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 TAXPAYER RESPONDENTS

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I. This Court's *Breitenfeld* decision does not mandate a ruling in favor of the State in that Hancock Amendment claims must be separately considered for each political subdivision and the Taxpayers in this case have asserted their Hancock Amendment claims in a manner distinct from the Hancock Amendment claims at issue in *Breitenfeld*.

This Court must consider the specific Hancock Amendment claim asserted by the Taxpayers of the five Kansas City Area School Districts, as well as the specific proof that they presented at trial, separately from the Hancock Amendment claim and proof presented by the Taxpayers in the *Breitenfeld* case. Without citing any authority, other than quotes from the *Breitenfeld* opinion, the State asserts that this Court's *Breitenfeld* decision "precludes" the Taxpayers' Hancock Amendment claim. *See* State Appellants' Reply Brief, p. 1. There is no legal basis for this assertion. In fact, this Court expressly recognized the limited application of its *Breitenfeld* decision, stating that the transfer statute was found to be constitutional only "as it is applied to the defendant school districts involved in [that] case." *Breitenfeld v. Sch. Dist. of Clayton*, 399 S.W.3d 816, 820 (Mo. 2013) (emphasis supplied).

Hancock Amendment precedent makes abundantly clear that Hancock Amendment claims are unique to each political subdivision. When challenging the exact same mandate, one political subdivision may prove its claim and another may not. Here, the Taxpayers have proceeded on a legal theory that is different from the legal theory in *Breitenfeld* in crucial respects. This case, unlike *Breitenfeld*, is not about an alleged

mandate to admit and educate additional students. This case is about an alleged mandate to admit significant numbers of out-of-district students on a tuition basis for whom tuition cannot cover their costs and no State funding whatsoever is provided.

A. The Taxpayers' Hancock Amendment claim is distinct from the Hancock Amendment claim asserted in *Breitenfeld* in that the Taxpayers here are not challenging the amendments to RSMo § 167.131 that require them to educate additional eligible students, but rather that they have to admit significant numbers of out-of-district students for whom no State funding is available.

The requirement or State-mandated activity that this Court examined in *Breitenfeld* was to "provid[e] eligible students in grades K–12 a free public education." 399 S.W.3d at 828. The Court reasoned that there was "nothing new" about the alleged new activities in *Breitenfeld,* in that the new activities would merely cause Clayton School District to experience a "gain in its [K-12 student] population." *Id*. at 831. Here, the Taxpayers do not complain that RSMo § 167.131 expands the numbers of students who are eligible to attend their school districts. The Taxpayers' claim is not that § 167.131 grants attendance eligibility to an additional population of out-of-district students. Rather, the Taxpayers' claim is that RSMo § 167.131 diverges completely from the requirements that existed in 1980 to educate out-of-district students on a tuition basis.

An examination of the requirements that existed in 1980 to admit out-of-district students on a tuition basis reveals the constitutional problems inherent in § 167.131. In

1980, there were only two limited circumstances under which an out-of-district student could attend a school district on a tuition basis. Under both those circumstances, school districts were permitted to set tuition in their discretion and in an amount which would allow them to recover their full costs.

In 1980, RSMo § 167.121 permitted out-of-district students to attend a different school district where the commissioner of education determined that the other district was more accessible. *See State ex rel. Pfitzinger v. Wasson*, 676 S.W.2d 533, 534 (Mo. App. 1984). RSMo § 167.151 permitted out-of-district students to attend a school district in which their parents paid taxes. *See* Appendix to Taxpayers' Opening Brief at A68. Neither statute established any tuition formula, such as the one set forth in § 167.131.2. Under both § 167.121 and § 167.131, the receiving district was permitted to establish tuition in the amount it deemed appropriate.

RSMo § 167.131 represents a wholly new requirement to educate out-of-district students on a tuition basis. It removes the ability of receiving school districts to establish tuition in an amount that will permit them to capture all of the costs they will incur. Rather, receiving school districts are only permitted to charge tuition for some of the categories of costs that they incur on a per pupil basis. Moreover, the Department of Education, which is the final arbiter of tuition disputes under § 167.131, has issued guidance stating that unaccredited school districts do not have to make full tuition

payment, but rather are permitted to make monthly reimbursements.[1] If this guidance is enforced by the Department, then receiving school districts will suffer further financial losses as a result of the new mandate. The flawed and restrictive funding formula in § 167.131.2, combined with the complete lack of State funding for students residing in unaccredited districts, results in an undeniable conclusion that at least some of the costs of educating students who reside in unaccredited districts will be borne by local taxpayers of accredited districts.

1. If this Court determines that RSMo § 167.131 does not impose "new" activities on the Area School Districts, then it should remand this case with instructions for the trial court to consider: (a) whether the statute imposes "expanded" activities, or (b) whether it concerns "existing" activities such that the State may have impermissibly reduced the State-financed proportion of the costs of such activities.

Every mandate imposed by the State falls into one of three categories: (1) new required activities; (2) expanded required activities; or (3) existing required activities. Mo. Const. art. X, § 21.[2] The language of the Hancock Amendment recognizes these

[1] *See* DESE Student Transfer Guidance, originally issued on June 19, 2013 and revised August 26, 2013, available at http://dese.mo.gov/documents/Transfer_Guidance.pdf.

[2] Section 16 of the Hancock Amendment uses the term "expanded" rather than "increased." Mo. Const. art. X, § 16.

three categories. To prove a Hancock Amendment violation for the first two categories (new or expanded activities), a taxpayer must show that that the State has not "made and disbursed" funds to cover the increased costs of the new or expanded activities. *Id*. To prove a Hancock Amendment violation for the third category (existing activities), a taxpayer must prove that the State has reduced the State financed proportion of the costs. *Id*. The mandate at issue here necessarily must fall into one of the three categories. This Court must decide if the requirement to admit significant numbers of out-of-district students on a tuition basis with no ability to count those students in ADA, as that requirement is defined by the 1993 amendments to § 167.131, is a new activity (as was alleged by the Taxpayers). If this Court reverses the trial court's decision by determining that § 167.131 does not impose a new activity, then this case must be remanded so that the Taxpayers have the opportunity to show that § 167.131 imposes an expanded activity, or that the State has impermissibly reduced the State-financed proportion of the funding for an existing activity.

Due to the pre-trial stipulations of the State and the trial court's August 1, 2012 judgment, the Taxpayers here did not proceed on an "expanded" activity theory or on an "existing" activity theory. The parties quickly brought this critical case to trial under an assumption that the 1993 revisions to § 167.131 and this Court's *Turner* decision imposed "new" activities on the Area School Districts. The Taxpayers did not have the opportunity at trial to present any evidence that § 167.131 imposed "expanded" activities on the Area School Districts. The Taxpayers also did not have the opportunity to

alternatively argue that, if § 167.131 represents an "existing" activity that was required in 1980, then the State financed proportion of the costs of the activity had been impermissibly reduced.

The § 167.131 mandate is either: a new requirement, an expanded requirement, or an existing requirement. Here, the Taxpayers challenged § 167.131 as a "new" requirement based upon this Court's statement in its *Turner* decision that, via the 1993 amendments, the legislature "amended [the statute] to remove the discretion previously given to the student's chosen school" and that the amendment changed the existing law. *Turner v. Sch. Dist. of Clayton*, 318 S.W.3d 660, 669 (Mo. 2010). The State agreed with the Taxpayers that § 167.131 presents a new requirement. If this Court overturns the trial court's ruling that § 167.131 imposes "new" requirements, then this case must be remanded so that the Taxpayers have a full and fair opportunity to argue and present evidence that the transfer statute either imposes an "expanded" requirement or that the State has reduced the State financed proportion of the costs of an "existing" requirement.

B. Supreme Court precedent establishes that *Breitenfeld* is not dispositive of this appeal.

As fully explained in the Taxpayers' Opening Brief, Hancock Amendment claims are political-subdivision specific. The State confuses this issue in its reply brief – the State argues that *Breitenfeld* "controls the outcome of this case" because its pre-trial stipulations are not binding. *See* State Appellants' Reply Brief, pp. 2-4. The binding nature of the State's pre-trial stipulations is wholly irrelevant to the issue of whether this

Court's *Breitenfeld* decision is dispositive of this appeal. According to Hancock Amendment precedent, this case must be decided separately from *Breitenfeld*, and the specific proof that the Taxpayers presented of: (1) a new activity; (2) increased costs; and (3) lack of State funding, must be considered.

The split decision by the trial court in this matter exemplifies that courts must analyze the constitutionality of statutes under the Hancock Amendment as to each individual political subdivision. The trial court found the transfer statute to be unconstitutional as to three of the Area School Districts, but constitutional as to two of the Area School Districts. The State does not argue that the trial court did not have authority to issue a split ruling; the State does not argue that the trial court had to address the claims of the Taxpayers of the five Area School Districts together and that its ruling regarding one of the Area School Districts was somehow dispositive of the claims concerning the other Area School Districts. Just as the trial court had to separately consider the claims and proof offered of the five Area School Districts involved in this case, this Court must consider the claims and proof offered by the five Area School Districts separate from the school districts involved in *Breitenfeld*.

The State's arguments concerning *Breitenfeld* can be summarized as follows: because the *Breitenfeld* school districts were not successful in proving their Hancock Amendment claim, and because the *Breitenfeld* taxpayers and the Taxpayers of the five area School Districts are challenging the same statute, the Taxpayers of the five Area School Districts cannot be successful on their Hancock Amendment challenge to the

transfer statute. The State's argument is belied not only by the trial court's ruling in this matter, but also by previous decisions by this Court on Hancock Amendment claims. In *Brooks v. State*, this Court held that the Conceal and Carry Act was unconstitutional as to four counties which presented testimony regarding anticipated activities and costs in implementing the Act. 128 S.W.3d 844, 850 (Mo. 2004) (enjoining the State from enforcing the Act "only to the extent it constitute[d] an unfunded mandate imposed on those counties"). In its holding, this Court recognized that it could not dispose of the case as to other counties and noted that each political subdivision affected by an unfunded mandate must provide specific proof of increased costs. *Id.* (citing *City of Jefferson v. Mo. Dept. of Natural Resources*, 916 S.W.2d 794, 796-97 (Mo. banc 1996)).

II. The State Appellants are bound to their pre-trial stipulations of fact, which amounted to admission of two elements of the Taxpayers' Hancock Amendment claim.

The State attempts to avoid the binding effect of its pre-trial stipulations by arguing that it could not have stipulated to the first two elements of the Taxpayers' Hancock Amendment claim because those elements are matters of law. *See* State Appellants' Reply Brief, pp. 2-3. In fact, the elements of a Hancock Amendment claim are issues of fact which must be proven by specific evidence. Simply stated, it is not a matter of law whether a statute imposes new activities and increased costs. Here, the State stipulated to facts, as it concedes in its reply brief. *See* State Appellants' Reply Brief, p. 3. Those stipulations amounted to admissions of two elements of the Taxpayers'

Hancock Amendment claim (that § 167.131 imposes a new activity and that there is no State funding for such activity).

The trial court did not find that § 167.131 imposes new activities as a matter of law. Rather, in its August 1, 2012 judgment and its final judgment and order, the Court states that § 167.131 presents a new unfunded mandate as a matter of law. LF 573, 604. The trial court correctly characterized its determination that a statute presented a new unfunded mandate is a conclusion of law. However, there are factual findings underlying the court's determination, and the State stipulated to those factual findings.

Here, the factual findings underlying the Court's determination that § 167.131 presented an unfunded mandate were that: (1) "§ 167.131, as amended in 1993, removed the requirement that the student have completed the highest grade legal available in their district of residence, required an unaccredited district to pay tuition to an adjoining accredited district for a resident student who transfers there, and removed discretion to reject or admit from the receiving, adjoining accredited school districts"; and (2) "[n]o State appropriation has been made to specifically compensate Area School Districts or Center for the new duties required under § 167.131." LF 569. The State stipulated to both of these facts. Specifically, the State Appellants stipulated that: (1) "the mandate to admit non-resident students residing in unaccredited school districts *was created* by an amendment to RSMo. § 167.131 in 1993"; and (2) the Area School Districts would "not receive any specific funding directly from the State of Missouri to finance the costs associated with admitting and educating KCPS students." *See* Appendix to Taxpayers'

Opening Brief at A48-49. The State stipulated to the very facts which formed the basis for the trial court's conclusion that § 167.131 presented an unfunded mandate and, in doing so, it stipulated to the two elements of the Taxpayers' Hancock Amendment claim.

The only contested issue at the trial of this matter was whether § 167.131 imposes increased costs. As stated above, if this Court reversed the trial court's ruling that § 167.131 imposes new activities (and thereby determines that the statute can only present expanded or existing activities), then this case must be remanded so that the Taxpayers can present evidence of: (a) failure to fully fund an expanded activity through a State appropriation; and/or (b) a reduction in the State financed proportion of the costs of an existing activity.

The State is incorrect in its assertion that judicial estoppel does not apply here because it did not "previously prevail" on an argument that § 167.131 does not impose a new unfunded mandate. *See* State Appellants' Reply Brief, p. 4. The goal and purpose of judicial estoppel is to prevent parties from "playing fast and loose with the courts." *In re Contest of Primary Election Candidacy of Fletcher*, 337 S.W.3d 137, 143 (Mo. App. 2011) (citation omitted). The doctrine exists to prevent parties from taking inconsistent positions. *Id*. Courts may apply the following three factors in determining whether to judicially estop a parting from taking inconsistent positions: (1) whether a party's later position is clearly inconsistent with its earlier position; (2) whether the party has *succeeded in persuading a court to accept* that party's earlier position; and (3) whether the party seeking to assert an inconsistent position would derive an unfair advantage or

impose an unfair detriment on the opposing party if not estopped. *Id.* There is no requirement that a party must have "prevailed" based upon a prior position. Moreover, the three factors are "not fixed or inflexible prerequisites", and are merely factors for the court to consider. *Id.*

Here, the State is attempting to take a position that is clearly inconsistent with its prior position to the disadvantage of the Taxpayers who had no opportunity to present evidence of the new activities imposed by § 167.131 at trial. Accordingly, the State should be estopped from disputing on appeal the issues of whether § 167.131 imposed new activities and whether the State has appropriated any funds for the new activities.

III. Whether the Hancock Amendment requires a "line item appropriation" is irrelevant because the State has provided no funding whatsoever for the RSMo § 167.131 mandate.

The State Appellants devote much of their brief to an argument that the Hancock Amendment does not require the State to make a specific line-item appropriation for new (or expanded) activities. The issue of whether the Hancock Amendment requires a line item appropriation need not be answered by this Court in ruling on the Taxpayers' claim. In this case, the State has admitted, and entered into binding stipulations, that the State has made no appropriation whatsoever to cover the costs of the activities required by § 167.131. *See* Appendix to Taxpayers' Opening Brief at A48-49. Thus, the issue for this Court to consider and determine is whether the State can meet its funding obligation under the Hancock Amendment through third party payments by other political

subdivisions. Both the plain language of the Hancock Amendment and Hancock Amendment precedent establish that payments from third parties are not "State funding."

Contrary to the State's assertion in its Reply Brief, the Taxpayers have never asserted that the Hancock Amendment requires a line item appropriation. *See* State Appellants' Reply Brief, p. 10. Again, such an assertion would be irrelevant and superfluous because the State has made no appropriation of funds for § 167.131 costs. The Taxpayers have maintained throughout this case that the Hancock Amendment requires that the State provide specific funding to cover the costs of new or expanded mandates and that the State cannot point to unrestricted funds as a source of funding for a new mandate. *Rolla 31 Sch. Dist. v. State*, 837 S.W.2d 1, 7 (Mo. 1992) ("without a categorical appropriation for [the] specific purpose [of a preschool special education program] the unrestricted school funds do not meet [the appropriation] requirement."). The *Rolla 31* Court provided specific examples of how the State could meet its funding obligation. The State may make an appropriation from the general fund, an appropriation providing categorical aid for a new mandate as part of the school foundation fund, or a set-aside in the school foundation fund. Each of these appropriations would be sufficiently specific to qualify as a "State appropriation." *Id*. However, the State may not point to unallocated school foundation funds as the source of funding for new mandates. *Id*. at 6-7.

The State attempts to make the Taxpayers' demand for compliance with the Hancock Amendment appear impossible by arguing that the State cannot include a

specific line item appropriation in the budget for every activity required since 1980. This argument should not be entertained by the Court. First, *Rolla 31* provides clear guidance on how the State can meet its funding obligation, and clearly states that non-line-item-appropriations (*i.e.*, set-asides in the school foundation fund) can satisfy the Hancock Amendment. Second, the Taxpayers here are not seeking a line item appropriation; they are simply seeking full State funding for the new activities required by § 167.131, as required by the Hancock Amendment. Third, the State has provided no funding whatsoever for the § 167.131 mandate, and thus the issue of whether a line item appropriation is required is wholly irrelevant. The State has pointed to tuition payments from unaccredited districts as the source of funding for the new activities required by § 167.131, and this Court must decide if that funding source is permitted under the Hancock Amendment.

IV. This Court has never used a "net cost analysis" when evaluating a Hancock Amendment claim and such an analysis is not supported by either the plain language of the Hancock Amendment or by Hancock Amendment precedent.

None of the cases which the State Appellants cite in their reply brief supports their argument that courts examining a Hancock Amendment claim may conduct a net cost analysis. This Court has never held that payments from non-State sources (such as other political subdivisions) may be considered when determining whether sufficient funding has been provided to cover the full costs of a new mandated activity. To the contrary,

this Court has repeatedly affirmed the obligation of the State to fully fund new mandates in order to ensure that the costs of compliance are not borne by local taxpayers.

The State conceded in its brief that the *Rolla 31* Court held that a specific appropriation by the State does not meet the requirements of the Hancock Amendment unless it covers the entire cost of the new mandate. *See* State Appellants' Reply Brief, p. 12. The *Rolla 31* Court did not conduct a net cost analysis, but rather explicitly held that a specific appropriation must be made by the State which covers the full costs of compliance. 837 S.W.2d at 6-7. The Court held that funding for new mandates could not come from local sources. *Id*. at 7.

The *City of Jefferson* Court likewise did not conduct a net cost analysis or consider funds from non-State sources. The Court held that the State must appropriate funds which "specify the amount and purpose of the appropriation" in order to meet its funding obligation. *City of Jefferson v. Missouri Dep't of Natural Res.*, 916 S.W.2d 794, 796 (Mo. 1996). The Court held that there was no Hancock Amendment violation with respect to the City of Eldon because Eldon has not shown that it "had costs exceeding the amount of the [State] grants." *Id*. at 796-97. The Court's holding reveals that, if the amount of the State grants had been insufficient to cover the full costs of preparing an updated solid waste plan, then the statute at issue would have violated the Hancock Amendment. The State argues that the *City of Jefferson* opinion cannot be construed to mean that State funds must be disbursed by the State before a political subdivision is required to comply with a new mandate, but that is exactly what the plain language of the

opinion stated. The Court stated that Jefferson City "need not comply with the [new] mandate" "[u]ntil a specific appropriation is made and disbursed to [the City]." *Id.* at 796.

Finally, *State v. Brooks* does not suggest that a net cost analysis is appropriate. The Court unequivocally explained that its opinion did not address the issue of whether the State can meet its obligation to fully fund new mandates through a fee paid by citizens:

> In identifying plaintiffs' Hancock claims, it must be emphasized that the challenge is only to the inadequacy of the fee to fund the mandate. Plaintiffs do not challenge, and therefore this Court does not address, the issue raised by the dissent, that is, 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." *See* art. X, secs. 16 and 21. The parties apparently characterize the fee—at least to the extent that it funds or partially funds the mandate—as a permissible "user fee." As so characterized, it does not require a vote of the people under article X, section 22(a), another Hancock provision….

128 S.W.3d at 848. Moreover, the Court did not conduct a net cost analysis as the State claims. A careful reading of the opinion reveals that the Court did not consider whether the $100 user fee was sufficient to cover the costs of issuing permits. The fees, which were to be deposited in the sheriff's revolving fund, could only be used for equipment

and training and could not be used for the costs associated with issuing permits, such as obtaining fingerprint and background checks. *Id*. at 850. The amount of the fee in relation to the cost of issuing permits was irrelevant, because the fee could not be used for the types of costs that the counties would incur in issuing permits. *Id*.

V. Even under an improper "net cost analysis", the Taxpayers of the Blue Springs and Raytown School Districts proved that their districts will incur increased costs under the RSMo § 167.131 mandate.

There is no basis for the use of any mathematical formula to determine if § 167.131 violates the Hancock Amendment as to the five Area School Districts. As explained above, there is absolutely no "State funding" to offset the increased costs the Districts will incur. *Rolla 31* and *City of Jefferson* demonstrated that existing appropriations by the State may be considered in determining whether a political subdivision will incur increased costs. However, potential payments from another political subdivision or a third party may never be considered in a Hancock Amendment analysis.

In the event this Court determines that potential tuition payments from the Kansas City Public School District qualify as "State funding" and a "specific appropriation" by the State, then this Court must still reach the conclusion that the transfer statute violates the Hancock Amendment. The Taxpayers proved at trial that any amount which they could recover from KCPS in tuition will never cover the costs they will incur in admitting and educating KCPS students.

For each student that transfers, the Area School Districts will incur: (1) costs reflected in the § 167.131.2 tuition formula; (2) higher per-pupil costs associated with educating KCPS students; and (3) capital outlay costs. The State claims that "the Taxpayers have never calculated what they claim the total costs of those three categories to be." *See* State Appellants' Reply Brief, p. 16. This claim is patently false. The Taxpayers introduced evidence at trial concerning each of the three categories of costs. Finance officers from each of the Area School Districts testified as to these costs. Furthermore, the trial court relied on the cost evidence submitted by the Taxpayers in rendering its judgment. The State made no effort to calculate the costs associated with educating KCPS students and, to this day, has not proffered what it believes to be a reasonable estimate of the cost to educate a KCPS student.

Finance officers from each of the Area School Districts, prior to trial, calculated the amount of tuition that they could charge to KCPS for each transfer student. *See* Appendix to Taxpayers' Opening Brief at A116-127. The tuition amounts reflect costs that the Area School Districts will incur that fall "inside" the tuition formula. At trial, the State did not challenge the tuition amounts that had been calculated by the finance officers. In fact, the State used those tuition amounts as "revenue" that the Area School Districts could receive in its "net cost" formula.

The Taxpayers proved at trial not only that KCPS students are more expensive to educate than the Area School Districts' students, but also exactly how much more expensive KCPS students are to educate. The Taxpayers proved that, on average, KCPS

students are $5,500 more expensive to educate than their resident students. The evidence in support of this fact was two-part. First, the Taxpayers introduced DESE School Finance Data for each of the five Area School Districts and for KCPS. *See* Appendix to Taxpayers' Opening Brief at A138-143. DESE's data for each school districts shows that KCPS spent approximately $5,500 more per student in fiscal year 2011 than each of the Area School Districts. In an effort to explain this cost difference, the finance officers, as well at the State's witness (Dr. Roger Dorson) were questioned as to why KCPS students are more expensive to educate. The testimony of these individuals revealed that KCPS students are more expensive to educate partially because a higher percentage of those students are FRL/IEP/LEP students, and partially because those students reside in a failing school district. Tr. 158:16-196:1; 256:1-271:19; 324:7-343:11; 401:11-415:16; 465:12-481:15; 536:2-540:25. The Taxpayers proved, through careful calculations by the finance officers, that the additional FRL/IEP/LEP costs associated with KCPS students account for $1,922 of the $5,500 difference between the cost to educate a KCPS student and the costs to educate the Area School Districts' resident students. *See* LF 356-405; Appendix to Taxpayers' Opening Brief at A128-137.

Finally, the Taxpayers proved the capital outlay expenses that they will incur based on the approximate number of incoming students who reside within the KCPS District. The finance officers testified that, using grade level estimates for the incoming students, they were able to determine how many mobile classroom units they would have to acquire and install for each grade level grouping, the costs associated with acquiring

and installing the mobile units, and what their furniture, fixture, and equipment (FFE) costs would be for each grade level grouping. Tr. 158:16-196:1; 256:1-271:19; 324:7-343:11; 401:11-415:16; 465:12-481:15. The Taxpayers introduced exhibits at trial showing the estimated capital outlay expenses for each of the Area School Districts. *See* Appendix to Taxpayers' Opening Brief at A128-137. Again, the State did not dispute the calculations of the finance officers or introduce any evidence challenging the capital outlay expenditure calculations and figures.

A. The calculation proposed by the State should not have been used in analyzing the Hancock Amendment claim by either the Blue Springs and Raytown School Districts, or the three prevailing School Districts.

As to the calculation employed for the Blue Springs and Raytown School Districts, the State asserts that the "Taxpayers do not dispute those calculations on appeal." *See* State Appellants' Reply Brief, p. 16. In fact, in their Opening Brief, the Taxpayers explained to this Court, in detail, why the State's calculation was flawed (and why the trial court should not have adopted that calculation in reaching its judgment). *See* Taxpayers' Opening Brief, pp. 66-70.

The State's calculation is flawed in multiple respects. On the revenue-side of the equation, the calculation assumes that the Area School Districts can charge KCPS for each of the costs recognized in the § 167.131.2 tuition formula, that the State Board of Education will approve the tuition amounts established by the Area School District's Boards, and that KCPS will pay the full amount of the tuition. On the expense-side of the

equation, the calculation assumes that the Area School Districts will incur only three categories of costs: (1) the limited operating costs recognized in each of the Area School District's per pupil expenditure amounts; (2) the capital outlay expenditures the Districts will incur in accommodating KCPS students; and (3) the additional FRL, IEP, and LEP costs that the District will incur for each KCPS student who transfers.

The primary error in the calculation is that costs which are recognized on one side of the equation are not recognized on the other side. The per pupil expenditure shown in DESE's school finance data is based on each district's "total current expenditures." "Total current expenditures" include limited categories of costs that school districts incur – they include only instruction and support expenditures. *See* Appendix to Taxpayers' Opening Brief at A138-143. "Total current expenditures" do not include many of the costs that are recognized by law in the Section 167.131.2 formula. The law recognizes "all amounts spent for teachers' wages, incidental purposes, debt service, maintenance and replacements" as costs that receiving school districts will incur on a per pupil basis. RSMo § 167.131.2. However, "per pupil expenditures" do not capture many of these per pupil costs, the most significant cost being debt service. The calculation used in the trial court's judgment is flawed in that, on the revenue-side of the equation, it recognizes per pupil debt service costs as costs that receiving districts incur (it assumes that the Area School Districts will incur per pupil debt service costs, and that they will charge KCPS for per pupil debt service costs). On the costs-side of the equation, however, it fails to

recognize per pupil debt service costs as costs that receiving districts will incur (it assumes that the Area School Districts will not incur per pupil debt service costs).

The secondary error in the calculation is that it fails to fully account for one of the most critical pieces of evidence that the Petitioners proved at trial – that KCPS students are, on average, more expensive to educate than the Area School Districts' resident students. The calculation only accounts for the additional FRL/IEP/LEP costs that are associated with KCPS students, and does not account for all the factors that make KCPS students more expensive to educate. Finance officers from each of the Area School Districts and Dr. Dorson testified that part of what makes KCPS students more expensive to educate is that a much higher percentage of KCPS students are FRL, IEP, and/or LEP. There are several other factors that make KCPS students more expensive to educate than the Area School Districts' students, primarily the fact that KCPS students will be transferring from a failing and unaccredited school district.

The evidence presented at trial showed that each of the Area School Districts would incur approximately $1,922 in additional FRL/IEP/LEP costs for each KCPS student who transfers. However, as shown in exhibits that were admitted at trial, and by the testimony of all the witnesses, the swing between KCPS's per pupil expenditures and the Area School Districts' per pupil expenditures is much more than $1,922. *See* Appendix to Taxpayers' Opening Brief at A138-143. In fact, KCPS spent approximately $5,500 more per student in fiscal year 2011 than each of the Area School Districts. *Id.* This $5,500 amount is attributable to not only additional FRL/IEP/LEP costs, but also to

a myriad of other factors including that KCPS has had to spend significant resources trying to improve its students' test scores such that it can meet State accreditation requirements. KCPS students will cost the Area School Districts, at a minimum, $5,500 more to educate than their resident students.

As to the three prevailing school districts, the State claims that the "circuit court performed its own calculations after trial." *See* State Appellants' Reply Brief, p. 17. In fact, the trial court employed the exact same flawed formula which the State derived and proposed during its closing arguments. LF 602-603. Even under this highly flawed formula, the trial court determined that the Independence, Lee's Summit, and North Kansas City School Districts would incur increased costs. *Id*.

B. Debt service is a per pupil cost that school districts incur and which cannot be allocated to specific categories of students.

The State attempts cherry-pick out certain per pupil costs which it asserts will not be incurred by the Area School Districts. Specifically, the State argues that the Area School Districts will not incur per pupil debt service costs for students who transfer from KCPS. The State's argument is undermined by the plain language of the transfer statute, which expressly recognizes debt service as a cost that school districts incur on a per pupil basis. *See* RSMo § 167.131.2. By excluding these recognized per pupil costs, the State's calculation inherently ignores a significant category of costs that school districts annually incur.

On the cost-side of the State's calculation, the State relied upon the lower amount of "per pupil expenditures" for each Area School District. DESE calculates each Missouri school district's per pupil expenditures by dividing "total current expenditures" by the Average Daily Attendance (ADA) figure. *See* Appendix to Taxpayers' Opening Brief at A138-143. As stated above, the term "total current expenditures" means the sum of instruction and support expenditures. "Total current expenditures" do not include many of the costs that school districts annually incur, such as debt service. *See* Appendix to Taxpayers' Opening Brief at A116-127.

The "per pupil expenditure" amount does not take into account amounts that school districts spend on debt service. However, debt service expenditures are costs that schools incur on an annual basis. The Section 167.131.2 formula acknowledges and affirms that debt service expenditures are: (1) costs that school districts incur every year; and (2) costs that are attributable on a per pupil basis. The formula permits sending districts to charge for per pupil debt service amounts because incoming students must also share a fair responsibility of the receiving districts' costs.

Mr. Brian Blankenship, the Associate Superintendent of Operations of the Raytown School District, testified extensively at trial about the Missouri school finance system. He explained that "each student brings with them or carries with them a liability." Tr. 390:7-393:18. He also explained that all expenditures are analyzed on a per pupil basis, and that DESE does not assign costs to any particular student. *Id.*; Tr. 383:22-384:4. To assign a cost to one specific student would be illogical. A student at

the "tipping point", whose entrance into the district causes the district to hire a new teacher or purchase a new cafeteria table, is not responsible for 100% of those expenditures. *Id*. Rather, all the students who benefit from those items bear responsibility for the costs. By the same token, it is unreasonable to attribute a debt service expense to the student at the "tipping point" who caused the district to take out the loan, in that many students benefit from items that were purchased with loaned funds. It would also be unreasonable to attribute debt service expenses to only a district's resident students, and not to transfer students. The State's calculation assumes that only resident students are responsible for debt service expenditures, and that transfer students should not be assigned their share of the receiving district's debt service costs.

The § 167.131.2 tuition formula recognizes that transfer students must be assigned their share of the receiving district's debt service costs because, for every student in attendance, school districts incur a specific amount of debt service costs. However, the State's calculation ignores debt service as a cost associated with KCPS students. This approach is contrary to the law set forth in § 167.131.2 and to the system of school finance established in Missouri. Further, the calculation proposed by the State makes no sense if it assumes, on one side of the equation, that receiving districts can charge sending districts for per pupil debt service costs, but then assumes, on the other side of the equation, that school districts don't actually experience per pupil debt service costs. If any calculation is to be employed by this Court in ruling on the Taxpayers' Hancock

Amendment claim, then debt service costs must be subtracted from the tuition that the Area School Districts will charge to KCPS.

C. On average, the Area School Districts will incur an additional $5,500 per student for each student that transfers from the Kansas City Public School District, and only part of that amount is attributable to FRL, IEP, and LEP costs.

In its reply brief, the State takes issue with the evidence that the Taxpayers introduced at trial concerning the additional FRL, IEP, and LEP costs that the Area School Districts will incur for each student that transfers from the Kansas City Public School District. Even if the $1,922 figure were relevant to a net cost analysis (which it is not as it only accounts for part of the additional costs to educate a KCPS student), the finance officers fully explained at trial why KCPS students will, on average, cost an additional $1,922 due to FRL, IEP, and LEP costs. The finance officers testified that their districts receive an additional amount of ADA funds for students who are classified as FRL, IEP, or LEP, due to the fact that the State has recognized that those students are more expensive to educate. Tr. 158:16-196:1; 256:1-271:19; 324:7-343:11; 401:11-415:16; 465:12-481:15. Prior to trial, the finance officers estimated how many KCPS students would be FRL, IEP, or LEP students based on the data available concerning those percentages at KCPS schools. LF 356-405. With those estimates, the finance officers were able to calculate the additional amount that each of these groups will cost the Area School Districts. *Id.*

The State argues that the Area School Districts will not incur an additional $1,922 for each KCPS student due to FRL/IEP/LEP costs because the "Taxpayers neglected to back out the percentage of their own resident students who impose extra costs." *See* State Appellants' Reply Brief, p. 20. Under the foundation formula, school districts receive a weighted ADA amount for each FRL, IEP, and LEP student above a certain threshold. Tr. 506:1-515:16. School districts receive 1.25 of their per student ADA amount for the number of FRL students above a 32% threshold, they receive 1.75 of their per student ADA for IEP students above a 13.7% threshold, and they receive 1.60 of their per student ADA for LEP students above a 0.9% threshold. *Id.*

The State's argument, although unclear, is apparently that the Area School Districts would not receive weighted ADA for transfer students unless they had met the thresholds at their districts, and thus the Taxpayers needed to present evidence concerning their current percentage of FRL/IEP/LEP students at trial. This argument does not undermine the $1,922 number the Taxpayer's presented at trial for a number of reasons. First, as stated above, the Taxpayers presented the $1,922 figure at trial in order to explain the $5,500 difference between its per pupil expenditures and KCPS's per pupil expenditures. The Taxpayers do not argue that students transferring from KCPS will be on average $1,922 more expensive to educate. Rather, they argue that each student from the Kansas City Public School District will be $5,500 more expensive to educate (not including capital expenditures). This is based on data gathered and published annually by the Department of Education.

Second, the Area School Districts will not actually receive ADA for any students who transfer under § 167.131. KCPS has a significantly high percentage of FRL, IEP, and LEP students, and thus many of the transfer students who the Area School Districts will be required to admit will fall into those categories. DESE has recognized that such students are more expensive to educate through ADA weighting. The Area School Districts will be required to educate these more expensive students, but they will not receive any ADA for the students.

CONCLUSION

For the foregoing reasons, and for the reasons stated in the Taxpayers' Opening Brief, the trial court's judgment holding RSMo § 167.131 to be unconstitutional as to the Independence, Lee's Summit, and North Kansas City School Districts should be upheld and its judgment holding RSMo § 167.131 to be constitutional as to the Blue Springs and Raytown School Districts should be reversed.

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Respectfully submitted,

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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 7,669 words as calculated pursuant to the requirements of Rule 84.06(b)(2).

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