IN THE
SUPREME COURT OF MISSOURI

No. SC89370

GILBERT L. ALDERSON, et. al,

Appellants,

v.

STATE OF MISSOURI, et. al,

Respondents.

Appeal for the Circuit Court of Cole County, Honorable Richard G. Callahan

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Brief of Respondents County Employees' Retirement Fund and the members of the Board of Directors of the County Employees' Retirement Fund

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STATEMENT OF FACTS

A. Introduction

At issue in this case is the constitutionality of the statutes and regulation that exclude Appellants' class from participation in the County Employees' Retirement Fund ("CERF"). There is no genuine dispute as to any of the material facts of this case (App. Br. 37). Appellants' statement of facts, however, fails to include all of the pertinent facts.

B. The Appellants

There are three Appellants (L.F. 89-90). All three hold positions that are under the supervision of the 23rd Judicial Circuit of Missouri, which is a single-county circuit comprised of Jefferson County (L.F. 90-91). The Appellants are: (1) Gilbert L. Alderson, the Juvenile Officer; (2) Theodore R. Allen, Jr., an attorney for the Juvenile Officer; and (3) Joseph J. Polette, the Chief Deputy Juvenile Officer (L.F. 89-90).[1] Mr. Alderson's salary is paid in part by the state of Missouri and in part by Jefferson County (L.F. 89). Mr. Allen and Mr. Polette receive all of their salary and benefits from Jefferson County (L.F. 89-90).

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[1] A fourth individual, Susan K. Nukols, was also a plaintiff in this case. Ms. Nukols was an attorney for the Juvenile Officer (L.F. 90). She is now deceased. On September 4, 2007, her attorney filed suggestions of death, and no motion for substitution was ever filed (L.F. 90).

All three Appellants were appointed to their positions by the Circuit Court of the 23rd Judicial Circuit (L.F. 90). The circuit court also has the authority to terminate their employment (L.F. 90). The Administrative Judge of the Family Court of the 23rd Judicial Circuit ultimately directs and controls their work responsibilities (L.F. 90). Although each Appellant receives all or part of his salary from Jefferson County, the Jefferson County Commission has no authority or responsibility with respect to the hiring, dismissal, control or direction of Appellants in connection with their work (L.F. 91). The court—not the county—is responsible for these aspects of Appellants' employment (L.F. 90-91).

All three Appellants are eligible to participate in the Local Area Government Employees' Retirement System ("LAGERS") (L.F. 95, 105). Mr. Alderson is also eligible to participate in the Missouri State Employees' Retirement System ("MOSERS") with respect to the portion of his salary that is paid by the state (L.F. 95; section 211.393[2]). Appellants seek participation in CERF in addition to their participation in LAGERS and MOSERS (L.F. 105).

C. The Other Parties

Appellants initiated this case by filing a petition for declaratory judgment and injunctive relief in the Cole County Circuit Court on October 13, 2006, against the state of Missouri, Governor Matt Blunt, Attorney General Jeremiah

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[2] All statutory references are to the Revised Statutes of Missouri (2000) unless otherwise noted.

Nixon, the County Employees' Retirement Fund, and the individual board members of the County Employees' Retirement Fund in their official capacity as its board of directors (L.F. 6-20). Motions to dismiss filed on behalf of Governor Blunt and Attorney General Nixon were sustained by the Circuit Court, and these defendants were dismissed from the case (L.F. 31).

D. The County Employees' Retirement Fund ("CERF")

CERF was established on August 28, 1994, by the enactment of section 50.1010, RSMo. (1994) (L.F. 58, 92). CERF was created to provide retirement benefits for county employees, other than employees of first class charter counties and the City of St. Louis (L.F. 92). At the time that CERF was formed, more than 50 counties in Missouri offered no retirement benefits to their employees (L.F. 92).

CERF notified Mr. Alderson by letter dated July 11, 1995, that employees who are subject to "hiring, supervision or termination by either the circuit court or the chief juvenile officer are not county employees and thus not eligible for benefits from [CERF]" (L.F. 19-20). This letter informed Mr. Alderson that neither he, nor any of the other Appellants in this case were eligible for CERF membership (L.F. 19-20, 91).

CERF promulgated 16 CSR 50-2.010(1)(L), effective May 30, 1996 (L.F. 91). This regulation reiterated the position expressed in CERF's letter of July 11, 1995, that Appellants are excluded from membership in CERF, since they were not "hired and fired" by the county, nor was their "work directed and controlled"

by the county (L.F. 91). In addition, sections 50.1000(8), 50.1010 and 211.393, expressly exclude Appellants' class from membership in CERF (L.F. 91).

Members in CERF are offered the right to receive a monthly benefit for life following their retirement (L.F. 92). The amount of the benefit is based on the member's years of service and salary (L.F. 92). Funding for the benefits paid by CERF come from a number of sources. CERF derives most of its funding from fees and penalties that are dedicated to its use by statute (L.F. 92). These fees and penalties are not tied to the number of members enrolled in CERF (L.F. 59, 93). Additional funding for CERF comes from the paychecks of county employees that do not participate in LAGERS, who contribute 2% of their compensation to CERF on a before-tax basis (L.F. 92). All county employees hired or rehired on and after February 25, 2002, are subject to an additional contribution of 4% of their compensation paid on and after January 1, 2003 (L.F. 93).

At the time CERF was established, membership projections by its actuary concluded that contributions from members that were not enrolled in LAGERS would be sufficient to provide the legislatively-established level of pension benefits for CERF members (L.F. 92). The membership projections proved to be inaccurate, and CERF's growth was "explosive" rather than the expected "modest growth." (L.F. 93). When CERF was formed, it covered 7,342 active employees according to county surveys (L.F. 93). By 2002, CERF's membership grew to 10,244. Its current membership is 11,072 (L.F. 93).

Because CERF's primary source of funding is not related to the number of members participating in CERF, increases in CERF's membership without additional funding sources is a concern to CERF (L.F. 93). Under section 50.1010, if insufficient funds are available to provide CERF benefits, then CERF's board must "apportion the benefits according to the funds available." (L.F. 93). If this should occur, existing members of CERF could face a hardship when their expected pension benefits are reduced (L.F. 93).

A judgment in favor of Appellants in this case could add 1,500 new active members to CERF (L.F. 93). These new members would include all juvenile court employees not currently enrolled in MOSERS and other employees subject to hiring and termination by the circuit court, but paid by a county, as well as other employees subject to hiring and termination by entities other than the county, but paid by a county (L.F. 93-94). Their addition to CERF would require the board of CERF to cut the pension benefits of existing members by 13.3 to 14 percent, assuming no new funding sources are added to cover the benefits of the additional members, and assuming that the additional members would be required to make retroactive payment of member contributions, as required, without interest (L.F. 94). This cut in benefits would cause a severe hardship to existing CERF members who have planned their retirements in reliance on a higher level of benefits (L.F. 95).

STATEMENT OF THE ISSUES

Section 50.1000(8) excludes from membership in the County Employees' Retirement Fund ("CERF") individuals who are not compensated directly from county funds and who are not hired, fired, directed and controlled by a county official. Sections 50.1010 and 211.393 include additional provisions consistent with section 50.1000(8)'s exclusion of these individuals. Both case law and common sense indicate that indicia of employment include direction and control of employees by the employer and compensation from the employer. Is the **county** hiring/firing requirement an arbitrary and unreasonable condition for participation in a **county** retirement fund?

Juvenile officers and other juvenile court employees are hired, fired, directed and controlled by the juvenile court, an agency of the state of Missouri rather than an agency of county government. Each of the Appellants is an employee or officer of the juvenile court and qualifies for a pension under the Local Area Government Employees' Retirement System ("LAGERS"), and in the case of Appellant Alderson, the Missouri State Employees' Retirement System ("MOSERS") as well. Nothing within sections 50.1000(8) and 211.393 curtail or limit the compensation a court may pay to any of its employees or limit who they may appoint. Does the exclusion of Appellants from an additional retirement system, CERF, by sections 50.1000(8) and 211.393 unconstitutionally interfere with the juvenile court's ability to appoint, control and pay its staff?

Finally, should Appellants be permitted to proceed with their equitable claims after failing to raise these issues for over eleven years, where the undisputed facts of the case show that Appellants' delay in bringing the underlying action will result in undue harm to Respondents and the other participants in CERF?

STANDARD OF REVIEW

The Circuit Court entered summary judgment in favor of Respondents in this case. The Circuit Court's judgment is subject to essentially *de novo* review by this Court, and should be affirmed if this Court finds that there are no genuine issues of material fact and Respondents are entitled to judgment as a matter of law. *ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.,* 854 S.W.2d 371, 376 (Mo. banc 1993).

ARGUMENT

I. THE CIRCUIT COURT DID NOT ERR IN DENYING APPELLANTS' MOTION FOR SUMMARY JUDGMENT AND GRANTING SUMMARY JUDGMENT IN FAVOR OF RESPONDENTS BECAUSE SECTIONS 50.1000(8), 50.1010, 211.393.5, RSMO, AND REGULATION 16 CSR 50-2.010(1)(L) DO NOT VIOLATE APPELLANTS' RIGHT TO EQUAL PROTECTION UNDER THE LAWS IN THAT THERE IS A REASONABLE BASIS FOR THE EXCLUSION FROM CERF OF APPELLANTS AND OTHERS SIMILARLY SITUATED TO APPELLANTS, UNDER THESE LAWS. (RESPONDS TO APPELLANTS' POINTS I AND IV).

A. Introduction

Under sections 50.1000(8) and 211.393.5 and 16 CSR 50-2.010(1)(L), Appellants belong to a class that is clearly *not* eligible for membership in CERF. As a juvenile officer, attorney for the juvenile officer, and deputy juvenile officer, all of the Appellants were appointed to their positions by the Circuit Court of the 23rd Judicial Circuit. L.F. 90. They are subject to the direction and control of the circuit court, and their employment can be terminated by the court. L.F. 90-91. It is undisputed that the court is an arm of state, not county, government. These undisputed facts establish that none of the Appellants meet the definition of an "employee" of a county for the purpose of CERF membership, as found in section

50.1000(8) and 16 CSR 50-2.010(1)(L). In addition, section 211.393.5 expressly provides that juvenile court employees are not eligible to participate in CERF. Section 50.1010 further provides that after September 1, 2001, no new classes of members will be allowed to participate in CERF "unless adequate additional funds are provided for the costs associated with such coverage." No additional funding is provided for juvenile court employees to participate in CERF since Appellants do not seek to have the legislature amend the law, but rather seek this Court's amendment.

In Point I of their brief, Appellants challenge the current version of sections 50.1000(8), 50.1010, and 211.393 and regulation 16 CSR 50-2.010. They assert that these laws' exclusion from *county* retirement fund membership of those who are not hired, fired, directed and controlled by *county* officials is not "rationally related to a legitimate state interest" and is unconstitutional in violation of the equal protection clauses of amendment XIV of the United States Constitution and article I, section 2 of the Missouri Constitution. App. Br. 20. Under Point IV of their brief, Appellants assume that the current version of sections 50.1000(8) and 211.393.5 and regulation 16 CSR 50-2.010 are invalid and void, and argue that Appellants qualify as county employees under the 1994 version of section 50.1000(8) because such qualification would largely be dependent on the common law. Because each of these points address the same issue, Respondents combine their response to these points herein.

As explained below, it is clear that the applicable statutes and regulation reasonably limit membership in CERF to "employees" of counties in the traditional sense. In establishing who is a county "employee" for CERF purposes, these laws apply an intuitively rational and reasonable criteria, criteria that this Court has used in determining who is an "employee."

Specifically, section 50.1000(8) requires an eligible "employee" to be hired by, subject to termination by, and under the control of a county official, as well as being paid from county funds. These criteria are obviously rationally related to the state's legitimate interest in ensuring the solvency of CERF, and in assuring that its benefits are provided to individuals who are, in fact, county "employees" in the normal sense of the term—that is, someone who is paid by and under the direct control of a county employer. These statutes easily meet the "rational basis" test that applies in this case.

Finally, it should be noted that to prevail in this case, Appellants' must establish: (1) that each of the applicable statutes is invalid; (2) that the applicable regulation is invalid; (3) that Appellants belonged to a class that was eligible for CERF membership under the original, 1994 version of section 50.1000(8); and (4) that their eleven year delay in bringing their claims did not bar those claims under the doctrine of *laches.* As explained below, Appellants' have failed on each of these points, and their claims were properly denied.

B. Section 50.1000(8) and 16 CSR 50-2.010 and Historical Background

CERF was established by the General Assembly in 1994. The original version of section 50.1000(8), which was enacted in 1994, defined the term "employee" for purposes of CERF membership as:

> any county elective or appointive officer or employee whose position requires the actual performance of duties during not less than one thousand hours per year, except county prosecuting attorneys covered under section 56.800 to 56.840, RSMo., circuit clerks and deputy circuit clerks covered under the Missouri state retirement system and county sheriffs covered under sections 57.949 to 57.997, RSMo, in each county of the state, except any city not within a county and any county of the first classification having a charter form of government[.]

Section 50.1000(8), RSMo (1994).

The original version of the CERF statutes did not further define the term "employee" as used in this section. In the year prior to the enactment of section 50.1000(8), however, this Court handed down a decision involving similar language in the context of the workers' compensation statutes. *See Smith v. Thirty-Seventh Judicial Circuit*, 847 S.W.2d 755, 757 (Mo. banc 1993). In *Smith*,

this Court considered whether a chief deputy juvenile officer was an employee of the state or the county. The statutory language at issue in *Smith* was found in section 105.800, RSMo (1986), and defined the term "state employee" as "any person who is an elected or appointed official of the state of Missouri or who is employed by the state and earns a salary or wage in a position normally requiring the actual performance by him of duties on behalf of the state." *Smith* at 757. The court concluded that the chief deputy juvenile officer was a state employee within the meaning of this statute.

In reaching this conclusion, the Court recognized that chief deputy juvenile officers are paid by counties—although funding for their salaries comes from both state and county sources. *Id.* at 756. The same is true of the salaries of Appellants. *See* section 211.393. The Court also noted that the statutory language at issue defining who is a state employee "does not mention, let alone emphasize, the source of the salary or the nominal payer." *Id.* at 758. The Court concluded that in the context of section 105.800, "it is the right of control and not the source of funds that determines who is the employer." *Id.* Because of the similarity between the language used in the original version of section 50.1000(8) and section 105.800, the *Smith* decision indicates that the "right to control" should also determine who is a *county* employee under section 50.1000(8), RSMo. (1994).

The Court's ruling in *Smith* turned on the fact that the chief deputy juvenile officer was subject to the exclusive control of the circuit court—not the county. The court had the authority to hire and fire the chief deputy juvenile officer, and

had exclusive control over his duties. *Id.* at 756. This is also true of Appellants in this case. It follows that Appellants were *not* county employees within the meaning of the original version of section 50.1000(8), RSMo. (1994).

The Court's opinion in the *Smith* case suggests that there is not a single test for determining whether an individual is an employee of the county or the state. As this Court explained, "[d]etermining whether a particular employee is a state employee depends on the precise language of the particular statute involved and the general principles in the relevant area of law." The Court noted that a court bailiff is *not* a state employee for purposes of the State Legal Expense Fund, but an official court reporter *is* a state employee for purposes of the Missouri State Employees Retirement System. *Id.* at 758, *citing Cates v. Webster,* 727 S.W.2d 901, 906 (Mo. banc 1987), and *Hawkins v. Missouri State Employees Retirement System*, 487 S.W.2d 580, 583 (Mo. App. 1972). Those cases indicate that the source of the employee's pay is also a consideration in determining the identity of the individual's employer. Indeed, two judges joined in Judge Price's concurring opinion in *Smith,* that only those individuals who are paid directly by the state should be considered state employees for workers' compensation purposes. *Id.* at 761.

Against this backdrop, the CERF board of directors wrote to Appellant Alderson in July of 1995 and, consistent with *Smith* (the Court's most recent decision on this issue), explained to him that "juvenile employees who are employed either by the circuit court or by the chief juvenile officer within a circuit

or who are subject to hiring, supervision or termination by either the circuit court or the chief juvenile officer are not county employees and thus are not eligible for benefits from the County Employees' Retirement Fund." L.F. 19-20.

Within three months after sending this letter, on October 11, 1995, CERF's board of directors approved and filed 16 CSR 50-2.010. This rule, effective May 30, 1996, included the following definition of the term "employee" for purposes of participation in CERF:

> (L) Employee means any county elective or appointive officer or employee *who is hired and fired by an employer and whose work and responsibilities are directed and controlled by the employer and who is compensated directly from county funds* and whose position requires the actual performance of duties during not less than one thousand (1,000) hours per year[.]

16 CSR 50-2.010(1)(L) (emphasis added). The term "employer" is defined by the regulation as: "each county in the state, except any city not within a county and counties of the first classification with a charter form of government." 16 CSR 50-2.010(1)(M).

Respondents object to Appellants' mischaracterization of the purpose for the cited regulation, and the legislative amendments to section 50.1000(8) and 211.393.5, as a correction of an "actuarial miscalculation" rather than "any

considered legislative purpose." App. Br. 28. Appellant's citation to the Legal File (L.F. 97) provides utterly no support for that assertion and it finds no support anywhere in this record. Appellants note that their county clerk signed them up for CERF and that the Board of CERF concluded that Appellants did not qualify for CERF because the Board did not believe Appellants were county employees. The record is silent regarding the purpose of passage of the regulation or the applicable statutory amendments. The reference to actuarial assumptions in this record is found in the affidavit of Sarah Maxwell (L.F. 68-70) and solely with reference to the economic impact to the retirement fund should this court effectively add a new class of members to CERF.

In 1998, the General Assembly amended section 50.1000(8), RSMo. (1994), and added language mirroring the regulation's definition of "employee." Following this amendment, the statute defined an "employee" for CERF purposes as:

> any county elective or appointive officer or employee *who is hired and fired by the county and whose work and responsibilities are directed and controlled by the county and who is compensated directly from county funds* whose position requires the actual performance of duties during not less than one thousand hours per year[.]

Section 50.1000(8), RSMo (2000) (emphasis added).

In short, both section 50.1000(8) and regulation 16 CSR 50-2.010 impose each of the requirements that this Court, in both its majority and concurring opinions, recognized in *Smith*: a source of funds requirement and a direction/control requirement.

Appellants do not challenge the notion that membership in the *County* Employees' Retirement Fund can and should be limited to *county* employees. Rather, because section 50.1000(8) and 16 CSR 50-2.010(1)(L) require both direct county compensation *and control by a county official*, and because appellants are not directed and controlled by any county official, they seek to have this Court amend the applicable statute by eliminating the direction and control requirement. They advance the argument that section 50.1000(8)'s direction and control requirement is "irrational to any legitimate legislative purpose, and [is] … arbitrar[y]." App. Br. at 24. The Circuit Court refused to rewrite the law because it concluded that the direction and control requirement was "intuitively rational" and recognized by this Court as a reasonable criteria in determining employment (L.F. 97).

As demonstrated by the foregoing, the regulation and the legislature's 1998 amendments to section 50.1000(8) simply codified the Court's analysis in *Smith*, and that analysis was intuitively rational and reasonable. And, as explained above, even if this Court were to effectively repeal the regulation and statutory definition of "employee," Appellants would still not be county employees under the common law under *Smith*. The "right to control" test which is now explicit in section

50.1000(8), was implicit in the original statute which limited participation in CERF to county "employees"—just as in *Smith* the "right to control" test was implicit in the term "state employee" as used in section 105.800, RSMo. (1986).

C. 1999 Amendment to Section 211.393

The Missouri Legislature amended 211.393, effective July 1, 1999. This section explains the complicated system by which the state and counties share the burden of providing funding for juvenile officers and other juvenile court employees. There are separate provisions in this law for: (1) juvenile officers employed in single county circuits after the effective date of the law (July 1, 1999); (2) juvenile officers who begin employment in single county circuits after the effective date of the law; (3) all other juvenile court employees employed in single county circuits; (4) juvenile court employees in multicounty circuits; (5) juvenile court employee positions added after December 31, 1997; and (6) all other employees of a multicounty circuit who are not juvenile court employees. For salary purposes under this statute, juvenile officers in single county circuits employed prior to the effective date of the law are treated as county employees to the extent they are paid by a county and state employees to the extent they are paid by the state. Section 211.393.2(1)(a) and (b). This provision applies to Mr. Alderson. The other Appellants are considered county employees for salary purposes under this law. Section 211.393.2(3)(a).

Consistent with section 50.1000(8), subsection 5 of section 211.393 (added by the 1999 amendments to this statute) expressly provides that:

> "No juvenile court employee employed by any single or multicounty circuit shall be eligible to participate in the county employees' retirement system fund pursuant to section 50.1000 to 50.1200, RSMo."

Appellants' discussion of section 211.393 (App. Br. 26-27) confuses this point, while section 211.393.5 is clear that no CERF coverage is provided to any juvenile court employees.

Juvenile court employees are not, however, excluded from all pension plans. Those who are "county employees" for salary purposes are eligible to participate in any county retirement plan other than CERF. Thus, they still may participate in LAGERS. *See, e.g.*, section 211.393.2(2)(b). Juvenile court employees who are considered state employees are expressly permitted to participate in MOSERS, the state retirement plan, but must forfeit their rights to participate in other retirement plans. *See, e.g.*, section 211.393.3(1)(b) and (d). Juvenile officers in single circuit counties employed prior to July 1, 1999, such as Mr. Alderson, are entitled to receive state retirement benefits on that portion of their salary paid by the state and in any county retirement plan other than CERF (such as LAGERS) on that portion of their salary paid by the county. Section 211.393.2(1).

D. 2001 Amendment to Section 50.1000(8)

The legislature made additional changes to section 50.1000(8) in 2001. Although these changes had no effect on Appellants' eligibility for CERF benefits,

Appellants have nonetheless included them in their challenge to the constitutionality of section 50.1000(8). App. Br. 33-34. The 2001 amendment extended the definition of a county "employee" to include the emphasized language below:

> any county elective or appointive officer or employee who is hired and fired by the county *or by the circuit court located in a county of the first classification without a charter form of government which is not participating in LAGERS,* whose work and responsibilities are directed and controlled by the *county or by the circuit court located in a county of the first classification without a charter form of government which is not participating in LAGERS* . . . .

Section 50.1000(8), RSMo. (Supp. 2007) (emphasis added).

As with the other statutes at issue in this case, Appellants seek this Court's declaration that this amendment to section 50.1000(8) is unconstitutional, and thus void *ab initio*. App. Br. 63-64; L.F. 16-17. Appellants then seek this Court's declaration that they are county employees within the meaning of the original version of this statute (as it existed prior to this amendment and the 1998 amendment) and entitled to CERF benefits under that version of the statute. App. Br. 63-64; L.F. 16-17.

Even assuming the 2001 amendment to section 50.1000(8) is unconstitutional, Appellants gain nothing by having this amendment stricken.

Without this amendment, section 50.1000(8) still expressly excludes Appellants from membership in CERF because Appellants are not hired, fired, directed or controlled by a county official. Under section 1.140, the provisions of every statute are severable. This section "permits one offending provision of a law to be stricken and the remainder survive." *Akin v. Director of Revenue*¸ 934 S.W.2d 295, 300 (Mo. banc 1996). Specifically, section 1.140 provides that:

> If any provision of a statute is found by a court of competent jurisdiction to be unconstitutional, the remaining provisions of the statute are valid unless the court finds the valid provisions of the statute are so essentially and inseparably connected with, and so dependent upon, the void provision that it cannot be presumed the legislature would have enacted the valid provisions without the void one; or unless the court finds that the valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent.

As this Court explained in *Simpson v. Kilcher,* 749 S.W.2d 386, 393 (Mo. banc 1988), "[t]he test of the right to uphold a law, some portion of which may be invalid, is whether or not in so doing, after separating that which is invalid, a law in all respects complete and susceptible of constitutional enforcement is left,

which the legislature would have enacted if it had known that the exscinded portions were invalid." In this instance, it is clear that the 2001 amendments to section 50.1000(8) are severable from the rest of section 50.1000(8) under this test. This amendment was apparently added in response to the Court's decision in *Boone County v. County Employees' Retirement Fund*, 26 S.W.3d 257 (Mo. App. 2000), which ruled that certain employees of the 13th Judicial Circuit in Boone County were not eligible to receive either MOSERS or CERF pension benefits under the 1998 version of section 50.1000(8) and the applicable provisions of the MOSERS law. The 2001 amendment obviously satisfies the test for severability under section 1.140, since the amendment was enacted years after the legislature enacted the other provisions of this section. There is no doubt about whether the legislature would have enacted the other provisions of the statute without these amendments—since the legislature did, in fact, do so.

Because the 2001 amendments to the statute are severable from the rest of section 50.1000(8), no purpose is served in even addressing this portion of Appellants' argument. If the 2001 amendments are stricken, the remaining provisions of section 50.1000(8) still bar Appellants from participating in CERF. Moreover, it is clear that Appellants and the class of individuals described by this amendment are *not* similarly situated in that Appellants are eligible for LAGERS benefits. L.F. 95, 105. A reasonable basis therefore exists for treating Appellants differently from the individuals included in the class described in the 2001 amendment to section 50.1000(8)—this amendment provided a county retirement

benefit to a group of individuals who were not otherwise eligible for retirement benefits, unlike Appellants who participate in LAGERS.

E. 2001 Amendment to Section 50.1010

The final statutory provision challenged by Appellants is the 2001 version of section 50.1010. The specific provision challenged by Appellants is the second sentence of section 50.1010, which provides:

> Notwithstanding any provision of sections 50.1000 to 50.1200 to the contrary, an individual who is in a job classification that the [county employees'] retirement system finds not eligible for coverage under the retirement system as of September 1, 2001, shall not be considered an employee for purposes of coverage in the [county employees'] retirement system, unless adequate additional funds are provided for the costs associated with such coverage.

This section is largely irrelevant to this case. This section effectively imposes a funding requirement before new classes of members may be added to the retirement fund. Only the Missouri legislature has the authority to do that, and it has not seen fit to do so. If anything, section 50.1010 would prohibit the board of CERF, or this Court, from expanding coverage under the retirement system without providing a source of funding.

F. Legitimate State Interest Served by these Provisions

To prevail in this case, Appellants must demonstrate that each of the statutes that bar them from CERF membership, as well as the regulation promulgated by CERF, create a classification that serves no legitimate state interest. *Missourians for Tax Justice Education Project v. Holden*, 959 S.W.2d 100, 103 (Mo. banc 1997). Appellants concede that this standard applies, since they have not asserted that a fundamental right is at issue, nor do they claim to be members of a suspect class. App. Br. 19-20. Under the analysis applicable to this case, the statutes must be found constitutional if "any state of facts can reasonably be conceived that would justify" the classification at issue. *Id., citing McGowan v. Maryland*¸ 366 U.S. 426 (1961). In addition, the statutes at issue here are considered "economic legislation" and are "entitled to a strong presumption of constitutionality . . . ." *Slavsky v. New York City Police Dept.*, 967 F. Supp. 117, 119 (S.D.N.Y. 1997), *citing Schweiker v. Wilson,* 450 U.S. 221, 238 (1981).

As explained above, in excluding Appellants and all others who are not hired and fired by and subject to the direction and control of a county official, 16 CSR 50-2.010(1)(L), section 50.1000(8), and section 211.393 simply codified the common law as set out by this Court in *Smith* and other decisions. Those decisions were rational and reasonable since employment is determined by both compensation and control. This approach, moreover, is rationally related to a legitimate state purpose to preserve the solvency of CERF.

The undisputed facts of this case establish that CERF's principal source of funding is limited and not tied to the number of participants in the fund. L.F. 93. To allow CERF to provide meaningful pension benefits with its limited financial resources, the state obviously must draw a line somewhere. CERF cannot provide a pension to every person with some connection to a county. By limiting participation in CERF (the *County Employees'* Retirement Fund) to those individuals whose relationship with a county makes them a *county employee* as recognized by the Courts, CERF's board and the legislature acted reasonably to allow CERF to administer its resources for the benefit of those individuals with a legally meaningful and significant employee/employer relationship with a county.

The 2001 amendment to section 50.1010 serves a similar purpose. This provision prohibits the addition of new classifications of employees to CERF's rolls, "unless adequate additional funds are provided" to cover the costs associated with providing benefits to these individuals. This provision obviously protects CERF's solvency, and ensures that it will have adequate funds to pay the benefits expected by its participants.

It should also be noted that the cases cited by Appellants in support of their equal protection arguments are inapposite. In *Ranschburg v. Toan*, 709 F.2d 1207 (8th Cir. 1983), the court considered the constitutionality of a Missouri statute that provided money for utility bills to elderly and disabled persons. To be eligible for the program, an elderly, disabled person had to also be enrolled in one of the six public assistance programs listed in the statute. The plaintiffs in the case were

elderly, disabled people who also received public assistance—however, their public assistance program was *not* listed in the statute. The court found that there was no rational basis for favoring the elderly, disabled individuals enrolled in the six programs listed in the statute over the plaintiffs because, among other reasons, the state had no legitimate interest in favoring one group of totally disabled persons on public assistance over another. *Id.* at 1212. In other words, the plaintiffs and the beneficiaries of the program were in all relevant respects similarly situated. This ruling has no application to the instant case. Here, Appellants are not eligible for CERF benefits because they are not county *employees* under the statute, the common law, and as that term is commonly understood. As individuals who are hired by, fired by and under the control of the courts, they lack the legal relationship with the county that would permit their participation in CERF. As noted above, CERF's resources do not permit it to provide a pension to all individuals with some connection to a county—but only those people who are hired, fired and under the control of a county in the course of their employment and who are also paid by county funds.

In *Sommer v. Bihr,* 631 F. Supp. 1388, 1389 (W.D. Mo. 1986), also cited by Appellants, the plaintiffs were "state employees" who unlike all other "state employees" were denied fully-funded retirement benefits. Obviously this is not analogous to the situation in the instant case where Appellants are *not* county employees because they are not hired, fired, directed and controlled by a county official. Similarly, the plaintiffs in *Barbour County Com'n v. Employees of*

Barbour County Sheriff's Dept., 566 So.2d 493 (Ala. 1990), stood in precisely the same legal position with respect to the county as the employees who were covered by the county's annuity and pension plan. All of the plaintiffs, like the individuals entitled to county benefits, could only be hired or fired by the formal action of the county commission, were paid through the county budget, and were subject to the policies in the county's "Employee Guidebook." This is not true of Appellants in the case at hand. In sum, none of the cases cited by Appellants in support of their equal protection claims support Appellants' position.

G. Appellants Are Not Entitled to CERF Benefits Regardless of the Constitutionality of the Challenged Provisions

Finally, even assuming 16 CSR 50-2.010(1)(L), the 1998 and 2001 amendments to section 50.1000(8), and the 1999 amendments to 211.393, and the 2001 amendment to section 50.1010 are unconstitutional, and are void *ab initio*¸ Appellants are nonetheless ineligible for membership in CERF. As explained above, the original version of section 50.1000(8) limited participation in CERF to county "employees." *See* Section 50.1000(8), RSMo. (1994). Contrary to Appellants' assertions (App.Br. 22), this statute does not authorize their participation in CERF.

This Court's decision in *Smith* demonstrates that the right to control an individual's employment is a key issue in determining whether an individual is an "employee" of a particular entity. Here, the Appellants' employment is controlled by the 23rd Judicial Circuit Court—not Jefferson County. The circuit court is a

department of the state—not the county. *See Hawkins v. Missouri State Employees' Retirement System*, 487 S.W.2d 580, 582 (Mo. App. 1972) ("the law of Missouri is now settled that circuit judges "are judges of the State of Missouri[.]"). Under the right to control test, the Appellants are not county employees.

As Appellants note, prior to the *Smith* case, court employees had been found to be county employees in some contexts. *See e.g.*, *Cates v. Webster*¸ 727 S.W.2d 901 (Mo. banc 1987) (bailiff was an employee of Jackson County and not a state employee for purposes of the State Legal Expense Fund.). In *Hawkins, supra*, however, the Court of Appeals found that circuit court clerks who were paid by the county and state and controlled by the court were *state* employees for pension purposes.

With respect to juvenile court employees, however, the legislature demonstrated its approval of this Court's holding in *Smith* by amending section 105.800 in 1993. This statute now expressly provides that "[t]he term 'state employee' also includes all juvenile court personnel, whether compensation for such personnel is paid by the state, the judicial circuits, the counties, or a combination thereof." Section 105.800. This provides further support for the conclusion that Appellants should not be considered county employees for CERF purposes under the original version of section 50.1000(8).

In sum, contrary to Appellants' assertions, the weight of authority indicates that under the original version of section 50.1000(8), Appellants are not eligible

for membership in CERF. Accordingly, this Court should not grant Appellants' request for relief, even if this Court accepts Appellants' constitutional challenges to the amendments to sections 50.1000(8), 50.1010, and 211.393, and to 16 CSR 50-2.010(1)(L).

II. THE CIRCUIT COURT DID NOT ERR IN DENYING APPELLANTS' MOTION FOR SUMMARY JUDGMENT AND GRANTING SUMMARY JUDGMENT IN FAVOR OF RESPONDENTS BECAUSE SECTIONS 50.1000(8), 50.1010, 211.393.5, RSMO, AND REGULATION 16 CSR 50-2.010(1)(L) ARE CONSTITUTIONAL IN THAT THESE LAWS DO NOT INFRINGE UPON THE EXERCISE OF POWERS PROPERLY BELONGING TO THE JUDICIARY BY IMPAIRING THE COURTS' ABILITY TO HIRE EMPLOYEES. (RESPONDS TO APPELLANTS' POINT II).

Appellants, apparently conceding that they are court, not county, employees, next assert that their exclusion from CERF violates the separation of powers clause of Article II, Section 1 of the Missouri Constitution. App. Br. 37-44. This clause provides:

> The powers of government shall be divided into three distinct departments—the legislative, executive and judicial—each of which shall be confided to a separate magistracy, and no person, or collection of persons, charged with the exercise of powers properly belonging to one of those departments, shall exercise any power properly belonging to either of the others,

except in the instances in this constitution expressly directed or permitted.

Appellants theorize that the exclusion of certain court employees from retirement benefits under CERF violates the separation of powers clause because that exclusion impairs the court's ability to "secure the personnel it needs and must obtain . . . and affix their salary and benefits." App. Br. 40-41. This theory, however, is wholly unsupported. No facts have been alleged to establish that the exclusion of court employees from CERF impairs the court's ability to secure qualified employees. Indeed, the undisputed facts set out in the record of this case fail to include any such facts. *See* L.F. 38-74, 67-71.

What the undisputed facts do show is that Appellants already qualify for retirement benefits. Mr. Alderson is covered under the MOSERS and LAGERS retirement systems, and the remaining Appellants are covered under the LAGERS retirement system. *See* Plaintiffs' Second Responses to Interrogatories; L.F. 95, 105; section 211.393.2(1). Appellants alleged and presented no facts to support their arguments on this point since the marketplace has already factored all court employees' benefits into the economic equation by dictating salaries that complement those benefits. For this reason, Appellants' discussion (App. Br. 43) of taxable compensation, deferred compensation and the like is off the mark.

Similarly, Appellants' discussion (App. Br. 43-44) of the differing treatment of juvenile court employees under section 211.393, depending on whether they are part of single or multi-county circuits, is off the mark. Section

211.393 grants no CERF benefits to anyone and is thus irrelevant in this respect. It does grant MOSERS benefits to some juvenile court employees while denying them to others, but Appellants do not challenge that distinction, and did not name MOSERS as a party herein. Presumably, that is because Appellants seek at least two retirement benefits and section 211.393.8 conditions receipt of MOSERS benefits on the voluntary forfeiture of other retirement benefits earned as a juvenile court employee. Should Appellants succeed herein, they will secure at least two retirement benefits for themselves while there colleagues in multi-county circuits receive only the MOSERS retirement benefit.

Appellants cite *State ex inf. Anderson ex rel. Weinstein v. St. Louis County*, 451 S.W.2d 99 (Mo. banc 1970) (*"Weinstein II"*) in support of this argument. *Weinstein II* is inapposite for it stands merely for the proposition that courts have the right to select their employees and fix their compensation. Nothing in sections 50.1000(8) or 211.393 curtail the judiciary's rights with respect to setting the compensation of employees. While Appellants are correct that the judiciary's salary recommendations are subject to review under section 50.630 of the county budget law, it is nonetheless reasonable to conclude that courts can consider all benefits, including retirement benefits, when fixing salaries of their employees. Thus there is no basis for concluding that the courts' ability to hire employees is impaired by the statutes at issue in this case.

Moreover, *Weinstein II* demonstrates that if there is any harm to the courts resulting from these statutes, Appellants are not the proper parties to raise this

issue. Appellants cite no authority for their assertion that court employees have standing to challenge the adequacy of the benefits they receive under the separation of powers clause.

III. THE CIRCUIT COURT DID NOT ERR IN DENYING APPELLANTS' MOTION FOR SUMMARY JUDGMENT AND GRANTING SUMMARY JUDGMENT IN FAVOR OF RESPONDENTS BECAUSE SECTIONS 50.1000(8), 50.1010, 211.393.5, RSMO, AND REGULATION 16 CSR 50-2.010(1)(L) ARE CONSTITUTIONAL AND ARE NOT SPECIAL LAWS PROHIBITED BY ARTICLE III, SECTION 40 OF THE MISSOURI CONSTITUTION, IN THAT THESE PROVISIONS APPLY TO ALL EMPLOYEES WITHIN A PROPERLY DEFINED CLASS. (RESPONDS TO APPELLANTS' POINT III).

Appellants' third and final constitutional challenge to sections 50.1000(8), 50.1010, and 211.393 and 16 CSR 50-2.010 centers on article III, section 40(30) of the Missouri Constitution, which provides that "[t]he general assembly shall not pass any local or special law . . . where a general law can be made applicable, and whether a general law could have been made applicable is a judicial question to be judicially determined without regard to any legislative assertion on that subject." The challenged laws are not, however, invalid under this constitutional provision.

In *Savannah R-III Sch. Dist. v. Pub. Sch. Ret. Sys. of Missouri*, 950 S.W.2d 854, 859 (Mo. banc 1997), this Court stated that:

> A "special law" is a law that "includes less than all who are similarly situated … but a law is not special if it applies to all of a given class alike and the classification is made on a reasonable basis." "In

> essence, the test for 'special legislation' under article III, sec. 40, of the Missouri Constitution, involves the same principles and considerations that are involved in determining whether the statute violates equal protection … where the rational basis test applies."

Id. citations omitted. Thus, Appellants' arguments in connection with this point essentially restate the arguments in the first point of their brief.

In *Jefferson County Fire Protection Districts Assn. v. Blunt*, 205 S.W.3d 866 (Mo. banc 2007), this Court stated that a "law is facially special if it is based on close-ended characteristics, such as historical facts, geography, or constitutional status." In such a case, the party "defending the statute must demonstrate a substantial justification for the special treatment." *Id.* But "a law based on open-ended characteristics is not facially special and is presumed to be constitutional." *Id.* In this case, the classification included in the challenged statutes and regulation are based on "open-ended characteristics." No one is precluded from participating in CERF so long as they are directed and controlled by a county official and are compensated with county funds. Appellants wholly mischaracterize the issue when they state (App. Br. 45) that they are county employees but treated differently "based on their legislative and historical status as circuit court appointees." Nothing about section 211.393 implies that juvenile officers are county employees *for purposes of CERF*. Indeed, section 211.393.5 expresses the clear legislative intent that they are not. Also,

Appellants overplay the fact that their county clerk enrolled them in CERF. App. Br. 48. That clerical mistake does not show that Appellants are or were county "employees" within the meaning of the law. Appellants are not county employees under section 50.1000(8) because they are directed and controlled by other than county officials and, as explained above, they were not county employees even before the 1998 amendment of section 50.1000(8). The challenged laws are therefore entitled to a presumption of constitutionality, which has not been overcome by Appellants' arguments.

As explained in Point I of this brief, the challenged statutes and regulation reasonably limit CERF participation to county "employees." Because Appellants are not hired, controlled or subject to termination by a county official, they do not come within this class and are reasonably excluded from CERF coverage. All members of the class—those hired, fired, directed and controlled by a county official and paid with county funds—are treated equally. In addition, the challenged laws do not prohibit Appellants from receiving all pension benefits. Appellants are covered under pension plans other than CERF. The challenged statutes and regulation simply place a reasonable limitation on the class of individuals entitled to CERF benefits, in light of CERF's limited resources.

Moreover, as explained above, Appellants and the class of individuals described in the 2001 amendment to section 50.1000(8) are not similarly situated so the 2001 amendment is not a special law. The 2001 amendment extended CERF benefits to certain court employees who are not entitled to pension benefits

through LAGERS. Appellants, on the other hand, are all eligible for LAGERS benefits. This distinction provides a reasonable basis for excluding Appellants from this legislation. More importantly, as explained above, even if the 2001 amendment to section 50.1000(8) was invalid as a "special law," this would have no effect on Appellants' eligibility for CERF benefits. The remaining provisions of section 50.1000(8), which are severable from the 2001 amendment, as well as sections 50.1010 and 211.393.5 and 16 CSR 50-2.010, prohibit Appellants' inclusion in CERF.

The two cases cited by Appellants do not support their arguments on this point. In *State ex rel. Public Defender Commission v. County Court of Greene County*, 667 S.W.2d 409, 410 (Mo. banc 1984), the statute at issue expressly exempted Greene County from the scope of the public defender system. On its face, this law "did not purport to apply alike to all members of a described class." *Id.* at 412. The statute was found to be "special on its face" which allowed this Court to "presume its invalidity." *Id.* at 413. This is not true of the statutes at issue here. As this Court explained in *State v. Cella*, 32 S.W.3d 114, 118 (Mo. banc 2000), (also cited by Appellants) a statute that establishes a classification that "is made on a reasonable basis" and that "applies to all of a given class alike" is not a special law. This principle describes not only the laws at issue in *Cella*, which applied to all judicial officers, but the statutes at issue here, which apply equally to all county "employees."

In sum, this Court should reject Appellants' assertion that sections 50.1000(8), 50.1010, and 211.393 and 16 CSR 50-2.010 are unconstitutional special laws.

IV. THE CIRCUIT COURT DID NOT ERR IN DENYING APPELLANTS' MOTION FOR SUMMARY JUDGMENT AND GRANTING SUMMARY JUDGMENT IN FAVOR OF RESPONDENTS, BECAUSE EVEN ASSUMING THAT THE LAWS AT ISSUE ARE INVALID, APPELLANTS' CLAIMS ARE BARRED BY THE DOCTRINE OF *LACHES*, IN THAT APPELLANTS' DELAY IN BRINGING THIS ACTION WAS UNREASONABLE AND ALLOWING APPELLANTS' ACTION TO PROCEED WOULD CAUSE UNDUE HARM TO RESPONDENTS AND THE EXISTING MEMBERS OF CERF. (RESPONDS TO APPELLANTS' POINT V).

Appellants are seeking equitable relief in this case, namely a declaration that certain laws are unconstitutional and that Appellants qualify to participate in CERF. They also seek an injunction instructing Respondents to enroll Appellants in CERF. L.F. 16-18. Respondents properly raised *laches* to the claims because Appellants sat on their hands for eleven years. L.F. 25.

Whether to invoke *laches* is "a question of fact for the court." *Landwersiek v. Dunivan*, 147 S.W.3d 141, 148 (Mo. App. S.D. 2004). "Generally, the trial court must determine whether the harm to the defendant in allowing the suit to proceed outweighs the harm to the plaintiff in failing to consider her claims." *Elton v. Davis*, 123 S.W.3d 205, 211 (Mo. App. 2003). Here the trial court found facts that demonstrate that in fact the harm to Respondents in allowing the suit to

proceed greatly outweighs any potential harm to the Appellants in barring their suit.

If Appellants are allowed to proceed notwithstanding their delay in bringing suit, and they convince this Court to effectively rewrite sections 50.1000(8) and 211.393, the Court's action will have a profoundly prejudicial impact on Respondents and those currently enrolled in CERF. By removing the county hiring/firing/control restriction in section 50.1000(8), this Court would open CERF up to all circuit court employees, other than those of the City of St. Louis, Jackson County, and the 13th judicial circuit, who are paid directly with county funds. Included therein would be certain juvenile court employees. L.F. 93-94. The affidavit of CERF's actuary showed that: (1) the additional liabilities thus imposed on CERF will not be accompanied by any sufficient influx in funding and; (2) the retirement benefits for existing employees enrolled in CERF would be cut by fourteen percent. Munzenmaier Aff. ¶ 5, L.F. 64. Respondents, and all current members of CERF, have been relying, since as far back as 1994, on a certain level of retirement benefit. Conversely, those who will effectively be folded into CERF by the requested declaratory judgment and injunction were, like everyone else, presuming that the law was valid and thus could have had no reasonable expectation of a CERF retirement benefit. To them, then, that benefit would amount to a windfall. Had Appellants brought their claims timely, Respondents and the members of CERF would not have relied, during the period

of Appellants' delay, on a level of benefit that will not be provided if Appellants are successful in undoing the will of the General Assembly.

Appellants claim that Respondents were not misled "in a *legal sense*" by Appellants' considerable delay. App. Br. 59-60 (emphasis added). They argue that CERF should have foreseen this challenge to the statute, since other parties have asserted that they are entitled to benefits, and legislation has been introduced, but not passed, that would have expanded CERF's coverage. They also note that other parties may raise these arguments again in the future.

All of Appellants' arguments are irrelevant to the issue of whether *laches* should bar Appellants' claims. The record in this case is clear that Respondents and CERF enrollees will be substantially harmed by the relief Appellants seek, and as a direct consequence of Appellants' delay in bringing suit, unless the Court assumes that the General Assembly will fund extra retirement benefit liability for the members of Appellants' class. Such an assumption is wholly unwarranted. *See* L.F. 11, 94 (noting that the General Assembly rejected SB 850 in 2006, a bill that would merely have added to CERF juvenile court employees in single-county circuits). Also note that section 50.1020.2 provides that "[n]o state moneys shall be used to fund sections 50.1000 to 50.1300."

The affidavits of the Executive Director of CERF, Sarah Maxwell, and CERF's actuary, Fred Munzenmaier, show that the existing CERF enrollees have relied on a level of retirement benefit that will be greatly curtailed, in the event this Court does what the General Assembly chose not to do and expand the scope

of CERF to include juvenile court employees and others who are hired and fired by the circuit court but paid by a county. L.F. 58-64. It is patently unfair and unreasonable for Appellants to knowingly delay taking any action for eleven years and then spring their claim for benefits that could effectively unravel the retirement plans of thousands of CERF members. This is particularly true since the members of Appellants' class, relying on the law, are presumed to have understood for the last eleven years that CERF benefits were not provided to them, but would reap a huge and unexpected windfall. Equity should not reward eleven years of delay in this manner. Accordingly, the doctrine of *laches* bars Appellants' claims for equitable relief in this case.

Conclusion

Appellants are not entitled to the relief they have requested. For the reasons stated above, this Court should affirm the ruling of the Circuit Court in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

The undersigned hereby certifies that on October ____, 2008, one true and correct copy of the foregoing brief, as well as a labeled disk containing an electronic copy of the same, were mailed postage prepaid to:

Mr. Ted Allen, Jr.
PO Box 100
Hillsboro, MO 63050

The undersigned further certifies that the foregoing brief complies with Rule 55.03 and with the limitations contained in Rule 84.06(b) in that it contains 9,707 words, excluding the cover, certificate of service, certificate required by Rule 84.06(c), signature block and appendix.

The undersigned further certifies that the labeled disk filed contemporaneously with the hard copies of this brief has been scanned for viruses and is virus-free.

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TABLE OF APPENDICES