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

REPLY 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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The briefs of the respondent taxpayers and school districts sharpen the issues, highlighting seven questions.

1. Does Art. X, § 21 require a separate, specific, line-item appropriation, rather than merely enough appropriated funds, to cover the costs of each and every new or expanded State requirement?

The taxpayers' simplest argument is that the General Assembly never created a new line item for § 167.131 transfers, and that because of this Court's holding in *Rolla 31 School Dist. v. State*, 837 S.W.2d 1 (Mo. banc 1992), the absence of a new line item excuses all districts from following § 167.131 as it was amended after 1980. As the taxpayers point out, the State does ask the Court to reverse or correct that aspect of *Rolla 31.* Notable in the taxpayers' response are the absence of any justification for the *Rolla 31* rule and the failure to recognize the significant problems that rule presents.

Section 21 speaks of "a state appropriation … for any increased costs." In the taxpayers' view, supported by *Rolla 31*, each time the General Assembly lengthens the required school year, it must add an entirely new appropriation—another line item—to each subsequent annual education appropriations bill to cover that particular extension. Similarly, each and every time the General Assembly required counties to meet even a slightly

higher security standard for circuit judges in county courthouses, the General Assembly would have to create a new line item for that change—independent of any line item that would cover any prior or future change, and regardless of the amount of additional funding the State made available through an increase in a more general appropriation or from some other source to cover the cost of that security.

That requirement in *Rolla 31* goes beyond what the Hancock Amendment requires. The point of the unfunded mandate portion of the amendment is to bar the General Assembly from avoiding the Amendment's limits on government growth by transferring costs from the State to political subdivisions of the state, and thus from state taxpayers to local taxpayers. It is not to make the appropriations process increasingly and unnecessarily complex.

Indeed, the specific-line-item requirement may well be counterproductive, in terms of local taxpayers: If the additional funds come as part of a broader grant (such as in the foundation formula payments), the political subdivision can look for ways to perform the new or expanded task more efficiently, and use leftover funds for other purposes—or to lower the taxes they impose. The school day example is a good one. If the Department of Elementary and Secondary Education and the General Assembly calculate that the cost of adding 6 school days to the school year (the proposal made by

the Governor in the 2014 budget) is about $16 million, it seems very odd that lawyers who represent school districts would demand a line item that would bar districts that manage to extend the school year for less to retain and use leftover funds.

The Court should reject the artificial requirement imposed in *Rolla 31*, and require taxpayers suing under Art. X, § 21 to prove not just that there was not a specific line item appropriation to cover the cost of a new mandate, but that the General Assembly has not otherwise appropriated funds sufficient to cover those costs. Here, no taxpayer made any attempt to prove that point as to § 167.131 transfers.

2. Did the Hancock Amendment bar the General Assembly from following the longstanding approach of reimbursing school district expenditures rather than granting funds in advance of compliance?

The briefs raise another question with regard to the form of appropriations. State aid for schools in Missouri has long been paid during one school year based on expenses incurred during the prior school year. The Clayton and St. Louis taxpayers say, in effect, that when the people enacted the Hancock Amendment, they required that the districts receive all payment for the new or expanded tasks in advance. In other words, in their view, the voters barred the use of the reimbursement approach for § 167.131

transfers—and, implicitly, for every requirement that the General Assembly newly enacts or expands. In essence, they claim that although the State for many, many years has granted state school aid based on invoices already paid, since 1980 the State has been required to grant some kinds of aid in advance of a purchase that could be invoiced. The taxpayers do not, of course, deal with the accompanying reduction in accountability. The Court should reject that reading of the Hancock Amendment.

3. Is the concealed carry licensing provision at issue in *Brooks* unenforceable?

The next question goes to the issue of alternative funding, *i.e.*, when funds from a third party offset any cost to the political subdivision. At least as to the plaintiff children, the Clayton taxpayers must argue the case from the point of view of a subdivision whose costs of compliance are borne by a third party. The taxpayers insist that under Art. X, § 21, third-party payments are irrelevant. *See* Clayton Brief at 73. The taxpayers never quite reach, but necessary lead to, the question of the continuing viability of the concealed carry licensing provision at issue in *Brooks v. State*, 128 S.W.3d 844 (Mo. banc 2004).

As this Court noted, the statute at issue in *Brooks* imposed a new requirement on sheriffs: to process "concealed carry" applications. *Id.* at 848-851. Yet the General Assembly had not—and has not—appropriated funds to

cover the costs to sheriffs of processing those applications. The legal rule advocated by the Clayton taxpayers would apply to the cost to a sheriff of processing concealed carry license applications just as it would apply to the cost to a district of educating a student who transfers pursuant to § 167.131.[1] In other words, the Clayton taxpayers are necessarily asking this Court to implicitly endorse the rationale of the dissent in *Brooks*, adopting a legal rule under which no sheriff would be obligated under § 571.094 to process applications for "concealed carry" permits.

That is why, as to the Clayton district and its entitlement to tuition payments, the State focused its brief on the protection of taxpayers. Once the General Assembly fixed the problem with the deposit and use of fees paid for concealed carry permit applications (*see Taylor v. State*, 247 S.W.3d 546 (Mo. banc 2008)), the taxpayers of the counties were no longer impacted by the

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[1] The Clayton taxpayers also assert that their district cannot be required to accept transfer students when the unaccredited district refuses to pay. That is a matter to be resolved among the districts and the students involved—perhaps to be presented first to the State Board of Education pursuant to § 167.131.2 ("If there is disagreement as to the amount of tuition to be paid, the facts shall be submitted to the state board of education, and its decision in the matter shall be final.").

permitting process. Similarly, at least for the plaintiff's children and the first few hundred additional transfer students, the Clayton taxpayers are not harmed by the § 167.131 requirement. Indeed, they may greatly benefit, because the amount that the Clayton district can charge in tuition is vastly more than the marginal costs of educating the plaintiff's children and many more students.

4. Are K-8 districts entirely unable to obtain "foundation formula" funding for high school students?

Reaching another practice long embedded in Missouri school finance, both the Clayton and St. Louis taxpayers argue that the Department of Elementary and Secondary Education cannot legally disburse funds to a school district for a resident student who that district educates by paying tuition to a school elsewhere. Clayton Brief at 17, 63; St. Louis Brief at 40, 45. Such a holding would have significant adverse consequences on students in school districts far removed from those involved in this case.

There is a common—and longstanding (*see* Tr. at 537-540)—circumstance where a district educates a student by paying tuition to another district: where the "K-8 district" student resides does not have its own high school. The K-8 district instead pays tuition to a nearby district to educate high school students. Indeed, the pre-1993 version of § 167.131 was aimed directly at that circumstance.

If this Court holds that the Clayton and St. Louis taxpayers are right and the resident district cannot receive state funds for a student it educates by paying tuition to another district, the Court would be effectively holding that the K-8 districts are not and have never been entitled to state aid for their high school students. Nor, for that matter, would any district be entitled to state aid for a district-resident disabled child who is best served by placement in a private school or in a specialized setting in another district. Nor would any district be entitled to state aid for a resident student who attends a vocational program operated by another district. The Court should not allow an argument unnecessarily made by the taxpayers here to so significantly harm the ability of other districts, many of them rural ones with far fewer resources than the two districts before the Court, to serve children who cannot be best served by a school in the district.

5. Is it proper to apply an "all or nothing" methodology?

The districts and their taxpayers give short shrift to a principal theme of the State's argument: that neither the Hancock Amendment nor any "impossibility doctrine" contemplates that a party may posit a "worst case scenario," show that it would be "impossible" to deal with that scenario or that the State has not appropriated sufficient funds to cover that scenario, and by virtue of that showing avoid the obligation to comply with the law *even to the slightest degree*. Thus there is not a single citation in the districts'

and taxpayers' briefs to any authority for an "all or nothing" analysis. They provide no tie between the "all or nothing" approach and any constitutional or statutory language. They make no attempt at a logical explanation for why an "all or nothing" approach would serve any doctrinal purpose of the Hancock Amendment or an "impossibility" doctrine.

Indeed, it would not serve such purposes. That is evident, first, as to the Hancock Amendment. As discussed above, the taxpayers argue that the State must appropriate, in separate, specific line items, funds for each and every post-1980 mandate. If they are right in their "all or nothing" argument, then if the line item is even a penny short of covering costs that the political subdivision proves it *might someday* incur pursuant to a post-1980 mandate, then the subdivision is entirely relieved of its obligation to fulfill that mandate. Thus if the General Assembly this year passes a line item appropriation to cover the cost of six additional school days, and the amount comes up a penny short, the districts are not required to add five days; they are excused from adding any days at all. There is, quite simply, no way to read the words, history, or logic of the Hancock Amendment to reach that result.

Nor can that result be derived from the authorities the districts cite for their application of an "impossibility doctrine."[2] To give their "impossibility" claim legal substance, the districts cite two cases, only one of which comes close to the analysis needed here[3]: *Egenreither ex rel. Egenreither v. Carter*, 23 S.W.3d 641 (Mo. App. E.D. 2000). There, the question was whether the failure of the defendant to have complied with a city ordinance, in a particular past circumstance, constituted negligence per se when compliance was impossible. But the court did not apply any doctrine of "impossibility." The court merely cited *MacArthur v. Gendron*, 312 S.W.2d 146 (Mo. App. St.L. 1958). There, the Court posed a hypothetical where liability for

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[2] The dissent in this Court's prior opinion mentioned the possibility of asserting "impossibility"—but without citing any authority. *Turner v. School Dist. of Clayton*, 318 S.W.3d 660, 676 n. 10 (Mo. banc 2010) (Breckenridge, J. dissenting).

[3] In the other, *George v. Quincy, O. & K.C.R. Co.*, 167 S.W. 153 (Mo. App. K.C. 1914), the railroad defendant argued that it was "impossible" to comply with a statute requiring "best known" practices because the railroad could not know, in advance, what "best known" meant. In modern jurisprudence we would deal with that problem not as an "impossibility" claim, but as a "vagueness" argument.

violating a statute could be excused because compliance with a statute would have been "impossible." Nothing in *MacArthur* or *Egenreither* suggests that an "impossibility doctrine" would apply outside the private tort context, nor that it could be applied to some projection, however credible, of a future circumstance.

What the districts really argue is that to comply with one statute, § 167.131 will interfere with their compliance with other statutes. Such conflicts are all too common. They are resolved through the use of rules of construction. But neither district is willing to engage in that kind of analysis—perhaps because they recognize that one way to at least temporarily deal with conflicting legal authorities is to require compliance with each until compliance with both is impossible. And compliance with § 167.131 as to the plaintiff children and all others from unaccredited districts who have actually enrolled in the Clayton district was and is possible.

6. Does the Hancock Amendment impose a one-way ratchet, such that whenever the State voluntarily increases funding for a class of political subdivisions, it is barred from retracting or redirecting that increase?

Again, none of the taxpayers addressed whether increased State funding since 1980 is sufficient to both retain the proportion of state funding

for mandated programs that existed in 1980 and to cover the cost of at least some § 167.131 transfers. In at least the St. Louis taxpayer's view, the considerable increases in state education funding since 1980 are entirely irrelevant to the Hancock Amendment analysis because once the State voluntarily increases funding without imposing new mandates—thus allowing the political subdivision to use the funds for non-mandated programs, or to increase the State funding for mandated programs beyond 1980 levels—it cannot redirect those funds for use in new mandates.

To support her claim, the St. Louis taxpayer refers to § 21 and to language in *Rolla 31* about redirecting funds. She starts by citing the title to § 21 (St. Louis Brief at 51)—though the title was not part of the proposal on which the people voted, *see* Mo. Laws. 1980, p. 630, and thus is not part of the Constitution itself. Then she refers to the first sentence of § 21—which the Clayton taxpayer says repeatedly is not at issue here. *See* Clayton Brief at 56, 66-67. Then she claims that the State is "conflating" the two sentences. St. Louis Brief at 51.

We agree that the two sentences of § 21 stand independent of each other—but that does not eliminate from consideration in a second-sentence case every issue dealing with current and past payments. The first sentence addresses the status of funding in 1980, and requires that the State not reduce, proportionally, its funding of local government programs—whether

mandated or not. The second deals with post-1980 mandates. But assuming we have the right answer to Question 1, the issue before the Court necessarily implicates both sentences: whether the General Assembly can redirect appropriations that exceed what is required by the first sentence to fulfill the requirements of the second. To answer "no" would impose a perverse disincentive on the General Assembly—which is perhaps why the Clayton taxpayer expressly disavows a reading of § 21 that imposes a one-way ratchet. *See* Clayton Brief at 78.

This Court should disavow any language in *Rolla 31* (*see* St. Louis Brief at 19) suggesting that the General Assembly, whenever it has chosen since 1980 to exceed the requirements of the first sentence, is forever barred from redirecting its voluntary payments to cover the costs of new or expanded mandates. And the Court should require that taxpayers prove that the General Assembly has not done so with regard to the costs of the new or expanded requirement that they challenge.

7. Can lawyers for a taxpayer suing under the Hancock Amendment who bypass yet ultimately prevail on a simple legal argument recover from the public purse the cost of unnecessary discovery and trial?

The last question is highlighted by an unambiguous statement in the Clayton brief: "The State also concedes that there is not 'specific

appropriation' for § 167.131. *This alone is separately sufficient* to prove a violation of Hancock." Clayton Brief at 87, n. 39 (emphasis added). The St. Louis district and its taxpayers endorse that theory. St. Louis Brief at 20-21, 70-71. Appropriations are enactments, subject to judicial notice and beyond dispute. Thus under the taxpayers' legal theory, it was possible from the moment they sued to entirely resolve their Hancock Amendment claims on a very simple motion for summary judgment. No taxpayer explains why further proceedings were necessary, if they are right on the law.

Instead, the Clayton taxpayers suggest that the State should have sought summary judgment. Clayton Brief at 103. But how could the State have sought summary judgment on the taxpayers' legal theory, with which the State disagreed?

In our view, once the Court abandons the specific, line item appropriation restriction invented in *Rolla 31* (Question 1) and rejects the "all or nothing" approach (Question 5), an Art. X, § 21 case should proceed through five steps:

1. The taxpayers prove that there was a new or expanded requirement imposed on each district. (This will usually be a question of law, as it is here.)

2. The taxpayers prove the costs to the political subdivision of the new or expanded requirement.
3. The taxpayers compare the amounts appropriated currently with the amounts appropriated in 1980, to enable the court to calculate the amount of increase in appropriation.
4. The taxpayers show what portion of that increased amount is required to maintain the proportion of state funding in 1980 for programs then in place and to cover the cost of any new requirements, since 1980, other than the requirement at issue.
5. The taxpayers show that the cost of the new or expanded requirement exceeds the amount available, *i.e.*, the cost exceeds the difference between 3 and 4.

For the State to obtain summary judgment, the State would have to either prevail at step 1 as a matter of law, or show that there was no dispute at any step. The taxpayers do not even hint as to how that would have been possible here.

With one exception: the Clayton taxpayers suggest that the State conceded the answer at step 2 as to their district: the cost that the district

would incur to provide state-mandated services to each § 167.131 transfer student. Clayton Brief at pp. 19-20. That is not true. The State did not contest what the districts *spend*, on average, per pupil—which should be no surprise, because the only expenditure figures the State has are those provided by the school districts themselves. But spending is the wrong question. The Clayton taxpayers have no basis for claiming that the district's spending equals the cost of providing state-mandated services. If it did, the per-pupil spending by Clayton would be much closer to that of other St. Louis County districts. *See* State's Exhibit E. Moreover, as even the Clayton taxpayer at least implicitly concedes (*see* Clayton Brief at 68) the average per-pupil expenditure bears little or no relationship to the marginal cost of providing state-mandated services to one or even a handful of transfer students. The State also did not contest the amount that the Clayton district could charge in tuition—another figure that is based solely on the district's spending figures. But that amount, too, is well in excess of the marginal cost of educating the plaintiff and some number of additional children, and is not tied to state educational requirements.

But most important, again, with regard to the fee question, is the fact that all of the cost analysis has always been irrelevant if the taxpayers are correct as to the law discussed in Question 1. And the fee provision of the Hancock Amendment should not be made available to attorneys to search for

claims that can be resolved quickly on legal argument, then profit from the public purse[4] by taking their cases through unnecessary discovery and trial.

[4] Given that the same attorneys represent the taxpayers and the school districts, this could be an argument about from *which* public purse fees will be paid. But it should not be: We are not aware of any authority for a political subdivision to pay counsel to bring on behalf of taxpayers a suit that the political subdivision could not bring itself. *See King-Willmann v. Webster Groves School Dist.*, 361 S.W.3d 414 (Mo. banc 2012).

CONCLUSION

For the forgoing 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 January 31, 2013, 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 3,414 words.

/s/ *James R. Layton*
Solicitor General