IN THE SUPREME COURT OF MISSOURI

APPEAL NO. SC 92159

CITY OF ST. LOUIS, et al.

Respondents/Cross-Appellants/Plaintiffs

vs.

STATE OF MISSOURI

Appellant/Cross Respondent/ Defendant

APPEAL FROM THE NINETEENTH JUDICIAL CIRCUIT COURT
DIVISION NO. 1, CIRCUIT COURT NO. 10AC-CC00434

HONORABLE JON BEETEM

BRIEF/REPLY BRIEF OF PLAINTIFFS/RESPONDENTS/CROSS-APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES: **PAGE:**

CONSTITUTIONAL PROVISIONS: **PAGE:**

STATUTES: **PAGE:**

RULES: **PAGE:**

JURISDICTIONAL STATEMENT

Respondents/Cross-Appellants City of St. Louis ("City"), Slay, Gadell and Clark[1] concur with the jurisdictional statement of Appellant/Cross Respondent State of Missouri ("State") that jurisdiction in the instant cross-appeal is proper in this Court because it involves the constitutionality of a state statute.

STATEMENT OF FACTS

The City's initial brief contains a statement of facts, much of which will not be repeated herein. While the City does not dispute many of the fact statements contained in the State's Brief, clarification and supplemental facts are required for context and a proper analysis of the legal issues.

The State Law

Senate Bill 739 (the "State Law") provides, in pertinent part:

> no employee of a fire department who has worked for seven years for such department shall, as a condition of employment, be required to reside within a fixed and legally recorded geographical area of the fire department if the only public school district available to the employee within such fire department's geographical area is a public school district that is or has been unaccredited or provisionally accredited in the last five years of such employee's employment. . . . .

§ 320.097 R.S.Mo.

The parties agree that boundaries of the St. Louis Public School district are

[1] Said respondents are sometimes referenced collectively herein as the "City."

identical to the boundaries of the St. Louis Fire Department and that the St. Louis Public School District is unaccredited. L.F. Vol. II, 181. Among all local government entities in Missouri, only the City has the combination of a public school district that has been unaccredited or provisionally accredited in the last five years and a residency requirement for municipal employment. L.F. Vol. II, 181.

Plaintiffs' Claims and Trial Court Judgments

Plaintiffs/Cross-Appellants filed suit challenging the validity of the State Law in three counts, all alleging that the State Law violated provisions of the Missouri constitution. The trial granted decided all three claims by way of summary judgment, finding in favor of plaintiffs/respondents on Counts I and III of plaintiffs' First Amended Petition, declaring the State Law invalid. The trial court found in favor of the State with respect to Count II. On September 1, 2011, the trial court held that the State Law exceeded the Article VI, Section 22 limitation on the State's power and was unconstitutional as a matter of law for encroaching upon the powers reserved for charter cities by the constitution. L.F. Vol. VII, 672. On November 10, 2011, the trial court determined that the State Law violated the equal protection clauses of the Missouri and United States constitutions and entered summary judgment in favor of plaintiffs on Count III of their petition. L.F. Vol. X, 988-989.

Purpose of the State Law

In the trial court, the State admitted that the general assembly's intent in

enacting the State Law was to supersede the residency employment qualification contained in the voter-approved Charter of the City of St. Louis, as applied to a specified group of City fire department employees. L.F. Vol. IV, 300. The State Law's terms and conditions do not affect or impact any other fire department employees in Missouri. L.F. Vol. II, 180. The State also admitted that the State Law did not have any application to any constitutional charter city in Missouri other than the City of St. Louis. L.F. Vol. IV, 299.

The State's initial brief ("State Brief") makes reference to the St. Louis Metropolitan Police Department ("SLMPD"), a state agency created pursuant to state statutes. State Brief, p. 11. SLMPD is an independent entity governed by a board of police commissioners who are appointed by the governor of Missouri. *R.S.Mo. § 84.030.* SLMPD is an "agency of the state" and is not a local or municipal agency. *Smith v. State,* 152 S.W.3d 275, 278 (Mo. 2005). L.F. Vol. X, 995-997.

The State Brief includes an "Introduction" section prior to its Statement of Facts. The State's Introduction contains information apparently obtained from internet websites. The State represents that the website information indicates a number of Missouri school districts that were either provisionally accredited or unaccredited "when the circuit court issued its judgments in this matter." State Brief, p. 9. However, that information was not provided to the trial court and was not part of the summary judgment record. The State does not assert or suggest that a residency requirement exists for any firemen employed within those

unaccredited or provisionally accredited school districts.

If the "introduction" portion of the State's Brief is also intended to serve as its "Statement of Facts," the website information is improper in that it was not part of the summary judgment record below, despite the State's acknowledgement that the information was available "when the circuit court issued its judgments in this matter." State Brief, p. 9.[2] In any event, the website information referenced in the State's Brief does not change the core, undisputed fact that the State Law has no application to any constitutional charter city in Missouri other than Plaintiff City of St. Louis and that only St. Louis firemen would be affected by the law.

Employment Qualifications

In the trial court, the State admitted that the residency requirement contained in the City's Charter is a qualification for City employment. L.F. Vol. II, 178. The express terms of the City's Charter also establish city residency as a

[2] The State did not move the trial court to take judicial notice of the website information. Judicial notice of adjudicative facts is a rule of evidence. *Randall v. St. Albans Farms, Inc.*, 345 S.W.2d 220, 223 (Mo. 1961). Therefore, "[t]he facts of which a trial court does take judicial notice must be offered in evidence so as to become a part of the record in the case." *Id.* Because these statements are not supported by the summary judgment record, these statements should be disregarded. *Mo.R.Civ.P. 84.04(i).*

qualification for employment. L.F. Vol. I, 34, 75; Vol. II, 178.[3] The State also admitted that the State Law regulates some of the terms and conditions of employment for the City's fire department employees. The State further acknowledged that qualifications, terms and conditions of municipal employment are a matter of local concern.[4] L.F. Vol. II, 179; Vol. IV, 295.

Practical Impact of the State Law

Whereas the City Charter requires all 817 full-time firemen to reside in the City (L.F. Vol. I, 34; Vol. II, 176), the residency exemptions contained in the State Law would allow more than 78 percent of those firemen to move up to an hour

[3] In the argument section of its Brief, the State apparently attempts to withdraw or retract its previous admissions in this respect, arguing that the City Charter's residency "cannot properly be said to be a qualification or prerequisite for employment." State's Brief, pp. 16-17. Because the State made multiple admissions to the contrary in the trial court, those admissions must be considered conclusively established. *Mo.R.Civ.P. 59.* The State did not move to withdraw or amend its admissions, and identical statements were admitted in response to the statements of uncontroverted facts submitted by the City in the trial court. L.F. Vol. I, 67; Vol. II, 176-182; Vol. IV, 295.

[4] All of these facts were admitted as part of the summary judgment proceedings and were based upon the State's responses to admission requests.

away from the City.[5] L.F. Vol. I, 76; Vol. IV, 348. That 78 percent would include all of the fire department's captains, battalion chiefs and deputy chiefs. L.F. Vol. IV, 303, 348-349.

Pursuant to all local emergency management plans affecting the City of St. Louis, off duty firefighters understand that they may be called to duty in the event an emergency response is required. L.F. Vol. IV, 305-306. According to the unrebutted affidavit of the City's fire chief, the State Law's provisions will "severely undermine the Fire Department's ability to assemble effective emergency response teams on short notice" because the law will allow all supervisory personnel to live up to an hour away from the City. L.F. Vol. IV, 306, 352. The State Law would lengthen and delay the response times of the City's Fire Department and would severely undermine the ability to assemble off duty firemen for emergency response teams on short notice. L.F. Vol. IV, 305-306.

In most emergency situations, response time is an essential component of effective control and management. Emergency response times will be lengthened and delayed if ranking, experienced firefighters and supervisory personnel require more time to respond. L.F. Vol. IV, 306, 352-353.

After City fireman have attained six years of service, they rarely leave the

[5] Of the 817 employees assigned to the City's fire department, 78.7 percent (643) had seven or more years of service as of November 20, 2010. L.F. Vol. X, 956.

department before retirement. In the five years prior to the trial court proceedings, turnover rate of the fire department employees with six or more years of service was less than one-half of one percent (.0044 percent). L.F. Vol. IV, 303-304.[6] Employment at the City's fire department is competitive. The position of probationary fire private usually becomes open every two to three years. L.F. Vol. IV, 303. From 1,500 to 2,000 applicants seek the positions each time, with only about 200 typically selected for the list of eligible candidates. L.F. Vol. IV, 303.

The City employs its fire department employees under the City's civil service system. L.F. Vol. I, 76; Vol. IV, 303. The Charter imposes a duty on the City's Civil Service Commission to "consider and determine any matter…on appeal by any appointing authority [or] employee…from any act of the director or of any appointing authority." L.F. Vol. VI, 547. The Charter also instructs the Civil Service Commission to promulgate rules and regulations governing, among other things, procedures and requirements for obtaining employment with the City. L.F. Vol. VI, 547. The State admits that the State Law eliminates the power and duty of the Civil Service Commission to determine whether waivers of residency requirements may be granted to employees to whom the State Law applies. L.F.

[6] The City employs 817 people in its fire department. Aside from retirement, 14 employees with more than six years of service left City employment at the fire department during the previous five-year period. L.F. Vol. IV, 303-304.

Vol. II, 179.

The Charter provides that Plaintiff Slay's powers and duties as mayor are to "exercise a general supervision over all the executive affairs of the city and see that each officer and employee performs his duty and that all laws, ordinances, and charter provisions are enforced within the city… [and] appoint and may remove all nonelective officers and all employees." (L.F. Vol. VI, 512).

CROSS-APPELLANTS' ARGUMENT IN RESPONSE TO APPELLANT'S BRIEF

I. THE CIRCUIT COURT CORRECTLY HELD THE STATE LAW (SENATE BILL 739; § 320.097 RSMO) INVALID BECAUSE IT IMPERMISSIBLY ENCROACHED UPON POWERS RESERVED FOR CHARTER CITIES BY ARTICLE VI, SECTION 22 OF THE MISSOURI CONSTITUTION.

The trial court found that the State Law violated Missouri's constitutional prohibition against state laws "fixing the powers, duties or compensation of any municipal office or employment" for charter cities. *Mo.Const., Article VI, § 22.* L.F. Vol. VII, 672. The States' legislators intended that SB 739 would supersede the residency requirement for City of St. Louis employment contained in the City's voter-approved charter. The trial court held that the State Law impermissibly encroached upon powers expressly reserved for charter cities by Article VI, Section 22.

The State offers four arguments in its request for reversal of the trial court's decision: (a) the State Law merely limits the powers exercised by the City's Civil Service Commission and therefore does not violate Article VI, Section 22; (b) the circuit court erred in finding that the City charter's residency requirement is a job "qualification"; (c) the State may enact laws governing employment qualifications for charter cities in any event; and (d) the State's attempt to supersede the City's residency requirement for employment is a proper exercise of the State's police

powers, (Appellant's brief, 17-18). Those arguments will be addressed in the same order.

(a) The State Law's impact on the duties of Civil Service Commission members is a collateral impact of a law that eviscerates a voter-approved employment qualification in a home rule city.

In the trial court, the City asserted that the State Law exceeded the limitations imposed by Article VI, Section 22 for two reasons (i) the law constitutes an impermissible intrusion into the home rule authority of the City to establish qualifications for municipal employment; and (ii) a collateral effect of the State Law was to impermissibly modify the powers and duties of the City's Civil Service Commission members by eliminating their authority and jurisdiction to consider and grant exemptions to the City's residency requirement. L.F. Vol. I, 24, 50-64. The trial court's decision rested on the first premise – that the State's admitted attempt to supersede an employment qualification contained in the City's charter infringed upon rights specifically reserved for charter cities in Missouri's constitution. L.F. Vol. VII, 652-655, 663-666, 670-672. The State's Brief attempts to redirect the Court's focus away from the grounds relied upon by the trial court to the second premise, regarding the duties of the Civil Service Commission members.

This Court has held "the ***qualifications***, tenure, and compensation [of municipal employment] must be determined by the people or the people will lose

control of their government." *State ex rel. St. Louis Fire Fighters Ass'n Local No. 73 v. Stemmler*, 479 S.W.2d 456, 460 (Mo. 1972)(emphasis added). Accordingly, municipal employment decisions are among the powers reserved for charter cities. *State ex rel. Burke v. Cervantes*, 423 S.W.2d 791, 793 (Mo. 1968). Even the State acknowledges that Article VI, Section 22 of the Missouri Constitution was intended to give "home rule" charter cities such as the City of St. Louis a "broad measure of complete freedom from State legislative control (over municipal employment decisions)." L.F. Vol. IV, 294.

The City maintains, and the trial court correctly held, that the constitutional concepts of "home rule" and local control of local issues and employments decisions would be illusory if the State may establish or overrule employment qualifications established in a city's charter. The City cannot possess a "broad measure of complete freedom from State legislative control over municipal employment decisions," if the general assembly may effectively veto those same decisions with legislation such as the State Law.

This broad grant of authority to home rule cities was intended to prevent the State from intervening in a charter city's "manner of selection of city officials and employees" as evidenced by the transcripts from the 1945 Constitutional Convention. *City of St. Louis v. Missouri Commission on Human Rights*, 517 S.W.2d 65, 69 (Mo. 1974). Article VI, Section 22 was added as a new provision to the constitution for the purpose of reversing a series of cases holding that state statutes, rather than the city charter provisions, governed a charter city's "manner

of selection of city officials and employees." *Id.* This is a consistent legal theme. "The constitutional authority granted to cities to adopt and amend a charter, *Mo. Const. art. VI, §§ 19-22*, intends to grant cities broad authority to tailor a form of government that its citizens believe will best serve their interests." *State ex rel. St. Louis Fire Fighters Ass'n. Local No. 73, AFL-CIO v. Stemmler*, 479 S.W.2d 456, 458-59 (Mo. banc 1972); *City of Springfield v. Goff*, 918 S.W.2d 786, 789 (Mo. banc 1996).

The State attempts to shift the focus to the generic legal proposition that a city's charter provisions may not conflict with the Missouri constitution or state statutes. State Brief, pp. 15-16. The generic proposition is accurately stated, but it gives way to the specific limitation of the general assembly's authority contained in Article VI, Section 22. As noted by this Court in *State ex rel. Sprague v. City of St. Joseph*, 549 S.W.2d 873 (Mo. banc 1977), Article VI, Section 22 is a limitation on the power of the general assembly with respect to constitutional charter cities. *Id.* at 876. State statutes that infringe upon a charter city's powers and duties specified in Article VI, Section 22 are invalid, notwithstanding the generic legal premise recited in the State's Brief. *Id.* at 879. As this Court described in an often-quoted passage from *Grant v. Kansas City*, 431 S.W.2d 89, 92 (Mo. 1968), state legislation that regulates the local functions of charter cities is invalid as a matter of law:

> Certainly the provision that charters must be consistent with the constitution and laws of the state means that some sort of restriction is

> placed upon the home rule grant to special charter cities. While the decisions construing that restriction may not be entirely in harmony, ***one rule has been definitely established, i.e., 'that as to its form of organization and as to its private, local corporate functions, and the manner of exercising them, the constitutional provision grants to the people of the cities designated part of the legislative power of the state for the purpose of determining such matters and incorporating them in their charter as they see fit, free from the control of the General Assembly.*** When matters of this nature are adopted in a charter, as prescribed by a Constitution, such charter provisions have the force and effect of a statute of the Legislature and can only be declared invalid for the same reason, namely, if they violate constitutional limitations or prohibitions.

Id. (emphasis added), citing City of Kansas City v. Marsh Oil Co., 41 S.W. 943 (Mo. 1897)*;* State *ex rel. Sprague v. City of St. Joseph*, 549 S.W. 2d 873, 879 (Mo. banc 1977).

The State attempts to mischaracterize the State Law as one that merely limits the powers exercised by the members of the City's Civil Service Commission. State Brief, p. 16 (the second basis advanced by the City in the trial court). The trial court did not reach that issue. The acknowledged purpose of the State Law was to supersede the St. Louis charter's residency requirement altogether for firemen with seven years of service. The impact upon the Civil

Service Commission is collateral because one of its duties – considering residency waiver requests – will be eliminated if the residency requirement is superseded by the State Law.

The Charter specifically delegates to the City's three-member Civil Service Commission the duty and power to grant exemptions to the City's residency requirement for employment. L.F. Vol. III, 210 (Charter, Art VIII, § 2). The Commission's authority includes, among other things, responsibility for considering and ruling upon requests for waivers of the City's residency requirement for employment. *Id.*[7] The State Law would undeniably eliminate the Civil Service Commission's existing authority and jurisdiction to consider and grant exemptions to the City's residency requirement as to firemen with seven years of service. While the State acknowledges the impact of the State Law upon the members of the City's Civil Service Commission, the State argues that the State Law merely limits, and does not "create" or "fix" the duties of the Civil Service Commission members.

The flaw in this portion of the State's argument is that a law can just as easily "create" or "fix" duties of a public official or employee by way of limitation as by adding duties. Laws that legislate powers or duties of municipal officials by eliminating them are no less offensive than laws imposing additional duties upon

[7] The Commission has three members, one of which is plaintiff John Clark. L.F. IV, 293.

municipal employees.

(b) In the trial court, the State admitted and acknowledged that the St. Louis charter's residency requirement was a "qualification" for municipal employment.

The State argues that the residency requirement contained in the St. Louis charter "cannot properly be said to be a qualification or prerequisite for employment." State's Brief, pp. 16-17. However, in the trial court the State specifically admitted that residency was a "qualification" for municipal employment as established in the City's charter. L.F. Vol. I, 34, 75; Vol. II, 178. The State admitted that the charter's residency requirement is a "job qualification." L.F. Vol. I, 34, 75; Vol. II, 178. The state also admitted that the intent of the State Law is to supersede the "residency employment qualification" contained in the St. Louis Charter, as applied to fire department employees with seven or more years of service. L.F. Vol. IV, 300.

The State is thus bound by its multiple admissions in the trial court that the St. Louis charter's residency requirement for employment is a "qualification" for City employment. Any matter admitted pursuant to a request for admission is conclusively established unless the court on motion permits withdrawal or amendment of the admission. *Mo.R.Civ.P. 59.* The State made no such motion.

In addition, the terms of the State Law confirm that the City's residency requirement is a condition (i.e., a qualification) for employment with the City: "No

employee of a fire department who has worked for seven years for such department shall, *as a condition of employment*, be required to reside within a fixed and legally recorded geographical area of the fire department.." (L.F. Vol. I, 41-42)(emphasis added). A "condition" of employment is synonymous with a "qualification" for employment. For instance, if a valid driver's license is a condition of employment, it would also be a "qualification for employment. *See also, Mahon v. Scearce*, 228 S.W.2d 384, 386 (Mo.App. 1950)(suggesting in dicta that the City of St. Louis residency requirement is a qualification for employment)

(c) Municipal employment qualifications are included in the scope of limitations on the general assembly's power contained in Article VI, Section 22.

The State observes that Article VI, Section 22 does not contain the term "qualification," and that the State Law does not establish offices, duties or wages of city officials or employees. State Brief, p. 16. However, the State's Brief does not offer legal argument based upon those observations. Id.

Words used in constitutional provisions must be viewed in context. *Buechner v. Bond*, 650 S.W. 2d 611, 613 (Mo. banc 1983). Courts must attempt to harmonize all provisions of the constitution. *State ex. inf. Martin v. City of Independence*, 518 S.W.2d 63, 66 (Mo.1974). The Missouri constitution contains multiple provisions granting authority to Missouri's charter cities and counties. *Mo. Const. art. VI, §§ 19-22.*

As noted above, the combined effect of the constitution's multiple provisions governing charter cities is to grant "broad authority to tailor a form of government that its citizens believe will best serve their interests." *Stemmler,* 479 S.W.2d at 458-59. The State effectively asks this Court to do the opposite – to disregard Article VI, Section 22's undisputed purpose of preventing state interference in the "manner of selection of city officials and employees." *City of St. Louis v. Missouri Commission on Human Rights*, 517 S.W.2d at 69. As stated by this Court, "[t]he ***qualifications***, tenure, and compensation [of municipal employment] must be determined by the people or the people will lose control of their government." *Stemmler*, 479 S.W.2d at 460.

The first rule of construction of a constitutional amendment is to give effect to its intent and purpose. *Buechner v. Bond*, 650 S.W.2d 611, 613 (Mo banc 1983), *citing City of Willow Springs v. Missouri State Librarian*, 596 S.W.2d 441, 445 (Mo. banc 1980). The State Law cannot be harmonized with the acknowledged constitutional intent to provide charter cities with a "broad measure of complete freedom from State legislative control over municipal employment decisions" and to reverse a pattern of meddling by the State in municipal employment decisions that are obviously local in nature.

The State Law exceeds the Article VI, Section 22 limitation on the State's power and is therefore invalid as a matter of law for encroaching upon powers reserved for charter cities by the constitution. *State ex rel. Sprague v. City of St. Joseph*, 549 S.W.2d 873, 879 (Mo. banc 1977). The trial court's decision should

be affirmed.

(d) **The State Law is not a valid exercise of statewide police powers because the law governs municipal employment which the State acknowledges are matters of local concern.**

Finally, the State argues that the general assembly may adopt laws of statewide application governing fire departments pursuant to the State's police powers, notwithstanding the limitations contained in Article VI, Section 22. State's Brief, pp. 17-20. In the trial court, the State offered two rationales for this argument. First, it asserted that all matters pertaining to fire departments are necessarily "governmental" as opposed to local functions. That assertion is repeated in its brief to this Court. State Brief, p. 18. Second, it argued that the State Law was a permissible regulation of the "working conditions" of firemen. The State does not repeat the "working conditions" argument from its trial court pleadings in its brief to this Court, but the State offers a new argument that it may exercise its police powers to enacts laws "pertaining to the general public interest," notwithstanding Article VI, Section 22. According to the State's argument, the matters of "general public interest" that it sought to regulate were (i) the quality of public education available to children; and (ii) fire protection services. *Id.* at 17-18. However, the State's Brief offers these suggestions only in conclusory terms and without any factual support in the record whatsoever. *Id.*

Although the State admitted in the trial court that employment qualifications for municipal jobs are a matter of local concern, the State's Brief now bases an argument upon the broad conclusion that all matters pertaining to local fire departments are necessarily matters of "general statewide concern." The "statewide concern" argument is defeated by the State's admissions in the trial court. But even without those admissions, the State's argument fails because, while the general assembly may have some legitimate, statewide interests regarding some fire department operations, it does not necessarily follow that all subjects related to fire departments are therefore subject to State regulation and interference. This Court previously noted that "[t]here is much conflict in the decisions as to whether fire protection in municipalities is peculiarly local, or of state-wide concern subject to regulation by the state." *Cervantes, supra*, 423 S.W.2d at 793. *Cervantes* concluded that the state-verses-local analysis depends on the subject of the legislation and rejected the sweeping assertion that all fire department issues must necessarily be subject to state regulation. *Id. at 793-794.*

At issue here is a voter-approved residency qualification for employment with the City. Municipal employment decisions are among the powers reserved for charter cities. *Cervantes*, 423 S.W.2d at 793; L.F. Vol. IV, 294. The State acknowledges that employment qualifications for municipal jobs are a matter of local concern. L.F. Vol. IV, 295. Part of the City's power as a constitutional charter city is the authority to choose the people it employs. If the State is permitted to intervene in this uniquely internal aspect of City government, then the

constitution's intended grant of a "broad measure of complete freedom from State legislative control (over municipal employment decisions)" would be thwarted. *Cervantes*, 423 S.W.2d at 793; L.F. Vol. IV, 294.

It is significant that the State Law does not contain any terms or provisions addressing actual operations of the City fire department, or anything else that would be considered a matter of statewide concern. The State admits that the intended effect of the State Law is to supersede the residency requirement contained in the city charter for the City of St. Louis. L.F. Vol. IV, 300. The State also admits that the State Law does not affect any employees of any fire department other than those in St. Louis. L.F. Vol. II, 180. The record conclusively demonstrates that the State Law has no real or intended statewide application. The mere fact that it relates to a fire department does not automatically convert it to a matter of general statewide concern.

But even if some arguable "statewide" concern might exist for a law that was admittedly directed against the City and affects only the City, that concern still must be balanced against the City's right as a charter city to be free from State interference in its internal affairs.[8] As stated by this Court, the Article VI, Section

[8] A prior opinion authored by the Missouri Attorney General conflicts with its position in this case, concluding that Article VI, Section 22 may preclude the legislature from regulating municipal affairs even if a matter of statewide concern is involved. *Mo.A.G. Op. 17-73*. "Although the establishment of a civil defense

22 balancing test weighs "the right of the state to promote the public welfare through programs of state-wide application and the right of charter cities to be free from outside interference in their internal affairs." *City of St. Louis v. Grimes*, 630 S.W.2d 82, 85 (Mo. banc 1982). The *Grimes* balancing test weighs in the City's favor. So even if we indulge the notion that the State Law is designed to address some matter of statewide concern, the weight of that alleged concern must be balanced against the clear constitutional intent to prevent the general assembly from interfering in local matters of charter cities.

The statewide concerns proffered by the State for the balancing test are the quality of public education and fire protection services. State Brief, pp. 17-18. Other than making a conclusory statement identifying those alleged interests, the State makes no effort in this section of its brief to explain or support its conclusion that the State Law somehow improves the quality of public education or fire protection services. *Id.* Nor does the State suggest why these "interests," stated in conclusory terms without record support, should outweigh the clear constitutional preference for allowing voters in charter cities to govern their own affairs.

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network is a matter of statewide concern, the Missouri constitutional provision limiting interference with home-rule municipalities prevents the legislature from designating which constitutional charter city officer is charged with the local civil defense responsibility." *Id.*

Finally, the State may attempt to borrow from the equal protection section of its argument in suggesting its purported "statewide interests" in the context of the Article VI, Section 22 analysis. The State Law does not, by its terms, indicate how or why the law will advance any education or fire protection interests or any other "statewide" interests. The legislative note contains no mention of education or fire protection, simply stating that the intent is to supersede the City charter's residency requirement. Appendix, A2. The State did not assert any affirmative defenses to the City's claims.

While the State enjoys significant latitude in speculating as to a possible, rationally related purpose for its law in the context of equal protection analysis, that latitude does not apply to an Article VI, Section 22 balancing test. Rather, the balancing test should be based upon facts and interests demonstrated in the record. The record demonstrates that the City's interests stem from its charter provisions approved by its voters, its interest in having off duty firemen readily available for emergency response, the constitutional assurance of self-governance and the corresponding safeguards against interference by the general assembly. The State's interests are purely hypothetical and without any record support. While a hypothetical interest might be appropriate in the context of an equal protection argument, record support should be required for any balancing test analysis for purposes of Article VI, Section 22. Aside from its conclusory assertions, the State offers no facts or argument in support of its suggestion that the State Law addresses either such "concern." Those conclusory concerns must be balanced

against the constitutional grant to charter cities of a "broad measure of complete freedom from State legislative control" over municipal employment decisions. *Cervantes*, 423 S.W.2d at 793. The balancing test weighs in favor of the City.

In the alternative, if the Court elects to consider the so-called "statewide" interests of improving public education and fire protection services, the classification established in the State Law (firemen with at least seven years of service) bears no rational relation to either interest. That issue is addressed in Point II of this brief. If appropriate, the City requests that the City's arguments in Point II be applied in the context of the Article VI, Section 22 balancing test analysis as well.

II. THE CIRCUIT COURT CORRECTLY HELD THE STATE LAW (SENATE BILL 739; § 320.097 RSMO) INVALID UNDER THE EQUAL PROTECTION CLAUSES OF THE MISSOURI AND UNITED STATES CONSTITUTIONS BECAUSE THE CLASSIFICATION ESTABLISHED IN THE LAW – FIREMEN WITH SEVEN YEARS SERVICE OR MORE – IS IRRATIONAL IN THE CONTEXT OF THE "CONCEIVABLE" INTERESTS SUGGESTED BY THE STATE.

In Count III, plaintiffs asserted that the State Law contains an arbitrary classification and bears no rational relation to a legitimate state interest, thus violating the Missouri Constitution's equal protection clause, Article II, Section 4, as well as U.S. Const, Amend. XIV, Section 1. L.F. Vol. I, 29-30. The trial court

correctly applied the rational basis test in determining the equal protection claims in Count III of plaintiffs' petition, finding that the classifications created in the State Law bore no rational relation to the interests posited by the State. L.F. Vol. X, 988.[9]

A legal classification considered under a rational basis standard will survive judicial examination if the state's purpose in creating the classification is legitimate, and if any state of facts reasonably may be conceived to justify the classification chosen to accomplish that purpose. *Missourians for Tax Justice Education Project v. Holden*, 959 S.W.2d 100, 103-104 (Mo. 1998). The law must also be rationally related to a legitimate state purpose. *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78-79, 31 S.Ct. 337, 340-41, 55 L.Ed. 369 (1911); *City of St. Louis v. Liberman*, 547 S.W.2d 452, 458 (Mo. banc 1977). Challenged legislation will not survive judicial scrutiny under the rational basis test unless the state's purpose for creating the classification is legitimate and "if any statement of facts reasonably may be conceived to justify the means chosen to accomplish *that* purpose." *Linton v. Missouri Veterinary Medical Bd.*, 988 S.W.2d 513, 515-516 (Mo. 1999)(emphasis added). Second, if a legitimate interest is articulated, the court must then examine whether that the means chosen is rationally related to

[9] Count III is brought, in part, by Plaintiff James Gadell, a Civil Service employee of the City who is subject to the Charter's residency requirements. L.F. Vol. IV, 322.

achieving *that* purpose. *Id.* at 516.

By its terms, the State Law does not indicate what interests it seeks to advance. The only goal indicated in the legislative summary for the bill is the goal of superseding the residency requirement in the St. Louis charter. Appendix A2.[10] The State posits two possible interests that the State Law, and its classification of firemen, might advance: (1) the quality of public education to children and (2) fire protection services. State Brief, p. 20. The State specifies that "fire protection services" refers to the goal of "encouraging experienced fire department employees to remain at their current jobs." *Id., at 23.* As the trial court observed, the goals are admirable, but the classification utilized by the general assembly bears no rational relation to the goals. L.F. Vol. X, 988. The State has not articulated any set of facts that would justify the nexus between the narrow class of firefighters at issue in the State Law, education, and fire protection.

The State admits that the State Law creates an exception to the Charter's residency requirement for some, but not all City employees. L.F. Vol. II, 178. It grants special rights and privileges to City of St. Louis fire department employees

[10] Defendant requests this Court to take judicial notice of legislative summary as a legislative record of the State. Appellate courts have taken judicial notice of legislative facts on appeal. *See State ex rel. Department of Social Services, Family,* 118 S.W.3d 283 (Mo. App. W.D. 2003); *In re Gerling's Estate,* 303 S.W.2d 915, 920 (Mo. 1957).

but not to other City employees. L.F. Vol. II, 180, 182. The State Law creates a subclass of municipal employees of the City who are afforded rights and privileges that no other City employees enjoy. L.F. Vol. II, 181.

(a) The classification established in the State Law has no rational relation to the goal of improving public education.

The State does not suggest any basis, rational or irrational, for distinguishing firemen with seven years of service from any other City employees in the context of improving public education. All full-time City employees are subject to the Charter's residency requirement. If the supposed benefit of the law is that children of employees will be "better adjusted" if they live closer to their schools, no conceivable basis exists to distinguish the children of a subset of firemen from children of other City employees or other firemen. Allowing City firemen to live closer to their children's schools will not improve the quality of education any more or less than if the right was bestowed upon City building inspectors or park rangers instead of firemen.

Also, the State's logic is flawed in that there is no reason to believe that having firemen live closer to their children's schools will "enhance the quality of education" provided at those schools. The theory that living closer to one's school is better was spawned, at least in part, by the fact that state law allowed City students to attend public districts other than the St. Louis Public School District. *§ 167.131 R.S.Mo. § 167.131 R.S.Mo,* L.F. Vol. II. In the trial court, the State admitted that this option existed before the State Law was enacted. While the

Amicus argues that this statute has been held unconstitutional by the trial court in *Breitenfeld v. School District of Clayton*, 12SL-CC00411, the State has recently filed an appeal to this Court. Thus, the State did not argue or assert that the State Law improves public education by affording alternative school choices to children of firemen. Instead, the State argues that public education will be improved if the families of City students who exercise their option under § 167.131 to attend schools in other districts are also allowed to move outside the City, closer to those schools.

The State's logic is strained at best. Schools will operate the same no matter where a select group of firemen live. The "quality of education" provided at those schools will not change. Moreover, plaintiffs are unaware of any generally accepted principle that students are better-adjusted when they live closer to their schools. The "closer is better" theory advanced by the State is simply an arbitrary conclusion that does not provide a rational basis to supersede the City Charter's residency requirement.

Further, as noted above, even if this theory had any basis in fact, it does not provide a rational basis for creating the classification of firemen with seven years of service. The classification established in the State Law is proper only if the state's purpose in creating the classification is legitimate, and if any state of facts reasonably may be conceived to justify the classification chosen to accomplish that purpose. *Missourians for Tax Justice Education Project v. Holden*, 959 S.W.2d 100, 103-104 (Mo. 1998). No conceivable facts justify the State Law's

classification of firemen with seven years experience for the purpose of improving public education. The classification is arbitrary and improper in the education context advanced by the State.

Finally, as referenced in the Statement of Facts section of this brief, the introduction to the State's Brief regarding the accreditation status of various Missouri school districts should be disregarded to the extent there is no evidence of such facts in the record. Nor is there any evidence that the State Law would apply to any fire departments that might exist within those school districts. Rural fire departments may consist entirely of volunteer firefighters (see RSMo. § 320.310), and the record is silent as to whether any of these fire departments possess employees, a condition required in order for the State Law to apply. L.F. Vol. I, 41-42. And there's no indication in the record or the State's Brief whether any fireman in any of the school district it mentions must comply with a residency requirement.[11] In fact, the State "has no idea how many municipalities have such

[11] There is no evidence on the record whatsoever supporting the State's assertion that "[c]hildren residing within Caruthersville 18 have the option of attending school in Cooter, Steele, Wardell, or an accredited district in an adjacent county, but face a lengthy commute to reach schools in any accredited district." *State Brief, p. 22.* There is no evidence that the "the only public school district available to the employee within such fire department's geographical area is a public school district that is or has been unaccredited or provisionally accredited in the last five

a [uniform residency] requirement or enforce such a requirement." L.F. Vol. IV, 328. The State is not aware of any other fire departments or jurisdictions that fall within the statute." L.F. Vol. IV, 329.

(b) The classification established in the State Law has no rational relation to the goal of improving fire protection services.

On its face, the State law does nothing to promote or enhance fire protection services. As with the education argument, if the State Law bears any rational relation to improving the quality of fire protection services, it must necessarily be an indirect relationship that must be identified by the Court.

The State suggests a theory that the State Law will encourage experienced firemen to "remain at their current jobs," therefore serving a legitimate state interest. The State appears to assume, without explanation, that this encouragement will somehow enhance fire protection, even though almost 4 out of every 5 of the City's firemen could then live up to an hour away from the City.

In any event, the implication that the City's residency requirement somehow pushes firemen out the door is a fiction created to justify irrational

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years of such employee's employment" as required by the State Law. L.F. Vol. I, 41-42. Finally, there is no evidence whatsoever that the employees of these fire departments are "required to reside within a fixed and legally recorded geographical area of the fire department" as a condition of employment. L.F. Vol. I, 41-42.

legislation. Firefighter turnover is almost nonexistent in the City among those with six or more years of service. L.F. Vol. IV, 303-304. Of all the possible "fire protection" concerns that the general assembly might need to address, encouraging experienced St. Louis to "remain at their current jobs" is at the bottom of the list. Among the "experienced firemen" group targeted by the State Law – firemen with at least seven years of service – the turnover rate during the five years preceding summary judgment was less than one-half of one percent (.0044 percent).[12] If anything, experienced firemen are reluctant to leave. That may be due to the relatively generous wages mandated by the Charter (firefighters' wages must be comparable to police wages),[13] exceedingly generous disability coverage[14] and a defined benefit retirement plan that exceeds any private sector package.[15] Whether for those reasons or for other reasons, the indisputable fact is that firemen rarely leave the City's fire department after they have 6 years of service or more.

Employment at the City's Fire Department is extremely competitive at all levels. The position of probationary fire private usually comes up about every two to three years. From 1,500 to 2,000 applicants seek the positions each time, with

[12] Firemen who retired are not counted in this calculation.

[13] St. Louis Charter, Article XVIII, Section 31

[14] Section 87.195 R.S.Mo.

[15] Sections 87.120 through 87.370 and 87.371, R.S.Mo

only about 200 typically selected for the list of eligible candidates. Although the City fire department turnover rate is low at all levels, firemen are most likely to leave during their first five years (a period not addressed by the State Law). All told, of the 59 firefighters who left the City fire department for any reason during the last 5 years (other than retirement), the large majority left during their first 5 years of employment.

Even though the facts in the record demonstrate that the State's theory is incorrect, the State suggests that its law survives the rational basis test because the hypothetical purpose of using the law as encouragement to firemen to remain employed is "reasonably conceivable" in theory even though we know the theory is false. The unique facts of this case compel a different result. The State candidly admits that the State Law was intended to target the residency requirement in the St. Louis charter. In the trial court, the State further acknowledged that the State Law's terms and conditions do not affect or impact any other fire department employees in Missouri. For those reasons it is entirely proper for this Court to focus on the facts as they pertain to the intended target – St. Louis. As described above, a law designed to "encourage" City's firemen to remain with the City's fire department is pointless – they almost never leave City employment.

The State Law is irrational for other reasons as well. By its terms, the State Law allows the City's most experienced firemen − those with seven years and more on the job − to reside as much as an hour away from the City they were hired

to protect. In actual numbers, the Law allows more than 78 percent of the Fire Department's personnel to live up to an hour away from the City. It is irrational to believe that any legitimate "fire protection" interest is served if 4 out of every 5 firefighters are allowed to move an hour away from the City they are paid to protect. If common sense does not compel this conclusion, the summary judgment record does.

Off duty firefighters understand that they may be called to duty in the event an emergency response is required. L.F. Vol. IV, 305-306. The unavoidable consequence of allowing firefighters to move an hour away from the City is that the emergency response time for off duty firemen will increase. L.F. Vol. IV, 306. In most emergency situations, response time is an essential component of effective control and management. L.F. Vol. IV, 306. The summary judgment record confirms these facts, but they are also common sense. That is likely the reason that the State did not attempt to rebut or contradict those facts in the trial court. Given those facts, the State Law is not rationally related to promoting "fire protection."

The State effectively argues that even "facts" known to be false may be "reasonably conceived" to justify legislation in equal protection analysis. State Brief, p. 20. The trial court properly rejected this notion, reasoning that the State's approach would "make the rational basis test meaningless." L.F. Vol. X, 988.

For these reasons, the trial court's decision was proper in light of the facts

of this case because the State Law is not rationally related to the proffered interests of the State. There is no legitimate "state interest" in superseding the Charter's residency requirement for a subclass of firemen. The classification established under the State Law is arbitrary and is not conceivably related to any legitimate purpose.

CROSS APPELLANT'S ARGUMENT IN REPLY TO CROSS RESPONDENT'S BRIEF

I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANT ON COUNT II OF PLAINTIFFS' PETITION WITH REGARD TO ARTICLE III § 40(30) OF THE MISSOURI CONSTITUTION BECAUSE THE DEFENDANT FAILED TO PROVE, ON THE BASIS OF FACTS AS TO WHICH THERE IS NO GENUINE DISPUTE, A RIGHT TO JUDGMENT AS A MATTER OF LAW IN THAT THE STATE LAW IS A SPECIAL LAW WHERE A GENERAL LAW COULD BE MADE APPLICABLE BECAUSE THE STATE LAW IS TAILORED TO SPECIFICALLY APPLY TO THE CITY OF ST. LOUIS AND ITS FIRE DEPARTMENT AND THE DEFENDANT FAILED TO MEET ITS BURDEN OF DEMONSTRATING A SUBSTANTIAL JUSTIFICATION FOR THE SPECIAL LAW WITH RESPECT TO TAILORING THE STATE LAW TO SPECIFICALLY APPLY TO THE CITY OF ST. LOUIS AND ITS FIRE DEPARTMENT.

A classification is considered open-ended if it is possible that the status of members of the class could change. *Harris v. Missouri Gaming Com'n*, 869 S.W.2d 58, 65 (Mo. 1994). "Classifications based on historical facts, geography, or constitutional status focus on immutable characteristics and are therefore facially special laws." *Id.*

The test for whether a statute with an open-ended classification is special legislation under article III, section 40 of the Missouri Constitution is similar to the rational basis test used in equal protection analyses. *Jefferson County Fire Protection Districts Ass'n v. Blunt*, 205 S.W.3d 866, 870 (Mo. 2006). Closed-ended legislation "typically singles out one *or a few political subdivisions* by permanent characteristics." *City of Springfield v. Sprint Spectrum, L.P.*, 203 S.W.3d 177, 184 (Mo. 2006).

With regard to local or special laws, "the basis of sound legislative classification is similarity of situation or condition with respect to the feature which renders the law appropriate and applicable." *Building Owners and Managers Ass'n of Metropolitan St. Louis, Inc. v. City of St. Louis, MO*, 341 S.W.3d 143, 150-151 (Mo. App. E.D. 2011). A law may not include less than all who are similarly situated." *Id.* Where the statutory classification is arbitrary and without a rational relationship to a legislative purpose, a law founded on open-ended criteria is unconstitutional. *School Dist. of Riverview Gardens v. St. Louis County*, 816 S.W.2d 219, 222 (Mo. 1991).

As analyzed in detail *supra*, the State Law is anything but rational.

Furthermore, contrary to the State's argument, the State Law is a special law. The evidence in this case establishes that only the City of St. Louis has the combination of facts and geographical characteristics to fall within the statute. The State has admitted to this fact and is bound by this admission. (Rule 59, L.F. Vol. IV, 329; Vol. II, 180).

The State cannot reasonably argue that the State Law does not target the City of St. Louis when the bill summary states that SB 739 states otherwise. (Appx. A2). According to the State Law's legislative history, it is unequivocally clear that the purpose of the State Law is to "remove the provision allowing the voters of *St. Louis City* to prevent the enactment of these provisions in the city..." (emphasis added) (Appendix, A2). Thus, the *only* purpose of this bill is to thwart actions by the voters of the City.

Furthermore, there is no evidence on the record that the combination of any other fire department and school district falls within the requirements of the State Law. The fact that a school district is unaccredited or provisionally accredited alone is insufficient to trigger the applicability of the State Law.

While the State alleges additional facts for the first time in its appellate brief; namely, that a number of additional school districts are unaccredited or provisionally accredited, these new facts are not supported by the record in this case. In fact, other than the City of St. Louis, the State admits that it does not know how many municipalities have a residency requirement or whether any other fire departments or jurisdictions fall within the statute. (L.F. Vol. IV, 328, 329).

The State Law only applies in very narrow circumstances when four separate criteria are present. Each criterion viewed separately and individually may appear open-ended. However, when all four criteria are viewed together along with the State's admission and the facts of this case, there can be no other option but to conclude that the State Law is a special law that targets the City.

First, the State Law only applies to employees of a fire department. (L.F. Vol. I, 41). Missouri law permits the operation of volunteer fire departments, including municipal fire departments. RSMo. § 320.300 to 320.310. Such volunteers are not "employees" of the fire district, even if they receive limited benefits. RSMo. § 320.320(3). Although not supported by the record, the State mentions that several districts in the State of Missouri are unaccredited or regionally accredited in the introduction to the State's brief. Of these school districts, there is no evidence on the record to conclude whether the fire departments located within those districts utilize volunteers or employees. In contrast, it is uncontroverted that the fact the City employs its fire department employees under the civil service system. (L.F. Vol. I, 76; Vol. IV, 303).

Second, the State Law only applies to fire department employees who are subject to a residency requirement as a condition of employment. (L.F. Vol. I, 41). The evidence in this case also clearly establishes that the City of St. Louis requires its permanent full time employees to reside within the city limits as a condition of employment. (L.F. Vol. I, 34). There is no evidence that any of the other fire departments are or even could be the subject of such a requirement.

Third, the State Law only applies if the *only* public school district available to the fire department employee within such fire department's geographical area is a public school district that is or has been unaccredited or provisionally accredited in the last five years of such employee's employment. (L.F. Vol. I, 41). There is no question that the boundaries of the St. Louis Public School district are identical to the boundaries of the St. Louis Fire Department and that the St. Louis Public School District is unaccredited. (L.F. Vol. II, 181). There is no evidence that any other public school district is the *only* public school district that is available to employees within a fire department's geographical area and has been unaccredited or provisionally accredited in the last five years.

Even though charter schools are defined as public schools according to the existing law of this state, the State Law specifically provides that "no charter school shall be deemed a public school for purposes of this section." (Compare RSMo. § 160.400 to L.F. Vol. I, 41). There is no doubt that charter schools operate within the City of St. Louis Fire Department's geographical area. RSMo. § 160.400, L.F. Vol. II, 178. The State has not articulated any justification whatsoever to exempt charter schools from the definition of a public school.

While the City admits that it is possible for a school district's accreditation status to change over time, the State is incorrect that this possibility alone is outcome determinative. While it is true that other school districts could loose accreditation, the State admits that currently only the City of St. Louis meets *all* of the State Law's requirements. (L.F. Vol. IV, 329). It is clear that the general

assembly enacted SB 739 in order to alter the qualifications imposed on St. Louis City firefighters, and that class alone.

Citing 321.300 and 321.460, the state argues that geographical area of fire departments can change through a rigorous annexation or consolidation process. The state's assertion that the State Law is not a special law because the geographical area of fire departments can change over time is not persuasive. This argument not only ignores the fact that four separate criteria must be met for the State Law to apply, but also has no bearing on the practical aspects of this case. In other words, even if a fire department's boundaries change, each of the four separate criteria discussed above must be met in order for the State Law to apply.

According to the State, the fact that the State Law does not include every city employee of fire department employee within the does not render the State Law a special law. This position is contrary to *Building Owners and Managers Ass'n of Metropolitan St. Louis, Inc. v. City of St. Louis.* According to that case, legislative classification requires "similarity of situation or condition with respect to the feature which renders the law appropriate and applicable." *Building Owners and Managers Ass'n of Metropolitan St. Louis, Inc.*, 341 S.W.3d at 150-151. As discussed above, the State Law undoubtedly includes "less than all who are similarly situated." *Id.*

Because there is no question that the State Law targets the City of St. Louis and is a special law, the State is required to show substantial justification and "the mere existence of a rational or reasonable basis for the classification is

insufficient." *Id.* at 152. *See also State ex rel. Wagner v. St. Louis County Port Authority,* 604 S.W.2d 592 (Mo. banc 1980) (City of St. Louis and Kansas City automatic port authority qualification was held to be a special law and the State was required to show substantial justification).

Presumably, as substantial justification, the State argues that "[e]veryone benefits when a child is given an opportunity to become a successful, contributing member of society through access to a quality public education." (Appellant's brief, 26). However, the State law does not benefit City employees who are paid far less than fire department employees who may have special needs children. As discussed above, the State Law has nothing to do with improving the *quality* of education at all, much less on a state-wide basis.

For these reasons, the State Law is a special law. Because it is uncontroverted that it is tailored to specifically apply to the City of St. Louis and its fire department, the State was required to demonstrate a substantial justification for the State Law. Because it has not done so, the trial court erred in granting summary judgment in the State's favor.

Alternatively, even if the State Law was founded upon open ended criteria, the State Law is unconstitutional because it is clearly arbitrary and without a rational relationship to a legislative purpose for the myriad reasons set forth *supra.* As in *Building Owners and Managers Ass'n of Metropolitan St. Louis, Inc. v. City of St. Louis, MO,* the State Law clearly includes less than all who are similarly situated. *Building Owners,* 341 S.W.3d at 150-151. Therefore, the trial court's

determination that the State Law is not a special law contradicts its finding that the State Law violated constitutional equal protection provisions.

CONCLUSION

In conclusion, the trial court's decision finding the State Law unconstitutional under Article VI, Section 22 should be upheld because the State Law encroaches upon the powers that Missouri's constitution reserves for charter cities. The trial court did not err in finding the State Law invalid under the equal protection clauses of the Missouri and United States Constitutions because the classification created by the State Law – firemen with seven years service – was arbitrary and not rationally related to the State's purported interests in fire protection services and the quality of public education available to children. However, the trial court erred in granting summary judgment in favor of the State on Count II of Plaintiffs' petition with regard to Article III § 40(30) of the Missouri Constitution because the State failed to prove entitlement to judgment as a matter of law. Therefore, this cause should be reversed and remanded to the circuit court for consideration of the remaining issues in Count II of plaintiffs' petition if this Court finds in favor of the State on the State's appeal.

Respectfully Submitted,
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CERTIFICATE OF COMPLIANCE WITH RULE 84.06

The undersigned hereby certifies that this Brief of Respondents/Cross-Appellant/Plaintiffs was prepared in the format of Microsoft Word, using Times New Roman typeface in font size 13. This Brief contains approximately 9,684 words of text. It has been scanned and found to be virus-free. The name, address, bar, and telephone number of counsel for Appellant is stated herein and the Brief has been signed by the attorney of record.

/s/ Christine Hodzic
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CERTIFICATE OF SERVICE

The undersigned certifies that a true and accurate copy of the foregoing document was served by operation of the Court's electronic filing system, this 11th day of June 2012, upon all attorneys of record to this proceeding:

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