SC92653

IN THE SUPREME COURT OF MISSOURI

GINA BREITENFELD,

Plaintiff/Appellant,

vs.

SCHOOL DISTRICT OF CLAYTON, et al.,

Defendants/Respondents.

Appeal from the Circuit Court of St. Louis County, Missouri
The Honorable David Lee Vincent III, Circuit Judge

BRIEF OF APPELLANTS

CHRIS KOSTER
Attorney General

JAMES R. LAYTON
Mo. Bar No. 45631
Solicitor General
THOMAS D. SMITH
Mo. Bar No. 61928
Assistant Attorney General
P.O. Box 899
Jefferson City, MO 65102-0899
(573) 751-3321
(573) 751-0774 (facsimile)
James.Layton@ago.mo.gov
Thomas.Smith@ago.mo.gov

ATTORNEYS FOR APPELLANTS

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JURISDICTIONAL STATEMENT

This appeal involves the validity of § 167.131,[1] as applied to the St. Louis and Clayton school districts for a period that began in 2007 and ended in October 2012. This Court has exclusive jurisdiction pursuant to Art. V, § 3 of the Missouri Constitution.

[1] All references to the Missouri Revised Statutes are to RSMo 2000 unless otherwise specified.

STATEMENT OF FACTS

When it previously considered this case, this Court observed that "it is uncontested that the St. Louis public school district lost its accreditation with the state board of education. Additionally, it is uncontested that the parents and their children reside in the City of St. Louis, but the children attend accredited schools in a school district in an adjoining county." *Turner v. Sch. Dist. of Clayton,* 318 S.W.3d 660, 665 (Mo. banc 2010). According to the Court, that meant that § 167.131 applied to the St. Louis district.[2] At the time this case was tried, the St. Louis district remained unaccredited, and thus subject to § 167.131, RSMo. *See* Tr. 449:1-16. That is no longer true; contrary to the assumptions made by school district officials at trial (*e.g.*, Tr. 500:20-24), the St. Louis district regained provisional accreditation in October 2012, and § 167.131 no longer applies to the facts of this case except as to past tuition charges for the named plaintiff students.

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[2] The St. Louis district is now being operated by the "transitional school district" pursuant to § 162.1100. That means that the district is run not by the elected school board, but by an appointed board. But the distinction is irrelevant here. So we will refer simply to the "St. Louis district."

Section 167.131 allows students from an unaccredited district to "attend schools in an accredited school in another district of the same or an adjoining county." The St. Louis district is located in the City of St. Louis, a city not within a county. The Clayton School District is one of 22 other accredited school districts in St. Louis County, which adjoins the City of St. Louis. Tr. 379:1-13, SLPS Exh. 3 and 4. Thus St. Louis district students were entitled under § 167.131 to attend schools in the Clayton district until October 2012. *See id.* at 663, 669.

There is no evidence in the record in this case that any student actually ever transferred from the St. Louis district to a school in the Clayton district, nor to any other St. Louis County school pursuant to § 167.131. In fact, after the St. Louis district temporarily lost its state accreditation in 2007, the Clayton district made a "decision not to accept city transfer students." Tr. 169:15-170:5. Following this Court's decision in 2010, the Clayton district received inquiries about transfer enrollment, but advised parents it still "would not be accepting students until the final resolution of this matter." Tr. 174:21-25, 175:1-4, 176:17-177:8. And again, the time for such transfers has now past.

District costs and capacity.

This is an appeal from a decision of the circuit court holding that § 167.131 could not be applied to any student transferring or seeking to

transfer from the St. Louis to the Clayton district, holding that the statute violated Art. X, § 21 of the Missouri Constitution—the "unfunded mandate" provision of the Hancock Amendment—and that compliance would be "impossible." The pertinent facts, then, are largely restricted to those regarding the current (and, according to the districts and their taxpayers, future) financial status of the two districts involved in this case.

The Clayton district educates approximately 2,500 Kindergarten-12th grade ("K-12") students in its five schools and has an operating budget of approximately $50 million. Tr. 163:11-13, 239:10-240:19, 271:14-17, Clayton Exh. C11. Though the Clayton district receives some state funding, about 75 percent of its operating revenue is derived from local real estate and personal property taxes. Tr. 272:3-10. The record does not show how much the Clayton district received from the State in 1980, 2011, or any other year.

Over 23,000 K-12 students are enrolled in St. Louis district's 76 schools. Tr. 364:20-22, 396:13-17; SLPS Exh. 1. The district has experienced declining enrollment since the 1970's. Tr. 397:9-22. For example, its K-12 enrollment decreased by more than 4,500 students in a single year between 2007 and 2008. Tr. 396:23-397:2.

In fiscal year ("FY") FY 2011, the St. Louis district's operating revenues totaled $296 million, while its operating expenditures were $288 million, resulting in a $9 million budget surplus. Tr. 363:5-21; SLPS Exh. 1. The St.

Louis district receives local revenue from sales and property taxes and additional funding from the state and federal governments. Tr. 389:14-24. The record does not show how much the St. Louis district received from the State in 1980, or in any other year prior to 2011.

Missouri's foundation formula calculates state aid to school districts based on their weighted average daily attendance ("WADA"), which multiplies districts' average daily attendance ("ADA") by statutory weighting factors. §§ 163.011 and 163.031; Tr. 370:22-371:9, 516:2-13. The WADA calculation drives additional state funding to the St. Louis district based on its student demographics. Tr. 516:14-23. As of the time of trial, the district's state foundation formula amount per WADA was approximately $3,620. Tr. 372:11-20; SLPS Exh. 6. For FY 2011, then, the St. Louis district received $56,593,263 in state foundation formula payments for students enrolled in its schools. Tr. 373:2-24; SLPS Exh. 6.[3]

State payments to the St. Louis district declined between 2007 and 2011 because, again, those payments are based on enrollment and attendance, and the district's K-12 enrollment declined. *See* §§ 163.011 and

[3] Many St. Louis district-resident students are educated at charter schools. State funding for those students goes directly to the charter schools. *See* § 160.415; Tr. 399:2-24, 519:3-11.

163.031; Tr. 370:22-371:9, 394:23-395:3, 396:12-21, 516:2-13. Nevertheless, the district developed a budget each year based on projected enrollment decreases (and corresponding State revenue reductions); despite the reductions, the academic performance of district students improved. Tr. 397:9-22, 398-1-6.

A school district's average current expenditures per ADA represent the approximate per pupil amount the district spends to educate students in a particular school year. Tr. 403:20-404:8. The St. Louis district's average current expenditures per ADA total $15,861. Tr. 404:2-4; State Exh. E. For the Clayton district, the amount is approximately $18,000. Tr. 296:24-297:9.

The record does not show—and the circuit court made no findings regarding—how much of the amount spent per student in either district is now, or was in the past, attributable to State requirements as opposed to local choices. The Clayton superintendent, Dr. Wilkinson, testified that the Clayton district "go[es] beyond" statutory requirements applicable to Missouri school districts and does not disaggregate its average current expenditures per ADA based on what is and is not required by state law. Tr. 169:5-14, 213:20-214:3. For example, the district, not the State, sets class size standards. Tr. 207:12-208:3. The State does set out minimum teacher salaries ranging from $25,000 to $33,000. § 163.172. But the Clayton district's Chief

Financial Officer, Mary Jo Gruber, testified that the average Clayton district teacher earns $88,000 in salary and benefits. Tr. 272:19-22.

Similarly, the St. Louis district's Budget Director, Angela Banks, testified that the district board—not the State—decides, subject to certain guidelines, how to allocate local and state funding to best educate students. Tr. 389:4-390:18. Each year, the school board approves the district's operating budget based on projected enrollment and other factors. Tr. 390:19-24. The board determines how many teachers to employ and how much to pay them. Tr. 390:25-391:4. The St. Louis district has thus decided that its 1,739 teachers will earn, on average, more than twice what state law requires: $49,511 plus additional benefits valued at about 40% of that amount. Tr. 365:18-10, 391:5-16; SLPS Exh. 6. The St. Louis district spends approximately $120 million on central administration not required by state law. Tr. 391:19-392:10.

The State does not dictate what types of facilities the St. Louis and Clayton districts must provide and, except for certain core courses, does not prescribe its course offerings. Tr. 392:11-393:8.

Section 167.131 prescribes "[t]he rate of tuition to be charged by the district attended and paid by the sending district[.]" § 167.131.2. By design, it allows a receiving district to recover the per pupil amount it spends to educate students in a transfer student's cohort: "the per pupil cost of

maintaining the district's grade level grouping which includes the school attended." *Id.* The statutory formula for determining the maximum allowable "cost of maintaining a grade level grouping" includes "all amounts spent for teachers' wages, incidental purposes, debt service, maintenance and replacements." *Id.* Only cash expenditures for capital improvements—amounts a district spends to acquire land or construct new buildings without a bond issue—are not included in the statutory tuition calculation. *Id.*; Tr. 257:22-261:4, 552:25-553:18; Deposition of Roger Dorson at 72:11-75:1.

The Clayton district calculated its allowed tuition as, on average, $20,252.67 per student. *Id.* The actual allowed tuition rate would depend on which of the Clayton district's five school buildings a particular transfer student might attend; it ranges from $18,887.90 (Meramec Elementary) to $21,160.58 (Clayton High School). Clayton Exh. C12. The statutorily allowed tuition rate corresponding to each of the Clayton district's five schools exceeds the Clayton district's Average Current Expenditures per ADA. Tr. 296:24-297:9; Clayton Exh. C12. The Clayton district's statutory tuition rates for the two Breitenfeld children are $20,888.03 (Wydown Middle School) and $19,169.35 (Glenridge Elementary). *Id.*; Tr. 179:19-180:1, 282:22-284:9, 381:25-382:11; Exh. SLPS 6.

The Clayton district's current enrollment includes some nonresident students: 393 nonresident students participating in the Voluntary

Interdistrict Choice Corporation ("VICC") program, 70-100 nonresident students whose parents are employed by the Clayton district, some nonresident students whose parents pay tuition at a rate established by the Clayton district school board, and other nonresident students. Tr. 163:11-13, 204:24-205:18; Tr. 310:14-311:19; Clayton Exh. C4 at Clayton District 1308; Clayton Exh. C15 at Clayton District 1301. Rather than charge the statutorily allowed tuition rate, the Clayton school board has set tuition rates for nonresident students at $10,500 for elementary school and $15,750 for high school. Tr. 284:22-285:13. And the Clayton district accepts $7,000 per transfer student from the VICC in lieu of tuition. Tr. 285:19-286:7.

The Clayton district's enrollment fluctuates and it sometimes experiences an unexpected enrollment increase. Tr. 184:16-185:17, 208:7-209:7. Adding a few students—whether because they move into the district, choose public rather than private schools, or transfer as nonresident students for whom tuition is charged—does not require the Clayton district to hire an additional teacher or build a new school. Tr. 209:8-210:5. The Clayton district's marginal cost for enrolling a single new student—expenses associated with providing supplies and textbooks—ranges from $285 to $650, depending on grade level. Tr. 273:3-17. Dr. Wilkinson offered 1,000 as her "ballpark figure" of the number of additional students that the Clayton district could not educate if that many "presented themselves … without

planning, at [district's] doors in September." Tr. 219:1-23. Education of 1, 2, 20, 100, or even 200 transfer students would not be impossible. Tr. 217:19-219:9.

The Clayton district's Chief Financial Officer, Mary Jo Gruber, conceded that the district has "no idea" what the district's cost might be if less than 2,500 transfer students enrolled in the district pursuant to § 167.131. Ms. Gruber estimated that if 2,500 students transferred to the district, requiring the district to hire additional staff, the district would incur $42,200,000 in additional operating costs to maintain its current level of service. Tr. 273:25-274:19, 292:3-15; Clayton Exh. C13. This figure excludes any expenses associated with land acquisition or building construction, but includes additional staff salaries and increases in curriculum, assessment, communications, technology, transportation, food services, physical plant and athletic field, and other operational costs. *Id.*; Tr. 277:2-10. The district's operational cost per pupil ($42,200,000/2,500) would total $16,880–thousands less than the statutorily authorized tuition rates. Tr. 292:13-293:25.

The record does not show what it would cost the Clayton district to temporarily house such students in modular classrooms—an option that the Clayton district, in another context, called "an easy and cost-effective solution" to temporary space needs Clayton Exh. C10. Indeed, the Clayton district used two modular classrooms during the construction of its new high

school and could use them to accommodate new students on a temporary basis, Tr. 190:17-22, 211:1-213:9, 295:3-9, but did not present evidence of the cost of using those classrooms. Other St. Louis County districts have also used modular classrooms. Tr. 313:21-314:24; Tr. 336:24-337:24. Moreover, the Clayton district owns a vacant elementary school, Maryland School, that can accommodate approximately 200 students. Tr. 243:22-244:8; Clayton Exh. C10. The district's Director of Facility Services, Timothy Wonish, estimated that the district could renovate the building for classroom use in one year to 18 months. Tr. 245:7-12. He did not explain why renovation would be necessary. The district also owns an approximately 8,000 square foot building it currently leases for use as a daycare on an annual basis. Tr. 252:2-15. Last spring, the district started construction of a new middle school to replace Wydown Middle School, which currently enrolls approximately 600 students. Tr. 186:18-187:1, 187:19-22. But Clayton district witnesses did not present evidence of the cost of continuing to use the Wydown building. Nor did they address what it would have cost to use scheduling methods, such as split schedules and year-round schools, to accommodate more students in its existing buildings, in order to accommodate St. Louis transfer students between 2007 (assuming, contrary to fact, that students had sought to transfer then) and 2012 (when the St. Louis district regained accreditation).

The Jones Study.

Neither district, nor any of their taxpayers, attempted to create a record in the circuit court regarding the actual costs of the few St. Louis district students who transferred to Clayton schools, who the Clayton district chose to enroll (apparently voluntarily, because the enrollment preceded this Court's decision), who later brought this case asserting that § 167.131 required the St. Louis to pay their tuition.

Nor did the districts nor their taxpayers create a record regarding any larger set of identifiable students who would have transferred. That makes some sense; neither district accepted applications from any students seeking transfer, Tr. 226:4-13, 409:10-14, so there are no student-specific records from which to make a calculation. St. Louis district officials do not know whether even ten students or parents inquired about the possibility of transferring to St. Louis County schools. Tr. 409:15-24. The Clayton district has records documenting about 100 inquires since the St. Louis district temporarily lost its accreditation and may have received as many as 200 to 300 additional inquiries that were not documented because those individuals were unwilling to leave their names. Tr. 177:12-178:22, 226:14-227:6. But the number of inquiries to the Clayton district gradually decreased after this Court's decision in this case, and the Clayton district had received just "one from this school year [2011-12]." Tr. 176:25-177:9, 227:25-228:5. Neither the

Clayton nor the St. Louis district presented evidence regarding what it would have cost to allow the transfer of the number of students whose parents inquired. *See* Tr. 291:4-22.

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. Tr. 68:8-12, 71:8; Addendum at A, p. 4; LF 1850. *See*, *e.g.*, Tr. 400:19-25, 410:7-24. The Jones Study concludes that a staggering number of St. Louis City resident students, 15,740—roughly two-thirds of the St. Louis district's current enrollment—would transfer *en masse* to St. Louis County schools pursuant to § 167.131 in 2012. Tr. 83:8-83:14, 396:13-17, 495:12-496:9; Clayton Exh. C1 at 1; Addendum at A, p. 4; LF 1850.

Dr. Jones' opinions were based primarily on a survey of St. Louis City telephone customers. Tr. 73:23-74:10, 76:19-77:1. Approximately 56,000 school-aged children live in St. Louis City. Tr. 109:8-12. Those asked to complete the survey were telephone customers who answered and stated that they were residents of St. Louis City, live with one or more children who will be attending grades K-12 in 2012, and make or participate in decisions about where the children will attend school. Tr. 109:20-111:10; State Exh. C.

Only 15 to 20 percent of the phone customers who answered these questions in the affirmative—601 total—completed the 10-15 minute phone survey. Tr. 109:13-15; 111:11-14; Addendum at A, page 4; LF 1850. Dr. Jones has no opinion regarding whether individuals who were willing to complete the survey might be more interested in the education of their children than the average population. Tr. 111:15-22, 142:2-23, 152:10-15. He testified, "Any bias is potentially there, but I did not see it as one that needed serious consideration in the design of the survey." Tr. 143:4-7.

In order to predict the St. Louis County school districts to which students might transfer, phone customers were asked to rank by importance seven "school selection factors." Tr. 113:23-114:5, 114:21-115:2, 119:15-120:3; Clayton Exh. C1; State Exh. C. The factors were dollars spent per student, student performance on the Missouri Assessment Program ("MAP"), diversity, graduation rate, school proximity to home and public transit, and percentage of graduates that attend college. *Id.* Dr. Jones did not perform research or otherwise attempt to determine whether these factors are most important for parents making placement decisions, and phone customers were not asked whether there are other factors they would consider more important (*e.g.*, courses or extracurricular activities offered, whether the child's friends and family members attend the same school, availability of after-school care, whether the school is parochial or faith-based, satisfaction

with the child's current school). Tr. 116:22-118:13, 121:5-123:12. Dr. Jones' response when asked whether a child likes her current school, something phone customers were not asked but which Dr. Jones admitted "might be" an important factor, Tr. 123:5-8, is illustrative:

> Q. But we don't know because, in reality, seven factors by which the Clayton School District ranks at or near the top of [sic] in every case were selected by you for the survey individuals to ask folks about, after consulting with the school district attorneys; correct?
>
> A. The – that's correct.

Tr. 123:5-19. Dr. Jones' report did not reference results of a survey question asking whether the fact that St. Louis district was then unaccredited would make phone customers more or less likely to enroll a child in a St. Louis County school. Tr. 124:6-15.

After being told the six districts with the highest student performance on the Missouri Assessment Program ("MAP") are Brentwood, Clayton, Kirkwood, Ladue, Lindbergh, and Rockwood, survey respondents were asked to state "which of these districts would be your first choice ... or if some other district would be your first choice, just say so." Tr. 127:10-13; Clayton Exh. C1, p. 9. There are more than 20 school districts in St. Louis County, and of

the three "school selection factors" related to academic performance (MAP scores, graduation rate, and college attendance rate), survey respondents ranked MAP performance least important. Tr. 129:17-130:2, 130:11-13. Nevertheless, Dr. Jones concluded, based on the results of this survey question, that 22.7 percent of students transferring from St. Louis district (3,567) would enroll in the Clayton district. Tr. 83:15-23, 127:6-9; Clayton Exh. C1, p. 9; Addendum at A, page 4; LF 1850.

Dr. Jones' conclusion that 15,704 students will transfer in 2012 is based in large part on an answer to these questions:

> What if, starting with fall 2012, this child would be free to attend the public school of your choice in St. Louis County with no charge for tuition? How likely would you be to enroll this child in the St. Louis County public school of your choice?
>
> Would you be almost 100 percent certain to enroll this child? Would the chances be 75 percent or more but less than 100 percent? Would the chances be 25 between 50 percent and 74 percent? Between 25 percent and 49 percent? Or would they be less than 25 percent?

Tr. 87:17-88:1; Clayton Exh. C1, p. 10. Dr. Jones testified that, based on the 601 responses to this question, he "calculated a transfer rate with the following assumptions:"

> Those that said almost certain, 90 percent of them would transfer. Those that said 75 percent but less than 100 percent, 75 percent would transfer. Those that said 50 to 74 percent, 50 percent would transfer. Those that said 25 to 49 percent, 25 percent would transfer. Those that said 25 percent or less than 25 percent, that none would transfer.

Tr. 88:2-9; Clayton Exh. C1, p. 10.

Dr. Jones could point to no research other than his work in this case to support these assumptions. Tr. 136:21-137:7. Rather, he testified:

> Q. And your assumption that 90 percent of the people who completed a ten-minute phone survey during which they said that they are almost certain to transfer their child, the basis for that assumption is your professional judgment and nothing else; right?
>
> A. Correct.

* * *

> Q. …I mean, in following up on that, the colloquy that you just had, in terms of making this cascading series of assumptions, the 90 percent, 75 percent: If those assumptions are wrong, then your analysis is flawed; correct?
>
> A. If they're too low, I'm underestimating the number of transfers. If they're too high, I'm overestimating the number of transfers. They are my best professional judgment about the numbers to use.
>
> Q. Right. And there's no data that actually supports those assumptions that you made; correct? It's just made in your professional judgment; right?
>
> A. That's correct.

Tr. 136:15-20, 153:22-154:9.

Dr. Jones agreed that a survey's predictive validity, "how the answer to a particular question will enable one to predict a certain decision," is determined by follow-up research that investigates whether behavior predicted by the survey has actually occurred. Tr. 137:13-22. When asked whether there is any research proving that his survey has any predictive validity, Dr. Jones responded, "We have not had a situation like this, to my

knowledge, in the United States, so there's little research on which to base that." Tr. 137:23-138:4.

Dr. Jones did not attempt to correlate his findings with evidence of actual transfers, requests to transfer, or inquiries about transfers. In fact, he confirmed that he could not do so: he had no information whatsoever about the number of inquires the Clayton and St. Louis districts actually received about the possibility of transfer. Tr. 134:8-24.

Consistent with its reliance on Dr. Jones' study, the St. Louis district made no attempt to determine whether it could continue to operate and provide the same level of educational services, nor whether it could carry out its statutory mission to regain accreditation, if fewer students transfer than Dr. Jones' phone survey conclusions predict. Tr. 503:22-10-505:10. And again, the Clayton district made no effort to calculate the cost of smaller numbers of students from St. Louis enrolling, Tr. 291:4-22, and thus made no effort in the circuit court to identify the point, on a range of increasing numbers of transfer students, at which the cost of educating those students would exceed the revenue received from statutorily-authorized tuition.

State payments for transferring students.

At trial there was some question about the payment of state funds for students who live in one district but attend another, with the resident district paying tuition to the nonresident district. Roger Dorson, Ed.D., Coordinator

of School Financial and Administrative Services for the Missouri Department of Elementary and Secondary Education ("DESE"), testified insofar as DESE performs calculations of state payments to the St. Louis district, if the St. Louis district paid tuition to the Clayton district for the Breitenfeld children, the St. Louis district could include the two children in its ADA count. Tr. 524:14-23. As a result, the St. Louis district would receive the same formula foundation payment per WADA for those two children that the district receives for students educated in its schools. Tr. 524:24-535:16. In addition, although the St. Louis district spends, on average, $15,861 to educate a student in its own schools, the district would receive the same formula payment per WADA even if was instead paying tuition at Mehlville's $7,858 statutory tuition rate. Tr. 528:3-25.

Dr. Dorson confirmed that since before 1993, Missouri school districts have paid tuition for students transferring pursuant to § 167.131. Tr. 529:2-530:15. For example, many K-8 school districts fulfill their obligations to instruct students by paying tuition for students transferring to a neighboring K-12 district. Tr. 530:16-531:11. In those cases, the district of residence includes the transfer student in its ADA count for state aid purposes despite the fact that the student is enrolled in another district. Tr. 532:3-17. As a result, the district of residence receives the same state aid amount it receives

for any student and can combine the state aid and locally-generated funds to pay tuition to the neighboring district. Tr. 532:18-23.

DESE's Core Data Reference Manual contains instructions regarding how school districts should enter ADA and other data into DESE's computer system for calculating state aid. Tr. 533:6-16. The manual states that students residing in a school district but legally attending a school in another district for whom the resident district is paying full tuition may be included in the resident district's ADA count using a data field captioned "Resident II." Tr. 535:17-536:16. State Exh. P. "That has been the case for as long as [Dr. Dorson] can remember, long before [he] came to DESE." Tr. 536:18-20. If the St. Louis district were paying statutory tuition for the two Breitenfeld children, the St. Louis district would increase its "Resident II" entry by two and receive the corresponding increase in state foundation formula funding per WADA. Tr. 536:21-537:23. That would be true even if the students had never attended St. Louis district schools. Tr. 567:12-18.

Procedural History

This case was brought by a handful of school-age residents of the St. Louis school district who the Clayton school district allowed to enroll subject to tuition payments. The students sought to have the St. Louis district pay their tuition, invoking § 167.131. The St. Louis and Clayton districts argued that § 167.131 did not apply; this Court ruled otherwise. *Turner v. Sch. Dist.*

of Clayton, 318 S.W.3d at 665. The Court remanded the case to the circuit court.

Following remand from this Court, three Clayton taxpayers and one St. Louis taxpayer intervened and filed petitions, along with the districts, naming the State of Missouri as a defendant. LF 1116; LF 1142. In their petitions, the taxpayers claimed § 167.131 was unconstitutional under the "unfunded mandate" provision of the Hancock Amendment. LF1116; LF 1142. Additionally, the taxpayers claimed § 167.131 was unconstitutional under what they termed a doctrine of "impossibility." LF1116; LF 1142. After discovery, the circuit court heard testimony from the parties. On May 1, 2012, the circuit court entered judgment in favor of the taxpayers and districts, finding that § 167.131 was unconstitutional under the Hancock Amendment and because compliance with § 167.131 was impossible for the districts. LF 1847. On May 21, 2012, the circuit court entered judgment awarding attorneys fees to attorneys for the taxpayers and districts. LF 1880. The State of Missouri timely filed their appeal of those judgments. LF 1885.

POINTS RELIED ON

1. The circuit court erred in entering judgment for the taxpayer of the St. Louis school district because paying tuition pursuant to § 167.131 is not a "new activity or service" mandated by the State in that the district had the duty in 1980 to educate all resident students and payment of tuition is merely a new method of accomplishing a pre-existing responsibility.

   Berry v. State; 908 S.W.2d 682 (Mo. banc 1995)

   School Dist. of Kansas City v. State; 317 S.W.3d 599 (Mo. banc 2010)

   State ex rel. Collector of Winchester v. Jamison,

   357 S.W.3d 589 (Mo. banc 2012)

   § 167.131

2. The circuit court erred in entering judgment for the taxpayer of the St. Louis or Transitional School District because § 167.131 does not impose an increase in an activity or service by requiring the district to educate to a new population of students in that the statute does not expand the district's obligation beyond resident students.

   § 167.131

3. The circuit court erred in entering judgment for the taxpayer of the St.

Louis or Transitional School District because the taxpayer did not prove that § 167.131 imposes an increased level of activity or service with an increased cost by requiring transportation of students to Clayton or other districts in that § 167.241 allows the unaccredited district to "designate" to which districts it would provide transportation, and the taxpayer neither showed that the St. Louis district had "designated" Clayton or any other district for transportation, nor did the taxpayer provide the data and calculations necessary to establish that transportation of any student to a "designated" district would cost more than transportation of that student to a school they are eligible to attend within the St. Louis district. Moreover, the question is moot.

Fort Zumwalt School Dist. v. State; 896 S.W.2d 918 (Mo. banc 1995)

Neske v. City of St. Louis; 218 S.W.3d 417 (Mo. banc 2007)

§ 167.241

4. The circuit court erred in entering judgment for the taxpayers of the Clayton district because insofar as the plaintiff students are concerned, § 167.131 does not impose an increase level of activity or service cognizable under Art. X, § 21, in that the increased cost of providing a state-required education to the plaintiff students—and to some

additional students—is, in context, de minimis and thus not cognizable under § 21.

Brooks v. State; 128 S.W.3d 844 (Mo. banc 2004)

City of Jefferson v. Dept. of Natural Resources;

916 S.W.2d 794 (Mo. banc 1996)

5. The circuit court erred in entering judgment for the taxpayers of the Clayton district because § 167.131 does not impose "increased costs" on taxpayers in that rather than incurring a net cost increase in costs that would be passed on to the Clayton taxpayers, the statute provides for the payment of tuition that actually exceeds the costs to the Clayton district of educating the plaintiff students—and many more—thus giving the Clayton taxpayers savings rather than costs.

§ 167.131.2

6. The circuit court erred in entering judgment for the taxpayers because the taxpayers failed to prove that § 167.131 does not impose an increased level of activity or service by increasing costs of the districts for thousands of students in that the projected increase in costs is based on a now irrelevant, but inherently speculative study, rather than on objective fact.

Fort Zumwalt School Dist. v. State; 896 S.W.2d 918 (Mo. banc 1995)

School Dist. of Kansas City v. State; 317 S.W.3d 599 (Mo. banc 2010)

7. The circuit court erred in granting any relief to the taxpayers based on Art. X, § 21, because the taxpayers did not meet the evidentiary standards imposed by this Court in its Hancock Amendment precedents in that the districts did not prove that the increase in state funding since 1980, as compared to increased state mandates since that date, is insufficient to cover all or part of the costs of the § 167.131 requirement.

Fort Zumwalt School Dist. v. State; 896 S.W.2d 918 (Mo. banc 1995)

School Dist. of Kansas City v. State; 317 S.W.3d 599 (Mo. banc 2010)

State ex rel. Collector of Winchester v. Jamison,

357 S.W.3d 589 (Mo. banc 2012)

8. The circuit court erred in finding that the taxpayers had proven a violation of Art. X, § 21, because the taxpayers did not meet their burden of proof in that they failed to prove what proportion of district funding the State was providing in 1980, what additional funding the State has currently appropriated, and the cost of additional State mandates imposed since 1980, and failed to prove what new or

increased activities or services the State has required since 1980 and whether State funding, including but not limited to the "foundation formula," has increased enough to cover that cost.

Fort Zumwalt School Dist. v. State; 896 S.W.2d 918 (Mo. banc 1995)

School Dist. of Kansas City v. State; 317 S.W.3d 599 (Mo. banc 2010)

9. The circuit court erred in holding that the districts were entirely absolved from complying with § 167.131 because the Art. X, § 21 does not render a statute invalid on its face based on future funding possibly being inadequate in that Art. X, § 21 excuses only duties and activities to the extent they are not funded.

Brooks v. State; 128 S.W.3d 844 (Mo. banc 2004)

10. The circuit court erred in entering judgment for the taxpayers of the School Districts on the basis that compliance with § 167.131 is "impossible" because there is no "impossibility" rule that entirely excuses a political subdivision from complying with a statutory mandate merely because there may be some future point beyond which further compliance is impractical, and because compliance with § 167.131 is not impossible in that the Clayton district has actually complied and the St. Louis district did not prove that it lacks sufficient

revenue to comply as to the only live issue: the retroactive payment of tuition for the plaintiff students.

Steffen v. Fox; 124 Mo. 630, 28 S.W. 70 (Mo. 1894)

11. The trial court erred in awarding most of the taxpayers' attorneys' fees because the award was not "reasonable" under Art. X, § 23, in that the taxpayers incurred fees for discovery and a trial that were unnecessary given the undisputed fact that there was no line item appropriation for the costs of transfers under § 167.131 and their legal theory that absent such an appropriation, the school districts were entirely excused from compliance with § 167.131.

Art. X, § 23

ARGUMENT

Standard of Review

> "[T]he decree or judgment of the trial court will be sustained by the appellate court unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law."… Issues of law, however, are reviewed de novo. … .

American Eagle Waste Industries, LLC v. St. Louis County, --- S.W.3d ----, 2012 WL 3106074 *5 (Mo. banc 2012), quoting *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976) (citations omitted).

Introduction

This case was brought by a handful of school-age residents of the St. Louis school district who the Clayton school district allowed to enroll subject to tuition payments. The students sought to have the St. Louis district pay their tuition, invoking § 167.131. The St. Louis and Clayton districts argued that § 167.131 did not apply; this Court ruled otherwise. *Turner v. Sch. Dist. of Clayton,* 318 S.W.3d at 665. The Court remanded the case to the circuit court.

There, taxpayers from the two districts intervened and asserted claims against the State based on the "unfunded mandate" provision of the Hancock Amendment, Art. X, § 21 of the Missouri Constitution. In their view, which the circuit court accepted, the failure of the General Assembly to enact line items in appropriations bills to cover all costs the districts might incur in complying with § 167.131 entirely absolved the districts from complying with that statute to any degree—even with regard the remaining two plaintiff students. The districts themselves also made claims that compliance with § 167.131 was "impossible." Relying on a survey suggesting that thousands of students would transfer from the St. Louis district to Clayton schools, the circuit court absolved the districts of even partial compliance on that ground as well.

The circuit court's decision raises difficult questions regarding the meaning of Art. X, § 21. Properly read, that provision only bars the General Assembly from requiring a political subdivision to perform a "new" or "increased activity or service" to the extent that the "new" or "increased" responsibility leads to increased taxes. And here, the taxpayers did not sufficiently prove that would occur.

The "impossibility" question is simpler to answer: there is no "impossibility defense" that allows political subdivisions to entirely evade compliance with state law based on a hypothetical future.

I. Art. X, § 21 applies only where the General Assembly imposes on political subdivisions new or increased duties that impose new or increased costs on taxpayers.

A. The purpose of the Hancock Amendment generally and the "unfunded mandate" provision, Art. X, § 21, specifically, is to protect taxpayers, not political subdivisions.

This appeal involves a portion of the "Hancock Amendment," enacted by initiative in 1980 and named for its most prominent proponent, then-Congressman Mel Hancock. In 1982, this Court addressed the purpose of the Hancock Amendment:

> [T]he objectives of the Hancock Amendment as clearly understood by voters [were] to rein in increases in governmental revenue and expenditures. The official ballot title for the Hancock Amendment specifically informed voters that the amendment "prohibits local tax or fee increases without popular vote." "(T)he Amendment * * * is popularly described as 'the taxing and spending lid' amendment, words which also reflect its central purpose."

Roberts v. McNary, 636 S.W.2d 332, 336 (Mo. banc 1982), quoting *Buchanan v. Kirkpatrick*, 615 S.W.2d 6, 13 (Mo. banc 1981).

Much of the Hancock Amendment was directed at State government. Its provisions featured a ceiling on the amount the State could take in as revenue each year, calculated based on the State's revenue in 1980. Art. X, § 18. When the amount of revenue exceeds the ceiling by a certain amount, the excess must be refunded to taxpayers. *Id.*; *see, e.g.*, *Missouri Merchants and Manufacturers Ass'n v. State*, 42 S.W.3d 628 (Mo. banc 2001).

Congressman Hancock and other proponents of the Hancock Amendment understood that some governmental responsibilities can move from one part of government to another. The Hancock Amendment thus allows for revenue and spending limits to be adjusted to take into account such changes. Art. X, § 18(d). But Congressman Hancock and other proponents also recognized the possibility that a State government unable to add new responsibilities to its own portfolio because of the Hancock Amendment limits might be tempted to accomplish the same thing by mandating that local governments instead perform a "new" or "increased" task. The Hancock Amendment addresses that possibility in Art. X, § 21, the "unfunded mandate" provision:

> 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.

The Hancock Amendment questions here are (1) whether, and if so, to what extent, the 1993 amendment to § 167.131, as interpreted by this Court in *Turner v. Clayton School District*, imposed a "new activity or service or an increase in the level of an[] activity or service," if so, (2) whether that "new" or "increased" responsibility results in "increased costs"; and (3) if so, whether and how the General Assembly must appropriate funds to pay those costs.

This Court has seldom addressed the way in which those questions are to be answered. But its precedents do lead to two conclusions pertinent here. The first conclusion is that the Hancock Amendment addresses only activities and services that are new or increased overall, among all political subdivisions, rather than focusing on the impact of state law on a particular

political subdivision. The second is that "increased costs" refers to costs that could result in high taxes—"net" rather than "gross" increases in costs.

B. Art. X, § 21 applies only when the General Assembly imposes a new or increased duty on a political subdivision; it is not implicated when the General Assembly merely reassigns responsibilities among political subdivisions, nor when the General Assembly gives new instructions to a political subdivision as to how to fulfill a responsibility it already has, absent proof that the change will increase costs to taxpayers.

The first conclusion, that the Hancock Amendment addresses only activities and services that are new or increased overall, among all political subdivisions, rather than focusing on the impact of state law on a particular political subdivision, arises from the basic fact that nothing in the Hancock Amendment has been construed—or should be construed—to to prevent the General Assembly from reorganizing duties already assigned among political subdivisions. That is true even if that reorganization means that one political subdivision will now receive less revenue or incur more expense, while another political subdivision benefits from the change.

This Court's decision in *Berry v. State*, 908 S.W.2d 682 (Mo. banc 1995), is based on that rule. There, various municipalities in St. Louis County challenged a reallocation of sales taxes among cities in St. Louis County. The Court rejected the premise that the Hancock Amendment required that the General Assembly leave everything in place as it had been in 1980. One group of cities, "Group A," "assert[ed] that the revised distribution formula shifts the tax burden to Group A cities, forcing them to pay the costs for new or expanded activities by other political subdivisions," which they alleged violated Art. X, §§ 16 and 21. 908 S.W.2d at 685. According to this Court, those "cities misinterpret[ed] these constitutional provisions." *Id*. The constitutional language addressed shifting tax burdens, through the assignment of new duties and responsibilities, from the State to local government. *Id.* The Court held that shifting tax revenue among local governments does not implicate the Hancock Amendment. The same should be true for shifting assignments.

To rule otherwise would inhibit the ability of the General Assembly to periodically review for fairness assignments given to political subdivisions. And it would inhibit the ability of the General Assembly to innovate in the provision of services. Again, there is nothing in the Hancock Amendment's language or history that would support the claim that Art. X, § 21 or any other provision was intended to prevent such changes—so long as the scope of

State requirements did not change overall. And to limit the General Assembly's ability to make such changes, there must be an express constitutional decree. *See State ex rel. Collector of Winchester v. Jamison*, 357 S.W.3d 589, 592 (Mo. banc 2012), quoting *State ex rel. K.C. v. Gant*, 661 S.W.2d 483, 485 (Mo. banc 1983) ("The constitution, therefore, in no way 'limit[s] or constrict[s] the power of the General Assembly. Its power is plenary, so long as it follows the constitutional procedure.'").

That same requirement for constitutional specificity limits this Court's ability to hold that Art. X, § 21 could implicitly limit the General Assembly's ability to instruct political subdivisions how to perform existing duties. Perhaps the most dramatic example of innovation in that regard is the creation of charter schools—an entirely new (to Missouri) method of having school districts educate resident students. *See School Dist. of Kansas City v. State*, 317 S.W.3d 599 (Mo. banc 2010). The General Assembly chose to shift some of the responsibility for educating students residing in the Kansas City and St. Louis districts from those districts themselves to charter schools, operating under a somewhat different set of rules. The General Assembly also reallocated revenue to fund those schools—reallocation that was at issue in *School District of Kansas City*, and in two other cases still pending, *School Dist. of Kansas City, Missouri v. Missouri Bd. of Fund Com'rs*, *see* 2012 WL 3568265 (Mo. App. W.D. 2012), and *State ex rel. Saint Louis Charter School v.*

State Bd. of Educ., *see* 376 S.W.3d 712 (Mo. App. W.D. 2012). To hold that the change to educating resident students in charter schools rather than district-operated schools was a "new activity or service" implicating the Hancock Amendment, would threaten the entire charter school program. And, again, it would severely reduce the ability of the General Assembly to innovate.

C. In speaking of increased costs, Art. X, § 21 addresses only increases that require the political subdivision to either increase taxes or eliminate or reduce expenditures on other items in order to avoid increasing taxes.

One respect in which Art. X, § 21 is limited is by its last two words: It addresses only those "new activities or services" that come with "increased costs." This Court has not expressly addressed what "increased costs" means. Is it net? Or gross? If the State imposes a new requirement and that requirement means that a political subdivision will have to spend more money, but the requirement also comes with a funding source other than a state appropriation (generally, payment by a third party, but perhaps from offsetting savings created by the elimination or reduction of other state mandates), is there still an "increased cost"? The answer depends on whose point of view the voters had in mind when they voted in 1980.

One possibility is that the voters had in mind the point of view of a budget officer for a political subdivision. The budget officer looks at the State requirement, calculates what it costs to fulfill that requirement, and if there is such a cost—of any amount—says that there is an "increased cost." She does so, presumably, even if there is no increased "net cost" because the new requirement will result in not just new tasks, but new revenues that offset the cost of completing those tasks. She would conclude, then, that there is an "increased cost" even if the result of the new requirement is a net decrease in cost, *i.e.*, if the amount of revenue that the political subdivision takes in exceeds what it must spend to comply.

The other possibility is that the voters had in mind their own situation, as taxpayers. For the taxpayer, a new requirement that is accompanied by new revenue that meets or exceeds the expense of compliance is not an "increased cost" at all. Indeed, it may well be a *decreased* cost: it may result in taxes going down, not up.

A change in school district boundaries is a good example of the contrasting views. Such a change occurred between the Kansas City and Independence districts. *See Burnett v. Kansas City School Board,* 237 S.W.3d 237 (Mo. App. W.D. 2007). The movement of a portion of the Kansas City district into the Independence district certainly resulted in a significant increase in the Independence district's expenses. But it came with an

increased tax base. So from the point of view of the taxpayer, it may not have been an increase at all.

The logical choice is the second point of view—the one ensures that "taxpayers are protected from increased local taxes for new or increased services mandated by the state," *Rolla 31 School Dist. v. State*, 837 S.W.2d 1, 6 (Mo. banc 1992), without depriving them of lower taxes that may result from a State mandate. If an Independence district taxpayer could show that the boundary change would result in increased costs that would force the district to either raise taxes or reduce services paid for by taxes, logically Art. X, § 21 would be implicated. But if the tax burden remained the same because the new addition paid for itself, there is simply nothing in the Hancock Amendment's language, structure, or history to suggest that the framers or the voters were intending the Amendment to interfere with a State-authorized change.

That point of view is consistent with the conclusion of this Court's majority (despite its disavowal of the proposition) in *Brooks v. State*, 128 S.W.3d 844 (Mo. banc 2004). There was no doubt that the task assigned to county sheriffs—issuing concealed carry permits—was a new one. And considered from the point of view of the county budget officer, it would raise expenses. But it would have no impact on taxpayers, insofar as it was funded

by fees paid by applicants, and the funds were available for use in paying the increased expenses.

That the right point of view is that of the taxpayer is also consistent with this Court's decisions with regard to standing. This Court has held that political subdivisions do not have standing to sue under the Hancock Amendment. *King-Willmann v. Webster Groves School Dist.*, 361 S.W.3d 414 (Mo. banc 2012). In doing so, this Court declared: "The Hancock Amendment makes no pretense of protecting one level of government from another." Again, that is because those who drafted and voted for the Hancock Amendment intended to protect not political subdivisions, but taxpayers. And taxpayers are not harmed by mandates, like those in *Brooks*, to the extent those mandates do not result in increased taxes, even if they result in higher expenditures. To invoke the language of Art. X, § 21, expenditures are not necessarily "costs" to taxpayers.

We do not mean to suggest that the possibility—or even the reality—that taxes will not increase is itself enough to eliminate an Art. X, § 21 claim. It is true, as this Court observed in *Rolla 31 School District*, 837 S.W.2d at 6-7, that the taxpayer interests protected by the Hancock Amendment are harmed not just when the taxpayer must pay more, but also when the district

chooses to divert local tax funds[4] being spent elsewhere to pay for the new mandate, rather than raising taxes. But "increased cost" should still mean something to the taxpayer himself or herself: if the taxpayer does not have to pay more for district services, and does not lose services because of funds required to be redirected to avoid a tax increase, then there is simply not an "increased cost" as Art. X, § 21 uses that phrase.

II. Section 167.131 does not impose increased costs—the result of new or increased responsibilities—on the taxpayers of the St. Louis and Clayton districts.

Applying the legal standards in part I to the facts in this case, the transfer of the plaintiff students—and the transfer of many other students—does not implicate Art. X, § 21 as to either the St. Louis or the Clayton district. Thus the claims made by the districts' taxpayers[5] fail.

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[4] As discussed below at pp. 59-60, in *Rolla 31* the Court went further than the Hancock Amendment can justify, however, in barring the State from redirecting *state* funds from discretionary to mandatory programs.

[5] Because only taxpayers, not the districts, have standing to sue on the basis of the Hancock Amendment, we refer throughout the argument—except

A. The duty imposed on the St. Louis district, to educate all resident students, was not changed by § 167.131.

We turn, first, to the question of whether the post-1980 change to § 167.131 imposes a "new activity or service."

There is no dispute that the statute requires a "new activity or service" of the Clayton district. Before, that district could choose whether to accept transfer students. Afterwards, it was required to do so (though in return for tuition).

But the duty of the St. Louis district remained the same: to educate all resident students. That leads to our first "point relied on":

> *1. The circuit court erred in entering judgment for the taxpayer of the St. Louis school district because paying tuition pursuant to § 167.131 is not a "new activity or service" mandated by the State in that the district had the duty in 1980 to educate all resident students and payment of tuition is merely a new method of accomplishing a pre-existing responsibility.*

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for in the "impossibility" discussion—to the taxpayers as those responsible for bringing and proving their case against the State.

The St. Louis taxpayer has never disputed that the St. Louis district was required in 1980 to educate each resident student. And that is all that the St. Louis district is required to do under § 167.131.

Section 167.131 does require the St. Louis district to fulfill its longstanding obligation in a way that was previously just optional (and presumably rare, for a district that operates schools at all grade levels): to pay tuition to another school district, instead of educating a student in its own schools. This Court has never concluded that merely requiring a political subdivision to fulfill an old requirement in a new way is a "new activity or service" under Art. X, § 21. Nor has the Court suggested, despite reaching the fringe of such a question in *School Dist. of Kansas City v. State*, that changing how a school district must complete its previously-assigned task constitutes a "new" duty.

Curiously, in addressing the duties imposed on the St. Louis district, the circuit court concluded that § 167.131 "expanded an unaccredited district's activity by requiring payment for a new population of students, from kindergarten to 8th grade." Appendix at A; page 12; LF 1858. That leads to our second "point relied on":

> *2. The circuit court erred in entering judgment for the taxpayer of the St. Louis or Transitional School District because § 167.131 does not impose an increase*

in a activity or service by requiring the district to educate to a new population of students in that the statute does not expand the district's obligation beyond resident students.

We agree that if the General Assembly added students to the population it has long been required to serve—that is, if § 167.131 extended the St. Louis district's obligation to educate someone other than resident students—that would be an "increase" in a "activity or service." But we do not know what the circuit court's conclusion refers to. There is no finding of fact that addresses any "new population." And there is nothing in § 167.131 that suggests that an unaccredited district must educate anyone (neither directly nor by paying tuition—nor through a charter school) other than a resident student.

Perhaps the circuit court was referring to evidence before it that had the St. Louis district remained unaccredited, some resident students who attend private or parochial schools, or participate in transfers enabled by the Voluntary Interdistrict Choice Corporation (VICC), would have opted to instead transfer under § 167.131. *See* Appendix at A; page 4; LF 1850. But that is legally irrelevant to the question of whether the statute requires a "new activity or service." The St. Louis district always had the duty to enroll and educate those students. That some students would choose other means of

obtaining an education was true in 1980 and is true today. But the population for which the St. Louis district is responsible remains the same today as it was well before 1980: student-age children who reside in the district.

B. The St. Louis taxpayer failed to prove that § 167.131 imposes an increased duty for transportation, accompanied by an increased cost, that would implicate Art. X, § 21.

In addition to complaining that educating students through the payment of tuition rather than directly is a new duty, the St. Louis taxpayer claimed that the State has imposed an increased duty to transport students to distant schools. That leads to our third "point relied on":

> *3. The circuit court erred in entering judgment for the taxpayer of the St. Louis or Transitional School District because the taxpayer did not prove that § 167.131 imposes an increased level of activity or service with an increased cost by requiring transportation of students to Clayton or other districts in that § 167.241 allows the unaccredited district to "designate" to which districts it would provide*

transportation, and the taxpayer neither showed that the St. Louis district had "designated" Clayton or any other district for transportation, nor did the taxpayer provide the data and calculations necessary to establish that transportation of any student to a "designated" district would cost more than transportation of that student to a school they are eligible to attend within the St. Louis district. Moreover, the question is moot.

The circuit court agreed with the St. Louis taxpayer, finding that § 167.131 imposes an increased duty on the St. Louis district with regard to transportation. And there is some legal basis for that conclusion: Though various statutes formerly required the St. Louis district to provide transportation to some students to some schools within the district, the new regime extends that requirement. It requires that the St. Louis district provide transportation for some students to schools in other districts.

But that does not mean that the St. Louis taxpayer proved a Hancock violation; the taxpayer must also prove, as discussed at pp. 37-41, that the increased requirement comes with an increased cost. And regardless of whether the cost increase is "gross" or "net" (*see* p. 37), the taxpayer failed to make an adequate showing here.

To analyze whether the change in transportation requirements results in increased costs not covered by State funds, the circuit court was logically required to first address what the new transportation requirements are—and what they are not. The circuit court implicitly concluded that St. Louis is required to provide transportation for each and every § 167.131 transfer student to whatever school he or she chooses, in each and every district in St. Louis County. That would mean that the St. Louis district was required to provide transportation to the plaintiff students to their chosen schools in Clayton—again, the only requirement that could still be in play, now that the St. Louis district is accredited.

That question is now moot, of course. Neither the plaintiff students nor the Clayton district are asking that the St. Louis district be required to reimburse anyone for past transportation expenses. And no one would qualify today for transfer and thus no one would qualify for transportation from the St. Louis district under § 167.131.

But even if the question were not moot, the answer would not be the one the circuit court reached, for the statutory transportation required is substantially narrower than the court assumed. The statute did not require the St. Louis district to pay for transportation for any student to any Clayton school.

Section 167.131 requires the unaccredited district only to "provide transportation consistent with the provisions of section 167.241." Section 167.241 then identifies, referencing back to § 167.131, to which districts the unaccredited district must provide transportation:

> Transportation for pupils whose tuition the district of residence is required to pay by section 167.131 … shall be provided by the district of residence; however, in the case of pupils covered by section 167.131, the district of residence shall be required to provide transportation only to school districts accredited by the state board of education pursuant to the authority of the state board of education to classify schools as established in section 161.092 and those school districts designated by the board of education of the district of residence.

The use of the word "only" establishes that § 167.241 is a limitation on the scope of the transportation obligation in § 167.131. The statute then sets out two criteria: (1) that the schools be "accredited by the state board of education"; and (2) that the schools be in districts "designated by the board of education of the district of residence." The two criteria are connected by the conjunction "and." There are two ways to read that conjunction.

The first is to read it as providing that the unaccredited district must provide transportation to all qualifying schools that are accredited, and also to all schools designated by the board of the unaccredited district. But every school in any other district that a student residing in the unaccredited district could attend is necessarily "accredited by the state board of education." So the second criteria would add nothing to the first, violating the canon that requires the court to give effect to each phrase. *E.g.*, *Neske v. City of St. Louis*, 218 S.W.3d 417, 424 (Mo. banc 2007).

The more reasonable alternative is to read the second criteria as a restriction on the first–*i.e.*, to be entitled to transportation, the student must attend a school that is accredited (a broad category) and *also* in a district designated by the board of the unaccredited district (a restriction on the first category). Then both criteria have meaning.

And that meaning is consistent with the history of § 167.241, which predates the version of §167.131 that is at issue here. The prior version of § 167.131 (RSMo 1986) applied only to K-8 districts—those that had no high school. K-8 districts would work out arrangements with adjacent districts to pay tuition to educate students who reside in the K-8 district. Section 167.241 gave the K-8 district the ability to decide to which districts the K-8 district would provide transportation, barring students from requiring the K-8 district to provide transportation to multiple and distant, but qualifying

district high schools rather than one or perhaps two nearby ones. The section should now be read to do the same thing for unaccredited districts. There is simply no reason to conclude that the legislature intended not just to open to residents of unaccredited districts the doors of every school district in the same or an adjacent county to students from the unaccredited district, but to also require that the unaccredited district provide transportation to every single school in every other district. Just like the K-8 district, the unaccredited district should be able to make transportation decisions that preserve, to the extent possible, both local and State transportation funds.

Given that reading of the statute, the St. Louis taxpayer's proof at trial failed at the first essential point: she did not prove that the St. Louis district ever "designated" Clayton as one to which transportation would be provided. She simply left that question open. Yet the circuit court assumed that the St. Louis district would have to provide transportation to Clayton—and to every other district in St. Louis County. Because that conclusion was based on a misreading of §§ 167.131 and 167.241, it was erroneous and should be reversed.

But even if the taxpayer had shown that the St. Louis district had "designated" the Clayton district, the rest of her proof would be insufficient to show an Art. X, § 21 violation. It is not enough that the St. Louis district was newly required to move some student to a different location. That change

must have some impact on the taxpayers. Thus, to make a successful "unfunded mandate" claim, a taxpayer must provide considerable detail about costs and state funding. And the St. Louis taxpayer made no attempt to provide such detail.

To do so, and assuming that the Clayton district had been "designated" by the St. Louis district, the taxpayer would first have to calculate the cost to the St. Louis district of providing transportation within the district for the students who chose to transfer elsewhere. As to the plaintiff students (but no others), the taxpayer could look in the existing record to complete the second step: identifying which schools those students chose to attend in Clayton. Third, the taxpayer would have to determine whether the transferring students are far enough from the transferee schools as to be statutorily entitled to transportation. Fourth, the taxpayer would have to calculate the cost of transportation for the transferring students to their chosen schools. And fifth and finally, she would have to compare the cost of intradistrict to the cost of inter-district transportation for those same students. Only then could the circuit court know whether the cost of transportation is greater if the students are allowed to transfer under § 167.131 than if they are not. *See Fort Zumwalt School Dist. v. State*, 896 S.W.2d 918, 922 (Mo. banc 1995).

Here, the St. Louis taxpayer never took any of those steps for the plaintiff students. The record created by the pleadings and some testimony

tells us which Clayton schools the plaintiff students chose, but literally nothing else about transportation costs for them. Nor did she take those steps for the thousands of other students that she hypothesized the St. Louis district would have to transport. She did use gross figures based on a survey of hypothetical (and now unavailable) choices in order to attempt an answer to the fourth question. But she—and the circuit court—largely ignored the rest of the analysis.

C. The Clayton taxpayers failed to prove that enrolling the plaintiff students—and at least some others—would result in "increased costs" that the taxpayers would have to bear.

Next we turn to the claims made by the Clayton taxpayers. Again, we recognize that the post-1980 change in § 167.131 imposed a new duty on the Clayton district, making some transfers mandatory rather than voluntary. But that is not enough; there must also be an "increased cost" to those taxpayers.

The first question in that regard is whether the "increase," whether considered from the point of view of the district (gross cost) or the taxpayer (net cost) is great enough to implicate the Hancock Amendment at all. That question arises, first, in our fourth "point relied on":

4. The circuit court erred in entering judgment for the taxpayers of the Clayton district because insofar as the plaintiff students are concerned, § 167.131 does not impose an increase level of activity or service cognizable under Art. X, § 21, in that the increased cost of providing a state-required education to the plaintiff students—and to some additional students—is, in context, de minimis and thus not cognizable under § 21.

Like the St. Louis taxpayer, the Clayton taxpayers convinced the circuit court that § 167.131 imposed on their district increased costs. And if the criteria is whether there is a gross increase in costs, that is true: it does cost something to add a transfer student to a classroom But this Court has never heard a Hancock Amendment case where the additional costs were in the range of those at issue here—the marginal cost of enrolling the two plaintiff students. And this Court has suggested in the past—and should hold here—that *de minimus* increases in costs are not cognizable under Art. X, § 21. Such increases simply do not affect taxpayers, those who the "unfunded mandate" provision is designed to protect.

This Court first addressed the Hancock Amendment and *de minimis* costs in *City of Jefferson v. Missouri Dept. of Natural Resources*, 916 S.W.2d

794, 796 (Mo. banc 1996). There the Court rejected not the existence but the application of a *de minimus* rule, finding that "$15,289 … is not de minimis." In *Brooks*, the Court cited *City of Jefferson* when it explained that "plaintiffs need only show that the increased costs will be more than de minimis." *Brooks v. State*, 128 S.W.3d at 849. And the amount at issue in *Brooks*? "[A]pproximately $150,000 will be incurred in the first year" for one of the plaintiff counties. *Id.*

In their affirmative case, the Clayton taxpayers made no effort to prove what it cost to provide educational services—neither those required by State law, nor those that the Clayton district volunteers to provide—to the plaintiff students. Nor did the Clayton taxpayers make any effort to prove what it would cost to educate dozens of transfer students, relying instead on the huge numbers posited by the survey discussed at pp. 12-19. On cross-examination, though, the Clayton superintendent testified that the district spends $285 to $650, depending on grade level, to enroll an additional student. Tr. 273:3-17. She made no effort to distinguish, within that figure, costs that are required by State law from those volunteered by the district. But even the figures she gave are far, far less than what this Court has in the past deemed to be more than *de minimis*. Those amounts are so small that in the context of a school district's multi-million dollar budget, it is simply not possible to presume that those additional costs will result in any increase in taxation.

The Court should give meaning to its past, implicit recognition that *de minimis* cost increases cannot form the basis for an Art. X, § 21 claim—thus discouraging school districts and other political subdivisions from orchestrating (and perhaps paying for, assuming that there is statutory authority for a political subdivision to pay for counsel for a Hancock plaintiff) taxpayer suits that are really aimed not at reining in taxes not authorized by popular vote, but at avoiding compliance with responsibilities assigned by the legislature.

It is certainly true, however, that at some point, additional enrollment in the Clayton district would result in having to hire more staff and perhaps reconfigure building usage and schedules to accommodate the increase. The evidence presented by the Clayton taxpayer gives us only the vaguest sense of what that point might actually be. But we agree there is a point at which the enrollment of additional students would result in expenses that are more than *de minimis*. That does not, however, prove the Clayton taxpayer's case, because that does not mean that the additional enrollment results in "increased costs" to the taxpayer if the funds that accompany the student match or exceed those costs. That leads to our fifth "point relied on":

> *5. The circuit court erred in entering judgment for the taxpayers of the Clayton district because § 167.131 does not impose "increased costs" on taxpayers in that*

> *rather than incurring a net cost increase in costs that would be passed on to the Clayton taxpayers, the statute provides for the payment of tuition that actually exceeds the costs to the Clayton district of educating the plaintiff students—and many more—thus giving the Clayton taxpayers savings rather than costs.*

The requirement imposed on the Clayton district is not independent of the requirement that the unaccredited district pay tuition for the students:

> The board of education of each district in this state that does not maintain an accredited school … *shall pay the tuition of … each pupil resident therein who attends an accredited school in another district* of the same or an adjoining county.

§ 167.131.1. And it sets out the method by which the receiving district calculates that tuition. § 167.131.2.[6]

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[6] "The rate of tuition to be charged by the district attended and paid by the sending district is the per pupil cost of maintaining the district's grade level grouping which includes the school attended. The cost of maintaining a grade level grouping shall be determined by the board of education of the

The trial court made no express finding as to the tuition that the Clayton district could charge. But the court implicitly sanctioned evidence that the statutorily allowed tuition for the two plaintiff students, per year, was $40,057.38. Appendix at A, p. 6; LF at 1852. Though the precise figures may vary by school and year, there is no dispute here that the Clayton district is authorized under § 167.131 to collect approximately $20,000 per transfer student per year.

Again, the Clayton taxpayers neither elicited testimony nor presented documentary evidence as to the actual cost of providing either state-mandated or even Clayton-volunteered educational services to the plaintiff students. And the Clayton superintendent did testify that the cost of adding one student was a few hundred dollars. Comparing that amount to the approximately $20,000 in tuition, it is undisputed, on this record, that for

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district but in no case shall it exceed all amounts spent for teachers' wages, incidental purposes, debt service, maintenance and replacements. The term 'debt service', as used in this section, means expenditures for the retirement of bonded indebtedness and expenditures for interest on bonded indebtedness. Per pupil cost of the grade level grouping shall be determined by dividing the cost of maintaining the grade level grouping by the average daily pupil attendance."

Clayton to provide the plaintiff students (and at least some others—perhaps many others) even the package of services that the district chooses to provide will result in savings, not costs, to the Clayton taxpayers. Under the actual facts of this case, then, the Clayton taxpayers did not and could not prove that they bear "increased costs" as a result of § 167.131.

D. The taxpayers cannot base their case on a speculative study projecting how many St. Louis students might have transferred to Clayton.

We conclude our discussion of the "increased cost" aspects of the taxpayers' Hancock Amendment claims with our sixth "point relied on":

> *6. The circuit court erred in entering judgment for the taxpayers because the taxpayers failed to prove that § 167.131 does not impose an increased level of activity or service by increasing costs of the districts for thousands of students in that the projected increase in costs is based on a now irrelevant, but inherently speculative study, rather than on objective fact.*

Rather than provide the kind of detail that this Court has always required for an Art. X, § 21 claim, both the St. Louis and Clayton taxpayers

relied on the results of a survey hypothesizing future (and now impermissible) events. The taxpayers did so as to transportation costs, the cost of tuition that the St. Louis district would have had to pay under § 167.131, and the costs that Clayton would incur in educating transfer students. That study was essential to much of the circuit court's analysis; without it there is no support in the record for the findings that each year, transportation costs under § 167.131 for the St. Louis district would exceed $25 million (Appendix at A, p. 6; LF 1852); that tuition payments by the St. Louis district would exceed $223 million; and that Clayton "would have to build multiple school buildings," incurring capital costs of $135 million and annual operating costs of $42 million (Appendix at A, p. 8; LF 1854). All of that in a case in which there have never been more than a handful of transferring students, and only two remaining student plaintiffs.

That study is now, of course, outdated. The St. Louis district having regained accreditation, none of the transfers the study projects are possible. The Court should thus disregard it.

But the study would be problematic in any event. This Court has insisted on facts, not speculation, in its "unfunded mandate" cases. *See School Dist. of Kansas City v. State*, 317 S.W.3d at 611; *Fort Zumwalt*, 896 S.W.2d at 922-23. Here, the taxpayers evaded that restriction by converting parental speculation into expert-endorsed fact. But despite the circuit court's

willingness to find as fact the accuracy of the study's results, the study remains speculation. We simply do not know how many of the St. Louis districts actually would have transferred, whether to Clayton or elsewhere—especially if they had understood that the transfer right would disappear immediately when the St. Louis district regained accreditation, as it has. And we know now that no one will transfer, at least not in the foreseeable future.

III. Where Art. X, § 21 applies, a political subdivision cannot evade new responsibilities because the General Assembly did not appropriate in advance, by specific line item, and in addition to prior appropriations not tied to state mandates, every penny that might be required to pay for every possible cost that taxpayers might eventually bear as a result of the new or increased duty.

If, contrary to what we point out in part II, the State had imposed a new or increased duty or responsibility on the school districts that did result in increased costs to be borne by the districts' taxpayers (or, as discussed in part IV, below, to the extent but only to the extent that the State has imposed such increased costs), the Court would have to take up the question of whether State funding is sufficient. That would require that the Court first address what Art. X, § 21 actually requires: Feeding enough money from the

State through school funding formulas to cover the costs? Or that the money come as entirely new money, appropriated in advance of any expense, and set out in a specific line item in the appropriations bill? That leads to our seventh "point relied on":

> *7. The circuit court erred in granting any relief to the taxpayers based on Art. X, § 21, because the taxpayers did not meet the evidentiary standards imposed by this Court in its Hancock Amendment precedents in that the districts did not prove that the increase in state funding since 1980, as compared to increased state mandates since that date, is insufficient to cover all or part of the costs of the § 167.131 requirement.*

Taking up that "point" requires the Court to look at a series of questions.

A. Art. X, § 21 does not require the General Assembly to create a new line item in appropriations bills for each new or increased activity or service.

It is undisputed that at no time during the period in which the St. Louis district was unaccredited, the General Assembly did not include in any appropriations bill a line item devoted to paying for transfer costs incurred under § 167.131—neither to the resident district (here, St. Louis, the district

that must pay tuition), nor to the enrolling district (Clayton, the recipient of tuition).[7] And in the view of the taxpayers, that is the end of the story—a position that finds support, unfortunately, in this Court's decision in *Rolla R-III School District*.

In *Rolla R-III*, this Court rejected the State's argument that increases in State funding were sufficient to cover the cost of the newly mandated program. The court rejected that argument in part because the State had not enacted a "specific appropriation" for the expenses of the new mandate. 837

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[7] The circuit court observed: "Because there was no evidence submitted during the trial that the § 167.131 … mandate included funding for student transfers, the Court finds that this mandate did not include any State funding." That is a curious statement. It appears to impose on the State the burden of showing that there was funding, when the burden is on the taxpayers to show that there was not. And it supposes that a piece of substantive legislation passed in 1993 could include an appropriation for fiscal years beginning a decade or more later, which it could not. Nonetheless, because the circuit court and this Court could take judicial notice of the content of appropriations bills, we agree that there were no line items for § 167.131 transfer funding in the years at issue.

S.W.2d at 7. The only way for the legislature to make a "specific appropriation" is to set it out in a line item in an appropriations bill.

Despite the language in *Rolla R-III*, there is no justification in the Hancock Amendment nor in Art. X, § 21 for requiring line items dedicated to each and every new or increased "activity or service" that the State requires. The purpose of the Hancock Amendment generally and of the section specifically is only to protect taxpayers, not to dictate the manner in which the General Assembly write appropriations bills. It makes no difference to the taxpayer whether funds from the State come to the district through a new line item or through additional funding in an existing line item.[8] Either way, payment comes from the State; the district taxpayer suffers no disadvantage

[8] And it is curious that school districts—or attorneys who represent both school districts and district taxpayers in the same suit—would endorse the requirement for specificity. What *Rolla R-III* accomplished was to place funding for early childhood education is a separate line item (*see*, *e.g.*, § 2.055, H.B. 2002 (2012))—which, when it arrives at the school district, can be spent on nothing else. The districts and their taxpayers would have benefitted from the flexibility that would come from including that amount, instead, in a more general appropriation.

from the more flexible choice. To put it in *Rolla R-III* terms, whether the Rolla R-III district got the money to fund the early childhood education mandate through a separate line item or through a change in the "foundation formula," the impact on Rolla R-III district taxpayers is precisely the same.

Thus, absent a clear limitation in the Hancock Amendment on the legislative power to craft its appropriations bills, the Court should disavow the "specific appropriation" requirement in *Rolla R-III* and leave to the General Assembly the choice as to how to appropriate. To do otherwise is to leave in place an unjustified exception to the rule that the General Assembly's power can only be limited by express constitutional decree. *See State ex rel. Collector of Winchester v. Jamison*, 357 S.W.3d at 592.

B. The longstanding approach to education funding is to reimburse after the fact—and the history and language of the Hancock Amendment does not suggest the people intended to make a problematic change to that practice.

The circuit court's apparent insistence that the 1993 General Assembly have appropriated funds on the premises that someday there would be an unaccredited district, that some student from the district would transfer under § 167.131, and that the transfer would impose an "increased cost" to be

borne by some district's taxpayer, raises the question of not just how, but also when an appropriation must be made. In the context of school funding, that question is a tricky one.

The scheme for state funding of Missouri schools is that the districts enroll the students, report that enrollment, and receive State funds based on that enrollment. In general, the state payments are based on the past school year enrollment, although there are alternatives. *See* §§ 163.031 and 163.032. But the general rule and all of the alternatives have in common two points: The State does not pay for projected or hypothetical student enrollment, but only for actual enrollment. And the State bases its payments on district reports of enrollment.

The reason that scheme becomes problematic here is that neither the St. Louis district nor the Clayton district has ever reported the attendance of either of the plaintiff students. So there has never been a factual basis on which the Department of Elementary and Secondary Education (DESE) could distribute funds for those students—regardless of whether the funds were appropriated to DESE for that purpose in a specific appropriation or through an increase in an existing line item.

Again, in the view of the circuit court (and presumably of the taxpayer parties), the General Assembly must somehow anticipate the costs of transfers, appropriating funds regardless of whether there are any and

whether they are timely reported. Those funds would then be unavailable for use in other State programs—including education programs. But there is nothing in the Hancock Amendment generally, nor in Art. X, § 21 specifically, to suggest that the voters in 1980 intended to require that the General Assembly depart from its long-established methods of funding public schools so as to require that approach any and every time State law changes requirements for local schools.

C. Art. X, § 21 does not bar the General Assembly from redirecting funding increases made after 1980 and not required to fund any other "new" or "increased" "activity or service" to cover the costs of § 167.131 transfers.

In *Rolla R-III*, this Court rejected another argument made by the State, and in doing so again departed from the objective of the Hancock Amendment. The State pointed out that prior to the fiscal year at issue, it had provided funds to school districts as an incentive for early childhood education preschool programs. 837 S.W.2d at 6. When the State made those programs mandatory, the State sought to transform the incentive funding into funding for the mandatory program that would meet the Art. X, § 21 requirement. *Id*. This Court said, "No." In the Court's view, once the State—

entirely of its own volition, not tied to any mandatory program—gave the Rolla R-III district additional funds that the district could use for the early childhood education program but also for other purposes, the State was barred from eliminating the voluntary funds and then appropriating similar amounts for the new mandate. *Id.*

That holding has some appeal, if considered only with a myopic focus on a particular change, and from the point of view of a school district. The Court was right that in the short term, if the State is allowed to redirect funds previously provided as an incentive for a district to conduct a voluntary program, to the extent the district used those funds for something other than the newly-mandated program the district would have to choose between reducing whatever other programs it was conducting using those funds and imposing higher taxes. 837 S.W.2d at 6-7. But that holding is not justified by the language nor the purpose of the Hancock Amendment.

Art. X, § 21 addresses *only* State requirements. It does not address what school districts may choose to do, whether entirely on their own or with State funding incentives. It does not bar the General Assembly from withdrawing funding that is not tied to post-1980 mandates. It does not purport in any way to prevent the State from encouraging districts to initiate programs and then withdrawing that encouragement, so long as the programs are not required. Yet this Court's holding in *Rolla R-III* effectively

says to the General Assembly: "Don't give school districts any money that isn't necessary to fill a state mandate, because once you do so, you are forever bound." If this Court endorses that view, the General Assembly would logically stop its efforts to increase appropriations for the "foundation formula," available for the districts to use largely as they choose. The legislature would be better served by withholding funding until it has some mandate to accompany the increase. That is antithetical to Missouri's concept of local control of the schools. And it falls outside of the scope of what the Hancock Amendment and Art. X, § 21 require.

IV. The taxpayers failed to prove that increased State funding since 1980 was insufficient to cover the costs of complying with § 167.131, at least as to the plaintiff students and others who at least inquired as to the possibility of transfer.

Art. X, § 21, properly read and applied, then, cannot be applied just by identifying for some new requirement and looking at the latest appropriations bill for a "line item" to cover potential future costs. Rather, it requires an inquiry into what the State paid in 1980, what requirements it has added since 1980, and what additional funding it is providing to both

maintain its previous level of funding and pay for those new mandates. In that regard, we reach our eighth "point relied on":

> *8. The circuit court erred in finding that the taxpayers had proven a violation of Art. X, § 21, because the taxpayers did not meet their burden of proof in that they failed to prove what proportion of district funding the State was providing in 1980, what additional funding the State has currently appropriated, and the cost of additional State mandates imposed since 1980, and failed to prove what new or increased duties or activities the State has required since 1980 and whether State funding, including but not limited to the "foundation formula," has increased enough to cover that cost.*

In the past, this Court has previously considered whether State appropriations were sufficient to cover increased costs for a school district to comply with State requirements. The Court has repeatedly emphasized that the Constitution imposes a considerable burden on taxpayers seeking to invoke the "unfunded mandate" provision. Most recently, the Court said:

> As this Court noted in *Fort Zumwalt*, to establish a violation of section 21, plaintiffs "must

> present evidence to establish the program mandated by the state in 1980–81 and the ratio of state to local *612 spending for the mandated program in that year" and further prove "costs of the mandated program in each subsequent year and the ratio of state to local spending for the mandated program in each subsequent year." 896 S.W.2d at 922.
>
> It is well-settled that the calculation of a mandated program's costs "may not include any discretionary expenditures a district undertook that went beyond the state mandate" and requires that plaintiffs clearly distinguish "resources directly committed to the state mandates ... from those not so dedicated." *Id*. (emphasis added). "Providing these factors for 1980–81 and each subsequent year ... require[s] sophisticated budgetary evidence and economic expertise."

School Dist. of Kansas City v. State, 317 S.W.3d at 612.

Here, despite the holdings in *Kansas City* and *Fort Zumwalt*, the taxpayers made no attempt whatsoever to make the showing those decisions require. They provided the trial court with no "sophisticated budgetary

evidence," nor with "economic expertise." We simply cannot divine, based on what the taxpayers presented to the circuit court, whether the increase in State funding for these districts since 1980 has been sufficient to cover the costs of all the post-1980 mandates and at the same time maintain the proportion of funding promised by Art. X, § 21.

V. Art. X, § 21 does not entitle school districts to entirely evade compliance with § 167.131 just because there may be a point in the future beyond which their costs would exceed the revenues provided by the General Assembly.

By relying largely on the Jones study rather than on specific facts of the sort this Court has seen (but confirmed to be insufficient) in the *Kansas City* and *Fort Zumwalt* cases, the circuit court demonstrated its adoption of a startling conclusion: that if a taxpayer can posit a future circumstance in which, if State appropriations continue at current levels, available revenue will not be sufficient to cover all the "increased costs" of a new activity or service, the political subdivision is entirely absolved from performing that activity or service—even to the extent that the revenues provided by the General Assembly actually cover the costs. That leads to our ninth "point relied on":

9. The circuit court erred in holding that the districts were entirely absolved from complying with § 167.131 because the Art. X, § 21 does not render a statute invalid on its face based on future funding possibly being inadequate in that Art. X, § 21 excuses only duties and activities to the extent they are not funded.

The circuit court treated Art. X, § 21 as a basis for holding that a statute was invalid on its face—at least during a period in which there is no line item appropriation sufficient to cover all possible costs under the statute. But that is not how the provision should be read.

The concept embodied in Art. X, § 21 is that there should be correspondence between what the State requires and what the State ensures is paid for without local funding. The provision speaks of maintaining "proportions" and of not going "beyond" prior requirements. It is tied to costs that someone must bear—either the State or the local taxpayer (again, either through higher taxes or through forgoing services paid for by local funds that must be redirected). It cannot fairly and should not, as a policy matter, be read to allow a political subdivision to refuse to do anything just because the State has not (yet, anyway) provided the funding to allow the political subdivision to do everything.

That conclusion is consistent with *Brooks*. There, this Court said there would be an "unfunded mandate" and thus excused compliance—but only to the extent the costs imposed could not be covered by the funds provided. 128 S.W.3d at 851. That approach makes eminent sense. If the legislature comes up short in providing revenue, political subdivisions should still be required to do what they can with the revenue they are given, not entirely avoid their statutory responsibility.

VI. The school districts do not have an "impossibility defense" to compliance—at least partial compliance—with State law.

We move briefly from the Hancock Amendment asserted by the taxpayers to an argument made by the districts themselves that also relates to partial compliance. The districts argued—and the circuit court concluded—that the districts are entirely exempt from § 167.131 because full compliance at some future date in an always-speculative and now-impermissible circumstance would be "impossible." There we reach our tenth "point relied on":

> *10. The circuit court erred in entering judgment for the taxpayers of the school districts on the basis that compliance with § 167.131 is "impossible" because*

> *there is no "impossibility" rule that entirely excuses a political subdivision from complying with a statutory mandate merely because there may be some future point beyond which further compliance is impractical, and because compliance with § 167.131 is not impossible in that the Clayton district has actually complied and the St. Louis district did not prove that it lacks sufficient revenue to comply as to the only live issue: the retroactive payment of tuition for the plaintiff students.*

The "impossibility" argument may have been prompted by a statement made by the dissenters in *Turner v. School Dist. of Clayton*, 318 S.W.3d 660, 676 n. 10 (Breckenridge, J. Dissenting). In the districts' view, if a political subdivision can prove that under some possible future scenario the burden of complying with a State mandate may eventually exceed the political subdivision's capacity to comply, compliance is "impossible" and the political subdivision can entirely ignore the mandate.

We are not aware of any legal authority for that breathtaking proposition. Whatever the dissenters on this Court meant, it cannot have been that. After all, political subdivisions are subordinate to the State. Their very existence is dependent on State law. Except insofar as the Missouri

Constitution or federal law bars it, the General Assembly can instruct political subdivisions as the General Assembly chooses.

There are times, of course, that compliance with state law requires a political subdivision to make a difficult choice. Indeed, there may well be times when a political subdivision must choose between complying with one mandate and another. But that does not mean that a political subdivision can claim that it will someday have to make such a choice, and that the prospect of doing so is sufficient to excuse the political subdivision from complying with one requirement or the other today—or even at that future point, if partial compliance with one or both provisions is possible.

It is possible, of course, that it may be legally impossible for a state entity to comply with a state-law mandate. But the trial court did not suggest, and we cannot discern, any basis for claiming that it is legally impossible for the school districts to comply with the mandate. There is no federal law that bars students residing in the St. Louis district from attending a Clayton school, so federal supremacy (the most typical circumstance for an "impossibility" claim in Missouri precedent) does not apply. There is no subsequent Missouri law that makes compliance impossible.

The closest either district came below to stating a claim of legal impossibility is a vague citation by the St. Louis district to the settlement

agreement by which the long-running St. Louis desegregation was resolved. In that district's view, apparently, if the language enacted in § 167.131 in 1993 were implemented even in part, that would violate the settlement agreement entered into in 1999. Where the violation would be we do not know. There is no provision of that agreement that bars Clayton from accepting transfers under § 167.131. At trial the St. Louis district suggested that there could be so many transfers that the payment of tuition would eventually make it impossible for the district to comply with its obligations under the agreement. And the district hinted that the racial makeup of the transferring population might have some significance. But those concerns could lead, at most, to some limit on transfers and tuition payments, not to a bar on transfers and payments entirely. And to decide when the St. Louis district could quit paying tuition under such a rule would require a real set of facts, not a hypothetical projection.

The trial court, then, found that it was factually impossible for the districts to comply with § 167.131. But again, that is premised on thousands of students moving—and on the idea that compliance is "all or nothing." And the record shows that partial compliance is possible—at least as to Clayton.

There is no dispute that Clayton could educate at least some St. Louis students. Indeed, it has done precisely that, as to the original and current

plaintiff students and others, without (we assume) violating any state or federal mandate.

The record is less specific as to St. Louis. But that does not matter; neither the St. Louis district nor its taxpayer even tried to prove that it could not pay tuition for the plaintiff students. And if there is an "impossibility" doctrine that excuses compliance, it must be the burden of the political subdivision to prove it.

But we do not concede that such a doctrine exists, at least not in the "all or nothing" form the circuit court supposed. In fact, we have been unable to find any precedent where a political subdivision was excused entirely from compliance with a statute because of increased costs, or because of the possibility that under some hypothetical circumstance the political subdivision could not fully comply with a statute. More important, in the rare instance where the "impossibility" concept is used (outside the context of political subdivisions, of course), the courts require substantial compliance, not excusing compliance entirely but only to the degree that it is literally impossible. *E.g.*, *Steffen v. Fox*, 124 Mo. 630, 28 S.W. 70, 71 (Mo. 1894) (compliance with construction requirement excused only for location at which it was impossible to comply).

Here, Clayton made no credible argument that cannot comply with § 167.131 not just to a slight, but to a great degree. There is no credible

argument that at the tuition rate that § 167.131 allows Clayton to charge, the district cannot provide "free public schools" (Mo. Const. Art. IX, § 1) meeting all state requirements to one, two, a handful, or even hundreds of additional students. If Clayton cannot accommodate the 1000th student at its tuition rate, there might be an "impossibility" defense when the 1000th student tries to enroll, but there is no such defense today.

And the St. Louis district made no argument—credible or not—that it could not pay tuition for the plaintiff students and some number of others, less than the thousands posited by the Jones report. Thus neither district was entitled, at the time of the circuit court proceedings, to a finding that it was impossible to comply with § 167.131 as to the plaintiff students and every other student who actually showed up at a Clayton school to enroll pursuant to that statute (assuming that there actually were any).

VII. The amount awarded to the taxpayers in attorneys' fees was not "reasonable" if they prevail on their arguments that did not require discovery or trial.

Finally, we return briefly to the Hancock Amendment context. The Hancock Amendment allows a court to award the successful taxpayer (again, not the school district) plaintiff "reasonable attorneys' fees." What is "reasonable" must, of course, be evaluating in terms of not just the procedural

facts, but in terms of the legal holdings on which the taxpayers prevail and what was necessary, as a procedural matter, for them to prevail in that ground. Assuming that the taxpayers prevail here on appeal based on the questions discussed principally in Part III of this brief, there was no reason to have had discovery and a trial—thus raising this, our final "point relied on":

> *11. The trial court erred in awarding most of the taxpayers' attorneys' fees because the award was not "reasonable" under Art. X, § 23, in that the taxpayers incurred fees for discovery and a trial that were unnecessary given the undisputed fact that there was no line item appropriation for the costs of transfers under § 167.131 and their legal theory that absent such an appropriation, the school districts were entirely excused from compliance with § 167.131.*

One of the taxpayers' successful arguments to the trial court was that if to perform a new or increased "activity or service" mandate a political subdivision must have, in advance, a line-item appropriation from the General Assembly to pay any and all costs of that activity or service. Here, as noted above, we agree that the General Assembly has never enacted such a line item in any appropriations bill. So if the taxpayers are right on the law, they win.

But such a victory never required a trial. It never required evidence developed through discovery. It could have been achieved through a motion for summary judgment. But the taxpayers resisted taking that step, instead preferring to incur hundreds of thousands of dollars in potentially unnecessary fees and costs.

The purpose of the fees provision in Art. X, § 23, was not to encourage attorneys to engage in unnecessary discovery and require judges to preside over unnecessary trials. It should be used only to award the fees and costs that were actually necessary in a particular case. If the Court affirms based on conclusions that did not require discovery and trial, it should remand for reconsideration of what constitutes a "reasonable" fee award.

CONCLUSION

For the foregoing reasons, the trial court's judgment abrogating the requirements of § 167.131 as to the St. Louis and Clayton school districts should be reversed.

Respectfully submitted,

CHRIS KOSTER
Attorney General

By: /s/ *James R. Layton*
Mo. Bar No. 45631
Solicitor General
THOMAS D. SMITH
Mo. Bar No. 61928
Assistant Attorney General

P.O. Box 899
Jefferson City, MO 65102-0899
(573) 751-1800
(573) 751-0774 (facsimile)
James.Layton@ago.mo.gov
Thomas.Smith@ago.mo.gov

ATTORNEYS FOR APPELLANTS

CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that a true and correct copy of the foregoing was filed and served electronically via Missouri CaseNet on November 20, 2012, to:

Elkin L. Kistner
Sean M. Elam
BICK & KISTNER, P.C.
101 So. Hanley Rd., Suite 1280
St. Louis, MO 63105
elkinkis@bick-kistner.com
smelam@bick-kistner.com

Mark J. Bremer
D. Leo Human
KOHN, SHANDS, ELBERT, GIANOULAKIS & GILJUM, LLP
1 North Brentwood Blvd., Suite 800
St. Louis, Missouri 63105
mbremer@ksegg.com
lhuman@ksegg.com

Richard L. Walsh, Jr.
Evan Z. Reid
LEWIS, RICE & FINGERSH, L.C.
600 Washington Ave., Suite 2500
St. Louis, MO 63101
rwalsh@lewisrice.com
ereid@lewisrice.com

The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b) and that the brief contains 17,919 words.

/s/ *James R. Layton*
Solicitor General