IN THE SUPREME COURT OF MISSOURI

No. SC95271

PEGGY STEVENS MCGRAW and SAMUEL C. JONES,

Appellants,

v.

STATE OF MISSOURI and
MISSOURI STATE EMPLOYEES' RETIREMENT SYSTEM,

Respondents.

On Appeal from the Circuit Court of Cole County
Hon. Frank Conley, Circuit Judge

BRIEF OF RESPONDENT MISSOURI STATE EMPLOYEES' RETIREMENT SYSTEM

THOMPSON COBURN LLP
Allen D. Allred, #26367
Jeffrey R. Fink, #44963
One US Bank Plaza
St. Louis, Missouri 63101
314-552-6000
FAX 314-552-7000
aallred@thompsoncoburn.com
jfink@thompsoncoburn.com

Attorneys for Respondent
Missouri State Employees' Retirement System

Table of Contents

Table of Authorities

Page(s)

Cases

Statutes and Constitutional Provisions

Other Authorities

Jurisdictional Statement

The jurisdictional statement of Plaintiffs/Appellants Peggy Stevens McGraw and Samuel C. Jones is inaccurate. Nevertheless, this Court has jurisdiction over this appeal pursuant to Article V, Section 3 of the Missouri Constitution because Plaintiffs' claims involve the validity of a Missouri statute—the 2010 schedule of compensation issued by the Missouri Citizens' Commission on Compensation (the "Commission")—under Plaintiffs' interpretation of the schedule. *See State ex rel. Union Elec. Co. v. Pub. Serv. Comm'n*, 687 S.W.2d 162, 165 (Mo. banc 1985) (Supreme Court of Missouri has jurisdiction if interpretation of statute implicates validity of statute even if Court rejects that interpretation and decides case without reaching constitutional question).

Under Article XIII, Section 3 of the Missouri Constitution, the compensation of Missouri judges (and elected state officials and legislators) is established in schedules of compensation that the Commission periodically issues. Under RSMo § 476.530, the retirement benefits of Missouri judges are based on their compensation when they terminate employment as judges.

The Commission's 2010 schedule set state judicial salaries as a percentage of federal judicial salaries beginning on July 1, 2012 (the start of fiscal year 2013). Beginning on that date, Defendant/Respondent the State of Missouri paid Missouri judges the specified percentage of the actual salaries paid to their federal judicial counterparts. These federal judicial salaries were the same when: (a) the Commission's 2010 schedule took effect on February 1, 2011; (b) Missouri judges began to be paid based on federal

judicial salaries on July 1, 2012; and (c) the State appropriated funds for judicial salaries for fiscal years 2013 and 2014 in 2012 and 2013.

In October 2012 and December 2013, two lower federal courts determined that Congress had unlawfully blocked cost of living adjustments ("COLAs") for federal judges during some prior years (1995, 1996, 1997, 1999, 2007, and 2010). As a result, these federal courts ruled that since 1995, federal judges should have received more than what they had been paid. Since the decisions in these and other related cases, the federal government has adjusted federal judicial salaries effective January 1, 2014 to incorporate the past COLAs that federal judges should have received, and federal judges have received back pay for years prior to 2014.

Plaintiffs, two former Missouri judges, claim that the State erroneously implemented the Commission's 2010 compensation schedule for fiscal years 2013 and 2014 and thereby underpaid them for their services during those fiscal years. Plaintiffs contend that because the federal courts retroactively corrected federal judicial salaries for years prior to 2014, the State is required under the 2010 schedule to: (a) retroactively adjust their salaries for fiscal years 2013 and 2014 based on the corrected federal judicial salaries; and (b) pay them additional compensation for their services during fiscal years 2013 and 2014. In turn, Plaintiff McGraw, who retired in October 2013 (during fiscal year 2014), claims that because the State underpaid her in October 2013, Defendant/Respondent Missouri State Employees' Retirement System ("MOSERS") has underpaid her retirement benefits under Section 476.530.

Contrary to Plaintiffs' contention, MOSERS has not asserted that the 2010 schedule violates the Missouri Constitution. Just the opposite, MOSERS contends that the schedule is valid if construed in a manner consistent with the Missouri Constitution. MOSERS asserts that under Plaintiffs' interpretation of the schedule, the schedule violates Article XIII, Section 3, the non-delegation doctrine, and the budget and appropriation process under the Missouri Constitution. This Court, therefore, has appellate jurisdiction, even if it ultimately rejects Plaintiffs' interpretation of the schedule and does not reach the constitutional question. *Union Elec.*, 687 S.W.2d at 165.

Statement of Facts

The brief of Plaintiffs/Appellants Peggy Stevens McGraw and Samuel C. Jones does not contain a complete statement of the relevant facts. Accordingly, MOSERS submits this statement of facts.

A. The Judicial Retirement Plan.

Judges of the Supreme Court of Missouri, the Missouri Court of Appeals, and any Missouri circuit court participate in the judicial retirement plan established by RSMo §§ 476.450 to 476.690. MOSERS administers the Judicial Retirement Plan. § 476.580.

A retired judge is eligible to receive full retirement compensation at age 55 if the judge has at least 20 years of service, at age 60 if the judge has at least 15 years of service, and at age 62 if the judge has at least 12 years of service. § 476.520. A retired judge who does not have these levels of service is eligible to receive reduced retirement compensation at age 60 or age 62 based on the judge's years of service. § 476.545.

Section 476.530 establishes the amount of full retirement compensation for a retired judge: "The retirement compensation shall be equal to fifty percent of the compensation which was in effect, at the time of the judge's termination of employment as a judge for the highest judicial position that the judge ever held on a full-time basis." Under Section 476.530, retirement benefits are usually based on the retired judge's compensation when he or she "quits working as a judge." *Russell v. Missouri State Employees' Retirement System*, 4 S.W.3d 554, 560 (Mo. App. W.D. 1999).

B. Compensation of Missouri judges.

1. Article XIII, Section 3 of the Missouri Constitution and the Missouri Citizens' Commission on Compensation of Elected Officials.

The compensation of judges, legislators, and elected state officials is determined by the process set forth in Article XIII, Section 3 of the Missouri Constitution. "This article establishes a Citizens' Commission to review, study, and fix the relationship of compensation to the duties of all elected state officials, legislators, and judges." *Weinstock v. Holden*, 995 S.W.3d 411, 413 (Mo. banc 1999). Article XIII, Section 3.8 provides: "The commission shall, beginning in 1996, and every two years thereafter, review and study the relationship of compensation to the duties of all elected state officials, all members of the general assembly, and all judges, except municipal judges, and shall fix the compensation for each respective position."

Under Section 3.8, the Commission was required to file an initial schedule of compensation by December 1, 1996, and it is required to file a new compensation schedule every two years by December 1 of even-numbered years (*e.g.*, 2010, 2012, 2014). Section 3.8 provides: "The schedule of compensation shall become effective unless disapproved by concurrent resolution adopted by a two-thirds majority vote [of] the general assembly before February 1 of the year following the filing of the schedule."[1]

[1] Under Section 3.11, schedules filed by the Citizens' Commission are also "subject to referendum upon petition of the voters of" Missouri.

Unless validly disapproved by the General Assembly, "[t]he schedule shall apply and represent the compensation for each affected person beginning on the first day of July following the filing of the schedule," *i.e.*, during the State's next fiscal year (which runs from July 1 to June 30). § 3.8.[2]

Section 3.8 provides that the Commission's compensation schedules "shall be published by the secretary of state as part of the session laws of the general assembly" and "shall also be published by the revisor of statutes as part of the revised statutes of Missouri." The schedules are contained in Appendix G to the Revised Statutes of Missouri. The salaries paid to Missouri judges during each fiscal year are listed in Appendix D to the Revised Statutes of Missouri.

---

[2] Under Section 3.8, the State may increase the scheduled compensation by any COLAs that apply to all State employees: "In addition to any compensation established by the schedule, the general assembly may provide by appropriation for periodic uniform general cost-of-living increases or decreases for all employees of the state of Missouri and such cost-of-living increases or decreases may also be extended to those persons affected by the compensation schedule fixed by the commission. No cost-of-living increase or decrease granted to any person affected by the schedule shall exceed the uniform general increase or decrease provided for all other state employees by the general assembly."

2. The Commission's pre-2010 compensation schedules.

The Commission timely filed its initial schedule of compensation in 1996. This initial schedule became effective on February 1, 1997 "[b]ecause the general assembly failed to validly disapprove" it. *Weinstock*, 995 S.W.2d at 417. The initial schedule proposed to increase base salaries for the chief justice, supreme court judges, court of appeals judges, circuit judges, and associate circuit judges to $122,500, $120,000, $112,000, $105,000, and $99,000, respectively, beginning on July 1, 1997 (the start of fiscal year 1998). *Id.* at 432. These proposed salary increases, however, did not materialize because at the time, Section 3.8 provided that the schedule was "subject to appropriations" and "the legislature made no additional appropriation to fund any increase proposed by the" initial schedule. *Id.* at 417-18.[3] Instead, judges received the salaries previously established by statute plus COLAs provided by the State pursuant to RSMo § 105.005 and Section 3.8 during fiscal years 1998 and 1999.

In 1998, 2000, 2002, 2006, and 2008, the Commission filed new compensation schedules.[4] Like the 1996 schedule, each of these schedules proposed to fix judicial salaries at increased, specific amounts.[5] Some of the proposed salary increases

[3] The "subject to appropriation" requirement in Section 3.8 was removed by Missouri voters in 2006.

[4] In 2004, there was no Commission and, thus, no new compensation schedule.

[5] The 1998 schedule proposed to increase salaries during fiscal years 2000 and 2001 to $122,500 and $128,500 for the chief justice, to $120,000 and $126,000 for supreme court

materialized; others did not, either because the General Assembly disapproved the new schedules or because appropriations were not made to fund the proposed salary increases.

3. The Commission's 2010 compensation schedule.

On November 24, 2010, the Commission filed a new schedule of compensation. The 2010 schedule proposed no increase for fiscal year 2012. (Am. Pet. ¶ 20). But unlike the prior schedules, which proposed to fix judicial salaries at increased, specific amounts, for fiscal year 2013, the 2010 schedule "provide[d] that each state judge's salary shall be indexed to the commensurate judicial position in the federal system" with supreme court judges receiving 69% of the salary of their federal judicial counterparts and all other Missouri judges receiving 73% of their federal judicial counterparts.

---

judges, to $112,000 and $118,000 for court of appeals judges, to $105,000 and $111,000 for circuit judges, and to $93,000 and $99,000 for associate circuit judges. The 2000 schedule proposed to: (a) increase judicial salaries from fiscal year 2001 by 5.5 percent for fiscal year 2002 and by another 5.5 percent for fiscal year 2003. The 2002 schedule proposed to increase judicial salaries by $6,000 for fiscal year 2004 and by another $6,000 for fiscal year 2005. There was no schedule in 2004. The 2006 schedule proposed to increase judicial salaries in fiscal year 2008 by adding $1,200 to the then-existing judicial salaries, adding an additional four percent, and adding an additional $2,000 for associate circuit judges. The 2008 schedule proposed to increase judicial salaries "to the same extent the salary of the average state worker is increased." *See* RSMo App. G.

The 2010 schedule noted: "Although these amounts [of state judicial salaries] may change depending on the level of federal judicial compensation at the time these recommendations take effect, it is necessary for purposes of transparency to inform readers of this report about the effects of this schedule were it to take effect today." (RSMo App. G-41). Based on the salaries actually paid to federal judges when the 2010 schedule was filed, the 2010 schedule advised: "For fiscal 2013 (beginning July 1, 2012), the schedule would result in [state judicial] salaries of $154,215 for the chief justice, $147,591 for judges of the Supreme Court, $134,685 for judges of the Court of Appeals, $127,020 for circuit judges and $116,858.40 for associate circuit judges." (*Id.*). The 2010 schedule assumed that any increases to federal judicial salaries would come from Congress: "Such an index takes into account the nation's economic condition, assuming Congress would not raise federal judges' salaries if doing so were not fiscally appropriate." (RSMo App. G-53).

The General Assembly did not disapprove the 2010 schedule. As a result, the 2010 schedule became effective on February 1, 2011.

4. The State's implementation of the 2010 schedule.

The 2010 schedule recited that state judicial salaries for fiscal year 2013 would "depend[] on the level of federal judicial compensation at the time these recommendations take effect." (RSMo App. G-41). When the Commission's schedule became effective on February 1, 2011, when fiscal year 2013 began on July 1, 2012, and

when the State appropriated funds for judicial salaries in 2012 and 2013 for fiscal years 2013 and 2014, federal judges were paid as follows:

Position	Salary
United States Chief Justice	$233,500
United States Associate Justices	$213,900
United States Court of Appeals Judges	$184,500
United States District Judges	$174,000
United States Magistrate Judges	$160,080

(L.F. 51-53). These were the salaries paid to federal judges between 2009 and 2013. (*Id.*).

Based on the 2010 schedule and the actual salaries paid to federal judges, the State increased the salaries of Missouri judges to the following amounts, effective July 1, 2012 (the beginning of fiscal year 2013):

Position	Fiscal Year 2012 Salary	Fiscal Year 2013 Salary
Missouri Chief Justice	$139,534	$154,215
Missouri Supreme Court Judges	$137,034	$147,591
Missouri Court of Appeals Judges	$128,207	$134,685
Missouri Circuit Judges	$120,484	$127,020
Missouri Associate Circuit Judges	$109,396	$116,858

(RSMo App. D).

The State made appropriations for state judicial salaries for fiscal year 2013 in 2012 and for fiscal year 2014 in 2013 based on the actual salaries paid to federal judges and the resulting increases in state judicial salaries called for by the 2010 schedule.

5. The federal courts' later rulings that Congress had unlawfully withheld COLAs from federal judges for some prior years.

On October 5, 2012, the United States Court of Appeals for the Federal Circuit ruled that Congress had unlawfully withheld cost-of-living adjustments ("COLAs") from six federal judges in 1995, 1996, 1997, 1999, 2007, and 2010. *Beer v. United States*, 696 F.3d 1174 (Fed. Cir. 2012). For relief, the federal court ruled that these six federal judges were "entitled to monetary damages for the diminished amounts they would have been paid if Congress had not withheld the salary adjustments mandated by the Act." *Id.* at 1186. The federal court ruled that in calculating damages, the trial court "shall incorporate the base salary increases *which should have occurred* in prior years had all the adjustments mandated by the 1989 Act had actually been made." *Id.* at 1187 (emphasis added).

As Plaintiffs acknowledge, "*Beer* applied only to the six federal judges who filed the case," and on December 10, 2013, "[a] subsequent case—*Barker, et al. v. United States* … extended *Beer's* holding to all federal judges, and ordered compensation increases for all federal judges *to take effect in January 2014*." (L.F. 13) (emphasis added). Indeed, notwithstanding the decisions in *Beer* and *Barker*, the official, published salaries of federal judges remained the same from 2009 to 2013, and the official,

published salaries of federal judges were not increased to incorporate the decisions in *Beer* and *Barker* until January 1, 2014. Plaintiffs conceded that "[f]ederal judges began receiving correct salaries on January 1, 2014." (L.F. 15).

This fact is confirmed in the chart entitled "Judicial Salaries Since 1968" that the federal judiciary posts on its website at: http://www.uscourts.gov/JudgesAndJudgeships/JudicialCompensation/judicial-salaries-since-1968.aspx (last visited on November 4, 2015). Plaintiffs cited this chart in paragraph 31, footnote 2, of their amended petition (L.F. 12), and, thus, have incorporated it into their amended petition. The chart (as updated for 2015) states:

Year	District Judges	Circuit Judges	Associate Justices	Chief Justice
2015	$201,100	$213,300	$246,800	$258,100
2014[1]	$199,100	$211,200	$244,400	$255,500
2013	$174,000	$184,500	$213,900	$223,500
2012	$174,000	$184,500	$213,900	$223,500
2011	$174,000	$184,500	$213,900	$223,500
2010	$174,000	$184,500	$213,900	$223,500
2009	$174,000	$184,500	$213,900	$223,500

(L.F. 51-53). In their amended petition, Plaintiffs cited footnote 1 of this chart, which discusses federal judicial salaries in 2014:

> These salary levels reflect two separate adjustments. *Beer v. United States*, 696 F.3d 1174 (Fed. Cir. 2012), *cert. denied*, 133 S.Ct. 1997, held that the denial of certain cost-of-living adjustments for judges was an unconstitutional deprivation of judicial compensation in violation of the Compensation Clause and that a 2001 amendment that barred judges from receiving additional compensation except as Congress specifically authorized did not override the provisions of the Ethics Reform Act of 1989, Pub. L. No. 101-194. In an order filed on December 10, 2013, in *Barker v. United States*, No. 12-826 (Fed. Cl. filed Nov. 30, 2012), this holding was applied to other Article III judges, effective that date. *As directed by these decisions, the salaries were reset to include the missed adjustments, resulting in the salaries of circuit judges set at $209,100, district judges at $197,100, the Chief Justice at $253,000 and the Associate Justices at $242,000. These salary levels were then further adjusted by the one percent cost-of-living adjustment provided to nearly all federal government employees and officials, in accordance with Executive Order No. 13655 (Dec. 23, 2013), effective January 1, 2014.*

(L.F. 51-53) (emphasis added). Notably, although the official, published salaries of federal judges were reset for 2014, these salaries for 2009-2013 remained the same as before the *Beer* and *Barker* decisions.

The *Beer* and *Barker* decisions have only been applied to federal judges and judges of the District of Columbia.[6] Notably, the *Beer* and *Barker* decisions were issued long after the Commission's 2010 schedule became effective on February 1, 2011, long after state judicial salaries were increased on July 1, 2012, and long after the State had made the appropriations necessary to fund these increased state judicial salaries. The State has not retroactively increased compensation paid to Missouri judges during fiscal years 2013 or 2014 based on the *Beer* and *Barker* decisions.

6. The absence of any compensation schedule in 2012.

In 2012, there was no Commission and, thus, there was no new schedule of compensation as required by Article XIII, Section 3. State judicial salaries remained the same during fiscal year 2014 as they were during fiscal year 2013 as the actual salaries

[6] Plaintiffs assert that "federal and *state* judges who are paid under an index" tied to the federal judicial salaries of Article III judges have prevailed in closely analogous litigation" to recover back pay for years prior to 2014. (Appellants' Br. at 36) (emphasis added). By "state" judges, Plaintiffs refer to judges of the District of Columbia. Of course, such judges are not "state" judges because the District of Columbia is not a state and its judiciary is funded and operated by the federal government. That is why the lawsuit brought by judges of the District of Columbia and cited by Plaintiffs—*Duncan-Peters v. United States*— was brought against the United States in federal court. No state court has yet ruled that state judges are entitled to back pay based on the increased federal judicial salaries mandated by the *Beer* and *Barker* decisions.

paid to federal judges had not changed. (RSMo App. D). In 2013, the General Assembly made appropriations for state judicial salaries for fiscal year 2014.

During fiscal year 2015, the State increased judicial salaries based on the percentage formula in the 2010 schedule and the increase in federal judicial salaries that took effect on January 1, 2014.

Position	Fiscal Year 2014 Salary	Fiscal Year 2015 Salary
Missouri Chief Justice	$154,215	$176,295
Missouri Supreme Court Judges	$147,591	$168,636
Missouri Court of Appeals Judges	$134,685	$154,176
Missouri Circuit Judges	$127,020	$145,343
Missouri Associate Circuit Judges	$116,858	$133,716

(RSMo App. D).

7. The Commission's rejected compensation schedule in 2014.

The Commission was formed again in 2014. In November 2014, the Commission filed another compensation schedule. With respect to state judicial salaries, the 2014 schedule repeated the same index formula found in the 2010 schedule.

In January 2015, the General Assembly enacted, and the Governor approved, a concurrent resolution disapproving the 2014 schedule. *See* House Concurrent Resolution Nos. 4 & 3, 98th General Assembly, First Regular Session. While the General Assembly disapproved the index formula for judicial compensation found in the 2014 schedule (along with the rest of the 2014 schedule), that same index formula remains in effect

because it is found in the 2010 schedule and the 2010 schedule continues to govern judicial compensation.

C. Plaintiffs' lawsuit.

Plaintiffs Peggy Stevens McGraw is a former circuit judge. (L.F. 7). Plaintiff Samuel C. Jones is a former associate circuit judge. (L.F. 7).

McGraw terminated her employment as a judge in October 2013. (L.F. 7). Between July 2012 and October 2013, McGraw's salary as a circuit judge was $127,020, which was 73 percent of the $174,000 salary that federal district judges were paid between 2009 and 2013.

Jones terminated his employment as a judge in November 2014. (L.F. 7). Between July 2012 and June 2014, Jones' salary as an associate circuit judge was $116,858, which was 73 percent of the $160,080 salary that federal magistrate judges were paid between 2009 and 2013.

Plaintiffs allege that the State underpaid them during fiscal years 2013 and 2014 in violation of the Commission's 2010 schedule. They complain that their compensation was based on the salaries actually paid to their federal counterparts during this time period instead of the corrected salaries that *Beer* and *Barker* later determined should have been paid to federal judges during (and before) this time period. In Counts I and III of Plaintiffs' amended petition, which are asserted only against the State, Plaintiffs seek additional compensation from the State and purport to bring a class action on behalf of all

Missouri judges who served between July 2012 and June 2014 (*i.e.*, during fiscal years 2013 and 2014).

Pursuant to Section 476.530, MOSERS has paid McGraw retirement benefits based on the $127,020 salary that she was receiving when she terminated her employment as a judge in October 2013. Based on her claim that the State underpaid her, McGraw alleges that MOSERS has underpaid her retirement benefits. In Counts II, IV, and V of Plaintiffs' amended petition, McGraw seeks additional retirement benefits from MOSERS and purports to bring a class action on behalf of all Missouri judges who retired between July 2012 and June 2014 (*i.e.*, during fiscal years 2012-13 and 2013-14).[7]

The State and MOSERS filed motions to dismiss. (L.F. 28-56). The Circuit Court granted these motions and dismissed all counts of Plaintiffs' amended petition with prejudice. (L.F. 189-193). Plaintiffs appealed. (L.F. 194-206).

[7] Plaintiff Jones does not assert any claims against MOSERS.

ARGUMENT

I. The Circuit Court correctly dismissed Plaintiff McGraw's claims against MOSERS (Counts II, IV, and V of Plaintiffs' amended petition) with prejudice because MOSERS has correctly determined her retirement benefits based on the $127,020 annual salary that the State correctly paid her in October 2013 when she terminated employment. (Responds to Points II and III).

Under Section 476.530, Plaintiff McGraw's retirement benefits are based on "the compensation which was in effect, at the time of the judge's termination of employment as a judge." MOSERS has paid retirement benefits to McGraw based on the $127,020 salary that was actually in effect and paid by the State to her and other circuit judges when she terminated employment in October 2013.

In Points II and III of their brief, Plaintiffs contend that the State underpaid Missouri judges during fiscal years 2013 and 2014 in violation of the Commission's 2010 schedule of compensation.[8] While not directly saying so in their points relied on or in their argument, McGraw apparently intended to contend that MOSERS has underpaid her retirement benefits because the State allegedly underpaid her in October 2013 when she terminated her employment as a judge.

[8] Point I of Plaintiffs' brief addresses the State's sovereign immunity defense. MOSERS did not assert a sovereign immunity defense in its motion to dismiss.

The 2010 schedule establishes the salaries of Missouri judges as of July 1, 2012 at a percentage of the salaries of their federal counterparts. The schedule, however, does not expressly specify when the State is to apply this formula to calculate the amount of state judicial salaries. It is well-settled that "ambiguous statutes that are susceptible to more than one construction should be construed in a manner consistent with the constitution." *Savannah R-III Sch. Dist. v. Pub. Sch. Ret. Sys. of Mo.*, 950 S.W.2d 854, 858 (Mo. banc 1997).

Under the 2010 schedule, as properly construed in a manner consistent with the Missouri Constitution, McGraw was entitled in October 2013 to receive 73% of the salary that was paid to federal district judges: (a) when the 2010 schedule became effective on February 1, 2011; (b) alternatively, when the State made its appropriation for judicial salaries for fiscal year 2014 in 2013; or (c) at the very latest, in October 2013. The actual salary paid to federal district judges at each of these times was the same—$174,000. Accordingly, regardless of which of these dates is used, the State correctly paid McGraw an annual salary of $127,020 (73% of $174,000) in October 2013.

McGraw is not entitled to have her salary in October 2013 retroactively increased based on the "corrected" salaries that the federal courts later determined that federal judges should have received prior to 2014. Such a construction of the 2010 schedule would render the 2010 schedule unconstitutional.

Under Section 476.530, MOSERS has correctly determined McGraw's retirement benefits based on the $127,020 annual salary that was actually in effect and correctly paid

by the State to her and other circuit judges when she terminated employment in October 2013. The Court, therefore, should affirm the Circuit Court's judgment dismissing McGraw's claims against MOSERS (Counts II, IV, and V of Plaintiffs' amended petition) with prejudice.

A. Under the 2010 schedule, as construed in a manner consistent with Article XIII, Section 3 and the non-delegation doctrine, McGraw was entitled to an annual salary of $127,020 in October 2013, calculated as 73% of the $174,000 salary actually paid to federal district judges when the Commission's 2010 schedule took effect on February 1, 2011.

Under a construction of the 2010 schedule that is consistent with the Missouri Constitution, McGraw was entitled for two reasons to be paid in October 2013 based on the salary actually paid to federal district judges when the 2010 schedule took effect on February 1, 2011, not the "corrected" salaries that the federal courts later ruled should have been paid to federal judges. First, the Commission was required under Article III, Section 3.8 to "fix" state judicial salaries at definite and firm amounts that were not subject to change after the 2010 schedule took effect on February 1, 2011. Second, the constitutional non-delegation doctrine precluded the Commission from having state judicial salaries increase based on increases to federal judicial salaries that occurred after the 2010 schedule took effect on February 1, 2011.

In October 2013, the State paid McGraw an annual salary of $127,020—73% of the $174,000 salary actually paid to federal district judges as of February 1, 2011. Thus,

McGraw received the compensation to which she was entitled in October 2013, and her claims against MOSERS are meritless.

1. The Commission was required under Article III, Section 3.8 to "fix" judicial compensation at definite and firm amounts that were not subject to change after the 2010 schedule became effective on February 1, 2011.

Article XIII, Section 3.8 provides that the Commission "shall *fix* the compensation" of Missouri judges in the Commission's schedule. (emphasis added). "We assign to words not otherwise defined in the constitution their plain, ordinary and natural meaning as found in the dictionary." *Missouri Gaming Comm'n v. Missouri Veterans' Comm'n*, 951 S.W.2d 611, 612 (Mo. banc 1997). Under the plain, ordinary, and natural meaning of the word "fix" as found in the dictionary, the Commission was required in its 2010 schedule to establish judicial salaries at definite and firm amounts and those amounts could not change after the schedule took effect on February 1, 2011.

In *Rackliff v. Peters*, 115 S.W. 503, 504 (Mo. App. 1908), the Missouri Court of Appeals summarized how four different dictionaries define the word "fix":

> According to Webster, the word "fix" means immovable or definite; according to Century, "to determine or settle definitely, to make certain"; according to Standard, "to decide definitely, to make sure, settle, to determine"; and according to Worcester, "to establish, settle, determine, to direct without variation."

Id.; *see also Dietsch v. C.I.R.*, 249 F.2d 534, 536 (6th Cir. 1957) ("The term 'fix' is not ambiguous … and must be construed in its usual sense of 'to assign precisely; … to make definite and settled.'") (quoting WEBSTER'S NEW INTERNATIONAL DICTIONARY (2d ed.)). Plaintiffs acknowledge that "relevant definitions of 'fix'" are found in Merriam-Webster's Collegiate Dictionary (11th ed. 2012), which defines "fix" to mean "to make firm, stable, or stationary" or "to set or place definitely: establish"; and in Black's Law Dictionary 637 (6th ed. 1990), which defines "fix" to mean: "Adjust or regulate; determine; settle; make permanent. Term imports finality; stability; certainty; definiteness. *See also* Firm." (Appellants' Br. At 53). All of these dictionary definitions confirm that the word "fix" means to make definite and firm.

To "fix" compensation in compliance with Article III, Section 3.8, the Commission was required in its 2010 schedule to establish judicial salaries at definite and firm amounts, and those amounts could not change after the schedule became effective on February 1, 2011. Indeed, this was the Commission's past practice. In its prior schedules of compensation from 1996 to 2008, the Commission set judicial salaries at definite and firm amount in compliance with this obligation. *See* RSMo App. G.

The Commission could choose to set state judicial salaries based on a percentage of the actual salaries paid to federal judges when the Commission's schedule took effect on February 1, 2011. That would comply with the Commission's obligation to "fix" compensation because these federal judicial salaries were known and the proposed state judicial salaries were definite and firm after these federal judicial salaries were multiplied

by the specified percentages. For example, the actual salary paid to federal district judges was $174,000 as of February 1, 2011, so it could readily be determined that Missouri circuit judges such as McGraw would be paid $127,020 (73 percent of $174,000) starting on July 1, 2012.

Under its obligation to "fix" compensation, the Commission could not have state judicial salaries increase in conjunction with any increases in federal judicial salaries that occurred after the Commission's schedule took effect. This is because the amount of state judicial salaries would not have been definite and firm, but, as Plaintiffs advocate, would have been subject to change—both prospectively and retroactively—based on the future, unpredictable actions of the federal government. Indeed, under Plaintiffs' logic, if the federal courts had ruled that federal district judge salaries should have been $1 million, then the State would now be obligated to pay circuit judges $730,000. In adopting, Article XIII, Section 3—and specifically, the requirement that the Commission "fix" compensation—Missouri citizens surely did not intend to empower the Commission to allow potential uncertainty as to the amount of state judicial salaries or to subject state judicial salaries to the whims of future actions by the federal government.

Plaintiffs' position, if accepted, would defeat the procedural protections in Article XIII, Section 3 and, as discussed in more detail below, would undermine the State's budget and appropriation process. If the Commission is not required to propose definite and firm compensation that is not subject to change, there is no way to determine the fiscal impact on the State, there is no way to budget and appropriate for salaries, and

there is no way for legislators and Missouri citizens to meaningfully determine whether they should exercise their authority under Sections 3.8 and 3.11 to reject the increased compensation proposed by the Commission.

When the Commission filed its 2010 schedule, the Commission advised the General Assembly and Missouri citizens that, based on the actual salaries that federal judges were receiving, "[f]or fiscal 2013 (beginning July 1, 2012), the schedule would result in [state judicial] salaries of $154,215 for the chief justice, $147,591 for judges of the Supreme Court, $134,685 for judges of the Court of Appeals, $127,020 for circuit judges and $116,858.40 for associate circuit judges." (RSMo App. G-41). The Commission noted that the "amounts [of state judicial salaries] may change depending on the level of federal judicial compensation *at the time these recommendations take effect*." (RSMo App. G-41) (emphasis added). The Commission's "recommendations" (the 2010 schedule) took effect on February 1, 2011 because the General Assembly did not disapprove the schedule before then. As of February 1, 2011, the actual salaries paid to federal judges and the projected resulting salaried to be paid to Missouri judges beginning in fiscal year 2013 were the same as described in the 2010 schedule.

In 2010-11, the Commission, the General Assembly, and Missouri citizens presumably relied on the actual federal judicial salaries reported by the federal government and stated in the 2010 schedule. The Commission relied on the actual salaries paid to federal judges in issuing its 2010 schedule. The General Assembly relied on these salaries in not rejecting the schedule by the February 1, 2011 deadline for doing

so. And Missouri citizens relied on these salaries in not exercising their right under Section 3.11 to reject the schedule by referendum by the August 2011 deadline for doing so.[9]

Lacking a crystal ball, the Commission, the General Assembly, and Missouri citizens could not possibly have known in 2010-11 that the actual salaries paid to federal judges violated federal law and that the proper amount of their salaries would be disputed. Nor could the Commission, the General Assembly, and Missouri citizens have reasonably anticipated that the federal courts would determine years later that Congress had unlawfully suppressed federal judicial salaries and that federal judicial salaries

---

[9] Plaintiffs incorrectly suggest that Missouri citizens can still reject the 2010 schedule by referendum. (Appellants' Br. at 51). Article XIII, Section 3.11 provides that "Schedules filed by the commission shall be subject to referendum upon petition of the voters of this state in the same manner and under the same conditions as a bill enacted by the general assembly." Article III, Section 52(a) of the Missouri Constitution provides: "Referendum petitions shall be filed with the secretary of state not more than ninety days after the final adjournment of the session of the general assembly which passed the bill on which the referendum is demanded." The 2010 schedule is deemed to have been passed during the 2011 session of the General Assembly. Mo. Const. Art. III, § 3.8. Consequently, the deadline for Missouri citizens to petition for a referendum as to the 2010 schedule has long expired.

should have been over 14 percent higher than the reported amounts that had actually been paid to federal judges.

If any of this had been known in 2010-11, the Commission, the General Assembly, and the people of Missouri might have acted differently. The Commission might not have recommended an index formula, or the General Assembly or Missouri citizens might have rejected the use of an index formula. Alternatively, the Commission might have set state judicial salaries at a lower percentage of federal judicial salaries such that state judicial salaries beginning on July 1, 2012 would still have been $154,215 for the chief justice, $147,591 for judges of the Supreme Court, $134,685 for judges of the Court of Appeals, $127,020 for circuit judges, and $116,858.40 for associate circuit judges. If the Commission would have retained the same percentages used in the schedule, thereby resulting in higher amounts for state judicial salaries, the General Assembly or Missouri citizens might have thought that the Commission's proposed increases in judicial salaries were too high and rejected the 2010 schedule. Indeed, in January 2015, the General Assembly disapproved the Commission's 2014 schedule, which contains the same index formula for judicial compensation as the 2010 schedule. *See* House Concurrent Resolution Nos. 4 & 3, 98th General Assembly, First Regular Session.

To comply with Section 3.8, the Commission was required to fix judicial compensation at definite and firm amounts that were not subject to change after the 2010 schedule became effective on February 1, 2011. The State fulfilled this requirement on the Commission's behalf during fiscal years 2013 and 2014 by paying Missouri judges

based on the actual salaries that federal judges received as of February 1, 2011. Accordingly, there is no merit to Plaintiffs' claims that the State underpaid them during fiscal years 2013 and 2014 or that MOSERS has underpaid retirement benefits to McGraw.

2. Under the constitutional non-delegation doctrine, the Commission could not have state judicial salaries increase based on increases to federal judicial salaries that occurred after the 2010 schedule took effect on February 1, 2011.

Even if Section 3.8 did not require the Commission to "fix" compensation, the Commission still could not incorporate future changes to federal judicial salaries in the 2010 schedule because that would amount to an unlawful delegation of the Commission's authority to set compensation to the federal government in violation of the Missouri Constitution. *See State v. Thompson*, 627 S.W.2d 298, 300-02 (Mo. banc 1982); *State ex rel. St. Louis Fire Fighters Ass'n v. Stemmler*, 479 S.W.2d 456, 458 (Mo. banc 1972); *Professional Houndsmen of Missouri, Inc. v. County of Boone*, 836 S.W.2d 17, 21 (Mo. App. W.D. 1992). State legislative power—including the state legislative power to set judicial salaries—cannot be delegated to the federal government because Article III, Section 1 of the Missouri Constitution provides that "[t]he legislative power shall be vested" with the General Assembly. *See, e.g., Thompson*, 627 S.W.2d at 300-02. "[N]umerous cases [ ] announce the general proposition that a legislative body may not abdicate or delegate its legislative power." *St. Louis Fire Fighters*, 479 S.W.2d at 458.

"[A] delegation of a power to make law, which involves a discretion as to what the general law will be, … is void in the absence of constitutional authorization." *Akin v. Director of Revenue*, 934 S.W.2d 295, 299-300 (Mo. banc 1996).[10]

a. The 2010 schedule could incorporate existing federal judicial salaries, but not later changes to federal judicial salaries.

Thompson and *Professional Houndsmen* teach that under the Missouri Constitution's non-delegation doctrine, a state law such as the Commission's 2010 schedule may incorporate *existing* federal law, but cannot incorporate later *changes* to federal law. Plaintiffs cite no contrary authority in Missouri (or elsewhere). Thus, the Commission could lawfully incorporate federal judicial salaries as they existed when the Commission issued its 2010 schedule, but the Commission would have unlawfully delegated its power to set compensation to the federal government if the 2010 schedule incorporates subsequent changes to federal judicial salaries.

[10] Even though MOSERS had not yet filed its appellate brief, Plaintiffs assert that "MOSERS has not cited a single Missouri decision invalidating a statute under the non-delegation doctrine." (Appellants' Br. at 48). In *Akin*, this Court struck down a statute under the non-delegation doctrine. 934 S.W.2d at 299-300 (contingent referendum provisions in education act were void attempt to delegate legislative authority because provisions were not consistent with constitutionally authorized referendum).

In *Thompson*, the plaintiff challenged a Missouri statute that required the Missouri Department of Health to classify a substance as a controlled substance under Missouri law if the substance became classified as a controlled substance under federal law unless the Missouri Department of Health objected to the federal classification. The plaintiff argued that the Missouri statute involved an unconstitutional delegation of state legislative power to a federal agency. The trial court agreed, ruling that the Missouri statute was "an unconstitutional and illegal delegation of power by the Missouri General Assembly because it provides for the inclusion of substances as 'controlled substance drugs' automatically if controlled by the Federal Government." 627 S.W.2d at 299. This Court disagreed. It acknowledged that state legislative power cannot be delegated to the federal government, but concluded that "no delegation of power to control substances in Missouri has been delegated to the federal government" because any changes to federal law governing controlled substances became a part of state law only if the Missouri Department of Health did not object to the change in federal law and issued a rule adopting the change pursuant to its rulemaking authority. *Id.* at 302.[11] This Court rejected

[11] Plaintiffs misleadingly quote from *Thompson*: "'The legislature cannot delegate its power to make a law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. To deny this would be to stop the wheels of government.'" (Appellants' Br. at 47 (quoting *Thompson*, 627 S.W.2d at 303)). The Court said this in addressing the validity of the legislature's delegation of power to the Missouri Department of Health to make rules

the premise that state law can incorporate a change to federal law without additional state-level action accepting the change.

Prior to the adoption of Article XIII, Section 3, the power to determine the compensation of Missouri judges was vested with the General Assembly. Article XIII, Section 3 transferred this legislative power to the Commission. Just as the General Assembly cannot delegate its legislative power to the federal government, the Commission likewise cannot delegate its legislative power to set compensation to the federal government.

Under this non-delegation principle, the Commission could lawfully incorporate federal judicial salaries as they existed when the Commission's 2010 schedule became effective on February 1, 2011, but the Commission would have unlawfully delegated its power to set compensation to the federal government if the Commission sought to incorporate subsequent changes to federal judicial salaries in its schedule. *Professional Houndsmen of Missouri, Inc. v. County of Boone*, 836 S.W.2d 17, 21 (Mo. App. W.D. 1992).

> It is perfectly legitimate for the Legislature to adopt existing federal rules, regulations or statutes as the law of this state…. However, *it is universally held that an incorporation by state statute of rules, regulations, and*

---

governing controlled substances. Contrary to Plaintiffs' misstatement, this Court did *not* "succinctly discuss[] the difference between relying on a federal benchmark versus improperly delegating authority." (Appellants' Br. at 47).

> *statutes of federal bodies to be promulgated subsequent to the enactment of the state statute constitutes an unlawful delegation of legislative power.* Since the Legislature exercises absolutely no control over Congress or its agencies, the adoption as state law of those bodies' prospective enactments is viewed as a complete abdication of legislative power.

State v. Williams, 583 P.2d 251, 254-55 (Ariz. 1978) (emphasis added) (citations omitted); *see also Radecki v. Dir. of Bureau of Worker's Disability Comp.*, 526 N.W.2d 611, 613 (Mich. Ct. App. 1994) ("[I]t is an unlawful delegation of legislative power to adopt by reference future legislation enacted by another sovereign entity."); *Wallace v. Commissioner of Taxation*, 184 N.W.2d 588, 593 (Minn. 1971) ("The legislature did not, or could not, grant to Congress the right to make future modifications or changes in Minnesota law."); *State v. Johnson*, 173 N.W.2d 894, 895 (S.D. 1970) ("The statute does not adopt the regulations of the federal government or one of its agencies at a given time, but attempts to adopt any and all regulations and changes therein promulgated under the federal act In futuro ad infinitum. This the legislature could not constitutionally do and was an unlawful delegation of legislative power."); *Florida Indus. Comm'n v. State ex rel. Orange State Oil Co.*, 21 So. 2d 599, 603 (Fla. 1945) ("[I]t would be an unconstitutional delegation of legislative power for the legislature to adopt in advance any federal act or the ruling of any federal administrative body that Congress or such administrative body might see fit to adopt in the future."); *State v. Gill*, 584 N.E.2d 1200, 1201-02 (Ohio 1992); *Seale v. McKennon*, 336 P.2d 340, 345 (Or. 1959).

In *Professional Houndsmen*, the plaintiff challenged a county's animal control ordinance that incorporated the "most current edition" of the *Rabies Compendium* published by the National Association of Public Health Veterinarians. The plaintiff argued that the ordinance improperly delegated legislative authority to the association. The Missouri Court of Appeals rejected the plaintiff's challenge after determining that the ordinance only incorporated the edition of the compendium in effect when the ordinance was adopted. 836 S.W.2d at 21. The court observed that "[i]ncorporation by reference is an appropriate legislative procedure" and that "'[s]uch adoption takes the statute as it exists at the time of adoption and does not include subsequent additions or modifications of the statute so taken unless it does so by express intent.'" *Id.* at 20-21 (quoting *City of Warrensburg v. Board of Regents of Central Missouri State Univ.*, 562 S.W.2d 340, 344 (Mo. banc 1978)). The court observed that there "would be an unlawful delegation" of the county's authority to the association if "the ordinance incorporated not only the edition [of the compendium] in effect when the [county] commission wrote the ordinance, but all future editions [of the compendium]." *Id.* at 21. This potential unlawful delegation was avoided, however, because the ordinance could be interpreted to mean that the ordinance only incorporated the edition of the compendium in effect when the ordinance was adopted: "Such an interpretation avoids any delegation problem. So long as the county commission enforces its ordinance in that manner and amends its ordinance to incorporate any future editions of the compendium, it will not have committed an unlawful delegation." *Id.*

These same principles apply to the Commission. The Commission could incorporate the actual salaries paid to federal judges when the Commission's schedule became effective on February 1, 2011. However, the Commission could not incorporate later changes to federal judicial salaries in the 2010 schedule because "[t]hat would be an unlawful delegation" of the Commission's authority in that the federal government, not the Commission, would be setting state judicial salaries. *Professional Houndsmen*, 836 S.W.2d at 21.

In *Thompson*, the Supreme Court of Missouri ruled that there was no unlawful delegation of state legislative power to the federal government because any change in federal law became a part of Missouri law only if the Missouri Department of Health did not object and took affirmative action by issuing a rule that accepted the change in federal law. In contrast, according to Plaintiffs, any changes in federal judicial salaries automatically (and, in the present case, retroactively) change state judicial salaries without any further approval by the Commission, the General Assembly, or any other part of state government accountable to Missouri citizens. Under *Thompson* and *Professional Houndsmen*, that outcome is not permissible because it would involve an unlawful delegation of state legislative power by the Commission to the federal government in violation of the Missouri Constitution.

b. The non-delegation doctrine applies to the Commission because the Commission exercises legislative power in setting compensation.

Plaintiffs argue that the Commission is immune from the non-delegation doctrine because, Plaintiffs maintain, only the General Assembly exercises any legislative power. The General Assembly, however, is not the only governmental body in Missouri that exercises legislative power, and the non-delegation doctrine applies to any governmental body that exercises legislative power. Indeed, in *Professional Houndsmen*, the court ruled that a county commission was subject to the non-delegation doctrine when it enacted ordinances.

In *Johnson v. State*, 366 S.W.3d 11, 19-20 (Mo. banc 2012), this Court held that the bipartisan reapportionment commission established under the Missouri Constitution exercises legislative power when it issues congressional redistricting plans even though the reapportionment commission consists solely of judges of the Missouri Court of Appeals:

> [T]he Constitution created the [reapportionment commission] for the express purpose to apportion the state into senatorial districts, and for that purpose the Constitution gives to it the same power and authority that it gave to the Legislature proper in that regard…. *[T]he constitution grants the commission the power to perform a legislative function—i.e., to reapportion congressional districts…. Accordingly, this Court reviews the*

> *constitutional validity of the plan as if it were a statute enacted by the legislature.*

Id. (emphasis added) (quotation omitted).

Similar to the reapportionment commission in *Johnson*, the Commission acts as a legislative body, performs a legislative function, and exercises the legislative power that was formerly vested with the General Assembly. Indeed, Section 3.8 deems the Commission's compensation schedules to be the same as laws and statutes enacted by the General Assembly, stating that the Commission's schedules "shall be published by the secretary of state as part of the session laws of the general assembly" and "shall also be published by the revisor of statutes as part of the revised statutes of Missouri." Plaintiffs acknowledge that "the 2010 Schedule is a Missouri statute." (Appellants' Br. at 1).

The power to set the compensation of state officials is quintessentially a legislative power because it involves lawmaking and discretion as to what the new, general law will be.

> Public offices and positions belong to the people…. The qualifications, tenure, and compensation thereof must be determined by the people or the people will lose control of their government. This must be done by the representatives the people have authorized to act for them, unless the people themselves have determined these matters by writing them into the Constitution. If the people have not thus themselves determined them, then

> under our Constitution and theory of government, these are legislative powers.

State ex rel. Rothrum v. Darby, 137 S.W.2d 532, 536 (Mo. 1940).

The people of Missouri have not themselves determined the compensation of Missouri judges by fixing the amount of judicial compensation in the Missouri Constitution. If they had, "[d]etermination of [state judicial salaries] then would cease to be a legislative question." *St. Louis Fire Fighters*, 479 S.W.2d at 460.

Instead, the people have authorized the members of the Commission to represent and act for the people in determining judicial compensation from time to time. Accordingly, the Commission's power under Section 3.8 is legislative and determination of state judicial salaries remains a legislative question. *Rothrum*, 137 S.W.2d at 536; *St. Louis Fire Fighters*, 479 S.W.2d at 460.

Prior to the establishment of the Commission, the power to set the compensation of judges, legislators, and state elected officials was clearly a legislative power vested with the General Assembly. While this power was largely transferred from the General Assembly to the Commission, it remains a legislative power even though it is now exercised by a commission established by the Missouri Constitution instead of the General Assembly. *Johnson*, 366 S.W.3d at 19-20. Consequently, like the General Assembly, the Commission is subject to the non-delegation doctrine under the Missouri Constitution and cannot delegate its authority to set compensation to the federal government or anyone else.

Plaintiffs erroneously assert that "the non-delegation power to determine judicial compensation because that power is granted exclusively to *taxpayers* in Article III, § 3." (Appellants' Br. at 45) (emphasis added). Section 3 grants the power to determine judicial compensation to the Commission, not "taxpayers."[12] The Commission, like the General Assembly, acts as a representative body for the people of Missouri. Like the General Assembly, the Commission is subject to the non-delegation doctrine under the Missouri Constitution.

c. The people of Missouri have not authorized the Commission to tie state judicial salaries to federal judicial salaries.

The people of Missouri, of course, could themselves write into the Missouri Constitution that the salaries of Missouri judges shall be tied to the salaries of their federal counterparts without running afoul of the non-delegation doctrine:

[12] Under Article XIII, Sections 3.2 and 3.3, the Commission consists of persons who are residents and registered voters in Missouri, and the Commission's members are selected by the Secretary of State, this Court, and the Governor (with the Senate's advice and consent) subject to various qualifications (including place of residence within Missouri, status as a retired judge, political party affiliation, age, and business background).

> [T]he people themselves may write into their basic law such provisions or restrictions with respect to the fixing of compensation of officials and employees as they desire to adopt….
>
> Applying the principle that the people themselves may determine compensation of those serving them in government by constitutional provision, it seems clear that the people of Missouri could amend our state constitution to provide that the salary of the governor shall be a fixed sum of say $50,000 per year. Determination of the governor's salary then would cease to be a legislative question. It also is clear that the people could write into our constitution that the governor shall receive the same salary as the President of the United States, or perhaps half of that salary, or such other percentage thereof as the people might elect to write into the constitution…. None of these hypothetical provisions, when written into the constitution by action of the people, would be a delegation or abdication of legislative authority. They would be part of the state's … basic law written into their constitution … by action of the people themselves.

St. Louis Fire Fighters, 479 S.W.2d at 460-61. Similarly, the people of Missouri could authorize the Commission to incorporate federal judicial salaries in setting state judicial salaries. *See, e.g.*, *Carter v. Director of Revenue*, 805 S.W.2d 154, 158-59 (Mo. banc 1991) (Missouri statute pegging Missouri taxpayers' adjusted gross income to taxpayers' federal adjusted gross income was not unconstitutional delegation of legislative power

under Article III, Section 1 because Article X, Section 4(d) of the Missouri Constitution expressly permits incorporation of federal law for purposes of Missouri income taxation).

The people, however, have not written into the Missouri Constitution any provision that ties the compensation of Missouri judges to the compensation of federal judges. Nor have the people granted the Commission any authority to tie state judicial salaries to federal judicial salaries or to otherwise delegate the power to set compensation to the federal government.[13]

d. Other Missouri statutes that reference federal law are irrelevant.

Unable to cite any case supporting their position, Plaintiffs argue that "the Court should decline to invalidate the 2010 Schedule" because such a "ruling would call into question" some Missouri statutes that incorporate "federal benchmarks." (Appellants' Br. at 47-49).[14] None of these other statutes are before the Court and, of course, the mere fact

[13] Plaintiffs' argument that "MOSERS' position would [ ] strip the Citizen's Commission of its power under Article III, § 3 to determine official compensation," (Appellants' Br. at 42), is meritless. The Commission can readily set state salaries without reference to federal salaries; indeed, it did so in every schedule issued before the 2010 schedule.

[14] MOSERS does not seek to "invalidate" the 2010 schedule, but only advocates that the 2010 schedule be construed in a constitutional manner.

that some Missouri statutes incorporate federal benchmarks does not make the practice constitutional.

Several of the statutes cited by Plaintiffs incorporate some market-based economic indicator that the federal government calculates from time to time, such as the per diem allowance or the consumer price index (CPI). Unlike the Commission's 2010 schedule, those Missouri statutes do not incorporate any federal *law*.

The Commission's 2010 schedule does not incorporate any market-based economic indicator or any federal "benchmark." Instead, the 2010 schedule incorporates federal judicial salaries, which are determined legislatively by Congress, not calculated by some federal agency based on economic conditions. Plaintiffs contend that other Missouri statutes "incorporate significantly more qualitative, discretionary standards than the federal judicial standards indexed in the 2010 Schedule." (Appellants' Br. at 50). But except for COLAs, federal judicial salaries are *entirely* within the legislative discretion of Congress.

e. Article XIII, § 3 does not trump the non-delegation doctrine and other parts of the Missouri Constitution.

Plaintiffs also argue that Article XIII, Section 3 trumps the non-delegation doctrine and all other parts of the Missouri Constitution because Article XIII, Section 3 begins with the phrase "Other provisions of this constitution to the contrary notwithstanding." This Court rejected this very argument in *Weinstock v. Holden*, 995 S.W.2d 411, 420 (Mo. banc 1999):

> We acknowledge that article XIII, section 3.1 begins with the phrase "Other provisions of this constitution to the contrary notwithstanding". This language, however, does not mitigate against our duty to read article XIII, section 3, consistent with the remainder of the Missouri Constitution. The phrase applies, by its terms, only to the other provisions of the Constitution that are "to the contrary" and not possible of harmonization. A number of other constitutional provisions are relevant to the interpretation of article XIII, section 3 and can be read in harmony with it: article II, section 1; article III, section 16; article III, section 21, *et seq.;* article III, section 36; article IV, section 8; article V, section 20; and article V, section 21.

Id. (citations omitted). Plaintiffs inexplicably fail to advise the Court of this holding in *Weinstock*, which is directly adverse to Plaintiffs' position.[15]

There is no conflict between Article XIII, Section 3 and the non-delegation doctrine set forth in Article III, Section 1 and inherent in the Missouri Constitution. Moreover, Article XIII, Section 3 can and must be read in harmony with the non-

[15] Instead, Plaintiffs ignore *Weinstock* (even though Plaintiffs included a copy of this case is in the appendix to their brief) and cite an opinion by the Missouri Attorney General, which is neither binding on this Court nor entitled to any deference because this Court, not the Attorney General, has the power to construe and declare the law. *Gershman Inv. Corp. v. Danforth*, 517 S.W.2d 33, 36 (Mo. banc 1974); *Laws v. Secretary of State*, 895 S.W.2d 43, 48 n. 5 (Mo. App. W.D. 1995).

delegation doctrine. Article XIII, Section 3 vests the legislative power to set compensation with the Commission. Just as the General Assembly cannot lawfully delegate its legislative power to the federal government, the Commission likewise cannot lawfully delegate its legislative power to set compensation to the federal government.

* * *

In sum, under the non-delegation doctrine, the Commission could incorporate the actual salaries paid to federal judges when its 2010 schedule became effective on February 1, 2011, but the Commission could not have state judicial salaries increase based on subsequent increases to federal judicial salaries. Consistent with this principle, the State correctly construed and implemented the 2010 schedule and correctly paid McGraw in October 2013 based on the actual salary paid to federal district judges as of February 1, 2011. Accordingly, there is no merit to McGraw's claims that the State underpaid her in October 2013 or that MOSERS has underpaid her retirement benefits.

B. Alternatively, under the 2010 schedule, as construed in a manner consistent with the constitutional budget and appropriation process, McGraw was entitled to an annual salary of $127,020 in October 2013, calculated as 73% of the $174,000 salary actually paid to federal district judges when the State appropriated funds for fiscal year 2014 in 2013, because state judicial salaries had to become definite and firm by the time the State made this appropriation.

Alternative, if the Missouri Constitution permits the 2010 schedule to incorporate increases to federal judicial salaries that occur after February 1, 2011 (when the 2010 schedule took effect), under the 2010 schedule, as construed in a manner consistent with the constitutional budge and appropriation process, McGraw was entitled to be paid in October 2013 based on the actual salary paid to federal district judges when the State appropriated funds in 2013 for fiscal year 2014. Under the constitutional budget and appropriation process, state judicial salaries had to become definite and firm by no later than the time the State made this appropriation.

In October 2013, the State paid McGraw 73% of the salary actually paid to federal district judges when the State made its appropriation for state judicial salaries for fiscal

year 2014 in 2013.[16] Thus, McGraw received the compensation to which she was legally entitled in October 2013, and her claims against MOSERS are without merit.

As discussed above, Section 3.8 required the Commission to "fix" compensation at an amount that was definite and firm when its 2010 schedule became effective on February 1, 2011. But at the very least, the State must be able to definitively and firmly determine judicial compensation for an upcoming fiscal year when the State prepares its budget and makes appropriations for that fiscal year. The State can do this only if it can rely on the actual salaries paid to federal judges at that time.

As stated in *Weinstock*, the Court has a duty to "read article XIII, section 3, consistent with the remainder of the Missouri Constitution," including the constitutional budget and appropriation process. 995 S.W.3d at 420. Under the Missouri Constitution, the State operates under a budget that corresponds to fiscal years running from July 1 to June 30. During the first part of each year, the General Assembly, working with the Governor, must determine what revenues the State expects to receive and what expenditures the State can afford to make and should make during the upcoming fiscal year.

[16] Similarly, the State paid Missouri judges during fiscal year 2015 based on the actual salaries paid to federal judges when the State appropriated funds for fiscal year 2015 in 2014.

Judicial salaries, like all other expenditures of the State, must be paid out of appropriations made for that purpose. Mo. Const. art. III, § 36 ("[T]he general assembly shall have no power to divert the same or to permit the withdrawal of money from the treasury, except in pursuance of appropriations made by law."); Mo. Const. art. IV, § 28 ("No money shall be withdrawn from the state treasury except by warrant drawn in accordance with an appropriation made by law."). Appropriations must be made on a fiscal-year basis for one or two fiscal years. Mo. Const. art. IV, § 23. "The Missouri Constitution bars appropriation bills from being considered after the first Friday following the first Monday in May, while the current fiscal year does not end until June 30." *Gerken v. Sherman*, 351 S.W.3d 1, 9 (Mo. App. 2011) (citing Mo. Const. art. III, § 25).

Each legislative session, the State must know how much state judicial salaries will be as of July 1 when it makes its appropriation for judicial salaries (and all other appropriations) for the upcoming fiscal year. If state judicial salaries are increased after the State has already made its appropriation for judicial salaries for the upcoming fiscal year, there will be insufficient funds appropriated and the increased judicial salaries cannot be paid. Missouri citizens surely did not envision such a possibility when they adopted Article XIII, Section 3. To the contrary, Section 3.8 provides that a Commission's schedule applies "on the first day of July following the filing of the schedule," *i.e.*, the beginning of the State's fiscal year, precisely so that the State has

sufficient time to budget and appropriate enough funds for the compensation prescribed by the new schedule.

Plaintiffs fail to explain how "the 2010 Schedule is sufficiently definite so as to give the legislature an adequate basis for preparing the State's budget," (Appellants' Br. at 56), when, as happened here, unexpected increases in federal judicial salaries occurred long after the State had prepared its budgets and made all of its appropriations for fiscal years 2013 and 2014 based on the actual salaries paid to federal judges at the time. Instead, Plaintiffs contend that allowing retroactive increases in judicial salaries—long after the budget and appropriation process has been completed— is no big deal. They argue that "the entire budgeting and appropriation process is 'dynamic,'" (Appellants' Br. at 55), and suggest that the State is free at any time to spend more than has been budgeted and appropriated. Plaintiffs are incorrect because the Missouri "constitution does not permit the state to spend money it does not have." *State ex rel. Liberty Sch. Dist. v. Holden*, 121 S.W.3d 232, 234 (Mo. banc 2003).

Under Article IV, Section 23 of the Missouri Constitution, "[e]very appropriation law shall distinctly specify the amount and purpose of the appropriation." Indeed, the appropriations for state judges and other state officials for the current fiscal year are specific amounts, not "estimated" amounts. *See* House Bill No. 12, 98th General Assembly, First Regular Session (L.F. 147-157). The State cannot lawfully enact an "estimated" appropriation that authorizes the Governor to increase the appropriation beyond the "estimated" amount. *See Schweich v. Nixon*, 408 S.W.3d 769, 772 (Mo. banc

2013) (noting Circuit Court of Cole County's ruling "that the Governor is not authorized to increase appropriations based on an 'estimated' or 'E' designation on the line item," but dismissing case on standing and ripeness grounds).

As Plaintiffs correctly note, appropriations are based on revenues that the State expects to receive during the upcoming fiscal year. As a result, "Article IV, section 27 [of the Missouri Constitution] broadly authorizes the governor to control the rate at which any appropriation is expended and to balance the state's budget by reducing expenditures in the event that state revenues fall below the revenue expectations." *Liberty Sch. Dist.*, 121 S.W.3d at 234. In contrast, the Missouri Constitution does not permit the Governor to spend in excess of appropriated amounts if actual state revenues exceed expected state revenues. *Missouri Health Care Ass'n v. Holden*, 89 S.W.3d 504, 508 (Mo. banc 2002) ("Money in the state treasury cannot be spent unless it is appropriated."); Mo. Const. art. IV, § 28 ("No money shall be withdrawn from the state treasury except by warrant drawn in accordance with an appropriation made by law.").

As evident from the provisions of the Missouri Constitution governing the budget and appropriation process, Missouri judicial salaries for any particular fiscal year must become definite and firm when the State appropriates funds for judicial salaries for that fiscal year. The only way that Missouri judicial salaries could become definite and firm for fiscal years 2013 and 2014 was for the State to apply the schedule's formula to the actual salaries paid to federal judges when the State made its appropriations for those fiscal years. This is exactly what the General Assembly did.

C. Alternatively, under the 2010 schedule, McGraw was entitled to an annual salary of $127,020 in October 2013, calculated as 73% of the $174,000 salary actually paid to federal district judges in October 2013.

McGraw contends that under the 2010 schedule, her salary at any given time was to be 73% of the salary of federal district judges at that given time. Assuming, *arguendo*, that she is correct, it is undisputed that in October 2013, the State paid her an annual salary of $127,020, which was 73% of the $174,000 salary actually paid to federal district judges in October 2013. Accordingly, because MOSERS has calculated her retirement benefits based on what the State correctly paid her when she terminated her employment in October 2013, MOSERS has correctly paid her retirement benefits under Section 476.530, and she has no claims against MOSERS.

D. Plaintiffs' interpretation of the 2010 schedule is unconstitutional and impractical and should be rejected.

According to Plaintiffs, under the 2010 schedule, the State must retroactively increase state judicial salaries and pay back pay to Missouri judges whenever federal judicial salaries are retroactively increased for whatever reason. Under Plaintiffs' reasoning, if the federal courts were to determine five years from now (in 2020) that federal judges were underpaid since 2015, then, according to Plaintiffs, the State would have to retroactively adjust state judicial salaries and would owe over five years of back pay to Missouri judges. The State obviously cannot function with such uncertainty as to state judicial salaries, and the Missouri Constitution does not permit this. Article XIII,

Section 3 was intended to "fix" judicial compensation, not allow judicial compensation to remain indefinitely in a state of flux based on potential future events. Plaintiffs' interpretation of the 2010 schedule is unconstitutional and impractical and should be rejected.

Plaintiffs contend that Article XIII, "§ 3.8 … empowers the Commission to establish a rate of compensation that is definite, known, and precisely calculable at any given time – not only at the moment the schedule is filed." (Appellants' Br. at 53). But Plaintiffs fail to provide any rational basis for determining the "given time" by when compensation must be "definite, known, and precisely calculable."

Under Plaintiffs' position, state judicial salaries could not have been definite, known, and precisely calculable when the State made its appropriations because no one could have foreseen that the federal courts would rule years later that federal judicial salaries should have been 14 percent higher than what had been paid. Indeed, under Plaintiffs' position, state judicial salaries could never be definite, known, and precisely calculable at any given time because federal judicial salaries could always be "corrected" or retroactively increased, either by the federal judiciary or Congress.

Plaintiffs contend that the "corrected" pre-2014 federal judicial salaries, as determined in *Beer* and *Barker*, were already required under federal law all along. However, because the proper amount of pre-2014 federal judicial salaries was disputed until federal courts adjudicated the multiple lawsuits concerning the salaries, these "corrected" federal judicial salaries were obviously *not* "definite, known, and precisely

calculable" when the Commission's 2010 schedule took effect, when state judicial salaries for fiscal years 2013 and 2014 were calculated and published in Appendix D to the Revised Statutes of Missouri, or when the State made appropriations for those fiscal years. Indeed, the actual, pre-2014 salaries of federal judges published on the federal courts' own website were not, and have never been, the "corrected" amounts. Instead, even today, they remain the very amounts cited in the Commission's 2010 schedule and used by the State to calculate the amount of state judicial salaries for fiscal years 2013 and 2014. (L.F. 51-53).

Conclusion

Under the Commission's 2010 schedule—as interpreted in harmony with Article III, § 13, the non-delegation doctrine, and the budget and appropriations provisions of the Missouri Constitution—Plaintiff McGraw was entitled to be paid in October 2013 based on the actual salary paid to federal district judges: (a) when the 2010 schedule took effect on February 1, 2011; (b) alternatively, when the State made its appropriation for state judicial salaries for fiscal year 2014 in 2013; or (c) at the very latest, in October 2013. The actual salary paid to federal district judges on each of these dates was the same—$174,000. In October 2013, the State paid McGraw an annual salary of $127,020, or 73% of this federal district judge salary. The State correctly paid McGraw in October 2013, and, in turn, MOSERS has correctly paid her retirement benefits. The Court should affirm the Circuit Court's judgment in favor of MOSERS and against McGraw.

Respectfully submitted,

THOMPSON COBURN LLP

By /s/ Allen D. Allred

Allen D. Allred, #26367
Jeffrey R. Fink, #44963
One US Bank Plaza
St. Louis, Missouri 63101
314-552-6000
FAX 314-552-7000
aallred@thompsoncoburn.com
jfink@thompsoncoburn.com

Attorneys for Respondent
Missouri State Employees' Retirement System

Certificate of Service

I hereby certify that on November 6, 2015, the foregoing was filed electronically with the Clerk of the Court to be served by operation of the Court's filing system upon the following:

Matthew L. Dameron, Esq.
Michael A. Williams, Esq.
Eric L. Dirks, Esq.
WILLIAMS DIRKS DAMERON LLC
1100 Main Street, Suite 2600
Kansas City, MO 64105
matt@williamsdirks.com
mwilliams@williamsdirks.com
dirks@williamsdirks.com

J. Kent Emison, Esq.
Robert L. Langdon, Esq.
Brett Emison, Esq.
LANGDON & EMISON
911 Main Street
Lexington, MO 64067
Kent@lelaw.com
Bob@lelaw.com
Brett@lelaw.com

Attorneys for Plaintiffs/Appellants Peggy Stevens McGraw and Samuel C. Jones

Robert Presson
Assistant Attorney General
P.O. Box 899
Jefferson City, MO 65102
Robert.presson@ago.mo.gov

Attorney for Respondents/Defendants State of Missouri, Commissioner of Administration, and State Treasurer

/s/ Allen D. Allred

Certificate of Compliance

I certify that this brief complies with Rules 55.03 and 84.06, is proportionately spaced, using Times New Roman, 13 point type, and contains 12,776 words, excluding the cover, the certificate of service, the certificate of compliance required by Rule 84.06(c), and the signature block.

I also certify that the computer diskettes that I am providing have been scanned for viruses and have been found to be virus-free.

/s/ Allen D. Allred