

No. SC88453

IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI *ex rel.* AMBASSADOR PROPERTIES, L.L.C. and
KARL THOMAS,
Relators,

v.

THE HONORABLE THOMAS C. CLARK, JUDGE,
Circuit Court of Jackson County, Missouri,
Respondent.

HOUSE RESCUE CORPORATION,
A Missouri Not-for-Profit Corporation,
Real Party in Interest.

Original Proceeding on Petition for Writ of Mandamus
to the Jackson County Circuit Court, 16th Judicial Circuit,
Cause No. 04CV225744, the Honorable Thomas C. Clark, Presiding

BRIEF OF RESPONDENT IN OPPOSITION TO
PETITION FOR WRIT OF MANDAMUS

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ATTORNEYS FOR HOUSE RESCUE CORPORATION

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PRELIMINARY STATEMENT

Finding the normal judicial process too burdensome and lengthy, Relators Ambassador Properties, L.L.C. and Karl Thomas (hereinafter jointly referred to as “Ambassador Properties”) attempt to sidestep the process and bring to this Court an original action challenging whether the Missouri Abandoned Housing Act (“the Act”) violates the Constitutions of the United States and Missouri. Mandamus is not the appropriate mechanism and the claims fail in any event.

The extraordinary writ of mandamus is a mechanism by which to compel or execute the performance of ministerial duties; it is not a tool designed to adjudicate questions of fact or law, much less to adjudicate disputed facts or constitutional issues of first impression. Courts have routinely rejected writs of mandamus seeking to raise constitutional questions. This is perfectly consistent with well recognized authority that decisions on constitutional issues must be avoided when a decision can be made on narrow non-constitutional grounds. The facts and procedural history of this case demonstrate why it would be inappropriate for the Court to grant a writ. As an example, Ambassador Properties is claiming a property interest based on a deed which is clearly fraudulent on its face. This impacts fundamental questions of standing and property interests.

Not only is the relief sought unwarranted, but should the writ be granted, other parties will be encouraged to bypass the judicial process and attempt to use a writ of mandamus to take their legal issues directly to this Court. Such an approach is contrary to the law and would undermine the entire judicial system. Indeed, questions would be

raised without the benefit of a factual record that would otherwise be established through the normal judicial process. This mitigates the opportunity for courts to resolve conflicts on narrow non-constitutional grounds. For these reasons alone the Court should deny mandamus and quash the preliminary writ.

To the extent that this Court addresses the merits of the constitutional claims, the Court should deny mandamus because House Rescue Corporation (“House Rescue”) is a private party, and therefore not subject to claims under either state or federal constitutions, nor to claims made under Section 1983. Even if this Court were to determine that House Rescue is a state actor, there is still no constitutional violation, because the Act provides numerous procedural safeguards to protect the rights of property owners, and Ambassador Properties received numerous opportunities to avail itself of the protections afforded by the Act’s safeguard provisions.

Ambassador Properties fails at every turn to establish that a writ of mandamus is appropriate in this case. Therefore, its petition for writ of mandamus should be denied and the preliminary writ quashed.

JURISDICTIONAL STATEMENT

This Court has jurisdiction to consider a petition for writ of mandamus. *See* Mo. R. Civ. P. 84 & 94; Mo. Rev. State §§ 529.010 to 529.100. However, none of the issues Relators raise are proper for the issuance of a writ of mandamus. As set forth more fully below, mandamus is not an appropriate mechanism to consider constitutional questions of first impression, nor to adjudicate questions of fact or law. *See State ex rel. Johnson v. Griffin*, 945 S.W.2d 445 (Mo. banc 1997).

STATEMENT OF FACTS

Despite suggestions that the circuit court has been complicit with House Rescue in committing an unconstitutional deprivation, Ambassador Properties has not provided this Court with the true picture of the proceedings below. It has misstated or omitted critical facts, including hearings held by the circuit court to consider and protect the parties' interests. Therefore, House Rescue provides the following statement of facts in accordance with Rule 84.04(f).

A. House Rescue Petitions to Rehabilitate the Abandoned Property.

House Rescue is a Missouri Not-for-Profit Corporation whose mission is to acquire and rehabilitate housing in the urban core for the purpose of providing affordable housing and safe neighborhoods. (Resp't App. A112.) Before becoming President of House Rescue, Elbert Harris operated a contracting company for 23 years in the Kansas City, Missouri area. (Resp't App. A032.) Although now retired, Mr. Harris spends a significant amount of time serving as House Rescue's President and locating abandoned houses in the Kansas City urban core for rehabilitation. (Resp't App. A283 at ¶ 3.)

One house located by Mr. Harris was 3120 Cypress, Kansas City, Missouri (hereinafter referred to as "the Abandoned Property"). In July of 2004, House Rescue sent a letter to the last owners of record, Charles and Louise Laspy, concerning the Abandoned Property. (Resp't App. A108 at ¶ 8.) After receiving no response, House Rescue submitted information on the Abandoned Property to House Rescue's counsel, Patrick Reavey, to commence proceedings pursuant to the Missouri Abandoned Housing Act. (Resp't App. A108 at ¶ 9.) The Abandoned Property would have been sold at the

Jackson County delinquent tax sale on August 23, 2004, had it not been for House Rescue's successful Motion to remove it from the sale on account of House Rescue's intention to pursue rehabilitation of the Abandoned Property under the Act. (Resp't App. A110 at ¶ 10; *see also* Resp't App. A114-17.)

B. Notice is Given That the Abandoned Property is in Litigation.

On August 23, 2004, House Rescue filed a Notice of Lis Pendens with the Recorder of Deeds notifying third parties that the Abandoned Property was the subject of litigation in the Jackson County Circuit Court. (Resp't App. A119-20.) The Notice indicated the objective of the litigation was to allow House Rescue to rehabilitate the Abandoned Property. (Resp't App. A119.) After Mr. Reavey was unable to find a current address for Charles and Louise Laspy, he retained a private investigator for assistance in locating the Laspys. (Resp't App. A266 at ¶ 6.) The investigation revealed that Louise Laspy was deceased and the former residence of Charles Laspy was vacant. (Resp't App. A122.) The investigator also reported finding no known relatives of Mr. Laspy. (Resp't App. A122.)

Upon the motion of House Rescue, and an affidavit of Mr. Reavey, the circuit court entered an Order permitting House Rescue to serve by publication. (Resp't App. A021-25.) After no Answer was filed, the circuit court held an evidentiary hearing on House Rescue's Petition to rehabilitate the Abandoned Property. (Resp't App. A028-43.) Testimony was presented on behalf of House Rescue as to the factors contained in Mo. Rev. Stat. § 447.622, as well as the rehabilitation plan. (Resp't App. A034-39.) Thereafter, the circuit court entered an Order giving House Rescue temporary possession

of the Abandoned Property to complete the rehabilitation plan submitted to the court. (Resp't App. A026-27.)

C. Ambassador Properties Claims Questionable Title.

Ambassador Properties now claims an interest in the Abandoned Property by virtue of a Quitclaim Deed purportedly between Theresa Nelson and Curtis Laspy, as grantors, and "Ambassador Properties, LLC" as grantee. (Resp't App. A124-25.) As supposed proof, Ambassador Properties initially submitted two affidavits to the circuit court indicating that "[o]n November 23, 2004, [Karl Thomas], through Ambassador Properties, L.L.C., acquired [the Abandoned Property] via a Quit-Claim Deed, from Theresa Nelson and Curtis Laspy." (Resp't App. A158-59 at ¶ 3; A169-71 at ¶ 3.) There is no evidence of how Theresa Nelson and Curtis Laspy obtained the Abandoned Property, if at all.

Moreover, after House Rescue pointed out that Ambassador Properties was not even in existence until February 24, 2005 (Resp't App. A126-28, A249-51), Ambassador Properties manufactured a third affidavit. (Resp't App. A207-09.) In the third affidavit, Ambassador Properties asserted that Brent Barber helped it acquire the Abandoned Property. (Resp't App. A207-08 ¶ 4.) Apparently, on February 18, 2005 (which is still before Ambassador Properties was formed), Ambassador Properties paid \$22,000 to "Washington Mutual" at the direction of Mr. Barber, and that it attributes \$12,000 of the \$22,000 as the purchase price for the Abandoned Property. (Resp't App. A207-08 at ¶ 4.) The cashier's check submitted in payment indicated, however, that the funds were drawn on the account of "Karl Thomas LLC," another Missouri limited liability company

formed by Mr. Thomas in June of 2004. (Resp't App. A211.) Ambassador Properties also concedes that Mr. Barber has pled guilty to numerous felonies for real estate fraud, and that Mr. Thomas of Ambassador Properties is listed as a "victim-witness" in the criminal cases against Mr. Barber. (Resp't App. A208 at ¶¶ 5-6.)

Ms. Nelson's signature on the Quitclaim Deed is notarized, but Mr. Laspy's is not; thus, there is no indication of when (or if) Mr. Laspy signed the deed. (Resp't App. A125.) Indeed, the Quitclaim Deed was not recorded until May 23, 2005, six months after it was purportedly signed. (Resp't App. A124.) And contrary to Ambassador Properties' third affidavit, Mr. Laspy has stated that the Abandoned Property was actually purchased for \$2,000 by a check written to Ms. Nelson. (Resp't App. A136 at ¶ 6.) The Deed references the name "Wayne Elliott," but it is not clear what relationship (if any) Mr. Elliott has to the deed or transaction. (Resp't App. A125.)

Latt Copley, as a consultant for a Missouri Not-for-Profit Corporation named Urban Renewal of KC, Inc., acquired the Quitclaim Deed that Ambassador Properties relies on in claiming an ownership interest in the Abandoned Property. (Resp't App. A253 at ¶¶ 1-3.) Curiously, the Deed, which previously listed Urban Renewal of KC, Inc. as the grantee, now lists "Ambassador Properties, LLC" as the grantee. (Resp't App. A253 at ¶ 5.) Mr. Copley has never performed work for Mr. Thomas or his company Ambassador Properties, nor has he sold any property to Mr. Thomas or Ambassador Properties, including the property located at 3120 Cypress. (Resp't App. A253 at ¶ 6.)

Neither Mr. Thomas, nor his company Ambassador Properties, had any involvement in meeting with Ms. Nelson or Mr. Laspy, or in obtaining the Quitclaim

Deed or the Abandoned Property from them. (Resp't App. A254 at ¶ 7.) There is no evidence that Mr. Laspy and Ms. Nelson ever authorized the insertion of Mr. Thomas, Brent Barber, or Ambassador Properties as a grantee of the Abandoned Property. (*See* Resp't App. A253-54.) Likewise, the record is devoid of any evidence that either Mr. Laspy or Ms. Nelson authorized the alteration of grantee from "Urban Renewal" to another party. (*See* Resp't App. A253-54.) Unlike all other text contained on page 1 of the Quitclaim Deed, "Ambassador Properties LLC," its mailing address, and the notation "Legal Description Attached," are inserted by handwritten notations. (Resp't App. A124.)

D. House Rescue Repeatedly Attempts to Contact Ambassador Properties.

In the Spring of 2005, a "For Sale by Owner" sign was placed in the front yard of the Abandoned Property. (Resp't App. A109 at ¶ 18.) On several occasions, Mr. Harris called the number listed on the sign and left numerous messages informing the alleged seller that House Rescue was pursuing the Abandoned Property pursuant to the Act. (Resp't App. A109 at ¶ 19.) Over a month went by without any return call. (Resp't App. A109 at ¶ 20.)

Approximately two months after the initial "For Sale" sign was placed, a second "For Sale" sign appeared in the yard. (Resp't App. A109 at ¶ 21.) Soon thereafter, a dumpster was placed on the Abandoned Property, and the brush and grass were cut. (Resp't App. A109 at ¶ 22.) Again, Mr. Harris called the number listed on the second sign and, again, left messages for the alleged seller. (Resp't App. A109 at ¶ 23.) He also taped on the front door a copy of the court's order granting House Rescue temporary

possession to rehabilitate the Abandoned Property, along with a note listing both Mr. Harris's number and Mr. Reavey's number with instructions to call. (Resp't App. A109 at ¶ 24.)

Shortly thereafter, Brian Lindsey, who identified himself as an agent for Ambassador Properties, contacted Mr. Harris and asked whether he wanted to purchase the Abandoned Property. (Resp't App. A109 at ¶ 25.) After Mr. Harris explained that the court had given House Rescue temporary possession to rehabilitate the Abandoned Property, Mr. Lindsey gave Mr. Harris the telephone number for Ambassador Properties. (Resp't App. A109 at ¶ 25.) Ambassador Properties and House Rescue agreed that the court likely would need to resolve the disputed ownership of the Abandoned Property. (Resp't App. A109 at ¶ 25.)

E. The Circuit Court Holds a Hearing Concerning Ownership.

The circuit court scheduled a hearing on the ownership dispute for August 17, 2005. (Resp't App. A110 at ¶ 26.) Two days before the hearing, Ambassador Properties paid the delinquent taxes on the Abandoned Property. (Resp't App. A170 at ¶¶ 7 & 8.)

At the August 17, 2005 hearing, Ambassador Properties represented to the court that it paid \$12,000 for the Abandoned Property. (Resp't App. A059.) The court pointed out to Ambassador Properties that the filing of the Notice of Lis Pendens by House Rescue put it on notice that the Abandoned Property it was attempting to purchase was the subject of litigation in the Jackson County Circuit Court. (Resp't App. A053-58.) However, the court assured Ambassador Properties that, if it truly was an innocent, good faith, bona fide purchaser of the Abandoned Property for \$12,000, the court would

consider granting Ambassador Properties a lien against the Abandoned Property to compensate it for its losses. (Resp't App. A066-67; A069-70; A074-76; A080-81.)

The court also instructed Ambassador Properties to retain a lawyer (as a Missouri limited liability company must appear in court through counsel) and submit evidence, including receipts and copies of checks, on its good faith purchase of the Abandoned Property. (Resp't App. A066-67; A085-86.) Ambassador Properties agreed that two weeks would be sufficient time to obtain a lawyer and present evidence. (Resp't App. A090.) Accordingly, the court provided two weeks. (Resp't App. A090.)

F. Ambassador Properties Fails to Present Evidence of a Good Faith Purchase.

Two weeks passed without Ambassador Properties presenting any evidence of its supposed good faith purchase of the Abandoned Property. (Resp't App. A110 at ¶ 30.) After Ambassador Properties failed to submit anything, House Rescue commenced rehabilitation. (Resp't App. A110 at ¶ 31.) Specifically, House Rescue replaced all of the electrical and plumbing systems, replaced the exterior doors, and commenced renovations to the interior, the estimated costs of which totaled approximately \$10,000. (Resp't App. A110 at ¶ 31.)

On October 3, 2005, counsel for Ambassador Properties sent a letter to the court requesting a status conference on the Abandoned Property. (Resp't App. A130; A283 at ¶ 4.) Within a few days of the letter, the court again conducted a hearing on the ownership dispute and the City of Kansas City's Code Enforcement actions with respect to the Abandoned Property. (Resp't App. A283-84 at ¶¶ 5, 7.) Mr. Reavey raised the

fact that, although Ambassador Properties was instructed to present to House Rescue receipts and copies of checks representing work done on the Abandoned Property, as well as documents reflecting the purchase price of the Abandoned Property, no documentation had been received by House Rescue. (Resp't App. A284 at ¶ 8.) In response to the Court's questioning, counsel for Ambassador Properties stated she did not have the receipts with her, but that the receipts were back at her office and she would be happy to provide them to Mr. Reavey. (Resp't App. A284 at ¶ 9.)

To this day, the only documentation Ambassador Properties has presented on the purchase price of the Abandoned Property is a document titled "Real Property Certificate of Value," dated October 17, 2005. (*See* Resp't App. A167.) Interestingly, the document is dated five months after the Quitclaim Deed allegedly transferring the Abandoned Property to Ambassador Properties was recorded, despite the fact that the Certificate itself indicates it is "REQUIRED TO BE FILED WITH DEED AT TIME OF RECORDING". (Resp't App. A167.) More importantly, the document is dated *after* Ambassador Properties represented to the court it already had documentation for the purchase of the Abandoned Property. (*See* Resp't App. A167.)

G. Ambassador Properties Claims the Act is Unconstitutional.

Rather than following the court's instructions and pursuing a remedy and protections under the Act, Ambassador Properties formally moved to intervene in the litigation on November 9, 2005. (Resp't App. A002-03.) Ambassador Properties immediately filed a Motion to Rescind the Order of Temporary Possession and to Dismiss on the basis that the Act is unconstitutional on its face and as applied. (Resp't

App. A003.) On January 5, 2006, the circuit court granted the Motion to Intervene, but denied the Motion to Rescind Order of Possession and to Dismiss. (Resp't App. A137-38.) In the Order, the court **again** invited Ambassador Properties to pursue a remedy under the Act, stating "Ambassador Properties, L.L.C. and Karl Thomas are invited to file appropriate pleadings with the Court pursuant to Mo. Rev. Stat. 447.638 to address these issues." (Resp't App. A138.)

Despite the court's clear instructions and invitation to make a claim pursuant to Mo. Rev. Stat. § 447.638, Ambassador Properties failed to avail itself of any remedies afforded by the Act. Instead, with the assistance of the Pacific Legal Foundation, it counterclaimed to pursue a declaration that the Act is unconstitutional. (Resp't App. A201-19.)

H. Ambassador Properties Sidesteps the Appellate Process.

On October 5, 2006, Ambassador Properties filed a Motion for Summary Judgment or in the Alternative, Motion for Judgment on the Pleadings, again challenging the constitutionality of the Act. (Resp't. App. A006.) And again, on December 15, 2006, the Circuit Court declined to declare the Act unconstitutional and denied the Motion. (Resp't App. A274-75.)

Knowing that a party cannot file an appeal of a denial of summary judgment, and not wishing to be burdened by the hassle of trial, Ambassador Properties filed a petition for writ of mandamus with the Missouri Court of Appeals, Western District. (Resp't. App. A276-80.) The Court of Appeals denied the petition. (Resp't. App. A281.) After

that petition was denied, Ambassador Properties filed a petition for writ of mandamus with this Court. (Petition for Writ of Mandamus.)

SUMMARY OF MISSOURI'S ABANDONED HOUSING ACT

Ambassador Properties' description of the Missouri Abandoned Housing Act (the "Act") set forth in its brief is not only slanted but inaccurate. It argues, for instance, that the statute "allows no opportunity to cure any alleged defects in the property and provides for no payment of just compensation," apparently completely ignoring Mo. Rev. Stat. § 447.638 and Mo. Rev. Stat. § 447.640. (Relators' Br. at 6, 11-15.) It makes similar misstatements in characterizing the statute as "recently adopted," "remarkable," and "without any known counterpart in any other state." (Relators' Br. at 6-7.) Ambassador Properties then proceeds to question the sufficiency and fairness of each of the requirements for temporary possession, relying on hypothetical factual situations which have nothing to do with the facts in this case. (Relators' Br. at 7-11.) House Rescue submits this summary in response.

The Act was not "recently adopted," but was originally enacted over 14 years ago in 1993. 1993 Mo. Legis. Serv. S.B. 376. While several amendments have been made through the years, in substance, the overall structure of the Act has remained unchanged. *See* 1994 Mo. Legis. Serv. S.B. 513; 2002 Mo. Legis. Serv. H.B. 1634; 2002 Mo. Legis. Serv. S.B. 1086 & S.B. 1126; 2005 Mo. Legis. Serv. H.B. 58. Similarly, Ambassador Properties is also mistaken in its characterization of the statute as "remarkable" and "without any known counterpart in any other state." In fact, two of Missouri's neighbors, the state of Illinois and the state of Kansas, have had nearly identical statutes on their books since 1991 and 1994, respectively. 310 Ill. Comp. Stat. 50/1 et seq.; Kan. Stat. Ann. § 12-1756a et seq.

Illinois, like Missouri, permits temporary possession of real property by not-for-profit entities if: 1) “the property has been continuously unoccupied”; 2) “the property is a nuisance;” 3) “the organization intends to rehabilitate the property”; and 4) “the organization has sent notice to the parties in interest of the property.” 310 Ill. Comp. Stat. 50/3. Likewise, Kansas permits temporary possession by nonprofit corporations where: 1) “taxes are delinquent”; 2) the property has been “unoccupied continuously”; 3) “the organization intends to rehabilitate the property”; and 4) “the organization has sent notice to . . . the parties in interest of the property.” Kan. Stat. Ann. §§ 12-1750(c)-(d), 12-1756a(a).

All of the abandoned housing acts provide similar protections for owners, including notice, hearings on the organization’s petition, opportunities for the owner to be heard, approval and oversight of the organization’s rehabilitation efforts, preparation and filing of status reports by the organization with respect to the rehabilitation, and an opportunity to regain possession of the property. 310 Ill. Comp. Stat. 50/3(d), 50/4, 50/6, 50/7; Kan. Stat. Ann. §§ 12-1756a, 12-1756b, & 12-1756c. Unlike Missouri’s Act, however, the Illinois and Kansas statutes make no provision for compensation to the owner. *Compare* 310 Ill. Comp. Stat. 50/1 et seq. & Kan. Stat. Ann. § 12-1756a et seq. *with* Mo. Rev. Stat. § 447.640.

A. The Act Grants Temporary Possession in Limited Circumstances.

With respect to the substantive provisions of Missouri’s Act, Ambassador Properties makes numerous misstatements. The Act permits Missouri not-for-profit organizations to “petition to have property declared abandoned” and seek “temporary

possession of such property.” Mo. Rev. Stat. § 447.622. Not all not-for-profit organizations are eligible. *Id.* § 447.620(5). Rather, to qualify, an organization must: 1) be “validly organized pursuant to law”; 2) have a purpose which “includes the provision or enhancement of housing opportunities in its community”; and 3) have “been incorporated for at least six months.” *Id.*

A qualifying organization which petitions under the Act must satisfy four additional procedural safeguards to obtain a declaration that property is abandoned and to be granted temporary possession:

- (1) The property has been continuously unoccupied by persons legally entitled to possession for at least six months prior to the filing of the petition;
- (2) The taxes are delinquent on the property;
- (3) The property is a nuisance; and
- (4) The organization intends to rehabilitate the property.

Id. § 447.622. Further, to satisfy the Act’s “nuisance” requirement, the organization must show that the:

property which because of its physical condition or use is a public nuisance or any property which constitutes a blight on the surrounding area or any property which is in violation of the applicable housing code such that it constitutes a substantial threat to the life, health, or safety of the public. . . .

[A]ny declaration of a public nuisance by a municipality

pursuant to an ordinance adopted pursuant to sections 67.400 to 67.450 RSMo, shall constitute prima facie evidence that the property is a nuisance[.]

Id. § 447.620(4).

The conditions that are necessary to obtain a declaration that a property should be declared abandoned are difficult to satisfy. Each condition constitutes a substantial requirement and demonstrates significant neglect and abandonment of the property by the owner. Ambassador Properties ignores the fact that a court will grant temporary possession for rehabilitation purposes *only* upon a finding that: 1) “the conditions alleged by the plaintiff as specified in section 447.622 existed at the time the verified petition was filed[;]” 2) “the plan for the rehabilitation of the property submitted to the court by the plaintiff is feasible[;]” and 3) the “defendant has failed to demonstrate that the plaintiff should not be allowed to rehabilitate the property.” *Id.* § 447.632.

B. The Act Includes Numerous Procedural Protections.

Furthermore, and contrary to Ambassador Properties’ assertions, the Act contains numerous protections for abandoned property owners and other parties in interest. The Act, for instance, requires the filing of a petition in circuit court and for “service of process [to] be had as in other in rem or quasi in rem civil actions.” *Id.* §§ 447.622 & § 447.625(2). In civil actions in rem or quasi in rem, the Missouri Rules of Civil Procedure permit service of process to be made by personal service, registered or certified mail, or by publication. *See* Mo. R. Civ. P. 54.12. Before any rehabilitation efforts are undertaken, the qualifying organization’s rehabilitation plan for the abandoned

property must be submitted to and approved by the court. Mo. Rev. Stat. § 447.631. Further, as previously noted, a court will grant a petition only in those circumstances in which the “defendant has failed to demonstrate that the plaintiff should not be allowed to rehabilitate the property.” *Id.* § 447.632.

Even after temporary possession has been granted to a qualifying organization, an “owner may petition the circuit court for restoration of possession of the property.” *Id.* § 447.638. The Act provides for a hearing on the petition during which “the court shall determine whether the owner has the capacity and the resources to complete rehabilitation of the property” if rehabilitation of the abandoned property has not been completed. *Id.* If the Court determines “that the owner has the capacity and the resources to complete the rehabilitation,” “the owner shall resume possession of the property” after “the court determine[s] proper compensation to the organization for its expenditures,” if any, and “[a]fter the owner pays the compensation to the organization.” *Id.* Similarly, if rehabilitation has been completed by the organization, “the owner shall resume possession of the property” after “the court determine[s] proper compensation to the organization for its expenditures,” if any, and “[a]fter the owner pays the compensation to the organization.” *Id.*

In the event “an owner does not regain possession of the property in the one-year following the entry of an order granting temporary possession of the property to the organization,” and the qualifying organization seeks title to the abandoned property through a petition for quitclaim judicial deed, the Act requires that notice of the petition is provided to the named defendants. *Id.* § 447.640.

In addition to all of these procedural protections, the Act provides oversight of the rehabilitation efforts undertaken on the abandoned property. Specifically, the Act requires the organization to “file a quarterly report of its rehabilitation and use of the property” *Id.* § 447.636. The report shall include “a statement of all expenditures made by the organization and all income and receipts from the property for the preceding quarters.” *Id.*

C. The Act Provides for the Payment of Compensation.

Last, and perhaps most glaring, Ambassador Properties asserts that the Act provides for “confiscation of fee title without compensation.” (Relators’ Br. at 14.) Ambassador Properties apparently ignores the final sentence in Mo. Rev. Stat. § 447.640. In the event “an owner does not regain possession of the property in the one-year period following entry of an order granting temporary possession of the property to the organization,” and the organization petitions for a quitclaim judicial deed to the abandoned property, “[a]ny party in interest of the property shall present any claim for compensation prior to the entering of the court order conveying title to the organization.” *Id.* § 447.640.

RESPONSE TO POINTS RELIED ON^{1/}

I. Relators are Not Entitled to a Writ of Mandamus Ordering That the Trial Court Find the Missouri Abandoned Housing Act Unconstitutional and Imposing Liability under 42 U.S.C. § 1983 Because a Writ of Mandamus is Not Available for Relators’ Requested Relief In That a Writ of Mandamus is Available Only to Compel Ministerial Actions. – Responding to Relators’ Points A, B, C, D & E.

State ex rel. Brentwood Sch. Dist. v. State Tax Comm’n, 589 S.W.2d 613
(Mo. banc 1979).

State ex rel. Johnson v. Griffin, 945 S.W.2d 445 (Mo. banc 1997).

State ex rel. Kelley v. Mitchell, 595 S.W.2d 261 (Mo. banc 1980).

^{1/} Ambassador Properties fails to conform its “Points Relied Upon” to Missouri Rule of Civil Procedure 84.04(d)(3). “An insufficient ‘point relied on’ preserves nothing for this court’s review.” *State v. Nenninger*, 872 S.W.2d 589, 589-90 (Mo. Ct. App. 1994). Accordingly, the petition for writ of mandamus should be dismissed and the preliminary writ quashed. *See, e.g., Avis Rent-A-Car Systems, Inc.*, 133 S.W.3d 122 (Mo. Ct. App. 2004); *Patterson v. Waterman*, 96 S.W.3d 177 (Mo. Ct. App. 2003) (per curiam); *Jennewein Puricelli*, 988 S.W.2d 643 (Mo. Ct. App. 1999); *Shellenberger v. Shellenberger*, 931 S.W.2d 483 (Mo. Ct. App. 1996) (per curiam).

State ex rel. Mason v. County Legislature, 75 S.W.3d 884 (Mo. Ct. App. 2002).

II. Relators are Not Entitled to a Writ of Mandamus Because They Have No Standing In That The Quitclaim Deed Purporting to Transfer Ownership in the Subject Property is Invalid. – Responding to Relators’ Points A, B, C, D & E.

In re Ancillary Adversary Proceeding Questions, 89 S.W.3d 460 (Mo. banc 2002).

Carmack v. Saunders, 884 S.W.2d 394 (Mo. Ct. App. 1994).

State ex rel. City of St. Louis v. Baumann, 153 S.W.2d 31 (Mo. banc 1941).

Lett v. City of St. Louis, 24 S.W.3d 157 (Mo. Ct. App. 2000).

III. Relators are Not Entitled to a Writ of Mandamus Because the Trial Court Correctly Denied Their Summary Judgment Motion In That Missouri’s Abandoned Housing Act Does Not Violate the United States Constitution or the Missouri Constitution. – Responding to Relators’ Points A, B, C, D & E.

Mo. Rev. State §§ 447.620 et seq.

Lugar v. Edmondson Oil Co., Inc., 457 U.S. 922 (1982).

Ruckelshaus v. Monsanto, 467 U.S. 986 (1984).

Simpson v. Kilcher, 749 S.W.2d 386 (Mo. banc 1988).

ARGUMENT

I. Relators are Not Entitled to a Writ of Mandamus Ordering That the Trial Court Find the Missouri Abandoned Housing Act Unconstitutional and Imposing Liability under 42 U.S.C. § 1983 Because a Writ of Mandamus is Not Available for Relators' Requested Relief In That a Writ of Mandamus is Available Only to Compel Ministerial Actions. – Responding to Relators' Points A, B, C, D & E.

Standard of Review

“To be entitled to a writ of mandamus, the relator must have a clear, unequivocal, specific right to have an act performed.” *Carmack v. Saunders*, 884 S.W.2d 394, 398 (Mo. Ct. App. 1994). Likewise, the respondent must have a “present, imperative, unconditional duty to perform the action sought.” *Id.* Thus, courts issue the writ of mandamus sparingly, and only to compel performance of a clearly established, presently existing right. *See State ex rel. Brentwood Sch. Dist. v. State Tax Comm’n*, 589 S.W.2d 613, 614 (Mo. banc 1979); *see also Clay v. Dormire*, 37 S.W.3d 214, 218 (Mo. banc 2000) (holding the purpose of a writ of mandamus is to “execute, not adjudicate”) (internal quotations omitted); JAMES W. ERWIN, MO. APPELLATE COURT PRACTICE § 13.2 (Mo. Bar 5th ed. 2002, 2007).

This Court has stated with respect to a writ of mandamus that a court can provide no remedy “that is more drastic, no exercise of raw judicial power that is more awesome, than that available through the extraordinary writ of mandamus.” *State ex rel. Kelley v. Mitchell*, 595 S.W.2d 261, 266 (Mo. banc 1980). To check the exercise of this raw

judicial power, a “writ of mandamus ‘will not lie to establish a legal right, but its office is to enforce one which has already been established.’” *State ex rel. Brentwood Sch. Dist.*, 589 S.W.2d at 614 (quoting *State ex rel. Crites v. Short*, 174 S.W.2d 821, 823 (Mo. 1943)). As such, mandamus is appropriate to compel a “ministerial duty.” JAMES W. ERWIN, MO. APPELLATE COURT PRACTICE § 13.4 (Mo. Bar 5th ed. 2002, 2007) (citing and quoting *State ex rel. McDonald v. City of Brentwood*, 66 S.W.3d 46, 51 (Mo. Ct. App. 2001), and *Jones v. Carnahan*, 965 S.W.2d 209, 213 (Mo. Ct. App. 1998)).

Ambassador Properties not only fails to identify these extraordinary standards, *see* Mo. R. Civ. P. 84.04(e), but its arguments clearly fail to satisfy the standards.

A. Constitutional Claims are Not Appropriate for a Writ of Mandamus.

Based on the specific purpose and controlling standards for a writ of mandamus, Missouri courts have uniformly held that “[m]andamus is not available ‘to directly challenge and determine the validity or constitutionality of an ordinance or statute respecting the duty involved.’” *State ex rel. Mason v. County Legislature*, 75 S.W.3d 884, 888 (Mo. Ct. App. 2002) (quoting *State ex rel. Chiavola v. Vill. of Oakwood*, 931 S.W.2d 819, 825 (Mo. Ct. App. 1996)). Yet, that is exactly what Ambassador Properties – with the aid of Pacific Legal Foundation – is trying to do in this Court.

Ambassador Properties seeks to disregard the law and the entire Missouri judicial system in order to raise constitutional questions of first impression with this Court. The supposed reason for raising constitutional questions on a writ of mandamus, as opposed to the ordinary process for all constitutional claims, is because it believes “there is no other forum for doing so.” (Relators’ Br. at 22.) This is neither true nor appropriate for a

writ of mandamus. Ambassador Properties certainly could – and did – raise constitutional questions with the circuit court. However, when its motion for summary judgment was denied, it decided to file a writ of mandamus instead of proceeding to trial and appeal, or even attempting to resolve disputed ownership issues. Such a process is contrary to controlling case law and would undermine the entire judicial system.

The purpose of a mandamus is clear: to execute and not to adjudicate. *State ex rel. Johnson v. Griffin*, 945 S.W.2d 445, 446 (Mo. banc 1997). Since there is no decision concerning the constitutionality of the Act (other than the circuit court’s refusal to find it unconstitutional), the present petition for writ of mandamus can only be a request to adjudicate. And “to the extent that legal or factual issues must be adjudicated, mandamus is not an appropriate mechanism.” *Carmack*, 884 S.W.2d at 398 (emphasis added) (citing *Kelley*, 595 S.W.2d at 266). As set forth below, there are both legal and factual issues to be resolved.

Responding to this argument, which was raised by the Respondent in the Answer, Ambassador Properties ignores the many cases that expressly state that constitutional questions are not appropriate for mandamus relief, and instead cite inapplicable cases in an attempt to infer that a court “may consider” constitutional claims. (Relators’ Br. at 23.) These cases provide no assistance nor justify consideration of constitutional questions by way of mandamus. For example, in *State ex rel. Myers v. Shinnick*, 19 S.W.2d 676 (Mo. 1929), the case was actually an appeal from an order quashing a writ of mandamus. The “presence of certain constitutional questions” merely justified the

Supreme Court in “grant[ing] an appeal,” which was promptly dismissed. *Id.* Moreover, the case was about a ministerial action – the issuance of a building permit. *Id.*

Similarly, in *State ex rel Neu v. Waechter*, 58 S.W.2d 971 (Mo. banc 1933), this Court considered whether a candidate’s name should be printed on the election ballot. *Id.* at 972. “[I]n view of the exigency of the matter” both parties in the mandamus proceeding actually joined in the request to have the matter decided by mandamus. Finally, in *State ex rel. Gen. Motors Acceptance Corp. v. Brown*, 48 S.W.2d 857 (Mo. banc 1932), this Court considered the appropriate remedy when a court refuses to exercise jurisdiction over a case. However, based on the unique setting of the case, the refusal to exercise jurisdiction could not be raised on direct appeal. *Id.* at 858-59. It was for this reason that mandamus relief was appropriate. *Id.* 859-60. This is not the case here. The circuit court did not dismiss, but considered the constitutional challenges.

If Ambassador Properties’ mandamus theory were correct (and the controlling law is wrong), then no constitutional challenge would ever proceed through the lower courts. Instead, all constitutional challenges could bypass the lower courts and go directly to the Missouri Supreme Court. This is contrary to the fundamental operation of the Missouri judicial system as established by the Missouri Constitution and would render this Court a court of general jurisdiction for a large swath of claims. The attendant problems with such a “new and unwise” use of the extraordinary writ are numerous. *State ex rel. Mason*, 75 S.W.3d at 888-89 (detailing only some of the problems, including avoidance of traditional remedies, subversion of statutory provisions, and rushed reasoning without the benefit of a record).

Just as in *Mason*, the “Relators attempt to establish their right to relief by asserting violation of constitutionally guaranteed due process rights.” *Id.* The law has not changed, and “[m]andamus is not the appropriate remedy to adjudicate the constitutional claim.” *Id.*

B. Mandamus is Also Not Appropriate to Set a Trial Date Since a Trial Setting Was Never Requested nor Denied.

In addition to its constitutional claims, Ambassador Properties seeks a writ of mandamus requiring the circuit court “to set trial for a determination of the damages.” (Relators’ Br. at 19.) While it may be possible to compel a court to take required action, *see, e.g., State ex rel. Cohen v. Riley*, 994 S.W.2d 546, 548-49 (Mo. banc 1999) (finding a judge must grant an application for a change of judge when the conditions for such action are met), “[m]andamus will not issue unless the party has been given an opportunity to perform and performance has been refused.” 24 DANIEL P. CARD II & ALAN E. FREED, MISSOURI PRACTICE SERIES, APPELLATE PRACTICE § 12.2, at 485 (2d ed. 2001) (citing *Naugher ex rel. State v. Mallory*, 631 S.W.2d 370 (Mo. Ct. App. 1982)).

Not surprisingly, Ambassador Properties does not identify any effort to seek a trial date, nor does it point to any refusal by the circuit court. That is because neither is the case. In fact, the present petition for writ of mandamus evidences its intent to circumvent a trial. Accordingly, Ambassador Properties has once again failed to establish that mandamus relief is available, and its petition should be denied and the preliminary writ quashed.

II. Relators are Not Entitled to a Writ of Mandamus Because They Have No Standing In That The Quitclaim Deed Purporting to Transfer Ownership in the Subject Property is Invalid. – Responding to Relators’ Points A, B, C, D & E.

Not only is a writ of mandamus an improper mechanism to raise constitutional claims, but Ambassador Properties further lacks standing to bring the claims.

Standard of Review

“Standing is akin to jurisdiction over the subject matter . . . [and a]s such, . . . a party’s standing can be raised at any time, even sua sponte by this Court.” *State ex rel. Mathewson v. Bd. of Election Comm’rs*, 841 S.W.2d 633, 634 (Mo. banc 1992). Standing cannot be waived. *Cook v. Cook*, 143 S.W.3d 709, 712 (Mo. Ct. App. 2004). A court’s review of “whether a litigant has standing to pursue claims is *de novo*.” *Home Builders Assoc. of Greater St. Louis, Inc. v. City of Wildwood*, 32 S.W.3d 612, 614 (Mo. Ct. App. 2000), *rev’d on other grounds* at 107 S.W.3d 235 (Mo. banc 2003). However, a determination of standing requires the court to “engage in a summary judgment mode of analysis” by looking at the petition and uncontested facts. *Switzer v. Hart*, 957 S.W.2d 512, 514 (Mo. Ct. App. 1997). Of course, mandamus relief is not available if there are issues of fact. *See Carmack*, 884 S.W.2d at 398 (citing *Kelley*, 595 S.W.2d at 266). In this case, Ambassador Properties either lacks standing or there are issues of fact. Either way, mandamus is inappropriate.

A. Standing Requires a Legally Cognizable Interest.

Determining whether a party has standing to contest the constitutionality of a legislative enactment is a prerequisite to deciding the merits. *See In re Ancillary Adversary Proceeding Questions*, 89 S.W.3d 460, 463-64 (Mo. banc 2002) (per curiam) (“Until this Court determines the issue of standing, it cannot reach the other issues raised by the parties, for standing is a jurisdictional matter antecedent to the right to relief.”). “Where . . . a question is raised about a party’s standing to sue or appeal, courts have a duty to determine the question of their jurisdiction before reaching the substantive issues raised, for if a party lacks standing to bring an action, the court must dismiss the case because it does not have jurisdiction of the substantive issues presented.” *Id.* at 464.

“Standing requires a party seeking relief to have a legally cognizable interest in the subject matter and to have suffered a threatened or actual injury.” *Lett v. City of St. Louis*, 24 S.W.3d 157, 160 (Mo. Ct. App. 2000). The subject matter of this case is the abandoned property located at 3120 Cypress, Kansas City, Missouri. Thus, to establish standing to contest the constitutionality of the Act, Ambassador Properties must show it has an interest in the property. It cannot make such a showing because the quitclaim deed is invalid, and, therefore, passed no interest in the abandoned property.

B. Ambassador Properties Has No Legally Cognizable Interest in the Subject Property Because the Quitclaim Deed is Invalid.

Ambassador Properties' Quitclaim Deed is invalid on its face because it purports to pass title from Ms. Nelson and Mr. Laspy^{2/} to Ambassador Properties on November 18, 2004. (Resp't App. A124-25.) A review of Kansas corporate records shows that Ambassador Properties L.L.C. did not become a legal entity until February 24, 2005, three months after the deed was signed. (Resp't App. A126-28; A249-51.) It has long been established that a deed in favor of a fictitious corporation is void. *See Douthitt v. Stinson*, 63 Mo. 268, 1876 WL 9386 at *6 (Mo. 1876) (holding there must be "competent parties" to a deed); *see also, Seabaugh v. Sailer*, 679 S.W.2d 924, 926 (Mo. Ct. App. 1984).

In addition to being invalid on its face because the grantee was a fictitious corporation, the deed is further invalid because it was altered after its execution on November 18, 2004. (Resp't App. A136.) Specifically, the deed includes handwritten notations, unlike any other text, reflecting the grantee as "Ambassador Properties LLC," its mailing address, and "Legal Description Attached." (Resp't App. A124.) Mr. Copley has now offered affidavit testimony that the deed originally was made between the grantors and Urban Renewal of KC, Inc. (Resp't App. A253 at ¶ 5.) Mr. Copley has also

^{2/} Mr. Laspy's alleged signature on the deed is also not acknowledged, which is required for an effective deed under Missouri law. *See In re Jennings*, 206 B.R. 954, 956 (Bkrcty. W.D. Mo. 1997).

testified that Mr. Thomas had no involvement in obtaining the deed from the grantors. (Resp't App. A254 at ¶ 7.) This testimony directly conflicts with paragraph 4 of Mr. Thomas' affidavit which states that Brent Barber helped Ambassador Properties acquire the Abandoned Property. (Resp't App. A207-08 at ¶ 4.) There is also no evidence of how Ms. Nelson and Mr. Laspy came into possession of the property.

At a minimum, it is clear that someone (presumably Brent Barber or Mr. Thomas, or both of them working together as is suggested in paragraph 4 of Mr. Thomas' Affidavit) altered the deed to change the grantee from Urban Renewal of KC, Inc. to Ambassador Properties. Ambassador Properties has failed to offer any evidence showing that Ms. Nelson and Mr. Laspy authorized such changes, or entered into a new deed with a different grantee. Rather, Ambassador Properties acknowledges that Brent Barber, who helped "acquire the property," has pleaded guilty to illegal real estate transactions. (Resp't App. A207-08 at ¶¶ 4-6.)

In the absence of evidence showing the grantors authorized Urban Renewal of KC, Inc., Brent Barber, Karl Thomas, and/or Ambassador Properties, LLC to alter the deed given, the deed, in its altered form, is invalid and is ineffective in passing any interest. *See Cheney v. Eggert*, 199 S.W. 270, 270 (Mo. Ct. App. 1917) ("It needs no citation of authority to establish the fact that a deed for the conveyance of real estate is not a complete deed, and therefore not valid, until the name of the grantee is inserted *by a person authorized so to do.*") (emphasis added); *Derry v. Fielder*, 115 S.W. 412, 416 (Mo. 1909) (finding the addition of names would not make them grantees); *Allen v.*

Withrow, 110 U.S. 119, 128-129 (1884) (holding that the blank in a deed for the grantee must be filled by the party authorized to fill it).

C. Ambassador Properties Has No “Equitable Title.”

Ambassador Properties attempts to gloss over the question of standing by claiming an “equitable interest” in the abandoned property based on the recorded deed. Missouri courts have defined an equitable interest in title as “the right in the party to whom it belongs to have the legal title transferred to him upon the performance of specified conditions.” *State ex. rel. City of St. Louis v. Baumann*, 153 S.W.2d 31, 35 (Mo. banc 1941). Even under this broad definition, Ambassador Properties has offered no proof that it possesses an equitable title interest in the subject property. In the absence of a property interest, there is no standing to challenge the constitutionality of the Act.

Moreover, at a minimum, there are substantial questions of law and fact that are unresolved as to the basic issues of ownership of the abandoned property in dispute. And “to the extent that legal or factual issues must be adjudicated, mandamus is not an appropriate mechanism.” *Carmack*, 884 S.W.2d at 398 (emphasis added) (citing *Kelley*, 595 S.W.2d at 266). For these reasons, the petition should be denied and preliminary writ quashed.

III. Relators are Not Entitled to a Writ of Mandamus Because the Trial Court Correctly Denied Their Summary Judgment Motion In That Missouri’s Abandoned Housing Act Does Not Violate the United States Constitution or the Missouri Constitution. – Responding to Relators’ Points A, B, C, D & E.

Even if this Court decided to disregard the established law and consider constitutional questions on a writ of mandamus, and then assumed that Ambassador Properties has standing, its constitutional claims nonetheless fail on the merits.

Standard of Review

“This Court’s standard of review for constitutional challenges to a statute is *de novo*.” *Rizzo v. State*, 189 S.W.3d 576, 578 (Mo. banc 2006) (citing *Barker v. Varker*, 98 S.W.3d 532, 534 (Mo. banc 2003)). When considering constitutional challenges, “[a] statute is presumed to be constitutional and will not be invalidated unless it clearly and undoubtedly violates some constitutional provision and palpably affronts fundamental law embodied in the constitution.” *Bd. of Educ. of St. Louis v. State*, 47 S.W.3d 366, 368-69 (Mo. banc 2001); *see also Berdella v. Pender*, 821 S.W.2d 846, 850 (Mo. 1991).

A. Courts Decide on Narrow Non-Constitutional Grounds.

Well established principles of statutory construction require that courts “construe legislative enactments so as to render them constitutional and avoid the effect of unconstitutionality, if it is reasonably possible to do so.” *Simpson v. Kilcher*, 749 S.W.2d 386, 390 (Mo. banc 1988), *overruled on other grounds by Kilmer v. Mun*, 17 S.W.3d 545 (Mo. 2000). Courts “avoid an interpretation of the Constitution” unless “necessary by the absolute requirements of the law.” *Carmack v. Dir. of Mo. Dep’t of Agric.*, 945 S.W.2d

956, 959 (Mo. banc 1997). As set forth above, there are ample reasons to decide this matter on narrow non-constitutional grounds.

Moreover, courts “resolve all doubt in favor of the act’s validity” and “in so doing [the Court is] allowed to make every reasonable intendment to sustain the constitutionality of the statute.” *Westin Crown Plaza Hotel Co. v. King*, 664 S.W.2d 2, 5 (Mo. banc 1984). In other words, “when a constitutional and unconstitutional reading of a statute are equally possible, the court must choose the constitutional one.” *State v. Beine*, 162 S.W.3d 483, 490 (Mo. banc 2005) (quoting *Spradlin v. City of Fulton*, 924 S.W.2d 259, 263 (Mo. banc 1996)). The burden of proof regarding the unconstitutionality of a statute is on the party attacking the statute. *Westin Crown Plaza*, 664 S.W.2d at 5. In this case, Ambassador Properties failed in its substantial burden.

B. House Rescue is a Private Party, and Thus There is No State Action to Support Constitutional Claims.

The Fourteenth Amendment of the United States Constitution guarantees due process and prohibits states from denying federal constitutional rights. *Rendell-Baker v. Kohn*, 457 U.S. 830, 837 (1982); *see also* U.S. Const. amend. XIV, § 1. Because the Fourteenth Amendment prohibits the states from denying federal constitutional rights, it “applies to acts of the states [only], not to acts of private persons or entities.” *Id.* at 837-38. In other words, the Fourteenth Amendment “can be violated only by conduct that may be fairly characterized as ‘state action.’” *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 924 (1982). In the absence of state action, there can be no violation.

Generally, “a State is responsible for the . . . act of a private party when the State, by its law, has compelled the act.” *Flagg Bros., Inc. v. Brooks*, 436 U.S. at 164 (quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 170 (1970)). “Authorization or encouragement” from the state by enacting a statute, however, is insufficient to constitute state action. *Flagg Bros.*, 436 U.S. at 164-66. Likewise, “[a]ction taken by private entities with the mere approval or acquiescence of the State is not state action[,]” nor is “[p]rivate use of state-sanctioned private remedies or procedures.” *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 52-53 (1999) (quotation omitted).

The United States Supreme Court has articulated a two-part approach for finding state action, requiring: 1) “an alleged constitutional deprivation caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible[;]” and 2) that “the party charged with the deprivation must be a person who may fairly be said to be a state actor.” *Id.* at 50; *see also Lugar*, 457 U.S. at 937. As to the state actor requirement, this may be fulfilled by showing the actor is a state official, or that the actor acted together with or obtained significant aid from state officials, or that the conduct is otherwise chargeable to the state. *See Lugar*, 457 U.S. at 937.

Simply put, the body of law cited by Ambassador Properties in support of its claims, is not intended or meant to apply to a dispute between two private entities, such as the dispute before this Court. *Mottl v. Mo. Lawyer Trust Account Foundation*, 133 S.W.3d 142, 146 (Mo. Ct. App. 2004). Under the facts of this case, House Rescue is a private party and cannot be characterized as a state actor. The State did not, in any way,

compel House Rescue to act. Rather, House Rescue's actions amount to mere private use of state-sanctioned private remedies or procedures and are thus insufficient to be considered state action.

The only basis for Ambassador Properties to claim a deprivation caused by the exercise of some right or privilege created by the state is to argue that the circuit court's actions pursuant to the Act so involved the state that it can be said there has been "State action." This same argument was made in *Mottl*. In *Mottl*, the plaintiff alleged that the Missouri Supreme Court rule allowing interest on lawyer IOLTA accounts to be used for legal services for the poor was unconstitutional and violated 42 U.S.C. § 1983. *See id.* at 144. Ultimately, the court concluded that there was no "state action":

[A] State is responsible for the ... act of a private party when the State, by its law, has compelled the act. That the State has "authorized" or "encouraged" the conduct by enacting a statute is insufficient to conclude that the conduct is attributable to the State. Similarly, action taken by a private entity with the mere approval or acquiescence of the State is not state action ... Because Mr. Mottl failed to plead facts showing that the challenged action is fairly attributable to the State, the trial court did not err in dismissing his petition. The judgment of the trial court is affirmed.

Id. at 147-48 (citing *Flagg Bros.*, 436 U.S. at 164-65 (quoting *Adickes*, 398 U.S. at 170)).

The same is true here.

House Rescue's decision to pursue the Abandoned Property was completely voluntary and not coerced by any state actor or state statute. The fact that the Act *permits* House Rescue to make the decision it did (*i.e.*, to pursue rehabilitation of the property) does not convert House Rescue into a state actor, nor does it convert House Rescue's action into "state action." Ambassador Properties argues that the *Mottl* case is distinguishable because the plaintiff's contribution in that case to the lawyer trust account fund was voluntary, which actually is not the case as the contribution at issue (*i.e.*, interest earnings) is mandated to be turned over to the State.

Ambassador Properties cites to *Williams v. City of St. Louis*, 783 F.2d 114 (8th Cir. 1986), in support of its argument "that an act is under color of state law when state power is granted to a private person – in that case a redevelopment agency." (Relators' Brief at 54.) *Williams* is inapposite. In *Williams*, the City of St. Louis enacted an ordinance granting redevelopment powers, including the power of eminent domain, to Midtown Medical Center Redevelopment Corporation. *See id.* at 115. The Eighth Circuit held the City acted under color-of-state-law because it delegated powers possessed by virtue of state law and traditionally exercised by the City. *See id.* at 117. That is not the case here.

In passing the Abandoned Housing Act, the Missouri legislature did not delegate powers traditionally exercised by the State of Missouri to non-profit corporations. Instead, the statute gives non-profit corporations the opportunity to seek temporary possession of properties declared abandoned for purposes of rehabilitating the property. *See Mo. Rev. Stat. § 447.620, et seq.* Non-profit corporations must fulfill specific

requirements to the satisfaction of Missouri courts to demonstrate that the property they seek to rehabilitate is abandoned. *See id.*

Ambassador Properties failed to demonstrate that House Rescue is a state actor or that there was state action in this case. Therefore, it is not entitled to any relief on its constitutional claims.

C. The Abandoned Housing Act Does Not Violate Substantive Due Process.

In addition to the lack of any state action, Ambassador Properties' substantive due process claim is meritless for still further reasons. A substantive due process claim requires that the actions alleged "shock the conscience," offend the "concept of ordered liberty," or suggest "outrageousness." *Baker v. McCollan*, 443 U.S. 137, 147 (1979) (Blackmun, J., concurring).^{3/} Unless the alleged conduct is so egregious as to violate "a principle of justice so rooted in the conditions and conscience of our people as to be ranked as fundamental," it does not violate substantive due process and will not support a claim, such as Relators' claim, under § 1983. *See Baker*, 443 U.S. at 146-47; *Snyder v. Mass.*, 291 U.S. 97, 105 (1934), *overruled on other grounds by Malloy v. Hogan*, 378

^{3/} The Missouri Supreme Court has held that the due process clauses of the United States and Missouri Constitutions are equivalent with regard to the amount of protection afforded citizens. *See, e.g., Jamison v. State, Dept. of Soc. Servs., Div. of Family Servs.*, 218 S.W.3d 399, 405 (Mo. banc 2007). Therefore, the due process clauses of the Missouri and United States Constitutions will be referred to interchangeably.

U.S. 1 (1964). Ambassador Properties argues that the Act violates the Due Process Clauses of both the Missouri and United States Constitutions. As it concedes, to determine whether government action violates substantive due process, “one must establish that the government action complained of is ‘truly irrational,’ more than arbitrary, capricious, or in violation of state law.” *Lane v. State Comm. of Psychologists*, 954 S.W.2d 23, 24-25 (Mo. Ct. App. 1997).

In *Lane*, the Missouri Court of Appeals noted that in order to determine whether state action is “truly irrational,” the court must look at the action taken in light of the purpose behind the law. *See id.* In *Lane*, petitioner complained that the committee of psychologists deprived him of a fundamental property interest, his license to practice psychology, and that such deprivation was “truly irrational” and therefore a violation of his due process rights. *See id.* The court rejected this argument, noting that the committee’s “primary purpose” was to protect the public interest by safeguarding the public from psychologists who act inappropriately, and that depriving petitioner of his property interest was not “truly irrational” when viewed within the context of this “primary purpose.” *See id.*

Indeed, it is difficult to meet the “truly irrational” standard in almost any context because of the great leeway our constitutions afford our democratically elected representatives. To illustrate, the Eighth Circuit described a “truly irrational” ordinance as one “applying to only persons whose names begin with a letter in the first half of the alphabet.” *Chesterfield Dev. Corp. v. City of Chesterfield*, 963 F.2d 1102, 1104 (8th Cir. 1992). The Act does not meet this extraordinary standard, since its primary purpose is to

help non-profit neighborhood associations address abandoned property that has become a hazardous nuisances.

The Act is intended to assist in revitalizing neighborhoods in the urban core which have experienced a general decline in all facets of quality of life. *See* Robyne S. Turner, Ph.D., *Recommendations for a Neighborhood Based Housing Strategy in Kansas City*, Cookingham Inst. of Pub. Affairs & Midwest Ctr. for Nonprofit Leadership, University of Missouri – Kansas City (Oct. 2004).^{4/} Indeed, the State of Missouri has a vital interest in improving the quality of life in Kansas City’s urban core, and the Act is rationally related to the Act’s primary purpose.

Ambassador Properties does not dispute that the statute fulfills a legitimate government purpose. Moreover, it has not presented any evidence or argument to show that the Order of possession issued by the circuit court to House Rescue in this case for the Abandoned Property was “truly irrational” or unrelated to the primary purpose of the Act. For these reasons, Ambassador Properties’ unsupported assertion that the Act is unconstitutional on its face and as applied is without legal support or merit.

1. The Act, on its face, does not violate substantive due process.

Ambassador Properties argues that the Act is unconstitutional as applied to any Missouri property owner. In adjudicating facial substantive due process challenges, courts ask only whether a conceivable rational relationship exists between the challenged

^{4/} The report is also available at <http://www.bloch.umkc.edu/centers-institutes/lpcookingham/projects/kc-housing-task-force/download.aspx?id=1218>.

statute and its legitimate purpose. *See WMX Technologies, Inc. v. Gasconade County*, 105 F.3d 1195, 1200 (8th Cir. 1997). Ambassador Properties does not contest that the Act seeks to achieve legitimate public purposes.

There is a rational relationship between the State of Missouri's goal to alleviate abandoned houses in the urban core and the Act, which permits non-profit organizations to petition the courts for temporary possession of abandoned housing in the urban core for purposes of rehabilitation. "Under the deferential standard of review applied in substantive due process challenges to economic legislation there is no need for mathematical precision in the fit between justification and means." *Concrete Pipe & Products of Cal., Inc. v. Const. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 639 (1993) (citing *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 19 (1976)). The Act does not "shock the conscience," offend the "concept of ordered liberty," or suggest "outrageousness." *See Baker*, 443 U.S. at 147.

In fact, Ambassador Properties suggests that if the state is concerned with outstanding back taxes, "nuisance-like" conditions, and the adverse impacts of a large number of unoccupied structures, then the state should pass legislation to address these issues. (Relators' Brief at 30) This is not the standard by which substantive due process is determined. Moreover, Ambassador Properties merely suggests that the legislature employ after-the-fact punitive measures to address a few of the problems that stem from large tracts of abandoned property in the urban core. Unlike the Act, the proposed legislation does not seek to rehabilitate abandoned properties to prevent the negative impact on neighborhoods.

Ambassador Properties suggests, for example, that the “state might impose stiffer penalties on criminals that use unoccupied buildings for nefarious purposes.” (Relators’ Brief at 30.) This argument ignores the fact that this after-the-fact remedy is not proven to deter the types of criminal actions the state has an interest in preventing. Moreover, the state has a fundamental interest in protecting the safety and welfare of its citizens by *preventing* (not just punishing) criminal activities. *See State v. Purnell*, 621 S.W.2d 277, 284 (Mo. 1981) (per curiam). Ambassador Properties cannot seriously claim that the state does not have a legitimate interest in preventing crimes, or that such a purpose is “truly irrational.”

Finally, Ambassador Properties has failed to show that *any* application of the Act is unconstitutional, as it is required to do in order to show that the statute violates the due process clause. It claims that “anyone who is made the victim of this statute would be losing a fundamental right in the ownership of property.” (Relators’ Br. at 29.) This is not true. Indeed, if a non-profit group petitioned for temporary possession of abandoned property and the property owner stepped forward, then they would be entitled to adjudicate the matter before the court, which is sufficient to protect the property owner’s due process rights. Therefore, the Act, as written, does not violate the due processes clauses of Missouri or the United States.

2. As applied, the Act does not violate substantive due process.

Ambassador Properties also claims that the Act, as applied to it, violates its substantive due process rights. In support of this claim, it alleges that it did not receive “notice of building violations” and that it “have never been notified that criminals have

used [their] property for evil purposes.” However, in making an “as applied” challenge to the Act, they must show that the government action complained of is “truly irrational.” *See WMX Technologies, Inc.*, 105 F.3d at fn.1 (citing *Eide v. Sarasota County*, 908 F.2d 716 (11th Cir. 1990)). In this case, the government action in question is the passage of the Act. Ambassador Properties does not dispute that the Act furthers legitimate governmental purposes and it has failed to demonstrate the statute is not rationally related to the furtherance of those purposes. Therefore, the Act, as applied, does not violate the due processes clauses.

D. The Act Does Not Violate Procedural Due Process.

The Act not only comports with substantive due process requirements, it satisfies procedural due process concerns as well. Ambassador Properties argues in Section II(C) of its brief that the Act violates procedural due process. In a challenge to a statute based on a deficiency in procedural due process, a court must consider three factors when determining what procedures are constitutionally sufficient: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *See Jamison*, 218 S.W.3d at 405.

1. The Act, on its face, does not violate procedural due process.

Ambassador Properties erroneously asserts that there is no opportunity to cure any defects in code violations or back taxes prior to the property being rehabilitated. It cites

no legal support for its contention that due process requires an opportunity to cure prior to a deprivation of a property interest. In fact, due process does not require an opportunity to cure prior to the deprivation of a constitutionally protected interest; it requires only an opportunity to be heard. *See Fitzgerald v. N.Y. City Dep't of Hous. Pres. & Dev.*, 767 N.Y.S.2d 589, 589-90 (N.Y. App. 2003). Were this otherwise, a criminal defendant convicted of theft would be able to escape prison by simply offering to return the goods to their rightful owner.

There is no known instance where an individual who violates a statute is entitled to an opportunity to “cure” his actions prior to being deprived of a constitutional interest. For instance, where a doctor loses her license for malpractice, she is being deprived of a protected property interest, but she has no right to cure her alleged impropriety, only to have a hearing where she can defend her actions prior to being deprived of her property interest. *See Lane*, 954 S.W.2d at 24-25. The doctor would not constitutionally be required another chance to commit malpractice. *See id.*

Even Ambassador Properties concedes that Missouri law allows the government to foreclose on private property after the back taxes are due for a period of two years, and it does not argue that an individual is entitled to cure the back taxes *after* foreclosure proceedings have begun. (Relators’ Br. at 8 (citing Mo. Rev. Stat. § 141.260(1).) However, Ambassador Properties believes that the six months afforded to the owners of abandoned property to maintain their property or prevent the property from becoming a “substantial threat,” or to pay taxes on their property is constitutionally deficient.

Presumably, Ambassador Properties believes it has a constitutional right to leave its property abandoned and posing a “substantial threat” to its neighbors for a period greater than six months. This is not the standard by which the statute’s constitutionality is measured. Due process does not require that the state provide all possible safeguards to property owners before depriving them of their property interest, only those that are deemed reasonable under the circumstances. *See Bell v. U-32 Bd. of Educ.*, 630 F. Supp. 939, 947 (D. Vt. 1986) (“Due process only requires that notice be reasonable under the circumstances and that there is an opportunity to be heard.”) (citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), and *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428-29 (1982)).

Ambassador Properties has also argued that the court has no discretion in ordering rehabilitation proceedings under the statute. This is not the case. The court does in fact have discretion in determining whether the abandoned property should be rehabilitated. The statute provides that the organization “*may petition* to have property declared abandoned” if it meets the elements of the statute. Nowhere in the statute does it provide that the court must grant such petition. *See Mo. Rev. Stat. § 447.622* (emphasis added). Moreover, the statute provides that the court “shall grant the organization’s petition **if the court finds** that the conditions alleged by the plaintiff as specified in section 447.622 existed.” *See id. § 447.632* (emphasis added).

Most importantly, the Act expressly mandates that no petition may be granted until the abandoned property owner is “given an opportunity to show cause why such organization should not be allowed to rehabilitate the property.” *See id. § 447.630.*

Hence, the statute provides constitutionally sufficient due process protections on its face. *See Bell*, 630 F. Supp. at 947 (“Due process only requires that notice be reasonable under the circumstances and that there is an opportunity to be heard.”).

Moreover, for the court to exercise its discretion and allow the organization to rehabilitate the abandoned property, the property at issue must be a danger to the community. There is nothing “irrational” about protecting the community. Indeed, the Missouri Supreme Court has long recognized that the state has broad power to legislate for the betterment of society as a whole, including the management of neighborhoods for the benefit of those who reside in them. This Court explained:

[T]he police power of a state embraces its whole system of internal regulation, by which the state seeks not only to preserve the public order and to prevent offenses against the state, but also to establish for the intercourse of citizens with citizens those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own so far as is reasonably consistent with a like enjoyment of rights by others

State v. Day-Brite Lighting, Inc., 240 S.W.2d 886 (Mo. banc 1951).

Permitting actions to address abandoned housing in order to prevent criminal activity is a reasonable use of the state’s broad police power and the Abandoned Housing Act is therefore constitutional.

2. Ambassador Properties received sufficient notice of the hearing.

Ambassador Properties also contends that neither it nor the heirs of Charles Laspy received sufficient notice of the litigation. Contrary to Ambassador Properties' contention, the Supreme Court's decision in *Jones v. Flowers* requires no more notice than was provided in this case. See *Luessenhop v. Clinton County*, No. 04-263, 2007 U.S. Dist. LEXIS 25787, *12-16 (N.D.N.Y. Apr. 6, 2007) (explaining rationale in *Jones v. Flowers*, 547 U.S. 220 (2006)). In *Jones* the State argued that notice consisting of two letters sent by the state to the property owner which were returned unclaimed was a constitutionally adequate attempt at notice. *Id.* at 224. The Court held only "that when mailed notice of a tax sale is returned unclaimed, the State must take additional reasonable steps to attempt to provide notice to the property owner before selling his property, if it is practicable to do so." *Id.* at 225.

The Court left intact its prior precedent that the state need not provide any further notice than mailing provides when it has no reason to doubt that the mail was received. See *id.* at 226. The Court went on to explain that due process does not require the individual to receive the notice, only that the notice be sent. See *id.* ("Due process does not require that a property owner receive actual notice before the government may take his property.").

Relators' brief cites *Robinson v. Hanrahan*, 409 U.S. 38, 40 (1972), and *Covey v. Town of Somers*, 351 U.S. 141 (1956), for the proposition that "actual notice" is due before the government can take an owner's property. (Relators' Br. at 35.) However, those cases do not stand for such principle, and the Court in *Jones* thoroughly explained

that actual notice is not required before the government may take private property. *See Jones*, 547 U.S. at 230. In *Covey* the government sent plaintiff notice of foreclosure of his property even though the government knew that he was in prison so he could not receive the notice in time to challenge it. *See id.* In *Robinson*, the government sent notice of foreclosure on property even though it knew the property holder was incompetent and therefore would not be able to understand or appreciate the notices. *See id.* In each of these cases the government *knew before the notice was sent* that the recipient would not receive the notice. In *Jones*, the Court kept intact its prior precedent that where the government has no reason to know that mail will not be received by the intended recipient and the mail was not immediately returned “unclaimed,” then mailing of the notice is legally sufficient to satisfy due process. *See id.* at 230-31; *see also Crum v. Vincent*, No. 06-3471, 2007 U.S. App. LEXIS 17912, *6-7 (8th Cir. July 27, 2007) (interpreting *Jones v. Flowers* and finding that case did not change the general premise that “[n]otice by mail is ordinarily presumed to be constitutionally sufficient.”). Thus, *Robinson* and *Covey* are very much unlike the instant action where there was no knowledge of whether the owner lived at the home or not, and therefore the simple mailing of the notice satisfied due process.

Additionally, in this case, the record details the length of activities performed to apprise the property owner of notice, including, but not limited to, mailing a copy of the notice of intent to rehabilitate the property via regular mail, hiring a private investigator to search for the property owners and heirs of Charles Laspy, serving notice by publication, and posting the Court’s order granting possession to House Rescue to the

door. (Resp't App. A021-25; A108-09 at ¶¶ 8, 24; A265-66 at ¶ 6.) These actions went above and beyond the reasonable steps to attempt to provide notice to the property owner which the Court in *Jones* approved and recommended. *See* 547 U.S. at 234-36 (recommending mailing notice by regular mail and posting notice on the door). Hence, the heirs of Charles Laspy received constitutionally sufficient notice of the impending action.

Likewise, in the instant case, Ambassador Properties, as a prospective purchaser, received ample notice of the pending action under the Act because a Notice of Lis Pendens was on file with the Jackson County Recorder of Deeds at the time Ambassador Properties allegedly obtained titled to the property. The Act itself requires non-profits such as House Rescue to file a Notice of Lis Pendens. *See* Mo. Rev. Stat. § 427.628. Under Missouri law, the filing of such notice “shall be constructive notice to purchasers or encumbrancers” of the pendency and contents of the lawsuit. *Id.* § 527.260; *see also id.* § 447.628 (“From the time of filing [notice of pendency of the suit under the Act pursuant to § 527.290] the pendency of suit shall be constructive notice to persons thereafter acquiring an interest in the building.”).

“The well-settled rule is that a lis pendens, prosecuted in good faith, is notice to any and all purchasers, so as to affect and bind by the decree any interest in the property which they may acquire by reason of their purchase.” *Turner v. Edmonston*, 109 S.W. 33, 35 (Mo. 1908). Even where a purchaser had no actual knowledge of the pendency of the suit at the time he or she purchased the property, under Missouri law the purchaser “is nevertheless chargeable with legal or constructive notice so as to render his title subject

to the result of said suit.” *Id.* Providing notice to prospective purchasers of legal proceedings involving real property in this manner satisfies due process. *See Kornblum v. St. Louis County*, 72 F.3d 661, 664 (8th Cir. 1995).

Here, Ambassador Properties acknowledges that House Rescue filed a Notice of Lis Pendens, in accordance with the statutory safeguard, three months *prior* to the alleged quit-claim deed. (Relators’ Br. at 3-4.) Hence, at a minimum Ambassador Properties had constructive notice that the property at issue was in dispute prior to purchasing the property.

E. The Act Does Not Effectuate A Taking of Private Property Without The Payment Of Just Compensation.

Similar to the absence of due process violations, the Act does not constitute a takings violation. Ambassador Properties argues that the Act effects a taking of property without the payment of just compensation in violation of the Fifth Amendment to the United States Constitution as well as Article I, Section 26, of the Missouri Constitution. The takings challenge to the Act fails on numerous grounds. To mount a successful challenge to a statute on the basis of the takings clause, a party must demonstrate: 1) a property interest protected by the Fifth Amendment Takings Clause or Article 1, Section 26 of the Missouri Constitution; 2) the challenged action effects a taking of that property interest; 3) the taking is for public use; and 4) the statute does not provide for adequate compensation. *Ruckelshaus v. Monsanto*, 467 U.S. 986, 1000-01 (1984); *see also Felling v. Wire Rope Corp. of Am., Inc.*, 854 S.W.2d 458, 460-62 (Mo. Ct. App. 1993) (noting that takings claim under Fifth Amendment of the United States Constitution “is paralleled

in essential parts by . . . Mo. Const. art. 1, § 26” and analyzing both claims pursuant to Ruckelshaus).

As noted in Point II above, Ambassador Properties’ takings challenge to the Act is thwarted by the first prong of the takings analysis; it has no cognizable property interest. The fact that the deed pursuant to which it claims title shows blatant signs of alteration and purports to transfer title to a grantee entity prior to that entity’s existence undermines the validity of the deed. Moreover, Ambassador Properties’ alleged property interest arose several months after House Rescue had filed a Notice of Lis Pendens with the recorder of deeds. Additionally, as more fully explained in Point III(A), the challenged action does not effect a taking because House Rescue is not a state actor.

1. House Rescue’s actions do not constitute a taking.

“Property interests . . . are not created by the Constitution,” but “[r]ather . . . are created and their dimensions defined by existing rules or understandings that stem from an independent source such as state law” *Texaco, Inc. v. Short*, 454 U.S. 516, 525 (1982) (quoting *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972)). Accordingly, “[e]very citizen holds his property subject to the valid exercise of the police power.” *State ex rel. State Highway Comm’n. v. Meier*, 388 S.W.2d 855, 859 (Mo. banc 1965); *see also Nemours v. City of Clayton*, 175 S.W.2d 60, 65 (Mo. Ct. App. 1943).

Generally, pursuant to their police power, states “promote the health, welfare, and safety of the people by regulating all threats either to the comfort, safety, and welfare of the populace or harmful to the public interest.” *Craig v. City of Macon*, 543 S.W.2d 772, 774 (Mo. banc 1976). Valid exercises of the police power include enacting building

regulations, enforcing property maintenance ordinances, ordering and executing the demolition of buildings, and defining acts which constitute public nuisances. *City of Kansas City v. Jordan*, 174 S.W.3d 25, 41 (Mo. Ct. App. 2005). The police power may also be exercised to protect public health and safety. *Id.* In fact, this Court has recognized that “the preservation of the public health is a paramount end of the exercise of the police power of the state.” *Mahoney v. Doerhoff Surgical Servs., Inc.*, 807 S.W.2d 503, 507 (Mo. banc 1991).

“Where public safety and welfare, as well as peace and health are involved, the sovereign may abridge, abrogate, impair, or even destroy property.” *City of Kansas City*, 174 S.W.3d at 41. Moreover, “[a] valid exercise of the police power is not a taking of private property for public use.” *City of Kansas City*, 174 S.W.3d a 48. In that same vein, the United States Supreme Court has long recognized “that States have the power to permit unused or abandoned interests in property to revert to another after the passage of time.” *Texaco*, 454 U.S. at 526.; *see, e.g., Wilson v. Iseminger*, 185 U.S. 55, 65 (1902) (upholding state statute which extinguished interest in ground rents if owner collected no payment or made no demand); *Hawkins v. Barney’s Lessee*, 30 U.S. 457 (1831) (upholding state adverse possession statute); *Jackson ex. dem. Hart v. Lamphire*, 28 U.S. 280 (1830) (upholding recording statute). In upholding the extinguishment of such rights the Court has reasoned: “The right to appropriate a derelict is one of universal law, well known to the civil law, the common law, and to all law: it existed in a state of nature, and is only modified by society, according to the discretion of each community.” *Hawkins*, 5 Pet. at 467; *see also id.* at 466.

Further, in ruling that states have the power to deem private property “to be abandoned and to lapse upon the failure of its owner to take reasonable actions imposed by law, [the Supreme] Court has never required the State to compensate the owner for the consequences of his own neglect.” *Texaco*, 454 U.S. at 530. In those instances, the Court has found “no ‘taking’ that requires compensation” because “[i]t is the owner’s failure to make any use of the property-and not the action of the State-that causes the lapse of the property right” *Id.* (upholding state statute that provided for extinguishment of unused mineral interests).

Similarly, through their police power, states may properly restrict uses of land. The Supreme Court has consistently denied Due Process Clause and Takings Clause challenges to states’ use of their police powers to enjoin property owners from activities akin to public nuisances. *See, e.g., Miller v. Schoene*, 276 U.S. 272, 279-80 (1928) (finding no Takings Clause violation where state ordered destruction of diseased cedar trees to prevent infection of nearby orchards). The Court has held that “a prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or appropriation of property.” *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 489 (1987). Such restrictions are considered “part of the burden on common citizenship.” *Id.* at 492. “[A]ll property in this country is held under the implied obligation that the owner’s use of it shall not be injurious to the community . . . and the Takings Clause did not transform that principle into one that requires compensation whenever the State asserts its power to enforce it.” *Id.*

Accordingly, a “[s]tate need not provide compensation when it diminishes or destroys the value of property by stopping illegal activity or abating a public nuisance.” *Keystone*, 480 U.S. at 489; *see also Lucas v. S. C. Coastal Council*, 505 U.S. 1003, 1022 (1992). Courts simply find no taking because “no individual has a right to use his [or her] property so as to create a nuisance or otherwise harm others,” and thus “the State has not ‘taken’ anything when it asserts its power” *Keystone*, 480 U.S. at 492.

In this case, the Act is a proper exercise of the state’s police power to protect the health, safety, and welfare of the citizens of Missouri. To obtain a declaration that a property is abandoned under the Act, a petitioner must demonstrate: 1) “[t]he property has been continuously unoccupied . . . for at least six months”; 2) “[t]he taxes are delinquent”; and 3) “[t]he property is a nuisance.” Mo. Rev. Stat. § 447.622. Moreover, a property is not considered a “nuisance” unless it “constitutes a substantial threat to the life, health, or safety of the public.” *Id.* § 447.620(4). A property will not be declared abandoned under the Act if an owner takes any one of three actions: 1) occupies or secures occupancy of the property; 2) pays the property taxes; or 3) abates the nuisance on the property.

Each of these potential actions to be taken to avoid a declaration of abandonment furthers a legitimate state goal. The state has an interest in the public’s safety and health and thus has an interest in seeing that buildings are occupied because abandoned housing

leads to increased crime, decreased property values, and safety concerns.^{5/} The Supreme Court has explained the states' interest in housing conditions:

Miserable and disreputable housing conditions may do more than spread disease and crime and immorality. They may also suffocate the spirit by reducing the people who live there to the status of cattle. They may indeed make living an almost insufferable burden. They may also be an ugly sore, a blight on the community which robs it of charm, which makes it a place from which men turn. The misery of housing may despoil a community as an open sewer may ruin a river.

Berman v. Parker, 348 U.S. 26, 32-33 (1954). The state's fiscal interest in collecting property taxes is also obvious. *Texaco*, 454 U.S. at 529. Similarly, courts have long recognized a state's interest in abating nuisances. *Miller*, 276 U.S. at 279-80.

^{5/} William Spelman, *Abandoned Buildings: Magnets for Crime?*, 21 J. Crim. Just. 481, 481-95 (1993); Turner, *supra*, note 6 and text accompanying note 6; Temple Univ. Ctr. For Pub. Policy, *Blight Free Philadelphia: A Public Private Strategy to Create and Enhance Neighborhood Value* (2001), available at <http://www.temple.edu/rfd/content/BlightFreePhiladelphia.pdf>; U.S. Fire Admin., *Arson in the United States*, Topical Fire Research Series, Vol. 1, Issue 8 (Jan. 2001), available at <http://www.usfa.dhs.gov/downloads/pdf/tfrs/v1i8-508.pdf>.

As Ambassador Properties so aptly notes: “There is no constitutional way for divesting man’s title except by his own act or default.” (Relators’ Br. at 17 (citing *Masterson v. Roberts*, 78 S.W.2d 856, 861 (Mo. 1934) (per curiam))). The Act comports with this principle by divesting an owner of property rights only as a result of the owner’s actions of abandonment and neglect. Thus, in the event state action exists (which it does not), the state has not taken anything; it has merely engaged in a valid exercise of its police powers. Alternatively, it is the owner’s failure to make use and care for the property – and not the State – that causes the lapse of the property right.

2. Even if House Rescue’s actions constituted a taking, any such deprivation would constitute a taking for the public use.

Ambassador Properties argues alternatively that the Act is unconstitutional because it effects a taking of property for a private use rather than a public use. In light of recent Supreme Court precedent, Ambassador Properties takes too narrow of an approach to “public use.” The Supreme Court “‘long ago rejected any literal requirement that condemned property be put into use for the general public’” to satisfy the public use requirement. *Kelo v. City of New London*, 545 U.S. 469, 479 (2005) (quoting *Hous. Auth. v. Midkiff*, 467 U.S. 229, 244 (1984)). “‘It is not essential that the entire community, nor even any considerable portion, . . . directly enjoy or participate in any improvement in order for it to constitute a public use.’” *Midkiff*, 467 U.S. at 244 (quoting *Rindge Co. v. Los Angeles County*, 262 U.S. 700, 707 (1923)); see also *In re Kansas City Ordinance No. 39946*, 252 S.W. 404, 408 (Mo. banc 1923) (“to constitute public use, it is not necessary that the whole community or any large part of it should actually use or be

benefited by a contemplated improvement.”). The Supreme Court has “embraced the broader and more natural interpretation of public use as ‘public purpose.’” *Kelo*, 545 U.S. at 479 (holding economic development qualified as a public purpose).^{6/}

Under that broader interpretation, the Supreme Court, for instance, has upheld a state statute which provided for the transfer of title to real property from lessors to lessees in order to reduce the concentration of land ownership. *Midkiff*, 467 U.S. at 231-32, 241-44. In *Midkiff*, the Court concluded that the state’s purpose in eliminating “the social and economic evils of a land oligopoly” qualified as a public use. *Id.* at 241-42. The fact that the state immediately transferred the properties to private individuals upon condemnation did not concern the Court; “it is only the taking’s purpose, and not its mechanics,” that matters. *Id.* at 244; *see also In re Kansas City Ordinance*, 252 S.W. at 408 (“[T]he mere fact that the advantage of a public improvement also inures to a particular individual or group of individuals [does not] deprive it of its public character.”)

^{6/} Ambassador Properties attempts to distinguish *Kelo* on the basis that *Kelo* involved a taking pursuant to a general, comprehensive development plan, and not the taking of an individual parcel. (Relators’ Br. at 45-46.) This is a distinction without significance. Legislative determinations as to the public purposes to be advanced by an exercise of the taking power may be made either on a piecemeal basis (i.e., lot by lot, building by building) or as part of a community redevelopment plan. *See Kelo*, 545 U.S. at 481 (quoting *Berman*, 348 U.S. at 34-35).

Moreover, the Court noted that judicial deference to a state legislature's public use determination was "required because, in our system of government, legislatures are better able to assess what public purposes should be advanced by an exercise of the taking power." *Id.* "Thus, if a legislature, state or federal, determines there are substantial reasons for an exercise of the taking power, courts must defer to its determination that the taking will serve a public use." *Id.*; *see also In re Kansas City Ordinance*, 252 S.W. at 408 (adopting liberal and flexible interpretation of public use).

Similarly in *Berman*, the Supreme Court upheld a redevelopment plan which targeted a blighted area of Washington D.C. 348 U.S. at 32-34. In upholding the plan, the Court stated: "We do not sit to determine whether a particular housing project is or is not desirable. The concept of the public welfare is broad and inclusive." *Id.* at 33. Pursuant to the plan, the real property gathered could be leased or sold "to a redevelopment company, individual, or partnership." *Id.* at 30. In fact, the plan provided that "[p]reference [was] to be given to private enterprise over public agencies in executing the redevelopment plan." *Id.* The property owners argued that the use of private enterprise rendered "the project a taking from one businessman for the benefit of another businessman." *Id.* at 33. The Court rejected this argument:

[T]he means of executing the project are for Congress and Congress alone to determine, once the public purpose has been established. . . . The public end may be as well or better served through an agency of private enterprise than through a department of government-or so the Congress might

conclude. We cannot say that public ownership is the sole method of promoting the public purposes of community redevelopment projects.

Id. at 33-34.

In this case, based on the broad interpretation of public use as public purpose, if the Act effects a taking, such a taking is for a public purpose. As previously noted, the main purpose of the Act is to revitalize neighborhoods in the urban core which have experienced a general decline in all facets of quality of life. Such revitalization efforts constitute a public purpose. *See Kello*, 545 U.S. 484; *Berman*, 348 U.S. at 32-34. Moreover, the fact that House Rescue, a private party, was involved in the revitalization efforts does not render the use private.

3. If House Rescue’s actions constituted a taking, the Act provides adequate compensation.

Ambassador Properties contends that the Act provides “no hint of compensation” and that the Act’s failure to provide for such compensation renders the statute “unconstitutional on its face.” (Relators’ Br. at 42.) Apparently, it would have this Court ignore the plain language providing for compensation set forth in Mo. Rev. Stat. § 447.640. The section states in its entirety:

If an owner does not regain possession of the property in the one-year period following entry of an order granting temporary possession of the property to the organization, the organization may file a petition for judicial deed and, upon

due notice to the named defendants, an order may be entered granting a quitclaim judicial deed to the organization. A conveyance by judicial deed shall operate to extinguish all existing ownership interests in, liens on, and other interest in the property, except tax liens. *Any party in interest of the property shall present any claim for compensation prior to the entering of the court order conveying title to the organization.*

Id. § 447.640 (emphasis added). The Act defines “parties in interest” as “any owner or owners of record, occupant, lessee, mortgagee, trustee, personal representative, agent, or other party having an interest in the property as shown by the land records of the recorder of deeds of the county wherein the property is located” *Id.* § 447.620(6). In light of this language, the statute clearly contemplates compensation in the event an owner forfeits the abandoned property to the petitioning organization.

To the extent Ambassador Properties contends that an owner should be compensated for the possessory interest temporarily taken by the petitioning organization, nothing in Mo. Rev. Stat. § 447.640 prohibits a party in interest from making a claim for compensation for the temporary loss of possession. Moreover, its argument overlooks the manner in which such compensation would be calculated. In contrast to the situation where a public entity permanently damages property rights and is thus liable for the fair market value lost in that property, where a public entity only temporarily damages the property rights of a plaintiff, “the proper measure [of

compensation] is the diminution in value of the use of occupancy of the property for the period taken or damaged.” *Byrom v. Little Blue Valley Sewer Dist.*, 16 S.W.3d 573, 577 (Mo. banc 2000) (quotation omitted). Typically, the value is equivalent to the rent that could have been obtained for that period. *Id.* Here, any property falling within the reach of the Act necessarily would be unoccupied, a nuisance, and uninhabitable. In such circumstances, the landowner has suffered no diminution in value of the use of occupancy of the abandoned property for the period of temporary possession, and accordingly is entitled to zero compensation.

Because the Act clearly contemplates compensation in the event an owner forfeits valuable property to the petitioning organization and landowners of abandoned and uninhabitable properties cannot demonstrate a diminution in value of the use of occupancy of the abandoned property, Ambassador Properties’ takings challenge fails.

F. The Act Does Not Provide a Basis for Damages Under 42 U.S.C. § 1983.

Ambassador Properties also seeks damages under 42 U.S.C. § 1983 for alleged due process and takings violations. To recover on a claim for relief in accordance with 42 U.S.C. § 1983, they must establish that: 1) “they were deprived of a right secured by the Constitution or laws of the United States[;]” and 2) “the allege deprivation was committed under color of state law.” *Sullivan*, 526 U.S. at 49-50. As explained above, Ambassador Properties has failed on both accords. House Rescue is not a state actor, but instead a private actor that voluntarily chose to initiate an action pursuant to the Act. House Rescue’s actions merely amount to private use of state-sanctioned private

procedures. Similarly, Ambassador Properties has suffered no deprivation of a constitutional right, whether in terms of substantive due process, procedural due process, or taking of private property without just compensation. None of the claims (even if true) rises to this level. Accordingly, it is not entitled to relief under 42 U.S.C. § 1983.

G. The Missouri Constitution’s Redevelopment Clause Does Not Apply to the Abandoned Housing Act.

Ambassador Properties’ final claim is that the Act does not conform to the requirements of Article 6, Section 21 of the Missouri Constitution, which states: “Laws may be enacted, and any city or county operating under a constitutional charter may enact ordinances, providing for the clearance, replanning, reconstruction, redevelopment, and rehabilitation of blighted, substandard, or insanitary areas ... *and* for taking or permitting the taking, by eminent domain, of property for such purposes” (emphasis added). This provision of the Missouri Constitution authorizes laws, enacted by the Missouri Legislature and Missouri cities and counties operating under constitutional charters, to take property through eminent domain for the purpose of rehabilitating blighted areas. Not-for-profit corporations, such as House Rescue, cannot take property through the power of eminent domain because they do not possess eminent domain power.

The Act permits not-for-profit corporations to petition Missouri courts to rehabilitate abandoned property, once the court has determined that they have met the requirements to bring such a petition. *See* Mo. Rev. Stat. § 447.620, et seq. Moreover, the Act permits restoration of possession by the original owner of the abandoned property. *See id.* § 447.638. The taking of property by the government pursuant to its

power of eminent domain differs entirely. As such, Article 6, Section 21 of the Missouri Constitution has no application to the Act as the statute does not address the government's taking of property through eminent domain.

CONCLUSION

For the foregoing reasons, this Court should deny the Petition for Writ of Mandamus and quash the preliminary writ.

Respectfully submitted,

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