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**SUPREME COURT OF MISSOURI**

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**MISSOURI PROSECUTING ATTORNEYS )**  
**AND CIRCUIT ATTORNEYS )**  
**RETIREMENT SYSTEM, AN AGENCY )**  
**OF THE STATE OF MISSOURI, )**  
**)**  
**Respondents, )**  
**)**  
**vs. ) APPEAL NO. SC88956**  
**)**  
**)**  
**PEMISCOT COUNTY, CHARLES MOSS, )**  
**WENDELL HOSKINS, SR., and )**  
**DAVID WILKERSON, )**  
**)**  
**Appellants. )**

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**Appeal from the Circuit Court of Pemiscot County  
Thirty-Fourth Judicial Circuit  
Honorable Fred W. Copeland, Presiding**

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**BRIEF OF RESPONDENT**

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## **JURISDICTIONAL STATEMENT**

Respondent agrees with Appellants' Jurisdictional Statement that this Court has exclusive jurisdiction over the issues raised in this appeal, and hereby adopts the Jurisdictional Statement submitted by Appellants.

## **STATEMENT OF FACTS**

### **A. PROCEDURAL HISTORY**

Respondent Missouri Prosecuting Attorneys and Circuit Attorneys Retirement System ("Respondent" or "PACARS") filed a Writ of Mandamus in the Circuit Court of Pemiscot County against Appellants Pemiscot County and its County Commissioners (Charles Moss, Wendell Hoskins, Sr. and David Wilkerson) ("Appellants"). (L.F. 5). Pemiscot County, a county of third classification, voted to elect a full-time prosecutor during the August 4, 1998 election, pursuant to the provisions of RSMo. §56.363.<sup>1</sup> (L.F. 31, paras. 10-11; L.F. 62, paras. 10-11). The measure passed by a majority of the voters of Pemiscot County. Pursuant to its election to make the position of prosecuting attorney a full time position, Respondent PACARS contends Pemiscot County, beginning

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<sup>1</sup>All statutory references are to Mo.Rev.Stat. 2007 unless otherwise indicated.

August 28, 2001, is to pay the same amount as a county of first classification under RSMo. §56.807. (See Petition for Writ of Mandamus) (L.F. 5).

Prosecuting Attorney Mike Hazel (“Hazel”) was elected as prosecuting attorney in Pemiscot County in November 1998, taking office in January 1999. (L.F. 31, para. 12; L.F. 62, para. 12). Hazel had previously been elected as a part-time prosecutor in Pemiscot County prior to Pemiscot County electing to make the position full time in August 1998. (L.F. 31, para. 14; L.F. 62, para. 14). He has since been re-elected and remains the prosecuting attorney in Pemiscot County. As an elected prosecuting attorney, Hazel is a member of PACARS and is entitled and/or will be entitled to retirement benefits. (L.F. 31, para. 13; L.F. 62, para. 13). As a part-time prosecutor, Hazel was allowed to maintain a private practice of law. (L.F. 32, para. 15; L.F. 63, para. 15). Hazel is not allowed to engage in the practice of law as a full-time prosecutor pursuant to RSMo. §56.067. (L.F. 32, para. 16; L.F. 63, para. 16; Resp..App. A17).

There are currently six counties which elected to make the prosecuting attorney full time prior to August 28, 2001. (L.F. 32, para. 17; L.F. 63, para. 17; L.F. 39). Those counties are Butler, Lawrence, Lincoln, Pemiscot, Polk and Stone. (L.F. 32, para. 18; L.F. 63, para. 18; L.F. 39). Lincoln and Stone are currently

paying into PACARS the amounts set forth under RSMo. §56.807.5(3). (L.F. 32, para. 19; L.F. 63, para. 19; L.F. 39).

Since July 1993, Pemiscot County has paid into PACARS \$375.00 per month. (L.F. 32-33, para. 22; L.F. 63, para. 22; L.F. 40). This amount has not changed since Pemiscot County elected to make the position of prosecuting attorney a full-time position, and therefore, Appellants are paying the same amount into PACARS as it did when the position was part time. (L.F. 32-33, para. 22; L.F. 63, para. 22; L.F. 37).

Appellants filed a Motion for Summary Judgment pursuant to Rule 74.04 of the Missouri Rules of Civil Procedure. (L.F. 14). Respondent also filed a Motion for Summary Judgment. (L.F. 34). After briefing the motions, oral argument was heard on August 5, 2005 and the matter was taken under advisement by the trial court. (L.F. 3). On September 15, 2005, the trial court entered the following docket entry, finding in favor of Appellants:

The Court, having reviewed the pleadings, arguments of counsel, as well as the respective motions for summary judgment and supporting memorandums, and being fully advised, does hereby make the following findings: That there are no uncontroverted material facts at issue in this

cause. That in reading 56.087 RSMo. together with 56.363.3 RSMo. the Court finds that the legislative intent is clear that the legislature did not intend to require counties that had elected ‘full-time’ prosecuting attorneys prior to August 28, 2001 to have that position qualify for the retirement benefits available for a full-time prosecutor of a first class county absent affirmative action by the county commission. It is hereby Ordered and Adjudged that the Defendants’ motion for summary judgment is sustained. Plaintiff’s motion for summary judgment is denied. Plaintiff’s Petition for Writ of Mandamus is hereby denied. **Dicta by the Court: The Court has entered these Orders based upon the Court’s interpretation of sections 56.807 and 56.363.3 RSMo. The Court finds that the action and intent of the legislature have been to create, intentionally or not, a small group of ‘second class’ prosecuting attorneys in the state of Missouri. It seems absurd to the Court that those prosecuting attorneys from**

**counties who elected to have full time prosecutors  
prior to August 28, 2001 shall be treated differently  
from those where similar action was taken subsequent  
to that date. Reluctantly, it is this Court's opinion  
that only action by the legislature or the Pemiscot  
County Commission can cure this injustice.**

(L.F. 3; Resp.App. 37)(Emphasis Added). The trial court issued a written Order and Judgment finding in favor of Appellants and against Respondent. (L.F. 85).

This matter was then appealed by Respondent PACARS to the Missouri Court of Appeals, Southern District ("Court of Appeals"). (L.F. 88). After briefing by both parties and oral argument, the Court of Appeals issued its decision reversing and remanding the case to the trial court. (L.F. 90, 91-101; Appendix A26). The Court of Appeals reversed and remanded the issue on the basis that the trial court did not rule on the constitutional challenge presented by Respondent PACARS, which the Court of Appeals determined had been properly preserved by Respondent. (L.F. 100).

Upon remand, Appellants and Respondent submitted additional legal argument to the trial court. (L.F. 102-130, 131-137). The parties agreed to submit the respective summary judgments on the pleadings and the appellate court briefs

after argument to the trial court on June 5, 2007. (L.F. 4, 102, 131; Supp. L.F. 1).

On July 31, 2007, the trial court made a docket entry finding the statutes to be unconstitutional and in violation of the Equal Protection clauses of the Missouri and United States Constitution “as it relates to retirement benefits to be received by the elected prosecuting attorney of Pemiscot County.” (L.F. 4; Resp.App. A8).

On October 1, 2007, the trial court entered a written Judgment and Order granting Respondent PACARS’ Motion for Summary Judgment and denying Appellants’ Motion for Summary Judgment. (L.F. 138-143; Resp.App. A2). The trial court found that, as written, RSMo. §§ 56.363, 56.807 and 56.816 “create a disparity in treatment between those prosecuting attorneys from third class counties whose position became full-time prior to August 28, 2001 and those whose position became full-time after that date.” (L.F. 141, para. 5; Resp.App. A5). The trial court found that the distinction between the retirement benefits received “is not based on length of service, the date of retirement, or even when the prosecutors first begin working full-time.” (L.F. 141, para. 6; Resp.App. A5). The trial court further found Appellant’s argument that a legitimate state purpose was served to be unpersuasive, stating that “[c]ounties whose voters freely elected to have a full-time prosecutor assumed the risk of greater expenditures for compensation for that prosecutor including adjustments to salary and retirement contributions.” (L.F.

141, para. 6; Resp.App. A5). The trial court found that the disparity in retirement benefits violates the equal protection clauses of Article 1, section 2 of the Missouri Constitution and the Fourteenth Amendment of the United States Constitution.

(L.F. 142, para. 7, Resp.App. A6). The trial court ordered that:

- a. subsection 3 of RSMo. §56.363 be stricken as unconstitutional;
- b. “after August 28, 2001, or whose county commission has elected a full-time retirement benefit pursuant to subsection 3 of section 56.363” be stricken from subdivision 3 of subsection 2 of section 56.807 and subdivision 3 of subsection 5 of section 56.807, RSMo.;  
and
- c. “after August 28, 2001” be stricken from subsection 3 of section 56.816, RSMo.

(L.F. 143; Resp.App. A7). The court found the remaining provisions of these statutes to be valid and capable of standing alone and “not essentially connected with or dependent on the unconstitutional language.” (L.F. 142-143, para. 8; Resp.App. A6-A7).

This appeal followed.

**B. THE STATUTES AT ISSUE**

Appellants and Respondent disagree as to the constitutionality of various statutes relating to PACARS, in particular as to retirement benefits to be received by the elected prosecuting attorney of Pemiscot County. Section 56.807 of the Missouri Revised Statutes was originally passed in 1989, with amendments in 1993, 1995, 2001, 2002 and 2003. The statute states in its current form<sup>2</sup> as follows:

**Local payments, amounts--prosecuting attorneys and circuit attorneys' retirement system fund created-- donations may be accepted.**

**1. 56.807. 1. Beginning August 28, 1989, and continuing monthly thereafter until August 27, 2003.**

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<sup>2</sup>Bold type indicates the additions to the statute from Senate Bill 5 in 2003. Senate Bill 5, introduced and passed during the 2003 Legislative Session was the most recent amendment to RSMo. §56.807. According to the Senate Bill Summary from the Missouri Senate's website, the new provisions added a \$4 surcharge to all criminal cases filed, payable to PACARS, and restructured the amount of the county contribution to PACARS. (L.F. 43).

the funds for prosecuting attorneys and circuit attorneys provided for in subsection 2 of this section shall be paid from county or city funds.

2. Beginning **August 28, 1989**, and **continuing** monthly thereafter **until August 27, 2003**, each county treasurer shall pay to the system the following amounts to be drawn from the general revenues of the county:

(1) For counties of the third and fourth classification except as provided in subdivision (3) of this subsection, three hundred seventy-five dollars;

(2) For counties of the second classification, five hundred forty-one dollars and sixty-seven cents;

(3) For counties of the first classification, counties which pursuant to section 56.363 elect to make the position of prosecuting attorney a full-time position after August 28, 2001, or whose county commission has elected a full-time retirement benefit pursuant to subsection 3 of

section 56.363, and the city of St. Louis, one thousand two hundred ninety-one dollars and sixty-seven cents.

**3. Beginning August 28, 1989, and continuing until August 27, 2003, the county treasurer shall at least monthly transmit the sums specified in subsection 2 of this section to the Missouri office of prosecution services for deposit to the credit of the "Missouri Prosecuting Attorneys and Circuit Attorneys' Retirement System Fund", which is hereby created. All moneys held by the state treasurer on behalf of the system shall be paid to the system within ninety days after August 28, 1993. Moneys in the Missouri prosecuting attorneys and circuit attorneys' retirement system fund shall be used only for the purposes provided in sections 56.800 to 56.840 and for no other purpose.**

**4. Beginning August 28, 2003, the funds for prosecuting attorneys and circuit attorneys provided for in this section shall be paid from county or city funds and the surcharge established in this section**

and collected as provided by this section and sections 488.010 to 488.020, RSMo.

5. Beginning August 28, 2003, each county treasurer shall pay to the system the following amounts to be drawn from the general revenues of the county:

(1) For counties of the third and fourth classification except as provided in subdivision (3) of this subsection, one hundred eighty-seven dollars;

(2) For counties of the second classification, two hundred seventy- one dollars;

(3) For counties of the first classification, counties which pursuant to section 56.363 elect to make the position of prosecuting attorney a full-time position after August 28, 2001, or whose county commission has elected a full-time retirement benefit pursuant to subsection 3 of section 56.363, and the city of St. Louis, six hundred forty-six dollars.

6. Beginning August 28, 2003, the county treasurer

shall at least monthly transmit the sums specified in subsection 5 of this section to the Missouri office of prosecution services for deposit to the credit of the Missouri prosecuting attorneys and circuit attorneys' retirement system fund. Moneys in the Missouri prosecuting attorneys and circuit attorneys' retirement system fund shall be used only for the purposes provided in sections 56.800 to 56.840, and for no other purpose.

7. Beginning August 28, 2003, the following surcharge for prosecuting attorneys and circuit attorneys shall be collected and paid as follows:

(1) There shall be assessed and collected a surcharge of four dollars in all criminal cases filed in the courts of this state including violation of any county ordinance or any violation of criminal or traffic laws of this state, including infractions, but no such surcharge shall be assessed when the costs are waived or are to be paid by the state, county, or municipality

or when a criminal proceeding or the defendant has been dismissed by the court or against any person who has pled guilty and paid their fine pursuant to subsection 4 of section 476.385, RSMo. For purposes of this section, the term "county ordinance" shall include any ordinance of the city of St. Louis;

(2) The clerk responsible for collecting court costs in criminal cases shall collect and disburse such amounts as provided by sections 488.010 to 488.026, RSMo.

Such funds shall be payable to the prosecuting attorneys and circuit attorneys' retirement fund.

Moneys credited to the prosecuting attorneys and circuit attorneys' retirement fund \* shall be used only for the purposes provided for in sections 56.800 to 56.840 and for no other purpose.

8. The board may accept gifts, donations, grants and bequests from private or public sources to the Missouri prosecuting

attorneys and circuit attorneys' retirement system fund.

9. No state moneys shall be used to fund section 56.700 and sections 56.800 to 56.840 unless provided for by law.

RSMo. §56.807 (Emphasis Added)(Resp.App. A20).

RSMo. §56.363 states:

56.363. 1. The county commission of any county may on its own motion and shall upon the petition of ten percent of the total number of people who voted in the previous general election in the county submit to the voters at a general or special election the proposition of making the county prosecutor a full-time position. The commission shall cause notice of the election to be published in a newspaper published within the county, or if no newspaper is published within the county, in a newspaper published in an adjoining county, for three weeks consecutively, the last insertion of which shall be at least ten days and not more than thirty days before the day of the election, and by posting printed notices thereof at

three of the most public places in each township in the county. The proposition shall be put before the voters substantially in the following form:

1. Shall the office of prosecuting attorney be made a full-time position in ..... County?

    Yes    No

If a majority of the voters voting on the proposition vote in favor of making the county prosecutor a full-time position, it shall become effective upon the date that the prosecutor who is elected at the next election subsequent to the passage of such proposal is sworn into office.

2. The provisions of subsection 1 of this section notwithstanding, in any county where the proposition of making the county prosecutor a full-time position was submitted to the voters at a general election in 1998 and where a majority of the voters voting on the proposition voted in favor of making the county prosecutor a full-time position, the proposition shall become effective on

May 1, 1999. Any prosecuting attorney whose position becomes full time on May 1, 1999, under the provisions of this subsection shall have the additional duty of providing not less than three hours of continuing education to peace officers in the county served by the prosecuting attorney in each year of the term beginning January 1, 1999.

3. In counties that, prior to August 28, 2001, have elected pursuant to this section to make the position of prosecuting attorney a full-time position, the county commission may at any time elect to have that position also qualify for the retirement benefit available for a full-time prosecutor of a county of the first classification. Such election shall be made by a majority vote of the county commission and once made shall be irrevocable. When such an election is made, the results shall be transmitted to the Missouri prosecuting attorneys and circuit attorneys' retirement system fund, and the election shall be effective on the first day of January following

such election. Such election shall also obligate the county to pay into the Missouri prosecuting attorneys and circuit attorneys' system retirement fund the same retirement contributions for full-time prosecutors as are paid by counties of the first classification.

RSMo. §56.363 (Resp.App. A18).

The final statute before this Court is RSMo. § 56.816. This statute states as follows:

1. The normal annuity of a retired member who served as prosecuting attorney of a county of the third or fourth class shall, except as provided in subsection 3 of this section, be equal to:

1. (1) Any member who has served twelve or more years as a prosecuting attorney and who meets the conditions of retirement at or after the member's normal retirement age shall be entitled to a normal annuity in a monthly amount equal to one hundred five dollars multiplied by the number of two-year periods and partial two-year

periods served as a prosecuting attorney;

(2) Any member who has served twenty or more years as a prosecuting attorney and who meets the conditions of retirement at or after the member's normal retirement age shall be entitled to a normal annuity in a monthly amount equal to one hundred thirty dollars multiplied by the number of two-year periods and partial two-year periods as a prosecuting attorney.

2. The normal annuity of a retired member who served as prosecuting attorney of a first or second class county or as circuit attorney of a city not within a county shall be equal to fifty percent of the final average compensation.

3. The normal annuity of a retired member who served as a prosecuting attorney of a county which after August 28, 2001, elected to make the position of prosecuting attorney full time pursuant to section 56.363 shall be equal to fifty percent of the final average compensation.

4. The actuarial present value of a retired member's

benefits shall be placed in a reserve account designated as a "Retired Lives Reserve". The value of the retired lives reserve shall be increased by the actuarial present value of retiring members' benefits, and by the interest earning of the total fund on a pro rata basis and it shall be decreased by payments to retired members and their survivors. Each year the actuary shall compare the actuarial present value of retired members' benefits with the retired lives reserve. If the value of the retired lives reserve plus one year's interest at the assumed rate of interest exceeds the actuarial present value of retired lives, then distribution of this excess may be made equally to all retired members, or their eligible survivors. The distribution may be in a single sum or in monthly payments at the discretion of the board on the advice of the actuary.

RSMo. § 56.816. (Resp.App. A24). The latest revision to this bill was in 2001 through Senate Bill 290, which added subsection 3 and added the language "except as provided in subsection 3 of this section" to subsection 1. (Appellants' App.

A19).

**POINT RELIED ON**

**The trial court did not err in finding in favor of Respondent PACARS on its Motion for Summary Judgment and denying Appellants' Motion for Summary Judgment because Sections 56.363, 56.807 and 56.816 of the Revised Statutes of Missouri violate the Equal Protection Clauses of the United States Constitution and the Missouri Constitution in that the statutes result in disparate treatment of the prosecuting attorney in Pemiscot County with similarly situated full-time prosecuting attorneys and such interpretation is not rationally related to any legitimate state interest, and the ruling of the trial court does not result in the imposition of an unfunded mandate in violation of Article 10, Sections 16 and 21 of the Missouri Constitution ("Hancock Amendment").**

***Gramex Corp. v. Von Romer*, 603 S.W.2d 521 (Mo. 1980)**

***Neske v. City of St. Louis*, 218 S.W.3d 417 (Mo.banc 2007)**

***St. Louis Police Officers' Assoc. v. Sayad*, 685 S.W.2d 913**

**(Mo.App. E.D. 1984).**

**RSMo. §56.363**

**RSMo. §56.807**

**RSMo. §56.816**

**U.S. Const., Amend. 14**

**Mo. Const., art. I, §2**

## ARGUMENT

The trial court did not err in finding in favor of Respondent PACARS on its Motion for Summary Judgment and denying Appellants' Motion for Summary Judgment because Sections 56.363, 56.807 and 56.816 of the Revised Statutes of Missouri violate the Equal Protection Clauses of the United States Constitution and the Missouri Constitution in that the statutes result in disparate treatment of the prosecuting attorney in Pemiscot County with similarly situated full-time prosecuting attorneys and such interpretation is not rationally related to any legitimate state interest, and the ruling of the trial court does not result in the imposition of an unfunded mandate in violation of Article 10, Sections 16 and 21 of the Missouri Constitution ("Hancock Amendment").

### A. STANDARD OF REVIEW

Appellate review of summary judgment is essentially de novo. *I.T.T. Commercial Finance Corp. v. Mid-Am Marine*, 854 S.W.2d 371, 376 (Mo.banc 1993). Summary judgment is appropriate where there exists no genuine dispute as to the material facts upon which a claimant would have the burden of persuasion at trial. *Id.* at 381. "The key to summary judgment is the undisputed right to judgment as a matter of law; and not the absence of a fact question." *Id.* at 380. If

a movant has shown a right to judgment as a matter of law, the non-movant must establish a genuine issue by supplementing the record with competent material. *Id.* at 382. Where established facts are not in dispute, they are admitted for the purpose of analyzing the summary judgment motion. *Id.*

“The function of a writ of mandamus is to enforce, not establish, a claim or right and its purpose is to execute, not adjudicate... The general rule is that a court will issue a writ of mandamus only where it is shown that one requesting the writ has a clear and unequivocal right to the relief requested and a corresponding present, imperative, unconditional duty imposed on the respondent which the respondent has breached.” *St. Louis Police Officers’ Assoc. v. Sayad*, 685 S.W.2d 913, 916 (Mo.App. E.D. 1984)(quoting *Naugher v. Mallory*, 631 S.W.2d 370 (Mo.App. 1982).

A statute is presumed to be constitutional. *Blaske v. Smith & Entzeroth, Inc., et al*, 821 S.W.2d 822, 828 (Mo.banc 1991). That presumption remains “unless the statute clearly contravenes some constitutional provision.” *Mahoney v. Doerhoff Surgical Services, Inc.*, 807 S.W.2d 503, 512 (Mo.banc 1991). An analysis of a claim of violation of equal protection is a two-step process. The first step is to determine if the classification burdens a “suspect class” or impinges on a “fundamental right,” so as to require strict scrutiny. *Blaske*, 821 S.W.2d at 829.

Respondent PACARS does not contend it is a suspect class or that the statute, as interpreted by Appellants, impinges on a fundamental right. The second step, when there is not a suspect class or a fundamental right, is whether the classification is rationally related to a legitimate state interest. *Id.*

The Missouri State legislature is presumed to have acted within its constitutional power in enacting laws despite that a law may result in some disparate treatment and inequality, so long as facts may be conceived to justify the action. *Mahoney*, 807 S.W.2d at 512. “[Those challenging the legislative judgment must convince the court the legislative facts upon which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker.” *Id.* at 512. A party challenging the legislation as unconstitutional may present arguments or facts to show that the classification, as applied, is not rational to any legitimate state interest. *Id.* at 513.

In addition, the provisions of every statute are severable. RSMo. § 1.140. Section 1.140 of the Missouri Revised Statutes provides that if any provision of a statute is found to be unconstitutional, the remaining provisions of the statute are valid unless those provisions “are so essentially and inseparably connected with, and so dependent upon, the void provision that it cannot be presumed the legislature would have enacted the valid provisions without the void one; or unless

the court finds the valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent.” RSMo. § 1.140. (Resp.App. A16).

## **B. HISTORY AND BACKGROUND OF PACARS**

The Prosecuting Attorneys and Circuit Attorneys’ Retirement Fund (hereinafter “PACARS”) was established by the Missouri Legislature in Section 56.800 of the Missouri Revised Statutes. Every person employed as an elected or prosecuting attorney or circuit attorney shall become a member of PACARS. RSMo. §56.811. (Resp.App. A23). This membership continues as long as the person continues to be an employee, or receives or is eligible to receive benefits. RSMo. §56.811. (Resp.App. A23). RSMo. §56.800 provides that if insufficient funds are generated to provide the benefits payable pursuant to the provisions of sections 56.800 to 56.840, the board is to proportion benefits according to the funds available. RSMo. §56.800.

Salaries for prosecuting attorneys are set by RSMo. §56.265. A full-time prosecutor is to receive compensation equal to the compensation of an associate circuit judge. RSMo. §56.265.1(1). In counties of first classification and counties which have passed the proposition authorized by section 56.363 making its attorney full time, the prosecuting attorney shall not engage in the practice of law

and shall devote full time to his office. RSMo. §56.067.(Resp.App. A17). A part-time prosecutor is allowed to have a private practice separate from his or her job duties.

### **C. ANALYSIS**

Appellants claim that because Pemiscot County elected to make the position of prosecuting attorney a full-time position before August 28, 2001 and because the Pemiscot County Commission did not elect a full time retirement benefit pursuant to RSMo. § 56.363.3, the Pemiscot County prosecuting attorney is not entitled to a first-class rate for purposes of his or her retirement benefits. (L.F. 16-17, 22-23). Instead, Appellants claim that the prosecuting attorney in Pemiscot County, a full-time position, is instead only entitled to retirement benefits of that of a part-time prosecutor in a third class county. (L.F. 16-17, 22-23). This is despite the fact that as a full-time prosecutor the prosecuting attorney in Pemiscot County is entitled to and receives the salary of other full-time prosecuting attorneys. To read as Appellants suggest raises equal protection concerns under both the Missouri<sup>3</sup> and United States Constitution<sup>4</sup>. MO.CONST., art. I, §2; U.S. CONST.

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<sup>3</sup>“[T]hat all persons are created equal and are entitled to equal rights and opportunity under the law; and that to give security to these things is the principal office of government, and that when government does not confer this security, it

Amend.14.

- 1. There is no rational relationship to a legitimate state interest in creating a sub-class of full-time prosecuting attorneys for purposes of retirement benefits based on an arbitrary and irrational date.**

PACARS contends that the classification of the prosecuting attorney of Pemiscot County (as well as the five other counties) as being entitled only to part-time retirement benefits of a third class county simply because Pemiscot County elected to have the position be made full time prior to August 28, 2001 is not rationally related to any legitimate state interest. There is no legitimate state interest in classifying a full time prosecutor in Pemiscot County differently than other full-time prosecutors simply because of the date in which the county elected to make the position full time.

Appellants have argued that the legitimate state interest is to avoid the imposition of an unfunded mandate on the “already financially burdened counties  
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fails in its chief design.” MO.CONST, Art I, §2.

<sup>4</sup>No state shall “deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST Amend 14.

of the third and fourth classifications in violation of the Missouri Constitution.”  
(App. Brief 20). There is absolutely no evidence in the record before this Court to  
support this blanket statement made by Appellants. The statement assumes that  
Pemiscot County and all third and fourth class counties are financially burdened.  
Appellants presented no evidence before the trial court to support this argument,  
and there is nothing in the record before this Court to support a statement that third  
and fourth class counties are financially burdened. The statement also assumes  
that only third and fourth class counties who made the election before August 28,  
2001 are financially burdened. Otherwise, under Appellants’ reasoning, no third or  
fourth class counties would make the election after August 28, 2001 (whether by  
county vote or vote by the county commission) as they are financially burdened as  
a third or fourth class county. This statement is based on irrational speculation and  
should not be considered as a valid reason for finding the statute to be  
constitutional as written.

In support of its argument, Appellants cite to the case *Police Retirement System of St. Louis v. City of St. Louis*, 763 S.W.2d 298 (Mo.App. E.D. 1989). This case involved a change to retirement benefits of individuals who retired before and after a certain date. Those individuals alleged their contributions were not returned. *Id.* at 300. The Eastern District Court of Appeals determined that there was a rational basis for the legislation, as under Article III, §39(3) of the Missouri Constitution legislation cannot grant former employees increased benefits or compensation after the service is rendered. *Id.* at 303.

The present case is not a situation where a retired prosecuting attorney is claiming benefits equal to that of a current prosecuting attorney. Instead, the current full-time prosecuting attorney of Pemiscot County is claiming he is entitled to equal compensation through the retirement system as that of other current, full-time prosecuting attorneys. The prosecuting attorney of Pemiscot County is not claiming “additional compensation” after services were rendered, but is instead claiming the compensation that should have been provided to him as his services were rendered, and as he continues to provide services to the citizens of Pemiscot County.

Appellants also make general reference to a few cases from other states and federal courts that are inapplicable to the present set of facts. There is clearly a

distinction in the present case from the situation of treating employees differently based upon their years of service, as in *Hall v. Board of Trustees of Arkansas Public Employees*, 671 F.2d 269 (8<sup>th</sup> Cir. 1982). In the present case, there is no attempt to distinguish individuals based on years of service or when a person retires. (*Gulbrandson v. Carey*, 901 P.2d 573 (Mont. 1995); *Hughes v. Judges' Retirement Board*, 282 N.w.2d 160 (Mich. 1979)).<sup>5</sup> Instead, the statutes place a select few full-time prosecuting attorneys - those who are only entitled to part-time benefits - in a different class from other full-time prosecuting attorneys, based on nothing more than the arbitrary date chosen in legislation as to when the citizens voted to elect the prosecuting attorney as a full-time position. There is no rational basis to any legitimate state purpose in the distinction between the two groups, and therefore, the statutes violate the Equal Protection clauses of the United States and Missouri Constitutions.

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<sup>5</sup>Appellants also cite to *U.S.S.R. Retirement Board v. Fritz*, 449 U.S. 166, (1980).(Phasing out retirement benefits under federal law to retired railroad workers who were receiving a windfall in their retirement by receiving both railroad retirement benefits and Social Security benefits.) This situation is clearly inapplicable to the facts before this Court.

A statute is to be interpreted to avoid a constitutional confrontation if possible. *State v. Williams*, 787 S.W.2d 308, 312 (Mo.App. E.D. 1990). The law favors construction of statutes that “harmonizes with reason, and which tends to avoid absurd results.” *Beal v. Board of Education, Laclede County School Dist. R-1*, 637 S.W.2d 309, 311 (Mo.App. S.D. 1982). “When statutes are loosely drawn, strict meaning and arrangement of individual words are not as persuasive for purposes of statutory construction as are a reasonable meaning of the words in accordance with the legislative objective.” *Id.*

In *St. Louis Police Officers’ Assoc. v. Sayad*, 685 S.W.2d 913, 916 (Mo.App. E.D. 1984), the Eastern District Court of Appeals dealt with a rule implemented by the St. Louis Police Officers’ Association relating to citizen complaints. The issue was whether the new rule applied only to new complaints, or also to old complaints. The new rule, as interpreted by the board, placed officers in two categories based solely on his or her tenure with the department, with expungement of unfounded complaints only applying to new complaints. The court noted that the board did not advance any reason why the rule should apply to new complaints but not old complaints. *Id.* at 917. “Even utilizing the ‘rational-relation-to-some-legitimate-state-interest’ test for equal protection it is apparent that the disparate treatment has questionable constitutional validity.” *Id.* In interpreting a statute,

the court noted that courts should, if possible, utilize a construction which will avoid invalidity. *Id.* at 918. The court then looked at the purpose of the rule, which was to prevent unfounded citizen complaints from being used against officers in matters of discipline or promotion and found the purpose was served by applying the rule to all complaints, old and new. *Id.* The purpose was not served by disparate treatment of similarly situated officers, with the Eastern District Court noting that the courts favor construction which avoids unjust or unreasonable results and that gives effect to legislative intent. *Id.*

The purpose of the revisions to RSMo. §56.807 was to restructure the payment system of PACARS and provide that counties which had elected to make the position of prosecuting attorney full time would have to pay in an amount equal to other counties who had full-time prosecuting attorneys. (See Senate Bill Summary, L.F. 43). In other words, the purpose and objective was to provide that full-time prosecutors received full-time benefits. The purpose of the legislation is served by requiring all counties who have made an election to make the prosecuting attorney full time to make the same payment into the PACARS retirement account, not just those that make the election after August 28, 2001. To rule otherwise, would be to say that the six counties who made the election before August 28, 2001, do not have to pay the same amount as other counties. No

objective is served by creating a subclass of full-time prosecuting attorneys. The prosecuting attorneys from those six counties would not receive the same full-time retirement benefits,<sup>6</sup> although they might arguably be entitled to the same retirement benefits as full-time prosecuting attorneys from first class counties or counties which made the election after August 28, 2001.<sup>7</sup>

This results in disparate treatment of the prosecuting attorney in Pemiscot County to similarly situated counties who were first class counties or who made an

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<sup>6</sup>Two of those six counties, Lincoln and Stone, are paying full time benefits into PACARS despite making the election to full time prosecuting attorney before August 28, 2001.

<sup>7</sup>There is also an additional argument that despite Pemiscot County not paying into PACARS full time benefits the prosecuting attorney in that county is still considered full time for purposes of the statutes relating to PACARS. In that situation, PACARS may be responsible for paying the Pemiscot County prosecuting attorney the same benefits as other full-time prosecutors irregardless of the amounts paid by Pemiscot County and to the detriment of the other counties. If insufficient funds are generated to provide the benefits payable pursuant to the provisions of sections 56.800 to 56.840, the board is to proportion benefits according to the funds available. RSMo. §56.800.

election after August 28, 2001. There is no rational relationship to any legitimate state interest by interpreting the statute in the way advanced by Appellants so as to conclude that only counties which made the prosecuting attorney full time after August 28, 2001 are entitled to full-time benefits. Instead, the only interpretation of the legislative intent to avoid constitutional questions is to strike the unconstitutional language, thereby requiring all counties which had elected to make the position of prosecuting attorney a full time position pay the same amount. To allow the offensive language creates constitutional questions of Equal Protection.

In addition, Pemiscot County, despite having a full-time prosecutor, is essentially arguing that it only has to pay the same amount as it would had the county not elected to make the prosecuting attorney a full-time position and the position remained part time. Had the citizens of Pemiscot County not made the election to have a full-time prosecuting attorney, there is no question that Pemiscot County would only make the payment outlined in RSMo. §56.807 for counties of the third class. Appellants have paid into PACARS the same amount as it did prior to the election making the prosecuting attorney a full time position, or \$375.00. (L.F. 37). Respondent argues that Pemiscot County was and is required

to pay into PACARS \$1,291.67 for the time period of August 28, 2001 to August 27, 2003 and \$646.00 from August 28, 2003 to present.<sup>8</sup> RSMo. §56.807.

Appellants have argued to the trial court and the Southern District that RSMo. §56.807 creates four “distinctively different classes of prosecutors” who are entitled to the higher monthly retirement of full-time benefits. (L.F. 13). These classifications are: (1) prosecutors for counties of first classification; (2) prosecutors in counties that pursuant to RSMo. §56.363 elected to make the position full time *after August 28, 2001*; (3) prosecutors in third class counties whose county commission has elected a full-time retirement benefit pursuant to RSMo. §56.363.3;<sup>9</sup> and (4) prosecutors in the city of St. Louis. (L.F. 16). The

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<sup>8</sup>RSMo. §56.807 provides that up until August 27, 2003, counties with first class prosecutors or counties which had elected to make the position full time pursuant to RSMo. §56.363 were to pay into PACARS \$1,291.67 compared to \$375.00 for prosecutors in third-class counties. Starting August 28, 2003, this amount changed to \$646.00 and \$187.00 respectively. (Resp.App. A20).

<sup>9</sup>Respondent concedes that the Pemiscot County Commission could elect to have a full-time benefit paid to its prosecuting attorney and has not done so, however, Respondent would also point out that there is no incentive for a commission to voluntarily agree to pay more when it can have a full-time

classification system advanced by Appellants leaves out full-time prosecutors whose counties made the election before August 28, 2001. Appellants argue the prosecuting attorneys in those select counties such as Pemiscot County are only entitled to benefits of other third and fourth class counties that are not required to have, and do not have, full-time prosecuting attorneys. The classifications advanced by Appellants creates a disparity among similarly situated full-time prosecuting attorneys. There is no rational relationship to a legitimate state purpose in excluding six prosecuting attorneys based on an arbitrary date.

Appellants are paying part-time benefits for a full-time service being provided to its county. In addition, under the statutes, the prosecuting attorney, as a full-time position, is no longer able to engage in a private practice. RSMo. §56.067 (Resp.App. A17). Therefore, the prosecuting attorney is no longer able to supplement his or her income or retirement. Any full-time prosecuting attorney is entitled to full-time benefits, and to interpret the statute otherwise violates Equal Protection.

Appellants state on page 19 of their brief that “this is only logical, as the voters of third and fourth-class counties who voted for a full-time prosecutor before the substantial increase in monthly contributions approved by the  

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prosecutor without having to pay full time retirement benefits.

Legislature in the 2001 legislative session could not make an informed decision about the financial obligations that accompanied their decision until Senate Bill 290 was enacted. (App.Brief, p. 19). Appellant fails to also state that in 2003, RSMo. § 56.807 was again revised by Senate Bill 5, which reduced the amounts to \$187.00 for third and fourth-class counties and \$646.00 for first-class counties and counties which elected to make the position full time. (L.F. 43; Appellants' App. A22). When the voters of Pemiscot County made the decision to have its prosecuting attorney as a full-time position it is logical to assume that such a decision would result in increased compensation, both in salary and retirement benefits, as PACARS was established before the election was made, as were the statutes setting forth the salary for prosecuting attorneys. The citizens of Pemiscot County do not set the salary of the prosecuting attorney, which is set by statute, as are the retirement benefits. It is logical to assume that the salary and benefits would increase over time, although in the present case, the retirement benefits have actually been reduced. Because the benefits are statutorily set, the voters could make an informed decision about the financial obligations. Appellants' argument amounts to nothing more than an attempt to pay part-time services for full-time work.

The trial court, in dicta from its original decision which was appealed to the

Court of Appeals, acknowledged that the action of the legislature, whether intentional or not, had been to create a “small group of ‘second class’ prosecuting attorneys in the state of Missouri.” (L.F. 3; Resp.App. A37). The trial court also noted the absurdity of this action stating, “It seems absurd to the Court that those prosecuting attorneys from counties who elected to have full time prosecutors prior to August 28, 2001 shall be treated differently from those where similar action was taken subsequent to that date.” (L.F. 3; Resp.App. A37). In its subsequent Judgment and Order which is now before this Court on appeal, the trial court again noted the disparity created by the language of the statutes in ruling that portions of the statute were unconstitutional. (L.F. 138; Resp.App.A2). The trial court stated in paragraph 6 of its Judgment and Order:

This distinction between the retirement benefits received by full-time prosecutors in third class counties is not based on length of service, the date of retirement, or even when the prosecutors first began working full-time. This disparity in treatment among full-time third class county prosecutors is based solely on the date of the county election. Defendants’ argument that this serves a legitimate state purpose of protecting those counties that elected prior to August 28, 2001

to make the prosecutor's position full-time from a great financial obligation is unpersuasive. Counties whose votes freely elected to have a full-time prosecutor assumed the risk of greater expenditures for compensation for that prosecutor including adjustments to salary and retirement contributions. Defendants' contention implied the legislature should be prevented from modifying contribution requirements without first seeking voter approval. This cannot be what the legislature intended. Furthermore, the Court finds no other set of facts which can justify this difference in treatment.

(L.F. 141-142; Resp.App. A5-A6).

The unconstitutional and arbitrary nature of the statutes is most evident when looking by way of example at the annual annuity which retired prosecuting attorneys are to receive upon retirement based solely on the arbitrary date of August 28, 2001. Prosecuting attorneys who were made full-time prosecuting attorneys prior to August 28, 2001 and prosecuting attorneys of first and second-class counties receive fifty percent of the final average compensation. RSMo. §§ 56.816.2 and 56.816.3. (Resp.App. A24). However, a full-time prosecuting attorney who became full-time before August 28, 2001 is based on years of service

under RSMo. § 56.816.1. RSMo. §56.816 (Resp.App. A24).

Full-time prosecuting attorneys receive compensation equal to the compensation of an associate circuit judge. RSMo. § 56.265.1(1). According to the 2005-2006 Missouri Blue Book, associate circuit judges make \$96,000.00. See also, RSMo. §§ 476.405 and 478.018. Under the argument advanced by Appellants, the prosecuting attorney in Pemiscot County would only be able to receive either \$105.00 or \$130.00 (depending upon years of service) multiplied by the number of two-year periods, while his counterparts will be entitled to fifty percent of his or her final average compensation. RSMo. § 56.816.<sup>10</sup> (Resp.App. A24). The difference in retirement is based solely on the date in which the prosecuting attorney became full-time, which ironically, was before the other full-time prosecuting attorneys. All would be doing the same full-time job, yet a select few would receive significantly lower retirement.

The various classifications of full-time prosecutors as Appellants would

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<sup>10</sup>Assuming the salary for full-time prosecuting attorneys is the same for a period of 20 years, the average annual retirement would be \$48,000 per year. A prosecuting attorney in Pemiscot County, working full-time for the same 20 years would receive only \$15,600.00 per year in retirement benefits. ( $\$130 \times 10$  (number of two-year periods)  $\times 12$  months).

have this Court follow are not rationally related to any legitimate state interest. What legitimate state interest exists in excluding a select few full-time prosecutors simply because of the date they became full time? Respondents did not provide the trial court with any legitimate basis, nor can one be advanced. Equal Protection requires that the select language be stricken as indicated by the trial court to avoid invalidity. (See L.F. 143; Resp.App. A2). The purpose of the legislation is served by requiring all counties who have made the election to make the prosecuting attorney full time to make the same payments into the PACARS retirement system, not just those of first class or those who made the election after August 21, 2001.

**2. The amounts of contributions set by the statutes at issue do not create an unfunded mandate so as to violate Article 10, sections 16 and 21 of the Missouri Constitution, also known as the Hancock Amendment.**

Appellants argue that the increase in the mandated monthly contributions to PACARS as a result of Senate Bill 290 in 2001 constitute an unfunded mandate in violation of the Hancock Amendment, found at Article X, §§ 16 and 21 of the Missouri Constitution (“Hancock Amendment”) because there is no accompanying “state appropriation.” Appellants once again fail to mention that the RSMo. §56.807 has again been revised by Senate Bill 5 in 2003, which actually

significantly reduces the financial obligations of counties. (Appellants' App. A22).

Appellants do not cite to any case law in support of either argument.

Article X of the Missouri Constitution, is commonly referred to as the Hancock Amendment. MO.CONST., Art. X, §21. (Resp.App. A15). Section 21 of Article X states as follows:

The state is hereby prohibited from reducing the state financed proportion of the costs of any existing activity or service required of counties and other political subdivisions. A new activity or service or an increase in the level of any activity or service beyond that required by existing law shall not be required by the general assembly or any state agency of counties or other political subdivisions, unless a state appropriation is made and disbursed to pay the county or other political subdivision for any increased costs.

MO.CONST., Art. X, §21. (Resp.App. p. A15. Section 16 of Article 10 of the Missouri Constitution states:

Section 16. Property taxes and other local taxes and state taxation and spending may not be increased above the

limitations specified herein without direct voter approval as provided by this constitution. The state is prohibited from requiring any new or expanded activities by counties and other political subdivisions without full state financing, or from shifting the tax burden to counties and other political subdivisions. A provision for emergency conditions is established and the repayment of voter approved bonded indebtedness is guaranteed. Implementation of this section is specified in sections 17 through 24, inclusive, of this article.

MO.CONST., Art. X, §16 (Resp.App. A14). These sections were adopted in November 1980. Under Appellants' reasoning, the entire fund violates the Hancock Amendment, as long before Pemiscot County made its election to full time, the statute imposed that the funds be paid from the general revenues of the various counties, no matter what the classification. See RSMo. §56.807.1. Even as a part-time position, the statute still imposed a set amount to be paid into PACARS long before the citizens of Pemiscot County voted to make the position full time. The statutes establishing the retirement system, from their inception, provided that funding for the retirement system was to be paid by the counties. There has never been a state appropriation for the funding of PACARS.

However, Article VI, Section 11 of the Missouri Constitution provides, in part, as follows:

1. Except in counties which frame, adopt and amend a charter for their own government, the compensation of all county officers shall either be prescribed by law or be established by each county pursuant to law adopted by the general assembly. **A law which would authorize an increase in the compensation of county officers shall not be construed as requiring a new activity or service or an increase in the level of any activity or service within the meaning of this constitution...**

MO. CONST. Art. VI, §11 (Emphasis Added)(Resp.App. p. A10). This was amended to include bold language in 1986. The language used in the amendment to this constitutional provision uses the same language as section 21 of the Hancock Amendment, by stating “a new activity or service or an increase in the level of any activity or service” and similar language to that of section 16. It is

clear that the Amendment to Article VI, §11 was meant to address unintended issues caused by the Hancock Amendment.

Prior to the amendment to Article VI, §11 of the Missouri Constitution, the Missouri Supreme Court decided the case of *Boone County Court, et al. v. State of Missouri, Mel Carnahan, Treasurer, et al.*, 631 S.W.2d 321 (Mo.banc 1982). The Court found that because of the language of the Hancock Amendment, the legislature could not increase the salary for second-class county collectors without an appropriation by the State to the county to pay for the increased costs. *Id.* at 326. The Court also looked at Article VI, §11 of the Missouri Constitution, however, this was before it was amended. Under the amended Article VI, §11, the result would not be the same. The amendment to MO. CONST. Art. VI, §11 in 1986 was clearly meant to limit the impact of the Hancock Amendment and to allow the legislature to establish the compensation to be paid to county officials without requiring state funding.

In addition, this Court recently decided the case of *Neske v. City of St. Louis*, 218 S.W.3d 417 (Mo.banc 2007) which addresses similar issues raised by Appellants relating to the Hancock Amendment. *Neske* involved the issue of whether requiring the city to pay amounts under the police retirement system and the firemen's retirement system violated the Hancock Amendment. Like

PACARS, these retirement systems were created by, and governed by statute and administered by a board of trustees. *Id.* at 420. The Court determined that despite the fact that the dollar amounts increased beyond that certified for the 1980-1981 fiscal year, the city's requirement remained unchanged as it was still required to pay the entire amounts certified by the retirements funds boards of trustees. *Id.* at 422. While *Neske* involved a fund that had been established prior to the adoption of the Hancock Amendment, any alleged increased activity is a result of the citizens of the county voting to increase the activity by having a full-time prosecutor, and the retirement system, and the formula for funding the system, existed in place long before that election.

The prosecuting attorney of Pemiscot County is a county officer. The position is an elected position within the county. The statutes at issue involve the compensation of prosecuting attorneys through the retirement system. Therefore, the Hancock Amendment does not apply to the current situation in light of Article VI, Section 11 of the Missouri Constitution. In addition, Pemiscot County is also receiving the benefit of the full-time services of a prosecuting attorney. The increased compensation to the prosecuting attorney is a result of the citizens voting that the position be full-time, and not as a result of a state mandate for increased activity. Because the increase in compensation is not the imposition of an

unfunded mandate in violation of the Hancock Amendment, there is no legitimate state interest in making the classifications among various full-time prosecuting attorneys based on the arbitrary date of August 28, 2001.

The trial court correctly determined that the offending and unconstitutional language of sections 56.363, 56.807 and 56.816 be stricken and that the remaining provisions could and should remain valid. In the present case, “enough remains, which is good, to clearly show the legislative intent, and to furnish sufficient details of a working plan by which that intention may be made effectual...”  
*Gramex Corp. v. Von Romer*, 603 S.W.2d 521 (Mo. 1980). The offending and unconstitutional language contained in these statutes can be fixed with this Court’s “pen” while still keeping the legislative intent the same - providing prosecuting attorneys with retirement benefits - by affirming the decision of the trial court.

### **CONCLUSION**

The statutes as currently written create a sub-class based on an arbitrary date of August 28, 2001. The effect of this is to establish that six full-time prosecuting attorneys are not entitled to the same benefits of other full-time prosecuting attorneys. This cannot reasonably be the intent of the legislature as there is no rational relationship nor any plausible reason for such a distinction.

The trial court correctly found in favor of Respondent PACARS in determining that the classifications created in the statutes results in disparity in retirement benefits among members of the same class, and that such classification was not rationally related to any legitimate state interest. There is no rational relationship to any legitimate state interest in creating a separate and sub-class of full time prosecuting attorneys based on the date of August 28, 2001. Equal Protection requires that this Court affirm the decision of the trial court in striking the unconstitutional language, while still preserving the legislative intent of providing retirement benefits to prosecuting attorneys.

The trial court correctly ruled in striking the unconstitutional language. Respondent PACARS respectfully requests this Court affirm the decision of the trial court.

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**CERTIFICATE OF COMPLIANCE**

The undersigned hereby certifies that:

1. This brief complies with the information required by Rule 55.03.

2. This brief complies with the limitations contained in Rule 84.06(b).

3. The brief complies with the page limits of Rule 360.

4. The word count of this brief is 9859 words and the line count is 1091.

5. The disk served with the briefs filed to the Court and the disk served with the briefs to the Appellant have been scanned for viruses and are virus-free.

6. The brief was prepared using “Times New Roman” in 14 point font, in WordPerfect 10.0.

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**CERTIFICATE OF SERVICE**

The undersigned attorney for Respondent hereby certifies that the original and nine copies of Appellant's Brief were mailed to the Clerk of the Missouri Supreme Court on the 11<sup>th</sup> day of March, 2008, and further certifies that two copies of Respondent's Brief was mailed on said date, U.S. Mail, postage prepaid, to Mr. Wendell L. Hoskins II, Law Office of Wendell L. Hoskins II, 404 Ward Avenue, Post Office Box 1115, Caruthersville, MO 63830.

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-  
Subscribed and sworn to before me this 11<sup>th</sup> day of March, 2008.

\_\_\_\_\_  
Notary Public - Sharon J. Lee

My Commission Expires:

August 6, 2010