

**IN THE  
SUPREME COURT OF MISSOURI**

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**Cause No. 84659**

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**STATE ex rel. KATHLEEN DIEHL,**

**Relator,**

**v.**

**HONORABLE JOHN R. O'MALLEY  
Judge, Division 6,  
Circuit Court of Jackson County, Missouri,**

**Respondent.**

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**BRIEF OF AMICI CURIAE  
ASSOCIATED INDUSTRIES OF MISSOURI, GREATER KANSAS CITY CHAMBER  
OF COMMERCE, MISSOURI BANKERS ASSOCIATION, MISSOURI CHAMBER  
OF COMMERCE AND INDUSTRY AND  
THE NATIONAL ASSOCIATION OF MANUFACTURERS**

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## **STATEMENTS OF INTEREST**

The Associated Industries of Missouri represents the interests of over 1,500 small and large Missouri businesses. Since 1919, AIM has represented the interests of Missouri employers before the General Assembly, state agencies, the courts and the public.

The Greater Kansas City Chamber of Commerce is the oldest and largest business organization serving the bi-state area. There are over 7500 companies that belong to the GKCCC. The GKCCC and its member companies are committed to the continuous improvement of the business environment in Greater Kansas City.

Founded in 1891, the Missouri Bankers Association is an organization of 388 state and national chartered banks, trust companies, savings and loans and savings banks. The MBA represents small and larger financial institutions employing over 30,000 employees in almost 1,900 Missouri locations.

The Missouri Chamber of Commerce and Industry is the largest statewide general business organization in Missouri. The Missouri Chamber represents almost 3,000 small and large employers and 200 local chambers. The Missouri Chamber understands the quality of life in our State depends on quality jobs for Missourians. To that end, the Missouri Chamber has one simple mission: to protect and advance Missouri business.

The National Association of Manufacturers – 18 million people who make things in America – is the nation’s largest industrial trade association. The NAM represents 14,000

members (including 10,000 small and mid-sized companies) and 350 member associations serving manufacturers and employees in every industrial sector and all 50 states.<sup>1/</sup>

As set forth in their motion for leave to file this brief, the Amici, as representatives of Missouri's employers (and particularly its small employers), have a keen interest in the issue before this Court: whether claims made under the Missouri Human Rights Act ("MHRA") must be tried to a jury. Requiring a jury trial would upset the balanced, detailed remedial scheme adopted by the General Assembly, and may increase plaintiffs' propensity to bypass the investigation and conciliation process before the Missouri Human Rights Commission mandated by the statute. Mandating jury trials would also increase the cost, and unpredictably, of MHRA litigation, an issue which is of particular interest to the smaller employers subject to the MHRA (but who are not otherwise subject to Title VII of the federal Civil Rights Act, or are subject only to capped damages under the federal statute). Further, jury trials could result in higher, unjustifiable, actual and punitive damage awards, an outcome the legislature clearly considered in explicitly providing for bench trials under the MHRA.

### **STATEMENT OF FACTS**

The Amici add the following to the statements of fact provided by Relator and her amicus.

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<sup>1/</sup> Collectively, the amici curiae seeking to support Respondent's position will be referred to as the "Amici."

## Legislative History of the Missouri Human Rights Act

In 1961, the General Assembly passed legislation making unlawful certain discriminatory employment practices. §§ 296.010, et seq., RSMo. (Supp. 1961); Apdx at A1-A4. This legislation was the predecessor to the Missouri Human Rights Act (“MHRA”), § 213.010, et seq. RSMo. (2000). The legislation created the Missouri Human Rights Commission and, in cases in which the Commission upon hearing determined an unlawful employment practice had occurred, empowered the Commission to order the violator to “cease and desist from such unlawful employment practice and to take affirmative action to require reinstatement or upgrading of employees with or without back pay. . . .as in the judgment of the commission will effectuate the purposes of this chapter.” § 296.040.6 RSMo. (Supp. 1961).

The law also provided for judicial review of the Commission’s orders by trial de novo in circuit court. Id. at § 296.050.1. Under the law, any party to the trial was entitled upon request to “a trial of the issues by a jury.” Id.

The legislature amended the statute in 1965, providing that review of the Commission’s orders would be governed by Chapter 536 RSMo. (1959), so that trial would be to the circuit court and not to a jury. § 296.050.3 RSMo. (Supp. 1965); § 536.140.1 RSMo. (1959) (“The court shall hear the case without a jury. . ..”); Apdx at A5-A6.

In 1986, § 296 RSMo. was repealed and replaced by § 213, commonly known as the MHRA. Sections §§ 213.010, et seq. RSMo. (1986). Section 213.111 of the MHRA allowed a person complaining of an unlawful discriminatory practice to “bring suit before a circuit or associate circuit judge.” Id. at § 213.111.1. In such an action, “the court” could

“grant as relief, as it deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order, and may award to the plaintiff actual and punitive damages, and may award court costs and reasonable attorney fees to the prevailing party. . . .” Id. at § 213.111.2.

In 1989 the General Assembly passed an amendment to Section 213.111 providing: “Such an action shall be tried before a jury if one is requested by either party.” Mo. H.B. 758, Apx at A7-A8. Governor Ashcroft vetoed the bill on July 14, 1989. July 14, 1989 Veto of H.B. 758, Apx at A9-A10. He did so because the Missouri Commission on Human Rights voted to withhold support for the bill and the Governor agreed he could “see no positive public policy benefit from” the bill. Id. He noted further:

“The Human Rights Commission was established to focus and expedite the processing of human rights complaints. To the extent that individuals bypass the Commission, that purpose is not achieved. This bill may prompt some complainants to abandon the Human Rights Commission process and file suit in circuit court. This could undermine the purpose of the administrative process, delay resolution of discrimination claims and contribute to a backlog of cases in the judicial system. For these and other reasons, this bill is inconsistent with the practice in most other states.

For the above and foregoing reasons, House Bill No. 758 is returned and not approved.” Id.

Since 1989, the legislature has repeatedly addressed the issue of whether to amend Section 213.111 to provide for a right to jury trial. Each year since 1998 alone, proponents

have introduced such amendments. Apdx at A11-A23. In 1998 and 2000, the National Employment Lawyers Association and the Missouri Association of Trial Attorneys testified at committee hearings on behalf of the proposed amendments. Apdx at A12, A17.<sup>2/</sup>

No such proposed amendment has become law.

### **Relator's Claims**

Relator's first amended petition alleges NASD Regulation, Inc. discriminated against her on the basis of her age and sex and retaliated against her – all in violation of the MHRA. First Am. Pet., Ex. B to Relator's Pet. for Writ of Prohib.

Relator seeks past and future “damages in the form of lost salary, emotional pain, suffering, mental anguish, inconvenience, and loss of enjoyment of life.” Id. at ¶ 15. She also seeks attorneys fees and costs. Id. at ad damnum clause. Relator limits her request for relief to \$75,000. Id.

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<sup>2/</sup> The St. Louis Chapter of the National Employment Lawyers Association has, of course, submitted a brief as an amicus curiae to this Court. Relator's counsel, Mr. Meyers, is an esteemed member of the plaintiffs' bar and, according to the website for the Missouri Association of Trial Attorneys, Mr. Meyers serves on its board of governors. Apdx at A29.

## ARGUMENT

The Court should discharge its preliminary writ of prohibition. The General Assembly’s unmistakable intent in crafting the MHRA was to require that any claims pursued in court be tried to the court. The Missouri Constitution does not mandate a right to jury trial on MHRA claims and indeed the Court is required to defer to the legislature’s determination of proper policy.<sup>3/</sup>

### **I. WEIGHING PUBLIC POLICY, THE LEGISLATURE DETERMINED THAT MHRA CLAIMS, IF PURSUED IN THE COURTS, MUST BE TRIED TO THE COURT.**

Neither Relator nor her amicus argue the MHRA itself provides claimants a right to jury trial. They cannot do so because the plain language of the statute and its legislative history make such an argument untenable. Where “the legislature has spoken on the subject, the courts must defer to its determinations of public policy.” Budding v. SSM Healthcare System, 19 S.W.3d 678, 682 (Mo. 2000).

#### **A. The MHRA’s Plain Language Requires Trial to the Court.**

Section 213.111 of the MHRA authorizes a person complaining of an unlawful discriminatory practice to “bring suit before a circuit or associate circuit judge.” Section 213.111.1 RSMo. (2000). In such an action, “[**t**he court may grant as relief, as **it** deems

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<sup>3/</sup> As Respondent suggests, a writ of prohibition is inappropriate here because Respondent ruled in conformity with the controlling authority on the issue and Relator has an adequate remedy through appeal of any alleged error. State ex rel. Chassing v. Mummert, 887 S.W.2d 573, 577 (Mo. 1994).

appropriate, any permanent or temporary injunction, temporary restraining order, or other order, and may award to the plaintiff actual and punitive damages, and may award court costs and reasonable attorney fees to the prevailing party. . .” *Id.* at § 213.111.2 (emphasis supplied). Under the statute, even the award of actual or punitive damages lies within the court's discretion: the court "may" award such damages, "as it deems appropriate."

This language cannot reasonably be interpreted to require anything but trial to the court. *Budding*, 19 S.W.3d at 680 (“The Court’s role. . .is to ascertain the intent of the legislature from the language used, to give effect to that intent if possible, and to consider the words used in their plain and ordinary meaning.”).<sup>4/</sup>

**B. The MHRA’s Legislative History Confirms the Legislature’s Intent.**

If there could be any doubt about the legislature’s intent on this issue, the MHRA’s legislative history completely dispels it.

In 1989 the General Assembly passed an amendment to Section 213.111 providing: “Such an action shall be tried before a jury if one is requested by either party.” Mo. H.B. 758, Apdx at A7-A8. Explicitly considering the public policies at issue, including the

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<sup>4/</sup> The legislature’s intent is bolstered further by the context in which the cause of action is granted. *Robbins v. Dir. of Revenue*, 893 S.W.2d 894, 897 (Mo. 1995) (statutory construction requires determining legislative intent based on words used and their context; related words and phrases should be considered together). Section 213.111.2 grants the court discretion to award actual and punitive damages in the same phrase it grants the court discretion to award injunctive relief, costs and attorneys fees – all forms of relief exclusively governed by the court and not a jury.

importance of the Missouri Human Rights Commission's administrative process of discrimination claims, the governor vetoed the bill. July 14, 1989 Veto of H.B. 758, Apdx at A9-A10.

Since 1989, the legislature has repeatedly readdressed the issue of whether to amend Section 213.111 to provide for a right to jury trial. Each year since 1998 alone, proponents have introduced such amendments. Apdx at A11-A23.

No such proposed amendment has become law.

These proposed – but ultimately rejected – amendments confirm beyond dispute the legislative intent clearly expressed in the statute's plain language. State ex rel. Tolbert v. Sweeney, 828 S.W.2d 929 at 931-32; State ex inf. Danforth v. David, 517 S.W.2d 56, 58 (Mo. 1974) (amendatory legislation “is properly considered” to determine meaning of original statute).

**C. The Legislature Balanced Competing Interests by Applying the MHRA to Small Employers and Allowing for Uncapped Damages (and a Broad Range of Equitable Relief) in Trials to the Court.**

Unlike its principal federal counterpart, Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, et seq. (“Title VII”), the MHRA applies to employers with as few as six employees and it does not limit the damages available to claimants. Compare 42 U.S.C. § 2000e(b) (defining “employer”) with § 213.010(7) RSMo. (same) and 42 U.S.C. § 1981a (limiting compensatory and punitive damages for intentional discrimination, depending on the size of the employer) with § 213.111.2 RSMo. (2000).

The General Assembly chose to balance competing policy interests by making the MHRA applicable to small employers and allowing claimants to pursue uncapped damages, but by simultaneously requiring that any suit for such damages be tried to the court. As one commentary observes: “There is a balance inherent in the employment provisions of the MHRA: MHRA plaintiffs may be entitled to recover unlimited. . .damages for intentional discrimination, but only experienced fact-finders (i.e., judges) may award such damages.” Seyferth & Knittig, A Conflict of Balances: The Adjudication of Missouri Human Rights Act Claims in Federal Court, 63 Mo. L. Rev. 307, 309-13 (1998).

Absent a constitutional mandate to the contrary (which as explained below does not exist), this Court “must defer to [the legislature’s] determinations of public policy.” Budding, 19 S.W.3d at 682.

**II. THE MISSOURI CONSTITUTION DOES NOT PROVIDE A RIGHT TO JURY TRIAL FOR MHRA CLAIMS.**

After repeatedly losing their battle in the legislature to amend the MHRA to provide for jury trials, the Missouri Trial Attorneys Association and the National Employment Lawyers Association (see footnote two, above), on behalf of Relator, are creatively attempting to obtain that result from this Court.

Relator's underlying suit was crafted as a vehicle to advance this policy-making agenda. One can reasonably assume Relator did not unintentionally limit her claim to \$75,000 (the threshold for federal diversity jurisdiction) or fail to assert available federal age, sex and retaliation claims (thereby avoiding federal question jurisdiction). First Am. Pet.; 28 U.S.C. §§ 1331 & 1332. These decisions foreclosed NASD Regulation, Inc.'s option to remove the suit to federal court. 28 U.S.C. § 1441.

Relator's end-run around the general assembly, however, falls short. As Respondent's Brief exhaustively and conclusively establishes, the Missouri Constitution does not require that Relator be provided a jury trial on her MHRA claims because:

- MHRA claims are a statutory cause of action created subsequent to the adoption of Missouri's first Constitution in 1820 and they encompass a remedy and cause of action completely foreign and contrary to the common law; and,
  - the MHRA in any event provides an administrative and essentially equitable remedy.
- Hammons v. Ehney, 924 S.W.2d 843, 846-49 (Mo. 1996) (holding: (1) Article I, § 22(a) of the Constitution preserves the right to jury trial as "heretofore enjoyed" and "does not provide a jury trial for proceedings subsequently created[;]" (2) the Court "must look to the essential nature of the action, not merely the remedy sought" to determine if a claim is legal or equitable; and, (3) there is no constitutional right to a jury trial on an equitable

claim); Demay v. Liberty Foundry Co., 327 Mo. 495, 504, 37 S.W.2d 640, 644-45 (1931) (holding no right to jury trial for claims under the Workers Compensation Statute as they provide “a new right and remedy, not theretofore available under the rules of the common law”).

The section of the MHRA authorizing civil claims for alleged unlawful employment practices emphasizes the broad range of equitable relief the legislature deemed necessary to combat discrimination. Section § 213.111.2 RSMo. (2000) (“The court may grant as relief, as it deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order, and may award to the plaintiff actual and punitive damages, and may award court costs and reasonable attorney fees to the prevailing party. . .”).

The MHRA’s legislative history provides further evidence of the administrative and equitable nature of MHRA claims. Under the statute, the Missouri Human Rights Commission plays a vital role in the administration of claims of discrimination:

“The Human Rights Commission was established to focus and expedite the processing of human rights complaints. To the extent that individuals bypass the Commission, that purpose is not achieved. This bill [proposing an amendment to provide a right to jury trial] may prompt some complainants to abandon the Human Rights Commission process and file suit in circuit court. This could undermine the purpose of the administrative process, delay resolution of discrimination claims and contribute to a backlog of cases in the judicial system.”. July 14, 1989 Veto of H.B. 758, Apx at A9-A10.

Section 213.111 of the MHRA simply cannot be divorced from and read to disregard the legislative purpose behind the statute as a whole.

### **III. PUBLIC POLICY WEIGHS AGAINST THE CREATION OF A RIGHT TO JURY TRIAL ON MHRA CLAIMS.**

Contrary to the assertions of Relator's amicus, important public policy considerations militate against the creation of a right to jury trial for MHRA claims. Br. of Relator's Amicus at 15-18.

#### **A. The Legislature is Best Suited to Balance – as It has – the Competing Interests Addressed in the MHRA.**

Perhaps the most important policy consideration is that when the legislature has determined policy for the State in a statute, the Court is ill-equipped to second guess that policy determination. Budding, 19 S.W.3d at 682 (“[T]he courts must defer to the [legislature’s] determinations of public policy.”).

The St. Louis Chapter of the National Employment Lawyers Association (“NELA”) argues juries are better than judges at finding facts. Br. of Relator’s Amicus at 15. Regardless of the accuracy of this doubtful proposition, the legislature has already determined MHRA claims are to be tried to the court.

Balancing a host of important policy considerations, the legislature crafted the MHRA to:

- provide an expedited equitable and administrative remedial structure to combat unlawful discrimination, with an emphasis on conciliation and voluntary elimination of discriminatory practices;

- allow claims to be brought against employers with as few as six employees;
- allow suits for unlimited damages and a broad range of equitable relief; and,
- require that any such suit be tried to the court. Id.; A Conflict of Balances, 63 Mo. L. Rev. at 309-13.

This Court must not accept Relator's invitation to overrule the legislature's policy determinations by stretching beyond recognition the claims for which the Missouri Constitution requires a right to jury trial.

**B. The Creation of a Right to Jury Trial Would Particularly Burden Small Employers.**

Small businesses are vital to our state's economy. According to the United States Small Business Administration, in 1999 Missouri's small businesses (defined as those with less than 500 employees) employed over 1.1 million (or 49.5%) of the state's 2.35 million non-farm, private sector employees. 2002 Small Business Profile: Missouri, Apdx at A32-A33.

According to the United States Census Bureau, in that same year in Missouri, there were:

- 20,523 businesses with between five and nine employees paying 134,426 employees over \$3 million in total payroll; and,
- 12,449 businesses with between ten and nineteen employees paying 165,777 employees over \$4.1 million in total payroll. Statistics of U.S. Businesses: 1999: All Industries Missouri: By Employment Size of Enterprise, Apdx at A34.

In deciding to apply the MHRA to employers with as few as six employees, the legislature balanced its decision by requiring that suits be tried to the court.

Overturing the legislature’s policy determination would burden all Missouri employers, but it would especially harm small employers since they typically lack the resources of larger employers. This Court is well aware – as it is expert in the law – that:

- the filing of a petition does not mean a violation of the law occurred;
- regardless of liability for the claims asserted, litigation is expensive;
- if it is determined an employee suffered even minimal damages under the MHRA, the employer bears additional liability for the employee’s attorneys fees but such fees can almost never be recovered if the employer prevails;
- plaintiffs’ lawyers represent employment litigation claimants under contingent fee agreements despite the fee-shifting provisions in employment statutes;
- many employers decide to settle employment litigation claims regardless of liability in order to avoid the cost of litigation; and,
- jury trials, compared to bench trials, are generally more expensive and are considered to carry a greater risk of liability and a “runaway” damages verdict.

The bottom line for Missouri employers is, of course, greatly enhanced employment litigation and settlement costs. The legislature – not this Court – is the proper body to decide whether to impose on Missouri’s employers such added costs to doing business in the state.

**C. The Creation of a Right to Jury Trial Would Result in Venue Shopping and Additional Burden on Missouri Courts.**

NELA argues the legislature’s determination in the MHRA to provide for trial to the Court “generates an incentive” for claimants to “bring their MHRA claims in federal court

instead of state court” because under federal law, they receive a jury trial on those claims. Br. of Relator’s Amicus at 16-17.<sup>5/</sup> This argument does not support the judicial creation of a right to jury trial; rather, the argument illustrates why the Court should not do so because it highlights the frustration of the public policy of Missouri embodied in the MHRA. Missouri public policy is violated not by the state courts’ application of legislative intent but rather by the federal courts when they try MHRA claims to a jury. A Conflict of Balances, 63 Mo. L. Rev. at 309-16.

NELA also asserts MHRA claimants’ decisions to pursue litigation in federal court result in a “significant loss of community control” because in federal court “jurors are drawn from a wide geographical region. . . .” Br. of Relator’s Amicus at 17-18.

NELA’s argument – that a jury drawn from a smaller area is somehow more "representative" of the community than a jury drawn from a larger area – lacks merit for at least two reasons.

First, as Judge Wolff articulated last year in the context of personal injury venue litigation in the Circuit Court for the City of St. Louis, the narrow jury pools NELA apparently seeks are not representative of the community at large:

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<sup>5/</sup> Federal courts allow for a jury trial on MHRA claims pursuant to the Seventh Amendment of the federal Constitution. Gipson v. KAS Snacktime Co., 83 F.3d 225, 230-31 (8<sup>th</sup> Cir. 1996). The Seventh Amendment does not apply to actions in state court. Hammons, 924 S.W.2d at 848 n.3; See also A Conflict of Balances, 63 Mo.L. Rev. at 309-16 (exploring differences between the Missouri and federal constitutional law on the issue).

“If litigants were to get the same jury whether they are in city or county, they would get juries more broadly representative of the St. Louis community, and the question of venue would be of much less importance.

\* \* \*

From an advocate’s perspective, venue . . . is all about jurors.

\* \* \*

As to juries, the goal is a diverse cross-section widely representative of the community at large. To achieve this goal, the laws relating to juries should be changed to eliminate the distinction between city and county jurors by combining the jurors into a single jury pool.

The distinction between city jurors and county jurors has a tendency to skew the jury composition of those separate jurisdictions so as to be unrepresentative of the community at large. The population changes in the city and county since 1945 give these separate jurisdictions jury pools that appear to be substantially segregated by race and socioeconomic status, even though the county’s population has become more diverse in recent years.

\* \* \*

...[J]uries ought to be drawn from both city and county so that they may more accurately reflect the racial, ethnic, religious, economic, geographic diversity of the entire St. Louis community.” State ex rel.

Linthicum v. Calvin, 57 S.W.3d 855, 859-60, 862 (Mo. 2001) (Wolff, J., concurring and dissenting in part).<sup>6/</sup>

Moreover, as MHRA claims would be filed in those jurisdictions perceived to be advantageous to plaintiffs, judicial creation of a right to jury trial would add a considerable (and unequal) burden on Missouri trial courts. Linthicum, 57 S.W.3d at 860-61 (noting the “tremendously disproportionate” jury burden carried by citizens of St. Louis city).<sup>7/</sup> It would also encourage the very venue machinations Judge Wolff decried in Linthicum.

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<sup>6/</sup> NELA’s focus on obtaining a narrow jury pool also provides evidence of the plaintiff’s bar’s motivation for seeking to get this Court to overrule legislative policy. As advocates who earn money based on contingent fees, they would benefit if they are able to obtain jury trials on MHRA claims in venues where jurors are perceived to be predisposed to such claims.

<sup>7/</sup> According to the Administrative Office of the United States Courts, in fiscal year 2001, plaintiffs filed in the United States District Courts for the Eastern and Western Districts of Missouri approximately 934 cases of the type likely to contain MHRA claims. Table C-3 to Federal Judicial Caseload Statistics (2001) (civil rights, private cases), Apx at A41. If the Court created a right to jury trial in state court for MHRA claims, one can reasonably assume the plaintiffs’ bar would file almost every suit in state court and would file suits they would not have filed absent the change in law. The net result would be an almost inevitable tidal wave of new litigation in Missouri’s courts, primarily targeted at the Circuit Courts of St. Louis City and Jackson County.

In short, granting the request of the plaintiffs' bar through Relator would not only improperly overrule the legislature's determination of the correct policies for MHRA litigation – that judicial policy-making would itself be unwise.

### **CONCLUSION**

For the reasons set forth above, the Court should discharge its preliminary writ of prohibition.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the above Brief of Amici Curiae, together with a copy of the brief on diskette, was hand-delivered, on this 20<sup>th</sup> day of November, 2002, to:

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Attorneys for Relator

I hereby certify that a copy of the above Brief of Amici Curiae, together with a copy of the brief on diskette, was served by first class mail, postage prepaid, on this 20<sup>th</sup> day of November, 2002, to:

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**CERTIFICATE REQUIRED BY RULE 84.06(C)**

I hereby certify:

1. I am an attorney practicing law with the law firm of Bryan Cave LLP, 3500 One Kansas City Place, 1200 Main Street, Kansas City, Missouri 64105-2100. My telephone number is (816) 374-3200. My Missouri Bar Number is indicated below.
2. I am one of the attorneys submitting the foregoing Brief for the Amici Curiae supporting Respondent.
3. The foregoing Brief complies with Supreme Court Rule 55.03 and with the limitations contained in Supreme Court Rule 84.06(b). Based on the word-counting feature of the Microsoft Word software used to prepare this Brief, the Brief contains 4,190 words.
4. I have filed a copy of the foregoing Brief with the Court on diskette, and have served a copy of that diskette on each party and the amicus curiae supporting Relator. The diskettes have been scanned for virus and that the diskettes are virus-free.

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