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SC97833

IN THE SUPREME COURT OF MISSOURI

REBECCA KARNEY, *et al.*
Plaintiffs/Respondents

v.

THE MISSOURI DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS, *et al.*
Defendants/Appellants

Appeal from the Circuit Court of Jackson County, Missouri at Independence
The Honorable James Francis Kanatzar, Circuit judge

RESPONDENT'S BRIEF

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STATEMENT OF FACTS

In 1965 the Missouri legislature passed a few public-sector labor laws that established a very limited collective bargaining framework applicable to most government employees. On May 17, 2018, the Missouri General Assembly adopted House Bill 1413 ("HB 1413"), which attempts to rewrite much of Missouri public-sector labor law. House Bill 1413 went into effect and became law on August 28, 2018. It created several new statute sections in the Missouri Revised Statutes, including a new § 105.585(2).[1] Section 105.585(2) provides the following:

> (2) Every labor agreement *shall expressly prohibit* all strikes and *picketing of any kind*. A strike shall include any refusal to perform services, walkout, sick-out, sit-in, or any other form of interference with the operations of any public body. Every labor agreement *shall include a provision acknowledging that any public employee* who engages in any strike or concerted refusal to work, or *who pickets over any personnel matter, shall be subject to immediate termination of employment.*

Section 105.585(2) (emphasis added).

Section 105.585(2) only applies to certain public employees and public employee labor organizations. It does not apply to a "labor agreement" between a labor organization and an employer that is not a "public body." In other words, it does not apply to private industry. The statute also excludes public safety employees and department of correction employees.[2]

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[1] All statutory references herein are to the most current edition or supplement of the Missouri Revised Statutes, unless otherwise noted.

[2] Mo. Rev. Stat. § 105.503 (excluding public safety employees and labor organizations, department of corrections employees, and private industry); Mo. Rev. Stat. §105.585(2) (only applicable to labor agreements between a public body and a labor organization).

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The Plaintiffs are employed as 911 dispatchers for the Sheriff of Jackson County. **TR 36:10-22, 18:2-5, 53:19-23**.[3] There are thirteen 911 dispatchers working for the Jackson County Sheriff. **TR 37:24-25**. They are all union members in Communication Workers of America Union Local 6360 ("CWA Local 6360"). **TR 37:13-23**. Section 105.585(2) applies to the Plaintiffs and their union.[4]

In December 2018, CWA Local 6360 had a labor agreement with Jackson County that was expiring on December 31, 2018. **TR 15:21-4,** The effective dates of that agreement were November 16, 2015 through December 31, 2018. **TR 15:21-4, 16:9-12; App 32**. Critically, *picketing was allowed under this labor agreement*. **TR 15:10-14, 31:25-32:2, 108:6-15, 16:9-12; App 32-58**.

In December 2018, negotiations over a new agreement were underway, but a new agreement had not been reached. **TR 17:15-20, 38:24-39:1**. CWA Local 6360 had a bargaining committee to negotiate with Jackson County. Respondents Becky Karney and Johny Miller were members of that bargaining committee. **TR 17:21-18:8**. Ms. Karney is a union steward. **TR 38:1-4**. In this position, she participated in labor contract negotiations. **TR 38:13-16.**

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[3] All references to the "TR" refer to the December 14, 2018 Bench Trial Transcript.

[4] As defined by Mo. Rev. Stat. § 105.500, this union is a "labor organization," the Plaintiffs are "public employees," and Jackson County is a "public body." **TR 53:24-54:23; App 1-5**. Further, this union is not a "public safety labor organization," and the Plaintiffs are not members of a "Public Safety Labor Organization." **TR 54:24-55:7; App 1-5**.

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CWA Local 6360 was negotiating over wages for the 911 dispatchers. **TR 39:20-23**. The reason for this, in part, was because the Jackson County Sheriff was having problems with high turnover for 911 dispatchers because the pay rate is below the standard for dispatchers in the area. **TR 24:6-12, 39:24-40:4**

In November 2018, members of CWA Local 6360 picketed outside the Jackson County Sheriff's Office. **TR 18:21-19:10, 40:19-42:13, 20:14-16; App 6-31**. The purpose of the picketing was to inform the public that the union was negotiating with Jackson County and to communicate that the 911 dispatchers are underpaid. **TR 21:8-14, 41:1-5**.

The dispatchers that participated in this picketing were off duty during the picketing, and they were not on strike. **TR 19:11-13, 42:14-22**. These individuals were picketing on public property. **TR 19:14-**16. And *the picketing did not in any way disrupt the operation of the Jackson County Sheriff's department*. **TR 22:4-23:21, 43:3-21, 44:11-45:4**. The Respondent's filed the underlying action for a declaratory judgment and a permanent injunction to prevent § 105.585(2) from affecting the ongoing negotiations and the future labor agreement.

A trial was held on December 18, 2018. The trial court entered an order declaring that § 105.585(2) "clearly and undoubtedly violates the Constitutions of the State of Missouri and the United States and palpably affronts fundamental law embodied in the Constitutions of the State of Missouri and the United States." **D510 p. 7**. The court also entered an injunction that permanently enjoined the Jackson County Sheriff from using or applying the prohibition against picketing in § 105.585(2) in negotiating or executing any collective bargaining agreement with the Plaintiffs. **D510 p. 8**.

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POINTS RELIED ON

I. Responding to Appellants' Point I: The Trial Court Did Not Err by Construing § 105.585(2) to Require Collective Bargaining Agreements to Prohibit "Picketing of Any Kind."

Wolfe Shoe Co. v. Director of Revenue, 762 S.W.2d 29 (Mo. banc 1988)

Police Dept. of City of Chicago v. Mosley, 408 U.S. 92 (1972)

Carey v. Brown, 447 U.S. 455 (1980)

Mo. Rev. Stat. § 105.585(2)

II. The Trial Court Properly Held that § 105.585(2) Violates the Constitutions of the State of Missouri and the United States Because § 105.585(2) Violates the Right to Freedom of Speech, in that § 105.585(2) is a Content-Based Restriction on Speech that is Not Narrowly Tailored to Promote a Compelling Government Interest or, Alternatively, a Content Neutral Restriction that Does Not Allow for Reasonable Alternative Avenues of Communication.

Ex Parte Hunn and Ex Parte Le Van, 207 S.W.2d 468 (Mo. 1948)

G.Q. Gentlemen's Quarters, Inc. v. City of Lake Ozark,

83 S.W.3d 98 (Mo. App. W.D. 2002)

U.S. Const. amend. I

Mo. Const. art. I, § 8

Mo. Rev. Stat. § 105.585(2)

III. Responding to Appellants' Point II: The Trial Court Did Not Err by Holding that § 105.585(2) Violates the Constitutions of the State of Missouri and the United States Because § 105.585(2) Violates the Right to Freedom of Speech, in that § 105.585(2) Does Not Promote a Compelling State Interest that Cannot be Achieved Through Means that are Significantly Less Restrictive or, Alternatively, § 105.585(2) Restricts Speech on Matters of Public Concern and the Interest of the State in Promoting the Efficiency of Public Services Does Not Outweigh the Interests of the Employee in Commenting on Matters of Public Concern.

United States v. Treasury Employees, 513 U.S. 454, 466-68 (1995)

Janus v. American Federation of State, County, and Mun. Employees, Council 31, 138 S. Ct. 2448 (2018)

Harris v. Quinn, 134 S. Ct. 2618 (2014)

U.S. Const. amend. I

Mo. Const. art. I, § 8

Mo. Rev. Stat. § 105.585(2)

IV. Responding to Appellants' Point III: The Trial Court Did Not Err by Holding that § 105.585(2) Violates the Constitutions of the State of Missouri and the United States Because § 105.585(2) Violates the Right to Freedom of Speech, in that § 105.585(2) is an Impermissible Blanket Prohibition Against Picketing by Public Employees.

Janus v. American Federation of State, County, and Mun. Employees, Council 31, 138 S. Ct. 2448 (2018)

U.S. Const. amend. I

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Mo. Const. art. I, § 8

Mo. Rev. Stat. § 105.585(2)

V. The Trial Court Properly Held that § 105.585(2) Violates the Constitutions of the State of Missouri and the United States Because § 105.585(2) Violates the Equal Protection Clause, in that § 105.585(2) Restricts Expressive Conduct Protected by the First Amendment and it Discriminates Among Pickets, But it is Not Finely Tailored to Serve a Substantial State Interest.

Police Dept. of City of Chicago v. Mosley, 408 U.S. 92 (1972)

Carey v. Brown, 447 U.S. 455 (1980)

U.S. Const. amend. XIV

Mo. Const. art. I, § 2

Mo. Rev. Stat. § 105.585(2)

VI. Responding to Appellants' Point IV: The Trial Court Did Not Err by Holding that § 105.585(2) Violates the Constitution of the State of Missouri Because § 105.585(2) Violates the Right to Bargain Collectively, in that § 105.585(2) Infringes Upon the Right to Collective Bargaining, and it is Not Necessary to Accomplish a Compelling State Interest.

Independence-Nat'l Educ. Ass'n v. Independence Sch. Dist.,

223 S.W.3d 131 (Mo. 2007)

Eastern Missouri Coalition of Police, Fraternal Order of Police,

Lodge 15 v. City of Chesterfield, 386 S.W.3d 755 (Mo. banc 2012)

American Federation of Teachers v. Ledbetter, 387 S.W.3d 360

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(Mo. banc 2012)

Mo. Const. art. I, § 29

Mo. Rev. Stat. § 105.585(2)

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ARGUMENT

I. Responding to Appellants' Point I: The Trial Court Did Not Err by Construing § 105.585(2) to Require Collective Bargaining Agreements to Prohibit "Picketing of Any Kind"

The primary rule of statutory construction is to ascertain the intent of the legislature from the language used, to give effect to that intent if possible, and to consider the words used in their plain and ordinary meaning. *Wolfe Shoe Co. v. Director of Revenue,* 762 S.W.2d 29, 31 (Mo. banc 1988). Under the traditional rules of construction, the word's dictionary definition supplies its plain and ordinary meaning. *Hoffman v. Ban Pak Corp.*, 16 S.W.3d 684, 688 (Mo. App. E.D. 2000).

When a statute's language is clear and unambiguous, there is no room for construction. *Wolfe Shoe Co,* 762 S.W.2d at 31. In other words, if a statute is clear and unambiguous, a court should apply the statute in accordance with its plain and ordinary meaning and should not engage in statutory construction. *State v. Rowe*, 63 S.W.3d 647 (Mo. banc 2002); *Kearney Special Road Dist. v. County of Clay*, 863 S.W.2d 841, 842 (Mo. banc 1993). In determining whether the language is clear and unambiguous, the standard is whether the statute's terms are plain and clear to one of ordinary intelligence. *Wolfe Shoe Co.,* 762 S.W.2d at 31; *Kearney Special Road Dist.*, 863 S.W.2d at 842.

The Appellants assert that § 105.585(2) only addresses picketing in conjunction with a strike and picketing about disputes over employment conditions governed by a

collective bargaining agreement. This extremely narrow reading is not supported by the plain language of the statute. Section 105.585(2) states the following:

> (2) Every labor agreement ***shall expressly prohibit*** all strikes and ***picketing of any kind***. . . . Every labor agreement *shall include a provision acknowledging that any public employee* who engages in any strike or concerted refusal to work, or ***who pickets over any personnel matter****, shall be subject to immediate termination* of employment.

Mo. Rev. Stat. § 105.585(2) (emphasis added). This is clearly broader than the Appellant's interpretation.

The Appellants base their position on the argument that the dictionary definition of "picket" only includes labor picketing during a strike.[5] But the dictionary definition is not that narrow. The definition of "picket" also includes a "group of demonstrators" that are "carrying placards to advocate a cause or register a protest."[6] The fact is the definition of "picketing" includes a demonstration by employees aimed at publicizing a labor dispute, but it also includes any "demonstration by one or more persons outside a business or organization to protest the entity's activities or policies and to pressure the entity to meet the protesters' demands."[7]

The phrase "picketing of any kind" in § 105.585(2) is plain and clear to a person of ordinary intelligence. It means all types of demonstrations—including non-labor picketing.

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[5] Brief of Appellants at 16-17.

[6] New Websters Dictionary and Thesaurus of the English Language 759 (1993).

[7] Black's Law Dictionary (11th ed. 2019).

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Accordingly, the trial court was correct when it concluded that "the plain reading of Section 105.585(2) is broader than the States' interpretation." **D510 p. 2, n.3**.

Moreover, the legislature is presumed to know the existing law when enacting a new piece of legislation. *State ex rel. Nothum v. Walsh*, 380 S.W.3d 557, 567 (Mo. banc 2012). Prominent cases decided by the Supreme Court of the United States show that picketing does not only mean labor picketing. In *Police Dept. of City of Chicago v. Mosley*, 408 U.S. 92, 94-102 (1972), the Court held that a city ordinance prohibiting all picketing near a school, except peaceful picketing of any school involved in a labor dispute, was unconstitutional because it made an impermissible distinction between peaceful labor picketing and other peaceful picketing. The picketing in that case involved a federal postal employee picketing a high school by walking the public sidewalk adjoining the school and carrying a sign stating that the school "practices black discrimination." *Id.* at 93.

In *Carey v. Brown*, 447 U.S. 455, 457 (1980), the Court held that a statute prohibiting picketing of residences or dwellings that had an exemption for peaceful picketing of a place of employment involved in a labor dispute was unconstitutional. The picketing involved individuals that "picketed the Mayor of Chicago's home in protest against his alleged failure to support the busing of schoolchildren to achieve racial integration." *Id.* at 455. When the legislature included the phrase "picketing of any kind" in § 105.585(2) it knew that term "picketing" does not only mean labor picketing. There are numerous cases involving non-labor picketing. [8]

[8] *See e.g., Grayned v. City of Rockford*, 408 U.S. 104 (1972) (involving picketing by students, family, and friends at a school to address racial discrimination); *Boos v. Barry*,

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Further, it must be presumed that the legislature intended every word, clause, sentence, and provision of a statute to have effect and meaning. Conversely, it is presumed that the legislature did not include excess verbiage in a statute. *City of Bridgeton v. Titlemax of Missouri, Inc.*, 292 S.W.3d 530, 536 (Mo. App. E.D. 2009). The Appellants' argument reads the phrase "***of any kind***" out of the statute. If the legislature intended § 105.585(2) to only addresses picketing in conjunction with a strike and picketing about disputes over employment conditions governed by a collective bargaining agreement, the first sentence in § 105.585(2) would have stated exactly that or limited its prohibition to picketing over personnel matters. Instead, it requires every labor agreement to "*expressly prohibit all strikes and picketing* ***of any kind***."[9]

Finally, issues raised through defective or improperly drafted "points relied on" preserve nothing for appeal. *In re Marriage of Gerhard*, 34 S.W.3d 305, 307 (Mo. App. S.D. 2001); *Murphy v. Shur*, 6 S.W.3d 207, 209 (Mo. App. S.D. 1999). Rule 84.04 required

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485 U.S. 312 (1988) (involving picketing by individuals carrying signs critical of foreign governments on public sidewalks near the embassies of those governments).

[9] The Appellants incorrectly argue that interpreting the first sentence of § 105.585(2) to require labor agreements to prohibit picketing of any kind renders the second reference in the statute to picketing superfluous. (Brief of Appellants at 18.) They argue that if the first sentence already prohibited all types of picketing there is no purpose to include the second reference to "picketing over any personnel matter." This argument fails to understand the language in the statue. The first reference to picketing requires labor agreements to prohibit picketing of any kind. The second reference to picketing requires labor agreements to contain a provision stating that any public employee that "pickets over any personnel matter" shall be subject to immediate termination. The second reference is not superfluous because it requires something different to be included in labor agreements. The clear intent of the legislature was to require labor agreements to prohibit "picketing of any kind" and also include a termination provision for a specific kind of picketing—picketing related to personnel matters.

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Appellants' points relied on to (A) identify "the trial court ruling or action that the" Appellants challenge; (B) state "concisely the legal reasons for the . . . claim of reversible error;" and (C) explain "in summary fashion why, in the context of the case, those legal reasons support the claim of reversible error." Rule 84.04(d)(1). The Appellants' Point I does not explain why the legal reasons support a claim for reversible error. In fact, the claim of error raised by this point does not alone constitute reversible error. It is merely the first step in the Appellants' argument that § 105.585(2) should be reviewed under the framework established by *Pickering v. Board of Ed. of Township High School District 205, Will County, Illinois*, 391 U.S. 563 (1938), and *Connick v. Myers*, 461 U.S. 138 (1983).

II. The Trial Court Properly Held that § 105.585(2) Violates the Constitutions of the State of Missouri and the United States Because § 105.585(2) Violates the Right to Freedom of Speech, in that § 105.585(2) is a Content-Based Restriction on Speech that is Not Narrowly Tailored to Promote a Compelling Government Interest or, Alternatively, a Content Neutral Restriction that Does Not Allow for Reasonable Alternative Avenues of Communication

The First Amendment to the United States Constitution provides the following regarding freedom of speech: "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. The First Amendment to the United States Constitution is applicable to states through the due process clause of the Fourteenth Amendment. Article I, Section 8, of the Missouri Constitution also protects freedom of speech:

> That no law shall be passed impairing the freedom of speech, no matter by what means communicated: that every person shall be free to say, write or publish, or otherwise communicate whatever he will on any subject, being responsible for all abuses of that liberty . . . .

Mo. Const. art. I, § 8.

The Supreme Court of the United States has held that picketing is expressive conduct that is protected by the First Amendment. *Janus v. American Federation of State, County, and Mun. Employees, Council 31,* 138 S. Ct. 2448, 2469-70 (2018) ("Taking away free speech protection for public employees would mean overturning decades of landmark precedent"); *Police Dept. of City of Chicago v. Mosley*, 408 U.S. 92, 99 (1972); *Carey v. Brown*, 447 U.S. 455, 460 (1980). It is firmly established under Missouri law that peaceful picketing as an incident of free speech is a constitutional right. *Ex Parte Hunn and Ex Parte Le Van*, 207 S.W.2d 468, 470 (Mo. 1948). Although the State may prescribe reasonable regulations as to the manner of picketing, it may only abolish the abuse, not the right of free speech through picketing. *Id.*

A. Section 105.585(2) is a Content-Based Restriction on Speech Subject to Strict Scrutiny that Cannot Pass Constitutional Muster

Content-based restrictions on speech are subject to strict scrutiny. *Ocello v. Koster*, 354 S.W.3d 187, 200 (Mo. 2011). When a statute regulates speech based on its content, it must be narrowly tailored to promote a compelling government interest. *G.Q. Gentlemen's Quarters, Inc. v. City of Lake Ozark*, 83 S.W.3d 98, 101 (Mo. App. W.D. 2002) (citing *United States v. Playboy Entertainment Group, Inc.,* 529 U.S. 803, 813 (2000)).

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Section 105.585(2) contains two portions that restrict speech. First, it requires all labor agreements to prohibit "picketing of any kind." Second, it requires all labor agreements to state that any employee that pickets "over any personnel matter" will be subject to immediate termination.

This second portion regulates picketing by public employees based on the content of the speech—personnel matters. Accordingly, the statute must be narrowly tailored to promote a compelling government interest. *G.Q. Gentlemen's Quarters, Inc.*, 83 S.W.3d at 101.[10] Section 105.585(2) fails to meet the strict scrutiny standard. This clause of the statute prohibits picketing not in terms of time, place, or manner, but in terms of subject matter. Hence, the statute is not narrowly tailored to promote a compelling government interest. This prohibition "'slip[s] from neutrality of time, place and circumstance into a concern about content.' This is never permitted." *Mosley*, 408 U.S. at 99 (citing *Kalven, The Concept of the Public Forum: Cox v. Louisiana*, 1965 Sup. Ct. Rev. 29, 379 U.S. 536, 556 n.14 (1965)).

The first portion of § 105.585(2) prohibiting "picketing of any kind" is also a content-based restriction on speech. Because speech restrictions based on the identity of the speaker are all too often simply a means to control content, laws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content preference. *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2230-31 (2015);

[10] Further, the State's asserted compelling government interest must be genuine, not hypothesized or invented *post hoc* in response to litigation. *See U.S. v. Virginia*, 518 U.S. 515, 533 (1996).

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Citizens United v. Federal Election Comm'n, 538 U.S. 310, 340-41 (2010); *see also, Sorrell v. IMS Health, Inc.,* 564 U.S. 552, 563-66 (2011) (disfavored speaker law is essentially viewpoint discrimination); *City of Cincinnati v. Discovery Network, Inc.,* 507 U.S. 410 (1993) (a law's burden on commercial handbills that does not burden an ordinary newspaper is a type of content-based law subject to strict scrutiny as it disfavors the speaker).

In this case, § 105.585(2) only prohibits certain public employees and public employee labor organizations from picketing. It provides that every "labor agreement" shall prohibit all "picketing of any kind." This statute, however, does not apply to a "labor agreement" between a labor organization and an employer that is not a "public body." In other words, it does not apply to private industry. The statute also excludes public safety employees and department of correction employees.[11] Hence, § 105.585(2) prevents most public employees and their labor organizations ("Disfavored Public Employees and Unions") from picketing while allowing other public employees (public safety and department of correction employees), private industry employees, and labor organizations for both these groups to picket. This is a clear speech restriction based upon the identity of the speaker. Further, this speaker preference reflects a content preference: the aversion to what these disfavored speakers have to say. Hence, strict scrutiny should apply.

[11] Mo. Rev. Stat. § 105.503 (excluding public safety employees and labor organizations, department of corrections employees, and private industry); Mo. Rev. Stat. 105.585(2) (only applicable to labor agreements between a public body and a labor organization).

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It is true that when the government's purpose for a statute that is facially neutral is the prevention of negative secondary effects, the statute is deemed content neutral and only intermediate scrutiny applies. *G.Q. Gentlemen's Quarters, Inc.*, 83 S.W.3d at 101. But a court should not presume that a statute was enacted to prevent negative secondary effects absent indication of such purpose. *Id.* at 102. "The secondary effects doctrine is an exception to the general rule that legislation that restricts expressive conduct is subject to the strictest scrutiny." "Presuming a governmental intent of preventing negative secondary effects . . . without any evidence of such intent would permit the exception to swallow the rule especially in light of the government's burden of proving the constitutionality of a statute or ordinance that restricts speech." *Id.*

The State must produce some evidence that the purpose of enacting the statute was a concern over negative secondary effects rather than merely opposition to expression. *Id.* at 102. The Appellants claim that the purpose of the statute is to prevent disrupting the performance of government functions. They also argued that picketing could negatively impact public services *if* it included blockading the workplace.[12] But there is nothing in the

[12] The Appellants cannot offer any evidence that picketing will disrupt the performance of government functions. This is purely hypothetical. The Appellants reach this speculative conclusion by arguing that striking and picketing are synonymous or go "hand and hand." But striking and picketing are not synonymous. During the hearing on the Temporary Restraining Order, counsel for the Appellants conceded that one can picket without striking or in the absence of a strike. **TRO TR at 43:24-44:6**. Also, the Appellants' retained expert testified and agreed that picketing can occur without a strike. **D504 p. 40:18-52:21**. Further the Appellants are in essence arguing that the interest supporting § 105.585(2) is promoting "labor peace." In *Janus*, the Court discussed "labor peace" related to the assessment of agency fees, and it concluded that "labor peace" could be achieved by less restrictive means. *Janus*, 138 S. Ct. at 2465-66.

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record indicating that this was the legislature's purpose for the statute. In fact, the Appellants now argue that § 105.585(2) was enacted because the sponsor of HB 1413 *mistakenly* believed that it was consistent with the current law regarding picketing relating to public employees—not a concern over negative secondary effects.[13] Accordingly, strict scrutiny should apply. And this portion of the statute cannot satisfy that standard.

B. Section 105.585(2) Impermissibly Abolishes the Right to Lawfully Picket—Not the Abuse of Picketing—by Requiring Labor Agreements to Prohibit "Picketing of Any Kind"

Even if the first portion of § 105.585(2) prohibiting "picketing of any kind" is treated as content neutral, it is still unconstitutional because it impermissibly abolishes the right to lawfully picket—not the abuse of picketing.

Assuming the Appellants could show that this portion of § 105.585(2) is content-neutral and was enacted to prevent negative secondary effects, the Appellants would still need to satisfy intermediate scrutiny. *G.Q. Gentlemen's Quarters, Inc.*, 83 S.W.3d at 101. The issue would be whether this part of § 105.585(2) addressing "picketing of any kind" is "designed to serve a substantial government interest and allows for reasonable alternative avenues of communication." *City of Renton v. Playtime Theaters, Inc. 475* U.S. 41, 50

[13] Brief of Appellants at 7-8, 17. It is undisputable that the current law regarding picketing related to public employees prior to the enactment of HB 1413 did not require labor agreements to prohibit picketing of any kind and to include a provision stating that any employee that pickets over any personnel matter shall be subject to immediate termination. It is firmly established under Missouri law that peaceful picketing as an incident of free speech is a constitutional right. *Ex Parte Hunn and Ex Parte Le Van*, 207 S.W.2d 468, 470 (Mo. 1948).

(1986). The prohibition against picketing of any kind found in § 105.585(2) clearly does not allow for reasonable alternative avenues for communicating through picketing. The legislature could easily have addressed the concerns submitted by the Appellants by regulating the time and place of peaceful picketing by public employees. Instead, the legislature chose to prohibit picketing of "any kind." In doing so, the State chose to impermissibly abolish the right, not the abuse of picketing. *Ex Parte Hunn and Le Van*, 207 S.W.2d at 470.

III. Responding to Appellants' Point II: The Trial Court Did Not Err by Holding that § 105.585(2) Violates the Constitutions of the State of Missouri and the United States Because § 105.585(2) Violates the Right to Freedom of Speech, in that § 105.585(2) Does Not Promote a Compelling State Interest that Cannot be Achieved Through Means that are Significantly Less Restrictive or, Alternatively, § 105.585(2) Restricts Speech on Matters of Public Concern and the Interest of the State in Promoting the Efficiency of Public Services Does Not Outweigh the Interests of the Employee in Commenting on Matters of Public Concern

Section 105.585(2) violates the constitutions of the State of Missouri and the United States even if this case is reviewed under a *Pickering* analysis. The purpose of Appellants' argument that § 105.585(2) only addresses picketing in conjunction with a strike and picketing about disputes over employment conditions governed by a collective bargaining agreement is to argue that this case should be decided under the framework established by

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Pickering v. Board of Ed. of Township high School District 205, Will County, Illinois, 391 U.S. 563 (1938), and *Connick v. Myers*, 461 U.S. 138 (1983).

The *Pickering* case and later cases in the same line concern the constitutionality of restrictions on speech by public employees. Under those cases, employee speech is unprotected if it is not on a matter of public concern, and speech on matters of public concern may be restricted only if "the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees" outweighs "the interests of the [employee], as a citizen, in commenting upon matters of public concern." *Harris v. Quinn*, 134 S. Ct. 2618, 2642 (2014) (quoting *Pickering,* 391 U.S. at 568). On matters of public concern, public employees "must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively." *Garcetti v. Ceballos*, 547 U.S. 410, 419 (2006).

A. The *Pickering* Standard Does Not Apply to § 105.585(2) Because it is a General Rule that Affects Broad Categories of Workers

This *Pickering* framework was, however, developed for use in a very different context. It was designed to determine whether *one specific* public employee's speech that already occurred interfered with the effective operation of a government office. *Janus v. American Federation of State, County, and Mun. Employees, Council 31*, 138 S. Ct. 2448, 2457, 2472 (2018). Cases decided under *Pickering* involve conduct by a single employee that already occurred. For example, the *Pickering* case involved a teacher that was terminated for sending a letter to the newspaper voicing his disagreement with the

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allocation of school funds. *Pickering*, 391 U.S. at 565-66. In *Connick*, an assistant district attorney was terminated for circulating a questionnaire to the other attorneys in the office regarding, among other things, the office transfer policy, the level of confidence in supervisors, and whether employees felt pressure to work on political campaigns. *Connick*, 461 U.S. at 138.[14]

Section 105.585(2) is a general rule that affects broad categories of workers and unions. It is a blanket restriction on speech that applies to all Disfavored Public Employees and Unions. Hence, the *Pickering* standard is not applicable. Accordingly, the analysis outlined above should be applied. *See supra*, Argument § II.

The United States Supreme Court has sometimes looked to *Pickering* in considering general rules that affect broad categories of employees, but it has acknowledged that the standard *Pickering* analysis requires modification in those situations. *Janus*, 138 S. Ct. at 2472. "A speech-restrictive law with 'widespread impact," [the Court explained] "gives rise to far more serious concerns than could any single supervisory decision." *Id.* (quoting

[14] *See also, Greminger v. Seaborne,* 584 F.2d 275 (8th Cir. 1978) (involving teachers that publicly advocated for higher salaries and then did not have teaching contracts renewed); *Gieringer v. Center School Dist. No. 58,* 477 F.2d 1164 (8th Cir. 1973) (involving the dismissal of a teacher that made a report to a teaching association concerning the ability of the school district to pay increased salaries); *Medvik v. Ollendorff*, 772 S.W.2d 696 (Mo. App. E.D. 1989) (involving a city mechanic discharged from employment for using abusive language of a racial nature against a fellow employee); *City of San Diego, Cal. V. Roe*, 543 U.S. 77 (2004) (involving a police officer terminated for selling videotapes he made showing himself in sexually explicit acts); *Roberts v. Van Buren Public Schools*, 773 F.2d 949 (8th Cir. 1985) (involving public school teachers' action alleging that their teaching contracts were not renewed in retaliation for filing grievances in violation of their First Amendment rights); *Borough of Duryea, Pa. v. Guarnieri*, 564 U.S. 379 (2011) (involving an action alleging employment retaliation for filing a union grievance).

United States v. Treasury Employees, 513 U.S. 454, 466-68 (1995)). When such a law is at issue, the government must shoulder a correspondingly heavier burden and is entitled to less deference in its assessment that a predicted harm justifies a particular impingement on First Amendment rights. *Id.* The end product of those adjustments is a test that more closely resembles exacting scrutiny than the traditional *Pickering* analysis. *Janus*, 138 S. Ct. at 2472. This requires a compelling state interest that cannot be achieved through means significantly less restrictive. *Id.* at 2465.

B. Section 105.585(2) Violates the Constitutions of the State of Missouri and the United States Even if this Case is Reviewed under a *Pickering* Analysis

Even if some form of a *Pickering* standard were applied, § 105.585(2) would not survive. It is beyond all dispute that the speech in this case constitutes matters of public concern. Several cases analyzed under the *Pickering* standard have found that the speech involved was a matter of public concern.

In *Pickering*, a teacher was terminated for sending a letter to the newspaper voicing his disagreement with the allocation of school funds. The Court explained that the "question whether a school system requires addition funds is a matter of legitimate public concern." *Pickering*, 391 U.S. at 571-72. In *Greminger v. Seaborne,* 584 F.2d 275, 277-78 (8th Cir. 1978), teachers were publicly advocating for higher salaries. The court explained that the allocation of funds for increased teacher salaries is a subject of public concern upon which teachers may comment. Likewise, in *Gieringer v. Center School Dist. No. 58,* 477 F.2d 1164 (8th Cir. 1973), the court held that a teacher's report to a teaching association

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concerning the ability of the school district to pay increased salaries was protected under the *Pickering* standard.

In *Harris v. Quinn*, the United States Supreme Court specifically explained that it is impossible to argue that the level of state spending for employee benefits in general is not a matter of great public concern:

> This argument flies in the face of reality. In this case, for example, the category of union speech that is germane to collective bargaining unquestionably includes speech in favor of *increased wages and benefits* for personal assistants. Increased *wages and benefits for personal assistants* would almost certainly mean increased expenditures under the Medicaid program, and it is impossible to argue that the level of Medicaid funding (or, for that matter, state spending for employee benefits in general) is not a matter of great public concern.

Harris, 134 S. at 2642-43 (emphasis added).

In *Janus*, the Court recently discussed types of union speech that address many important matters of public concern. Specifically, the Court discussed the budget problems in Illinois and the differing views the Governor and public-sector unions had. The Court explained that to "suggest that speech on such matters is not of great public concern . . . is to deny reality." *Janus*, 138 S. Ct. at 2475-76. How public money is spent is a matter of public concern. The Court went on to identify examples of subjects where unions express views: "education, child welfare, healthcare, and minority rights." And the Court explained that what "unions have to say on these matters in the context of collective bargaining is of great public importance." *Id.*

In this case, a more rigorous analysis than the typical *Pickering* standard would be required. *Janus*, 138 S. Ct. at 2477, 2472-73. This heightened standard would not be

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satisfied. In fact, even under a traditional *Pickering* standard, § 105.585(2) cannot survive. The restrictions on picketing under § 105.585(2) are not necessary for the public entities of Missouri to operate efficiently and effectively because they restrict peaceful, non-obstructive, non-abusive forms of picketing by public employees. Accordingly, even if a *Pickering* analysis was applied, § 105.585(2) would be unconstitutional.

IV. Responding to Appellants' Point III: The Trial Court Did Not Err by Holding that § 105.585(2) Violates the Constitutions of the State of Missouri and the United States Because § 105.585(2) Violates the Right to Freedom of Speech, in that § 105.585(2) is an Impermissible Blanket Prohibition Against Picketing by Public Employees

In *Janus v. American Federation of State, County, and Mun. Employees, Council 31,* the Supreme Court of the United States recently recognized the First Amendment of the Constitution of the United States prohibits public employers from compelling the speech of its employees when it struck down an Illinois statute containing a "blanket requirement that all employees subsidize private speech with which they may not agree." *Janus*, 138 S. Ct. 2448, 2472. The Court declined to decide the issue of whether strict scrutiny should apply because the statute at issue could not survive exacting scrutiny. *Id.* at 2465. And the *Janus* Court recognized that measures compelling speech "are at least as threatening" to the constitution as restrictions on speech. *Id.* at 2464. Like the Illinois statute under review in *Janus*, § 105.585(2) is a blanket prohibition against picketing by public employees. If the constitution protects public employees from statutory blanket

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requirements of compelled speech, it must also protect them from statutory blanket requirements that restrict speech.

V. The Trial Court Properly Held that § 105.585(2) Violates the Constitutions of the State of Missouri and the United States Because § 105.585(2) Violates the Equal Protection Clause, in that § 105.585(2) Restricts Expressive Conduct Protected by the First Amendment and it Discriminates Among Pickets, But it is Not Finely Tailored to Serve a Substantial State Interest

In deciding whether a statute violates the Equal Protection clause, the Missouri Supreme Court engages in a two-part analysis: the first step is to determine whether the classification operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution. If so, the classification is subject to strict scrutiny, and the Court must determine whether it is necessary to accomplish a compelling state interest. *Etling v. Westport Heating & Cooling Services, Inc.*, 92 S.W.3d 771, 774 (Mo. 2003). "Fundamental rights include the *rights to free speech*, to vote, to freedom of interstate travel, and other basic liberties." *Id.* (emphasis added).

The Supreme Court of the United States has held that laws prohibiting some picketing while allowing other forms violate the Equal Protection Clause. *Police Dept. of City of Chicago v. Mosley*, 408 U.S. 92 (1972); *Carey v. Brown*, 447 U.S. 455 (1980). In *Mosley*, the Court held that a city ordinance prohibiting all picketing near a school, except peaceful picketing of any school involved in a labor dispute, was unconstitutional because

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it made an impermissible distinction between peaceful labor picketing and other peaceful picketing. *Mosley*, 408 U.S. at 94-102. The Court reached its conclusion with guidance from these principles:

> Necessarily, then, under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities. There is an "equality of status in the field of ideas," and government must afford all points of view an equal opportunity to be heard. Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone.

Id. at 96 (citations omitted).

The Court recognized that picketing is subject to reasonable time, place, and manner regulations. *Id.* at 98-99. And that under an equal protection analysis, there may be sufficient regulatory interests justifying selective exclusions or distinctions among pickets. But because picketing plainly involves expressive conduct within the protection of the First Amendment, discriminations among pickets must be tailored to serve a substantial government interest. *Id.* at 99.

The Court explained that the ordinance in *Mosley* described "impermissible picketing not in terms of time, place, and manner, but in terms of subject matter." Hence, the regulation was not a neutral time, place, and manner, restriction, but restricted certain content. "This is never permitted." *Id.* at 99.

Interestingly, the Court in *Mosley* rejected the argument that "preventing school disruption" could justify the law even though that would *normally* have been a legitimate

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concern. *Id.* at 100. This is because the ordinance prohibited all picketing near a school, but it also allowed peaceful picketing of any school involved in a labor dispute. In other words, the government "determined that peaceful labor picketing during school hours is not an undue interference with school," but other peaceful picketing would interfere with school.

The Court explained the following in rejecting the contention that non-labor picketing is more prone to interfere with school:

> Predictions about imminent disruption from picketing involve judgments appropriately made on an individualized basis, not by means of broad classifications, especially those based on subject matter. *Freedom of expression, and its intersection with the guarantee of equal protection, would rest on a soft foundation indeed if government could distinguish among picketers on such a wholesale and categorical basis*. . . .
>
> The Equal Protection Clause requires that statutes affecting First Amendment interests be narrowly tailored to their legitimate objectives. [The government] may not vindicate its interest in preventing disruption by the wholesale exclusion of picketing on all but one preferred subject. Given what [the government] tolerates from labor picketing, the excesses of some nonlabor picketing may not be controlled by a broad ordinance prohibiting both peaceful and violent picketing. Such excesses 'can be controlled by narrowly drawn statutes *focusing on the abuses and dealing evenhandedly with picketing regardless of subject matter*. [This] ordinance imposes a selective restriction on expressive conduct far 'greater than is essential to the furtherance of (a substantial governmental) interest.' Far from being tailored to a substantial governmental interest, the discrimination among pickets is based on the content of their expression. Therefore, under the Equal Protection Clause, it may not stand.

Id. at 100-101 (internal citations omitted) (emphasis added).

In *Carey v. Brown*, the statute prohibited picketing of residences or dwellings, but it had an exemption for peaceful picketing of a place of employment involved in a labor dispute. *Carey*, 447 U.S. at 457. The Court explained that when regulation discriminates

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among speech-related activities in a public forum, the Equal Protection clause mandates that the legislation be finely tailored to serve substantial state interests. *Id.* at 461-62. The Court held that the statute denied equal protection because it gave preferential treatment to the expression of views on one particular subject but restricted discussion of other issues. The permissibility of picketing under the statute was "dependent solely on the nature of the message being conveyed." *Id.*

Section 105.585(2) restricts expressive conduct protected by the First Amendment, and it discriminates among pickets. As explained above, § 105.585(2) prevents Disfavored Public Employees and Unions from picketing while allowing other public employees (public safety and department of correction employees), private industry employees, and labor organizations for both these groups to picket. Hence, this discrimination among pickets must be finely tailored to serve a substantial government interest. The restrictions on picketing under § 105.585(2) are not sufficiently tailored to serve a substantial government interest because they restrict peaceful, non-obstructive, non-abusive forms of picketing by public employees.

Further, the State's alleged government interest is to prevent picketing by public employees because it could disrupt the performance of government functions. Like the argument made in *Mosley* that the purpose of the rule was to prevent school disruption, this justification also fails. Section § 105.585(2) allows picketing by other public employees (public safety and department of correction employees), private industry employees, and labor organizations for both these groups to picket. Hence, the government determined that picketing by these individuals and groups would *not* disrupt the performance of critical

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government functions. Since the State allows picketing by these individuals and groups, it cannot restrict all peaceful picketing by the Disfavored Public Employees and Unions. *See Mosley*, 408 U.S. at 100-101. The State cannot make predictions about disruption from picketing by means of broad classifications—especially those based on subject matter. *Mosley*, 408 U.S. at 100-101.

VI. Responding to Appellants' Point IV: The Trial Court Did Not Err by Holding that § 105.585(2) Violates the Constitution of the State of Missouri Because § 105.585(2) Violates the Right to Bargain Collectively, in that § 105.585(2) Infringes Upon the Right to Collective Bargaining, and it is Not Necessary to Accomplish a Compelling State Interest

Article I, section 29, of the Missouri Constitution protects employee collective bargaining rights. It provides "[t]hat employees shall have the right to organize and to bargain collectively through representatives of their own choosing." Mo. Const. art. I, § 29. The legislature and other public entities may establish procedures for the exercise of the right to organize and bargain collectively, as long as such procedures "satisfy the constitutional requirements" of article I, section 29. *Eastern Missouri Coalition of Police, Fraternal Order of Police, Lodge 15 v. City of Chesterfield*, 386 S.W.3d 755, 760 (Mo. banc 2012).

The constitutional right employees have to organize and bargain collectively under article I, section 29 is fundamental, and government action infringing on it is subject to

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strict judicial scrutiny to determine whether it is necessary to accomplish a compelling state interest. *See United C.O.D. v. State*, 150 S.W.3d 311, 313 (Mo. banc 2004) (explaining that rights are "fundamental" if they are "explicitly or implicitly protected by the Constitution").

In *Independence-Nat'l Educ. Ass'n v. Independence Sch. Dist.*, 223 S.W.3d 131, 137-38 (Mo. 2007), the Supreme Court of Missouri held that article I, section 29 of the Missouri Constitution—guaranteeing "employees" the right to organize and bargain collectively—applies to public employees as well as private-sector employees.

In *Eastern Missouri Coalition of Police, Fraternal Order of Police, Lodge 15 v. City of Chesterfield*, 386 S.W.3d 755, 760 (Mo. banc 2012), the Court reaffirmed that article I, section 29 grants public employees the right to bargain collectively. With regard to the scope of the article I, section 29 right to collective bargaining, the Court explained that "the very notion of collective bargaining still entails 'negotiations between an employer and the representatives of organized employees to determine the conditions of employment'" *Id.* (citing *Independence*, 223 S.W.3d at 138, n.6). Indeed, the "'point of collective bargaining, of course, is to reach an agreement.'" *Id.* (citing *Independence*, 223 S.W.3d at 138).

In *American Federation of Teachers v. Ledbetter*, 387 S.W.3d 360, 366-68 (Mo. banc 2012), the Supreme Court of Missouri held that article I, section 29 of the Missouri Constitution grants all public employees the right to bargain collectively, which requires employers to negotiate in good faith. The Court specifically held that the requirement in article I, section 29 "inherently includes the obligation that public employers act in good faith because otherwise public employers could act with the intent to thwart collective

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bargaining so as never to reach an agreement, frustrating the very purpose of bargaining and invalidating the right." *Id.* at 367.

The Court explained that "good faith" is not an abstract thing, but it is a "'concrete quality, descriptive of the motivating purpose of one's act or conduct when challenged or called in question.'" Parties act in "good faith" when they act "'without simulation or pretense, innocently and in an attitude of trust and confidence.'" Such parties act "'honestly, openly, sincerely, without deceit, covin, or any form of fraud.'" *Id.* (quotations omitted). Accordingly, the "course of negotiations between parties acting in good faith should reflect that both parties sincerely undertook to reach an agreement." *Id.*

Section 105.585(2) requires certain public-sector "labor agreements" to prohibit picketing and require termination if a public employee "pickets over any personnel matter." This infringes upon the public employee right to organize and bargain collectively provided by article I, section 29. It denies an employee the right to collectively bargain over basic terms and conditions of employment that union members have traditionally bargained over, including discipline and termination matters.

The constitutional right employees have to organize and bargain collectively under article I, section 29 requires negotiations between an employer and the representatives of organized employees to determine the conditions of employment. *Ledbetter*, 387 S.W.3d at 363. Section 105.585(2) violates this right by preventing good faith negotiations over the conditions of employment since it requires every labor agreement to prohibit picketing and require termination if an employee "pickets over any personnel matter."

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The constitutional right employees have to organize and bargain collectively under article I, section 29 guarantees employees the freedom of choice in the selection of a bargaining representative. *Ledbetter*, 387 S.W.3d at 363. Section 105.585(2) violates the article I, section 29 rights of certain public employees by preventing the right to engage in expressive conduct if they work as a member of public employee labor organization. They are denied the right to select a bargaining representative because they cannot choose to be represented by a public employee labor organization without foregoing their protected right to engage in expressive conduct.

Further, picketing is protected free speech under the United States and Missouri Constitutions. *Janus,* 138 S. Ct. at 2469-70; *Mosley*, 408 U.S. at 99; *Carey*, 447 U.S. at 460; *Ex Parte Hunn and Le Van*, 207 S.W.2d at 470. Section 105.585(2) allows "labor agreements" negotiated between a "public body" and a "labor organization" to "cover wages, benefits, and all other terms and conditions of employment for public employees" but *only if* it is subject to the limitation that the "labor agreement" prohibits picketing and requires termination if an employee "pickets over any personnel matter." In other words, the public employee right to collectively bargain and negotiate work conditions in good faith under article I, section 29 of the Missouri Constitution is only allowed under § 105.585(2) if the labor agreement waives the public employee right to freedom of speech. This clearly infringes upon the right of public employees to collectively bargain and negotiate work conditions in good faith.

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CONCLUSION

Section 105.585(2) is an impermissible blanket prohibition against picketing by certain disfavored public employees. This statute violates the Constitutions of the State of Missouri and the United States. It is not sufficiently tailored to meet any government interest. It does not establish time, place, or manner restrictions. In other words, it does not establish reasonable regulations about the manner of picketing. Instead, it abolishes the right of free speech through picketing—not the abuse. This is not allowed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on December 16, 2019, a true and correct copy of this brief was electronically filed, with electronic service to:

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CERTIFICATE OF COMPLIANCE

Under Missouri Supreme Court Rule 84.06(c) I hereby certify the following:

1. This brief complies with the requirements of Missouri Supreme Court Rule 55.03, the requirements and limitations set forth in Missouri Supreme Court Rule 84.06(b), and the Special Rules of the Court;
2. This brief contains 8,254 words—excluding the cover, signature block, table of contents, table of authorities, certificate of service, and this certification—as determined by Microsoft Word software; and
3. A copy of this brief and the appendices are filed in PDF format with the Missouri Courts e-Filing System.

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