IN THE SUPREME COURT OF MISSOURI

No. SC92653

GINA BREITENFELD,
Appellant,

v.

SCHOOL DISTRICT OF CLAYTON, et al.,
Respondents,

v.

STATE OF MISSOURI, et al.,
Appellants

ON APPEAL FROM THE CIRCUIT COURT OF
THE COUNTY OF ST. LOUIS, STATE OF MISSOURI
Cause Nos. 12SL-CC00411, 07SL-CC00605

HONORABLE DAVID LEE VINCENT, III

BRIEF OF RESPONDENTS SCHOOL DISTRICT OF CLAYTON AND CLAYTON TAXPAYERS

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JURISDICTIONAL STATEMENT

This appeal involves the validity of R.S.Mo. §167.131, which the judgment below held to be unenforceable as applied to the St. Louis Public Schools ("SLPS")[1] and School District of Clayton ("Clayton"). This Court has exclusive jurisdiction pursuant to Article V, §3 of the Missouri Constitution.

[1] SLPS refers collectively to the Board of Education of the City of St. Louis and the Transitional School District of the City of St. Louis. The Special Administrative Board of the Transitional School District is the governing body of SLPS.

STATEMENT OF FACTS

I. History and procedural course of this action

A. Background – R.S.Mo. §167.131, as amended in 1993; SLPS's loss of accreditation; the State's guidance to St. Louis County school districts and Clayton's decision not to enroll §167.131 transfer students

This action concerns R.S.Mo. §167.131. That statute, as substantially amended by the legislature in 1993, provides that "each pupil resident" in an unaccredited school district "shall be free to attend the public school of his or her choice" in "the same or an adjoining county," and that the district of residence will pay a statutorily-defined tuition amount, based on the chosen district's "per pupil costs," for each student who transfers.

In 2007, SLPS lost its accreditation. *Turner v. School District of Clayton*, 318 S.W.3d 660, 662-663 (Mo.banc 2010). Prior to that district's loss of accreditation, Clayton and the other St. Louis County school districts received a letter dated April 24, 2007 from the State's Department of Elementary and Secondary Education (DESE), signed by the Commissioner of Education, which stated in part as follows:

> As you know, the St. Louis Public School District will be classified as unaccredited on June 15, 2007; and the district will be administered by a new three-member transitional board.
>
> You have probably already been contacted by parents of students who live in the St. Louis Public School District to request transfer of their children to your district.

> I am hopeful that you will consider addressing these requests through the existing transfer program operated under the Voluntary Interdistrict Choice Corporation (VICC).[2] Currently, VICC oversees more than 8,000 student transfers and has provided significant support for students and parents in the St. Louis area. . . .
>
> The wise choice appears to be to work through VICC on this issue rather than each district acting independently on the transfer requests.

Ex. D42; LF610; *see also* LF288, ¶3.[3] The State's guidance to St. Louis County school districts was consistent with its longstanding, historical, and publicly stated position that

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[2] VICC is the entity which operates and administers the voluntary City-to-County student transfer program that resulted from the settlement of the St. Louis school desegregation case, and exists in its current form pursuant to the 1999 Settlement Agreement approved by the federal court. Tr.303:22-304:19; LF683.

[3] *See also* Deposition of Roger Dorson, Ed.D ("Dorson depo.") 129:1-130:5. Dr. Dorson gave deposition testimony as the State's designated deponent pursuant to Rule 57.03(b)(4) and testified at trial as the State's only witness. In order to reduce the need for a lengthy cross-examination at trial, the parties agreed to admit Dr. Dorson's deposition into evidence, and statements therein are admissions of a party opponent (the State). Tr.538:2-539:19. The State reserved the right at trial to review the transcript and submit substantive objections after trial (*id.*), but did not submit any such objections.

"[a]ccredited districts . . . have the authority to accept or reject non-resident students based on their own policies and on their capacity" and "cannot be compelled to accept students." Exs.D43 (summarizing DESE's "[h]istorical[]" position), D52; *see also* Exs.D47, D48, D50; Dorson depo. 130:6-25, 133:7-124:3, 136:15-137:1.

Consistent with the State's recommendation in the April 24, 2007 letter, Clayton determined that it would not participate in the transfer of students from SLPS resulting from the unaccredited status of that district. In addition to being based on advice from the State, Clayton's decision was based on its own problematic past experience with §167.131 transfers from the Wellston School District, concerns about the existing City-to-County student transfer program (VICC), concerns about the provision of services for students with disabilities, and SLPS's stated position that it could not and would not pay for such transfers. Tr.170:1-171:16, 172:23-174:6.

B. Filing of this action, first trial court proceedings, and summary judgment

On October 26, 2007, plaintiff Gina Breitenfeld and three other plaintiffs filed this action seeking to require Clayton to bill SLPS for tuition and SLPS to pay that tuition. LF569-74. Plaintiffs were parents of six City-resident children all of whom were attending Clayton pursuant to tuition contracts. LF571 ¶¶1,6,7. Plaintiffs' initial petition sought a declaration that Clayton was required to admit plaintiffs' children, but in an amended petition plaintiffs removed that prayer for relief because plaintiffs' children were already "attend[ing]" Clayton schools. LF714.

Before filing an answer, as their first responsive pleadings, defendants moved to dismiss and for summary judgment, arguing that §167.131 did not apply to SLPS for

multiple reasons including that district's history and participation in the ongoing desegregation transfer program. LF29-31, 289-468. Clayton also argued that the statute did not apply to contract tuition students such as plaintiffs'. LF649-52.

Defendants' threshold motions were granted by the trial court, Judge David Lee Vincent, III. The Missouri Court of Appeals, Eastern District (cause no. ED92226), affirmed the judgment and transferred the case to this Court.

C. This Court's opinion in *Turner v. School District of Clayton*; post-disposition proceedings in this Court; remand and mandate

In a July 16, 2010 opinion, this Court rejected defendants' arguments that §167.131 did not apply to SLPS. *Turner*, 318 S.W.3d at 663. Section 167.131, the Court held, is a "straightforward and unambiguous statute" and a "plain reading . . . demonstrates that it applies to [SLPS]." *Id*. at 662, 664. The Court further held that Clayton and other receiving districts lack discretion regarding whether and how many students to enroll under the statute, again holding that the statutory language was "clear." *Id*. at 668-669. In doing so, the Court rejected the State's interpretation and guidance that the statute was discretionary as to receiving districts. *Id*. "[T]his Court need not look to the Department of Elementary and Secondary Education's interpretation of §167.131 . . . Courts do not look to agency interpretations when a statute is unambiguous." *Id*. at 669 n.9. Finally, the Court held that plaintiff parents who had signed tuition contracts were bound by those tuition contracts. *Id*. at 669-670. Although plaintiffs had cross-moved for summary judgment and on appeal requested that the Court direct that a judgment be entered in their

favor, the Court did not direct such a judgment, and instead, ordered the case remanded for further proceedings. *Id*. at 670.

Two of the Court's three holdings – that the statute applies to SLPS and that the tuition contracts were binding – were unanimous. *Id*. at 670 (Breckenridge, J., concurring in these holdings). The remaining holding, regarding receiving districts' lack of discretion over enrollment, divided the Court 4-3. *Id*. The majority held, as noted, that the statute, by clear language, imposed a mandatory obligation on receiving districts. *Id*. at 668-669. Judges Breckenridge, Stith and Russell, dissenting on this issue, stated that the majority's interpretation "would mean there is no limit to the potential influx of pupils that Clayton or any other school district in St. Louis County could face" and that "school districts in St. Louis County would be required to accept pupils from the transitional school district even if the number of pupils seeking admittance exceeded their capacity or if St. Louis County school districts have difficulty collecting tuition payments from the transitional school district." *Id*. at 675. The dissenting judges cited census statistics to show that if even 3% of school-age children living in the City of St. Louis applied for enrollment at Clayton, "the district would be required to accept all of those students, despite the fact that it would cause nearly a 100-percent increase in its enrollment. Such an increase would require the Clayton school district, virtually overnight, to acquire new classroom buildings and hire numerous additional faculty members to meet the increased demands on the district. Such a result is absurd." *Id*.

Following the Court's decision, both defendants moved for rehearing. Defendants pointed out that, although the issue was not yet ripe for determination, the Court's

interpretation of §167.131 would result in an unfunded mandate in violation of the Hancock Amendment, Article X, §§16-21 of the Missouri Constitution ("Hancock"). *See* July 30, 2010, City District's Motion for Post-Disposition Rehearing or, in the Alternative, Motion to Modify, in case SC90236, p.12 n.8; July 30, 2010, School District of Clayton's Post-Disposition Motions for Rehearing or, Alternatively, to Modify, in case SC90236, p.15.

Defendants' motions for rehearing were joined by numerous *amicus curiae*, including the State on behalf of DESE. The State, as *amicus*, argued that the Court's holding would "dramatically change the way students are enrolled in Missouri public schools"[4] and would require Clayton and other surrounding districts to "accommodate every high school student who chooses to come from St. Louis, Riverview Gardens, or any other school district in St. Louis or an adjacent county that loses accreditation or decides not to operate its own high school" (p.5). This change goes "well beyond even legislative proposals for open enrollment" (p.6). The Missouri School Boards' Association pointed out that the Court's holding would "lead to overcrowding and lack of resources for all students" (p.1). In their separate *amici* brief, dozens of individual school districts, through the Cooperating School Districts of Greater St. Louis, explained that

[4] All *amicus* briefs, including the State's, were filed on July 30, 2010 in SC90326, and the Court may take judicial notice thereof. In addition, the State's *amicus* brief was made part of the record below as part of the agreed-upon submission of the Dorson deposition into evidence at trial. Ex.D11; Dorson depo. 89:22-90:1; *see also* p.3 n.3, above.

plaintiffs' position would result in them "facing a potential budgetary and operational crisis" (p.4).

While defendants' motions for rehearing were pending, plaintiffs filed a new circuit court proceeding[5] seeking an immediate writ of mandamus based on this Court's still non-final opinion. Relief was denied in the trial court, and plaintiffs challenged that decision by means of both a petition for writ of prohibition and a simultaneous motion for temporary restraining order, both filed in this Court (*see* August 19, 2010 Appellants' Motion for Temporary Restraining Order and Further Injunctive Relief in SC90236; Relators' Petition for Writ of Mandamus in SC91127). On August 24, 2010, plaintiffs' writ petition and all pending motions (including plaintiffs' motion for temporary restraining order and defendants' motions for rehearing) were denied by this Court, and the case was remanded to the circuit court for "further proceedings" and "resolution of all issues." August 24, 2010 Orders in cases SC90236 and SC91127.

D. Proceedings after remand; intervention of the State and taxpayers

In the circuit court on remand, plaintiffs sought immediate judgment in their favor, without consideration of any defenses the school districts might have, and filed a motion "for entry of declaratory judgment." LF750-752. Defendants argued that the proper next step, based on this Court's mandate for "further proceedings" and "resolution of all issues," was to follow ordinary litigation procedures. Since this Court's opinion effectively resulted in the denial of defendants' threshold motions to dismiss, those

[5] St. Louis County Circuit Court cause no. 10SL-CC03143.

procedures now called for defendants to file their answers, which had not previously been due or filed. *See* LF861-865, 866-882. The answers filed by Clayton and SLPS asserted defenses based on plaintiffs' tuition contracts, the Hancock Amendment, and impossibility of compliance with §167.131. *Id*. Before deciding whether defendants were entitled to raise these defenses or whether plaintiffs' motion for immediate judgment should be granted, Judge Vincent requested that the parties prepare briefs discussing the law of remand and appellate mandates. LF902-931, 932-940. After considering the arguments of the parties, and in particular this Court's directive that there be "further proceedings" and "resolution of all issues," Judge Vincent held that defendants were entitled to file answers and raise defenses, and denied plaintiffs' motion. LF 963-967.

In a series of appellate writ proceedings, first in this Court (SC9127), then in the Missouri Court of Appeals, Eastern District (ED95975), then again in this Court (SC91416), plaintiffs challenged Judge Vincent's ruling that defendants were entitled to raise defenses. All plaintiffs' writ petitions were denied, and the parties therefore took up the question of scheduling in a conference before Judge Vincent on February 22, 2011. *See* LF1037. At that conference, plaintiffs proposed that litigation proceed on a reduced basis until May 31, 2011 (the end of the legislative session), and the parties ultimately agreed to permit limited discovery and otherwise continue the case to that date, which Judge Vincent approved and so ordered. *Id*. Plaintiffs also proposed, and the parties agreed, to notify the Attorney General of the Hancock challenge to §167.131. *Id*. The Attorney General entered his appearance on April 19, 2011.

Although the legislature considered a number of amendments to §167.131 in the spring of 2011 (so-called "*Turner* fixes"),[6] none were enacted. At a May 31, 2011 status conference, the matter was set for trial. At the next scheduled appearance before Judge Vincent, Clayton and SLPS taxpayers sought and were granted leave to intervene in the case.[7] SLPS and its taxpayer and Clayton and its taxpayers filed petitions against both plaintiffs and the State seeking declaratory judgment that §167.131 was unenforceable under the Hancock Amendment and because of impossibility of compliance. LF1142-1149.

Throughout this lengthy litigation process, Clayton took care to make sure that the dispute between adults did not interfere with the ongoing education of plaintiffs' children. Clayton maintained the *status quo* for those children, and the record shows that some of the original plaintiffs' children graduated from Clayton's high school while the case was pending. Tr.179:5-10; LF1302-1308.[8] With respect to Breitenfeld, who

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[6] *See* Dorson depo. 59:13-60:15, 82:14-85:7; Exs. D17, D20, D21 (State fiscal notes regarding proposed legislative amendments to §167.131).

[7] The intervening Clayton taxpayers were Jan Abrams, Judy L. Glik and Elizabeth L. Wack ("Clayton Taxpayers"), and their standing was stipulated at trial. LF1623

[8] Before trial the particular plaintiff parents involved in the case changed multiple times. At the time of trial, the sole remaining plaintiff was appellant Gina Breitenfeld. In the course of these changes, Breitenfeld also filed a separate petition (St. Louis County

enrolled children in Clayton in 2009 based on a sworn affidavit claiming residency in Clayton, then later admitted, contrary to that affidavit, that she resides in the City of St. Louis and asserted a right to enroll pursuant to §167.131, maintaining the *status quo* meant that her children have attended Clayton schools for multiple years without any funding mechanism (*see* Statement of Facts IV, below, discussing Breitenfeld). In addition to Clayton and Clayton Taxpayers' primary claims in this case, which challenge the enforceability of §167.131, Clayton also asserted claims in its petition below seeking tuition payment from the parties that might potentially be responsible for such payment – namely, SLPS (who would be obligated to pay tuition pursuant to §167.131 were that statute enforceable) and Breitenfeld (who would be responsible for such payments if §167.131 is not enforceable). LF871-873.

Following joinder of all parties and claims,[9] and after several months of discovery disputes (ultimately necessitating a court order requiring the State to fully answer discovery; LF1517-1520), the case proceeded to a bench trial on March 5, 2012. Testimony was heard over three days. After-trial briefing was completed, proposed findings of fact and conclusions of law were submitted, and the case was taken under

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Circuit Court cause no. 12SL-CC00411) which was consolidated with the original action and is thus also the subject of this appeal.

[9] The Special School District of St. Louis County ("SSD") also intervened in the action but its claims and defenses were resolved by unopposed motion for judgment on the pleadings just prior to trial. LF1521-1532.

submission on April 10, 2010. Judge Vincent's Findings of Fact, Conclusions of Law, Order of Judgment were entered on May 1, 2010.

II. Findings of fact, conclusions of law, and judgments below

Judge Vincent found and concluded in part as follows:

> After the St. Louis public school district lost its accreditation in 2007, §167.131 RSMo (2000) mandated that Clayton school district shall admit City of St. Louis resident students and the transitional school district of the City of St. Louis (transitional school district) shall pay for students' tuition. . . . This mandate, however, did not include State funding.

LF1848. Section 167.131, the trial court concluded, "created new and increased activity or service for school districts over and above what was required in 1980 . . .." LF1858. Judge Vincent identified at least the following unfunded costs as a result of this mandate. As to SLPS:

> [T]he expense of paying for the transferring students would be $223,790,964.16 per year. Out of this total amount, the St. Louis public school district would have to pay $40,057.38 per year for Breitenfeld's children's enrollment in the Clayton schools. Along with un-reimbursable costs of bus transportation estimated between $25.6 million to $38.4 million, the total cost of §167.131 transfers can go as high as $262 million.

LF1852. As to Clayton:

> The district's costs for textbooks and supplies for each student range from $285 to $650. The average annual cost of hiring an additional teacher is $88,000 and a teaching intern is $35,000.
>
> * * *
>
> Also, without state funding or additional support, the Clayton school district could not finance the $135 million capital expenditures required by §167.131 RSMo (2000) . . .

LF1853-1860. And the court further noted that:

> Breitenfeld's children . . . currently attend an elementary school and a middle school in the Clayton schools. They never attended the St. Louis public schools and the transitional school district receives no funding from the State for their education. Breitenfeld's children have attended Clayton schools for the 2009-2010, 2010-2011, and 2011-2012 school years.

LF1849.

Judge Vincent also summarized the trial evidence and made the following findings regarding the number of transfers projected to occur for the 2012-2013 school year, pursuant to §167.131:

> During the trial, [expert witness E. Terrance Jones, Ph.D.] testified that approximately 15,740 St. Louis City resident students would transfer this coming fall from their current school to a school in St. Louis County if given the opportunity under §167.131 RSMo

> (2000), with 8,318 students coming from the St. Louis public schools. . . . Jones estimated that 3,567 would transfer to the Clayton school district[.].

LF1850. As additional support for these projections, Judge Vincent noted the testimony of Kelvin Adams, Ph.D., Superintendent of SLPS, that "there are some 6,000 to 7,000 transfer applications each year for magnet schools, and that the culture of applying to County schools for transfer is also well established as a result of the VICC transfer program." LF1852. He further found that Dr. Jones' report was the only information available for school district administrators to use in their planning. LF1851.

Judge Vincent also found, based on the trial evidence, that in multiple respects compliance with the statute was impossible. The decision states that "[t]ransitional planning for the student transfers under §167.131 RSMo (2000) may be virtually impossible" and that "school districts experiencing rapid growth in student enrollment generally have years of advanced planning to adequately accommodate increased enrollment." LF1851. Furthermore, illustrating impossibility as to SLPS, Judge Vincent found:

> The annual tuition cost of $223,790,964.16 along with transportation costs, would likely consume over 77% of St. Louis public school district's operating budget, leaving the district without a sufficient budget to properly educate the remaining students. As indicated, by Dr. Adams' testimony, the St. Louis public schools would cease to exist in any meaningful sense.

LF1859-1860. And, based on the testimony of Clayton's Superintendent, Sharmon Wilkinson, Ed.D., as to Clayton:

> The Clayton school district lacks the ability to plan in advance to accommodate these transfers, lacks the financial mechanisms needed to fund construction that would be required, and does not have land available that it could use to build the required buildings. The tuition payments chargeable under §167.131 RSMo (2000) would not be enough to finance such a project.

LF1860.

Based on these findings and conclusions and the evidence at trial, Judge Vincent held and entered judgment declaring that:

> §167.131 R.S.Mo. (2000) is unconstitutional and unenforceable as to transitional school district, St. Louis public school district and Clayton school district because it violates the unfunded mandate prohibition contained in the Hancock Amendment, Mo. Con. Art. X, §§16, 21 and, alternatively to this constitutional violation, because compliance is impossible, and said statute shall not be enforced against transitional school district, St. Louis public school district or Clayton school district.

LF1862.

In addition to this primary judgment, the trial court also entered two other judgments that are at issue in this appeal. First, the court entered judgment in Clayton's

favor on its counterclaim for tuition owed by Breitenfeld, in the amount of $49,133.33. Second, in a later and separate judgment, the court awarded Clayton Taxpayers and SLPS Taxpayer attorneys' fees and costs incurred in pursuing the Hancock claims. LF1880-1881. That second judgment awarded SLPS Taxpayer $258,951.50 for fees and costs and Clayton Taxpayers $291,477.32 for fees and costs. *Id*.

III. Substantial evidence supporting the judgments

A. Evidence showing a violation of the Hancock Amendment

1. No state funding for §167.131 transfer students

One pivotal item of testimony, not mentioned anywhere in the brief of either appellant, was the State's candid admission at trial that it is aware of no legal basis for State funding of §167.131 transfer students.[10] The relevant testimony came from the State's only witness, Roger Dorson, Ed.D, Director of Finance for DESE. Dr. Dorson testified that any funding would need to come through the State's so-called "foundation formula" for school funding. Tr.544:14-24; *see also* Ex.D6 State response to Clayton request for admission 1 (admitting that there was no funding for §167.131 except to the

[10] The State, in its brief, admits that there is no "line item" appropriation to fund the education of §167.131 transfer students, but suggests there is a basis for funding somehow in the foundation formula. Based on the State's own admissions at trial (discussed in the text above) and as a matter of law (discussed below in Argument I.A.1), that is not correct. There is no basis for funding *either* in the foundation formula *or* in a separate line item appropriation.

extent it is funded through the foundation formula). The foundation formula is set forth in state statutes, and it is DESE's obligation to comply with the statutes in distributing funds. Tr.544:25-545:2. The statutes provide that funds are distributed based on "weighted average daily attendance" ("WADA"). Tr.545:21-24. In order to be included in "weighted average daily attendance," a student must fit the statutory definition of a "resident pupil" in §163.011(2). Dorson depo. 42:2-43:5. According to that definition, a resident pupil must both "reside in" and "attend" the school district that is to receive funds. Tr.547:23-548:8 (Dr. Dorson: "that is very clear to me"); Dorson depo. 43:22-44:12. Students transferring under §167.131 do not fit that definition, and cannot be counted for foundation formula purposes. Tr.548:17-23.[11]

As noted in the State's brief, Dr. Dorson did testify that a computer program managed by DESE (DESE's "Core Data" computer system) contains a data field in which data regarding §167.131 transfer students could be entered, leading, according to the State, to those students being counted in WADA. State br. 21 (summarizing that testimony). Dr. Dorson testified that he does not know whether this computer program was meant to be based on Missouri statutes. Tr.549:6-9; 536:20 (explaining that program was here "before I came to DESE"). He cannot explain how this computer program data

[11] As discussed below in Argument I.A.1 (p.64 n.30) there are specific statutory exceptions that allow for students attending a district other than their district of residence (e.g., teachers' children, VICC transfer students, etc.) to be counted, but none of those exceptions apply to §167.131 transfer students.

field can exist if it is contrary to his understanding of what Missouri statutes provide. Tr.549:10-15; Dorson depo. 53:23-54:3. It is Dr. Dorson's understanding that official administrative approval of this program would require approval by the State Board of Education, but he testified there was no rule-making by either DESE or the State Board of Education that approved the Core Data program. Dorson depo. 56:7-15; Tr.560:19-25.

As previously noted, Dr. Dorson was the State's designated deponent and only witness in this action, and his testimony and admissions were on behalf of the State. Tr.549:16-25; Dorson depo. 8:2-6.

2. New activities or services or increases in the level of activities or services required of school districts by §167.131

The State admits in its brief that "[t]here is no dispute that the statute requires a 'new activity or service' of the Clayton district." State br. 42. "Before, that district could choose whether to accept transfer students. Afterwards, it was required to do so . . .." *Id.* The State's admissions and other testimony at trial clarify the nature and extent of this undisputed and admitted new mandate. First, to state what may be obvious, "Clayton would have the same obligation [to §167.131 transfer students that it] did to any other student in the Clayton School District." Dorson depo. 70:19-71:6. That means providing "instruction" and otherwise providing the "same kinds of activities with respect to non-resident transfer students as it would to its own resident students." Dorson depo. 72:7-12, 71:1-18; Tr.180:7-15. In terms of admission, that means (after verifying that residency requirements have been met) promptly enrolling the student, even if the student shows up in the middle of a semester. Tr.164:6-11; Dorson depo. 115:21-24. The State admits that

there are no parameters for refusing to admit a transferring student, and that, based on the statute, 50,000 students could transfer to Clayton immediately. Dorson depo. 117:7-118:2. And the State also admits that Clayton has an obligation to plan and prepare for such an eventuality. Dorson depo. 118:3-6. But the State further admits it has no advice or guidance regarding how to plan or prepare for compliance with §167.131's mandate. Dorson depo. 115:14-116:8.

3. Evidence of increased costs to Clayton

Clayton adduced substantial evidence showing the costs that have been and would be incurred in complying with §167.131. For analytical purposes, the cost evidence adduced below may be divided into costs already incurred by Clayton while this lawsuit has been pending, and projected costs were Clayton required to fully comply with the statutory mandate described in the preceding section.

a. Costs already incurred by Clayton

i. Actual costs incurred for plaintiff's children

Clayton's fundamental mandate is to "instruct[]" students, and the State admits that "it costs something to instruct a student." Ex.D6; Dorson depo. 71:7-12, 70:1-18; Tr.180:7-15. According to Dr. Dorson, the cost of that mandate (the "actual cost of providing all State-mandated education services") is best indicated by the district's "current operating expenditures per ADA." Dorson depo. 110:15-112:4. "[C]urrent operating expenditure per ADA" is a number calculated by the State (DESE) based on school districts' financial reporting. *Id.*; Tr.295:15-25. According to this method of calculation, Clayton's actual cost of providing all State-mandated education services is

$18,065.88 per student.[12] Ex.D34 (last page); Dorson depo. 110:15-112:4; Tr.297:6-9. At the time of trial, Breitenfeld had two children attending Clayton schools. Tr.179:19-22. Based on the method of calculation specified and admitted by the State and Dr. Dorson, therefore, Clayton's costs for education of Breitenfeld's two children for the 2011-2012 year are $36,131.76.

A similar, but slightly more precise and complete, calculation of "actual cost" was submitted at trial based on the "per pupil cost" formula contained in §167.131 itself. §167.131.2. That formula defines the components of the "per pupil cost of maintaining the district's grade level grouping which includes the school attended" as follows: "all amounts spent for teachers' wages, incidental purposes, debt service, maintenance and replacements." *Id*. This calculation is similar to the State's "current expenditure per ADA" calculation, except that it includes additional amounts for "debt service" (payments towards interest and principal on bonded indebtedness).[13] In this sense, because the statute both imposes mandates and contains a formula for calculating the per

[12] This amount based on "operating" expenditures does not include capital costs. The full cost of compliance, based on projected enrollment and including capital costs, is discussed below. *See* Statement of Facts III.A.3.b.

[13] Again, the §167.131 formula calculation does not include new capital expenditures unless they are funded through bonded indebtedness (Dorson depo. 73:8-74:22), a fact that becomes significant when one considers the realities of admitting a large number of new students. *See* Statement of Facts III.B.2, below.

pupil cost of fulfilling those mandates, §167.131 is a statute that specifies its own costs of compliance. Dorson depo. 114:4-8. Based on this statutory formula (and DESE's guidance and interpretation of that formula) Clayton's district-wide average per-pupil cost of compliance with §167.131 is $20,252.67. The costs for Breitenfeld's children alone (one at Wydown Middle School and one at Glenridge Elementary School), incurred just during the single 2011-2012 school year, are $40,057.38. Tr.382:9-20; Ex.C12.

These amounts – the $36,131.76 for "actual cost of providing all State-mandated education services" according to the State and the $40,057.38 calculated according the §167.131's own formula – show Clayton's incurred costs for Breitenfeld's two children alone.[14]

ii. Greater than *de minimis* costs for school supplies and books alone

The evidence at trial showed that, setting aside teachers, buildings, administrative costs, and other expenses that are incurred as part of school operations, there are direct costs, for supplies and school books, attributable to the education of even a single

[14] As this section and the section just below regarding books and supply costs show, the State's assertion that "the Clayton district made no effort to calculate the cost of smaller number of students from St. Louis enrolling" is incorrect. State br. 19. Costs for even a single student were established by substantial evidence including the State's own admissions.

student.[15] The testimony of Clayton's Chief Financial Officer, Mary Jo Gruber, established those costs to be at least $285 for each elementary school student, $440 for each middle school student, and about $650 for each high school student. Tr.273:3-15.

Taking Breitenfeld's two children alone, and considering only the two full years at issue at trial (2010-2011 through 2011-2012), these undisputed amounts incurred for books and school supplies amounted to $1,295.[16] Further, the record shows that the six original plaintiffs' children in the case each attended Clayton for at least two years prior

[15] Providing textbooks is part Clayton's fundamental mandate to provide free instruction. Tr.184:3-15. In addition, a Missouri statute specifically requires public school districts to provide free textbooks. Tr.198:7-11; *see also* R.S.Mo. §170.051. Contrary to the State's suggestion (State br. 6), the record is clear that these are costs "attributable to State requirements." The State's suggestion is also legally irrelevant insofar as it relies on the argument that Clayton must disaggregate and show what "proportion" of its program is a pre-existing State mandate. *See* Argument I.B.3, below.

[16] The record shows that Breitenfeld's children attended Glenridge Elementary School and Wydown Middle school at the time of trial (Tr. 179:21-180:1), but does not show where they attended in previous years. Therefore, this calculation uses the lowest supply-cost figure ($285 for elementary) for both children and for both years except for the one year in which the record shows that one child was attending middle school ($440 in supply costs).

to the Court's first decision in this case – for a minimum of an additional $3,420[17] in costs incurred for books and school supplies alone, and a total cost for school supplies and books of $4,715 solely for the actual plaintiffs' children in this case.

b. Projected costs

i. Projections that thousands of students would transfer, and costs based thereon

(1) Dr. Jones' telephone survey results project overall transfer rate of 27.8% (15,740 students) with 6.3% (3,567 students) to Clayton

Expert Credentials

Dr. Jones is a professor of political science and public policy administration at the University of Missouri-St. Louis (UMSL), where he is also Chair of the Department of Political Science. Tr.68:6-15; Ex.C2 p.1 (appx. A22). Dr. Jones has served in academic and administrative positions at UMSL for more than four decades. Tr.69:15-16; Ex.C2 p.1 (appx. A22). His professional training and experience include obtaining a bachelor's degree in economics from St. Louis University, earning a doctorate in political science

[17] As with the previous calculation, this amount conservatively assumes the minimum supply cost of $285 for elementary, even though the record demonstrates that at least some of plaintiffs' children were at the middle or high school levels (*see* LF1302-1303), which would result in greater costs.

from Georgetown University, and completing post-graduate training in survey research at the University of Michigan. Tr.69:7-14.

Dr. Jones' fields of specialization are public opinion, public decision-making, metropolitan governance and planning, public policy and survey research. Tr.69:23-70:2; Ex.C2 p.1 (appx. A22). His expertise includes "measuring how individuals make public decisions." Tr.101:21-22. Much of his work is focused geographically on the State of Missouri and the St. Louis region in particular. Tr.70:3-6. In his fields of study, Dr. Jones has published numerous materials, including books, chapters in edited collections and articles (totaling in excess of 50), prepared dozens of technical reports, authored still more dozens of papers and written more than 80 book reviews, and he has also performed extramural grant-funded research projects and consulting engagements for more than a hundred governmental and other entities. Tr.69:1-6; Ex.C2 pp. 2-15 (appx. A23-A37). The governmental entities for which he has done research and consulting work include many dozens of school districts and municipalities in the St. Louis area, and also the State of Missouri itself. *Id*.; Tr.70:7-20. These governmental entities rely on Dr. Jones' work product in their planning and decision-making. *Id*. Prior to the trial below, Dr. Jones had qualified as an expert witness in other court trials and never failed to qualify as an expert witness in a court trial. Tr.71:2-7.

Overall Methodology

Dr. Jones was engaged by counsel for Clayton and Clayton Taxpayers to project the number of St. Louis City children who would transfer from their current school to Clayton and other St. Louis County school districts for the 2012-2013 school year, with

no charge for tuition, if their parents (or comparable decision-makers) were given that choice. Tr.71:8-72:13,79:20-80:6; Ex.C1 pp.1,3,10 (appx. A9, A11 & A18). Dr. Jones set out to make such projections using multiple corroborating methodologies and data sets because it is standard social science methodology, whenever possible, to see whether you can reach similar conclusions using different methodologies and data sets. Tr.92:1-9. As detailed in his report, Dr. Jones used five separate sources of data to make and corroborate his projections. Ex.C1 p.3 (appx. A11). They included, primarily, a random digit telephone probability survey of City of St. Louis adults who make the enrollment decisions for one or more children who would be attending kindergarten through grade 12 in Fall 2012, but also included: historical data on actual applications for and enrollments in the VICC City-to-County transfer program, supplied by the VICC office; automobile and public transit times generated by the Google web program using other available data; Missouri Achievement Program (MAP) test scores collected by and obtained from the Missouri Department of Elementary and Secondary Education (DESE); and the most recent five-year (2005-2009) American Community Survey (ACS) conducted by the U.S. Census Bureau for the City of St. Louis. Tr.72:23-73:7; Ex.C1 p.3 (appx. A11) & *passim*. The methodology and the process Dr. Jones employed were appropriate and accepted in his fields of study and work engagements. Tr.79:4-7.

Survey Methodology

With respect to the results of Dr. Jones' telephone probability survey, similar information and data are routinely relied upon by school districts and other government entities in their planning and decision-making. Tr.69:23-70:20;78:21-79:19 (Dr. Jones);

465:4-14 (Dr. Adams); 234:1-14 (Dr. Wilkinson). The telephone survey conducted in this case is similar to, but more rigorous than, surveys Dr. Jones has conducted for other governmental entities. Tr.74:11-13, 77:9-15. On Dr. Jones' recommendation, the telephone survey used in this case was one where every landline and cell phone in the City of St. Louis had an opportunity to be selected, which would cover over 97% of the adults in the City of St. Louis. Tr.74:1-10. Including cell phones in the survey is "more rigorous" and more "costly" but it ensures that cell-phone-only households – which, according to the data, now comprise approximately 25% of households locally – will also be eligible for random selection. Tr.74:11-21, 77:13-15. And by using a random digit dialing approach, both listed and unlisted telephone numbers are eligible to be randomly selected. Tr.74:1-10 Dr. Jones used Survey Sampling, Inc., one of the two largest vendors of its kind in the nation, to provide the randomized sample phone number listing. Tr.74:22-75:2.

With input from attorneys on topics to be addressed, and with advice and assistance from another survey researcher, Dr. Rod Wright, Dr. Jones was responsible for the preparation of the survey questionnaire and the wording of the questions. Tr.75:3-14. A copy of the complete questionnaire in written form as prepared by Dr. Jones is contained in the record as State's Ex. C.

The telephonic interviews were conducted from the questionnaire (converted to a computer-screen format) by a professional calling center, Telephone Contact Inc. (TCI). Tr.75:15-76:14; 112:15-113:7. Dr. Jones has used TCI "hundreds of times in my career." Tr.76:12-18. He is very familiar with the credentials of TCI's Supervisor of

Interviewing, who has been doing survey research for over 20 years. Tr.108:8-17. She is responsible for training and monitoring the work of the interviewers. *Id.* During a survey project the Supervisor of Interviewing randomly monitors the telephone interviews, including to ensure that the interviewers do not engage in any dialogue or conversation with the interviewees beyond what is in the questionnaire. Tr.108:25-109:7.

Before the actual telephone interviews begin, dozens of practice interviews are performed to see whether there might be problems with the questionnaire. Tr.75:15-76:18. "We did not find any such problems." *Id.* The actual surveying occurred during October and November of 2011. Ex.C1 p.1 (appx. A9). Dr. Jones monitored the surveying while it was in process. Tr.75:25-76:11; 140:1-4. At one point, when the St. Louis Cardinals started to play in the World Series, almost nobody would respond to the questionnaire, so Dr. Jones made a decision to suspend the survey until the World Series was over. *Id.* During the surveying, Dr. Jones also monitored and analyzed the responses to a question asking for interviewees' zip codes to ensure that the survey was well distributed geographically within the City of St. Louis. Tr.77:2-8.

Analysis of Survey Results

A total of 601 telephonic interviews were completed, representing 1,008 qualifying children (after weighting for landline versus wireless). Tr.76:21-23; Ex.C1 p.3 (appx. A11). This is a "statistically valid sample," which enabled Dr. Jones to project an overall transfer rate of 27.8% such that in Fall 2012 a total of 15,740 (plus or minus 3.6%) K-12 children from the City of St. Louis would transfer from their current school to a public school district in St. Louis County, and that 6.3%, or approximately 3,567, would transfer

to Clayton. Tr.147:7-148:21; Ex.C1 p.1 (appx. A9). A sample of this size allows the use of the "law of large numbers" to derive the error range and the most likely estimate (based on a bell-shaped curve). *Id*. Where, as here, the sampling error is less than plus-or-minus 4%, with a 95% level of confidence that the number is within that range, the results are statistically "significant." *Id*. The 95% confidence level is the standard one used for survey research. *Id*.

The total number of telephone calls was over 10,000, but only a portion (approximately one-third) of the persons answering the phone were qualified for the survey, namely, adults residing in the City who were responsible for the school-choice decisions for one or more children who would enroll in K-12 in Fall 2012. Tr.109:13-111:13. Of the persons so qualified for the survey, 15 to 20 percent actually completed the survey. *Id*. A survey completion rate of 15 to 20 percent is a "very common completion rate now." Tr.152:3-9. "[C]onsiderable research" has been done on whether people who do not respond to surveys would answer the survey questions differently than those who do, and "[t]he research indicates that the answer to that is no." *Id*.

The key question in Dr. Jones' phone survey, asked of the decision-maker for each of up to four school-aged children in the household, was as follows:

> What if starting with Fall 2012 this child would be free to attend the public school of your choice in St. Louis County with no charge for tuition? How likely would you be to enroll this child in the St. Louis County public school of your choice? Would you be almost 100% certain to enroll this child, would the chances be 75%

> or more but less than 100%, would the chances be between 50% and 74%, between 25% and 49%, or would they be less than 25%?

Ex. C1 p.10 (appx. A18).

In making his projections from the responses to this question, Dr. Jones conservatively used the lowest number in each of the percentage-range answer choices. *Id.*; Tr.87:6-88:10. Thus, for those replying that their likelihood of enrolling the child in a County school was "less than 25%" (or that they did not know or refused to answer), Dr. Jones assumed the likelihood of transfer was zero percent; for those replying "between 25% and 49%," he assumed 25%; for "between 50% and 74%," he assumed 50%; and for "75% or more but less than 100%," he assumed 75%. *Id.*; C1 p.10. For a respondent who was "almost 100% certain" to enroll the child in a County school, Dr. Jones testified that he could have used 95% or 100% in making his calculations, but to be conservative he assumed only a 90% likelihood for such respondents. *Id.*;Tr.135:25-136:14. The 90% figure, if anything, erred on the low side. Tr.153:14-15. Using the foregoing assumptions, but before accounting for the responses to two subsequent questions, Dr. Jones computed an estimated overall transfer rate of 49.3%. Ex.C1 p.10 (appx. A18).

The additional two questions, the results of which caused Dr. Jones to reduce the ultimate transfer rate to 27.8%, were as follows:

> What if you were responsible for providing the transportation for this child between your home and the St. Louis County public school? Would that make you more likely or less likely to enroll in

> a St. Louis County public school of your choice-or would it not make much difference either way? (IF MORE/LESS LIKELY) Would it make you a lot (MORE/LESS LIKELY) or somewhat (MORE/LESS LIKELY)?
>
> If the St. Louis Public Schools improve enough to meet the State of Missouri's standards for accreditation, the opportunity to send this child to a public school in St. Louis County would end and you would need to make other arrangements for this child's school the following school year. Does knowing that make you more likely or less likely to enroll this child in a St. Louis County public school of your choice, or would it not make much difference either way? (IF MORE/LESS LIKELY) Would it make you a lot (MORE/LESS LIKELY) or somewhat (MORE/LESS LIKELY)?

State's Ex. C1, pp.10-11 (appx. A18-A19). Here again, Dr. Jones conservatively assumed for any respondent who replied either "somewhat less likely" or "a lot less likely" to either of these questions that there was a zero percent likelihood that the child would be transferred. *Id.* at p.11 (A19). Applying these assumptions to the responses to the above two additional questions, the overall estimated transfer rate dropped to 27.8%. *Id.*

As pointed out by appellants (State br. 15), there was another question in the survey dealing with the City District's lack of accreditation – question No. 14, between the two quoted above – which was as follows:

> Currently the St. Louis Public Schools are not accredited by the State of Missouri. Does knowing that make you more likely or less likely to enroll this child in a St. Louis County Public School of your choice – or would it not make much difference either way? (IF MORE/LESS LIKELY) Would it make you a lot (MORE/LESS LIKELY) or somewhat (MORE/LESS LIKELY)?

Ex. C (Question No. 14). It is true, as Dr. Jones acknowledged on cross-examination, that he did not include information about the responses to this question in his report. Tr.124:6-9. He went on to explain that the frequency distributions of the responses showed that the interviewees, when informed by this question that the City schools were not accredited, responded that they "[we]re 'a lot more likely' or 'somewhat more likely'" to transfer their children to the County. Tr.125:2-15. Including information from these responses in the analysis would have therefore resulted in a higher overall transfer rate. Inclusion of this information – which, as noted, Dr. Jones did not do – would have made "a modest difference, not a major one." Tr.125:6-8. Again, following a conservative approach, Dr. Jones kept the overall transfer rate at 27.8% without any increase otherwise warranted by the responses to question 14.

(2) VICC data independently establishes (and corroborates) overall transfer rate of approximately 30%

Historical data from the VICC office obtained and analyzed by Dr. Jones demonstrated that for a recent four-year period (through the 2009-2010 school year) the

average annual demand to participate in the City-to-County transfer program was 11,069 students, including both enrollees and non-enrolled applicants. Ex.C1 p.12 (appx. A20). Dividing that number by the ACS Census estimate of the overall number of African-American students in St. Louis (the VICC program is limited to such students) in grades one through twelve generates a transfer rate of 33.8%. *Id*. Adjusting this rate to include a proportionate number of kindergarteners (ACS Census data does not count them) gives an ultimate transfer rate of 31.3%, which is very close to the phone survey's projected overall transfer rate of 27.8%. Ex.C1 pp. 1 & 12 (appx. A9 & A20); Tr.90:1-12.

The VICC transfer rate of 31.3% is based on "people actually making a transfer decision," on "actual behavior." Tr.133:16-134:7; *see also* 77:18-21 & 90:1-12. It is "hard data about previous circumstances that are similar to the situation that [the phone survey is] trying to predict in the future." Tr.138:20-139:1. "The VICC experience, where one-third of the eligible African-American parents choose to . . . or to try to transfer, . . . corroborates [the survey]." Tr.136:21-137:7. The actual VICC data "came to a similar result which gives you greater confidence in the telephone survey's finding" and is "important in terms of corroborating results of the telephone survey." Tr.138:12-19.

(3) State's own "Fiscal Note" and trial testimony establishes (and corroborates) overall transfer rate of 25% to 50% as "reasonable"

Pending in the Missouri legislature at the time of trial was House Bill 1740, an omnibus education bill that included proposed so-called "*Turner* fix" provisions.

Tr.557:13-558:5. A "Fiscal Note" was prepared by the Oversight Division of the Committee on Legislative Research for HB 1740. Tr.553:24-554:2; 555:21-23; 557:3-16. The fiscal note for HB 1740 contains estimates of the financial impact of the *Turner*-fix provisions that were based on two express assumptions: one, that "50 percent of the students opt to transfer out of the unaccredited school district," and the other, that "25 percent of the students opted to transfer out of the unaccredited school district." Tr.558:11-559:3. According to the State's witness, Dr. Dorson, these assumptions, used to estimate financial impact of the proposed "*Turner* fix" provisions under both scenarios, were "very important assumption[s] to make, because there's a lot of money involved." Tr.559:22-24.

A fiscal note, Dr. Dorson further explained, provides an estimate of the cost of proposed legislation, based on input from state agencies and other governmental units. Tr.554:17-555:25. "[E]very agency that provides information in [a] Fiscal Note does it to the best of their ability [so] as to try and determine an estimation." Tr.557:3-5. The expectation is that the information provided "in these fiscal notes has a reasonable basis [and has] been carefully thought out so that it can be a basis for [legislative] decision-making regarding a proposed bill." Tr.557:6-12. Dr. Dorson testified that he did not "have any reason to dispute . . . the reasonableness of [the 25% and 50% transfer-rate] assumptions" in the fiscal note for HB 1740. Tr.560:2-6.

Dr. Jones' telephone survey's overall transfer rate of 27.8% and the actual VICC transfer rate of 31.3% are both within the legislative fiscal note's transfer-rate range of 25% to 50%, which the evidence independently showed was "reasonable[]." *Id*.

(4) Other trial evidence corroborates high rates of transfer overall and to Clayton

"Historical Culture" of Student Transfers in St. Louis

Dr. Adams testified that in the City of St. Louis "there is a historical culture that has been built around applying for schools, whether internally [or] externally in the district." Tr.466:23-25. Internally, there are "six to 7,000 applications on a yearly basis for students to transfer within the district to magnet schools." Tr.466:21-23. Externally, "[s]ince, obviously, the advent of the deseg agreement, the City of St. Louis culture is such that persons have to apply on a regular basis for the VICC program." Tr.466:11-14. "[D]ata has been collected over a number of years to indicate that the culture of this city [is] that persons look at schools outside of the district," due to the long-standing VICC program. Tr.466:15-18. As noted above, the average annual demand for VICC transfers exceeds 11,000. Ex.C1 p.12 (appx. A20). Based on the well-established St. Louis culture of student transfers, and even without regard to the telephone survey results, Dr. Adams "consider[ed] Dr. Jones' approximation of 15,000 student transfers to be a reasonable estimation." Tr.466:5-25.

Distance/Travel-Time Analyses

Dr. Jones found that approximately two-thirds of St. Louis city students live less than twenty minutes driving time to the Clayton public schools for their grade level. Ex.C1 p.5 (appx. A13). He determined this based on ACS Census data on the number and grade levels of children in each of 113 census tracts in the City of St. Louis, and calculations of automobile driving times (using the Google travel time program) between

the most central intersection in each census tract and each of the five Clayton school buildings (three elementary, one middle and one high) – for a total of 665 travel time estimates (113 tracts times five buildings). *Id*. p.4 (A12). More specifically, he found, a total of 36,985 City students lived within a 19-minute drive of their appropriate grade level school in Clayton, and 14,618 lived within a 14-minute drive. *Id*. p.5 (A13). Dr. Jones also determined, again from ACS Census data, that over 90% of worker households in the City have at least one vehicle, with over half (53.4%) having two or more vehicles, "making automobile commutes a realistic possibility for most City households." *Id*. p.7 (A15).

Dr. Jones did a similar travel-time analysis for public transit. Ex.C1 pp. 4-5 (appx. A12-A13). He found that about one half of City students (28,153) live within a 59-minute public-transit ride to the appropriate Clayton school, 7,975 live within 44 minutes, and 1,836 live within 29 minutes. *Id*. Dr. Jones further determined – breaking down VICC enrollment data by ACS Census tracts and computing travel times as above – that typical VICC public transit times are either longer than or equal to the maximum times he computed to Clayton schools, "suggesting that public transit travel time up to one hour would not deter parents from using that mode for their children." *Id*. p.6 (A14).

Given that academic factors are important in school choice decisions (*see* next section), Dr. Jones also separately analyzed travel times (for both automobile and public transit, and again from each census tract's centroid) to public schools (at all three grade levels) in St. Louis County districts with high MAP score averages. Ex.C1 pp. 5-6 (appx. A13-A14). As detailed in his report, Dr. Jones found that Clayton, by a large margin,

was geographically the closest high achievement district to the highest number of City census tracts for various combinations of grade levels and modes of transportation. *Id.*

Dr. Jones testified that his foregoing three sets of findings regarding distances and travel-times strongly corroborated the survey-based projection of 3,567 transfers to Clayton as well as the overall projection of 15,740 transfers. Tr.90:13-23; 94:20-96:1; 150:5-10.

MAP Score Analyses

Of the six districts in St. Louis County with the highest student performance – as measured by MAP score results – Clayton was chosen by 22.7% of survey respondents as their first choice, which was nearly twice the rate for the next highest choice, Kirkwood.[18] Ex.C1 pp. 9-11 (appx. A17-A19); Tr.82:23-84:24. As detailed in Dr. Jones' report, applying the 22.7% selection rate for Clayton to the overall transfer rate of 27.8% yields a 6.3% transfer rate to Clayton, which gave the projection of 3,567 transfers to Clayton. *Id*. His report and testimony established that there were multiple data-supported bases both to justify the use of MAP scores as a measure for determining parental school choice and to corroborate the survey's projected transfer rates.

[18] The other four highest achieving districts listed in the survey question were Brentwood, Ladue, Lindbergh and Rockwood. Ex.C1 pp.9-10 (appx. A17-A18). Survey respondents were also given the option to select a district not on the list. *Id*. Respondents were told that the listed districts were in no particular order, and the order was randomized during the survey to prevent sequencing bias. *Id*.

First, based on the most recently available VICC applicant data (reflecting actual transfer choices for the 2011-2012 school year), Dr. Jones determined that VICC parents were "considerably more likely to choose districts with higher MAP scores." Ex.C1 p.8 (appx. A16). More specifically, their first-choice districts averaged 3.48% higher, which is "statistically significant at the .001 level (*i.e.*, the probability of it occurring by chance is less than one in a thousand)." *Id.* This actual VICC data confirmed that "academic performance of . . . school districts" correlates with "the choice [parents] made" and is "highly corroborative of" the survey's projected high transfer rate (3,567 students) to Clayton. Tr.78:2-11; 93:21-96:1.

Second, as detailed in Dr. Jones' report, when survey respondents were asked to rank the degree of importance or unimportance of seven factors in selecting a County school district (where the factors were randomized, to avoid sequencing bias), the three academic factors (graduation rate, college attendance rate, and MAP scores) were ranked most important.[19] Ex.C1 pp. 7-8 (appx. A15-A16). Of these three academic factors,

[19] The other four (non-academic) factors were dollars spent per student, diversity of the students, proximity of the district and availability of public transit. Ex.C1 pp. 7-8 (appx. A15-A16). The seven factors as listed in the survey were chosen by Dr. Jones himself. Tr.149:13-19. They were based on his own previously conducted survey research to determine the "factors that make a difference . . . in school enrollments" (albeit, as he acknowledged on cross-examination, his prior research did not specifically determine "the seven *most* important factors") (emphasis added). Tr.115:3-12; 116:22-118:9.

"the one that was easiest to assemble . . . was the MAP scores," which had already been collected by and were available from DESE. Ex.C1 p.3 (appx. A11); Tr.129:21-130:10. Dr. Jones testified that the responses to the seven-factor questions – which demonstrated the importance of academic factors in transfer choices – strongly corroborated the survey transfer projections, and also confirmed the soundness of using MAP scores to identify the six County districts that were listed in the questionnaire. *Id*.; Tr.90:24-91:25.

Finally, respondents were specifically asked to assign a letter grade (A, B, C, D or Fail) to public schools in the City, in the County and in the State. Ex.C1 pp. 8-9 (appx. A16-A17); Tr.91:15-25. As detailed in his report, Dr. Jones determined that by either the grade point average standard or the proportion receiving a D or an F, the County public schools were "perceived as being considerably better" and received "much higher grades." *Id*. The disparity in perception between City and County public schools was, like the VICC applicant MAP score data, "statistically significant at the .001 level (*i.e*., the probability of it occurring by chance is less than one in a thousand)." *Id*. This additional "grading" analysis, Dr. Jones testified, further "indicat[ed] that academic standards are important in the parental [school] choice" and, again, "strongly corroborat[ed]" the survey's overall transfer rate and projection of 15,740 transfers from the City to the County. Tr.91:15-92:11.

(5) Increased costs to Clayton based on thousands of transfers

For Clayton, which has a current enrolment of about 2,500, accommodating the projected 3,567 transfer students would require Clayton to more than double its size.

Tr.191:7-192:6. The total cost for building construction and land acquisition just to double the capacity of Clayton would be at least $135 million. Tr.280:18-281:20; Ex.C23.

The building costs, which total $96 million, were derived from the replacement values for the district's existing high school, middle school and two (of three) elementary schools, as shown on the district's latest insurance policy. Tr.239:1-241:13; Ex.C11. These values, according to the testimony of the district's Director of Facilities, Timothy Wanish, were based on appraisals conducted by the insurance company, and were "low" and "conservative" estimates of the costs of new construction because, among other reasons, they did not include the costs of site preparation or building contents. *Id*. Rather than including the replacement cost of the third existing elementary school (exceeding $13 million), the much lower cost ($5 million) of rehabbing the district's old and unoccupied Maryland elementary school was used to determine the total cost of new construction. Tr.243:23-244:25; Exs. C11 & C23.[20]

The calculation of land acquisition cost, which came to $39 million, was similarly conservative. Ex. C23. The acreage of Clayton's existing four school facilities (not including one elementary school), which totals 50 acres, was used as the acreage needed for the additional schools, even though the acreage for the existing facilities is "quite a bit lower" than what is called for under applicable national architectural standards.

[20] Clayton's facilities director testified that the rehab was required for numerous reasons, including asbestos abatement. Tr.244:12-22.

Tr.245:13-246:21. Clayton's Chief Financial Officer, Mary Jo Gruber, testified that the price per acre for land in Clayton, based on both county department of revenue assessed valuations and independent professional advice, ranges from $785,000 to $2.6 million per acre, with an average of about $1.6 million per acre. Tr.278:8-280:17. For purposes of her calculations Ms. Gruber used the lowest price in the range, giving a total land acquisition cost of about $39 million ($785,000 x 50 acres). *Id.*; Ex.C23.[21]

From an operational standpoint, the additional annual cost for Clayton to double its enrollment comes to $42.2 million. Tr.273:21-274:19;276:19-277:10; Ex.C13. That amount, which Ms. Gruber detailed in Ex.C13 and explained in her testimony, would be in addition to Clayton's existing annual operational budget of $50 million. *Id.*; Tr.271:14-17.

ii. Evidence showing 200-300 transfers, as urged by appellants, and costs based thereon

Appellants urge the Court to consider another piece of evidence that, they suggest, gives rise to a projection that less than thousands of students would transfer to Clayton.

[21] Ms. Gruber further testified that Clayton's constitutionally-limited bonding capacity was $56 million, which means that the total construction and acquisition costs of $135 million would exceed that limit by $79 million. Tr.269:23-270:10, 280:18-282:1; Ex.C23. There was no available mechanism for Clayton to raise the additional $79 million, even if its taxpayers wished to do that, she explained, and that amount in any event would not be recoverable under the tuition reimbursement formula in §167.131. *Id.*

This evidence is the testimony of Clayton's Superintendent, Dr. Wilkinson, regarding the number of inquiries Clayton received regarding admission pursuant to §167.131 following the Court's decision in this case. According to that testimony, Clayton received approximately 200-300 inquiries following the decision. In response to these inquiries Clayton informed parents that it "would not be accepting students until the final resolution of this matter." Tr.175:1-4 (Dr. Wilkinson). Clayton's decision and position was widely disseminated in press reports. Tr.175:9-176:16 (Dr. Wilkinson); Ex.C9. Most of the inquiries Clayton received were received after this Court's decision or in the immediately following (2010-2011) school year, but the district did receive "one" during the 2011-2012 school year. Tr.177:4-9 (Dr. Wilkinson).

Appellants adduced no evidence at trial to show the scientific validity of a projection based on this data. [22] However, this testimony does show that, even at a time when the unavailability of such transfers was widely reported in the press, at least 200-300 parents sought transfer. Assuming each parent inquiring had only one school-aged child (Dr. Jones' survey of 601 adults covered 1,008 children; Ex.C1 p.3), that gives rise to an alternative transfer projection for a single school year of approximately 200-300

[22] Dr. Jones explained that in his view this data, in contrast to his survey results and other data sources, was not scientifically "relevant" because it did not show the "probability" of transfer based on a "representative sample" who were asked to assume that the option to transfer was available. Tr.134:8-135:12, 143:8-22, 145:11-146:4.

children.[23] The record evidence shows that this number of students (approximately 10% of Clayton's current student population; Tr.163:11-13) is roughly the same number that is housed in one of Clayton's three elementary schools, each of which cost in excess of $5.8 million annually to operate. Ex.C12. The record also shows that, if Clayton were provided the time and funding to do so, the Maryland school could be rehabbed at a cost of $5 million and would accommodate about 200 students. Tr.244:9-245:6,188:10-17.[24] Thus, appellants' preferred evidence regarding actual inquiries received by Clayton supports a cost projection of approximately $10.8 million.

B. Evidence showing consequences of §167.131 for students and schools, and demonstrating impossibility of compliance

In addition to the evidence reviewed above, which focuses on the financial impact of §167.131 and supports the trial court's Hancock Amendment judgment, the record

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[23] Breitenfeld asserts that the transfer inquiries were received over a five year period but that is incorrect. Dr. Wilkinson's testimony was regarding inquiries "after the case was decided" just prior to the 2010-2011 school year (Tr. 174:21-25, 176:17-178:22), and that "one" was during the 2011-2012 school year. She also testified that the largest volume of inquiries was received shortly after this Court's decision in this case.

[24] This analysis assumes that all 200-300 students could be educated in a single school building. Mr. Glaser testified that one of the challenges when dealing with an unexpected influx of students is that they will be spread among grade levels, which increases the difficulties of accommodating the students. Tr.321:1-7.

below also contains a significant amount of evidence regarding consequences of §167.131 for students and schools. This additional evidence further supports the trial court's judgment that compliance with §167.131 is impossible.[25]

1. Evidence of the impossibility of planning for §167.131 transfers

Planning is very important to public school districts. Tr.183:10-13. Districts plan in order to be able to fulfill their statutory obligation to provide an appropriate education to students, which includes providing books, classroom space, and a certified teacher. Tr.182:20-183:9, 198:2-11. In the case of resident students, who may show up in the middle of a semester, planning is particularly important, and districts have an "ongoing planning process" to be sure that they are able to meet their needs. Tr.164:18-25. Clayton, which is fully developed, has not had dramatic changes in enrollment in recent years, but districts that are experiencing such growth plan so that they can add facilities and project their finances for the future. Tr.165:12-18. To plan, districts use a number of resources including demographic data and input from builders and developers regarding new home construction, in order to project not just district-wide enrollment figures but also enrollment figures for each individual school in the district. Tr.315:21-316:20, 211:4-13, 164:12-25. Districts plan carefully because enrollment projections that are either too high or too low create problems for the district and students. Tr.321:22-322:21.

[25] It also rebuts any argument that §167.131 might somehow benefit St. Louis area children.

David Glaser, currently Chief Executive Officer for VICC, testified about his experience at Francis Howell and Rockwood, two rapidly growing school districts during his time with them. Tr.302:13-23. Rockwood, particularly during Mr. Glaser's first five years there (1996-2001), was "experiencing very rapid growth." Tr.314:12-19. "[V]ery rapid growth" for Rockwood, a district with about 17,000 students in 1996, meant from 700 to almost 1,000 students per year, or a growth rate of 3 to 6 percent. *Id.*; Tr.314:3-11,314:25-315:3. Dealing with this level of growth presented a challenge for Rockwood. Tr.317:23-318:9. The district was able to "step up the plate" and successfully provide the necessary teachers and facilities because they had "advanced notice that the kids were coming." *Id*. To do that, Rockwood had several long-range planning committees that were made up of district employees and also parents and business leaders in the community. Tr.315:7-20. Those committees reviewed enrollment projections showing growth up to five years in the future. *Id*. They identified new subdivisions that were coming on line, obtained birth records to determine how many children were born each year ("we can assume that five years later, unless something changes, that they'll be starting kindergarten"), and talked with builders and developers to project how many homes would be built over the next five years, because they "needed to know where those kids were going to be going to school next year and even five years into the future." Tr.315:21-316:11, 316:21-23. Through this comprehensive planning process, Rockwood was "almost always" able to project district-wide enrollment within one percent for the next school year. Tr.317:12-22.

Based on its rolling five-year projections, Rockwood made decisions about bond issues, land purchases, building new schools, renovating existing schools, and so on, all in preparation to make sure there were appropriate facilities in place when those students arrived. Tr.316:21-317:6. The five year lead time was necessary because the process of seeking approval of a bond issue, designing a new building, then constructing that building could take up to three to five years. Tr.324:11-14; *see also* Tr.241:14-243:17.

Notwithstanding all this careful planning, districts sometimes experience unforeseen variations in enrollment. Tr.319:3-7. Mr. Glaser testified regarding one example of such a situation at Rockwood, in which about 50 more students than were expected showed up at one of the district's 550-600 student elementary schools. Tr.319:8-320:25. That situation presented a challenge to deal with because "they're going to be spread [from] kindergarten through fifth grade," which may require "four or five, six additional classrooms." Tr.321:1-7. This necessitated not only finding space for these classrooms, but hiring of additional staff on short notice. Tr.321:8-18. And further demonstrating the large impact that seemingly small numbers of students can have, Francis Howell, a district that experienced "relatively rapid growth," but not the "very rapid growth" that there was at Rockwood (3-6% per year), adopted a year-round school schedule to accommodate the influx. Tr.302:17-23, 314:12-24, 377:22-378:9.

As part of his work, Mr. Glaser keeps informed about national trends in school district finance and planning. Tr.322:22-323:7. Mr. Glaser testified that school district growth rates of 10 to 15 percent would be in the top "one percent or top one-tenth of one percent" nationally. Tr.323:8-15. "There's not very many districts around the country

that would be growing more than 10 percent a year on an annual basis. That's [an] extremely high growth rate." Tr.323:15-18. Those districts that do experience such extremely high growth rates, to Mr. Glaser's knowledge, do so under circumstances similar to Rockwood's, which permit planning and projection years in advance to deal with that growth. Tr.323:19-25. Mr. Glaser is not aware of any instance where a school district has experienced a 100% increase in enrollment in a single year. Tr.324:1-4.

As previously described, §167.131 creates a new right to enrollment for an additional population. The State admits that 50,000 students could transfer to Clayton immediately. Dorson depo. 117:7-118:2. The State has no suggestion regarding how Clayton could plan for compliance with this statute. Dorson depo. 115:14-116:8. The planning mechanisms described by Mr. Glaser, which are based on monitoring new construction and records of live births, would be of no use in projecting enrollment under §167.131. Tr.324:19-325:19, 232:16-233:13. Other than commissioning a study like the one undertaken by Dr. Jones for this case, there is no way for a school district to know how many students will enroll under §167.131. *Id.*; LF1851.

2. Evidence of impossibility for Clayton to enroll and educate the projected number of §167.131 transfer students

Sharmon Wilkinson, Ed.D., Superintendent of Clayton, testified that it would be impossible for Clayton to accommodate the 3,567 transfer students projected by Dr. Jones without years of advance planning and construction work. Tr.191:7-193:7. As previously noted, in order to accommodate 3,567 transfer students, Clayton would need to more than double its capacity, which would require building multiple new school

buildings, a mechanism for financing construction, and land for new buildings. Tr.191:7-193:7,245:7-23,269:1-270:24. There is no mechanism to finance the construction of these new schools. Clayton lacks the bonding capacity to finance such construction by issuing bonded indebtedness. Tr.269:23-270:10. The tuition payments chargeable under §167.131 would not be enough to finance such a project, even if they were paid enough in advance to be used for this purpose. Ex.C23; Tr.280:15-281:16. Doubling Clayton's capacity would require approximately 50 acres of land, which Clayton also does not have available. Tr.245:13-19.

The State at trial adduced testimony that it would be "unreasonable" for a school district to double its capacity for a program that would be temporary. Tr.224:19-225:24. The State presented no evidence of an acceptable alternative scheme that would meet §167.131's statutory requirements. In its brief the State cites evidence showing that Clayton has in the past considered use of modular classrooms ("trailers") for certain purposes. But the evidence shows that this was not a viable alternative to house a large number of students for Clayton because of the lack of land on which to place such trailers and because trailers cannot house certain kinds of facilities like cafeterias. Ex.C10; Tr.189:23-190:25.[26] There is no evidence in the record to suggest that these kinds of measures could accommodate the 3,567 projected transfers to Clayton. But there was

[26] The State goes outside the record to argue that Clayton has an old middle school available that could be used to accommodate transfers. State br. 11. The record does not support this, and Clayton does not have such a building.

undisputed evidence at trial, from Dr. Adams based on his experience as an educator, that these suggestions to put large numbers of City students in trailers would be "criminal" and would not create an appropriate "educational environment" for children. Tr.489:17-23.

3. Evidence of other impossible and untenable consequences, including for SLPS students and for VICC transfer students

There was also evidence at trial showing damaging consequences of §167.131 on other students and schools besides Clayton's. Much of this evidence concerned the effect of §167.131 transfers on SLPS and the students that would remain in SLPS schools.

Based on the expert projection of 15,740 transfers, SLPS would face a total tuition and transportation cost of $263 to $283 million. Dr. Adams testified that it would be impossible for SLPS to adequately educate the remaining 15,182 students enrolled in the district if the transfers estimated by Dr. Jones occurred and the resulting tuition and transportation costs were imposed on the district. Tr. 477:17-478:19; 482:5-15. Dr. Wilkinson and Dr. Dorson (who is a former school superintendent himself) concurred with Dr. Adams' conclusion. Tr.200:7-202:13, 577:20-578:7.

The evidence also showed that §167.131 would be "devastating" for the longstanding and successful VICC transfer program, which Clayton has participated in as a leader since the program's inception in 1981. Tr.312:12,325:10-19 (Glaser).

4. Additional evidence in the supplemental record showing impossibility and negative effects of §167.131

By agreement of the parties, the record in this case was supplemented with evidence showing that SLPS was granted provisional accreditation on October 16, 2012 at 2:00 p.m., "effective immediately." Appellants' Supplemental Legal File p.A1. Contemporaneous statements by DESE's commissioner indicate that SLPS will be subject to review under new and heightened standards starting in just one year. Respondents' Supplemental Legal File p.3. As previously noted, even the State's evidence showed it would be "unreasonable" for a school district to double its capacity for a program that would be temporary. Tr.224:19-225:24.

The record shows that this important achievement of gaining (provisional) accreditation would not have been possible if SLPS had been under the tuition obligation imposed by §167.131. Tr.450:14-25, 475:16-476:10,505:21-506:11. Indeed, the evidence raises the strong inference that, but for Judge Vincent's decision below, SLPS would not have become provisionally reaccredited.

C. Facts regarding Breitenfeld and evidence supporting Clayton's judgment for past tuition amounts owed by Breitenfeld

Breitenfeld was one of the four original plaintiffs in this action. Like all the original plaintiffs, at the time the case was filed her two children were attending Clayton on a tuition-contract basis. Prior to the filing of this case Breitenfeld in sworn statements claimed residency in Clayton for the 2006-2007 school year, claims that she now admits were false. Breitenfeld depo. 77:11-16. While the case was pending on its first appeal,

Breitenfeld submitted an application to enroll her children as students in Clayton school on a residency basis for the 2009-2010 school year. Breitenfeld depo. 91:15-20; Ex.B30. Breitenfeld admitted that her "children . . . have attended and are attending Clayton pursuant to Affidavits for Establishment of Residence" ("Residency Affidavits," Exs.B25, B30). LF871, 1506. The Residency Affidavits, which were sworn, contain an acknowledgement, signed by Breitenfeld, that submission of false residency information is a crime, and that Clayton may recover tuition from non-residents at a per-diem rate. Exs.B25, B30. The tuition amounts charged by Clayton are market rates. Tr.299:5-12 (Gruber).

Prior to trial, Breitenfeld stipulated that she did not live in Clayton for the 2010-2011 or 2011-2012 school years. LF1621. As a compromise of disputed factual issues, Clayton and Breitenfeld agreed to a stipulation that she did not reside in Clayton for two-thirds of the 2009-2010 school year as well. *Id*. It was also stipulated that her children were attending Clayton schools during that entire time. *Id*. It was further agreed that Breitenfeld's deposition and exhibits would be placed in the record under seal as evidence in connection with Clayton's tuition counterclaim. Tr.264:4-265:6. Based on the stipulated facts, the deposition record, and the agreed per diem amounts in her Residency Affidavit, Clayton presented evidence at trial to establish tuition owed by Breitenfeld of $49,133.33. Tr.262:13-268:12 (Gruber).

D. Facts supporting judgment for attorneys' fees

The Court's judgment for attorneys' fees and costs in favor of Clayton Taxpayers was supported by an affidavit of counsel with a detailed itemization. LF1863-1869.

Clayton Taxpayers' submission sought $291,477.32 for fees and costs. This amount included $228,163.20 for attorneys' fees and $63,314.12 in expenses. The expense amount sought by Clayton Taxpayers included the cost of Dr. Jones' expert work and report. LF1867-1868 ¶6,1864 ¶¶2,3. This amount included only fees and costs incurred pursuing Clayton Taxpayers' successful Hancock claim. LF1867-1868 ¶5.

ARGUMENT

The evidence at trial unequivocally establishes that §167.131 is an unconstitutional, unworkable, and impossible transfer statute. It creates a mandate that Clayton must accept as students all school-age children who reside in the City of St. Louis and request admission. The evidence at trial showed the consequences of this mandate for students in both the Clayton and SLPS districts. Without adequate notice or ability to plan, districts must prepare to accommodate hundreds or, in the case of Clayton and certain other districts, thousands of new students. There is no State funding for the statute. One way or another, every penny that is spent on new programs or facilities for §167.131 transfers must come at the expense of one or both districts' programs for existing students or from the pockets of one or both districts' taxpayers.

Yet, after setting in motion this massive transfer program, the statute is not finished. After districts rework their educational programs and facilities to make space for transfer students, this same statute, with equally arbitrary lack of regard for the educational needs of students or the logistical realities of schools, extinguishes the transfer right the moment the sending district becomes provisionally (or fully) reaccredited, as occurred with respect to SLPS in the middle of last semester, on October 16, 2012, a Tuesday, at 2:00 p.m. Section 167.131 functions in an impossibly unrealistic world where teachers, school buildings and other educational resources are fungible commodities that can instantly flow from one school district to another when students transfer out of a district then flow right back when that transfer right disappears. That cannot be, as the evidence at trial demonstrated.

It bears noting this case is not about the concept of St. Louis City-to-County transfers as an abstract item of policy. Clayton has been a leader for decades in the VICC voluntary student transfer program. Tr.310:2-311:19; Ex.C15. Thousands of City-resident students have attended and graduated from Clayton schools through this program and hundreds are currently attending. *Id.* The VICC program demonstrates through its success all the things that are lacking in §167.131 – mechanisms for sufficient and reliable financing, addressing capacity limitations, permitting advance planning, and addressing issues of services for students with special needs. Without these mechanisms in place, a large scale transfer program simply cannot function.

The trial court's judgment declaring §167.131 unenforceable as to SLPS and Clayton was supported by substantial evidence and should be affirmed. The judgments against Breitenfeld for tuition and the State for attorneys' fees, each of which also necessarily presents the non-moot issue of the validity of §167.131, should also be affirmed.[27]

[27] For these reasons and others discussed in respondents' joint suggestions in opposition to the State's motion for remand (filed in this case October 29, 2012), it is imperative that this case be decided on the merits in order to give school districts guidance regarding enforceability of §167.131.

I. The trial court's judgment that §167.131 is unenforceable under the Hancock Amendment was supported by substantial evidence at trial, is correct as a matter of law, and should accordingly be affirmed (responds to Breitenfeld's point VII and multiple points by the State identified in separate headings below).

Standard of Review

Except as otherwise noted below, the Court's review of the judgments in this case is under the standard described in *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo.banc 1976). The trial court's judgment must be sustained unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law. *Id.*; *Hale v. Hale*, 180 S.W.3d 85, 89 (Mo.App.E.D. 2005). The Court accepts as true the evidence and reasonable inferences therefrom in the light most favorable to the verdict, and disregards all contradictory evidence and inferences. *Id.*, citing *Malawey v. Malawey*, 137 S.W.3d 518, 522 (Mo.App.E.D. 2004). Deference is given to the trial court's superior ability to judge factors such as credibility, sincerity, character of the witnesses, and other intangibles not revealed in the transcript. *Id.* "[T]he evidence and permissible inferences therefrom" are viewed "in the light most favorable" to the trial court's determination; "all contrary evidence and inferences" are "disregard[ed]." *Mehra v. Mehra*, 819 S.W.2d 351, 353 (Mo.banc 1991).

The trial court in this case prepared findings of fact and conclusions of law. LF1847-1862. In reviewing the judgment, "[f]actual issues on which no specific findings

are made shall be considered as having been found in accordance with the result reached." *McCullough v. Doss*, 318 S.W.3d 676, 678 (Mo.banc 2010); Rule 73.01(c).

The Hancock Amendment's prohibition of unfunded mandates; this Court's decisions in *Rolla 31*, *City of Jefferson* (*I* and *II*) and *Brooks*

Article X §§16-24 of the Missouri Constitutional is a voter-enacted "taxing and spending lid" called the Hancock Amendment. *Roberts v. McNary*, 636 S.W.2d 332, 336 (Mo.banc 1982). The purpose of Hancock is to "rein in increases in governmental revenue and expenditures" and "erect a comprehensive, constitutionally-rooted shield . . . to protect taxpayers from government's ability to increase the tax burden . . .." *Id*. at 336; *Fort Zumwalt Sch. Dist. v. State*, 896 S.W.2d 918, 921 (Mo.banc 1995). Article X §16 of the Missouri Constitution states in part:

> The state is prohibited from requiring any new or expanded activities by counties and other political subdivisions without full state financing, or from shifting the tax burden to counties and other political subdivisions.

Implementing and expanding on this prohibition, Article X §21 states in part:

> A new activity or service or an increase in the level of any activity or service beyond that required by existing law shall not be required by the general assembly or any state agency of counties or other political subdivisions, unless a state appropriation is made and disbursed to pay the county or other political subdivision for any increased costs.

A separate prohibition in §21 prevents the state from "reducing the state financed proportion of the costs of any existing activity or service," but that provision is not implicated here because, as the State admits, this case involves a new (post-Hancock) mandate. *See* Argument I.A.2, below.

A Missouri public school district is a "political subdivision" under Hancock. *See* Mo. Con. Art. X §15; *Rolla 31 School Dist. v. State*, 837 S.W.2d 1 (Mo.banc 1992). Under the Hancock Amendment, the legislature must provide complete funding in the form of a specific appropriation for any newly mandated program implemented after November 4, 1980. *Rolla 31*, 837 S.W.2d at 7. A mandate that is not "fully fund[ed]" – an unfunded mandate – is unconstitutional and may not be enforced. *Id*. at 5-6.

Rolla 31 provides a good example of how this requirement has been applied. That case concerned a State early childhood special education mandate which the State had funded in large part, but not entirely, with a specific appropriation and a set-aside from the school foundation fund. *Id*. at 1-2. The State argued that the remaining costs of the program, beyond those covered by the specific appropriation or foundation fund set-aside could be funded with the schools' general foundation formula dollars, "pointing out that it annually furnishes large sums of money to the school districts in the form of the School Foundation Program; for example, it provided $1.157 billion in fiscal year 1991-92." *Id*. at 6. These funds were "unallocated and unrestricted," meaning the school district was not legally prohibited from using them for any purpose. *Id.* Thus, the State contended it was "entitled to use these unallocated funds to meet the requirements of the Hancock Amendment." *Id.* This Court disagreed: "[w]e reject the state's position for several

reasons." *Id.* After reviewing both the policy and literal language of Hancock, the Court held:

> Article X, Section 21 of the Missouri Constitution provides that a state mandated program shall not be required "unless a state appropriation is made . . . to pay the county or other political subdivision for any increased costs." We believe this means what it says; it requires that the legislature make a specific appropriation which specifies that the purpose of the appropriation is the mandated program.

Rolla 31, 837 S.W.2d at 7. Thus, despite the fact that most of the cost of the program was funded by the State in a specific appropriation, because a portion of the cost would be funded with local effort or unrestricted school foundation funds, the Court held that the State's early childhood special education mandate violated Hancock and was unenforceable.

Rolla 31 stands for two propositions that bear on this case. First, it holds that "full" state funding is required under Hancock, just as the constitutional language states. Second, it expressly holds that general school foundation formula dollars, not allocated or attributed in any way to a new program, cannot meet the State's obligation to "fully fund" new mandates under the Hancock Amendment.

After *Rolla 31* was decided the legislature annually made a specific "line item" appropriation for early childhood special education and has maintained it to this day. Dorson depo. 25:12-26:13. This is a perfect example of what Hancock contemplates: the

legislature decided to make early childhood special education a real priority and provided the funding to make it happen through an express appropriation. *Rolla 31* and the legislature's response to it show that Hancock does not prohibit legislative mandates – it simply requires the legislature to put its money where its mouth is by forthrightly acknowledging and funding costs of the requirements it imposes.

This Court's decisions in the *City of Jefferson* cases further illustrate Hancock's unfunded-mandate prohibition. These two cases involved a Hancock challenge to a State statute requiring cities and counties to submit expanded solid waste plans. *City of Jefferson v. Mo. Dept. of Natural Resources*, 863 S.W.2d 844 (Mo.banc 1993) ("*City of Jefferson I*"). In a first appeal, following summary judgment in favor of the State, the State argued that this new requirement was not unfunded because a statutory "grant program" allowed for State funding to defray any costs incurred. *Id*. at 848-849. The Court rejected this argument. Because the grant program "d[id] not create a statutory obligation to reimburse all of a political subdivision's increased costs," it was insufficient to satisfy Hancock's requirement:

> The road to compliance with Article X, Section 21, cannot be paved with good intentions. Rather, the constitution requires that the legislature pass a specific appropriation to cover the costs of the increased activity it demands of a political subdivision. *Rolla 31 School District v. State*, 837 S.W.2d 1, 7 (Mo.banc 1992).

Id. at 848-849. Summary judgment in favor of the State was therefore reversed, and the case was remanded for further proceedings to allow plaintiffs to present evidence regarding the cost of the mandate.

On remand, evidence was adduced showing that "Jefferson City, as a city independent of a solid waste management district, would have to hire additional staff or consultants to update its plan," at a cost of at least $4,739.[28] *City of Jefferson v. Mo. Dept. of Nat'l Resources*, 916 S.W.2d 794, 796-797 (Mo.banc 1996) ("*City of Jefferson II*"). The State argued in response that there were alternative and, according to the State, less costly ways of meeting the planning requirement, but the State apparently presented no evidence as to the cost of these supposedly cheaper alternatives. *Id*. at 796. On a second appeal the Court held that the cost evidence presented by Jefferson City was sufficient – the "engineering bids for solid waste plans [were] evidence of increased costs" and those costs were "more than *de minimis*." *Id*. Thus, the Court concluded, "[u]ntil a specific appropriation is made and disbursed to Jefferson City, it need not comply with the planning mandate." *Id*.[29]

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[28] The evidence showed that "[t]wo engineering firms submitted bids of $15,289 and $47,000 to prepare Jefferson City's plan" and "31 to 49 percent of these costs" were attributable to the new requirement. The number stated in the text ($4,739) is 31 percent of $15,289.

[29] A separate plaintiff, the city of Eldon, was able to discharge its planning obligation through participation in an existing solid waste district, and its obligation was therefore

The *City of Jefferson* cases stand for several points important to this appeal. First, these decisions confirm *Rolla 31*'s holding that compliance with Hancock requires the State to actually appropriate and disburse funds to pay for increased costs, not merely exhibit "a beneficent intention" to do so. These cases also define a standard for proof of "increased cost." They hold that a plaintiff must show increased costs that are "greater than *de minimus*" and the evidence of that cost may properly be in the form of a projected estimate of the costs involved. In the first appeal it rejected the plaintiff's conclusory assertion without evidence that the mandate would result in increased costs; in the second appeal, after cost had been proven, it rejected the State's equally conclusory assertion that lower cost alternatives might exist. These cases stand for a clear rule that arguments by the parties or their lawyers, which the Court called "speculation," carry no weight. What is required is *evidence*. The Court found Jefferson City's projected cost evidence sufficient for this purpose.

"mostly limited to a single employee who attended monthly or bi-monthly meetings." This limited impact was offset by $45,000 in State grant appropriations distributed pursuant to R.S.Mo. §260.325.9 (which provides that funds may, "upon appropriation," be made available "for the purpose of implementing the requirements of this section"). Because properly appropriated State funding that had been "actually recei[ved]" to offset any costs that there were, Eldon was unable to show a violation of Hancock. *Id*. at 796-797.

A final important Hancock unfunded mandate case is *Brooks v. State*, 128 S.W.3d 844 (Mo.banc 2004). That case involved a challenge to Missouri's concealed carry law. Before that law went into effect, suit was filed by plaintiffs and officials from four Missouri counties challenging the law because, they argued, the statutory requirement that local counties handle concealed carry permit requests was an unfunded mandate in violation of Hancock. In deciding the Hancock issue, this Court took care to describe the evidence that had been adduced for each of the four counties involved. The Jackson County sheriff, for example, testified to his "projection" that the county would be required to issue an estimated 5,000-6,000 such permits and that "approximately $150,000" would be required in the first year for personnel to handle the work of processing permit requests. *Id*. at 849. The other three counties involved in the case took a different approach. Rather than make an overall cost "projection," these counties adduced evidence regarding costs that would be incurred to issue a single permit – specifically, a $38 per-permit cost that would be required to conduct "fingerprint analysis." *Id*.

On appeal, the State argued, similarly to arguments it makes in this case, that the evidence of cost was insufficient. This Court (although divided on other issues) unanimously rejected the State's arguments. Specifically addressing the cost evidence adduced as to each county (because "proof of increased costs must be shown by each city or county affected"), the Supreme Court held that the testimony regarding "costs for personnel in Jackson County and for the Highway Patrol fingerprint analyses [shown for the other three counties] . . . proves the Hancock violation on the merits of the case." *Id*.

at 850. The Court held that both Jackson County's evidence – a projected $150,000 for personnel – and the other counties' evidence – $38 per transaction cost for fingerprints – were each independently sufficient to support of finding of violation, concluding that "the Act constitutes an unfunded mandate in Jackson [and in each of the other three counties], for which an injunction will lie prohibiting enforcement by the state." *Id*.

Like the *City of Jefferson* cases, *Brooks* speaks to the evidentiary burden a plaintiff bears in an unfunded mandate case like this one. Like those cases, it again holds that evidence-based projections regarding actual costs that would be incurred if the mandate were to go into effect are a proper and sufficient basis for establishing cost, and that such proof need only establish that the costs involved are greater than *de minimis*.

A. Substantial evidence at trial established that §167.131 violates the Hancock Amendment's unfunded mandate prohibition in multiple respects.

Based on these cases, in order to show a violation of the Hancock Amendment Clayton was required to establish at trial that (1) §167.131 mandates new or increased activities or services, (2) resulting in increased costs (3) that are not fully funded by the State in compliance with Hancock. As discussed below, Clayton's evidence at trial established each of these points. We address funding first, because that point addresses one of the most egregious omissions in appellants' briefs – the undisputed fact, admitted by the State's witness at trial, that there is no statutory basis for State funding of §167.131 transfer students.

1. There is no State funding for §167.131 transfer students.

The evidence at trial established an extraordinary fact – the statutory school foundation formula that constitutes the primary State funding mechanism for education in the State of Missouri, and which the State admits is the only potential funding source available for §167.131 transfers, does not include §167.131 transfer students. *See* Statement of Facts III.4.1 and legal analysis immediately below. There is no statutorily authorized mechanism for any Missouri school district to receive one dollar of state funding for §167.131 transfer students. This striking omission places §167.131 outside the ordinary school funding rules that this Court has considered in prior cases, and reveals clearly the legislature's complete failure to fund the costs of its new transfer program.

The legal analysis showing this failure is clear and is not disputed by the State. Foundation formula funding is based on "average daily attendance" (ADA) by "resident pupils." R.S.Mo. §163.031.1. Resident pupils are defined by statute as pupils who are "residents of the school district and who are attending kindergarten through grade twelve in such district." R.S.Mo. §163.011(2). Section 167.131 transfers, who are "residents" in one district but "attend" in another, do not fit this basic definition and, therefore, cannot be counted by a district for purposes of receiving State funds. In other cases where students transfer from one district to another district the legislature has made specific

provision for their inclusion in funding calculations.[30] But there is no similar provision for §167.131 transfer students. As a result, there is no legal basis for the inclusion of these students in foundation formula funding. At trial, Dr. Dorson, testifying for the State, concurred with this analysis. Tr.547:23-548:23. And the State in its brief makes no effort to argue to the contrary. There is simply *no legal basis* for the State to fund §167.131 transfer students.

The State's brief does reference testimony by Dr. Dorson regarding a computer program that, according to his testimony, could be used to enter data regarding §167.131 transfer for ADA purposes. The State makes no effort to argue that this computer program or its manual should take precedence over the governing statutory law, and DESE has no explanation or position as to how the computer program can be reconciled

[30] *See, e.g.*, §162.1060.3 (VICC students: "Other provisions of law to the contrary notwithstanding, each student participating in the program shall be considered an eligible pupil of the district of residence for the purpose of distributing state aid"); §163.011(2) (teachers' children: "such child shall be considered a resident pupil of the school district which the child is attending . . ."); §167.151 (tuition tax-credit students: "The school district . . . shall count the children in its average daily attendance for the purpose of distribution of state aid through the foundation formula."); §167.121.2(1) (virtual schools: "The school district of residence shall include the pupil's enrollment in the virtual school created in section 161.670 in determining the district's average daily attendance.").

with the express language of the statute. Dorson depo. 50:18 -53:13. The statutory definition of "resident pupil" is unambiguous, leaving no room for interpretation by DESE. *See* Tr.547:23-548:8 (Dr. Dorson: "that is very clear to me . . . as far as the reading goes"); *see also Turner v. School Dist. of Clayton*, 318 S.W.3d 660, 667-668 & n.9 (Mo.banc 2010) ("this Court need not look to the Department of Elementary and Secondary Education's interpretation . . . Courts do not look to agency interpretations when a statute is unambiguous"), citing *Blue Springs Bowl v. Spradling*, 551 S.W.2d 596, 599-600 (Mo.banc 1977) ("[t]he plain and unambiguous language of the statute cannot be made ambiguous by administrative interpretation"). Moreover, again just like the DESE interpretation that was rejected in *Turner*, DESE's computer program "cites no legal authority and has not been subjected to the rulemaking process." *Turner*, 318 S.W.3d at 668 n.9. Statutory law, not administrative practice, controls the distribution of State tax dollars, and that statutory law does not provide for the inclusion of §167.131 students.

The conclusion is stark. The State has a detailed foundation formula to provide some basic level of funding for each student attending a Missouri public school. *See Committee for Education Equality v. State*, 294 S.W.3d 477 (Mo.banc 2009). But §167.131 students are not included. There is no statutory basis to provide either Clayton or SLPS even one dollar of state funding for the purpose of complying with this statute. As previously noted, one way or another, every dollar spent for §167.131 transfers must come at the expense of one (or both) of the two districts' programs for their existing students or from the pockets of one (or both) of the two districts' taxpayers. As discussed

in the next two sections below, the burden upon taxpayers and students will be substantial.

2. Section 167.131 mandates "[a] new activity or service or an increase in the level of any activity or service beyond that required by existing law," as the State now admits (responds to State's points 1, 2 and 3).

The Hancock Amendment's unfunded mandate provision applies when the State requires "[a] new activity or service or an increase in the level of any activity or service beyond that required by existing law." Mo. Con. Art. X §21. Although it argued otherwise below, the State now admits that §167.131 "requires a 'new activity or service' of the Clayton district." State br. 42.[31] "Before, [Clayton] could choose whether to accept transfer students. Afterwards, it was required to do so . . .." *Id.* It is unmistakably clear that §167.131 imposes a new burden on Clayton that did not exist when Hancock was enacted on November 4, 1980. That a new mandate was imposed by the legislature's 1993 enactment of the amended §167.131 was made clear in this Court's prior decision in this case. The Court there specifically held that the legislature's 1993 amendments "change[d] the existing law" to require districts to admit students they would not otherwise need to admit, "taking away any discretion of the receiving school to deny admission." *Turner*, 318 S.W.3d at 667-669, quoting *Cox v. Dir. of Revenue*, 98 S.W.3d

[31] Breitenfeld does not concede the point, but her argument is without merit as both the State's concession and the analysis in the text demonstrate.

548, 550 (Mo.banc 2003) ("[w]hen the legislature amends a statute, that amendment is presumed to change the existing law."). There is simply no argument to be made that Clayton was required to admit plaintiff's children under the law as it existed before the legislature's amendment of §167.131 in 1993. Nor, for that matter, is there any argument that SLPS would be required to pay tuition for such children to attend school in another district (not to mention providing their transportation) before that same amendment. These are new, post-Hancock requirements, and that they are is law of the case. *Id.*

3. Clayton Taxpayers adduced substantial evidence of increased costs as a result of the new or increased activities required by §167.131.

a. The undisputed evidence shows that Clayton has already incurred costs for plaintiffs' children, and those costs are greater than *de minimis* under the Court's precedents (responds to State's point 4).

The burden on Clayton Taxpayers to show unfunded costs is not heavy – a showing of anything more than "de minimis" costs is enough to prove a Hancock violation. *City of Jefferson II*, 916 S.W.2d at 795 (proving increased cost "demands only greater than a de minimis increase"); *Brooks*, 128 S.W.3d at 849-851 ("plaintiffs need only show that the increased costs will be more than de minimis"). In *Brooks*, three counties involved in the suit showed costs of only $38 per permit issued, yet the Supreme Court held that evidence was sufficient to show a violation. 128 S.W.3d at 855. Similarly, in *Boone County Court v. State*, 631 S.W.2d 321, 323, 326 (Mo.banc 1982), the Court held that a

mandatory salary increase to county employees of $100 violated the Hancock Amendment's prohibition on unfunded mandates.

i. Clayton's "actual costs," admitted by the State, are far greater than *de minimis*.

There is no question that Clayton Taxpayers have shown costs for just the education of plaintiff Breitenfeld's children that are sufficient to prove a Hancock violation under the foregoing standard. By the State's own admission, through its designee, Dr. Dorson, Clayton's "actual costs" in 2011-2012 for education of Breitenfeld's two children were $36,131.76. Ex.D34 (last page); Dorson depo. 110:15-112:4; Tr.297:6-9; *see also* Statement of Facts III.A.2.a.i. This amount is far greater than the amounts at issue in *Brooks* or *City of Jefferson II* and indisputably greater than *de minimis* under this Court's precedents.

ii. The undisputed evidence shows that costs for books and school supplies alone are greater than *de minimis*.

The undisputed evidence at trial showed that, even setting aside costs for teachers, facilities, and everything else other than books and school supplies, the cost for those books and school supplies is still least $285 for each elementary school student, $440 for each middle school student; and about $650 for each high school student. Tr.273:3-15. Taking Breitenfeld's two children alone, and considering only the two full years at issue at trial (2010-2011 and 2011-2012), these undisputed amounts incurred for books and school supplies amount to $1,295. Taking all six original plaintiffs in this case, the total cost for school supplies and books actually incurred comes to $4,715. Under *City of*

Jefferson II, *Brooks* and *Boone County*, even these amounts are greater than *de minimis* and sufficient to show a violation.

b. The total projected cost of compliance with §167.131 was properly shown at trial based on sound expert testimony and other evidence (responds to State's point 6).

i. Well-founded projections that thousands of students would transfer demonstrate costs to Clayton in excess of $175 million.

This Court's precedents unassailably establish that cost "projection[s]" may be used to prove "increased costs" in a Hancock unfunded mandate case. Indeed, *Rolla 31*, *City of Jefferson*, and *Brooks* all necessarily involved future projection of costs, because all of those cases involved challenges to statutes that had not yet been implemented by the political subdivisions in question. The situation in *Brooks* is particularly illuminating. There, like in this case, the true total cost of the State's new mandate depended on the extent of future public interest in the new program. Thus, in *Brooks*, the Court considered a "projection," based on prior experience with similar programs, that "an estimated 5,000 to 6,000" permit applications would result in "costs of approximately $150,000 . . . to provide the personnel" for fingerprinting, background checks, and processing. 128 S.W.3d at 849. The student transfer projections that were offered by Clayton Taxpayers in this case are significantly more scientific and rigorous than the evidence offered by Jackson County in *Brooks*, and *Brooks* unassailably sustains the viability of such proof to demonstrate a Hancock violation.

Clayton Taxpayers' evidence at trial, which is discussed in detail in Statement of Facts III.A.3.b.i, above, demonstrates multiple independent bases for projecting that thousands of students would transfer to Clayton under this statute if such transfers were allowed. Dr. Jones' projected 3,567 transfers. This number of transfers would require Clayton to more than double in size, virtually overnight. The total cost for building construction and land acquisition just to double the capacity of Clayton would be at least $135 million. Tr.280:18-281:20; Ex.C23. For operations, the additional annual cost for Clayton to double its enrollment comes to $42.2 million. Tr.273:21-274:19;276:19-277:10; Ex.C13. Thus, the total cost to double the size of the district for one school year would be $177.2 million.

In making this projection, Dr. Jones and district administrators used impeccably conservative methodology, as the Statement of Facts exhaustively demonstrates. The State has preserved no point challenging the admissibility of Dr. Jones' expert testimony,[32] and neither appellant has addressed the multiple other bases in the record that independently support the conclusion that several thousand students would transfer to Clayton under §167.131. Appellants correctly point out that this Court has demanded evidence, not "speculation," in its Hancock decisions. But they can cite no case, because there is none, in which this Court has rejected a carefully developed and supported expert

[32] Breitenfeld's point regarding Dr. Jones, which she raises in the context of impossibility, is addressed in the section of the brief addressing impossibility (Argument II, below).

projection of the kind adduced in this case, particularly where the finder of fact found such evidence to be credible and no contrary evidence was adduced. Under the circumstances, appellants' arguments amount to nothing more than a plea that this Court ignore the record evidence and its prior precedents. The projections of thousands of transfers offered at trial were sound and should be considered by this Court as a third independent showing of "increased costs."

ii. The evidence of 200-300 transfer inquiries, urged by appellants to be the correct number, demonstrates increased costs of at least $10.8 million.

The record supports a fourth separate showing of "increased costs" based on the testimony showing 200-300 actual transfer inquiries to Clayton, which appellants urge the Court to consider. The cost of rehabbing the Maryland school and operating a school for 200-300 students comparable to one of Clayton's existing 300-student elementary schools would be approximately $10.8 million. Statement of Facts III.A.3.b.ii.

In sum, substantial, indeed, overwhelming evidence independently demonstrated "increased costs" to Clayton as a result of §167.131 in four separate ways, two based on projected costs of compliance and two based on costs actually incurred by Clayton. Each of these four showings is alone sufficient under the Hancock Amendment and this Court's precedents to establish the constitutional violation.

B. In order to defend the constitutionality of §167.131, the appellants advance arguments that are legally unfounded, refuted by the language of Hancock, contrary to multiple on-point decisions of this Court and/or contrary to substantial evidence.

The preceding analysis demonstrates that §167.131 is a new, unfunded mandate on Clayton and other Missouri school districts, and that it violates the Hancock Amendment in multiple respects under both the plain language of Art. X §21 and this Court's settled precedents. The State's arguments in response ask this Court to overrule its settled precedents and ignore the plain language of the Constitution. These arguments amount to an admission that §167.131 cannot withstand constitutional scrutiny. Each argument is addressed separately below.

1. Appellants' arguments regarding appropriation procedure are irrelevant and, in any event, meritless (responds to State's point 7).

The State's point 7 (State br. p.61) suggests, without ever quite stating outright, that some funding might exist for §167.131. The State then argues, in three sections, that the Court should accept that supposed funding as sufficient for Hancock purposes without there being a need to comply with certain specific requirements that the State characterizes as excessively onerous. Thus, the State argues it should not be required to show "a new line item" for §167.131; that it should not be required to fund a mandate in advance and should instead be permitted to reimburse after the fact; and that it should be permitted to "redirect" funding from other programs to fund §167.131. State br. 61, 64,

66. In a similar vein, the State complained at trial that it could not be expected to provide a "check written by the Treasurer of the State of Missouri" for §167.131. Tr.55:8-18.

The State's arguments are both meritless and irrelevant. Meritless, because the language of the Constitution and prior holdings of this Court clearly specify that funding must be in the form of an "appropriation . . . made and disbursed to pay the political subdivision." And irrelevant because as a matter of law there is no funding at all for §167.131, regardless of payment technicalities. We address the latter point first.

a. Appellants' appropriation procedure arguments are irrelevant because the State has completely failed to even attempt to comply with the Hancock funding requirement for §167.131.

As a matter of law, there is no State funding for §167.131, whether by appropriation bill "line item" or by any other legal or statutory mechanism (*see* point I.A.1, above). In these circumstances, questions about whether the State pays with a check written by the Treasurer, appropriates funding by earmark, redirects funding from other programs, pays before or after the fact, or any other technical questions about the formal requirements for payment, simply do not enter into the analysis. It may be true, as the State says, that the effect is the same whether the money comes "through a separate line item or through a change in the 'foundation formula,'" (State br. 64) but in this case there is *neither*. This is not a case about a technical failure by the State to dot its "i"s or cross its "t"s. The legislature has completely failed to fund, or even attempt to partially fund, §167.131. The State's arguments about when payment should be made, who should write the check, or whether funding needs to be in the form of an "line item" appropriation are academic

where, as here, there is no funding at all from the State. The State's "line item" and other technical "appropriation" arguments should be disposed of on this basis.

b. Appellants' arguments regarding appropriation procedure are without merit; the plain language of the Constitution and multiple decisions of this Court require new or increased mandates to be funded by an "appropriation . . . made and disbursed," the trial evidence establishes that compliance with this requirement is simple, and this Court's holding in *Rolla 31* was impeccably correct and should not be overruled.

In addition to be being irrelevant, the State's arguments are also incorrect. What the constitution requires is clear – "a state appropriation . . . made and disbursed to pay the county or other political subdivision for any increased costs" incurred as a result of any new or increased State mandate. Art. X §21. This language "means what it says." *Rolla 31*, 837 S.W.2d at 7 (Mo.banc 1992); *see also City of Hazelwood v. Peterson*, 48 S.W.3d 36, 39 (Mo.banc 2001) (Price, J.) (in applying Hancock, "the plain language of the constitutional amendment is controlling"). The constitution therefore "requires that the legislature make a specific appropriation which specifies that the purpose of the appropriation is the mandated program." *Id*.; *City of Jefferson I*, 863 S.W.2d at 848-849 ("The road to compliance with Article X, Section 21, cannot be paved with good intentions. Rather, the constitution requires that the legislature pass a specific appropriation to cover the costs of the increased activity it demands of a political subdivision."). There is no argument to be made that this requirement has been met with

respect to §167.131. Aside from their irrelevancy, plain constitutional language and the express holdings of this Court dispose of the State's "appropriation" arguments.

The constitution unquestionably requires an "appropriation," and requires the legislature to "specif[y]" that the funding is directed to the mandated program. *Rolla 31*, 837 S.W.2d at 7; *and compare City of Jefferson I*, 863 S.W.2d 848-849 (funding through generalized grant program under R.S.Mo. §260.335, not specifying its purpose is to fund mandate program, held insufficient to comply with Hancock), *with City of Jefferson II*, 916 S.W.2d at 797 (funding under R.S.Mo. §260.325.9, which specifies that "[f]unds may, upon appropriation, be made available . . . for the purpose of implementing the requirements of this section," were sufficient to comply with Hancock).[33] It further requires that funding must be actually "disbursed," not merely anticipated to be received after the fact. *Id*. (funds "actually received" by a city comply with Hancock, but "[u]ntil a specific appropriation is made and disbursed to Jefferson City, it need not comply with the planning mandate"). And it is not enough for the State to "point[] out that it annually furnishes large sums of money" that is "unallocated and unrestricted" and may be used for the mandate program. *Rolla 31*, 837 S.W.2d at 6.

[33] The clarity of the Constitution's language was emphasized by Judge White, joined by Judge Teitelman, in their opinion in *Brooks*, 128 S.W.3d at 852-853. As there stated, under the plain language of the Hancock Amendment, "the State, and **only the State**, is required to '***fully finance***.'" *Id*. (emphasis original).

The State argues that Hancock's "appropriation . . . made and disbursed" requirement is "problematic," but evidence at trial showed just the opposite. Compliance with Hancock (which, in any event, is not optional) is simple. As just one example, the General Assembly had no trouble making a line-item appropriation for pre-school special education following the *Rolla 31* decision and maintaining the appropriation every year since then. Tr.543:7-14 (Dorson). The legislature annually funds dozens of other educational priorities each year with specific line item appropriations, including for items as small as $1,200. *Id*. There is nothing problematic or impracticable about requiring that the legislature honestly and forthrightly account for the costs of its newly mandated programs in its appropriation bills, as the Constitution explicitly requires.

The legislature itself apparently does not agree with the State's contention that Hancock is unmanageable as written. If the legislature shared these concerns, it has the constitutional authority to address them by passing implementing legislation. *See* Art. X §24 (authorizing the general assembly to "enact laws implementing [Hancock's] provisions which are not inconsistent with the purposes of said sections"). The legislature has not done so. Instead, as reflected in its response to the Supreme Court's decision in *Rolla 31*, it has chosen simply to abide by the Constitution's requirements as written. That legislative choice is entirely inconsistent with the State's contention that compliance with these requirements places an unmanageable burden on the legislature. The courts should respect the legislature's choice to be bound by the plain language of Hancock, and the case law previously cited demonstrates that they do.

The State concedes that the constitutional "appropriation" requirement "finds support . . . in this Court's decision in [*Rolla 31*]" and therefore asks that the Court "disavow" this decision. State br. 62, 64. Of course, the support for these requirements is hardly limited to *Rolla 31*. The requirement that an "appropriation" be both "made and disbursed to pay the . . . political subdivision for any increased costs" is straight from the Constitution itself. Art. X §21. And, as all the authority previously cited shows, this Court has repeatedly held that the Constitution, and this language in particular, "means what it says." Clayton would prevail in this case even if *Rolla 31* had never been decided.

Nonetheless, the State asks that *Rolla 31* be overruled. But its explication of *Rolla 31* bears little resemblance to the actual holdings of the case. According to the State, the *Rolla 31* case stands for an unjustified prohibition on reassignment of State funding from existing voluntary programs to new mandatory ones. This is not correct. *Rolla 31* addressed two issues, only one of which is directly relevant to this case. The State's summary of the case conflates the two issues to make the decision appear analytically jumbled. State br. 62-64. The State's summary of the opinion has nothing to do with what this Court actually held in *Rolla 31*.

The first issue in *Rolla 31* was whether the State had complied with certain statutes prohibiting "reallocation of money appropriated for the public school foundation program." 837 S.W.2d at 3. The Court held that it had, even though the money was transferred from a "similar voluntary program" the prior year. *Id*. at 5. But even with this funding, local districts were not "fully fund[ed]" – they were still required to provide

10% of the funding for the program. Thus, the Court turned to the second issue, whether there was an unfunded mandate in violation of Hancock (as to the 10%). *Id*. at 6. Because there were no funds set aside by the legislature at all (whether transferred from a voluntary program or otherwise) to make up the difference between the State funding and the full funding required, the State argued that school districts should make up the shortfall with general unallocated school funding dollars. *Id*. As previously discussed, the Court rejected that argument. Neither of these holdings prevents the legislature from transferring funds from voluntary to mandatory programs as the State claims. The Court *upheld* the transfer of funds from one program to another, but the funds transferred simply *were not enough* to "fully fund" the program in compliance with Hancock. The State's argument erects and then attacks a straw-man version of this Court's opinion. *Rolla 31* is a well-reasoned decision applying clear, plain-language constitutional principles, and the State's request that this Court disavow that decision only demonstrates the weakness of its position.

In the end, of course, the State's complaints about Hancock are simply irrelevant. The Constitution says what it says. And the Supreme Court in *Rolla 31* and other cases has emphasized that it "means what it says." If the State, as suggested in this case, disagrees with its Constitution as adopted by the people of Missouri, then the remedy is to seek an amendment to the constitution. It is not to ask this Court to reject plain constitutional language that requires that the judgment in favor of Clayton be affirmed.

2. The State's argument that Clayton Taxpayers must show costs "passed on to the taxpayers" is unsupported and contrary to the Constitution and this Court's prior cases (responds to State's point 5).

The State's fifth point relied on asserts that Clayton Taxpayers did not show increased costs "passed on to the Clayton taxpayers." State br. 56.[34] The State's legal argument in support of this point for this argument appears on pages 37-41 of its brief, where it argues that the Court must consider "whose point of view the voters had in mind when they voted in 1980." State br. 37. According to the State, the voters had themselves in mind (as taxpayers), and this means that a Hancock claim requires a showing of costs "passed on to the Clayton taxpayers." State br. 37, 56. Thus, the State argues, "a new requirement that is accompanied by new revenue" would not violate the Hancock Amendment. State br. 37-38. Based on this legal argument, the State argues that Clayton cannot show "increased costs" because one must count the §167.131 tuition amount as an offset ("net") against the costs of education, and the amount of tuition is greater (according to the State) than the costs.

This argument is legally and factually unfounded for multiple reasons. At first blush, the argument is nothing more than a rehash of the State's "appropriation" arguments addressed in the previous section. As in the "appropriation" arguments, the

[34] The state preserves no point arguing that SLPS Taxpayer failed to comply with this alleged requirement.

State is arguing in point five it need not comply with the requirement of a "state appropriation . . . made and disbursed." Specifically, the State's argument is that tuition payments from SLPS (which are neither appropriated nor from the State) should count towards compliance with Hancock. This argument can be rejected for all of the reasons stated in the previous point. Hancock specifies with clear and precise language how the State shall fund its new mandates, and statutory tuition payments from another school district cannot be squared with that language.

In addition to being a rehash of arguments previously refuted, the State's contention that Clayton must show costs "passed on to the Clayton taxpayers" is contrary to this Court's holdings in every previous Hancock unfunded mandate case in which a violation was found. *See, e.g., Brooks, Rolla 31, City of Jefferson II, Boone County*. In all of these cases the Court held that the evidence was sufficient to prove an unfunded mandate. And in none of these cases is there any reference to separate evidence showing a cost "passed on" to the taxpayers.

What the cases do say, which the State quotes as its support for its argument, is that the purpose of Hancock is to protect taxpayers. That it true. But it is equally true that the Hancock Amendment spells out the requisite *means* to reach that end. One of those means is Article X §21's prohibition against new mandates on local governments absent a state appropriation to fully fund "any increased costs." The premise of this prohibition is that placing a mandate on local government without such funding is "essentially the same as requiring local [entities] to raise money to support a state mandated program." *Rolla 31*, 837 S.W.2d at 7. That is a valid premise, and it was a valid policy choice by

the voters to prohibit unfunded mandates as a bright-line way to prevent this behavior. Hancock could have been drafted in the way the State suggests – in which case it would say that the appropriation must be made "for increased costs that will be passed on to taxpayers." It does not say that. Instead, the voters chose to prohibit a new mandate that imposed "*any* increased costs." Art. X §21 (emphasis added); *see also Boone County* (interpreting Art. X §21: "The word 'any' as used in a constitutional provision is all-comprehensive, and is equivalent to 'every.'") (internal quote omitted).[35]

In addition to its lack of merit, the State's novel argument fails for another reason. The State's argument purports to protect taxpayers, but what it is really urging is simply the shifting of that burden from one group of taxpayers (Clayton's) to another (SLPS's). The funds the State says will benefit Clayton Taxpayers will be paid dollar-by-dollar from the pockets of City of St. Louis taxpayers and out of the educational resources for City-resident students, without a dime of State funding to defray these costs. The State apparently sees no Hancock infirmity on a new mandate to be funded by a massive transfer of money from the City to St. Louis County. The result, urged by the State to be constitutionally permissible, would be a region-wide educational disaster, leading to the effective bankruptcy of SLPS and disrupting the education of tens of thousands of St. Louis area children. Nothing in the letter or spirit of the Hancock Amendment authorizes

[35] In addition to being legally incorrect, the State's argument is also factually unfounded because the tuition pursuant to §167.131 is not sufficient to cover the costs of the mandate. *See* Argument I.C, below.

such a scenario. The Court should reject the State's unsupported novel theory that some unwritten requirement that taxpayers must prove costs "passed on" to them should be read into the Amendment.

3. Clayton Taxpayers were not required to prove the proportion of funding that was received from the State in 1980; the State's analysis is contrary to Hancock's plain language and relies on irrelevant legal authority (responds to the State's point 8).

Point eight of the State's brief digresses into irrelevant legal analysis taken from cases applying a separate prohibition in the Hancock Amendment that is not at issue in this case. Article X §21 contains two separate prohibitions, and this Court has explained the difference between them as follows:

> To the extent that the state required local governments to perform activities and provided some funding of those activities on November 4, 1980, the first sentence of Section 21 prohibits the state "from reducing the state financed proportion of the costs" of the mandated activity. The second sentence of Section 21 prohibits the state from requiring local government to begin a new mandated activity or to increase the level of a previously mandated activity beyond its 1980-81 level unless the General Assembly appropriates sufficient funds to finance the cost of the new or increased activity.

Fort Zumwalt, 896 S.W.2d at 921. The State argues, citing *Fort Zumwalt* and *School District of Kansas City v. State*, 317 S.W.3d 599, 612 (Mo.banc 2010), that Clayton was

required to show "the program mandated by the state in 1980-81 and the ratio of state to local spending for the mandated program in that year." But, as both *Fort Zumwalt* and *Kansas City* make clear, this "ratio" analysis applies to the first prohibition in §21, which "prohibits the state 'from reducing the state financed proportion of the costs.'" *Fort Zumwalt*, 896 S.W.2d at 921-923; *Kansas City*, 317 S.W.3d at 611-612. This requirement does not apply to the second, "new mandate[]" prohibition in §21 because the funding provided for other programs in 1980 is completely irrelevant to whether the State has fully funded a new program that did not exist when Hancock was enacted. Confirming the point, not one of the cases decided by this Court finding a "new mandate" violation (*e.g.*, *Brooks*, *Rolla 31*, *City of Jefferson I* and *II*, and others) has required the evidence that the State claims is essential for such a case.

Since the State admits that §167.131 "requires a 'new activity or service' of the Clayton district" (State br. 42), Clayton was not required to present the evidence the State seeks.[36]

[36] For the same reason, Clayton was not required to show how much Clayton received from the State for its general education programs. Nonetheless, that information does appear in the record in Ex.D34, which shows (at pages CSD836-837) that Clayton receives about $1,500,000, or just under 3% of its total budget, from the State. The State's assertion that Clayton did not provide this evidence (State br. 4) is both incorrect and irrelevant.

4. The remedy ordered by the trial court, holding that §167.131 is unconstitutional and unenforceable, was correct (responds to State's point 9).

The State's final point on Hancock questions the trial court's remedy in this case. According to the State, the judgment invalidated §167.131 "on its face[37] – at least during a period in which there is no line item appropriation[38] sufficient to cover all possible costs under the statute." State br. 72. The State urges that the court instead should have "excused compliance – but only to the extent the costs imposed could not be covered by the funds provided." State br. 73. Again, the State's argument is factually unfounded and seeks to rewrite the Hancock Amendment and this Court's decisions.

To begin with the obvious factual point, the State's contention rests on the unfounded notion that there are some sort of State "funds provided" here that would permit either school district to comply to a certain "extent." There are no State funds provided here, making this argument an irrelevancy. *See* Argument I.A.1, above. But aside from being irrelevant, the argument is also legally without merit.

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[37] The trial court's judgment did not invalidate §167.131 "on its face." It invalidated as applied to SLPS and Clayton. LF1862.

[38] The trial court's judgment did not rest on (or even mention) the absence of a "line item appropriation." Rather, it held – correctly – that there is "no State funding for §167.131" *at all*. The State erects a strawman in place of the trial court's opinion, just as it does with this Court's opinion in *Rolla 31*, and with equal invalidity.

The Hancock Amendment says "[t]he state is prohibited from requiring any new or expanded activities by counties and other political subdivisions without *full state financing*." Art. X, §16 (emphasis added). As with other provisions of the Hancock Amendment, the Court has applied this requirement as written. In *Rolla 31* only 10% of the total funding for the education program in issue was to come from local taxpayers. 837 S.W.2d at 7. Yet the Court did not hesitate to invalidate the entire statute on those facts. *Id*. This Court imposed no requirement that school districts use the 90% funding that they had to comply "to the extent" that that funding allowed.

The State cites *Brooks* as if it supports its position, but it does not. *Brooks* involved a challenge to a legislative act (the Concealed Carry Act) with many separate components. The Hancock Amendment challenge was to just one of those components, namely, the requirement that counties issue concealed carry permits. With respect to that mandate, the Court held that "the Act constitutes an unfunded mandate [on the four counties involved in the case] for which an injunction will lie prohibiting enforcement by the state," and ordered an injunction "to the extent" called for by the Court's ruling. *Id*. at 850. Other provisions in the Act, permitting, for example, the transportation, carrying and discharge of firearms in certain circumstances, did not impose any new mandate on local government and were therefore not enjoined. *Id*. at 850-851. In this case, all that is in issue is one statute (§167.131), that statue does impose a mandate, and it should be held unenforceable, just as the mandate in *Brooks* was. Indeed, the judgment in this case, which holds §167.131 unenforceable only as to the Clayton and SLPS, is directly analogous to the judgment entered in *Brooks* enjoining enforcement of the Act's permit

mandate only on those counties that directly participated in the action. *Brooks* fully supports the judgment in this case and in no way undercuts it.

The State's brief suggests that the trial court should have allowed for the possibility that the State may provide funding for §167.131 sometime in the future, but that argument is refuted by this Court's decision in *City of Jefferson II*. "Until a specific appropriation is made and disbursed to Jefferson City, it need not comply with the planning mandate." 916 S.W.2d at 797. The same answer is appropriate here. The State may in the future choose to fund its unfunded mandate in §167.131. Until that time, Clayton "need not comply."

This result is required by plain and unambiguous constitutional language requiring "full state funding," but it is also necessary to avoid a pragmatic and jurisprudential nightmare for local governments and the courts. Under the State's approach, constitutional requirements become a moving target, requiring courts and governmental officials to determine from day to day to what "extent" compliance is required under the level of funding currently provided. In place of clear rules that resolve disputes, the State would impose amorphous, ever-shifting obligations that would foster unending litigation. Again, nothing in the letter or spirit of Hancock warrants the State's urged approach.

C. Summary of multiple grounds appearing in the record for affirmance of the trial court's judgment in favor of Clayton Taxpayers based on the Hancock Amendment.

Based on facts and legal authority discussed above in Argument I.A, Clayton Taxpayers have proven §167.131 to be an unfunded mandate in violation of the Hancock

Amendment in multiple respects. The violation is most succinctly stated as follows: (1) §167.131 indisputably and admittedly mandates new and increased activities and services by Clayton; (2) it is also indisputable and admitted that these new mandated activities and services will result in increased costs (in multiple respects), which the evidence at trial shows are far more than *de minimis*; (3) there is no State funding whatsoever for §167.131.[39]

The funding mechanism provided by §167.131 – tuition payments from SLPS – places Clayton in untenable position of relying for funding on an entity that has stated it cannot and will not pay. SLPS, for its part, has perfectly good reasons for refusing to pay. That district, like Clayton, receives no State funding for §167.131, and the evidence shows that the total statutory tuition bill would likely consume almost the entire SLPS budget, including local funds, leaving virtually nothing to educate the thousands of children who would remain in its schools.[40]

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[39] The State also concedes that there is no "specific appropriation" for §167.131. This alone is separately sufficient to prove a violation of Hancock. *City of Jefferson I*, 863 S.W.2d at 849 ("the constitution requires that the legislature pass a specific appropriation to cover the costs of the increased activity it demands of a political subdivision").

[40] Completely independently of Clayton's preceding arguments, this also requires invalidation of §167.131's statutory mandate on both Clayton and SLPS. If SLPS cannot pay, or if it is relieved of the obligation to pay under Hancock or because of impossibility of compliance, then Clayton will be left with no source of funding for plaintiff's children

And even if Clayton did receive the tuition, the amount of that tuition would still fall short of covering the costs required to comply with the statute. The total projected cost to Clayton under this statute would be $177.2 million in the first year. This dwarfs the statutory tuition collectable for the 3,567 projected transfer students ($72,241,273.89). Tr.387:10-19. It exceeds the amount of that tuition *plus* Clayton's constitutionally-limited bonding capacity of $56 million. Tr.270:4-10. Similarly, taking the lesser projection that transfers would be limited to the 200-300 requests that were actually received, Clayton's tuition would be $6,075,801, but the costs incurred would be $10.8 million.[41]

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or for any other transfer students. This untenable situation would clearly violate Hancock under all the authority previously cited. Additionally, as a matter of straightforward statutory analysis, SLPS obligation to pay is an essential (non-severable) component of §167.131, and the statute cannot be enforced against Clayton in its absence. *See Associated Ind. of Missouri v. Director of Revenue*, 918 S.W.2d 780, 785 (Mo. banc 1996).

[41] These deficiencies are compounded by the failure of §167.131's statutory formula to include new capital expenditure costs unless financed through bonded indebtedness. Dorson depo. 73:8-74:22; Tr.260:24-261:4. This means that any capital expenditure a district incurs to accommodate §167.131 transfer students – even including leasing a trailer or purchasing equipment worth more than $1,000 – would not be compensable under the statute. Tr.294:17-295:2, 260:12-15.

As a matter of straightforward Hancock analysis, not to mention the interests of affected children and simple financial reality, §167.131 does not pass constitutional muster. The trial court judgment was correct and should be affirmed.

D. The trial court correctly allowed, and in any event did not abuse its discretion in allowing, Clayton Taxpayers to intervene and raise Hancock claims and defenses (responds to Breitenfeld's points V and VI).

Standard of review: Breitenfeld's point V inadequately states the applicable standard of review. Clayton Taxpayers' intervention in this action was on both permissive grounds (under Rule 52.12(b)) and as a matter of right (under Rule 52.12(a)). Breitenfeld states the standard of review for intervention as a matter of right (Breitenfeld br. 33), but fails to state the standard applicable for permissive intervention. This Court reviews permissive intervention for abuse of discretion, i.e., whether "the trial court's ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice." *State ex rel. Nixon v. American Tobacco Company*, 34 S.W.3d 122 (Mo.banc 2000).[42]

[42] Clayton Taxpayers' motion to intervene and to file the intervenors' pleading by which they raised the Hancock claims and defenses (LF1129-1132) were granted by the trial court in a July 22, 2011 Order. *See* LF13-14 (trial court docket sheet). That Order, however, appears nowhere in appellants' legal file. *See* Rule 81.12(a) ("[t]he legal file shall always include . . . the judgment or order appealed from").

Clayton Taxpayers were correctly permitted to intervene both permissively and as a matter of right to raise their Hancock claims and defenses. Rule 52.12(a) requires intervention as a matter of right "when the applicant claims an interest relating to the property or transaction that is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties." Rule 52.12(a)(1). Prior to this Court's decision in *King-Willmann v. Webster Groves School District*, 361 S.W.3d 414, 417 (Mo.banc 2012), which for the first time clarified that a political subdivision may not raise Hancock as a defense in litigation, there might have been some question about whether this ground applied (because the taxpayers' interests might arguably have been "adequately represented by existing parties"). Now, however, there can be no serious debate on the point. Hancock exists to protect the taxpayers. If an unfunded mandate is imposed by a lawsuit against a political subdivision, as Breitenfeld is attempting in this case, the impact of that mandate will fall on the taxpayers, and exclusively so for purposes of asserting rights under Hancock. "[A]s a practical matter," Clayton Taxpayers had no mechanism available to fully protect their constitutional rights other than by intervening in this case, and Rule 52.12(a)(1) squarely applies. Intervention was therefore proper as a matter of right.

Permissive intervention was also proper, and certainly well within the broad latitude afforded by the "abuse of discretion" standard. Permissive intervention is proper "when an applicant's claim or defense and the main action have a question of law or fact in common." Rule 52.12(b)(2). Clayton Taxpayers' claims overlapped substantially with

the impossibility defenses raised by both SLPS and Clayton. They were essentially identical to the Hancock defenses that, at the time of intervention (prior to the *King-Willmann* decision), had arguably been properly raised by SLPS and Clayton. And, indeed, their claims overlapped in a fundamental way with the basic legal issue that Breitenfeld herself raised and continues to raise in this case: Do Breitenfeld's children have a right to transfer pursuant to §167.131 or not?

Breitenfeld also argues that Hancock claims and defenses were waived because they were not raised at the first available opportunity. Certainly, however, there can be no argument that *Clayton Taxpayers* waived any Hancock arguments. Clayton Taxpayers were not even involved in this action before they intervened on July 22, 2012, and when they did intervene their very first filing was a petition setting forth the claim that §167.131 was unconstitutional under Hancock. Breitenfeld seems to be arguing that *Clayton* waived Hancock defenses by not raising them on the first appeal in this case. That argument ignores the fact that at the time of the first appeal, Clayton had not even filed an answer, and that the appeal in the first case presented limited questions of statutory interpretation that would have obviated the need for extended constitutional litigation. It also ignores the fact that Breitenfeld repeatedly sought to prevent Clayton from raising defenses in this case following this Court prior decision, with no less than 9 separate motions and writ petitions, and every one was denied. *See* Statement of Facts

I.D and final paragraph of I.C, above.[43] But in any event, the argument is now irrelevant because it is eminently clear based on *King-Willmann* that *Clayton* has no Hancock claims or defenses to waive. The Hancock issues before the Court in this appeal are presented by Clayton Taxpayers, and there is no argument made by any party that Clayton Taxpayers waived their Hancock claims.

II. The judgment of the trial court should also be affirmed because substantial evidence establishes that compliance with §167.131 is impossible in multiple respects (responds to State's point 10 and Breitenfeld's points III and IV).

In this Court's prior opinion in this case, both the majority and the dissent discuss the prospect that compliance with §167.131 might be "impossible." The majority held that there was not sufficient "factual information contained in this record" to find impossibility and refused to "speculate that a sufficient number of city students would choose any particular new district to make their attendance impossible." *Turner*, 316 S.W.3d at 667 n.7. The dissent, taking judicial notice of U.S. Census data, noted that "even if only 3 percent of the approximately 66,000 school-aged pupils living in the City of St. Louis applied for enrollment in the Clayton school district, the district would be required to accept all of those students, despite the fact that it would cause nearly a 100-percent increase in its enrollment," describing this result as "absurd." *Turner*, 316

[43] It was indisputably correct as a matter of law for Clayton to be permitted to raise defenses on remand. *See* LF902-931, 932-940 (trial court ruling on this issue, citing the relevant case law).

S.W.3d at 675-676. The dissent further noted that on remand, under the majority's holding, "the parties are free . . . to offer additional proof on relevant issues, including impossibility to comply with section 167.131." *Turner*, 316 S.W.3d at 676 n.10. Thus, although the majority and the dissent disagreed regarding the sufficiency of the evidence demonstrating impossibility, the two opinions agreed that "impossibility" was a matter for factual development in the record. The Court's discussion on this issue is consistent with Missouri law generally, which recognizes 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, O & K.C.R. Co.*, 167 S.W. 153, 156 (Mo.App.K.C. 1914); *see also Egenreither ex rel. Egenreither v. Carter*, 23 S.W.3d 641, 646 (Mo.App.E.D. 2000) ("considerations of safety, emergency conditions, or impossibility of compliance may constitute valid excuses for noncompliance with a statute").

The evidence in the record amply, indeed overwhelmingly, demonstrates the impossibility of compliance with §167.131. *See* Statement of Facts III.B.1. The evidence showing the impossibility of planning is particularly compelling – in order to comply with the statute school districts must make decisions about facilities and staffing as much as five years before the first student arrives at school. But there is absolutely no way for a district to know five years (or even one year) in advance how many students will transfer under this statute. *Id.*III.B.1. Indeed, given the State's recent mid-semester (provisional) accreditation of SLPS it is now clear that a district cannot even count on knowing whether such transfers will or will not be occurring even a month in advance. Statement of Facts III.B.5. This evidence does not even take into account the

fundamental impossibility for Clayton in particular of doing what the statute would require for that district – doubling its facilities in a single year without funding, land, or time to do so. Statement of Facts III.B.2. The evidence also shows impossible and unworkable consequences to other educational institutions and students, including SLPS (which would "cease to exist in any meaningful sense"; LF1859-1860), and the VICC program (which would be "devastate[ed]"; Tr.312:12). *See* Statement of Facts III.B.3.

Breitenfeld, in point IV of her brief, challenges the use of Dr. Jones' expert projections in the context of defendants' "impossibility" arguments.[44] Breitenfeld br. 27. The admissibility of expert testimony in Missouri is governed by statute, R.S.Mo. §490.065. "In deciding whether to admit an expert's testimony, the circuit court is required to ensure that all of the statutory factors are met; however, the court is not required to consider the degree to which they are met. So long as the expert is qualified, any weakness in the expert's knowledge" goes to "what weight to give the expert," not admissibility. *Kivland v. Columbia Orthopaedic Group*, 331 S.W.3d 299, 311 (Mo.banc 2011); *see also Elliott v. State*, 215 S.W.3d 88, 95 (Mo.banc 2007) ("Any weakness in the factual underpinnings of the expert's opinion ... goes to the weight that testimony should be given and not its admissibility."). "It is only in those cases where the source upon which the expert relies for opinion is so slight as to be fundamentally unsupported,

[44] The State quite properly does not challenge the admissibility of Dr. Jones' expert testimony in any of its points on appeal.

that the finder of fact may not receive the opinion." *8000 Maryland v. Huntleigh Financial Serv.*, 292 S.W.3d 439, 447 (Mo.App.E.D. 2009).[45]

The careful and conservative methodology employed by Dr. Jones is extensively described above. Statement of Facts III.A.3.b. The reasonable reliability of properly conducted survey research has been confirmed many times by Missouri courts. *See Liberty Financial Management Corporation v. Beneficial Data Processing Corporation*, 670 S.W.2d 40, 54-55 (Mo.App.E.D. 1984) (affirming admission of survey results and expert opinion based thereon where the expert had "extensive experience in poll taking" and testified to the "methodology employed in taking the survey as well as its statistical reliability"); *Del-Mar Redevelopment Corporation v. Associated Garages, Inc.*, 726 S.W.2d 866, 870-71 (Mo.App.E.D. 1987) (expert testimony based on survey results was admissible even where survey was conducted by a third party); *Schaffer v. Litton Interconnect Technology*, 274 S.W.3d 597, 607 (Mo.App.E.D. 2009) (citing *Liberty* and *Del-Mar* and recognizing that "[c]ourts have permitted scientifically designed and statistically reliable surveys to be used in evidence"); *see also, e.g., Stell v. Board of Public Education for the City of Savannah*, 724 F. Supp. 1384, 1392 (S.D.Ga. 1988) (admitting expert testimony regarding student enrollment and transfer projections based on a parent survey where "the survey used accepted techniques and met acceptable

[45] This Court reviews a trial court's decision to admit or exclude expert testimony for "abuse of discretion." *Kivland*, 331 S.W.3d at 311.

standards so that its results would be reliable"), *aff'd by Stell v. Savannah-Chatham County Board of Education*, 888 F.2d 82 (11th Cir. 1989).

Breitenfeld's argument that Dr. Jones impermissibly relied on "hearsay" has been repeatedly rejected by Missouri courts. *Liberty Financial Management Corp.*, 670 S.W.2d at 54-55 (expert opinion and survey results admitted over "hearsay" objection); *Del-Mar Redevelopment Corporation*, 726 S.W.2d at 870-871 (same); *see also Peterson v. National Carriers, Inc.*, 972 S.W.2d 349, 354 (Mo.App.W.D. 1998) (Stith,J.) (§490.065 "does not prohibit an expert from relying on hearsay" and "recognizes the generally accepted principle that an expert necessarily acquires his knowledge and expertise from many sources, some of which are inadmissible hearsay") (internal quotations omitted).

The State and Breitenfeld make many statements regarding Dr. Jones' testimony, in an attempt to impugn his testimony. Some of appellants' statements are incorrect[46] and

[46] *Compare* Tr.88:11-89:19 (respondents were told that "If the St. Louis Public Schools improve enough to meet the State of Missouri's standards for accreditation, the opportunity to send this child to a public school in St. Louis County would end" and anybody who said they were "'somewhat less likely' or 'much less likely' was eliminated from the transfer calculations.") *with* State br. 60 (stating respondents did not "under[stand] that the transfer right would disappear" when SLPS regained accreditation.).

others are misleading.[47] But regardless of the particulars, all appellants' arguments have two things in common: (1) they ignore the multiple independent and corroborating bases for the expert's enrollment projections, and (2) they all go, at best, merely to the weight of the expert testimony and not its admissibility. Under the applicable standard of review, and the expert witness cases cited above, such arguments present no basis at all to exclude Dr. Jones' testimony or for reversal of the judgment in this case. In any event, overwhelming unrebutted evidence showed Dr. Jones' report and conclusions to be rigorous, highly reliable, and strongly corroborated in numerous respects, and to be precisely the kind of information governmental (and other) entities including the State itself reasonably and routinely rely on in making decisions. Tr.69:23-70:20;78:21-79:19 (Dr. Jones); 465:4-14 (Dr. Adams); 234:1-18 (Dr. Wilkinson). It is difficult to imagine a

[47] Appellants attack Dr. Jones's determination that 90% of those answering that they are "almost 100% certain" to transfer would transfer, but the evidence shows that Dr. Jones could have used 95% or 100%, but chose 90% to be even more conservative. Tr.135:25-136:14,87:17-88:10; *see also* Statement of Facts III.A.3.b.i(1).Analysis of Survey Results. As to the State's attack on Dr. Jones' choice of seven "school-selection factors" to include in his survey, the data regarding these factors was not integral to his conclusions (although it does corroborate those conclusions; Tr.149:20-150:4) but in any event the seven factors were selected competently based on Dr. Jones' prior research in the field of school choice. *See* p.37 n.19 above.

more competent and credible set of expert projections than those established in the trial record below, and upon which the trial judge fully relied as credible.

As a matter of law and substantial evidence, the trial court's impossibility judgment must be affirmed.

III. Clayton's judgment for unpaid tuition against Breitenfeld is supported by substantial evidence and should be affirmed (responds to Breitenfeld's points I and II).

As summarized above (Statement of Facts III.C), substantial evidence supports the trial court's judgment against Breitenfeld for tuition amounts owed on both express and implied[48] contract grounds. Her points on appeal seeking to challenge that judgment on grounds other than the enforceability of §167.131 have not been properly preserved for review and, in any event, lack merit.

The trial below was conducted on the premise that Breitenfeld's liability to Clayton for tuition would ultimately depend on whether the trial court sustained the challenges to

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[48] *Midwest Crane and Rigging, Inc. v. Custom Relocation's Inc.*, 250 S.W.3d 757, 760 (Mo.App.W.D. 2008) (*quantum meruit* claim lies where "plaintiff provided to the defendant materials or services at the defendant's request or with the acquiescence of the defendant, . . . the materials or services had reasonable value, and . . . the defendant, despite the demands of the plaintiff, has failed and refused to pay the reasonable value of such materials or services"). Each of these elements is established in the record, as Judge Vincent properly concluded.

the validity and enforceability of the statute, and that she was not otherwise raising defenses to her liability to pay tuition.[49] That Breitenfeld's liability for tuition would "turn on [the court's] ultimate judgment" on the statutory issue was recited in a colloquy between counsel for both parties with Judge Vincent in open court. Tr.156:9-158:5. To this end, Breitenfeld and Clayton reached a compromise stipulation on the (otherwise disputed) duration of the residency of Breitenfeld and her daughters in the City of St. Louis, and thereby obviated the need for Breitenfeld to testify at trial (regarding her shifting and inconsistent sworn and pleaded claims of residency). LF1621.[50] Breitenfeld accordingly rested her case without presenting any evidence at trial other than the agreed residency stipulation. Tr.67 (Breitenfeld rests). At one point during the trial, when Clayton presented its evidence on the amount that would be owed for tuition on its counterclaim, Breitenfeld's counsel requested and was granted leave to file a later objection to Clayton's evidence in the event that the proffered tuition payment documents signed by her did not "fully support[]" Clayton's CFO's testimony on the amount owed. Tr.264:14-265:15. However, no such objections were made. See Tr.299:24-300:2 & *passim*. Given that Breitenfeld at trial raised no defenses to her obligation to pay tuition

[49] Breitenfeld pleaded no defenses in her answer to Clayton's tuition counterclaim. LF1506-1507; Tr.6:21-22.

[50] It was also stipulated, to preserve privacy and confidentiality for her and her daughter, that Breitenfeld's deposition and exhibits were included in the trial record but filed under seal.

(other than that §167.131 was enforceable), her defenses now raised in points I and II are not preserved for review and cannot be a basis to overturn the tuition judgment entered by Judge Vincent.

These points are also waived, and not reviewable, by virtue of Breitenfeld's failure to include in the record all of the evidence that was adduced against her at trial – namely, her deposition and exhibits thereto. An "appellant challenging the sufficiency of the evidence . . . has a duty, pursuant to Rule 81.12(a) to provide this Court with a full and complete record of all proceedings and evidence necessary to make a determination of all questions presented on appeal." *Wallace v. Wallace*, 269 S.W.3d 469, 487 (Mo.App.E.D. 2008), citing Rule 81.12(e) ("[a]ppellant is responsible for depositing all exhibits that are necessary for the determination of any point relied on").

Apart from being waived and not preserved for review, Breitenfeld's points in any event lack merit. With respect to her argument that the trial court's judgment holding §167.131 unenforcable should be applied prospectively rather than retrospectively, the case law cited by Breitenfeld does not support her position. In every case she cites, the parties in the immediate litigation were held to be bound by the Court's decision. *See, e.g, In re Ext. of Boundaries of Glaize Creek*, 574 S.W.2d 357, 364-365 (Mo.banc 1978) (parties "in the present case" were bound by the result, but holding was not retroactively applied to those not a party in the lawsuit); *Sumners v. Sumners*, 701 S.W.2d 720 (Mo.banc 1985) (holding that court's ruling applied retroactively to both parties and non-parties); *Cipriano v. City of Houma*, 395 U.S. 701, 706 (1969) (holding applied to parties in that case and in other pending "cases . . . which [were] not yet final," but not applied

retrospectively in cases not subject to pending litigation). The only question in these cases was whether those *not* a party to the lawsuit should be retrospectively bound. Under these cases there is no question that Breitenfeld, who *is* a party in this case, must be bound by the judgment both prospectively and retrospectively.

Moreover, in the cases cited by Breitenfeld the court applied its judgment prospectively only because parties outside the case may have had reliance interests that required protection. *See Sumners*, 701 S.W.2d at 723 ("prospective-only application depends on the presence of reliance by the parties"). But Breitenfeld did not rely on the *Turner* case when sending her children to Clayton, and made no showing at trial that she did (she adduced no evidence at all). To the contrary, her deposition shows, she hedged her bets by submitting (false) affidavits of residency claiming that she lived in Clayton (LF1621; Exs.B25, B30). The cases cited by Breitenfeld do not apply for this further reason.

Finally, to the extent the basis of Breitenfeld's argument is to invoke "equity," as in the cases she cites, she put on no proof at trial, much less that it would be somehow inequitable to require her to pay tuition. And again, to the contrary, as her deposition shows, Breitenfeld has not acted equitably, has unclean hands, and should not be aided by equity.[51] Breitenfeld's argument should be rejected for this third reason as well.

[51] Breitenfeld's unclean hands are demonstrated by her multiple false (including sworn) statements to Clayton and others throughout this litigation and going back years. Breitenfeld depo. 77:11-16; Exs.B25,B30.

The tuition judgment against Breitenfeld was supported by substantial evidence, she has not shown otherwise, and the judgment should accordingly be affirmed.

IV. The trial court's award of attorneys' fees was not an abuse of discretion and should be affirmed (responds to State's point 10).

Standard of review: Point 10 of the State's brief seeks reduction of the attorneys' fee and cost award in favor of Clayton Taxpayers. The State's brief does not identify the standard of review for this point. "The circuit court is deemed an expert at fashioning an award of attorneys' fees and may do so at its discretion." *Western Blue Print Co. v. Roberts*, 367 S.W.3d 7, 23 (Mo.banc 2012). The amount of such an award is reviewed for "abuse of discretion." *Howard v. City of Kansas City*, 332 S.W.3d 772, 792 (Mo.banc 2011); *Russell v. Russell*, 210 S.W.3d 191, 199 (Mo.banc 2007). "To demonstrate an abuse of discretion" in the amount of fees "the complaining party must show the trial court's decision was against the logic of the circumstances and so arbitrary and unreasonable as to shock one's sense of justice." *Id.*

The trial court did not abuse its discretion in awarding and setting the amount of fees. The fee award to Clayton Taxpayers was properly supported by competent evidence (LF1863-1869) as well as the trial court's own expertise and observation of the services rendered. *Western Blue Print Co.*, 367 S.W.3d at 23. Indeed, the State does not challenge counsels' hourly rates, the time expended, or costs incurred. The State's sole argument is that a trial, and hence, attorneys' fees, were unnecessary to the extent that the judgment finding a Hancock violation is affirmed by this Court based on indisputable facts because presumably, in that event, the State's failure to comply with Hancock was

clear as a matter of law. Contrary to this novel theory to avoid liability for attorneys' fees, the State then and now vociferously disagrees that it violated Hancock at all, much less as a matter of law. How or why an award of attorneys' fees to a prevailing litigant should be reversed on this ground is inexplicable and the State cites no authority for it.

According to the State – but completely contrary to its sole argument against the fee award – Clayton Taxpayers' case was flawed because they presented *too little* evidence at trial. *See* State's points relied on 5, 8. But critically, for purpose of Hancock analysis, this Court, without a trial and factual record, still would have no evidentiary basis on which to base projections of increased cost or levels of enrollment – the very same information that both the majority and dissent complained was missing in the first appeal of this case. *Turner*, 316 S.W.3d at 667 n.7, 676. In addition, without the testimony of Dr. Dorson, the Court would not have the benefit of the State's candid admission that there is no statutory basis for funding §167.131 transfers. *See* Statement of Facts III.A.1. The State's suggestion that, for purposes of the fee award, no trial was necessary is defeated by its own contentions elsewhere made on appeal and is otherwise meritless.

If the State truly believed that this matter should have been appropriately resolved as a matter of law without the need for a trial, it had a procedural avenue open to it: a motion for summary judgment under Rule 74.04. But the State, not surprisingly, did not choose that path. It chose, rather, to resist discovery even to the point of refusing to admit, among other things, that Clayton was required to provide instruction to students attending its schools. *See* Ex.D6, request for admission 10. After being ordered to do so

by the Court, the State finally admitted this and other facts on February 29, 2012, just five days before the trial in this case. *See* LF1517-1520; Ex.C22.

The fee award to Clayton Taxpayers was fully supported by competent evidence and the trial court's own expertise and observation of the services rendered. *Western Blue Print Co.*, 367 S.W.3d at 23; *Howard*, 332 S.W.3d at 792; *Russell*, 210 S.W.3d at 199. The State has not shown otherwise, much less that Judge Vincent abused his discretion in any respect, and the award should accordingly be affirmed.

Conclusion

The judgments of the trial court should be affirmed. Additionally, pursuant to Mo. Con. Art. X §23, Clayton Taxpayers should be awarded additional attorneys' fees and costs incurred post-judgment and for the appeal in this case.

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Certificate of Compliance

The undersigned hereby certifies that this brief includes the information required by Rule 55.03 and complies with the limitations contained in Rules 84.06(b). According to the word count feature of Microsoft Office Word, this brief, from the Table of Contents through the Conclusion, contains 27,891 words. The undersigned further certifies that the electronic copy of this brief submitted on CD-R pursuant to Rule 103.04(c) has been scanned for viruses and is virus free.

/s/ Mark J. Bremer

Certificate of Service

The undersigned certifies that an electronic copy of the foregoing was served by operation of the Court's electronic filing system on this 16th day of January, 2013, on Elkin L. Kistner, Jones, Haywood, Bick, Kistner & Jones, P.C., 1600 South Hanley Road, Suite 101, St. Louis, MO 63144, attorney for plaintiffs, James Layton, Solicitor General of the State of Missouri, P.O. Box 899, Jefferson City, MO 65102-0899, and Richard B. Walsh, Jr., Lewis, Rice & Fingersh, LC, 500 N. Broadway, Suite 2000, St. Louis, MO 63102, attorney for respondent Transitional School District of the City of St. Louis.

/s/ Mark J. Bremer