IN THE SUPREME COURT OF MISSOURI

No. SC92653

GINA BREITENFELD,

Plaintiff/Appellant,

v.

SCHOOL DISTRICT OF CLAYTON, et al.,

Defendants/Respondents

ON APPEAL FROM THE CIRCUIT COURT
OF THE COUNTY OF ST. LOUIS
STATE OF MISSOURI
CAUSE NUMBERS 07SL-CC00605/12SL-CC00411 (CONSOLIDATED)

THE HONORABLE DAVID LEE VINCENT, III

# BRIEF OF *AMICUS CURIAE* COOPERATING SCHOOL DISTRICTS OF GREATER ST. LOUIS

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## STATEMENT OF CONSENT

*Amicus Curiae,* Cooperating School Districts of Greater St. Louis, files this brief pursuant to Mo. R. Civ. Pro. 84.05(f)(2), and states that it has obtained consent of all parties to this matter for such filing.

## JURISDICTIONAL STATEMENT

*Amicus Curiae* hereby adopts and incorporates herein by reference the jurisdictional statement set forth in the brief submitted to this Court by Respondent School District of Clayton.

## STATEMENT OF FACTS

*Amicus Curiae* hereby adopts and incorporates herein by reference the facts as set forth in the brief submitted to this Court by Respondent School District of Clayton.

## STATEMENT OF INTEREST OF *AMICUS CURIAE*

Cooperating School Districts of Greater St. Louis ("CSD") is an organization comprised of public school districts and charter schools from the St. Louis metropolitan area and the adjoining counties (hereinafter referred to as the "CSD Members"). ***See Appendix of Amicus Curiae Cooperating School Districts of Greater St. Louis (hereinafter "Appendix"), at A-19.*** CSD Members serve students and families from various socioeconomic levels and geographic locations throughout St. Louis County and the surrounding counties. ***Appendix, at A-19.*** CSD includes urban, suburban, and rural school districts who serve large and small student populations. ***Appendix, at A-20.*** Some CSD Members also comprise the membership of the Voluntary Interdistrict Choice Corporation ("VICC").[1] ***Id.*** Since transfers began in the early 1980s, CSD districts have educated more than 65,000 students through voluntary transfers between St. Louis Public School District ("SLPS") and participating St. Louis County districts.[2] ***Id.*** CSD

[1] VICC is the voluntary desegregation program created by the settlement agreement in ***Liddell, et al. v. Board of Education of the City of St. Louis, Missouri, et al.***, No. 72-100(c), United States District Court for the Eastern District of Missouri, whereby participating St. Louis County districts accept black students from St. Louis City and non-black resident students of those County districts are able to transfer to SLPS magnet schools. ***Appendix, at A-20.***

[2] CSD districts that participate in VICC commit to educating VICC transfer students until those students graduate. ***Appendix, at A-20.***

Members include fully accredited, provisionally accredited (including SLPS), and unaccredited school districts. ***Appendix, at A-20.*** The mission of CSD Members is to provide the best educational services possible to students attending their schools. ***Id.*** Members accomplish that goal through careful long-range planning based on predictable student populations and budgeted resources. ***Id.*** CSD Members have a unique perspective in this matter because of their broad range of experiences educating children in the St. Louis area.

CSD Members share a common interest in the outcome of the instant litigation as this Court considers the constitutionality of Mo. Rev. Stat. § 167.131 under Article X, § 21 (the "Hancock Amendment") and whether compliance with that statute is impossible. If this Court upholds § 167.131, CSD Members face the prospect of providing new services to an unlimited influx of students from unaccredited districts. Without the discretion to limit transfers, both sending and receiving districts will encounter unpredictable additional costs associated with providing services, tuition and transportation. Clearly, this Court's decision will implicate CSD Members' ability to plan effectively, allocate resources, and provide appropriate educational services to current and future students. Furthermore, the tax payers residing within CSD Member districts will be impacted by new and increased demands. Hence, this Court's decision in the instant case will **directly, significantly, and immediately** impact CSD Members and the students and families they serve.

Moreover, the issues in this case are not moot. Although the St. Louis Public School District has recently attained provisional accreditation, two other CSD Member

districts, the Normandy School District and the Riverview Gardens School District, are currently unaccredited. ***Appendix, at A-21.*** These two districts together serve over 10,000 students and will find themselves in the same predicament as SLPS, facing the prospect of overwhelming costs associated with the provision of tuition and transportation. ***Id.*** In addition, as discussed herein, the SLPS's provisional accreditation may be short-lived. This instability and unpredictability further highlight the unworkable nature of the statutory obligations imposed by § 167.131, and the impossibility of compliance with those obligations. Neither impacted districts nor the students they serve can rely on choices made as a result of current accreditation status. This uncertainty undermines CSD Members' ability to provide educational services that meet the needs of all students in attendance. Therefore, the issues raised in this case continue to be of paramount concern to all CSD Members.

## ARGUMENT

### I. The Circuit Court Correctly Held that § 167.131 Violates the Hancock Amendment.

The Hancock Amendment was adopted to "rein in increases in governmental revenues and expenditures," and "to erect a comprehensive, constitutionally-rooted shield . . . to protect taxpayers from the government's ability to increase the tax burden. . . ." ***Roberts v. McNary***, 636 S.W. 2d 332, 336 (Mo. banc 1982); ***Fort Zumwalt Sch. Dist. v. State***, 896 S.W.2d 918, 921 (Mo. banc 1995). The Circuit Court in this case correctly held that that because § 167.131 requires school districts to engage in new or increased

activity, but lacks corresponding state funding, it violates the Hancock Amendment and is therefore unconstitutional.

The Circuit Court applied a two-prong analysis: (1) whether the amended version of § 167.131 (adopted in 1993 – after the Hancock Amendment went into effect on November 4, 1980) requires new or increased activity or services of affected school districts; and (2) whether the affected school districts experience increased costs in performing activities or services without full state funding. ***Appendix, at A-10.*** As the Circuit Court noted, the Hancock Amendment requires that the State make and disburse funds that will **"fully offset"** the additional costs of compliance. ***Id.***

The Circuit Court held that the version of § 167.131 that existed in 1980 was markedly different from the amended version adopted in 1993. Indeed, the clear and unambiguous language of the 1993 version by its very terms "created new and increased activity or service for school districts over and above what was required in 1980 under the old transfer law." ***Appendix, at A-12.***

The version of § 167.131 that existed in 1980: (1) applied only to school districts that did not have accredited high schools, (2) required that students complete the highest grade available in the district of residence before being eligible to transfer, and (3) granted discretion to receiving school districts to refuse students. Hence, school districts' obligations under the amended statute are "new and increased" because those obligations apply regardless of the transferring students' previous attendance at the sending district or prior completed grade level. Further, and for the first time, these services include the requirement that districts honor transfer requests from students to a particular school,

regardless of the capacity in the school of choice or other related considerations. These new obligations arise from the elimination of district discretion to accept or deny the admission of transfer students from unaccredited districts. ***See***, ***Turner v. Sch. Dist. of Clayton***, 318 S.W. 3d 660, 669 (Mo. banc. 2010). Accordingly, the Circuit Court correctly concluded that the amended statute required school districts to provide new and increased services to an unlimited and new population of students.

The Circuit Court further found that the evidence in the instant case conclusively established that the new mandates in the 1993 version **"did not include any State funding."** ***Appendix, at A-11.*** The Court also noted the State failed to provide any funding whatsoever to cover the School District of Clayton's increased capital and operational expenditures necessary to educate the anticipated number of transfer students as detailed in the report of E. Terrance Jones (referred to as the "Jones Report.") ***Appendix, at A- 4, A-11 – A-13.*** The CSD Members are particularly concerned by the findings of the Jones Report, which found that multiple CSD Members could receive a substantial influx of students via transfer from the St. Louis Public Schools.[3] ***Id., at A-4 – A-5.*** To accommodate this influx, receiving CSD Members would be required to engage in substantial long-range planning and make considerable expenditures,

[3] As mentioned above, presently both the Normandy School District and Riverview Gardens School District are unaccredited. ***Appendix, at A-21.*** The Jones Report did not take into account the possible transfers from the more than 10,000 students who are enrolled in those districts.

including, but not limited to, making capital improvements, hiring large numbers of teachers and other staff, as well as purchasing additional equipment and supplies. ***Appendix, at* A-*21.*** Moreover, sending CSD Members would also face increased costs, in the form of tuition and transportation expenses. ***Id.*** CSD Members are not aware of any state appropriation to cover those new or increased activities and services. ***Id.***

Given that the increased costs associated with new demands on affected districts are not funded by the State, CSD Members strongly urge this Court to affirm the Circuit Court's finding that § 167.131 violates the Hancock Amendment.

II. The Circuit Court Correctly Held that Compliance with §167.131 is Impossible.

Missouri law provides that "if a statute is such that it is 'impossible to comply with its provisions, it will be held to be of no force and effect.'" ***George v. Quincy, Omaha & K.C. R. Co.***, 167 S.W. 153, 156 (Mo. Ct. App. 1914); ***see also Egenreither v. Carter***, 23 S.W.3d 641, 646 (Mo. Ct. App. 2000) (holding that "impossibility of compliance may constitute [a] valid excuse[ ] for non-compliance with a statute").

In the case at bar, the Circuit Court correctly held that the evidence at trial demonstrated that it would be impossible for the School District of Clayton and SLPS to comply with § 167.131. Indeed, the Circuit Court noted that the anticipated transportation costs alone ($223,790,964.16) would decimate the finances of the St. Louis Public Schools. ***Appendix, at A-13 – A-14.*** Further, the Circuit Court noted that the State's own witness, former superintendent Dr. Roger Dorson, testified "that in his experience a district would be unable to provide an adequate education to two-thirds of its existing student body after losing 80% of its operating budget." ***Appendix, at A-7.***

The Circuit Court noted witness testimony of the "dire consequences" that would result from an attempt to implement § 167.131 and concluded that enforcement of the statute would "overwhelm area school resources to the extent of adversely impacting local districts." ***Appendix, at A-14.***

Similarly, it is very likely that significant influxes of children both in and out of other CSD Members would have the same result. For example, as noted above, two CSD Member districts are currently unaccredited, the Riverview Gardens School District and the Normandy School District. ***Appendix, at A-21.*** The combined enrollment of these two districts exceeds ten thousand (10,000) students.[4] ***Id.*** If this Court upholds the statute, resulting in transfers from unaccredited districts, the CSD Members could find themselves in a position of undertaking significant capital improvements, hiring teachers and staff, and accommodating unlimited numbers of transferring students. As with SLPS, the unaccredited districts face the prospect of overwhelming tuition payments and transportation costs. The students currently enrolled in receiving districts would face decreased opportunities as their districts grappled with the unlimited influx of students, with none of the benefits of long-term planning or any state appropriated funding. ***Appendix, at A-23.*** Significantly, the students who were able to transfer to a receiving district would face uncertainty and disruption, as they would have no control and no way

[4] This number only includes children who are enrolled in both districts. This number does not include school-aged children residing within the boundaries of those districts who attend private schools.

of knowing how long they would remain at the receiving district.[5] ***Id.*** The students who remain in the sending (unaccredited) districts would encounter diminished resources as those districts likely would struggle to pay overwhelming tuition and transportation costs. ***Appendix, at A-22.***

When unaccredited districts' statuses change, transferring students would be sent back to the sending districts upon reaccreditation. The sudden departure of those students could, in turn, leave receiving districts with empty buildings and an oversupply of staff, resulting in significant layoffs and financial hardship to the taxpayers of the receiving districts. ***Appendix, at A-22.*** Certainly, these ramifications underscore the impossibility of compliance with the statute. Accordingly, the Circuit Court correctly held that the statute has no force and effect.

III. This Matter is Not Rendered Moot by the Recent Provisional Accreditation of the St. Louis Public Schools.

On or about October 16, 2012, the Missouri State Board of Education reclassified the St. Louis Public School District as "provisionally accredited." Rather than render this matter moot, the provisional accreditation of SLPS instead illustrates the heavy burden and utter turmoil that compliance with §167.131 would cause both Respondents and the other CSD Members. As described below, SLPS's accreditation status remains in jeopardy, in part because of the State's implementation of new State accountability

[5] By contrast, students participating in the VICC program have guaranteed placement at receiving districts through graduation.

standards. All Missouri school districts are subject to the Missouri School Improvement Program ("MSIP"), which is the State's school accountability system for reviewing and accrediting public school districts in Missouri. ***Appendix, at A-21.*** MSIP began in 1990 and entered its 5th version ("MSIP 5") at the start of the 2012-2013 school year. ***Id.*** There is no dispute that the MSIP 5 standards are more rigorous than all of the prior standards. ***Id.*** Each new cycle of MSIP requires that districts demonstrate compliance with increased standards and measures in order to achieve or maintain accreditation. ***Appendix, at A-22.***

SLPS's recent provisional accreditation was based on the comparatively more lenient requirements and standards of MSIP 4. ***Appendix, at A-17.*** In her October 16, 2012 remarks regarding SLPS's provisional accreditation, Missouri Commissioner of Education Chris L. Nicastro commented on SLPS's uphill battle to maintain its provisional accreditation under MSIP 5's heightened standards. ***Id.*** In cautioning that the "celebration" over the provisional accreditation should be "brief and realistic," Dr. Nicastro made note of the "difficult" path forward for SLPS. ***Appendix, at A-18.*** Dr. Nicastro was also careful to remind observers that SLPS will be reviewed under the requirements of MSIP 5 in September 2013. ***Id.***

With the new and tougher MSIP 5 standards, SLPS and other districts may swing back and forth between unaccredited status and provisionally accredited status in the coming years. If the Court does not render a decision in the present case, it is likely that the issues presented herein will continue to evade review by this Court. As the experience of SLPS demonstrates, it is possible for district accreditation to change from

year-to-year before litigation in such matters reaches this Court's review. Accordingly, this case is not moot, and the Court's review is both appropriate and necessary. ***See., e.g., State ex rel. Mo. Pub. Defender Comm'n v. Waters***, 370 S.W.3d 592, 603 (Mo. banc. 2012).

## CONCLUSION

The issues in this case are not merely academic, as the importance of this Court's decision cannot be overstated. As the Circuit Court noted, a decision to uphold § 167.131 would have dire, very real negative consequences for the operation of public education in Missouri. Accordingly, *Amicus Curiae*, the Cooperating School Districts of Greater St. Louis, joins Respondents in urging this Court to uphold and affirm the Order and Judgment entered by the Circuit Court on May 1, 2012, finding Mo. Rev. Stat. § 167.131 unconstitutional and unenforceable.

Respectfully submitted,

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## CERTIFICATE OF SERVICE AND COMPLIANCE

The undersigned hereby certifies that the foregoing Brief of *Amicus Curiae* was filed via the Court's electronic notification system on January 16, 2013, upon the following parties of record:

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The undersigned further certifies that the Brief of *Amicus Curiae* complies with the limitations contained in Missouri Supreme Court Rule 84.06(b) and, according to the word count feature on Microsoft Word, contains 2,907 words, exclusive of the cover, Certificate of Service, Certificate of Compliance, and the signature block.

/s/ Melanie Gurley Keeney