IN THE
SUPREME COURT OF MISSOURI

No. SC93848

MISSOURI BANKERS ASSOCIATION, INC. and JONESBURG STATE BANK,

Plaintiffs and Appellants,

v.

SAINT LOUIS COUNTY, MISSOURI *et al.*,

Defendants and Respondents.

Appeal from the Circuit Court of Saint Louis County, Missouri
Division 33, Honorable Brenda Stith Loftin, Judge
Circuit Court Case No. 12SL-CC03659

BRIEF AS AMICUS CURIAE BY THE BUSINESS BANK OF SAINT LOUIS

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The interest of Amicus: its power to make real estate loans

Amicus is a Missouri state chartered bank. As a bank it does not have the power to engage in any business activity unless authorized to do such by Missouri state law. It can engage in only the banking business and no other business. A very substantial part of Missouri state chartered banking business is making of loans on real estate. Mo. Rev. Stat. § 362.105.1(1) gives state banks the power to "(1) Conduct the business … ***of loaning money upon real estate*** or personal property." A later part of Section 362.105 reaffirms the power to make real estate loans.

Mo. Rev. Stat. § 362.105 2. states that, "In addition to the power and authorities granted in subsection 1 of this section, and notwithstanding any limitations therein, a bank or trust company may … (2) Loan money on real estate … as a core part of the banking business …."

In addition to the express power to loan money on real estate, as a state chartered bank, the Business Bank has all additional necessary, proper or convenient powers needed to engage in the banking business. Mo. Rev. Stat. § 362.109 ("(1) A bank or trust company may exercise all powers necessary, proper or convenient to effect any of the purposes for which the bank or trust company has been formed and any powers incidental to the business of banking.").

Counties are not supposed to interfere in the business of banking for Missouri state law expressly preempts cities and counties from regulating Missouri's

state banks. Mo. Rev. Stat. § 362.109, captioned, "**Restrictions on orders and ordinances of political subdivisions**," reads "Notwithstanding any law to the contrary, any order or ordinance by any political subdivision shall be consistent with and not more restrictive than state law and regulations governing lending or deposit-taking entities regulated by the division of finance or the division of credit unions."

In 2012, Respondent Saint Louis County adopted a Mortgage Foreclosure Intervention Code by ordinance,[1] applicable to "loans on upon real estate," made by Movant. The MFI Code delays foreclosure of defaulted real estate loans, requiring Movant to pay fees and participate in a mediation program before proceeding with contractually agreed upon foreclosure of delinquent real estate loans.

In response, the 2013 97th General Assembly passed HB 446 enacting Mo. Rev. Stat. § 443.454 providing that "no local law or ordinance may add to, change, delay enforcement, or interfere with, any loan agreement, security instrument, mortgage or deed of trust."

After passage of the MFI Code, Appellants brought an action to enjoin its enforcement. The circuit court denied relief and this appeal followed. HB 446 was passed and became law while the appeal pended before the court of appeals, at

[1] Ordinance 25,190 of 2012, as amended by Ordinance 25,239 of 2012

which point the courts of appeals asked the parties to brief the impact of HB 446 and § 443.454 on the issues raised by the appeal.

Respondent Saint Louis County filed a letter brief judicially admitting the MFI "Code is clearly inconsistent with the newly stated policy of the State and cannot be enforced by St. Louis County" reasoning this mooted this case.

No constitutional challenge was raised by Saint Louis County at the first instance, in this letter brief, to the constitutional application of § 443.454.

A division of the court of appeals dismissed the action as moot, based on this judicial admission, but one judge dissented, impermissibly acting as an advocate for Saint Louis County. The dissent contended the MFI Code "falls squarely within County's broad 'legislative power pertaining to any and all [municipal] services and functions" as a charter county under Mo. Const. Art. VI, § 18(c)'" and for that reason wanted to affirm the circuit court's dismissal of Appellants action.

Business Bank has never had the opportunity to present evidence at trial on the demerits of this conclusion. This Brief explains why the dissent was wrong and no trial is needed. However, if the Court refuses to follow the "science" of the economic literature outlined below, this Brief explains why the cause must be remanded for trial.

Argument

In 2012, the Saint Louis County Council adopted a Mortgage Foreclosure Intervention Code, codified in Chapter 727 of the Saint Louis County Revised Ordinances,[2] applicable "in both the incorporated and unincorporated areas of St. Louis County." Stl. Cnty. Rev. Ord. § 727.100.[3]

The consequence of the MFI Code, whether intended or not, is to decrease the value of Saint Louis County real property in two ways.

First, the MFI Code imposes a moratorium or delay on foreclosure, by private power of sale, of mortgages or deeds of trust or other security instruments securing a real estate loan with "residential property." until a mediation process is completed. Stl. Cnty. Rev. Ord. § 727.200.2.

Second, the MFI Code requires the lender to pay fees at above market rates to a private contractor, called a mediation coordinator, who will coordinate and lead a mediation in which the lender must make "a good faith effort" to mediate. Stl. Cnty. Rev. Ord. § 727.400—.500.There are three costs to this delay.

There are actually three sets of costs incorporated in the delay: property tax-

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[2] August 5, 2013 letter from Saint Louis County to the Missouri Court of Appeals, Eastern District (attached)

[3] The entire MFI Code is available at http://library.municode.com/index.aspx?clientId=11512

es, insurance, and excess depreciation. We consider each in turn. First, if the borrower is not paying, the servicer must continue to make tax payments. These can be quite sizeable.

* * *

Second, the lender must also continue to make insurance payments; if force-placed insurance is used, the insurance payments can be quite large. Finally, there is an additional cost, one that we call "excess depreciation." Each day the home is occupied by a borrower not making his mortgage payments, that borrower is likely not taking care of the home, and it is likely the home will be sold for less at liquidation. Servicers pay for property maintenance costs after a property is in REO and the property is vacant (e.g., mowing the lawn, fixing the roof). In addition, there are servicer foreclosure costs that are time dependent. Lawrence R. Cordell, et al. *The Cost of Delay*. No. 13-15, at 15, Federal Reserve Bank of Philadelphia, 2013.[4]

It cannot be disputed that state laws like the MFI Code make real estate loans insecure, raise the cost of credit, decrease loan size and decrease real property values. *See generally* Kyle Fee and Thomas J. Fitzpatrick IV, Economic Commen-

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[4] Available at http://www.frbatlanta.org/documents/news/conferences/13residential_mortgage_markets/Cordell_Geng_Goodman_Yang.pdf

tary, Federal Reserve Bank of Cleveland, *Estimating the Impact of Fast-Tracking Foreclosures in Ohio and Pennsylvania* (Mar. 6, 2014);[5] Lawrence R. Cordell, et al. The cost of delay. No. 13-15. Federal Reserve Bank of Philadelphia, 2013;[6] Jean Imbs and Giovanni Favara. "Credit Supply and the Price of Housing." Available at SSRN 1555404 (2010);[7] Manuel Adelino, Antoinette Schoar, and Felipe Severino. "Credit Supply and House Prices." NBER Working Paper 17832 (2012);[8] and Karen M. Pence "Foreclosing on opportunity: State laws and mortgage credit." *Review of Economics and Statistics* 88.1 (2006): 177-182.[9]

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[5] Available at http://www.clevelandfed.org/research/commentary/2014/2014-03.cfm?WT.oss=foreclosures&WT.oss_r=939

[6] Available at http://www.frbatlanta.org/documents/news/conferences/13residential_mortgage_markets/Cordell_Geng_Goodman_Yang.pdf

[7] Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1555404

[8] http://www.philadelphiafed.org/research-and-data/events/2011/consumer-credit-and-payments/papers/Adelino_pres.pdf

[9] Available at http://www.federalreserve.gov/PUBS/feds/2003/200316/200316pap.pdf

These materials, readily available on the internet, are subject to judicial notice by this Court for any investor in a publicly owned bank or savings and loan would be charged with knowledge of such government and private reports. *E.g., Whirlpool Financial Corp. v. GN Holdings, Inc.*, 67 F.3d 605, 610 (7th Cir. 1995) ("In today's society, with the advent of the 'information superhighway,' federal and state legislation and regulations, as well as information regarding industry trends, are easily accessed. A reasonable investor is presumed to have information available in the public domain, and therefore Whirlpool is imputed with constructive knowledge of this information.").

Pence's seminal paper, and the papers since, all find that laws like the MFI Code that protect borrowers have the unintended consequence of reducing the supply of mortgage credit, thus decreasing home values while at the same time increasing costs for borrowers.

To assure Missouri borrowers access to larger real estate loans at lower costs, Appellants Missouri Bankers Association and Jonesburg State Bank brought this action for a declaratory judgment, under the Uniform Declaratory Judgment Act, Mo. Rev. Stat. § 527.010, et seq., Rule 87, seeking a declaration that the MFI Code conflicted with state statutes and the Missouri Constitution.

The circuit court granted summary judgment in favor of Respondents, declaring the MFI Code valid against all challenges.

Appellants Missouri Bankers Association and Jonesburg State Bank then appealed to the Missouri Court of Appeals, Eastern District. While the appeal was pending and before any opinion was issued, for at least five reasons—effective August 28, 2013—the Ninety-Seventh General Assembly, First Regular Session passed House Bill Nos. 446 & 211, now codified as Mo. Rev. Stat. § 443.454, which provides:

> **443.454**. The enforcement and servicing of real estate loans secured by mortgage 2 or deed of trust or other security instrument shall be pursuant only to state and federal law and no local law or ordinance may add to, change, delay enforcement, or interfere with, any loan agreement, security instrument, mortgage or deed of trust. No local law or ordinance may add, change, or delay any rights or obligations or impose fees or taxes of any kind or require payment of fees to any government contractor related to any real estate loan agreement, mortgage or deed of trust, other security instrument, or affect the enforcement and servicing thereof.

HB 446 had at least five discrete purposes.

First, HB446 was a measure to enhance and preserve state revenue. Article X of the Missouri Constitution permits a state tax on real property but, "The state tax on real and tangible personal property, exclusive of the tax necessary to pay

any bonded debt of the state, shall not exceed ten cents on the hundred dollars assessed valuation." Accordingly, the State has a direct interest in maximizing assessed values of real property state wide. To that end it is proper that the State prohibit local governments from passing laws that decrease the availability of credit, increase the costs of loans, and thus decrease real property values.

The MFI Code has negative effect directly and indirectly on real property values. Directly, the MFI Code raises lending costs, meaning that there will fewer qualified borrower and those borrowers who do qualify will be able to borrow less, as interest rates will be higher. Indirectly, "if a household in one [county or] state has difficulties obtaining a consumer installment loan or a home equity loan, then production of durable goods in other [counties or] states should take a hit."[10]

Second, HB 446 protects lender solvency by protecting the value of real estate securing loans and thus protects depositors with banks, savings and loans, and credit unions and the general public doing business with banks, savings and loans, and credit unions.

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[10] Samuel Haltenhof, Seung Jung Lee, and Viktors Stebunos, *Bank* Lending Channel During the Great Recession at 3 (Federal Reserved Board Dec. 28, 2012).

Third, it is important to recall that a significant bank lending channel is through "home equity loans to household-owners to prop up their businesses."[11] is a primary source of borrower's equity to support loans secured by real estate but made for other purposes, i.e., the "wealth effect" of real estate values exceeding loan balances.

Fourth, HB 446 eliminated the moral hazard, abuse of the mediation process by borrowers living rent free after default, created by the MFI Code including strategic default. *See* Dustin A. Zacks, *The Grand Bargain: Pro-Borrower Responses to The Housing Crisis and Implications for Future Lending and Homeownership*, 57 LOY. L. REV. 541, 586 (2012) ("This Article has enumerated the myriad of ways in which lengthening the foreclosure process can cost everyone more and can increase moral hazard and strategic default.").

Fifth, and last, the MFI Code is not a free lunch. Given that there are externalities, it is for the General Assembly to make the policy choices. Zacks concludes (Id. at 584–86):

> The Article next examined the changes in the foreclosure process that legislators and courts have considered in reacting to the foreclosure crisis, including moratoria, lengthened notice periods, mediation regimes, and increased burden of proof hurdles. In each instance, the proposed solution

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[11] *Id*.

produces externalities on society as a whole. This is due to the solutions resulting in an increased likelihood of strategic default, a continuing reduction or stagnation in housing prices, and increased costs to lenders that are eventually passed on to future consumers in the form of more expensive or rationed credit.

Accordingly, one of the major conclusions of this Article is that when it comes to changing state foreclosure processes, there is no free lunch in enacting additional consumer protection. All of society is paying for government efforts to keep homeowners from losing their homes, whether in terms of increased funding necessary to pay for judicial costs or through lost home values as a result of extended foreclosure processes. Importantly, both current and future members of society carry these costs. This is because some future borrowers, who might not yet be born, will inevitably pay more for housing credit due to increased consumer protections enacted in response to the current crisis.

Given that society as a whole pays for the attempts to make state foreclosure processes more consumer friendly, there are two different ways to view these costs.

* * *

> Aside from the fact that society-wide benefits of foreclosure process changes may not be immediately noticeable to the average individual current homeowner footing the bill for those changes, consider also that current homeowners did not request help for delinquent homeowners. Thus, even if one could measure the effect on each member of society of, say, a prevented burglary due to a prevented foreclosure auction, and even if that effect were substantial and worth the cost of changing the foreclosure process, the current homeowner was still never given a real choice of whether to spend his tax money in that fashion. Even assuming a societal net positive cost/benefit analysis of allocating resources toward changing foreclosure processes, homeowner advocates cannot necessarily argue that spending money on foreclosure prevention is the best use of government money. After all, who is to say that ethanol subsidies or wind farm subsidies or high-speed rail investments would not create more jobs and, ergo, prevent more foreclosures than changes to the foreclosure process?

In sum, HB 446 is exactly the kind of broad policy legislation that inherently falls to the General Assembly. It is for the General Assembly to decide whether future borrowers will pay more for credit or have more to spend to combat global climate

change, not the Saint Louis County Council.

Shortly before HB 446 was to become effective, by an Order entered July 24, 2013, the court of appeals asked Appellants and Respondents to submit letter briefs regarding the application of HB 446 to the pending appeal.

Saint Louis County submitted a letter brief conceding the MFI Code could no longer "be enforced by St. Louis County." Saint Louis County wrote to the court of appeals:

> The General Assembly having expressly prohibited local governments from enforcing the exact type of regulation that had been enacted by St. Louis County, the Mortgage Foreclosure Intervention Code at issue is clearly inconsistent with the newly stated policy of the State and cannot be enforced by St. Louis County. The dispute pending before the Court concerning consistency with other statutes is therefore moot and subject to dismissal, insofar as "[a] case is moot where an event occurs that makes the court's decision unnecessary" and "Missouri courts do not decide moot issues." *Carlisle v. Carlisle*, 277 S.W.3d 8015 802 (Mo. App. 2009) (citations omitted).

Saint Louis County ended its letter by asking the court of appeals to dismiss the appeal and remand this case to the circuit court for vacation of the judgment and dismissal of the lawsuit, which is what the two judges of the panel of the court of appeals held should be done.

However, one of the judges of the panel dissented, arguing at length that the MFI Code trumped newly enacted HB 446, reasoning that Saint Louis County had the police power to regulate the banking business and that such trumped the State's power to regulate the business of banking.

This course of events presents four questions to this Court, should it act as an advocate for Saint Louis County as did the dissenting division court of appeals judge. Because the dissent acted as an advocate, never giving either Appellants or Business Bank the opportunity to present evidence affirming the constitutionality of § 443.454. the following questions may not be adequately presented by the Appellants.

First, is the business of banking—including real estate loans, loan delinquencies and defaults—a distinctly local Saint Louis County matter or is the business of banking —including real estate loans, loan delinquencies and defaults—a matter of public policy of state as a whole, making § 443.454 constitutionally valid?

Second, will the MFI Code result in fewer real estate loans, for smaller amounts, at higher costs to borrowers and attendant ills or reduced property values, falling tax revenue, increased unemployment, increased crime, disruption of families, and increased costs for police, first, and emergency social services, making § 443.454 constitutionally valid?

Third, will the MFI Code result in lower production of durable goods and services in other Missouri counties, making § 443.454 constitutionally valid?

Fourth, will the MFI Code have hidden costs arising out of its delays and costs resulting in higher credit costs and in turn resulting in fewer real estate loans for smaller amounts, at higher costs to borrowers, making § 443.454 constitutionally valid?

These questions raise additional issues. Given the concession or judicial admission by St. Louis County the Mortgage Foreclosure Intervention Code "cannot be enforced by St. Louis County," can this Court (or any court) rule to the contrary, *i.e.*, rule as the dissent from the division panel of the court of appeals wanted to rule, to-wit that "Section 433.454 does not moot this case because the Mediation Program falls squarely within County's broad 'legislative power pertaining to any and all [municipal] services and functions' as a charter county under Article VII, Section 18(c) of the Missouri Constitution.'" Dissenting Opinion, October 15, 2013 at 2.

Further, if the concession by Saint Louis County that the MFI Code cannot be enforced is not binding on this or any court, do Mo. Rev. Stat. § 527.110 and Rule 87.04 require this case to be remanded to the circuit court for trial, after addition of all parties who would be affected by a declaration that this case is not mooted by the enactment of § 433.454 by HB 466.

The panel dissent made a fundamental error going to the heart of the judicial process, becoming an advocate for one of the parties (Saint Louis County). It is settled doctrine, "It is not the function of the appellate court to serve as advocate for any party to an appeal. That is the function of counsel. It would be unfair to the parties if it were otherwise. That is the reason for the sometimes expressed unwillingness of an appellate court to assume the role of counsel and advocate for a party on appeal." *Thummel v. King*, 570 S.W.2d 679, 686 (Mo. 1978); *accord Manzara v. State*, 343 S.W.3d 656, 659 (Mo. 2011); *JAD v. FJD*, 978 S.W.2d 336, 338 (Mo. 1998).

What made the division dissent particularly egregious was that it disregarded settled doctrine that constitutional questions have to be raised in Missouri at the first reasonable opportunity. *E.g. Smith v. Shaw*, 159 S.W.3d 830, 836 (Mo. 2005) ("Constitutional issues are waived unless raised at the earliest possible opportunity consistent with orderly procedure."); *Hollis v. Blevins*, 926 S.W.2d 683, 683 (Mo. banc 1996).

Applying this later doctrine, if Saint Louis County contended HB 446 was trumped by its powers as a charter county, it was incumbent upon Saint Louis County to raise that position in its letter brief filed with the court of appeals on August 5, 2013, which Saint Louis County did not do such, waiving the point.

If Saint Louis County were to ask this Court to rule that it may continue to enforce the MFI Code even though it conflicts with § 433.454, in effect, Saint Louis

County would be asking for a declaratory judgment that § 433.454 is unconstitutional as applied to the facts and circumstances extant in Saint Louis County. Would Saint Louis County have to proceed by naming a defendant class? Yes

Had § 433.454 been passed when this case was still before the trial court it would have been incumbent upon Plaintiffs-Appellants to have proceed amended their petition to bring a class action comprised of a class of all lenders for a Declaration—under the Uniform Declaratory Judgment Act § 11; Mo. Rev. Stat. § 527.110; Rule 87.04; see *generally Witty v. State Farm Mut. Auto. Ins. Co.*, 854 S.W.2d 836 (Mo. Ct. App. 1993) (Rule 87.04 is a re-script of § 11 of the Uniform Act); *Mahoney v. Doerhoff Surgical Services*, 807 S.W.2d 503, 506–07 (Mo. 1991) (same);' *Epstein v. Villa Dorado Condominium Ass'n*, 316 S.W.3d 457, 461 (Mo. Ct. App. 2010) (Absence of valid class violated Rule 87.04 in that the absent class members were directly affected and "had an obvious interest in any judicial declaration"); *accord Sterling Inv. Group v. Board of Managers*, 402 S.W.3d 95, 98 (Mo. Ct. App. 2013) (*Epstein* was correctly decided on its facts and *Epstein* "trial court erred by extending its judgment to all owners in the purported class without proper class certification.")—that HB 446 and § 443.454 trumped the MFI Code.

Both § 527.110 and Rule 87.04 have the identical command, from § 11 of the Uniform Act that, "When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration."

Applying § 527.110 and Rule 87.04 is mandatory and jurisdictional. Notwithstanding Rule 84.14 ("**Disposition on Appeal**. The appellate court shall award a new trial or partial new trial, reverse or affirm the judgment or order of the trial court, in whole or in part, or give such judgment as the court ought to give. Unless justice otherwise requires, the court shall dispose finally of the case."), when an appellate court discovers the absence of parties necessary for entry of a declaratory judgment, the remedy is to either require that the parties be added or to reverse and remand to the trial court. *E.g.*, *Weldon Revocable Trust v. Weldon*, 231 S.W.3d 158, 171 (Mo. Ct. App. 2007).

It goes without saying that, as its interests under § 443.454 are identical to the interests of Appellants, Business Bank is as necessary a party as either.

Conversely, if Saint Louis County contended that its powers as a charter county, arising under Mo. Const. Art. VI, § 18(c) trumped HB 446 and § 443.454, before the circuit court it should have filed a counterclaim seeking such a Declaration under the Uniform Declaratory Judgment act, naming as defendants a class of all lenders. *See generally Cicco v. Stockmaster*, 728 N.E.2d 1066, 1070–71 (Ohio 2000).

Cicco, an Ohio Supreme Court case, also arose under Section 11 of the Uniform Declaratory Judgment Act. It involved the question, what happens under the Act when a party should have but fails in its pleading to raise a constitutional chal-

lenge to a statute. The Ohio Supreme Court stated, "the Ciccos should have asserted their constitutional challenge in their complaint or amended complaints." The court held that the constitutional question could not be reached until the case was remanded to the trial court, a proper pleading was filed, and the proper parties added (and in the case of the Attorney General, notified).

It is appropriate for the appellate court to render judgment under Rule 84.14 only when there is no dispute as to the facts *Sterling Inv. Group v. Bd. of Managers*, 402 S.W.3d 95 (Mo. Ct. App. 2013).

In the present posture of the case it is important to recall that no trial has been held and neither Amicus nor the State of Missouri nor the Attorney General nor the Director Finance nor any other banks, savings and loans, credit unions or other lenders have been given an opportunity to present evidence in support of HB 446 or § 443.454 being a valid enactment of the General Assembly. *Maclean v. United Southwest Service Agency, Inc.*, 792 S.W.2d 402 (Mo. Ct. App. 1990); *Taylor v. Coe*, 675 S.W.2d 148 (Mo. Ct. App. 1984).

The dissent by a member of the panel of the court of appeals was based upon a number of numerous factual errors going to the heart of the case, errors that would not have been made had the dissent respected Rule 84.14

Had there been a trial, supporters of HB 466, like the Business Bank, would be able to show that the premise that the foreclosure epidemic was not an urgent

local Saint Louis problem; it was a national (actually international) crisis as the dissent admitted. How an international or national economic crisis can be transmogrified into constitutional doctrine that local laws will trump state laws is simply not part of our jurisprudence.

Simply put, the dissent, not having the benefit of trial and proper briefing, contradicts itself. It admits there was "a national foreclosure crisis," at 2, but then proceeds on then labeled this a "local problem." But this entire argument is contrary to the text of § 18(c) which reads:

> The charter may provide for the vesting and exercise of legislative power pertaining to any and all services and functions of any municipality or political subdivision, except school districts, in the part of the county outside incorporated cities; and it may provide, or authorize its governing body to provide, the terms upon which the county may contract with any municipality or political subdivision in the county and perform any of the services and functions of any such municipality or political subdivision.

There is no precedent anywhere that the regulation of the business of banking or business of lending money on real estate is a function or service of local government. In fact, the entire trend of the law is the opposite. It is now common knowledge that banks are regulated by international law through the capital standards of the Basel Accords applicable to United States banks and bank holding

companies through the Federal Reserve.[12] The MFI Code indirectly interferes with the entire process of state and federal regulation of the capital of the Business Bank.

The dissent on the court of appeals panel showed no appreciation for the slippery slope on which its approach placed bank regulation. If Saint Louis County may regulate foreclosures does it also have the power to regulate the terms and conditions on which credit is extended in the first instance? Does Saint Louis County have the power to require that loans be made, if a borrower produces an appraisal? Can the County regulate the loan to value (LTV), the amount of down payment or private mortgage insurance? The dissent doesn't even see the issue, let alone offer a principled boundary.

This is what happens when a court impermissibly becomes an advocate for a party. It proceeds blindly into matters which are unknown unknowns to the Court.

Question 1: **The business of banking is a matter of state wide concern, properly the subject of state wide regulation**.

Simply put, this hardly needs said. The primary purpose of bank chartering and regulation is to protect bank depositors and the public by assuring the solvency of existing banks. E.g., *Bank of Belton v. State Banking Bd.*, 554 S.W.2d 451, 457

[12] http://www.federalreserve.gov/bankinforeg/basel/

(Mo. Ct. App. 1977) ("the basic legislative purpose [is] to maintain a healthy system of banks"). "The principal concern with banking legislation ...[is] protection of the public and the economy from the effects of bank failures. *Central Bank of Clayton v. State Banking Bd. of Mo.*, 509 S.W.2d 175, 183 (Mo. Ct. App. 1974).

The MFI Code conflicts with this fundamental policy. By reducing real estate values, it threatens lenders with insolvency and is a direct attack upon a healthy system of banks, savings and loans, and credit unions.

Question 2: The MFI Code will result in fewer real estate loans, for smaller amounts, at higher costs to borrowers.

The Lesser Depression has given economists motive and opportunity to study in depth possible governmental responses to real estate loan delinquencies and defaults. To be sure, foreclosures have attendant costs. But all the studies and reports confirm there is no free lunch; the costs and delays of a foreclosure mediation program only make a bad situation worse. Saint Louis County's MFI Code only passed costs on to the future unborn in the form of higher interest costs and smaller loans.

Question 3: The MFI Code will lower production of goods and services in other Missouri counties.

Application of the MFI Code will result in lower property values and decrease home equity. Smaller home equity will result in smaller home equity loans. In turn, this will mean that home owners who are business owners will have less to invest in their firms and reduced purchases of durable goods and business services from other Missouri counties. Smaller home equity loans also means that consumers will buy fewer durable goods—i.e., a new boat at the Lake of the Ozarks—and services in other Missouri counties.

Question 4: There is no free lunch when it comes to a financial crisis.

The underlying flaw of the MFI Code is its faulty premise that the loan losses arising out of the Lesser Depression are somehow not "real." To the contrary, they are very real. The financial crisis has destroyed wealth, immense sums of wealth. There is no possible way for the recognition of these losses to be avoided.

Study after study, several noted above, has confirmed that the best solution in a financial crisis is prompt foreclosure not foreclosure delayed. Delaying foreclosure only increases losses in the form of great insurance, more taxes, and depreciation of the improvements. This is bitter medicine, medicine which the General Assembly was willing to take by passing HB 446.

Last, passage of HB 446 means that Missouri's qualified borrowers will be able to borrow more money at lower cost, speeding recovery.

All this was a policy choice entrusted to the General Assembly by Missouri's Constitution.

Conclusion.

It is the position of the Business Bank—based on the foregoing studies—that there is no factual or legal dispute about the constitutionality of HB 466 and § 443.454 and that is Court should enter a declaratory judgment holding that the MFI Code must be repealed by Saint Louis County.

If the Court is unwilling to follow the foregoing studies and uphold HB 466 and § 443.454 on that basis, alone, then it is the position of the Business Bank that the case must be remained to the circuit court for amendment of the pleading and trial. The Court must keep in mind that the Business Bank and all other lenders have never had an opportunity for a trial to present evidence as to the validity of HB 466 and § 443.454.

Respectfully submitted,

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Certificate Of Compliance With Rule 84.06(B)

I, John L. Davidson, certify that:

1. This brief includes the information required by Rule 55.03.

2. This brief complies with the limitations contained in Rule 84.06(b).

3. There are 5940 words contained in this brief.

/S/John L. Davidson

Certificate Of Service

The undersigned certifies that a copy of this notice was filed electronically with the Court on Monday, March 17, 2014 and served by electronic means on all counsel of record.

/S/John L. Davidson