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IN THE SUPREME COURT OF MISSOURI

PEGGY STEVENS McGRAW,	)	
	)	
and	)	
	)	
SAMUEL C. JONES,	)	
	)	
on behalf of themselves and all others similarly situated,	)	
	)	
Appellants,	)	
	)	
v.	)	No. SC95271
	)	
STATE OF MISSOURI, et al.	)	
	)	
Respondents.	)	

Appeal from the Nineteenth Judicial Circuit Court
Cole County, Missouri
The Honorable Frank Conley, Judge

APPELLANTS' REPLY BRIEF

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ARGUMENT

The arguments advanced by Defendants in support of dismissal, if accepted, would wreak havoc with Missouri law and create a bleak situation for Missouri judges. Under Defendants' arguments:

- The State can pay Missouri judges (and all public officials) whatever it wants. For example, the State could pay Missouri judges 10% of federal salaries for 2013 (or for 2017, for that matter) and judges would be without legal recourse to recover their unpaid salaries. State's Br. at 8-9.
- In calculating Missouri salaries as a percentage of federal salaries, the State is free to ignore federal law, the U.S. Constitution, federal judicial orders, and even the total salaries actually paid to federal judges for a given time period. State's Br. at 24; MOSERS' Br. at 19.
- The State's adjustment of judicial salaries as of July 1, 2014 to account for federal action on January 1 of that year was gratuitous, if not unconstitutional. State judicial salaries should **still** be calculated according to the federal wages being paid on February 1, 2011. MOSERS' Br. at 20.
- Myriad Missouri laws incorporating variable federal standards and indices, including essential wage, health and safety laws, are potentially unconstitutional. MOSERS Br. at 39-40.
- Although the Compensation Commission cannot index state judicial salaries to federal judicial salaries without impermissibly delegating its power, the State may rely with impunity on the federal government's unlawful and

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unconstitutional withholding of federal judicial salaries in underpaying its own judges. MOSERS' Br. at 24-25, 27-28.

- Notwithstanding the specific action of the General Assembly and citizens of Missouri to ensure that compensation under an effective schedule is not "subject to appropriations," compensation and all rights and remedies under such a schedule are still wholly determined and limited by the appropriations process. MOSERS' Br. at 43.
- Missouri judges – unlike every other category of judge who is paid under a similar formula – will be denied relief in the wake of *Beer* and its progeny. *See* State's Br. at 23; MOSERS' Br. at 50.

Defendants' arguments are untenable. Accordingly, the Court should **REVERSE** the trial court's order of dismissal.

I. BACK PAY IS NOT A "RETROACTIVE SALARY INCREASE."

In their briefs, Defendants repeatedly contend that Plaintiffs seek a "retroactive increase" in their salaries. Not true. Plaintiffs seek only to have their salaries *correctly* calculated under existing law, using the *correct* components of the equation. Judicial compensation in Missouri is expressed as the following mathematical formula:

Percentage X Federal Judicial Salary = Missouri Judicial Salary

In this case, the second component – the applicable federal judicial salary – was incorrect during the relevant time period.

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In fact, not only was it incorrect, but it was calculated in a way that violated Article III of the United States Constitution, and the Ethics Reform Act of 1989 ("1989 Act"). *See Beer v. United States*, 696 F.3d 1174, 1187 (Fed. Cir. 2012).

Thus, Plaintiffs are not seeking a retroactive increase in pay, or an upward adjustment to which they are not entitled. Rather, they are seeking the same relief that several other categories of judges have received: to have their compensation adjusted to reflect the *correct* product of the calculation set forth above – nothing more, nothing less.[1]

Thus, no matter how many times Defendants say it, a judgment for back pay is not a "retroactive salary increase." On the contrary, across numerous and diverse areas of law, "'back pay' is to be treated as wages," and "it should be allocated to the periods when the regular wages were not paid as usual." *Soc. Sec. Bd. v. Nierotko*, 327 U.S. 358, 370 (1946); *see also State ex rel. Evans v. Brown Builders Elec. Co.*, 254 S.W.3d 31, 37 (Mo. banc 2008) (prevailing wage back pay subject to "prejudgment interest on the underpaid wages and fringe benefits, calculated from the date the wages became due and payable under the contract."); *N. L. R. B. v.*

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[1] Again, as outlined in Plaintiffs' opening brief, **every category of judge who is paid according to a similar formula has received compensation in the form of settlements or judgments**. *See* App. Br. at 34-35. Just like these other categories of federal and local judges, Plaintiffs seek only a correction of their salaries during the applicable time period.

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Killoren, 122 F.2d 609, 614 (8th Cir. 1941). Defendants' repeated characterizations of back pay as a "retroactive salary increase" is erroneous, reflecting a fundamental misunderstanding not only of what such awards *are*, but also of what courts *do*.

Courts do not give raises or prescribe legal obligations. Rather, courts determine obligations under existing laws and legal instruments and prescribe conformity therewith. Plaintiffs in this case – like the litigants in *Beer*, a contract action, or a Title VII case – do not seek a raise or a salary increase, but merely seek to vindicate their rights under the law.

Indeed, though their employment contexts are different, the nature of the judges' claims is closely analogous to those of the plaintiffs in *Evans*, 254 S.W.3d at 36. In *Evans*, apprentice electricians were entitled to be paid 46.2% of "sponsor's wage rate for a fully trained professional in the occupation." *Id*. at 33. At the time, the "sponsor's current rate for the occupation" was $13 per hour, less than the prevailing wage rate. *Id*. Thus, the employer paid the plaintiffs for public works based on the **actual** wages paid to his regular employees in that profession, rather than the prevailing wage. *Id*. at 34.

This Court held that the apprentices were entitled to wages based on the prevailing wage rate rather than the regular wage rate actually paid to other workers at the time. *Id*. at 36. That is, the plaintiffs were entitled to the relevant percentage of the wages that **should have been paid** to the benchmark employees under applicable law, rather than the percentage of wages **actually paid** to those workers during the relevant time period.

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The same is true here. Plaintiffs are entitled to compensation based on the salaries that should have been paid to federal judges under federal law at the time the 2010 Schedule was submitted, approved, and went into effect – not what federal judges actually received. The actual, unlawfully diminished wages paid federal judges at the time, like the "regular salary" of electricians in *Evans*, "has no bearing" on Missouri judges' rights. *Id*. To suggest otherwise is misguided and should not be credited by this Court.

II. THE 2010 SCHEDULE IS LEGALLY ENFORCEABLE.

Any argument that the State or its officers are immune from an action for back wages, on any grounds, is an argument that the State can pay Missouri judges whatever it wants. *See Weinstock v. Holden*, 995 S.W.2d 411, 418 (Mo. banc 1999) (The "practical value" of a schedule of compensation that is not legally enforceable is "minimal").[2] In claiming immunity, the State and its officers are asserting an absolute right to pay judges as they see fit, without regard to the Constitution and without any check or balance from coordinate branches or the Citizens' Commission on Compensation. This is the underlying premise – and would be the ultimate effect – of a finding that sovereign immunity precludes this suit and an ability to enforce the 2010 Schedule. In short, to find immunity would be to grant impunity.

[2] MOSERS does not dispute that it is subject to suit by virtue of section 104.530, RSMo.

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But even the State cannot earnestly maintain this position. The State admits that the 2006 Amendment removing the language "subject to appropriations" from Article XIII, section 3 of the Missouri Constitution creates an "enforceable right" in compensation schedules promulgated under that section. State's Br. at 13. This should end the discussion of sovereign immunity.

Nevertheless, the State proceeds to raise the novel argument that an express waiver of sovereign immunity that does not specify or limit the remedies that may be sought against the state is inherently limited to the remedy of a declaratory judgment. This argument has no basis or precedent in Missouri law.

A. The 2006 Amendment Authorizes Damages by Reversing *Weinstock*.

In 2006, the General Assembly and citizens of Missouri amended Article XIII, section 3 by removing the phrase "subject to appropriations" from the text. App. Br. at 16. The context of this 2006 Amendment makes clear that the state's waiver of sovereign immunity extends to actions for compensation under approved schedules. Indeed, that Amendment reversed *Weinstock*, which had held that under the version of Art. XIII, sec. 3 then in place, a Missouri judge had "no enforceable right to any […] increase in his individual compensation." In the State's own words:

> **The amendment removing that language would apparently mean that there is now an enforceable right**.
>
> […]

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> Now **Article XIII, § 3.8, by eliminating the "subject to appropriation" language, inferentially creates a right to enforce it** [….]

States Br. at 13.

As the State admits, the removal of "subject to appropriations" from Article XIII, sec. 3.8 reverses the holding of *Weinstock* that the section creates no enforceable right to compensation under an approved schedule. The "enforceable right" that now exists is the right to "individual compensation"; i.e., money. The waiver of sovereign immunity affected by the 2006 Amendment – and acknowledged by the State – necessarily includes a recovery of money damages.

This result is confirmed by the court of appeal's treatment of the same "subject to appropriation" language in *State ex rel. Kansas City Symphony v. State*, 311 S.W.3d 272 (Mo. App. 2010). There, the plaintiff Symphony brought an action against the State and the General Assembly seeking unpaid funds owed pursuant to Missouri statute. In granting the State judgment on the pleadings, the court held that the State's obligation to pay the Symphony was "subject to appropriation" and, thus, reserved the state's immunity from the monetary relief sought. *Kansas City Symphony*, 311 S.W.3d at 276.

Both the *Weinstock* and *Symphony* courts found State immunity in the explicit condition that state obligations were "subject to appropriation." The deliberate removal of that condition waives that immunity. Indeed, the power of appropriations is the power over the State's money – to relinquish this power is to

subject that money to the duly codified commitments of the Commission. If those commitments are "enforceable" – as the State concedes – they are enforceable by money judgment.

B. A Waiver of Sovereign Immunity Need Not Itemize Relief.

Similarly, the State's argument that a general waiver of sovereign immunity is inherently limited to declaratory remedies is unfounded. No case, doctrine, or provision of Missouri law suggests that a waiver of sovereign immunity must individually itemize available forms of relief. Indeed, the most common form of general waiver – statutory authority to sue and be sued – has consistently been held to subject government entities to suit for money damages, without any express consent to suit for money damages. *See, e.g.*, *Kubley v. Brooks*, 141 S.W.3d 21, 31 (Mo. banc 2004) ("Statutory authority to sue and be sued is sufficient consent to suit to waive the doctrine of immunity of the sovereign from suit without its consent [….] Accordingly, [plaintiff's] claim for money had and received is not barred by the immunity of the sovereign from suit without its consent."). Indeed, as this Court explained in *Kubley*, outside of the tort context there is no reason "to give the words 'sue and be sued' any meaning other than the usual and ordinary one conveyed by the language used, which is that the entity in question may sue and be sued, **without restriction as to kind of liability sought to be imposed**." *Id.* at 30 (emphasis added).

Even where "sue and be sued" language is not relied on, however, this Court has approved money damages where a statute grants an enforceable right without

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specifying the relief available. *See Bachtel v. Miller Cty. Nursing Home Dist.*, 110 S.W.3d 799, 804 (Mo. banc 2003) (approving suit for damages against political subdivision, noting: "[n]othing in the statutes or case law requires that certain magic words must be used in order to waive sovereign immunity," but that case law "merely requires that the **intent** of the legislature to waive sovereign immunity must be express rather than implied.") (emphasis added).

As the State concedes, such intent was expressed here through the legislatively resolved, voter-approved removal of "subject to appropriations" from Article XIII, section 3. This general waiver creates an enforceable right and constitutes consent to suit for money damages to enforce that right.

C. The State Misstates the Text of the Hancock Amendment and the Disposition of *Fort Zumwalt*.

Even if the State's Hancock arguments were factually accurate, they would be legally irrelevant: judges cannot be precluded from recovering unpaid salaries under Article XIII, section 3 because the Hancock Amendment limits its taxpayer remedies to declaratory relief. The two constitutional provisions are separate and distinct. That the State's arguments are also factually inaccurate only confirms their lack of merit.

1. The Hancock Amendment Specifies the Remedies Authorized.

The State claims that like Article XIII, section 3, the Hancock Amendment provides "a right to enforce its provisions without a specification of remedies." State's Br. at 13. This is incorrect.

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As this Court has emphasized, Article X, section 23 explicitly limits the remedies available under the taxpayer actions it authorizes. A taxpayer who successfully shows a violation of the Amendment "shall receive from the applicable unit of government his costs, including reasonable attorneys' fees incurred in maintaining such suit." Mo. Const. art. X, § 23; *see also Zweig v. Metro. St. Louis Sewer Dist.*, 412 S.W.3d 223, 249 (Mo. banc 2013) ("the only money judgment expressly authorized by article X, section 23, is an award of 'costs, including attorneys' fees incurred in maintaining the suit' if the taxpayer's claim is sustained.").

As the State concedes, the waiver of immunity for actions under Article XIII, section 3 applicable here contains no specification of remedies. State's Br. at 13. Thus, the State's attempt to analogize this case to the Hancock Amendment fails.

2. The Fort Zumwalt *School Districts' Claims were Not Barred by Sovereign Immunity.*

Compounding its error, the State also relies on *Fort Zumwalt Sch. Dist. v. State*, 896 S.W.2d 918 (Mo. banc 1995). According to the State, this Court in *Fort Zumwalt* held that due to sovereign immunity, plaintiff "school districts' claim for a money judgment was barred even though the school districts could proceed with a claim for a declaratory judgment." *Id.* at 11. This is incorrect. In fact, the Court did not even discuss sovereign immunity with reference to the school districts because the Court held that the school districts had no enforceable rights under the Hancock Amendment. *Fort Zumwalt*, 896 S.W.2d at 921 (Mo. banc 1995) ("The

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Hancock Amendment makes no pretense of protecting one level of government from another [….] any apparent injury to the school district is merely derivative of the taxpayers' injury."). Therefore, the school districts lacked standing to bring **any** claim against the state, whether for money damages or for declaratory relief. *Id*.

Rather, the Court's discussion of sovereign immunity in that case related to "the taxpayers' claims exclusively." *Id*. at 921.[3] This is not a mere technical distinction. Unlike the Hancock Amendment, which makes "no pretense" of conferring rights upon school districts, the 2010 Schedule explicitly provides for and quantifies the compensation to which Missouri judges are entitled. The State does not – and cannot – argue that the Schedule does not confer rights upon Missouri judges; in fact, the State admits that the constitutional provision authorizing the Schedule "inferentially creates a right to enforce it." State's Br. 13.

Thus, to the extent the State relies on *Fort Zumwalt* and attempts to draw a corollary between the instant case and cases brought under the Hancock Amendment, those efforts are meritless.

D. Money Damages is the Only Adequate Relief for the "Enforceable Right" to Compensation Under the 2010 Schedule.

Again, the State concedes that the 2006 Amendment created an "enforceable right" under Article XIII, section 3. Yet the State argues that Plaintiffs cannot

[3] Notably, the State makes no mention of these taxpayers or their claims in its lengthy discussion of *Fort Zumwalt*. State's Br. at 9-12.

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enforce the right because 1) declaratory relief is unavailable in this case as Plaintiffs' claims are actually retroactive in nature, and 2) declaratory judgment is an adequate alternate remedy in this case because it is a remedy for Hancock violations – again, a completely separate constitutional provision. State's Br. at 11-12. But money damages is the only appropriate remedy for a past deprivation of a public official's salary. *Steadley v. Stuckey*, 87 S.W. 1014, 1014 (Mo. App. 1905) (awarding damages in the amount of unpaid salary to public official deprived of a portion of his salary).

Furthermore, the Retired Judge Subclass in this case alleges that the benefits it now receives continue to be unlawfully diminished, and requests prospective relief in the amount of benefits correctly calculated pursuant to the 2010 Schedule. This is not artful pleading; a judgment declaring the Retired Judges' rights under the law and requiring MOSERS to comply therewith is the appropriate remedy for an ongoing deprivation of retirement benefits. *Crain v. Missouri State Employees' Ret. Sys.*, 613 S.W.2d 912, 917 (Mo. App. 1981) (approving declaratory action to determine judges' rightful retirement benefits). Thus, even under the State's impertinent invocation of Hancock jurisprudence, sovereign immunity could not possibly bar the Retired Judge Subclass's claims.[4]

[4] As MOSERS concedes, the merits of these claims must also be considered in light of MOSERS' statutory waiver of sovereign immunity. § 104.530, RSMo; *see Crain*, 613 S.W.2d at 917; MOSERS Br. at 18 n.8.

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III. THE STATE'S RELIANCE ON TORT IMMUNITY PRINCIPLES IS MISPLACED.

The State's claim to immunity from this suit repeatedly relies on tort jurisprudence with no bearing on this case. When these cases are appropriately disregarded, the fallacy of the State's arguments is even more evident.

A. The State Improperly Relies on Tort Sovereign Immunity Cases.

Throughout its sovereign immunity argument, the State inappropriately propounds principles of tort sovereign immunity analysis as if they are applicable to the present suit. *See, e.g.*, State's Br. at 6 (citing *Shifflette v. Missouri Dep't of Nat. Res.*, 308 S.W.3d 331 (Mo. App. 2010) for pleading requirements where state is sued in tort); State's Br. at 8 (quoting tort discussion in *Jones v. State Highway Comm'n*, 557 S.W.2d 225, 230 (Mo. 1977) concerning liability for governmental functions). Like the public entity in *Kubley*, 141 S.W.3d at 29, here the State's "position reflects a fundamental, but not uncommon, confusion of the doctrine of sovereign immunity from liability in tort with the separate, but related, doctrine that the sovereign cannot be sued without its consent." And here, as in that case, "the doctrine of sovereign immunity in tort and the cases discussing it are simply irrelevant." *Kubley*, 141 S.W.3d at 31.

B. The Tort Defenses of Official Immunity and the Public Duty Doctrine are Irrelevant to This Case.

The State's confusion extends to its discussion of liability against the Individual Defendants. The State alternatingly seeks to invoke the protections of

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sovereign immunity – which applies only to state entities, not employees – and of official immunity and the public duty doctrine – which are exclusively applicable to suits in tort. These efforts are misplaced.

1. Individual Officials are Not Entitled to Sovereign Immunity.

This Court's recent jurisprudence makes clear that sovereign and official immunity are not interchangeable doctrines, to be claimed by different parties as the circumstances warrant. "[S]overeign immunity and official immunity are distinct legal concepts." *Davis v. Lambert-St. Louis Int'l Airport*, 193 S.W.3d 760, 765 (Mo. banc 2006). "Governmental entities […] are protected by sovereign immunity," while "[o]fficial immunity is personal to the officeholder." *Id*. at 764, 765; *see also Southers v. City of Farmington*, 263 S.W.3d 603, 610 (Mo. banc 2008) (sovereign immunity protects "government entities, not their employees," but "public employees are covered by two different government immunity doctrines: the official immunity and public duty doctrines."); *Jackson v. Wilson*, 581 S.W.2d 39, 42 (Mo. App. 1979).[5]

Kleban v. Morris, 247 S.W.2d 832, 839 (Mo. 1952) – a case cited by the State – does not suggest otherwise. There, the Court noted that where the recovery of money (in that case, a tax refund) is sought against the state, "the *state* […] is

[5] Because official immunity is a tort doctrine, cases discussing and explaining it necessarily are tort cases. This is true of the official immunity cases cited by the State as well. *See* State's Br. at 16-18.

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entitled to invoke *its* sovereign immunity from suit even though individual officials are nominal defendants." *Kleban*, 247 S.W.2d at 839 (emphasis added). No suggestion is made that the officials themselves are entitled to sovereign immunity, as the State claims here.

2. Official Immunity and the Public Duty Doctrine are Exclusively Tort Defenses.

Official immunity and the public duty doctrine likewise provide no refuge for Individual Defendants. For one thing, these doctrines are applicable only in tort actions. *See Southers*, 263 S.W.3d at 612 ("[a]pplication of the public duty doctrine leaves the plaintiff unable to prove all the elements of his claim for **negligence**, whereas application of the doctrine of official immunity merely impacts liability, but does not destroy the underlying **tort**.") (emphasis added); *Davis*, 193 S.W.3d at 765; *Oberkramer v. City of Ellisville*, 650 S.W.2d 286, 295 (Mo. App. 1983) ("[a]n official is immune from liability for **torts** arising out of a discretionary act") (emphasis added); *Newson v. City of Kansas City*, 606 S.W.2d at 490 (Mo. App. 1980) ("[a] public employee […] has an official immunity from **tort** liability from discretionary acts in the performance of governmental duty") (emphasis added); *Jackson*, 581 S.W.2d at 42 ("official immunity" protects "public officials from **tort** liability") (emphasis added).

Additionally, "official immunity is an affirmative defense." *Richardson v. City of St. Louis*, 293 S.W.3d at 139 (Mo. App. 2009); *see also Southers*, 263 S.W.3d 611 ("the defense of official immunity is personal to a public employee"). "As the

party asserting the affirmative defense of official immunity, an individual defendant bears the burden of pleading and proving that he is entitled to that defense." *Rhea v. Sapp*, 463 S.W.3d 370, 376 (Mo. App. 2015). The Individual Defendants make no pretense of having pleaded or proved this defense. *See* State's Br. at 19. The State's assertions on appeal that "[t]he financial administration of the State" is "complex" does not satisfy this burden. *Id*. Moreover, the Individual Defendants could not have established this defense even if they had tried, because the defense only applies to tort claims not present in this suit.

Rather, this suit is warranted, and the Individual Defendants are liable, under the "well–settled rule that where the law requires absolutely a ministerial act to be done by a public officer, and he neglects or refuses to do the act, he is liable in damages at the suit of a person injured." *Knox Cty. v. Hunolt*, 19 S.W. 628, 630 (Mo. 1892); *see also St. Joseph Fire & Marine Ins. Co. v. Leland*, 2 S.W. 431, 432 (Mo. banc 1886) (same); *Amy v. Des Moines Cty. Sup'rs*, 78 U.S. 136, 138 (1870) (same). Where failure to perform the ministerial duty comprises a deprivation of money rightfully owed to the plaintiff, a money judgment is proper. *Knox Cty.*, 19 S.W. at 630; *Leland*, 2 S.W. at 432; *Amy*, 78 U.S. at 138. This is particularly true where the ministerial duty failed, and the deprivation worked, was of a plaintiff public official's rightful salary. *Steadley v. Stuckey*, 87 S.W. 1014, 1015 (Mo. App. 1905) (awarding damages to public official for salary lost due to another official's failure to perform ministerial duty).

As Plaintiffs have alleged, payment of a public official's salary as provided

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by statute is a ministerial duty. *Cf. State ex rel. Zevely v. Hackmann*, 254 S.W. 53, 55 (Mo. banc 1923) (granting mandamus against the state auditor for payment of statutory compensation); *State v. Walker*, 10 S.W. 473, 474 (Mo. banc 1889) (granting mandamus against the state auditor for payment of salary established by law); LF 16. Official immunity, and the attendant concerns of capacity and/or scienter, are irrelevant in cases like this. "In such cases a mistake as to his duty and an honest intention is no defense." *Knox Cty.*, 19 S.W. at 630; *see also Leland*, 2 S.W. at 432; *Amy*, 78 U.S. at 138. The Individual Defendants are liable to Plaintiffs for their failure in the ministerial duty to properly calculate and pay Plaintiffs' salaries under the 2010 Schedule.

IV. THE 2010 SCHEDULE IS CONSTITUTIONAL.

A. The Commission Adequately "Fixed" Judicial Compensation.

Again, judicial pay in Missouri is expressed as a mathematical formula that is, at any given moment, "firm, stable, or stationary." *See* FIX, Merriam-Webster's Collegiate Dictionary (11th ed. 2012).

In its brief, MOSERS[6] appears to concede that the formula adopted by the Commission in the 2010 Schedule is calculable and definite – a reversal from its position before the trial court. *See* LF 161. Instead, MOSERS now asserts that the

[6] The State of Missouri and the individual Defendants do not challenge the constitutionality of the 2010 Schedule.

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2010 Schedule would not be adequately "fixed" if this or any other Court applied any federal judicial salaries that are different from those that were in effect in 2010.

Indeed, MOSERS argues that "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." MOSERS' Br. at 20. MOSERS then attempts to read the minds of the Commission and other Missouri officials when it states, "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." *Id.* at 24. Thus, according to MOSERS, Missouri cannot use any figures to calculate judicial compensation other than those figures that were in effect as of November 2010.

MOSERS' argument ignores several important points. First, its argument does not really address whether the 2010 Schedule adequately "fixes" compensation. MOSERS' argument conflates two distinct questions: (1) whether the formula in the 2010 Schedule is adequately "fixed" within the meaning of that term, and (2) whether the federal judicial pay standard can vary from what is contained in the 2010 Schedule.

Regardless of what benchmark Missouri uses to calculate its judicial compensation, as long as it is firmly and definitely pegged to a calculable figure, then it is "fixed" within the meaning of section 3.8. Thus, even if the federal

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benchmark changes, it is still "fixed" and MOSERS' brief does not undermine that assertion in any way.

Second, MOSERS' argument ignores relevant language in the 2010 Schedule. MOSERS correctly points out that the Commission enumerated the specific salaries for federal judges. *See* MOSERS' Br. at 24. However, the 2010 Schedule delineates those salaries only "[f]or fiscal 2013 (beginning July 1, 2012)." *See* 2010 Schedule at G-41. The 2010 Schedule does not, as MOSERS would imply, articulate those as the salaries for Missouri judges for as long as the schedule is effective; instead, the Commission limited those salaries to a specific fiscal year. Similarly, MOSERS' argument ignores how the salaries are expressed: as **percentages** of federal judicial salaries, suggesting that the Commission intended for the Missouri judicial salaries to have the potential for alteration. If the Commission had intended to be bound to the federal judicial salaries as they existed at the time, they could have just adopted the calculations that MOSERS now relies on, but they did not. MOSERS' argument also ignores the Commission's description of the 2010 Schedule as a "more permanent" means of determining judicial pay, and a "long-term option," meaning that the Commission did not intend to be bound to the judicial pay snapshot as it existed in 2010. Simply put, MOSERS' interpretation of the 2010 Schedule – and its faulty assumptions based on those interpretations – are misguided.

Finally, MOSERS' argument ignores that Missouri **has changed** judicial compensation since 2010, based on the 2010 Schedule. It is undisputed that as of

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July 1, 2014, Missouri adjusted judicial pay upward to correspond to the corrected federal salaries in accordance with the 2010 Schedule. Thus, if MOSERS' argument prevails, that upward adjustment violated the Missouri Constitution because it diverged from the specific figures articulated in the 2010 Schedule – a result that would be absurd and unintended.[7]

In sum, there is simply no basis for MOSERS' bald assertion that (1) the Commission intended only to fix the salaries of Missouri judges to the specific figures as they existed in 2010, and (2) that indexing to a federal benchmark somehow makes the 2010 Schedule not "fixed" in accordance with section 3.8. The Court should reject MOSERS' argument.

B. The 2010 Schedule Does Not Violate the Non-Delegation Doctrine.

1. MOSERS' Cited Cases Are Inapposite.

As Plaintiffs outlined in their initial brief, the cases cited by MOSERS before the trial court and reiterated in their opposition brief before this Court are distinguishable. *See* App. Br. at 47-49. Simply put, MOSERS has cited no

[7] MOSERS' argument also ignores that in 2014, the Commission reaffirmed its commitment to the judicial compensation schedule set out in the 2010 Schedule. Thus, even with full knowledge of the 2014 adjustment, the Commission renewed its commitment to the salary calculations articulated in the 2010 Schedule.

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compelling authority for its position that the 2010 Schedule violates the non-delegation doctrine.[8]

In its brief, MOSERS cites only one additional case where this Court purportedly struck down a statute under the non-delegation doctrine: *Akin v. Director of Revenue*, 934 S.W.2d 295, 299-300 (Mo. banc 1996). But *Akin* is distinguishable.

In *Akin*, the General Assembly passed a statute governing taxes for education. The constitutional challenge concerned sections B, C and D of the statute. Section B contained the applicable tax provisions; section D concerned the General Assembly's obligation to put the taxes in Section B to a vote of the people. Section C of the statute stated:

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[8] MOSERS criticizes Plaintiffs because they "cite no contrary authority in Missouri (or elsewhere)" to support their argument that the 2010 Schedule is valid. *See* MOSERS' Br. at 28. Of course, Plaintiffs were not movants in the trial court, and it is certainly not their obligation to cite authority supporting the constitutionality of a statute. Under Missouri law, statutes are **presumed** constitutional and the burden to demonstrate otherwise falls squarely on MOSERS as the movant. *Missouri Prosecuting Attorneys v. Barton Cnty.*, 311 S.W.3d 737, 741 (Mo. banc 2010) ("Courts will enforce a statute unless it plainly and palpably affronts fundamental law embodied in the constitution," and "[d]oubts will be resolved in favor of the constitutionality of the statute.") (internal citations omitted).

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> Section B of this act shall become effective only if the question prescribed in Section D of this act is submitted to a statewide vote and a majority of the qualified voters voting on the issue approve such question, and not otherwise.

Id. at 297-98. Striking down sections B, C and D, this Court drew a distinction between delegating the authority to enact a law and delegating the authority to determine how to carry out a law. It said:

> The true distinction is between a delegation of a power to make law, which involves a discretion as to what the general law will be, and conferring an authority or discretion as to how the law shall be executed. A delegation of the power to enact or repeal a general tax for education, as is provided in sections B, C and D of [the statute] falls into the former category and is void in the absence of constitutional authorization.

Id. at 299 (internal citations omitted). Thus, because section C of the statute delegated the authority to **make** a law – as opposed to delegating the authority about how the law "shall be executed" – the Court struck it down.

The proposition articulated in *Akin* is not unique. In *State v. Thompson*, 627 S.W.2d 298, 299-300 (Mo. banc 1982), this Court succinctly discussed the difference between the two concepts articulated in *Akin*:

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> 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.

Id. at 303 (emphasis added). In *Thompson*, the Court upheld the purported delegation of authority and sustained the state's reference to federal drug guidelines.

Unlike *Akin*, the 2010 Schedule does not delegate the authority to **make** a law. Rather, it delegates "authority or discretion as to how the law shall be executed" in that it makes reference to federal judicial salaries. *Akin*, 934 S.W.2d at 299. Thus, *Akin* is distinguishable and inapposite to the instant case.

Other than *Akin*, MOSERS has not cited a single case where a Missouri court has struck down a statute on delegation grounds. Given this Court's previous admonition to "enforce a statute unless it **plainly and palpably** affronts fundamental law embodied in the constitution," and that "[d]oubts will be resolved in favor of the constitutionality of the statute," the Court should reject MOSERS' argument. *Missouri Prosecuting Attorneys*, 311 S.W.3d at 741 (internal citations omitted) (emphasis added).[9]

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[9] MOSERS also attempts to distinguish the other Missouri statutes referenced by Plaintiffs because they are based on "market-based" indicators – a distinction

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The cases cited by MOSERS from other jurisdictions are equally unavailing. It is true that the courts of some other states have adopted much stricter doctrines of non-delegation than exists in Missouri. Each doctrine is predicated on one of the nation's fifty-one constitutions, and will vary to some degree with the different texts and constructions of each. *See* Jim Rossi, Dual Constitutions and Constitutional Duels: Separation of Powers and State Implementation of Federally Inspired Regulatory Programs and Standards, 46 Wm. & Mary L. Rev. 1343, 1362 (2005).

Moreover, sometimes "[s]tates with similar textual language reach very different results, and states with different constitutional language sometimes reach the same results." *Id*. Just as there are states with more strictly expressed doctrines, many states find no improper delegation of legislative authority where a statute incorporates external standards, "even when the standards are subject to periodic revision." *Madrid v. St. Joseph Hosp.*, 928 P.2d 250, 256 (N.M. 1996) (upholding statute incorporating American Medical Association standards, citing precedent from Maryland, Wisconsin, Maine, and Colorado).

In fact, even those states whose strongly stated non-delegation doctrines MOSERS cited have upheld statutes prospectively incorporating qualitative federal

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without a difference. A federal standard is a federal standard. Without any explanation, MOSERS attempts to argue that the 2010 Schedule is unique because it incorporates a federal law as opposed to a regulation or rule. The point is inapposite and the Court should reject it.

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standards. *See, e.g.*, *Minnesota Energy & Econ. Dev. Auth. v. Printy*, 351 N.W.2d 319, 351 (Minn. 1984) (upholding state statute that "incorporates by reference the definition of small business contained in regulations of the United States small business administration, 'as amended from time to time'" against non-delegation challenge); *Taylor v. Smithkline Beecham Corp.*, 658 N.W.2d 127, 136 (Mich. 2003) (upholding state statute that incorporates future decisions of the FDA because such a decisions are merely a "measuring stick" for state action). Contrary to MOSERS' contentions, nothing in Missouri law suggests that the 2010 Schedule's incorporation of the quantitative "measuring stick" of federal judicial salaries is impermissible.

2. Article XIII, Section 3 Operates Notwithstanding the Non-Delegation Doctrine.

As articulated in Plaintiffs' initial brief, Article XIII, § 3 prevails over other constitutional provisions to the extent there is any conflict. *See* App. Br. at 58-59. Plaintiffs stand on their argument that, to the extent there is a conflict between the operation of Article XIII, § 3 and the non-delegation doctrine, then Article XIII, § 3 must prevail. Again, this position is supported by an opinion articulated by the Missouri Attorney General. *See* Opinion No. 76-2011, 2011 WL 1112865 (Mo. A.G. March 21, 2011).

MOSERS contends that *Weinstock* somehow undermines this argument and criticizes Plaintiffs because they "inexplicably fail to advise the Court of this

holding in *Weinstock*, which is directly adverse to Plaintiffs' position." MOSERS Br. at 41.

But *Weinstock* did not consider the harmony (or lack thereof) between Article XIII, Section 3 and the non-delegation doctrine. Indeed, *Weinstock* does not concern the non-delegation doctrine in any way, and the list of constitutional provisions contained in the quotation provided by MOSERS does not include Article III, Section 1 – the provision governing the non-delegation doctrine. At most, *Weinstock* stands for the unremarkable proposition that courts, if they are able, should read Article XIII, Section 3 in harmony with other constitutional provisions – a proposition that is not in dispute here.

But if the Court is inclined to find that Article XIII, § 3 and the 2010 Schedule somehow run afoul of the non-delegation doctrine, then the "contrary notwithstanding" language in Article XIII, § 3 directs the Court to give that provision precedence. This position is not undermined in any way by MOSERS' argument or *Weinstock* and is, instead, buttressed by the Attorney General's previous interpretation of Article XIII, § 3.

C. The 2010 Schedule Is Sufficiently Definite for the Appropriations Process.

As outlined herein, Article XIII, section 3 is no longer "subject to appropriations." Thus, MOSERS' argument that Plaintiffs' requested relief under that provision is somehow encumbered by the appropriations process is not supported by the plain language of the Constitution. Simply put, the Court should

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not strike down the 2010 Schedule on appropriations grounds given that its enabling provision – Article XIII, section 3 – is expressly not subject to appropriations.

But even if the Court finds that the appropriations process acts as a check on the 2010 Schedule, the 2010 Schedule is sufficiently definite for the state's appropriations process, particularly when appropriations are inherently based on "estimates" and a "dynamic" process. *See* App. Br. at 54-56. In its brief, MOSERS submits that the General Assembly must have certainty in all fiscal matters before it can make an appropriation, but it ignores that appropriations are (1) based on estimates, and (2) appropriated in large swaths for officeholders or agencies.

1. Missouri's Appropriations Are Based On Estimates.

MOSERS' argument reflects a misunderstanding of the appropriations process in Missouri because the process is, by definition, based on estimates. The budget process begins with the Governor's proposed budget, which is presented to the General Assembly. *See Missouri Health Care Ass'n v. Holden*, 89 S.W.3d 504, 507 (Mo. banc 2002). The proposed budget is based on "an estimate of revenues" that the State anticipates receiving during the upcoming fiscal year. *Id.* The estimate includes "the major portions of the general revenue fund **expected** to be available for appropriation." *Id.* (emphasis added). The money that is appropriated based on the estimates "is money that is expected, not money actually in the treasury. State finances, and its budget, are a dynamic process [and] corrections need to be made as actual revenues differ from estimates." *Id.* at 508. Thus, the entire budgeting and

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appropriation process is "dynamic" and is in no way undermined by the 2010 Schedule and its index to the federal salary benchmarks.

This Court has acknowledged that there are uncertainties built in to Missouri's appropriations process because Missouri appropriates money in certain funds with an "E" designation. According to this Court, "'E' appropriations are appropriations by which the legislature does not approve spending at a particular appropriated amount but, instead, in areas where the exact dollar figure that will be needed cannot be specified, approves the spending of funds in excess of an estimated or 'E' amount for the stated purpose." *Schweich v. Nixon*, 408 S.W.3d 769, 772 n.1 (Mo. banc 2013). Examples of "E" appropriations abound. *See* House Bill No. 12 (98th General Assembly), sections 12.155 through 12.170.[10]

Of course, the 2010 Schedule provides far more certainty than an "E" designation "where the exact dollar figure that will be needed cannot be specified." *Schweich*, 408 S.W.3d at 772 n.1. Federal judicial salaries do not fluctuate wildly, nor do they change routinely during the normal fiscal year. Instead, they remain constant throughout a given time period – much like Missouri's judicial salaries. In this sense, federal judicial salaries provide the Missouri legislature all the certainty it needs to budget and plan for the upcoming fiscal year in its appropriations process.

[10] LF 151.

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2. Missouri's Appropriations Are Not Line Item Appropriations.

Additionally, MOSERS' argument fails to consider the manner in which funds are appropriated. They are not, as MOSERS implies, a line by line appropriation that require a precise calculation for every judge or judicial position. Rather, funds are appropriated in large swaths for officeholders or agencies. For example, in the appropriations bill for Fiscal Year 2016 that the General Assembly considered, the judiciary's budget was expressed as a series of large transfers from a variety of funds – not as specific line items for particular judges or specific judicial positions. *See* House Bill No. 12 (98th General Assembly), sections 12.300 through 12.330.[11]

Considering the appropriations for the Auditor's Office – appropriations that are closely analogous to the judiciary's – courts have held that "[t]he appropriation itself is a general one, not limited to use for any particular program." *Schweich*, 408 S.W.3d at 778. "Once appropriated, unless otherwise restricted by law, it is within the discretion of the office holder or agency to use the appropriation within the broad categories allowed by the bill." *Id.*

Because the judiciary's appropriation is general in nature, and because all Missouri appropriations are based on estimates, MOSERS' argument fails and the 2010 Schedule is sufficiently definite so as to give the Legislature an adequate basis

[11] LF 147.

for preparing the State's budget. MOSERS cites no cases or statutes to the contrary, and the Court should reject its argument.

CONCLUSION

For the foregoing reasons, the judgment of the trial court should be **REVERSED** and the cause remanded for further proceedings.

DATED: November 18, 2015

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that I have signed an original copy of this brief, to be maintained by me for a period of not less than the maximum allowable time to complete the appellate process, in compliance with Rule 55.03(a).

This brief complies with the limitations contained in Rule 84.06(b). This brief contains 7216 words.

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of November 2015, the foregoing was sent by electronic mail and filed electronically with the Clerk of Court to be served by operation of the Court's filing system upon the following:

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