

IN THE MISSOURI SUPREME COURT

No. SC90701

STATE OF MISSOURI EX REL., GINA MARIE HOUSKA,
PERSONAL REPRESENTATIVE OF THE
ESTATE OF JEFFREY A. HOUSKA, DECEASED,

Relator,

vs.

THE HONORABLE RAY DICKHANER,
ASSOCIATE CIRCUIT JUDGE, 23RD JUDICIAL CIRCUIT,
JEFFERSON COUNTY MISSOURI,

Respondent.

Petition for Writ of Prohibition, or, in the Alternative,
For a Writ of Mandamus

Division 11

23rd Judicial Circuit

Honorable Ray Dickhaner

**BRIEF OF RESPONDENT
THE HONORABLE RAY DICKHANER**

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TABLE OF CONTENTS

	<u>Page No.</u>
Table of Authorities	iii
Statement of Facts	1
Points Relied On	2

Argument:

I The Court Did Not Err in Overruling
 Relator’s Motion to Dismiss Panagos’
 Claim on the Ground That it Was
 Untimely Filed, Because the Statutes
 That Set Deadlines for a Creditor to File
 a Claim Against a Decedent’s Estate Are
 Unconstitutional, in That:

A. The Probate Nonclaim Statute
 and the Statute of Repose Violate
 the Federal and State Constitutional
 Guarantees of Due Process, Because
 They Do Not Require Actual Notice to
 Creditors Whose Identities Are Known
 or Are Reasonably Ascertainable;

B. The Probate Nonclaim Statute and the

Probate Statute of Repose, Together with
the Probate Notice Statute, Violate the
Federal and State Constitutional
Guarantees of Equal Protection under
the Law, Because They Require That
Actual Notice Be Given to Heirs but Not
to Known or Reasonably Ascertainable
Creditors; And,

C. The Bill by Which the One-Year Probate
Statute of Repose Was Enacted Lacked
a Clear Title as Required by Article III,
Section 23 of the Missouri Constitution 5

Appendix:

Notice of Entry of Judgment A-1
Judgment A-2
Affidavit of James T. Panagos A-4
United States Constitution, Fourteenth Amendment A-7
Missouri Constitution Article 1, Section 2 A-7
Missouri Constitution, Article 1, Section 10 1-7
Missouri Constitution, Article III, Section 23 A-8
Section 472.010, R.S.Mo. (2000) A-8

Section 473.033, R.S.Mo. (2000) A-9

Section 473.360.1, R.S.Mo. (2000) A-11

Section 473.444.1, R.S.Mo. (2000) A-12

Section 561.110, R.S.Mo. (2000) A-12

Section 516.120, R.S.Mo. (2000) A-13

TABLE OF AUTHORITIES

CASES

<i>Batek v. Curators of the University of Missouri</i> , 920 S.W.2d 895 (Mo banc. 1996)	49
<i>Blaske v. Smith & Entzeroth, Inc.</i> , 821 S.W.2d 822 (Mo. banc 1992)	28, 50
<i>Brown v. Board of Education</i> , 473 U.S. 483 (1954)	49
<i>Burnett v. Villeneuve</i> , 685 N.E.2d 1103 (Ind.App. 1997)	40
<i>City of New York v. New York, N.H. & M.R. Co.</i> , 344 U.S. 293 (1953)	33
<i>Denver Water Department Credit Union v. The Estate of Ongaro</i> , 998 P.2d 1097 (Colo. banc 2000)	38, 39
<i>Easter v. Ochs</i> , 837 S.W.2d 516 (Mo. banc 1992)	44, 47
<i>Estate of Busch v. Ferrell-Duncan Clinic, Inc.</i> , 700 S.W.2d 86 (Mo. banc 1985)	25
<i>Estate of Decker v. Farm Credit Service</i> , 684 N.E.2d 1137 (In. 1997)	39
<i>Estate of Kruzynski</i> , 744 A.2d 1054 (Me. 2000)	41
<i>Federal National Mortgage Association v. Howlett</i> , 521 S.W.2d 428 (Mo. banc 1975)	43, 44
<i>Fifth Third Bank v. Gottlieb</i> , No. WD- 1997 WL 543069 (Ohio App. 6 Dist., Aug. 29, 1997), 1997 Ohio App. LEXIS 3815	41

<i>First National Bank of Kansas City v. Danforth,</i>	
523 S.W.2d 808 (Mo. 1975)	44
<i>Flagg Brothers, Inc. v. Brooks,</i> 436 U.S. 149 (1978)	33, 34, 35, 36, 39
<i>Hatfield v. McCluney,</i> 893 S.W.2d 822 (Mo. banc 1995)	15, 28, 52
<i>Home Builders of Greater St. Louis v. State of Missouri,</i>	
75 S.W.3d 267 (Mo. banc 2002)	52
<i>In Re Estate of Forhan,</i> 149 S.W.3d 537 (Mo.App. S.D. 2004)	14
<i>J.C.W. ex rel. Webb v. Wyciskalla,</i> 275 S.W.3d 249 (Mo. banc 2009)	9
<i>Jamison v. State Division of Family Services,</i>	
218 S.W.3d 399 (Mo. banc 2007)	6, 43, 45
<i>Junkins v. Local Union No. 6313, Communication Workers of America,</i>	
263 S.W.2d 337 (Mo. 1954)	43
<i>Logan v. Zimmerman Brush Co.,</i> 455 U.S. 422 (1982)	33
<i>Lugar v. Edmondson Oil Co.,</i> 457 U.S. 922 (1982)	33, 34
<i>Magee v. Blue Ridge Professional Building Co.,</i>	
821 S.W.2d 839 (Mo. banc 1991)	28
<i>Memphis Light, Gas & Water Div. v. Craft,</i> 436 U.S. 1 (1978)	33
<i>Mennonite Board of Missions v. Adams,</i> 462 U.S. 791 (1983)	25, 33
<i>Miller v. Swearingen (In re Estate of Spray),</i>	
77 S.W.3d 25 (Mo.App. E.D. 2002)	15
<i>Minnesota Mutual Life Insurance Company v. Fuhrman,</i>	

521 S.W.2d 440 (Mo. banc 1975)	44
<i>Missouri Highway & Transportation Commission v. Myers,</i>	
785 S.W.2d 70 (Mo. banc 1990)	14
<i>Mullane v. Central Hanover Bank & Trust Co.,</i>	
339 U.S. 306 (1950)	25, 33, 34
<i>Ohio Casualty Insurance Company v. Hollowell (In Re Estate of Auguste),</i>	
94 Md.App. 444, 617 A.2d 1134 (1993)	39
<i>Roddy v. Hamilton County Nursing Home (In re Estate of Key),</i>	
No. 03A01-9810-CH-00319, 1999 WL 172675	
(Tenn. Ct. App., Mar. 24, 1999), 1999 Tenn. App. LEXIS 201	40
<i>Schroeder v. City of New York</i> , 371 U.S. 708 (1962)	33
<i>Shelley v. Kraemer</i> , 334 U.S. 1 (1948)	37
<i>Sniadach v. Family Finance Corp.</i> , 395 U.S. 337 (1969)	33, 34
<i>Society National Bank v. Johnson</i> , No. 72002, 1997 WL 781741	
(Ohio App. 8 Dist., Dec. 18, 1997), 1997 Ohio App. LEXIS 5682	40
<i>St. Louis Health Care Network v. State of Missouri,</i>	
968 S.W.2d 145 (Mo. banc 1998)	53
<i>State ex rel. BP Products North America, Inc. v. Ross,</i>	
163 S.W.3d 922 (Mo. banc 2005)	8, 11
<i>State ex rel. Bloomquist v. Schneider</i> , 244 S.W.3d 139 (Mo. banc 2008) . .	8, 10, 11
<i>State ex rel. Chassaing v. Mummert,</i>	

877 S.W.2d 573 (Mo. banc 1994)	7, 8, 10, 12
<i>State ex rel. Clem Trans., Inc. v. Gaertner</i> , 688 S.W.2d 367 (Mo. banc 1985) . . .	9
<i>State ex rel. Fisher v. McKenzie</i> , 754 S.W.2d 557 (Mo. banc 1988)	9
<i>State ex rel. Henley v. Bickel</i> , 285 S.W.3d 327 (Mo. banc 2009)	8, 10
<i>State ex rel. Nixon v. Peterson</i> , 253 S.W.3d 77 (Mo. banc 2008)	45
<i>State ex rel. Simmerock v. Brackmann</i> ,	
714 S.W.2d 938 (Mo.App. E.D. 1986)	7, 9, 11, 12
<i>Texaco, Inc. v. Short</i> , 454 U.S. 516 (1982)	25, 30, 21, 32, 33, 34, 36
<i>Thibodeau v. Wilkinson (In Re Estate of Wilkinson)</i> ,	
843 S.W.2d 377 (Mo.App. E.D. 1992)	14
<i>Trout v. State of Missouri</i> , 231 S.W.3d 140 (Mo. banc 2007)	52
<i>Tulsa Professional Collection Services, Inc. v. Pope</i> ,	
485 U.S. 478 (1988)	13, 14, 15, 16, 17, 18, 19, 22, 23
	24, 25, 26, 27, 28, 29, 30, 32, 33,
	34, 37, 38, 39, 40, 41, 42, 49, 50

CONSTITUTIONAL AUTHORITIES

Missouri Constitution, Article 1, Section 2	46, 55
Missouri Constitution, Article 1, Section 10	19, 42, 52
Missouri Constitution, Article III, Section 23	51, 53, 54, 56
Missouri Constitution, Article V, Section 14	9
Missouri Constitution, Article V, Section 17	9

Constitution of the United States,

Fourteenth Amendment 19, 23, 24, 35, 42, 46, 47, 55

STATUTES

Chapter 194, R.S.Mo. (2000) 54

Chapter 301, R.S.Mo. (2000) 54

Chapter 351, R.S.Mo. (2000) 54

Chapter 404, R.S.Mo. (2000) 54

Chapter 442, R.S.Mo. (2000) 54

Chapter 456, R.S.Mo. (2000) 54

Chapter 475, R.S.Mo. (2000) 54

Chapter 473, R.S.Mo. (2000) 54

Section 8.380.3, R.S.Mo. (2000) 53

Section 91.010, R.S.Mo. (2000) 54

Section 472.010, R.S.Mo. (2000) 45

Section 472.020, R.S.Mo. (2000) 9

Section 473.017, R.S.Mo. (2000) 47

Section 473.033, R.S.Mo. (2000) 46, 47, 48, 49, 51, 55

Section 473.034 (proposed, but not adopted) 18

Section 473.065, R.S.Mo. (2000) 47

Section 473.083, R.S.Mo. (2000) 45, 46, 47

Section 473.110, R.S.Mo. (2000) 48

Section 473.183, R.S.Mo. (2000)	48
Section 473.233, R.S.Mo. (2000)	48
Section 473.360, R.S.Mo. (1986)	25
Section 473.360, R.S.Mo. (2000)	12, 14, 23, 25, 28, 46, 47, 58, 50, 51, 55
Section 473.380, R.S.Mo. (2000)	48
Section 473.403, R.S.Mo. (2000)	48
Section 473.413, R.S.Mo. (2000)	48
Section 473.397, R.S.Mo. (2000)	49
Section 473.444, R.S.Mo. (2000)	6, 7, 12, 13, 14, 15, 16, 17, 19, 26, 37, 28, 29, 31, 32, 38, 42, 46, 47, 50, 51, 52, 55
Section 473.493, R.S.Mo. (2000)	49
Section 473.540, R.S.Mo. (2000)	49
Section 473.610, R.S.Mo. (2000)	51
Section 473.617, R.S.Mo. (2000)	49
Section 473.780, R.S.Mo. (2000)	49
Section 516.110, R.S.Mo. (2000)	31
Section 516.120, R.S.Mo. (2000)	31
House Bill 47, Law of Missouri, 1989	54
House Bill 145, Laws of Missouri, 1989	17, 50, 51, 52, 54
House Bill 211, Laws of Missouri, 1989	54

House Bill 249, Laws of Missouri, 1989	54
Senate Bill 40, Laws of Missouri, 1989	54
Senate Bill 340, Laws of Missouri, 1989	54

OTHER AUTHORITIES

Charles L. Black, Jr., Forward: “ <i>State Action</i> ,” <i>Equal Protection and California’s Proposition 14</i> , 81 Harv.L.Rev. 69 (1967)	21
Julie K. Brown, Note, <i>Less is More: Decluttering the State Action Doctrine</i> , 73 Mo.L.Rev. 561 (2008)	21
Kevin L. Cole, <i>Federal and State “State Action”</i> : <i>The Undercritical Embrace of a Hypercriticized Doctrine</i> , 24 Ga.L.Rev. 327 (1990)	21
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John Fee, <i>The Formal State Action Doctrine and Free Speech Analysis</i> , 83 N.C.L. Rev. 569 (2005)	21
Helen B. Jenkins, <i>Creditors’ Right to Actual Notice of Revocable Trust on Death of Settlor in the Aftermath of Pope: The Blessing of Change, The Sin of Avoidance, and The Forgiving Solution</i> , 19 Seton Hall Legis. J. 453 (1995)	18

Mark Reutlinger, *State Action, Due Process, and the New Nonclaim Statutes: Can No Notice Be Good Notice If Some Notice Is Not?*,
24 Real Prop. Prob. & Tr. J 433 (1990) 13, 17, 19, 21, 22, 23,
28, 29, 35, 36

Ronald D. Rotunda and John E. Nowak, *Treatise on Constitutional Law: Substance and Procedure*,
Volume 2, §16.5 (3d ed. 1999) 21

Lawrence H. Tribe, *American Constitutional Law*
§18-1 (2d ed. 1988) 21, 22, 47, 49

STATEMENT OF FACTS¹

In the autumn of 2006, James T. Panagos, LLC (“Panagos”) performed electrical contracting services and supplied electrical material for a home which decedent was building. **[Affidavit of James T. Panagos attached to Return as Exhibit A, ¶3 (a copy is attached hereto as Appendix pp. (“A”) 4-6].** Panagos furnished his invoice, dated October 26, 2006, in the amount of \$1,498.75, directly to decedent, in the week before decedent’s death. **[A-1, ¶5, A-3; Relator’s Appendix p. 9].** Decedent failed to pay Panagos. **[A-4, ¶6].** Relator never notified Panagos of the decedent’s death or of the opening of a probate estate. **[A-4-5, ¶¶’s 7 and 8].** Panagos filed its claim against the estate more than six months after the date of the first publication of notice of the decedent’s death and of the opening of the estate and more than one year after the death. **[Relator’s Appendix at pp. (“Relator’s A”), 9, 3, 16-17].** Relator objected to the claim as untimely. **[Relator’s A3].** After initially granting Relator’s motion to dismiss, Respondent reversed this ruling and reinstated the claim. **[Relator’s A9 and A1 and Respondent’s A-1 - A-3].**

¹Relator’s Statement of Facts, though accurate, is both incomplete and unnecessarily detailed. Accordingly, Respondent offers this summary of the relevant facts.

POINTS RELIED ON

Responding to Relator's Point I

I

THE COURT DID NOT ERR IN OVERRULING RELATOR'S MOTION TO DISMISS PANAGOS' CLAIM ON THE GROUND THAT IT WAS UNTIMELY FILED, BECAUSE THE STATUTES THAT SET DEADLINES FOR A CREDITOR TO FILE A CLAIM AGAINST A DECEDENT'S ESTATE ARE UNCONSTITUTIONAL, IN THAT:

- A. THE PROBATE NONCLAIM STATUTE AND STATUTE OF REPOSE VIOLATES THE FEDERAL AND STATE CONSTITUTIONAL GUARANTEES OF DUE PROCESS, BECAUSE THEY DO NOT REQUIRE ACTUAL NOTICE TO CREDITORS WHOSE IDENTITIES ARE KNOWN OR ARE REASONABLY ASCERTAINABLE;**
- B. THE PROBATE NONCLAIM STATUTE AND THE PROBATE STATUTE OF REPOSE, TOGETHER WITH THE PROBATE NOTICE STATUTE, VIOLATE THE FEDERAL AND STATE CONSTITUTIONAL GUARANTEES OF EQUAL PROTECTION UNDER**

**THE LAW, BECAUSE THEY REQUIRE THAT
ACTUAL NOTICE BE GIVEN TO HEIRS BUT NOT TO
KNOWN OR REASONABLY ASCERTAINABLE
CREDITORS; AND,**

**C. THE BILL BY WHICH THE ONE-YEAR PROBATE
STATUTE OF REPOSE WAS ENACTED LACKED A
CLEAR TITLE AS REQUIRED BY ARTICLE III,
SECTION 23 OF THE MISSOURI CONSTITUTION.**

Tulsa Professional Collection Services, Inc. v. Pope,

485 U.S. 478 (1988)

Texaco, Inc. v. Short, 454 U.S. 516 (1982)

Mennonite Board of Missions v. Adams, 462 U.S. 791 (1983)

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950)

Constitution of the United States, Fourteenth Amendment

Missouri Constitution, Article 1, Section 2

Missouri Constitution, Article 1, Section 10

Missouri Constitution, Article III, Section 23

Section 473.033, R.S.Mo. (2000)

Section 473.360, R.S.Mo. (1986)

Section 473.444, R.S.Mo. (2000)

Mark Reutlinger, *State Action, Due Process, and the New Nonclaim*

Statutes: Can No Notice Be Good Notice If Some Notice Is Not?,

24 Real Prop. Prob. & Tr. J 433 (1990)

ARGUMENT

Responding to Relator's Point I

I

THE COURT DID NOT ERR IN OVERRULING RELATOR'S MOTION TO DISMISS PANAGOS' CLAIM ON THE GROUND THAT IT WAS UNTIMELY FILED, BECAUSE THE STATUTES THAT SET DEADLINES FOR A CREDITOR TO FILE A CLAIM AGAINST A DECEDENT'S ESTATE ARE UNCONSTITUTIONAL, IN THAT:

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CLEAR TITLE AS REQUIRED BY ARTICLE III,
SECTION 23 OF THE MISSOURI CONSTITUTION.**

A. Standard of Review

The constitutionality of a statute is a question of law. *E.g., Jamison v. State Division of Family Services*, 218 S.W.3d 399, 404-05 (Mo. banc 2007). Though, as discussed below, there is no procedural or substantive basis to make the preliminary writ in prohibition permanent, this court’s review is *de novo*. *Id.* There is a presumption that a statute is constitutional. *Id.* Nevertheless, if it clearly contravenes a specific constitutional provision, it must be struck down. *Id.*

B. Standard For Issuance of Extraordinary Writs

1. Introduction

Relator argues that Panagos’ claim against her father’s probate estate is barred, because it was not filed within one year of her father’s death, as required by Section 473.444, R.S.Mo. (2000)[**Relator’s Brief, pp. 7-21; Respondent’s Appendix (“A”) p. 12**], She seeks to have the preliminary writ of prohibition made absolute,

preventing Respondent from considering Panagos' claim or, in the alternative, seeks a writ of mandamus requiring Respondent to dismiss the claim. [**Petition for Writ of Prohibition and/or For Writ of Mandamus, p. 1**].

Relator's analysis of the standard of review is flawed, not only because she overlooks the general principles which govern this court's exercise of its discretion in deciding whether to review trial court error by use of the extraordinary writs of prohibition and mandamus, but also, because she fails to point out the distinguishing features of the cases upon which she relies.

2. Writs of Discretion

This court has discretion in deciding whether to issue a writ of mandamus or a writ of prohibition, even if it finds grounds exist. *E.g., State ex rel. Chassaing v. Mummert*, 877 S.W.2d 573, 576 (Mo. banc 1994)(mandamus); *State ex rel. Simmerock v. Brackmann*, 714 S.W.2d 938, 939 (Mo.App. E.D. 1986) (prohibition).

3. The Nature of Mandamus

Because the question which Relator raises, whether Panagos' claim is untimely under Section 473.444 [A-12] regardless of actual notice to Panagos of decedent's death and of the opening of the estate, has not been previously decided by a Missouri court, mandamus does not lie. *Chassaing*, 887 S.W.2d at 576. Mandamus may not be used to adjudicate "a legal right, but only to compel performance of a right that already exists." *Id.*

4. The Function of Prohibition

Prohibition is not a substitute for an appeal. The “[i]nterlocutory review of trial court error by writ of prohibition . . . should only occur in extraordinary circumstances. If the error is one of law, and reviewable on appeal, a writ of prohibition is not appropriate.” *Id.*, 887 S.W.2d at 577 (citations omitted). Prohibition lies only to prevent the trial court from exceeding its jurisdiction, from abusing its discretion, or where the relator lacks “an adequate remedy by appeal.” *Id.*; *State ex rel. Henley v. Bickel*, 285 S.W.3d 327, 330 (Mo. banc 2009). This includes situations in which “there is an important question of law decided erroneously that would otherwise escape review by this Court, and the aggrieved party may suffer considerable hardship and expense as a consequence of the erroneous decision.” *Chassaing*, 887 S.W.2d at 577 (citations omitted).

Relator cites two cases in which a writ of prohibition was issued to prevent the trial of claims barred by a statute of limitations: *State ex rel. Bloomquist v. Schneider*, 244 S.W.3d 139, 141 (Mo. banc 2008); and, *State ex rel. BP Products North America, Inc. v. Ross*, 163 S.W.3d 922 (Mo. banc 2005). She also relies upon a case in which a writ of prohibition was employed to prevent the trial court from exceeding its jurisdiction by allowing a defendant to file a counterclaim after plaintiffs had filed a voluntary dismissal of their suit: *State ex rel. Fisher v. McKenzie*, 754 S.W.2d 557 (Mo. banc 1988). Finally, she cites a case in which a writ of prohibition was issued to prevent the continued prosecution of a cross-claim for contribution or indemnity where that claim had been extinguished when the personal injury plaintiff had fully released the relator:

Simmerock, 714 S.W.2d 938.

5. Respondent Has Not Exceeded His Jurisdiction or Abused His Discretion

Unlike the situation in *Fisher*, 754 S.W.2d at 558-62, Relator does not demonstrate that Respondent has exceeded his jurisdiction in any way. Sitting as the probate division of the circuit court, Respondent has subject matter and personal jurisdiction of the estate, the claim, and of the parties. Mo. Const. Art. V, Sections 14 and 17; Section 472.020, R.S.Mo. (2000). *See also J.C.W. ex rel. Webb v. Wyciskalla*, 275 S.W.3d 249, 251-54 (Mo. banc 2009)(discussing the meaning of jurisdiction). He would not exceed that jurisdiction by hearing and deciding the claim, even if, as Relator contends, it is time-barred. *Id. See, e.g., State ex rel. Clem Trans., Inc. v. Gaertner*, 688 S.W.2d 367 (Mo. banc 1985)(the trial court's erroneous ruling, based upon factual issues, that it has jurisdiction is simply an error reviewable on appeal and not grounds for use of the extraordinary writ of prohibition). Overruling Relator's motion to dismiss Panagos' claim was a decision of law, not one in which Respondent exercised any judicial discretion. Thus, there was no abuse of discretion.

6. Relator Has An Adequate Remedy By Appeal

So, this court should not make its preliminary writ in prohibition absolute unless Relator can demonstrate the only other basis for prohibition: that she lacks "an adequate remedy by appeal." *Chassaing*, 887 S.W.2d at 577. *See also Henley*, 285 S.W.3d at 333-35 (Fischer, J., dissenting)("There is nothing 'extraordinary' about a

trial judge overruling a motion to dismiss,” no reason to think that the continuation of the case in the trial court would have caused the parties or the state to waste more money and judicial resources than the writ proceedings have, and no reason to short-circuit the normal trial court and appellate processes. *Id.* at 335). She fails to explain how the continued defense in the probate division of this \$1,498.75 claim will cause her “considerable hardship and expense.” *Id.* Indeed, one has to wonder whether this claim could not have been prepared, tried, and appealed, not to mention paid, if necessary, with only slightly more, and perhaps even less, time, effort, expense, and use of scarce judicial resources than that entailed in Relator’s pursuit of extraordinary writs in the court of appeals and in this court.

In *Bloomquist*, 244 S.W.3d at 139, a physician facing a suit for medical malpractice obtained a writ of prohibition to prevent the continuation of what, by the very nature of such suits, most likely, would have been an expensive, time-consuming, and embarrassing litigation, on the grounds that the statute of limitations had run. Panagos’ small, garden-variety claim for payment for services rendered bears no resemblance to the suit which *Bloomquist* defended. Even additional discovery on the question of whether Panagos was a known or reasonably ascertainable creditor, as hinted at by Respondent’s December 21, 2009 order [**A-1 - A-3**], would add only a little factual complexity to and only slightly burden the preparation and trial of this very small claim.

In *BP Products*, this court issued a writ of prohibition to spare *BP* from a trial of claims of injurious falsehood, where those claims were barred by the statute of

limitations. *BP Products*, 163 S.W.3d at 923. Unlike Relator, who faces Panagos' modest and straight-forward claim for less than \$1,500.00, BP was confronted with the trial of a multi-party case involving thirteen claims. *Id.*, 163 S.W.3d at 925. Apparently, the trial would have included evidence of commercial dealings between *BP* and a service station operator, of the operator's right to possess a car wash machine, of the propriety of BP's reports to police concerning the claimed theft of the machine, of searches of the operator's warehouse, of criminal prosecutions of the operator, and of a myriad of other details. *Id.* at 923-28.

In *Simmerock*, 714 S.W.2d at 939, a defendant, who settled a personal injury claim by paying \$45,000.00 and obtaining a release, was forced to defend against a non-settling defendant's cross-claim for contribution and indemnity. Relator's defense of Panagos' small claim does not involve such multi-party claims and has little of the factual or legal complexity that likely beset the *Simmerock* relator.

Relator does not show how the issue she puts before this court, whether Section 473.444 [A-12] bars a claim regardless of notice, would "escape review by this Court" on a direct appeal after the trial of this claim. *Chassaing*, 887 S.W.2d at 577.

This court ought to exercise its discretion to dissolve its preliminary writ in prohibition. Even should this court determine that Respondent has decided incorrectly a question of law, Relator would suffer little hardship and expense in defending the claim to conclusion in the trial court. She has an adequate remedy by appeal.

C. The Nonclaim Statute Is Unconstitutional,

**As Applied To Known Creditors and To
Those Whose Identity Can Be Ascertained
With Reasonable Diligence, Because It
Denies Such Creditors Due Process By Not
Requiring That They Receive Actual Notice**

Relator objected to Panagos' claim, arguing that it was time-barred under the nonclaim statute,² Section 473.360, R.S.Mo. (2000) [A-11], as well as under the probate statute of repose,³ Section 473.444. [A-12; Docket entries of 5-20-09 and 5-22-09 attached to Relator's Brief at A6]. After first dismissing Panagos' claim [Docket

²Courts and commentators have used a variety of names to describe statutes of this type: nonclaim statutes, probate statutes of limitations, statutes of repose, short-term probate statutes of limitations, long-term probate statutes of limitation, short-term nonclaim statutes, and long-term nonclaim statutes. Professor Reutlinger's suggested terminology to describe a statute that is triggered by notice of the commencement of probate is "nonclaim statute." He uses the term "probate statute of repose" to describe a statute which cuts off all claims within a certain period after the decedent's death. Mark Reutlinger, *State Action, Due Process, and the New Nonclaim Statutes: Can No Notice Be Good Notice If Some Notice Is Not?*, 24 Real Prop. Prob. & Tr. J. 433, 435, fn. 6 (1990). Even though both kinds of statutes might be described both as nonclaim statutes as well as statutes of repose, Professor Reutlinger's terminology is a useful shorthand way of distinguishing these statutes. Accordingly, Respondent adopts it herein.

³Ibid.

entry of 5/22/09 at A6 of Relator’s Brief], Respondent set the dismissal aside and reinstated the claim to allow the parties to develop and present evidence as to whether Panagos was a known or reasonably ascertainable creditor and, so, should have been given actual notice of the opening of the estate, *citing Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478 (1988). **[Relator’s A1-A2]**.

Relator apparently concedes the correctness of Respondent’s conclusion, which impliedly held that the nonclaim statute, Section 473.360 **[A-11]**, violates the due process rights of a known or reasonably ascertainable creditor to notice and an opportunity to be heard. She writes that “Panagos (sic) assertion [that it is a known or reasonably ascertainable creditor], if factually sound, might carry the day under R.S.Mo. §473.360. . . .” **[Relator’s Brief, p. 9 (footnote omitted)]**. And, she acknowledges that *Thibodeau v. Wilkinson (In Re Estate of Wilkinson)*, 843 S.W.2d 377 (Mo.App. E.D. 1992), held that “the actual notice requirements announced in *Pope* are applicable to R.S.Mo. §473.360.” **[Relator’s Brief, pp. 11-12]**. *Accord In Re Estate of Forhan*, 149 S.W.3d 537, 542 fn. 7 (Mo.App. S.D. 2004)(*dictum*)(a known or reasonably ascertainable creditor must be given actual notice of the opening of the estate). *But, cf., Missouri Highway & Transportation Commission v. Myers*, 785 S.W.2d 70, 74 (Mo. banc 1990)(*Pope* does not invalidate the nonclaim statute as applied to a claimant who knows of the decedent’s death). So, she confines her argument to considering whether the probate statute of repose, Section 473.444 **[A-12]**, requires any notice at all in order to pass constitutional muster. **[Relator’s Brief, pp. 7-21]**.

**D. The Probate Statute of Repose, Which Requires
No Notice to Creditors, Is Unconstitutional,
Because It Denies Creditors Due Process**

1. Missouri Cases Decided Since Pope

In addition to *Thibodeau*, 843 S.W.2d at 381 (which declined to apply Section 473.444 retroactively), Relator cites two Missouri cases dealing with the probate statute of repose decided since *Pope*: *Miller v. Swearingen (In re Estate of Spray)*, 77 S.W.3d 25 (Mo.App. E.D. 2002); *Hatfield v. McCluney*, 893 S.W.2d 822 (Mo. banc 1995). Neither case is helpful in the analysis of whether the probate statute of repose violates the due process guarantees of the federal and state constitutions.

In *Miller*, the claimant learned of the decedent's death about five months before the one-year deadline, set by Section 473.444 [A-12], for filing his claim. *Miller*, 77 S.W.3d at 25. Accordingly, the court never reached the question of whether due process required any notice. *Id.*

Likewise, in *Hatfield*, the claimant "was apparently aware of the death of Ms. McCluney as well as the fact that she owned certain assets which were subject to probate." *Hatfield*, 893 S.W.2d at 824. So, the court did not consider whether due process required the personal representative to give notice to the creditor in order to invoke the bar of the probate statute of repose. *Id.*, 893 S.W.2d 825-29.

**2. How Can Due Process Require Notice to
Creditors Under The Nonclaim Statute**

But Not Under the Probate Statute of Repose?

Relator argues that, despite the ruling in *Pope*, “Section 473.444.1 **absolutely bars** Panagos’ claim, regardless of whether Panagos received actual or constructive notice of the decedent’s death, or [of] the opening of the estate by the personal representative.” [Relator’s Brief, p. 9]. Though she concentrates her discussion on an analysis of *Pope*’s *dicta*, she never steps back to address or explain away the apparent absurdity of her argument: that due process requires actual notice under the nonclaim statute but no notice whatsoever under the probate statute of repose. [Relator’s Brief, pp. 8-16]. The incongruity of such a result has not escaped scholarly notice:

If the late Gracie Allen had been a law student, perhaps she would have understood: The Supreme Court has declared unconstitutional the common practice of cutting off the claims of a decedent’s creditors following publication notice of the decedent’s death, holding that publication notice does not satisfy the requirements of due process. The solution? Because it was the notice that was faulty, simply give those creditors *no notice* of the decedent’s death, and thus eliminate any constitutional barrier to the cutoff of their claims. Unfortunately, this impeccable logic is not an excerpt from a Burns and Allen script; it is the practical effect of the responses of the drafters of the Uniform Probate Code and

many state legislatures to the Supreme Court's 1988 constitutional nullification of traditional nonclaim statutes in *Tulsa Professional Collection Services v. Pope*.

Reutlinger, *supra*, at 433. Professor Reutlinger is not alone in concluding that this situation is puzzlingly inconsistent:

[T]here is some question whether this section [473.444] also violates due process by barring a creditors's (sic) claim without notice. Instinctively, it seems illogical that a statute which provides for less notice than the one the *Pope* Court found to be violative of due process would not suffer from the same constitutional infirmity.

Brian J. Doherty, Comment, *Notice and the Missouri Probate Nonclaim Statutes: The Lingering Effects of Pope*, 59 Mo.L.Rev. 187, 203 (1994) (footnotes omitted).

As Relator explains, the Missouri legislature enacted the probate statute of repose in response to the decision in *Pope*.^{4,5} **[Relator's Brief, p. 12]**. Implicit in Relator's

⁴The legislature's response to *Pope* was minimal. It "failed to enact proposed Section 473.034, which would have required the personal representative to give actual notice to known or ascertainable creditors, . . . [it slightly changed] the form of the notice to be published, . . . [and] the long-term nonclaim statute, which barred all claims after three years from the decedent's death, was reduced to one year." Doherty, *supra*, at 193 (footnotes omitted). This is despite the emergency clause contained within S.S.H.C.S.H.B. 145 (House Bill 145), by which

argument is the contention that, in doing so, the legislature crafted a statute that completely escapes any due process scrutiny. Implicit in Relator’s argument is the contention that there is no state action⁶ and, so, the protections afforded by the Due Process Clause of the Fourteenth Amendment [A-7] to the Constitution of the United States and Article 1, Section 10 of the Missouri Constitution [A-7] do not arise.

3. Three Questions:

a. Is Section 473.444 a statute of

these changes were made, which provided that it would take effect immediately upon passage and approval “[i]n order to bring Missouri’s probate law into conformity with due process requirements recently articulated by the Supreme Court. . . .” Laws of Missouri 1989 at 991, 942-91.

⁵Many other states responded to *Pope* in various ways. Unlike Missouri, a majority require that creditors be given “actual notification of the death of a debtor.” Helen B. Jenkins, *Creditors’ Right to Actual Notice of Revocable Trust on Death of Settlor in the Aftermath of Pope: The Blessing of Change, The Sin of Avoidance, and The Forgiving Solution*, 19 Seton Hall Legis. J. 453, 467 (1995).

⁶“State action” is the term used by the United States Supreme Court to describe a certain minimum level of governmental involvement in the activities of private persons sufficient to implicate the government in certain conduct that violates the rights protected by the Fourteenth Amendment [A-7]. See, e.g., *Pope*, 485 U.S. at 485; Reutlinger, *supra*, at 440-52; Doherty, *supra*, at 204.

limitations?; and, if so,

b. Is it “self-executing”?, and, if so,

c. Is it beyond due process scrutiny?

Instead of a rigorous analysis of the two principal issues, state action and what process is due, Relator focuses her argument on one phrase from *Pope*: “a self-executing statute of limitations.” [Relator’s Brief, pp. 13-14]. *Pope* used the phrase in its state action analysis to describe a type of statute that might involve the government too little to implicate the Due Process Clause. *Pope*, 485 U.S. at 485-88 (*dictum*). Relator contends that Section 473.444 [A-12] is such “a self-executing statute of limitations. . . .” [Relator’s Brief, p. 12 (footnote omitted)].

But, Relator fails to carefully examine the two aspects of this premise. Is this a statute of limitations? If so, is it self-executing. And, she fails to examine her underlying assumption. Even if it is a self-executing statute of limitation, is there sufficient state action to implicate the constitutional guarantees of due process?

A methodical analysis must begin with a more general consideration of the concept of state action.

4. State Action

The state action doctrine has never been clearly defined and has spawned much confusion:

The distinction between public and private actors, and the resulting effects on Constitutional claims, is commonly

known as the “state action doctrine.” This doctrine is often seen as a threshold test, ensuring that a governmental wrongdoing is the basis for a Constitutional claim, even before the merits of a claim are considered. In use since 1875, the application of the state action doctrine has been inconsistent and choppy at best, with the Supreme Court handing down a variety of state action determinative “tests.” This situation has prompted commentators to call this doctrine, among other things, “dysfunctional” and “a conceptual disaster area,” with Justice (sic) Black referring to the United States Supreme Court’s jurisprudence on the issue as “a torchless search for a way out of a damp echoing cave.”

....

... The state action doctrine is slowly descending into utter confusion

Julie K. Brown, Note, *Less is More: Decluttering the State Action Doctrine*, 73 Mo.L.Rev. 561, 562, 581 (2008)(footnotes omitted)(quoting, John Fee, *The Formal State Action Doctrine and Free Speech Analysis*, 83 N.C.L. Rev. 569, 575 (2005), Kevin L. Cole, *Federal and State “State Action”*: *The Undercritical Embrace of a Hypercriticized Doctrine*, 24 Ga.L.Rev. 327, 343 (1990), and Charles L. Black, Jr., Forward: “*State Action*,” *Equal Protection and California’s Proposition 14*, 81 Harv.L.Rev. 69, 95

(1967)). *See also, e.g.*, Lawrence H. Tribe, *American Constitutional Law* §18-1 at 1690 (2d ed. 1988) (“[D]espite the precedents, and despite the vocabulary, the Supreme Court has not succeeded in developing a body of state action ‘doctrine,’ a set of rules for determining whether governmental or private actors are to be deemed responsible for an asserted constitutional violation”); *Reutlinger, supra*, at 442-56 (“The Supreme Court itself has despaired of ever reaching a coherent and consistent definition of state action and it appears to proceed historically on a case-by-case basis, following only vaguely those rare patterns and precedents that emerge from time to time.” *Id.* at 443 (footnotes omitted)).

Rejecting the notion that the state action cases reveal any general rule, Professor Tribe calls state action an “anti-doctrine.” Tribe, *supra*, §18-1 at 1691. He explains that the best way to understand it is simply as a way of expressing the boundary of the activities to which the Court believes the Constitution ought to apply. Tribe, *supra*, §18-7, at 1720. Similarly, some commentators have suggested that, “under the guise of a formulistic search for an undefined minimum amount of state acts” what the Supreme Court has really done employ a balancing test: “[w]hen the harm to protected rights outweighed the value of the challenged practice, the Court has found sufficient state action, which made easy a final ruling of unconstitutionality.” Ronald D. Rotunda and John E. Nowak, *Treatise on Constitutional Law: Substance and Procedure*, Volume 2, §16.5 at 196-97 (3d ed. 1999). *Cf.* *Reutlinger, supra* at 448 (“[S]tate action may be found if the court or its dissenters wish to reach the merits of the underlying constitutional issue,

and may be missing if they do not.” *Id.* (footnotes omitted)).

Without referring to any particular test or rule, *Pope* confronted the question of whether there was state action in the enactment and application of a probate nonclaim statute. *Pope*, 485 U.S. at 479-94.

5. *Tulsa Professional Collections Services, Inc. v. Pope*

a. *Pope’s Facts*

In *Pope*, 485 U.S. at 479-94, the Court considered whether an Oklahoma nonclaim statute’s notice provisions violated the rights of a decedent’s creditor to due process, as guaranteed by the Fourteenth Amendment [A-7] to the Constitution of the United States. *Id.*, 485 U.S. at 482-83. The Court noted that most states had two nonclaim statutes, one that provided a short period for filing a claim after the commencement of probate proceedings and another that allowed a longer period that ran from the date of the decedent’s death. *Pope*, 485 U.S. at 480.^{7, 8} But, Oklahoma had only the first type.⁹ *Id.* at 481. It required only notice by publication and provided that

⁷It observed that, at that time, Missouri had such a dual approach, *citing* “Mo.Rev.Stat. §§ 473.360(1), (3), (six months; three years).” *Id.*

⁸See note 2 above. To avoid confusion, Professor Reutlinger suggests that such statutes be called a “nonclaim statute,” and “a probate statute of repose,” respectively. Reutlinger, *supra*, at 435, fn. 6.

⁹For this reason, *Pope’s* discussion of the type of statutes that run from the date of death, probate statutes of repose, is *dictum*. It is principally upon this *dictum* that Relator bases her

creditors must present their claims within two months of the date of first publication of that notice. *Id.*

The decedent's wife initiated probate proceedings in an Oklahoma court, was appointed by that court as the executrix of the estate, and published a notice in a legal newspaper that any creditor must file any claim within two months of the date on which the notice was first published. *Id.*, 485 U.S. at 482. After the two-month nonclaim period had passed, a creditor sought payment from the estate. *Id.*, 485 U.S. at 482-83. The trial court ruled that the creditor's claim was untimely. *Id.*

b. State Action

The Court began its analysis by observing that the creditor's claim against the estate was a type of property, an intangible interest, that is protected by the Fourteenth Amendment [A-7]. *Id.*, 485 U.S. at 485. It explained that "[t]he Fourteenth Amendment protects this interest, however, only from a deprivation by state action." *Id.* It observed that the enactment of a statute of limitations "obviously is state action." *Pope*, 485 U.S. at 486-87. But, in *dictum*, the Court said that the mere enactment of a statute of limitations "falls short of constituting the type of state action required to implicate the protections of the Due Process Clause." *Id.* It elaborated:

[w]hen private parties make use of state procedures with the
overt, significant assistance by state officials, state action may

entire argument.

be found. The question here is whether the State's involvement with the nonclaim statute is substantial enough to implicate the Due Process Clause.

Id., 485 U.S. at 486 (citations omitted).

Reviewing the procedural history of the case, the Court recounted that the Supreme Court of Oklahoma had rejected the creditor's contention that *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), and *Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1983) rendered the Oklahoma statute's notice provision, which required notice by publication only, a violation of due process. *Pope*, 485 U.S. at 483. The Supreme Court of Oklahoma had relied on the decision of this court in *Estate of Busch v. Ferrell-Duncan Clinic, Inc.*, 700 S.W.2d 86, 88-89 (Mo. banc 1985), finding persuasive the *Busch's* conclusion that nonclaim statutes do not require actual notice, because they merely act to extinguish claims by the passage of time, and, so, are "self-executing statutes of limitation." *Pope*, 485 U.S. at 483. *Pope's* executrix argued that Oklahoma Supreme Court's rationale was correct and cited *Texaco, Inc. v. Short*, 454 U.S. 516 (1982).

Though the Court conceded that nonclaim statutes "possess some attributes of statutes of limitations," and, in *dictum*, it said that it is the "'self-executing feature' of a statute of limitations that makes *Mullane* and *Mennonite* inapposite," it concluded that the

Oklahoma statute¹⁰ was “not a self-executing statute of limitations. . . .” *Id.*, 485 U.S. at 486-88.

While it did not fully explain what was needed in order to fairly describe a statute of limitations as “self-executing,” in evaluating the nonclaim statute, it focused on what it described as the “substantial involvement of the probate court” in the claims process, including the triggering of the time limit for the filing of claims, the publication of notice, and the filing of the notice and affidavit of notice. *Id.*, 485 U.S. at 486-88. It concluded that “the running of Oklahoma’s nonclaim statute is accompanied by sufficient government action to implicate the Due Process Clause.” *Id.*, 485 U.S. at 488. In his dissent¹¹ in *Pope*, Chief Justice Rehnquist contended that it was “out of context and

¹⁰ The court compared the Oklahoma nonclaim statute to Section 473.360, R.S.Mo. (1986), *amended by* Section 473.360 R.S.Mo. (2000) [A-11]. *Id.*, 485 U.S. at 480.

¹¹ Justice Rehnquist’s wrote that the determination of whether notice is required turns not upon whether the statute can be described as “self-executing,” but, rather, upon the level of court involvement. He argued that the Oklahoma court’s involvement in the probate process, triggering the start of the non-claim statute, was too perfunctory to rise to the level of state action, and, so, to give rise to the notice requirements of the Due Process Clause. *Id.*, 485 U.S. at 494. Even so, his use of the term “self-executing” is persuasive. The Missouri probate statute of repose, Section 473.444 [A-12] cannot be described as “self-executing” in the sense understood by Justice Rehnquist, because a claim is not extinguished unless and until a court rules that it is filed too late.

contrary to common sense” to describe a statute as “self-executing,” unless there is no “judicial or other determination that itself extinguishes the claimant’s rights.” *Pope*, 485 U.S. at 494.

c. What Process is Due?

Once it determined that there was state action, the Court considered whether the Due Process Clause required any notice to creditors before the nonclaim statute’s bar could take effect. *Pope* held that termination of a known or reasonably ascertainable creditor’s claim without actual notice violates due process. *Id.*, 485 U.S. at 491. Implicit in its holding is that it employed a balancing test in reaching this conclusion: “a requirement of actual notice to known or reasonably ascertainable creditors is not so cumbersome as to unduly hinder the dispatch with which probate proceedings are conducted. *Id.*, 485 U.S. at 490.

6. *Pope* and Nonclaim Statutes

That Run From Date of Death

Relator argues that “*Pope* has no application to R.S.Mo. §473.444,” because, she contends, it is a “self-executing statute of limitations.” [**Relator’s Brief, p. 12**]. This is both a misleading description of the statute and a misreading of *Pope*.

Relator’s entire argument is infected by her erroneous and misleading characterization of Section 473.444 [**A-12**] as a “statute of limitations.” [**Relator’s Brief, pp. 10-12, 14, 16-19**]. It is not a “statute of limitations” as that phrase is ordinarily used and understood:

A statute of limitation precludes suit after the passage of a legislatively imposed number of years following the accrual of a cause of action, while a statute of repose bars suit for a specified number of years after the occurrence of a particular event without regard to the date of the accrual of a cause of action.

Magee v. Blue Ridge Professional Building Co., 821 S.W.2d 839, 845 fn. 3 (Mo. banc 1991)(citations omitted). *Accord Blaske v. Smith & Entzeroth, Inc.*, 821 S.W.2d 822, 834 (Mo. banc 1992). Because Section 473.444 [A-12] cuts off a claim if it is not filed within one year of the decedent's death, regardless of when it accrued, it is better described as a statute of repose. *Id. Cf. Reutlinger, supra* at 435, fn. 6 (“it is more in the nature of a repose statute.”)(citations omitted). *But see, e.g., Hatfield v. McCluney*, 893 S.W.2d 822, 825-26 (Mo. banc 1995)(“§§ 473.360 and 473.444 are separate statutes of limitations.” *Id.* at 826).

Pope never characterized nonclaim statutes that are triggered by a decedent's death, rather than by the publication of notice of the commencement of probate proceedings, as self-executing. *Pope*, 485 U.S. at 488. It also never said that its analysis might not also apply to such statutes:

The Court did not consider whether the operation of a probate statute of repose [such as §473.444] is the mere running of a statute of limitations or whether it sometimes might be

sufficient to implicate due process. The Court simply had ‘no occasion to consider the proper characterization of nonclaim statutes that run from the date of death. . . .’

....

It is clear that the majority did not hold that all self-executing statutes of limitation are free of due process implications or that probate statutes of repose necessarily are such statutes.

Reutlinger, *supra*, at 441-42 (*quoting Pope*, 485 U.S. at 488). So, *Pope*’s remark that “the State’s involvement in the mere running of a general statute of limitations [is not] generally sufficient to implicate due process” is *dictum*. *Pope*, 485 U.S. at 485-86. It is *dictum*, because the Court never said that the Oklahoma nonclaim statute at issue in *Pope* was a “general statute of limitations.” *Pope*, 485 U.S. at 486. It said only “that nonclaim statutes generally possess some attributes of statutes of limitations.” *Id.*, 485 U.S. at 486.

7. *Texaco, Inc. v. Short*

While *Pope* did not define the term “self-executing,” it referred to *Short*, 454 U.S. at 516, as an example of a statute that could be so described. *Pope*, 485 U.S. at 485-88. Relator, too, cites and quotes *Short*. [**Relator’s Brief, pp. 13-14**].

Short considered an Indiana statute which provides “that a mineral interest that is not used for a period of twenty years automatically lapses and reverts to the current surface owner of the property, unless the mineral owner files a statement of claim in the local county recorder’s office.” *Id.* at 518 (footnote omitted). The Court observed that the owner of a mineral interest is presumed to know this law. *Id.* at 533. It analogized this Mineral Lapse Act with a “self-executing statute of limitations” in holding that the Due Process Clause did not require the surface owner to give notice to the mineral owner that mineral owner’s interest was soon to lapse. *Id.* at 536 and 531-40. It elaborated: “The Due Process Clause does not require a defendant to notify a potential plaintiff that a statute of limitations is about to run. . . .” *Short*, 454 U.S. at 536 (*dictum*).

Short never discussed the threshold issue of state action. *Id.*, 454 U.S. at 531-38. Instead, the Court simply decided, that, under the circumstances presented, the Due Process Clause did not require any notice. *Id.* *Short* can best be understood this way. Where all affected parties know or should know the facts which trigger the deadline, due process does not require one party to send the other a reminder that its rights will soon terminate. This is not the result of state action analysis, but rather it is simply a balancing of interests in determining what process is due.

The situation in *Short* bears no resemblance to that of the case at bar. Relator seeks to defeat Panagos' claim based on the expiration of a deadline triggered by an event, the death of her father, known, perhaps,¹² only to her. This is the event that, one must infer, Relator insists transformed the legal relationship between debtor and creditor, shortening the general statute of limitations that otherwise would have governed Panagos' claim. Section 516.120, R.S.Mo. (2000)(five years for actions on contracts, express or implied) [A-13]; Section 516.110, R.S.Mo. (2000)(ten years on written contract for the payment of money) [A-12].

This difference between a statute of limitation and probate statute of repose, such as Section 473.444 [A-12], was noted in *Doherty*, 59 Mo.L.Rev. at 207:

in the situation of typical statutes of limitation, the event that triggers the running (commencement) of the statute is or should be known to the person affected, the potential plaintiff or claimant. For example, a party to a contract that has been breached is generally aware of the breach that causes the statute of limitations to start running. Therefore, no notice is required for typical statutes.

¹²The record before this court does not clearly establish when Panagos learned of the decedent's death; rather, it establishes only that he received no notice of the death and of the institution of probate proceedings. [Affidavit of James T. Panagos, ¶¶'s 7 and 8 [A-4 - A-5].

On the other hand, the situation is different for a probate claim. In that case, the creditor is not usually aware of the decedent's death, but the decedent's death is what causes the running of the statute [such as Section 473.444]. Because the running of the statute is triggered by an event a creditor will not likely be aware of, notice to the creditor of the decedent's death should be required to satisfy due process.

(citations and internal quotation marks omitted). For this reason, both *Short* and the *Pope dicta* about “self-executing statutes of limitations” are inapposite.

8. Pope's Antecedents

a. The Foundation of *Pope's* Due

Process Notice and Hearing Analysis

A full understanding of *Pope* and a fair assessment of how it applies to the Missouri probate statute of repose, Section 473.444 [A-12], requires the examination of the due process cases upon which it was based. In addition to *Short*, *Pope* relied on *Mullane*, 339 U.S. at 314, *Mennonite*, 462 U.S. at 791, *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149 (1978), *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982), *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969), *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982), *City of New York v. New York, N.H. & M.R. Co.*, 344 U.S. 293 (1953), *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1 (1978), and *Schroeder v. City of New York*, 371 U.S. 708 (1962).

b. Government Actors

In those cases where the challenged action was that of some unit of government, *Mennonite*, 462 U.S. at 792-95 (county), *Logan*, 455 U.S. at 424-44 (state commission), *New York, N.H. & M. R. Co.*, 344 U.S. at 294-97 (city), *Craft*, 436 U.S. at 3-21 (municipal utility), and *Schroeder*, 371 U.S. at 208-14 (city), the Court did not address the requirement of state action. Instead, it simply considered what kind of notice was constitutionally required. *Id.*

c. Private Actors

In *Pope* and the other cases in which the challenged conduct was initiated by a private actor, *Pope*, 485 U.S. at 479-91 (executrix of estate), *Mullane*, 339 U.S. at 313-20 (trust company), *Short*, 454 U.S. at 518-540 (landowner), *Flagg Brothers*, 436 U.S. at 151-66 (warehouseman), *Lugar*, 457 U.S. at 923-944 (creditor), and *Sniadach*, 395 U.S. at 337-42 (creditor), the Court only touched on state action in three cases.

In *Mullane*, *Short*, and *Sniadach*, it simply addressed the question of what kind of notice was constitutionally required. In each of these cases, private persons sought to employ court procedures to determine the property rights of others. In *Mullane*, 339 U.S. at 307-320, the trustee sought court approval of its accounting, so that the trust beneficiaries would be bound. In *Short*, 454 U.S. at 518-40, a landowner sought a declaratory judgment that the rights of mineral interest owners had lapsed. In *Sniadach*, 395 U.S. at 337-42, a creditor employed court procedures to garnish a debtor's wages

prior to judgment.

In the remaining cases, the Court confronted the state action requirement head on, finding sufficient governmental involvement to require due process in two of the three cases: *Pope*, 485 U.S. at 479-91, and *Lugar*, 457 U.S. at 923-43, and failing to find state action in only one, *Flagg Brothers*, 436 U.S. at 151-66.

Pope found state action in the involvement of the probate court in, among other things, appointing the executrix and in directing her to publish notice of the opening of the estate. *Pope*, 485 U.S. at 487-88.

Lugar held that the sheriff's pre-judgment attachment of a debtor's property at the request of the creditor, employing state-created procedures, was state action. *Lugar*, 457 U.S. at 941-42.

Only in *Flagg Brothers* did the Court not find state action. The Court held that a warehouseman's threatened private sale of bailed goods to satisfy unpaid storage charges, as permitted but not required by statute, was not the action of the state; accordingly, it was not subject to the constitutional protection of due process. *Id.*, 436 U.S. at 156-66. It noted that there was a "total absence of overt official involvement" in the warehouseman's sale. *Flagg Brothers*, 436 U.S. at 157, and 151-66.

The rule that the holdings in these cases suggests is that where the machinery of government is employed by a private party to determine the property rights of another party, there is state action and the protections guaranteed by the Due Process Clause of the Fourteenth Amendment [A-7] must be afforded. It is just such machinery of

government that Relator seeks to employ in obtaining a judicial determination that Panagos' claim is time-barred and that she and her brother are entitled to distribution of the estate's assets free from all claims. [Relator's A6 (Docket entries of 5/20/2009 and 5/22/2009), A13 - A15].

9. The "Self-Executing" Fallacy

Relator uses her characterization of the probate statute of repose as "self-executing" to suggest that somehow this makes it "impervious to due process analysis." Reutlinger, *supra*, at 452. [Relator's Brief, pp. 12-14]. As Professor Reutlinger explains in his exhaustive and persuasive analysis, this conclusion:

is wrong on two counts. It is wrong because such a statute is not self-executing in the sense that the statute in *Flagg Brothers* might have been. And it is wrong because self-executing in the sense later used in *Texaco [, Inc. v. Short]* goes to the question whether due process has been violated, not to any issue of state action. Thus, an analysis is required of the merits of the issue: does elimination of notice for a probate statute of repose violate due process?

Id.

Professor Reutlinger explains that in a probate statute of repose, the state is far more deeply implicated in the deprivation of property than it was in simply permitting, but not compelling, the warehouseman in *Flagg Brothers* to conduct a private sale of

bailed goods. *Id.* at 448. Unlike the situation in *Flagg Brothers*, the state statute has not simply offered the parties the right to make a choice as to how they might wish to resolve any breach of contract. Instead, “it has mandated that *all* claims be cut off, regardless of any action or inaction by any private party.” *Id.* The state is not a passive party, merely allowing the parties to enforce some private agreement. It is actively engaged in setting the time limit for the presentation of claims and in “enforc[ing that time limit] by denying a remedy that, but for the statute, the parties would have [had].” *Id.* at 449.

Not only is the state much involved in this deprivation of property, contrary to Relator’s argument, Professor Reutlinger contends that there is even more state action in this case than there was in *Pope*:

Once it is conceded that there is a deprivation of property cutting off a creditor’s claim, which *Pope* makes clear, it seems logical to assume that someone is responsible for that deprivation. If the state did not, by direct action, cut off the creditor’s claim before it otherwise was due to end, then who did? The state is more involved here than in the case of a typical short-term nonclaim statute, which *Pope* held to be state action. Although the probate court is involved in the opening of probate or the issuance of an order to publish, it is really the action of the personal representative that triggers the running of the short-term statute and, if interested

individuals decided not to probate the will or otherwise open administration proceedings, the nonclaim period does not commence to run. Yet in the case of a probate statute of repose, no such “private” action is required to execute the state’s mandated cutoff of the creditor’s claim.

Id. (footnotes omitted). And, there is far more governmental involvement than the conduct which the Court, in *Shelley v. Kraemer*, 334 U.S. 1 (1948), held was state action: court enforcement of a private agreement, a racially-restrictive real estate covenant.

So, taken together, the state’s enactment of the probate statute of repose and its enforcement of the statute by denying a late-filed claim is state action. *Id.* at 451-52, 443-52.

10. Decisions of Other States

Relator asserts that its analysis that Section 473.444 [A-12] is “self-executing” is supported by all other states which have considered this question.

[Relator’s Suggestions, pp. 9-10]. While, apparently, this is true, the opinions which Relator cites are marred by their uncritical application of *Pope dicta* to their analyses and, in some instances, by a complete lack of analysis.

Relator cites *Denver Water Department Credit Union v. The Estate of Ongaro*, 998 P.2d 1097, 1105 (Colo. banc 2000), a case that characterized the Colorado statute that cuts off all claims, without notice, one year after death as “self-executing.” It insisted that the statute is “a nonclaim statute, not a statute of limitations.” *Ongaro*, 998 P.2d at 1102.

But, it failed to acknowledge the key difference between such statutes: the claimant's awareness of the event that starts the clock. *Ongaro*, 998 P.2d at 1105-06. It never mentioned the requirement of state action. *Id.* Instead, it paraphrased and confused *Pope's dictum* about the state's involvement in the running of a statute of limitation being insufficient state action to implicate the constitutional right to due process. *Id.* It relied on this *dictum* and, also, without any analysis, on *Flagg Brothers*, 436 U.S. at 149, to uphold its statute from constitutional attack. *Id.* *Ongaro*, 998 P.2d at 1105-06. For all these reasons, it is unpersuasive.

In *Estate of Decker v. Farm Credit Services*, 684 N.E.2d 1137 (In. 1997), without any analysis of state action or explanation of its reasoning, the court held that the Indiana one-year-from-the-date-of-death nonclaim statute¹³ was “self-executing,” and, so, unaffected by *Pope*. *Decker*, 684 N.E.2d at 1139. This superficial consideration ought to be given little weight.

Relator also cites *Ohio Casualty Insurance Company v. Hollowell (In Re Estate of Auguste)*, 94 Md.App. 444, 617 A.2d 1134 (1993). Unlike *Ongaro* and *Decker*, *Hollowell* included a somewhat detailed analysis of *Pope*; and, it offered some explanation for its conclusion that *Pope* does not invalidate a nine-months-from-death statute of repose which requires no notice to creditors. Even so, *Hollowell* is

¹³It held that this provision was not a statute of limitations. *Decker*, 684 N.E.2d at 1137-39.

unconvincing for many of the same reasons as *Ongaro* and *Decker*. It failed to look at the “self-executing” label in the wider context of both state action and due process.

Hollowell, 617 A.2d at 1136-38. It never attempted to explain how this statute of repose, triggered by an event about which a creditor might be ignorant, could be equated with a “self-executing statute of limitations” is triggered by events of which the plaintiff is or should be aware. *Id.*

The court in *Burnett v. Vallaneuve*, 685 N.E.2d 1103, 1111, fn. 9 (Ind.App. 1997), another case cited by Relator, quoted *Pope dicta* and concluded that the one-year-from-death statute was a “self-executing nonclaim statute” which did not implicate the Due Process Clause. *Id.*, at 1111-12. It failed to look at the wider picture of what is state action, at why the enactment of the nonclaim statute and its judicial enforcement do not amount to state action, and why a statute whose time deadline is triggered by some fact possibly known to only one of two litigants can be fairly analogized to the self-executing statutes of limitations mentioned in *Pope dicta*.

Relator also cites *Roddy v. Hamilton County Nursing Home (In re Estate of Key)*, No. 03A01-9810-CH-00319, 1999 WL 172675 (Tenn. Ct. App., Mar. 24, 1999), 1999 Tenn.App. LEXIS 201, which held that *Pope* had no application to Tennessee’s one-year-from-the-date-of-death probate statute of repose. Without any analysis, the court simply announced its conclusion, calling the provision a “self-executing statute of limitations. . . .” *Id.*, WL at *5. *Roddy* should be given little weight, not only because it never addresses why such a statute can be considered a statute of limitations or the wider context of the

constitutional requirement of state action, but also because it is factually distinguishable. *Id.*, WL at *1-5. Unlike Panagos, in *Roddy*, the creditor learned of the death soon after it occurred. *Id.*

Another case which Relator cites, *Society National Bank v. Johnson*, No. 72002, 1997 WL 781741 (Ohio App. 8 Dist., Dec. 18, 1997), 1997 Ohio App. LEXIS 5682, is distinguishable for the same reason: the creditor learned of the decedent's death within two months of its occurrence and ten months before the cut-off date for making a claim. *Id.*, WL at *5. The court's analysis of *Pope* is flawed, because it reflexively characterized its statute as "a self-executing statute of limitations. . ." without a careful consideration of whether it is a statute of limitation and of the broader issues of state action addressed in *Pope*, and of those cases upon which *Pope* relied. *Id.*, WL at *4-5.

Fifth Third Bank v. Gottlieb, No. WD-96-054, 1997 WL 543069 (Ohio App. 6 Dist., Aug. 29, 1997), 1997 Ohio App. LEXIS 3815, another case cited by Relator, is unconvincing in refusing to invalidate the Ohio one-year-from-death bar. It called the law "a self-executing statute of limitations" without recognizing the difference between a statute of repose and a statute of limitation. *Id.*

Estate of Kruzynski, 744 A.2d 1054 (Me. 2000), considered the constitutionality of a statute which barred anyone, including a creditor who had just learned of the debtor's death, from opening a probate estate more than three years after the death. *Id.* Like the other cases upon which Relator relies, it upheld the statute without any apparent recognition of the difference between a statute of repose and a statute of limitation. *Id.* It

also applied the *Pope dicta* without any acknowledgment of the weakness of such authority. *Id.*

11. Due Process Requires Actual Notice

To Those Creditors Who Are Known or Are Reasonably Ascertainable

Once the threshold of state action is crossed, we must consider what process is due. *Pope* instructs that a known or reasonably ascertainable creditor of a decedent is entitled, under the Due Process Clause, to actual notice of the decedent's death, of the opening of a probate estate, and to the opportunity to be heard. *Pope*, 485 U.S. at 488-91. Requiring such notice would "not [be] so cumbersome as to unduly hinder the dispatch with which probate proceedings are conducted." *Pope*, 485 U.S. at 490. So, the Missouri probate statute of repose, Section 473.444.1 [A-12], violates the Due Process Clause of the Fourteenth Amendment [A-7], as applied to a known or reasonably ascertainable creditor, because it fails to require any notice, much less actual notice.

E. The Probate Statute of Repose

Violates The Due Process Clause of the Missouri Constitution

1. State Action

Like the Due Process Clause of the Fourteenth Amendment [A-7] of the Constitution of the United States, the due process clause of the Missouri Constitution,

Article I, Section 10 [A-7], does not reach purely private conduct. *E.g., Junkins v. Local Union No. 6313, Communications Workers of America*, 263 S.W.2d 337, 339 (Mo. 1954), appeal transferred, 241 Mo.App. 1029, 271 S.W.2d 71 (1954)(there is no constitutional right to due process in a union’s internal disciplinary proceedings). In deciding that Missouri’s extrajudicial foreclosure statute did not violate Article I, §10 of the Missouri Constitution, this court stated that:

It is well settled that this provision to the Missouri Constitution is a protection against state governmental action through executive, legislative or judicial authority and that it is not applicable to acts of individuals as they affect rights of other individuals.

Federal National Mortgage Association v. Howlett, 521 S.W.2d 428, 439 (Mo. banc 1975)(citing, *Junkins*, 263 S.W.2d 337). Missouri’s due process clause “parallels its federal counterpart, and in the past this Court has treated the state and federal due process clauses as equivalent.” *Jamison*, 218 S.W.3d at 399 (citations omitted).

However, those few cases finding insufficient state action to implicate the due process guarantee of the Missouri Constitution all involve the unconstrained contractual or testamentary arrangements of private parties. *Junkins*, 263 S.W.2d at 339, considered a worker’s voluntary membership in a union which governed its members under its own bylaws. In *Howlett*, the court held that the conduct was not that of the state, because the foreclosure of the deed of trust was conducted by authority of the contractual provisions

in the deed of trust itself, not under any power granted by state statute. *Howlett*, 521 S.W.2d at 433. *Accord, Minnesota Mutual Life Insurance Company v. Fuhrman*, 521 S.W.2d 440 (Mo. banc 1975)(extrajudicial foreclosure of deed of trust).

Similarly, in *Easter v. Ochs*, 837 S.W.2d 516, 519 (Mo. banc 1992), *certiorari den.*, 507 U.S. 987 (1993), this court found no state action in these circumstances.

Testator left a life estate in certain farms to his son with the remainder to “the heirs of his [son’s] body.” *Id.* at 517-18. The court referred to a Missouri statute, which defined “heirs of the body,” to rule that the son’s adopted children did not inherit the remainder. *Id.*, 837 S.W.2d at 518. The court held the Missouri Constitutional guarantees of equal protection and due process did not arise, because there was no state action. *Id.*, 837 S.W.2d at 519. The rationale was that the statute was employed only to determine the testator’s true intent, not to require him to treat adopted children differently from natural children. *Id.*, 837 S.W.2d at 519. *Cf. First National Bank of Kansas City v. Danforth*, 523 S.W.2d 808 (Mo. 1975) (trust with provisions that preferred persons and institutions for religious and racial reasons did not violate federal or state constitutions because of lack of state action (case focused on the federal constitution and federal state action cases)).

In contrast to these cases, the extensive involvement of the probate court in the enactment of the probate statute of repose and in its enforcement, by the judicial denial of a late-filed claim, is state action sufficient to invoke the Missouri Constitution’s guarantee of due process.

2. What Process Is Due?

Like the federal guarantee of due process, Missouri's does not countenance the loss of property without notice and the opportunity to be heard. *Cf. State ex rel. Nixon v. Peterson*, 253 S.W.3d 77, 82 (Mo. banc 2008)(discussing the right to a hearing concerning a threatened deprivation of property); *Jamison*, 218 S.W.3d at 408 (notice and hearing required for threatened deprivation of a liberty interest). Thus, the probate statute of repose, which provides no notice to creditors that the time otherwise allowed them under the applicable general statute of limitations might be much shortened, violates Article I, §10's guarantee of due process.

F. The Probate Notice Statute, the Nonclaim Statute, and the Probate Statute of Repose Deny Creditors Equal Protection Under the Law

1. Heirs and Creditors

Those who have an interest in a decedent's probate estate include not only his heirs, devisees, legatees, and spouse, if any, but also his creditors. Section 472.010(8, 15), R.S.Mo. (2000) [A-8]. Once letters testamentary or letters of administration are granted, the personal representative is required to publish a notice directed "To all persons interested in the estate. . ." Section 473.033, R.S.Mo. (2000) [A-9]. Among other things, the notice advises its readers of the date of the decedent's death, of the date of the first publication of the notice, of the county in which the estate is

pending, and of the deadlines for creditors to file claims established by Sections 473.360 [A-11] and 473.444 [A-12]. *Id.* The probate clerk is required to “send a copy of the notice by ordinary mail to each heir and devisee. . .,” but not to any spouse or creditor. *Id.* The statute allows, but does not require, the personal representative to mail a copy of the notice to creditors. *Id.*

An heir who receives such notice has the opportunity to participate in the probate proceedings, as, for example, by contesting the will, if any, which was admitted to probate or by offering for probate another will, so long as he does so within six months of the date of first publication. Section 473.083, R.S.Mo. (2000). Unless he is lucky enough to see the published notice or learns of the death and of the opening of the estate by some other means, a creditor has to hope that the personal representative will be both honest and diligent in choosing to mail him a copy of the notice or in voluntarily paying what is due.

So, we must consider whether Section 473.033 [A-9], in conjunction with Sections 473.360 [A-11] and 473.444 [A-12], establishes classifications that deny to creditors the equal protection of the law, as required by the Fourteenth Amendment [A-7] of the United States Constitution and by Article I, Section 2 of the Missouri Constitution [A-7].

2. State Action

Like the Fourteenth Amendment’s Due Process Clause, its guarantee of equal protection restricts only the actions of the state. Tribe, *supra*, at 1688, fn. 1. Missouri’s constitutional promise of equal protection is also so limited. *E.g., Easter*, 837

S.W.2d at 519.

As discussed above, there is state action in the enactment and enforcement of the probate statute of repose, Section 473.444 [A-12]. But, when the probate notice, Section 473.033 [A-9], probate nonclaim, Section 473.360 [A-11], and probate statute of repose, Section 473.444 [A-12] are considered together, particularly in the context of the elaborate statutory framework for the administration of decedents' estates,¹⁴

¹⁴The court is intimately involved in the probate process, including, in most cases, some or all of the following:

- a. the court's consideration of the application for letters testamentary or of administration, under Section 473.017, R.S.Mo., (2000);
- b. the probate of the will, if any, under Section 473.065, R.S.Mo. (2000);
- c. the contest of the will, if required, under Section 473.083;
- d. the granting of letters testamentary to the personal representative or letters of administration to the administrator, under Section 473.110, R.S.Mo. (2000);
- e. the publication of notice of the issuance of letters, and the probate clerk's mailing of notices to the heirs, devisees, and legatees, pursuant to Section 473.033 [A-9];
- f. the approval of the personal representative or administrator's bond, if required, under Section 473.183, R.S.Mo. (2000);

the governmental involvement is considerable. For example, it is the Probate Clerk, not some private person, who is required to mail notices to the heirs under the probate notice statute, Section 473.033 [A-9] . This extensive state entanglement is comparable to that which the Court held in *Pope*, 485 U.S. at 485-88, constituted state action.

- g. the filing of the personal representative's inventory of the estate's assets, pursuant to Section 473.233, R.S.Mo. (2000);
- h. the receipt of claims from creditors, pursuant to Section 473.360 [A-11];
- i. the Clerk's mailing of copies of those claims to the personal representative, as required by Section 473.380.4, R.S.Mo. (2000);
- j. the trial of any contested claims, pursuant to Sections 473.403 and 473.413, R.S.Mo. (2000);
- k. the classification of claims and statutory allowances, as per Section 473.397, R.S.Mo. (2000);
- l. the approval of the sale of real property, pursuant to Section 473.493, R.S.Mo. (2000);
- m. the filing of the personal representative's statement of account, and the auditing and approval of them, pursuant to Section 473.540, R.S.Mo. (2000), unless the estate is being administered independently, pursuant to Section 473.780, R.S.Mo. (2000); and,
- n. the entry of a decree of final distribution of the estate's assets, pursuant to Section 473.617, R.S.Mo. (2000).

Another way of looking at the requirement of state action is this: “[w]here the validity of the statute is necessarily implicated, state action is obvious, and no formal inquiry into the matter is needed.” Tribe, *supra*, §18-1 at 1688 (citing, *Brown v. Board of Education*, 473 U.S. 483 (1954)). Cf., *Batek v. Curators of University of Missouri*, 920 S.W.2d 895, 898 (Mo. banc 2006)(in considering whether a tolling statute’s provision, making an exception for actions for medical malpractice, violated the federal and state equal protection clauses, this court saw no need to question or discuss whether there was state action). So, because the validity of the statutes in requiring the Probate Clerk to mail notices to only one group of interested parties, the heirs, legatees, and devisees, and in cutting off the claims of creditors, regardless of notice, is in question, there is state action.

3. Equal Protection

Though the property right of a creditor is not a fundamental right and creditors are not a suspect class, this classification of those interested persons entitled to mailed notice cannot be sustained if it is not rationally related to a legitimate state interest. *E.g., Blaske*, 821 S.W.2d at 822-29.

While there is undoubtedly a legitimate state interest in the prompt settlement of decedents’ estates, *see, e.g., Pope*, 485 U.S. at 489, the treatment of creditors, one group of those who have an interest in the estate, differently from the heirs and devisees is not rationally related to that state interest.

If the personal representative mails a notice to a creditor or serves him with it,

Section 473.360 [A-12] provides that the creditor has only two months thereafter within which to file a claim. A personal representative who promptly mails or personally serves such a notice cuts off the filing of any more claims long before the expiration of the six-month will contest deadline, Section 473.083, and long before the earliest usual time for the final distribution of the estate, Section 473.610, R.S.Mo. (2000) (“six months after the date of the letters”).

While Section 473.444.1 cut off the rights of all creditors one year after a decedent’s death, the heirs do not suffer the same fate. Though any will must be filed within one year of death, Section 473.050.3(2), R.S.Mo. (2000), the heirs may still, for years thereafter, obtain the fruits of their inheritance by filing a petition for determination of heirship under Section 473.663, R.S.Mo. (2000).

As there is no rational basis for preferring heirs over known or reasonably ascertainable creditors in the distribution of an estate’s assets, Sections 473.033 [A-9], 473.360 [A-11], and 473.444 [A-12], as part of a comprehensive statutory scheme for the handling of decedents’ estate, Chapters 472 and 473 R.S.Mo., violate the constitutional guarantees of equal protection under law.

G. Section 474.444 Is Unconstitutional for the Reason That House Bill 145 Violates the Clear Title Requirement of Article III, Section 23 of the Missouri Constitution

Article III, Section 23 of the Missouri Constitution [A-8] provides that

“[n]o bill shall contained more than one subject which shall be clearly expressed in its title. . . .” [A-8]. House Bill 145 (S.S.H.C.S.H.B. 145 found at p. 942 *et seq.* Laws of Missouri, 1989) by which, among other things, Section 473.444 was adopted, violates this clear title requirement.¹⁵

The title of House Bill 145 is “An Act to repeal sections 194.115 . . . and 486.595, R.S.Mo. 1986, *relating to ownership and transfer of certain property*, and to enact in lieu thereof eighty-three new sections relating to the same subject” (*Id.*)(emphasis added). Because the purpose of the clear title rule is to alert legislators and citizens of the nature of proposed legislation, the words of the title must be given their common and ordinary meanings. *Home Builders of Greater St. Louis v. State of Missouri*, 75 S.W.3d 267, 271 (Mo. banc 2002).

In *Home Builders*, this court considered a bill entitled “An Act to Repeal Sections 53.135 . . . *relating to property ownership*, and to enact in lieu thereof seventy new sections relating to the same subject. . . .” *Id.*, 75 S.W.3d at 269. Reasoning that the word “property” included real, personal, and intangible property, *Id.* at 271, the court observed that “nearly every piece of legislation passed could fit within the title ‘relating to property ownership.’” *Id.* at 272. Because the title was “so amorphous,” this court held

¹⁵*Hatfield*, 893 S.W.2d at 829, declined to decide whether House Bill 145 violated both the single subject and the clear title requirements, because these issues had not been timely raised.

that it violated the clear title mandate, and, so, was unconstitutional. *Id.*

House Bill 145's title is remarkably similar. The only differences are that it adds the words "transfers" and "certain."

In *St. Louis Health Care Network v. State of Missouri*, 968 S.W.2d 145, 148 (Mo. banc 1998), this court considered whether the use of the word "certain" to modify "incorporated and non-incorporated entities" in the title of a bill avoided having the bill run afoul of the clear title rule. The court reasoned that the word "certain" did nothing but narrow the range of entities to which the bill might apply to somewhere between "one entity or all but one." *Id.* The use of the word "certain" in the title of House Bill 145 has the same inconsequential effect. It does not narrow the scope of the title in any understandable way. In *St. Louis Health Care*, the court explained that the title "certain incorporated and non-incorporated entities" could encompass everything from "amend[ing] the tax laws for the charities that provide homeless shelters . . . [to] prohibit[ing] the mining of limestone by domestic business corporations." *Id.* For that reason, it held that the title was "too broad and too amorphous to identify a single subject within the meaning of article III, section 23." *Id.*

In the same way, according to its title, House Bill 145, could include many of the subjects described in the Missouri Revised Statutes, including, just for example, the state board of public buildings' use of the power of condemnation to acquire and own property under Section 8.380.3, R.S.Mo. (2000), a city's purchase and ownership of power plants to operate a municipal utility under Section 91.010, R.S.Mo. (2000), the various

provisions governing the ownership and transfer of motor vehicles contained in Chapter 301, the ownership and transfer of stock in general and business corporations under Chapter 351, and the provisions of Chapter 442 dealing with “Titles and Conveyance of Real Estate.” This title violates Article III, Section 23 [A-8], because it is too broad and amorphous to be meaningful. *Id.*

A cursory examination of the session laws of 1989 suggests that many other bills could have employed this title. For example, House Bill 211 deals with the ownership and transfer of motor vehicles, aircraft, and watercraft (Laws of Missouri, 1989, p. 749), Senate Bill 340 with selling wine (*Id.* at 782), House Bills 249 and 47 with the transfer of corporation stock (*Id.* at 866), and Senate Bill 40 with savings and loan associations (*Id.* at 890).

House Bill 145 contains many and diverse subjects, including provisions which govern the consent needed to perform an autopsy and who may make an anatomical gift (Chapter 194), twenty-six new sections of the Missouri Transfers to Minors Law (Chapter 404), three new sections dealing with the distribution of trust income (Chapter 456), the enactment of the extensive Durable Power of Attorney Law of Missouri and the Nonprobate Transfers Law of Missouri, changes to laws governing guardians and conservators (all contained in Chapter 475), and eight new sections relating, in various ways, to the administration of decedents’ estates (Chapter 473). The sections dealing with estates include not only Section 473.444 [A-12], the related non-claim section, 473.360 [A-11], and notice provision, Section 473.033

[A-9], but also sections dealing with such subjects as, for example, the time limit for filing wills and will contests, and the compensation of personal representatives, attorneys, and accountants. Though it might be possible to conceive of a title that is a “broad umbrella,” *Trout v. State of Missouri*, 231 S.W.3d 140, 142-45 (Mo. banc 2007), to describe and cover these diverse topics, House Bill 145’s title is much too vague to apprise the legislators and public of what is proposed. For this reason, it, and the statutes it contains, including the probate statute of repose, Section 473.444 is unconstitutional.

CONCLUSION

If Panagos was a known or reasonably ascertainable creditor, then the Due Process Clause of the Fourteenth Amendment [A-7] to the Constitution of the United States and Article I, Section 10 of the Missouri Constitution [A-7] required Relator to take reasonable measures to give actual notice to Panagos of her father’s death and the opening of an estate. Because Sections 473.360 [A-11] and 473.444 [A-12] do not require this, they are unconstitutional.

The probate notice, nonclaim, and repose statutes violate the equal protection clauses of the Fourteenth Amendment to the Constitution of the United States and of Article I, Section 2 of the Missouri Constitution [A-7], because they prefer heirs by requiring that they be given mailed notice of the opening of an estate while failing to require that such actual notice to given to known or reasonably ascertainable creditors.

The Missouri probate statute of repose is also unconstitutional, because the bill by which it was enacted violates the clear title requirement of Article III, Section 23 of the

Missouri Constitution.

For these reasons, the preliminary writ of prohibition should be dissolved and Respondent allowed to proceed in his consideration of Panagos' claim.

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CERTIFICATE OF COMPLIANCE WITH
RULE 84.06(c)

The undersigned counsel of record hereby certifies that the foregoing brief includes the information required by Rule 55.03, was prepared in proportional typeface of 12 points, that the word processing system used to prepare the brief is WordPerfect X4 in Arrus BT font, and that the brief contains 13, 390 words as determined by the WordPerfect X4 word counting system.
