

**IN THE SUPREME COURT OF MISSOURI**

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**SC88368**

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**MISSOURI ALLIANCE FOR RETIRED AMERICANS, et al.,  
Plaintiffs-Appellants,**

**v.**

**DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS,  
DIVISION OF WORKERS' COMPENSATION,  
Defendant-Respondent.**

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**Appeal from the Cole County Circuit Court  
Nineteenth Judicial Circuit  
Honorable Byron L. Kinder, Judge**

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**BRIEF OF *AMICUS CURIAE* THE  
MISSOURI ASSOCIATION OF TRIAL ATTORNEYS  
IN SUPPORT OF PLAINTIFFS-APPELLANTS**

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## **INTEREST OF THE AMICUS CURIAE MATA**

The issues presented by this case are of vital importance and interest to all Missourians in addition to the immediate parties, including the Missouri Association of Trial Attorneys (“MATA”). MATA is a non-profit, professional organization consisting of approximately 1,400 trial attorneys in Missouri, most of whom represent citizens of the state of Missouri in the civil justice system including workers compensation claims. For over fifty years, MATA lawyers have vigilantly worked to protect their clients and Missouri citizens from injustice. The first objectives of MATA since its founding are to uphold and defend the Constitution of the United States of America and the Constitution of the State of Missouri. In doing so, MATA strives to promote the administration of justice, to preserve the entire civil justice system, and to apply its knowledge and experience in the field of law to advance the interests and protect the rights of individuals. MATA's members and their clients will be immediately and greatly affected by the Court's decision in this case.

Because the trial court’s ruling upholds a statutory scheme which will drastically and unconstitutionally reduce the ability for injured workers to receive prompt and just compensation, and risks a statutory framework and body of jurisprudence which has protected Missouri’s citizens and workers for over 80 years, MATA’s interest in ensuring that the workers’ compensation act in Missouri does not leave injured workers or their

surviving families without adequate remedy for injuries sustained as a result of their employment for Missouri's employers cannot be overstated.

This brief *amicus curiae* is submitted in support of the Plaintiffs (Appellants) and addresses the issues presented for review in a broader and different perspective than the perspectives presented by the parties. In particular MATA wishes to supplement Appellants' arguments by emphasizing and underscoring the significant policy reasons why the trial court's decision is incorrect, and further emphasizing the implications and the broad scope of the devastating impact of this sweeping piece of legislation on both the workers' compensation and civil justice systems in Missouri. For these reasons, MATA and its members on behalf of their clients—and on behalf of every employee in Missouri—have the most compelling interest in helping to explain why this Court should reverse the decision below and strike down the provisions of Senate Bill 1 and 130 as passed by the legislature in 2005.

### **CONSENT OF THE PARTIES**

MATA has received written consent from the Plaintiffs-Appellants, and from the Defendant-Respondent Labor and Industrial Relations Commission, Division of Workers' Compensation, to file this brief *amicus curiae*. Therefore, MATA is filing this amicus brief pursuant to Rule 84.05(f)(2).

## **STATEMENT OF JURISDICTION**

The sole issue in this action is the validity of Missouri's Workers Compensation Law, RSMo Chapter 287, as amended by Senate Bills 1 and 130 ("SB1") in 2005, under the Constitution of the United States and the Missouri Constitution. Specifically, whether the Workers Compensation Law as amended by SB1 violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment and the due process and open courts guarantees of the Missouri Constitution, Art. I, §10 and Art. I, §14. This Court therefore has exclusive appellate jurisdiction under Article V, section 3, of the Missouri Constitution.

## **STATEMENT OF FACTS**

MATA adopts and incorporates Plaintiffs-Appellants' Statement of Facts, and only adds that Senate Bills 1 and 130 (SB1) were introduced and passed by the majority of both houses of the General Assembly within just 72 days.

**POINTS RELIED ON**

**I. The court below erred in granting Defendant's Motion for Summary Judgment because Plaintiffs' Petition for Declaratory Judgment presents a justiciable controversy.**

Missouri Health Care Ass'n v. Attorney General of the State of Mo.,

953 S.W.2d 617 (Mo. 1997)

Duncan v. Missouri Bd. for Architects, Professional Engineers and Land

Surveyors, 744 S.W.2d 524 (Mo. App. 1988)

Farm Bureau Town and Country Ins. Co. of Missouri v. Angoff, 909 S.W.2d 348

(Mo. 1995).

**II. The trial court erred in granting Defendant's Motion for Summary Judgment and denying Plaintiffs' Motion for Partial Summary Judgment Because the provisions of Senate Bill 1 Violate the due process and open courts guarantees of the Missouri Constitution and the Fourteenth Amendment Due Process Clause in that the act no longer provides workers certain or adequate substitute remedy for work related injuries.**

New York Central R. Co. v. White, 243 U.S. 188, 203 (1917)

Smothers v. Gresham Transfer, Inc., 23 P.3d 333, 340-45 (Ore. 2001)

Strahler v. St. Luke's Hosp., 706 S.W.2d 7 (Mo. 1986)

Injured Workers of Kansas v. Franklin, 942 P.2D 591, 623 (Kan. 1997)

**III. The lower court erred in denying Plaintiffs' Motion for Partial Summary Judgment and granting Defendant's motion because the amendments to the workers' compensation act contained in Senate Bill 1 violate due process and equal protection in that the legislation bears no rational relationship to the legislature's purpose.**

Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 173 (1972)

Murphy v. Commissioner of Dept. of Indus. Accidents, 612 N.E.2d 1149  
(Mass. 1993)

Missourians For Tax Justice Educ. Project v. Holden, 959 S.W.2d 100, 104  
(Mo. 1997)

Kelo v. City of New London, 545 U.S. 469, 488, 490, 491 (2005)

## **BACKGROUND AND SUMMARY**

The provisions of SB1 were not merely changes to the way in which workers compensation benefits are obtainable in Missouri, but as a whole consisted of a drastic, wholesale change to the entire Missouri Workers Compensation Act, and indeed to the very fundamental purpose of workers' compensation in this country. SB1 excludes large classes of injured workers from coverage, and denies coverage for injuries which are clearly work-related, but have been deemed uncompensable for reasons wholly unrelated to proper function of the legislature or the workers compensation law. The amendments of SB1 were far more sweeping and cut benefits and compensation more drastically than any of the prior sets of amendments to Missouri's workers compensation law since its adoption in 1926, when it was deemed to be one best laws workers compensation laws in the country. After SB1, it has been called one of the worst.

To be clear, SB1 was in no way a "compromise" or the result of negotiation—it was passed by a newly elected legislative majority within just 72 days and signed into law by the majority party's Governor with little to no input allowed from the minority party or the many of the groups affected by the workers compensation system, and with little real debate. Not a single provision benefiting injured workers was included in SB1.

SB1 breaches the social contract that was the basis of the entire workers compensation statutory scheme by unilaterally negating the *quid pro quo* given to

employees in exchange for their common law rights and those rights guaranteed by the United States and Missouri Constitutions.

Workers compensation laws were also founded on the basis “that the cost of business should be borne by business.” However, for the first time, the workers compensation laws—that is to say, the injuries and deaths of working Missourians—are being used instead as an economic development tool as an enticement for businesses and corporations, with little to no indication that they could even be effective as such.

The widely touted purpose of SB1 was to attract and keep employers in Missouri, but the arbitrary, capricious, and discriminatory restrictions and limitations contained in SB1 simply have no rational or reasonable relationship to that end, even if it were a permissible one. It is not only fundamentally unfair for an injured worker to be denied benefits under the workers compensation act after having been stripped of all common law and tort causes of action by the same law, but it violates those rights guaranteed in the United States Constitution and the Missouri Constitution. For the reasons set forth herein, and because SB1 so eviscerates the workers compensation law and the necessary requisite of assured, certain, and immediate benefits, it violates the rights guaranteed Missourians in both the United States Constitution and the Missouri Constitution. As such, SB1 must be overturned by this Court.

## ARGUMENT

### **I. THE COURT BELOW ERRED IN GRANTING DEFENDANT’S MOTION FOR SUMMARY JUDGMENT BECAUSE THE PLAINTIFF’S PETITION FOR DECLARATORY JUDGMENT PRESENTS A JUSTICIABLE CONTROVERSY.**

The court below erred in holding that Plaintiffs had failed to present a justiciable controversy, as this cause of action fully satisfies each of the necessary requirements of a presently-existing controversy admitting of specific relief, a legally protectible interest, a ripe controversy, and an inadequate remedy at law. Plaintiffs’ challenge to the constitutionality of SB1 is now properly and finally before this Court.

#### **A. Plaintiff’s Petition Does Not Merely Seek an Advisory Opinion but Presents a Presently Existing Controversy Seeking Specific Relief**

In adopting the Defendant’s Proposed Findings of Fact, Conclusions of Law, and Judgment in its entirety, the lower court held that no “real, substantially, presently-existing controversy” exists because “the plaintiffs’ claims rest on hypothetical scenarios.” However, plaintiffs’ Petition properly seeks redress for the drastic changes to the workers’ compensation act made by SB1 which became law on August 28, 2005.

The far-reaching amendments to the workers compensation act in SB1 drastically reduced coverage for all employees in Missouri and those covered by the act, substantially increasing their risk of medical expenses, lost income, and loss of

compensation for personal injury, disability, and death, which is clearly a legally protectible interest of the Plaintiffs' members. As in *Missouri Health Care Association v. Attorney General of the State of Mo.*, 953 S.W.2d 617 (Mo. 1997), the Plaintiffs here—on behalf of all Missouri workers—seek freedom from the constraints of an unconstitutional law, and are entitled to legal protection. To hold otherwise would substantially delay and diminish the ability of all Missourians to be free of unconstitutional legislation.

**B. This Court Clearly Has Jurisdiction to Decide the Constitutionality of SB1 Without Prior Administrative Determination, the Matter is Ripe, and Plaintiffs Have No Other Adequate Remedy at Law**

The lower court's opinion also held that Plaintiffs' claims are not ripe, apparently because the Labor and Industrial Relations "Commission has exclusive jurisdiction to decide questions such as whether an incident is covered by the law, or other questions requiring agency expertise. The plaintiffs' individual members have not exhausted their administrative remedies." Opinion at 7.

Such holding misstates the law, as the Commission lacks any authority to declare any statute unconstitutional. As held in *Duncan v. Missouri Bd. for Architects, Professional Engineers and Land Surveyors*, 744 S.W.2d 524, at 531 (Mo. App. 1988), "Administrative agencies lack the jurisdiction to determine the constitutionality of statutory enactments. Raising the constitutionality of a statute before such a body is to present to it an issue it has no authority to decide. The law does not require the doing of a

useless and futile act. We see no logical reason to require that a constitutional challenge to the validity of a statute be raised before an administrative body in order to preserve the issue for appellate review.”

It is also well settled that “Where there is a constitutional challenge to a statute which forms the only basis for granting declaratory judgment, exhaustion of administrative remedies is not required.” *Farm Bureau Town and Country Ins. Co. of Missouri v. Angoff*, 909 S.W.2d 348, 353 (Mo. 1995). The Defendant-Respondent would require individual injured workers who’s workers compensation benefits are being denied under SB1 to file their Claim for Compensation with the Division of Workers Compensation, navigate through the ever increasing maze of administrative rules and requirements necessary to have a Final Hearing before an Administrative Law Judge, and then to appeal the Division’s Award to the Labor and Industrial Relations Commission, only to have to then argue the constitutionality of the statutes to the Court of Appeals or to this Court. Obviously such a scenario would not only be extremely burdensome if not devastating to the injured worker, it would waste an enormous amount of administrative and judicial resources and further delay this determination by a number of years. The law does not require such an exercise in futility to be free of an unconstitutional law.

Further, this matter is ripe for determination as it is a constitutional challenge to the severe reduction of the rights and benefits properly afforded and reserved to all workers in Missouri under the U.S. and Missouri Constitutions. No further events or

actions need occur before this Court can decide the constitutional issues raised by this case, as the provisions of SB1 became effective on August 28, 2005. Plaintiffs' Petition and Motion for Partial Summary Judgment is a challenge to SB1 on its face. Because organizations may seek a declaratory judgment that a statute or regulation is unconstitutional prior to enforcement against its members, this matter is ripe and properly before this court. See *Missouri Health Care Association v. Attorney General of the State of Mo.*, 953 S.W.2d 617, 621 (Mo. 1997).

The court also erred in finding that Plaintiffs have "an adequate remedy at law – administrative remedies under the workers compensation law, as provided in Chapter 287...". As discussed above, those remedies are manifestly not an adequate remedy at law, as the Labor and Industrial Relations Commission does not have the authority to rule on the constitutionality of the workers' compensation law as amended by SB1. See *Duncan, supra*. This matter is properly squarely and finally before the Court.

**II. THE COURT BELOW ERRED IN GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT BECAUSE THE PROVISIONS OF SENATE BILL 1 VIOLATE THE DUE PROCESS AND OPEN COURTS GUARANTEES OF THE MISSOURI CONSTITUTION AND THE FOURTEENTH AMENDMENT DUE PROCESS CLAUSE IN THAT THE**

**ACT NO LONGER PROVIDES WORKERS CERTAIN OR ADEQUATE  
SUBSTITUTE REMEDY FOR WORK RELATED INJURIES.**

**A. Due Process Requires That Injured Workers Must Be Afforded an Adequate  
Substitute Remedy for Their Common Law Cause of Action**

Missouri's workers compensation act—as with other states' workers compensation laws—is not merely a legislative prerogative or grant, but since its inception has been based upon what is known as the “workers compensation bargain.” 1B Arthur Larson & Lex K. Larson, *LARSON'S WORKERS' COMPENSATION LAW* § 1.04 (2004). In short, employers gave up their fault-based defenses in exchange for immunity from unlimited tort liability. In return, workers' common-law right to sue their employers in tort was exchanged for *assured, certain, and immediate* workers' compensation benefits.

The police power of the Missouri General Assembly is indisputably subject to the constitutional limits of due process. *State ex rel. Carpenter v. City of St. Louis*, 318 Mo. 870, 897 (Mo. 1928). It is equally clear that the Fourteenth Amendment's Due Process Clause is applicable to the states, and applies to workers' compensation laws which attempt to replace civil lawsuits for personal injury. Of course, the Missouri Constitution also guarantees this fundamental right in its own due process clause, Article I, §10.

In applying due process to states' workers compensation laws, the Court in *New York Central R. Co. v. White*, 243 U.S. 188, 205 (1917) cautioned that if the substitute remedy was not adequate—such as if it provided only “insignificant” compensation—it

would violate due process. Similarly, in *Truax v. Corrigan*, 257 U.S. 312, 329-30 (1921), the Court held that abolishing a common law cause of action for injury to person or property without providing an adequate substitute remedy violates due process.

The acceptable substitution of workers compensation laws for tort claims—so long as they afford certain, adequate remedy—has been summarized as a “quid pro quo for potential tort victims.” *Park v. Rockwell Int’l Corp.*, 436 A.2d 1136, 1138 (N.H. 1981). Although the legislature may enact workers compensation laws, including amendments to the law over time, it may not leave the individual without an adequate substitute remedy. Recently, the Oregon Supreme Court set out an excellent discussion of this fundamental principle and its relevance to states’ workers compensation acts in a very straightforward manner in *Smothers v. Gresham Transfer, Inc.*, 23 P.3d 333, at 340-45 (Ore. 2001).

### **B. The Open Courts Guarantee Also Requires That the Legislature Provide An Adequate Substitute Remedy for Causes of Action for Injuries**

The Missouri Constitution further guarantees this principle in both the due process clause, Art I, §10, and also in the open courts guarantee, Art. I, § 14,<sup>1</sup> which has been called “a second due process clause to the state constitution.” *Goodrum v. Asplundh Tree*

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<sup>1</sup> “That the courts of justice shall be open to every person, and certain remedy afforded for every injury to person, property or character, and that right and justice shall be administered without sale, denial or delay.” Mo. Const. Art. I, § 14.

*Expert Co.*, 824 S.W.2d 6, 9 & 10 (Mo. 1992) (en banc). Most state constitutions contain similar provisions, and as the Chief Justice of the Texas Supreme Court has noted, “all states apparently recognize the doctrine of a substitute remedy, or quid pro quo, to justify legislative change.” Thomas R. Phillips, *The Constitutional Right to a Remedy*, 78 N.Y.U. L. Rev. 1309, 1335 (2003). A complete and scholarly analysis of this precise issue has recently been provided by the Oregon Supreme Court, which concludes:

Drafters of remedy clauses in state constitutions sought to protect absolute common-law rights by mandating that a remedy always would be available for injury to those rights. . . . The legislature may abolish a common-law cause of action, so long as it provides a substitute remedial process in the event of injury to the absolute rights that the remedy clause protects. At a minimum, to be remedy by due course of law, the statutory remedy must be available for the same wrongs or harms for which the common-law cause of action existed....

*Smothers v. Gresham Transfer, Inc.*, 23 P.3d 333, 356 (Ore. 2001).

This Court, shortly after statehood, adopted this majority rule: “The Legislature may modify the remedy, but they cannot constitutionally take away all remedy.” *Baily v. Gentry*, 1 Mo. 164 (1822). The “adequate remedy” requirement is also confirmed in Missouri’s well-settled rule that a statute which creates a new cause of action will not be construed as eliminating a common-law cause of action unless the statute affords an

adequate remedy for the harm. *See Everett v. County of Clinton*, 282 S.W.2d 30, 34 (Mo. 1955); *St. Louis County v. Moore*, 818 S.W.2d 309, 310 (Mo. Ct. App. 1991).

Most importantly, this principle also served as the basis for this Court's only decision to date regarding the constitutionality of Missouri's workers compensation law, *De May v. Liberty Foundry Co.*, 37 S.W.2d 640 (1931), in which the plaintiff challenged the workers compensation law as a violation of the open courts guarantee. This Court did not hold that the legislature enjoys unfettered discretion to eviscerate common law rights of action. Rather, the Court stated that Missourians are guaranteed a remedy for "such wrongful injuries to person, property, or character as are actionable or remediable under the rules of the common law..." *Id.* at 645-46.

The Court in *De May* agreed that the legislature is permitted "to substitute a new system for compensation" in place of tort liability, but was clear that the elimination of a recognized common-law remedy comports with the open courts guarantee only where the legislature provides an adequate substitute. *Id.* at 647, quoting *Adams v. Iten Biscuit Co.*, 162 P. 938, 942 (Okla. 1915).

The *DeMay* Court also quoted at length from *Middleton v. Texas Power & Light Co.*, 185 S. W. 556 (1916), citing *Jensen v. Southern Pac. Co.*, 215 N. Y. 514 (N.Y. 1915), reversed on other grounds, 244 U.S. 205 (1917), observing, "It is not accurate to say that the employee is deprived of all remedy for a wrongful injury. He is given a remedy, . . . he is now assured of a definite compensation for an accidental injury

occurring with or without fault imputable to the employer, and is afforded a remedy which is prompt, certain, and inexpensive.” *See De May* at 648.

It is important to note that Missouri’s Worker’s Compensation Act reviewed by the *DeMay* Court was “not in any sense compulsory, but it is wholly elective or voluntary; that is to say, neither an employer nor an employee is *compelled* to accept, or to become subject to, the provision and requirements of such act, but either an employer or an employee may reject the act...” *Id.* at 644. The Act did not become mandatory until amended in 1974, and has not been challenged since. V.A.M.S. §287.030 (2003). Equally important, as Chief Justice Billings later observed, “It was only after finding the existence of this alternative remedy that the Court in *De May* upheld the statute.” *Simpson v. Kilcher*, 749 S.W.2d 386, 395 n.1 (Mo. 1988).

This Court has reiterated the adequate substitute remedy requirement in *Strahler v. St. Luke’s Hosp.*, 706 S.W.2d 7 (Mo. 1986), and struck down a medical malpractice statute of limitations for minors because it “arbitrarily and unreasonably denies them a set of rights without providing any adequate substitute course of action for them to follow.” *Id.* at 12. The *Strahler* Court’s reasoning applies equally to this matter, and the workers compensation act as amended by SB1 must adhere to the “adequate substitute remedy” requirement in order to satisfy the Due Process and the Open Courts guarantees of the Missouri Constitution. Otherwise, these two fundamental guarantees would be empty.

It is also clear that the employee’s right to hold the employer liable for workplace

injuries is among the “recognized causes of action for personal injury” afforded constitutional protection and the adequate substitute guarantee. However, SB1 destroyed any guarantee of “prompt, certain, and inexpensive” adequate substitute remedy under Missouri’s workers compensation act. Under many of the new provisions of SB1, an injured worker will have to bear the ever-increasing costs of medical bills for the injury out of his own pocket, temporary disability wage-loss benefits will be denied, and many workers will receive no compensation at all for their permanent injuries due to the various changes made in the act, which is their exclusive remedy and is now mandatory.

To give but a few examples under SB1, medical treatment and lost wage benefits will be denied if workers cannot overcome the new overly-strict proof requirements for an “accident,” cannot establish the “prevailing cause” of the injury or disease, cannot produce “objective findings” of the injury, or cannot overcome a showing that an “idiopathic” cause was even indirectly responsible. Injured workers in Missouri will be denied any medical care at all—even initial medical treatment—if the accident did not also result in disability, under SB1’s new § 287.020.3(1). It is important to recognize that SB1 not only injects fault into the system, it allows fault-based defenses to result in the *complete denial of all benefits*—not just compensation—including medical treatment.

The court below ignores the adequate substitute remedy requirement, instead creating a new and implausibly overbroad holding that “the legislature was and is free to change the Workers' Compensation Law as it sees fit.” Op. at 4. It is clear that while

elimination of the entire Workers Compensation Act would leave injured workers with their previously existing tort remedy, the legislature cannot effectively eliminate remedies for workplace injuries without providing any adequate substitute in their place. Such a finding would render the open courts guarantee of our Constitution meaningless, even though it was put in place by the people of Missouri as a safeguard to keep “renegade legislatures” in check. The legislature which passed SB1 in less than 72 days was just such a renegade legislature from which the Constitution requires protection.

It is also important to note that this is not an issue of the Court having to decide what the legislature intended, or to decide between two conflicting statutes, but to uphold the language of the Missouri Constitution. The open courts provision of Missouri’s Constitution is unambiguous, and it should therefore be made perfectly clear that the authority of the legislature is not absolute, as the plain language of Article I, Section 14 still protects the absolute “right to certain remedy afforded for every injury to person.”

### **C. Amendments to the Workers Compensation Act Are Valid Only If the Statutes Provide an Adequate Substitute Remedy for All Injuries to the Person**

The constitutional requirement that injured employees be afforded an adequate quid pro quo for their common-law cause of action would also be meaningless if—for example—a subsequent “renegade” legislative majority would be free to amend away the substitute remedy either in one either one act or with multiple amendments over time.

Not surprisingly, many factors (social needs, the workforce, and the nature of work itself) have evolved since the early 1900's and every state has from time to time amended its workers compensation laws. *See generally* Martha T. McCluskey, *The Illusion of Efficiency In Workers Compensation "Reform,"* 50 Rutgers. L. Rev. 657, 767-857 (1998). No state, however, has attempted to amend into law the wholesale exclusion of such large categories of covered workers and injuries as found in SB1.

It is not necessary to determine whether the "quid pro quo" requirement applies to each subsequent set of amendments (such as to those contained in SB1) so that every amendment that disadvantages workers must include an equal advantage. However, it is well settled that the amended act—that is, what is left of it after SB1—viewed in its entirety, must continue to maintain "the integrity of the fundamental quid pro quo." *Thompson v. Forest*, 614 A.2d 1064, 1067 (N.H. 1992).

Kansas recently addressed this issue in *Injured Workers of Kansas v. Franklin*, 942 P.2d 591, 623 (Kan. 1997), where labor unions and individuals brought a declaratory judgment action challenging anti-worker amendments (though not as punitive as SB1). The court restated its holding in *Bair v. Peck*, 248 Kan. 824, 844, 811 P.2d 1176 (1991), "that an originally adequate quid pro quo for the abrogation of a common-law right might become so cut down and diluted that it would no longer be adequate to support the abrogation of the common-law right and would thus violate due process." *Id.* at 620. The

*Franklin* court did not find their amended act had yet gone too far, but reiterated the warning that:

We recognize that there is a limit which the legislature may not exceed in altering the statutory remedy previously provided when a common-law remedy was statutorily abolished. The legislature, once having established a substitute remedy, cannot constitutionally proceed to emasculate the remedy, by amendments, to a point where it is no longer a viable and sufficient substitute remedy.

*Id.* at 622, quoting *Blair* at 1191.

Similarly, labor unions in *Texas Workers' Compensation Commission v. Garcia*, 893 S.W.2d 504 (Tex. 1995), sought a declaratory judgment that amendments to the Texas workers compensation law violated due process and the open-courts guarantee of the Texas constitution. The Texas court concluded that the amended statute continued to provide a more certain remedy than the tort system—irrespective of fault—and thus remained an adequate substitute remedy, but cautioned that further amendments could render benefits “so inadequate as to run afoul of the open courts doctrine.” *Id.* at 521. The Texas law is distinguishable from SB1 in that SB1 now injects multiple fault-based defenses into Missouri’s workers compensation act which allow for denial of *all* benefits.

In addition, in *Baldock v. North Dakota Workers Compensation Bureau*, 554 N.W.2d 441 (N.D. 1996), the Supreme Court of North Dakota reviewed statutory

amendments that limited vocational rehabilitation retraining benefits and warned that “sure and certain” benefits were the basis for the workers compensation bargain and that in reducing benefits, “there is at some point no longer the economic relief bargained for by the injured workers. At that point the legitimate state interest no longer bears any rational relationship to the legislation.” *Id.* at 446 n.4. Missouri’s act does not provide for any vocational rehabilitation retraining benefits, and there can be no doubt that benefits under SB1 are no longer “sure and certain” and will leave countless injured workers completely without redress. SB1 slashes the economic relief to injured workers to the point that it no longer bears any rational relationship the legitimate state interest.

**D. SB1 So Diminishes the Certainty of Compensation Without Regard to Fault that the Missouri Workers Compensation Act No Longer Provides an Adequate Substitute For Workers’ Common Law Cause of Action**

The essential quid pro quo provided to workers in exchange for the exclusivity of remedy for the damages from injury consists of (1) the certainty of “a sure and speedy means of compensation for injuries suffered in the course of employment” and (2) the availability of medical treatment and compensation irrespective of fault. *St. Lawrence v. Trans World Airlines, Inc.*, 8 S.W.3d 143, 149 (Mo. App. E.D. 1999).

SB1 enacted 39 new sections of the Missouri Workers Compensation Law *all* of which shrink the coverage of Missouri workers for on-the-job injuries. Extremely telling—and important in the analysis of the sufficiency of the remaining act—is the fact

that *not a single* amendment increased benefits or broadened the scope of coverage for injured workers. Unlike those amendments to other states laws which were held to be acceptable, SB1 did not merely alter the measure of benefits for certain injuries or curtail certain peripheral benefits. *E.g., Garcia, supra* (the calculation of permanent disability benefits), *Injured Workers, supra* (shortening the notice period, reclassification of shoulder injuries, and retirement benefits offset), *Baldock, supra* (limitation on vocational rehabilitation benefits), *Acton, supra* (restriction on lump sum disability payments).

In distinct contrast, SB1—on its face—excludes large categories of injured workers from any benefits at all. To give but a few examples under SB1, medical expenses will not be paid and disability benefits will be denied unless if the employee cannot prove the injury resulted from a separate “accident,” cannot establish the “prevailing cause” of the injury, cannot produce “objective findings” of the injury, or is unable to affirmatively prove that no “idiopathic” cause was even indirectly responsible for the injury. The employer can even deny all medical care if the accident did not also result in disability, though impossible to know that at the outset prior to even the initial medical treatment.

Perhaps the most far-reaching reduction of benefits in SB1 is drastically increased the level of proof required to prove the work accident was related to the injury or disability, from the former requirement of “a substantial factor” to the new requisite that the accident be “the prevailing factor”. SB1 § 287.020.2 and SB1 § 287.020.3(1).

Since the workers compensation act replaces the common law and tort cause of actions for work-related injuries, the basis of legal causation in the act cannot be higher than that of the negligence law, which is based on foreseeability. Harper, LAW OF TORTS, 258 (1933). In explaining the standards of proof in workers' compensation laws it has been explained that "the essence of the actor's fault is that, although the consequences of his or her conduct were foreseeable, he or she nevertheless carried on that line of conduct. The foreseeability of the consequences is an inextricable part of the fault-character of the act." 1-3 LARSON'S WORKERS' COMPENSATION LAW § 3.06.

Due to the broad coverage and nature of workers' compensation laws, the standard of proof test generally applied is whether there was substantial evidence to support the award of compensation. Various states' laws have used different—though similar—descriptive terms to describe the minimum required quantity of proof necessary to prove a compensable claim: "Among the phrases encountered are "any evidence," "some evidence," "any credible evidence," "substantial evidence," "supported by evidence," and many others." 8-130 LARSON'S WORKERS' COMPENSATION LAW § 130.01. As the United States Supreme Court has expressly held that "substantial evidence" is not a larger quantity than "any evidence," the various adjectives used by different states' laws all describe the same concept. *Del Vecchio v. Bowers*, 296 U.S. 280, 80 L. Ed. 229, 56 S. Ct. 190 (1935); *Centrilift v. Evans*, 915 P.2d 391 (Okla. Ct. App. 1995). SB1 attempts to raise the requisite standard of proof to higher than that found even of the negligence law,

which is in direct violation of the due process and open courts guarantees of the Missouri Constitution, but also of the Due Process and Equal Protection Clauses of the Fourteenth Amendment in that those whose injuries happened to occur at work now have no remedy.

Moreover, SB1 openly and repeatedly injects fault into what was required since its inception to be a “non-fault” system. For example, under SB1, benefits may be taken away in part or even entirely for failing to use a safety device or obey a safety rule (SB1 § 287.120.5), for refusing the employer’s demand for a drug test (SB1 § 287.120.6(3)), or where the injury occurred “in conjunction with” the use of drugs or alcohol, even if drugs or alcohol was not the cause of the injury (SB1 § 287.120.6). Worst of all, older or disabled employees may receive only reduced benefits – or none at all – due to their age or pre-existing disability (SB1 § 287.067.2). Incredibly, under SB1 the employer is allowed—if not encouraged—to cut off the required temporary disability payments by firing the injured employee “for post-injury misconduct” (SB1 § 287.170.3). In short, the law under SB1 no longer provides the “sure and speedy” means of compensation for work-related injuries, much less “a prompt, certain, and inexpensive” adequate substitute remedy for an injured employee’s tort remedy which was the very basis for the constitutionality of the workers compensation law since its inception.

Also quite telling is the fact that the Defendant has not disagreed with the above analysis. Instead, the Defendant argues that—even accepting that SB1 eliminated the constitutionally required quid pro quo for injured workers—those workers are not

deprived of a remedy because they can bring a tort action against their employers. The court below adopted Defendant's proposed Judgment, stating:

In short, the *Deckard* court held, if compensation is not available under the Workers' Compensation Law for a particular injury, the employee is entitled to assert a common law claim in circuit court. SB1 did not change § 287.120 in this regard - employees remain entitled to assert common law claims where the Law does not apply.

Op. at 4.

It is true that many state's courts have held that employees whose injuries are not compensable due to restrictive amendments to the workers' compensation statute must constitutionally be afforded a tort cause of action. *E.g.*, *Automated Conveyor Systems v. Hill*, 362 Ark. 215, 208 S.W.3d 136 (Ark. 2005) (employee whose gradual onset neck injury did not meet the separate "accident" requirement and was not compensable under the Act be afforded a negligence cause of action); *Smothers v. Gresham Transfer, Inc.*, 23 P.3d 333, 362 (Ore. 2001) (where accident was not "the major contributing cause" of the injury or disease as required by statute, worker must be afforded tort remedy). *O'Regan v. Preferred Enterprises, Inc.*, 758 So.2d 124, 134 (La. 2000) (by severely restricting the definition of occupational disease, "the Legislature has, in effect, withdrawn the *quid pro quo* between labor and industry" and employee must be permitted to pursue an action in tort). *See generally* *Eston W. Orr, Jr., The Bargain Is No Longer Equal: State Legislative*

*Efforts to Reduce Workers' Compensation Costs Have Impermissibly Shifted the Balance of the Quid Pro Quo in Favor of Employers*, 37 Ga. L Rev. 325, 353-56 (2002).

This Court, however, has not yet ruled that the exclusivity provision in § 287.120 applies in that exact manner.<sup>2</sup> The appellate court in *Deckard* simply upheld an employee's defamation action against his employer as the harm to his reputation was obviously not due to an "accidental injury or death" provided for in § 287.120.2, and explained the exclusivity test as follows:

The Workers' Compensation Law ... bars common lawsuits for only those damages covered by the law and for which compensation is made

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<sup>2</sup> § 287.120.1. Every employer subject to the provisions of this chapter shall be liable, irrespective of negligence, to furnish compensation under the provisions of this chapter for personal injury or death of the employee by accident arising out of and in the course of his employment, and shall be released from all other liability therefor whatsoever, whether to the employee or any other person. . . .

2. The rights and remedies herein granted to an employee shall exclude all other rights and remedies of the employee, his wife, her husband, parents, personal representatives, dependents, heirs or next of kin, at common law or otherwise, on account of such accidental injury or death, except such rights and remedies as are not provided for by this chapter.

available under its provisions. Section 287.120.2, RSMo 1994; *Gambrell v. Kansas City Chiefs Football Club, Inc.*, 562 S.W.2d 163, 166 (Mo. App. 1978). Thus, an employee is free, despite the Workers' Compensation Law, to bring suit at common law for wrongs not comprehended within the law. 31 S.W.3d 6 at 14 (emphasis added).

Here, the lower court adopted Defendant's view, indicated by its added emphasis above, that the exclusivity provision only encompasses injuries that are both provided for under the workers compensation act and compensated under the workers compensation act. This Court, however, has previously stated: "We do not understand the words 'provided for' to mean 'compensated for'." *Holder v. Elms Hotel Co.*, 92 S.W.2d 620, 622 (Mo. 1936). However, in order to comply with the constitutionally mandated due process and open courts guarantees, an injured worker *must* be compensated under *either* the workers compensation statutory scheme, *or* be free to bring a claim in tort. This court need not decide that issue with this case unless it allows SB1 to stand, in which case the right to bring suit in tort as guaranteed by the constitution must be clearly reaffirmed.

It would be highly unlikely, indeed, that the 2005 Missouri General Assembly intended the interpretation urged by the Defendant. As the lower court indicated, the legislature enacted SB1 to make Missouri more attractive to businesses by attempting to lower costs to Missouri employers. To attempt to do so by removing large categories of injured workers from the workers compensation system which only requires limited

benefits to be paid and thereby allowing them to pursue their tort claims for unlimited damages for the injury itself, physical impairment, lost income, pain and suffering, and even punitive damages, would seem to be completely irrational.

Even a cursory comparison of the much higher awards allowed injured workers under the federal Jones Act, the Federal Employers Liability Act (FELA), the Longshore Act, or other statutory schemes or governmental programs which do not so severely limit the damages due to injured workers—much less under the tort law—makes this quite clear. However, if an injured workers' claim is not compensated for by the workers' compensation law, the constitutionally guaranteed right to a remedy requires that the worker's tort claim must remain.

**III. THE LOWER COURT ERRED IN DENYING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND GRANTING DEFENDANT'S MOTION BECAUSE THE AMENDMENTS TO THE WORKERS COMPENSATION ACT CONTAINED IN SENATE BILL 1 VIOLATE DUE PROCESS AND EQUAL PROTECTION IN THAT THE LEGISLATION BEARS NO RATIONAL BASIS TO THE LEGISLATURE'S PURPOSE.**

As Plaintiffs allege in their Petition and Motion for Partial Summary Judgment, separate and apart from the violation of the due process and open courts guarantees of the Missouri Constitution, the amendments to the workers compensation act made by SB1 violate the Due Process guarantee of Art 1, §10 of the Missouri Constitution as well as

the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution because they simply lack any rational relationship to a legitimate state objective—in this case, to attract businesses by lowering insurance costs.

**A. The Rational Basis Test Requires Both a Legitimate State Purpose and a Factual Basis for the Legislature Reasonably to Believe Its Enactment Would Accomplish Their Objective**

The court below indicated that because no “fundamental right” is at stake, this challenge is governed by the rational basis test. Op. at 2. Although SB1 does not satisfy even this minimal constitutional standard, the proper level of judicial review of these fundamental changes is the strict scrutiny standard. Under the Equal Protection Clause, a statute that “impinges upon a fundamental right explicitly or implicitly protected by the Constitution” is not presumed to be constitutional and must be shown ‘to be necessary to further a compelling state interest.’ *In re Marriage of Kohring*, 999 S.W.2d 228, 232 (Mo. 1999), quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973).

However, simply because workers compensation involves monetary benefits does not render it “mere” economic regulation. See *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 670 (1966) (dealing with a poll tax). The appropriate inquiry is whether the statute “touches upon” constitutionally protected rights. *San Antonio Indep. Sch. Dist.* at 38-39. See also *Mahoney v. Doerhoff Surgical Services, Inc.*, 807 S.W.2d 503, 512 (Mo. 1991) (strict scrutiny appropriate where legislation “touches a fundamental right”).

The right of access to the courts is expressly guaranteed by Art. I, § 14 of the Missouri constitution and is implicitly guaranteed by the Constitution of the United States. *Christopher v. Harbury*, 536 U.S. 403, 415 n.12 (2002). This Court has held that the open courts guarantee was not implicated to trigger strict scrutiny when a sufficient alternative remedy was provided under workers compensation in *Goodrum v. Asplundh Tree Expert Co.*, 824 S.W.2d 6, 10 (Mo. 1992) (en banc), because the claimants' wrongful death claim was not recognized at common law in *Etling v. Westport Heating & Cooling Services, Inc.*, 92 S.W.3d 771, 773 (Mo. 2003) , and because plaintiffs who were subject to a statutory cap on damages were still able to recover all their economic losses and substantial noneconomic damages in *Adams v. Children's Mercy Hosp.*, 832 S.W.2d 898 (Mo. 1992). In this case, however, where large classes of workers are completely deprived of *any* remedy for their injuries, SB1 clearly touches upon a fundamental right. It should be obvious that SB1 does not meet the strict scrutiny standard of review, and the Court is encouraged to properly so hold in striking down SB1 in its entirety.

Arguing, *innuendo*, that the proper standard is rational basis, the same analysis is required under either the due process or equal protection guarantees. *Kelo v. City of New London*, 545 U.S. 469, 490 (2005) (Kennedy, J., concurring); That standard is a two-part test, assessing *both* the legislative ends *and* the *means* used to achieve those ends. The level of judicial scrutiny is "limited to determining that the purpose is legitimate and that Congress rationally could have believed that the provisions would promote that

objective.” *Kelo*, 545 U.S. at 488 n. 20, quoting *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1015, n. 18 (1984). The test is generally decided by the second, ‘means used’ test.

In this case, SB1 fails to satisfy even the rational basis standard. Although making Missouri more attractive to businesses is a legitimate state interest, there was no basis for the legislature to *rationaly and reasonably* believe that the provisions of SB1 would achieve that purpose simply by slashing the number of compensable claims.

**1. Under the first step of rational basis analysis, legislation is be deemed to have a proper purpose if it is found to be related to a legitimate state objective.**

Though the first step of the rational basis test is usually met, the deferential analysis of the first step is not to be carried over into the second step. Legislatures often end their own analysis after the first step, completely ignoring the relationship of the means to the end. The court below erred by also focusing solely on the first step of the two-part analysis, stating “All facts necessary to sustain the act must be taken as conclusively found by the legislature, if any such facts may be reasonably conceived in the mind of the court . . . nor do the courts have to be sure of the precise reasons for the legislation.” Op. at 2. The lower court concluded that the “changes made by SB1 plainly bear a real and substantial relationship to the police power,” Op. at 3, and that “the legislature may seek to foster a pro-business climate through its enactments.” Op. at 5.

It is also evident by the two decisions cited by the lower court and Defendant that the lower court focused only on the “any conceivable set of facts” language properly used

to ascertain whether legislation had a legitimate purpose, and that the court court's ruling essentially only addressed only the first step—whether SB1 is within the police power.

In the case of SB1, the legislative majority's purpose was fairly obvious—though disturbing in that it essentially trades injured workers for corporate welfare—SB1 was enacted as an economic development measure to lower workers compensation costs to employers so as to attract new businesses to Missouri and dissuade existing businesses from relocating elsewhere, as was widely proclaimed by the legislature and Governor.

However, the lower court failed to take up the central and deciding issue—that the legislature lacked any rational basis to expect that the various assortment of amendments contained in SB1 would accomplish its objective. For example, in *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 173 (1972), the Court struck down a state workers' compensation provision under which unacknowledged illegitimate children received less in death benefits than legitimate children. The Court in *Weber* made it clear the focus is *not* on the state's interest, but “what we do question is how the challenged statute will promote it.” Similarly, the proper focus on the legislature's actions here is whether it could reasonably expect the amendments of SB1—not just its stated goal or its many touted purposes which failed to ever materialize in the bill—would accomplish SB1's purported purpose of lowering workers' compensation costs and attracting businesses to come to Missouri or to not leave Missouri for another state or to relocate overseas. To simply state that the police power is broad does not address the constitutionality of the

required reasonable means used to accomplish the stated purpose, or whether there was an objective factual basis for the legislature to believe that SB1 would accomplish such.

**2. The second step of the rational basis analysis requires a factual, objective basis for the legislature reasonably to believe the legislation would accomplish its purpose.**

Even under rational basis review, “the Equal Protection Clause requires more than the mere incantation of a proper state purpose.” *Trimble v. Gordon*, 430 U.S. 762, 769 (1977). The Court’s role is not to routinely rubber-stamp every legislative act that has a plausibly legitimate goal. As the Supreme Court has explained, even under “the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained.” *Romer v. Evans*, 517 U.S. 620, 632 (1996). The “any conceivable set of facts” analysis proffered by the Defendant, here, has no place in this second step of the rational basis test, as Justice Stevens admonished, because such limited judicial review would be “tantamount to no review at all,” *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 323 n.3 (1993) (Stevens, J., concurring).

Rather, review of a statute’s rational relationship to its legitimate state purpose looks to the real world in which the statute will operate. The means to the ends test “will not be satisfied by flimsy or implausible justifications for the legislative classification, proffered after the fact by Government attorneys.” *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 184 (1981) (Brennan, J., dissenting). Quite appropriate to the extensive changes made by SB1, independent judicial review of the factual basis for

legislation is necessary so that the stated public purposes are not merely “incidental or pretextual public justifications” for disadvantaging the burdened group or benefiting special interests. *Kelo, supra*, at 491 (Kennedy, J., concurring). With due respect, Defendant’s justifications for SB1 do seem to be proffered after the fact, if not implausible, particularly when disadvantaging a burdened group (injured workers) or benefiting special interests (business and industry—or more accurately, self-insured big businesses and the insurance industry), as was undeniably the case with SB1.

Certainly, the U.S. Supreme Court has not hesitated to strike down legislation that had a proper objective but did not have “a sufficient factual context for us to ascertain some relation between the classification and the purpose it served.” *Romer*, 517 U.S. at 632-33. For example, in *Murphy v. Commissioner of Dept. of Indus. Accidents*, 612 N.E.2d 1149 (Mass. 1993), the court struck down a filing fee for appeals by workers represented by counsel, holding that the purposes—discouraging frivolous appeals and imposing costs on those who could afford to pay—were legitimate, but that the legislature lacked any factual basis to believe the fees would accomplish its goals. The state failed to show represented workers were more prone to frivolous appeals than pro se claimants, and failed to show that workers retaining counsel on a contingency fee basis were any better off financially than those representing themselves.

In the case of SB1, assuming that the purposes of the law are legitimate, it must still be determined “whether the means chosen to implement the law is rationally related

to achieving that purpose.” *Missourians For Tax Justice Educ. Project v. Holden*, 959 S.W.2d 100, 104 (Mo. 1997). The rational means test is not met here, however.

**B. There Was No Factual Basis Showing a Substantial Relationship Between the Exclusion of Previously Compensable Claims and the Goal of Attracting Businesses**

Making Missouri more competitive in attracting employers and jobs is a legitimate state objective, but the legislature has a wide range of options at its disposal to do so—tax incentives, economic development tools, state-sponsored incentive programs, insurance regulation—without attempting to do so by using injured Missouri workers. However, there was simply no objective, factual basis for the legislature *reasonably* to believe that its attempt to lower workers compensation insurance costs to employers (and not merely increase profits for insurers) by reducing the number of compensable claims under the workers compensation act would achieve that objective. Indeed, the vast amount of factual data available to the legislature prior to enacting SB1 strongly suggested that such an approach would *not* lower insurance premiums or costs to Missouri employers.

**1. Eliminating compensation for injuries is arbitrary and does not in any rational way address the causes of increased workers compensation costs.**

Admittedly, jobs are essential to Missouri’s economy, and controlling workers compensation premiums paid by Missouri employers through accident prevention, administrative efficiency, or even regulation of insurance premiums would be worthwhile

endeavors. However, attempting to reduce workers compensation costs to employers solely by cutting the number of compensable claims is irrational and arbitrary.

First, a legislature does not *rationaly* address the problem of accidental injuries simply by redefining the terms “accident” and “injury.” In striking down a money-saving amendment to their workers’ compensation law, The Montana Supreme Court made this compelling point, which would certainly apply as much or more to the passage of SB1:

Cost-control alone cannot justify disparate treatment which violates an individual’s right to equal protection of the law. Discrimination, that is, offering services to some while excluding others for any arbitrary reason, will always result in lower costs. We do not, however, allow discrimination merely for the sake of fiscal health.

*Heisler v. Hines Motor Co.*, 937 P.2d 45, 52-53 (Mont. 1997). Equally compelling and similarly applicable to the provisions of SB1, the Alaska Supreme Court stated:

[T]he asserted goal of lowering insurance premiums can have no independent force in the state’s attempt to meet its burden under [the rational-basis test]. Although reducing costs to taxpayers or consumers is a legitimate government goal in one sense, savings will always be achieved by excluding a class of persons from benefits they would otherwise receive.

*Alaska Pacific Assurance Co. v. Brown*, 687 P.2d 264, 272 (Alaska 1984). *See also* *Pierce v. LaFourche Parish Council*, 739 So. 2d 297, 300 (La. Ct. App. 1999) holding

that “Reducing the cost of workers’ compensation premiums is a legitimate state goal,” but it was arbitrary to place the burden of reducing premiums on the backs of older workers, and compare to SB1§ 287.067.2 which reduces or completely eliminates disability benefits for older workers due to their age or pre-existing disability; *And See Nyitray v. Industrial Comm’n of Ohio*, 443 N.E.2d 962, 966 (Ohio ) (“conserving funds is not a viable basis for denying compensation to those entitled to it.”).

Secondly, as discussed above, the legislature completely ignored the evidence available from the Defendant that the increases in workers compensation insurance premiums during 2001-2003 were due to the higher cost of reinsurance, uncertainty about terrorism exposure, and insurers’ loss of investment income during the economic downturn—and *not* do to an increased number of claims. Legal File, Vol. 2 at 000252.

Indefensibly—and glaringly so—the 39 newly enacted sections of SB1 addressed *none* of these causes and would *do nothing* to prevent future insurance premium increases under similar circumstances. Instead, the entire focus of the legislation—though ‘focus’ is a misnomer when examining the various sections of the act amended in SB1—simply hoped to lower insurance premiums by reducing the number of compensable claims. And yet it is undisputed that the number of claims did *not* cause the rise in insurance premiums. Indeed, the number of claims declined significantly at the very time insurance premiums were going up. *See Plaintiffs Statement of Facts* at 7; Legal File, Vol. 2 at 000252. It was simply irrational and unreasonable to solely cut the number of claims.

Perhaps most importantly, the legislature had no objective, factual or reasonable basis for believing that the very modest cost savings anticipated under SB1 would at all influence employers' decisions to locate or remain in Missouri. Even NCCI estimated that SB1 would result in a mere 1% decrease in costs, a reduction that the Department of Insurance characterized as "almost no impact." Missouri Dept. of Insurance, *Review of the National Council on Compensation Insurance Workers' Compensation Insurance Advisory Loss Cost Filing Effective January 1, 2006*, and its Exhibit 3a. The Missouri Department of Insurance generally agreed with the NCCI forecast, but suggested that an additional 1.6% might be saved by the increased penalty and fault-based provisions dealing with drugs and alcohol. *See Id.*, and its Exhibit 3b.<sup>3</sup>

The legislature apparently blindly assumed, or perhaps really only hoped—or worse, only hoped that *it would appear* to the public or to certain special interest groups—that various nationwide workers' compensation insurers would pass along any savings from fewer compensable claims under SB1 on to Missouri employers in the form of lower premiums in Missouri, rather than spreading the savings out over other states' premiums, increasing their investments, shareholder dividends, executive compensation,

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<sup>3</sup> The Department of Insurance acknowledged that this figure may be unreliable, noting that there "are not many studies relating directly to workplace injuries involving drugs or alcohol," and the studies the DOI relied on are "old and may not accurately reflect current Missouri circumstances." *See Id.*, and its Exhibit 3c.

retirement packages, administrative expenditures, or corporate profits. Such an assumption or hope fails to provide the objective, factual evidence necessary to prove the substantial relationship required to satisfy the rationality standard.

To the contrary, studies of the impact of cuts in workers' compensation benefits enacted in many states in the early 1990s found that the savings did *not* translate into corresponding reductions in employers' premiums. Instead, employer's costs continued to rise while insurers' profits soared. *See* John F. Burton, Florence Blum & Elizabeth H. Yates, *Workers Compensation Benefits Continue to Decline*, *Workers Compensation Monitor* (July/Aug. 1997); "Benefits Paid Declined But Employers Costs Increased in Early '90s, Researchers Say," 8 BNA's *Workers Comp. Rep.* 488-89 (Sept. 29, 1997); *See also* McCluskey, *supra*, at 713 & 714 ("[W]hile benefit costs declined sharply through the early 1990s nationwide, employers' average costs continued to increase until the mid-1990s [and] on the whole employers' gains have taken the form of stabilized costs rather than major premium reductions." At the same time, "profits for workers' compensation insurers have soared".) It should be noted that the Missouri legislature also amended the workers compensation act in 1993 during that national wave of "reforms."

Even if we assume a 1% or even greater reduction in workers compensation premiums, the legislature had absolutely no *objective factual* basis for expecting that such a reduction would motivate any employer (much less a sufficiently justifiable number of employers) to relocate to Missouri or change its decision to move out of state or overseas.

The objective evidence reveals that the legislature was legislating in the dark and on a fast track in passing SB1 in 79 days, rather than legislating rationally with a factual basis.

Particularly when cutting medical care and wage loss benefits to disabled Missouri workers who have been stripped of their constitutionally guaranteed common law and tort rights, the final connection between the means used—cutting disabled workers out of the system completely—and actually attracting additional businesses to relocate to Missouri or convincing Missouri businesses to not leave the state must be conclusively proven by the legislature. As discussed herein and more fully in Plaintiff’s Motions for Judgment on the Pleadings and Partial Summary Judgment, Defendant failed to meet its burden of proving that the elimination of compensation for injuries—and particularly in the manner and means employed by the various amendments of SB1—has a substantial and rational relationship to the causes of increased workers’ compensation insurance premiums.

**2. SB1 can rationally be expected to result in increased costs to employers.**

The anticipated cost savings, if any, of SB1 from workers compensation insurance premiums did not take into account *increases* to other costs to employers under SB1.

SB1 replaces what was a relatively straightforward standard of compensability previously set forth in part in §287.020.2: “An injury is compensable if it is clearly work related. An injury is clearly work related if work was a substantial factor in the cause of the resulting medical condition or disability. An injury is not compensable merely because work was a triggering or precipitating factor.” V.A.M.S. §287.020 (2003).

Instead, SB1 substitutes a new, complicated definitional matrix of new (and often undefined) terms which by all accounts will result in increased litigation of workers compensation claims, both at the initial hearing level before the Division and then the Commission, and for clarification of the legal issues up through the courts of appeal. Certainly the added complexity of issues and the number and new forms of defenses available to employers will increase both the number of contested cases and the extent of litigation. For example, the new § 287.020.2 of SB1 requires proof of a specific, separate accident resulting in the employee's injury. It's true that during the time when proof of an "accident" was required in Missouri, disputes concerning that requirement accounted for a majority of litigated workers compensation cases. Robert J. Domrese & Stephen L. Graham, *Workmen's Compensation in Missouri*, 19 St. Louis U.L.J. 1, 6 (1974-75). It cannot be disputed that litigation costs will rise—if not skyrocket—under SB1.

Secondly, simply narrowing the definition of "injury" or "accident" covered under the workers' compensation act does not somehow decrease the number of injuries or make the injured workers' medical bills disappear. Those denied workers' compensation coverage for medical care under SB1 will have to rely instead on their employee health insurance, if available. For employers providing health benefits—either by purchasing insurance or under self-funded plans—SB1 simply promises to cost-shift possibly lower workers compensation premiums for most likely significantly higher medical insurance premiums or out of pocket costs. Rationally, SB1 will only make Missouri more

attractive to companies that provide no medical benefits at all, shifting those costs on to the rest of the health care system, or more likely on to the state and to Missouri taxpayers.

In addition, many of the new provisions of SB1 overtly increase the cost of claims. For example, under the new § 287.390.5, if an employee rejects an initial offer of settlement, and if the ALJ or the Commission or the appellate court rules that the injury is not compensable, the employee is still entitled to 100% of the initial offer. Under the new strict construction requirement of SB1 (SB1 § 287.800.1) the result will be higher payments than are legally required or, more likely, an abrupt end to early offers of settlement. In either event, the result will be higher costs to employers.

Another likely a result of the law of unintended consequences, SB1 may actually *increase* claims, or at least costs, over the long term. The workers compensation system as a whole provides a financial incentive for employers to invest in workplace safety—which has consistently been shown to be the easiest and best way to lower costs. As Justice Holmes correctly proffered, “There is no more certain way of securing attention to the safety of the men . . . than by holding the employer liable for accidents.” *Arizona Copper Co. v. Hammer*, 250 U.S. 400, 432-33 (1919) (Holmes, J., concurring).

As much as SB1 might shield employers from responsibility for workplace injuries, it equally reduces the incentive for safety and can rationally be expected to lead to an increase the number of on-the-job injuries and claims. More overtly, SB1 actually discourages workplace safety by removing the incentive for employers to post safety

rules in a conspicuous place on their premises, and decreases the degree of effort required by the employer to cause employees to use safety devices or follow safety rules in order to enforce the newly increased safety penalty. SB1 § 287.120.5.

If workers whose claims are excluded under SB1 are entitled to bring a civil action in tort—as the Missouri constitution requires—then SB1 partly relieves the employer of the obligation to pay the severely limited benefits to those workers under Chapter 287 (particularly under SB1), but imposes liability for unlimited tort damages, including the full compensation for past and future lost income, damages for pain and suffering, and punitive damages. For the majority 2005 legislative majority to suggest that such a “reform” would attract businesses to Missouri is simply irrational, if not ridiculous.

**3. There was simply no rational basis to believe SB1 would result in increasing and retaining employers in Missouri.**

Simply put, the legislature had no *factual* basis to *rationaly and reasonably* believe that attempting to use the workers’ compensation law as an economic development tool would put Missouri at a significant advantage in the competition for employers and jobs. Defendant cannot produce any factual basis, even after the fact, for the legislature to reasonably believe that a substantial number of businesses would make their relocation decisions based upon the methodology used by SB1 to deny benefits to injured workers. In fact, reasonable business owners would recognize the costs would be shifted to their group health insurance plans, not to mention the increased lost time and

the costs of hiring and training replacement workers, caused by cutting the number of compensable work injuries under the act, rather than rationally and reasonably trying to curb the well-recognized cost drivers of workers compensation insurance premiums.

Even if we assume, *arguendo*—despite the severely doubtful prospect for success as described herein—that SB1 showed signs of attracting businesses to Missouri, other states would simply adopt similar and even more restrictive “reforms” which cut benefits, decrease safety, cost-shift to health insurance carriers, and transfer the burden to the worker, to the state, or to society. In the end, Missouri would simply become one of the early leaders in a race to the bottom in the protection of workers—that is, until either the insurance cycle comes around again or other extrinsic economic or political factors prompt another round of “reforms” at the expense of disabled workers.

Such a scenario cannot be described as *reasonable* or rational, and cannot be justified given the extreme toll taken by SB1 on every employee in Missouri. Nowhere does Defendant even attempt to show the required causation step between the various provisions that make up SB1 and the legislative majority’s purported purpose of passing SB1 of actually increasing the number of jobs in Missouri by lowering costs to Missouri employers. Without proof of such, SB1 cannot be found to be a reasonable or rational means to achieve that end, particularly given the severe human costs it will toll. There can be no reasonable belief that in denying medical treatment to injured workers because of their age or disabilities, cutting all benefits by half or eliminating them completely

under a fault-based system—and the other dubious, attenuated means employed by the various provisions of SB1—that workers compensation insurance premiums will be lowered and despite the other increased costs, such changes will cause businesses to come to Missouri or reverse their decision to relocate to another state or overseas.

## CONCLUSION

The Founding Fathers of our nation—and separately, the drafters of Missouri’s first constitution—carefully and wisely adopted a constitutional plan which divides the powers of government among three independent and equal branches and made it “emphatically the province and duty of the judicial department to say what the law is” and to hold invalid legislative acts that contravene the constitution. *Marbury v. Madison*, 5 U.S. (1 Cranch.) 137, 177 (1803). In so doing, the court is “not made the critic of the legislature, but rather, the guardian of the Constitution.” *Kansas Malpractice Victims Coalition v. Bell*, 757 P.2d 251, 256 (Kan. 1988). It is properly this Court’s role—indeed its most important duty—to guard the guarantees and protections contained in the United States Constitution and in the Missouri Constitution.

By drastically cutting coverage for work-related injuries and to whole classes of injured workers, SB1 breaches the social contract that was the basis of the entire workers compensation statutory scheme by unilaterally negating the *quid pro quo* given to employees in exchange for their common law rights and those rights guaranteed by the United States and Missouri Constitutions. The provisions of SB1 no longer allow for the “sure and speedy” means of compensation for work-related injuries, nor provide “a prompt, certain, and inexpensive” adequate substitute remedy for an injured employee’s tort remedy which was the very basis for the constitutionality of the workers compensation law since its inception.

Further, the legislature simply cannot cut benefits to hundreds of thousands of injured Missourians and the families of those killed on the job without having an objective, factual, *reasonable*, and rational basis in believing it will accomplish a legitimate state purpose *without* infringing on those rights guaranteed by the constitution. In viewing the provisions of SB1 objectively and fairly in light of the purposes of the workers compensation act, it cannot be found that the extreme and unprecedented means used by SB1 to cut benefits to Missourians injured as a result of their job are justifiable, even if such means could be proven to be able to reach the legislative majority's purported goal. SB1 directly violates the Constitutional guarantees provided in both the U.S. Constitution and the Constitution of Missouri. It is this Court's duty to protect those rights, protections, and guarantees which Missourians have given themselves in the Constitution, and it is therefore this Court's duty to overturn SB1.

For the foregoing reasons, we urge this Court to reverse the order of the court below, and to Grant Plaintiffs' Motion for Partial Summary Judgment.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

The undersigned certifies that a copy of the computer diskette containing the full text of the Brief of *Amicus Curiae* Missouri Association of Trial Attorneys In Support of Plaintiffs-Appellants is included with this Brief and has been scanned for viruses and is virus-free.

Pursuant to Rule 84.06(c), the undersigned hereby certifies that: (1) this Brief includes the information required by Rule 55.03; (2) this Brief complies with the limitations contained in Rule 84.06(b); and (3) this Brief contains 12,631 words, as calculated by the Microsoft Word software used to prepare this brief.

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that two true and accurate copies of the foregoing was served, via First Class Mail, this 19th day of June, 2007, to:

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