IN THE SUPREME COURT OF THE STATE OF MISSOURI

Appeal 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 ST. LOUIS COUNTY, MISSOURI
Cause Nos. 12SL-CC00411, 07SL-CC00605
HONORABLE DAVID LEE VINCENT, III

BRIEF OF RESPONDENTS TRANSITIONAL SCHOOL DISTRICT OF THE CITY OF ST. LOUIS, BOARD OF EDUCATION OF ST. LOUIS, AND CARRIE L. HEGDAHL

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JURISDICTIONAL STATEMENT

This appeal involves the validity of § 167.131 R.S.Mo., which the judgment below held to be unenforceable as applied to the St. Louis Public Schools ("SLPS")[1] and to the 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

The Transitional School District of St. Louis, the Board of Education of St. Louis, and SLPS taxpayer Carrie L. Hegdahl adopt and hereby incorporate by reference the Statement of Facts contained in the brief of Respondents School District of Clayton and its taxpayers.

History of SLPS and Loss of Accreditation

In 2007, the St. Louis Public School District ("SLPS") was classified as unaccredited by the State Board of Education. *Turner v. Sch. Dist. of Clayton*, 318 S.W.3d 660 (Mo. banc 2010). Responsibility for the governance of the SLPS therefore shifted from the elected Board of Education of St. Louis to an appointed Special Administrative Board of the Transitional School District of St. Louis. § 162.1100 R.S.Mo.; § 162.621.2 R.S.Mo. On November 3, 2008, Dr. Kelvin Adams took up his position as Superintendent of Schools for SLPS. (Tr. 420).

Under the then-current fourth cycle of the Missouri School Improvement Program (MSIP), the classification for accreditation of public school districts in Missouri was determined by whether the district met fourteen indicators. (Tr. 441). Six of the fourteen indicators concerned the academic performance of district students as measured by standardized tests. The remaining eight indicators concern attendance, college placement, scores on the ACT college entrance examination, and provision of upper-level classes, among others. (SLPS Ex. 8, p. 11). At the time Dr. Adams began his tenure, the SLPS was meeting three of fourteen indicators. (*Id.*). At the time of the trial of this cause, SLPS was meeting six of fourteen indicators. (*Id.*). On October 16, 2012, after

recognizing that SLPS was meeting seven of fourteen indicators, the State Board of Education voted to classify SLPS as provisionally accredited. (Respondents' Supplemental Legal File (RSLF) at 1). The Department of Elementary and Secondary Education and its director, however, have stated that the State Board has the right to again classify SLPS as unaccredited under the new, fifth cycle of MSIP, which takes effect this year. (RSLF 2-4, 5-6). They have emphasized that MSIP 5 is more rigorous and demands more of districts than did MSIP 4. (RSLF 2, 3-4).

Notwithstanding the risks of future loss of accreditation, it must be noted that the record is replete with facts concerning the progress made since SLPS lost accreditation in 2007, and while § 167.131 was not being enforced against the district. In recent years, SLPS has closed thirteen schools, reduced staffing by 1,724, and reduced teachers by 819. (SLPS Ex. 6). SLPS has eliminated its operating budget deficit and has a balanced budget, but does not have an operating surplus. (Tr. 368-69; 433). Between 2007-2011, the percentage of SLPS students meeting annual yearly progress targets in Communication Arts has increased by 13.6%, while the statewide increase is 10.2%. (SLPS Ex. 8, p. 4). Between 2007-2011, the percentage of SLPS students meeting annual yearly progress targets in Mathematics has increased by 13.7%, while the statewide increase is 9.3%. (*Id.*, p. 5). Between 2007-2011, the percentage of SLPS students scoring as advanced or proficient in English II end-of-course testing has increased by 14.2%, while the statewide increase is 1.7%. (*Id.*, p. 6). Between 2007-2011, the percentage of SLPS students scoring as advanced or proficient in Algebra I end-of-course testing has increased by 19.3%, while the statewide increase is 7%. (*Id.*, p. 7). Between

2007-2011, the attendance rate for SLPS increased by 3.8% to 92.9%. (*Id.*, p. 8). The statewide average for 2011 is 94.4%. (*Id.*).

Facts Relating to Taxpayer Carrie L. Hegdahl

The parties to this action stipulated that Carrie Hegdahl is and at all relevant times has been a taxpayer within the confines of the St. Louis Public School District. (L.F. 1623). The parties further stipulated that Ms. Hegdahl has standing to bring suit in Circuit Court pursuant to Mo. Con. Art. X, § 23. (*Id.*).

Facts Relating to SLPS Taxpayer Hegdahl's Hancock Amendment Claim

Parents within the SLPS do not have to enroll their children in SLPS schools and if they choose not to do so, SLPS has no obligation to educate those children. § 167.031 R.S.Mo. For those children that do enroll in SLPS schools, they must do so according to the rules adopted for the governance and organization of SLPS. § 171.011 R.S.Mo.

The forerunner of § 167.131 was first adopted in 1931, and had nothing to do with any grade level other than high school, nothing to do with transportation between districts, and nothing to do with district-wide accreditation. C.S.S.B. 237, 269, 322, 323, 326, and 327, Section 16, 1931 Laws of Missouri, p. 343. At no time prior to 1993 did the statute apply to districts as a whole or to any grade level other than high schools and no transportation of students was required by the statute. (Tr. 574, 576). The modern concept of district-wide accreditation based chiefly on student performance factors did not exist in Missouri law until after 1993. (Tr. 576). Before 1993 (and before the adoption of the Hancock Amendment in 1980), SLPS was only required by § 167.131 to have one operating high school. SLPS met and continues to meet the pre-1993 and pre-

1980 requirements of § 167.131 and its predecessor statutes. (Tr. 435-36, testimony of Dr. Adams relating to course offerings).

With respect to just the two children of Plaintiff Breitenfeld, the Chief Financial Officer for the Clayton School District, Mary Jo Gruber, testified that the annual tuition that would be charged to SLPS in the event that § 167.131 is upheld amounted to $19,169.35 for the Plaintiff's child who attends an elementary school and $20,888.03 for Plaintiff's child who attends a middle school. (Tr. 283; Ex. C-12). The total yearly tuition bill that would be charged to SLPS by Clayton just for Plaintiff's children at present grade level would be $40,057.38. (SLPS Ex. 6, p. 11). As each child advances up through the Clayton school system, the tuition amounts become higher, and so SLPS's costs will also increase. (Ex. C-12). Because neither of Plaintiff's children attends or has ever attended an SLPS school, SLPS receives no state funding for their education. (Tr. 375-76). SLPS is barred by state law from claiming funding for children who reside in its boundaries but attend school elsewhere. § 163.011(2) R.S.Mo.

Dr. Terry Jones prepared a report that included projections of potential transferees from the City of St. Louis to schools in St. Louis County pursuant to § 167.131. (Ex. C-1). Dr. Jones testified that his research resulted in a projection that 15,740 children would seek to enroll in St. Louis County schools pursuant to § 167.131 if they were afforded that opportunity. (Tr. 83). Using the findings in Dr. Jones' report, the total amount of annual tuition that SLPS would have to pay to County districts for the 15,740 likely transferees identified in Jones expert report was calculated at $223,790,964.16.

(SLPS Ex. 2). Dr. Adams testified that in his experience and with his knowledge of the St. Louis district, Dr. Jones' projections of transfers were accurate. (Tr. 466).

The Chief Executive Officer of the Voluntary Interdistrict Choice Corporation (VICC), the voluntary City-County desegregation program in St. Louis, David Glaser, testified as to the transportation costs that SLPS could expect to pay if § 167.131 were enforced against it. Mr. Glaser's estimate was $40 million to $60 million in annual transportation costs if SLPS has to provide transportation for all 15,750 likely transferees identified in the Jones study. (Tr. 331). If only a single bus was needed for one district (Mr. Glaser used Clayton, the district attended by Plaintiff Breitenfeld's children for purposes of his estimate), the expense would be $46,202 in annual transportation costs. (Tr. 332).

Dr. Adams and Dr. Dorson both testified about the lack of identifiable savings for SLPS in connection with the enforcement of § 167.131 on the district. There is no connection between differences in the average cost to educate a student in SLPS and those in certain County districts. SLPS provides special education services directly, while most of the County schools have such services provided by the Special School District, meaning that the average per student cost of education is not comparable between SLPS and most County districts. (Tr. 429-30).

Even if students were to withdraw from SLPS schools and transfer under § 167.131, there is no way to predict who would withdraw or how particular buildings or programs would be affected. (Tr. 451). Dr. Adams testified that he would still have to open, staff, and operate schools even if hundreds or thousands of students left SLPS, thus

negating any potential savings. (Tr. 455-56). This testimony was confirmed by the State's witness, Dr. Roger Dorson. (Tr. 587-88). SLPS has no expenses related to Plaintiff's children or any of the other school-age children who presently attend schools other than SLPS schools or who are home-schooled and thus could realize no savings connected with their transfer to a County district. (Tr. 375-76, 382). Of the 15,740 projected transferees identified in the Jones expert report, 7,422 do not presently attend SLPS schools. (Ex. C-1).

By the admission of the State's own witness, Dr. Dorson, the only potential source of state money to pay costs of compliance for § 167.131 are the funds that SLPS receives through the State's foundation formula for education. (Tr. 544). The total amount that SLPS received through the foundation formula for FY 2011, after deductions for payments to charter schools, was $56.6 million. (Tr. 373). Dr. Dorson testified that, after the foundation formula money is spent, all costs for compliance with § 167.131 would have to be borne by local taxpayers. (Tr. 569). There is no specific state appropriation made and disbursed to pay for the costs of compliance with § 167.131. (State Brief at 79).

Facts Relating to Defense of Impossibility of Compliance with § 167.131

SLPS performed calculations relating to the tuition costs in connection with the projections contained in the Jones expert report. (SLPS Ex. 2). The numbers of transferring students for each named district were multiplied by the suggested tuition figures for transferee districts provided by the State of Missouri as part of this action. (SLPS Exs. 2 and 3). For Clayton, the tuition figure as calculated by the Clayton district

was utilized. (Ex. C-12). Survey respondents who did not specify a district were placed in a catch-all category, with a tuition figure calculated by averaging the State-provided district-wide tuition figures for the nine accredited districts (other than Clayton) that border the City of St. Louis. This emphasis on proximity echoed Dr. Jones's efforts to control for the fact that SLPS may not be required to provide transportation to all § 167.131 transferees. (Tr. 89). The total amount of annual tuition that SLPS would have to pay to County districts for the 15,740 likely transferees identified in the expert report was calculated at $223,790,964.16. (SLPS Ex. 2). Added to this figure is the estimate of $40 million to $60 million in transportation costs if SLPS has to provide transportation for all 15,750 likely transferees, as testified to by David Glaser of VICC. (Tr. 331).

Thus, total annual projected costs for SLPS if § 167.131 were to be enforced against it is between $260 million and $280 million. The operating budget for SLPS in FY 2011, which contains all of the available, unrestricted funds that SLPS might be able to use to both educate students enrolled in its schools and pay for tuition and transportation obligations under § 167.131, totaled just $288 million. (SLPS Ex. 1, Tr. 361-62).

The current enrollment of SLPS for K-12 is approximately 23,500. (Tr. 423). After the transfers identified by Dr. Jones, approximately 15,182 students will remain enrolled in SLPS. (*Id.*; Ex. C-1). As set forth above, the district will have less than $10 million in its operating budget which to meet their educational needs. Moreover, SLPS will also lose restricted federal funds, including funds for free and reduced lunch, as

children transfer out of the district. (Tr. 509). Dr. Adams testified that it would be impossible for SLPS to adequately educate the remaining 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. 477-8; 482). He further testified that the district could not regain accreditation if § 167.131 were enforced, even if the costs imposed were far lower than were otherwise indicated in Dr. Jones' study. (Tr. 475-77).

Dr. Sharmon Wilkinson, Superintendent of the Clayton School District, also testified that it would be impossible for a school district to adequately educate two-thirds of its existing student body after losing 90% of its operating budget. (Tr. 200-02). Dr. Dorson, the State's witness and a former superintendent in two school districts, testified that in his experience a district would be unable to provide an adequate education to two-thirds of its existing student body after losing 80% of its operating budget, and would probably lapse. (Tr. 577-78). It is probable that, following the initial wave of transfers identified by Dr. Jones and in light of the resources that will be shifted from SLPS as it pays tuition to St. Louis County school districts and transportation costs pursuant to § 167.131, more students will choose to leave SLPS. (Tr. 99-100; 510-11). Dr. Adams testified that, had § 167.131 been enforced against SLPS beginning with the loss of accreditation in 2007, it would have been impossible for the district to hold the three indicators that it had and it would have been impossible to advance from three APR indicators met to six APR indicators met in 2011. (Tr. 475-6).

Facts Related to Special Educational Services

Among the likely transferees identified by Dr. Jones are an estimated 3,157 children with disabilities who have Individual Education plans, or IEPs. (Ex. C-1, p. 12). Fifteen percent of current enrolled SLPS students receive special education services. (Tr. 428).

ARGUMENT

Standard of Review

The standard of review in a court-tried case is governed by the principles enunciated in *Murphy v. Carron*, 536 S.W.2d 30 (Mo. banc 1976). The judgment of the trial court will be affirmed unless it is not supported by substantial evidence, unless it is against the weight of the evidence, or unless it erroneously declares or applies the law. *Gilmartin Bros., Inc. v. Kern*, 916 S.W.2d 324, 328 (Mo. Ct. App. 1995). "In reviewing court-tried matters, the appellate courts give due deference to the trial court and its unique ability to judge the credibility of the witnesses." *Id.* The appellate court will uphold the trial court's judgment if the result was correct on any tenable basis. *Id.* The appellate court "will set aside the trial court's decision only when firmly convinced that the judgment is wrong." *Waldroup v. Dravenstott*, 972 S.W.2d 364, 368 (Mo. Ct. App. 1998).

In addition, the appellate court will presume that the trial court's decision is correct and the appellant bears the burden of demonstrating that the trial court's judgment is erroneous. *Kerr v. Jennings*, 886 S.W.2d 117, 123 (Mo. Ct. App. 1994). Further, the appellate court "defers to the trial court as the finder of fact in determinations as to whether there is substantial evidence to support the judgment and whether that judgment is against the weight of the evidence, even where those facts are derived from pleadings, stipulations, exhibits and depositions." *Business Men's Assur. Co. of America v. Graham*, 984 S.W.2d 501, 506 (Mo. banc 1999). The trial court is accorded wide

discretion even if there is evidence in the record which would support another conclusion. *Engelage v. Director of Revenue*, 197 S.W.3d 197, 198 (Mo. Ct. App. 2006).

Introduction

This case arose out of an effort by a group of parents living in the City of St. Louis who had voluntarily enrolled their children in the Clayton School District to take advantage of the subsequent loss of accreditation by the St. Louis Public Schools in 2007 by demanding that SLPS pay the tuition for their children to continue to attend Clayton schools. The basis for this demand, § 167.131 R.S.Mo., was amended in 1993 as part of a new scheme of statewide school accreditation. However, the law contains no funding mechanism to pay for the increased costs arising from its new mandates and, as found by the trial court on May 1, 2012, is therefore unconstitutional under the Hancock Amendment of the Missouri Constitution, Art. X §§ 16 and 21, as applied to SLPS. Moreover, because the evidence at trial established that the burdens imposed by § 167.131 on the SLPS are so massive that it would not be able to comply with both that statute and its obligations to those students who chose to remain in SLPS schools, the trial court found that it would be impossible for SLPS to comply with § 167.131. Thus, the statute was invalid as applied to SLPS.

The State of Missouri and Plaintiff Gina Breitenfeld, mother of two children and an original plaintiff in this action, have appealed. The fate of their appeal depends on this Court rewriting the Hancock Amendment and overturning numerous cases interpreting the Amendment over the past thirty-two years. However, the evidence produced at trial was in accordance with the plain language of the Hancock Amendment and provided

sufficiently strong support for the trial court's judgment on both the Hancock Amendment and the impossibility issues. In light of this evidence, much of which the appellants either ignore or misconstrue, the appellants cannot carry their heavy burden of showing the necessity of overturning the judgment of the trial court. The judgment below should be affirmed.

I. THE JUDGMENT OF THE TRIAL COURT SHOULD BE UPHELD BECAUSE § 167.131 VIOLATES THE HANCOCK AMENDMENT IN THAT IT IMPOSES A NEW MANDATED ACTIVITY ON SLPS WITHOUT PROVIDING FUNDING TO OFFSET THOSE COSTS.

(Responding to State's Points 1-3, 6-9; Breitenfeld's Points 5-7).

A. The State's Attempt to Rewrite the Hancock Amendment Is Contrary to the Plain Text of the Amendment and Thirty Years of Cases Interpreting It, and Should Be Rejected.

The State's brief in this appeal is based on a radical reinterpretation of Art. X, §§ 16 and 21 of the Missouri Constitution, known as the Hancock Amendment. This tactic is not surprising, because neither appellant can prevail here unless this Court first agrees to tear the Amendment down and rebuild it along the lines that the appellants propose. Indeed, the changes urged at considerable length by the State would rewrite both the Amendment and overturn the consistent body of jurisprudence that has emerged since the adoption of the Amendment in 1980. While the State's brief presents its proposed rewriting of a Constitutional Amendment as something of an intellectual exercise based on a free-form series of questions rather than as a concrete legal argument,

the Court should not be led astray. The State's contentions, if adopted, would drastically change the Hancock Amendment and eliminate much of the protection it provides to Missouri's taxpayers. The Court should follow its numerous prior decisions, which correctly interpreted and applied the Hancock Amendment, and reject the proposed rewriting of the Amendment.

The Hancock Amendment is not complex, particularly when it comes to new or expanded mandates that are imposed by the State on its subordinate entities. Art. X, § 16 states in relevant 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.

Art. X, § 21 carries out the policy set forth in § 16, stating in relevant 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.

Despite the State's extensive efforts here to obfuscate the history and meaning of the Hancock Amendment, the language of the Amendment that is relevant to this case plainly and simply targets new mandates that are imposed on political subdivisions without specific funding to pay for them.

It has long been understood that § 21 of the Hancock Amendment is violated if both (1) the State requires a new or increased activity or service of a political subdivision[2] and (2) the political subdivision experiences increased costs in performing that activity or service without funding from the State. *Miller v. Dir. of Revenue*, 719 S.W.2d 787, 788-89 (Mo. banc 1986). This Court's commonsense reading of the Hancock Amendment has stood the test of time and has ensured that the Amendment provides real protection for Missouri's taxpayers.[3] There is no reason for the Court to drastically change course in the way urged by appellants, and compelling jurisprudential reasons not to. "The doctrine of *stare decisis*—to adhere to decided cases—promotes stability in the law by encouraging courts to adhere to precedents." *Med. Shoppe Int'l, Inc. v. Dir. of Revenue*, 156 S.W.3d 333, 334-35 (Mo. banc 2005). While the doctrine is not absolute, "a decision of this court should not be lightly overruled, particularly where, as here, the opinion has remained unchanged for many years." *Novak v. Kansas City Transit, Inc*., 365 S.W.2d 539, 546 (Mo. banc 1963).

Notwithstanding the plain text of § 21 and the well-established nature of the cases interpreting it, the State proposes wholesale changes to the Amendment in the guise of a reinterpretation. First, the State asserts that "the Hancock Amendment addresses only

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[2] School districts are political subdivisions for purposes of the Hancock Amendment. Mo. Const. Art X, § 15.

[3] Indeed, in the first *Turner* case, this Court held a statute means what it plainly says, even if it results in dire circumstances. *Turner*, 318 S.W.3d at 662, 664.

activities and services that are new and increased overall, among all political subdivisions, rather than focusing on the impact of a state law on a particular political subdivision." There is considerable case law from this Court that directly contradicts this claim. For example, in *Brooks v. State*, 128 S.W.3d 844 (Mo. banc 2004), this Court found increased costs for five counties that had challenged the concealed carry law, but withheld judgment as to other counties that had not provided evidence of increased costs. In *City of Jefferson v. Mo. Dept. of Natural Resources*, 916 S.W.2d 794 (Mo. banc 1996) (*Jefferson II*), the Court considered and upheld a Hancock Amendment challenge brought by a lone municipality. Other cases discussed throughout this brief considered Hancock Amendment challenges on an entity-by-entity basis.

This Court's interpretation in these cases is well-grounded in the text of the Amendment. Section 21 contains no language that can be read to require that a mandate must affect all counties and political subdivisions before the Hancock Amendment applies. To the contrary, § 21 couches the requirement that costs be offset in the singular: "**the** county or other political subdivision" (emphasis added) must be paid for its increased costs, not "each county or other political subdivision," "every county or other political subdivision," or "all counties or political subdivisions". There is no support for the State's argument that a mandate must have a universal effect before it can be found to violate the Hancock Amendment.

Second, the State argues that "'increased costs' refers to costs that could result in high [sic] taxes—'net' rather than 'gross increases' in costs." (State Brief at 34). Again, this position finds no support in the text of the amendment. No proof of actual or

probable increases in levels of taxation is required by the plain language of the Amendment in order to find that a violation has occurred. The Amendment speaks only of "any increased costs" to a political subdivision that is affected by the mandate.

While it is true that the Hancock Amendment protects taxpayers, not political subdivisions themselves, it is not true, as the State contends, that this must mean that the Hancock Amendment is only triggered when a new or expanded activity results in higher taxes. (State Brief at 40). Just because the focus of the Amendment is on the rights of the taxpayer does not require that the test of a violation of the Amendment must be whether or not taxes have risen in real terms in response to a new mandate. A political subdivision could completely shut down other services and protection to pay for the increased unfunded mandate and the taxpayers are substantially damaged. The correct test is the one that is both consistent with the plain language of the Amendment and that actually protects taxpayers without imposing a burden of proof that makes establishing a violation of the Amendment difficult or even impossible.

As noted above, § 21 is clear that "any increased costs" to the political subdivision must be offset by an appropriation "made and disbursed" if a new mandate is to pass Constitutional muster. The question then becomes how the term "increased costs" is defined. Although the State treats this question as novel, there are thirty years' worth of judicial answers to this question already in the books. The courts in Missouri, led by this Court, have applied the "any increased costs" language plainly, and in the way best calculated to protect taxpayers. Not coincidentally, the test used by this Court is also the one that has the closest relation to the actual text of the Hancock Amendment. If more

funds must be expended by a political subdivision to implement a state mandate for a new or expanded activity, then full compensation must be provided. This makes sense not only as a matter of faithfulness to the plain language of the Hancock Amendment, but it also represents sound public policy by making the Amendment enforceable and giving its provisions real teeth.

The interests of taxpayers are best served by transparency and predictability in the operations of the governmental entities that the taxpayers fund. The framers of the Hancock Amendment clearly recognized that these interests could best be protected by a bright line rule: if the evidence shows that a mandate imposing a new or expanded activity will result in increased costs to a political subdivision, those costs must be paid for up front by the State with the mandate. That way, there can be no shifting of funds or programs behind closed doors to mask an increased burden on the taxpayers.

Although it is by no means clear what the State is actually proposing in this case, it appears to want to shift the test from the longstanding and textually correct one of "increased costs" at the time a new or expanded activity is mandated to one of "increased total costs leading to higher taxes," something that could only be measured in many instances long after the new mandate has taken effect and the harm has become irreparable, if it can be measured at all. Rather than requiring the General Assembly to think sensibly about the effect of the mandates that it adopts for political subdivisions, the State would shift all of the burden to the taxpayers to eventually prove that the overall

effect of the mandate was to increase taxes. This momentous shift is not supportable by the case law and, if adopted, would be disastrous for Missouri taxpayers.[4]

As this Court correctly recognized in *Rolla 31 Sch. Dist. v. State*, 837 S.W.2d 1 (Mo. banc 1992), the Hancock Amendment "is designed to place in taxpayers the decisions of both determining increases in government services and raising taxes to pay for those increased services. At the same time taxpayers are protected from increased local taxes for new or increased services mandated by the state by the requirement that the state pay for such new programs." *Id.* at 6. If, as the State proposes here, it can impose a mandate without funding and place the full onus on local taxpayers to account for all variables, programmatic shifts and accounting tricks that can later be used by either the state or by a local entity to mask the true impact of a new state mandate, taxpayers will have to perform the impossible task of making a straight line out of a labyrinth in order to establish a Hancock violation. The Hancock Amendment would then cease to be enforceable.

This is precisely the type of official mischief that this Court assailed in *Rolla 31*, when it rejected the same argument that the State is making here, specifically, that it can impose a mandate and then require a school district to pay for that mandate by shifting previously unrestricted state funds provided through the foundation formula. This Court

[4] The Missouri legislature has been aware of the courts' interpretation of the required test of increased costs. If the legislature believed the courts had misinterpreted the Amendment, it would have acted accordingly to correct that misinterpretation.

in *Rolla 31* held that such an approach "would essentially eliminate the Hancock Amendment as a factor in public school financing, which constitutes at least 25% of the state revenue." 837 S.W.2d at 6. The Court continued, stating that:

> Allowing the state to mandate programs and cover their costs by unrestricted funds puts taxpayers in the same position as if they were required to raise funds for the cost of the state mandated program, at least when state aid is not dramatically increasing. If the local entity is required to use its unrestricted funds to pay for a mandated program, it will then be forced to raise additional tax money to pay for the program previously supported by unrestricted funds. Since funds are fungible, allowing the state to use unrestricted funds to support mandated programs is essentially the same as requiring local school districts to raise money to support a state mandated program. This defeats one of the essential features of the Hancock Amendment.

Id. at 6-7. Put another way, the State cannot force the school districts to raise taxes to support, or abandon, its existing programs by taking away some or all of the district's previously unrestricted foundation formula money to pay for the new mandates of § 167.131 as it was amended in 1993. Nor, by extension of the same logic, can the State force taxpayers to jump through impossible hoops merely to prove that a Hancock violation has occurred.

The State also takes issue with the holding in *Rolla 31* that a Hancock Amendment violation can only be ameliorated by an appropriation specifically intended to pay for the

costs of the new or expanded mandate. The Hancock Amendment plainly requires just that – if the State imposes a new or expanded activity on a political subdivision, the new or expanded activity is unconstitutional "unless a state appropriation is made and disbursed to pay the county or other political subdivision for any increased costs." Mo. Const., Art. X, § 21. This Court in *Rolla 31* held that "[w]e 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." 837 S.W.2d at 7. In *City of Jefferson v. Missouri Dept. of Natural* Resources, 863 S.W.2d 844 (Mo. banc 1993) (*Jefferson I*), this Court stated that "[t]he road to compliance with Article X, Section 21 cannot be paved with good intentions." Rather, it "requires that the legislature pass a specific appropriation to cover the costs of the increased activity it demands of a political subdivision." *Id.* at 850, citing *Rolla 31*.

Appellants concede that there was no specific appropriation made to pay for the costs of § 167.131. Dr. Roger Dorson testified that the only potential source of state money to pay costs of compliance for § 167.131 is the undifferentiated pool of funds that the districts receive through the State's foundation formula for education. (Tr. 544). The failure of the State to make an appropriation specifically to pay the costs of § 167.131 *ipso facto* means that the statute is unconstitutional under the plain language of the Hancock Amendment. Thus, under the State's proposed new interpretation, not only must *Rolla 31* and *Jefferson I* be overturned, but the plain language of § 21 itself, requiring an "appropriation is made and disbursed," must also be a nullity.

This case provides an excellent illustration of the effect of the State's proposed changes to the Hancock Amendment. The State argues that the districts and their taxpayers failed to account for any potential "savings" arising from the operation of § 167.131. The evidence adduced at trial, however, showed that any such "savings" were chimerical. Importantly, not one witness, expert or otherwise, testified as to any such "savings," because there would be none. In the first place, § 167.131 applies to all students living in the City of St. Louis, and not those actually attending SLPS schools. SLPS has no expenses related to Plaintiff's children or any of the other school-age children who presently attend schools other than SLPS schools or who are home-schooled. (Tr. 375-76, 382). Thus, if any of these children transfer under § 167.131, the result is an increase in costs, a flat loss, to SLPS in the form of tuition payments and transportation costs. In the case of the two Breitenfeld children, that amounts to $40,057.38 in tuition based on present grade level (SLPS Ex. 6) and $46,202 for transportation. (Tr. 332). Of the 15,740 transferees identified in the Jones expert report, 7,422 do not presently attend SLPS schools. (Ex. C-1).

With respect to those students actually attending SLPS schools, the State made much at trial about how the average per student cost of providing an education was lower in some St. Louis County districts than it was in the SLPS. It was explained in the first instance that this was because SLPS provides special education services directly while most of the County schools have that provided by the Special School District. (Tr. 429-30). As a result, the per student average cost of education would necessarily be higher than a County district that has special education services provided by Special School

District. Moreover, the State's argument confuses the marginal and fixed costs of educating students. While it is true that SLPS has average costs of education per average daily attendance of $15,861 (including special education costs), that does not mean that SLPS would save that amount—or anywhere near that amount—if a current student left SLPS to transfer to a County school under § 167.131. Appellants confuse the "average cost" of one child (*e.g.*, total costs divided by the number of students) and the "marginal cost" of adding or losing one student. Such "marginal costs" would exclude the fixed costs of hiring teachers and administrators, operating and maintaining schools, and providing transportation. In short, the marginal savings for the absent student are only expenditures that are personal to that student: books and other supplies and instructional materials, assuming that the transfer does not occur after the beginning of the school year when books and other supplies for the students would have already been purchased.

Dr. Kelvin Adams testified that he would still have to open, staff, and operate schools even if hundreds or thousands of students left SLPS, thus negating any potential savings. (Tr. 455-56). This testimony was confirmed by the State's witness, Dr. Roger Dorson. He testified that in the case a student left a school, "you still have to have the teacher there" for the remaining students. (Tr. 587). Dr. Dorson's testimony continued:

Q. You can't turn out the lights in the school, can you?

A. That's correct.

Q. You still have to maintain the building.

A. That's correct.

Q. You can't sell the school bus; correct?

A. That's correct.

Q. And so there's no way to simply say, Oh, we can just send this one student to Mehlville, for instance, as we see here on this Exhibit C [sic—State Ex. E], and we'll automatically save some $8,000; correct?

A. That's correct.

(Tr. 588). The evidence in the trial record demonstrates that the only theoretical reduction in costs to SLPS arising from transfers under § 167.131 would be limited to marginal costs associated with those students actually attending SLPS schools, not average costs. These minimal potential reductions in costs do not come close to offsetting the increased costs that SLPS will incur as a result of § 167.131.

The evidence in this case is unequivocal that there are no significant cost reductions that would accrue to the SLPS from the operation of § 167.131. Thus, even if the Court were to adopt the State's proposed radical rewriting of the Hancock Amendment, it would avail the State nothing in this case. However, this case illustrates the insuperable evidentiary hurdles that the State would erect for taxpayers seeking to bring Hancock challenges. Even if students were to withdraw from SLPS schools and transfer under § 167.131, there is no way to predict who would withdraw or how particular buildings or programs would be affected. (Tr. 451). In order to provide the level of proof that the State's proposed "new" Hancock Amendment would demand, taxpayers would have to wait until § 167.131 had taken full effect and all students who

were going to transfer from the City of St. Louis had done so (at least in the first wave, excluding potential future waves who would naturally want to leave an SLPS stripped of resources to pay the tuition bills coming from County districts). Then, the SLPS taxpayer would have to prove that after considering every possible variable (and no doubt, the State's imagination on this point will be inexhaustible), that the total additional costs imposed by the mandate would lead to higher taxes. The sheer impossibility and impracticality of what the State is proposing is difficult to overstate.

Beyond the legal discussion there is potentially a very real human cost to what the State is proposing. If, contrary to the plain language of the Hancock Amendment and the accepted practice of the past thirty-two years, a taxpayer cannot bring a Hancock Amendment challenge before a mandate is fully imposed and its costs and potential benefits entirely realized, an unfunded mandate may wreak havoc and destroy lives before it is halted (if, indeed, it can halted be in light of the barriers the State seeks to put in the path of potential plaintiff-taxpayers). The evidence from the trial here presents a scene where two-thirds of the students currently enrolled in SLPS schools will be left behind in a district that no longer has sufficient resources to do much more than turn on the lights for a brief time each day, if even that. While the State may dislike the way that the Hancock Amendment was framed and has been enforced, it makes sense that the Court interpret the Hancock Amendment in the same manner it has done, namely, on the side of the taxpayers and the recipients of the services that their tax dollars provide, and not, as the State urges, on the side of the legislators where spending habits prompted the adoption of the Amendment in the first place.

If the State were to have its way, § 21 of the Hancock Amendment would be drastically altered and would be rendered a nullity. This is how the new § 21 would appear, with allowances for the questions left unanswered by the State:

> 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 **every** count~~ies~~**y** or **of** ~~other~~ **every** political subdivision~~s~~, unless ~~a state appropriation is made and disbursed to pay the~~ **a payment is made or other state funds are transferred to each** county or ~~other~~ **each** political subdivision for any **net** increased costs, **where the increase in the level of any activity or service will (or perhaps is likely to, or perhaps may possibly) result in higher taxes being levied by each county or each political subdivision upon its taxpayers.**

Clearly, the changes urged by the State go well beyond any definition of "reinterpretation." Missouri's Constitution does not empower the Court to engage in a wholesale rewriting of a Missouri Constitutional provision simply because the State wants to be free of the strictures imposed by that provision. The power to amend the Missouri Constitution is reserved to the people. This Court should interpret and apply the Hancock Amendment just as it has for the past three decades, with fidelity to both the plain language of the Amendment and to its purpose of providing meaningful protection to the taxpayers of Missouri.

B. The Evidence Supports the Trial Court's Conclusion That the 1993 Amendment of § 167.131 Imposed a New or Expanded Mandate on SLPS.

Having confirmed the Constitutional correctness of this Court's past approach to the Hancock Amendment and thus having properly defined the issues before the Court, the first major issue is whether or not § 167.131, as amended in 1993, imposes a new or expanded activity on SLPS. The trial court properly concluded that it did.

The State contends that, with respect to § 167.131, "[t]he St. Louis taxpayer has never disputed that the St. Louis district was required in 1980 to educate each resident student." This claim is false. In fact, the SLPS taxpayer has repeatedly stated that the district was not obligated in 1980 to educate each resident student, quite the opposite of the State's claim. As recently as her post-trial brief, the SLPS taxpayer discussed the obligations on the district and rejected the State's argument that SLPS was required in 1980 (or at any time prior) to provide an education to all students who resided in the confines of the district. (L.F. 1829).

SLPS is (and has been) required to provide a free public education only to those who actually present themselves at the appropriate district facility, enroll, and thereafter attend their assigned school within the confines of the district. *See* § 171.011 R.S.Mo. (the district may adopt all "needful rules" relating to its organization and government). The district has (and historically had) no obligation to educate those children who choose to attend a private, parochial, or charter school. *See* § 167.031 R.S.Mo. (requiring parents to provide an education for their children, but not necessarily in public schools).

Nor is it obliged to educate those who are home-schooled by their parents, or those who attend the schools of another district through a transfer program (like the Voluntary Interdistrict Choice Corporation) or a personal tuition program like that offered by the Clayton School District. SLPS's obligation to the school-age children of its district is by definition a limited one that has always been confined to the services that it provides in its own facilities to actual attendees.

The State's appeal fails at this point because the premise for its argument is wrong. The State cannot conduct a proper analysis of pre- and post-Hancock Amendment mandates on the SLPS because it misstates the historical burdens placed on the district.

To understand what was required by § 167.131 prior to 1993 and thus grasp the breadth of the new mandates that were imposed by the Outstanding Schools Act amendment, it is important to recognize the limited scope of the statute prior to 1993. At the time of its enactment in 1931, the predecessor statute to § 167.131 read in relevant part:

> The board of directors of each and every school district in this state that does not maintain an approved high school offering work through the twelfth grade shall pay the tuition of each and every pupil resident therein who has completed the work of the highest grade offered in the school or schools of said district and attends an approved high school in another district of the same or adjoining county where work of one or more higher grades is offered … .

C.S.S.B. 237, 269, 322, 323, 326, and 327, Section 16, 1931 Laws of Missouri, p. 343. As one can see, the original 1931 version of the statute and the version that was in effect in 1980 are functionally identical. The new law was codified as § 10458 R.S.Mo., and was re-codified in 1945 and 1951 before a final re-codification as § 167.131 in 1963. At no time prior to 1993 did the statute apply to districts as a whole or to any grade level other than high schools and no transportation of students was required. (Tr. 574, 576).

In 1931, the terms "approved," "classified," and "accredited" were used interchangeably with respect to the schools, but the modern concept of district-wide accreditation based chiefly on student performance factors simply did not exist in Missouri law until after 1993. (Tr. 576). Instead, the state superintendent of public schools was only empowered to classify public high schools according to the "minimum course of study for each class." § 10602 (R.S.Mo. 1939, § 9447 R.S.Mo. 1929). Under the 1931 statutory scheme, a high school of the first class would have to offer four years of studies for at least nine months in each year in the subjects of English, mathematics, science, and history, and would have to employ at least three teachers approved for high school work. *Id.* At the bottom of the "approved" scale were third class high schools, which had to offer two years studies for at least eight months in each year in the same subjects. *Id.* The statute concluded that "[a]ll work in an accredited high school shall be given full credit in requirements for entrance to and classification in any educational institution supported in whole or in part by state appropriations." *Id.*

> Section 10603 further explains the concept of "accreditation" as it existed in 1931:
>
> For the purpose of classifying high schools and having their work accredited by higher educational institutions, the state superintendent of public schools shall, in person or by deputy, inspect and examine any high school making application for classification, and he shall prescribe rules and regulations governing such inspections and examinations, and keep complete record of all inspections, examinations, and recommendations made. He shall, from time to time, publish lists of classified high schools: *Provided*, he may drop any school in its classification if, on reinspection or re-examination, he finds that such school does not maintain the required standard of excellence.

Section 10603 (R.S.Mo. 1939, § 9448 R.S.Mo. 1929). Under this statutory scheme, only those high schools that were "classified" as provided for in § 10602 were "accredited," and those terms were interchangeable with "approved." In short, the forerunner to present § 167.131 was designed to ensure that all students in Missouri had access to a minimum course of study so that they could gain entry into the University of Missouri or other state-supported colleges or universities.

Interestingly, §§ 10602 and 10603 R.S.Mo. (1939) were repealed in 1945 and were not reenacted. Another statute, still in effect in 1980, gave to the State Board of Education the power to "classify the public schools of the state, subject to limitations provided by law, establish requirements for the schools of each class, and formulate rules governing the inspection and accreditation of schools preparatory to classification."

§ 161.092 R.S.Mo. (1978). No new statutory definition of what constituted an "approved" high school was adopted by the General Assembly after the repeal of the old definition in 1945. Consequently, all that § 167.131 required of SLPS in 1980 was that it have at least one open and operating high school. No one disputes that SLPS has always had several open and operating high schools and that it therefore complied with § 167.131 as it existed at the time the Hancock Amendment was adopted.

This history of § 167.131 brings the mandates that were imposed by the 1993 amendment into sharp focus. Section 167.131 R.S.Mo. , from the amendment in 1993 to the present, Part of Outstanding Schools Act, reads as follows:

> The board of education of each district in this state that does not maintain an accredited school pursuant to the authority of the state board of education to classify schools as established in section 161.092 shall pay the tuition of and provide transportation consistent with the provisions of section 167.241 for each pupil resident therein who attends an accredited school in another district of the same or an adjoining county ….

The "new" or "increased" activity or service required by the 1993 amended Section 167.131 R.S.Mo. is set forth below. Deletions from the original text are crossed out, additions are in bold and underlined:

> The board of education of each district in this state that does not maintain an ~~**approved high school offering work through the twelfth grade**~~ **accredited school pursuant to the authority of the state board of education to classify schools as established in section 161.092 RSMo,** shall pay the tuition of **and provide the transportation consistent with the provisions of section 167.241, RSMo, for** each pupil resident therein ~~**who has completed the work of the highest grade offered in the schools of the district and**~~ who attends an ~~**approved high**~~ **accredited** school in another district of the same or an adjoining county**,** ~~**or an approved high school maintained in connection with one of the state institutions of higher learning, where work of one or more higher grades is offered**~~ ….
>
> The first increased activity was a change from an:
>
> "[A]pproved high school" to **accredited school pursuant to the authority of the state board of education to classify schools as established in section 161.092 RSMo,** ….

Before 1993 (and before the adoption of the Hancock Amendment in 1980), SLPS was only required by § 167.131 to have one operating high school. It is undisputed that SLPS met and continues to meet the pre-1993 and pre-1980 requirements of § 167.131.

(See Tr. 435-36, testimony of Dr. Adams relating to course offerings).[5] Post-1993, SLPS was required by the Outstanding Schools Act and the Missouri School Improvement Program initiated under the authority of the Act to maintain district-wide accreditation according to a system based on fourteen specific indicators, only two of which concerned the courses offered by the district, in addition to discretionary judgments relating to the district's finances, governance, and academic progress. (SLPS Ex. 8; Tr. 440-42). In 2007, after the district failed to meet enough of these criteria to satisfy the State Board of Education, the district lost its state accreditation. If this were to occur again, as it might, the district would then be required by the amended § 167.131 to pay tuition to other school districts, and to pay for transportation to schools outside the district, neither of which it had ever been required to do prior to the adoption of the Hancock Amendment. Section 167.131 as amended by the Outstanding Schools Act in 1993 clearly imposed new mandated activities on SLPS, and, therefore, is subject to the funding requirements of the Hancock Amendment.[6]

[5] Nor is there any dispute that SLPS would have complied with old § 167.131 in that it had several open and operating high schools over the last five years as evidenced by the testimony on admissions of its graduates to the University of Missouri and other universities. (Tr. 435). The forerunner of § 167.131 was originally passed to help children gain admittance to the University of Missouri.

[6] It is also true that the pre-existing mandate on SLPS is to provide education, not to spend a specific sum in tuition. The State has pointed out, including in this case, that a

Section 167.131, as amended in 1993, imposes for the first time a requirement that SLPS pay to transport children to schools located in other districts. In particular, the 1993 amendments to Section 167.131 R.S.Mo. added the following mandate that the district shall:

> **… provide the transportation consistent with the provisions of section 167.241, RSMo … .**

Section 167.131 R.S.Mo. , as amended in 1993, imposes for the first time the requirement that SLPS pay for the education for students at all grade levels regardless of whether they ever attended SLPS schools:

> [E]ach pupil resident therein ~~**who has completed the work of the highest grade offered in the schools of the district and**~~ who attends an ~~**approved high**~~ **accredited** school in another district of the same or an adjoining county.

---

school district does not need to spend tens of thousands of dollars to meet its obligation to provide a free public education, particularly if the district were to accept the State's view of what an education requires and teach children for just three hours a day with teachers that are paid $25,000 a year without benefits. But under § 167.131, the discretion to limit local expenditures is taken from SLPS. It is now required to pay for whatever services Clayton or other county school districts choose to provide, which is certainly more than the minimum SLPS is required to do under state law.

Even if one accepts the State's contention that a mandated school tuition and transportation law enacted as part of a far-reaching new scheme of state-administered, district-wide accreditation is not a new activity, it certainly represents a massive expansion of SLPS's existing activities, involving payments to other districts and children being transported across district lines. Expanded activities are subject to the full funding requirements of the Hancock Amendment just as much as entirely brand-new activities are.

Rolla 31, 837 S.W.2d 1, is a compelling example of an expanded activity in the field of education requiring full state funding before the mandate can be given effect. Prior to 1990, Missouri law required that school districts provide special education services for children aged five and older. In 1990, the General Assembly enacted a law mandating that districts provide the same services to children beginning at age three. *Id.* The funding for the expansion of the special education program was divided between federal, state and local sources, with local monies paying for 10% of the program costs. *Id.* at 6. This Court held that the failure of the State to provide full and dedicated funding to pay for the cost of expanding the special education program violated the Hancock Amendment. *Id.* at 7. The fact that the Rolla district had been providing special education services and that the new legislation merely expanded the program did not affect the court's analysis, nor does the question of whether § 167.131 as amended represents a new or merely an expanded activity change the fact that the statute imposes a mandate without full state funding in violation of the Hancock Amendment.

The State's position is further undermined by *Jefferson I*. Prior to the adoption of the Hancock Amendment, Missouri statutes had required cities and counties to submit solid waste management plans. 863 S.W.2d at 848. In 1990, the General Assembly passed a new law requiring, inter alia, that cities with a population over 500 and all counties submit new solid waste plans within 180 days with certain specified features included. *Id.* The Supreme Court held that the new statute mandated an increased activity on the part of the political subdivisions that were subject to the statute's requirements. *Id.* Tellingly, it did not matter that the cities and counties had previously been required to submit solid waste management plans. The determining factor was that they were now required to submit solid waste management plans that had certain prescribed features. Even this seemingly innocuous change was enough to satisfy the new or expanded activity test of the Hancock Amendment. The changes imposed on SLPS in 1993 were far, far greater than those that were at issue in *Jefferson I* and must be recognized as being of sufficient dimension to satisfy the first prong of the test for violations of the Hancock Amendment.

The State's argument on the crucial point of whether the 1993 amendment to § 167.131 imposed a new or expanded mandate on SLPS is limited to an incorrect claim that the SLPS taxpayer supports a demonstrably incorrect assertion regarding the historic duties of SLPS. The evidence actually in the record establishes, at the very least, a massive expansion of SLPS's duties. Instead of educating its enrolled students in its buildings according to its programs within the confines of its budget, SLPS is required by § 167.131 to pay other districts what they demand to educate all City-resident children,

whether or not they ever attended City schools and at every grade level, according to the programs of those districts, and all within the context of what in 1993 was a new scheme of statewide, district-based accreditation. The trial court's finding that amended § 167.131 imposes new mandates on SLPS is supported by overwhelming evidence in the record, and should be affirmed.

C. Substantial Evidence Exists in the Record of Increased Costs Connected to Amended § 167.131 and an Absence of State Funding.

The second prong of the Hancock Amendment test focuses on increased costs and the adequacy of State funding to offset those costs. The State's argument on this point is, like its arguments on points one and two in its brief, based on inaccurate facts. It is also based on a legal misconception – the State's unsupported claim that the Hancock Amendment cannot apply until a taxpayer shows that a new mandate has actually caused an increase in taxes. That legal misconception has already been examined and addressed in this brief. As with the State's Points One and Two, Point Six fails at the outset because the legal premise for the point is erroneous.

The factual inaccuracy underpinning the State's Point Six is asserted in its brief:

> Rather than base their case on actual transfers, applications for transfer, or even inquiries about transferring, the districts and their taxpayers based their claims on projections made in a study commissioned by the Clayton district and conducted by University of Missouri—St. Louis professor of political science and public policy administration, E. Terrence Jones, Ph.D.

(State Brief at 13).

This statement is undeniably inaccurate. One core of the case brought by the St. Louis taxpayer concerns the increased and unrecompensed costs arising from the claims of Plaintiff Gina Breitenfeld (and the Clayton School District) that the St. Louis district is responsible for paying the tuition, pursuant to the mandates imposed by § 167.131, of her two children who reside in the City of St. Louis who have never attended SLPS schools, but rather attend schools in Clayton. Contrary to the claims of the State, the SLPS taxpayer did base her claims on "actual transfers." The trial judge cited the figures relating to the costs of those transfers in his judgment. (L.F. 1858-59).

The failure of the State to address the facts in the record relating to the tuition demands of the Breitenfeld children is a tacit admission that the State cannot prevail unless it convinces this Court to either: (1) change the Hancock Amendment itself; or (2) ignore the facts of the case. If this Court applies Hancock just as it always has, the evidence of increased costs in connection with the tuition payments for the Breitenfeld children is more than sufficient to sustain the judgment of the trial court.

The evidence at trial plainly demonstrated that SLPS will incur increased costs arising from § 167.131. SLPS need only show *de minimis* increased costs resulting from the increased activity mandated by the statute. *Brooks*, 128 S.W.3d at 849 (Mo. banc 2004), *citing Jefferson II*, 916 S.W.2d at 795. In *Brooks*, this Court considered evidence of increased costs from the concealed-carry firearm law for Jackson County that consisted of a future "projection" based on the population of the county and the number of firearm transfer permits issued in the county during earlier years. *Id.* For the other counties in the lawsuit, the evidence was limited to testimony that the counties would

have to pay $38 for each background check that they ordered from the Highway Patrol. *Id.* Based on this evidence, the Court held that the challenge to the concealed-carry law was ripe for all the counties assailing the statute under the Hancock Amendment. *Id.*

The evidence offered with respect to increased costs in this case is far more concrete than the "projection" that this Court found to be sufficient in *Brooks*. The evidence also proves increased costs to SLPS that far outstrip the $38 threshold that this Court recognized in *Brooks* as being sufficient to maintain a Hancock Amendment challenge. The State cannot reasonably contend that SLPS will not face increased costs arising from § 167.131.

With respect to just the two children of Plaintiff, the Chief Financial Officer for the Clayton School District, Mary Jo Gruber, testified that the annual tuition that would be charged to SLPS in the event that § 167.131 is upheld amounted to $19,169.35 for the Plaintiff's child who attends an elementary school and $20,888.03 for Plaintiff's child who attends a middle school. (Tr. 283; Ex. C-12). The total yearly tuition bill that would be charged to SLPS by Clayton just for Plaintiff's children at present grade level would be $40,057.38. (SLPS Ex. 6, p. 11). As each child advances up through the Clayton school system, the tuition amounts become higher, and so SLPS's costs will also increase. (Ex. C-12). Because neither of Plaintiff's children attends or has ever attended an SLPS school, SLPS receives no state funding for their education. (Tr. 375-76).

Tuition Costs to District For Plaintiff's Children

	Clayton Tuition to SLPS For Plaintiff's Children	State Formula Aid to SLPS For Plaintiff's Children
Student 1	$20,888.03	$0
Student 2	$19,169.35	$0
Total	$40,057.38	$0

Unfunded Mandate

$40,057.38

(SLPS Ex. 6).

In addition, contrary to the claims of the State, SLPS cannot receive State funding for them in the future—that claim is contradicted by statute. § 163.011(2) R.S.Mo. (requiring both that a student reside in and attend school in "such" district to allow the district to claim funding for that student).

SLPS presented strong evidence to the Court of its increased costs associated with § 167.131 for just the two children of Plaintiff. As noted, annual tuition costs for the two would be $40,057.38. Unreimbursed transportation costs for the two between the City and Clayton could be at least $29,569.28, and would probably be much more. The evidence introduced at trial proves that SLPS would suffer increased annual costs arising from § 167.131—again, with respect to just the Plaintiff's children—in an amount no less than $69,626.66, easily surpassing the *de minimis* level required to sustain a challenge to a statute under the Hancock Amendment.

Of course, the evidence at trial went well beyond the costs connected with Plaintiff's children. Clayton School District presented testimony and a report by an expert witness, Dr. Terry Jones, that quantified the number of children living within the confines of SLPS who would seek to transfer pursuant to § 167.131 if the law were upheld. At trial, Dr. Jones testified that his research, which included but was not limited to a telephone survey of 601 parents of over 1,000 school-age children living within SLPS's boundaries, projected that 15,740 children would seek to enroll in St. Louis County schools pursuant to § 167.131 if they were afforded that opportunity. (Tr. 83). Dr. Jones also testified as to the preferred County districts for the potential transferees. (Tr. 83-84).

Using the transfer figures and locations provided by Clayton's expert witness, SLPS placed into evidence calculations of the annual tuition cost it would face for the projected 15,740 transferees under § 167.131. (SLPS Ex. 2). The numbers of transferring students for each named district were multiplied by the suggested district-wide tuition figures provided by the State of Missouri as part of this action. (SLPS Exs. 2 and 3). For Clayton, the tuition figure as calculated by the Clayton district was utilized. (Ex. C-12). Survey respondents who did not specify a district were placed in a catch-all category, with a tuition figure calculated by averaging the state-provided district-wide tuition figures for the nine accredited districts (other than Clayton) that border the City of St. Louis. This emphasis on proximity echoed Dr. Jones's efforts to control for the fact that SLPS may not be required to provide transportation to all § 167.131 transferees. (Tr. 89). The total amount of annual tuition that SLPS would have to pay to County districts

for the 15,740 likely transferees identified in the expert report was calculated at $223,790,964.16. (SLPS Ex. 2).

PROJECTED ANNUAL TUITION COSTS FOR SLPS UNDER 167.131 R.S.MO.

DISTRICT	PROJ. %	TRANSFERS	SUGG. TUITION	TUITION AMT.
Clayton	22.7	3,567	$20,252.67	$72,241,274
Kirkwood	12.1	1,904	$12,195.67	$23,220,555
Lindbergh	11.8	1,857	$10,873.08	$20,191,313
Rockwood	11.2	1,763	$9,970.45	$17,577,912
Ladue	11.0	1,731	$14,057.43	$24,333,412
Brentwood	7.3	1,149	$18,376.46	$21,114,553
Others (9)	23.9	3,769	$11,969.21	$45,111,945
TOTAL				**$223,790,964**

(SLPS Ex. 2).

This Court has upheld the use of projections of increased costs to establish a violation of the Hancock Amendment, as in the *Brooks* case. The work of Dr. Jones

certainly serves as a solid foundation for a projection of increased costs. The survey conducted by Dr. Jones and bolstered by his research into data that he concluded supported the survey results far outstrips in rigor and dependability the type of evidence that was approved by this Court in *Brooks*. The Superintendent of SLPS, Dr. Kelvin Adams, endorsed Dr. Jones' conclusions based on his knowledge of the district. (Tr. 466). While the Court need not credit the Jones testimony and report to find a Hancock Amendment violation here with respect to SLPS—because the presence of the Plaintiff and her children provide an entirely sufficient and separate basis to do so—there is nothing in the record that should cause the Court to refuse to give full weight to the work done by Dr. Jones. There is also nothing in the record that casts doubt on the tuition calculations that were built upon the expert report and testimony of Dr. Jones. There was no testimony by any witness that contradicted or otherwise did not agree with his analysis and findings.

As described above in Section I.A, there is no specific appropriation made and disbursed to SLPS to pay for the increased costs associated with § 167.131.[7] The State agrees that the only source of state funds to pay for the costs of § 167.131 is that which the SLPS receives through the foundation formula. (Tr. 568-69). However, the total amount that SLPS received through the foundation formula for FY 2011, after deductions for payments to charter schools, was $56.6 million. (Tr. 373). The foundation formula money, as it is based on local attendance, is meant to pay for local school students, not

[7] The State concedes this fact in Point 11 of its brief.

transfer students. After the foundation formula money, all costs for compliance with § 167.131 would have to be borne by local taxpayers. (Tr. 569).

Thus, even if the Court were to agree with the State and overrule *Rolla 31*, requiring SLPS to potentially commit all of its unrestricted foundation funds to § 167.131 compliance, that amount of money would be nowhere near the total amount that the district would likely have to spend if § 167.131 were ever to be enforced. Moreover, for those students who live in the City but do not attend SLPS, the district receives no foundation formula money to even partially offset tuition payments to County districts.

STATE FOUNDATION FORMULA FOR SLPS FY 2011

Weighted Average Daily Attendance:

27,628

State Foundation Formula Per Weighted ADA:

$3,620.2740

State Foundation Formula Amount:

$100,023,026

State Deduction For Payment to Charter Schools:

-$43,429,763

Total State Foundation Formula Payment to SLPS:

$56,593,263

Comparing the tuition costs to SLPS for a Transfer to Clayton for a child currently enrolled in SLPS creates a vivid picture.

Clayton Average Tuition - $20,252.67

Foundation Formula Per Weighted ADA - $3,620.27

Difference: - $16,632.40

(SLPS Ex. 6).

Although the State claims that the SLPS can manipulate a computer program to claim foundation formula funds for its resident students attending County districts, any such effort is barred by statute. § 163.011(2) R.S.Mo. requires both that a student reside in and attend school in "such" district to allow the district to claim funding for that student. In short, the State cannot point to even a partial funding source for the costs imposed by § 167.131 unless it changes both the Hancock Amendment and § 163.011(2) and, even then, the funds that might be available to offset the costs of compliance are woefully inadequate to meet the need.

There was unquestionably substantial evidence in the record to support the trial court's conclusion that SLPS faced increased costs as a result of the post-Hancock mandates imposed by § 167.131. In response, the appellants did not bring forth any contradictory evidence or witness testimony but rather offer only vague and unsupported criticism of Dr. Jones and his work. The State also ignores the actual costs associated with the Plaintiff Breitenfeld's transfers. The trial court's judgment should be upheld on the crucial second prong of the Hancock Amendment test, as the evidence establishes increased costs to SLPS arising out of the expanded mandates of § 167.131 without State funding—through specific appropriation or otherwise—sufficient to offset even a small fraction of those costs.

D. Newly Imposed Transportation Duties Also Create New Costs For Which There Is Only Inadequate State Funding—Hancock Amendment Issues Not Moot.

Entirely separate from the increased costs arising from tuition for transferring students are the increased costs relating to transportation. One of the longest discussions in the State's brief is in relation to its Point Three, which concerns the transportation provisions of § 167.131. The State contends at first that § 167.131 does not impose an increased duty with respect to transporting children and, in any event, the SLPS taxpayer has failed to show increased costs arising from such a duty.

Notwithstanding the claims in Point Three itself, the State concedes in the body of its argument that there "is some legal basis" for the contention that, with respect to transportation, § 167.131 imposes an increased obligation on SLPS. (State Brief at 46). This is not a difficult concession to make. At no time prior to the amendment of § 167.131 was SLPS required to transport students to schools in other districts, as the State's own witness admitted. (Tr. 574).

The State's real contention with respect to transportation concerns the evidence of increased costs associated with the inter-district transportation mandate. The State claims that the SLPS taxpayer failed to provide evidence that meets what the State asserts is the proper reach of the transportation mandate. Specifically, the State believes that §§ 167.131 and 167.241, when read together, require that SLPS pay for transportation only to those school districts "designated" by SLPS. (State Brief at 48). The relevant statute, § 167.241 R.S.Mo., is not clear on this point, and so the question of the extent of

SLPS's exposure to additional transportation costs in connection with § 167.131 is indeed an unresolved issue. As will be discussed below, however, it is not necessary to resolve it here in order to find substantial evidence of increased costs arising from the expanded transportation mandate.

The State also claims that the transportation issue is moot because "no one would qualify today for transfer and thus no one would qualify for transportation from the St. Louis district under § 167.131." (State Brief at 47). This reference to mootness—arising in the context of SLPS's recent provisional accreditation by the State Board of Education—requires a response. It is undisputed that there are other unaccredited school districts at present in the state of Missouri, and so the issue of what an unaccredited district is required to provide with respect to transportation (as well as its broader obligations under § 167.131) should be resolved as a matter of public interest and it also falls into the category of being capable of repetition, but evading review. *See State ex rel. Missouri Public Defender Comm'n v. Waters*, 370 S.W.3d 592, 603 (Mo. banc 2012) (citing the "public interest exception" to mootness; "this exception permits a court to decide an issue [e]ven though [it] may appear to be moot … if there is some legal principle at stake not previously ruled as to which a judicial declaration can and should be made for future guidance") (internal quotation marks omitted).

There remains a very real possibility that SLPS will once again lose accreditation as the Missouri Department of Elementary and Secondary Education (DESE) introduces a new and substantially stricter set of criteria for education this year under MSIP (which was authorized by the same legislation that amended § 167.131 in 1993). DESE had

suggested that loss of accreditation was a possibility for SLPS this year even as it announced the district's provisional accreditation in late 2012. (RSLF 2-4, 5-6). DESE further asserts the right to reassess the accreditation status of any district at any time. (RSLF 2, 3-4). Given the continued existence of unaccredited districts in Missouri who are presently affected by § 167.131, as well as the possibility that SLPS may once again face loss of accreditation in the near future, there is a strong public interest in the Court deciding all of the questions concerning § 167.131 that have been tried and raised in this case.

There is substantial evidence to support the trial court's determination that the statute imposes increased costs on SLPS, including in the area of transportation. SLPS provided specific evidence of what its transportation costs would be under two scenarios: (1) if it only had to transport the children of Plaintiff to Clayton; and (2) if it had to transport all of the likely transferees identified in the expert's report. In the instance of scenario (1), David Glaser, the CEO of VICC, testified that providing transportation to Clayton and from the City of St. Louis costs $46,202 for a single bus in a school year. (Tr. 332). In the instance of scenario (2), Mr. Glaser's estimate was $40 million to $60 million in transportation costs if SLPS has to provide transportation for all 15,750 likely transferees identified in the Jones study. (Tr. 331).

This evidence is more than sufficient to support the trial court's judgment on the transportation issue and also reduces the State's claim that SLPS was required to "designate" districts for transportation purposes to its proper status as legal marginalia. If only one district is designated and only one bus is dispatched to that district, the record

contains evidence of the relative cost of that endeavor. The State admits that SLPS must designate at least one district and that will necessitate sending at least one bus. As established in the record, there is undoubtedly a cost for sending that bus.

If, however, SLPS must provide transportation to all students seeking to transfer under § 167.131 to each and every district the transferees choose, the cost of that undertaking is set forth in the record as well, and it is staggering. Furthermore, the testimony of the State's own witness establishes that, under either the large scenario or the small scenario, SLPS will not receive sufficient compensation from the State for its increased transportation costs arising from § 163.131. It was further established at trial that, at most, SLPS could expect to receive reimbursement of only 36% of its additional transportation expenses under the statute, and Dr. Roger Dorson admitted that SLPS would likely receive less than that percentage because of an inefficiency penalty that would be worsened by the act of transporting children outside the confines of the district. (Tr. 375; 574-75).

The evidence at trial established that SLPS faced a new mandate for transportation under § 167.131 (which the State concedes), a mandate which imposes increased costs whether transportation is provided to just one district in St. Louis County or to all of them. The State's funding for these costs does not come close to compensating SLPS. There is substantial evidence in the record to support the trial court's judgment that, separate and apart from increased costs for tuition payments, § 167.131 imposes increased costs related to transportation of students, costs that are not paid for by the State.

E. The Hancock Amendment Does Not Require SLPS to Show Historic Mandates or Changed Funding Levels in Cases Involving a New Mandate.

The State next argues in its Points Seven and Eight that the SLPS taxpayer was required to show the historic levels of state funding for education and prove that the increases in state funding since 1980 were insufficient to cover the costs of new mandates, including that set forth in § 167.131. This argument is entirely without merit. The Hancock Amendment provides that in "new mandate" cases, as opposed to "pre-existing mandate" cases, a taxpayer-plaintiff need only show increased costs associated with the new or expanded mandate that are not paid by the State. *Fort Zumwalt Sch. Dist. v. State*, 896 S.W.2d 918, 922-23 (Mo. banc 1985). As set forth above, the evidence of increased costs arising from § 167.131 and the absence of funding from the State for those costs is abundant.

One need look no further that Art. X, § 21 to understand the error in the State's position. Earlier, this brief referenced the relevant portions of § 21, that is, the portions that are relevant to instances of new mandates or expansions of old mandates. Now, § 21 is set forth here in full, with its heading:

> **State support to local governments not to be reduced, additional activities and services not be imposed without full state funding.** Section 21. The state is hereby prohibited from reducing the state financed proportion of the costs of any existing activity or service required of counties and other political subdivisions. 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.

(Mo. Const., Art. X, § 21) (emphasis in original). As can be seen from its title, § 21 targets two very different types of potential violations. First, "State support to local governments not to be reduced" and, second, offset from the first provision by a comma, "additional activities and services not to be imposed without full state funding." Likewise, the text of § 21 is bifurcated. It begins by prohibiting reduced funding from the State for existing mandates, and then sets out the now-familiar ban on new or expanded mandates without State funding to pay for increased costs. Clearly, the State in Points Seven and Eight of its brief is trying to conflate these two different provisions into one in order to create an evidentiary burden for taxpayers that is irrelevant in cases of new or expanded mandates.

The cases cited by the State do not support its position. In *Sch. Dist. of Kansas City v. State*, 317 S.W.3d 599 (Mo. banc 2010), this Court found that the Kansas City district was under no mandate, new or existing, with respect to charter schools. *Id.* at 611. In short, they were not required to have created any charter schools. So the *Kansas City* case has nothing relevant to tell us about how costs arising from a new mandate are to be calculated. *Fort Zumwalt* is likewise not an instance of the State mandating new or expanded activities. The Fort Zumwalt district and other plaintiffs had alleged that the

State had reduced its funding for special education services below the level of the 1980-81 appropriations and asked for money damages. 896 S.W.2d at 919. Specifically, "the school districts allege the state has unconstitutionally reduced the proportion that its reimbursement of costs bears to costs of the school districts in providing special education services." *Id.* at 920. As this Court explained, *Fort Zumwalt* differs from *Rolla 31* because in the latter case the plaintiffs were trying to block the unfunded expansion of early childhood special education while in the former case the plaintiffs were trying to obtain money damages based on the reduced proportion of state funding for special education as measured pre- and post-Hancock. The *Rolla 31* scenario is the one that is present here, and both *Rolla 31* and this case are based on the "new mandate" portion of § 21. The question of historical funding is extraneous to this case, just as it was in *Rolla 31*, *Jefferson I* or *Brooks*.

As it admits, the State is attempting to overturn *Rolla 31*. However, *Rolla 31* is rooted in the plain language of § 21, and so there is no basis for overturning *Rolla 31*. Section 21 of the Hancock Amendment provides that, in instances such as this one where the State imposes a mandate for a new or expanded activity, the historical cost and funding information demanded by the State is irrelevant. Thus, the trial court did not err in finding that there was substantial evidence to prove a violation of § 21 in connection with the application of § 167.131 to SLPS because the evidence that is required by both the Hancock Amendment and the cases interpreting it was indeed present in the record and fully supports the trial court's judgment.

F. The State Wrongly Claims That the Trial Court Invalidated § 167.131 "On Its Face."

The premise of State's Point Nine is that the trial court invalidated § 167.131 "on its face." In fact, the trial court's judgment makes clear that it invalidated § 167.131 **as applied** to SLPS and the Clayton district, not on its face. Compounding the error, the State once again in Point Nine relies on the "existing mandate" portion of § 21, not the separate "new mandate" portion of the section. (State Brief at 72).

The State argues that the districts must do what they can with the funds provided. However, *there are no funds actually provided for the implementation of § 167.131, from any source*. If there were, the State would not be rearguing *Rolla 31* on its twenty-year anniversary and asking the Court to allow it to rob Peter to pay Paul by shifting about insufficient foundation formula funds. Even if *Brooks* could be read to support the State's position on this point, the State's victory would be Pyrrhic. The taxpayers have proven that there is no funding for any part of § 167.131 and so there is nothing that the districts can implement without harming taxpayers by covering the costs of § 167.131 by raising taxes or reallocating local tax dollars away from other expenditures. The State's witness, Dr. Dorson, astutely recognized this. (Tr. 568-69). Point Nine does nothing to question the trial court's judgment that § 167.131, as applied to SLPS and CSD, violates the Hancock Amendment.

II. THE TRIAL COURT'S JUDGMENT THAT ADHERENCE TO § 167.131 IS EXCUSED FOR SLPS BECAUSE COMPLIANCE WITH THE STATUTE IS IMPOSSIBLE SHOULD BE AFFIRMED BECAUSE THE EVIDENCE ESTABLISHED THE IMPOSSIBILITY OF COMPLIANCE IN THAT SLPS WOULD BE UNABLE TO MEET ITS STATUTORY AND CONSTITUTIONAL OBLIGATIONS TO ITS REMAINING STUDENTS IF IT WERE FORCED TO DEPLETE ITS RESOURCES BY MAKING TUITION PAYMENTS TO COUNTY DISTRICTS AND PAY TRANSPORTATION COSTS.

(Responding To State's Point 10 and Breitenfeld's Points 3, 4).

A. Case Law and Common Sense Recognize the Impossibility Defense.

In addition to its findings with respect to the Hancock Amendment, the trial court found that the districts were not required to comply with § 167.131 because for them to do so would be impossible. The appellants contest both the legal and factual basis for this portion of the trial court's judgment. In fact, case law supports an impossibility of compliance defense and common sense dictates that, where a law cannot as a practical matter be enforced, the courts should step in and prevent the damage that would result from a futile effort to carry out the impossible. The factual record in this case establishing the impossibility of compliance is overwhelming. If there is some limit on the ability of the State to command the impossible—and Missouri courts have previously held that there is—this case clearly lies well beyond that limitation. The trial court's judgment should be affirmed.

Impossibility of compliance is a recognized, though not often invoked, defense under Missouri law. *See George v. Quincy, Omaha & K.C. R.R. Co.*, 167 S.W. 153, 156 (Mo. Ct. App. 1914) (holding 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.'"); *see also Egenreither ex rel. Egenreither v. Carter*, 23 S.W.3d 641, 646 (Mo. Ct. App. 2000) ("considerations of safety, emergency conditions, or impossibility of compliance may constitute valid excuses for non-compliance with a statute"). The question put by the *George* court was: "is it impossible in any reasonable application, to comply with [the statute]?" 167 S.W. at 156.

It was precisely for this purpose that this case was remanded by this Court in 2010: to determine all defenses and factual matters, including "impossibility to comply with section 167.131." *Turner*, 318 S.W.2d at 676 n.10 (Breckinridge, J., dissenting). Notably, the *Turner* majority did not quarrel with the dissent's position on this point. The dissent wanted the Court to take judicial notice of census data to "illustrate the grievous consequences" of the majority's interpretation of § 167.131. *Id.* at 676 n.9. The majority did not agree with this approach, noting the lack of factual information in the record, but pointedly did not refute the dissent's view of the existence of the defense and what should occur on remand. *Id.* at 667 n.7.

The evidence subsequently introduced at trial and an examination of relevant statutes and regulations proves unquestionably that the St. Louis district cannot comply with § 167.131 as it was interpreted by this Court in *Turner* without, as a factual matter, rendering itself incapable of educating the currently enrolled students who do not avail

themselves of § 167.131. Moreover, application of § 167.131 places the St. Louis district in conflict with federal and state laws and regulations. The answer here to the question posed in *George* must be, therefore, a resounding "No."

B. The Evidence Unequivocally Established That It Would Be Impossible for SLPS to Both Comply With § 167.131 and Carry Out Its Obligations to Its Remaining Students.

Three current or former school superintendents testified at the trial of this cause. Each one—including the sole witness for the State of Missouri, Dr. Roger Dorson—stated that unequivocally it would be impossible for a school system to operate under the scenario presented for the St. Louis Public Schools by the expert testimony and report of Dr. Terry Jones and the resulting calculations of tuition and transportation costs required by § 167.131 R.S.Mo. Dr. Kelvin Adams testified that he could not run the St. Louis district or regain state accreditation with even a quarter of the additional costs that were projected based on the Jones report being imposed on the district.[8]

The evidence at trial established a probable annual cost to SLPS arising from compliance with § 167.131 including transportation costs of between $260 million and $280 million. (SLPS Ex. 2; Tr. 331). Clayton School District presented testimony and a

[8] The State incorrectly claims in its Brief that there was no evidence relating to the potential impact on the SLPS arising from transfers of less than the number projected by Dr. Jones. In fact, Dr. Adams testified directly on this subject in the context of the district's efforts to regain accreditation. (Tr. 475-77).

report by Dr. Jones that endeavored to quantify the number of children living within the confines of SLPS who would seek to transfer pursuant to § 167.131 if the law were upheld, ultimately arriving at a best estimate of 15,740, with 7,422 not currently enrolled in SLPS schools. (Ex. C-1). Crucially, no contrary evidence was submitted by the State or the Plaintiff.

Using the transfer figures and projected transfer location data provided by Clayton's expert witness, SLPS placed into evidence calculations of the annual tuition cost it would face for the projected 15,740 transferees under § 167.131. (SLPS Ex. 2). The numbers of transferring students for each named district were multiplied by the suggested district-wide tuition figures provided by the State of Missouri as part of this action. (SLPS Exs. 2 and 3). For Clayton, the tuition figure as calculated by the Clayton district was utilized. (Ex. C-12). Survey respondents who did not specify a district were placed in a catch-all category, with a tuition figure calculated by averaging the State-provided district-wide tuition figures for the nine accredited districts (other than Clayton) that border the City of St. Louis. This emphasis on proximity echoed Dr. Jones's efforts to control for the fact that SLPS may not be required to provide transportation to all § 167.131 transferees. (Tr. 89). The total amount of annual tuition that SLPS would have to pay to County districts for the 15,740 likely transferees (in the first wave) identified in the expert report was calculated at $223,790,964.16. (SLPS Ex. 2). Added to this figure is the estimate of $40 million to $60 million in transportation costs if SLPS has to provide transportation for all 15,750 likely transferees, as testified to by David Glaser of VICC. (Tr. 331).

The impact of § 167.131 on SLPS is best seen through the district's operating budget. The operating budget is the non-federal, unrestricted funds that can be used to pay tuition and other costs associated with § 167.131 and to provide general education services. (Tr. 361-62). For FY 2011, coinciding with the last full school year, the operating budget expenditures for SLPS totaled $288 million. (SLPS Ex. 1). The annual cost of compliance with § 167.131 just for tuition, set forth above, would consume nearly 80% of the district's operating budget. Once transportation costs are factored in, costs of compliance would rise to above 90% of the district's operating budget.

And yet, according to the expert testimony of Dr. Jones, these costs would cover only 8,318 students currently enrolled in SLPS, or roughly one-third of the 23,500 K-12 students currently enrolled. (Ex. C-1; SLPS Ex. 7). The district would be left with, at best, a few million dollars to provide an adequate education to two-thirds of its current enrollment – an impossible task. Dr. Kelvin Adams, the Superintendent of SLPS, testified bluntly to this fact. (Tr. 477-78; 482). Asked about the impact of § 167.131 on the district, he testified that "I would not be able to continue the kind of education that the children need to have and, quite frankly, I think there would not be a St. Louis Public School District." (Tr. 511).

The two other witnesses with service as school superintendents (including the State's witness) agreed that it would be impossible for a district facing the loss of most its operating budget to educate two-thirds of its current student body. Dr. Sharmon Wilkinson, the acting Superintendent of Clayton School District, agreed (Tr. 200-02), as did Dr. Roger Dorson, the State's own witness. Speaking of the scenario facing SLPS as

applied to his former district, Dr. Dorson testified with creditable candor that: "[w]e wouldn't have had enough money to operate. We would have had a lapse probably." (Tr. 577-78). Every witness agreed that § 167.131, if enforced as to SLPS, would be fatal to the district. There was no witness who testified to the opposite, that SLPS could actually operate with those conditions.

Dr. Adams testified as to other features of the statute that make compliance with § 167.131 impossible. As students leave, and state and local money is shifted to pay tuition and transportation costs, necessary federal funds will decrease as well. (Tr. 509). Additionally, the structure of § 167.131 is such that it will be impossible for SLPS to plan for the loss of students under the statute because it would not know who might stay and who might leave and there are no limits on when transfers might occur. (Tr. 450-51; 488).

The expert analysis was just for the first wave of departing students, undoubtedly to be followed by many more when there are no funds left in SLPS. It is a matter of simple mathematics that as resources in SLPS dwindle following the enforcement of § 167.131, as programs are cut and classrooms become crowded, more current students will seek to leave than the original 8,318 estimated in the expert testimony and report of Dr. Jones. Indeed, Dr. Jones testified to this spiraling effect as the district's resources are shifted to pay tuition to County districts, with the initial wave of transfers leading to more transfers. (Tr. 99-100). Dr. Adams did as well. (Tr. 510-11).

The evidence at trial was absolutely clear. If § 167.131 were ever to be applied to SLPS, the district would fail, and this failure would imperil thousands of school children.

In this context, the correlation between the Hancock Amendment and the defense of impossibility becomes evident. If the General Assembly cannot impose new or expanded mandates on political subdivisions without providing full funding, then it must also be true that it cannot order one of its political subdivisions to, in essence, throw itself off a cliff, or attempt to do so. In this case, the harm to students who would be left behind in an SLPS void of almost all resources is undeniable. Likewise, the harm to taxpayers who would see the demise of an institution that they have supported with their tax dollars for decades and which is an integral part of their community is clearly established by the record.

The appellants argue that SLPS should, in the event it loses accreditation again, simply try to comply with § 167.131 and then stop when the money runs out. This approach is madness, akin to stepping on a known landmine to see if it is still active, or lighting a match in a dark room to determine if the fluid on the floor that smells like gasoline is really gasoline. Where, as here, the evidence—unchallenged by the appellants with witnesses at trial—proves that, to impose § 167.131 on SLPS will lead to its swift destruction and the abandonment of thousands of students who will be left behind in devastated schools, the courts can and must step in. The judgment of the trial court is consistent with past case law recognizing the defense of impossibility of compliance and is amply supported by the record. It should be affirmed.

C. The Mandates of § 167.131 Conflict with Various Mandates Imposed By Other State and Federal Laws, Making Compliance with § 167.131 Impossible.

1. The Requirements of § 167.131 Conflict with the State's Mandate to the SAB to Regain Accreditation.

Apart from the financial realities which make compliance with § 167.131 impossible for SLPS, there are serious conflicts between the statute and other state and federal mandates. The first of these is the requirement, if SLPS should again lose accreditation, that it make the changes necessary to regain accreditation, as set forth in § 162.1100. Section 162.1100 R.S.Mo. was adopted specifically to address issues relating to the governance of SLPS, and to provide for its leadership in the event that the district lost accreditation. *See Turner*, 318 S.W.3d at 667 ("[t]he special administrative board and the chief executive are responsible for taking broad actions aimed at restoring the city district to accreditation"). It is important to understand that in 2007 the State Board of Education made the deliberate and considered choice to strip SLPS's accreditation under § 162.1100, as opposed to another statute, § 162.081 R.S.Mo.[9] Unlike 162.081, the SLPS-specific statute 162.1100 has no provision for SLPS to lapse following loss of accreditation, no provision for carving up SLPS and doling out the

[9] See http://dese.mo.gov/news/2010/SABextension.htm, last accessed on March 27, 2012, referring to "[a] state law special to [the] St. Louis Public Schools" as the basis for the authority for the SAB.

pieces to bordering districts. Under § 162.1100, the only path forward for SLPS is to regain accreditation. Should the State Board of Education choose to once again classify SLPS as unaccredited, it undoubtedly will do so through the "instant" process of § 162.1100, rather than through the slower process prescribed by § 162.081 R.S.Mo.

The evidence at trial established that enforcement of § 167.131 against SLPS in the event of a future loss of accreditation will make it impossible to gain reaccreditation. It is therefore impossible for SLPS to comply with § 167.131 without the Special Administrative Board defaulting on its most fundamental statutory responsibility and betraying the very reason for its existence, namely, the return of the district to accredited status. Consequently, it is a legal impossibility for SLPS to comply with § 167.131 because doing so would subvert the statutory requirements and the entire purpose of the SAB under § 162.1100.

Dr. Adams testified that had § 167.131 been enforced against SLPS from the advent of loss of accreditation in 2007, it would not have made the advance from three to six APR points that it realized beginning in 2008. (Tr. 475). He testified that this progress would have been impossible even if the district had been forced to pay $50 million in tuition, as opposed to the over $200 million figure based upon Dr. Jones's report and testimony. (*Id.*). Indeed, the district would have been unable to maintain even the three APR points it had at the end of 2007 if § 167.131 had been enforced at that time, whether the tuition bill was $200 million or $50 million. (Tr. 475-76). Looking back and considering this testimony, it is certain that had § 167.131 been enforced beginning in 2007, the district would never have regained accreditation in 2012. Looking

forward, if SLPS loses accreditation under the new Missouri School Improvement Program Cycle 5 standards, a second return to accredited status will be impossible if § 167.131 is enforced against the district. Thus, it is impossible to reconcile the absolute mandate of achieving reaccreditation as set forth in § 162.1100 with the provisions of § 167.131.

2. The State's Special Education Mandates Conflict with § 167.131.

It was established by the trial court that the responsibility for providing children with special needs with the "free and appropriate public education" (or FAPE) that is required by the Individuals with Disabilities Education Act (or IDEA), 20 U.S.C. § 1400 *et seq.*, belongs to SLPS when the children in question reside within the boundaries of SLPS. (Judgment and Order of March 2, 2012; § 162.700.1 R.S.Mo. (school district is responsible for providing special educational services for children three and older who are "residing in the district")). A student who transfers under § 167.131 still resides in the SLPS district and so it remains the responsibility of SLPS to provide special education services.

It is not possible to reconcile the requirements of IDEA with those of § 167.131. As part of his study, Dr. Jones estimated 3,157 transferee students out of the total 15,740 would have Individual Education Plans (or IEPs), the cornerstone of special educational services under IDEA. (Ex. C-1, p. 12). Fifteen percent of currently enrolled SLPS students receive special education services. (Tr. 428).

Unlike Clayton School District, which utilizes the Special School District ("SSD"), SLPS provides special education services in its own facilities. (Tr. 429-30).

The conflict between § 167.131 and the special education statutes and regulations arises when a child seeks to transfer to a County district under § 167.131 and then demands that SLPS provide special education services in the setting of the County district. Nothing in state or federal law requires SLPS to provide FAPE for a particular child in any other school district if it can provide FAPE for that child in its own facilities. In fact, a placement under an IEP should be as close as possible to the child's home. (Missouri State Plan for Special Education, p. 53. The Plan is codified at 5 C.S.R. 70-742.140). Section 167.131 does not change SLPS's obligations with respect to the provision of FAPE.

If it should again be classified as unaccredited, SLPS faces the impossible choice of either complying with § 167.131 for all students, and thereby attempting to shoulder the enormous burden of providing special services in every school in St. Louis County where SLPS-resident special needs children decide to attend, or following the letter of IDEA and the state statutes and regulations and offer FAPE only in its own facilities whenever such a placement would be appropriate. If SLPS chooses the latter course it will, in effect, be telling children with disabilities to choose between attending a County school or receiving special services, because SSD will not provide services to City residents in County schools and SLPS cannot. In this way, § 167.131 could not apply to children with disabilities, a distinction that will surely give rise to accusations of discrimination. Because of this conflict, it is impossible for SLPS to comply with both § 167.131 and with IDEA and relevant Missouri statutes and regulations. The conflict provides an additional ground to support the trial court's finding of impossibility.

3. The Requirements of the *Liddell* Desegregation Agreement Conflict with § 167.131.

Under the 1999 final Settlement Agreement in *Liddell v. Board of Education*, SLPS (and "all parties" thereto) acknowledged that "desegregation serves important remedial and educational goals and helps children to prepare for participation in a pluralistic society." (¶ 9). Consequently, SLPS (and, again, "all parties") "will continue to pursue a policy of desegregation" (*Id.*). The Settlement Agreement was entered into the trial record in this cause. (Tr. 470).

SLPS is faced with a situation—should it once again lose accreditation—where it is mandated by the Supreme Court's holding in *Turner* that it comply with § 167.131 but where it is still under a continuing obligation to pursue "a policy of desegregation" in a Settlement Agreement entered into under the aegis of the federal court. Those two obligations are not at all congruent, and the question cannot and will not be resolved in this venue. The testimony presented was that if SLPS is required to pay for the transfer of white school-age children out of the City of St. Louis to predominantly white school districts in St. Louis County, it would be promoting a policy of resegregation, rather than one of desegregation. (Tr. 468). Following the dictates of *Turner* and § 167.131, SLPS would be expressly violating ¶ 9 of the Settlement Agreement.

Ultimately the question of whether or not § 167.131 can survive *Liddell* is one for the federal court. However, this Court should be aware of the full range of policy complications that are raised by § 167.131. This context supports the conclusion of the trial court that compliance with § 167.131, for so many reasons, is impossible for SLPS.

III. THE TRIAL COURT DID NOT ERR IN PERMITTING THE TAXPAYERS TO INTERVENE BECAUSE EVEN IF THE TAXPAYERS DID NOT HAVE THE ABSOLUTE RIGHT TO INTERVENE THE TRIAL COURT HAD DISCRETION TO PERMIT INTERVENTION IN THAT THE TAXPAYERS HAD CLAIMS THAT WERE RELATED TO THE SUBJECT MATTER OF THE EXISTING LAWSUIT AND RIGHTS THAT WOULD BE AFFECTED BY THE OUTCOME AND ONLY THE TAXPAYERS COULD RAISE THE HANCOCK AMENDMENT ISSUE.

(Responding to Breitenfeld's Points 5 and 6).

Appellant Breitenfeld complains that the taxpayers should not have been allowed to intervene in this action. Breitenfeld would have beeen the instrument of imposing increased costs on the districts through the unfunded mandate of § 167.131, but have the taxpayers for the districts be powerless to object. As this Court has recently confirmed, only the taxpayers had standing to raise the Hancock Amendment issue; the districts could not. *King-Willmann v. Webster Groves Sch. Dist.*, 361 S.W.3d 414 (Mo. banc 2012).

Despite the holding in *King-Willmann*, Breitenfeld also argues that after remand in *Turner*, the *districts* should not have been allowed to raise the Hancock Amendment issue. As has been demonstrated by the districts in several rounds of writ requests made by Breitenfeld (including in this Court), the remand in *Turner* was general, and the parties were permitted to raise all issues that had not been disposed of in *Turner*. The *Turner* appeal was not after a trial or discovery. It was after a summary judgment ruling.

Prior to the grant of summary judgment that resulted in the *Turner* ruling, the districts had not answered, and therefore had not had the opportunity to interpose any affirmative defense, including that of the Hancock Amendment. In any event, Point Six makes no sense in light of Point Five and *King-Willmann*. The districts are not permitted to raise the Hancock Amendment as a defense, so it does not matter when they raised it.

In making her point regarding taxpayer intervention, Breitenfeld focuses narrowly on one part of Missouri Rule of Civil Procedure 52.12, specifically that portion of Rule 52.12(a)(1) concerning an unconditional statutory right to intervene. Breitenfeld argues that having standing under the Missouri Constitution to sue is not the same as having an indefeasible statutory right to intervene, but cites no cases that support this position. It would certainly be strange if the State's Constitution gave taxpayers the standing to bring a Hancock Amendment claim but the Rules of Civil Procedure denied them the right to intervene in a case where the Hancock Amendment is directly relevant.

Breitenfeld also ignores the balance of Rule 52.12(a), which also permits intervention as 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." Mo.R.Civ.P. 52.12(a)(2). Thus, "[i]n the absence of a statute conferring an unconditional right of intervention," a person seeking to intervene must establish the following three elements: (1) an interest relating to the property or transaction which is the subject of the action; (2) that the applicant's ability to protect the

interest is impaired or impeded; and (3) that the existing parties are inadequately representing the applicant's interest." *Allred v. Carnahan*, 372 S.W.3d 477, 481 (Mo. Ct. App. 2012) (internal quotation marks and citation omitted). The Rule "should be liberally construed to permit broad intervention" and even the requirement of a pleading may be excused. *State ex rel. St. Joseph, Mo. Ass'n of Plumbing, Heating and Cooling Contractors, Inc. v. City of St. Joseph*, 579 S.W.2d 804, 806 (Mo. Ct. App. 1979).

An interest, for purposes of intervention as of right, "means a concern, more than mere curiosity, or academic or sentimental desire." *In re Liquidation of Prof'l Med. Ins. Co.*, 92 S.W.3d 775, 778 (Mo. banc 2003). The taxpayers here certainly met this criteria. They were deeply and personally concerned about the harm that would befall both them and the school districts that served their community. The taxpayers here certainly had an interest in the subject matter of Breitenfeld's suit.

Nor can there be a question that the taxpayers' rights would be impaired by a judgment in Breitenfeld's favor. Absent intervention, after the remand of *Turner*, a judgment in favor of the plaintiffs and declaring an absolute and unfettered right for City residents to enroll their children in a County school of their choice, the harm to the taxpayers and the districts that they had supported would be immediate and irreversible. For SLPS, the tuition bills would start coming due, with no funds at the district level to pay for them. The State's witness, Dr. Dorson, admitted that it would fall to the taxpayers to satisfy tuition and transportation costs under § 167.131 once the already scanty discretionary funds had all been spent by SLPS. (Tr. 569).

Finally, this Court has settled the issue of whether the districts can adequately represent the interests of the taxpayers. *King-Willmann* made it clear that only taxpayers can bring a Hancock Amendment challenge, not political entities. With this final element in place, there can be no doubt that even if the taxpayers did not have a right to intervene by virtue of their Constitutionally-recognized and unique standing to bring Hancock Amendment challenges, they certainly had a particular interest in the Breitenfeld case that gave them the right to intervene.

Breitenfeld gives short shrift to the idea of permissive intervention under Missouri Rule of Civil Procedure 52.12(b), dismissing it by stating once again that Constitutional standing does not equal a statutory right to intervene and by arguing that the taxpayers' "Hancock Amendment defense did not implicate questions of law or fact in common" with the "then-available" defenses of the districts. This latter conclusory statement is wrong. As seen in this brief, there are close links between the Hancock Amendment and the defense of impossibility. In the end, both are intended to protect the rights of the taxpayers and the local communities they live in from overreaching by the State. The facts that established the impossibility defense also gave added dimension to the facts surrounding the Hancock Amendment violation, helping to show the true extent of the unfunded mandate that had been imposed on the districts by § 167.131. There is simply no credible argument that the trial court erred in permitting the taxpayers to intervene in this action.

IV. THE ATTORNEYS' FEES AWARDED TO THE TAXPAYERS WERE REASONABLE AND SHOULD BE UPHELD.

(Responding to State's Point 11).

Judge Vincent did not abuse his discretion, the standard by which the court reviews such awards of fees, in any respect when he awarded Ms. Hegdahl attorneys' fees and costs pursuant to Mo. Con. Art. X § 23. *Howard v. City of Kansas City*, 332 S.W.3d 772, 792 (Mo. banc 2010); *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 fee award to Ms. Hegdahl was properly supported by competent evidence. (LF 1870-1877, 1880). The trial judge is considered an expert at fashioning attorneys' fees awards. *Western Blue Print Co. v. Roberts*, 367 S.W.3d, at 23 (Mo. banc 2012).

The State does not really contest the hourly rates, time expended, or costs. Rather, the State's argument is that a trial was not required. Having argued in its lengthy brief that the Hancock Amendment should be rewritten and that there were not sufficient facts presented at trial, the State contends that the award of attorney's fees to the taxpayers is not reasonable because they should just have moved for summary judgment on the argument that no specific appropriation for the increased costs of § 167.131 was made and disbursed, a point that the State graciously concedes at this rather late stage in the proceedings. As the State notes, this was "one" of the taxpayers' successful arguments at the trial court level; there were numerous others, each of which is sufficient on its own to

end the threat that is posed by § 167.131, even if the Court accepts the invitation of the State and overturns *Rolla 31* and *Jefferson I*.

In light of the State's extensive efforts to overturn all existing Hancock Amendment law, including *Rolla 31* and *Jefferson I* and the requirement of a specific appropriation for increased costs, it would have been foolishness for the taxpayers' counsel to, legally speaking, place all their eggs in one basket. It would have been foolish for the taxpayers to acquiesce in such a strategy. Nothing in the Hancock Amendment requires taxpayers to choose just one argument, and the State cites no case law from the Hancock Amendment context or any other in support of this claim. The taxpayers have the right to vindicate their interests under Art. X of Missouri's Constitution. They have done so, and are entitled to the limited recompense of attorney's fees and costs incurred in the effort. The trial court's award of attorney's fees and costs should be affirmed.

CONCLUSION

In the end, there is no real dispute that § 167.131 imposes new duties on SLPS and that the result of these new duties are increased costs that are not paid for by the State through a specific appropriation. The evidence, when the Hancock Amendment and interpreting case law is plainly and correctly read, is clear. Under this Court's established case law and the overwhelming record in this case, the Hancock Amendment has been violated and § 167.131 is unenforceable as applied to SLPS. Recognizing this to be so, but unwilling to concede defeat, the appellants focus on the Hancock Amendment itself, and try to convince the Court to engage in a massive rewriting of its provisions. They

provide no convincing reason why the Court should do this, and they ignore the simple fact that it is not within this Court's power to rewrite a Constitutional Amendment. The judgment of the trial court correctly declared and applied the law, is supported by substantial evidence, and must therefore be affirmed. As further relief, Ms. Hegdahl pursuant to Mo. Con. Art. X § 23, should be awarded additional attorneys' fees and costs incurred post-judgment and for the appeal in this case.

Respectfully submitted,

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CERTIFICATE PURSUANT TO RULES 84.06(c) and 84.06(g)

The undersigned counsel for Respondents hereby states:

1) The foregoing brief contains 20,069 words as counted by Microsoft Word, excluding the cover, certifications, and the signature block, which is within the applicable limitations in length set forth in Rule 84.06(b); and

2) The electronic copy of this brief has been scanned for viruses, and the virus-scanning software has reported that the copy is virus-free.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 16th day of January, 2013, the foregoing was filed electronically with the Clerk of Court to be served by operation of the Court's electronic filing system upon: 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 Mark Bremer, 1 North Brentwood Blvd., Suite 800, St. Louis, MO 63105, attorney for School District of Clayton and Clayton taxpayers.

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