to be consumed at home.” (LF 8).

## SUMMARY OF THE ARGUMENT

Are food stamps used to purchase popcorn, fountain drinks, and candy at Wehrenberg's movie theaters? No, of course not. The Federal Food Stamp Program was designed to provide basic or staple foods for needy families and children, not to provide expensive and unhealthy concessions at a movie theater. 7 U.S.C. § 2011 (declaring the "policy of Congress" as "raising levels of nutrition among low-income households"). Indeed, in accordance with 7 U.S.C. § 2012(k)(1), which defines the "food" covered by the Federal Food Stamp Program, the food must be "for home consumption."

Missouri sales tax law in § 144.014 incorporates the federal definition of "food" under the Federal Food Stamp Program. The law provides that a reduced sales tax rate of one percent is available for retail sales of food, but only for "those products and types of food for which food stamps may be redeemed pursuant to the provisions of the Federal Food Stamp Program as contained in 7 U.S.C. Section 2012." § 144.014.2.

In accordance with the plain language of § 144.014, and the incorporated federal definition of "food," popcorn, fountain drinks, and candy purchased at a movie theater is not food for which food stamps may be redeemed – *i.e.* "for home consumption." Thus, sales at Wehrenberg's concession stands are not entitled to the reduced sales tax rate in § 144.014.

Wehrenberg's refund claim in this case fails for this reason, as well as other reasons consistent with the Administrative Hearing Commission's decision. Therefore, the Commission's decision should be affirmed.

## ARGUMENT

### *Standard of Review*

A decision of the Administrative Hearing Commission must be affirmed if: “(1) it is authorized by law; (2) it is supported by competent and substantial evidence on the whole record; (3) mandatory procedural safeguards are not violated; and (4) it is not clearly contrary to the reasonable expectations of the General Assembly.” *Brinker Mo., Inc. v. Dir. of Revenue*, 319 S.W.3d 433, 435-36 (Mo. banc 2010); § 621.193, RSMo (Cum. Supp. 2010).

When the Commission has interpreted the law or the application of facts to law, the review is *de novo*. *State Bd. of Registration for the Healing Arts v. McDonagh*, 123 S.W.3d 146, 152 (Mo. banc 2003); *Zip Mail Servs., Inc. v. Dir. of Revenue*, 16 S.W.3d 588, 590 (Mo. banc 2000). In addition, the Commission’s factual determinations “are upheld if supported by ‘substantial evidence upon the whole record.’ ” *Concord Publ’g House, Inc. v. Dir. of Revenue*, 916 S.W.2d 186, 189 (Mo. banc 1996) (quoting *L & R Egg Co. v. Dir. of Revenue*, 796 S.W.2d 624, 625 (Mo. banc 1990)).

Finally, this Court can affirm on any basis supported by the record. *See Missouri Bd. of Nursing Home Administrators v. Stephens*, 106 S.W.3d 524, 528 (Mo. App. W.D. 2003). Here, the Commission’s decision is supported by the record and the law, and should, therefore, be affirmed.

**I. The Administrative Hearing Commission Should be Affirmed Because Items Such as Popcorn, Fountain Drinks, and Candy Bought at a Movie Theater are Not Food “For Which Food Stamps May be Redeemed” Under § 144.014.**

The issue before the Court is one of simple statutory interpretation – whether a movie theater is entitled to a reduced tax rate under § 144.014 for the sale of popcorn, fountain drinks, and candy (among other similar items). There are several reasons why movie theater concessions are not subject to a reduced tax rate under the statute, and Wehrenberg entirely misses the first and most basic reason in its brief; that is, Missouri law requires that the food be of the type “for which food stamps may be redeemed” in order to qualify for the reduced tax rate. § 144.014.2.

The plain language of the statute provides a dispositive answer in this case. Popcorn, fountain drinks, and candy purchased at a movie theater are not food “for which food stamps may be redeemed.” *Id.* Thus, there is no need to engage in any rules of construction as the plain language of the statute is clear and controlling. Yet, even if the Court were to go beyond the plain language of the statute, the structure and purpose of the statute also support this same conclusion.

**A. The Plain Language of § 144.014 Narrowly Limits  
the “Retail Sales of Food” Subject to a Reduced Tax Rate.**

The “primary rule of statutory interpretation is to give effect to legislative intent as reflected in the plain language of the statute.” *Akins v. Dir. of Revenue*, 303 S.W.3d 563, 565 (Mo. banc 2010) (citing *State ex rel. White Family Partnership v. Roldan*, 271 S.W.3d 569, 572 (Mo. banc 2008)). To this end, courts consider the words used in their plain and ordinary meaning. *Metro Auto Auction v. Dir. of Revenue*, 707 S.W.2d 397, 401 (Mo. banc 1986).

Where a statute’s language is clear and unambiguous, there is no room for construction. *Id.* In determining whether the language is clear and unambiguous, the standard is whether the statute’s terms are “plain and clear to a person of ordinary intelligence.” *Alheim v. F.W. Mullendore*, 714 S.W.2d 173, 176 (Mo. App. W.D. 1986). “In the absence of statutory definitions, the plain and ordinary meaning of a term may be derived from a dictionary ... and by considering the context of the entire statute in which it appears.” *State ex rel. Burns v. Whittington*, 219 S.W.3d 224, 225 (Mo. banc 2007) (citing *Am. Healthcare Management, Inc. v. Dir. of Revenue*, 984 S.W.2d 496, 498 (Mo. banc 1999), and *Butler v. Mitchell-Hugeback, Inc.*, 895

S.W.2d 15, 19 (Mo. banc 1995)). In this case, the plain language and dictionary definitions are clear.

1. **“Food” is narrowly defined to include only food “for home consumption.”**

Section 144.014 subjects certain “retail sales of food” to a reduced tax “rate of one percent” instead of the regular four percent imposed by § 144.020.<sup>1/</sup> In order to qualify for the reduced rate, however, the “food” must be “those products and types of food for which food stamps may be redeemed pursuant to the provisions of the Federal Food Stamp Program as contained in 7 U.S.C. Section 2012.” § 144.014.2. Thus, § 144.014 defines “food” subject to the reduced tax rate by reference to a specific federal statute.

It is not new, of course, for Missouri law to reference and incorporate federal law. *See, e.g.*, § 208.010, *cited in Gee v. Dep’t of Soc. Servs., Family Support Div.*, 207 S.W.3d 715 (Mo. App. W.D. 2006). And as such, we must turn to the statutory definition provided in federal law to determine the plain

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<sup>1/</sup> Wehrenberg takes the odd position of arguing generally for strict construction of statutes imposing taxes while actually seeking to expand such a statute. A taxing statute, however, cannot be expanded merely because the tax rate happens to be lower, and, therefore, more desirable.

and ordinary meaning of the provisions in § 144.014. *See id.* at 719 (holding that a state agency cannot exceed the federal definition incorporated into Missouri law).

The referenced federal statute, 7 U.S.C. § 2012, contains definitions to be used in the Federal Food Stamp Program, including a definition of “food.” As provided in 7 U.S.C. § 2012(k), “food’ means”:

[A]ny food or food product *for home consumption* except alcoholic beverages, tobacco, and hot foods or hot food products ready for immediate consumption . . . .

*Id.* (emphasis added). Thus, to qualify for the reduced tax rate under Missouri law, the food must, at a minimum, be “for home consumption.”<sup>2/</sup>

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<sup>2/</sup> Federal Regulation, 7 C.F.R § 271.2, when defining “eligible foods” substitutes the word “human” for “home.” While the language in the statute controls over language in a regulation, this nevertheless eliminates inclusion of food purchased for animals.

**2. Popcorn, fountain drinks, and candy purchased at a movie theater are not “for home consumption.”**

The terms – “for home consumption” – having been incorporated by the Missouri legislature from the federal definition of “food,” cannot be ignored as Wehrenberg does in its brief. Indeed, for whatever reason the Commission itself did not commit any significant analysis to these terms in its decision – choosing instead to simply find as a matter of fact that “[t]he food was not intended to be consumed at home.” (LF 8). In contrast, the Director raised and emphasized the point in its briefing and argument below. *See* Resp’t Br. to the Commission pp. 10-13 & 24 (“The only food subject to the reduced one percent sales tax rate is food for home consumption . . . .”); *see also* Appellant’s Br. p. 16 (noting that the “arguments and the evidence presented sought the Administrative Hearing Commission’s conclusions on whether the certain food sold by Appellant met the definition of ‘food’ ”).

The terms – “for home consumption” – are controlling in this case and are plain and clear to a person of ordinary intelligence. *See Alheim*, 714 S.W.2d at 176. Just as the Commission found that the food was not to be consumed at home, no rational person considers that the popcorn, fountain drinks, and candy they buy at the movie theater is actually for home consumption. It is not common sense, nor is it financially practical. To be

sure, popcorn, drinks, and candy can all be purchased at the local supermarket, and if purchased at the local supermarket may in fact be “for home consumption.” But the purchase of these items at a supermarket versus the purchase of these items at the movie theater is drastically different. *Id.*

In the first place, the popcorn, fountain drinks, and candy are packaged in a way to be consumed at the movie theater. The fountain drinks are put in cups that fit the cup holders on the theater chairs. The popcorn is likewise packaged in a way to be consumed at the movie theater – in open containers and not in closed or sealed bags (or in unpopped microwavable packages as is most often the case at local supermarkets).

The packaged candy for sale at a movie theater can be purchased at local supermarkets, but there is typically one striking difference – it is exceedingly more expensive. This is true, of course, of all concession items at the movie theater. If the movie theater food were really intended “for home consumption” it would undoubtedly be priced more appropriately.

3. **Dictionary definitions confirm the plain and ordinary meaning of “for home consumption.”**

In addition to the plain and ordinary meaning of “home consumption,” the dictionary likewise confirms the same conclusion. The dictionary provides the following relevant definitions for each of these terms:

**Home – 1a:** the house and grounds with their appurtenances habitually occupied by a family: one’s principal place of residence **b:** a private dwelling . . . to or at one’s principal place of residence . . . .

**Consumption – 1a:** the act or action of consuming or destroying . . . **2:** the utilization of economic goods in the satisfaction of wants or in the process of production resulting in immediate destruction (as in the eating of foods) . . . .

Webster’s Third New International Dictionary 490, 1082 (1993).

Quite literally, “home consumption” for food means to eat or drink at a person’s principal place of residence. This is not the purpose for which movie theater popcorn, fountain drinks, and candy is sold. Instead, the point of concession sales is for consumption of these items during the movie, and to

enhance the entertainment experience. That is exactly what the Commission found – “[t]he food was not intended to be consumed at home.” (LF 8).

By referencing only the definitional section of the Federal Food Stamp Program in 7 U.S.C. § 2012, the Missouri legislature intended to adopt this very concept in § 144.014. In accordance with the plain language of the statute a movie theater such as Wehrenberg is not entitled to the reduced tax rate.

**4. Movie theater popcorn, pretzels, nachos, and other hot items are further excluded as “hot foods” “ready for immediate consumption.”**

Not only is “food” narrowly defined to include only items “for home consumption,” but the federal definition of “food” also excludes “hot foods or hot food products ready for immediate consumption.” 7 U.S.C. § 2012(k)(1). On this point, Wehrenberg is conspicuously inconsistent. On the one hand, Wehrenberg does not even raise or discuss the federal definition of “food” as it relates to the requirement of “home consumption” – choosing simply to ignore this dispositive issue. At the same time, however, Wehrenberg admits in its brief that it is not seeking a refund for “hot foods or hot food products ready for immediate consumption” because “[f]ederal law does not allow food stamps to be used to purchase hot foods and hot food products ready for

immediate consumption.” Appellant’s Br. p. 28 (citing 7 U.S.C. § 2012(g) [sic]).

The inconsistent application of the federal definition of “food” is but one of Wehrenberg’s errors in analysis. The other is the drastic misclassification of “hot foods or hot food products for immediate consumption.” Wehrenberg’s biggest profit item, popcorn, is, after all, a “hot food[] or hot food product[] ready for immediate consumption” when prepared and sold at a movie theater concession stand. 7 U.S.C. § 2012(k).

The evidence established that popcorn is prepared by Wehrenberg employees in heated kettles that pop raw popcorn seed. The kettles are hot enough to cause the moisture inside the popcorn seed to expand and “pop.” The cooked popcorn is moved to a heated conditioner/holding bin where hot air flows through and around the popped popcorn. Heat is required to initially prepare the popcorn and then later to freshen the popcorn for sale. Popcorn at a movie theater is hot and intended for immediate consumption. Thus, popcorn prepared by Wehrenberg is further excluded from the definition of “food” eligible for the reduced sales tax rate in § 144.014.

Likewise, pretzels and nachos are hot foods for immediate consumption. Pretzels arrive frozen and must be microwaved or put into a heated display case prior to sale. Nacho chips are also served with hot

melted cheese for immediate consumption. The pretzels and nachos are, therefore, hot food products for immediate consumption excluded from the definition of food eligible for the reduced sales tax rate.

Wehrenberg's concession stand sales are not for home consumption, and even if the concession sales were for home consumption, the popcorn, pretzels, and nachos (among other items) do not qualify for the reduced tax rate because they are hot foods or hot food products excluded from the definition of "food" under § 144.014.

**B. The Statutory Structure and Purpose of § 144.014 Also Support Denial of the Reduced Tax Rate.**

Beyond merely the plain language of § 144.014, the statutory structure and purpose all support the conclusion that the reduced tax rate does not apply to movie theater popcorn, fountain drinks, and candy (among other items).

The legislature intended that the reduced tax rate be limited. First, it is only applied to the types of food that are covered by the Federal Food Stamp Program as contained in 7 U.S.C. § 2012. The very nature of the Federal Food Stamp Program is that it is for basic or staple foods – not for food as part of entertainment at a movie theater. *See* 7 U.S.C. § 2011 (declaring the policy of Congress for the food stamp program). Indeed, the

federal statute incorporated into § 144.014 also contains a definition of “staple foods.” Staple foods means foods in the following categories: “Meat, poultry, or fish”; “Bread or cereals”; “Vegetables or fruits”; and “Dairy products.” 7 U.S.C. § 2012(r)(1). These are classic staple foods.

The federal statute even defines what are not “staple foods”; namely “accessory food items, such as coffee, tea, cocoa, carbonated and uncarbonated drinks, candy, condiments, and spices.” 7 U.S.C. § 2012(r)(2). Likewise, the federal definition of food also excludes “alcoholic beverages, tobacco, and hot foods or hot food products ready for immediate consumption.” 7 U.S.C. § 2012(k)(1). The narrow emphasis of the Federal Food Stamp Program is on basic or staple foods and not food for entertainment purposes such as movie theater popcorn, fountain drinks, and candy. That same emphasis is incorporated into Missouri’s sales tax law.

Second, even all of the food for which food stamps may be redeemed are not subject to the reduced tax rate in § 144.014. As discussed more fully below, the reduced tax rate does not apply to food “sold by any establishment where the gross receipts derived from the sale of food prepared by such establishment for immediate consumption . . . constitutes more than eighty percent of the total gross receipts of the establishment.” § 144.014.2. Thus, the legislature’s intent is clear – narrowly limit the retail food sales subject to

a reduced tax rate in order to benefit needy families and children in their purchase of basic or staple foods.

Consistent with the plain language of the statute, as well as the legislature's purpose and the associated statutory structure, this Court should affirm the Administrative Hearing Commission's decision denying Wehrenberg a refund for sales taxes collected on entertainment foods.

**II. The Administrative Hearing Commission Should be Affirmed, in the Alternative, Because Movie Theater Concession Stands are Separate "Establishments" Under § 144.014. – Responding to Appellant's Point Relied On.**

Wehrenberg spends the entirety of its argument, and its sole point relied on, on one issue – whether movie theater concession stands are “establishments” under § 144.014, and, therefore, subject to the 80/20 rule. Indeed, it asserts that the argument was waived by the Director because the argument was raised for the first time in the Director's “brief to the Commission.” Appellant's Br. p. 14. Of course, Wehrenberg presents no authority for this proposition, nor is it accurate. Even Wehrenberg argued the issue to the Commission – in its opening statement no less. (Tr. at 11 (“Thus, in the case before you today we believe the 80/20 test should not be an issue.”)). Furthermore, the Commission specifically reserved the

presentation of closing arguments, based on the evidence, for the briefing. (Tr. at 134-35).

Moreover, this issue is secondary to the controlling question in this case of whether the food sold at a movie theater is the type of food subject to the reduced tax rate. As set forth above, movie theater popcorn, fountain drinks, candy, and other food items sold at the movie theater are not subject to the reduced tax rate because these items are not “for home consumption.” But even assuming these entertainment foods are “for home consumption,” Wehrenberg is still not entitled to a reduced tax rate on its concession sales at the movie theater, as the Commission held, because concession stands are separate “establishments” under § 144.014.

Section 144.014 provides that even though the type of food sold might qualify, it is not subject to the reduced tax rate if it is “food or drink sold by any establishment where the gross receipts derived from the sale of food prepared by such establishment for immediate consumption . . . constitutes more than eighty percent of the total gross receipts of that establishment.” § 144.014.2. This is a further narrowing of the reduced tax rate.

The evidence in this case is that box office sales averaged 64 percent of the total gross receipts and the concession sales made up 32 percent of the total gross receipts. But this is not the whole story. Reviewed separately

from the box office sales, the gross receipts of the concession stands from the sale of food prepared by the establishment for immediate consumption – which Wehrenberg itself separately breaks out – constitute far more than eighty percent of the total gross receipts of the concession stands.

Wehrenberg prepares the beverages, popcorn, pretzels, and restaurant type foods constituting \$1,222,251.36 of the refund claim. Only the candy portion of the refund claim, \$119,780.08, is not prepared by Wehrenberg. Thus, ninety-one percent was prepared by Wehrenberg for immediate consumption. As a result, the Administrative Hearing Commission held that “[c]onsidering the statutory language in context, we conclude that the concession stand is an establishment; the concession stand, rather than the movie theater in general, is specifically the seller of the refreshment items.” (LF 13).

Section 144.014.2 provides that an establishment includes, but is not limited to, “any restaurant, fast food restaurant, delicatessen, eating house or café.” Other than this reference to these various types of food service businesses, the term “establishment” is not defined in the statute. The dictionary defines “establishment,” in relevant part, as “a more or less fixed and usually sizable place of business or residence together with all the things

that are an essential part of it.” Webster’s Third New International Dictionary 778 (1993).

The legislature could have used the term “business” in place of the term “establishment” in determining gross receipts. But the legislature did not. Indeed, the term “business” is defined under § 144.010.1(2), as including, in relevant part, “any activity engaged in by any person or caused to be engaged in by him, with the object of gain, benefit or advantage.” While Wehrenberg complains that all restaurants would fail the Commission’s 80/20 test, the legislature purposely chose to use the term “establishment” with the phrase “any restaurant, fast food restaurant, delicatessen, eating house, or café.”

The real concern addressed by the Commission in its decision is that such an interpretation avoids absurd results. Under Wehrenberg’s theory – that gross receipts include theater ticket sales – a department store that operates a restaurant or café within or adjacent to its store would sell food at the reduced sales tax rate because its sales of non-food items dwarfs its food sales. That would be an absurd result, and unfair to other similar restaurants and cafés that must charge the higher tax rate. Therefore, only the concession stand gross receipts should be considered in determining gross receipts from the sales of food. And the Commission should be affirmed on this basis as well.

## CONCLUSION

For the foregoing reasons, the Administrative Hearing Commission's decision should be affirmed.

Respectfully submitted,

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**ATTORNEYS FOR THE DIRECTOR OF  
REVENUE**

## CERTIFICATION OF SERVICE AND COMPLIANCE

The undersigned hereby certifies that on this 7<sup>th</sup> day of June, 2011, 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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St. Louis, MO 63103

The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b) and that the brief contains 4,718 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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Jeremiah J. Morgan

**RESPONDENT'S APPENDIX**

§ 144.014, RSMo (Cum. Supp. 2010) .....A1

7 U.S.C. § 2012.....A2