IN THE SUPREME COURT OF MISSOURI

SC88368

MISSOURI ALLIANCE FOR RETIRED AMERICANS, et al.,
Appellants,

v.

DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS,
DIVISION OF WORKERS' COMPENSATION,
Respondent.

Appeal from the Cole County Circuit Court
Nineteenth Judicial Circuit
Honorable Byron L. Kinder, Judge

BRIEF OF *AMICI CURIAE* ASSOCIATED INDUSTRIES OF MISSOURI, NATIONAL FEDERATION OF INDEPENDENT BUSINESS LEGAL FOUNDATION AND ASSOCIATED HOME BUILDERS AND CONTRACTORS, INC. IN SUPPORT OF RESPONDENT

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Status of Amici Curiae

Amici Curiae Associated Industries of Missouri, National Federation of Independent Business Legal Foundation and Associated Builders and Contractors, Inc. – Heart of America Chapter have received consent from all parties to file their Amici Brief in this case pursuant to Rule 84.05(f). Amici file their brief in support of Respondent Department of Labor and Industrial Relations, Division of Workers' Compensation

Statement of Interest of Amicus Associated Industries

Associated Industries of Missouri (hereinafter "Associated Industries") is Missouri's longest continuously running association of business and industry. It was formed on May 6, 1919 and approved as a pro-forma corporation by the Circuit Court of the City of St. Louis. The object and purpose of Associated Industries of Missouri is to secure organized co-operation amongst the industrial and commercial interests of the State of Missouri in all matters, national and local, affecting their welfare and the welfare of the people of Missouri.

Among the very first actions taken by Associated Industries of Missouri was an effort to develop and pass a workers' compensation system for the State of Missouri. Associated Industries was formed to support the very first Workers' Compensation Law passed by the Missouri General Assembly in 1919. Associated Industries supported this law as a ballot initiative in elections held in 1920, 1922, and 1924, and in1926, when it finally passed. Associated Industries supported the Workers' Compensation Law because it was in line with its purpose of promoting the welfare of industrial interests and of the people of the State of Missouri.

Statement of Interest of Amicus National Federation of Independent Business Legal Foundation

The National Federation of Independent Business Legal Foundation (hereinafter "NFIBLF"), a nonprofit, public interest law firm established to be the voice for small business in the nation's courts and the legal resource for small business, is the legal arm of the National Federation of Independent Business (hereinafter "NFIB"). To fulfill this role as the voice for small business, the NFIBLF frequently files amicus briefs on behalf of NFIB and its members in cases throughout the country that will impact small businesses.

NFIB is the nation's leading small-business advocacy association, with offices in Washington, D.C. and all 50 state capitals. NFIB represents over 9,000 members in Missouri, and its membership spans the spectrum of business operations, ranging from one-person enterprises to firms with hundreds of employees. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses. Workers' compensation costs are a top concern for NFIB and its members. A survey conducted by the NFIB Research Foundation determined that workers' compensation costs rank as the third most important problem for small-business owners, preceded only by health care and liability insurance costs. Small Business Problems & Priorities 13 (NFIB Research Foundation, June 2004), available at http://www.nfib.com/object/IO_16191.html.

Statement of Interest of Associated Home Builders and Contractors, Inc.

Associated Builders and Contractors, Inc. – Heart of America Chapter (hereinafter "ABC") was established in 1950 and is now a national trade association representing over twenty-three thousand contractors, subcontractors, material suppliers and professional firms. The ABC Heart of America Chapter is committed to developing a safe workplace and a high-performance workforce though quality education and training with comprehensive safety and health programs.

ABC members are pledged to support certain enumerated basic principles in the following areas: preservation of free enterprise in the construction industry, protection of the public by requiring open public bidding on contracts for spending the taxpayer's money, sound legislation on workers' compensation, unemployment compensation and safety, labor legislation, monopolies, government economy, non-discrimination, and businessperson's responsibility to the community.

General Statement of Interest of All Amici

Throughout the history of Missouri's workers' compensation system, Associated Industries, NFIB, and ABC have been active in overseeing and monitoring the application of the workers' compensation system and in supporting and defending the intent of that system. Associated Industries, NFIB and ABC have also conducted extensive education for employers on the workers' compensation system and its implementation.

During the course of the last eighty years the workers' compensation system in Missouri has changed substantially. From a relatively limited system, it has expanded both by legislative action and by judicial interpretation to a broad and universal system applying to all workers in the State of Missouri. Until the advent of Senate Bill 1, Laws 2005, it covered nearly any type of injury that occurred to any worker that had even the most remote relation to work. It was these great expansions in the coverage of the workers' compensation system, most of which were made by judicial decision, that was the impetus for Senate Bill 1.

Associated Industries, NFIB, and ABC were active in the drafting, negotiation, and ultimate passage of Senate Bill 1. While reasonable people may disagree as to the changes made in Senate Bill 1, clearly those changes were within the discretion of the General Assembly and do not violate the Missouri Constitution.

STATEMENT OF FACTS

Amici Curiae Associated Industries of Missouri, National Federation of Independent Business Legal Foundation and Associated Builders and Contractors, Inc. – Heart of America Chapter adopt the Statement of Facts of Respondent Department of Labor and Industrial Relations, Division of Workers' Compensation.

STANDARD OF REVIEW

Article III, Section 1 of the Missouri Constitution vests in the General Assembly "broad, plenary, legislative powers." *Akin v. Director of Revenue*, 934 S.W.2d 295, 299 (Mo. banc 1996). Thus, "[a]ny constitutional limitation….must be strictly construed in favor of the power of the General Assembly." *Board of Education of the City of St. Louis v. City of St. Louis*, 879 S.W.2d 530 (Mo. banc 1994) (citing *Brown v. Morris*, 290 S.W.2d 160, 166 (Mo. banc 1956)).

"[L]egislative enactments carry a strong presumption of constitutionality." *Akin*, 934 S.W.2d at 299 (Mo. banc 1996). Statutes are presumed to be valid and a challenger carries a heavy burden to demonstrate the invalidity of a statute. *Hoskins v. Business Men's Assurance*, 79 S.W.3d 901, 904 (Mo. banc 2002). Any doubt as to the validity of a statute is to be resolved in favor of validity by upholding the statute. *Id.* "Any act of the legislature must clearly and undoubtedly violate a constitutional procedural limitation before this Court will hold it unconstitutional." *Carmack v. Director, Missouri Department of Agriculture* (Mo. banc 1997) (citing *Hammerschmidt v. Boone County*, 877 S.W.2d 98, 102 (Mo. banc 1994).

Appellants fail to carry their burden of proof in this matter. Amici Curiae Associated Industries, NFIBLF and ABC urge this Court to affirm the judgment of the trial court in granting Respondent's motion for judgment on the pleadings with respect to Count I of the Appellant's petition for declaratory judgment and granting Respondent's

motion for summary judgment on all remaining counts of the petition and urge this Court to uphold as valid the amendments contained in Senate Bill 1.

ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT BECAUSE APPELLANTS' PETITION SEEKS AN ADVISORY OPINION IN THAT THERE IS NO SUBSTANTIAL, PRESENTLY-EXISTING CONTROVERSY SINCE ALL ALLEGATIONS ARE HYPOTHETICAL AND NOT BASED IN FACT.

The trial court correctly granted Respondent's Motion for Summary Judgment as the Appellants' Petition seeks an advisory opinion rather than presenting a real, substantial, presently-existing controversy.

A party seeking declaratory relief must show a "justiciable controversy that presents a real, substantial, presently-existing controversy admitting of specific relief, as distinguished from an advisory decree upon a purely hypothetical situation." *Lane v. Lensmeyer*, 158 S.W.3d 218, 222 (Mo. banc 2005).

Appellants have offered hypothetical examples of potential applications of the Workers' Compensation Law. In doing so, Appellants request an advisory opinion which the Court has no jurisdiction to render. The ultimate issues are factual and can only be determined by the appropriate fact-finding entity, whether the Labor and Industrial Relations Commission or the Circuit Court when an actual suit is brought alleging and proving specific facts. As the Western District had previously noted, the Labor and Industrial Relations Commission:

> has exclusive original jurisdiction to determine the facts that establish jurisdiction, or in other words, whether the injury falls within the workers' compensation law.

Deckard v. O'Reilly Automotive, Inc., 31 S.W.3d 6, 14 (Mo. App. W.D. 2000). Appellants' arguments on what a hypothetical employee "may be unable" to address or "may also be denied" emphasize that this Court, at this time, is not the proper forum for such an adjudication. *If* such facts were to develop, the Labor and Industrial Relations Commission would have primary jurisdiction to review those facts to determine jurisdiction. Until such facts do develop, there is no controversy and this Court should affirm the trial court's ruling.

By attempting to raise such issues by Declaratory Judgment, Appellants not only fail to understand the workers' compensation system but they do not present claims which are ripe for this Court's determination.

"Determining whether a particular case is ripe for judicial resolution requires a two fold inquiry: a court must evaluate (1) whether the issues tendered are appropriate for judicial resolution, and (2) the hardship to the parties if judicial relief is denied." *Mo. Soybean Ass'n v. Mo. Clean Water Comm'n*, 102 S.W.3d 10, 27 (Mo. banc 2003) (citing *Abbot Laboratories Inc. v. Gardner*, 387 U.S. 136, 149 (1967)).

In *Mo. Soybean Ass'n v. EPA*, "[b]ecause MSA had not shown that the EPA's approval affected [it's] members in any concrete way, the Eighth Circuit held that the suit was not ripe for adjudication and should be dismissed…[reasoning that the] complaint

focuse[d] on potential harm to its members…[and] it remain[ed] uncertain whether [the changes would] adversely impact MSA's members." *Mo. Soybean Ass'n v. Mo. Clean Water Comm'n*, 102 S.W.3d at 29-30 (citing *Mo. Soybean Ass'n v. EPA*, 289 F.3d 509, 512 (8th Cir. 2002)).

Similarly, in offering nothing but hypotheticals, without facts, Appellants do not provide a justiciable controversy for this Court to decide. Appellants have offered no concrete facts, their complaint focuses on *potential* harm, and it remains uncertain whether the changes contained in Senate Bill 1 would actually adversely impact anyone. When and if there is a Plaintiff who claims to be injured on the job, such Plaintiff must first file a workers' compensation claim and have jurisdiction determined by the Labor and Industrial Relations Commission. Only upon the exhaustion of administrative remedy would that Plaintiff have the right to come to a circuit court, and ultimately this Court, on these issues. Such a Plaintiff would maintain common law rights to bring a negligence action if their injury were excluded or not compensable under the workers' compensation system.

This court should take the same position as in *Mo. Soybean Ass'n* because "[r]eview now, based on generalities and speculation, would require a crystal ball or, at least, a lively imagination. Review should occur only when claims of harm are 'more imminent and more certain' and the effects….are felt in a concrete way." *Mo. Soybean Ass'n v. Mo. Clean Water Comm'n*, 102 S.W.3d at 29.

Since Appellants offer only hypothetical issues, this Court should affirm the trial court's decision.

II. THE TRIAL COURT DID NOT ERR IN DENYING APPELLANTS' MOTION FOR JUDGMENT ON THE PLEADINGS AND GRANTED RESPONDENT'S MOTION BECAUSE MISSOURI WORKERS' COMPENSATION LAW, AS AMENDED BY SENATE BILL 1, COMPORTS WITH CONSTITUTIONAL REQUIREMENTS IN THAT COMPENSATION IS STILL AVAILABLE UNDER SB1 FOR WORKERS INJURED ON THE JOB THROUGH THE WORKERS COMPENSATION SYSTEM OR IN A CIRCUIT COURT.

Appellants contend that Senate Bill 1 violates the Due Process Clause of Article I, Section 10 of the Missouri Constitution.[1] In Missouri, the validity of exclusivity

[1] Appellants rely upon decisions from North Dakota, Texas, New Hampshire, Kansas, Florida, and Colorado but no citations related to Missouri law or the Missouri Constitution. The foreign decisions relating to various changes to those states' workers' compensation systems. In each case the challenged legislation restricted or modified the existing workers' compensation system. In all such cases the Supreme Courts of the other states affirmed the validity of the Workers' Compensation Law and the newly enacted statutory amendments. See *Baldock v. North Dakota Workers Compensation Bureau*, 554

provisions of the Workers' Compensation Law have been construed by the appellate courts on a number of occasions. Recently, the Western District Court of Appeals, in *Deckard v. O'Reilly Automotive, Inc.*, 31 S.W.3d 6 (Mo. App. W.D. 2000) addressed the application of the workers' compensation statutes to various claims:

> the exclusive remedy for injury or death of an employee from an accident rising out of and in the course of employment is a claim for compensation under Chapter 287. *Lovelace v. Long John Silver's, Inc.*, 841 S.W.2d 682, 686 (Mo. App. W.D. 1992). The Workers' Compensation Law, however, bars common lawsuits for only those damages covered by the law and for which compensation is made available under its provisions. Section 287.120.2, RSMo 1994; *Gambrell v. Kansas City Chiefs Football Club, Inc.*, 562 S.W.2d 163, 165 (Mo. App. 1978). Thus, an employee is free, despite the Workers' Compensation Law, to bring suit at common law for wrongs not comprehended within the law.

N.W.2d 441 (N.D. 1996); *Texas Workers Compensation Commission v. Garcia,* 893 S.W.2d 504 (Tex. 1995); *Thompson v. Forest,* 614 A.2d 1064 (N.H. 1992); *Bair v. Peck,* 811 P.2d 1176 (Kan. 1991); *Acton v. Fort Lauderdale Hospital,* 440 So.2d 1282 (Fla. 1983); and *Kandt v. Evans,* 645 P.2d 1300 (Colo. 1982).

Id. at 14. (Emphasis added). If compensation is not available under the Workers' Compensation Law for a particular injury, then the Workers' Compensation Law does not act as a bar and the employee is entitled to assert common law claims in the circuit court. Nothing in Senate Bill 1 changes this fundamental principle of Missouri's workers' compensation system. Appellants' distaste for the changes made by Senate Bill 1 cannot and do not render it unconstitutional. Appellants focus their attacks in two categories: Compensation Issues and Fault Issues. Neither offers adequate support for their position. The provisions of Senate Bill 1 should be upheld.

1. Compensation Issues

Appellants conveniently overlook the fundamental principles of the workers' compensation system. While they may be unhappy with the requirements contained in Senate Bill 1, they cannot deny that where compensation is not available under Senate Bill 1 that an employee may assert common law claims. The changes challenged by Appellants are valid under the Workers' Compensation Law principles voiced in *Deckard*, *supra*, and its predecessor cases.

"Accident" Requirement

As noted, the legislature has the discretion, indeed the duty, to make policy determinations with respect to laws. The "accident" requirement is a classic example of legislative policy determination. This Court has previously construed the Workers' Compensation Law to determine that there must be an occurrence of an accident to allow the workers' compensation statutory scheme to apply. See *State ex rel. Hussman Ligonier*

Co. v. Hughes, 153 S.W.2d 40 (Mo. 1941). This interpretation of the Workers' Compensation Law was affirmed by this Court, *Id.* at 42, and remained the law of the State of Missouri until 1983 when this Court reversed its prior precedent and changed its construction of the Workers' Compensation Act. *Wolfgeher v. Wagner Cartage Service, Inc.*, 646 S.W.2d 782 (Mo. 1983). The *Wolfgeher* decision was then enacted into the statutes by the General Assembly in 1993.

The change contained in Senate Bill 1, specifically to Section 287.020.2,[2] is an example of the legislature making a policy decision regarding the Workers' Compensation Law. The requirement that an actual accident be identified and be the prevailing factor of an injury, simply affirms what this Court had previously adopted in *State ex rel. Hussman*, and which had been the law of the State of Missouri for more than forty years.

At no point throughout Appellants' argument regarding the accident requirement is there any reference to any precedent which would hold that such legislative change is invalid under the Missouri Constitution or that the law, on its face, is violative of any Missouri precedent. As noted above, if an accident cannot be identified, the Workers' Compensation Law does not apply and thus the employee is free to pursue his common law remedies. That latitude affirms the fundamental underpinning of the workers'

[2] All statutory references are to RSMo Supp. 2005 (which includes the changes in Senate Bill 1) unless otherwise noted.

compensation system to allow a remedy in any situation. Therefore this Court should reject Appellants' argument regarding the accident requirement.

Prevailing Factor Requirement

Senate Bill 1 changed the determination of a compensable injury from work being a "substantial factor" to work being the "prevailing factor." Section 287.020.3(1). Under the prior language, courts had broadened the interpretation of a "substantial factor" to the point where injuries that had minimal causation from work were being compensated. *See* e.g. *Kasl v. Bristol Care, Inc.*, 984 S.W.2d 852 (Mo. banc 1999) (where the Court found a claimant's work was a "substantial factor" in causing her injury when claimant failed to notice that her foot had fallen asleep, and as a result, fell and broke her ankle while at work). In Senate Bill 1, the General Assembly determined that since the courts (in its opinion) were not properly interpreting "substantial factor" as requiring that work be the main factor, that the legislature would clarify this by using the term "prevailing factor" in a statutory amendment. While such a change may be unpopular with Appellants, it is clearly within the legislative discretion of the General Assembly, by virtue of the authority vested in them by Article III, Section 1 of the Missouri Constitution, to make such a change. Mandating that work be the primary or "prevailing" factor in an injury simply dovetails with the common understanding of the intent of the Workers' Compensation Law – that only injuries which occurred *due to work* would be compensated outside of the common law tort system.

Again, this change does not impact the fundamental principles of the Workers' Compensation Law. If work is not the prevailing factor in the injury, the employee still has all his rights to go to the circuit court under the common law.[3] As noted before, the

[3] Appellants point to a 2001 Oregon case to support the proposition that other states have invalidated analogous provisions. *Smothers v. Gresham Transfer, Inc.*, 23 P.3d 333 (Oregon 2001). The *Smothers* case does not stand for the proposition offered by Appellants. In *Smothers*, the Oregon Supreme Court did not invalidate, on a facial constitutional basis, the change to the Oregon Workers' Compensation Law. The Oregon Court determined that because the Oregon statute would not provide compensation for a purported injury, that the employee had the right to go to the circuit court. *Id.* at 362-363. The Court remanded the case to the trial court and allowed the employee to proceed with his negligence claim. *Id.* Oregon was therefore simply affirming the bargain contained in the *Deckard* analysis previously cited.

Additionally, Oregon's statutory scheme was significantly different than Missouri's. The Oregon Supreme Court reviewed the Workers' Compensation Laws and determined that the Oregon statutes made workers' compensation the exclusive remedy for work related injuries, whether or not a claim was a compensable claim. *Id.* at 357. This is quite different from Missouri's workers' compensation system, which as noted in *Deckard*, only applies where "an accident arises out of and in the course of employment" **and** where "compensation is made available under the Workers' Compensation Law."

workers' compensation system was a substitute for the common law in certain circumstances. Where those circumstances do not exist, such as where work is not the prevailing factor of an injury, the workers' compensation system simply does not apply and an employee has all his common law rights.

"Medical Only" Injuries

Senate Bill 1 made a technical change to the language contained in Section 287.020.3(1) to require that a work related accident be "the prevailing factor in causing both the resulting medical condition *and* disability." (emphasis added). The change was from an "or" to an "and." A factual analysis of particular claims and fact patterns is not before this Court. Such factual analysis is the exclusive province of the Labor and Industrial Relations Commission in a workers' compensation claim. *Supra,* Point I. Without exhausting administrative remedies, it is inappropriate for this Court to make such adjudications, especially where such determinations are based upon only the text of the statute.

Addressing Appellants' claims, however, it is clear that any type of injury which requires medical attention would qualify as a disability. The appellate courts have stated that workers' compensation coverage would be provided for any injury which required medical attention. See *Jones v. Dan D. Services, LLC*, 91 S.W.3d 214, 220 (Mo. App. W.D. 2002). Appellants seem to be arguing that the technical change made by Senate Bill

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Deckard, 31 S.W.3d at 14. The Oregon analysis in *Smothers* has no application to Missouri's workers' compensation system.

1 amounts to a new requirement. The plain language does not support their claim. The precedent, evidenced in *Jones*, continues under Senate Bill 1. The change **is** requiring an accident to be the "prevailing factor", and **is not** requiring "both" a medical condition and a disability. **If** such a change were to exclude a claim, then the employee would have the right to proceed with common law remedies. Because Appellants have not demonstrated any legal invalidity and certainly failed to show a clear violation of the Constitution, this Court should affirm the decision of the trial court.

"Idiopathic" Causation

Historically, appellate courts of this state have accepted an idiopathic exclusion under the Workers' Compensation Law. *See Morris v. Dexter Manufacturing*, (Mo. Ct. App. 1931). Where injury is caused not by work but by a claimant's physical problems unrelated to work, there was no compensation. This remained Missouri law for many years until changed by judicial interpretation. Recognizing that this is and always has been a point of legislative discretion and has previously been approved by courts of this state, Appellants resort to *in terrorem* arguments. Reading the language "directly or indirectly from idiopathic causes" in such a manner that even the most minor idiopathic aspect excludes the injury from workers' compensation remedies, requires an absurd construction of Section 287.020.3(3). Courts are not to construe statutes in such a manner as to be absurd. *Elrod v. Treasurer of Missouri*, 138 S.W.3d 714, 716 (Mo. banc 2004). Section 287.020.3(3) clearly indicates that an injury which results from idiopathic causes

should not be compensable as a work related injury. In their analysis, Appellants ignore the word "from" in a futile attempt to create an ambiguity which simply does not exist.

Appellants then proceed to additional hypothetical arguments that are not properly before this Court. Any specific facts must be raised before the Labor and Industrial Relations Commission for a determination of jurisdiction. They cannot be used to resolve this case in this Court.

Even **if** Appellants are correct with respect to their interpretation of the outcome of the idiopathic issues, the Workers' Compensation Law has never been held in Missouri to establish new rights for employees. It simply supplants common law, where it applies. As a result, an employee would still have all his rights under common law if such an injury were found to be non-compensable. See *Deckard, supra*. There is no right to have a claim specially created and preserved for the workers' compensation system. That there is no common law special benefit placed upon idiopathic causation does not invalidate the Workers' Compensation Law; to the contrary, it shows how an injured employee has the right to rely on the common law and assert a negligence claim.

Repetitive Motion Injuries

Appellants argue that the new statutory language contained in Section 287.067.2 - .3, excludes progressive degeneration caused by repetitive motion injuries from work. They assert that work is "a day-to-day living activity" and thus any repetitive motion injury caused by work would be excluded under the new Workers' Compensation Law. This is an extreme and absurd interpretation of the language contained in the statute. The

plain language of the statute relating to normal activities of day-to-day living does not relate to work. Injuries caused on the job are expressly covered under Section 287.067, as amended by Senate Bill 1. Such injuries on the job, as a result of work, are the *raison d'etre* of the Workers' Compensation Law.

Amici can find no case support for Appellants' argument and Appellants state none. If such an injury were excluded, the injured employee would be free to pursue common law remedies in circuit court, resulting in no detriment under the principles of Missouri's workers' compensation system to the injured claimant. The changes in Senate Bill 1, however, simply do not eliminate coverage for such work-related repetitive motion injuries.

Subjective Medical Findings

Appellants object to the changes contained in Senate Bill 1 related to a preference for "objective medical findings" over "subjective medical findings." The effect of such change is grossly overstated by Appellants. Objective medical findings have always been used in determining compensability. In addition to X-rays, range of motion tests are a classic example of an objective medical finding.

Appellants set up the classic "strawman." First, Appellants assert, as fact, that range of motion tests would not be objective (offering no support for such an argument because no such support exists). This unsupported assertion establishes the strawman, which they then proceed to knock down by arguing that injuries, such as soft tissue injuries, would never be found compensable. This argument is without substance.

The change in Senate Bill 1 only gives a **preference** for objective medical findings – if conflicting medical opinions exist the objective medical findings are to prevail over subjective medical findings. Section 289.190.6(2). This preference gives guidance to the Labor and Industrial Relations Commission to determine the scope and extent of an injury. It does not bar compensation.

Even if Appellants' argument carried any weight, which it does not, an injured employee would have the ability to go to a trial court to present the case under common law theories. Thus, there is no legal invalidity even under Appellants' strawman theory.

All the changes contained in Senate Bill 1 are completely valid under the fundamental principles of the workers' compensation system. The changes in Senate Bill 1 do not so fundamentally change the workers' compensation system "that it no longer exists." Quite the opposite, the workers' compensation system is maintained in a form in which a fair bargain is reached between employees and employers. If employees' injuries are excluded for compensation purposes under the new changes, employees retain their common law rights, which are in no way abrogated by the provisions of Senate Bill 1.

As noted above, coverage of an injury is a factual determination and a jurisdictional issue to be first determined by the Labor and Industrial Relations Commission. By attempting to raise such issues by Declaratory Judgment, Appellants not only fail to understand the workers' compensation system but they do not present claims which are ripe for this Court's determination. In offering nothing but hypotheticals, and no actual facts, Appellants offer nothing justiciable for this Court to decide. When and if

there is a Plaintiff who claims to be injured on the job, such Plaintiff must first file a workers' compensation claim and have jurisdiction determined by the Labor and Industrial Relations Commission. Only upon the exhaustion of administrative remedy would that Plaintiff have the right to come to a circuit court on these issues. Such a Plaintiff would maintain common law rights to bring a negligence action if their injury were excluded or not compensable under the workers' compensation system. For these reasons, Appellants' argument regarding certainty of compensation should be rejected.

2. Fault Issues

Appellants also argue that the changes contained in Senate Bill 1 are invalid because issues of fault are injected into a determination of whether an injury is compensable. While it may be correct that fault-based issues are part of the workers' compensation system as amended, it is also true that they have always been part of the workers' compensation system. See e.g., Section 287.120.5, RSMo 2000. Such changes have been accepted by the Courts of our state and the amendments contained in Senate Bill 1 should therefore be upheld by this Court.

Failure to Use Safety Devices or Obey Safety Rules

Senate Bill 1 changes the reduction in compensation for the failure to obey a safety rule or use a safety device from 15% under the prior law to a range between 25% and 50%. Such a reduction is a classic example of legislative discretion to determine the effect and appropriateness of employee conduct. Throughout the Workers' Compensation Law, employee conduct is a crucial element in determinations regarding compensation.

See e.g., §287.120.3 (self-inflicted injury); §287.120.5 (willful failure to use safety devices). Changing from 15% to 25% or even 50% is within the legislative prerogative, under Article III, Section1 of the Missouri Constitution, as demonstrated by the provisions of the prior law. This Court should defer to the legislature in such an issue of appropriate judgment on percentages. The Courts have never usurped the role of the legislature in judging the wisdom of such choices.

Furthermore, revised §287.120.5 states that such a reduction in compensation can ONLY occur if "it is shown that the employee had **actual** knowledge of the rule so adopted by the employer; and provided, further, that the employer had, prior to the injury, made a reasonable effort to cause his or her employees to use the safety device or devices and to obey or follow the rules so adopted for the safety of employees." Section 287.120.5. Actually, the only change made with respect to safety rules and equipment is a change in the percentage reduction in compensation for employees who not only fail but **refuse** to comply. Merely not using safety equipment or following a safety rule will not result in any reduction. The employer would be required to show that (1) the employee had actual knowledge of the rule or the need to use provided safety equipment **and** (2) the employer made reasonable efforts to insure that such safety equipment was used or that such safety rule was followed. Only where both elements are shown is any reduction authorized; and then the amount of reduction is discretionary, between 25% and 50%.

A failure by an employee to use provided safety equipment or obey safety rules does not eliminate their ability to be compensated for an injury. It simply reflects that

employees who ignore work rules or fail to use provided safety equipment, should not be compensated in the same manner or to the same extent as employees who follow the rules and use equipment which they know is provided for their safety. Such a rational analysis of the Workers' Compensation Law is evidence of not only its validity but of its inherent sense of fair play.

Violation of Drug and Alcohol Policy

The amendments contained in Senate Bill 1 regarding an employee's adherence to an employer's drug and alcohol policies, affirms the announced public policy of this state that illegal drug use should not be encouraged or supported and that alcohol use in the work place, where prohibited, is against public policy. The State of Missouri has numerous statutes regarding illegal use of drugs and alcohol and it is nonsensical to condone an employee's use of illegal drugs or alcohol. The legislature is not required to ignore a crime under Missouri law and award compensation if an individual is injured while committing that crime. This is a proper legislative decision that confirms the long-standing public policy of this state to discourage drug and alcohol use in the work place.

Appellants argue that benefits are reduced if an employee is injured and another employee, who was involved in the injury, used illegal drugs or alcohol.[4] This is another

[4] Appellants argue that the provision may apply "where the injury occurred 'in conjunction with' the use of drugs or alcohol by a co-worker or at third party." The language 'in conjunction with' existed prior to Senate Bill 1, and remained unchanged by Senate Bill 1.

absurd reading of a statute. The clear language of the statute (and the legislative intent) is to reduce an employee's compensation if **that** employee was using drugs or alcohol in violation of company policy. Appellants' attempt to conjure up unfairness by an absurd reading of the statute should be rejected by this Court.

Appellants misstate the status of "controlled drugs" as enumerated in Chapter 195, RSMo, incorporated in Senate Bill 1 by reference in Section 287.120.6(3). The schedule of controlled drugs, contained in Section 195.017, RSMo, lists compounds and drugs which are and have always been restricted and controlled by the State of Missouri. Section 195.060, provides that such controlled substances as defined in Section 195.017 may only be dispensed by a pharmacist by prescription or in certain emergency situations. §195.060. That such controlled substances may be "commonly found in the desks and purses and lockers of employees" is irrelevant in interpreting Senate Bill 1. If such controlled substance is found in the "desks and purses and lockers of employees" pursuant to a proper prescription, then there is no violation of Section 287.120.6. Conversely, if such substances are in the "desks and purses and lockers of employees" and such substances have not been properly prescribed to such an employee pursuant to Chapter 195, RSMo, then a criminal violation of the state controlled substances laws would potentially have been committed by the employee. *See* §195.202. Whether an employee is using a controlled substance which was prescribed for another person, whether that other person is a family member, a friend or a person standing on a corner selling such substance, or is otherwise engaged in unlawful use, does not change the nature of the violation under Missouri laws. Requiring adherence to Missouri drug and

alcohol laws is clearly within the legislative prerogative, under Article III, Section 1 of the Missouri Constitution, and consistent with public policy.

Moreover, the change contained in Senate Bill 1 does not eliminate the compensation for such injury where the employee is illegally using drugs or improperly using alcohol. Section 287.120.6 simply reduces the compensation by 50% if the use of drugs or alcohol is not the proximate cause of the injury.[5] This is a legislative prerogative and is eminently rational in light of the long standing policies of the State of Missouri regarding abuse of alcohol and drugs.

Finally, Appellants assert more hypothetical situations where coverage may or may not occur. Determination of coverage is within the exclusive primary jurisdiction of the Labor and Industrial Relations Commission and is fact based, determined on a case-by-case basis. Appellants cannot raise such claims in this case, as they have no standing and such additional facts are simply not before this Court.

Rebuttable Presumption of Alcohol as Proximate Cause

The presumption that alcohol is a cause of injury, contained in Section 287.120.6(3), is simply that – a rebuttable presumption that the use of alcohol was the proximate cause of an injury. An employee need only show by preponderance of the

[5] Section 287.120.6(2) already contained provisions for forfeiture of benefits if drug use or alcohol use, in violation of the employer's policy, was the proximate cause of the injury. §287.120.6(2), RSMo 2000. The new provision simply compliments and supplements the compensation scheme of the current Workers' Compensation Law.

evidence that such was not the case to rebut that presumption. §287.120.6(3). Utilizing a .08 blood alcohol level, the State of Missouri has made a policy decision that a person operating a motor vehicle is impaired. That presumption is not rebuttable. By allowing this similar blood alcohol percentage to be a rebuttable presumption regarding an injury, the public policy of this state is affirmed and a rationality brought to the workers' compensation system. Prior to Senate Bill 1, alcohol use as a proximate cause of the injury resulted in a forfeiture of benefits. §287.120.6(2), RSMo 2000. The new language in §287.120.6(3) simply provides a fair standard to determine if alcohol use was the proximate cause of the injury.

Refusal to Test

The refusal to take a test for alcohol or drugs, post injury, now results in a forfeiture of benefits. §287.120.6(3). This provision simply confirms the important goals of the state in insuring that the work place is safe and drug and alcohol free. *See* RSMo 577.041 (which makes evidence of refusal to submit to a chemical test admissible in a proceeding and upon refusal to test, authorizes a police officer to immediately serve a notice of license revocation and take possession of a persons license to operate a motor vehicle). By insuring that employees who are injured on the job were not using alcohol or illegal drugs, Senate Bill 1 confirms the long-standing policy position of this state that such use should be discouraged. It also requires a fair factual basis to make such a determination.

Again, Appellants attempt to raise hypothetical factual situations which are not contained in their pleadings and which would be within the exclusive primary jurisdiction of the Labor and Industrial Relations Commission to determine. *Supra* fn. 3. This Court should not decide those hypothetical factual allegations in this lawsuit. If a claimant is denied compensation, under this provision such claimant could resort to their common law remedies.

Post Injury Misconduct

The changes contained in Senate Bill 1 relating to post injury misconduct are entirely rational and within the discretion of the General Assembly. Contrary to Appellants' allegations, that this provision would allow an employer to terminate an injured employee for reasons separate from the accident and for any reason whatsoever, **only employee misconduct** would serve as a sufficient reason for termination of a temporary disabled employee. § 287.170.4. It further excludes "absence from the workplace due to an injury" from the definition of "post injury misconduct." *Id*. The Courts have been consistent and clear on what misconduct is and the requirement that such is an appropriate reason for either termination or denial of benefits. The standard of "misconduct" is high. In *Ritch v. Industrial Commission*, 271 S.W.2d 791 (Mo. App. 1954), the Kansas City Court of Appeals defined misconduct as:

> an act of wanton or willful disregard of the employer's interest, a deliberate violation of the employer's rules, a disregard of standards of behavior which the employer has the

> right to expect of his employee, or negligence in such degree or recurrence as to manifest culpability, wrongful intent, or evil design, or show an intentional and substantial disregard of the employer's interest or of the employee's duties and obligations to the employer.

Id. at 793. The *Ritch* decision has been adopted and recently affirmed by all of the Missouri Courts of Appeal. See e.g., *City of Jennings v. Division of Employment Security*, 943 S.W.2d 330, 334 (Mo. App. E.D. 1997); *Circuit Court of Jackson County v. Division of Employment Security*, 936 S.W.2d 611, 614 (Mo. App. W.D. 1997); and *City of Branson v. Santo*, 111 S.W.3d 910, 913 (Mo. App. S.D. 2003). The universally accepted definition of misconduct and the willingness of the appellate courts to apply it clearly indicates that misconduct is a proper reason to terminate an employee from their employment, regardless of their disability status.

No Missouri Court has ever determined that termination for misconduct, when an employee is disabled, is an improper action by an employer. Moreover, the policy of the state, as evidenced in the Unemployment Compensation Law (*See* Ch. 288, RSMo) and now in the Workers' Compensation Law, is to discourage employee misconduct in all circumstances and situations. Senate Bill 1 is a rational change to the workers' compensation statutory scheme in accordance with public policy. Where an employee is terminated for misconduct, it is reasonable that payments not be made under the workers'

compensation scheme, since, due to their own misconduct, the employee would no longer be working.

Further, Appellants contend that trial court erred in granting the Defendant's Motion for Summary Judgment because Senate Bill 1 violates the Missouri and United States Constitution in that the Act no longer provides workers certain or adequate substitute remedies for work related injuries through the abolishment of what Appellants have termed a "quid pro quo" requirement. Appellants fail to provide any authority, because none exists, to support the notion that **Missouri** has expressly adopted a "quid pro quo" system of workers compensation. Amici Curiae maintain that Senate Bill 1 provides both a certain and adequate substitute remedy, but further contend that to the extent that any "quid pro quo" system existed, altering or "amending away" such a system does not constitute a violation of either the Missouri or the United States Constitution. For this reasons, the trial court did not err in granting Defendant's Motion for Summary Judgment.

Senate Bill 1 complies with all constitutional requirements and precedential decisions of the Appellate Courts of the State of Missouri. Where an injury is either not caused by work or not compensable under the Workers' Compensation Law, all injured employees have recourse to the common law judicial avenues for relief. Accordingly, they are losing no rights under the changes made by Senate Bill 1, and may actually be better off than under a different system of workers' compensation. In any event, the changes to the workers' compensation system contained in Senate Bill 1 do not create

any type of due process violation. Senate Bill 1 is constitutional, valid and should be upheld by this Court.

III. THE TRIAL COURT DID NOT ERR IN GRANTING RESPONDENT'S MOTION FOR JUDGMENT ON THE PLEADINGS AND DENYING APPELLANTS' MOTION FOR JUDGMENT ON THE PLEADINGS BECAUSE THERE EXISTS A FACTUAL, OBJECTIVE BASIS FOR THE LEGISLATURE REASONABLY TO BELIEVE THAT SENATE BILL 1 WOULD ACCOMPLISH ITS PURPOSE.

Appellants' allegations contained in Count III of their Petition incorrectly assert that the changes contained in Senate Bill 1 lack any rational basis. Clearly, the legislature had a rational basis to make changes to the workers' compensation system. Again, as before, Appellants' allegations and argument on the rational basis of the General Assembly's actions have added unsupported facts and hypotheticals in an inappropriate use of Declaratory Judgment.

There was more than just a minimal rational factual basis to support the decisions made by the General Assembly in enacting Senate Bill 1, which more than adequately establish the rational relationship between the legislation and legitimate state interests. Appellants bear the burden of proof of irrational decision-making. Appellants' mere

assertions fail to meet the standard to show that there was no rational basis for the legislature's changes.[6]

There is no doubt that the state has a legitimate interest in fostering a favorable business climate. Not only is reforming workers' compensation a legitimate interest in tax policy, economic development policy, and innumerable other policies of state government, it is also frequently a major issue in political races. Creating a "pro-

[6] Appellants rely, in part, on an Ohio case, *Nyitray v. Industrial Commission of Ohio*, 443 N.E.2d 962 (Ohio 1983), that dealt with the denial of accrued unpaid workers' compensation to dependents of a worker who died. This issue is distinguishable from the instant case, in that in *Nyitray* did not involve hypothetical situations or merely conjectures but a set of facts involving the **actual** denial of workers compensation to a **real** person. Further, the case had nothing to do with the supposed denial of workers compensation due to statutory changes made by legislators. In any event, the dissent of that case is most persuasive, stating "a reasonable basis can be found in the General Assembly's interest in making the most efficient use of a finite Workers Compensation Fund….conservation of funds is a legitimate state interest." *Id.* at. 968 (J. Krupansky, dissenting). The dissent finds support from a Supreme Court's decision, *Dandridge v. Williams*, 397 U.S. 471 (1970), where the Court stated : "[T]he Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited…public funds among the myriad of potential claimants." *Nyitray*, 443 N.E.2d at 968.

business" climate has always been deemed an appropriate state interest, goal and objective. Appellants agree that "[m]aking Missouri more competitive with other states in attracting employers and jobs is a legitimate state objective." Appellants' Brief, p. 83.

"The rational basis test requires only that the challenged law bear some rational relationship to a legitimate state interest." *Deaton v. State,* 705 S.W.2d 70, 74 (Mo. App. E.D. 1985). Further, "[t]he challenger bears the burden of showing that the law is wholly irrational. *Id*. (citing *Woods v. Holy Cross Hospital,* 591 F.2d 1164, 1174 (5th Cir.)).

The history of Missouri's workers' compensation system shows that over time judicial interpretations of the workers' compensation system have consistently expanded the reach and scope of that system. The intent of the legislative changes in Senate Bill 1 was to reform the workers' compensation system to bring it back to its original design. The system was to be an alternative to the civil court system. But it was not intended to cover every circumstance, nor every employee injury, regardless of causation, location of occurrence, or underlying issues, including fault. It is the legislature's duty and prerogative to adjust the workers' compensation system from time to time in order that it serve legitimate state interests, rather than as Appellants would have it that the state serve the interests of the workers' compensation system.

Prior to the enactment of Senate Bill 1, one area of increasing legislative concern related to permanent partial disability settlements. These settlements, authorized in Section 287.190 were out of control in the State of Missouri. The National Council of Compensation Insurance had recognized for several years prior to the implementation of

Senate Bill 1 that Missouri was out of line with respect to other states in its permanent partial disability settlement awards. Such permanent partial disability awards were a major cost driver in workers' compensation insurance. The reforms contained in Senate Bill 1 were intended to bring permanent partial disability issues back in to a range of normality and Senate Bill 1 did have the positive effect of reducing certain cost drivers.

As evidence of the positive effect of Senate Bill 1, on January 1, 2006 the Missouri Employees Mutual Insurance Company, one of the state's leading workers' compensation insurance carriers, which was created by statute in the 1990's, notified all policy holders of an estimated 5% reduction in their premiums. In that notice to policy holders, Missouri Employers Mutual specifically identified the passage and implementation of Senate Bill 1 as the basis for that premium reduction.

In looking at the purpose for enactment of Senate Bill 1, reduction of employer cost was a key objective. The actions of Missouri Employers Mutual clearly demonstrate that the changes in Senate Bill 1 did have the intended effect of reducing premiums. While Appellants may disagree, the facts stand unassailable: after the enactment of Senate Bill 1, premiums for workers' compensation insurance have decreased across the State of Missouri.[7] This reduces the costs to Missouri employers and serves the purpose

[7] Although Appellants assert that Senate Bill 1 "will not result in significant cost savings," the 5% premium reduction is a significant cost savings which has been immediately passed on from insurers to businesses across the State of Missouri. Appellants' assertion is not just unsupported – it is wrong.

which Senate Bill 1 was intended to serve – "[m]aking Missouri more competitive with other states in attracting employers and jobs." *See* Appellants' Brief, p. 83.

In addition, Amici Curiae believe that another purpose of the enactment of Senate Bill 1 protects both workers and employers in allowing workers to maintain tort claims against employers. Employers are incentivized to post safety guidelines and information regarding workers compensation claims; at the same time, employees are on notice that if the fail to follow the proper safety guidelines or proper procedures regarding workers compensation claims that they may be penalized, therefore incentivizing workers to focus on safety in the workplace and be more diligent regarding possible workers compensation claims. Not only does allowing workers to maintain tort actions against employers promote safety in the work place but it also fosters efficiency within the workers compensation system itself; therefore, this Court should affirm the trial court's decision upholding Senate Bill 1.

IV. THE TRIAL COURT DID NOT ERR IN UPHOLDING SENATE BILL 1 BECAUSE SENATE BILL 1 PROVIDES EQUAL RIGHTS TO ALL WORKERS IN THAT THE PROVISIONS OF SENATE BILL 1 RATIONALLY PROVIDE NON-DISCRIMINATORY TREATMENT FOR ALL WORKERS AND APPELLANTS HAVE FAILED TO.

Appellants allege in Count IV of their Petition that Senate Bill 1 deprives workers of equal rights under law guaranteed by Article I, Section 2 of the Missouri Constitution

and the Fourteenth Amendment of the Constitution of the United States. As with Appellants' prior allegations, Appellants allege only that the legislature lacked a rational basis for the amendments to the Workers' Compensation Law contained in Senate Bill 1.

Appellants allege that the "prevailing factor" requirement of Section 287.020.3(1), as construed by Appellants in conjunction with "occupational disease" (Section 287.067.2) and "repetitive motion injury" (Section 287.067.3) somehow creates a "classification" which is arbitrary and unreasonable. Appellants fail to provide any description of this classification, or of how these terms would apply unequally to any person or persons within such classification. The provisions challenged by Appellants apply to all claimants equally. There is no discrimination. Neither law nor logic supports the contention of arbitrary or unreasonable action by the legislature in modifying these pre-existing terms of the statute. Appellants' hypothetical situations and conjectures about various outcomes of various combinations of facts and circumstances are not properly before this Court through a Declaratory Judgment action in the circuit court. Conjecture and hypothesis do not carry the burden of proving irrationality.

Similarly, there is no merit to Appellants' allegation that the preference for "objective symptoms" of an injury is irrational. Amici's previous discussion of this issue under Appellants' Due Process challenge in Point II applies fully to this as yet unidentified class. No discrimination or arbitrariness is apparent on the face of the statute. None has been proven by Appellants. Appellants' **opinion** that a "substantial number of workers" will somehow be excluded from coverage is, as previously noted, no basis

whatsoever for a constitutional claim because alternative common law remedies are available even if this were true. No "right" of any identifiable person in any classification has been shown to be affected by this provision. Appellants fail to carry their burden of proof on this claim.

Appellants make the unfounded assertion that the provisions of Sections 287.067.2 and 287.067.3 discriminate against "older workers." This contention is fallacious. If Appellants' contention is that these provisions **have** discriminated against any such amorphous classification as "older workers," Appellants have not presented one scintilla of evidence to prove this is true. The provisions apply equally to all workers and, on their face, do not create any such classification as "older" workers. Prescribing the limits of the Workers' Compensation Law and focusing on work related injuries to the exclusion of non-work related maladies is a legitimate legislative judgment that cannot be remade by the courts at Appellants request. Appellants fail to carry their burden of proof that such provisions create **any** classification which is discriminated against under any circumstances other than those which are designed to protect legitimate state interests. No "right" has been identified as having been violated. The studies, articles and opinions relied upon by Appellants to argue an adverse affect on older workers might be appropriate to present to the legislature. But they have no value in determining the constitutionality of Senate Bill 1 under the rational basis test. Again, hypothesis and conjecture do not carry the burden of proof.

Finally, Appellants' contention of "discrimination" created by changes to provisions involving "company owned vehicles" (Section 287.020.5) and compensation to "firefighters and police officers" (Section 287.067.6) lacks merit. Appellants fail to demonstrate any irrationality, arbitrariness or unreasonableness. Again, circumscribing the coverage of workers' compensation for injuries sustained in company owned or subsidized automobiles is within the legislative prerogative and violates no **right** of any injured employee, who may seek relief in the courts if it is determined his injuries are not covered by workers' compensation. Firefighters and police officers have always been separately and specially treated, both as to their benefits and to their burdens under law. The "Fireman's Rule" and rules governing Professional Rescuers have never been found irrational for the simple reason that special circumstances justify special treatment. Senate Bill 1's treatment on this and all other issues under Count IV of Appellants' Petition for Declaratory Judgment easily pass the rational basis test of equal protection; and, in any event, Appellants have in no way carried their burden of proving the lack of a rational basis for any of these statutory amendments.

CONCLUSION

The trial court correctly granted Respondent's Motion for Summary Judgment as Appellants' Petition seeks an advisory opinion rather than a substantial, presently-existing controversy, and Appellants have failed to present a controversy ripe for judicial determination.

By offering hypothetical situations that include conjecture, surmise and extraneous facts without evidentiary support, Appellants show they are not seeking a declaration of the facial invalidity of Senate Bill 1, but are raising as an applied challenge to Senate Bill 1. Declaratory judgment is inappropriate for such a challenge.

The trial court correctly denied Appellants' motion for judgment on the pleading granted Respondent's motion because Missouri Workers' Compensation Law, as amended by Senate Bill 1, comports with constitutional requirements. Under Senate Bill 1, injured workers maintain their right to common law remedies; and, in the alternative, Senate Bill 1 provides an adequate remedy.

Senate Bill 1 does not violate the due process clauses of the Missouri or United States Constitutions. On a facial challenge, Appellants should be denied relief since employees remain entitled to workers' compensation or entitled to seek relief under the common law in circuit courts. As a result, no "rights" of employees are being violated or unfairly restricted by Senate Bill 1 changes to the Workers' Compensation Law. Appellants have failed to demonstrate that Senate Bill 1 "clearly and undoubtedly" violates the Constitution and thus this court should affirm the judgment of the trial court.

The trial court correctly denied Appellants' Motion for Judgment and granted Respondent's Motion for Judgment on the pleadings, because there is a factual, objective basis for the legislature to have reasonably believed that Senate Bill 1 would accomplish its intended purpose.

The General Assembly not only had sufficient information and a rational basis upon which to enact Senate Bill 1 for the purpose of reducing costs upon Missouri businesses, but the effects of Senate Bill 1 have confirmed that such beneficial cost reductions did occur. By serving such a legitimate state interest, the enactment of Senate Bill 1 fully comports with the rational basis requirement. Relief should be denied on Appellants' Petition Counts III and IV, and thus the trial court's decision should be affirmed.

This Court should affirm the judgment of the trial court in granting Respondent's motion for judgment on the pleadings with respect to Counts I & II of the Appellants' petition for declaratory judgment and granting Respondent's motion for summary judgment on all remaining counts of the petition and uphold as valid the amendments contained in Senate Bill 1.

WHEREFORE, Amici Curiae Associated Industries of Missouri, National Federation of Independent Business Legal Foundation and Associated Home Builders and Contractors, Inc. pray that this Court deny relief requested by Appellants, affirm the decision of the trial court and enter its order declaring the validity of Senate Bill 1.

Respectfully submitted,

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CERTIFICATE OF ATTORNEY

I hereby certify that the foregoing Amici Brief complies with the provisions of Rule 55.03 and complies with the limitations contained in Rule 84.06(b) and that:

(A) It contains 9,390 words, as calculated by counsel's word processing program;

(B) A copy of this Brief is on the attached 3 1/2" disk; and that

(C) The disk has been scanned for viruses by counsel's anti-virus program and is free of any virus.

_____

Marc H. Ellinger

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Brief of *Amici* Associated Industries of Missouri, National Federation of Independent Business Legal Foundation, and Associated Home Builders and Contractors, Inc. in Support of Respondent was sent by U.S. Mail, postage prepaid, this 20th day of August, 2007, to the following:

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