SC92932

IN THE SUPREME COURT OF MISSOURI

BLUE SPRINGS R-IV SCHOOL DISTRICT, et al.,

Respondents/Cross-Appellants

vs.

SCHOOL DISTRICT OF KANSAS CITY, MISSOURI, et al.,

Appellants/Cross-Respondents

Appeal from the Circuit Court of Jackson County, Missouri
The Honorable Brent W. Powell, Circuit Judge

REPLY BRIEF OF STATE APPELLANTS

CHRIS KOSTER
Attorney General

J. ANDREW HIRTH
Mo. Bar No. 57807
Deputy General Counsel

THOMAS D. SMITH
Mo. Bar No. 61928
Assistant Attorney General

P.O. Box 899
Jefferson City, MO 65102
(573) 751-0818
(573) 751-0774 (facsimile)
Andy.Hirth@ago.mo.gov
Thomas.Smith@ago.mo.gov
ATTORNEYS FOR STATE APPELLANTS

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I. *Breitenfeld* precludes the Taxpayers' Hancock claim.

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The legal theory upon which the Taxpayers base their petition for declaratory relief in this case was rejected in *Breitenfeld v. Sch. Dist. of Clayton*, 399 S.W.3d 816 (Mo. 2013). There, this Court held unanimously that the educational mandates of §167.131 RSMo, as amended in 1993, require nothing "new" or "increased" for purposes of the Hancock Amendment. *Id.* at 828-831. "The mandate that has long-existed for Missouri's school districts is to provide a free public education to all students who attend, even when the students are nonresidents who are permitted under statutory directives to attend an out-of-district school." *Id.* at 830. Thus, even if a receiving district "might gain in its student population as a consequence of enforcement of section 167.131, a Hancock violation is not shown because [the receiving district] would continue to be engaged in its existing activities and services of operating schools for students in grades K–12." *Id.* at 831.

Notwithstanding the breadth and clarity of that decision, Respondent Taxpayers argue that they should still prevail on appeal because (A) the State cannot rely on *Breitenfeld* in this case; and (B) the Hancock claim in *Breitenfeld* was different from the Taxpayers' claim in this case. Neither argument is persuasive.

A. *Breitenfeld* controls the outcome of this case.

The Taxpayers try to avoid the holding of *Breitenfeld* by claiming that the State "entered into a binding stipulation as to the first and third elements of the Taxpayer Respondents' Hancock Amendment claim [new activity and lack of state appropriation] and thus the parties did not present evidence concerning those elements at trial." Taxpayers' Br. At 31-32. They also claim that "[t]he State is judicially estopped from arguing a lack of new activities or the existence of State funding on appeal." *Id.* at 32. There are three flaws in their argument.

First, a party cannot stipulate to a rule of law. *St. Louis v. City Of St. Louis*, 149 S.W.3d 442, 446 n.1 (Mo. 2004); *see also State v. Biddle*, 599 S.W.2d 182, 186 n.4 (Mo. 1980) ("The general rule is that stipulations of litigants cannot be invoked to bind or circumscribe a court in its determination of questions of law."); *State ex rel. Glendinning Cos. of Conn., Inc. v. Letz*, 591 S.W.2d 92, 96 n.1 (Mo. App. W.D. 1979) ("The court is not bound by any stipulation of law."); *Midella Enters., Inc. v. Mo. State Highway Comm'n*, 570 S.W.2d 298, 301 (Mo. App. S.D. 1978) ("no agreed statement of facts can fix a conclusion of law").

Second, even if the State could have bound this Court to a rule of law contrary to *Breitenfeld* through pre-trial stipulations, it did not do so here.

Prior to the parties' stipulations, the circuit court ruled, "as a matter of law, that Section 167.131 created a new mandate for Area School Districts." LF573, LF604. Thus, the only issue the circuit court left unresolved for trial was "whether Area School Districts will bear increased financial burden as a result of the new mandate." LF604. The Taxpayers are correct that the State stipulated before trial *to the fact* that §167.131 was amended in 1993 and that those amendments required districts, for the first time, to accept transfer students from neighboring unaccredited districts. Taxpayers' Br. at 23-24. But to the extent any of the State's pre-trial stipulations of fact could be construed as a concession of *law*, those stipulations merely reflect what the circuit court had already ruled. The Taxpayers concede as much elsewhere in their brief: "In recognition of the trial court's sound analysis, the State stipulated before trial that the 1993 amendments to the statute imposed new requirements such that the issue of whether §167.131 imposed new activities was not an issue at trial…." Taxpayers' Br. at 37. And yet, the Taxpayers now appear to argue that because the State "agreed" to incorporate the circuit court's summary judgment ruling into its trial stipulations, the State waived its right to appeal the circuit court's ruling on the underlying legal issue. The law does not require parties to reargue legal issues decided on summary judgment for a second time during trial in order to preserve them.

Third, the State cannot be "judicially estopped" from arguing that §167.131 does not impose any new mandates because that is not an argument on which the State has previously prevailed. "The doctrine of judicial estoppel provides that where a party *assumes a certain position* in a legal proceeding, *and succeeds in maintaining that position*, he may not thereafter, simply because his interests have changed, assume a contrary position…." *Taylor v. State*, 254 S.W.3d 856, 858 (Mo. 2008) (emphasis added) (internal alteration and quotation marks omitted). The State most assuredly did *not* argue to the trial court that §167.131 imposes a new mandate on school districts. Indeed, the State argued the *opposite* position, LF174-76, but the circuit court ruled in favor of the Taxpayers on that point. LF573. The State cannot be "estopped" from appealing that ruling simply because it incorporated the ruling into its pre-trial stipulations.

B. The Taxpayers' Hancock claim is identical to the claim in *Breitenfeld.*

The Taxpayers argue that the "new mandate" alleged in their Hancock claim is "more precise" than the claim asserted in *Breitenfeld* because here the Taxpayers allege "(1) §167.131 imposes a new requirement by the State to admit large numbers of out-of-district students; *and (2) there is no funding available whatsoever for those new activities*." Taxpayers' Br. at 33 (emphasis added). The only way the Taxpayers' claim is "more precise" than the claim in

Breitenfeld is that here the Taxpayers have collapsed the *increased costs* element of their Hancock claim into the *new mandate* element of their claim in an effort to sidestep the holding in *Breitenfeld*. Section 167.131 imposes a "new" mandate, the Taxpayers argue, *not* because their districts are now required to admit out-of-district students from unaccredited districts, but rather because their districts "are now required to admit out-of-district students from unaccredited districts *without complete payment*." Taxpayers' Br. at 34 (emphasis added).

But whether a political subdivision receives complete payment to cover the cost of a mandated activity or service is a *separate* question from whether that mandate is "new" or "increased" for Hancock purposes. "The plain language of Article X, Section 21 indicates that it is violated if *both*: (1) the State requires a new or increased activity or service of political subdivisions; *and* (2) the political subdivisions experience increased costs in performing that activity or service." *Breitenfeld*, 399 S.W.3d at 826 (emphasis added). A taxpayer cannot establish a Hancock violation simply by showing "there are more requests for performance of an existing activity or service—what for ease of reference will be hereinafter referred to as an increased 'frequency' of undertaking a given activity or service." *Id.* at 827. If, as this Court held in *Breitenfeld*, the requirement to educate K-12 students from other districts is

not new a mandate for Hancock purposes, it does not become new simply because the district must do so "without complete payment."

Comparing two of this Court's prior Hancock cases, the Taxpayers define "new activity" as any "activity that a political subdivision alleges it previously has not been required to perform." Taxpayers' Br. at 44 (comparing *City of Jefferson v. Mo. Dep't of Natural Res.*, 863 S.W.2d 844 (Mo. 1993), with *In re 1984 Budget for Circuit Court of St. Louis County*, 687 S.W.2d 896, 900 (Mo. 1985)). But the cases that the Taxpayers cite do not support such a broad or protean definition. In *City of Jefferson v. Mo. Dep't of Natural Res.*, 863 S.W.2d 844 (Mo. 1993), a taxpayer challenged a new law requiring his city to submit a new waste management plan that conformed to the requirements of two different statutes, one of which was enacted before the Hancock Amendment and one which was enacted after. The later-enacted statute required the city for the first time to include "a plan to address the separation of household waste, the reduction of solid waste placed in landfills and the preparation of a timetable for such reduction, procedures to minimize the introduction of small quantities of hazardous waste, and the establishment of educational programs." *Id.* at 848. As the city had never before been required to establish educational programs for waste management nor any of the other new requirements, this Court held that the

statute was in fact an "increase in activity required of a political subdivision by the General Assembly" for Hancock purposes. *Id.*

By contrast, *In re 1984 Budget for Circuit Court of St. Louis County*, 687 S.W.2d 896 (Mo. 1985), involved a Hancock challenge to an order by the State Judicial Finance Commission that the county pay the attorneys' fees for the circuit court's outside counsel, which St. Louis County taxpayers argued was a new or increased activity imposed by the state. This Court disagreed: "That the County has appropriated funds for payment of private attorneys' fees for the circuit court before and after adoption of the Hancock Amendment belies its contention that this is a new activity." *Id.* at 900. These cases do not hold, as Taxpayers suggest, that that any "activity that a political subdivision *alleges* it previously has not been required to perform" is a "new activity" for Hancock purpose. Rather, they stand for the proposition that having to pay for a new *kind* of expense—e.g., establishing education programs for waste treatment—is a "new activity" while having to pay for *more of the same kind* of expense as incurred in the past—e.g., hiring outside counsel—is not.

This Court made that distinction clear in *Sch. Dist. of Kan. City v. State*, 317 S.W.3d 599, 611 (Mo. 2010)—in which taxpayers brought a Hancock challenge against the state's charter schools act—by comparing the holdings of two other Hancock cases: *Neske v. City of St. Louis*, 218 S.W.3d

417, 422 (Mo. 2007) and *Rolla 31 Sch. Dist. v. State of Missouri*, 837 S.W.2d 1 (Mo. 1992). In *Neske*, it had become more expensive for the City of St. Louis to fund its police retirement system and firemen's retirement system than it had been in a previous fiscal year. Nonetheless, this Court explained, "[t]he City's requirements to pay are unchanged—the City still is required to pay the entire amounts certified by the PRS and the FRS boards of trustees. There is no new or increased activity." *Sch. Dist. of Kan. City*, 317 S.W.3d at 611 (quoting Neske, 218 S.W.3d at 422).

In *Rolla 31*, by contrast, a new law obligating a school district to provide special education and related services for disabled three-and four-year-old children—when it had previously educated only K-12 students—was a new activity for Hancock purposes because the "school districts were required to provide educational services to a *new population* of district residents." *Sch. Dist. of Kan. City*, 317 S.W.3d at 611 (citing *Rolla 31*, 837 S.W.2d at 6-7). Comparing *Neske* and *Rolla 31*, the Court found that the charter schools act did not violate the Hancock Amendment because it did not require a new or increased activity on the part of Kansas City, Missouri School District: "Before the act, the KCMSD (and other public school districts) were required to provide a free public education to all eligible pupils who attended. This requirement remains." *Sch. Dist. of Kan. City*, 317 S.W.3d at 611.

The Taxpayers' Hancock claim in this case is more akin to the claims raised in *Neske, In re 1984 Budget,* and *School District of Kansas City* than those raised in *City of Jefferson* or *Rolla 31.* In the former cases, the alleged new activity was simply a continuation of an existing duty as to which implementation had become more expensive. In the latter cases, the alleged new activity actually imposed a brand new kind of duty on the political subdivisions, something they had never before been required to do.

But however similar those cases might or might not have been to the Taxpayers' claim in this case, *Breitenfeld* is on all fours—taxpayers from the *same* kind of political subdivision making the *same* argument to invalidate the *same* statute. As it did in that case, this Court should reach the same conclusion here: "In 1980, before the enactment of the Hancock Amendment, these school districts were providing K–12 educational services to eligible students, and they simply would be continuing to provide those services even if section 167.131 transfers were effectuated." *Breitenfeld*, 399 S.W.3d at 830.

II. The circuit court was correct in using a net cost analysis to review Taxpayers' claim because the Hancock Amendment does not require every newly mandated activity be paid for through a new line-item appropriation

-- State's response to Taxpayers' Points 3, 4 and 6

Assuming they can overcome *Breitenfeld* to show that §167.131 imposes a new or increased activity on their districts, the Taxpayers rely on *Rolla 31 Sch. Dist. v. State*, 837 S.W.2d 1 (Mo. 1992), to argue that nothing short of a line-item appropriation specifically added to the budget to cover the costs of the new mandate will satisfy the Hancock Amendment. It is not good enough, they argue, for the political subdivision to have no net increase in costs; every new mandate must be paid for with new, specific funding directly from the state treasury. Neither *Rolla 31* nor the Court's subsequent Hancock cases support such a narrow reading of the Amendment.

In *Rolla 31*, this Court considered two related Hancock issues. First, "whether the failure of the legislature to provide specific, state funding for the entire cost of the mandated program violates the Hancock Amendment"; and second, "whether, absent a specific appropriation such as an appropriation for categorical aid for this purpose, general unrestricted funds paid to the school districts under the School Foundation Program can be used to meet the Hancock Amendment requirements for the mandated program."

Rolla 31 Sch. Dist. v. State, 837 S.W.2d 1, 2 (Mo. 1992). The Court answered the second question unequivocally in the negative: "Since funds are fungible, allowing the state to use unrestricted funds to support mandated programs is essentially the same as requiring local school districts to raise money to support a state mandated program." *Id.* at 7.

At first blush, it might appear that the Court answered the first question in the affirmative. Noting that the Hancock Amendment permits a political subdivision not to comply with a new mandate "unless a state appropriation is made," this Court wrote, "We believe this means what it says; it requires that the legislature make a specific appropriation which specifies that the purpose of the appropriation is the mandated program." *Id.* at 7. However, if the Court truly intended to answer the first question with an unqualified "yes," there would have been no need for it to reach the second question at all. If the lack of a specific appropriation were dispositive—as the Taxpayers in this case suggest it is—what difference would it make whether unrestricted funds available through the Foundation Formula could be used for that purpose?

A closer reading of *Rolla 31* reveals that this Court was simply performing the same kind of net cost analysis that the circuit court conducted in this case. Specifically, the Court noted that a $3 million set-aside—written into the budget a year earlier to pay for a different, *voluntary* program for

disabled preschoolers—was "sufficiently specific to qualify" as a "state appropriation" for the new, *mandatory* program to educate disabled preschoolers within the meaning of the Hancock Amendment. *Id.* at 7. Had that $3 million been sufficient to cover the *entire* cost of the new mandate, *Rolla 31* implies that the new mandate would not have violated the Hancock Amendment: "We hold that the mandate … violates the Hancock Amendment because the legislature failed to provide a specific appropriation to cover *the full cost* of the program." *Id.* (emphasis added).

The Taxpayers' reading of *Rolla 31* is further belied by two of this Court's more recent Hancock decisions, *City of Jefferson v. Mo. Dep't of Natural Res.*, 916 S.W.2d 794 (Mo. 1996), and *Brooks v. State*, 128 S.W.3d 844 (Mo. 2004), both of which the Taxpayers rely on elsewhere in their brief. In *City of Jefferson*, taxpayers from Eldon and Jefferson City challenged a law that imposed new waste management duties on their cities without adding a new line item to the State's budget to pay for it. 916 S.W.2d at 796-97. This Court denied Eldon's Hancock claim because that city had "received DNR grants totaling $45,000 for planning costs" and "presented no evidence that the district (or its members) had costs exceeding the amount of the grants." *Id.* at 796–97. Because Jefferson City had not received any grants from DNR, however, this Court held that it did not have to comply with the new law "[u]ntil a specific appropriation is made and disbursed." *Id.* at 796.

Distinguishing Eldon from Jefferson City, this Court held that, "[a]lthough the mere prospect of a 'grant' to cover increased costs does not justify summary judgment for the state, actual receipt of grant funds defeats an Article X, Section 21 violation, in the absence of evidence that the increased costs exceed the grant." *Id*. 797 (emphasis added). The Taxpayers interpret this language to mean that if the law provides funding for a new mandate from any source other than a specific line-item appropriation, a political subdivision need not comply with the mandate until *after* it is has "actual receipt" of the alternative funding. Tellingly, however, the Taxpayers reverse the order of the clauses in the Court's opinion and insert new causal language when they purport to quote it in their brief: "Specifically, this Court held, 'Jefferson city need not comply with the mandate … until the state *actually reimburses* the city for its increased costs … [because] the mere prospect of a 'grant' to cover increased costs does not [defeat an Article X, Section 21 violation].'" Taxpayers' Br. at 63-64 (emphasis and alterations in original). That is not what *City of Jefferson* says. Stripped of the "because" inserted by the Taxpayers and returned to its original order, *City of Jefferson* actually holds that where a discretionary grant from a state agency is sufficient to cover the entire cost of a newly mandated activity, that mandate does not violate the Hancock Amendment *even if there is no new line-item*

appropriation in the budget. That is the same kind of net cost analysis employed by the circuit court here.

The Taxpayers similarly misread *Brooks v. State*. In that case, taxpayers challenged a new law requiring county sheriffs to issue concealed carry permits; but instead of appropriating funds through the state budget to cover the costs of background checks, the law allowed the sheriffs to collect a "user fee" from permit applicants. 128 S.W.3d 848. This Court noted that "[i]f the fee can properly be used to fund the new activities and costs, which is the state's position, there is no unfunded mandate." *Id.* By conducting a net cost analysis, this Court found a Hancock violation in the four counties that had proved their increased costs would exceed the fees their sheriffs could charge. *Id.* at 849. It was premature to enjoin the law state-wide, however, because no other county produced sufficient evidence that their costs would exceed the fees they could collect—i.e., no other county had performed the appropriate net cost analysis. *Id.* As in *City of Jefferson*, this Court's ruling in *Brooks* suggests that a law cannot be enjoined under Hancock unless and until taxpayers prove that the cost of complying with its new mandate actually exceeds the amount of new revenue the law provides the political subdivision for that purpose—even if that revenue is not transferred directly from the state through a new line-item appropriation in the state's budget.

The Taxpayers argue that *Brooks* expressly reserved the question of "whether a fee can satisfy or obviate the requirement of Article X, Sections 16 and 21, that state mandates be funded by 'full state financing.'" *Id.* at 848. But when the language the Taxpayers cite is read in context of the following sentence, the Court's reservation was not as broad as the Taxpayers interpret it. Rather, as the Court went on to explain, "the question remains open, because it was not raised by the parties, as to whether a fee imposed by a sheriff, under the authority of Section 571.094.10, *is a user fee at all* or whether it is more accurately characterized as a 'tax…'." *Id.* The outstanding issue was not whether a source of funding other than a line-item appropriation could satisfy Hancock but whether this *particular* source of funding was truly a user fee or simply a tax in disguise. That issue does not exist in this case, however, because the Taxpayers here do not contend that the tuition provided by §167.131 is really a disguised tax. (They could not make that argument because the tuition is to be paid by the sending school district and not the Taxpayers' own districts.) Rather, their claim is that tuition cannot take the place of a line-item appropriation. *Brooks* and *City of Jefferson* suggest otherwise.

III. Taxpayers failed to prove that any of the Petitioner Districts will incur increased costs under §167.131 that exceed what those districts can charge in tuition.

-- State's response to Taxpayers' Points 2 and 5

In their brief, Taxpayers argue that there are three categories of costs imposed on their districts by §167.131: (1) costs that fall within the tuition formula, (2) higher per-pupil costs associated with KCPS students, and (3) per-pupil costs that fall outside the tuition formula—specifically, costs for capital outlay. Taxpayers' Br. at 51. Because categories 2 and 3 are not reflected in the tuition formula, Taxpayers argue, their districts will necessary incur higher costs than they can recover in tuition. Although it was their burden to do so, the Taxpayers have never calculated what they claim the total cost of those three categories to be—not at trial, and not in their opening brief. The only calculations of the total costs imposed by §167.131 made at any time during these proceedings were performed by the State at trial and by the circuit court in its Final Judgment and Order.

Assuming all of the costs articulated by the Taxpayers to be real and accurate, the State's calculations showed that Blue Springs and Raytown's total costs would not exceed what they could charge in tuition. Notably, the Taxpayers do not dispute those calculations on appeal. Indeed, they cannot

dispute them because the State used the Taxpayers' own figures. Instead, Taxpayers argue that it doesn't matter whether their districts can charge enough in tuition to cover their increased costs because Hancock requires a separate line-item appropriation for any new mandate. As discussed above, that argument fails as a matter of law.

As for Independence, Lee's Summit, and North Kansas City, the circuit court performed its own calculations after trial. Adding up the three categories of costs claimed by the Taxpayers, the court concluded that those districts' increased costs would exceed what they could charge in tuition. However, those calculations relied on two flawed assumptions: (A) that every part of the tuition formula in §167.131 reflects an actual cost to educate transfer students; and (B) that every KCPS student is at least $1,922 more expensive to educate than every student residing in the five Petitioner Districts. Not only are those assumptions unsupported by any evidence offered by the Taxpayers at trial, they are actually belied by evidence offered by the State.

A. The portion of §167.131's tuition calculation based on Petitioner Districts' existing "debt service" is not an actual cost those Districts will incur by educating transfer students.

In their opening brief, Taxpayers argue that "§167.131 establishes some, but not all, of the costs associated with complying with the statute." Taxpayers' Br. at 52. "By law," they argue, "teacher's wages, incidental purposes, debt service, maintenance, and replacements are costs that are associated with educating each student, and thus accredited districts are permitted to charge each non-resident transfer student for those costs." Taxpayers' Br. at 52. The State does not dispute that schools will incur additional expenses for teachers' wages, incidental purposes, maintenance, and replacements as the number of students increases. But that isn't true for debt service. Nowhere in the Record do the Taxpayers offer any evidence—or even any argument—that their districts' existing debt service will increase just because the district admits new students. Indeed, the State offered evidence to the contrary at trial. Tr. 524:13-525:19; *and see* State's Opening Br. at 16-18. A district's per-pupil debt service per is nothing more than its existing debt divided by its average daily attendance. The numerator in that formula—the district's total outstanding debt—does not increase each time

the district enrolls a new student. If anything, the addition of each new student should *lower* the district's per-pupil debt service because the numerator of the formula gets bigger.

Neither at trial nor in their brief to this Court did the Taxpayers offer any response to the State's argument that the portion of the tuition formula based on a district's debt service per ADA is not a new cost they will incur with each new student. Nor did they make any effort at trial or in their opening brief to show that the amount of debt service included in the tuition formula is insufficient to cover the cost of the new capital outlays they complain are not reflected in the tuition formula. Even though it was not our burden to do so, the State made that effort in *our* opening brief. We showed, definitively, that even assuming the Petitioner Districts will incur *all* the new capital costs their financial officers predicted at trial, the per-pupil cost of those capital outlays is still less than what the district can charge in tuition for its existing per-pupil debt service. See State's Opening Br. at 18-21.

Because the circuit court's calculations assumed that the portion of §167.131's tuition formula based on debt service was an actual cost, those calculations are wrong. The Taxpayers have not met and cannot meet their

burden to show their actual increased costs under §167.131 exceed what they can charge in tuition.

B. The taxpayers' calculation that every KCPS student will cost an extra $1,922 mistakenly assumes that there are no FRL, IEP, and LEP students currently residing in the Petitioner Districts.

The Taxpayers convinced the circuit court that every KCPS student who transfers will cost $1,922 more to educate than Petitioner Districts' resident students because KCPS has a higher percentage of students qualifying for Free and Reduced Lunch status (FRL), disability services (IEP), and Limited English Proficiency status (LEP). But as the State showed in its opening brief, the Taxpayers neglected to back out the percentage of their own resident students who impose those extra costs. Those costs are already reflected in the tuition formula because they are incorporated into the district's pre-existing cost to maintain each grade level grouping. State's Opening Br. at 21-25. The Taxpayers offer no response to the State's argument in their opening brief. They simply ignore it. Because the calculations on which the circuit court based its judgment are flawed, the Taxpayers have not met their burden to establish a Hancock claim with specific evidence.

CONCLUSION

For the reasons set forth above and in the opening Brief of the State Appellants, the judgment in favor of Lee's Summit, Independence, and North Kansas City should be reversed, and the judgment in favor of the State should be affirmed.

Respectfully submitted,

CHRIS KOSTER
Attorney General

/s/J. Andrew Hirth
J. ANDREW HIRTH
Mo. Bar No. 57807
Deputy General Counsel

THOMAS D. SMITH
Mo. Bar No. 61928
Assistant Attorney General

P.O. Box 899
Jefferson City, MO 65102
(573) 751-0818
(573) 751-0774 (facsimile)
Andy.Hirth@ago.mo.gov
Thomas.Smith@ago.mo.gov
ATTORNEYS FOR STATE APPELLANTS

CERTIFICATE OF COMPLIANCE WITH RULE 84.06

The undersigned hereby certifies that this brief complies with the limitations set forth in Rule 84.06(b) and contains 5,046 words as calculated pursuant to the requirements of Rule 84.06(b)(2).

CHRIS KOSTER
Attorney General

/s/J. Andrew Hirth
J. ANDREW HIRTH
Mo. Bar No. 57807
Deputy General Counsel

THOMAS D. SMITH
Mo. Bar No. 61928
Assistant Attorney General

P.O. Box 899
Jefferson City, MO 65102
(573) 751-0818
(573) 751-0774 (facsimile)
Andy.Hirth@ago.mo.gov
Thomas.Smith@ago.mo.gov
ATTORNEYS FOR STATE
APPELLANTS

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was filed electronically via Missouri CaseNet, and served, on August 14, 2013, to:

W. Joseph Hatley
Spencer Fane Britt & Browne, LLP
1000 Walnut, Suite 1400
Kansas City, MO. 64106
Facsimile: 816-474-3216

Duane Martin
Guin Martin & Mundorf, LLC
2401 Bernadette Drive, Suite 117
Columbia, MO. 65203
Facsimile: 573-777-9648

Allan V. Hallquist
Husch Blackwell, LLP
4801 Main Street, Suite 1000
Kansas City, MO. 64112
Facsimile: 816-983-8080

Ray E. Sousley
KCPS
1211 McGee Street
Kansas City, MO. 64106
Facsimile: 816-418-7610

/s/J. Andrew Hirth
Deputy General Counsel