No. SC 88368

IN THE
SUPREME COURT OF MISSOURI

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

v.

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

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

APPELLANTS' REPLY BRIEF

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I. PLAINTIFFS' PETITION FOR DECLARATORY JUDGMENT PRESENTS A JUSTICIABLE CONTROVERSY.

In defense of the summary judgment below, Respondent asserts that Plaintiffs "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." Respondent cannot demonstrate that it is "entitled to judgment as a matter of law" on any of these points. Rule 74.04(c). Respondent spends 20 pages attempting to narrowly define this Court's jurisdiction to resolve constitutional challenges to legislation, particularly by declaratory judgment. Resp. Br. at 65-85. Yet, Respondent completely ignores this Court's recent decision in *Planned Parenthood of Kansas v. Nixon*, 220 S.W.3d 732 (Mo., May 1, 2007), which speaks directly to this issue and requires reversal of the summary judgment in this case.

A. Plaintiffs' Petition Presents a Substantial, Presently Existing Controversy and Seeks Specific Relief, Not an Advisory Opinion.

Respondent correctly cites *Missouri Health Care Association v. Attorney General*, 953 S.W.2d 617 (Mo. banc 1997), as holding 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.'" Resp. Br. at 69, quoting 953 S.W.2d 622. The allegations in this case clearly meet that standard. Petitioners have alleged that SB1 had an immediate effect on their members by drastically reducing the value of the workers' compensation coverage provided to them by their employers. If an employer announced that it was unilaterally modifying agreed-upon employee health insurance so that certain diseases, certain treatments, or certain dependents would no longer be covered, there could be no question that such an action would have a current effect on employees, reducing the value of their insurance coverage, even before a claim is filed.

Respondent complains that Plaintiffs seek an advisory decree involving "hypothetical or speculative scenarios that may never come to pass" and not "anything that has actually happened under the new law." Resp. Br. at 68 & 71. However, the law is in place and, as this Court recently stated, "One must assume the State will enforce its laws." *Planned Parenthood,* at 739. Indeed, Respondent has submitted six decisions by Administrative Law Judges applying the new law. Resp. Br. at 78 n.23. In *Ahearn, Bivins, Johnson* and *Leal,* the ALJ denied compensation for injuries that would have been compensable under prior law. *See* Resp. Appendix at A93-A131. Obviously, these are not hypothetical scenarios that might never come to pass.

B. Plaintiffs Have Representational Standing To Challenge the Unconstitutionality of SB1.

Respondent asserts that the Petition did not plead facts sufficient to prove standing. Resp. Br. at 79. Respondent seeks to distinguish *Frank Coluccio Const. Co. v. City of Springfield*, 779 S.W.2d 550, 552 (Mo. banc 1989) , wherein the Court held that "standing is an affirmative defense for the governmental entity to plead and prove," as a unique case. Resp. Br. at 80. In fact, the prevailing rule in state courts is: "A challenge to standing is an affirmative defense." 61A Am. Jur. 2d *Pleading* § 316 (2007).

Plaintiffs have already addressed the arguments raised by Respondent: Union members need not exhaust administrative remedies where the sole basis of their suit is the unconstitutionality of SB1; asserting the constitutional rights of members is germane to the purposes of unions under Missouri law; and participation of individual members is not required where the relief sought does not include money damages. Appellants' Br. at 44-46.

Labor unions have been held by other state supreme courts, including those of Texas, Ohio, and Kansas, to have associational standing to challenge the constitutionality of amendments to workers' compensation statutes on behalf of their members. Appellants' Br. at 40-41. This fact is highly persuasive on Plaintiffs' standing here. *See Planned Parenthood*, 220 S.W.3d at 738 ("Planned Parenthood and other abortion providers have repeatedly been allowed to assert third party standing on behalf of their minor patients.").

C. Plaintiffs' Claims are Ripe.

Respondent, repeating the argument made in part A above, contends that Plaintiffs' claims are not ripe because "[t]hey contemplate factual scenarios that have not occurred." Resp. Br at 83. There are no conditions precedent that must occur before the provisions of SB1 may be enforced. Moreover, as this court has recently stated:

> There can be a ripe controversy before a statute is enforced. Parties need not subject themselves to a multiplicity of suits or litigation or await the imposition of penalties under an unconstitutional enactment in order to assert their constitutional claim for an injunction . . . [o]nce the gun has been cocked and aimed and the finger is on the trigger, it is not necessary to wait until the bullet strikes to invoke the Declaratory Judgment Act.

Planned Parenthood of Kansas v. Nixon, 220 S.W.3d 732, 738-39 (Mo. 2007) (citations and quotation omitted).

D. Plaintiffs Have No Adequate Remedy At Law.

Finally, Respondent asserts that Plaintiffs have an adequate remedy at law in the form of administrative compensation proceedings. Resp. Br. at 84. Administrative proceedings are not "at law." Nor can Petitioner unions and other organizations pursue their claims there because they are not parties to such

proceedings. Nor do Administrative Law Judges have authority to declare any portion of the workers' compensation statute unconstitutional.

It is not necessary that individual workers bring numerous challenges to individual provisions of SB1. Avoiding such duplicative waste of judicial resources is one purpose of the Declaratory Judgment Act. In addition, one of the constitutional arguments raised by Plaintiffs is that the numerous changes made by SB1 *in the aggregate* render the workers' compensation benefit an inadequate substitute for their common law right of action against employers. Individuals adversely affected by individual sections would likely have neither the incentive nor the standing to challenge the cumulative impact of all the SB1 changes on Missouri workers.

* * *

Plaintiffs presented two primary challenges to the constitutionality of SB1. First, the law eviscerates the quid pro quo guaranteed to workers in place of their tort cause of action: workers' compensation no longer provides the adequate substitute remedy required by the guarantees of due process and open courts. Secondly, SB1 has no rational relationship to its purpose in that there is no factual basis for the legislature reasonably to believe that its major provisions would attract employers to Missouri. Respondent resists applying these constitutional standards. Instead, Respondent insists upon a test that is far more deferential and subservient to the General Assembly, upholding any enactment that is "not wholly irrational" under "any conceivable basis." Resp. Br. at 26-28. Plaintiffs have

shown, to the contrary, that both the quid pro quo analysis and the rational relationship test are firmly grounded in both federal and Missouri constitutional precedent, and that SB1 cannot meet either standard.

II. SB1 SO EVISCERATES EMPLOYEES' STATUTORY REMEDY FOR WORK-RELATED INJURY THAT IT NO LONGER PROVIDES AN ADEQUATE SUBSTITUTE FOR THE COMMON LAW CAUSE OF ACTION.

A. The Due Process Clause of the Fourteenth Amendment Permits a State to Abolish a Common Law Cause of Action for Injury to Person or Property Only If An Adequate Substitute Remedy Remains.

Plaintiffs' Count I is based on the U.S. Supreme Court's settled explication of the Due Process Clause as a guarantee of some remedy for violation of Blackstonian "absolute rights," including the right to a remedy for harm to person or property recognized at common law. Appellants' Br. at 50-51. A legislature may alter or abolish the common law cause of action for injury to person or property, but it must provide some adequate substitute remedy in its place.

Respondent answers that this "is the wrong test." Resp. Br. at 45. In Respondent's view, legal recourse for injury to person or property continues only at the sufferance of the legislature, and injured workers have no remedy that cannot be abolished at the whim of a majority of the General Assembly. "The test

is simply whether the choice is rationally related to achieving its purpose." *Id.* at 41.

To the contrary, under both the federal and Missouri constitutions, SB1 is constitutional only if the workers' compensation law remains an adequate substitute for the injured worker's common law remedy.

The U.S. Supreme Court in *Middleton v. Texas Power & Light Co.*, 249 U.S. 152, 163 (1919), squarely held that due process permits the legislature to abolish employees' cause of action for job injuries so long as it provides "a reasonable substitute" in its place. The Court in *New York Central Railroad Co. v. White*, 243 U.S. 188, 203 (1917), also indicated that a state may substitute an administrative compensation system for the tort right of action, but added that workers' compensation does not satisfy due process if it provides only an "insignificant" remedy. *Id.* at 205. The Supreme Court and other state courts have read *White* as holding that workers' compensation comports with due process only because it provides an adequate substitute remedy as a quid pro quo for the elimination of workers' common law cause of action. Appellants' Br. at 52-54.[1]

[1] Respondent erroneously reads *Tracy v. Streater/Litton Ind.*, 283 N.W.2d 909 (Minn. 1979) as rejecting the quid pro quo test. Resp. Br at 31 & 53. In fact, the Minnesota court embraced that test in *Tracy* and recently reiterated its position in *Gluba v. Bitzan & Ohren Masonry*, 735 N.W.2d 713, 725-26 (Minn. 2007).

Respondent interprets these cases as holding that a statutory quid pro quo is merely helpful, but is not essential to determining whether the law is reasonable. Resp. Br. at 48. For support, Respondent looks to *Mountain Timber Co. v. Washington*, 243 U.S. 219 (1917) (challenging a tax on employers); *Arizona Copper Co. v. Hammer*, 250 U.S. 400 (1919) (challenging the elimination of employers' fault-based defenses) and the portion of *White* which upheld the elimination of an employer's defenses as not arbitrary. Resp. Br at 48-50. But these decisions hold only that *defenses* may be abolished and burdens imposed on the employer if reasonable. They are not at all inconsistent with the Court's holding in *White* and *Middleton* that common law *remedies* may be abolished only if some adequate remedy remains.

It is rare that a legislature completely abolishes a common law remedy for injury to person or property without providing a substitute remedy. When a legislature has done so, the Court has found it a violation of due process. *See* Appellants' Br. at 52-53. Respondent weakly asks this Court to ignore the due

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In addition, contrary to the assertion at Respondent's Br. at 32, the Mississippi Supreme Court also applies the quid pro quo test. *See Wells v. Panola County Bd. of Educ*. 645 So.2d 883, 894 (Miss. 1994) (Workmen's Compensation Act held not to violate due process because "the certain remedy afforded by the Compensation Act is deemed to be a sufficient substitute for the doubtful right accorded by the common law.").

process pronouncements of the U.S. Supreme Court in these cases because, "None involves review of workers' compensation schemes." Resp. Br. at 51. Yet, Respondent acknowledges, as it must, that "[t]he cases largely stand for the proposition that 'there are limits on governmental authority to abolish 'core' common-law rights.'" *Id.*[2]

Indeed, this is the widely prevailing constitutional principle. *See* 57A Am. Jur. 2d *Negligence* § 3 (2007) ("No one has a vested right in the common-law rules governing negligence actions that precludes a legislature from substituting a viable statutory remedy for the one available at common law. Thus, a state legislature may modify common-law negligence so long as it provides an adequate substitute remedy for the right infringed or abolished." 65 C.J.S. *Negligence* § 2 (2007) (same); 16A C.J.S. *Constitutional Law* § 411 (2007) ("there is no vested right to a particular remedy, and existing remedies may be changed or abolished, provided a substantial remedy remains."); 15A C.J.S. *Common Law* § 16 (2007)

[2] Respondent also suggests that the Court retreated from this principle in *Silver v. Silver*, 280 U.S 117 (1935). Resp. Br. at 59. That case, however, upheld an automobile guest statute that did not abolish the injured guest's cause of action, but merely raised the level of proof required of plaintiffs from negligence to recklessness. The same is true of the statute upheld in *Perozzi v. Ganiere,* 40 P.2d 1009 (Ore. 1935), which Respondent cites at Resp. Br. 59-60.

("Furthermore, a common law right may be abrogated only if the legislature has provided an adequate substitute remedy, that is, where a quid pro quo exists").

B. The Missouri Constitutional Guarantees of Due Process and Open Courts Permit the Legislature To Abolish a Common Law Cause of Action for Injury to Person or Property Only If An Adequate Substitute Remedy Remains.

Likewise, Plaintiffs allege that SB1 so undermines the statutory quid pro quo that workers' compensation is no longer an adequate substitute remedy for Missouri employees, in violation of Art I, § 10 and Art I, § 14 of the Missouri Constitution.[3]

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[3] Respondent complains that Plaintiffs' reliance on the open courts guarantee amounts to a "different theory" from the due process argument. Resp. Br at 24-25 n.5. It is true that the trial court dismissed Plaintiffs' due process argument but decided Plaintiffs' open courts challenge by summary judgment. Fundamentally, however, Plaintiffs have advanced only a single theory: that after SB1, workers' compensation no longer serves as an adequate substitute remedy. On the basis of that single theory, SB1 violates not only the due process guarantees of the federal and Missouri constitutions, but also the open courts guarantee of art. I, § 14. *See Goodrum v. Asplundh Tree Expert Co*., 824 S.W.2d 6, 10 (Mo. 1992) (en banc) ("[T]he analysis required for [a constitutional due process challenge to a workers compensation provision] is the same as is necessary to consider plaintiffs' open

Respondent begins with a serious misstatement of this Court's decision upholding the Workers' Compensation Law in *De May v. Liberty Foundry Co.*, 37 S.W.2d 640 (1931). Respondent reads that decision to hold that the legislature is not obliged to provide an adequate substitute for the common law remedy for personal injury. Resp. Br at 56-57. Instead, according to Respondent, the elimination of the workers' remedy was entirely within the legislature's prerogative. "The common law has never provided a cause of action for injuries occasioned without human fault, negligence, or wrong. 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." Resp. Br. at 24..

In fact, the *De May* Court did not so hold.

Albert De May allegedly suffered a hernia while turning a casting at the foundry. He was taken to the hospital and died following an operation. A Workmen's Compensation Commissioner determined after a hearing that De May's death was not due to "an injury received in an accident arising out of and in the course of his employment." *Id.* at 642. The full commission affirmed, and the claimant appealed to the circuit court. There counsel demanded a trial de novo, "insisting upon the right to proffer new and additional evidence *in support of the*

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courts claim under art. I, § 14, which is but a second due process clause to the state constitution.").

claim for compensation." *Id.* at 643. (emphasis added). The circuit court sustained the company's objection to the introduction of any evidence, and the court affirmed the commission's findings. *Id.*

The Missouri Supreme Court first addressed Mrs. De May's contention that she should have been entitled to present evidence on appeal to the circuit court. Section 44 of the workers compensation Act at that time provided: "Upon appeal no additional evidence shall be heard and in the absence of fraud, the findings of fact made by the commission within its powers shall be conclusive and binding." This enactment did not violate the open courts guarantee, the Court held, because that guarantee protects "only such wrongful injuries to person, property, or character as are actionable or remediable under the rules of the common law." *Id.* at 645-46. Because the legislature created the claim for workers' compensation benefits, the legislature could tailor the remedy as it saw fit. *Id.* That holding, which Respondent focuses on, is not at all relevant to this case.

The relevant portion immediately follows: "Nor do we think that the Workmen's Compensation Act must be held invalid because in contravention of the constitutional right . . . the act, by virtue of section 3 thereof, . . . 'shall exclude all other rights and remedies of such employee, at common law or otherwise.'" *Id.* at 646.

The injured employee, because the Act was at that time voluntary, may be deemed to have waived the constitutional right to bring a tort lawsuit. *Id.* In *De May*, however, the worker had died and the action was brought by his widow.

Because the common law recognized no cause of action for wrongful death, she was not deprived of a remedy recognized by common law. Her right was "indirect" and "obviously does not arise out of, or from, any injury to 'person, property or character,' which is the only class or kind of injuries for which the [open courts provision] insures or guarantees a remedy." *Id.* For the same reasons, the Court held that the law did not violate due process. *Id.* at 655.

A fair reading of the opinion, including the authorities quoted from other states, is that, absent waiver, the Missouri constitution "insures or guarantees a remedy" that is an adequate substitute for the lost common-law remedy. *Id.* at 658-59.

Respondent acknowledges that *Strahler v. St. Luke's Hosp.*, 706 S.W.2d 7 (Mo. 1986), provides strong support for this interpretation of art. I § 10. The Court there struck down a medical malpractice statute of limitations as applied to minors because it "denies them a set of rights without providing any adequate substitute course of action for them to follow." *Id.* at 12. Respondent contends, however that Plaintiffs' reading of "*Strahler* goes too far," in that the decision has been undermined or limited by *Goodrum v. Asplundh Tree Expert Co.*, 824 S.W.2d 6 (Mo. 1992) (en banc), *Etling v. Westport Heating & Cooling Services, Inc*, 92 S.W.3d 771 (Mo. 2003), and *Wheeler v. Biggs*, 914 S.W.2d 512 (Mo. 1997). Resp. Br. at 59. That is not the case.

In *Goodrum*, the Court emphasized that the open-courts guarantee, as well as due process, "does not create rights, but is meant to protect the enforcement of

rights already acknowledged by law." 824 S.W.2d at 10. quoted in Resp. Br. at 54. This is precisely what Plaintiffs argue, consistent with *De May*, above. Respondent omits from its *Goodrum* quotation the passage that immediately follows, which makes the Court's position quite clear:

> *See also Kandt v. Evans*, 645 P.2d 1300, 1306 (Colo.1982), holding provisions of state workers' compensation law which prohibited civil lawsuits against co-employee for commission of intentional tort did not infringe upon the state's constitutional "access to courts" provision "as long as an adequate statutory remedy was provided."

Id. at 10.

In *Entling*, cited at Resp. Br. 55, plaintiffs challenged the definition of "dependents" in the workers' compensation section providing death benefits for dependents. 92 S.W.3d at 772. As in *De May*, the Court found no violation of the open courts provision because Missouri did not recognize an action for wrongful death at common law. *Id.* at 773.[4]

[4] Respondent also relies on *Snodgras v. Martin & Bayley, Inc.*, 204 S.W.3d 638 (Mo. banc 2006), in which the Court found no violation of the open-courts provision in Missouri's dram shop act which precluded a cause of action against a liquor vendor for harm caused by a drunk driver. Resp. Br. at 56. Again, the Court's reasoning was not that the elimination of a common law remedy was rational, but that there existed no common law remedy to preserve because

Respondent also relies on *Wheeler v. Biggs*, 914 S.W.2d 512 (Mo. 1997), for the proposition that *Strahler* does not require a substitute remedy. Resp. Br at 54 & 59. But this Court in *Kilmer v. Mun*, 17 S.W.3d 545 (Mo. 2000), stated that the correct reading of open courts provision was not that of the *Wheeler* majority, but of Judge Holstein in dissent:

> The line of analysis articulated by Judge Holstein in *Wheeler* is most appropriate for recognizing the power of the legislature to "design the framework of the substantive law" by abolishing or modifying common law or statutorily based claims, yet keeping a meaningful right to a "certain remedy" where the law recognizes a cause of action."

Kilmer, at 550. Significantly, Judge Holstein stated that *Strahler* "is misconstrued by the majority" in *Wheeler*. 914 S.W.2d at 517.

It is clear, then, that under both the open courts and due process guarantees of the Missouri constitution, the legislature may abolish a common law cause of action for personal injury only if it provides a reasonable alternative remedy in its place.

Missouri followed the "common law rule that furnishing alcoholic beverages is not the proximate cause of injuries inflicted by intoxicated persons." *Id.* at 640.

C. SB1 So Eviscerates the Guarantee of Certain Compensation Without Fault That Workers' Compensation No Longer Provides an Adequate Substitute for the Injured Workers' Common Law Remedy.

Plaintiffs detailed the provisions of SB1 which denied workers' compensation for substantial groups of injured workers whose work-related injuries were previously compensable. Appellants' Br. at 13-30. Plaintiffs also noted that the constitutional test applied by the supreme courts of Colorado, Florida, Kansas, Minnesota, New Hampshire, and Texas inquires whether the workers' compensation law, as amended, continues to provide a reasonable alternative substitute for the workers' common law cause of action. Appellants' Brief at 65-67.

Respondent observes that those courts in the end upheld the amendments to their workers' compensation statutes. Resp. Br. at 62. Nevertheless, as the Texas and Kansas courts warned, there comes a point where amendments have effectively destroyed the quid pro quo provided to workers – certainty of compensation without regard to fault – that they violate due process or the open courts guarantee. *See* Appellants' Br. at 65-66. Other courts have applied the same constitutional test. The Minnesota Supreme Court recently stated:

> [T]he legislature could take many steps to reduce employers' costs, but if these steps resulted in the denial of benefits to a sufficiently large proportion of workers who incur severe economic hardship as a consequence of work-related injuries, the workers' compensation

> scheme would no longer represent "a reasonable trade-off" of workers' common-law tort rights.

Gluba v. Bitzan & Ohren Masonry, 735 N.W.2d 713 (Minn. 2007). *See also Venters v. Sorrento Delaware, Inc*., 108 P.3d 392, 399 (Idaho 2005) (applying quid pro quo test to workers' compensation amendment granting immunity to certain contractors); *Judd v. Drezga*, 103 P.3d 135, 139 (Utah 2004) (Right to a remedy is satisfied "if the law provides an injured person an effective and reasonable alternative remedy" and the "benefit provided by the substitute must be substantially equal in value or other benefit to the remedy abrogated."); *Mello v. Big Y Foods, Inc*., 826 A.2d 1117, 1124-25 (Conn. 2003) ("It is settled law that [Connecticut's open courts provision] restricts the power of the legislature to abolish a legal right existing at common law prior to 1818 without also establishing a 'reasonable alternative to the enforcement of that right.' [citing cases] [I]n determining whether an alternative [substitute remedy] is reasonable, a court need only consider the aggregated benefits of the legislative alternative and assess whether those aggregated benefits reasonably approximate the rights formerly available under the common law."). *See also* Easton W. Orr, Jr., Note, *The Bargain is No Longer Equal: State Legislative Efforts to Reduce Workers' Compensation Costs Have Impermissibly Shifted the Balance of the Quid Pro Quo in Favor of Employers*, 37 Ga. L.Rev. 325, 329-30 (2002) ("As employee benefits

continue to decrease, at some level, the quid pro quo is thrown out of balance and employer protection from tort liability can no longer be justified.").

Plaintiffs assert that with the enactment of SB1, Missouri workers' compensation law has tilted far past this tipping point. Courts have generally upheld individual amendments that have narrow or limited impact on the workers' remedy as a whole. No state legislature has enacted as drastic a set of restrictions on workers compensation as SB1, with its numerous limitations affecting the fundamental elements of compensability for nearly all workers.

Finally, the trial court held that, even if the quid pro quo standard applied, no employees are deprived of remedy by SB1 because any employee for whom compensation is not made available is entitled to sue his or her employers in tort. Opinion at 4. *See also* Brief of Amici Curiae AIM, et al., at 18-27, arguing even more explicitly that any injured employee denied compensation due to the restrictive provisions regarding "accident," "prevailing factor," "idiopathic injury," or any of the other limitations imposed by SB1 is entitled to sue in tort.

Plaintiffs disputed this narrow interpretation of Mo. Rev. Stat. § 287.120, the exclusivity provision of the workers' compensation law. Appellants' Br. at 71-72.

In defense of the lower court's decision, one might expect Respondent to cite examples of employees who were denied compensation for a work-related injury but were then permitted to bring a tort action against the employer. If the lower court were correct, there would be numerous decisions to choose from.

Respondent, however, could do no better than present cases standing for true, but irrelevant propositions such as, "When one is not at work, workers' compensation law does not apply," *Harris v. Westin Mgmt. Co. East*, 2007 WL 2247368 *2 (Mo. banc Aug. 7, 2007); or that one who is not a statutory employer is not protected by workers' compensation exclusivity. *Bradford v. BJC Corp. Health Svs*., 200 S.W.3d 173, 176 (Mo. App. E.D. 2006); *Rubio v. HomeDepot U.S.A., Inc.*, 188 S.W.3d 26, 33 (Mo. App. W.D. 2006). *See* Resp. Br. at 63-65 & n.19.

III. SB1 BEARS NO RATIONAL RELATIONSHIP TO A LEGITIMATE STATE PURPOSE, IN VIOLATION OF DUE PROCESS AND EQUAL PROTECTION.

Separate and apart from the unconstitutional destruction of the worker's remedy for job-related injury, SB1 also fails to satisfy even the minimal rational relationship test under the federal and Missouri constitutions. That test, whether it is applied under the due process or equal protection guarantees, requires that legislation have both a legitimate state purpose *and* some rational basis for the legislature reasonably to believe that the enactment will accomplish that purpose. SB1 has no rational connection to the goal of attracting and keeping employers in Missouri.

Plaintiffs do not contend that the Assembly must articulate its rationale, that it must approach a problem with mathematical precision, or that it must prove that

its enactment will definitely achieve its goals. *See* Resp. Br at 40. Nevertheless, there must be some basis in fact that the means are suited to the law's ends.

A. The Rational Relationship Test Requires Some Factual Basis to Reasonably Believe That Statute Will Accomplish Its Ends.

Respondent's primary response is that this rational basis test is not sufficiently deferential to the legislature and "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." Resp. Br. at 40. Respondent would uphold any statute whose purpose falls within the police power of the state, even if the evidence indicates that the statute could not possibly achieve that purpose. Under either the federal or Missouri rational basis test, Respondent declares, such "evidence is irrelevant." Resp. Br. at 41 (citing *Heller v. Doe by Doe,* 509 U.S. 312, 320 (1993), and *State v. Day-Brite Lighting, Inc.*, 240 S.W.2d 886, 893 (Mo. banc 1951)). Respondent is wrong on both federal and Missouri law.

1. Federal due process and equal protection requires some factual basis

The U.S. Supreme Court has held that rational-relationship review looks to whether "the purpose is legitimate and that Congress rationally could have believed that the provisions would promote that objective." *Kelo v. City of New London*, 545 U.S. 469, 488 n.20 (2005), quoting *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1015, n.18 (1984). The Court has repeatedly struck down legislation

where the lawmakers had no factual basis for expecting the legislative means would achieve its ends. *See* Appellants' Br. at 80-81 (summarizing cases).

Respondent answers that some of these cases were decided under the equal protection clause and some involved "protected or special classes of persons." Resp. Br. at 41. These attempted distinctions are unavailing. First, the rational relationship test is the same, whether the challenge to the statute is framed as a violation of due process or equal protection. *See Kelo*, *supra*, at 490 (Kennedy, J., concurring); *American Motorcyclist Association v. City of St. Louis*, 622 S.W.2d 267, 269 (Mo. App. 1981) (applying the identical rational-basis test to both due process and equal protection challenges).

Nor did the cases involving "protected classes" involve a different level of scrutiny. As an example, Respondent cites *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 448-50 (1985), which dealt with an ordinance against a home for the mentally disabled. Resp. Br. at 41 n.16. The Court held that the ordinance did not meet the rational basis test under the due process clause because there was no factual basis for believing the ordinance would accomplish its ostensible goals. *Id.* at 448-50. The very decision Respondent relies upon pointed out that *Cleburne* "applied rational-basis review." *Heller, supra,* at 321.

Most importantly, if judicial review of legislation requires courts to accept at face value any legitimate state purpose, there exists no constitutional check on the legislature to invalidate ostensibly appropriate legislation that is in reality

designed to benefit one politically favored group or punish another. *Kelo, supra*, at 491 (Kennedy, J., concurring).[5]

Respondent cites *Heller v. Doe by Doe*, 509 U.S. 312 (1993) for the proposition that the state is not obliged to produce evidence of rationality or subject it "to courtroom factfinding." Nevertheless, the Court itself emphasized, "even the standard of rationality as we so often have defined it must find some footing in the realities of the subject addressed by the legislation." *Id.* at 321.

Heller itself provides a good example. Following Justice Kennedy's statement of the rational basis test, he engaged in three pages of discussion of the relative difficulties in diagnosing mental illness as compared with mental retardation, with reference to treatises and authorities in the field, before deciding

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[5] Respondent erroneously cites *Chavez v. Martinez*, 538 U.S. 760, 775 (2003) for the proposition that 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.'" Resp. Br. at 29 n.7. In fact, the quoted passage was not from the majority opinion in *Chavez*, but rather the separate opinion of Justice Thomas. The Court's opinion on this point is by Justice Souter and states quite differently, "Whether Martinez may pursue a claim of liability for a substantive due process violation is thus an issue that should be addressed on remand, along with the scope and merits of any such action that may be found open to him." 538 U.S. at 779-80.

that "it would have been plausible for Kentucky to conclude that the dangerousness determination was more accurate as to the mentally retarded than the mentally ill." *Id* at 324.[6]

As Plaintiffs demonstrated, the Assembly not only lacked any factual basis for believing SB1 would attract employers to Missouri, the available evidence, much of which was provided by Respondent itself, indicated just the opposite.

2. Missouri Law Requires Some Factual Basis.

Respondent asserts that in Missouri, judicial review of economic legislation must be far more subservient to the legislature. In Respondent's view the Court must uphold legislation that has "any conceivable basis" linked to the police power. Resp. Br. at 26-27, and which is not "wholly irrational." *Id.* at 28.

Respondent relies heavily on an excerpt from *State v. Day-Brite Lighting, Inc*., 240 S.W.2d 886 (Mo. banc 1951), stating that regulation through workmen's

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[6] *See also Gluba v. Bitzan & Ohren Masonry*, 735 N.W.2d 713, 721 (Minn. 2007) (in challenge to an amendment affecting workers compensation disability payments, rational basis review under the Fourteenth Amendment, asks "whether the challenged classification has a legitimate purpose and whether it was reasonable [for the legislature] to believe that use of the challenged classification would promote that purpose.").

compensation laws is within the police power[7] and "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. Resp. Br. at 30-31 & 38.

Taken out of context, the Court's excerpt from Am. Jur. appears to preclude any meaningful judicial review. The full paragraph, however, carries a far different import:

> [I]n order to sustain legislation under the police power, *the courts must be able to see* that its operation tends in some degree to prevent some offense or evil or to preserve public health, morals, safety, and welfare, and that if a statute discloses no such purpose, has no real or substantial relation to these objects, or is a palpable invasion of rights secured by the fundamental law, *it is the duty of the courts so to adjudge* and thereby give effect to the Constitution. Only in cases, however, where the legislature exceeds its powers, will the courts interfere or set up their judgment against that of the legislature. Where an act has a real and substantial relation to the police power,

[7] The Court made clear in the quoted passage that it was speaking of regulations affecting the employment relationship relating to the health and welfare of workers and "which are an expense to the employer," not the elimination of workers' legal remedies. 240 S.W.2d at 892.

> then no matter how unreasonable nor how unwise the measure itself may be, it is not for the judicial tribunals to avoid or vacate it upon constitutional grounds.

11 Am. Jur. § 306, pp. 1087-89.[8]

Again quoting *Day-Brite*, which in turn quoted *Poole & Creber Mkt. Co. v. Breshears,* 125 S.W.2d 23 (Mo. 1938), *aff'd* 342 U.S. 421 (1952), Respondent suggests that this Court, "[i]n deference to the legislative role," has never inquired into the factual basis for a law's relationship to a legitimate state interest. Resp. Br. at 32-33.

In fact, the authority explicitly cited by the Court in *Poole* was *Mugler v. Kansas,* 123 U.S. 623 (U.S. 1887) at this passage:

> It does not at all follow that every statute enacted ostensibly for the promotion of these ends is to be accepted as a legitimate exertion of the police powers of the state. There are, of necessity, limits beyond which legislation cannot rightfully go. While every possible presumption is to be indulged in favor of the validity of a statute, the courts must obey the constitution rather than the law-making department of government, and must, upon their own responsibility, determine whether, in any particular case, these limits have been passed. . . . If, therefore, a statute purporting to have been enacted to

[8] See also 16A Am. Jur. 2d *Constitutional Law* § 339 (2007) (similar).

> protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the constitution.

Id. at 661. Thus, the Court in *Poole* stated, it will not sustain a law that "clearly appears . . . to have *no relation in fact* to the purported legislative purpose." 125 S.W.2d at 30. (emphasis added).

More recently, in another case cited by Respondent, this Court stated that economic legislation "is not to be pronounced unconstitutional unless *in the light of the facts made known or generally assumed* it is of such a character as to preclude the assumption that it rests upon *some rational basis within the knowledge and experience of the legislators*." *Coldwell Banker Residential Real Estate Services, Inc. v. Missouri Real Estate Comm'n*, 712 S.W.2d 666, 669 (Mo. 1986) (emphasis added).

B. There Was No Rational Basis for the Assembly to Believe That SB1 Would Accomplish Its Purpose.

Respondent agrees that the objective of SB1 was to be competitive with other states in attracting employers. Resp Br. at 39 & 42.

Respondent posits two additional legislative purposes. One was "to reign back a statutory scheme that the legislature deemed had strayed too far beyond the legislature's original intendments." Resp. Br. at 35-36. If so, SB1 is manifestly

irrational because all of the sections described in Plaintiffs' Complaint are contrary to the workers' compensation law as it was adopted in 1926 and applied in early cases. For example, the "prevailing factor" requirement in current § 287.020.3 and § 287.067 did not appear in the original statute. Nor did the "objective findings" requirement of new § 287.190.6(2). The "separate accident" requirement now in § 287.020.2 is contrary to early case law; it was engrafted onto the law by judicial decision and ultimately rejected both by this Court and by the legislature. *See* Appellants' Br. at 14-15. The exclusions of "medical only" claims and claims for injuries due to repetitive exposure or trauma at work were not aimed at judicial decisions, but at language in the statute itself that favored compensation. *See* Appellants' Br. at 18-20. None of these amendments is rationally related to returning the workers' compensation statute to its original intent.

Respondent also submits that many of the changes made by SB1 "are aimed at streamlining the proceedings." Resp Br. at 42. However, almost none of the sections cited at Resp. Br. 42-44 are named by Plaintiffs in their Complaint.[9] They are therefore irrelevant to the constitutional challenge before this Court.

[9] The exception is § 287.390, dealing with approval of settlements and offers of settlement. *See* Resp. Br. at 43. Under that section, if an unrepresented employee rejects an offer of settlement and subsequent proceedings determine that the employee is entitled to no compensation, the employee is nonetheless entitled to

Indeed, SB1 cannot meet even the very minimal test proposed by Respondent. It is irrational to expect workers' compensation premiums will automatically decline simply by legislatively reducing the number of compensable claims. Respondent's own figures show that the number of claims declined in each year during 2001-2003 even as premiums rose dramatically. Appellants' Br. at 7. Respondent's own investigation revealed that rising costs were due to national conditions wholly unrelated to Missouri's workers' compensation law. *Id.* at 7-10.

Nor is it rational to expect to attract businesses to Missouri, by taking whole categories of injuries out of the workers' compensation system, where might be required to pay limited compensation, and putting them in the tort system where employers may be held liable for unlimited lost wages, pain and suffering, and even punitive damages. *See* Resp. Br. at 44-45.

Finally, it is irrational to expect that Missouri could compete with other states for employers simply by altering the scope of workers' compensation coverage. It is a certainty that any legislative change that attracts employers will quickly be copied by other states, negating any advantage for Missouri. Appellants' Br. at 90.

100% of the initial offer. See Appellant's Br. at 30. Respondent fails to explain how this provision is rationally related to streamlining the proceedings. Nor can Respondent explain how such a provision might reduce workers' compensation costs or attract employers.

CONCLUSION

For the foregoing reasons, Appellants urge this Court to reverse the judgment of the court below and to grant Plaintiffs' Motion for Partial Summary Judgment.

Respectfully submitted,

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I hereby certify:

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