IN THE SUPREME COURT OF MISSOURI

SC92455

MISSOURI ROUNDTABLE FOR LIFE, INC., FREDERIC N. SAUER, MISSOURI RIGHT TO LIFE, PAM FICHTER, and LAWYERS FOR LIFE, INC.,

Respondents,

v.

STATE OF MISSOURI, et al.,

Appellants.

From the Circuit Court of Cole County,
The Honorable Daniel R. Green.

BRIEF OF RESPONDENTS

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STATEMENT OF FACTS

This appeal addresses whether the legislature may condition the effectiveness of a section of a law on the happening of a future event. Specifically, this appeal involves whether Section B, the contingency clause in Senate Bill 7 (hereinafter "S.B. 7"), enacted by the First Extraordinary Session of Missouri's 96th General Assembly in 2011, is effective and enforceable. (Legal File ("LF"), pp. 201-26; Appendix to Appellants' Brief ("Appx."), pp. 12-37.)

On August 22, 2011, and pursuant to Article IV, Section 9 of the Missouri Constitution, the Governor issued a Proclamation for the First Extraordinary Session of Missouri's 96th General Assembly. The Proclamation described both S.B. 7 (referred to as "MOSIRA") and Senate Bill 8 ("S.B. 8") (referred to in the Governor's Proclamation more generally as tax credit reform, and elsewhere commonly as "Aerotropolis"), as part of a unified objective of the special session to create and fund "economic growth" and "incentives" with the implementation of "tax credit reform" to "inject accountability, transparency and result in taxpayer funds being spent in a fiscally effective manner." (Proclamation of Governor Nixon, dated August 22, 2012, printed in the Journal of the Senate, Ninety-Sixth General Assembly of the State of Missouri, First Extra Session of the First Regular Session, pp. 1-3 (Sept. 6, 2011) (hereinafter "Governor's Proclamation"), available at http://www.senate.mo.gov/11info/Journals/SDay0109061-14.pdf#toolbar=1.)

S.B. 7 is titled a bill to "repeal sections 196.1109, 196.1115, 348.251, 348.253, 348.256, 348.261, 348.262, 348.263, 348.264, 348.271, and 348.300, RSMo, and to enact in lieu thereof fourteen new sections relating to science and innovation, with a contingent effective date." (LF, pp. 201-06; Appx., pp. 12-37.) It has two sections: Section A contains substantive provisions; Section B addresses the contingency on which the efficacy of Section A turned. (*Id.*) More specifically, S.B. 7 provides in Section B that:

> Section A of this act relating to science and innovation shall not become effective except upon the passage and approval by signature of the governor only of senate bill 8 relating to taxation and enacted during the first extraordinary session of first regular session of the ninety-sixth general assembly.

(LF, p. 226, Appx., p. 37.)

S.B. 7 did not pass without Section B, and it only passed when Section B was later added in the special session. As shown in the Record on Appeal, each version of S.B. 7 before the version finally passed did not contain the contingency and was not enacted. (LF, pp. 125-226, 1095-96.) This is also true for each predecessor version of S.B. 7 that the Missouri Senate and House of Representatives attempted to pass. (*Id.*, pp. 125-226, 956-1086, 1095-96) (containing all versions of Senate Bill 7 from the Senate's 2011 Extraordinary Session and all versions of House Bills 467 and 468 from the 2011 General Session).

The first two versions of S.B. 8 included the substance of S.B. 7 as part of their text. (*Id.*, pp. 227-447, as introduced, 448-666, Senate Committee Substitute for S.B. 8.) More specifically, S.B. 8, as introduced, along with the Senate Committee Substitute for S.B. 8, contained provisions of what the General Assembly later passed in Section A of S.B. 7 as MOSIRA. (*Id.*, pp. 335, 554.)

The General Assembly passed S.B. 7 with Section B and, on October 6, 2011, delivered it to the Governor. (*Id.*, p. 11, ¶ 33 and p. 46, ¶ 33.) The Governor signed S.B. 7 on October 21, 2011. (*Id.*, p. 11, ¶ 34 and p. 46, ¶ 34.) The extraordinary session ended on or about October 27, 2011. (LF, p. 10, ¶ 31, p. 46, ¶ 31, p. 1101.) The General Assembly did not pass, nor did the Governor approve, S.B. 8. (*Id.*)

Accordingly, pursuant to Article III, Section 29 of the Missouri Constitution, Section B of S.B.7 became effective on January 25, 2012. (*Id.*, p. 1101.) When he signed S.B. 7, the Governor issued a signing statement as follows:

> Senate Bill 7 contains a clause that requires its effective date be contingent on the passage of an unrelated bill. Contingency clauses contained in legislation have been voided in the past, and ultimately a court may have to determine the effect, if any, of the contingency clause contained in Senate Bill 7. With the signing of the bill, the State will initiate steps toward the implementation of Senate Bill 7.

(*Id.*, p. 41.)

Various state officers and agencies, including certain of the Appellants, began to implement Section A of S.B. 7. (*Id.*, pp. 49-86.) Respondents, as taxpayers and as organizations including Missouri taxpayers as their officers and members, filed this action in the Circuit Court to enjoin that implementation and to reverse the steps already taken. (LF, pp. 5-42.) On February 17, 2012, Respondents filed a Motion for Judgment on the Pleadings, asserting that:

(1) Section B of S.B. 7 was a constitutional example of contingent legislation and that, by the plain terms of Section B, Section A was null and unenforceable; and

(2) In the alternative, if the Circuit Court were to find Section B unconstitutional, Section B could not be severed from S.B. 7 because the record demonstrated that the General Assembly would not have passed S.B. 7 without the inclusion of Section B.

(*Id.*, pp. 87-96.)

On February 20, 2012, the Circuit Court granted Respondents' Motion for Judgment on the Pleadings on Respondents' second ground, finding that Section B was unconstitutional and that the Court was "convinced beyond a reasonable doubt" that the General Assembly would not have passed S.B. 7 without Section B. (*Id.*, pp. 1087-97; Appx., pp. 1-11.) The Circuit Court further held, accordingly, that Section B could not be severed from Section A, and that S.B. 7 was therefore invalid in its entirety. (*Id.*) The Circuit Court enjoined Appellants' further implementation of S.B. 7 and ordered that actions already taken be reversed. (LF, p. 1097; Appx., p. 11.)

On March 23, 2012, Appellants filed a Notice of Appeal to this Court. (LF, pp. 1098-1110.)

STANDARD OF REVIEW

The constitutionality, severability, and enforceability of Section B of S.B. 7 present questions of law that this Court reviews *de novo*. *Dujakovich v. Carnahan*, No. SC 02062, 2012 Mo. LEXIS 116, at *5 (Mo. banc July 3, 2012) (citing *Gurley v. Mo. Bd. of Private Investigator Exam'rs*, 361 S.W.3d 406, 411 (Mo. banc 2012)); *Legends Bank v. State*, 361 S.W.3d 383, 387 (Mo. banc 2012). The Court will affirm a trial court's judgment if it determines that the trial court reached the correct result, on any basis supported by the record, even if it determines that the reasons for the trial court's decision were "wrong or insufficient." *Trimble v. Pracna*, 167 S.W.3d 706, 716 (Mo. banc 2005); *Wilson v. Kuenzi*, 751 S.W.2d 741, 741 (Mo. banc 1988).

ARGUMENT

I. The contingency clause contained in Section B of S.B. 7 is a valid exercise of legislative power and, because that contingency did not, and no longer can, occur, the Circuit Court correctly, albeit for different reasons, enjoined the enforcement of S.B. 7. (Basis to Affirm – Responds to Section A of Appellants' Brief.)

In this case, the Circuit Court correctly enjoined Appellants from enforcing S.B. 7. The Circuit Court, however, incorrectly reasoned that Section B of S.B. 7 was unconstitutional.

So ruling, though, the Circuit Court held Section B of S.B. 7 to be non-severable and thereby invalidated S.B. 7. Under this Court's longstanding precedent, Section B of S.B. 7 represents a valid, effective, and constitutional exercise of the General Assembly's legislative powers. Section B of S.B. 7 neither violates the Governor's authority to sign or veto a bill, nor does Section B violate the single subject rule. However, because the contingency contained in Section B can no longer occur, Section A of S.B. 7 can now never take effect and is a nullity. Therefore, the Circuit Court correctly enjoined Appellants from enforcing S.B. 7. This Court should thus affirm the judgment of the Circuit Court.

A. Appellants do not and cannot carry their burden of overcoming the strong presumption of Section B's constitutionality.

As it is Appellants who argue that Section B of S.B. 7 is unconstitutional, Appellants bear the heavy burden of demonstrating the unconstitutionality of Section B. "An act of the legislature carries a strong presumption of constitutionality." *St. Charles v. State*, 165 S.W.3d 149, 150-51 (Mo. banc. 2005). This is because the Missouri Constitution, unlike the federal Constitution, is not a grant of power, but as to legislative power, is only a limitation. *State ex rel. Danforth v. State Environ. Improvement Auth.*, 518 S.W.2d 68, 72 (Mo. banc 1975) (citing Mo. Const. Art. III, § 1). Therefore, unless otherwise restricted by Missouri's Constitution, the General Assembly's legislative power "is unlimited and practically absolute." *Id*.

This Court thus resolves any doubts raised as to constitutionality in favor of the procedural and substantive validity of the challenged legislation. *St. Charles*, 165 S.W.3d at 150-51. Accordingly, Appellants, as the parties attacking the legislation, must show that the alleged constitutional limitation has been "clearly and undoubtedly" violated. *Id*. (quoting *Fust v. Attorney General*, 947 S.W.2d 424, 427-28 (Mo. banc 1997)).[1]

B. Section B of S.B. 7 is a valid exercise of the General Assembly's long-standing constitutional authority to make the effectiveness of a law, or a section of a law, contingent on the happening of a future event.

S.B. 7 provides in Section B that:

Section A of this act relating to science and innovation **shall not become effective except upon the passage** and approval by signature of the

[1] As detailed *infra* in Section III.B, where the Court determines, despite this presumption of constitutionality, that a provision of bill violates a procedural limitation of the Missouri Constitution, the presumption of constitutionality no longer applies. Instead, the Court moves on to a separate analysis: whether that provision should, or should not, be severed from the bill. *Hammerschmidt v. Boone County*, 877 S.W.2d 98, 103 (Mo. banc 1994); *Legends Bank* 361 S.W.3d at 387. As further detailed in Section II.A, *infra*, at that point the tables are turned, and the Court will find the entire bill at issue *invalid* ***unless*** the Court is *convinced* "*beyond a reasonable doubt*" that the offending provision is severable. *Id*. (emphasis added).

governor only **of senate bill 8** relating to taxation and **enacted during the first extraordinary session of first regular session of the ninety-sixth general assembly**.

(LF, p. 226; Appx., p. 37) (emphasis added). As demonstrated below, Section B constitutes a valid, effective, and constitutional exercise of the General Assembly's long-standing legislative powers under Missouri law.

1. For over 150 years, this Court has recognized the General Assembly's constitutional authority to pass a law to become effective upon the happening of a contingent future event.

Dating back as far as 1856, this Court has held that the General Assembly may constitutionally pass a law to become effective upon the happening of a contingent future event. *See St. Louis v. Alexander*, 23 Mo. 483, 512-514 (Mo. 1856) ("[N]o one will deny to the legislature the power to pass laws with conditions on many subjects."); *State ex rel. Barrett v. Dallmeyer*, 245 S.W. 1066, 1068 (Mo. banc 1922) ("The proposition cannot be successfully controverted, that a law may be passed to take effect on the happening of a future event or contingency.") (quoting *State ex rel. Dome v. Wilcox*, 45 Mo. 458, 463 (Mo. 1870)); *State ex inf. Crain ex rel. Peebles v. Moore*, 99 S.W.2d 17, 22-23 (Mo. banc 1936) ("[O]n both reason and authority the operative effect of a constitutional law may be made to depend on more than one contingency or on successive contingencies.").

Moreover, "it makes no difference what the nature of the contingency is, so that it be a moral and legal one, not opposed to sound policy." *Poindexter v. Pettis County*, 246 S.W. 38, 40 (Mo. 1922); *Roeslein v. Chicago & E. I. R. Co.*, 214 S.W.2d 13, 16 (Mo. 1948); *see also State ex rel. Maggard v. Pond*, 93 Mo. 606, 621-22 (Mo. 1887), *overruled on other grounds by State v. Buchardt*, 144 Mo. 83 (Mo. 1898).

A brief discussion of this Court's cases addressing contingent legislation through the years illustrates these principles. In the 1870 case of *State ex rel. Dome v. Wilcox*, the Court upheld as constitutional a state law authorizing cities, towns, and villages within Missouri to organize their own school corporations; this law would only take effect in each such city, town, or village upon the vote of its people approving it. 45 Mo. at 461, 464. The Court found that the "future event"—the vote of the people of a particular municipality—"simply furnishes the occasion for the exercise of the power." *Id.* "The law is complete and effective when it has passed through the forms prescribed for its enactment, though it may not operate, or its influence may not be felt, until a subject has arisen upon which it can act." *Id*. at 464.

Later, in the 1922 case of *Poindexter v. Pettis County*, the Court upheld a contingency that caused a law enacted in 1921 to go into effect on the appointment of a superintendent of public welfare by the Pettis County Court. 246 S.W. at 40. On the appointment of the superintendent, the 1921 Act effectively repealed an earlier law covering the same subject matter, thereby replacing the position of probation officer that had existed under the earlier law. *Id*. The Court found that the contingency in that

case—the appointment of a superintendent of public welfare—was valid and not an improper delegation of legislative authority. *Id*.

In 1948, the Court in *Roeslein* upheld a contingency that caused an ordinance setting a speed limit for trains operating in the City of St. Louis along or across intersecting streets to take effect only upon the providing of notice from the director of streets and sewers. 214 S.W.2d at 16. The Court found that the contingency—notice by the director—was valid and not an improper delegation of legislative authority. *Id*.

In 1996, the Court in *Akin v. Director of Revenue* held that the law at issue, which conditioned whether a general tax for education would be enacted upon a vote of the people, was unconstitutional in that it made the *enactment* of certain sections of the law—not their effect or execution—dependent on a vote of the people without following the constitutional procedures for a referendum. 934 S.W.2d 295, 299 (Mo. banc 1996). In so holding, the Court noted the essential "distinction . . . between a delegation of a power to make law, which involves a discretion as to what the general law will be, and conferring an authority . . . as to how," or by extension, when, "the law shall be executed." *Id*. at 299. Accordingly, although the law at issue fell outside it, *Akin* reaffirmed the long-standing rule in Missouri that "the legislature may enact laws to take effect on the happening of a future event." *Id*. at 299-300.

As a final illustration, in 2003 the Court heard an appeal from a writ of mandamus issued to enforce S.B. 781, codified as RSMo. § 162.666, containing a provision called the "St. Louis Students' Bill of Rights." *Bauer v. Transitional Sch. Dist. of St. Louis*, 111 S.W.3d 405, 406-08 (Mo. banc 2003). The General Assembly made the effectiveness of

that provision contingent, however, on "approval by a majority of the voters of the city of St. Louis voting thereon." *Id*. at 406-07. S.B. 781 then further required that the school district's board put the measure on the ballot for such vote by March 15, 1999. *Id*. at 407-08. Finding that this was a mandatory provision and that the board did not place the measure on the ballot by that time, the Court reversed the writ of mandamus. *Id*. Based on the plain terms of S.B. 781, the Court found that the plaintiffs' action to enforce the section of the law pertaining to the "St. Louis Students' Bill of Rights" was moot, because the express contingency of S.B. 781 had rendered that section unenforceable. *Id*.

2. This Court has also long recognized the General Assembly's constitutional authority to provide when certain sections of a law will become effective.

Moreover, the Court has also long recognized that the General Assembly may provide when certain *sections* of a law shall become effective. *State ex rel. Elsas v. Mo. Workmen's Compensation Comm'n.*, 318 Mo. 1004, 1012-13 (Mo. 1928); *State ex rel. Otto v. Kansas City*, 310 Mo. 542, 560-64 (Mo. 1925) ("In this State it is a very common thing for an act of the Legislature to provide that different parts thereof shall become effective on different dates."); *see State ex rel. Pedrolie v. Kirby*, 349 Mo. 1010, 1013 (Mo. 1942) (discussing and approving *State ex rel. Otto* as correctly following "established law").

3. The General Assembly thus has the constitutional authority to, as here, pass a law providing that a section within that law will become effective only on the happening of a future event.

In accord with these settled principles, the General Assembly may constitutionally pass a law providing that one section within that law will become effective only upon the happening of a future event. *See Bauer*, 111 S.W.3d at 406-08 (finding that the failure of an express contingency rendered a section of S.B. 781, RSMo. § 162.666, unenforceable); *Akin*, 934 S.W.2d at 299 (recognizing that, while the *enactment* of certain sections of a law could not be made contingent on a vote of the people, such sections' *effectiveness* could be made contingent in this manner). This is exactly what the General Assembly did here by providing in Section B of S.B. 7 that:

> **Section A** of this act relating to science and innovation **shall not become effective except upon the passage** and approval by signature of the governor only **of senate bill 8** relating to taxation and **enacted during the first extraordinary session of first regular session of the ninety-sixth general assembly**.

(LF, p. 226; Appx., p. 37.) (emphasis added). Here, then, in Section B of S.B. 7, the General Assembly made the effectiveness of Section A expressly contingent on the passage in the special session and approval by signature of the Governor of S.B. 8. Accordingly, the passage and approval of S.B. 8 was the future event on which the General Assembly conditioned whether or not Section A of S.B. 7 would become effective.

4. While the Court has not yet addressed a contingency expressly hinging the effectiveness of a section of one law on the enactment of another law, other states have affirmed the constitutionality of this legislative mechanism.

The Court has yet to address a contingency such as Section B of S.B. 7, which expressly hinges the effectiveness of a section of one law on the enactment of another.[2] However, numerous courts from other states have found, under principles of contingent legislation similar to Missouri's, that the legislature may make the effectiveness of one law contingent on the enactment of another. *See, e.g.*, *Wirtz v. Quinn*, 953 N.E.2d 899, 914-15 (Ill. 2011) ("[N]othing in our constitution prohibits making a piece of legislation contingent on a separate legislative enactment."); *Gaulden v. Kirk*, 47 So. 2d 567, 575 (Fla. 1950) (affirming the validity of a law made effective only upon the legislature's passage of two separate laws); *Shehane v. Wimbish*, 131 S.E. 104, 105 (Ga. Ct. App. 1925) (recognizing validity of making the effectiveness of one act conditioned on the passage of another, relying in part on Missouri law for the proposition that "it makes no difference what the nature of the contingency is, so that it be a moral and legal one, not

[2] The qualifying word "expressly" is needed here due to the case of *State ex rel. Barrett v. Dallmeyer*. In that case the Court determined that the two laws at issue before it were *in pari materia*, and found that the effectiveness of the first law was contingent on the enactment of the second, despite the absence of an express contingency clause. 245 S.W. at 1068.

opposed to sound policy"); *State Dept. of Human Res. (In the Matter of R.W.)*, 588 So. 2d 499, 500 (Ala. Civ. App. 1991) (recognizing validity of law made only to become effective on further legislative action); *State v. Reado*, 295 So. 2d 440, 444 (La. 1974) ("The [state] constitution does not prohibit the legislature from making an act effective, conditioned upon the passage of another law in the same session."); *see also Johnson v. State*, 60 P.2d 681, 682 (Wash. 1936) (state law's effectiveness made contingent on enactment of federal legislation); *Commonwealth v. Lichter*, 1 Pa. D. & C. 709 (Pa. C.P. 1922) (same, discussing the "abundant authority to the effect that the operation of a statute may be made contingent upon an extraneous fact, and that such extraneous fact may be the action of a foreign legislative body"); *Phoenix Ins. Co. v. Welch*, 29 Kan. 672, 675-78 (Kan. 1883) (effectiveness of state law made contingent on other states' passage of legislation).

For example, in *Gaulden v. Kirk*, the Florida Supreme Court affirmed the validity of a law made effective only on the passage of two other laws at the same special session of the legislature. 47 So. 2d at 575 (discussed by this Court with approval in *Chestnut, Inc. v. St. Louis*, 389 S.W.2d 823, 831 (Mo. 1965), on other grounds). The court denied the appellant's single subject challenge, finding that the law at issue had but one subject, notwithstanding that its effectiveness was made contingent on another bill that was part of a comprehensive tax program considered by the legislature at the same special session.

Id. Accordingly, the Court held that the law in question did not violate Florida's single subject rule and that it was valid contingent legislation. *Id*.

As recognized in these cases, then, on principles of contingent legislation substantially similar to those of Missouri's, a state legislature may constitutionally pass a law providing that its provisions, or (as a logical corollary) portions thereof, will become effective only upon the enactment of separate legislation. Under Missouri law, the limitation on this power would be that making the effectiveness of one act contingent on another must be, in a given case, "moral and legal" and "not opposed to sound policy."[3] *Poindexter*, 246 S.W. at 40; *Roeslein*, 214 S.W.2d at 16. Because, as further explained below, the General Assembly did not violate this limitation in making the effectiveness of Section A of S.B. 7 contingent on the passage and approval of S.B. 8, the Court should therefore find that Section B of S.B. 7 was within the General Assembly's constitutional authority to pass contingent legislation.

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[3] As detailed in Section I.D.3, *infra*, a further potential limitation is set forth in the case from which *Poindexter* and *Pond* stem: *State v. Parker*, 26 Vt. 357, 365 (Vt. 1854). There the court stated that "it makes no essential difference what is the nature of the contingency, so it be an equal and a fair one, a moral and legal one, not opposed to sound policy, ***and so far connected with the object and purpose of the statute as not to be a mere idle and arbitrary one***." *Id*. (emphasis added). Here, as discussed in Section I.D, *infra*, the connection between S.B. 7 and S.B. 8 is no mere idle or arbitrary one.

C. Section B of S.B. 7 does not violate the ninety-day minimum period set by Article III, Section 29 of the Missouri Constitution for a law to become effective, nor does it violate the Governor's signature or veto authority.

In arguing that Section B of S.B. 7 was not within the General Assembly's constitutional authority, Appellants' Brief fails to appreciate the fundamental distinction between (1) the enactment of a bill as law and (2) whether and when that law (or certain sections thereof) will go into effect.

This is perhaps best illustrated by Appellants' statement that "Section B of S.B. 7 purports to merely address when the bill would become law." (Appellants' Brief, p. 10.) Section B does no such thing. Instead, Section B addresses whether and when, *if passed into law*, Section A of S.B. 7 would take *effect*. This distinction is vital. *See Akin*, 934 S.W.2d at 299; *see also Springfield v. Allphin*, 384 N.E.2d 310, 314 (Ill. 1978) ("It therefore is important not to confuse the date on which the bill 'becomes a law' with the date on which that law becomes effective; the two need not coincide.").

Therefore the General Assembly may constitutionally enact a bill, or a section of a bill, in which one of its provisions will become effective only upon the happening of a future event. Section B does exactly this and therefore validly operates to render Section A of S.B. 7 unenforceable because, as discussed below, the event on which Section A's effectiveness is contingent has not occurred and, now, cannot occur.

1. Section B of S.B. 7 comports with the ninety-day minimum period set by Article III, Section 29.

Contrary to Appellants' argument, S.B. 7 does not violate the ninety-day minimum period set by Article III, Section 29 of the Missouri Constitution for a law to become effective. (Appellants' Brief, pp. 7-9.) As part of their argument, Appellants claim that S.B. 7 "never became effective." (*Id.*, p. 6.) To the contrary, pursuant to Article III, Section 29, Section B of S.B. 7 became effective on January 25, 2012, ninety days after the adjournment of the session at which it was enacted. (LF, p. 1101.) By operation of Section B, however, Section A did *not* become effective, and it can no longer become effective.

a. Article III, Section 29 sets a default ninety-day period for a law to become effective.

As recognized by this Court's contingent legislation jurisprudence, Article III, Section 29 of the Missouri Constitution sets the default time in which a law can become effective, unless the General Assembly properly inserts an emergency clause shortening that time. *State v. Pribble*, 285 S.W.3d 310, 317 (Mo. banc 2009). Article III, Section 29 provides, in relevant part:

> No law passed by the general assembly, except an appropriation act, shall take effect until ninety days after the adjournment of the session in either odd-numbered or even-numbered years at which it was enacted.

Mo. Const. Art. III, § 29. Here, the effect of Section B did not, and could not, alter this timing.

b. Section B of S.B. 7 does not alter the timing set forth in Article III, Section 29.

In this case, Section B states that Section A of S.B. 7 would "not become effective except upon the passage and approval by signature of the governor only of senate bill 8." (LF, p. 226; Appx., p. 37.) This language does not purport to alter the requirements of Article III, Section 29.

Instead, Section B became effective in accord with Article III, Section 29—on January 25, 2012, ninety days after the session at which S.B. 7 was enacted adjourned. (LF, p. 1101.) Section B, then, made Section A effective if the General Assembly had passed and the Governor approved S.B. 8 in the same special session. Necessarily, then, Section A could not have become effective any earlier than January 25, 2012, when Section B became effective. Accordingly, by the combined operation of Article III, Section 29, and Section B of S.B. 7, Section A could only have become effective "ninety days after the adjournment of the session . . . in which it was enacted" and upon passage and approval of S.B. 8.

To illustrate, if the General Assembly *had* passed S.B. 8 with the emergency clause contained in the final version considered by the General Assembly, and had the Governor approved it, nothing in the language of Section B of S.B. 7 would have *required* Section A to become effective earlier than the expiration of the ninety-day period set forth in Article III, Section 29. In other words, Section B did *not* state that "Section A *will* become *effective* at the precise time of the passage and approval . . . of senate bill 8." Thus, no conflict exists with Article III, Section 29.

In fact, the language of Article III, Section 29 merely reinforces the key distinction in this case between a law's *passage* and when that law becomes *effective*: "No *law passed* . . . shall take *effect* until ninety days after the adjournment of the session . . . at which it was enacted." Mo. Const. Art. III, § 29 (emphasis added). Section B thus in no way attempts to alter Section 29's default 90-day period, nor (as detailed below) does it interfere with the Governor's power to sign a bill into a law.

2. Section B of S.B. 7 comports with the Governor's signature and veto authority.

Also contrary to Appellants' contention, Section B of S.B. 7 comports with both the Governor's signature and veto authority. First, as demonstrated above, Section B simply designates when Section A of S.B. 7 would, or would not, become effective after S.B. 7 passed. Here, Appellants concede that the General Assembly passed S.B. 7 and the Governor signed it. (Appellants' Brief, p. 3.) The Governor's signature on S.B. 7 thus made it law. Mo. Const. Art. III, § 31.

Section B, then, merely operates to determine whether—after the Governor's signature and upon the expiration of ninety days from adjournment of the session—Section A of S.B. 7 would take *effect*. Mo. Const. Art. III, § 29; *Akin*, 934 S.W.2d at 299 (noting the "true distinction . . . between a delegation of a power to make law, which involves a discretion as to what the general law will be, and conferring an authority . . . as to how" or here, when, "the law shall be executed"); *Wirtz*, 953 N.E.2d at 915 (stating, under Illinois' substantially similar presentment and signature provisions: "The presentment clause does not mandate that, once the bill is signed by the Governor, the bill

must take effect immediately. It simply states that the bill 'shall become law.' The General Assembly has the authority to direct the date upon which an act shall take effect.").

Appellants concede that the General Assembly "can direct the governor in how to execute a law, even by making aspects of his authority or particular requirements contingent on particular circumstances or events." (Appellants' Brief, p. 15.) Appellants do not attempt to explain, however, why under Missouri's contingent legislation jurisprudence the General Assembly cannot also make *when* the law may be executed contingent on a future event. The reason Appellants fail to do this appears to come, again, from the misconception that the issue is "whether something becomes a law to be executed." (*Id*. at p. 16.) Here, there is no issue that S.B. 7 became law. Rather, Appellants simply seek to escape the effect of S.B. 7's plain terms. The law states in Section B that Section A would only be effective—and therefore executable—upon the passage and approval of S.B. 8. (LF, p. 226; Appx., p. 37.) These are the terms of the law the Governor signed.

Therefore, contrary to Appellants' characterization, the Governor's signature on S.B. 7 was final. Whether Section A of S.B. 7 later did or did not take effect had no impact on his signature's finality or, for that matter, his power to veto S.B. 7. *Id*. The Governor was free to veto S.B. 7 as he wished and could have sent it back to the General Assembly "*accompanied by his objections*." Mo. Const. Art. III, § 31 (emphasis added). The bill as signed cannot be re-cast after the fact to give the Governor's signature an effect that the legislature expressly did not intend and that the Constitution does not

permit. Here, the Governor did *not* return S.B. 7 to the General Assembly; instead, he signed S.B. 7 and it became law in the full form in which it was presented to him. *Id*. ("If the bill be approved by the governor it shall become a law.").

3. Appellants here seek to change the effect of the Governor's signature on S.B. 7.

Further, even minimal scrutiny of Appellants' arguments reveals that not Respondents but *Appellants themselves* are attempting to change the effect of the Governor's signature. Appellants would, in effect, have the Governor's signature render Section B, the contingency clause, *ineffective* and render Section A *effective*, contrary to the plain language of S.B. 7. (Appellants' Brief, pp. 7-11.)

Section B of S.B. 7, then, does not violate the Governor's authority to sign a bill into a law or his veto power. Moreover, if Appellants' arguments on the Governor's signature and veto authority were accepted, it would overturn the Court's deeply rooted contingency clause precedent and effectively abolish contingent legislation.

4. Appellants' position turns the Court's longstanding contingent legislation jurisprudence on its head and would effectively abolish contingent legislation and overturn 150 years of precedent.

Appellants' arguments on Article III, Section 29's ninety-day period and on the Governor's signature and veto authority, taken to their logical conclusion, would effectively abolish all contingent legislation. Appellants claim that they "do not suggest that there is no constitutionally permissible way to make some portion of a new law

contingent on subsequent events, including the passage of some prerequisite legislation in a future bill," but they articulate no example of a law that would pass muster under their arguments. (Appellants' Brief, p. 13.)

Under Appellants' view, a law that becomes effective upon an event occurring after the Governor's signature would necessarily take away the Governor's power to sign a bill into law or veto it. (Appellants' Brief, pp. 7-11.) Such a law would also, in Appellants' estimation, necessarily run afoul of the ninety-day period set forth in Article III, Section 29. (*Id.*) Essentially, then, no legislation containing a contingent effective date that could occur (a) after the Governor's signature, or (b) on any date other than exactly ninety days after the end of the session in which it was passed, could survive Appellants' arguments.

The Court's contingency clause jurisprudence, as detailed above, demonstrates the fallacy of Appellants' arguments. *See, e.g.*, *State ex rel. Barrett*, 245 S.W. at 1068-69; *State ex inf. Crain ex rel. Peebles*, 99 S.W.2d at 22-23; *Akin*, 934 S.W.2d at 299 (all recognizing the principle described in *Akin* as the "long-standing" rule "that the legislature may enact laws to take effect on the happening of a future event"). Appellants then essentially invite this Court to overturn over 150 years of contingency clause precedent. *See, e.g., Alexander*, 23 Mo. at 512-14; *Dallmeyer*, 245 S.W. at 1068; *Wilcox*, 45 Mo. at 463; *Roeslein*, 214 S.W.2d at 16; *Akin*, 934 S.W.2d at 299; *Bauer*, 111 S.W.3d at 406-08. Appellants offer no constitutionally sound principle, reason, or rationale for their rather bold invitation, nor does one exist.

To the contrary, longstanding and constitutionally grounded precedent demonstrates that Section B of S.B. 7 represents a valid exercise of the General Assembly's authority to determine when and on what proper conditions a law or a portion thereof may take effect. The Court should decline Appellants' invitation to overturn its deeply-rooted and well-reasoned precedent on this issue. Consistent with that precedent, the Court should instead uphold Section B of S.B. 7 as a valid exercise of the General Assembly's constitutional authority.

D. S.B. 7 complies with the single subject rule of Article III, Section 23.

Section B comports with the Missouri Constitution's single subject rule, in that it is not a separate subject and because Section B relates to the title of S.B. 7 and has a natural connection to the subject of S.B. 7. Missouri Constitution, Article III, Section 23 provides in relevant part: "No bill shall contain more than one subject which shall be clearly expressed in its title . . . ." *Akin*, 934 S.W.2d at 301-02 (citing *Hammerschmidt v. Boone County*, 877 S.W.2d 98 (Mo. banc 1994)). The subject of a bill shall be broadly interpreted in a way that upholds its constitutionality under Article III, § 23, unless the act "clearly and undoubtedly" violates the rule. *Id*.

The test for determining whether a bill contains more than one subject is "whether [the challenged provision] fairly relates to the subject described in the title of the bill, has a natural connection to the subject, or is a means to accomplish the law's purpose." *Trout v. State*, 231 S.W.3d 140, 146 (Mo. banc 2007); *Akin*, 934 S.W.2d at 301-02. If the bill's subject is not clearly expressed in its title, the Court may look beyond the title of the bill. *Hammerschmidt*, 877 S.W.2d at 102. Further, "[w]hether a bill violates the single-

subject requirement is a determination made *as to the bill as finally passed*." *Trout*, 231 S.W.3d at 146 (emphasis added).

1. In its title, S.B. 7 expressly refers to the contingency contained in Section B and therefore complies with the single subject rule.

Here, the title of S.B. 7 as finally passed is: "To repeal sections 196.1109 . . . RSMo, and to enact in lieu thereof fourteen new sections relating to science and innovation, *with a contingent effective date*." (LF, p. 201; Appx., p. 12) (emphasis added). Because S.B. 7's title expressly includes "a contingent effective date" as part of its subject, the part of the bill that contains that contingency (Section B) expressly "relates to the subject described in the title of the bill" as "finally passed." *Trout*, 231 S.W.3d at 146.

The question then becomes whether a subject that references the procedural mechanism for the efficacy of a section of that bill comports with the single subject rule. Appellants incorrectly frame the issue as whether a bill can "incorporate by reference one subject into a bill dealing with another," (Appellants' Brief, p. 11), when S.B. 7's title does no such thing.

Appellants do not cite any authority for the proposition that referring to a contingent effective date in a bill's title is anything other than fully compliant with the single subject rule. (*Id*. at pp. 11-13.) Appellants further fail to support their novel argument that S.B. 7's inclusion of the words "*with a contingent effective date*" in its title somehow incorporates by reference the subject of the entirety of another bill into its title. Consistent with the single subject rule, S.B. 7's title properly alerts the legislators voting

on it, and the Governor, that the efficacy of at least a portion of the bill depends on a contingency, much like the unquestionably proper inclusion of the words "with an emergency clause" in a bill's title properly alerts the legislators that the bill becomes effective immediately. *See* Mo. Const. Art. III, Sec. 29.

2. Section B also has a natural connection to S.B. 7's subject.

While Appellants, including the Governor himself, now argue that S.B. 7 violates the single subject rule, the Governor's own constitutionally mandated Proclamation[4] for the special session in which the General Assembly passed S.B. 7 described both S.B. 7 (referred to as "MOSIRA") and S.B. 8 (referred to in the Governor's Proclamation more generally as tax credit reform, and elsewhere commonly referred to as "Aerotropolis"), as part of a unified objective of the special session to create and fund "economic growth" and "incentives" with the implementation of "tax credit reform" to "inject accountability, transparency and result in taxpayer funds being spent in a fiscally effective manner." (Governor's Proclamation.)

In this way, the subject and purpose of S.B. 8, a bill "[t]o repeal sections 32.115 . . . RSMo, and to enact in lieu thereof forty-two new sections relating to taxation, with an emergency clause" has a natural connection to the subject of S.B. 7

[4] *See* Mo. Const. Art. IV. § 9 ("On extraordinary occasions [the Governor] may convene the general assembly by proclamation, wherein he shall state specifically each matter on which action is deemed necessary."). The Court may take judicial notice of this Proclamation. *State v. Adams*, 19 S.W.2d 671, 673 (Mo. banc 1929).

("[t]o repeal sections 196.1109 . . . RSMo, and to enact in lieu thereof fourteen new sections relating to science and innovation, with a contingent effective date"). The passage of S.B. 8 was designed to inject financial "accountability" and "transparency" into the funding of the government programs, including the science and innovation programs created by S.B. 7 and, as such, both, in the Governor's words, purported to contribute to economic development in Missouri. (Governor's Proclamation.)

Further, the text of S.B. 7 and S.B. 8 demonstrates that the Department of Economic Development is involved with the execution of each bill's provisions. (*See, e.g.*, LF, p. 842, "in regulations promulgated by the director of the department of economic development," p. 884, "as determined by the department of economic development," and pp. 218 and 223, referring to the statutorily authorized relationship between the Missouri Technology Corporation and the Department of Economic Development.) The text of S.B. 7 also shows that MOSIRA refers to the granting of a tax credit for entities engaged in "science and innovation" under the statutory provisions, and the text of S.B. 8 demonstrates that it concerns a comprehensive tax credit reform. (*Id.*, pp. 252 and 841-955, *passim*.)

Moreover, the first two versions of S.B. 8 actually included the substance of S.B. 7—MOSIRA—as part of their text. (*Id.*, pp. 227-447, as introduced, 448-666, Senate Committee Substitute for S.B. 8.) S.B. 8 as introduced, along with the Senate Committee Substitute, contained provisions of what later was passed in Section A of S.B. 7 as MOSIRA. (LF, pp. 335, 554, referring to MOSIRA.) This tends to further demonstrate

the connection of the subject matter of the bills that ultimately became the final versions of S.B. 7 and S.B. 8.[5]

Accordingly, Section B cannot be said to "clearly and undoubtedly" lack a natural connection to the subject of S.B. 7. *St. Charles*, 165 S.W.3d at 151-52 (holding that a bill with the subject of "emergency services" contained a single subject even though it also included a provision that prohibited tax increment financing districts in flood plains). In *St. Charles*, the Court determined that the prohibition on tax increment financing districts in flood plains related to "emergency services" in that the goal of the prohibition was to decrease the "likelihood that development will occur," thus creating "less need for emergency services." *Id.*

Here, then, S.B. 8 is at least as connected to the subject of S.B. 7 as that of tax increment financing to emergency services. In fact, in light of the Governor's Proclamation declaring the purposes of the special session in which the Governor

[5] Respondents recognize it could be contended that the separation of MOSIRA from S.B. 8 supports an argument that they are unrelated. Such an argument, however, would be less than compelling. Perhaps only one conclusion can reasonably be drawn from the fact that MOSIRA was at one point a part of S.B. 8—namely, that at a minimum, the bill's sponsor saw MOSIRA and S.B. 8 as related. The removal of MOSIRA from S.B. 8, on the other hand, can demonstrate a number of things, such as the possibility that certain legislators did not believe that MOSIRA could pass as part of S.B. 8, or did not believe that S.B. 8 could pass with MOSIRA included.

"deemed necessary" (Mo. Const. Art. IV. § 9) both bills for purposes of "economic growth," they are arguably even more connected.[6] Section B therefore complies with the single subject rule of Article III, § 23.

3. Section B of S.B. 7 is a valid procedural mechanism used to determine the timing of the efficacy of Section A of S.B. 7, not a separate subject.

As a final and conclusive matter, the history of contingent legislation demonstrates that like an emergency clause, the reference in S.B. 7's title to a "contingent effective date" is most properly viewed not as a separate subject of S.B. 7, but instead a procedural mechanism for a section of S.B. 7 to become, or not become, effective.

Missouri law does not condition the legislature's authority to hinge the effectiveness of laws, or sections thereof, only upon on events that must, themselves, be within the strict subject of the bill. *Poindexter*, 246 S.W. at 40; *Roeslein*, 214 S.W.2d at

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[6] As detailed in Section II.A.4, the nature of this connection between S.B. 7 and S.B. 8 distinguishes this case from *Legends Bank v. State*, 361 S.W.3d 383, 387 (Mo. banc 2012), in that only after the General Assembly added Section B (hinging the effectiveness of Section A on the passage and approval of S.B. 8) did S.B. 7 pass. In *Legends*, by contrast, the General Assembly in that case added unrelated provisions to a bill already destined for passage. *See id.* at 385-86 (describing the drafting history of S.B. 844, including the addition of multiple unrelated provisions to an otherwise straightforward procurement bill).

16; *Pond*, 93 Mo. 606, *overruled on other grounds by Buchardt*, 144 Mo. 83 ("It makes no difference what the nature of the contingency is, so that it be a moral and legal one, not opposed to sound policy.").

Moreover, this principle from *Poindexter* and *Pond* apparently stems from the case of *State v. Parker*, in which the Vermont Supreme Court stated:

> If the operation of a law may fairly be made to depend upon a future contingency, then, in my apprehension, it makes no essential difference what is the nature of the contingency, so it be an equal and a fair one, a moral and legal one, not opposed to sound policy, ***and so far connected with the object and purpose of the statute as not to be a mere idle and arbitrary one.***

State v. Parker, 26 Vt. 357, 365 (Vt. 1854) (emphasis added) (finding valid a contingency that could suspend the effective operation of a law) (cited by *Poindexter*, 246 S.W. at 40, and *Pond*, 93 Mo. 606). While the Supreme Court of Missouri did not expressly adopt the "idle and arbitrary" limitation of *Parker*, the relation between S.B. 7 and S.B. 8 demonstrates that, even if such limitation were to be applied, the contingency in Section B of S.B. 7 was "so far connected with the object and purpose" of S.B. 7 so as not to constitute a contingency that is merely "idle and arbitrary." *Id.*

Demonstrating this connection, as detailed above, the General Assembly considered both S.B. 7 and S.B. 8 within the same special session, and as part of the same policy initiative announced by the Governor in his constitutionally mandated Proclamation for the special session. (Governor's Proclamation.) Further, the text of

both S.B. 7 and S.B. 8 refer to tax credits, specifically, and relate to the goal of improving Missouri's economy, generally. (*Id.*, LF, pp. 225, 841-955.) In light of these connections between S.B. 7 and S.B. 8, it cannot be said that the act of making the effectiveness of S.B. 7 contingent on the passage of S.B. 8 is merely "idle" or "arbitrary."

Here, then, particularly in light of the presumptive constitutionality of legislation passed by the General Assembly, *see State ex rel. Danforth*, 518 S.W.2d at 72, the Court should find that Section B of S.B. 7 is a valid, constitutional enactment of contingent legislation under Missouri law.

E. The Court should affirm the Circuit Court's judgment, because—due to the non-occurrence of the contingency in Section B—Section A of S.B. 7 can now never go into effect and is therefore a nullity.

As Section B withstands all of Appellants' constitutional attacks, it is left to operate by its express terms. Section B of S.B. 7 states:

> **Section A** of this act relating to science and innovation **shall not become effective except upon the passage** and approval by signature of the governor only **of senate bill 8** relating to taxation and **enacted during the first extraordinary session of first regular session of the ninety-sixth general assembly**.

(LF, p. 226; Appx., p. 37) (emphasis added). The record below demonstrates, and Appellants admit, that S.B. 8 failed to pass in the special session and that the special session has ended. (LF., p. 10, ¶ 31, p. 46, ¶ 31, p. 1101.) Accordingly, the contingency

set forth in Section B of S.B. 7 can now never occur, and Section A of S.B. 7 is therefore a nullity.

On this point, the Supreme Court of Washington's case of *Johnson v. State* is instructive. 60 P.2d 681 (Wash. 1936). In *Johnson*, the Washington legislature passed an Unemployment Compensation Act ("UC Act") containing a provision that stated:

> This act is to become operative in the State of Washington from and after the enactment date of the Wagner-Doughton bill which is now before the congress of the United States.

Id. at 681-82. Congress subsequently did not pass the Wagner-Doughton bill, instead passing another bill covering the same subject matter, which was ultimately codified as the Social Security Act. *Id*. at 682. In a suit challenging the UC Act, the trial court declared the Act void and restrained its enforcement. *Id*. at 681. The Supreme Court of Washington affirmed, finding that because Congress did not enact the Wagner-Doughton bill, the state UC Act, while passed by the state legislature and signed by the Governor, never took effect. *Id*. at 682-83.

Accordingly, as with Washington's UC Act, the failure of S.B. 8 to pass in this case has left S.B. 7 with no substantively enforceable provisions. *See also Bauer*, 111 S.W.3d at 406-08 (finding that the failure of an express contingency rendered a section of S.B. 781, RSMo. § 162.666, unenforceable). The Circuit Court therefore properly enjoined the implementation of S.B. 7.

While the Circuit Court based this judgment upon the incorrect reasoning that Section B of S.B. 7 was unconstitutional, as noted above the Court will affirm a trial

court's judgment if it determines that the trial court reached the correct result on any basis supported by the record, even if it determines that the reasons for the trial court's decision were "wrong or insufficient." *Trimble*, 167 S.W.3d at 716; *Wilson*, 751 S.W.2d at 741. Accordingly, as the ultimate outcome of the Court's judgment—enjoining Appellants from enforcing S.B. 7—was correct, the Court should affirm the judgment of the Circuit Court.

II. Assuming *arguendo* the Court were to find Section B of S.B. 7 unconstitutional, then the Court should likewise affirm the Circuit Court's judgment declaring S.B. 7 null and void and enjoining its implementation because Section B is non-severable, in that it cannot be said beyond a reasonable doubt that the General Assembly would have passed S.B. 7 without Section B. (Basis to Affirm – Responds to Appellants' Point Relied On, Section B.)

Assuming for the sake of argument that the Court would find improper the procedure by which the General Assembly enacted S.B. 7, then the Court should still affirm the Circuit Court's ultimate conclusion that Section A of S.B. 7 is unenforceable. If Section B would constitute a constitutional violation, the violation invalidates S.B. 7 in its entirety.

The record before the Court demonstrates that including Section B was necessary to procure the passage of S.B. 7, which persistently failed to pass the legislature until the addition of Section B. (LF, pp. 125-226, 1095-96.) Appellants themselves argue that S.B. 7 and S.B. 8 were connected by "legislative strategy," the very kind of strategy

Appellants claim that the "'single subject' rule is there to prevent." (Appellants' Brief, p. 14.) Thus, it cannot be said beyond a reasonable doubt—as the Court's precedent requires—that the General Assembly would have passed S.B. 7 without Section B. Section B therefore cannot be severed from S.B. 7.

A. Severance is plainly inappropriate when the inclusion of the challenged provision was necessary to procure the bill's passage.

Where, as Appellants do here, a party claims that the procedure by which the General Assembly passed a bill is unconstitutional, this Court's precedent dictates that only where the Court is convinced "beyond a reasonable doubt" —the highest burden of proof in the law—that S.B. 7 *would* have passed *without* the challenged provision will the Court consider judicial severance. *Hammerschmidt v. Boone County*, 877 S.W.2d 98, 103 (Mo. banc 1994); *SSM Cardinal Glennon Children's Hosp. v. State*, 68 S.W.3d 412, 418 (Mo. banc 2002); *Legends Bank v. State*, 361 S.W.3d 383, 387 (Mo. banc 2012). As the Circuit Court correctly found, the record here demonstrates just the opposite: S.B. 7 would not have passed without the contingency clause at issue. (LF, pp. 125-226, 956-1086, 1095-96.)

1. The "beyond a reasonable doubt" test, contrary to Appellants' contention, is the proper standard for the Court to apply in procedural unconstitutionality cases such as this.

When it comes to procedural violations of the Constitution, the "beyond a reasonable doubt" test applies in considering severance. Appellants argue that the Circuit Court incorrectly "demanded that it be convinced 'beyond a reasonable doubt' that . . .

Section A [of S.B. 7] would have passed without Section B." (Appellants' Brief, p. 21.) Appellants apparently fail to recognize that the Court applies different severance tests depending on whether the constitutional violation is one of procedure or one of substance.

As stated above, where the challenge to a statute concerns the procedure by which the legislature enacted a law—such as an alleged violation of the single subject rule—the Court will find the entire bill at issue *invalid* ***unless*** the Court is *convinced* "*beyond a reasonable doubt*" that the offending provision is severable. *Hammerschmidt*, 877 S.W.2d at 103 (emphasis added).[7]

In cases in which the legislature commits a procedural violation of the Constitution, the Court applies the "beyond reasonable doubt" standard, as opposed to the standard set forth in RSMo. Section 1.140, because severance is "a more difficult issue" where "the procedure by which the legislature enacted a bill violated the Constitution."

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[7] In determining whether to sever a provision from an unconstitutionally enacted bill, *Hammerschmidt* stated that the Court may generally consider the following factors: (1) whether the void provision is essential to the bill's efficacy, (2) whether it is a provision without which the bill would be incomplete and unworkable, and (3) *whether the provision is one without which the legislators would not have adopted the bill*. *Hammerschmidt*, 877 S.W.2d at 103 (citing *Missourians to Protect the Initiative Process v. Blunt*, 799 S.W.2d 824, 832 (Mo. banc 1990)); *SSM Cardinal Glennon*, 68 S.W.3d at 418; *see also Legends Bank*, 361 S.W.3d at 387.

Id.[8] The "beyond a reasonable doubt" standard addresses the reality that it is generally more difficult for the Court to determine whether, and what, to sever from a procedurally defective bill than it is to determine if the legislature would have passed a procedurally sound bill absent a substantively unconstitutional provision. *See Legends Bank*, 361 S.W.3d at 391 n.5 (Fischer, J., concurring). The Court has thus applied the "beyond a reasonable doubt" test to claims of procedural unconstitutionality since at least as early as *Hammerschmidt*, and has applied this standard in numerous cases since. *See, e.g.*, *Carmack v. Dir., Mo. Dep't of Agric.*, 945 S.W.2d 956, 961 (Mo. banc 1997); *SSM*

[8] In contrast to the claimed procedural unconstitutionality here, in cases where the Court finds that a statutory provision is *substantively* unconstitutional (e.g., it violates the First Amendment), Section 1.140, RSMo., provides that the remaining provisions of the statute are valid unless:

> the [C]ourt 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 [C]ourt finds that the valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent.

Hammerschmidt, 877 S.W.2d at 103 (citing RSMo. § 1.140).

Cardinal Glennon, 68 S.W.3d at 418; *Rizzo v. State*, 189 S.W.3d 576, 581 (Mo. banc 2006); *St. Louis County v. Prestige Travel, Inc.*, 344 S.W.3d 708, 716 (Mo. banc 2011).[9]

Here, Appellants claim procedural unconstitutionality as to S.B. 7—that by adding an effective date contingent on the enactment of S.B. 8, the legislature committed a procedural violation of the Constitution. (Appellants' Brief, pp. 7-16; LF, p. 1098.) Appellants make no claim of substantive unconstitutionality. (*Id.*) Accordingly, the proper test to apply in this case is that the Court will not sever Section B from S.B. 7 unless the Court is convinced "beyond a reasonable doubt" that Section B can be severed from S.B. 7. *Hammerschmidt*, 877 S.W.2d at 103.

The import of the "beyond a reasonable doubt" terminology is significant. *Colo. v. Connelly*, 479 U.S. 157, 173 (U.S. 1986) (Brennan, J., dissenting) (referring to "beyond a reasonable doubt" as "the highest standard of proof" under the law). While

[9] As explained in further detail in section III.A, below, to some extent these cases do not fully differentiate between (a) the applicability of RSMo. Section 1.140 to the severance of substantively unconstitutional provisions and (b) the applicability of *Hammerschmidt*'s "beyond a reasonable doubt" review to the severance of provisions enacted in a procedurally unconstitutional manner. But as the Court explained in the *Hammerschmidt* decision, the ***Court's*** "beyond a reasonable doubt" standard, not the ***legislature's*** RSMo. Section 1.140 standard, supplies the rule for deciding severance when the legislature commits a procedural violation of the Constitution in securing passage of a bill. 877 S.W.2d at 103.

Missouri law does not expressly define the phrase "beyond a reasonable doubt," it at minimum requires that one be "firmly convinced" of the proposition at issue. *State v. Guinan*, 732 S.W.2d 174, 177 (Mo. banc 1987) (quoting MAI-CR2d 2.20). The record of S.B. 7's journey through the legislature reveals just the opposite.

2. The record demonstrates that the General Assembly would not have passed S.B. 7 without Section B.

Though, as noted, the test for severability of unconstitutional provisions has been articulated by this Court in various ways, this key principle is clear: If the addition of the void provision was essential to the passage of the bill, the void provision cannot be severed.

The Court's severance decisions uniformly reaffirm this fundamental principle. *See, e.g.*, *Hammerschmidt* ("[W]e are not convinced beyond a reasonable doubt that the legislature would have adopted the specific election procedures created in section 2 without authorizing a county to adopt the county constitution."); *Legends Bank*, 361 S.W.3d at 387 (severance is inappropriate where "it cannot be presumed the legislature would have enacted the valid provisions without the void one"); *SSM Cardinal Glennon*, 68 S.W.3d at 418 (holding that severance was appropriate where the Court was "convinced beyond a reasonable doubt" that "the legislature would have adopted" the bill without the unconstitutional provisions). Neither Appellants nor Amicus provides any substantial support for the proposition that an unconstitutional provision necessary to the passage of the enactment can be severed.

Here, the record demonstrates that the General Assembly would not have passed S.B. 7 without Section B. In other words, it cannot be said that "beyond a reasonable doubt that the legislature would have adopted" S.B. 7 without Section B, *Hammerschmidt*, 877 S.W.2d at 104, nor can it be "presumed the legislature would have enacted the valid provisions without the void one," *Legends Bank*, 361 S.W.3d at 387. In fact, the Circuit Court in this case made the *opposite* finding beyond a reasonable doubt, i.e., that S.B. 7 would not have passed without Section B: "[T]he Court is convinced beyond a reasonable doubt that the legislature would *not* have passed S.B. 7 without Section B." (LF, pp. 1095-96) (emphasis in original).

The record abundantly supports the Circuit Court's "beyond a reasonable doubt" finding. The record demonstrates that S.B. 7 never passed without Section B, and that it only passed when Section B was finally added in the midst of the special session. As shown in the Record on Appeal, every single version of S.B. 7 before the version finally passed did ***not*** contain the contingency ***and was not enacted***. (*Id*., pp. 125-226, 1095-96.) This is also true for every predecessor version of the bill that the Missouri Senate and House of Representatives attempted to pass. (*Id*., pp. 125-226, 956-1086, 1095-96) (containing all versions of S.B. 7 from the Senate's 2011 First Extraordinary Session and

all versions of House Bills 467 and 468 from the 2011 General Session).[10]

Appellants blithely attempt to dismiss this compelling evidence from the legislative record as "skeletal facts found in the legislative journals." (Appellants' Brief, p. 21.) Appellants' rejection of the bill's history attempts to cast aside this Court's case law on severance, which highlights the value of legislative drafting history in determining whether the legislature would have enacted a partially unconstitutional bill without the void provisions.

For example, in *Trout v. State*, faced with the issue of whether to sever a portion of a statute, this Court noted that severance ultimately turns on "whether the legislature would have enacted the valid provisions" within the bill at issue "without enacting" the invalid provision. 231 S.W.3d 140, 147-48 (Mo. banc 2007). Notably, *Trout* involved a First Amendment violation, an issue of substantive unconstitutionality, to which the Court appropriately applied the more permissive Section 1.140 standard of severance. The Court noted that,"[i]deally, the resolution of this and other severance issues,

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[10] Further, as noted above in Section I, the first two versions of S.B. 8 in the Senate's special session included MOSIRA as part of their text. The number of potential reasons for the removal of MOSIRA from S.B. 8—including that certain legislators did not believe MOSIRA could pass as part of S.B. 8, or did not believe S.B. 8 could pass with MOSIRA as part of it—simply go further to show that it cannot be said beyond a reasonable doubt that the General Assembly would have passed MOSIRA as S.B. 7 without the contingency contained in Section B.

consistent with [S]ection 1.140, and true to legislative intent, is by reference to the substantive legislative history, *or drafting history*, of the bill." *Id*. (emphasis added). The Court therefore examined the history of the bill at issue, HB 1900, a bill that (as passed) repealed campaign contribution limits to state legislators but enacted a "black-out" period for such contributions during the legislative session. *Id*.

The trial court in *Trout* found the "black-out" provision violated the First Amendment, so the Court examined the history of HB 1900 to see whether the General Assembly would have repealed the campaign contribution limits without also enacting the "black-out" provision. *Id*. Most importantly, the Court noted that an amendment was offered on the floor of the Senate to strike the black-out period from HB 1900, but that amendment failed. *Id*. Accordingly, the Court determined that even under Section 1.140's more permissive severability standard, it could not sever the unconstitutional "black-out" provision from HB 1900 because the bill's history demonstrated that the legislature would not have repealed the campaign contribution limits without that provision. *Id*.; *cf. Hammerschmidt*, 877 S.W. 2d at 104 (reviewing the course of the bill's passage through the House).

Here, the history of S.B. 7 tells a similar, if not more compelling, story. Every single prior version of S.B. 7 did ***not*** contain the contingency provision at issue ***and failed to pass***. (LF, pp. 125-226, 956-1086, 1095-96.) Only after Section B was added to S.B. 7 in the midst of the special session did it finally pass. (*Id*., p. 226.) In *Trout*, the drafting history led the Court to determine that, even under Section 1.140, it could not sever the provision at issue. 231 S.W.3d at 147-48. In this case—where the Court must

ask whether it is convinced "beyond a reasonable doubt" that the General Assembly would have enacted S.B. 7 without Section B—the history of S.B. 7 cements the issue. Contrary to Appellants' argument, the Court does not have to "guess" as to what would have happened to S.B. 7 absent the inclusion of Section B. (Appellants' Brief, p. 22.) The record amply demonstrates that, absent Section B, S.B. 7 would have failed to pass. Because S.B. 7 would not have passed without the unconstitutional provision, severance is inappropriate.[11]

B. Application of the *Hammerschmidt* factors to S.B. 7's plain language further shows that severance is inappropriate in this case.

The application of *Hammerschmidt*'s three factors to the plain language of S.B. 7 reinforces the conclusion that Section B cannot be severed. As discussed above, in determining whether to sever a procedurally unconstitutional provision from a bill,

[11] Last, even assuming for the sake of argument that Section 1.140 would be relevant to the Court's severance analysis in this case, the Court should still decline to sever Section B from S.B. 7. As detailed above, the fact that the very subject of S.B. 7 contains an express reference to Section B; that Section B expressly sets forth if and when Section A of S.B. 7 would take effect; and that the legislative history shows that the General Assembly would not have passed S.B. 7 without Section B, all amply demonstrate that the "valid provisions of" S.B. 7 "are so essentially and inseparably connected with, and so dependent upon" Section B "that it cannot be presumed the legislature would have enacted" S.B. 7 without Section B. RSMo. § 1.140.

Hammerschmidt stated that the Court will consider (1) whether the void provision is essential to the efficacy of the bill, (2) whether it is a provision without which the bill would be incomplete and unworkable, and (3) whether the provision is one without which the legislators would not have adopted the bill. 877 S.W.2d at 103 (quoting *Missourians to Protect the Initiative Process*, 799 S.W.2d at 832); *SSM Cardinal Glennon*, 68 S.W.3d at 418.

Here, in addition to the legislative record, the plain language of S.B. 7 demonstrates both that (1) Section B is *essential* to the *efficacy* of the remainder of S.B. 7, and (3) the General Assembly would not have passed S.B. 7 without Section B. As such, the first and third factors are dispositive.

First, S.B. 7's plain language demonstrates that Section B is "essential to the *efficacy*" of the version of S.B. 7 that the General Assembly passed. S.B. 7 contains two Sections—A and B. (LF, pp. 201-226; Appx. pp. 12-37.) Section B sets forth the express condition on which Section A was, or was not, to become *effective*. *Webster's*, for example, defines "efficacy" as "the power to produce a desired result or effect." *Webster's Encyclopedic Unabridged Dictionary of the English Language* (1989); *see also Merriam-Webster Online Dictionary*, http://www.merriam-webster.com/dictionary/ efficacy (last visited July 19, 2012) (defining efficacy as "the power to produce an effect"). Therefore, in that Section B controls if and when Section A will take *effect*, Section B is "essential to the *efficacy*" of the remainder of S.B. 7. The plain language of the bill demonstrates that Section A of S.B. 7 would not take effect unless and until the event set forth in Section B—the passage and approval of S.B. 8—occurred.

In a similar vein, the plain language of S.B. 7 also demonstrates that the General Assembly would not have adopted S.B. 7 without Section B. The text of Section B demonstrates the General Assembly's clear intent that "*Section A* of this act . . . *shall not become effective except upon the passage* and approval by signature of the governor only *of senate bill 8*." (LF, p. 226) (emphasis added). Moreover, the very title of S.B. 7 expressly references Section B: ". . . with a contingent effective date." (*Id*., p. 201.) Accordingly, in light of the plain text of S.B. 7—expressly hinging the efficacy of Section A, which contains the main substantive provisions of S.B. 7, on the passage of S.B. 8—Section B's language demonstrates that it is the lynchpin of the efficacy of Section A.

To reach the opposite conclusion, the Court would have to conclude that the legislature meant the exact opposite of what Section B says, which, under any test, cannot be done. Instead, the Court must presume that the legislature voted on and intended to pass the bill *in haec verba*. *Wollard v. Kansas City*, 831 S.W.2d 200, 203 (Mo. banc 1992). Given the express language of Section B, no other conclusion can be reached but that the legislature intended Section A to become effective if, *and only if*, S.B. 8 passed and became law.

The boilerplate "severability" provision contained in Section A of S.B. 7 does not alter this conclusion. As Appellants recognize, the Court has found that such self-inserted severability provisions are not controlling. (Appellants' Brief, p. 19 n.2) (citing *Preisler v. Calcaterra*, 243 S.W.2d 62, 66 (Mo. banc 1951)) (disregarding the severability clause inserted by the legislature in finding the act in question non-

severable).[12] The inclusion of this boilerplate severability provision here is belied most directly by the fact, again, that the General Assembly used Section B as the point on which the substantive effect of the entire bill turned. Accordingly, in addition to S.B. 7's legislative record, the plain language of S.B. 7 demonstrates that Section B cannot be severed from it.

C. *Legends Bank* likewise confirms that severance is inappropriate here.

Appellants and Amicus rely heavily on *Legends Bank v. State*, 361 S.W.3d 383 (Mo. banc 2012), but their reliance is misplaced. In *Legends Bank*, this Court considered a bill that was originally introduced as an uncontroversial procurement bill, to which the legislature added provisions relating to "campaign finance, ethics, and keys to the capitol dome." *Id.* at 387. The Court held that the addition of these extraneous provisions unrelated to procurement violated the original purpose requirement of Article III, Section

[12] In its judgment below, the Circuit Court did not find Section A's boilerplate severability clause "irrelevant," as Appellants claim. (Brief of Appellants, p. 19 n.2.) Instead, the Circuit Court simply found that the clause was not controlling and that the facts of S.B. 7's passage belied its applicability to the case at hand. (*See* LF, pp. 125-226, 956-1086, 1096, showing that all prior versions of S.B. 7 and the House bills also had the boilerplate severability clause, so it cannot be said that the severability clause was added at the same time as the contingency clause to address the presence of the contingency clause.)

21.[13] *Id.* The Court held that the later-added provisions could be severed because the Court was "convinced beyond a reasonable doubt that the specific provisions in question [were] not essential to the efficacy of the bill," and that the valid provisions were not "so essentially and inseparably connected with, and so dependent on, the void provision that it cannot be presumed that the legislature would have enacted the valid provisions without the void one." *Id.* The bill was severable because it could be fairly presumed that "the legislature would have enacted the valid provisions without the void one." *Id.*

In *Legends Bank*, there was no reasonable claim that the procurement provisions, which the Court left intact, would not have passed the legislature without the additional provisions.[14] *Legends Bank* thus presented a different situation—a situation in which legislators added unrelated provisions to a bill already destined for passage. *See id.* at 385-86 (describing the drafting history of S.B. 844, including the addition of multiple unrelated provisions to an otherwise straightforward procurement bill).

Accordingly, in conducting its severance analysis, this Court correctly focused on factors indicating whether the bill would remain functional without the additional

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[13] It is worth specific note that in *Legends Bank*, as in *Trout*, the Court examined the history of the bill at issue as it traveled through the legislative process. *Id*.

[14] As further evidence, Judge Fischer stated as the reason for his concurrence that "the provisions allowed to stand in this case beyond a reasonable doubt would have passed by a majority vote of both houses of the legislature." *Id*. at 393 n.10 (Fischer, J., concurring).

provisions—i.e., whether the objectionable sections were "essential to the efficacy of the properly enacted provisions pertaining to procurement," and whether the procurement provisions "are complete and are capable of being executed in accordance with legislative intent." *Id.* Under the situation presented in *Legends*, then, the factors that consider the practical functionality of the bill absent the objectionable provisions were the best and most natural way to determine whether it can or cannot be "presumed the legislature would have enacted the valid provisions without the void one." *Id.*

By contrast, instead of saddling an innocuous legislative vehicle with unrelated pet provisions, the General Assembly in this case added Section B to a bill that previously gave no indication of successful passage. Only after this addition did S.B. 7 pass. In such circumstances, severance is inappropriate because "it cannot be presumed the legislature would have enacted the valid provisions without the void one," regardless of the functionality of the remaining provisions. *Id.* In this case, no matter how logical or functional Section A of S.B. 7 may have been, the record demonstrates that S.B. 7 would not have passed without Section B.

Appellants, therefore, badly misconstrue *Legends Bank* when they characterize its holding as considering "whether if the invalid provision is eliminated, the rest constitutes a bill that the General Assembly *logically could have enacted*." (Appellants' Brief, p. 17) (emphasis added). The ultimate consideration, in *Legends Bank* and this Court's other severance cases, is not whether the legislature "logically could have enacted" the valid provisions, but whether the legislature, without the void provisions, "*would have* enacted" them. *Legends Bank*, 361 S.W.3d at 387 (emphasis added). The functional

analysis of *Legends Bank* provides the natural way to make this determination in cases where the single subject violation is achieved by saddling a bill with unrelated riders. But nothing in *Legends Bank*—nor any other case cited by Appellants—supports their contention that this Court should uphold a bill that the legislature "logically could have enacted," but consistently *failed* (or was unable) to enact, without committing a procedural violation of the Constitution.

For these reasons, Appellants' novel, unsupported, and far too permissive proposed test of considering whether the legislature "logically could have enacted" cannot supply the basis for decision. It would, in essentially all cases, allow legislation to stand that only achieved passage by violating the procedural mandates of the Missouri Constitution. As further explained below, such a rule would effectively eviscerate these mandates, leaving the General Assembly free to violate them at their whim.

In sum, assuming *arguendo* that the Court would find that Section B constituted a constitutional violation, that violation invalidates S.B. 7 in its entirety. The record before the Court demonstrates that including Section B was necessary to procure the passage of S.B. 7, which persistently failed to pass the legislature until the addition of Section B. Therefore, it cannot be said beyond a reasonable doubt that the General Assembly would have passed S.B. 7 without Section B. The language of Section B makes the opposite conclusion self-evident, as the Circuit Court correctly held. The Court should, accordingly, refuse to sever Section B from S.B. 7.

III. In the alternative, the Court should decline to sever Section B from S.B. 7 because, in procedural violation cases, the Court should exercise judicial severance only where the Court is convinced beyond a reasonable doubt that the General Assembly would have passed a bill without the challenged provision. (Alternative Basis to Affirm – Responds to Appellants' Section B.)

In the alternative, and again assuming solely for sake of argument that the Court would find that the procedure by which the General Assembly enacted S.B. 7 was improper, the Court can and should use this case to clarify the standard for judicial severance *in procedural violation cases*. In such cases, as set forth in *Hammerschmidt*, the Court should only sever an unconstitutionally enacted bill where the Court is convinced beyond a reasonable doubt that the General Assembly would have passed the bill without the challenged provision.

A. The cases applying judicial severance since *Hammerschmidt* demonstrate that the Court should clarify when and how to apply the practice.

While the preceding Section of this Brief has endeavored to harmonize the Court's precedent relating to judicial severance, this endeavor itself reveals that a clarification of when and how to apply judicial severance would benefit the Court, the General Assembly, and the people of Missouri by providing more certainty and accountability to the Constitution with respect to the circumstances in which provisions of a bill will and will not be severed.

For example, despite the Court's delineation in *Hammerschmidt* between the different severance standards applicable to substantive versus procedural violations of the Constitution, the Court has on several occasions cited the language of RSMo. Section 1.140 in analyzing whether to sever bills that the General Assembly enacted in violation of the Constitution's procedural mandates. *See, e.g.*, *Carmack*, 945 S.W.2d at 961 (citing Section 1.140); *SSM Cardinal Glennon*, 68 S.W.3d at 418 (same); *Rizzo*, 189 S.W.3d at 581 (same); *Mo. Ass'n of Club Execs., Inc. v. State*, 208 S.W.3d 885, 888-89 (Mo. banc 2006) (same); *Prestige Travel*, 344 S.W.3d at 716 (not citing Section 1.140 but applying its language and its presumption of severability); *Legends Bank*, 361 S.W.3d at 386 (same).

Additionally, the Court's severance analysis has sometimes examined whether a bill would not have passed without the challenged provisions, *see, e.g.*, *Hammerschmidt*, 877 S.W.2d at 103; *SSM Cardinal Glennon*, 68 S.W.3d at 418, and other times the Court's severance analysis has appeared to solely focus on whether the bill would be "workable" without the challenged provision, *see, e.g.*, *Legends Bank*, 361 S.W.3d at 386; *Mo. Ass'n of Club Execs., Inc.*, 208 S.W.3d at 888-89.

These decisions demonstrate that, where the General Assembly has passed a bill in violation of the Missouri Constitution, there is a potential lack of clarity regarding the standard for applying judicial severance. Here, then, we respectfully submit that the Court should take this opportunity to clarify (1) that RSMo. Section 1.140 does not govern severance in cases where the General Assembly has passed a bill in violation of the Missouri Constitution's procedural mandates, and (2) that the Court will sever a

provision from bills enacted in violation of the procedural mandates of the Constitution only where the Court is convinced beyond a reasonable doubt that the General Assembly would have passed the bill without the provision.

This clarification is appropriate because, as further detailed below, the "would have passed without the offending provision" test is the only proper one to apply in cases in which the General Assembly has passed a bill by a procedure that violates the Missouri Constitution. At root, a bill enacted in violation of the Missouri Constitution's single subject rule, for example, will almost always be "complete and workable" without the alleged offending provision, but if the bill would not have passed without that provision, then the Court risks violating the separation of powers guaranteed by Missouri's Constitution if it would allow the remainder of the bill to stand.

B. The Court is not compelled to sever bills that the General Assembly has enacted in violation of the Missouri Constitution's procedural mandates.

As noted above, the Court is not directed by statute to sever provisions from bills that the General Assembly commits procedural violations of the Constitution to pass. *Hammerschmidt*, 877 S.W.2d at 102. Nor, in light of the separation of powers guaranteed by the Missouri Constitution, would it be appropriate to expect or require the Court to do so. The Court need not save legislation that, at its root, is unconstitutional.

For example, the Court's statement that "[a]ttacks against legislative action founded on constitutionally imposed procedural limitations are not favored" is not properly relevant to the severance analysis, only to the initial constitutional challenge.

Legends Bank, 361 S.W.3d at 386. If the Court finds that, despite the disfavor of such challenges, a bill violates a procedural limitation of the Constitution, the Court will then simply decide whether that provision should, or should not, be severed from the bill under the Court's severance analysis. *Id*. at 387 (applying the beyond a reasonable doubt standard, not a presumption of constitutionality, upon determining that the General Assembly enacted the bill at issue by a procedure violating the Missouri Constitution).

In other words, once found unconstitutional, nothing (not even the practice of judicial severance) *requires* the Court to sever provisions from unconstitutionally enacted legislation. Indeed, as this Court unanimously stated in *Prestige Travel*, judicial severance runs the risk of violating the separation of powers on which our constitutional government is founded. *Prestige Travel*, 344 S.W.3d at 716 (citing Alexander R. Knoll, *Tipping Point: Missouri Single Subject Provision*, 72 Mo. L. Rev. 1387 (2007)).

Accordingly, Amicus misplaces its reliance on the "presumption of constitutionality" standard at the beginning of its severance argument. (Amicus' Brief, p. 16.) Amicus quotes *Rentschler v. Nixon*, 311 S.W.3d 783, 787 (Mo. banc 2010), for this well-established presumption, but (tellingly) *Rentschler* did not address severance. *Rentschler* simply upheld the statutes at issue against the constitutional challenge. *Id*. at 789. This misplaced reliance by Amicus belies the true nature of its argument. Amicus, purporting to speak on behalf of the "business community" (and presumably its lobbyists), would have the Court save each and every law that the "business community" favors, regardless of whether such laws were constitutionally enacted and regardless of

whether they would not have passed but for the addition of unconstitutional provisions. (Amicus Brief, pp. 16-18.)

Here, the Court can and should decline to sever Section B from S.B. 7, and in doing so clarify that the only appropriate situation in which to sever an offending provision from a bill found to be enacted via a procedure that violates the Missouri Constitution is where the Court is convinced beyond a reasonable doubt that the General Assembly would have passed the bill without the offending provision. *Hammerschmidt*, 877 S.W.2d at 104; *Prestige Travel*, 344 S.W.3d at 716.

C. Severing a bill where the Court is *not* convinced beyond a reasonable doubt that the General Assembly would have passed the bill without the offending provision risks violating the separation of powers mandated by the Missouri Constitution by allowing legislation to survive that may not otherwise have passed.

As this Court has noted in several opinions, including the unanimous opinion in *Prestige Travel*, the practice of judicial severance risks doing damage to the legislative process and the doctrine of separation of powers. *Prestige Travel*, 344 S.W.3d at 716 (citing Alexander R. Knoll, *Tipping Point: Missouri Single Subject Provision*, 72 Mo. L. Rev. 1387 (2007); Michael D. Gilbert, *Single Subject Rules and the Legislative Process*, 67 U. Pitt. L. Rev. 803, 867 (2006)); *see also Legends Bank*, 361 S.W.3d at 390-91 (Fischer, J., concurring); *Schaefer v. Koster*, 342 S.W.3d 299, 306 n.9 (Mo. banc 2011) (Fischer, J., dissenting).

Specifically, whenever the Court does not invalidate a bill that the General

Assembly has enacted in violation of the Missouri Constitution's single subject rule and severs only a portion of the bill, it risks allowing legislation to survive that otherwise might not have passed. *Id.* In such a situation the Court risks becoming a legislative body itself, thereby violating the separation of powers protected by the United States Constitution and by Article II, Section 1 of the Missouri Constitution. *Id.*

D. The Court should exercise judicial severance in procedural violation cases only where the Court is convinced beyond a reasonable doubt that the General Assembly *would* have passed a bill without the challenged provision, and here the record demonstrates the opposite—that S.B. 7 would not have passed without Section B.

In order to limit this risk of itself violating the Constitution, the Court should exercise the practice of severing a bill enacted in violation of the procedural mandates of the Constitution only where the Court is convinced beyond a reasonable doubt that the General Assembly would have passed the bill without the offending provision. This—as opposed to Appellants' novel, unsupported, and far too permissive "not incomplete and unworkable" analysis—is the only proper consideration in such a case. A bill enacted in violation of the single subject rule, for example, will almost always be "complete and workable" without the alleged offending provision. Thus, to apply a "not incomplete and unworkable" analysis to such a bill would be tantamount to allowing every such bill to stand, no matter how egregious the constitutional violation.

To illustrate, where a bill contains multiple unrelated subjects, each subject will nearly always constitute an integrated, workable whole after the others are excised. In

other words, if the parts constituted an integrated whole before severance, there would not be a single subject problem in the first place. So, relying on the "not incomplete and unworkable" factor in deciding whether to sever a bill with multiple subjects would almost always (if not every time) result in severance, and therefore would result in the upholding of the bill regardless of whether the General Assembly would otherwise have passed it or not. This would effectively gut the purpose of the single subject rule, which is designed to require the legislature to give an up-or-down vote to each discrete legislative subject that it considers.

Additionally, allowing such bills to stand would further contribute to the very problem that has concerned the Court the most with judicial severance—the risk of subverting the legislative process. *Prestige Travel*, 344 S.W.3d at 716 n.6. Accordingly, where the Court determines that the General Assembly has enacted a bill by a procedure that violates the Missouri Constitution, the Court should decline to sever the offending portion to "save" the bill unless the Court is convinced beyond a reasonable doubt that the General Assembly would have passed the bill without the offending provision.

This clarified standard, moreover, will create certainty in the legislative process—the very certainty, for instance, that Amicus purportedly desires. (Amicus' Brief, p. 20.) Amicus claims that certainty would somehow be promoted by the Court selecting certain portions of legislation to survive regardless of whether or not they would have originally passed as a whole. Severance, more frequently applied, would in this way actually lead to more uncertainty. On the other hand, applying severance only where the Court is

convinced beyond a reasonable doubt that the rest of the bill would have passed on its own will create greater predictability for the people of Missouri and their representatives.

Therefore—and again assuming solely for the sake of argument that the Court would find Section B of S.B. 7 to violate a procedural mandate of the Missouri Constitution—the Court should clarify here that (1) RSMo. Section 1.140 does not govern severance in cases where the General Assembly has passed a bill in violation of the Missouri Constitution's procedural mandates, and (2) that the Court will sever a provision from such a bill only where the Court is convinced beyond a reasonable doubt that the General Assembly would have passed the bill without the provision. Under this clarified standard, the Court should decline to sever Section B from S.B. 7 because the record demonstrates in this case that the General Assembly would not have passed S.B. 7 without Section B.

IV. In the alternative, the Court should decline to sever Section B from S.B. 7 because the Court should not sever bills enacted in violation of the procedural mandates of the Constitution, in that declining to sever upholds the will of the people as expressed in the Constitution, holds the legislature constitutionally accountable, and has the strong potential to stem the ever-growing tide of severance cases in Missouri courts. (Alternative Basis to Affirm – Responds to Appellants' Section B.)

As a further alternative—and again assuming solely for the sake argument that the Court would find Section B of S.B. 7 to violate a procedural mandate of the Missouri

Constitution—the Court should decline to sever Section B from S.B. 7 because the Court should decline to continue to sever bills enacted in violation of the Missouri Constitution.

If, despite the repeated failure of S.B. 7 and its predecessors to pass without Section B, as confirmed by the legislative record, the Court would find that it still cannot effectively determine whether S.B. 7 would not have passed without Section B (or if the Court would otherwise find Section B to not be essential to the efficacy of S.B. 7), such a situation would demonstrate the lack of a workable, effective check against procedurally unconstitutional legislation.

In other words, the General Assembly could add provisions that violate the Constitution at will, encouraged by the possibility that such provisions will gain votes and enable passage of otherwise un-passable laws, without concern that Court would strike down laws passed only as a result of unconstitutional maneuvering. *See Prestige Travel*, 344 S.W.3d at 716 n.6. Accordingly, the present case would represent the appropriate point at which to cease severing bills enacted in violation of the Missouri Constitution.

A. Declining to sever bills enacted in violation of the Missouri Constitution's procedural mandates would allow the Court to stay out of determining legislative intent where such violations have occurred.

Although the legislative record here demonstrates in a clear and uncomplicated way that the General Assembly would not have passed S.B. 7 without Section B, Respondents recognize that this may not be the same in every case. Some cases may

present difficulties for the Court to determine from the text of a bill or the legislative record whether the bill would not have passed without a challenged provision.

The "beyond a reasonable doubt" standard addresses this issue to some extent, i.e., when presented with such difficulties in reading a legislative record, the Court need go no further—a muddled record dictates the conclusion that the Court cannot determine beyond a reasonable doubt that the General Assembly would have passed the bill absent the challenged provision. In adopting the "beyond a reasonable doubt" standard, this Court has held itself to the same standard that a jury must apply in deciding the fate of a criminal defendant. Where the evidence does not establish guilt "beyond a reasonable doubt," the jury must acquit. *Guinan*, 732 S.W.2d at 177 (quoting MAI-CR2d 2.20). Much the same, where the record does not establish that the General Assembly would have passed a bill without the offending provision, the Court will not sever the bill.

However, the Court may also properly determine that having to read the General Assembly's intent in every such instance would frustrate judicial economy and would, itself, pose a risk to the separation of powers. Both Appellants and Amicus claim that having to examine the legislative history of a bill in order to determine whether or not to sever would lead to a parade of horribles, such as requiring the testimony of legislators in court proceedings. (Appellants' Brief, p. 22, arguing that when it comes to whether a bill would have passed without the challenged provision, "all a court could ever do is guess" and citing Justice Scalia's disdain for attempts to "reconstruct legislators' intentions"; Amicus Brief, p. 19, claiming that "the court would have to look at every version of the

respective bill, all predecessor bills, and all bills with the same subject matter and/or the same or similar language").

Assuming for sake of argument that the dire consequences feared by Appellants and Amicus would in fact result, this actually argues *against* the Court severing such bills. The Court can most properly remove itself from having to determine legislative intent in these cases by declining to continue severing bills that the legislature passes by unconstitutional maneuvering.

Other courts have so decided to decline to sever such bills, based on similar reasoning. *See, e.g., People v. Olender*, 222 Ill. 2d 123, 146 (Ill. 2005) ("Allowing for severability with regard to single subject violations would be contrary the purposes behind the single subject rule. This court previously has noted the seriousness with which this court regards single subject clause violations. We therefore decline the State's invitation to sever those provisions in Public Act 88-669 that violate the single subject clause.") (internal quotation omitted); *Evans v. State*, 872 A.2d 539, 552-53 (Del. 2005) ("[A] severability clause is unenforceable where, as in House Bill No. 31, the legislation collectively violates the single-subject provision . . . . If it were otherwise, the policy considerations served by the single-subject provision would be seriously undermined. Accordingly, the severability clause does not shield any of the substantive provisions of House Bill No. 31 from invalidation.") (internal citations omitted); *Power, Inc. v. Huntley*, 235 P.2d 173, 178 (Wash. 1951) (refusing, despite presence of severability clause, to sever bill in violation of the single subject rule). Similarly, assuming for sake of argument the Court would find that the General Assembly violated the Missouri

Constitution's procedural mandates, the Court should decline to sever Section B from S.B. 7.

B. Declining to sever bills enacted in violation of the Missouri Constitution's procedural mandates would encourage the General Assembly to pass laws in a constitutional manner and reduce the number of severance cases in Missouri's courts.

Furthermore, in a more positive sense, declining to sever bills enacted in violation of the Missouri Constitution's procedural mandates would encourage more principled, constitutional behavior on the part of legislators and a reduction in the number of such cases in Missouri's courts.

If the addition of procedurally unconstitutional provisions leads to invalidation of a bill, legislators will naturally be discouraged from this behavior. *Prestige Travel*, 344 S.W.3d at 716 (citing Knoll, *Tipping Point: Missouri Single Subject Provision*, 72 Mo. L. Rev. 1387). In other words, legislators whose bills are found invalid because of such additions may be less likely to bargain with those who add such provisions, and their constituents may well bring pressure on these legislators for the delay or failure to enact the legislation. *Id*. As it stands now, legislators have little reason to be concerned with such consequences, particularly if the Court is willing to come to the rescue of the General Assembly rather than require it to live within the bounds of the Constitution.

Rescuing unconstitutionally passed legislation has only increased the number of cases dealing with disputes over the manner in which the legislature has enacted bills; the number continues to rise annually. *Legends Bank*, 361 S.W.3d at 390-91 (Fischer, J.,

concurring) (counting 56 reported single subject cases heard by the Supreme Court before 2007, and eight more cases heard by the Court since then addressing the single subject, clear title, or original purpose provisions).[15] Appellants' argument that the "General Assembly relies" on the practice of judicial severance is all the more reason why the problem continues to grow. (Appellants' Brief, p. 20 n.3.)

Declining to sever bills enacted in violation of the Missouri Constitution would help discourage the legislative maneuvering that leads to such constitutional violations. Legislators would be encouraged to consider whether the laws they pass are constitutional and to refrain from inserting provisions that are almost certain to incite litigation after enactment. *See Prestige Travel*, 344 S.W.3d at 716 n.6. Both as a matter of encouraging "principled, constitutional behavior" and as a matter of judicial economy, then, considering severance only in cases of *substantive* constitutional violations would better serve the people of Missouri.

As a final consideration, the Court has already put the General Assembly on notice regarding its increasing disfavor with severing unconstitutionally enacted bills. For example, well before the 2011 Special Session in which S.B. 7 was passed, the Court issued its unanimous *Prestige Travel* decision expressly stating is discomfort with the practice. *Id.* The Court put the General Assembly on notice that it must abide by its obligation to uphold the procedures set forth in the Missouri Constitution.

[15] This case, of course, adds to that list.

Accordingly, and again assuming solely for the sake argument that the Court would find Section B of S.B. 7 to violate a procedural mandate of the Constitution, the Court should here and in the future decline to sever bills enacted by procedural violations of the Missouri Constitution, recognizing that the practice no longer serves "to support and protect the Missouri Constitution." *Prestige Travel*, 344 S.W.3d at 716 n.6.

CONCLUSION

The Court should affirm the judgment of the Circuit Court that S.B. 7 is unenforceable. Section B of S.B. 7 renders Section A of that law a nullity.

However, if the Court were to find that Section B of S.B. 7 violates the Missouri Constitution, the Court should still affirm the judgment of the Circuit Court. Under any applicable test, Section B cannot be severed and the entire bill fails.

Last, even if the Court were to decide that it cannot say whether S.B. 7 would have passed without Section B, it should still decline to sever S.B. 7. Declining to sever bills that the General Assembly has enacted in violation of the Missouri Constitution will encourage constitutional abidance by the legislature, promote judicial economy, and best serve the people of Missouri. Accordingly, the Court should affirm the judgment of the Circuit Court in this case.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies pursuant to Rule 84.06(c) that, this brief: (1) includes the information required by Rule 55.03; (2) complies with the limitations in Rule 84.06(b); and (3) contains 17,954 words, exclusive of the materials exempted by Rule 84.06(b), determined using the word count function in Microsoft ® Office Word 2010.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was filed electronically via Missouri CaseNet, and served, this 23rd day of July, 2012 to:

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