IN THE SUPREME COURT OF MISSOURI

COMMITTEE FOR EDUCATIONAL EQUALITY, et al., COALITION TO FUND EXCELLENT SCHOOLS, et al., and the SPECIAL ADMINISTRATIVE BOARD OF THE CITY OF ST. LOUIS,	)	
Plaintiffs and Plaintiff-Intervenors/ Appellants,	)	
vs.	)	**No. SC89010**
STATE OF MISSOURI, et al.,	)	
Defendants/Respondents,	)	
REX SINQUEFIELD, BEVIS SCHOCK, and MENLO SMITH,	)	
Defendant-Intervenors/ Respondents.	)	

APPEAL FROM THE CIRCUIT COURT OF COLE COUNTY
HONORABLE RICHARD G. CALLAHAN, JUDGE

JOINT REPLY BRIEF OF APPELLANTS COMMITTEE FOR EDUCATIONAL EQUALITY, ET AL., AND COALITION TO FUND EXCELLENT SCHOOLS

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INTRODUCTION TO ARGUMENT

In accordance with the special instructions by the Court with respect to the briefing in this case, the Appellants Committee for Educational Equality, et al. ("CEE, et al."), and the Appellants Coalition to Fund Excellent Schools, et al. ("CFES, et al."), file this Joint Reply Brief with respect to both the School Finance Issues and the Tax Assessment Issues.[1]

The Respondents have filed two Joint Briefs – (i) one relating to the School Finance Issues (which they denominated as "Constitutional Claims") in response to the

[1] The Court's briefing directions in this case refer to the "School Finance Issues" and the "CFES Tax Assessment Issues."

Appellants CEE, et al., filed an Initial Brief with respect to the School Finance Issues, in which Appellants CFES, et al., concurred (with the exception of CEE, et al.'s Point II relating to Article I, Section 2, of the Missouri Constitution) and the Appellant Special Administrative Board of the Transitional School District of the City of St. Louis ("St. Louis District") also concurred. Appellants CFES, et al., filed an Initial Brief with respect to the Tax Assessment Issues, and the CEE, et al., Appellants took no position with respect to those issues. The respective groups of Appellants take the same positions with respect to the School Finance Issues and the CFES Tax Assessment Issues in this Joint Reply Brief.

Initial Brief of Appellants CEE, et al., and (ii) one relating to the CFES Tax Assessment Issues (which they denominated as "Assessment Claims") in response to the Initial Brief of Appellants CFES, et al.

In accordance with the special briefing procedures set forth in the Court's Orders, Appellants CEE, et al., and CFES, et al., are filing this Joint Reply Brief. Part A of this Joint Reply Brief addresses the School Finance Issues in reply to what the Respondents refer to as their "Joint Brief Regarding Constitutional Claims." Part B of this Joint Reply Brief addresses the CFES Tax Assessment Issues in reply to what the Respondents refer to as their "Joint Brief Responding to Assessment Claims."

PART A

SCHOOL FINANCE ISSUES

Introduction With Respect to School Finance Issues

While there are a number of arguments and statements in the Respondents' Joint Brief with respect to the School Finances issues to which Appellants could properly reply, we are cognizant that there has already been existing briefing contained to the Initial Brief of the Appellants CEE, et al., and the supporting Amici Curiae Brief of Missouri School Boards Association, et al., and Amici Curiae Brief of Citizens for Missouri's Children, et al. We therefore do not attempt to reply to all of the assertions of Respondents in their Joint Brief, but instead limit the reply to their Points I and II (which are not responses to Appellants' Points and which were rejected in large measure by Judge Callahan) and a limited reply to certain other assertions. By not filing a reply with

respect to other assertions by the Respondents, we do not concede that any of the other assertions are correct or have merit.

I.

THE APPELLANTS HAVE STANDING WITH RESPECT TO THE SCHOOL FINANCE ISSUES (REPLY TO RESPONDENTS' POINT I OF THEIR SCHOOL FINANCE ISSUES BRIEF).

The trial court did not accept the assertions of the Respondent that the Plaintiffs/Appellants did not have standing with respect to the school finance issues. Clearly, the Appellants[2] do have standing with respect to the school finance issues.

With respect to CEE and CFES, Supreme Court Rule 52.10 permits an association to bring an action provided that the representative parties fairly and adequately protect the interests of the association and those whom they represent. The rule has been described as a virtual representation where it could be impracticable for parties to appear. Standing for CEE and CFES is appropriate for this action. See, *Executive Board of the Missouri Baptist Convention v. Carnahan*, 170 S.W.3d 437 (Mo. App. W.D. 2005). (The Missouri Baptist Convention, as an unincorporated religious association, had standing, and there was sufficient information for the Court to determine that the association fairly and adequately represented the members under Rule 52.10. *Id.* at 453.) See also, *Missouri Nat. Educ. Ass'n v. Missouri State Bd. of Educ.*, 34 S.W.3d 266 (Mo. App. W.D. 2000). MNEA had standing because its members had standing in their own right, the issues were germane to the purpose of the association and individual members were

[2] The Appellants include school districts, students, parents, taxpayers and organizations representing their interests.

not required in order to assert the claim or the relief. *Id.* at 275. The *MNEA* case relied upon *Missouri Outdoor Advertising Ass'n, Inc. v. Missouri State Highways and Transp. Comm'n,* 826 S.W.2d 342, 343 (Mo. banc 1992). *Id.*

School districts named in the litigation and school districts from which the Court heard district specific evidence as "focus districts" also have standing to bring a declaratory judgment action in this case. These school districts are directly affected by the question at issue and therefore have an interest in the dispute and the outcome in the litigation. See, *Ste. Genevieve School District R-II v. Board of Alderman of City of Ste. Genevieve,* 66 S.W.3d 6, 10 (Mo banc 2002). (Taxpayer and school district were held to have standing to bring a declaratory judgment action over the interest in appointing members to a TIF commission.) "Under Missouri law, a school district that is threatened with the imminent unlawful deprivation of part of its funds has standing to seek a declaratory judgment challenging the statutory interpretation that would lead to the deprivation." *State ex rel. Independence Sch. Dist. v. Jones*, 653 S.W.2d 178, 189 (Mo. banc 1983). *Ste. Genevieve* at 10. School districts have standing to assert claims under Article IX, Section 1(a). See also concurring Opinion of Robertson, J. (concurred in by Limbaugh, J.) in *Committee for Educational Equality v. State*, 878 S.W.2d 446, 458 (Mo. banc 1994) (ftnt. 2) ("In my view, plaintiff school districts and taxpayers have standing to raise the question whether Section 163.031 violates article IX, section 1(a).").

In the recent decision in *Gerken v. Sherman*, 276 S.W.3d 844 (Mo. App. W.D. 2009), blind persons and an association representing blind persons who received funds from the blind pension fund created by Article III, Section 38(b), of the Missouri

Constitution (which provides that the "general assembly **shall**[3] provide" [Emphasis added]) brought suit for additional funding. The plaintiffs appealed from a denial of relief by the Cole County Circuit Court. The Court of Appeals affirmed in part and reversed and remanded in part. Article III, Section 38(b), provides with respect to surplus funds in the blind pension funds that "any remaining balance shall be transferred to the distributive public school fund." The Court of Appeals held that the appellants did not have standing to maintain a declaratory judgment action for not sweeping funds into the distributive public school fund but that the **"public schools" did have standing**. The Court reasoned:

> "The public schools-not the appellants-have a pecuniary or personal interest directly jeopardized by the State's failure to sweep the blind pension fund balance into the distributive public school fund." (276 S.W.3d at 853).

And, see also the analogous situation in *Massachusetts v. Environmental Protection Agency*, 549 U.S. 497, 518-526 (2007), where the Supreme Court held that "only one of the petitioners needs to have standing to permit us to consider the petition for review" and that a subordinate governmental entity, i.e., a state, had standing to bring an action against a federal agency to "protect" its "interests."

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[3] Section 38(b) of Article III relating to the blind and Section 1(a) of Article IX relating to public schools are the only constitutional provisions which direct that the "general assembly shall" act to provide for specific programs.

Parents and students under the age of 21 years have the legally protectable interest of a free public education under the Missouri Constitution, Article IX, Section 1(a), as well as rights under Article I, Section 2. Clearly, parents and students have standing. See, *Concerned Parents v. Caruthersville 18 School District*, 548 S.W.2d 554, 557-58 (Mo. banc 1977).[4]

Taxpayers and parent taxpayers who are Appellants similarly have standing to bring a declaratory judgment action both in their status as taxpayers of the State of Missouri and as taxpayers of a school district. Standing of taxpayers to challenge governmental entities and officials relating to the lawfulness of expenditure of funds and to require conformance to the law and the Missouri Constitution when spending money are clearly situations where Missouri courts have previously allowed taxpayer standing. *State ex rel. Nixon v. American Tobacco Co.*, 34 S.W.3d 122, 133 (Mo. banc 2000). "In the context of an action for declaratory judgment, Missouri courts require that the

[4] Respondents read *Concerned Parents* too restrictively at pages 38-39 of their Joint Brief. This Court held that the provisions of Section 1(a) of Article IX were enforceable, i.e., justiciable, that parents and students had standing to maintain the case and that education was "fundamental." The particular issue before the Court involved whether fees could be charged to school students, and this Court held that they could not. The Court looked to decisions in other states which had reached varied results, and by looking to the words contained in the "introductory portion," i.e., the "general diffusion of knowledge" language, of Section 1(a).

plaintiff have a legally protectable interest at stake in the outcome of the litigation." *Ste. Genevieve Sch. Dist.*, 66 S.W.3d at 10 (citing *Battlefield Fire Prot. Dist. v. City of Springfield*, 941 S.W.2d 491, 492 (Mo. banc 1997).

With respect to the Hancock Amendment claims, Article X, Section 23, of the Missouri Constitution grants standing to taxpayers to bring suit to enforce the provisions of the Hancock Amendment. It **does not deny** standing which otherwise exists. The Hancock Amendment is derived from the 1978 Headlee Amendment to the Michigan Constitution (Article IX, Sections 25 through 31). *Scholle v. Carrollton School District*, 771 S.W.2d 336, 338 (Mo. banc 1989). Constitutional and statutory provisions borrowed from other states bring with them interpretations established by courts in other states before their adoption in Missouri. *State ex rel. Philipp Transit Lines, Inc. v. Public Service Commission*, 552 S.W.2d 696, 700 (Mo. banc 1977). See also, *Gilroy-Sims and Associates v. Downtown St. Louis Business District*, 729 S.W.2d 504, 508 (Mo. App. E.D. 1987), reasoning:

> "Missouri's Hancock Amendment was modeled after a constitutional provision adopted by Michigan voters in 1978 known as the Headlee Amendment. See, Mich. Const. of 1963, art. IX, §§ 25-34 (1978); 42 Op. Att'y Gen. No. 16-85 at 5 (March 11, 1985). Where a state statute copies nearly verbatim a statute of another state, there is a presumption that it was enacted with the construction placed upon it by the courts of that state, unless contrary to the clear meaning of the terms of the statute. *State ex rel. Nichols v. Fuller*, 449 S.W.2d 11, 14[2] (Mo. App. 1969)."

The comparable sections in the Hancock Amendment and the Headlee Amendment involved in this case are as follows:

Hancock Sections	Headlee Sections
(all in Article X, Mo. Const.)	(all in Article X, Mich. Const.)
Section 16	Section 25
Section 21	Section 29

(i) Hancock substitutes "counties and other political subdivisions" for "units of Local Government" used in Headlee.

(ii) Hancock omits the words "by state law" from the first sentence.

(iii) In the first sentence Headlee uses the term "necessary costs" and Hancock drops the word "necessary" and uses only the word "costs." In the second sentence, Headlee uses the term "necessary increased costs" and Hancock drops the word "necessary" and uses only the words "increased costs." Consequently, under Hancock, there is no burden of showing "necessary" in connection with costs.

Section 23	Section 32

Hancock substitutes "Missouri supreme court" for "Michigan State Court of Appeals" in Headlee and Hancock specifically authorizes jurisdiction in the circuit courts which Headlee does not.

Section 24(b)

Hancock specifies that its provisions are "self enforcing." Headlee has no equivalent provisions.

In construing the provisions of Hancock, it is appropriate to consider the precedents of the Michigan Court of Appeals and the Michigan Supreme Court

construing Headlee. The Michigan courts have construed the provisions of Headlee which are the equivalent of Hancock's Sections 21 and 23 in relation to school districts and mandated educational programs on a number of occasions.

Waterford School District v. State Board of Education, 296 N.W.2d 328 (Mich. App. 1980), involved Section 29 of Headlee (Section 21 of Hancock) and was decided before the November 8, 1980, election at which the Missouri voters adopted the Hancock Amendment.[5] The fact that *Waterford School District* was decided before Hancock was adopted makes the interpretations set forth in *Waterford School District* a part of Hancock.

In *Waterford School District*, the Plaintiff School District and the members of the District school board in their official capacity and as taxpayers filed a suit in Circuit Court under Sections 25 and 29 of Headlee (Sections 16 and 21 of Hancock) alleging that the state had reduced the per pupil state aid to the Waterford School District in the 1979-80 fiscal year below that which had been paid in the 1978-79 fiscal year, the base year of Headlee. The Defendants asserted that the Circuit Court did not have jurisdiction because such a claim could only be brought in the Court of Appeals by a taxpayer under the provisions of Section 32 of Headlee. The Circuit Court dismissed, and the Court of Appeals reversed and remanded.

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[5] The appeal in *Waterford* was decided by the Michigan Court of Appeals on July 18, 1980; the Opinion was "released for publication" on September 24, 1980; and "leave to appeal" to the Michigan Supreme Court was denied on October 20, 1980.

The Michigan Court of Appeals first noted that in Michigan under prior case law –

> ". . .[A] taxpayer has no standing to challenge the expenditure of public funds where the threatened injury to him is not different than that to taxpayers generally." (p. 331)

The Court noted that this "common law bar" to a taxpayer lawsuit had been relaxed some by a Michigan statute, but very stringent requirements under that statute had to be met before a taxpayer lawsuit could be brought. The Court of Appeals then reasoned that – "It is apparent that § 32 was intended to further ease the limitations on taxpayer lawsuits." *Id*.

In Missouri, however, single taxpayers have long been held to have standing to challenge governmental actions with respect to public funds. See, e.g., *Newmeyer v. Missouri & Mo.R.Co.*, 52 Mo. 81 (1873). Consequently, to a large extent, that part of Section 23 of Hancock (borrowed from Headlee Section 32) which specifically gives taxpayers standing to maintain an action for Hancock violations was largely unnecessary in Missouri.

With respect to the standing of the Waterford School District and the members of its school board in their **official** capacities, the Michigan Court of Appeals held that they did have standing to bring the actions seeking additional funds under the Headlee Amendment:

> "Defendants now argue that even if subject matter jurisdiction existed, accelerated judgment was proper as to the school district and the individual plaintiffs as school board members. Defendants contend that these

plaintiffs, as agents of the state, lack standing to attack a state statute as being violative of the state constitution. **We disagree**.

* * *

"As noted above, standing refers to the existence of a party's interest in the outcome of a litigation, a prerequisite imposed to assure vigorous advocacy. Michigan License Beverage Ass'n v. Behnan Hall. This suit was instigated because of the belief that the **Waterford School District is being directly deprived of state funds in violation of the Headlee Amendment. To the extent that those funds are necessary to the district to fulfill its responsibilities, the district has an interest in the outcome of this litigation**. Likewise, the school board members are under a statutory duty to '(d)o anything * * * which is necessary for the proper establishment, maintenance, management and carrying on of the public schools of the district.' M.C.L. s 380.246(f), M.S.A. s 15.4246(f). **This includes a responsibility to seek payment of the additional state funds that the district has allegedly been denied. The interests and responsibilities of the plaintiff school district and the board members place them in direct conflict with the State Board of Education and State Treasurer. This conflict assures that the respective positions of the parties will be presented in a truly adversary context.**" (Emphasis added).

Consequently, paraphrasing *Philipp Transit Lines*, it is clear that when Missouri borrowed most of the Headlee Amendment by the adoption of the Hancock Amendment,

it also adopted the "interpretation placed thereon prior to the time of enactment in the borrowing state [Missouri] by the courts of the state [Michigan] from which . . . [Hancock] was taken," including in particular the interpretations set forth in *Waterford School District.*

In *State ex rel. City of St. Louis v. Litz*, 653 S.W.2d 703 (Mo. App. E.D. 1983), the Court reversed a dismissal of a Petition by the Circuit Court and held that the City of St. Louis had standing to bring a suit against the City of Berkeley in St. Louis County for a Hancock Amendment violation even though the City of St. Louis was not a taxpayer. The case involved a question with respect to the constitutionality under Hancock of a Berkeley city ordinance imposing permit fees for demolition activities. Because the City of St. Louis had an interest in expanding the St. Louis Airport which it owns, the Missouri Court of Appeals held that the City of St. Louis had a sufficient interest to have standing to bring an action under Hancock:

> "Notwithstanding that the City of St. Louis is not a taxpayer within the City of Berkeley, we hold, without reaching the merits of the case of whether the ordinance is valid, the City of St. Louis has standing to challenge the ordinance. Persons whose rights are or may be injuriously affected by the enforcement of an ordinance may attack its validity in proper proceedings." (p. 706).

Because the fees imposed by the City of Berkeley had a financial impact upon the City of St. Louis, the Missouri Court of Appeals concluded that the City of St. Louis had

standing to maintain an action for alleged violations of the Hancock Amendment even though the City of St. Louis was exempt from taxes:

> "So, too, would other tax-exempt persons, like the City of St. Louis, be foreclosed from our courts. We interpret Section 23 of Article X to confer standing, **in addition to those persons ordinarily granted standing**, upon tax-payers, and not as a limitation. To construe it otherwise contravenes well established constitutional principles on standing discussed earlier."
>
> (p. 707, Emphasis added).

Cases in Michigan subsequent to *Waterford School District* interpreting Section 29 of the Headlee Amendment (Section 21 of Hancock) continued to allow school districts to be afforded relief. The seminal litigation is the *Durant v. State* litigation in which the Fitzgerald School District was a Plaintiff and which extended from 1980 until 1998. Companion litigation includes later phases of the *Waterford School District* case and *Schmidt v. Department of Education.* While these post-November 8, 1980, Opinions by the Michigan Appellate Courts do not have the same binding precedential effect as *Waterford School District* which became a part of the borrowed provisions from Headlee incorporated into Hancock under the rationale of *Philipp Transit Lines*, *supra*, the later Michigan cases are precedent which should be considered by this Court.

While there are a number of opinions of the Michigan Court of Appeals and the Michigan Supreme Court leading up to *Durant v. State of Michigan*, 566 N.W.2d (Mich. 1997) ("*Durant 1997*"), it is *Durant 1997* which encapsulates those earlier opinions, finally determines that the State of Michigan had not fully funded certain educational

programs as required by Section 29 of Headlee, that relief should be afforded to the school districts and that the plaintiffs were entitled to recover their attorneys' fees. It is noted that the Michigan Supreme Court, after oral arguments in *Durant 1997,* entered an order directing that the parties file additional briefs, address the issue of remedies and noted by name, in that connection, the case *Fort Zumwalt School District v. State of Missouri*, 896 S.W.2d 918 (Mo. banc 1995). See, order reported as *Durant v. State of Michigan,* 563 N.W.2d 646 (Mich. 1997), and *Durant 1997* at 284.

In *Durant 1997*, the Michigan Supreme Court held that special education and special education transportation were state mandated educational programs which fell within the ambit of being an "activity" or "service" within the meaning of Section 29 of Headlee, even though such programs were also required by federal mandates. The Court also determined that the school lunch program was a state mandated program falling within the ambit of an "activity" or "service" within the meaning of Section 29 of Headlee. In connection with the school lunch program, the Court noted:

> ". . . [O]nce the people adopted Headlee, the state lost direct control over the amount of all Headlee – required aid to local units of government." (p. 284).

The Michigan Supreme Court in *Durant* did not follow *Fort Zumwalt.*[6]

[6] The Court considered the "remedy" to be afforded, noting that "[t]his is the first case of underfunding under art. 9, § 29 to come to judgment." *Durant 1997* at 284. The Court

then looked to the provisions of Section 32 of Headlee (Section 23 of Hancock) and indicated –

> "The question is what did the great mass of people intend in directing the Court . . . 'to enforce' § 29.
>
> * * *
>
> "We conclude that the people's directive 'to enforce' § 29 was intended as a general directive, giving the Court the duty and authority to enforce § 29 in the way that would most effectuate the balances struck by the people in the Headlee Amendment."
>
> * * *
>
> "We anticipate that taxpayer cases filed in the Court . . . will proceed to rapid decision on the issue whether the state has an obligation under *art. 9, § 29* to fund an activity or service. * * *

B

Declaratory relief coupled with an award of damages is appropriate in this case as a result of the prolonged 'recalcitrance' of the defendants, and the damage award can, on this basis, be limited to the years 1991-1994. Any other remedy, particularly one that would grant declaratory relief alone,

The Michigan Supreme Court then determined "who should receive the judgment." The Court determined that the monies for the three underfunded years should go to the plaintiff school districts, the Court reasoning:

> "While the Headlee Amendment is a taxpayers' amendment, the requirement of *§ 29* adopted by the people does not directly mention the taxpayers. It directly protects the units of local government. It serves the overall purpose of the people by protecting units of local government from actions of the state government in foisting underfunded and unfunded mandates on local government, thus frustrating local discretion over local tax revenues. In this case, the underfunding certainly affected the level of regular educational services that the * * * boards of education could provide to all current students and many who have graduated or dropped out over the last almost two decades. Local boards have been faced with dizzying variety of choices on how to deal with underfunding and rising costs. Many, perhaps most, districts have had larger class sizes. Others have dropped programs such as elementary music. Perhaps none have had as much access to computer equipment as they would have liked. Many

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> would authorize the state to violate constitutional mandates with little or no consequence. The intent of the people in enacting *art. 9, § 32 of the Michigan Constitution* was not to enact a constitutional provision that could not be effectively enforced." (pp. 284-285).

> may have had no money for targeting and helping potential dropouts. The potential list is endless. * * * These students, no less than taxpayers have suffered the adverse consequence of defendants' underfunding." (p. 288).

The State of Michigan took "prompt action . . . to implement the relief granted" by *Durant 1997*. See, *Durant v. State*, 575 N.W.2d 546 (Mich. 1998).

The dissent in *Durant 1997*, relying upon *Ft. Zumwalt*, said that the relief should be limited to a declaratory judgment in favor of the plaintiffs, including the plaintiff school districts. Neither the majority nor the dissent held that a declaration should be entered which simply held that the school districts were relieved from complying with the state mandate because it was not fully funded.

We respectfully submit that the Appellants have standing with respect to all of the School Finance Issues.

II.

THE APPELLANTS' SCHOOL FINANCE CLAIMS DO NOT "PRESENT A NONJUSTICIABLE POLITICAL QUESTION" AS ASSERTED BY RESPONDENTS IN POINT II OF THEIR SCHOOL FINANCE ISSUES BRIEF.

The trial court in its Judgment properly rejected this argument which was asserted by the Defendants/Respondents:

> "The defendants contend that a 'threshold issue' which should result in the dismissal of the case is that how public education is funded is a political issue that should be left to the discretion of the legislative and executive branches of government. However, plaintiffs have not asked this Court to decide whether a particular financing scheme is 'better' as a matter of policy than another but rather whether the current level of state appropriations for public schools satisfies the constitutional requirements of providing for free public schools as set forth in Article IX of the Missouri Constitution. Judicial review of legislative enactments is central to our system of checks and balances and this Court declines defendants' invitation to avoid deciding the issues presented." Judgment, pp. 3-4, LF_5315-5316.

No cross appeal was filed with respect to this determination.

The Respondents in asserting that a nonjusticiable "political question" exists rely primarily upon *Baker v. Carr*, 369 U.S. 186 (1962), which held that reapportionment **was justiciable** and *Bennett v. Mallinckrodt, Inc.*, 698 S.W.2d 854 (Mo. App. E.D. 1985),

which held that individual tort recoveries stemming from nuclear-related activities are **"not precluded**" by the political question doctrine. The Respondents in their Brief concede that "[t]his Court has not, to date, expressly endorsed use of the 'political question doctrine. . . .'" Brief, p. 26.

In *Committee for Educational Equality v. State of Missouri*, 878 S.W.2d 446 (Mo. banc 1977) ("CEE I"), the appellant state defendants cited to *Baker* and *Bennett* and asserted that plaintiffs could not have relief because of the "political question doctrine." Appellants' Brief in SC75660, page 77. The majority opinion in CEE I did not reach the merits, but the concurring opinion by Robertson, J. (Limbaugh, J., concurring) determined that "plaintiff school districts and taxpayers have standing to raise the question whether Section 163.031 [the school foundation formula then and now] violates article I, section 1(a)." 878 S.W.2d at 458. Consequently, it is apparent that Judges Robertson and Limbaugh rejected the "political question doctrine" asserted by the State defendants.

Concerned Parents v. Caruthersville 18 School District, 548 S.W.2d 554 (Mo. banc 1977), held that the provisions of Article IX, Section 1(a), of the Missouri Constitution are justiciable and are enforceable by Missouri courts thereby rejecting the nonjusticiability concept of the "political question doctrine."

At page 23 of their Brief, Respondents quote from *Baker v. Carr* and state that such represents "standards for determining whether a case involves a nonjusticiable political question." The Respondents' Brief fails, however, to quote the language of Justice Brennan which immediately follows:

> "Unless one of these formulations is inextricable from the case at bar, **there should be no dismissal for nonjusticiability on the ground of a political question's presence**. The doctrine of which we treat is one of 'political questions,' not one of 'political cases.' **The courts cannot reject as 'no law suit' a bona fide controversy as to whether some action denominated 'political' exceeds constitutional authority**. **The cases we have reviewed** showed the necessity for discriminating inquiry into the precise facts and posture of the particular case, and the impossibility of resolution by any semantic cataloguing." (Emphasis added, 369 U.S. at 217.)

An understanding of what Justice Brennan referred to as the "cases we have reviewed" is critical in contextualizing the concept of "political questions" discussed in *Baker*. The "cases we have reviewed" include a limited and rarified field: foreign relations disputes, such as recognition of a foreign state; dates of duration of hostilities, *e.g.*, deciding when a war has ended; compliance with internal legislative formalities; and the status and recognition of Indian tribes. The Court also discussed claims under the guaranty of a republican form of government, U.S. Const. Art. IV, Section 4 (the "Guaranty Clause"). Again, only an exceptional group of Guaranty Clause claims has been found to be nonjusticiable, most of which arose in a far different era in the nation's history and implicated, for example, the congressional power to recognize which government was established in a state. *Baker*, 369 U.S. at 218-226.

In all those cases, the Court in *Baker* persistently stated that depending on the nature of the specific controversy, the judiciary was not foreclosed from exercising its role as the ultimate interpreter of the constitution and laws. See, *e.g., id.* at 215-16 and 215, fn. 43. Thus, justiciability objections based on lack of manageable criteria fall away when knowable, fundamental principles of a republican form of government are affected. *Id.*, at 222, fn. 48. Similarly, the courts "will not stand impotent before an obvious instance of a manifestly unauthorized exercise of power," such as arbitrarily calling a body of people an Indian tribe. *Baker*, 369 U.S. at 216. See also, *Japan Whaling Ass'n v. American Cetacean Society*, 478 U.S. 221, 229-30 (1986) (not every controversy that touches upon the area of foreign relations presents a nonjusticiable political question).

The redistricting of the House districts and Senate districts in *Baker v. Carr* is about as "political" that one can get – but *Baker* held that the issues were justiciable.

As pointed out in the Amicus Brief filed in this case by the Missouri School Boards Association, et al., plaintiffs have prevailed in many major school finance decisions on adequacy claims by the highest state courts or final trial court decisions.[7] In

[7] Those cases included: Alaska (*Kasayulie v. State*, No. 3AN-97-3782 (Alaska Super. Ct. Sept. 1, 1999)); Arizona (*Roosevelt Elementary Sch. Dist. No. 66 v. Bishop*, 877 P.2d 806 (Ariz. 1994)); Arkansas (*Lake View Sch. Dist. No. 25 v. Huckabee*, 351 Ark. 31, 91 S.W.3d 472 (Ark. 2002)); Idaho (*Idaho Schs. for Equal Educ. Opportunity*, 976 P.2d 913 (Idaho 1998); *Idaho Schs. for Equal Educ. Opportunity v. Evans*, 123 Idaho 573, 850 P.2d 724 (Idaho 1993)); Kansas (*Montoy v. State*, 102 P.3d 306 (Kan. 2005)); Kentucky

these cases the school finance adequacy claims were either specifically or in effect held to be justiciable.

In many of these decisions (or others in the same state), the so-called "political question doctrine" was presented to the Court – and either rejected or cited by a dissenting opinion. The Texas Supreme Court has specifically rejected the "political question doctrine." See, *Neeley v. West Orange-Cove Consolidated Independent School District*, 176 S.W.3d 746, 776-781 (Tex. 2005), rejecting the application of the "political

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(*Rose v. Council for Better Educ.*, 790 S.W.2d 186 (Ky. 1989)); Maryland (*Bradford v. Md. State Bd. of Educ.*, No. 94340058/CE189672 (Baltimore City Cir. Ct. 2000)); Massachusetts (*McDuffy v. Secretary of the Executive Office of Educ.*, 415 Mass. 545, 615 N.E.2d 516 (Mass. 1993)); Montana (*Columbia Falls Elementary Sch. Dist. No. 6 v. State*, 326 Mont. 304, 109 P.3d 257 (Mont. 2005)); New Hampshire (*Claremont Sch. Dist. v. Governor*, 703 A.2d 1353 (N.H. 1997)); New Mexico (*Zuni Sch. Dist. v. State*, No. CV-98-14-II (McKinley County Dist. Ct. Oct. 14, 1999)); New Jersey (*Abbott v. Burke*, 575 A.2d 359 (N.J. 1990)); New York (*Campaign for Fiscal Equity, Inc. (CFE) v. State*, 801 N.E.2d 326 (N.Y. 2003) (*CFE II*)); North Carolina (*Leandro v. State*, 346 N.C. 336, 488 S.E.2d 249 (N.C. 1997)); Ohio (*DeRolph v. State*, 78 Ohio St. 3d, 677 N.E.2d 733 (Ohio 1997)); Texas (*Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391 (Tex. 1989)); Vermont (*Brigham v. State*, 692 A.2d 384 (Vt. 1997)); and Wyoming (*Campbell County Sch. Dist. v. State*, 907 P.2d 1238 (Wyo. 1995)).

question doctrine" of *Baker* to school finance litigation predicated on **any part** of Article VII, Section 1, of the Texas Constitution, which provides:

> "**A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the Legislature** of the State **to establish** and make suitable provision for the support **and maintenance** of an efficient system of **public free schools**." (Emphasis added).

In the prior appeal in *West Orange-Cove*, 107 S.W.3d 558, 563-64 (Tex. 2003), the Court had held that –

> "By assigning to the Legislature a duty, this section both empowers and obligates: * * * First, the **education provided must be adequate**; **that is, the public school system must accomplish that 'general diffusion of knowledge . . . essential to the preservation of the liberties and rights of the people.**' * * * '[T]hese are admittedly not precise terms,' as we have acknowledged, but **'they do provide a standard** by which this court must, when called upon to do so, measure the constitutionality of the legislature's actions.' **The final authority to determine adherence to the Constitution resides with the Judiciary**." (Emphasis added).

The 2005 Opinion in *West Orange-Cove* noted that *Baker v. Carr* defines "nonjusticiable political questions **for purposes of demarcating the separation of powers in the federal government** under the United States Constitution." (Emphasis added, 176 S.W.3d at 778). The Court then considered –

> ". . . the State defendants' arguments as if the tests of *Baker v. Carr* would apply under the Texas Constitution. If they do--a question we need not reach--their application is limited. In the federal system, political questions are a rarity. The United States Supreme Court has held only two issues to be nonjusticiable political questions: whether the military was properly trained and whether the impeachment trial of a federal judge may be conducted before a Senate committee instead of the entire Senate. The Court did not hold the one-man-one-vote congressional apportionment issue in *Baker v. Carr* to be a political question, and it has refused to hold issues to be political questions in at least seven other cases. The Court did not even discuss the doctrine in *Bush v. Palm Beach County Canvassing Board* and *Bush v. Gore,* cases in which the winner of the 2000 national presidential election was at stake, certainly a "political issue" as conventionally understood, if not within the meaning of *Baker v. Carr.* Some have questioned whether the political question doctrine has any real vitality at all. This Court has never held an issue to be a nonjusticiable political question, and we have referred to the doctrine only in passing. The courts of appeals have applied the doctrine only rarely." (footnotes omitted, 176 S.W.3d at 779-780).

The 2005 Opinion then noted and summarized in its extensive footnote No. 183 school funding decisions in other states which had rejected the political question doctrine:

"*Lake View Sch. Dist. No. 25 v. Huckabee*, 351 Ark. 31, 91 S.W.3d 472, 507 (2002) (stating that '[t]his Court's refusal to review school funding under our state constitution would be a complete abrogation of our judicial responsibility and would work a severe disservice to the people of this state. We refuse to close our eyes or turn a deaf ear to claims of a dereliction of duty in the field of education.'); *Idaho Schools for Equal Educ. Opportunity v. Evans*, 123 Idaho 573, 850 P.2d 724, 734-35 (1993) ('[W]e decline to accept the respondents' argument that the other branches of government be allowed to interpret the constitution for us. That would be an abject abdication of our role in the American system of government.'); *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 213-14 (Ky.1989) ('To avoid deciding the case because of "legislative discretion," "legislative function," etc., would be a denigration of our own constitutional duty. To allow the General Assembly ... to decide whether its actions are constitutional is literally unthinkable.'); *McDuffy v. Secretary of the Executive Office of Educ.*, 415 Mass. 545, 615 N.E.2d 516, 554-55 (1993) (citing *Marbury v. Madison* for proposition that courts 'have the duty ... to adjudicate a claim that a law and the actions undertaken pursuant to that law conflict with [or fall short of] the requirements of the Constitution. "This," in the words of Mr. Chief Justice Marshall, "is of the very essence of judicial duty." ') (internal citation omitted); *Columbia Falls Elem. Sch. Dist. No. 6 v. State*, 326 Mont. 304, 109 P.3d 257, 260-61

(2005) (rejecting *Baker v. Carr*-based political question argument and concluding that, '[a]s the final guardian and protector of the right to education, it is incumbent upon the court to assure that the system enacted by the Legislature enforces, protects and fulfills the right [to education]'); *Claremont Sch. Dist. v. Governor*, 138 N.H. 183, 635 A.2d 1375, 1381 (1993) (concluding that constitutional right to adequate education is justiciable and that 'any citizen' has standing to 'enforce the State's duty' to fulfill this right); *Abbott v. Burke*, 149 N.J. 145, 693 A.2d 417, 428-29 (1997) (holding that, while deference should be given to legislative content and performance standards, it is still the courts' duty to ensure that these standards, 'together with funding measures, comport[ ] with the constitutional guarantee of a thorough and efficient education for all New Jersey school children'); *Campaign for Fiscal Equity, Inc. v. State*, 86 N.Y.2d 307, 631 N.Y.S.2d 565, 655 N.E.2d 661, 666-68 (1995) ('We conclude that a duty [to provide a sound, basic education] exists and that we are responsible for adjudicating the nature of that duty.'); *Leandro v. State*, 346 N.C. 336, 488 S.E.2d 249, 253 (1997) (rejecting 'political question' argument and stating that '[w]hen a government action is challenged as unconstitutional, the courts have a duty to determine whether that action exceeds constitutional limits.... Therefore, it is the duty of this Court to address plaintiff-parties' constitutional challenge to the state's public education system.'); *DeRolph v. State*, 78 Ohio St.3d 193, 677

N.E.2d 733, 737 (1997) (rejecting argument that school finance challenge presents nonjusticiable political question and citing both *Marbury v. Madison* and *Edgewood I* with approval); *Abbeville County Sch. Dist. v. State*, 335 S.C. 58, 515 S.E.2d 535, 540 (1999) (Because '[i]t is the duty of this Court to interpret and declare the meaning of the Constitution,' the trial court should not have 'us[ed] judicial restraint, separation of powers, and the political question doctrine as the bases for declining to decide the meaning of the education clause.'); *Seattle Sch. Dist. No. 1 v. State*, 90 Wash.2d 476, 585 P.2d 71, 84-87 (1978) (citing *Marbury v. Madison* and stating that a finding of nonjusticiability would be 'illogical'); *Pauley v. Kelly*, 162 W.Va. 672, 255 S.E.2d 859, 870 (1979) (after reviewing decisions from other jurisdictions, noting the deference courts give to legislatively promulgated education policies but stating that 'these jurisdictions have not hesitated to examine legislative performance of the [constitutional mandate], and we think properly so, even as they recite that courts are not concerned with the wisdom or policy of the legislation'); *Vincent v. Voight*, 236 Wis.2d 588, 614 N.W.2d 388, 396 n. 2 (2000) (after noting that *Baker v. Carr* holds that 'a court must decide on a case-by-case inquiry whether a so-called political issue is justiciable,' concluding that 'the [school finance] issues presented to us in this case are appropriate for decision by this court in the exercise of our constitutional role'); *Campbell County Sch. Dist. v. State*, 907 P.2d 1238, 1264 (Wyo.1995) (rejecting

separation of powers argument and stating that '[a]lthough this Court has said the judiciary will not encroach into the legislative field of policy making, as the final authority on constitutional questions the judiciary has the constitutional duty to declare unconstitutional that which transgresses the state constitution.')."[8] 176 S.W.3d at 780.

The school funding issues in this case are justiciable, and the so-called "political question doctrine" is not applicable.

[8] A subsequent Opinion by the Wyoming Supreme Court in the same litigation, *State v. Campbell County School District*, 32 P.3d 325, 331-337 (Wyo. 2001), further examines in scholarly reasoning, and rejects, the "political question doctrine" in school funding litigation.

III.

THE STATE HAS AND IS VIOLATING THE SCHOOL FUNDING REQUIREMENTS OF ARTICLE IX OF THE MISSOURI CONSTITUTION (REPLY TO RESPONDENTS' POINTS III AND IV OF THEIR SCHOOL FINANCE ISSUES BRIEF).

Respondents in their Brief do not refute the constitutional history of the provisions of what are now Section 1(a) of Article IX of the Missouri Constitution set forth in Appellants CEE, et al.'s Point I.

The Respondents base their arguments upon what "the framers of the 1945 Constitution intended" by quoting from delegates at the 1944 Constitution Convention who **unsuccessfully** sought to delete the existing first clause of Section 1 (now 1a) – "A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people. . . ." The effort was led by Mr. Nacy.[9]

[9] The amendment to strike the first clause of Section 1 was made by Democratic delegate Richard Nacy, a banker (Central Missouri Trust Company) in Jefferson City, who was also Chairman of the Democratic State Committee and second Vice-President of the 1943-44 Constitutional Convention. *Official Manual of the State of Missouri, 1945-46*, pp. 144-145, 465. Mr. Nacy possessed considerable political power, so it was not necessary for him to speak at length. Similarly, it did not behoove those who differed with him to challenge him directly. Consequently, one must look more broadly at the Debates to ascertain that Mr. Nacy's agenda was seeking to remove a standard of

Mr. Nacy after submitting his amendment attempted to play down the amendment's effect by stating that "this Constitution or no law could infuse intelligence" and that his amendment "would eliminate some words out of what otherwise might be a long constitution." Mr. Phillips parried by expressing "surprise" that "my good friend," Mr. Nacy, would "eliminate from our fundamental document the immortal words of Thomas Jefferson." *Debates of the 1943-44 Constitutional Convention*, pp. 2336-2337.

To put these comments into context, one must, however, look to the earlier debates when Section 1 of the Education Article was first presented for consideration (*Id.* p. 2321), the provisions of the proposed Education Article and the debates before Mr. Nacy offered his amendment to ascertain that Mr. Nacy had concerns with the increased amount of school funding by the State which had occurred and would occur. We therefore look to the earlier debates.

After Mr. Lindsay, Chairman of the Education Committee, had made opening remarks with respect to Section 1 of the Education Article, Mr. Nacy made a point about the funding of schools by the State increasing by "several times" between 1930-31 and 1941-42. It was then confirmed that it had increased more than three times. *Id.*, p. 2324. There then followed concerns about increased costs to the State because of the expanded age entitlements for students to qualify for free public education which were provided in

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education funding which had increased state funding of schools, which would continue to increase, and which would increase further under new provisions proposed by the Education Committee.

the Committee's Section 1. *Id*., pp. 2324-2329. Mr. McReynolds, who had been in the Legislature, then spoke of the shift of the tax burden from local to the state in the 1930 to 1942 time period. *Id.*, p. 2330.

Mr. Opie then spoke of the need to adequately fund education in Missouri because "other governments in this world, and there are many of them, are going all out on education, and the country that doesn't provide the highest class of education and every advantage is going to be left . . . in a competitive way." Mr. Opie then indicated that the Convention should support the "report of this Committee and look to the future, because if we don't, the citizens of Missouri will be left at the switch." *Id.*, p. 2330.

Mr. Lindsay then reiterated that this "is not a school system of isolated districts. **It's a state school system, and it's the state's obligation** to see that we have a school system . . . and there's nothing wrong with the state supplying the money" (Emphasis added). Mr. Lindsay indicated that the Committee[10] had given much thought to the

[10] It should be noted that the Education Committee was composed of citizens who were very knowledgeable with respect to education, including for example, Franc L. McClure (President of Westminster College at Fulton), L. E. Meador (a professor for many years at Drury College in Springfield), William L. Bradshaw (who for many years was Dean of the Business and Public Administration School at the University of Missouri in Columbia) and R. F. Wood (who was for many years a professor at Central Missouri State Teachers College in Warrensburg). *Official Manual of Missouri, 1945-46*, pp. 144,

provisions of Section 1. "I think that **every sentence and every word has been carefully weighed**" (Emphasis added). Mr. Lindsay stated that ". . . it's a feeling that this is the best . . . school section of any Constitution in the United States, if it is adopted, the way it is written." *Id*., p. 2331.

Mr. Meador then pointed out that "one of the weaknesses in Missouri that causes us to rank low is the fact that there is no provision in our Constitution for kindergarten. . . . Now the kindergartens, I think all modern research has indicated that our characters are determined far earlier than we have sometimes thought. . . . [T]he children learn much earlier than we ever thought in the past, and we put the age of education a little too high. . . .[11] A study was made not long ago of the history of the boys and the boys and girls in that group. In almost every instance it was discovered that a very painstaking person had taken that child at the age of two or three and commenced their education, and it is just marvelous what can happen to a boy or girl that is properly trained at an early age." *Id*., p. 2333. That removal of the lower age threshold of 6 years to receive a free public education which was

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146. The college president and the college and university professors certainly were aware of the need to provide for an adequate public school education.

[11] Section 1 of the Education Article as proposed by the Education Committee, and adopted by the Convention, removed the lower age threshold of 6 years to be entitled to a free public education.

recommended by the Education Committee and later adopted by the Convention would clearly require additional funding of the school system.

It was against this background of additional funding needed to fund a "state school system," which was the "state's obligation" which would be "competitive" with other countries in the world, which would provide for free public education for children at an early age, and the three-fold increase in state funding for schools that Mr. Nacy had referred to earlier that the Nacy Amendment was made. What were couched by Mr. Nacy in the explanation of his amendment to strike the first clause of Section 1 – that (i) "this Constitution . . . could not diffuse infuse intelligence" and (ii) "it would eliminate some words out of what otherwise might be a long constitution" (*Id.*, p. 2336) -- , was in reality an effort to strip a standard for the level and cost of education and thereby reduce the level of funding that was the "state's obligation."

Mr. Nacy carefully rephrased his interrogation of Mr. Phillips upon which the Respondents rely to query – "What **could** the Legislature or the people of Missouri **do** under Section 1 of this proposal now that they could not do if this amendment is carried?" (Emphasis added). *Id*., p. 2337. The real issue posed by the Nacy Amendment was not what the Legislature or the people of Missouri "could . . . do," but rather what the "**Legislature**" was **required to do** if the Nacy Amendment was adopted.

Mr. Phillips properly amplified the reason for the first clause of Section 1 by stating that "there is sound declaration of policy of the same character as our Bill of Rights is made up." *Id.* Mr. Nacy attempted to raise a partisan issue by making inquiry "of the Democrat from Joplin" by stating that "[y]ou are aware, no doubt, that it was a Republican [Charles Drake] and a Republican Convention in 1865 that put these words in the Constitution, are you not?" *Id*., pp. 2338-39.

Mr. Lindsay, the Education Committee Chairman and an attorney from St. Joseph, pointed out that the "words [which the proposed amendment sought to delete] serve a very useful purpose as a matter of declaring the purpose of this state [and] . . . that [he believed] that they mean something more than some of the delegates do." Mr. Lindsay continued – "If you will look through many of the decisions in this state of our Supreme Court dealing with the validity of school laws, you will find that they often quote from that section, and I have the feeling that it has had a great deal of influence in the writing of their decisions as pertain to acts of Legislature dealing with school problems." *Id*., p. 2339.

Mr. Tee then spoke, saying "I would just like to say and remind you that this is a Constitutional Convention and not a glorified drive to save paper, and I hope this motion will be defeated." *Id.*

The Nacy Amendment was defeated. *Id*., p. 2341.

The debates with respect to the Education Article proposed by the Education

Committee are reflected on pages 2309 through 2431 of the transcript of the 1943-44 Constitutional Convention. Most of the provisions of the Education Article (File 13) submitted to the Convention by the Education Committee survived intact during these debates, were later put into the final form by the Committee on Phraseology, Arrangement and Engrossment, and were a part of the final Constitution submitted and approved by the voters of Missouri.

One of the subjects **not discussed** during the debates (pp. 2309-2431 of the Transcript) was the 25% of state revenue provision which carried over from the 1875 Constitution and originated in the 1853 statutes. Rather, continual references at various points of the debates referred to the practice that had existed since 1887 of the General Assembly appropriating one-third of state revenue for free public schools. See, *e.g.*, statements of Mr. Mayer ("The schools get a third of the revenue of the state – not only the sales tax, but liquor taxes and all those things have been added." *Id.*, p. 2323), Mr. Lindsay ("It's now thirty-three and one-third percent of the revenue." *Id.*, p. 2328) and Mr. McReynolds (". . . the one-third received from the state. . . ." *Id.*, p. 2330). Consequently, it cannot be said that the 1943-44 Constitutional Convention gave any extended and significant consideration to the 25% of state revenue provision contained in Section 3(b) of Article IX.

CONCLUSION WITH RESPECT TO SCHOOL FINANCE ISSUES

In "framing" the education provisions of the 1945 Constitution, the Constitutional Convention carried forward the key provisions of the 1865 and 1875 Constitutions – with the basic obligations of the General Assembly, and hence the State, set forth in Section 1 remaining intact, and with the recognition that the obligations of the State in funding the state system would be greater because the school year was extended, free public education was required for younger children and students had to be educated to compete in a world economy.

The 1943-44 Constitutional Convention did not adopt any provision which placed a duty upon school districts to fund public education, but rather the obligation to fund free public education remained, and still remains, under Section 1(a) of Article IX with the General Assembly, and hence the State, to adequately fund free public education.

And, with the addition of the "equal . . . opportunity" requirement in Section 2 of Article I, the 1943-44 Constitutional Convention required that all children in Missouri were entitled to an equal opportunity to the adequate education in this era which is required to be provided by the State of Missouri under Section 1(a) of Article IX.

The enactment of Senate Bill 287 swept away the $904 million shortfall in operational school funding under Senate Bill 380 and adopted a system which

"targeted" an $800 million increase spread over seven years (rather than in 2005-06 which was required under SB 380) without considering existing underfunding not addressed by Senate Bill 380 – such as the State's obligations with respect to funding buildings and other infrastructure, transportation costs and early childhood education.

Section 21 of the Hancock Amendment has required since 1980 that the State, not the local school districts, provide funding for increased educational standards which are required by the Constitution or by statutes. That obligation of the State has not been met.

The Judgment of the trial court should be reversed, and this Court should enter the Judgment which the trial court should have entered and this Court should retain jurisdiction. We suggest that a Judgment along the lines suggested in Plaintiffs' Suggested Judgment submitted to the trial court (LF_5650-5658; App. to Initial Brief, Tab 34, App. 824-832) should be entered. We further suggest that this Court should retain jurisdiction, rather than remanding in the ordinary course to the trial court. Experience has shown that retaining jurisdiction in a state supreme court expedites final relief before the present generation of school children have graduated from school. See, *e.g.*, the retention of jurisdiction by the Kansas Supreme Court (*Montoy v. State of Kansas*, 102 P.3d 306 and 112 P.3d 923 (Kan. 2005) and the Arkansas Supreme Court (*Lake View School District v.*

Huckabee, 91 S.W.3d 472 (Ark, 2002), 142 S.W.3d 643 (Ark. 2004), and 144 S.W.3d 741 (Ark. 2004)).

PART B

CFES TAX ASSESSMENT ISSUES

I.

INTRODUCTION WITH RESPECT TO CFES TAX ASSESSMENT ISSUES

Respondents' Brief argues many issues that circumvent the ultimate question presented by Appellants CFES, et al. ("CFES"), on this appeal – is the definition of "local effort" in Section 163.011(10)(a), RSMo 2005[12] as used in the "funding formula" of SB 287 unconstitutional because the legislature relied on unlawful, arbitrary, capricious and unreasonable 2004 property tax assessment figures that are now "frozen" for all future years, thereby causing certain CFES school districts an unlawful deprivation of funds? This deprivation of funds is not, as Respondents argue, from additional state funds. Rather, CFES presented evidence as to how the school districts and taxpayers suffered and continue to suffer harm and threatened harm and how the school districts suffered damages *directly* in each year, irrespective of any additional funding from the state of Missouri.

II.

STANDARD OF REVIEW

The first issue is the appropriate standard of review for constitutional challenges to a statute. CFES contends that, as to this assessment issue, it is *de novo*. *City of Arnold v. Tourkakis*, 249 S.W.3d 202, 204 (Mo. banc 2008). CFES must demonstrate that the

[12] All references are to RSMo 2005 unless otherwise indicated.

statute in question clearly contravenes a constitutional provision. *Id*. See also, *Delta Air Lines, Inc. v. Director of Revenue*, 908 S.W.2d 353, 354 (Mo. banc 1995). (This Court has *de novo* review on questions of law, including the meaning of statutes.) Nonetheless, CFES asserts that the uncontroverted evidence the State's own evidence, and without any of the evidence presented by CFES' experts, demonstrated that § 163.011(10)(a) clearly contravenes numerous statutes and constitutional provisions.

Under any standard of review, the calculation of "local effort" in the funding formula required under SB 287 was incorrect because SB 287 did not use the "equivalent **sales ratios**" that the uncontroverted evidence either conceded or offered by Respondents demonstrated were required by a specific statute in order to achieve "equalized assessed valuations" as required by Art X §14, Mo. Const,, statutes and case law. Such a result is arbitrary, unreasonable and capricious and does not survive the rational basis test. Moreover, the law also requires **valuation** assessment data from all counties for 2004 in order to achieve those same "equalized assessed valuations" but DESE only had data that was provided directly from the counties that was never equalized. The evidence on this issue was also uncontroverted. Therefore, this Court's task is to make a *de novo* determination if, pursuant to SB 287, the legislature could have properly relied on arbitrary, capricious and unreasonable documents and information provided to DESE and relied on by the legislature when it made the local effort calculation that is now frozen in the funding formula for all future years funding. *State ex inf. Nixon v. Kinder*, 89 S.W.3d 454, 459 (Mo. banc 2002) ("But, if all or part of a statute does conflict with a

Comment: Do we want to say this is the only task???

constitutional provision or provisions, this Court must hold the conflicting portions invalid.") See also, *Rekart v. Kirkpatrick,* 639 S.W.2d 606, 608 (Mo. banc 1982).

III.

ARGUMENT

A. THE TWO ISSUES IN THE JUDGMENT

Respondents' brief only reiterates the trial court's Judgment finding that the two figures challenged by CFES that the legislature relied on to compute the "local effort" component were valid, as they both state: "[t]he figures used by the legislature consisted of the December 31, 2004, assessed valuation for each county, certified by the Commission in January, 2005; and the December 31, 2004, equivalent sales ratio for each county, certified by the Commission in March 2005." (Brief at 6; Judgment, A-30) However, if either or both of these two figures were, as a matter of law, incorrect, this Court cannot simply disregard them as not being "against the weight of the evidence" or as "contrary facts" to the Judgment. CFES will address these two issues and then address the several procedural issues raised by Respondents.

The above two figures that the legislature relied upon were contained in two documents that **should** have reflected "equalized assessed valuations" for all counties in Missouri for the year 2004, i.e., CFES-22 (2T-584) and State-708 (17T-4296-4299). Both documents relate to requirement that DESE, and therefore, the legislature, have information that will ensure that there are "equalized assessed valuations" of the property values amongst the property in the 115 counties in the state in order to ensure that the property wealth that forms the basis for school funding is properly spread amongst the districts. The first (CFES-22) does those through means of equivalent sales ratios; the

second (State-708) by means of actual aggregate valuations of the properties in all 115 counties in Missouri.

Clearly, the legislature made a choice to use that **one** assessment year as the "base" for all future years' computations of local effort.[13] This Court in *State ex rel. City of Independence Sch. Dist. v. Jones*, 653 S.W.2d 178, 189 (Mo. banc 1983), found that "[b]ecause locally-determined levels of valuation of real and tangible personal property vary from county to county, use in the formula of **'equalized' assessed valuations assures a somewhat uniform measurement of school district wealth**." *Id.* at 182. (Emphasis added.) Thus, if the legislature was going to adopt a funding solution whereby the property wealth component of the formula would no longer be measured on a yearly basis, without the semi-annual "check and balance" system that had always been used to ensure that the assessment figures were correct as in the past, this radical formula could only work if the "frozen" 2004 figures were clearly and accurately correct and calculated in accordance with the governing statutes and constitutional provisions.

CFES carefully presented its evidence that demonstrated how both of these exhibits presented to DESE, upon and which Respondents now admit that the legislature relied in passing SB 287 -- CFES-22 and State-708 (17T-4296-4299) -- did not comply with the governing statutes and constitutional provisions. See, Art X §14, Art. X §3 Mo. Const., §138.395, §138.390, §138.400.1, §163.011(8) and §163.011(10)(a). The key is

[13] This actually meant that they chose the 2003-2004 assessment cycle, as there were no assessments in 2004, only new construction and improvements were considered.

that § 163.011(10)(a), RSMo 2005's definition of "local effort" for purposes of § 163.031 and the new SB 287 provides that "… [f]or the fiscal year 2007 calculation, 'local effort' **shall be computed** as the **equalized assessed valuation** of the property of a school district in calendar year 2004 divided by one hundred and multiplied by the performance levy…." (Emphasis added.) This is a mandate, it is not discriminatory. Thus, the question becomes – did the information in these two documents comply with the statutes and constitution's requirement that the local effort computation contained "equalized assessed valuation of the property?" Subparagraph (b) of § 163.011(10) provides that this same calculation shall be used, plus or minus certain fines, "[i]n every year subsequent to fiscal year 2007." (Emphasis added.) This is why CFES refers to the term "frozen" for all future years and why this calculation is so dramatically important.

This Court in *State ex rel. City of Independence Sch. Dist. v. Jones* stressed why it was important to have "equalized assessed valuations" in the funding formula in one year, much less all future years, rather than just the valuations reported by the counties without any equalization:

> Plaintiffs and defendants agree one purpose of § 163.031 is to direct more state funds to less wealthy school districts in order to equalize the amount of money available to educate each child in the state. Section 163.011(4), in providing for equalized assessed valuations, evidences legislative concern that reported valuations may not convey a true picture of local property wealth. Accordingly, one factor in each equalized assessed valuation is the percent of true value at which the State Tax Commission determines the

property in each county is actually assessed. Use of this factor, along with the total assessed valuation of the district and the 33 1/3 percent of true value at which property is required to be assessed under § 137.115, is intended to produce a true indication of the value of the property in each school district and hence its wealth.

653 S.W.2d at 190. With this Court's admonition in mind, the question becomes – did the two documents Respondents assert were presented to DESE and used by the legislature have figures that utilized "equalized assessed valuations' for the 2004 year that are frozen into the formula such that they "direct more state funds to less wealthy school districts in order to equalize the amount of money available to educate each child in the state?" The answer is a clear and convincing no.

1. EQUIVALENT SALES RATIOS

With respect to the first document, CFES-22, the uncontroverted evidence presented by CFES and Respondents demonstrates that the legislature relied on "equivalent **appraisal** ratios" instead of "equivalent **sales** ratios," as specifically required by § 138.395 and 163.011(8).[14] It was admitted by the State Tax Commission (STC) Chairman when he said "The median that's utilized in the equivalent sales ratio comes

[14] Section 138.395 requires that the "**equivalent sales ratio**" be used and "adopted" by school districts and by DESE "for determining the "**equalized assessed valuation**" of every school district's property in the state and every school district's "equalized operating levy … for distributions of school foundation formula funds."

from our appraisal ratio study." 2T-577-578. The Chairman also testified that "Sales studies are forward looking. The appraisal ratio studies are based upon what's happened in the past." 17T-4353. The only evidence at trial was that Missouri was the only state that used appraisal ratio studies in its funding formula. 2T-361-362; 34T-8413; CFES-8 The State Auditor's Report, CFES-23, p.14, criticized the use of these appraisal ratio studies instead of market sales values *prior* to the May 2005, effective date of SB 287.[15] The State's evidence that the chief advantage of an appraisal ratio study is that it emulates the population by sampling from all properties (17T-4291) does not override the legislative requirement that sales ratios be used.

The point made by CFES is that, if the legislature requires the use of one type of ratio study, "studies [that] are forward looking" and not reliant upon past data, then it should be followed by the STC and if DESE relied on the study not required by statute, then the legislation that similarly relied on the wrong figures were not equalized, then those figures were, by definition arbitrary, capricious and unreasonable and should not be followed for all future years in determining future funding. When a statute is plain and the language conveys only one meaning, it should be followed. *City of Wellston v. SBC Communications, Inc.*, 203 S.W.3d 189, 192 (Mo. banc 2003). Again, the amount of

[15] In the *Jones* case, the court noted that these reports and STC legislative messages may be pivotal in the enactment of legislation: "Enactment of § 163.033 followed legislative and Tax Commission studies prompted by a report of the State Auditor that assessment levels of real property varied widely throughout the state." 653 S.W.2d at 190.

local effort counts "one for one" against the total funding needed to obtain the state funding required for each district. Local effort through local taxes is essentially a proxy for state funding.

In *State ex rel. City of Independence Sch. Dist. v. Jones*, 653 S.W.2d at 190, this Court held discussed the importance of the "legislative concerns" in "providing for equalized assessed valuations" in the funding formula:

> Section 163.011(4), in providing for equalized assessed valuations, evidences legislative concern that reported valuations may not convey a true picture of local property wealth. Accordingly, one factor in each equalized assessed valuation is the percent of true value at which the State Tax Commission determines the property in each county is actually assessed. Use of this factor, along with the total assessed valuation of the district and the 33 1/3 percent of true value at which property is required to be assessed under § 137.115, is intended to produce a true indication of the value of the property in each school district and hence its wealth.

The STC's report that was sent to DESE (CFES-22) in 2004 provided that all 115 counties were in perfect compliance as the equivalent sales ratios were all at 33.33%. See also, CFES-26; 2T-584. As noted in the CFES' original brief and in the next section, this was wholly contrary to the information that the STC was providing the legislature, the counties and the school districts with respect to **sales ratio** studies that were actually required under § 138.395 and § 163.011(8) and should have been reported to DESE and used by the legislature in computing the local effort in 2004. Although CFES experts

testified to this fact. 4T-848-849, 863; T-361-362; CFES-28, p.4, CFES does not truly need to rely on its own experts' evidence when: 1) the statutes themselves are clear on this point; and 2) the State's own uncontroverted evidence proves this point.

2. AGGREGATE VALUATIONS IN 115 COUNTIES

Second, as to State-708, again, the uncontroverted evidence was that DESE received this Annual Report to the Commissioner of Education that contained the 2004 aggregate assessed valuations for all 115 counties from the STC. 17T-4330-4331. It was again extremely important that these valuations, like the ratios, be accurate and "equalized" for the 2004 year, as the values became fixed in the formula. However, the STC Chairman admitted that the information on this report for the 2004 year came directly from forms (Forms 11 and 11A) submitted by the counties and the valuations were unchanged by the STC. 17T-4354; CFES-25. In other words, there was no attempt to "equalize" the valuations as required by law. *State ex rel. City of Independence Sch. Dist. v. Jones*, 653 S.W.2d at 189; Article X, § 14, Mo. Const.; § 138.390; § 138.400. 1. This failure to equalize is notwithstanding the fact that that the STC clearly had the ability to equalize insofar as it does so for "compliance" purposes with its "other set of books." The STC Chairman at one point argued that the STC did not have enough time to equalize in 2003 because the report to DESE was due so soon after it received the valuations. However, he later realized that this was not true for the 2004 year since there was a full extra even numbered year in between during which there were no new assessments. 17T-4354-4356.

The STC performs a two-year biennial assessment plan, value comparisons, sales studies, appraisal studies, and sends out compliance orders to determine the total assessed valuation for each county on an annual basis designed to determine the equalized assessed valuations for each county. 17T-4296-4299. Again, the data that comes from this two-year biennial assessment plan **is** utilized by the STC, just not with DESE. The State's own witness admitted that in the same year that State-708 was submitted wherein allegedly all 115 counties had "equalized assessed valuations", the STC sent compliance letters, based on the "sales studies," to the City and County of St. Louis Assessors which told them to increase their valuations by 34% and 16% respectively from valuations far below the 95% level and sent similar letters to six other counties because they were far under true value in the same 2003-2004 years that, based on "appraisal studies" used with DESE, the STC was calling perfect for school funding purposes. T17-4347-4348; CFES-29. Again, this was cross-examination of the State's witness and, as the *Jones* case noted, with the evidence relied on by that Court to reverse was uncontroverted.[16]

The STC witness also noted that in the year following 2004, the STC sent out 23 compliance orders for 23 counties that were not within acceptable market values based on "sales ratio studies." 17T-4328. However, this Court must keep in mind that the fact that those 23 counties that were not in compliance, as well as all valuation changes in

[16] Commissioner Davis also reported to the Joint Committee Tax Policy, CFES-28, that after 2003 "regression" or variability in statewide assessment had taken place. 2T-595-596. The STC

Missouri since 2004, are irrelevant for purposes of SB 287 because all values after 2004 are no longer considered for purposes of local effort in the formula. 17T-4357. Any attempts to bring counties to true value and correct the problems with equalized assessed valuations after 2004 and which could dramatically help the school districts in Missouri are a nullity for purposes of this local effort calculation.

The 2004 STC Recommendations to the Missouri Legislature stated that: "Assessment uniformity cannot be achieved on a consistent basis without the benefit of having accessibility to accurate sales data. The absence of certificate of value severely thwarts the attempt by assessors to facility uniform and equitable assessment throughout the state." CFES-23. If the STC is saying in one document that all counties are equalized perfectly and in another annual message to the legislature that is required by statute that such is impossible, something is desperately wrong that requires review.

The STC witness admitted that there is a different standard with sales ratios studies used in measuring counties' compliance with the laws on valuation than for the equivalent sales ratios that are sent to DESE. Some districts could not be in compliance for a compliance order and yet be put at 33.33% for the purposes of the report to DESE. There are two sets of rules. 17T-4328-4331. This is also simply wrong when the governing statue requires those sales ratios to be sent to DESE. In fact, when answering the trial court's question about the high variabilities in the appraisal ratios that were brought into the 33 1/3 compliance level, the STC Chairman testified that "[w]e have disparate treatment of taxpayers" and "Is that a good assessment program? No." 17T-4326-4327.

In *State ex rel. City of Independence Sch. Dist. v. Jones*, 653 S.W.2d at 189, this Court held that:

> In defining "equalized assessed valuation of the property of a school district" in § 163.011(4), the legislature did not specify how the State Tax Commission should determine the percent of true value at which property is assessed or what property should be considered. Section 138.390, which mandates equalization of assessed valuations of property among counties, however, requires the State Tax Commission to equalize classes of property separately.

In this case, the STC did not only fail to "equalize the properties separately" for purposes of reporting to DESE, it failed to equalize them at all. It simply regurgitated the information it received from the school districts directly to DESE without making any changes whatsoever.

In the *Jones* case, the school district adduced evidence that "that assessments of tangible personal property constitute 40 to 45 percent of the property tax base in Jackson County" and that there was "uncontradicted evidence that assessment practices as to real and tangible personal property differ markedly, and the record discloses no rational relationship between assessment levels of real and tangible personal property." *Id.* Therefore, this Court found that "[w]hile it may be the legislature delegated some discretion to the State Tax Commission in determining percents of true value, we find no delegation of authority to be arbitrary or capricious." *Id.* at 191.

In *Jones*, the challenge was on a Petition for Review of the STC's actions, so the STC was a necessary party. Here, the school districts had no property tax assessment before the STC and was not challenging a decision of the STC. The STC's evidence and other records were the only reason for its presence in the case as nothing the STC did or did not do after the passage of SB 287 could affect this litigation. For that reason, they were not a necessary party and no order of the trial court or this Court against the STC could affect this litigation involving a challenge to the validity of SB 287. Nonetheless, this does not mean that this Court's holdings in *Jones* regarding the legislative intent and the necessity of having "equalized assessed valuations" as a fundamental part of the funding formula should not be binding here.

CFES stresses that the *Jones* case only emphasized what numerous Missouri statutes and the Constitution require. Article X, § 14, Mo. Const. requires that "The general assembly shall establish a commission, to be appointed by the governor by and with the advice and consent of the senate, to equalize assessments as between counties." Section 138.390 provides that STC shall "equalize the valuation" of each class of property "among the respective counties" of the state in Missouri. Section 138.400. 1 requires that the STC transmit to all county clerks "the value of the real and tangible personal property of his county as equalized by said commission." The property assessment system is set up such that, between the June twentieth and the second Monday in July, the STC receives abstracts of all the taxable property in the counties and the abstracts of the sales of real estate and then add or deducts from the valuation of each class of the property of each county which it believes to be valued below its real value in

money such percent as will increase the same in each case to its "true value." There was not even an attempt to do this in the report sent to DESE – State-708. While one may hope that the effects of this failure could be "fixed" in previous years by the checks and balances of the bi-annual assessment cycle, the legislature froze this flawed 2004 year into the formula.

Here, the figures submitted to DESE were not only not equalized but they were not "uniform" as between counties in violation of Article X, § 3, Mo. Const. Commissioner Davis testified that it was the STC's policy that if it had evidence that there was *intra*county equalization in assessment practices, they assumed that there was *inter*county equalization. 2T-570-573. However, this is clearly an assumption that has no basis whatsoever in the facts or the law and this Court must make it so clear.

Article X, § 3 requires that "[t]axes may be levied and collected for public purposes only, and shall be uniform upon the same class or subclass of subjects within the territorial limits of the authority levying the tax." See also, *St. Louis County Library District v. Hopkins*, 375 S.W.2d 71 (Mo. 1972). CFES-10, Mr. Rothschild's "Multi-Taxing Jurisdiction Study," compared counties such as Audrain and Montgomery County, and found that taxpayers in Audrain bear a higher tax burden because they are assessed at a higher percentage of the true value of their property while taxpayers in Montgomery County are paying less than the full taxes on the same property within the same taxing district. Therefore, taxpayers in one county are subsidizing taxpayers in the other county where they share districts, which is exactly what Article X, §3 of the Missouri Constitution forbids. 1T-271-280 and CFES-10. This evidence was

uncontroverted as the STC's own evidence CFES-29--which again showed the widely disparate ratio study valuations that were also shown in CFES's "PPRC Report" for 27 counties. CFES-8. Thus, without any of CFES's expert evidence, CFES showed that in 2004 there were counties with completely disparate valuations, which makes it clear there was indeed a lack of uniformity in 2004.

CFES adduced uncontroverted evidence that when county assessors such as Shawn Ordway in Cole County and the assessor in St. Charles County do their jobs extremely well and the properties are assessed at 95% of true value, but the neighboring counties are assessed at far below true value, taxpayers in one county are subsidizing other taxpayers for shared school districts, which is Article X, §3 again forbids. Respondents and the trial court carefully avoided addressing these issues and instead concentrated on procedural issue that CFES will now address again, although its original brief has already discussed these issues in some detail.

B. CFES'S TWO CLAIMS - ONE ABANDONED

The Judgment described its ruling on the assessment claims as being on "two distinct claims." (A-24) It described the first as a request to establish "a new system for equalizing assessment practices across the state." It described the second as a request for "a declaration that the funding formula of SB 270[sic][17] is unconstitutional because the legislature relies on inaccurate and unequal 2004 assessment levels in computing the local effort component of the funding formula." *Id.* Respondents' Brief attempts to

[17] It is assumed that the Court meant SB 287 as there is no other reference to SB 270.

raise procedural arguments that are red hearing as they purposefully reargues issues related to the first claim even though CFES made it clear at trial, in its post-trial briefs and in its opening brief at this Court (p. 111) that it had abandoned this claim.

Nonetheless, Respondents **still** spent a large portion of their brief on issues of CFES' standing on this first claim, and whether the State Tax Commission was a necessary party. However, these issues only relate to the abandoned issues related to the first claim. For this reason, CFES has not responded to this part of Respondents' brief.

C. PLEADING ISSUES

Respondents also complain about the fact that CFES did not adequately plead or ask for the proper relief on the second claim. However, it is absolutely clear from the trial court's Judgment that the trial court was fully aware of the exact claims asserted by CFES the relief it asserted and that the trial court rendered judgment on that second claim. Moreover, there was no objection by Respondents to many witnesses and arguments by CFES during months of trial where this evidence and these arguments were made. Again, the trial court clearly set out in its Judgment the fact that CFES requests "a declaration that the funding formula of SB 270 [sic] is unconstitutional because the legislature relies on inaccurate and unequal 2004 assessment levels in computing the local effort component of the funding formula." (A-24) Indeed, Respondents point out that this litigation began in 2004 *prior* to the enactment of Senate Bill 287 and the initial pleadings of all parties were drafted at that time. Admittedly, the amended pleadings of CFES did not always delete references to matters that no longer have relevance or always add matters that should likely have been added to more directly focus the trial court on

the issues that were actually tried in this case. However, there is no question that, despite Respondents' argument that CFES did not properly amend its pleadings or ask for the proper relief, ultimately, the trial court **ruled** on both the evidence and issues that were presented by CFES at trial *without objection* from Respondents.

Thus, although the trial court denied a motion by CFES to amend its pleadings to conform to the evidence, Respondents do not point out to this Court that CFES filed the motion after the Judgment when it was clear that the court had already ruled on the issues presented by CFES. Therefore, the motion was brought to "clean up" the pleadings, in effect, moot. Pursuant to Rule 55.33(b), the evidence presented by CFES was never objected to at trial and, therefore, was "tried by the implied or express consent of the parties." As such, the evidence "**shall** be treated as if it were alleged and a motion to formally amend may be made **even after judgment**." *Barancik v. Meade*, 106 S.W.3d 582, 592 (Mo. App. W.D. 2003) citing *Rombach v. Rombach*, 867 S.W.2d 500, 503 (Mo. banc 1993) (Emphasis added).

D. CFES LACK OF INJURY OR PROTECTABLE INTEREST

Respondents complain that CFES and its individual taxpayer and parent/student plaintiffs do not have standing on the second claim, although most of the discussion pertains to the first, abandoned claim. This was discussed at length in the initial brief. On this issue, the trial court actually ruled that CFES had "not demonstrated an imminent unlawful deprivation of funds." Again, Respondents ignore that CFES is not bringing a "tax assessment claim" but rather a request for a declaratory judgment that the way in

which the foundation formula employs the local effort component is unconstitutional, unlawful and in violation of other laws of the state. 14LF-02414-02435.

CFES alleges that CFES and the member school districts have a right to intervene in that they have a right to receive tax dollars and have a "statutory duty to protect all rights of the students within the districts to funding and education guaranteed by law." 14LF-02415. CFES alleged in paragraph 11 of the Third Amended Petition that they have the right to bring an action to require the state of Missouri to expend its tax funds in a manner which comports with the requirements of the constitution and state law. 14LF-02420. CFES also generally asserted that it was bringing its action based upon the students and taxpayers of the member districts.

Supreme Court Rule 52.10 permits an association to bring an action provided that the representative parties fairly and adequately protect the interests of the association and its members. The rule has been described as a virtual representation where it could be impracticable for parties to appear. Standing for CEE and CFES is appropriate for this action. See, *Executive Board of the Missouri Baptist Convention v. Carnahan,* 170 S.W.3d 437 (Mo. App. W.D. 2005). See also, *Missouri Nat. Educ. Ass'n v. Missouri State Bd. of Educ.,* 34 S.W.3d 266 (Mo. App. W.D. 2000).

These school districts are directly affected by the question at issue and therefore, have an interest in the dispute and an outcome in the litigation. See, *Ste. Genevieve School District R-II v. Board of Alderman of City of Ste. Genevieve,* 66 S.W.3d 6, 10 (Mo banc 2002). "Under Missouri law, a school district that is threatened with the imminent unlawful deprivation of part of its funds has standing to seek a declaratory judgment

challenging the statutory interpretation that would lead to the deprivation." *State ex rel. Independence Sch. Dist. v. Jones*, 653 S.W.2d 178, 189 (Mo. banc 1983). *Ste. Genevieve* at 10. *St. Genevieve School District v. Bd. Of Alderman of City of St. Genevieve*, 66 S.W.3d 6, 10 (Mo. App. W.D. 2002) ("reduced to its essence, standing roughly means that the parties seeking relief must have some personal interest at stake in the dispute, even if that interest is attenuated, slight or remote….The district also has standing because the city's actions, if improper, would unlawfully deprive the district of tax revenue.") School districts have standing to assert claims under Article IX, Section 1(a). See footnote 2 of concurring opinion of Robertson, J., concurred in by Limbaugh, J., in *Committee for Educational Equality v. State*, 878 S.W.2d 446, 458 (Mo. banc 1994). And, see also the analogous situation in *Massachusetts v. Environmental Protection Agency*, 549 U.S. 497, 519-520, 127 S.Ct. 1438, 1454-1455 (2007), where the Supreme Court held that a subordinate governmental entity, i.e., a state, had standing to bring an action against a federal agency to "protect" its "interests."

Taxpayers and parent taxpayers who are Plaintiffs and Plaintiff Intervenors similarly have standing to bring a declaratory judgment action both in their status as taxpayers who support public schools in Missouri and as taxpayers of a school district. Standing to challenge expenditure of public funds through taxation and the allowance of citizens to have government conform to the law and the Missouri Constitution when spending money are clearly situations where Missouri courts have previously allowed taxpayer standing. *State ex rel. Nixon v. American Tobacco Co.*, 34 S.W.3d 122, 133 (Mo. banc 2000). "In the context of an action for declaratory judgment, Missouri courts

require that the plaintiff have a legally protectable interest at stake in the outcome of the litigation." *Ste. Genevieve Sch. Dist.*, 66 S.W.3d at 10 (citing *Battlefield Fire Prot. Dist. v. City of Springfield*, 941 S.W.2d 491, 492 (Mo. Banc 1997)).

The parties filed Stipulations regarding the taxpayer and student status of various Plaintiffs and Plaintiff Intervenors and the taxpayer status of the Defendant Intervenors. 26LF-04676-04686. The parties stipulated as to the specific student involved in the CFES suit that:

> 10. Plaintiff-Intervenor Carolyn E. Bock was enrolled in the New Madrid R-1 School District at the time of the filing of this lawsuit as a student, in grade 10 in the 2003-04 school year, grade 11 in the 2004-05 school year and grade 12 in the 2005-06 school year in the New Madrid R-1 School District until her graduation from high school in 2006 and she is a person under the age of 21 years. Carolyn Bock's date of birth is March 20, 1988.
>
> 26LF-04678.

Students under the age of 21 years have the legally protectable interest of a free public education under the Missouri Constitution, Article IX, Section 1(a), as well as rights under Article I, Section 2. This student was not in excess of twenty-one years and, therefore, falls within the gratuitous instruction in a public school required by the Constitution. The Constitution makes no differentiation between persons who have "graduated." This student and parent have standing. See, *Concerned Parents v. Caruthersville 18 School District*, 548 S.W.2d 554, 557-58 (Mo. banc 1997).

Local Effort is a component of the funding provided to school districts that is based upon a county's assessed valuation. If those assessments are not reflective of true value, then local school districts in the counties where the assessments are not based on true value are receiving less local effort funding than they should be receiving. The PPRC report established that for 68% of the residential property in Missouri, that the 27 counties (representing 71% of the total locally assessed residential values in the state of Missouri 2T-385 or about 50% of all property in Missouri), that schools were, in essence, losing funding as to the local component of funding because the assessments were not at true value. CFES-8; 2T-540; 8A-8B; 34T-8429. This flaw in the foundation formula constitutes damages to at least those 27 school districts that were studied and found to be assessing at less than true value. The actual calculation of specific "damages" is not an easy calculation, because it requires an application of this information to each specific school district.

Therefore, to establish a damages calculation as to specific CFES school districts which were focus districts in the lawsuit, Glaser, Fedchak and Harrell made a calculation to illustrate how local funding would be affected if assessments were at true value. CFES-43; 3T. They used the same computer program that the Missouri Senate employee Paul Wagner used to run simulations of the formula at the end of May 2005 based upon SB 287 and that Otto Fajen provided. CFES-30, 3T-672,669-670. CFES-30 is a copy of the program and it could be used to run any multitude of simulations to see how assessed valuations affect funding for schools.

Respondents' argument that there would have to have been more state funding if there was equalized state funding is a red herring. In fact, the only effect of having equalized assessed valuations is that the exact same amount of state funding would simply be spread differently amongst districts exactly as the case law and formula is supposed to work. The CFES school district witnesses testified as to exactly what was the ultimate effect of SB 287 having the frozen figures.

Although the testimony is complex, a simple example sets forth the issue. Assume there were two districts each with the same Average Daily Attendance (assume 1,000) and a dollar value modifier of $1.09 (a number that adjusts for variations in costs across the state). They would each also have the same State Adequacy Target (set at $6,177). These multiplied together would total $6,667,530 in state aid. The next step is to deduct the "local effort." For this we can assume that one county is St. Charles County and one is St. Louis County (or St. Louis City) since latter assessed valuations, by the admitted records of the STC and the PPRC study, were not equalized or uniform in 2004 despite the 2004 figures frozen in the formula.[18]

One can assume that if St. Charles County was properly assessed at 95% of true value but St. Louis County was 25% lower such that St. Charles' local effort deduction was $1 million more than that of St. Louis County because it did a better job in its assessments, i.e. its local effort at doing proper assessments. However, the DESE reports

[18] The number by which the local effort figures are multiplied are both the $3.43 legislatively set performance levy so this can be ignored for ease of reference.

relied on by Respondents instead had both counties (and all counties) at 90% or better, resulting in an extra $1 million deduction for the counties that should not have had this great of a deduction. This money was not "saved" by the state of Missouri however, so it should have been redistributed to the other districts, as Missouri must pay at least 25% of the state budget to the schools. The CFES witnesses merely offered to the trial court various "more realistic" options of what the legislature would have more likely done had the counties "true values" all had been available in the DESE reports, i.e. altered other variables in the formula. This did not mean in any way, however, that CFES was not arguing that school districts were going to have less money available in each and every year because more money was being deducted from the state formula than should have been because the local effort amounts were incorrect.

Harrell specifically testified that the impact to his school district of North Kansas City if the assessed valuation in Clay and Platte County were at 95% would result in an overall increase in local effort. The actual calculation showing this increase is in CFES-41-42. Fedchak testified that this would have increased the assessed valuation to $40 million. 3T-637. State funding would decrease the first year and overall by $1.4 million, but there would be an overall net increase in local funding. 3T-637. To the extent that there would have been an overall net increase in funding, this constitutes damages because the formula uses inaccurate assessed valuations that are frozen in time.

Fedchak also assisted with the Rockwood funding calculation if assessed valuations were at true value. For Rockwood, if assessment levels were at 95% for Rockwood School District, they would have increased local funding by $303 million,

which would have decreased state funding for Rockwood by $1.5 million the first year and $10 million over a 7-year period. Overall, this is a net increase. 3T-633-34. Once again, to the extent that there are assessments that are less than true value, these are actual damages that school districts are incurring. These districts were focus districts from whom specific evidence and testimony was elicited in order to limit the issues and time to try this case. These focus districts were damaged by the assessments in the counties where they are located not being at true value according to the PPRC study. CFES-8,8A,8B.

To the extent that the PPRC study is an "indicator of conditions", 1T-239, and to the extent that the computer simulation program could be used for each of the 27 counties from the PPRC study in the same manner as Fedchak, Glaser and Harrell did at trial, Fedchak testified that local effort statewide would increase by $228 million. CFES-32. Conversely, by not having local effort statewide be at the levels it should be, local school districts are damaged by the assessments levels not being at the 95% level, in accordance with state law.

IV.

CONCLUSION WITH RESPECT TO CFES TAX ASSESSMENT ISSUES

This is a case of exceptional importance. The equity issues arise at a time when this state falls far behind the other states in funding and it is looking for ways to compete not only with those states but in the world economy. There is no more important element in the competitive market than the minds of our youth.

The disparity in funding is not solely one of equity in financing but is also based on a failure of the assessments to be equalized amongst all counties. The CFES plaintiffs have clearly demonstrated that the case law, statutes and Missouri Constitution set forth a methodology for school funding premised on "equalized assed valuations" for properties amongst all counties. The basis for this bedrock principle is such that school districts may be assured that the property wealth that forms the basis for approximately 60% of K-12 education and 72% of all education in Missouri is spread equitably. The legislature's unprecedented decision to freeze the 2004 assessments into SB 287's formula for all future years could only have been successful if it had been done lawfully. It was clearly was not.

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CERTIFICATE OF COMPLIANCE

The undersigned counsel hereby certifies pursuant to Rule 84.06(c) that this brief (1) contains the information required by Rule 55.03; (2) complies with the limitations contained in Rule 84.06(b); and (3) contains 16,190 words, exclusive of the sections exempted by Rule 84.06(b)(2) of the Missouri Supreme Court Rules, based on the word count that is part of Microsoft Word 2003. The undersigned counsel further certifies that the CD has been scanned and is free of viruses.

CERTIFICATE OF SERVICE

I certify that one paper copy of this Brief and one electronic copy on CD, as required by Missouri Supreme Court Rule 84.06(g), were served on each of the counsel identified below via U.S. Mail, postage prepaid, on May 4, 2009:

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