IN THE SUPREME COURT OF MISSOURI

No. SC88368

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

Appellants,

v.

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

Respondent.

Appeal From Cole County Circuit Court
The Honorable Byron L. Kinder, Judge

RESPONDENT'S BRIEF

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

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Statement of Facts

This case involves a challenge to Senate Bill Nos. 1 and 130, which were passed by the 93rd General Assembly and signed by the governor on March 30, 2005. LF 81 and 97. The bill ("SB1") repealed certain sections of Chapter 287 and enacted 40 new sections in lieu thereof. LF 97.[1]

As presented to the trial court below, the facts are straightforward.

The plaintiffs are 71 organizations – one not-for-profit corporation; local, regional, and international labor unions; local and regional labor councils; and trade associations – that claim to represent Missouri workers. LF 16-17.

The Missouri Department of Labor and Industrial Relations, Division of Workers' Compensation is the sole defendant. LF 18. The Division carries out the provisions of MO. REV. STAT. Chapter 287, the Workers' Compensation Law.[2] MO. REV. STAT. §§ 287.410 and .650 (2000). Through administrative law judges, the Division adjudicates disputes between employers and employees regarding compensation benefits payable under Chapter 287 and issues awards. MO. REV.

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[1] The bill is included in the Division's separately-bound Appendix.

[2] All statutory references are to the Revised Statutes of Missouri (Supp. 2006) unless otherwise indicated.

STAT. §§287.450 and .460 (2000); Supp. LF 14, 21-25 (Defendant's motion for summary judgment, p. 2, ¶6, and Exhibits 1 and 2).[3]

The organizations filed a nine-count petition, LF 1, and the case was decided on motions, largely involving only legal arguments. Two of the organizations' nine counts – Counts I and III – were due process challenges to SB1 in its entirety. LF 39 and 47. The parties filed cross-motions for judgment on the pleadings with respect to those two counts. LF 186 and 263. The trial court granted the Division's motion and denied the organizations' motion, finding that the changes effected by SB1 comport with substantive due process. LF 292, 297.

The Division also moved for summary judgment on all counts, for lack of justiciability. Supp. LF 10, 13. The trial court granted the motion with respect

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[3] The Labor and Industrial Relations Commission, not a defendant here, reviews Division awards. MO. REV. STAT. §287.470 (2000). The Commission is a constitutionally established entity, existing within the Department of Labor and Industrial Relations. MO. CONST. art. IV, ¶ 49; Supp. LF 14, 26-28 (Defendant's motion for summary judgment, p. 2, ¶5, and Exhibit 4).

The Commission's final awards are reviewed by the appellate courts. MO. REV. STAT. § 287.495.

to Counts II and IV-IX,[4] and denied it as moot with respect to Counts I and III, in light of the disposition of the Division's motion for judgment on the pleadings. LF 292, 297. The court held that no genuine dispute of material fact existed and that the Division was entitled to judgment as a matter of law; the seven claims were not justiciable. *Id.*

[4] Count II was an open courts challenge to four provisions, LF 45-47; Count IV, an equal protection challenge to nine provisions, LF 50-53; Count V, a supremacy clause challenge to one provision, LF 53-55; Count VI, a request for declaratory judgment regarding the exclusivity provision, §287.120, LF 55-57; Count VII, a due process and access to courts challenge to an attorney fee provision, §287.390.5, LF 57-58; Count VIII, a separation of powers challenge to §287.610.2, LF 58-61; and Count IX, a search-and-seizure challenge to a drug testing provision, §287.120.6(3), LF 61-62.

Argument

I. The trial court correctly granted the Division's motion for judgment on the pleadings on the due process claims, Counts I and III. The new law thoroughly comports with due process. [Responds to the appellants' Points Relied On II and III.[5]]

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[5] In addition to the due process issues, the appellants state in their Points Relied On II and III, and argue thereunder, that the trial court erred in awarding judgment on the pleadings to the Division because the new law violates "open courts guarantees" and "equal protection," respectively. Appellants' Brief, pp. 48-49, 72. But as noted in the Division's Statement of Facts, the parties addressed due process – not open courts and equal protection – in their respective motions for judgment on the pleadings; those motions only went to Counts I and III, the due process claims. Counts II and IV were the open courts and equal protection claims, *see* LF 45 and 50 (petition), and were disposed of by summary judgment, LF 292, 297. (The Division will address those counts in Section III, below.)

Because the plaintiffs did not seek judgment on the pleadings on Counts II and IV, the trial court cannot be assigned error for having failed to grant it to them. *Jackson v. Cannon*, 147 S.W.3d 168, 172 (Mo. App. S.D. 2004)(party is

The common law has never provided a cause of action for injuries occasioned without human fault, negligence, or wrong. *DeMay v. Liberty Foundry Co.,* 37 S.W.2d 640, 646 (Mo. 1931) (Div. 1). Thus, whether the legislature chooses to provide for such a cause of action is a matter of its prerogative, generally subject to extension or retraction as the legislature sees fit in attacking social or economic problems.

The organizations' due process challenges to SB1 here readily failed, inasmuch as they could not meet their very heavy burden of showing that the law is wholly irrational. The law is eminently rational. Moreover, the "quid pro quo" twist that the organizations add to one of their due process claims, Count I, fails, as it is the wrong test altogether.

The trial court's judgment with respect to Counts I and III should be affirmed.

A. Judgment on the pleadings and standard of review

A party who moves for judgment on the pleadings accepts as true all well-pleaded facts in the opposing party's pleadings. *Felling v. Giles,* 47 S.W.3d 390, 393 (Mo. App. E.D. 2001), *citing Madison Block Pharm., Inc. v. U.S. Fid. & Gaur. Co.,* 620 S.W.2d 343, 345 (Mo. banc 1981). The movant does not admit

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bound on appeal to theory asserted in trial court and will not be heard on a different theory).

conclusions pleaded. *State ex rel. Jackson County Library Dist. v. Taylor,* 396 S.W.2d 623, 624 (Mo. banc 1965).

This Court's review of judgment on the pleadings, then, is essentially *de novo*: it reviews the well-pleaded facts in the non-moving party's pleading, and determines whether they are insufficient as a matter of law. *Felling*, 47 S.W.3d at 393.

B. The law is presumed constitutional and the challengers bear a very heavy burden.

The power of Missouri's general assembly is plenary. *Coldwell Banker Residential Real Estate Svs., Inc. v. Mo. Real Estate Comm'n*, 712 S.W.2d 666, 668 (Mo. banc 1986). The Missouri Constitution, art. III, § 1, affords the legislature "the single power and sole responsibility to make, amend and repeal laws for Missouri and to have the necessary power to accomplish its law-making responsibility." *State Auditor v. Joint Comm. on Legislative Research*, 956 S.W.2d 228, 230 (Mo. banc 1997). Similarly, the federal constitution "does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object," even if "otherwise settled expectations maybe upset thereby." *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 88 (1978) (citation omitted).

Therefore, those who challenge laws that do not impinge on fundamental rights shoulder a heavy burden. This Court begins with a presumption in favor of the validity of SB1 and against the organizations' challenge:

> A statute is presumed to be constitutional and will not be held to be unconstitutional unless it clearly and undoubtedly contravenes the constitution. Courts will enforce a statute unless it plainly and palpably affronts fundamental law embodied in the constitution. When the constitutionality of a statute is attacked, the burden of proof is upon the party claiming that the statute is unconstitutional .... [A court] will resolve doubts in favor of the procedural and substantive validity of an act of the legislature ....

United C.O.D. v. State, 150 S.W.3d 311, 313 (Mo. banc 2004)(citations omitted).

The presumption means that one who attacks legislation must "negative every conceivable basis which might support it." *Witte v. Dir. of Revenue*, 829 S.W.2d 436, 439 (Mo. banc 1992), *quoting Madden v. Kentucky*, 309 U.S. 83, 88 (1940). *See also Heller v. Doe by Doe,* 509 U.S. 312, 319 (1993)(The "burden is on the one attacking the legislative arrangement to negative every conceivable

basis which might support it…whether or not the basis has a foundation in the record.").

C. Count III, the substantive due process challenge, fails.

The organizations' third point relied on states only that rational basis review applies here, and their argument that follows is about whether the legislature had a rational basis in enacting SB1.[6] But the organizations do not

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[6] At the beginning of their rational basis argument, the organizations drop a footnote in which they enigmatically "submit that strict scrutiny is the appropriate level of judicial review in this case." Appellants' Brief, pp. 72-73 n.47. Any such argument is not preserved, for at least two reasons. One, they do not include it in their point relied on. *See Piazza v. Combs,* 226 S.W.3d 211, 222 (Mo. App. W.D. 2007)(issues not raised in point relied on and appearing only in argument portion of brief are not preserved for review).

Two, they did not raise it below, and in fact told the trial court that "the minimal rational-basis standard"…"applies to provisions of the Workers Compensation Law." LF 217. *See Campbell v. Tenet Healthsystem, DI, Inc.,* 224 S.W.3d 632, 639 (Mo. App. E.D. 2007)(issue raised for first time on appeal is not preserved for review); *Jackson v. Cannon*, 147 S.W.3d 168, 172 (Mo. App. S.D. 2004)(party is bound on appeal to theory asserted in trial court and will not be heard on different theory).

come to grips with the deferential and limited nature of this standard, as applied by Missouri courts and the U.S. Supreme Court.

1. The rational basis test.

When assessing a substantive due process challenge to a law that does not impinge on a fundamental right, Missouri courts and the U.S. Supreme Court employ the rational basis test, which requires only that the challenged law bear some rational relationship to a legitimate state interest. *Deaton v. State*, 705 S.W.2d 70, 73-74 (Mo. App. E.D. 1986).

The test is a highly deferential one because

> [l]egislatures are…afforded broad discretion in attacking social and economic problems, so long as they act in a rational manner. *Williamson v. Lee Optical of Okla.*, 348 U.S. 483 …(1955). The challenger bears the burden of showing that the law is wholly irrational.

In any event, they identify no fundamental right affected by SB1, nor does SB1 affect any such right. Fundamental rights protected by substantive due process are those inherent in the concept of ordered liberty, generally, matters relating to marriage, family, procreation, and bodily integrity. *Doe v. Phillips,* 194 S.W.3d 833, 843 (Mo. banc 2006) (and citations therein).

Woods v. Holy Cross Hosp., 591 F.2d 1164, 1174 (5th Cir. 1979).

Deaton, 705 S.W.2d at 73-74 (emphasis added). *See also Califano v. Jobst,* 434 U.S. 47, 55 (1977)(upholding section of Social Security Act that permits disabled dependent child's benefits to continue upon marriage to another beneficiary, but discontinues them upon marriage to a non-disabled person; law not wholly irrational).[7]

There is no Missouri appellate decision addressing a due process challenge to Missouri's workers' compensation scheme as a whole. Missouri courts do routinely apply the deferential rational-basis test in other cases involving the employer-employee relationship,[8] and in analogous cases, involving the conduct

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[7] Concomitantly, the U.S. Supreme Court has repeatedly stated its "reluctance to expand the doctrine of substantive due process…in large part because guideposts for responsible decisionmaking in this uncharted area are scarce and open ended." *Chavez v. Martinez*, 538 U.S. 760, 775 (2003) (quotations and citations omitted).

[8] *Day-Brite Lighting,* 240 S.W.2d 886 (upholding statute that penalized employers for refusing to permit employees time off to vote); and *Gray v. City of Florissant*, 588 S.W.2d 722, 725 (Mo. App. E.D. 1979)(upholding ordinance establishing minimum and maximum weight limits for police officers).

of one's profession, or the regulation of business.[9]

In the context of the exercise of the state's police power, including regulation of the employer-employee relationship, this Court has made abundantly clear that the deferential, rational basis standard applies. In *Day-Brite,* the Court rejected a substantive due process challenge to a statute that required employers to give employees time off to vote. 240 S.W.2d at 888. The Court noted that regulation of the employer-employee relationship – *including*

C.f. Pension Benefit Guar. Corp. v. R.A. Gray & Co., 467 U.S. 717, 730-731 (1984)(upholding, against due process challenge, congressional enactment that imposed retroactive liability on employers for payment of certain pension benefits); *Usery v. Turner Elkhorn Mining Co.,* 428 U.S. 1, 15-18 (1976) (upholding enactment that required coal operators to compensate certain miners and their survivors for disability due to black lung disease).

[9] *Coldwell Banker,* 712 S.W.2d at 667-668 (upholding statute that prohibited realtors from giving prizes to clients after closing a transaction); *Mo. Dental Bd. v. Alexander,* 628 S.W.2d 646 (Mo. banc 1982)(upholding statute that requires denture-fitters to be licensed dentists); *ABC Liquidators, Inc. v. Kansas City*, 322 S.W.2d 876 (Mo. 1959)(upholding ordinance that prohibited Sunday auctions); and *Poole*, 125 S.W.2d 23 (upholding statute that prohibited sale of milk or milk derivatives to which oil or fat had been added).

regulation through workmen's compensation laws, unemployment compensation laws, semi-monthly payment of wage laws, minimum wage and hour laws, Sunday labor laws, and the great multiplicity of safety and health laws – is within the police power of the state. *Id.* at 892 (and citations therein). And "[i]f an act had a real and substantial relation to the police power, then no matter how unreasonable or how unwise the measure itself may be, it is not for the judicial tribunals to avoid or vacate it upon constitutional grounds." *Id.* at 893, *citing* 11 Am. Jur. §306, p. 1089.

The U.S. Supreme has applied a rational basis test to due process challenges to workers' compensation laws. *E.g.*, *Arizona Copper Co. v. Hammer*, 250 U.S. 400, 419-420 (1919) (rejecting due process challenge to workers' compensation scheme as a whole; "[W]hether [the law] be a proper substitute was for the people of the state of Arizona to determine; but we find no ground for declaring that they have acted so arbitrarily, unreasonably, and unjustly as to render their action void.").

And other states' courts have done the same, acknowledging their legislatures' plenary authority to achieve the legislative goals that they see fit, subject only to the prohibition against truly irrational schemes. *E.g., Tracy v. Streater/Litton Ind.*, 283 N.W.2d 909, 915 (Minn. 1979)("The ultimate test is whether the statute is so arbitrary, unreasonable and unjust as to be repugnant to the due process guarantees."); *Walters v. Blackledge*, 71 So.2d 433, 443 (Miss.

1954)("[I]t is within the police power of the State to impose restraints upon the rights of the employer and employee contract with one another where the safety and welfare of the State require such restraints."); and *Adams v. Iten Biscuit Co.*, 162 P. 938, 941-942 (Okla. 1917)(agreeing with Washington Supreme Court that test was not whether the law "created a liability without a fault, or whether it took the property of one employer to pay the obligations of another, but was whether there was any reasonable ground to believe that the public health, safety, or general welfare was promoted thereby[.]").

In deference to the legislative role, a Missouri court's role in review of the rationality of a law's relationship to a legitimate state interest is not and never has been one of weighing evidence:

> If there is any reasonable basis upon which the legislation may constitutionally rest the court must assume that the legislature had such fact in mind and passed the act pursuant thereto. All facts necessary to sustain the act must be taken as conclusively found by the legislature, if any such facts may be reasonably conceived in the mind of the court[,]
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> nor do the courts have to be sure of the precise reasons for the legislation, or certainly know them, or be convinced of the wisdom or adequacy of the laws.

State v. Day-Brite Lighting, Inc., 240 S.W.2d 886, 893 (Mo. banc 1951), *quoting Poole & Creber Mkt. Co. v. Breshears*, 125 S.W.2d 23, 31 (Mo. 1938)(Div. 2), *aff'd* 342 U.S. 421 (1952).

The U.S. Supreme Court has likewise explained that a "State…has no obligation to produce evidence to sustain the rationality of a statutory classification. '[A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data.'" *Heller v. Doe by Doe,* 509 U.S. 312, 320 (1993), *quoting Fed. Commc'ns Comm'n v. Beach,* 508 U.S. 307, 315 (1993).

A court need not even be convinced that the legislature was correct in its projections or the conclusions that it drew:

> [The Court] do[es] not have to agree as to [the legislature's] projection of possible effects of the legislation if they represent conclusions the legislature might possibly draw. We are obliged to sustain legislation which is utterly foolish, absent a valid constitutional challenge.

Coldwell Banker Residential Real Estate Svs., Inc. v. Mo. Real Estate Comm'n, 712 S.W.2d 666, 668 (Mo. banc 1986). In *Williamson*, 348 U.S. at 490, the Court rejected a due process challenge to a statute that prohibited opticians from advertising their services of dispensing eye glasses without a prescription. The Court held that while the law "may exact a needless, wasteful requirement in many cases[,]…it is for the legislature, not the courts, to balance the advantages and disadvantages of the new requirement." *Id.* at 487. The legislature may have concluded that it had to regulate branches of the eye care field together to be effective, or that advertising needed to be restricted or abolished in the public interest, "or so the legislature might think." *Id.* at 490. The law comported with substantive due process. *Id.*

Finally, the means chosen by a legislature need not be precise. *City of Ladue v. Horn*, 720 S.W.2d 745, 750 (Mo. App. E.D. 1987)(holding that zoning ordinance was reasonable and not arbitrary, and bore a rational relationship to permissible state objective; whether city could have chosen a more precise means to effectuate its legislative goals was immaterial). Nor need the means comprehensively address all problems; the legislature is free to take one step at a time, addressing itself to what problems seem most acute to the legislative mind. *Williamson,* 348 U.S. at 488-489; *Gem Stores Inc. v. O'Brien,* 374 S.W.2d 109, 117 (Mo. banc 1964).

2. The organizations do not and cannot sustain their heavy burden.

They do not seriously dispute that the legislature sought to accomplish legitimate state objectives. *E.g.* Appellants' Brief, p. 77 ("SB1 was an economic development measure[.]"), and 83 ("Making Missouri more competitive with other states in attracting employers and jobs is a legitimate state objective."). But in their haste to decry the legislature's methods, they too narrowly circumscribe those objectives.[10]

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[10] The organizations concede, "in deference to the legislative role," that court is not limited in the parties' articulations of the legitimate state interests that a particular enactment seeks to promote; a court is free to supply the legitimate state interests that the legislature sought to promote. *See* Appellant's Brief, p. 76 (and citations therein). *See also Schnorbus v. Dir. of Revenue,* 790 S.W.2d 241, 243 (Mo. banc 1990) (noting that while the "General Assembly may have desired to" enact new benefit for state employees so as to attract persons to government service of retain employees,"[r]egardless of the actual justification for the statute, there [was] rational basis for" the enactment and the state had "legitimate interest in giving" the benefit to former government employees).

One that they overlook is the legislature's desire to reign back a statutory scheme that the legislature deemed had strayed too far beyond the legislature's original intendments.[11] "The workers' compensation law is entirely a creature of statute." *Hayes v. Show Me Believers, Inc.*, 192 S.W.2d 706, 707 (Mo. banc 2006) (internal quotation and citation omitted). And the legislature has always been presumed to be aware of the law, including interpretation of statutes, when it enacts legislation. *Nunn v. C.C. Midwest*, 151 S.W.3d 388, 396 (Mo. App. W.D. 2004). SB1 in fact contains some affirmative demonstration that the legislature was aware of case law interpreting Chapter 287 – and did not approve. In SB1, the legislature explicitly states its intent to reject and abrogate existing case law interpreting the former version of Chapter 287. Appendix A7, A11 (§287.020.10, §287.043).[12]

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[11] To be clear, SB1 did not change the manner in which rates are calculated, MO. REV. STAT. §287.200 and §287.250 (2000); the schedule of compensation for permanent partial disability or the value of rated body parts, MO. REV. STAT. §287.190.1 (Supp. 2006), Appendix A43; or the thresholds necessary to reach the second injury fund, MO. REV. STAT. §287.220 (2000).

[12] Dissents in some appellate cases interpreting workers' compensation statutes, opining that the law was never intended to reach so far as the majority construed it, to an extent foreshadowed the legislature's actions in SB1. *E.g.*

The legislature is free to explicitly reject judicial interpretation of a creature of statute, including interpretations that the legislature deems unduly expansive, or to narrow what it perceives to be the scheme's overbreadth, by enacting new laws. *See e.g., Lawson v. Ford Motor Co.,* 217 S.W.3d 345, 346 (Mo. App. E.D. 2007) (legislature's amendment of statute's definitions "merely serves as clarification of the fact that any construction of the previous definitions by the courts was rejected by" the amendment); *Div. of Employment Security v. Comer,* 199 S.W.3d 915, 921 (Mo. App. S.D. 2006) (recognizing legislature's authority to abrogate case law interpretations of "misconduct connected with work" under MO. REV. STAT. § 288.045.13(1) (Supp. 2005));

Fisher v. Waste Mgmt. of Mo., 58 S.W.3d 523, 527-528 (Mo. banc 2001)(majority extended definition of "statement" in MO. REV. STAT. §287.120 (2000) too far by construing "statement" to include a surveillance video)(Limbaugh, C.J., dissenting); *Kasl v. Bristol Care, Inc.*, 984 S.W.2d 852, 856 (Mo. banc 1999)(majority misapplies law to facts "in such an excessively liberal manner that one is hard-pressed to imagine any injury from an accident at work that is not compensable")(Price, J., dissenting, joined by Covington, J.); *Drewes v. Trans World Airlines,* 984 S.W.2d 512, 515 (Mo. banc 1999)(majority reads statute too broadly; injury did not arise out of and in the course of employment)(Covington, J., dissenting).

Christensen v. Am. Food & Vending Servs., Inc., 191 S.W.3d 345, 346 (Mo. App. E.D. 2006) (same; §288.045.13(1) (Supp. (2004)).

And manifestly, the legislature, as an exercise of its police power is free to change the contours of the employer-employee relationship – "it is not for the judicial tribunals to avoid or vacate [such a change] on constitutional grounds." *Day-Brite,* 240 S.W.2d at 893.[13]

Such purposes are legitimate state interests and SB1 was rationally related to accomplishing them.

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[13] Of course, no person or entity has "a vested right in a general rule of law or legislative policy that would entitle either to insist that a law remain unchanged." *Beatty v. State Tax Comm'n,* 912 S.W.2d 492, 496 (Mo. banc 1995). *See also Arizona Copper Co. v. Hammer*, 250 U.S. 400, 419-420 (1919) (no person has vested right entitling him to have unchanged the existing rules of law concerning employers' responsibility for injury or death of employee); *N.Y. Cent. R.R. Co. v. White*, 243 U.S. 188, 198 (1917) (no person has vested interest in any rule of law, entitling him to insist that it shall remain unchanged for his benefit).

And to be sure, the Missouri General Assembly has amended the workers' compensation law at least a dozen times since it was first enacted in the 1920s.

SB1 reflects other legitimate state interests, too, that the organizations do acknowledge. They note that the bill is "an economic development measure to lower workers' compensation insurance rates for employers so as to attract new businesses to Missouri and dissuade existing businesses from relocating elsewhere," and that "[m]aking Missouri more competitive with other states in attracting employers and jobs is a legitimate state objective." Appellants' Brief, pp. 77, 83; LF 226, 227, 233. They concede that the legislature "has a wide range of options at its disposal" to accomplish such goals. Appellants' Brief, p. 83; LF 228.

Promoting economic development is, as the organizations concede, Appellants' Brief, pp. 77 and 83, a legitimate state interest. Indeed, Missouri appellate courts have acknowledged when statutes and ordinances are aimed at fostering the business climate, and have approved those goals. *E.g. Int'l Bus. Mach. v. Dir. of Revenue,* 958 S.W.2d 554 (Mo. banc 1997)(sales tax exemption encourages development of enterprises that produce products subject to the sales tax); *Union Elec. Co. v. Mexico Plastic Co.*, 973 S.W.2d 170 (Mo. App. E.D. 1998)(purpose of ordinance granting exemptions from business license tax was to encourage manufacturers to locate in city and generally benefit community at large, but city could limit exemption in light of its budgetary needs); and *Anchor Sales & Serv. Co., Inc. v. Div. of Employment Sec.,* 945 S.W.2d 66, 70 (Mo. App. E.D. 1997)(construing employment security law so as to encourage employers to

use bonded leasing companies, reduce certain administrative burdens, and ensure that sufficient contributions are made for each employee).[14]

Moreover, the organizations concede that SB1's provisions are at least possibly rationally related to achieving the state's goals of economic development. *E.g.* Appellants' Brief, p. 84 ("Jobs are essential to Missouri's healthy economy[.]"). That admission should dispose of their due process claims.

But, the organizations insist, there was no "objective, factual basis" for the enactment and SB1 just won't work in the end, therefore it violates substantive due process. Appellants' Brief, pp. 78-86; LF 228-233. That is not the standard that any Missouri court or the U.S. Supreme Court has ever applied to a substantive due process challenge under rational basis analysis.

As discussed above, due process does not require that the choice the legislature makes to achieve a goal is likely, to some mathematical degree of certainty, to work; nor that a court agrees with the legislature's projections and conclusions about the likelihood of accomplishing its purpose; nor whether the legislature chose precise means. Nor does the due process test ask whether

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[14] Amicus curiae, the Workers Injury Law and Advocacy Group, in fact states that the modern trend of workers' compensation law is to limit coverage. WILG Brief, p. 25.

there were "objective facts," whatever that means, on the table when the legislature made its decision. The test is simply whether the choice is rationally related to achieving its purpose.

The organizations simply cannot negate every conceivable basis for SB1's validity. Their argument to the contrary, evidence is irrelevant to this requirement. *E.g., Day-Brite,* 240 S.W.2d at 893; *Heller,* 509 U.S. at 320. The U.S. Supreme Court cases that the organizations cite for the proposition that a factual basis is required to be established for a legislature's enactments to satisfy rational basis review, Appellants' Brief, pp. 80-81, simply do not so state. The cases are also inapposite equal protection cases, involving bright line classifications,[15] and protected or special classes of persons,[16] and are not

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[15] *E.g. Metro. Life Ins. Co. v. Ward,* 470 U.S. 869 (1985)(discrimination between in-state and out-of-state insurers); *Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985)(benefits for persons who established state residency before a certain date, none for persons who did so after).

[16] *E.g. City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985)(mentally retarded persons); *Plyler v. Doe*, 457 U.S. 202 (1982)(undocumented children); *Jimenez v. Weinberger*, 417 U.S. 628 (1974)(illegitimate children); *Weber v. Aetna Cas. & Sur. Co.,* 406 U.S. 164 (1972)(same); *Romer v. Evans*, 517 U.S. 620 (1996)(homosexuals).

comparable to the scenario here, in which the organizations challenge numerous changes to a statutory scheme.

The cases from other states that the organizations cite for the same proposition (that a factual basis must be proved), *see* Appellants' Brief, p. 82, of course are not binding here. To the extent that those states follow that rule, though, neither Missouri nor the U.S. Supreme Court does, and the cases are therefore inapposite.

Nevertheless, there is nothing arbitrary in tightening the definition of accident or injury, for example, to encourage employers to come to Missouri or to remain here. The legislature could have reasonably concluded that such a change was business-friendly, or would promote the state's reputation as a business-friendly one. Exactly *how* business-friendly or effective the change turns out to be remains to be seen, but is irrelevant to due process analysis, regardless of how certain the organizations are that the change just won't work that way in the end.

Moreover, the organizations overlook that many changes made by SB1 do not go to the scope of the claims for which the workers' compensation law provides – the organizations' overarching focus – but are aimed at streamlining proceedings and activities that occur under Chapter 287 in various ways, including the imposition of penalties for fraud or for litigating without reasonable grounds. *E.g.* §286.020, Appendix A4 (requiring Senate confirmation

of Commission members); §287.127, A21 (notification provision); §287.128, A23 (fraud provisions); §287.129, A29 (fraud penalty); §287.140.14, A36 (use of leave); §287.190.6 (1) and (2), A46 (evidentiary standards); §287.203, A51 (imposition of costs for bringing, prosecuting, or defending without reasonable grounds); §287.215, A52 (definition of "statement"); §287.253, A53 (monetary bonus over 3% of annual compensation counts in calculating employee's compensation under Chapter 287);

§ 287.380, A54 (when employer's notification to the Division is due); §287.390, A56 (approval of settlements and offers of settlement); §287.420, A58 (when notice of occupational disease or repetitive trauma is due to employer); §287.550, A60 (conduct of proceedings before Commission); §287.610, A61 (administrative law judges); §287.615, A66 (legal counsel); §287.642, A67 (deleting legal advisors' role as "public information persons"); §287.715, A71 (handling of the second injury fund surcharge); §287.800, A74 (construction of Chapter 287, and evidentiary standards); §287.808, A77 (burden of proof for affirmative defenses);

§ 287.812(5), A78 (defining "chief legal counsel"); §287.865, A80 (procedure for employee's open claim when division is notified that self-insured member filed for bankruptcy, liquidation, or dissolution); §287.894, A88 (commercial insurance carriers must provide data to Division, instead of Department of Health and Senior Services); §287.957, A89 (adjustments to experience

modification of an employer, and employer reporting); §287.972, A90 (director of insurance and pure premium rate data); and repealing §287.616, the legal advisors provision, A92.

There can be little quarrel that streamlining procedures and activities under the workers' compensation law is rationally related to promoting economic development.[17] And penalties encourage compliance with the law, on both sides. *Compare Pavia v. Smitty's Supermarket*, 118 S.W.3d 228, 244 (Mo. App. S.D. 2003)("Regarding [Mo. Rev. Stat.] section 287.120.4 [2000], we observe that the 'purpose of the penalty is to encourage employers to comply with the laws governing safety.'")(internal quotation and citation omitted).

In a related vein, the organizations baldly assert that if the circuit court was correct in holding that employees may still bring civil actions for claims for which the workers' compensation law no longer provides, then the law must be irrational because that would not attract businesses. Appellants' Brief, p. 89. But it is at least equally plausible for the legislature to have concluded that the specter of tort suits was a sufficiently big "hammer" – or penalty – to encourage

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[17] Indeed, states have long been entirely free to change a burden of proof without violating due process. *James-Dickinson Farm Mortgage Co. v. Harry*, 273 U.S. 119, 124 (1927).

business to make a relatively cheaper investment in safe work environments, even if employers' liability for injuries that nevertheless occur would not be decided in the context of workers' compensation proceedings. In other words, the legislature could have reasonably concluded that the market would best promote safe work environments, to the benefit of all.

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The organizations did not and cannot sustain their burden to negate every conceivable basis that the legislature may have had for passing SB1, and cannot demonstrate that the law is truly irrational. Their substantive due process claim fails and the trial court's judgment should be affirmed.

D. Count I, the "quid pro quo" challenge, fails.

In view of the above, the organizations' articulation of the due process analysis as one that asks whether the statutory enactment establishes an adequate substitute for remedies available at common law, or quid pro quo, Appellants' Brief, pp. 49-55, is the wrong test. And in fact, neither the United States Supreme Court nor this Court has articulated the due process test as such. Nor should this Court do so in this case. The organizations' test has no form or boundaries. The organizations do not, because they cannot, explain with any precision exactly what a "reasonable substitute" is.

As discussed in this Section, in reviewing workers' compensation schemes, courts from time to time summarize or describe a scheme as being in the nature of a trade-off or quid pro quo arrangement between employer and employee, or the "workers' compensation bargain," and the basis for abrogation of common-law rights as between them. But the courts' view of the alignment of benefits and obligations realized and foregone does not itself become the test. At most it is a factor going to rationality of a statutory scheme. The rational basis test, as discussed in Section I.C., above, remains the test and SB1 passes constitutional muster under that test. The organizations simply misread early U.S. Supreme Court cases, and meld due process protections with Missouri's open courts provision, distinct concepts.

1. The U.S. Supreme Court applies rational basis analysis to such challenges.

The U.S. Supreme Court has never held that workers' compensation schemes must represent an adequate substitute or quid pro quo for common law rights to be sustained. It has applied a rational basis analysis. In the earliest constitutional challenge to a workers' compensation scheme to reach the Court, *N.Y. Cent. R.R. Co. v. White*, 243 U.S. 188, 253-254 (1917), the Court upheld the New York workers' compensation law against an equal protection challenge when, after "[v]iewing the entire matter, it [could not be] pronounced arbitrary and unreasonable[.]"

Later that year, in *Mountain Timber Co. v. Washington*, 243 U.S. 219 (1917), the Court reviewed the Washington workers' compensation scheme, substantively different from New York's in that Washington's also imposed a tax on employers, regardless of whether the employee suffered injuries. *Id.* at 264. The Court held that if the legislation merely substituted "one form of employer's liability for another, the points raised against it would be answered sufficiently by our opinion in" *White*. *Id.* But the tax was a new twist. For purposes of due process analysis, then, "the crucial inquiry is whether [the law] appears to be not a fair and reasonable exertion of governmental power, but so extravagant or arbitrary as to constitute an abuse of power." *Id.* at 265. The Court held that the law comported with due process: "We are unable to find that the act, in its general features, is in conflict with the 14th Amendment." *Id.* at 268.

Two years later, the Court looked at another scheme and rejected a due process challenge in *Middleton v. Texas Power & Light Co.*, 249 U.S. 152, 162-163 (1919)(Pitney, J.). "[A]s has been held so often," the Court said,

> the liberty of the citizen does not include among its incidents any vested right to have the rule of law unchanged for his benefit. The law of master and servant, as a body of rules of conduct, is subject to change by legislation in the public interest. ... A plan imposing upon the employer responsibility for making

> compensation for disabling or fatal injuries irrespective or the question of fault, and requiring the employee to assume all risk of damages over and above the statutory schedule, when established as a reasonable substitute for the legal measure of duty and responsibility previously existing, may be made compulsory upon employees as well as employers.

Id.

The organizations seize on the Court's use of the phrase "reasonable substitute" in *Middleton* as authority for their version of the due process test. Appellants' Brief, p. 52. Read in context, the Court simply appeared to be holding that the scheme under review passed constitutional muster because it was a reasonable one, not that the scheme was *required* to be a substitute to pass constitutional muster.

And three months after deciding *Middleton*, the Court made clear in *Arizona Copper Co. v. Hammer*, 250 U.S. 400 (1919), that its use of the phrase "reasonable substitute" was not intended to establish a new due process test. Just as he had authored the opinion in *Middleton*, Justice Pitney authored the majority opinion in *Arizona Copper*. He noted that the Court had "been called upon recently to deal with various forms of workmen's compensation and employers' liability statutes," and its decisions had established that

> the rules of law concerning the employers' responsibility for personal injury or death of an employee arising in the course of employment are not beyond alteration by legislation in the public interest; that no person has a vested right entitling him to have these any more than other rules of law remain unchanged for his benefit; and that, if we exclude arbitrary and unreasonable changes, liability may be imposed upon the employer without fault, and the rules respecting his responsibility to one employee for the negligence of another and respective contributory negligence and assumption of risk are subject to legislative change.

Id. at 419-420 (emphasis added).

The Court held that the law survived the due process challenge, not *because* the law established a quid pro quo for rights at common law, though it was certainly intended to be a substitute, but because the law was rational:

> We cannot, ...regard this statue as anything else than a substitute for the law as it previously stood; whether it be a proper substitute was for the people of the state of Arizona to determine; but we find no ground for

> declaring that they have acted so arbitrarily, unreasonably, and unjustly as to render their action void.

Id. (emphasis added).

If there remained any doubt that the Court in *Arizona Copper* did not intend to establish quid pro quo as the test for validity of a workers' compensation scheme, it was put to rest by Justice McReynolds' stinging dissent, in which he explained that he was "unable to see any rational basis for saying that the act is a proper exercise of the state's police power." *Id.* at 568. Among other deficiencies Justice McReynolds perceived, the employer "[was] given no quid pro quo for his new burdens[.]" *Id.* at 567.

To the Division's knowledge, the U.S. Supreme Court has not adopted the organizations' quid pro quo test (nor Justice McReynolds') in more recent cases involving workers' compensation schemes, either. The Court has affirmed that it is simply up to a legislature to change unsatisfactory provisions in a workers' compensation law: "If anomalies actually do occur with any frequency in the day-to-day administration of the [workers' compensation law], they provide persuasive justification for legislative review[.]" *Potomac Elec. Power Co. v. Dir., Office of Workers' Comp. Programs*, 449 U.S. 268, 284 (1980)(case under Longshoremen's Act).

The organizations proceed to cite a few disparate U.S. Supreme Court cases for their quid pro quo proposition. *See* Appellants' Brief, pp. 52-53, *citing Truax v. Corrigan,* 257 U.S. 312, 329-330 (1921); *PruneYard Shopping Ctr. v. Robins,* 447 U.S. 74, 94 (1980) (Marshall, J., concurring); *Crane v. Hahlo,* 258 U.S. 142, 147 (1922); *Walters v. Nat'l Ass'n of Radiation Survivors,* 473 U.S. 305, 335 (1985). But the cases lend them no such support. None involves review of workers' compensation schemes. The cases largely stand for the proposition that "there are limits on governmental authority to abolish 'core' common-law rights, …at least without a compelling showing of necessity or a provision for a reasonable alternative remedy." *PruneYard,* 447 U.S. at 94. *Crane* involved the "fundamental right" of a property owner to recover damages caused by a city's construction of a viaduct next to his property. 258 U.S. at 147. *Truax* similarly involved "a direct injury to…fundamental property rights." 257 U.S. at 330. *Walters* does use "meaningful alternative" language but its significance, if any, is difficult to glean, inasmuch as the Court simultaneously addressed First Amendment concerns in that case. 473 U.S. at 335.

The organizations reveal the paucity of authority for their quid pro quo proposition by summarizing their discussion of the U.S. Supreme Court cases with a quote from a New Hampshire Supreme Court case, *Park v. Rockwell Int'l Corp.,* 436 A.2d 1136 (N.H. 1981), and a string cite of four other state cases.

Appellants' Brief, pp. 53-54. Of course, those cases do not bind this Court. Nor do they lend the organizations much support, if any.

For example, the court in *Park* struck a statutory classification under the New Hampshire workers' compensation laws, but not on due process grounds; the law was fine in that regard. 436 A.2d at 900. The court noted that workers' compensation laws "[g]enerally …withstand constitutional attack on due process grounds because they provide 'a quid pro quo for potential tort victims,'" and the provisions of the state's workers' compensation law "generally satisfy this requirement." *Id.* at 898. But the classification violated equal protection under the state constitutional provision. *Id.* at 900.

The other state court cases that the organizations cite are similarly unhelpful to them. *Walters v. Blackledge,* 71 So.2d 433, 441 (Miss. 1954), and *Breimhorst v. Beckman,* 35 N.W.2d 719, 736 (Minn. 1949), were unsuccessful due process challenges to workers' compensation laws; neither court held that the laws had to be sufficient or adequate substitutes to pass constitutional muster. In *Carlson v. Smogard,* 215 N.W.2d 615, 619 (Minn. 1974), the court struck one provision of a workers' compensation law because it wholly cut off the rights of third parties. *Grantham v. Denke,* 359 So.2d 785, 787 (Ala. 1978), was not a due process case at all; the court held that a provision immunizing a co-employee from suit by an injured employee violated that state constitution's open courts provision.

As noted in Section I.C., other states are in accord applying the standard, deferential, rational basis test to due process challenges to workers' compensation schemes, not a quid pro quo test, including the Minnesota Supreme Court, which in fact rejected the quid pro quo test in *Tracy*, 283 N.W.2d 909. There, after discussing *White* and *Arizona Copper,* the court held that "there [was] no need to determine whether the [challenged workers' compensation] statute even as a whole provides a reasonable substitute." *Id.* at 915.

Presumably, where a quid pro quo exists, a workers' compensation scheme should easily pass rational-basis review. But the existence of a quid pro quo – whatever that test actually is – is not necessary to sustain a law's validity under any due process test articulated by the United States Supreme Court.

The organizations' formless quid pro quo test should simply be rejected without further analysis.

2. Open courts analysis under MO. CONST. art. I, § 14 neither substitutes for, nor informs, due process analysis.

The organizations nevertheless proceed for a substantial section of their Brief, pp. 55-67, to argue that open courts analysis serves as a stand-in for their quid pro quo, due process test, and demonstrates their test's validity. It does neither thing. Whatever overlap exists between the open courts provision of the

Missouri Constitution, art. I, § 14, and due process analysis, the concepts are distinct.

In *Goodrum v. Asplundh Tree Expert Co.*, the Court explained that the Missouri Constitution's open courts guarantee

> does not create rights, but is meant to protect the enforcement of rights already acknowledged by law. The right of access means simply the right to pursue in the courts the causes of action the substantive law recognizes.

824 S.W.2d 6, 9 (Mo. banc 1992) (internal quotations and citations omitted). Thus, "[a]n open courts violation is established upon a showing that: (1) a party has a recognized cause of action; (2) that the cause of action is being restricted; and (3) the restriction is arbitrary or unreasonable." *Snodgras v. Martin & Bayley, Inc.,* 204 S.W.3d 638, 640 (Mo. banc 2006), *citing Kilmer v. Mun,* 17 S.W.3d 545, 549, 550 (2000).

The provision "does not assure that a substantive cause of action once recognized in the common law will remain immune from legislative or judicial limitation or elimination." *Wheeler v. Briggs,* 941 S.W.2d 512, 514 (Mo. banc 1997) (internal citation and quotations omitted). Under the open courts provision, "only those statutes that impose procedural bars to access of the courts are unconstitutional." *Id. Compare Etling v. Westport Heating &*

Cooling Svs., Inc., 92 S.W.3d 771, 773 (Mo. banc 2003) (distinguishing between equal protection and access to courts provisions; challenger's argument that access to courts is a "fundamental right" was at core an equal protection claim and did not implicate access to courts provision because they alleged no procedural hurdle).

This Court highlighted in *Etling* the critical distinction between a statute that imposes a procedural bar to access to the courts, or simply substantively changes or limits the right to recovery. In that case, the plaintiffs challenged MO. REV. STAT. § 287.420 (2000), the workers' compensation provision that allows death benefits for dependents, arguing that their exclusion from the definition of "dependents" violated the open courts provision. *Id.* at 772-773. "The flaw in [the challengers'] argument is that it attacks the substance of the very statute that gives rise to the remedy of wrongful death against an employer rather than alleging a viable procedural hurdle. Missouri does not recognize a common law cause of action for wrongful death." *Id.* at 773 (citation omitted). Recovery for wrongful death against an employer is only available by way of the workers' compensation statute. *Id.* "In short, except as provided by statute, there is no *right* to recover against employers for wrongful death." *Id.*

Therefore, the Court concluded, "[t]he statute creating a wrongful-death action for dependents is not violative of the open-courts doctrine simply because the legislature desires to exclude a class from maintaining an action. …To strike

the statute because it does not allow [the challengers] a mode of remedy would amount to the judicial creation of a cause of action, an act not contemplated by this provision." *Id.* at 774.

Likewise in *Snodgras*, the Court held that whether the dram shop act arbitrarily eliminated a cause of action "is not relevant to the open courts analysis. The open courts clause does not curtail the legislature's authority to abolish or modify common law or statutory claims." 204 S.W.3d at 640, *citing Kilmer*, 17 S.W.3d at 550. And in that case, the dram shop act did not impose any barriers to pursuing a recognized cause of action, it simply define[d] the scope of the cause of action." *Id.* Therefore, the dram shop act did not violate the Missouri Constitution's open courts provision. *Id.*

As the organizations point out, a division of this Court addressed a wholesale challenge to the workers' compensation law for the first and only time in *De May v. Liberty Foundry Co.*, 37 S.W.2d 640 (Mo. 1931)(Div. 1). But the organizations' attempt to extract a quid pro quo test for due process out of *De May,* or any other Missouri open-courts case, is an unsustainable stretch.

The Court in *De May* was faced with an open courts challenge under the Missouri Constitution, to the then-elective version of the workers' compensation law. *Id.* at 505. In upholding the statute, the Court held that the rules of common law – or such common-law rules as had been amplified by statute or

judicial decision – did not include injuries occasioned without human fault, negligence, or wrong, and therefore could be lawfully changed:

> It seems clear that the act does not in any wise contravene the [open courts provision] of our Constitution, for the reason that such an injury was never actionable or remediable in this state prior to the enactment and adoption of the Workmen's Compensation Act, and therefore is not such an injury as is included and comprehended by the said section of our Constitution.

Id. at 506. The Court in *De May* said nothing about an adequate substitute or quid pro quo test for due process challenges to workers' compensation schemes.

The organizations cite a few Missouri cases for what they call the "well-settled Missouri rule that a statute which creates a new cause of action will not be construed as eliminating a common-law cause of action unless the statute affords an adequate remedy for the harm." Appellants' Brief, p. 57. They cite *Baily v. Gentry*, 1 Mo. 164, 1822 WL 1430 (Mo. 1822), for the quotation, "The Legislature may modify the remedy, but they cannot constitutionally take away all remedy." Appellants' Brief, p. 57. Whether the quotation has some appeal at first glance, it is taken out of context. The case simply has no bearing here. *Baily* did not involve a due process challenge. The Court was examining a law

that postponed or deferred the rights that a party enjoyed under a contract. 1822 WL 1430 *4. The Court held that the law was repugnant to both the federal and Missouri constitutions, because it violated the prohibition against impairing the obligations of contracts, and the then-existing version of the Missouri Constitution's open courts guarantee, contained in Article 13, § 7, by "destroying" the right, and therefore the remedy, under the contract. *Id.* The Court's analysis, including the plaintiffs' quotation therefrom, is simply not applicable.

The other three cases that the organizations cite for the proposition, *Hickman v. City of Kansas*, 25 S.W. 225, 227 (Mo. 1894), *Everett v. County of Clinton*, 282 S.W.2d 30, 34 (Mo. 1955), and *St. Louis County v. Moore*, 818 S.W.2d 309, 310 (Mo. App. E.D. 1991), *see* Appellants' Brief, p. 57, do not so provide. In all three, the courts were simply considering whether statutory remedies were exclusive of or cumulative to common law remedies, not whether the statutory remedies were reasonable substitutes for the common law so as to be valid. And none were decided under the Missouri Constitution's open courts provision.

The organizations proceed to cite *Mangiaracino v. Laclede Steel Co.*, 145 S.W.2d 388 (Mo. 1940) (Div. 1), Appellants' Brief, p. 57, but this case demonstrates nothing about the Missouri Constitution's open courts provision, either. It was decided under Illinois law. *Id.* at 39.

Ultimately, their argument leads back to *Strahler v. St. Luke's Hosp.*, 706 S.W.2d 7 (Mo. banc 1986). Appellants' Brief, p. 63. They cite it for a substitute-remedy requirement because there the Court concludes its opinion with the phrase – not otherwise explained – "adequate substitute course of action." 706 S.W.2d at 12. *Strahler* has no bearing here. It is not a due process case (no such challenge was raised). And the opinion simply leaves an analytical gap in failing to explain "adequate substitute course of action" or provide authority for what it means. But cases such as *Goodrum*, *Wheeler*, and *Etling*, discussed above, demonstrate that the organizations' reading of *Strahler* goes too far.

The open courts analyses from other jurisdictions that the organizations cite do not inform analysis under Missouri's open courts provision. For example, the organizations refer this Court to the "excellent discussion in *Smothers v. Gresham Transfer, Inc.*, 23 P.3d 333, 340-345 (Ore. 2001)." *See* Appellants' Brief, pp. 54-55. *Smothers* was decided under the remedy clause of the Oregon Constitution, art. I., §10. *Id.* at 336. The remedy clause, the court noted, "is not a due process clause in the sense that due process is used in the Fourteenth Amendment to the United States Constitution." *Id.* at 355.

The Court in *Smothers* also demonstrated that Oregon's remedy clause analysis is different from Missouri's. In *Smothers*, the Court explained that Oregon's remedy clause jurisprudence took a marked turn in 1935, in response to a U.S. Supreme Court case, *Silver v. Silver*, 280 U.S 117 (1935). *Id.* at 352.

In *Silver*, the U.S. Supreme Court had held that the equal protection clause "does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative objective." 280 U.S at 122. The same year, relying on *Silver*, the Oregon Supreme Court decided in *Perozzi v. Ganiere*, 40 P.2d 1009, 1011 (Ore. 1935), that the state's guest passenger statute – abolishing causes of action by gratuitous guests injured in a motor vehicle accident – did not run afoul of the Oregon remedy clause because that clause did not prohibit the legislature from abolishing old rights recognized at common law.

The Oregon Supreme Court reversed *Perozzi* in *Smothers,* holding that the Oregon remedy clause was drafted with the intent to "protect absolute common-law rights respecting person, property, and reputation, as those rights existed when the Oregon Constitution was drafted in 1857." 23 P.2d at 353. Therefore, the legislature may abolish a cause of action for such a right recognized in 1857, "but must provide a substitute remedial process in the event of injury to the absolute rights that the remedy clause protects." *Id.* at 356.

That is not how this Court analyzes claims under the open courts provision of the Missouri Constitution.

Because no law applicable here requires SB1 to be an "adequate substitute" for common law remedies for purposes of comporting with due process, the plaintiffs' Count I fails.

3. The organization' claims fail even if a quid pro quo test exists.

To be sure, the quid pro quo or adequate substitute test is most certainly the wrong test to apply, at the very least in a Missouri court or under U.S. Supreme Court precedent. Even if this Court recognized the test, it is difficult to see why the organizations advance it as their lead substantive theory. It is not a test that works in their favor. The organizations cite a number of cases for their proposed application of the test. Appellants' Brief, pp. 64-67. While we do not concede that the courts in those cases even applied the organizations' quid pro quo test, suffice to say that in every case, the courts upheld the challenged statutes.[18]

This Court, though, if it decided to recognize the quid pro quo test, stil need not decide how to apply it here. Even if SB1 has limited the universe of compensability, and even if the quid pro quo is now "out of alignment," which we

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[18] At least one court expressed uncertainty as to how, even, to apply the test. In *Injured Workers of Kansas v. Franklin,* the Kansas Supreme Court noted, "'[T]his court struggles with the bottom line figure as to how much a quid pro quo can be amended and still remain an adequate quid pro quo.'" 942 P.2d 591, 622-623 (Kan. 1997), *quoting Lemuz v. Fieser,* 933 P.2d 134, 150 (Kan. 1997).

do not concede, the Court could not read the workers' compensation law to cut off all remedies. Missouri courts never have.

When it enacts statutes, the legislature is presumed aware of the law regarding that subject matter at time, including interpretations. *State ex rel. Kemp v. Hodge,* 629 S.W.2d 353, 358 (Mo. banc 1982). And prior to the enactment of SB1, Missouri's appellate courts routinely acknowledged that an employee was free to pursue – in court – claims not covered by the workers' compensation law. *Harris v. Westin Mgmt. Co. East,* 2007 WL 2247368 *2 (Mo. banc Aug. 7, 2007)(trial court incorrectly dismissed plaintiff's tort suit on basis of workers' compensation exclusivity; "When one is not at work, workers' compensation law does not apply[.]"); *Bradford v. BJC Corp. Health Svs.*, 200 S.W.3d 173, 176 (Mo. App. E.D. 2006)(worker filed medical malpractice lawsuit against company that operated clinic at his place of employment; no evidence of agency relationship between clinic physicians and employers, so claim not covered by workers' compensation); *Rubio v. HomeDepot U.S.A., Inc.,* 188 S.W.3d 26, 33 (Mo. App. W.D. 2006)(employee was not a "statutory" employee, so his lawsuit for personal injury could proceed); *Owner Operator Independent Drivers Ass'n., Inc. v. New Prime, Inc.*, 133 S.W.3d 162, 169 (Mo. App. S.D. 2004)("Common law rights and remedies should not be eliminated from those available to an employee unless they are abolished by clear and unambiguous terms…. [I]f it is a close question…the decision should be weighted in favor of

retention of the common law right of action."); *McClendon v. Mid-City Discount Drugs, Inc.,* 876 S.W.2d 657 (Mo. App. W.D. 1994) (after Commission decided it had no jurisdiction, plaintiffs were free to pursue alternative remedies, *i.e.,* tort suit); *Wiley v. Shank & Flattery, Inc.*, 848 S.W.2d 2, 4 (Mo. App. W.D. 1992)(test of whether petition states cause of action for common law tort is whether workers' compensation law "provides for relief for the acts" that the plaintiff complains the defendants committed).[19]

The legislature is presumed to have been aware of that law, then, when it enacted SB1.[20] Nothing in SB1 departs from that rule of availability of common law claims.

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[19] Other states, too, recognize that when an injury is excluded from coverage under workers' compensation, an injured worker may pursue a tort claim. *E.g. Automated Conveyor Systems v. Hill,* 208 S.W.3d 136 (Ark. 2005); *Urban v. Dollar Bank,* 725 A.2d 815 (Pa. Super. Ct. 1999); *Coates v. Wal-Mart Stores, Inc.,* 976 P.2d 999 (N.M. 1999); *Bunger v. Lawson Co.,* 696 N.E.2d 1029 (Ohio 1998); and *Snead v. Harbaugh,* 404 S.E.2d 53 (Va. 1991).

[20] The organizations acknowledge this rule in part, when they state that "[e]limination of all of chapter 287 would leave injured workers with their previously existing tort remedy." Appellants' Brief, p. 63.

Moreover, this Court must select the reading of a law that renders it constitutional whenever possible. *In re Care and Treatment of Coffman,* 225 S.W.3d 439, 442 (Mo. banc 2007). If resort to the proposition that common law remedies remain available is necessary to sustain the validity of SB1 under a quid pro quo, or any other, test, then that is the reading that the Court must adopt.

II. The trial court correctly granted the Division's motion for summary judgment on the seven remaining claims, Counts II and III-IX. The claims are not justiciable. [Responds to the appellants' Point Relied On I.]

The remaining seven claims were disposed of on the somewhat simpler basis of lack of justiciability. At core, the organizations simply seek an advisory decree; they lack standing to assert the claims; the claims are not ripe; and an adequate remedy at law – the administrative claims process – exists.

A. Summary judgment and standard of review

Summary judgment is appropriate when the pleadings, discovery, and affidavits reveal no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. Rule 74.04(c); *ITT Commercial Fin. Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 380 (Mo. 1993)(en banc).

Once the movant has demonstrated that no genuine issue of material fact exists, the burden shifts to the non-movant to show that there is a genuine dispute as to the material facts supporting the movant's right to summary judgment. *Id.* at 381-82. A genuine issue exists if there is a dispute that is real, not one consisting of merely conjecture, theory and possibilities. *Rice v. Hodapp*, 919 S.W.2d 240, 243 (Mo. 1996)(en banc).

No genuine dispute of material fact existed below, because under Rule 74.04(c)(2), the organizations admitted the Division's facts: they did not respond to the Division's statements of fact at all. They did not admit or deny each paragraph in corresponding numbered paragraphs; support any denials with specific citation to evidence; nor submit any evidence to support any denials. *See* Supp. LF 42.

Appellate review of summary judgment is *de novo*. *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993).

B. The prerequisites of justiciability

The General Assembly never intended for the vehicle of declaratory judgment to enlarge the courts' jurisdiction over subject matter or parties. *Farmers Ins. Co., Inc. v. Miller,* 926 S.W.2d 104, 106 (Mo. App. E.D. 1996). Thus, if there is no justiciable controversy between the parties in a declaratory judgment action, the court lacks jurisdiction and must dismiss. *Kinder v. Holden,* 92 S.W.3d 793, 810 (Mo. App. W.D. 2002); *Wentzville Public Sch. Dist. v. Paulson,* 699 S.W.2d 132, 133-134 (Mo. App. E.D. 1985).

A party seeking declaratory relief must establish four elements of justiciability

1. 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;

2. that the plaintiffs have a legally protectable interest at stake, consisting of a pecuniary or personal interest directly at issue and subject to immediate or prospective consequential relief;

3. a controversy ripe for judicial determination; and

4. an inadequate remedy at law.

Lane v. Lensmeyer, 158 S.W.3d 218, 222 (Mo. banc 2005).

Here, the trial court correctly found that the organizations failed to establish the four elements with respect to the remaining claims, Counts II and IV-IX, and its judgment should be affirmed.

C. The claims are not justiciable.

1. The organizations seek an advisory decree.

The organizations' claims rest on no more than hypothetical and speculative scenarios. This Court has long and firmly held that declaratory judgment is not available to adjudicate hypothetical or speculative scenarios that may never come to pass. *E.g., Craighead v. City of Jefferson,* 898 S.W.2d 543, 547 (Mo. banc 1997); *Tintera v. Planned Indus. Expansion Auth.,* 459 S.W.2d 356, 358 (Mo. 1970) (Div. 1); *Commonwealth Ins. Agency, Inc. v. Arnold,* 389 S.W.2d 803, 806 (Mo. 1965); *M.F.A. Mut. Ins. Co. v. Hill,* 320 S.W.2d 559,

564 (Mo. 1959) (Div. 2); *Tietjens v. City of St. Louis,* 222 S.W.2d 70, 71 (Mo. banc 1949); and *Republic Rubber Co. v. Adams,* 213 S.W. 80, 82 (Mo. 1919) (Div. 1).

A mere request for interpretation of the law does not establish a controversy sufficient to invoke a court's jurisdiction. *Wentzville Pub. Sch. Dist. v. Paulson,* 699 S.W.2d 132, 133-134 (Mo. App. E.D. 1985). The organizations "must have present legal rights entitling them to some relief." *Farmers Ins. Co. v. Miller,* 926 S.W.2d 104, 107 (Mo. App. E.D. 1996). And "[m]ere disagreement concerning a legal question is not an adequate ground." *Commonwealth Ins.,* 389 S.W.2d at 806.

Missouri courts approach this prong of justiciability in a practical way, requiring that there "be a sufficiently complete state of facts presenting issues ripe for determination." *Muth v. Bd. of Regents of Southwest Mo. State Univ.,* 887 S.W.2d 744, 751 (Mo. App. S.D. 1994). Thus, in *Mo. Health Care Ass'n v. Attorney General,* 953 S.W.2d 617 (Mo. banc 1997), the Court held that an association had standing to bring a constitutional challenge to a statute on behalf of its members because "the *current effect* of [the amended statute] on [the association's members] creates an immediate, concrete dispute." *Id.* at 622. In *M.F.A. Mutual,* the Court held that an insurance company lacked standing to seek a declaratory judgment as to whether the company was under a duty to defend an insured driver or liable for any judgment against the driver, because

the company had not been called upon to defend any action on behalf of the driver. 320 S.W.2d at 564.

The Court of Appeals applies the test the same way. In *George v. Brewer,* 62 S.W.3d 106 (Mo. App. S.D. 2001), the seller of a pharmacy business sought declaratory judgment as to the validity of a 10-year non-compete clause in a contract between him and the buyers of his business. The petition was properly dismissed, because it did not present a justiciable controversy. *Id.* at 110. The seller simply sought an advisory opinion on a hypothetical or a speculative situation that might or might not ever come to pass, *i.e.,* that he would open a competing pharmacy within ten years, and that the buyers of his business would seek to prevent him from doing so. *Id.* at 109. In *Willis v. Most Worshipful Prince Hall Grand Lodge of Mo.,* 866 S.W.2d 875, 878 (Mo. App. E.D. 1994), the court held that declaratory judgment did not lie when the issue was whether the Grand Lodge would deny a subordinate lodge one of its votes sometime in the future. In *Fulson v. Kansas City Star Co.,* 816 S.W.2d 297, 300 (Mo. App. W.D. 1991), declaratory judgment did not lie where the record failed to reflect any present and ongoing controversy between the entity requesting documents under the Sunshine law and a public body, concerning any specific records that the public body was actually withholding.

Here, the organizations' claims are as hypothetical and speculative as those routinely held by Missouri courts to be insufficient to establish a real,

substantial, presently existing controversy admitting of specific relief. There are no allegations whatsoever in the petition of anything that has actually happened under the new law, whether an accident or injury, denied claim, attorney fee dispute, or change in premiums, for example. The organizations plead no more than what – according to them – might happen, someday to somebody.[21]

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[21] In their first count, the organizations set forth what they call "[e]xamples of changes in the Act that impose greater burdens on claimants and make the workers' remedy much more difficult and uncertain[.]" LF 40, ¶ 46. One of the "examples" is amended §287.190.6(2), concerning objective and subjective medical findings, which the organizations declare "exclude from coverage a substantial number of genuine, medically recognized injuries to soft tissues that manifest themselves in pain or dysfunction but not in objective signs, such as x-rays. Such injuries would be recognized, based on competent medical testimony, in ordinary tort actions." *Id.*, ¶ 48.

The remaining counts contain similar "examples." *See* LF 49, ¶ 80 (alleging that lower compensation costs to employers "will result in less investment and workplace safety and, ultimately, in more workplace injuries and deaths"); LF 52, ¶ 91 (alleging that changes to definitions of "prevailing factor," weight of objective versus subjective medical findings, and exclusion of compensation for disability attributable to ordinary, gradual deterioration, or

Moreover, there can certainly be no presently-existing controversy between the organizations and the *Division*. One, the Division isn't even involved in every payment of benefits, because they are not all disputed. Employers remain perfectly free to pay benefits and employees remain perfectly free to accept them, under the changes effected by SB1, outside the hearing process. And two, as the Division demonstrated in its motion for summary judgment, the Division simply reviews claim disputes in the first instance, but an employee aggrieved by the Division's application of the new law would go next to the Commission for review, and then to the appellate courts. But again, the organizations do not allege that any entity, not even the Division, has adopted the organizations' prediction of how the new law will be applied.

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progressive degeneration of the body caused by aging or normal activities of day-to-day living, "will have a broad adverse effect on older workers"); LF 54, ¶ 98 (hypothetical scenario of disabled worker who "would be denied benefits because the injury was at least indirectly due to his disability"); LF 56, ¶ 102 (alleging that "the claims of a substantial number of employees with work-related injuries" will be excluded from compensability due to amended definitions of "accident," "injury," etc.); LF 58, ¶ 108 (alleging that §287.390.5 "impedes the ability of injured workers to retain counsel of their choice").

The organizations present no real, substantial, presently-existing controversy admitting of specific relief, and the trial court properly granted the Division's motion on this basis alone.

2. These plaintiffs have no legally protectable interest at stake.

The plaintiffs are 71 organizations, claiming to sue in their representative capacity on behalf of their individual members. But "[a]n organization can sue as a representative for its members [only] if (1) its members would otherwise have standing to bring suit in their own right; (2) the interest it seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members." *Mo. Health Care Ass'n v. Attorney General,* 953 S.W.2d 617, 620 (Mo. banc 1997) (citation omitted). The trial court correctly held that the organizations could not establish the three prerequisites, which the Division will address first. In Subsection d., below, the Division will address the organizations' flawed affirmative defense argument.

a. The organizations' members lack standing to sue in their own right.

The individual members cannot bring suit in their own right in circuit court, for at least two reasons.

One, the rights and remedies granted under the workers' compensation law are exclusive, except those for which the chapter does not provide. MO. REV. STAT. §287.120. And it is the Commission that has exclusive jurisdiction to decide questions such as whether an incident is covered by the law, or other questions requiring agency expertise. *State ex rel. Tri-County Elec. Coop Ass'n v. Dial*, 192 S.W.3d 708, 710 (Mo. banc 2006); *Deckard v. O'Reilly Automotive, Inc.*, 31 S.W.3d 6, 14 (Mo. App. W.D. 2000); and *St. Lawrence v. Trans World Airlines, Inc.,* 8 S.W.3d 143, 148 (Mo. App. E.D. 1999) (circuit court lacks subject matter jurisdiction in face of workers' compensation exclusivity). Litigants are not free to bypass administrative remedies by immediately proceeding to circuit court. They are required to exhaust the remedies available. Thus, to the extent that the plaintiff organizations complain that their members will suffer some deprivation under the new law, this Court simply cannot decide whether the new law applies at all, let alone how it applies.

The individual members do not have standing in their own right because, at the very least, they must exhaust their administrative remedies. Therefore, the organizations cannot have standing.

b. The interests that the organizations seek to protect are not germane to their organizational purposes.

The plaintiff organizations also lack representational standing because they did not allege and demonstrate that the interests they seek to protect are germane to their organizational purposes. Such an omission of pleading is fatal to the organizations' claim of associational standing. *See Citizens for Rural Preservation, Inc. v. Robinett,* 648 S.W.2d 117, 133 (Mo. App. W.D. 1982) (discussing criteria that "must be met before an association can bring suit on behalf of its members").

Applying the *Hunt* test,[22] the court of appeals in *Mo. Growth Ass'n v. Metro. St. Louis Sewer Dist.*, 941 S.W.2d 615 (Mo. App. E.D. 1997), affirmed the trial court's holding that all three of the organizational organizations lacked standing to represent the interests of their members. The case involved the organization's challenge to a sewer district's wastewater user charges. For example, the Plaintiff Missouri Growth Association's organizational purpose was "to promote common business interest of people and companies involved in developing, owning, and operating real estate." *Id.* at 621. But defeating the user charges was "too remote to be germane to the very general and broad purposes of developing, owning, and operating real estate." *Id.* Therefore, the association lacked standing. *Id.*

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[22] *Hunt v. Wash. State Apple Advertising Comm'n*, 432 U.S. 333 (1977).

In contrast, in *Mo. Bankers Ass'n v. Dir. Mo. Div. of Credit Unions,* 126 S.W.3d 360, 363 (Mo. banc 2003), a challenge to a commission decision allowing a credit union to expand its scope, a bankers' association pleaded the satisfactory purpose of protecting its member banks from unfair competition.

Here, the organizations' pleading of snippets of broad mission statements is as insufficient as the pleading in *Mo. Growth Association*. The lead plaintiff, the Missouri Alliance for Retired Americans, pleaded that its "mission is to ensure social and economic justice and full civil rights for all citizens so that they may enjoy lives of dignity, personal and family fulfillment and security." LF 16, ¶ 5. The remaining organizations – labor unions, labor councils, and trade associations – pleaded that their missions "encompass the responsibility to take actions to protect and enhance the health and safety of their members." LF 17, ¶ 6.

Such mission statements are simply too general and vague to demonstrate in what way striking the entirety of SB1 (Counts I and III) or portions thereof (Counts II and IV-IX) are interests germane to their organizational purposes. While we do not concede that such pleading would have sufficed, the organizations never pleaded that their missions include preservation of their worker-members' "rights in relation to the terms and conditions of their employment," *see* Appellants' Brief, pp. 43, nor that their missions include "going to court" for their members, *id.* at 44.

The organizations failed to demonstrate that the interests they seek to protect are germane to this general and vague organizational purposes that they pleaded.

c. The claims asserted and relief requested require the participation of the individual members.

The organizations' petition does not explicitly state whether they seek prospective or retrospective application of any judgment declaring SB1 invalid. Presumably they would press for retrospective application.

In *Sherwood Nat'l Educ. Ass'n v. Sherwood-Cass-R-VIII School Dist.,* 168 S.W.3d 456, 463 (Mo. App. W.D. 2005), though the Western District affirmed on other grounds, the court held that a teacher's association appeared to lack standing to assert claims on behalf of its individual members. The members' individual and separate contracts were implicated by the claims asserted and relief requested by the association. *Id.* Therefore, the members' participation appeared to be required. *Id.*

No employees who are now being affected by SB1, which has been in effect since 2005, are parties to the instant lawsuit.[23] If the judgment is to be applied

[23] They *are* proceeding to have their claims heard, under the new law, before ALJs in the course of exhausting their administrative remedies, and the ALJs are issuing final awards. *E.g., Ahern v. P & H L.L.C.,* Injury No. 06-10408

retrospectively, to affect the rights of individual employees under SB1, the employees were required to participate in this case, as the trial court correctly held.

d. The organizations' lack of standing was not the Divisions' affirmative defense to prove.

The organizations include a specious, preliminary argument that the Division bore the burden of proving a negative, *i.e.,* that the Division was required, as an affirmative defense, to prove the organizations' *lack* of standing. Appellants' Brief, pp. 42-43. Whether another state treats standing as an affirmative defense, *id.* at 42, that is not the law in Missouri.

(ALJ Knowlan, April 16, 2007) (idiopathic cause; described as "test case"); *Johnson v. Town & Country Supermarkets, Inc.,* Injury No. 06-078999 (ALJ Mahon, March 7, 2007) (injury while walking; constitutional claim raised); *Snyder v. Central Stone Co.,* Injury No. 05-106018 (ALJ Robbins, Aug. 8, 2006) (safety violation penalty; constitutional claim raised); *Leal v. City Wide Transportation,* Injury No. 06-010724 (ALJ Siedlik, May 1, 2007) (prevailing factor); *Norman v. Phelps Reg. Med. Ctr.,* Injury No. 06-001823 (Mo. Labor & Ind. Relations Comm'n, July 3, 2007) (compensable injury occurred when employee lifted her leg; reversing ALJ).

This Court's rules do not treat standing as an affirmative defense. *See* Mo. S. Ct. Rule 55.08, "Affirmative Defenses" (standing not listed).

Nor does Missouri case law. A "court determines standing as a matter of law *on the basis of the petition*, along with any other non-contested facts accepted as true by the parties[.]" *Sherwood Nat. Educ. Assoc. v. Sherwood-Cass R-VIII Sch. Dist.*, 168 S.W.3d 456,463 (Mo. App. W.D. 2005) (emphasis added), *quoting Kinder v. Holden*, 92 S.W.3d 793, 803 (Mo. App. W.D. 2002).

And it makes little sense to treat standing that way. An "affirmative defense seeks to defeat or avoid the plaintiff's cause of action, and avers that even if the allegations of the plaintiff's petition are taken as true, he or she cannot prevail *because there are additional facts that permit the defendant to avoid* the legal responsibility alleged." *Rodgers v. Threlkeld*, 22 S.W.3d 706, 710 (Mo. App. W.D. 1999) (emphasis added) (and citations therein, including Rule 55.08).

Here, the organizations' lack of standing is not a matter of proving additional facts – it is the *lack* of sufficient facts pleaded by the organizations. Nor is standing an avoidance. In contrast to a typical affirmative defense, such as accord and satisfaction, or the statute of limitations, a plaintiff must have standing or a court cannot decide the case. Standing cannot be waived; a court may even raise a plaintiff's lack of standing *sua sponte*. *State ex rel.*

Mathewson v. Bd. of Election Comm'rs, 841 S.W.2d 633, 634-635 (Mo. banc 1992) .

The organizations' authority is not availing. Their primary authority, *Frank Coluccio Const. Co. v. City of Springfield,* 779 S.W.2d 550, 552 (Mo. banc 1989) , involved the standing of a plaintiff (the prime contractor) to prosecute an action of a third party (a subcontractor) against the defendant (a governmental entity). The Court remarked that "standing is an affirmative defense for the governmental entity to plead and prove." *Id.* That remark is limited to the unique posture of the case.

The Court went on to explain that the public policy of protecting the government from the dangers of a dual recovery (against it) or dual liability (having to double pay, i.e., to pay both the prime contractor and the subcontractor), is best served by applying the *Severin*[24] rule. *Id.* Under that rule, the burden of proving that the prime contractor need not pay any recovery over to the subcontractor – *i.e.*, that the prime contractor has no standing to assert the subcontractor's claim – is placed on the government, so as to avoid collusion between the prime and subcontractor, or attempted double recovery against the government. *Id.* at 553. The *Coluccio* holding has not, to the

[24] *Severin v. U.S.*, 99 Ct. Cl. 435 (Ct. Cl. 1943).

Division's knowledge, been more broadly applied to establish that standing is now – and in every case – an affirmative defense.

The organizations' citation to *Clinch v. Heartland Health*, 187 S.W.3d 10 (Mo. App. W.D. 2006), does not support them. There, the Western District acknowledged that a defendant had raised standing as an affirmative defense and briefed it as such in the trial court. *Id.* at 19. But the Western District refused to entertain the plaintiff's argument, made for the first time on appeal, that the affirmative defense was not properly pleaded. *Id.* The court never addressed the merits of any such affirmative-defense argument.

The organizations' preliminary, affirmative-defense argument fails. Nor can they demonstrate a legally protectable interest.

3. No ripe controversy exists.

The organizations essentially argue that ripeness doesn't matter: "An organization may seek a declaratory judgment that a statute or regulation is unconstitutional prior to enforcement against its members." Appellants' Brief, p.47. But justiciability requires that a claim be ripe to secure review, and that requirement applies to all claims, including constitutional ones. *Farm Bureau Town & Country Inc. v. Angoff,* 909 S.W.2d 348, 352 (Mo. banc 1995). And the organizations' claims are not ripe.

In *Local Union 1287 v. K.C. Area Transp. Auth.,* 848 S.W.2d 462, 463-464 (Mo. banc 1993), this Court held that a circuit court's judgment upholding the

constitutional and statutory validity of the delegation of arbitration authority to an outside arbitrator was premature. A condition precedent to arbitration had not yet occurred. *Id.* at 463. And "[j]udicial resources should not be wasted on disagreements that may never require judicial resolution." *Id.* at 464. Further cautioning against deciding cases on undeveloped facts, the Court observed:

> [t]he judicial branch traditionally renders opinions because it is required to do so as a consequence of specific facts that necessitate a judicial judgment. If a court examines a matter in which facts are not completely developed, it is possible that the court may grant an incorrect judgment. It is also possible that, to the extent that the judicial branch contributes to the development of the law in our legal system, the court may take an inappropriate or premature step in the judicial development of the law.

Id. (citation omitted).

In *Buechner v. Bond,* 650 S.W.2d 611 (Mo. banc 1983), the trial court held that the Hancock Amendment refund provisions violated equal protection guarantees. The court based its decision on the probability that a refund would be necessary in the then-upcoming fiscal year, and that the refund provisions would unconstitutionally discriminate against certain classes of taxpayers. *Id.*

at 614. This Court reversed: "Ripeness does not exist when the question rests solely on probability and speculation." *Id.* at 614. *See also Mo. ex rel. Kan. Power & Light Co. v. Public Svs. Comm'n,* 770 S.W.2d 740 (Mo. App. W.D. 1989) (report and order of Public Service Commission regarding jurisdiction and authority over natural gas sales and transportation was not ripe for review; order was merely a "determination" that did not present concrete issue affecting the parties).

Nor can a "difference of opinion or disagreement on a legal question…make a case ripe" – "parties must show that their rights and liabilities are affected." *Akin v. Dir. of Revenue,* 934 S.W.2d 295, 298 (Mo. banc 1996), *citing Tietjens v. City of St. Louis,* 222 S.W.2d 70, 71-72 (Mo. banc 1949).

The organizations' claims here are not ripe. They contemplate factual scenarios that have not occurred. The organizations' firm conviction that such scenarios will come to pass cannot fill in the ripeness gap, any more than the organizations' and Division's disagreements about the legal issues raised in this case.

The organizations' claims were properly rejected for lack of ripeness.

4. There is an adequate remedy at law.

The fourth justiciability prerequisite is that a challenger have no adequate remedy at law. *Lane,* 158 S.W.3d at 222. In short, declaratory judgment simply does not lie when an issue can be raised by other means. *Id.* at 223. Here, the

employee members have another, perfectly adequate, means – administrative workers' compensation proceedings, with the attendant review by the Commission and the appellate courts.

In *S&P Properties, Inc. v. City of Univ. City,* a business brought a declaratory judgment claim regarding the constitutionality of a tax ordinance. 178 S.W.3d 579, 581 (Mo. App. E.D. 2005). The Eastern District held that declaratory judgment did not lie, because the business could raise its challenge by another means, the city's tax protest procedures. *Id.* at 582. Specifically, the business could pay the tax under protest, seek a refund, and make its constitutional challenge in that proceeding. *Id.* Accordingly, the business's petition did not state a claim for declaratory judgment. *Id.*

And this Court acknowledges that where constitutional claims are mixed with the interpretation of new law and the application of that new law to actual facts, the "constitutional issues…may be preserved and raised during the judicial review portion of the administrative proceeding." *Farm Bureau Town & Country Inc. v. Angoff,* 909 S.W.2d 348, 353 (Mo. banc 1995). Parties to a variety of administrative proceedings in Missouri do that every day, including parties to workers' compensation proceedings. *E.g. Dubinsky v. St. Louis Blues Hockey Club,* 2007 WL 1246048 (Mo. App. E.D. May 1, 2007) (employee claimed that statutory exception applicable to professional athletes under contract violated equal protection); *Medrano v. Marshal Elec. Contracting, Inc.*, 173

S.W.3d 333, 339-341 (Mo. App. W.D. 2005) (employer claimed that Commission's review deprived employer of due process); *Higgins v. Treasurer of State of Missouri*, 140 S.W.3d 94, 97-98 (Mo. App. W.D. 2005)(employee claimed that statutory interpretation deprived him of equal protection).

Indeed, employee-claimants are raising and preserving constitutional challenges in workers' compensation proceedings under the new law right now.[25]

An adequate remedy at law exists and the organizations' claims herein are not justiciable.

[25] *See* footnote 23, *supra.*

III. In the alternative, the trial court's judgment in favor of the Division on the remaining seven claims, Counts II and III-IX, should be affirmed because those claims fail on the merits.

While the remaining seven claims are for the most part in need of a developed factual record and an actual claimant, they lack substantive merit as pleaded. This Court may affirm the trial court's judgment in favor of the Division on this alternative basis as well.

A. Alternative bases for affirmance and standard of review

Because "[t]his Court is primarily concerned with the correctness of the result, [and] not the route taken by the trial court to reach it[,] the trial court's judgment will be affirmed if it is correct on any ground supported by the record, regardless of whether the trial court relied on that ground." *Mo. Soybean Ass'n v. Mo. Clean Water Comm'n,* 102 S.W.3d 10, 22 (Mo. banc 2003). *See also Sheedy v. Mo. Highways and Transp. Comm'n,* 180 S.W.3d 66, 71-72 (Mo. App. S.D. 2005)(unlike an appellant, a respondent is permitted to raise a new theory on appeal, for purposes of sustaining a favorable judgment).

B. The remaining claims lack merit in any event.

1. Sections 287.120.6(1), 287.120.6(3), 287.170.4, and 287.420 (Supp. 2006) do not violate the open courts provision of the Missouri Constitution (Count II).

As discussed in Section I.D., Article I, § 14 of the Missouri Constitution, the open courts provision, "does not create rights but is meant to protect the enforcement of rights already acknowledged by law." *Goodrum,* 824 S.W.2d at 9. "The right of access means simply the right to pursue in the courts the causes of action the substantive law recognizes." *Id.* (internal quotations and citations omitted). But the provision "does not assure that a substantive cause of action once recognized in the common law will remain immune from legislative or judicial limitation or elimination." *Wheeler v. Briggs,* 941 S.W.2d 512, 514 (Mo. banc 1997) (internal citation and quotations omitted). Thus, "[u]nder the open courts provision, only those statutes that impose procedural bars to access of the courts are unconstitutional." *Id.*

The organizations' open-courts claims under Count II fail for the same reasons that the claim failed in *Etling.* The common law has never provided a cause of action for injuries occasioned without human fault, negligence or wrong. *DeMay,* 37 S.W.2d at 646. Thus, whether the new law reduces or bars compensation, as the organizations allege, for a violation of a drug or alcohol policy, § 287.120.6(1); refusal to submit to drug or alcohol testing, § 287.120.6(3);

for post-injury misconduct, § 287.170.4; or for failure to timely provide notice to an employer, § 287.420 is not an open-courts issue at all. To strike any of the provisions because they limit coverage would amount to the judicial creation of a cause of action.

2. Sections 287.020.3(1), 287.020.2, 287.020.5, 287.067.2, 287.067.3, 287.067.6, and 287.190.6(3) (Supp. 2006) do not violate equal protection (Count IV).

The organizations allege in Count IV that certain "amendments made by SB1 include multiple classifications and discriminations that have no rational basis" for purposes of the equal protection provisions of the state and federal constitutions. LF 51.

The equal protection provisions under the state and federal constitutions are coextensive. *Bernat v. State*, 184 S.W.3d 863, 867 (Mo. banc 2006). Analysis of an equal protection claim is a two-step process. *Blaske v. Smith & Entzeroth, Inc.*, 821 S.W.2d 822, 829 (Mo. banc 1991). First, the court asks whether the classification burdens a suspect class or impinges on a fundamental right, in which case, strict judicial scrutiny is required. *Id.* If not, the court proceeds to the second step, and sustains the classification if it is rationally related to a legitimate state interest. *Id.* The standard is deferential. "The Legislature in the exercise of its power to classify is not required to trace with a hairline the

boundaries of the class to which the resulting enactment will apply." *Hawkins v. Smith,* 147 S.W. 1042, 1044 (Mo. banc 1912).

The organizations do not claim that the "classifications" burden a suspect class or impinge on a fundamental right, but that they have no rational basis. LF 51. Therefore, the Court proceeds to the second step.

The organizations attack the requirements in §287.020.3(1), §287.067.2, and §287.067.3 that an accident or occupational exposure be the "prevailing factor" in causing an injury.[26] They also attack the requirement in §287.020.2 that an "accident" be an event that produces "objective symptoms" at the time, and §287.190.6(2) which establishes an evidentiary preference for objective medical findings over subjective medical findings.[27] And they attack §287.067.2 and §287.067.3, which provide that injury caused by the normal wear-and-tear

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[26] Other states have similar statutes. *E.g.* MONT. CODE ANN. § 39-71-119(5) (primary factor).

[27] Other states have similar statutes, containing "objective symptoms" language. *E.g.* NEB. REV. STAT. § 48-151(2) (2006); NEV. REV. STAT. § 616A.030 (2007).

of living are not compensable, and §287.190.6(3), which reduces permanent partial disability awards by the percentage attributable to such wear-and-tear.[28]

Loosely described, the workers' compensation law provides compensation for work-related injuries; it is not intended to operate as general health insurance. The cited provisions simply ensure that the concept of work-relatedness is firmly tethered to any recovery under the workers' compensation scheme.[29] The "classifications" established by the provisions, to the extent that

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[28] Other states have similar statutes, containing exclusions from coverage for mere gradual or progressive deterioration, or disability as a result of the natural aging process, or day-to-day living. *E.g.* KAN. STAT. ANN. § 44-508 (e) (2006); LA. REV. STAT. ANN. § 1021 (1) (2006); OKLA. STAT. TIT. 85, § 3 (2007); OR. REV. STAT. § 30.298(5)(c) (2007).

[29] As noted in Section I.C., the legislature signaled its disapproval of the development of case law interpreting then-existing provisions of Chapter 287. Section 287.020.10 (Supp. 2006), App. A7, now provides: "In applying the provisions of this chapter, it is the intent of the legislature to reject and abrogate earlier case law interpretations on the meaning or definition of 'accident,' 'occupational disease,' 'arising out of' and 'in the course of employment' to include, but not be limited to, holdings in: *Bennett v. Columbia Health Care and Rehabilitation,* 80 S.W.3d 524 (Mo. App. WD 2002); *Kasl v. Bristol Care,*

they are "classifications" at all, are rational, in that they aim to distinguish between injuries that are work-related and injuries that are not.

The organizations also attack §287.020.5, which clarifies that injuries sustained traveling to and going home from work are not compensable, even if sustained in "company-owned or subsidized automobiles," because, the organizations allege, under the strict construction provision of §287.800, injuries sustained in company owned "trucks or vans…remain compensable." LF 53. Where Chapter 287 contains no definition, the plain and ordinary meaning of words controls. *Hayes v. Show Me Believers, Inc.,* 192 S.W.3d 706, 707 (Mo. banc 2006). The legislature did not say "everything but trucks and vans," but "automobile." And an "automobile" is a "4-wheeled automotive vehicle designed for passenger transportation on the streets and roadways and commonly propelled by a combustion engine using a volatile fuel (as gasoline)." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, p. 148 (1993). That is, the definition of automobile encompasses trucks and vans. The organizations' argument is simply silly.

Inc., 984 S.W.2d 85 (Mo. banc 1999); and *Drewes v. Trans World Airlines*, 984 S.W.2d 512 (Mo. banc 1999) and all cases citing, interpreting, applying, or following those cases."

Finally, the organizations attack §287.067.6, which explicitly provides compensation for lung disease, heart disease, and other occupational diseases to "paid" firefighters and police officers, of "paid" fire and police departments, if a "direct causal relationship is established." By failing to explicitly provide for such benefits to volunteers, the organizations claim, "similarly situated volunteers" have been excluded. LF 53. The organizations do not state to whom the volunteer fire fighters and police officers are similarly situated for purposes of occupational disease.

Setting that gap aside, the legislature may have determined that paid firefighters and police officers, persons who were more likely to perform the jobs on a full time basis, were likely to be exposed to the risk of those occupational diseases the most, and therefore in most need of an explicit provision requiring coverage upon demonstration of a "direct causal relationship," than volunteers, who are likely to be exposed less frequently. Moreover, §287.067.6 does not prohibit volunteers from recovering under other sections, such as § 287.067.2 (injury by occupational disease compensable if occupational exposure was the prevailing factor), or § 287.120.8-.10 (mental injury and psychological stress claims).

The challenged provisions have rational bases and must be sustained against an equal protection challenge.

3. Section 287.020.3(4) (Supp. 2006) does not violate the Supremacy Clause of the U.S. Constitution (Count V).

For Count V, the organizations claim that §287.020.3(4), dealing with idiopathic injuries, is invalid under the Supremacy Clause to the extent that it is in conflict with the Americans with Disabilities Act, 42 U.S.C. §121321. LF 53-55. There is no conflict.

The Supremacy Clause, Article VI of the United State Constitution, provides that a state law that conflicts with a federal law is of no effect. Congress may express its intent to override state law by explicitly saying so, or implicitly, by enacting a statute of a scope that indicates Congress' intent to occupy a field exclusively. *Thompson v. Brown & Williamson Tobacco Corp.*, 207 S.W.3d 76, 91 (Mo. App. W.D. 2006)(internal citations and quotations omitted). The Division is not aware of any provision in the ADA that explicitly displaces state workers' compensation schemes, whether in whole or with respect to the narrow category of idiopathic injuries, nor of any case law holding that the scope of the ADA signals Congress' intent to do so. And to quote the case that the organizations cite in their petition, LF 55, "disabled persons under the ADA…are entitled…only to meaningful access to benefits with non-prejudicial treatment based upon reasonable factors." *Harding v. Winn-Dixie Stores, Inc.*, 907 F.Supp. 386, 391 (M.D. Fla. 1995) (internal quotation and citations omitted). *See also Barry v. Burdines,* 675 So.2d 587, 590 (Fla. 1996)(what is important for

anti-discrimination purposes under ADA is that disabled and non-disabled persons are treated equally; state may limit compensation when injury is not direct result of work, so long as disabled and non-disabled persons are afforded equal opportunities for individualized assessment).

Certainly, nothing in §287.020.3(4) singles out disabled workers for unequal treatment in violation of the ADA.

The organizations' Supremacy Clause theory is at its core an as-applied claim, desperately in need of an actual claimant and a developed factual record. It, too, fails.

4. No declaratory judgment lies with regard to §287.120 (Supp. 2006) (Count VI).

It is difficult to see why the organizations brought the challenge to §287.120 at all. SB1 did not in any significant way amend the exclusivity provision of the workers' compensation law. Compare § 287.120.2 (Supp. 2006), App. A17, and §287.120.2 (2000).

And as discussed in Section I.D., case law is well settled in this state that when a claim is not provided for under Chapter 287, an employee is free to pursue remedies in circuit court. No provision of SB1 changes this line of case law.

5. Section 287.390.5 (Supp. 2006) does not violate any due process right to counsel or right of access to courts (Count VII).

The organizations claim that §287.390.5 violates due process and the right of access to courts because it "mandate[es]" the payment of attorneys fees, but makes no specific provision for their payment. LF 58, ¶ 108. In fact, §287.390.5 does nothing to alter attorneys' ability to recover a fee in worker's compensation cases.

Under both the state and federal constitutions, "[t]he fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.' " *Jamison v. Dept. of Social Services, Div. of Family Services*, 218 S.W.3d 399, 405 (Mo. banc 2007), *quoting Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). This does not mean that the same type of process is required in every instance; rather, "due process is flexible and calls for such procedural protections as the particular situation demands." *Id.*

Missouri courts have noted the importance of securing legal representation in worker's compensation cases. *See Page v. Green*, 758 S.W.2d 173, 176 (Mo. App. S.D. 1988) ("We are…aware that restrictions upon attorneys' fees, which prevent an attorney from receiving a reasonable fee, often work a hardship upon potential clients because they cannot secure the assistance they

need'). But to the Division's knowledge, Missouri has not recognized a due process right to counsel in such cases.

Presumably, the state could even limit attorney fees, consistent with constitutional protections. *See Cranston v. Industrial Comm'n,* 16 N.W.2d 865 (Wis. 1944) (Wisconsin statute limiting fees to 10 % of award); *Woodward Iron Co. v. Bradford*, 90 So. 803 (Ala. 1921) (limiting attorneys fees to 10% of award; court noted that "laws similar to this one have been attacked upon every conceivable ground as invading constitutional provisions, federal and state, and have been upheld by the courts."); and *Schilling v. Ind. Acc. Comm'n of Calif.*, 190 P. 373 (Cal. App. 1 Dist. 1920) (California Industrial Accident Commission had authority under Workmen's Compensation Insurance and Safety Act to fix the fees of attorneys representing a claimant).

But the challenged section does not limit fees or interfere with access at all. Section 287.390.5, by its plain language, does not restrict the ability of a claimant in a worker's compensation case to obtain counsel. The section specifically mandates that attorneys "shall receive reasonable fees for services rendered." Contrary to the organizations' claim, the section's inclusion of an attorney fees provision would more reasonably encourage representation.

SB1 also left in place MO. REV. STAT. § 287.260.1 (2000), which permits liens on compensation for "reasonable" attorney fees.

The organizations appear to take issue with the fact that §287.390.5 fails to specifically state the source from which the attorney will be paid. But §287.390.5 did not change an attorney's ability to recover a fee in worker's compensation cases, nor did it alter the manner in which an attorney is paid. In fact, attorneys in workers' compensation cases have long been permitted a presumptively reasonable fee of 25% of a claimant's award – a rule not established by statute or the Commission, but by case law. *Landman v. Ice Cream Specialties, Inc.,* 107 S.W.3d 240, 253 (Mo. banc 2003); *Page,* 758 S.W.2d at 176. Section 287.390.5 simply codifies the "reasonable" fee. And other parts of §287.390.5, mandating that an employee receive 100% of an offer made prior to representation of counsel, say nothing about precluding reasonable attorney fees. To read them as precluding attorney fees would be to read the final sentence out of the section.

Accordingly, §287.390.5 does not violate due process or the right of access to courts. It allows attorneys to continue to receive reasonable fees, as they did before SB1's enactment, and in no reasonable way detracts from the ability of worker's compensation claimants to obtain counsel.

6. Section 287.610.2 (Supp. 2006) does not violate Article II, ¶1, the separation of powers provision of the Missouri Constitution (Count VIII).

The organizations complain that new "§287.610.2", relating to administrative law judges, violates the separation of powers provision of the Missouri Constitution, art. II, §1. LF 58-60.[30] Whether they intended in their complaint to challenge more than subsection 2 of §287.610, they pleaded for declaratory judgment with regard to subsection 2, only. LF 59-60 ("Wherefore" paragraph). And nothing in subsection 2, which specifically directs the Division director to participate in performance audits of ALJs in conjunction with a committee, using written standards, suggests any separation of powers issue.

If the Court were to construe the challenge as a broader one – encompassing the procedure for no-confidence-votes by the committee to be sent to the governor, who may withdraw ALJ appointments, *see* LF 59, ¶¶ 112 and 114 – the claim would still fail. Separation of powers simply is not implicated.

When an administrative tribunal holds hearings and renders administrative decisions to discharge an administrative function of the agency, it is acting in no more than a quasi-judicial capacity. *Barber v. Jackson County Ethics Comm'n*, 935 S.W.2d 62, 65 (Mo. App. W.D. 1996). So long as the agency

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[30] It is particularly difficult to see how the organizations could have standing to assert this claim. They claim to represent employees, not ALJs. The plaintiff with standing to challenge new §287.610 would be an affected ALJ, not a trade association or labor union.

is not attempting to enforce a judgment, it is not performing a judicial act, *id.,* and its hearings and decisions cannot violate the constitutional separation of powers provision. *Id.* Logically, then, review of an ALJ's quasi-judicial performance by an administrative committee, or withdrawal of an ALJ's appointment by the executive, cannot violate the separation of powers provision, either.

7. Section 287.120.6(3) (Supp. 2006), the drug testing provision, does not violate the unreasonable search prohibitions of the state or federal constitutions (Count IX).

Finally, the organizations challenge §287.120.6(3) under an unreasonable search and seizure theory, alleging that the drug-testing provision "constitutes state action." LF 61-62. It does not.

The U.S. Supreme Court has held that attributing actions by private entities to the state "is a matter of normative judgment, and that the criteria lack rigid simplicity." *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*, 531 U.S. 288, 295 (2001). But the Court has identified factors to examine. *Id.* at 296.

Situations in which the Court has found that a challenged activity may be "state action" include those in which the private activity results from the state's exercise of "coercive" power; when the state provides "significant

encouragement" for the activity, either overt or covert; or when a private actor operates as a willful participant in joint activity with the state or its agents. *Id.* The Court has also treated a nominally private entity as a state actor when it is controlled by an "agency of the State," *Pa. v. Bd. of Dir. of City of Trusts of Philadelphia*, 353 U.S. 230, 231 (1957); when it has been delegated a public function by the state, *Edmonson v. Leesville Concrete Co.,* 500 U.S. 614, 627-628 (1988), and *West v. Atkins,* 487 U.S. 42, 56 (1988); or when it is "entwined with governmental policies," or when government is "entwined in [its] management or control," *Evans v. Newton,*382 U.S. 296, 301 (1966).

In short, "state action may be found only if there is such a "close nexus between the state and the 'challenged action' that seemingly private behavior 'may fairly be treated as that of the State itself.'" *Brentwood,* 531 U.S. at 295, *quoting Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974). Here, the Division believes that no such "close nexus" exists.[31]

Section 287.120.6(3) merely provides guidelines for drug testing in connection with workers' compensation claims. The provision does not mandate testing in any instance and in no way mandates any behavior on the part of

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[31] Substantive analysis of this claim, though, makes very plain the necessity of a concrete set of facts, such as a challenged policy and an employee whose benefits have been denied thereunder, for a reasoned test of the statute.

private employers. (To be sure, private employers may, and do, enact drug and alcohol testing policies for reasons completely unrelated to any statute, and such policies in no way implicate Fourth Amendment issues.) Instead, the challenged provision simply provides a framework under which employers may select how they wish to proceed. As such, the challenge here is similar to the case of *Nat'l Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179 (1988).

In *Tarkanian*, the Supreme Court examined whether the National Collegiate Athletic Association (NCAA) was a state actor, when a state university suspended the university's basketball coach based solely upon the NCAA's guidelines. The Court held that the university's imposition of disciplinary sanctions against the coach did not turn the NCAA's otherwise private conduct into state action, based in large measure on the fact that the NCAA possessed no governmental powers. *Id.* at 464-465. In other words, the Court held that the NCAA was not a state actor, even though a state institution imposed sanctions against a state employee based solely upon the NCAA's guidelines.

Here, the existence of state action is even more attenuated than in *Tarkanian* for at least two reasons. First, the suspension at issue in *Tarkanian* was done by a state institution. Here, all relevant behavior with respect to §287.120.6 (3) is performed by private employers. Second, *Tarkanian* involved the suspension of a state employee based solely upon the guidelines of a private

association. Though the NCAA's rules affect nearly every state university in the United States, the Court declined to find the existence of state action. *Id.* Here, private employers maintain independent discretion in enacting and enforcing drug and alcohol testing policies. Section 287.120.6(3) does not dictate their behavior in any respect. Instead, the provision serves merely as an evidentiary standard. Simply, §287.120.6 (3) does not contemplate the "entwinement" of a public function with a private entity. Thus, state action cannot be reasonably inferred.

The organizations cite a state court case in their petition, *State ex rel. Ohio AFL-CIO et al. v. Ohio Bureau of Workers' Compensation,* 780 N.E.2d 981 (Ohio 2002), *see* LF 61-62, in which the Ohio Supreme Court held that private employers who conducted drug testing pursuant to an Ohio workers' compensation statute were state actors for purposes of the Fourth Amendment. But the holding in the Ohio case, which is certainly non-binding in Missouri, fails in any event to comport with the U.S. Supreme Court's requirement that the private behavior be so entwined with the state that the actions of private employers "may fairly be treated as that of the State itself." *Brentwood,* 531 U.S. at 295. And the Division is not aware of any other state that treats such attenuated state involvement as state action.

Section 287.120.6(3) does not violate Art. I, §15 of the Missouri Constitution or the Fourth Amendment of the U.S. Constitution.

Conclusion

The trial court's judgment should be affirmed.

Respectfully submitted,

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Certification of Service and of Compliance with Rule 84.06(b) and (c)

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