IN THE SUPREME COURT OF MISSOURI

No. SC89010

COMMITTEE FOR EDUCATIONAL EQUALITY, et al., COALITION TO FUND EXCELLENT SCHOOLS, et al., BOARD OF EDUCATION OF THE CITY OF ST. LOUIS, et al., and the SPECIAL ADMINISTRATIVE BOARD OF THE CITY OF ST. LOUIS,

Plaintiffs and Plaintiff-Intervenors/Appellants,

v.

STATE OF MISSOURI, et al., and SCHOCK, SINQUEFIELD and SMITH,

Defendants and Defendant-Intervenors/Respondents.

Appeal from the Circuit Court of Cole County
The Honorable Richard Callahan, Judge

RESPONDENTS' JOINT BRIEF REGARDING CONSTITUTIONAL CLAIMS

Joshua M. Schindler, # 37891
The Schindler Law Firm
141 N. Meramec, Suite 201
St. Louis, MO 63105
Telephone: (314)862-1411
Facsimile: (314)862-1701
Attorney for Defendant-Intervenors/Respondents

CHRIS KOSTER
Attorney General
James R. Layton, #45631
Christopher J. Quinn, #41883
Maureen C. Beekley, #47133
Assistant Attorneys General
P.O. Box 899
Jefferson City, MO 65102
Telephone: (573)751-3321
Facsimile: (573)751-0774
Attorneys for Defendants/Respondents

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes and Rules

Other Authorities

STATEMENT OF FACTS

Parties

This action was initiated by the Committee for Educational Equality and certain Missouri public school districts, students, parents, and taxpayers (collectively "CEE"). Petition at Legal File (hereinafter "L.F") 45-92. Thereafter, the trial court allowed two other groups to join the litigation as Plaintiff Intervenors:[1] 1) the Coalition to Fund Excellent Schools and other school districts, students, parents, and taxpayers (collectively "CFES"), L.F. 222-245; and 2) the Board of Education of the City of St. Louis and additional parents, students, and taxpayers (collectively "SLPS"), L.F. 354-375. We refer to all plaintiffs collectively as "Plaintiffs" or "CEE."

The defendants are the State of Missouri; the State Treasurer; the State Board of Education; the Department of Elementary and Secondary Education ("DESE") and its Commissioner; the Commissioner of Administration; and the Missouri Attorney General (collectively "State Defendants").[2] *See* CEE Petition at L.F. 45-92; CFES Petition at L.F. 222- 245; SLPS Petition at L.F. 354-375. The

[1] The May 12, 2004, Order granting the Motions to Intervene is at L.F. 223-224.

[2] All individual State Defendants were named in their official capacities.

Plaintiffs initially challenged the formula for allocation of State aid to public school districts as it existed prior to the enactment of Senate Bill 287 ("SB 287") in 2006. *See* L.F. 1982.

In October 2006, W. Bevis Schock, Rex Sinquefield and Menlo Smith (collectively "Defendant Intervenors") filed a Motion to Intervene. L.F. 2773-2785. The Court denied the Motion under Rule 52.12(a), but granted the motion under Rule 52.12(b). L.F. 3836. Defendant Intervenors then participated in all aspects of this litigation. We will refer to State Defendants and Defendant Intervenors collectively as "Defendants."

Effective July 1, 2006, SB 287 changed the formula by which State aid is distributed to Missouri's public school districts. *See* SB 287, reproduced at Appendix to Respondents' Joint Brief Regarding Constitutional Claims ("Res. App."), pp. A49-A170. Plaintiffs then filed amended petitions attacking SB 287. CEE Second Amended Petition, L.F. 2443-2493; CFES Third Amended Petition, L.F. 2414-2437; SLPS Second Amended Petition, L.F. 2384-2410. SLPS was later granted leave to file a Third Amended Petition by Interlineation. L.F. 4642. That petition may be found at L.F. 3857-3882.

Judgment

The trial court entered its Judgment on October 17, 2007. L.F. 5313-5345.[3] The rulings directly relevant to this appeal are as follows:

Adequacy Claims Pursuant to Article IX, § 1(a)

> [T]he Court finds that section 1(a) describes what the General Assembly is to do ("establish and maintain free public schools for … all persons in this state within ages not in excess of twenty-one years as prescribed by law") and why (because "[a] general diffusion of knowledge and intelligence [is] essential to the preservation of the rights and liberties of the people"). Section 5 provides how the General Assembly is to "establish and maintain" free public schools (through a "public school fund"). And § 3(b) provides what the General Assembly "must" or "may" do when the public school fund is insufficient in terms of the twenty-five percent requirement.
>
> Accordingly, if the public school funds are insufficient, as plaintiffs allege here, the General Assembly "*may* provide for such deficiency…." beyond the twenty-five percent requirement, Art. IX, section 3(b), (emphasis added). Plaintiffs would have the Court read

[3] A copy of the Judgment may also be found at Res. App., pp. A1-A33.

into the Constitution a "must" when the drafters used the term "may". This, the Court cannot and will not do.

L.F. 5322-5323 (footnotes omitted).

Adequacy and Equity Claims Pursuant to the Equal Protection and Due Process Clauses

Plaintiffs seek to have the Court inscribe into the Missouri Constitution an equalization requirement that was removed over one hundred years ago. As with plaintiffs' adequacy argument, the Court will not imply a requirement into the Constitution that is not there.

L.F. 5330.

Compliance with Article IX, § 3(b)

"[U]nder every reasonable method of calculation presented at the hearing on September 20, 2007, defendants complied with the spending requirements contained in Article IX, section 3(b)."[4] L.F. 5323.

[4] The CEE and CFES Plaintiffs dropped their claims that Defendants have violated the twenty-five percent requirement contained in Article IX, § 3(b). L.F. 2443-2493, 2414-2437. The SLPS Plaintiffs never asserted this claim. Nonetheless, the trial court requested evidence and made the quoted finding on this point. L.F. 4998-4999.

Hancock Amendment Claims

"In the present case, plaintiffs' evidence was insufficient to establish a violation of the Hancock Amendment premised on a Pre-existing Mandate." L.F. 5332.

"Plaintiffs also failed to prove defendants' violation of the Hancock Amendment premised on any New Mandate." L.F. 5332.

"Even if plaintiffs had met their burden with respect to their Hancock Amendment claims, the Court would reject their claims because Hancock does not provide them the relief they seek." L.F. 5334.

Factual Issues Not Addressed in the Judgment

CEE acknowledges at page 19 of its brief that the "trial court did not consider the factual record to any significant extent." Nonetheless, CEE addresses in its Statement of Facts evidence of what Plaintiffs perceive to be problems with education funding. Brief of Appellants Committee for Educational Equality, et al. ("CEE Brief") at pp. 28-52. But evidence before the trial court contradicts the Plaintiffs' allegations. We cite a few of those contradictions.[5]

[5] CEE elected to include its proposed findings of fact and conclusions of law to the trial court in the Legal File and in its appendix. L.F. 5469-5658; CEE App., pp. 643-832. Although not indicated in the Legal File's Table of Contents, State

Funding "Adequacy"

The long-term goal of SB 287 was to move from a tax-rate driven formula to a student need-based formula.[6] Trial Transcript ("Tr.") at 6116, 6888-6889. To accomplish this end, DESE provided testimony to House and Senate Committees on ways to determine which schools are high-performing and successful. Tr. 6889. DESE issues annual reports from which one can identify successful school districts, their per-pupil expenditures, and some characteristics of their student populations. Tr. 6889-6890. The Missouri legislature ultimately arrived at the SB 287 formula as a way to calculate State aid to districts based on per-pupil spending

---

Defendants' proposed findings of fact and conclusions of law, which recite Defendants' contradictory evidence, are set forth at L.F. 6001-6151.

[6] SB 287 directs vastly more state aid to the State's poorest districts (poorest being defined by assessed value per pupil as well as in terms of where the poorest students live). Tr. 6128, 7892. For example, State aid per pupil is eight times more in real dollars in one CEE district than in other districts. Tr. 1840-1842. In the end, wealthier districts will receive less money under SB 287. Tr. 6129. SB 287 is better than its predecessor for low tax rate districts. Tr. 3995.

in successful districts, with adjustments for inter-district differences in student populations, local revenue, and other factors.[7] Tr. 5710, 5715-5716, 5720, 5726; § 163.031, RSMo.

In the last fifteen years, inflation-adjusted spending on education has grown faster in Missouri than in the United States as a whole.[8] Tr. 7480. Moreover, State spending on elementary and secondary education increased by approximately $160,000,000 between fiscal year 2006 and fiscal year 2007 (the first year under the SB 287 formula). Tr. 5810, 6887. By the time it is completely phased in, SB 287 is expected to inject an additional approximately $800,000,000 into Missouri's

---

[7] The computation of State aid under the SB 287 formula is more fully explained at pp. 32-35, *infra.*

[8] School districts in Missouri have elected to use some of this extra money to lower student-teacher ratios rather than to increase teacher pay. Tr. 7480. Missouri student-teacher ratios are low compared with national averages and those in neighboring states. *Id.* In fact, Missouri student-teacher ratios are, on average, two students lower than in the United States as a whole. Tr. 7480-7488. If Missouri schools maintained total spending at current levels but moved to a student-teacher ratio equal to the national average, they could raise the pay of every teacher by an average of 14.5 percent. Tr. 7570.

public education system. Tr. 5754-5755, 5789-5790.

While it is true that the superintendents presented as witnesses by Plaintiffs testified at trial that their schools have inadequate resources, they failed to prove that their resources are insufficient or that what resources they do have are spent wisely.

For example, the superintendent of a large school district took the position that her district did not have enough money to adequately educate its children, yet she could not tell the court what percentage of the district's budget was spent on athletics or whether that amount exceeded the amount spent on books. Tr. 1545-1546. By the time of trial, the amount of spending per student in that district had increased by more than $1,000 over a five year period,[9] Tr. 1553, yet its students' average ACT score and the percentage of its students taking the ACT had decreased. Tr. 1559. During the same period of time, the percentage of Missouri students taking the ACT as well as their average score improved. Tr. 1559. Most troubling is that the same district spent $1 million on Astroturf football fields for

[9] That district spent more than $2,000 per student over the state adequacy target, yet its superintendent testified that it cannot provide an adequate education for its students without an additional $210 million from the State for capital improvements and another $9,350,000 in State aid per year. Tr. 3901, 3907-3910.

two of its schools. Tr. 1542. That same district gave its students $318,000 in prepaid Visa credit cards to attend summer school. Tr. 3895-3896.

Another superintendent claimed that he could not adequately educate the children of his district. Tr. 1809. But in 1996 the district's reserves were $835,000 and the board suggested paying reserve balances down. By the time of trial, that district's reserves were $1.65 million. Tr. 1873.

Another superintendent complained at trial about leaking roofs, mold in her school, and overcrowding, but that district had not obtained bids to repair these items. Tr. 3247-3248. Nonetheless, the superintendent knew the exact amount it would cost to improve lighting on the football fields and the district had recently spent over $380,000 on a new athletic field house. Tr. 3249-3249.

While most superintendents stressed the need to provide more resources for students receiving free and reduced-price lunch assistance, when one superintendent had to decide which of four teachers to assign to teach that specific group, he decided against using his best teachers and instead chose the "weakest link" to teach those children. Tr. 2382-2383.

As for facilities, Defendants' expert, Dr. John Murphy, traveled to CEE's "focus districts"[10] to determine whether these districts' schools were sufficient to

[10] Missouri has 524 school districts. Tr. 1817. In order to reduce the

provide an "adequate" education. Tr. 6616-6620. For his purposes, an "adequate" education is one that prepares students to graduate from high school and then move on successfully to higher education or to be gainfully employed. Tr. 6802. Dr. Murphy testified that with the exception of the secondary school in Caruthersville (which had recently been hit by a tornado), the schools met this definition of "adequate." Tr. 6802-6803. In addition, a witness subpoenaed by Plaintiffs to testify as to the quality of the facilities in several Plaintiff school districts testified that the facilities are safe, well-lighted, and have not impaired students' ability to learn. Tr. 3805-3806, 3823-3824.

At trial, Plaintiffs also tried to establish that Missouri does not provide an "adequate" education by putting on a series of experts who tried to project expenditures required for all Missouri school children to be "proficient" in math and science. Yet, no research exists that demonstrates a statistically reliable relationship between how much is spent to provide educational services and student achievement. Tr. 4452. Therefore, these projections are flawed. As one

---

number of school districts from which district-specific evidence would be heard at trial, the circuit court ordered the parties to each designate a limited number of "focus districts." *See* L.F. 2528-2536, 2617-2619, 2630-2639, 2655-2657, 2731-2732.

expert testified, knowing whether a student is attending a high or low spending district tells you almost nothing about his or her test scores. Tr. 7287. There is no positive relationship between current spending per student and test scores. Tr. 7303. This conclusion is intuitive: knowing that a district spends $10,000 per student tells nothing about curriculum and teacher quality and provides no relevant information on the "causes" of a student's test scores. Tr. 7343. As conceded by one of Plaintiffs' experts, it is possible to provide significant amounts of additional money to a school district without a corresponding increase in performance. Tr. 5168.

In addition, most of the variation in student achievement is within school districts and within individual schools, rather than between districts. Tr. 7286. Equalizing spending between districts does little or nothing to address the problem of intra-district achievement gaps. Furthermore, there is a strong subjective element to setting proficiency levels. Tr. 7350. For example, early and current MAP test standards differ. Tr. 7352. The assessments changed significantly in 2006, as did the cutoff scores for defining "proficient" performance. Tr. 7369, 7377.

Missouri's curriculum standards are ambitious. Tr. 7350-7354. For example, many students who score less than "proficient" on the high school MAP test nevertheless succeed in higher education. Tr. 7352. Additionally, each state

defines proficiency differently and Missouri has been cited in federal comparisons as one of six states with the most rigorous standards. Tr. 6027. Despite claims by many school districts that they cannot provide an "adequate" education, Missouri exceeds its proficiency goal, Tr. 6029, and Missouri's aggregate performance is higher than the national average in both math and communications arts in all grade levels, Tr. 6034. Our assessment standards are either the same or higher than those utilized in the National Assessment of Education Progress ("NAEP"). Tr. 981.

Funding "Equity"

Horizontal equity, which assumes that all students should receive equal educational resources, was the dominant statistical approach and methodology used in research literature in the 1960s and 70s. Tr. 6130. While there is nothing wrong with looking at horizontal equity, it doesn't provide the full picture. Tr. 6310. Instead, experts today agree that vertical equity, which assumes that students of differing needs should receive unequal treatment, is a more worthwhile measure. Tr. 6130-6134. SB 287's weightings for certain categories of special needs students are designed to address vertical equity. Tr. 6165-6170.

Plaintiffs' primary equity expert did not present a vertical equity analysis under the SB 287 formula. Tr. 8462. He did not have enough time to perform the study because, as another expert explained, such an undertaking would have

required him to travel to every single school and look at its database. Tr. 3610, 8462. While he did reach some general conclusions on whether vertical equity would improve under SB 287, he stated candidly that he would not "bet the farm" on his projections. Tr. 8465.

Compliance with Article IX, § 3(b)

Marty Drewel, the Deputy Director of the Division of Budget and Planning in the Office of Administration, explained in great detail the process utilized to determine what items are included within state revenues for purposes of Article IX, § 3(b), and which expenditures are included to determine if twenty-five percent of state revenues has been expended in support of the free public schools. Tr. 7782-7838, 7859-7861. He demonstrated that state revenues for fiscal year 2006 were $10,645,680,457 and that twenty-five percent of that amount is $2,661,420,114. Tr. 7812-7813. He also testified that in fiscal year 2006 the State of Missouri expended $3,826,094,496 – an amount in excess of thirty percent of state revenue – in support of the free public schools. Tr. 7830-7831. While Plaintiffs did suggest that some expenditures included by Mr. Drewel included expenditures on behalf of students over age 21 (and thus were not properly included), Plaintiffs offered no evidence quantifying this amount or otherwise suggesting that Mr. Drewel's calculations were in error.

Hancock Amendment Claims

The record contains no evidence regarding any district's transportation costs in 1980-81 and whether the ratio of state to local funding for transportation, excluding discretionary spending, has changed since that time. In fact, CEE does not state any facts in its proposed findings of fact[11] that refer or relate to transportation costs in 1980-81. While CEE does refer to some "facts" in Section IV of its brief, even a cursory reading of that section shows that CEE refers only to transportation reimbursements from 2003 forward.

There is also no reference in the CEE Brief Statement of Facts that specifically addresses which alleged performance or accountability standards CEE relies on to prove its Hancock claims. Instead, CEE merely relies on its assertion, without citing this Court to any evidence in the record, that the

> record is replete with evidence that there are increased costs that are required to be expended in order that students may become more

[11] CEE has referred this Court to its Suggested Findings and Conclusions in support of the Statement of Facts in its brief. That document is 181 pages long and has no table of contents. *See* CEE App., Vol. V, pp. 643–823. However, it appears that nowhere in that document does CEE address the funding of transportation during the 1980-81 timeframe.

> proficient. The record also reflects that the provisions of the Outstanding Schools Act have drastically increased the administrative costs of school districts.

CEE Brief at p. 145.

ARGUMENT

Standard of Review

> When considering the legal issue of the constitutionality of a statute, this question of law is to be reviewed *de novo.* A statute is presumed to be constitutional and will not be invalidated unless it clearly and undoubtedly violates some constitutional provision and palpably affronts fundamental law embodied in the constitution.

Bd. of Educ. of City of St. Louis v. Missouri State Bd. of Educ., 271 S.W.3d 1, 7 (Mo. banc 2008) (internal citations and quotations omitted). CEE acknowledges at page 19 of its brief that "the trial court did not consider the factual record to any significant extent." To the extent that the circuit court did make findings of fact, in a court-tried case:

> This Court will affirm the judgment unless there is no substantial evidence to support it, it is against the weight of the evidence, it erroneously declares the law, or it erroneously applies the law. If the facts of a case are contested, then this Court defers to the trial court's determinations regarding those facts. If the facts are not contested, then the issue is legal and there is no finding of fact to which to defer.

Id. (citations omitted). *See also State v. Entertainment Ventures I, Inc.*, 44 S.W.3d 383, 385 (Mo. banc 2001) (in a court-tried case, this Court will "accept as true the

evidence and reasonable inferences in favor of the prevailing party and disregard the contrary evidence.”).

I. THE PLAINTIFF ORGANIZATIONS AND SCHOOL DISTRICTS LACK STANDING.

This Court decides constitutional questions only when a litigant's individual rights are directly affected by the resolution of the case. *W.R. Grace & Co. v. Hughlett*, 729 S.W. 2d 203, 206 (Mo. banc 1987); *State ex rel. Williams v. Marsh*, 626 S.W.2d 223, 227 (Mo. banc 1982); *State ex rel. Reser v. Rush*, 562 S.W.2d 365, 369 (Mo. banc 1978). In the absence of a sufficient personal stake, any decision rendered constitutes an advisory opinion that Missouri courts lack jurisdiction to issue. *State ex rel. Mathewson v. Bd. of Election Comm'rs of St. Louis County*, 841 S.W.2d 633, 635 (Mo. banc 1992). Thus, standing is a jurisdictional requirement antecedent to the right to relief, *Comm. for Educ. Equality v. State of Missouri*, 878 S.W.2d 446, 450 n. 3 (Mo. banc 1994), and "the question of a party's standing can be raised at any time, even *sua sponte* by this Court," *Mathewson*, 841 S.W.2d at 634.

A. The plaintiff organizations have standing only if their member school districts could bring this suit.

In its Second Amended Petition, the Committee for Educational Equality describes itself as "a not-for-profit corporation" comprised of "certain public school districts within the State of Missouri." L.F. 2443-2493. Similarly, the Coalition to Fund Excellent Schools is "an association of... certain public school

districts within the State of Missouri." L.F. 2414-2437. An organization may sue as a representative for its members only if its members would otherwise have standing to bring suit in their own right. *Missouri Health Care Ass'n v. Attorney General of Missouri*, 953 S.W.2d 617, 620 (Mo. banc 1997). Therefore, the standing of these organizations to assert their constitutional claims[12] is derivative and exists only to the extent that their member school districts are proper plaintiffs. *Id.*

B. School districts lack standing to bring this suit.

School districts lack standing to assert any of Plaintiffs' claims. School districts are mere "creatures of the state established to perform governmental functions." *State ex rel. Brentwood Sch. Dist. v. State Tax Comm'n*, 589 S.W.2d 613, 615 (Mo. banc 1979). As such, school districts lack constitutional rights guaranteed to individual citizens and cannot charge the state with violations of such rights. *Id. See also City of Chesterfield v. Director of Revenue*, 811 S.W.2d 375, 377 (Mo. banc 1991) ("Both state and federal courts have repeatedly held that municipalities and other political subdivisions established by the state are not

[12] The CFES Plaintiffs' lack of standing to assert their separate tax assessment claims is addressed in State Defendants' Brief Responding to Tax Assessment Issues.

'persons' within the protection of the due process and equal protection clauses of the United States Constitution."). School districts also lack the legal authority to assert students' constitutional claims as third parties. *See Reser*, 562 S.W.2d at 369 ("We will not entertain the constitutional questions raised by respondent on behalf of the children… because, among other reasons, respondent circuit judge has no standing to raise these issues, which are personal to them.").

In its 1994 opinion in *Committee for Educational Equality v. State of Missouri*, this Court noted the "jurisdictional deficiencies," created when "[p]ublic school districts and taxpayers seek to invoke rights belonging to individual students, giving rise to questions of standing." *Comm. for Educ. Equality*, 878 S.W.2d at 449-50. The Court explained in a footnote:

> The primary claim in the plaintiffs' pleadings is that students are being denied equal protection of the law in access to public education. Here there is a serious question whether school districts and taxpayers have standing to prosecute the students' equal protection claims. Generally speaking, political subdivisions, such as school districts, lack such standing because they are not considered "persons" having a constitutional right to due process or equal protection of the law. Similarly, the students' claims to equal protection may not be raised by third parties. School districts have a potential, if not inherent,

> conflict of interest with students claiming the right to equal protection of the law in education. Such rights are enforceable not only against the state at large but against the school district.

Id. at 450 n.3 (citations omitted).[13] Although the Court did not reach the standing issue, it cautioned that "in subsequent proceedings in this case or in new litigation, the trial court and the parties should be cognizant of the jurisdictional problems that have infected the earlier proceedings in this case." *Id.* at 455. In this case, because school districts have again attempted to assert alleged constitutional rights belonging only to individual students, the Court is faced with the same "jurisdictional problems" it saw before.

School districts also lack standing to assert Plaintiffs' Hancock Amendment claims. Article X, § 23, of the Missouri Constitution limits the class of persons who can bring an action to enforce the amendment to "any taxpayer." *Fort Zumwalt School Dist. v. State of Missouri*, 896 S.W.2d 918, 921 (Mo. banc 1995).

---

[13] That observation implicitly suggests the reason the school districts have not claimed to act on behalf of taxpayers: In some, perhaps many, instances, the reason a particular district has less to spend per pupil is the result of taxpayers' opposition to raising levies to match those in other districts. *See* Tr. 158-159, 2301, 3235-3236, 3250-3252.

This Court has ruled, however, that school districts are not taxpayers and, thus, that they lack standing to assert claims under the Hancock Amendment. *Id.* "The Hancock Amendment makes no pretense of protecting one level of government from another." *Id.*

Although individual students have standing to bring suit alleging that the State has violated their constitutional rights, this Court should hold that the plaintiff organizations and their member school districts do not. With the exception of nominal parties from whom the circuit court heard no testimony, Plaintiffs have no personal stake in the constitutional questions they raise.

II. PLAINTIFFS' CLAIMS PRESENT A NON-JUSTICIABLE POLITICAL QUESTION.

Contrary to the claim implicit in CEE's arguments, there are real limits on the extent to which the courts can, should, and will interfere with legislative decisionmaking. Judicial restraint is deeply rooted in the constitutional "separation of powers" doctrine and the respect that separate, coordinate branches of government owe each other. *See Wilson v. Washington County,* 247 S.W. 185, 187 (Mo. 1922) (courts must keep in mind that legislature has power to make laws, subject only to the Constitution); *Poole & Creber Market Co. v. Breshears,* 125 S.W.2d 23, 30-31 (Mo. 1938) (same).

The need to restrain the judiciary from moving into the legislative realm – *i.e.*, from having courts make policy choices (albeit ones that relate to constitutional principles) that are constitutionally assigned to the legislative branch – has been most clearly effected through the "political question" doctrine. In *Baker v. Carr*, 369 U.S. 186, 217 (1962), the United States Supreme Court articulated the following standards for determining whether a case involves a non-justiciable political question:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially

> discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. Several of the *Baker* factors are present in this case.

First, a plain reading of Missouri's Constitution establishes that any amount of educational funding above the twenty-five percent requirement of Article IX, § 3(b), is a question dedicated to the legislative branch. Article IX, § 3(b), provides, in relevant part: "In event the public school fund… shall be insufficient to sustain free schools…, the *general assembly may* provide for such deficiency…." (emphasis supplied). Further, Article IX, § 1(a), the provision relied upon by CEE to support its claim that the Missouri Constitution requires that the State provide students an "adequate" education, directs only the General Assembly to act and indicates that it should fulfill this section's directive by passing legislation ("as prescribed by law"). This provision, like § 3(b), demonstrates that decisions regarding the establishment and maintenance of public

schools are textually dedicated to the legislative branch and, thus, are non-justiciable political questions.

Second, CEE's request for a court-mandated admonition to the legislature to provide educational funding at a level adequate to produce a "general diffusion of knowledge and intelligence" sufficient to preserve "the rights and liberties of the people" lacks discoverable and manageable standards. Instead, this language articulates only a general principle and is "so vague as not to admit of an understanding of its intended scope…." *In re V.,* 306 S.W.2d 461, 463 (Mo. banc 1957).

Third, "[t]he political question doctrine establishes a limitation on the authority of the judiciary to resolve issues, decidedly political in nature, that are properly left to the legislature." *Bennett v. Mallinckrodt, Inc.,* 698 S.W.2d 854, 863-64 (Mo. App. E.D. 1985). Absent an explicit constitutional directive, it is difficult to envision a question more political than the amount of funding various state programs are to receive. Recognizing this fact and the importance of education to the citizens of this State, the framers of the 1945 Constitution created the minimum twenty-five percent educational spending requirement found in § 3(b); by enacting it, the voters removed a certain amount of educational funding from the political arena – but not all of it. Whether, how, and how much to spend

on the free public schools above the twenty-five percent requirement remain political questions.

Fourth, CEE's claims cannot be adjudicated "without expressing lack of the respect due coordinate branches of government…." *Baker*, 396 U.S. at 217. "The courts cannot transcend the limits of their constitutional powers and engage in judicial legislation ...." *Bd. of Educ. of St. Louis v. Missouri*, 47 S.W.3d 366, 371 (Mo. banc 2001). *See also Snodgras v. Martin & Bayley, Inc.*, 204 S.W.3d 638, 641 (Mo. banc 2006) ("[C]ivil lawsuits are not the only means of achieving social or economic objectives."). The direction Plaintiffs apparently seek from this Court – to fund education at the level the Court determines to be "adequate" – would necessarily demonstrate disrespect for the legislative branch of government and the political process by which it distributes finite funds to meet the infinite needs and desires of the citizenry.

This Court has not, to date, expressly endorsed use of the "political question" doctrine to keep the judiciary at a proper distance from legislative authority, as the court of appeals did in *Bennett*. But as shown above, this Court has invoked several of the *Baker* criteria. It has done so in the course of applying a closely related, if not analogous doctrine: the requirement that it give strong deference to legislative acts, or to phrase it another way, that it recognize that

legislation is entitled to a strong presumption of constitutionality. *Missouri Libertarian Party v. Conger*, 88 S.W.3d 446, 447 (Mo. banc 2002).

Missouri courts must to "ascribe to the General Assembly the same good and praiseworthy motivations as inform [the courts'] decision-making processes." *Hammerschmidt v. Boone County*, 877 S.W.2d 98, 102 (Mo. banc 1994). If the question of constitutionality is "fairly debatable," this Court has long respected the legislature's province to make such determinations, even if, in the Court's opinion, "the conclusion of the legislature is an erroneous one." *Poole*, 125 S.W.2d at 30-31. *See also Penner v. King*, 695 S.W.2d 887, 889 (Mo. banc 1985), *citing State ex rel. Holekamp v. Holekamp Lumber Co*., 340 S.W.2d 678 (Mo. banc 1960) (Court is "obliged" to uphold legislative enactment unless unconstitutionality is "clearly demonstrated"); *Wilson v. Washington County*, 247 S.W. 185, 187 (Mo. 1922) ("constitutional restrictions ought not to be held to apply if there exists any reasonable doubt in the judicial mind as to a conflict"); *Carmack v. Director, Missouri Dept. of Agriculture*, 945 S.W.2d 956, 959 (Mo. banc 1997) (same); *Hammerschmidt*, 877 S.W.2d at 102 (same).

This Court has recognized that the Missouri Constitution "bridle[s]" judicial decision-making with respect to a statute's constitutionality. *Carmack*, 945 S.W.2d at 959. This limitation serves "to channel the exercise of the court's discretion and encourage the judicial branch to avoid the temptation to substitute

its preferred policies for those adopted by the elected representatives of the people." *Spradlin v. City of Fulton*, 924 S.W.2d 259, 263 (Mo. banc 1996). The requirement that courts refuse invitations to substitute their will for legislative decisionmaking should actually be stronger under Missouri law than under federal law, since the separation of powers basis for that requirement is merely implicit in the federal constitution, but explicit in Article II of ours.

And it should be stronger because our constitution gives greater legislative authority than does its federal counterpart. "The state constitution, unlike the federal constitution, is not a grant of power, but as to legislative power, it is only a limitation; and, therefore, except for the restrictions imposed by the state constitution, the power of the state legislature is unlimited and practically absolute." *Americans United v. Rogers*, 538 S.W.2d 711, 716 (Mo. banc 1976). Thus, "[a]ny constitutional limitation ... must be strictly construed in favor of the power of the General Assembly." *Bd. of Educ. of City of St. Louis v. City of St. Louis*, 879 S.W.2d 530, 533 (Mo. banc 1994). In fact, the "deference due the General Assembly requires that doubt be resolved against nullifying its action if it is possible to do so by any reasonable construction of that action or by any reasonable construction of the Constitution." *Liberty Oil Co. v. Director of Revenue*, 813 S.W.2d 296, 297 (Mo. banc 1991).

Those considerations have led this Court to hold repeatedly that "[o]ne attacking the constitutionality of a statute bears an extremely heavy burden." *Linton v. Missouri Veterinary Medical Bd.*, 988 S.W.2d 513, 515 (Mo. banc 1999) (internal quotations omitted). To overcome this burden, the challenger must show that the legislation "clearly and undoubtedly contravenes the constitution and plainly and palpably affronts fundamental law embodied therein." *Etling v. Westport Heating & Cooling Services, Inc.*, 92 S.W.3d 771, 773 (Mo. banc 2003) (internal quotations omitted).

That is particularly difficult when the constitutional provision that the plaintiff invokes is not self-executing. The provision that is the keystone of CEE's argument, Article IX, § 1(a), is not self-executing. It includes the phrase that is the hallmark of non-self-executing provisions – a phrase that CEE deliberately and consistently ignores: "as prescribed by law." Constitutional provisions utilizing the phrase "as prescribed by law" are not considered self-executing because they contemplate additional legislative action. *See Wann v. Reorganized Sch. Dist. No. 6*, 293 S.W.2d 408 (Mo. 1956). In *Wann*, a case involving a challenge to a school bond election pursuant to Article VI, § 26(g), this Court stated:

> The first part of § 26(g), providing that "All elections under this article may be contested," is modified by the words "as provided by law." This latter phrase when used in constitutions, has been held to

> mean as prescribed or provided by statute..., but it could also refer to other provisions of the constitution.... When the entire phrase is considered it is evident that the provision lays down only a general principle and directs the legislature to provide the rules by which the general right which it grants may be enjoyed and protected.

Id. at 411. The "political question" doctrine is an effective means by which the courts can avoid usurping the legislative authority inherent in the constitutional scheme generally and in constitutional provisions, like those at issue in *Wann* and here, specifically.

This Court should adopt the "political question" doctrine, refuse to insert the courts into the inherently subjective and constantly moving world of school finance, and reject CEE's claim that the General Assembly has failed to "adequately" and "equitably" fund education is a justiciable question, beyond the specifics that the Missouri Constitution requires. Mo. Const., Article II, §1.

III. THE CIRCUIT COURT CORRECTLY HELD THAT THE STATE HAS NOT VIOLATED ARTICLE IX OF THE MISSOURI CONSTITUTION (RESPONDING TO CEE'S FIRST POINT RELIED ON).

The circuit court determined that CEE's claim that Article IX, § 1(a), of the Missouri Constitution requires the General Assembly to provide some kind of "adequate" funding in excess of the twenty-five percent requirement contained in Article IX, § 3(b), "simply ignores the existence and plain language of section 3(b)." L.F. 5322. The trial court's ruling on this point is correct and, for this reason alone, the judgment should be affirmed.[14]

[14] Having determined that the Missouri Constitution does not require that the State provide "adequate" or "equitable" school funding, the circuit court did not attempt to formulate a constitutional standard by which to judge Missouri's compliance against the volumes of evidence adduced at trial. CEE nevertheless implies that this Court should summarily rule in its favor. Should this Court disagree with the judgment of the circuit court, it should define the constitutional standard and remand this case to the circuit court for a determination of whether the evidence at trial established that Missouri complies with that standard. *See Southwestern Bell Tel. Co. v. Director of Revenue*, 78 S.W.3d 763, 768

In simplest terms,[15] the calculation of how much State aid a school district is to receive under the SB 287 foundation formula[16] is made by multiplying the

---

Mo. banc 2002) (remanding for further fact finding, consistent with the Court's construction of statute, where Administrative Hearing Commission based its decision solely on contrary interpretation); *Amway Corp., Inc. v. Director of Revenue*, 794 S.W.2d 666, 671 (Mo. banc 1990) (remanding for "additional factual findings and conclusions of law necessary to resolve undecided factual and legal issues.").

[15] SB 287 has many components that, given the trial court's limited factual findings, are not explained in detail herein. *See, e.g.*, § 162.974, RSMo (additional State aid for certain disabled students); § 163.011(5), RSMo ("dollar-value modifier"); § 163.031.2, RSMo ("hold harmless" provision); § 163.031.3, RSMo (extra-formula "categorical add-on revenue"); § 163.031.4, RSMo (statutory "phase-in" period); § 163.043, RSMo (classroom trust fund); § 163.044, RSMo (additional State aid for districts with less than 350 students). *See also* Tr. 79-83. Sections 163.011 and 163.031, RSMo, are reproduced at Res. App., pp. A40-A48.

[16] As noted at pp. 26-29, *supra,* the General Assembly's mechanism for the calculation and distribution of State aid to school districts enjoys a strong presumption of unconstitutionality, and CEE "bears an extremely heavy burden" in

district's weighted average daily student attendance by the state adequacy target, minus the amount of money raised by local tax effort. *See* § 163.031, RSMo (calculation of State aid to school districts). *See also* Tr. 32, 79-83, 6889. The state adequacy target ($6,177 for fiscal years 2007 and 2008, Tr. 79, 6893)[17] is essentially the average per pupil expenditure in those school districts achieving a perfect score on their annual performance report, excluding districts with per pupil expenditures in the top and bottom five percent.[18] *See* § 163.011(13), RSMo

---

proving otherwise. *Linton*, 988 S.W.2d at 515.

[17] The state adequacy target calculation under SB 287 is designed to estimate spending, net of federal funds and categorical grants, to achieve reasonably demanding educational objectives. Tr. 7692-7693. The actual dollar estimate well exceeds the actual expenditures of most districts that are currently meeting those objectives. Tr. 7693. As discussed further below, the legislature's selection of the performance districts was reasonable and rational. The General Assembly made a policy decision that those districts were achieving at the required levels and they were engaged in those activities. Tr. 6303.

[18] At trial, Plaintiffs objected to this approach, but one of their experts conceded that reasonable people can disagree regarding whether or not to normalize the distribution by excluding statistical outliers falling in the top and

(defining "performance districts"); § 163.011(18), RSMo (defining "state adequacy target"). *See also* Tr. 79-83, 6889, 6892-6893. Weighted average daily attendance is determined by multiplying the district's percentages of free and reduced-price lunch students (a proxy for poverty), special education students, and limited English proficiency students in excess of the percentage of those students in the "performance districts" by statutory weighting factors[19] for each of these groups. *See* § 163.011(20), RSMo (defining "weighted average daily attendance");

---

bottom five percent. Tr. 4550-4551. In any event, a calculation of the state adequacy target that included the outliers would have resulted in a similar ($6,284) state adequacy target figure. *See* Tr. 6892-6898.

[19] Education experts generally agree that students receiving free and reduced price lunch benefits require more resources but do not agree on the amount of money needed. The same is true for special education and limited English proficiency students. Tr. 1155-1158. While Plaintiffs' experts testified that the weights for free and reduced lunch students under SB 287 should be higher, they readily admitted that this is a value judgment and is subjective. Tr. 3586. Moreover, there is no definitive scientific literature that defines the appropriate weights to be utilized in a school funding formula (*e.g.*, how much more it costs to educate a special needs student). Tr. 6344.

§ 163.011(7), (9), and (17), RSMo (defining free and reduced lunch, limited English proficiency, and special education "thresholds"). *See also* Tr. 65-77, 6898-90. A school district's local effort is calculated by multiplying the assessed value of property in the district for the calendar year 2004 by a performance levy of $3.43 per hundred.[20] *See* § 163.011(10), RSMo (defining "local effort"); § 163.011(14), RSMo (defining "performance levy"). *See also* Tr. 81-86. Thus, the formula produces an amount that is due each school district regardless of what amount is due to another district. § 163.031, RSMo.

[20] The actual calculation is somewhat more complex. *See* § 163.011(10), RSMo. For example, if a district's assessed valuation decreases, the smaller figure is used to calculate local effort. *Id.* The General Assembly arrived at the $3.43 figure because it was an approximate average of performance district tax levy rates. Tr. 5727-5728. If a school district's tax levy is less than that number, the $3.43 figure is still utilized to determine local effort. *See* § 163.011(10), RSMo. *See also* Tr. 83-84. If a school district's levy is greater than $3.43, the district is allowed to keep the surplus revenue it generates by using a higher levy. *Id.*

A. Aside from the twenty-five percent requirement, Article IX contains no requirement that the General Assembly fund Missouri public schools at any particular level.

As the circuit court held, both the plain language and history of Missouri's Education Article demonstrate that the people of Missouri intended to leave the decision regarding whether to devote more than twenty-five percent of state revenue[21] (see Article IX, § 3(b)) to public education to their General Assembly. CEE's attempt to read a separate funding requirement into Article IX, § 1(a), that would require the General Assembly to provide "adequate" education funding is precluded by the language enacted by Missourians in their Constitution.

Section 1(a) is only one of several constitutional provisions in Article IX that describe how the General Assembly is to establish and fund Missouri's public

[21] CEE has not appealed the circuit court's finding that "under every reasonable method of calculation… defendants complied with the spending requirements contained in Article IX, section 3(b)." L.F. 5323. Thus, this Court need not address that issue. Even if the Court addresses this issue *sua sponte*, it should defer to the trial court's factual findings. *Bd. of Educ. of City of St. Louis*, 271 S.W.3d at 7; *Entertainment Ventures I*, 44 S.W.3d at 385.

schools. When read together, these provisions make it clear that CEE's attempt to find a separate funding requirement in Article IX, § 1(a), is legally incorrect.

Section 1(a) opens Article IX[22] with a broad statement of purpose or aspiration and a basic, more limited instruction to the General Assembly:

> A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the general assembly shall *establish and maintain* free public schools for the gratuitous instruction of all persons in this state within ages not in excess of twenty-one years as prescribed by law.

(Emphasis supplied). Article IX returns to the phrase "establish and maintain" in § 5, which provides that the proceeds of certain funds:

> shall be paid into the state treasury… and sacredly preserved as a *public school fund* the annual income of which shall be faithfully appropriated for *establishing and maintaining* free public schools, and for no other uses or purposes whatsoever.

(Emphasis supplied). Section 3(b) sets forth what the General Assembly may do should it determine that the "free public schools" need more funds:

> In event the public school fund provided and set apart by law for the

[22] Article IX, §§ 1(a), 3(b) and 5 are reproduced at Res. App., p. 34.

> support of free public schools, shall be insufficient to sustain free schools at least eight months in every year in each school district of the state, *the general assembly may provide for such deficiency;* but in no case shall there be set apart less than twenty-five percent of the state revenue, exclusive of interest and sinking fund, to be applied annually to the support of the free public schools.

(Emphasis supplied).

Section 1(a) itself lacks specific instruction to the General Assembly regarding funding. It consists of an introductory or prefatory clause containing a statement of purpose or aspiration ("[a] general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people"), followed by a basic but limited mandate to the General Assembly ("the general assembly shall establish and maintain free public schools for the gratuitous instruction of all persons in this state within ages not in excess of twenty-one years as prescribed by law"). A plain reading of § 1(a) establishes that it does not require any particular level of school funding. Instead, § 1(a) requires only that the General Assembly must provide for free public schools by law. As this Court explained in *Concerned Parents v. Caruthersville School District 18:*

> We are not persuaded by any of the cases decided in other states that we should interpret art. IX, s 1(a) *as directing other than that there*

> *must be public schools in Missouri for which there is no admission charge* (whether called tuition, registration fee or some other name) and no charge for instruction, which means no course fees. The clear meaning of the words used in art. IX, s 1(a), their relationship to each other and the language of the *introductory portion* of the section all indicate that this is the meaning intended.

Concerned Parents v. Caruthersville Sch. Dist. 18, 548 S.W.2d 554, 559 (Mo. banc 1977) (emphasis supplied).[23] Again, § 1(a) contains no provision requiring that the General Assembly appropriate any particular level of funding for Missouri's public schools, whether the level is labeled "adequate" or something else.

The prefatory clause in § 1(a) (described by the Court in *Caruthersville*, *supra*, as its "introductory portion") is merely an expression of the voters' purpose

---

[23] *See also Wright v. Bd. of Educ.,* 246 S.W. 43, 44 (Mo. 1922) ("In view of the beneficent purposes of public education, it was not attempted in the Constitution [of 1875] (article 11) [now, as amended, Article IX] to place any restriction upon legislative action in regard thereto [the establishment of a public school system] other than an age limit within which the rights granted were to be enjoyed.").

in requiring the General Assembly to establish and maintain the free public schools. Well-established principles of statutory construction provide that such introductory language cannot enlarge the meaning of an enactment and should be considered by the court only if the enactment's substantive terms are otherwise ambiguous. *See Lackland v. Walker,* 52 S.W. 414, 430 (Mo. 1899); *Miller v. Wagenhauser,* 18 Mo.App. 11, 1885 WL 7527 at *2-*3 (Mo.App. 1885). The substantive terms of § 1(a), *i.e.*, the "free public schools" clause, are not ambiguous.[24]

[24] This Court has held that similar prefatory language in the preamble to Missouri's Constitution stating that the people of Missouri established their Constitution "with profound reverence for the Supreme Ruler of the Universe, and grateful for His goodness" does not require that all Missourians observe Sunday as a day of worship; because if such an interpretation were to be inferred from the preamble, the preamble would itself violate constitutional provisions prohibiting state-established religion. *State v. Chicago, B. & Q. R. Co.*, 143 S.W. 785, 794 (Mo. 1912). *See also Oliver v. State Tax Comm'n of Missouri,* 37 S.W.3d 243, 251 (Mo. banc 2001).

Recently, the United State Supreme Court, in a case interpreting the Second Amendment to the United States Constitution,[25] addressed the principle that a prefatory clause does not limit the language of the operative clause. In that context, the Court stated:

> The Second Amendment is naturally divided into two parts: its prefatory clause and its operative clause. The former does not limit the latter grammatically, but rather announces a purpose. The Amendment could be rephrased, "Because a well regulated Militia is necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed." Although this structure of the Second Amendment is unique in our Constitution, other legal documents of the founding era, particularly individual-rights provisions of state constitutions, commonly included a prefatory statement of purpose.

District of Columbia v. Heller, --- U.S. ---, ---, 128 S.Ct. 2783, 2789 (2008) (citations omitted). Having concluded that the introductory clause was not the

[25] "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const., Amdt. 2.

operative clause, the Court proceeded to interpret the amendment's operative language; because apart from its "clarifying function" in resolving any ambiguity in the operative clause, "a prefatory clause does not limit or expand the scope of the operative clause." *Id.*

Like the Second Amendment to the United States Constitution, Article IX, § 1(a), is naturally divided into two parts. It, too, could be rephrased, consistent with the framers' intent, as follows:

> Because a general diffusion of knowledge and intelligence is essential to the preservation of the rights and liberties of the people, the general assembly shall establish and maintain free public schools for the gratuitous instruction of all persons in this state within ages not in excess of twenty-one years as prescribed by law.

In other words, § 1(a) mandates what the General Assembly must do ("establish and maintain free public schools") and why ("[a] general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people"). Then section 5 describes how the General Assembly is to establish and maintain free public schools (through a "public school fund"); and § 3(b) provides what the General Assembly "may" do should the public school fund prove insufficient ("provide for such deficiency"). The only substantive constitutional requirement specifying any amount of funding the General Assembly must allocate

to public education is contained in § 3(b) ("but in no case shall there be set apart less than twenty-five percent of the state revenue, exclusive of interest and sinking fund, to be applied annually to the support of the free public schools").[26]

At page 123 of its brief, CEE invokes this Court's decision in *State ex rel. Sharp v. Miller*, 65 Mo. 50, 1877 WL 9120 (Mo. 1877), in support of its claim that § 1(a) contains a substantive funding requirement. In *Sharp*, the Court was asked to interpret the Constitution of 1865. *Sharp*, 1877 WL 9120 at *2. Article IX, § 8, of the 1865 Constitution provided as follows:

> In case the public school fund shall be insufficient to sustain a free school, at least four months in every year, in each school district in this state, the general assembly may provide by law for the raising of such deficiency, by levying a tax on all the taxable property in each county, township or school district as they may deem proper.

See CEE Brief at pp. 75-76, 92. The twenty-five percent mandate currently set forth in Article IX, § 3(b), did not exist until the Constitution of 1875. *See* CEE App., Vol. 1, p. 128.

In *Sharp*, a taxpayer complained that the General Assembly violated the Constitution of 1865 by enacting a tax increase to fund schools that was *larger*

[26] This is the conclusion reached by Judge Callahan. L.F. 5322-5323.

than the Constitution allowed. *Sharp*, 1877 WL 9120 at *2. The Court held only that this language did not *prevent* the general assembly from authorizing "a larger tax… than was necessary to make up what the school fund might lack to maintain a free school at least four months in every year, in each school district in the State." *Id.* The Court determined that the provision provided the General Assembly the "right" to "provide the means for maintaining such schools for a longer period than four months"; it did not impose an obligation to do so. *Id.* Thus, this Court's holding in *Sharp* that Article IX (as it then existed) did not constrain the General Assembly's discretion in matters of school funding actually undermines CEE's claim.[27]

In a concurring opinion issued during CEE's last round of school finance litigation, one member of this Court, with another concurring, considered and

[27] The circuit court found that although the "dicta" in *Sharp* cited by CEE "offers strained support for plaintiffs," its holding "also supports the power and discretion of the general assembly to determine for itself the level of public school funding[.]" L.F. 5318. As noted at pp. 29-30, *supra*, this conclusion is further buttressed by the last three words of § 1(a), "as prescribed by law."

expressly rejected CEE's claim that the first clause of § 1(a) creates a substantive funding obligation separate from the twenty-five percent mandate contained in § 3(b). He wrote:

> [T]he trial court's judgment assumes that section 1(a) creates a substantive funding obligation in the General Assembly that exists independent of the twenty-five percent requirement of article IX, section 3(b). I believe the trial court's judgment misreads the constitution .... In my view, section 3(b) establishes a constitutional presumption that twenty-five percent of state revenues is adequate for purposes of funding the free public schools. To the extent that the General Assembly wishes to appropriate more than twenty-five percent of state revenues for that purpose, it reflects a discretionary policy choice in the legislative body to apply state resources in that manner and for that purpose.

Comm. for Educ. Equality, 878 S.W.2d at 458 (Robertson, J., concurring).

Article IX, § 1(a), by its terms does not require that the General Assembly financially maintain the public schools at some particular level. The Jeffersonian "general diffusion" language found in the first clause of § 1(a) only posits a general principle. Provided the General Assembly has satisfied the twenty-five percent requirement of § 3(b), the Constitution leaves it to the General Assembly

to determine the proper manner to provide for the public school system "as prescribed by law."

B. Missouri voters have demonstrated their ability to create an adequacy standard when they desired to do so.

An examination of various other provisions in the Missouri Constitution further demonstrates that Article IX was not intended by Missouri voters to require "adequate" public education funding. These provisions establish conclusively that when Missouri citizens wanted to create an adequacy standard, they used the word "adequate." *See, e.g.*, Article III, § 38(b) (providing for the appropriation of funds for the "adequate support for the commission of the blind"); Article III, § 46 (instructing the General Assembly to "provide for the organization, equipment, regulations and functions of an adequate militia"); Article IV, § 35 (directing the General Assembly to provide the Department of Agriculture "with funds adequate for administration of its functions"). Most importantly, Missourians have demonstrated their ability to require the General Assembly to provide "adequate" education funding when this was their intent: Article IX, § 9(b), of Missouri's Constitution directs the General Assembly to "adequately maintain the state university and such other educational institutions as it may deem necessary." This Court should not imply a requirement of "adequate" funding in Article IX, § 1(a), when Missouri voters have repeatedly demonstrated their ability to use words to

clearly express their intent to impose such a requirement when they wanted to do so.

C. The framers of the 1945 Constitution intended to allow the General Assembly broad discretion regarding how to establish and maintain the free public schools.

CEE bases the bulk of its argument that Article IX requires the State to "adequately" fund public education on debates occurring during Missouri's Constitutional Conventions. CEE Brief at pp. 74-101. None of the delegates to the 1944 debates preceding the Constitution of 1945 expressed the view that the prefatory clause of Article IX, § 1(a), was intended to impose a substantive funding standard or to supersede § 3(b)'s twenty-five percent requirement. Instead, the framers of the Constitution expressed a clear intention to provide the General Assembly broad discretion in the administration of Missouri schools.

At the Convention, Mr. Nacy proposed an amendment striking the introductory clause. Nacy's proposed amendment was rejected and the language of the introductory clause retained, but not because it created a substantive funding standard. In fact, the framers intended that the language only to set forth Jefferson's famous rationale for a free public school system:

> Mr. Nacy: My idea is that this Constitution or no law could diffuse intelligence. I realize it's in the Constitution of 1875, but I do

not believe that we can instill intelligence in anybody. I think it is desirable, yes, but for the purpose of brevity I think that those two and one-half lines add nothing to this section. By striking them out, it will take nothing out of the section. I mean, it will leave the meat of the section, and it would eliminate some words out of what otherwise might be a long constitution. I don't know what good those words do in this section, so, therefore, I am asking that they be stricken out....

Mr. Phillips (of Jackson): Mr. President, I am very much surprised at my good friend, Nacy, trying to eliminate from our fundamental document the immortal words of Thomas Jefferson.... I personally would be very much chagrined if, in the interest of brevity, we left those immortal words out of our Constitution. The Committee considered it well; thought they were eloquent and left them in there....

Mr. Nacy: Mr. Phillips, if this amendment is carried ... [w]hat could the Legislature or the people of Missouri do under Section 1 of this proposal now that they could not do if this amendment is carried?

Mr. Phillips (of Jackson): Not a thing....

Mrs. Hargis: Mr. President, I very much object to those words being left out of the Constitution, this declaration of rights. This

> represents seven thousand years of upward trends of our nation, and when our forefathers embodied this in the first Constitution, when William Pitt, then the Prime Minister of England, read the declaration of rights in the first Constitution, he said, "this Constitution will be the wonder and admiration of our future generations and the model of our future Constitutions." When I was just a young girl studying history, I liked to read that. It thrilled my heart, and I would like to have it repeated in history and government and teachings. I certainly wish it be retained in our report.
>
> Mr. Shepley: Mr. President, I arise to support Mr. Nacy's amendment. Could anyone, for one moment, question the purpose of this sentence: "The General Assembly shall establish and maintain free public schools for the gratuitous instruction of all person in this state." etc. Why is it necessary to try to explain a thing like that which is so very obvious? I don't believe the Constitution is the place to put the reasons why you adopt this provision....

1945 Constitutional Debates, Vol. VIII at 2336-38 (April 28, 1944), reproduced at Res. App., pp. A37-A39.

The framers never suggested that the prefatory clause of § 1(a) contained anything more than an explanation of why Missouri should choose to establish free

public schools. Instead, the debate concerned whether the Constitution should contain such an explanation. The decision of how to implement the Constitution's requirement to "establish and maintain" the free public schools was left to the General Assembly.[28]

[28] Moreover, assuming, *arguendo,* that the Missouri Constitution contains an implicit "adequacy" requirement, there is no evidence to suggest that the framers equated "adequacy" with MAP test "proficiency" (as that term would be used a half century later), as Plaintiffs suggest. It would be imprudent to define a Constitutional "adequacy" standard based on subjective and constantly changing assessments and performance targets. *See* Tr. 7376-7377.

IV. THE MISSOURI CONSTITUTION DOES NOT BAR THE GENERAL ASSEMBLY FROM ASSIGNING PRIMARY RESPONSIBILITY FOR SCHOOL FACILITIES, TRANSPORTATION, AND EARLY CHILDHOOD EDUCATION TO LOCAL SCHOOL DISTRICTS. THE GENERAL ASSEMBLY'S DECISION TO PROVIDE STATE SUPPORT IN THESE AREAS REPRESENTS A POLICY DETERMINATION WITHIN ITS DISCRETION (RESPONDING TO CEE'S THIRD POINT RELIED ON).

CEE maintains that Missouri's Constitution requires the General Assembly to "adequately" fund school facilities, early childhood education programs,[29] and student transportation. Yet, CEE cites no authority, constitutional or otherwise, in support of the claim that the Missouri Constitution requires those expenditures.[30]

---

[29] *Amici curiae* Citizens for Missouri's Children, et al., also make this claim. *See Amici Curiae* Brief of Citizens for Missouri's Children and Missouri Child Care Resource and Referral Network.

[30] In partial response to CEE's one-side recitation of the evidence adduced at trial, State Defendants would direct the Court's attention to the testimony of Dr. John Murphy, who observed "focus district" schools and testified that, with the

Moreover, as noted above, the Missouri Constitution contains no requirement that the State provide any amount of funding, for any purpose, beyond the mandate in Article IX, § 3(b).[31] "The state constitution, unlike the federal constitution, is not a grant of power, but as to legislative power, it is only a limitation; and, therefore, except for the restrictions imposed by the state constitution, the power of the state legislature is unlimited and practically absolute." *Americans United*, 538 S.W.2d at 716. *See also Fust v. Attorney General*, 947 S.W.2d 424, 430 (Mo. banc 1997) ("Absent a prohibition, the general assembly's legislative power is plenary.").

The decision of whether and to what extent Missouri should allocate funds to preschool, transportation, and facilities is left to the General Assembly.[32]

---

exception of one school that was recovering from a tornado, all focus district schools were sufficient to provide an adequate education. Tr. 6802-6803.

[31] *See* pp. 36-45, *supra.*

[32] The State does provide some support in these areas. *See* Tr. 1600-1601, 3017-3018, 3528-3531, 7868, 7884-7888; §163.161, RSMo; § 161.213, RSMo.

V. THE CIRCUIT COURT CORRECTLY HELD THAT MISSOURI'S SCHOOL FUNDING SYSTEM DOES NOT VIOLATE ITS CONSTITUTIONAL PROMISE OF EQUAL PROTECTION (RESPONDING TO CEE'S SECOND POINT RELIED ON).

This Court has held that if "a particular constitutional amendment provides specific protection for the right asserted… the alleged violation will be analyzed under that amendment." *Doe v. Phillips*, 194 S.W.3d 833, 843 (Mo. banc 2006). Thus, this Court need not conduct an equal protection analysis as CEE suggests but instead should look to Missouri's Education Article. *See Phillips*, 194 S.W.3d at 843, 845 (refusing to analyze claim that sex offender registration statute requirements affected alleged fundamental liberty and privacy interests under "amorphous concepts of substantive due process" and evaluating equal protection claims under rational basis test because plaintiffs identified no other fundamental right allegedly infringed).

As set forth above, Article IX does not require some level of "adequate" education funding above the minimum state revenue allocation specified in § 3(b). Nor does the Constitution guarantee "equity" in per-pupil expenditures between

school districts. Accordingly, the trial court correctly found that Missouri's school funding system does not violate Article I, § 2 of the Missouri Constitution.[33]

A. Missouri voters have expressly enacted in their Constitution a school funding system that does not require each district to fund schools at the same level.

When the voters approved the Constitution of 1945, they elected to leave unchanged the prefatory clause upon which CEE bases its claims. Thus, Missourians understood in 1945 that they were enacting a provision that permitted continuation of the existing education system, despite its reliance on local funding and the resulting differences in funding levels among districts – differences due to variations in tax bases, enrollments, and levies, among other factors.

In fact, Missouri voters have, from time to time, approved constitutional amendments that necessarily resulted in unequal school funding. For example, in Article IX, § 7, of the 1945 Constitution, Missouri created county school funds.

---

[33] In the trial court, CEE also argued that Missouri's school funding system violates the equal protection clause of the federal Constitution. The district court determined correctly that this argument is foreclosed by the decision of the United States Supreme Court in *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973). *See* L.F. 5325-5326.

The pre-existing county and township school funds were required to liquidate their property and reinvest the proceeds in county school funds. Income from the county school fund was to be distributed on a county wide basis. *See State ex rel. School Dist. of Fulton v. Davis*, 236 S.W.2d 301 (Mo. 1951). Those who enacted the Missouri Constitution had no reason to believe that the liquidation of property in each county would have created a school fund in proportionate share to the number of students in the various districts across the state; nor was there any reason to believe that the investments made by each such fund would produce equalized per-pupil educational expenditures from one county to the next. The same may be said for revenue school districts derive from fines and forfeitures. *See* Article IX, § 7. Hence, one of the funding streams for public education established by the Missouri Constitution operates to produce the very type of inequalities about which CEE complains.

Missourians have shown through their voting record that they do not expect that each public school student will receive equivalent educational expenditures. For example, Article X, § 11(b), specifically authorizes different tax rates for school districts without any apparent concern that those tax rates will inevitably result in unequal per student educational expenditures between districts. Similarly, Article X, § 11(c), authorizes school districts, by a vote of the patrons, to authorize widely varying tax levies. No reasonable person voting to enact this constitutional

provision could have expected that tax rates would have remained the same in the multitude of school districts across the state or that the varying tax rates would produce roughly equal or, absent legislative intervention, "equitable" per-pupil educational expenditures.

In fact, more than one hundred years ago Missouri voters removed the only equality standard that has ever been in our Education Article. The Constitution of 1865[34] required the General Assembly to incorporate, "as far as it can be done without infringing upon vested rights," all local school funds into the state public school fund and, when making annual distributions of the public school fund, to "take into consideration the amount of any county or city funds appropriated for common school purposes, and make such distributions as will equalize the amount appropriated for common schools throughout the State." *See* Mo. Const. 1865, Article IX, § 9. Neither this language nor any equivalent language appears in the 1875 or subsequent Constitutions. Rather, the 1875 Constitution provided that the income from the county school funds should be appropriated for establishing and maintaining free public schools in the several counties. *See* Mo. Const. 1875, Article XI, § 8.

[34] Article IX, § 9, of the Constitution of 1865 and Article XI, § 8, of the Constitution of 1875 are reproduced at Res. App., pp. A35-A36.

The removal of the 1865 Constitution's equalization language demonstrates the 1875 voters' intention that funds from various revenue sources need not be equalized among the state's school districts and a commitment by Missourians to finance public schools only partially with state funds. The commitment to continue financing public schools with local and state funds remained in the 1945 Constitution, and remains in our Constitution today. *See, e.g.,* Article IX, §§ 1(a), 3(b) and 5 (public school fund) and Article IX, § 7 (county school funds). CEE's suggestion that this Court should find an implicit requirement of "equitable" education funding is contrary to the expressed intentions of Missourians who voted to remove such a requirement more than one hundred years ago.

B. "Adequate" or "equitable" school funding is not a fundamental right.

Equal protection "must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantages to various groups or persons." *Romer v. Evans,* 517 U.S. 620, 631 (1996), *quoted with approval in Phillips,* 194 S.W.3d at 845. Thus, "not all distinctions in treatment of individuals or groups are invalid." *Phillips,* 194 S.W.3d at 845. Instead, only if "the law 'disadvantages a suspect class' or affects a 'fundamental right'" must the court apply strict scrutiny to determine "'whether the statute is necessary to accomplish a compelling state interest' and whether the chosen

method is narrowly tailored to accomplish that purpose." *Id.* (quoting *In re Marriage of Woodson,* 92 S.W.3d 780, 784 (Mo. banc 2003)). Otherwise, the Court analyzes the law under the rational basis test, "under which the statute will be upheld 'so long as it bears a rational relation to some legitimate end.'" *Id.* (quoting *Romer,* 517 U.S. at 631).

In addition to remarks made during Constitutional Convention debates,[35] CEE cites decisions of this Court, the Court of Appeals, the Circuit Court of Cole County,[36] and courts in other states[37] in support of its claim that this Court must

---

[35] This argument was addressed at pp. 46-49, *supra.*

[36] *Committee for Educational Equality v. State,* No. CV190-1371CC, reproduced at CEE App., Vol. 1, pp. 34-126.

[37] *Amici curiae* Missouri School Boards' Association, et al., also invoke decisions of courts in other states. *See Amici Curiae* Brief of Missouri School Boards' Association, Education Justice at Education Law Center, the National School Boards Association, and the Rural School and Community Trust. Of course, the interpretation of other states' constitutions is not before this Court.

In addition, at pages 121-22 of its brief, CEE cites a provision of the Texas Constitution providing that "[o]ne-fourth of the revenue derived from the State occupation taxes shall be set apart annually for the benefit of free public schools."

strictly scrutinize Missouri's school funding system. None of these authorities provide support for CEE's position.

The Supreme Court of Texas has described this constitutional provision as "a rather patched up and overly cobbled enactment," *Shepherd v. San Jacinto Junior College Dist.*, 363 S.W.2d 742, 744 (Tex. 1962), and noted that it has been "cited as an example of how not to write a constitution" because "it is a single sentence of 393 words" and "retains obsolete provisions such as the poll tax and state ad valorem tax, and covers subjects as disparate as the provision of free text books and the procedure for forming school districts," *Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood,* 826 S.W.2d 489, 503 (Tex. 1992). Thus, as CEE points out in its brief, the existence of this provision "has never been considered or advanced as a defense in school funding litigation in Texas." CEE Brief at p. 122. In contrast, this Court has twice stated that Article IX, § 1(a), requires only that public education must be provided at no charge, *Caruthersville,* 548 S.W.2d at 559; *Wright,* 246 S.W. at 44, and two members of this Court have concluded that the Article IX, § 3(b), creates the only substantive funding requirement in Missouri's Education Article. *Comm. for Educ. Equality,* 878 S.W.2d at 458 (Robertson, J., concurring).

This Court has never held that an "adequate" or "equitable" education is a fundamental right. In *Caruthersville,* the case CEE cites for that conclusion, this Court was merely asked to determine whether the requirement in Article IX, § 1(a), that "the general assembly shall establish and maintain free public schools for the gratuitous instruction of all persons in this state within ages not in excess of twenty-one years," prohibited Missouri public school districts from charging registration fees. *Caruthersville,* 548 S.W.2d at 556, 558. The Court was not asked to rule upon an equal protection challenge or determine whether "adequate" or "equitable" education funding is a fundamental right. *Id.*

Moreover, the dicta CEE cites in support of its claim, "the state accepted the Jeffersonian concept that education is fundamental to democracy and that the state should assume the primary educational role," *Caruthersville,* 548 S.W.2d at 558, does not support its arguments that "adequate" or "equitable" funding is a fundamental right under the Missouri Constitution. At most, *Caruthersville* stands for the proposition that the State must provide all children public education at no cost because universal access to education is a fundamental right. As the Court explained:

> We are not persuaded by any of the cases decided in other states that we should interpret art. IX, s 1(a) as directing other than that there must be public schools in Missouri for which there is no admission

> charge (whether called tuition, registration fee or some other name) and no charge for instruction, which means no course fees. The clear meaning of the words used in art. IX, s 1(a), their relationship to each other and the language of the introductory portion of the section all indicate that this is the meaning intended…. Accordingly, we hold that art. IX, s 1(a) prohibits a school district from charging registration fees or fees in courses for which academic credit is given.

Caruthersville, 548 S.W.2d at 562. Thus, *Caruthersville*, which interpreted Article IX, § 1(a), as directing nothing other than that there must be tuition-free public schools in Missouri *undermines* CEE's claim that § 1(a) contains an additional requirement that the State fund schools at a level sufficient to provide a "general diffusion of knowledge and intelligence."

Nor does *Weinshenk* support CEE's position. That case did not address Missouri's school funding laws. The issue before the Court was whether a statute requiring residents to produce certain types of government-issued identification as a prerequisite to voting unconstitutionally interfered with some qualified voters' right to cast ballots. *Weinshenk v. State*, 203 S.W.3d 201, 204 (Mo. banc 2006). The Court held that because the identification requirements imposed a "heavy burden" on the right to vote and were not narrowly tailored to meeting the State's

compelling interest in combating voter fraud, the statute was unconstitutional. *Id.* at 215-17.

In reaching its decision that the statute must be analyzed under strict scrutiny, the Court noted that unlike the federal Constitution, Missouri's Constitution not only guarantees qualified voters the right to vote, but explicitly and exhaustively sets forth voter qualifications. *Id.* at 211-12 ("the qualifications for voting under the federal system are left to legislative determination, not constitutionally enshrined, as they are in Missouri"). In contrast, Missouri's Constitution expressly delegates the decision of whether to provide additional State funding above twenty-five percent of state revenue to the discretion of the Missouri legislature. Article IX, §3(b) ("the general assembly may provide for such deficiency"). Thus, *Weinshenk* does not support CEE's position.

Decisions of the Court of Appeals also fail to provide persuasive authority for CEE's claims. In *Roberts,* the Court of Appeals held that a writ should issue to compel a public school to issue a graduation certificate withheld because the student had not paid tuition. *State ex rel. Roberts v. Wilson,* 297 S.W. 419, 420 (Mo. App. 1927). Like the dicta CEE cites from *Caruthersville,* the language CEE cites in support of its position, "[t]he right of children, of and within the prescribed school age, to attend the public school established in their district for them is not a privilege dependent upon the discretion of any one, but is a fundamental right,

which cannot be denied, except for the general welfare," *Roberts*, 297 S.W. at 420, stands, at most, for the proposition that Missouri students have a fundamental right to attend a public school at no cost.

The same may be said for *Fowler*, in which the Court of Appeals held that children who did not reside within a school district were *not* entitled to attend that district's public schools without paying tuition to the district. *Fowler v. Clayton Sch. Dist.*, 528 S.W.2d 955, 959 (Mo. App. 1975). The language at issue, "[b]ut even though children of school age have a fundamental right to attend the public school, this right is to attend the public school established in their district," *Fowler*, 528 S.W.2d at 959, stands, at most, for the proposition that Missouri children have a fundamental right to attend a public school in a district in which they reside. Neither Court of Appeals decision provides support for CEE's much broader claim that the Missouri Constitution contains a fundamental right to "adequate" or "equitable" school funding.

Finally, CEE's invocation of the 1993 Cole County case is bewildering. In its decision dismissing an appeal of the 1993 circuit court decision for lack of appellate jurisdiction, this Court expressly refused to decide CEE's constitutional claims and determined that the circuit court decision could be afforded no preclusive effect: "Because the judgment here is subject to modification, and because the state has done all within its power to seek appellate review, *res*

judicata principles will not apply to make the trial court's decision, as it now exists, preclusive of issues in future litigation." *Comm. for Educ. Equality*, 878 S.W.2d at 454. In fact, none of the cases cited by CEE provide any authority for its claim that "adequate" or "equitable" education funding is a fundamental right.[38] Were this Court to adopt that conclusion, it would be entirely unprecedented in Missouri.

C. Missouri's system of public school funding does not disadvantage a suspect class.

CEE suggests that Missouri's school funding system is unconstitutional because low property value districts cannot raise or spend as much local money on the education of their students as property wealthy districts. However, wealth is not a suspect classification requiring strict scrutiny:

---

[38] CEE also argues that the designation in Article III, § 36, of education is the "first priority" after payment of the sinking fund and interest demonstrates the "primacy of public education." CEE Brief at pp. 104-05. This provision lists only the order in which appropriations bills are to be presented. In *State ex rel. Fath v. Henderson*, 60 S.W. 1093 (Mo. 1901), this Court explained that the provision's predecessor did not "create special liens upon the moneys in the treasury, or give any priority of payment to one appropriation over another." *Id.* at 1096.

> A suspect classification exists where a group of persons is legally categorized and the resulting class is "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."

Missourians for Tax Justice Educ. Project v. Holden, 959 S.W.2d 100, 103 (Mo. banc 1997) (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973)). Neither school districts (which are not persons at all) nor persons living in school districts with low property wealth (who are not classified at all by Missouri's school funding laws) are saddled with such disabilities so as to relegate them to a position of political powerlessness such that they require extraordinary protection from the political process. And there is no evidence to suggest that only poor people live in such districts.[39] But even if that were the case, classifications based on wealth or poverty do not constitute suspect classifications. *Id.*

[39] Although not constitutionally required, the evidence at trial demonstrated conclusively that Missouri spends far more of its educational dollars in districts with low property wealth than in districts with high property wealth. *See* Tr. 6128-6129, 7891-7892.

D. CEE's claims cannot be evaluated under strict scrutiny analysis.

Although CEE argues at pages 130-32 of its brief that strict scrutiny is appropriate in this case, it provides no explanation of how the Court might undertake such an analysis. This omission is understandable: Even if "adequate" or "equitable" education is a fundamental right, legislative enactments that affect education cannot be judged under traditional strict scrutiny analysis.

Strict scrutiny applies when a fundamental right is being impinged and the State is attempting to *justify* the impingement. *See Katzenbach v. Morgan*, 384 U.S. 641, 657 (1966) ("[T]he principle that calls for the closest scrutiny of distinctions in laws denying fundamental rights… is inapplicable; for the distinction challenged by appellees is presented only as a limitation on a reform measure aimed at eliminating an existing barrier to the exercise of the [fundamental right to vote]."). Thus, in *Weinshenk,* for example, after first determining that the right to vote is fundamental and that the statute at issue burdened that right, the Court applied strict scrutiny to determine whether the identification requirements were necessary to accomplish a compelling state interest. *Weinshenk,* 203 S.W.3d at 217. The Court found that the State has a compelling interest in combating voting fraud but determined that the statute

violated equal protection because the identification requirements were not necessary to accomplish that end. *Id.*

This Court has not applied traditional strict scrutiny to a "positive" constitutional right, and it is difficult to imagine how the Court could undertake such an analysis in this case. Assuming, *arguendo*, that an "adequately" or "equitably" funded education is a fundamental right, the next step in traditional "strict scrutiny" would be to ascertain whether SB 287's "restrictions" somehow burden that right. Here, the challenged legislation does not restrict any right. Instead, it merely provides a mechanism for the distribution of State aid to local school districts. Moreover, because it is not possible to ascertain in what way the State has burdened any student's alleged fundamental right to an "adequate" or "equitable" education, the Court cannot complete its analysis by determining whether some compelling state interest justifies the non-existent restriction and whether the State may accomplish that end using less-restrictive means. *See Phillips*, 194 S.W.3d at 845.

The General Assembly's policy choices about how best to structure and fund Missouri's public education system are not appropriately evaluated using strict scrutiny. Instead, when, as here, the State legislates in an area that merely relates to a positive right (without actually denying anyone the right), even if that right is deemed to be fundamental, its action is given the traditional deference owed to the

coordinate branches of government. *Phillips*, 194 S.W.3d at 844-45; *Katzenbach*, 384 U.S at 657; *Weinschenk*, 203 S.W.3d at 212. The Court should reject CEE's invitation to attempt to drive its round equal protection claims through strict scrutiny's square hole and defer to the General Assembly's decision regarding how to best distribute state aid to Missouri's school districts.

E. Missouri's school funding system is rationally related to a legitimate state objective.

SB 287 bears a rational relation to a legitimate state end. "The statute is presumed to have a rational basis, and this presumption will only be overcome by a 'clear showing of arbitrariness and irrationality.'" *Snodgras,* 204 S.W.3d at 641 (quoting *Fust,* 947 S.W.2d at 432). This Court will uphold a statute "if any state of facts reasonably may be conceived to justify it." *McGowan v. Maryland*, 366 U.S. 420, 425 (1961), *quoted with approval in Mahoney v. Doerhoff Surgical Servs.*, 807 S.W.2d 503, 512 (Mo. banc 1991).

Missouri's school funding system easily passes this test. In the Spring of 2003, the Missouri General Assembly formed a Joint Interim Committee on Education ("Committee"). Tr. 5702. The Committee heard testimony from experts in school finance. Tr. 5702. School districts, school superintendents, and representatives of teachers' groups also made presentations to the Committee. Tr. 5702. Even counsel for CEE testified. Tr. 5705. After hearing all of this

testimony, the Committee decided that Missouri should move from a tax-rate driven school funding formula to a student-need based formula. Tr. 5705. Based on the testimony from school finance experts, the Committee decided that the successful schools model codified in SB 287 was the best means to accomplish this end. L.F. 5710-5711.

Using this model, the General Assembly identified its desired outcome using an existing and ascertainable measure of student success; determined, based on average expenditures of Missouri schools already performing at the desired level, the amount of spending capable of achieving the desired outcome; added adjustments for potential additional costs associated with inter-district differences in student characteristics, enrollment and cost of living; accounted for variations in districts' ability to raise revenue locally; and appropriated funds accordingly. *See* pp. 6-7, 32-35, *supra.*

SB 287 is not an irrational or arbitrary act. The legislation represents the culmination of nearly two years of intense consideration and debate within the legislature[40] regarding the most appropriate way to fund Missouri's public schools and, by the time of trial, had already injected over one hundred million additional

[40] *See also* section IV of State Defendants' Brief Responding to Tax Assessment Issues.

dollars into Missouri's public school system. Tr. 5810, 6887. Accordingly, CEE's equal protection challenge should be rejected.

VI. THE CIRCUIT COURT CORRECTLY DISMISSED PLAINTIFFS' HANCOCK AMENDMENT CLAIMS (RESPONDING TO CEE'S FOURTH POINT RELIED ON).

The circuit court held that any Plaintiffs who have standing[41] to assert claims under Article X, §§ 16-24, of the Missouri Constitution ("Hancock Amendment") failed to introduce sufficient evidence to prove a violation. L.F. 5332-5334. In this regard, this Court should defer to the judgment of the trial court. *Bd. of Educ. of City of St. Louis*, 271 S.W.3d at 7; *Entertainment Ventures I*, 44 S.W.3d at 385. As the circuit court stated:

> In *Fort Zumwalt Sch. Dist.*, [this Court] held that in order to establish a Hancock violation premised on a Pre-existing Mandate, plaintiffs "must present evidence to establish the program mandated by the state in 1980-81 and the ratio of state to local spending for the mandated program in that year," and further prove "the 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." *Fort Zumwalt Sch. Dist.*, 896 S.W.2d at 922. The calculation of a

[41] As noted at pp. 18-22 above, only individual taxpayer Plaintiffs have standing to assert Hancock Amendment claims.

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.* The Court noted that "[p]roviding these factors for 1980-81 and each subsequent year will require sophisticated budgetary evidence and economic expertise." *Id.* at 923.

L.F. 5331-5332. Furthermore, the circuit court noted that in order to prove a violation of the Hancock Amendment premised on a "New Mandate":

> [P]laintiffs must identify a new or expanded activity required by state law, establish with "specific proof" that the new mandated activity increases the school district's costs, and prove that the State does not provide funding for the program. *See Brooks v. State of Missouri*, 128 S.W.3d 844, 848-49 (Mo. banc 2004) (*quoting Miller v. Director of Revenue*, 719 S.W.2d 787, 789 (Mo. banc 1986)) ("these elements cannot be established by mere 'common sense,' or 'speculation and conjecture'"); *Division of Employment Security v. Taney County District R-III*, 922 S.W.2d 391, 395 (Mo. banc 1996) (plaintiffs must make a "specific factual showing" of increased costs associated with a new or expanded activity); *City of Jefferson v. Missouri Department*

of Natural Resources, 863 S.W.2d 844, 848 (Mo. banc 1993) (*City of Jefferson I*) (courts will not presume increased costs based solely on evidence of a requirement of an expanded activity).

L.F. 5332-5333.

A. Plaintiffs failed to prove a violation of the Hancock Amendment.

Plaintiffs failed to establish a violation of the Hancock Amendment premised either on a "Pre-Existing Mandate" or a "New Mandate." At pages 144-46 of its brief, CEE argues that the State decreased the percentage of school districts' "allowable transportation costs" and imposed new performance and accountability standards in 1993. CEE offers no accounting of the costs districts actually incurred, the ratio of state to local spending in real dollars, or the portion of any alleged cost increases due to state mandates, rather than local decisions. Furthermore, even if CEE's evidence consisted of the sophisticated budgetary analysis required, CEE presented no evidence of any school district's costs in 1980 and whether the ratio of state to local funding for any particular mandated program, excluding discretionary spending, has changed since that time.

CEE also failed to prove a violation of the Hancock Amendment premised on any New Mandate. In order to prove such a claim, CEE must first identify a new or expanded activity *required* by state law. *Miller,* 719 S.W.2d at 788.

However, the State of Missouri delegates control of virtually all aspects of public education to local school districts. Tr. 6020-6023. To be sure, a school district's eligibility for state aid is contingent upon its compliance with a certain standards governing, for instance, the minimum length of the school year, *see* § 163.021, RSMo; however, state aid is *not* contingent on compliance with accountability and performance standards promulgated pursuant to Senate Bill 380.[42] Thus, any costs

[42] Moreover, SB 287 provides that any school district may elect to exempt itself from virtually all State requirements provided the district agrees to forgo state aid. Although Plaintiffs attempted to characterize various requirements of the federal No Child Left Behind Act ("NCLB"), 20 U.S.C. § 6301, *et seq.*, as State mandates, SB 287 provides that option districts "may choose not to comply with any requirements of federal law and any funding attached to such requirements, provided that such noncompliance is not prohibited under federal law." § 163.042, RSMo. Hence, Missouri law recognizes the continuing applicability of the Supremacy Clause to school districts in Missouri. NCLB requires that any state wishing to receive federal education grants must submit to the Secretary of Education a state plan demonstrating that the state has implemented annual assessments meeting certain specifications. 20 U.S.C. § 6311(b)(3)(A). State assessment ("MAP") administration is mandatory; however, the fee Missouri

associated with such new standards are not "required" by State law. *See Miller*, 719 S.W.2d at 788; *Citizens for Rural Preservation, Inc. v. Robinett*, 648 S.W.2d 117, 131 (Mo.App. W.D. 1982).

Moreover, even assuming that performance and accountability standards imposed by the State in 1993 constitute new mandates, CEE presented no "specific proof" of any increase in any district's costs[43] associated with any of these standards and no evidence that the State has not provided funding sufficient to reimburse any district for these additional costs. In fact, CEE admits that State funding to schools increased with the passage of Senate Bill 380 in 1993, CEE Brief at p. 145, but offers no accounting of the additional funds districts received

---

school districts pay for the state assessment has remained constant or declined since the program's inception. Tr. 6014-6016.

[43] This Court has consistently held that the remedy for a Hancock violation is not statewide, but is instead limited to those jurisdictions for which evidence of the Hancock violation is presented. *See Brooks*, 128 S.W.3d at 850; *City of Jefferson v. Missouri Dept. of Natural Resources*, 916 S.W.2d 794, 795 (Mo. banc 1996). Thus, Plaintiffs were required to present district-by-district proof to make Hancock claims.

and whether the additional funds were sufficient to offset any cost increases caused by these allegedly new mandates. CEE has failed to establish any violation of the Hancock Amendment.

B. The relief CEE seeks is not available.

Finally, even if CEE had met its burden of proof, the Hancock Amendment does not provide the relief it desires. In *Fort Zumwalt,* this Court held that a judgment ordering an increase in state spending is both barred by the doctrine of sovereign immunity and unavailable under the Hancock Amendment. *Fort Zumwalt*, 896 S.W.2d at 922-23. The Court observed that Hancock's purpose, "to limit expenditures by state and local government," would be thwarted by "a judgment requiring the state to spend more money." *Id.* at 923. Accordingly, the Court ruled that the remedy available for a violation of the Hancock Amendment is a "declaratory judgment relieving a local government of the duty to perform an inadequately funded required service or activity." *Id.*

As CEE acknowledges in its brief, "Appellants seek a declaratory judgment with respect to the unfunded mandates – not a decision which indicates that the school districts are free not to provide the activities required under the unfunded mandate." CEE Brief at p. 148. Such a judgment is not available under the Hancock Amendment.

VII. THE TRIAL COURT DID NOT ERR IN PERMITTING THE INTERVENTION OF DEFENDANTS SINQUEFIELD, SCHOCK AND SMITH (RESPONDING TO CEE'S FIFTH POINT RELIED ON)

The Plaintiffs urge this Court to reverse the decision of the trial court of November 8, 2006, allowing Defendant Intervenors leave to participate in the defense of this matter.[44] On November 8, 2006, the trial court allowed Intervenor Defendants to participate in the defense of the underlying lawsuit. The court granted the Motion to Intervene under Rule 52.12(b).[45] From that point forward, the Intervenor Defendants fully participated in the defense of this matter and at the close of evidence, the State Defendants adopted, without objection, the evidence presented by Intervenor Defendants. L.F. 8543. On December 2, 2007, in the course of argument on a post-trial motion to amend judgment, the essential purpose of which was to exclude the Intervenor Defendants from further participation in

[44] The State Defendants do not join in the arguments raised in this section.

[45] The Court rejected the Motion to Intervene under Rule 52.12(a) and specifically rejected claims that the interest of the State was not being adequately represented by the Office of the Attorney General. L.F. 3836.

this matter, counsel for CEE stated that he would not seek to strike the evidence presented by Intervenor Defendants. Res. App., p. A174.

As an initial matter, the judgment from which the Plaintiffs appeal did not address the motion to intervene. Therefore, in actuality what Plaintiffs seek to appeal is the November 8, 2006, order allowing the intervention. Since Plaintiffs did not appeal that ruling, they waived their right to object to that decision.[46]

In denying Plaintiffs' Motion to Amend, Judge Callahan explained why he granted the Motion to Intervene. He stated in relevant part:

> At the time, I thought that, perhaps, I had the discretion. And at least what was going through my mind is that early in the litigation, the number of plaintiffs and the array of lawyers on the one side seemed to – not that the State of Missouri can't take care of itself – but when I counted lawyers, there always seemed to be a few more on plaintiffs' side than there were on the State's side. And the State has the obligation of defending a lot of things….
>
> I don't know that I would ever do it again, but this case had such statewide significance. It was a peculiar case, and I thought that the lawsuit, that the record and the Court would benefit from the

[46] Plaintiffs did not appeal this decision. L.F. 5422-6151.

> intervention…. I thought at least in this case, this was a very peculiar, special case, and I though it benefited from one other voice on the other side of the issues.

Res. App., pp. A189-A191.

Intervenor Defendants respectfully submit that the court was correct in its belief that it "had the discretion" under Rule 52.12(b) to permit the intervention. Rule 52.12(b)(2) permits intervention "when an applicant's claim or defense and the main action have a question of law or fact in common." There was such a question of law or fact in common in this case. Most of the defenses raised by Intervenor Defendants in their answer were the same as those of the State. *See* L.F. 3887-3915. In fact, if the State Defendants and the Intervenor Defendants did not have law and facts in common, why would the State Defendants have adopted all of the evidence presented by the Intervenor Defendants at the close of the case?

In any event, the decision on whether to permit intervention is left to the sound discretion of the trial court. *State ex rel. City of Jackson v. Grimm*, 555 S.W.2d 643, 646 (Mo.App. 1977). As the above-quoted remarks by Judge Callahan reflect, the court was very deliberate in its reasoning process in making its decision to permit intervention. The court was not required to share its thoughts on this point with Plaintiffs' counsel, but it did so, and its judicial reasoning was sound.

The fact that Plaintiffs seek to strike the Intervenor Defendants at this late date begs the question of what useful purpose would be served by excluding the Intervenor Defendants now. The only explanation provided by Plaintiffs is that Intervenor Defendants continue to cause additional costs.[47] There is no basis for such a conclusion. If anything, the fact that the State Defendants and the Intervenor Defendants are once again submitting joint briefs (as they did with the post-trial briefs) reflects a concerted effort not to waste any resources. Basically, what Plaintiffs seek from this Court is an advisory opinion that what Judge Callahan did should never happen again. Such a ruling would be inconsistent with this Court's longstanding rule against issuing advisory opinions. *Missouri Alliance for Retired Americans v. Department of Labor and Industrial Relations*, --- S.W.3d ---, 2009 WL 454282 at *1 (Mo., Feb. 24, 2009); *Valley Park Fire Protection District v. St. Louis County*, 265 S.W.3d 910, 914 (Mo.App. E.D. 2008).

[47] In footnote 23 on page 151 of its brief, CEE directs this Court to a bill of costs filed by the Intervenor Defendants. What Plaintiffs fail to advise this Court is that the bill of costs was withdrawn on November 21, 2007, L.F. 6152-6154, and Intervenor Defendants stipulated that they would not seek costs in this matter. Res. App., p. A174.

Generally, Rule 52.12 should be construed broadly. *Maries County Bank v. Hoertel*, 941 S.W.2d 806, 810 (Mo.App. S.D. 1997) (intervention rule "should be liberally construed so as to permit broad intervention"). In urging reversal of the trial court decision to permit the intervention now at issue, Plaintiffs do not, and presumably cannot, cite any authority holding explicitly that taxpayer standing in Missouri is limited to parties either bringing an action in the first instance as Plaintiffs or seeking to intervene as Plaintiffs in actions brought by others. The Defendant Intervenors know of no authority that would preclude taxpayer standing for prospective defendants as well as for prospective plaintiffs. The two cases cited in the CEE Brief are easily distinguished from the situation of the Defendant Intervenors here. *See State ex rel. Nixon v. American Tobacco Company, Inc.,* 34 S.W.3d 122 (Mo. banc 2001) (no party sought to intervene as defendant) and *State ex rel. Cooper v. Washington County Commission,* 848 S.W.2d 620 (Mo.App. E.D. 1993) (ex-prosecutor intervention applicant did not assert taxpayer standing, did not seek intervention as defendant, and had personal financial stake in outcome distinct from public interest of prosecutor's office). The Defendant Intervenors submit that the general taxpayer standing principles that have developed in recent years since *Eastern Missouri Laborers District Council v. St. Louis County*, 781 S.W.2d 43 (Mo. 1989), apply to their situation and to those of other parties seeking taxpayer standing as defendants.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the circuit court.

Respectfully submitted,

CHRIS KOSTER
Attorney General

THE SCHINDLER LAW FIRM, P.C.

JAMES R. LAYTON
Missouri Bar No. 45631
Solicitor General
P.O. Box 899
Jefferson City, MO 65102
(573) 751-3321
(573) 751-0774 (facsimile)
James.Layton@ago.mo.gov
CHRISTOPHER J. QUINN
Missouri Bar No. 41883
Christopher.Quinn@ago.mo.gov
MAUREEN C. BEEKLEY
Missouri Bar No. 47133
Maureen.Beekley@ago.mo.gov
Assistant Attorneys General
P.O. Box 861
St. Louis, Missouri 63188
(314)340-7861
(314)340-7029 (facsimile)
Attorneys for State Respondents

JOSHUA M. SCHINDLER
Missouri Bar No. 37891
141 N. Meramec Avenue, Suite 201
St. Louis, MO 63105
(314) 862-1411
(314) 862-1701 (facsimile)
josh@schindlerlawfirm.com
Attorney for Respondents W. Bevis Schock, Rex Sinquefield, and Menlo F. Smith

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the limitations contained in Rule 84.06(b). The foregoing document contains 15,901 words of proportionally spaced text as determined by the automated word count feature of the Microsoft Word 2003 word processing system and has 14 point print size.

CHRIS KOSTER
Attorney General

_____

JAMES R. LAYTON
Missouri Bar No. 45631
Solicitor General
P.O. Box 899
Jefferson City, MO 65102
(573) 751-3321
(573) 751-0774 (facsimile)
James.Layton@ago.mo.gov
CHRISTOPHER J. QUINN
Missouri Bar No. 41883
Christopher.Quinn@ago.mo.gov
MAUREEN C. BEEKLEY
Missouri Bar No. 47133
Maureen.Beekley@ago.mo.gov
Assistant Attorneys General
P.O. Box 861
St. Louis, Missouri 63188
(314)340-7861
(314)340-7029 (facsimile)
Attorneys for State Respondents

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing were sent via U.S. Mail, postage prepaid, this 17th day of April, 2009, to:

Alex Bartlett
Husch Blackwell Sanders, LLP
235 E. High Street, P.O. Box 1251
Jefferson City, MO 65102
Attorney for Appellants Committee for Educational Equality, et al.

Audrey Hanson McIntosh
Audrey Hanson McIntosh, P.C.
612 East Capitol Avenue
P.O. Box 1497
Jefferson City, MO 65102
Attorney for Appellants Coalition to Fund Excellent Schools, et al.

James C. Owen
McCarthy, Leonard, Kammerer, Owen, McGovern, Striler & Menghini, LC
400 S. Woods Mill Road, Suite 250
Chesterfield, MO 63017
Attorney for Appellants Coalition to Fund Excellent Schools, et al.

John Munich
Stinson Morrison Hecker LLP
168 N. Meramec, Suite 400
St. Louis, MO 63105
Attorney for State Defendants

Kenneth C. Brostron
Dirk DeYong
Lashly & Baer, P.C.
714 Locust Street
St. Louis, MO 63101
Attorneys for Appellants Board of Educ. of the City of St. Louis, et al.

Richard B. Walsh, Jr.
Evan Z. Reid
Lewis, Rice & Fingersh, L.C.
500 North Broadway, Suite 2000
St. Louis, MO 63102
Attorneys for Appellant Special Admin. Board of the City of St. Louis

Melissa K. Randol
Attorney At Law
2100 I-70 Drive SW
Columbia, MO 65203
Attorney for Amici Curiae Missouri School Boards' Association, et al.

Ellen M. Boylan
Molly A. Hunter
Education Law Center
60 Park Place, Suite 300
Newark, NJ 07102
Attorney for Amici Curiae Citizens for Missouri's Children, et al.

Rodney D. Gray
221 Bolivar Street
P.O. Box 1069
Jefferson City, MO 65102
Attorney for Amici Curiae Citizens for Missouri's Children, et al.