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JURISDICTIONAL STATEMENT

This Appeal involves the question of whether subsections 6 and 7 of Section 162.601, as amended, are unconstitutionally void for vagueness under the Due Process Clause of the Missouri Constitution Article I, Section 10. Because this case involves the validity of a state statute, the Missouri Supreme Court has exclusive appellate jurisdiction pursuant to Article V, Section 3 of the Missouri Constitution.

STATEMENT OF FACTS

Pursuant to Missouri Rule of Civil Procedure 84.04(f), Plaintiffs-Respondents, the Board of Education of the City of St. Louis (hereafter "St. Louis Board") and each of its individual members and Marybeth McBryan, John P. Mahoney as board members and prospective candidates and Albert E. Bender, Sr. as a prospective candidate adopt but also supplement Appellants' Statement of Facts with the following information which was not included in Appellants' Statement of Facts.

I. BACKGROUND

At all times relevant herein, Plaintiffs Marlene E. Davis, John P. Mahoney, Harold M. Brewster, William C. Haas, Marybeth McBryan, William Purdy, Madye Henson Whitehead and Paulette McKinney were members of the St. Louis Board and residents and taxpayers of the St. Louis Public School District (the "School District"). Plaintiff Albert E. Bender, Sr. was a resident and taxpayer of the School District. (L.F. 16).

At all times relevant herein, Plaintiffs McBryan, Mahoney and Bender (collectively the "Individual Plaintiffs") were seeking candidacy for the April 3, 2001 election. (L.F. 18, 33, 35, 37). As candidates intending to run in the April 2001 St. Louis Board election, they were required to file a declaration of candidacy no later than January 16, 2001 (not January 18, 2001 as in Appellants' Statement of Facts). (L.F. 19).

Plaintiffs filed their Petition on July 11, 2000, asking the Cole County Circuit Court to interpret, invalidate or otherwise declare unenforceable the recent amendments to Section 162.601 governing the method of election and qualifications for candidacy for members of the St. Louis Board. (L.F. 2, 22-38) Plaintiffs' Petition claimed that as a

result of the omissions and vagueness in the language of Section 162.601, the St. Louis Board was unable to determine which three subdistricts were to elect representatives at the April 2001 election. (L.F. 23-28). Therefore, it could not include such information when it carried out its statutory obligation to provide Election information to the Board of Election Commissioners of the City of St. Louis ("Election Commissioners") for the April 3, 2001 election. Id. In addition, because Section 162.601 also requires St. Louis Board members to reside in the subdistrict which the member is elected to represent, the Individuals Plaintiffs claimed that they were unable to determine whether they were qualified to run. (L.F. 30-32). Plaintiffs brought their action pursuant to the Declaratory Judgment Act, Section 527.020 of the Missouri Statutes. (L.F. 22).

II. JUDGMENT OF THE CIRCUIT COURT

Upon agreement of the parties, this matter was tried by the court based on the pleadings of the parties, a joint stipulation of facts, and appropriate memoranda of law. (L.F. 2). On November 6, 2000, the Circuit Court entered its decision. (L.F. 39-47).

The Court ruled that the statutory omissions and vagueness found in Section 162.601 impeded the statutory obligation of the St. Louis Board to provide election information to the Election Commissioners for the April 3, 2001 election. (L.F. 42, 44-45). The Court further found that potential candidates for the St. Louis Board, including the Individual Plaintiffs had no way of knowing whether they met the residency requirement of Section 162.601 for openings in the April 3, 2001 election and were thus unable to file. (L.F. 42, 45).

The trial Court ruled that parts of Section 162.601 were unconstitutionality void for vagueness because Section 162.601:

provides for three St. Louis Board members to be elected to represent subdistricts at the April 3, 2001 election, but then fails to provide which three subdistricts will elect Board members; (L.F. 41, 44); and

contains expressly contradictory subparts in subsection 6 and 7; (L.F. 42, 44); and

fails to specify whether a subdistrict could elect only one board member on April 3, 2001 and fails to state who may vote for each candidate. (L.F. 41-42, 44).

The Court also specifically found that the St. Louis Board lacks the requisite power to fill in missing details in Section 162.601 and that this matter presented a justiciable controversy. (L.F. 46).

After finding subsections 6 and 7 of Section 162.601 unconstitutionally void for vagueness, the trial court correctly applied the doctrine of severability to minimize the impact of its decision on the overall statute. Because subsections 1 through 5 and 8 were not "essentially and inseparably connected with and dependent upon" subsections 6 and 7, the Court only found subsections 6 and 7 needed to be stricken. Thus, the trial court found only a portion of Section 162.601 unconstitutional. (L.F. 46-47).

Finally, the trial court noted that subsections 6 and 7 amended the former method of electing members to the St. Louis Board. (L.F. 47). Prior to the amendments, members were elected in at-large elections on a general ticket. Mo. Rev. Stat. § 162.581 (1994). Having found subsections 6 and 7 unconstitutional, the trial court properly reinstituted the provisions of the former Section 162.581 and ordered that St. Louis Board

members will continue to be elected from the city in at-large elections on a general ticket. (L.F. 47). The Appellants do not dispute the correctness of this portion of the trial court decision.

POINTS RELIED ON

I. The Circuit Court Ruled Correctly That Subsections 6 And 7 Of Section 162.601 Are Unconstitutionally Void For Vagueness Because They Fail To Identify Which Three Subdistricts Were To Elect School Board Members At The April 2001 Election

State ex rel. Crow v. West Side St. Ry. Co., 47 S.W. 959 (Mo. 1898).

State ex rel. Mercantile Nat'l Bank v. Rooney, 402 S.W.2d 354 (Mo. 1966) (en banc).

Bodenhausen v. Missouri Bd. of Registration for Healing Arts, 900 S.W.2d 621 (Mo. 1995) (en banc).

Akin v. Director of Revenue, 934 S.W.2d 295 (Mo. 1996) (en banc).

Mo. Const. art. I, § 10.

Mo. Const. art. II, § 1.

Mo. Const. art. III, § 1.

Mo. Rev. Stat. § 115.125 (2000).

Mo. Rev. Stat. § 115.127 (2000).

Mo. Rev. Stat. § 162.571 (2000).

Mo. Rev. Stat. § 162.581 (1994), (2000).

Mo. Rev. Stat. § 162.601 (1994), (2000).

Mo. Rev. Stat. § 162.621 (2000).

Mo. Rev. Stat. § 178.820 (2000).

Mo. Op. Att'y Gen. 236, 3 (1971).

II. The Circuit Court Did Not Err In Ruling That Subsections 6 And 7 Of Section 162.601 Are Unconstitutionally Void For Vagueness Because They Contain Directly Conflicting Provisions As To Who Will Establish The Subdistricts And As Such Are Incapable Of Statutory Construction

Missouri Pac. R.R. Co. v. Morris, 345 S.W.2d 52 (Mo. 1961) (en banc).

Staley v. Missouri Dir. of Revenue, 623 S.W.2d 246 (Mo. 1981) (en banc).

Hyde Park Hous. P'ship. v. Director of Revenue, 850 S.W.2d 82 (Mo. 1993) en banc).

Columbia Athletic Club v. Director of Revenue, 961 S.W.2d 806 (Mo. 1998) (en banc).

Mo. Const. art. I, § 10.

Mo. Rev. Stat. § 162.601 (2000).

III. The Circuit Court Did Not Err In Ruling That Subsections 6 And 7 Of Section 162.601 Are Unconstitutionally Void For Vagueness Because They Fail To Specify Whether Any Subdistrict May Elect Only One Board Member And Fail To State Who Is Entitled To Vote For Each Candidate

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

State v. Burnau, 642 S.W.2d 621 (Mo. 1982) (en banc).

State ex rel. McClellan v. Kirkpatrick, 504 S.W.2d 83 (Mo. 1974) (en banc).

State ex rel. Burke v. Campbell, 542 S.W.2d 355 (Mo. Ct. App. 1976).

Mo. Const. art. I, § 10.

Mo. Rev. Stat. § 79.060 (2000).

Mo. Rev. Stat. § 162.492 (Supp. 1968), (1969), (2000).

Mo. Rev. Stat. § 162.601 (2000).

Mo. Rev. Stat. § 162.865 (1994).

IV. This Court Should Not Invalidate The April 3, 2001 Election Because The Trial Court's Decision Is Within The Standard Of Appellate Review And Because There Is No Showing That The Appellants Contested The Election And There Is No Showing Of Fraud

Kasten v. Guth, 395 S.W.2d 433 (Mo. 1965).

Beatty v. Metropolitan Sewer Dist., 700 S.W.2d 831 (Mo. 1985 (en banc).

Wells v. Noldon, 679 S.W.2d 889 (Mo. Ct. App. 1984).

Armantrout v. Bohon, 162 S.W.2d 867 (Mo. 1942).

Mo. Const. art. I, § 10.

Mo. Rev. Stat. § 115.001 (2000).

Mo. Rev. Stat. § 115.005 (2000).

Mo. Rev. Stat. § 115.013 (2000).

Mo. Rev. Stat. § 115.507 (2000).

Mo. Rev. Stat. § 115.553 (2000).

Mo. Rev. Stat. § 115.575 (2000).

Mo. Rev. Stat. § 115.577 (2000).

Mo. Rev. Stat. § 115.593 (2000).

Mo. Rev. Stat. § 115.600 (2000).

ARGUMENT

The Due Process clause of the Missouri Constitution requires laws to provide: 1) notice to the ordinary person of what conduct is required or proscribed so they may act accordingly; and 2) sufficient standards to those enforcing laws so as to prevent arbitrary and discriminatory enforcement. Mo. Const. art. I, § 10; U-Haul Co. v. City of St. Louis, 855 S.W.2d 424, 426 (Mo. Ct. App. 1993); see also, Missourians for Tax Justice Educ. Project v. Holden, 959 S.W.2d 100, 105 (Mo. 1997). The vagueness doctrine insures that guidance, through explicit standards, will be afforded to those who must apply the statute, avoiding possible arbitrary and discriminatory application. Hampton Foods Inc. v. Wettarau Fin. Co., 831 S.W.2d 699, 701 (Mo. Ct. App. 1992). A statute is unconstitutionally vague when the language is so confusing that its intent cannot be discerned with reasonable certainty. State v. Burnau, 642 S.W.2d 621, 622 (Mo. 1982) (en banc). See also Missouri Pac. R.R. Co. v. Morris, 345 S.W.2d 52, 52 (Mo. 1961) (en banc).

An act of the legislature, to be enforceable as a law, must prescribe a rule of action, and such rule must be intelligibly expressed. State ex rel. Crow v. West Side St. Ry. Co., 47 S.W. 959, 961 (Mo. 1898). A statute requires a competent and efficient expression of the legislative will, and the legislative will cannot be competently expressed when information critical to the manner the legislature intended for the statute to be implemented is missing. Id.

Based on the above principles, subsections 6 and 7 of Section 162.601 violate the Due Process Clause of the Missouri Constitution for several reasons. Foremost among

those reasons is that the subsections fail to identify which three subdistricts were to elect school board members at the April 2001 election. This is not a mere ministerial omission. The matter before this Court involves a legislative act where the General Assembly failed to include critical information as to how it intended to implement a subdistricting scheme for future elections of St. Louis Board members. Amending Section 162.601 by deciding in what order and on what date which subdistricts should elect representatives to the St. Louis Board requires a substantive legislative determination, the authority for which rests exclusively within the province of the General Assembly. The manner and order in which subdistricts are to elect representatives will determine who is eligible to run for office in any given election and who voters may choose. To correct this fundamental omission would require writing an entirely new statutory section — something only the legislature is authorized to do.

In addition, the subsections contain directly conflicting provisions as to who will establish the boundaries of the subdistricts, a conflict that may not be resolved by applying accepted rules of statutory construction. Finally, subsections 6 and 7 fail to specify whether any subdistrict may elect more than one board member and to state who is entitled to vote for each candidate.

In an appeal of a court-tried case, the judgment of the trial court should be upheld unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law. Murphy v. Carron, 536 S.W.2d 30, 32 (Mo. 1976) (en banc). In this case, the circuit court correctly applied the law and exhibited proper judicial restraint in minimizing the

effect of its ruling. As a result, this Court should rule that the trial court did not err in deciding that subsections 6 and 7 of section 162.601 are unconstitutionally void for vagueness.

I. The Circuit Court Ruled Correctly That Subsections 6 And 7 Of Section 162.601 Are Unconstitutionally Void For Vagueness Because They Fail To Identify Which Three Subdistricts Were To Elect School Board Members At The April 2001 Election

A. Subsections 6 And 7 Of Section 162.601 Fail To Identify Which Three Subdistricts Were To Elect Board Members At The April 2001 Election

Section 162.601 states that St. Louis Board members shall be elected to represent seven subdistricts, but there is no statement in Section 162.601, which sets forth which subdistricts were to elect representatives for the April 2001 election, or for other future elections. See Mo. Rev. Stat. § 162.601 (2000). Because the missing information makes it impossible to determine the legislature's intent as to how and in what order it intended the subdistricting scheme to be implemented, the trial court was correct in finding subsections 6 and 7 of Section 162.601 unconstitutionally void for vagueness.

During the 1997-1998 legislative session, the Missouri General Assembly revised Section 162.601 governing the method of election for members of the St. Louis Board. More specifically, Section 162.601, as amended by the Legislature, provides for a transition from a twelve to a seven member St. Louis Board by stating, in part:

> 1. Elected members of the board in office on August 28, 1998, shall hold office for the length of term for which they were elected, and

any members appointed pursuant to section 162.611 to fill vacancies left by elected members in office on August 28, 1998, shall serve for the remainder of the term to which the replaced member was elected.

2. No board members shall be elected at the first municipal election in an odd-numbered year next following August 28, 1998.

3. Three board members shall be elected at the second municipal election in an odd-numbered year next following August 28, 1998, to serve four-year terms.

4. Four board members shall be elected at the third municipal election in an odd-numbered year next following August 28, 1998, and two of such members shall be elected to four-year terms and two of such members shall be elected to three-year terms.

5. Beginning with the fourth municipal election in an odd-numbered year next following August 28, 1998, and at each succeeding municipal election in a year during which board member terms expire, there shall be elected members of the board of education, who shall assume the duties of their office at the first regular meeting of the board of education after their election, and who shall hold office for four years, and until their successors are elected and qualified.

Mo. Rev. Stat. § 162.601 (2000).

This same legislation also altered the election of the St. Louis Board members by requiring that St. Louis Board members be elected from subdistricts, rather than at-large. Specifically, Section 162.601, as amended, continues:

> 6. Members of the board of directors shall be elected to represent seven subdistricts. The subdistricts shall be established by the state board of education to be compact, contiguous and as nearly equal in population as practicable. The subdistricts shall be revised by the state board of education after each decennial census and at any other time the state board determines that the district's demographics have changed sufficiently to warrant redistricting.
>
> 7. A member shall reside in and be elected in the subdistrict which the member is elected to represent. Subdistrict 1 shall be comprised of wards 1, 2, 22 and 27. Subdistrict 2 shall be comprised of wards 3, 4, 5 and 21. Subdistrict 3 shall be comprised of wards 18, 19, 20 and 26. Subdistrict 4 shall be comprised of wards 6, 7, 17 and 28. Subdistrict 5 shall be comprised of wards 9, 10, 11 and 12. Subdistrict 6 shall be comprised of wards 13, 14, 16 and 25. Subdistrict 7 shall be comprised of wards 8, 15, 23, and 24.

Mo. Rev. Stat. § 162.601 (2000).

Although subsection 6 of Section 162.601 states that St. Louis Board members shall be elected to represent seven subdistricts, there is no statement in Section 162.601, or any other statutes governing the St. Louis Board, which set forth which subdistricts

will elect representatives during the stated elections. See Mo. Rev. Stat. § 162.601 (2000). This is in contrast to other Missouri statutes implementing subdistricts, where the legislature was very specific on this issue. See infra at 42-43.

The information missing from Section 162.601 prevents anyone, including the St. Louis Board, from determining the legislature's intent on how the subdistricting scheme should be implemented in the April 2001 and future elections. Section 115.125 of the Missouri Statutes requires the St. Louis Board to provide the Election Commissioners with certain Notice of Election information for school board member elections. Mo. Rev. Stat. § 115.125.1 (2000); (L.F. 17-18).[1] The provisions of Section 115.125 are mandatory, not directory. State ex rel. Referendum Petitioners Comm. Regarding Ordinance No. 4639 v. Lasky, 932 S.W.2d 392, 392 (Mo. 1996) (en banc).

Since Section 162.601 failed to set forth which three subdistricts were to elect representatives at the April 2001 election and other elections in the future, the circuit court correctly found that the St. Louis Board was unable to include the identity of the three subdistricts when it provided the required election information to the Election

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[1] This information includes a certified copy of the legal notice to be published pursuant to subsection 2 of Section 115.127, which must include the date and time of the election, the name of the officer or agency calling the election and a sample ballot. Mo. Rev. Stat. § 115.127.2 (2000); (L.F. 17-18). The Election Commissioners use the sample ballot provided by the St. Louis Board as a basis for the official ballot. See Mo. Rev. Stat. § 115.127.3 (2000); (L.F. 18).

Commissioners for the April 3, 2001 election. (L.F. 42, 44-45). In addition, since Section 162.601 requires that St. Louis Board members be residents of the subdistricts from which they are elected, potential candidates for the St. Louis Board, such as the Individual Plaintiffs, had no way of knowing whether they met the residency requirement of Section 162.601 for openings in the April 3, 2001 election. Mo. Rev. Stat. § 162.601.7 (2000); (L.F. 18-19). Accordingly, the trial judge was also correct to find that the failure of Section 162.601 to name the three subdistricts for the April 2001 election impeded the ability of potential candidates, such as the Individual Plaintiffs from filing in a particular subdistrict. (L.F. 42, 45).

The information the General Assembly failed to include is critical to determining how, when and in what manner it intended to implement a subdistricting scheme for future elections of St. Louis Board members. This is not merely a technical omission. The manner and order in which subdistricts are to elect representatives to the Board of Education is substantive legislation — it will determine who is eligible to run for office in any given election and who the voters may choose.

An act of the legislature, to be enforceable as a law, must prescribe a rule of action, and such rule must be intelligibly expressed. State ex rel. Crow v. West Side St. Ry. Co., 47 S.W. 959, 961 (Mo. 1898). A statute requires a competent and efficient expression of the legislative will. The legislative will is not competently expressed; however, when information critical to the manner the legislature intended for the statute to be implemented is missing. Id. Where the terms of a statute are of such uncertain meaning that courts cannot discern with reasonable certainty what is intended, the

enactment is void. Missouri Pac. R.R. Co. v. Morris, 345 S.W.2d 52, 57 (Mo. 1961) (en banc). Certainly the manner and timing of the legislature's intention in implementing the subdistricting scheme for St. Louis Board members cannot be determined with "reasonable certainty" when the information is missing.

For the above reasons, this Court should uphold the circuit court's finding that subsections 6 and 7 of Section 162.601 are unconstitutionally void for vagueness.

B. Only The General Assembly Has The Authority To Amend Subsections 6 And 7 Of Section 162.601

Under the Missouri Constitution, only the General Assembly has the authority to legislate and make substantive legislative decisions as to the content and language of a statute. Consequently, the trial court was correct that neither the courts nor the St. Louis Board may add to the subdistrict statute new language that specifies which subdistricts shall hold elections first. Such an action lies within the exclusive domain of the legislature. Mo. Const. art. III, § 1.

The Missouri Constitution vests the authority to legislate solely in the General Assembly. Mo. Const. art. III, § 1. It prohibits any of the three branches of government from exercising powers properly belonging to either of the others, unless expressly directed or permitted in the Constitution. Mo. Const. art. II, § 1. Provisions in the constitution that define powers should be strictly construed. State ex rel. Harry L. Hussmann Refrigerator & Supply Co. v. St. Louis, 5 S.W.2d 1080 (Mo. 1928) (en banc).

The trial court correctly acknowledged that although the primary responsibility of a court in interpreting a statute is to determine legislative intent from the statutory

language, it also recognized that the court lacked the authority to add language to Section 162.601. The trial court showed proper restraint in noting that "in construing a statute a court must not add provisions under the guise of construction if they are not plainly written or necessarily implied." (L.F. 42-43).[2] The court cannot supply that which the legislature has, either deliberately or inadvertently, or through lack of foresight, omitted from a statute. State ex rel. Mercantile Nat'l Bank v. Rooney, 402 S.W.2d 354, 362 (Mo. 1966) (en banc). The circuit court's decision not to amend the statute is correct and required by this Court's prior decisions.[3]

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[2] The trial court also correctly acknowledged that the judicial doctrine of severability would not allow it to insert words into Section 162.601 which were not placed there by the General Assembly. (L.F. 46).

[3] It is well established in Missouri that a court will not legislate by adding words to a statute. See e.g., Sayles v. Kansas City Structural Steel Co., 128 S.W.2d 1046, 1054 (Mo. 1939) (en banc) (holding that if a statute needs alteration it is for the legislature, not the courts to do it). See also State ex rel. American Asphalt Roof Corp. v. Trimble, 44 S.W.2d 1103, 1105 (Mo. 1931) (en banc) (courts cannot write into a statute provision not covered by its language); City of Charleston v. McCutcheon, 227 S.W.2d 736, 739 (Mo. 1950) (en banc) (courts cannot write a new law, nor by construction amend an act which the general assembly wrote); Dworkin v. Caledonian Ins. Co., 226 S.W. 846, 851 (Mo. 1920) (en banc) ("The court may feel sure the Legislature meant to include something which by oversight was omitted, yet cannot supply it."); State on Info. of Eagleton v.

It is the role of the General Assembly to amend Section 162.601. The power of the legislature to make laws may not be delegated. Akin v. Director of Revenue, 934 S.W.2d 295, 299 (Mo. 1996) (en banc); see also City of Springfield v. Clouse, 206 S.W.2d 539, 545 (Mo. 1947) (en banc) ("It is a familiar principle of constitutional law that the legislature cannot delegate its legislative powers…."); City of St. Joseph v. Hankinson, 312 S.W.2d 4, 7 (Mo. 1958) (strictly legislative powers may not be delegated to nonlegislative bodies). In interpreting a statute in State ex rel. Crow v. West Side St. Ry. Co., 47 S.W. 959 (Mo. 1898), this Court acknowledged the separation of powers concern when it noted that "[t]he courts cannot venture upon the dangerous path of judicial legislation to supply omissions or remedy defects in matters committed to a co-ordinate branch of the government. It is far better to wait for necessary corrections by those authorized to make them … however desirable they may be, than for judicial tribunals to transcend the just limits of their constitutional powers." Crow 47 S.W. at 961. See also State v. Young, 695 S.W.2d 882, 886 (Mo. 1985) (en banc) (indulging in statutory revision is a matter within the exclusive province of the General Assembly).

Champ, 393 S.W.2d 516, 526 (Mo. 1965) (en banc) (the function of the court is to adjudicate and not to legislate). See also; State v. Haskins, 950 S.W.2d 613, 615 (Mo. Ct. App. 1997) (We approach the task of statutory interpretation mindful that it is the function of the courts to construe and apply the law, and not to make it.); Brant v. Brant, 273 S.W.2d 734 (Mo. Ct. App. 1954) (courts cannot usurp the function of the general assembly and, by construction, rewrite statutes).

The matter before this Court involves a legislative act where the General Assembly failed to include information as to how it intended to implement a subdistricting scheme for future elections of St. Louis Board members. This is not a mere ministerial omission. Amending Section 162.601 by deciding in what order and on what date which subdistricts should elect representatives to the St. Louis Board requires a substantive legislative determination, the authority for which rests exclusively within the province of the General Assembly. This decision will determine which individuals are eligible to run for the St. Louis Board, and when they can run for office, and ultimately decides who the voters may choose to serve on the St. Louis Board. Such a decision rests with the legislature.

This Court should affirm the trial court's decision, rule as it did in Crow, and defer to the legislature to amend subsections 6 and 7 of Section 162.601 in a manner and time frame the legislature deems appropriate.

C. The Appellants' Position That The St. Louis Board Had An Implied Authority To Amend Section 162.601 Is Legally Unsupported And Would Dangerously Enlarge The Scope Of Power For Administrative Agencies Statewide

Appellants' suggestion that the St. Louis Board had an implied power to effectively add language to Section 162.601 and choose which subdistricts were to elect board members at the April 2001 election is legally erroneous. Appellants Br. at 19-23. Such an argument fails for at least three reasons.

First, the "implied authority" rule of law cited by Appellants is a narrow exception that occasionally permits an administrative agency to perform a limited range of actions, and then only when such actions are necessary for the agency to carry out a specific statutory delegation of authority. There is, however, no legal precedent to support the proposition offered by Appellants, that a duty placed generally upon administrative agencies in one statute may serve as the basis for an implied power to fill in language missing in a different statute.

Second, the Appellants' suggestion, if adopted by this Court, would vastly enlarge the implied power base of the St. Louis Board and every political subdivision in the State of Missouri. Finally, the suggestion that a board of directors for a public school district may influence the election process of its own members is inherently unwise and in direct conflict with a prior attorney general's opinion. Mo. Op. Att'y Gen. 236, 3 (1971).

1. A Ministerial Duty To Provide Notice Of Election Information In Section 115.125 Does Not Empower The St. Louis Board To Amend Section 162.601

The Appellants claim that the St. Louis Board had an implied power to choose which subdistricts were to elect board members at the April 2001 election — effectively adding language to the statute — simply because it has the narrow responsibility to provide specified notice of election information to the Election Commissioners as provided in Section 115.125. See Appellants Br. at 19-23. However, the Appellants have provided no legal basis for the creation of a hybrid authority that would permit an

administrative agency such as the St. Louis Board to add language missing from Section 162.601 because of a narrow responsibility in Section 115.125.

Administrative agencies have limited power. Local governmental units such as school districts are creatures of state government and must derive their authority from state law. Webb. v. Reisel, 858 S.W.2d 767, 769 (Mo. Ct. App. 1993). Administrative agencies possess only those powers expressly conferred or necessarily implied by statute. Bodenhausen v. Missouri Bd. of Registration for Healing Arts, 900 S.W.2d 621, 622 (Mo. 1995) (en banc). Although an agency may imply power from a statute, it may do so only if such power necessarily follows from the language of the statute. Mueller v. Missouri Hazardous Waste Mgmt. Com'n, 904 S.W.2d 552, 557 (Mo. Ct. App. 1995). Moreover, the law is clear that an administrative agency's power cannot be inferred from a statute simply because that power would facilitate accomplishment of an end deemed beneficial. Dishon v. Rice, 871 S.W.2d 126, 128 (Mo. Ct. App. 1994); Pen-Yan Inv. Inc. v. Boyd Kansas City Inc., 952 S.W.2d 299, 304 (Mo. Ct. App. 1997); Mueller, 904 S.W.2d at 557.

The trial court was correct that implying a power for the St. Louis Board to fill in details missing in Section 162.601 does not "follow" from the language of Chapter 115. (L.F. 46). This Court has previously determined that a school board's statutory obligation to call an election is a "purely ministerial duty" in the performance of which the board of directors possesses no discretion. State ex rel. Gault v. Gill, 88 S.W. 628, 630 (Mo. 1905). A ministerial act, as opposed to a discretionary act, does not require the exercise of reason in determining how the act should be done. Jones v. Carnahan, 965

S.W.2d 209, 213 (Mo. Ct. App. 1998). Therefore, the Appellant's suggestion would require this Court to (1) expand the implied power rule well beyond past holdings, (2) permit an implied power by combining the language of two statutes, and (3) allow the implication of power to originate from a simple ministerial duty.

Missouri courts have previously defined the powers and duties of public agencies narrowly to "those lying fairly within its scope, those essential to the accomplishment of the main purpose for which the office was created, and those which, although incidental and collateral, serve to promote the accomplishment of the principle purposes." In Re C.A.D., 995 S.W.2d 21, 31 (Mo. Ct. App. 1999) (citing Missouri Ethics Comm'n. v. Wilson, 957 S.W.2d 2d 794, 798 (Mo. Ct. App. 1997)). See also AT&T Info. Sys., Inc. v. Wallemann, 827 S.W.2d 217, 224 (Mo. Ct. App. 1992) (holding that implied powers are limited to "those essential to the accomplishment of the main purpose for which the office was created.") But, the main purpose of the St. Louis Board is to supervise and govern public schools and public school property in the City of St. Louis not to regulate or control elections. Mo. Rev. Stat. §§ 162.571, 162.621 (2000).

The cases cited by Appellants are factually distinguishable from the matter before this Court, and do not involve an implied power based on the combination of two statutes. As such, they are inapposite. Neither State ex rel. Ferguson v. Donnell, 163 S.W.2d 940 (Mo. 1942) (en banc) or Spitcaufsky v. Hatten, 182 S.W.2d 86 (Mo. 1944) (en banc) (overruled on other grounds) provide a sufficient basis to permit the statutory combination suggested by Appellants in their brief. Instead, both cases show that an

agency's implied power to fill in missing details only follows from a delegation of power specific to the individual agency and arising from a single statute.[4]

Finally, Section 162.601 should be construed in light of statutes *in pari materia.* Farinella v. Croft, 922 S.W.2d 755, 756 (Mo. 1996) (en banc); see also State ex rel. Rothermich v. Gallagher, 816 S.W.2d 194, 200 (Mo. 1991) (en banc) (all consistent statutes relating to the same subject are *in pari materia* and are construed together and presumed to be intended to be read consistently and harmoniously). In a similar situation involving the transition of a school district's elections to subdistricts, the legislature did not rely on an implied power, but instead provided a direct delegation of authority to the board. When the legislature enacted Section 178.820, it provided a delegation of authority for the Board of Trustees for a Junior College District to transition from electing board members at large to election from subdistricts. The legislature granted

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[4] The issue in Ferguson involved whether authorization granted to the Federal Housing Administrator under the National Housing Act to acquire and manage real estate also included authority to own certain personal property necessarily used in connection with the management of the real estate. State ex rel. Ferguson v. Donnell, 163 S.W.2d at 942-4. Likewise, Spitcaufsky involved the authority of a Land Trust created under the Land Tax Collection Act (the "Act") to appraise and handle the sale of land. The Court noted that since the Act stated in detail, "in twelve long sections", the powers and duties of the Trust, it had the interpretative power to fill in details regarding appraising and handling certain tracts of land. Spitcaufsky v. Hatten, 182 S.W.2d at 109.

specific authority for the Board of Trustees to "determine by resolution the assignment of [current] trustees to subdistricts." See Mo. Rev. Stat. § 178.820 (2000).

The legislature has not, however, enacted a similar provision applicable to the transition of St. Louis Board members. The General Assembly chose not to delegate any authority for the St. Louis Board to specify how its board members are to be elected. The legislature has specified that St. Louis Board members "shall be elected … as provided in section 162.601." See Mo. Rev. Stat. § 162.581 (2000). Section 162.601 is void of any mention of a role of the St. Louis Board in electing its members. Mo. Rev. Stat. § 162.601 (2000). Instead, the legislature itself went to great detail in describing how board members are to be elected. Id. Because Section 178.820 is *in para materia* with Section 162.601, this Court should rule that if the legislature wished the St. Louis Board to have the requisite authority to choose which subdistricts were to elect representatives at the April 2001 election, it would have specifically provided for such authority as it did in Section 178.820.

2. A Decision By This Court Granting The St. Louis Board An Implied Power By Commingling Two Statutes Would Vastly Broaden The Powers Of Administrative Agencies Statewide And Is Inherently Unwise

The implied authority rule of law cited by Appellants is a narrow exception which permits an administrative agency to perform a limited range of actions which are necessary for the agency to carry out a specific delegation of authority arising in a single statute. See generally discussion supra at 28-32. In past decisions, Missouri courts have

been reluctant to expand the powers of administrative agencies beyond those expressly conferred or necessarily implied by statute. In Bodenhausen v. Missouri Board of Registration for Healing Arts, this Court rejected an attempt by the Board of Registration for the Healing Arts to expand its power in disciplining physicians. Bodenhausen v. Missouri Bd. of Registration for Healing Arts, 900 S.W.2d 621, (Mo. 1995) (en banc). See also Citizens for Envtl. Safety Inc., v. Missouri Dept. of Natural Res., 12 S.W.3d 720, 724 (Mo. Ct. App. 1999), (the Missouri Department of Natural Resources was neither expressly nor implicitly vested with power to administer or enforce Section 226.720.1.)

This Court has also taken an explicitly negative view of attempts by administrative agencies to broaden their powers by performing statutory construction. See e.g., Harrell v. Total Health Care, Inc., 781 S.W.2d 58, 60 (Mo. 1989) (en banc) (holding that an administrative agency, in this case the Division of Insurance, has no authority to add to or to subtract from the law emanating from the general assembly and no authority to express a legally significant opinion as to how the law is to be construed).

A decision by this Court granting the St. Louis Board an implied power by combining language from two statutes would enlarge the base and scope of power of all administrative agencies statewide. Once administrative agencies have been given a narrow ministerial duty in one statute, they would be entitled to claim an implied power to fill in details missing in any other statute. Such a broad based expansion of power for administrative agencies is unprecedented in this State.

Besides being a dangerous precedent, the notion offered by Appellants is inherently unwise. Permitting a board of directors for a public school district to control or influence the election process of its own members could create the perception that the vote of certain board members may be motivated by a desire to protect their own seat on the board.

Prior to 1998, the St. Louis Board consisted of twelve members elected for staggered six-year terms. Four members were elected in every odd-numbered year in at-large elections. Mo. Rev. Stat. §§ 162.581; 162.601 (1994); see also (L.F. 17). That portion of Senate Bill 781 codified as Section 162.601 provided that when the terms of four of the twelve members expired in April 1999, no members were elected and the St. Louis Board was reduced to eight members. Mo. Rev. Stat. § 162.601.2 (2000). In April 2001, when the terms of four additional members expired, Section 162.601 provided for the election of three replacement members to four-year terms. Mo. Rev. Stat. §162.601.3 (2000); (L.F. 17). Thus, when the subdistrict elections were scheduled for implementation in April 2001, four of the original twelve-member board still had two years remaining on their terms ("remaining members") and will not be up for reelection until 2003.

Since Section 162.601 requires a board member to reside in the subdistrict the member represents, any of the remaining members who plan to seek reelection in 2003 could be perceived as voting to protect the seat for the subdistrict of their residence from

electing a representative to a four-year term in 2001.[5] Thus, when these same four remaining members complete their current term in 2003, they would be eligible to run for reelection.

Finally, in contrast to the position it is taking in this matter, the Attorney General's Office has previously recognized the potential risk in permitting a school board to control or influence the election process of its own members. Where a Missouri school board sought to set up procedures controlling how future candidates for board openings would be nominated, the Attorney General concluded that the school board members had no authority to prescribe rules governing the selection of candidates for election to membership on the board. Mo. Op. Att'y Gen. 236, 3 (1971).

In sum, the St. Louis Board lacks the authority to remedy the defects in Subsections 6 and 7 of Section 162.601. The circuit court was correct in finding that the St. Louis Board had no implied power to amend Section 162.601 and choose which subdistricts were to elect board members at the April 2001 election. Since only the General Assembly has the authority to make substantive legislative decisions as to the content and language of a statute, this Court should uphold the decision of the trial court and find subsections 6 and 7 of Section 162.601 unconstitutionally void for vagueness

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[5] Assuming *arguendo* that the language of Section 162.601 means that each subdistrict may only elect one board member.

because they fail to identify which three subdistricts were to elect school board members at the April 2001 election.

II. The Circuit Court Did Not Err In Ruling That Subsections 6 And 7 Of Section 162.601 Are Unconstitutionally Void For Vagueness Because They Contain Directly Conflicting Provisions As To Who Will Establish The Subdistricts And As Such Are Incapable Of Statutory Construction

Section 162.601 contains expressly contradictory subparts. Subsection 6 of Section 162.601 states that the subdistricts shall be established by the State Board of Education, but then in direct contrast, subsection 7 establishes the subdistricts. Mo. Rev. Stat. § 162.601.6, 7 (2000). Based on accepted rules of statutory construction, these two subsections are in direct conflict and cannot be harmonized. As a result, this Court should uphold the trial court's determination that subsections 6 and 7 of Section 162.601 are void for vagueness and unconstitutional.

Subsection 6 of Section 162.601 provides that the subdistricts shall be established by the State Board of Education by providing in relevant part:

> The subdistricts shall be established by the state board of education to be compact, contiguous and as nearly equal in population as practicable. The subdistricts shall be revised by the state board of education after each decennial census and at any other time the state board determines that the district's demographics have changed sufficiently to warrant redistricting.

Mo. Rev. Stat. § 162.601.6 (2000).

In direct contrast, in Subsection 7 the legislature establishes the subdistricts as follows:

> Subdistrict 1 shall be comprised of wards 1, 2, 22 and 27. Subdistrict 2 shall be comprised of wards 3, 4, 5 and 21. Subdistrict 3 shall be comprised of wards 18, 19, 20 and 26. Subdistrict 4 shall be comprised of wards 6, 7, 17 and 28. Subdistrict 5 shall be comprised of wards 9, 10, 11 and 12. Subdistrict 6 shall be comprised of wards 13, 14, 16 and 25. Subdistrict 7 shall be comprised of wards 8, 15, 23 and 24.

Mo. Rev. Stat. § 162.601.7 (2000).

The primary rule for construing statutes is to ascertain the lawmakers' intent from the language used, to give effect to that intent, if possible, and to consider the words used in their plain and ordinary meaning. Hovis v. Daves, 14 S.W.3d 593, 595 (Mo. 2000) (en banc). If possible, a statute should be construed in a manner to harmonize any potential conflict between its subsections. Id. at 596. However, where the statutory terms are of such uncertain meaning or so confused that the courts cannot discern with reasonable certainty what it is intended, an enactment is void. Missouri Pac. R.R. Co. v. Morris, 345 S.W.2d 52, 57 (Mo. 1961) (en banc).

In the matter before this Court, subsections 6 and 7 of Section 162.601 are incapable of being harmonized because they are in direct discord. Subsection 6 of Section 162.601 provides that the subdistricts shall be established by the State Board of Education while in Subsection 7 the legislature establishes the subdistricts. The legislature references the word “shall” several times in both subsections. The

legislature's use of the word shall in a statute is indicative of a mandate. State ex rel. Dreer v. Public Sch. Ret. Sys., 519 S.W.2d 290, 296 (Mo. 1975); see also State ex inf. McKittrick v. Wymore, 119 S.W.2d 941, 944 (Mo. 1938) (en banc) (holding generally, in statutes the word…"shall" is mandatory.) Thus, two directly conflicting legislative mandates cannot be harmonized.

The Appellants claim that these two subsections are not contradictory. Appellants Br. at 27. But Appellants' explanation for such a conclusion requires a strained reading of the statute. Contrary to the plain language of the statute, Appellants suggest that the state board of education is only required to *revise* the subdistricts, not initially establish them. Appellants Br. at 27-28. Such an interpretation, however, requires a complete disregard of the plain language of the statute.

It is a well-established rule of statutory construction that in interpreting statutes, every word, clause and sentence in a statute must be given some meaning. Staley v. Missouri Dir. of Revenue, 623 S.W.2d 246, 250 (Mo. 1981) (en banc); City of Willow Springs v. Missouri State Librarian, 596 S.W.2d 441, 446 (Mo. 1980) (en banc). It is presumed that the legislature did not insert idle verbiage or superfluous language in a statute. Hyde Park Hous. P'ship. v. Director of Revenue, 850 S.W.2d 82, 84 (Mo. 1993) (en banc). The legislature did not intend that a word used was to be meaningless. Roberts v. McNary, 636 S.W.2d 332, 335 (Mo. 1982) (en banc). To read subsection 6 as only requiring the state board to revise the subdistricts after they are established by the legislature as provided in subsection 7 would require rendering the word "establish" as it appears in subsection 6 meaningless.

The relevant portion of Subsection 6 is comprised of two independent and complete sentences each containing an independent verb:

1. The subdistricts shall be established by the state board of education to be compact, contiguous and as nearly equal in population as practicable.

2. The subdistricts shall be revised by the state board of education after each decennial census and at any other time the state board determines that the district's demographics have changed sufficiently to warrant redistricting.

Although Section 162.601 does not define the terms "established“ and “revised,” absent a statutory definition, the words used in a statute must be given their plain and ordinary meaning. Columbia Athletic Club v. Director of Revenue, 961 S.W.2d 806, 809 (Mo. 1998) (en banc). The plain and ordinary meaning is derived from the dictionary. Id. The dictionary defines the word "established” as to have “set up” or instituted and the word “revised” as to have reviewed, altered, and amended. Webster's New Twentieth Century Dictionary 625, 1552 (2d ed. 1979). As a result, it is clear that the legislature intended for the state board to establish or “set up” the subdistricts and revise them later in time in subsection 6, but then in 7 the legislature establishes them.

Because subsections 6 and 7 contain conflicting provisions, incapable of being harmonized, this Court should uphold the trial court’s decision finding the two subsections void for vagueness.

III. The Circuit Court Did Not Err In Ruling That Subsections 6 And 7 Of Section 162.601 Are Unconstitutionally Void For Vagueness Because They Fail To Specify Whether Any Subdistrict May Elect Only One Board Member And Fail To State Who Is Entitled To Vote For Each Candidate

Subsections 6 and 7 of Section 162.601 fail to specify whether any subdistrict may elect only one board member and fail to state who may vote for each candidate. As a result, this Court should uphold the circuit court's decision and find that the language of subsections 6 and 7 of Section 162.601 violates the Due Process Clause of the Missouri Constitution and is void for vagueness.

The Due Process clause of the Missouri Constitution states that no person shall be deprived of life, liberty or property without due process of law. Mo. Const. art. I, § 10. Due Process requires laws to provide: 1) notice to the ordinary person of what conduct is required; and 2) sufficient standards to those enforcing laws so as to prevent arbitrary enforcement. U-Haul Co. v. City of St. Louis, 855 S.W.2d 424, 426 (Mo. Ct. App. 1993); Missourians for Tax Justice Educ. Project v. Holden, 959 S.W.2d 100, 105 (Mo. 1997).

A statute is vague when the language is so confusing that its intent cannot be discerned with reasonable certainty. State v. Burnau, 642 S.W.2d 621, 622 (Mo. 1982) (en banc). See also Missouri Pac. R.R. Co. v. Morris, 345 S.W.2d 52, 57 (Mo. 1961) (en banc). Moreover, because of the critical importance of legislation dealing with the election process, the General Assembly has been precise when drafting legislation which

regulates the elective process. The preservation of the integrity of the electoral process is a legitimate state goal. State ex rel. McClellan v. Kirkpatrick, 504 S.W.2d 83, 88 (Mo. 1974) (en banc); see also State ex inf. Nixon v. Moriarty, 893 S.W.2d 806, 809 (Mo. 1995) (en banc) (sanctity of election process must be upheld).

Subsections 6 and 7 of Section 162.601 are vague because they fail to specify whether any subdistrict may elect only one board member. Section 162. 601 states that "[m]embers of the board of directors shall be elected to represent seven subdistricts." Mo. Rev. Stat. § 162.601.6 (2000). It further provides that "[a] member shall reside in and be elected in the subdistrict which the member is elected to represent." Mo. Rev. Stat. § 162.601.7 (2000). However, neither Section 162.601 nor any other statute states how many candidates may be elected from any one subdistrict. (L.F. 17, 19).

Moreover, based on its current language, it is not clear whether future St. Louis Board members will be elected only from the voters of each respective subdistrict or voters district-wide. (L.F. 17). The statute is silent as to whether voters at large may vote for each candidate or whether only voters within a specific subdistrict may do so. The statute says only that "[a] member shall reside in and be elected in the subdistrict which the member is elected to represent." Mo. Rev. Stat. § 162.601.7 (2000).

By comparison, the statute providing for subdistrict elections in urban school districts is explicitly clear that "one member of the board of directors shall be elected by

the voters of each subdistrict." Mo. Rev. Stat. § 162.492.3 (2000) (emphasis added).[6] Similarly, when legislation was adopted which originally implemented subdistricts in certain special school districts, the statute provided that 'the voters of each election district shall elect one board member…." Mo. Rev. Stat. § 162.865.1 (1994) (emphasis added).[7]

The manner in which these comparable statutes implemented subdistrict elections of board members in other school districts also demonstrate that Section 162.601 is vague and ambiguous. Section 162.492, passed by the Missouri General Assembly in 1967, implemented subdistrict elections in Urban School Districts with specificity. After first declaring that six board positions would be elected from subdistricts, Section 162.492 avoided the confusion found in Section 162.601 by choosing one election date where all

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[6] The General Assembly has recently acknowledged the many problems associated with subdistricts in the Kansas City School District. The current session of the Missouri Senate is considering Bill 0547 introduced by Senator Harry Wiggins which would totally eliminate the subdistricting scheme currently in place for the Kansas City School Board. The Bill provides that all new members will be elected at-large.

[7] There are other examples where a statute states with clarity that only voters of a specific district may vote for an elected official. For example, Aldermen of Fourth class cities "shall be elected from each ward by the qualified voters thereof." Mo. Rev. Stat. § 79.060 (2000).

six subdistricts would elect board members simultaneously. Mo. Rev. Stat. § 162.492 (Supp. 1968).[8] The statute further specified that the subdistricts would be numbered from one to six and that the directors elected from subdistricts one, three and five would hold office for terms of two years while the directors elected from subdistricts two, four and six would hold office for a four year term. Mo. Rev. Stat. § 162.492 (Supp. 1968). Finally, the statute established a rotation for members to be elected every two years thereafter. Id. Similar specificity was apparent when the legislature provided for the election of board members by subdistrict for a special school district with a population in excess of one hundred thousand. See Mo. Rev. Stat. § 162.865 (1994). Section 162.601 lacks any such specificity or precision. To the contrary, Section 162.601 completely fails to identify which subdistricts will elect representatives.

It is a basic and universally accepted rule that statutory and constitutional provisions which tend to limit the exercise of the right to vote or exclude any citizen from participation in the election process must be strictly construed in favor of the right of voters to exercise their choice. These rights should not be declared prohibited or curtailed except by plain provision of the law. State ex rel. Burke v. Campbell, 542 S.W.2d 355, 359 (Mo. Ct. App. 1976) (emphasis added). Since subsections 6 and 7 of Section 162.601 fail to state who may vote for each candidate, and because of the critical

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[8] Although initially 1969 was chosen as the election date for the six subdistricts, subsequent revisions to the statute changed the election date to 1970. Compare Mo. Rev. Stat. § 162.492 (Supp. 1968) with Mo. Rev. Stat. § 162.492 (1969).

importance of legislation regulating the election process, this Court should uphold the trial court's decision and find that subsections 6 and 7 of Section 162.601 are unconstitutionally void for vagueness.

IV. This Court Should Not Invalidate The April 3, 2001 Election Because The Trial Court's Decision Is Within The Standard Of Appellate Review And Because There Is No Showing That The Appellants Contested The Election And There Is No Showing Of Fraud

For the reasons set forth in the foregoing points in this brief, the trial court correctly applied the law and exhibited proper judicial restraint in minimizing the effect of its ruling by applying the doctrine of severability. (See L.F. 46-47). As a result, this Court should uphold the trial court's decision. Murphy v. Carron, 536 S.W.2d 30, 32 (Mo. 1976) (en banc). After finding subsections 6 and 7 unconstitutional, the trial court properly reinstituted the provisions of the former Section 162.581 governing the method of board member elections and ordered that St. Louis Board members should again be elected from the city in at-large elections on a general ticket. (L.F. 47). Even the Appellants do not dispute the correctness of this portion of the trial court decision.

If, however, this Court overturns the trial court and finds subsections 6 and 7 of Section 162.601 constitutional, it must deny Appellants' request to invalidate the April 3, 2001 election. See Appellants Br. at 30-31. For the first time in these proceedings, the Appellants now argue that this Court should invalidate the April 3, 2001 election, find it void, and order a new election to be called by the St. Louis Board. Id. Even if the Court accepts the timing of this new argument, it is flawed for several reasons. First, the

correct forum in which to allege election irregularities is through an election contest filed in the appropriate circuit court. Mo. Rev. Stat §§ 115.526-115.601 (2000). However, Appellants have not complied with the election contest statutes.

Second, voiding an election is an extreme remedy, is normally not used in the absence of fraud, and amounts to disenfranchisement of voters. Kasten v. Guth, 395 S.W.2d 433, 436 (Mo. 1965); State ex rel. Bonzon v. Weinstein, 514 S.W.2d 357, 363-64 (Mo. Ct. App. 1974). As a result, this Court should not void the April 3, 2001 election.

A. An Election Contest Is The Proper Procedure To Overturn The Election

First, this Court should not invalidate the April 2001 election because the correct forum in which to challenge an election is through an election contest. Mo. Rev. Stat §§ 115.526-115.601 (2000). In 1977, the General Assembly passed the Comprehensive Election Act (the "Election Act"). See Mo. Rev. Stat. § 115.001 (2000), et seq. The policy of the Election Act is to require the prompt resolution of questions relating to elections. Beatty v. Metropolitan Sewer Dist., 700 S.W.2d 831, 834 (Mo. 1985) (en banc). With the passage of the Election Act, the General Assembly mandated a procedure by which election questions could be brought. An election contest properly encompasses those issues which affect the conduct and outcome of an election. Id. at 838.

The Election Act contains explicit provisions as to who may challenge an election, when the challenge must occur, and in what legal forum. It is also clear that the Election Act applies to all public elections in the state, except elections for which ownership of

real property is required by law for voting. Mo. Rev. Stat. § 115.005 (2000). Based on the requirements of the Election Act, it is clear that the Appellants lack standing to bring such an action, bringing such an action for elections involving local offices at the present time may be untimely, and an election contest for a local election must initially be brought in a circuit court, not the Supreme Court.

Section 115.553 provides that any candidate for election may challenge the correctness of the returns for the office and charge that irregularities occurred in the election. Mo. Rev. Stat. § 115.553.1 (2000).[9] Section 115.600 also permits the appropriate election authority to petition for a recount of an election or a new election if errors have occurred on the part of any election personnel in the conduct of an election. Mo. Rev. Stat. § 115.600 (2000). Neither exists in the record here. There are no allegations of errors on the part of election authorities, and thus only a candidate from the

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[9] Certain registered voters are also authorized by Section 115.553(2) to contest any "question" in an election, but this provision is not applicable here. Mo. Rev. Stat. § 115.553(2) (2000). The statute defines "question" as "any measure on the ballot which can be voted 'YES' or 'NO.'" Mo. Rev. Stat § 115.013(22). Since the April 2001 election involved choosing from among candidates for the office of St. Louis Board member, rather than a ballot "question" as defined in the statute, non-candidate voters would lack standing to challenge the election. See State ex rel. Bushmeyer v. Cahill, 575 S.W.2d 229 (Mo. Ct. App. 1978).

April 2001 election, not the Appellants, has standing to file an election contest to the April 2001 election.

In addition, the Election Act stipulates the timing, venue and manner for filing an election contest. It provides that no later than thirty days after the official announcement of the election result by the election authority, any person authorized by section 115.553 who wishes to contest an election must file a petition in the appropriate circuit court. Mo. Rev. Stat. §§ 115.497, 115.577 (2000). But see Wells v. Noldon, 679 S.W.2d 889, 890 (Mo. Ct. App. 1984) (holding that a court lacks jurisdiction to hear any election contest where the Petition is filed prior to the certification of the election results as provided for in Section 115.497).

The Election Act also provides that "contested elections . . . shall be heard and determined by the circuit court of any circuit, selected by the contestant, in which all or any part of the election was held and in which any alleged irregularity occurred." Mo. Rev. Stat. § 115.575.2 (2000). The circuit court in which the petition is filed has exclusive jurisdiction over all matters relating to the contest. Mo. Rev. Stat. § 115.577 (2000). Appellants make no mention of whether an official announcement of the election result has occurred and such information is not in the legal file. Moreover, the proper forum to file an election contest for the April 2001 election would be the St. Louis City Circuit Court not this Court.

It is well established that the statutes governing election contest are a code unto themselves and one seeking relief under such provision must come *strictly within their terms.* Wells, 679 S.W.2d at 890. Moreover, the jurisdiction of a court is confined

strictly to the pertinent statutory provisions, hence the letter of the law is the limit of a court's power. Bushmeyer, 575 S.W.2d at 232. Based on the above, it is clear that Appellants lack the requisite standing to bring an election contest, whether the timing of such an action is proper is unclear, and this Court is not the proper forum in which a challenger may initiate an election contest for a local election.

B. Invalidating The Election Is An Inappropriate Drastic Remedy

Even if Appellants could satisfy the standing, timing and venue requirements of the Election Act, invalidating an election is an extreme remedy that disenfranchises voters. Courts have consistently held that fairly conducted elections will not be overturned unless there is evidence of fraud. Kasten, 395 S.W.2d at 436; Bernhardt v. Long, 209 S.W.2d 112, 116 (Mo. 1948); State ex rel. Brown v. Cape, 266 S.W.2d 45, 46 (Mo. Ct. App. 1954) (As a general rule and in the absence of fraud, an election will not be annulled.) Elections should be so held as to afford a free and fair expression of the popular will, but are not lightly set aside. Armantrout v. Bohon, 162 S.W.2d 867, 871 (Mo. 1942). Declaring an election invalid is a drastic remedy since it amounts to disenfranchisement of the voters. Bonzon, 514 S.W.2d at 362; see also Gerrard v. Board of Election Comm'rs, 913 S.W.2d 88, 90 (Mo. Ct. App. 1995).

Here, Appellants are claiming that the April 2001 election should be voided because, according to Appellants, the St. Louis Board failed to act on a purported implied authority to choose the identity of the three subdistricts for the April 3, 2001 election. Appellants Br. at 30. As authority, they cite a case that is factually inapposite and in an annexation context for the proposition that the failure to comply with a statute renders an

election void.[10] Id. The Appellants do not allege any allegation of fraud or election irregularity.

But prior decisions make it clear that in the absence of fraud, an election will not be annulled even if certain provisions of the law regarding elections have not been strictly followed. Brown, 266 S.W.2d at 46. See also Armantrout, 162 S.W.2d at 871. In any event, the St. Louis Board did comply with Section 162.601 to the extent that it was constitutional. The November 6, 2000 circuit court's order, in effect when the St. Louis Board filed the required notice of election information with the election commissioners, found that subsections 6 and 7 of Section 162.601 were unconstitutional. Appellants had

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[10] Appellants case is factually distinguishable. It did not involve a court voiding a contested election for public office. Instead, it involved one governmental entity seeking to enjoin another from exercising jurisdiction over a particular parcel of real property. See generally St. Louis County v. City of Florissant, 406 S.W.2d 281 (Mo. 1966) (en banc). The Court did not void an election. Rather, the Court declared a purported amendment to the City Charter (which had been submitted to voters) null and void because it was not in compliance with state law. Id. at 287. As a result, the subsequent purported annexation of real property which followed was void. Moreover, their case occurred prior to the General Assembly's enactment of the Election Act.

the option of requesting an expedited briefing schedule or a stay of the trial court's judgment in order to have these issues determined *prior to* the April 3, 2001 election.[11]

If Appellants intended for a decision of this Court to affect the April 3, 2001 election, they had ample time to ask the Court to resolve this appeal prior to the election. Appellants never requested an expedited hearing, or argued that this case must be decided prior to April 3, 2001. Moreover, the Appellants failed to request a stay pending appeal of the circuit court's opinion either in the trial court or with this Court. It would be inequitable at this point to allow the Appellants to overturn a validly conducted election based on the lack of urgency displayed throughout the appellate process. Since no stay pending appeal or expedited briefing schedule was sought or granted, the trial court's judgment was in effect for the April 3, 2001 election.

Clearly there is no allegation of fraud, or other irregularity of sufficient magnitude to case doubt on the validity of the election, thus this Court should uphold the circuit court's decision and not overturn the validly conducted April 3, 2001 election.

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[11] Appellate Courts have accommodated litigants who challenge matters scheduled for an upcoming election by placing such matters on an expedited hearing schedule to render a final decision prior to the date of the election. See e.g., Bergman v. Mills, 988 S.W.2d 84, 87 n.1 (Mo. Ct. App. 1999) (oral argument heard only eight days after appeals were filed); Hancock v. Secretary of State, 885 S.W.2d 42, 44 (Mo. Ct. App. 1994) (oral argument heard only seven days after date Notice of Appeal filed).

Finally, Appellants suggest this Court order the St. Louis Board to conduct a new election. Appellants Br. at 30-31. But, a new election is a drastic remedy. Board of Election Comm'rs v. Knipp, 784 S.W.2d 797, 798 (Mo. 1990) (en banc). Moreover, the legislature has incorporated the authority to order a new election as part of the Election Act and has delegated such authority to a circuit court after conducting a trial pursuant to an election contest. Mo. Rev. Stat. §. 115.593 (2000). Section 115.593 of the Missouri Revised Statutes provides that a new election may only be ordered when it is determined that there were "irregularities of sufficient magnitude to cast doubt on the validity of the initial election." Mo. Rev. Stat. § 115.593 (2000). The statute provides that the circuit court has authority to the set the date of the election and decide how notice of the election is to occur. Mo. Rev. Stat. § 115.593 (2000). Because the provisions of the Election Act have not been followed here, no new election is authorized by statute.

In sum, the April 3, 2001 election should be upheld. The Appellants are not the appropriate party to file an election contest, they have not followed the appropriate procedure for contesting an election and there has been no showing or fraud or other irregularity that would justify disenfranchising voters and overturning the April 2001 election. Moreover, it would be inequitable for this Court to overturn a validly conducted election, when the Appellants failed to request an expedited hearing or stay, therefore, this Court should uphold the election.

CONCLUSION

Subsections 6 and 7 of Section 162.601 are confusing, ambiguous and vague. The statute lacks adequate specificity to carry out its essential legislative purpose and certain portions of the statute contradict other subsections. As written, the subsections are void for vagueness and violate the Due Process Clause of the Missouri Constitution. This Court should hold that subsections 6 and 7 of Section 162.601 fail to identify which three subdistricts were to elect school board members at the April 2001 election, an omission which only the legislature is authorized to correct. In addition, this Court should hold that they contain directly conflicting provisions as to who will establish the subdistricts, a conflict which may not be resolved by applying accepted rules of statutory construction. Finally, this Court should hold that subsections 6 and 7 fail to specify whether any subdistrict may elect only one board member and to state who is entitled to vote for each candidate. For the foregoing reasons, this Court should hold that the circuit judge did not err in ruling that subsections 6 and 7 of section 162.601 are unconstitutionally void for vagueness. If, however, this Court overturns the trial court and finds subsections 6 and 7 of Section 162.601 constitutional, it must deny Appellants' request to invalidate the April 3, 2001 election because Appellants have not complied with the election contest statutes and voiding an election is an extreme remedy.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that:

1. The foregoing brief complies with the limitations contained in Special Rule 1(b) of this Court in that it contains approximately 11,604 words, excluding the cover, certificate of service, Special Rule No. 1(c) certificate of compliance and signature block. This certification is determined by Microsoft® Word software using Times New Roman Font Face with serifs in Font Size 13; and

2. That Pursuant to Special Rule 1 of this Court, Respondents hereby certify that they are filing herewith their diskette containing Respondents' Brief in Appeal NO. SC83261 and that the diskette has been scanned for viruses and is virus-free.

CERTIFICATE OF SERVICE

Pursuant to Special Rule 1(f) of this Court, the undersigned hereby certifies that a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief were mailed, postage prepaid on April 17, 2001 to: Ira Young, Esq., 509 Olive Street, St. Louis, Missouri 63101, Attorney for Floyd A. Kimbrough, Edward E. Ottinger, Joseph V. Neill and Joan M. Crawford, in their official capacity as members of the Board of Election Commissioners of the City of St. Louis, and Assistant Attorney General Joel E. Anderson, Esq., Office of the Attorney General, Post Office Box 899, 221 West High Street, Jefferson City, Missouri 65102, Attorney for Appellants State of Missouri, Governor Bob Holden and Missouri State Board of Education.

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