



STATE OF MISSOURI
OFFICE OF ATTORNEY GENERAL

Please Deliver to	Sent By Date: October 23, 2003
Receiver: Peter von Gontard	Sender: Alana M. Barragán-Scott
Office: Sandberg, Phoenix & von Gonard	Office: Attorney General's Office
Fax number: (314) 241-7604	Fax number: (573) 751-8796
Voice number:	Voice number: (573) 751-0638

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Message

IN CIRCUIT COURT OF THE CITY OF ST. LOUIS
STATE OF MISSOURI

ALVIN BROOKS, et al.,)	
)	
Plaintiffs,)	
)	
v.)	Case No. 034-02425
)	Division 2
STATE OF MISSOURI, et al.)	
)	
Defendants.)	

**Supplemental Brief of Defendants State and Attorney General
in Support of Judgment in Their Favor,
on Plaintiffs’ Claim for Declaratory and Injunctive Relief**

In their Memorandum of October 20, 2003, plaintiffs brief not only their argument concerning Article I, § 23, MO. CONST., but the claims that this Court, in the context of the preliminary injunction proceedings, has already rejected as lacking any likelihood of success on the merits. With regard to the Article I, § 23, the defendants will add nothing further to their Brief – the plaintiffs’ primary argument is essentially a bald demand that this court remake the General Assembly’s policy decision to override a governor’s veto, which this court of course cannot do. The legal theories that plaintiffs would revive – concerning Article X, §21, Article I, §1 and Article III, §1, MO. CONST., along with vagueness¹ – are as lacking in merit today as they were two weeks ago when this court rejected them. The defendants address those arguments in turn.

¹ The plaintiffs appear to have abandoned any separation of powers claim under Art. II, §1, Mo. Const., *see* Amended Petition, p. 11, as they did not brief it.

I. The court must reject the Article X, §21 claim, as plaintiffs cannot overcome the presumption of constitutionality, and in any event, they overreach in their request for a remedy.

Plaintiffs fundamentally misunderstand the nature of Article X, §21 and the limited remedy that the provision affords. Though statutes change in Missouri every year to affect local authorities, the case law reflects relatively few challenges under Article X, §21 since its adoption in 1980, and most of that case law reflects that the challenges failed. That is because the provision was not designed to require an appropriation for every statutory change, only those changes, 1) establishing a new activity or service, or an increase in the level of any activity or service beyond that required by existing law, 2) that results in increased costs. Challenges to statutes under this constitutional provision operate like challenges any other constitutional provision: The plaintiffs bear the heavy burden to overcome the presumption of constitutionality afforded the 2003 Amendments, and to establish that they “clearly and undoubtedly” violate the letter of Article X, §21. *Miller v. Director of Revenue*, 719 S.W.2d 787 (Mo. banc 1986).

As discussed below, the plaintiffs have not done so. Even were they to do so, the remedy for a violation is not wholesale injunction and a declaration that the 2003 Amendments are void. The remedy is limited to staying the obligation of certain entities to comply with the law, until such time as an appropriation is made. The only entities who may take advantage of a “stay” are those for whom the court is presented evidence concerning activities or services and costs.

With respect to the specific elements, the plaintiffs are required to prove, as a threshold matter, 1) a new activity or service, or an increase in the level of any activity or service beyond that required by existing law, 2) that results in increased costs. They have not and cannot meet this burden of proof. The only activity or service that matters for purposes of this analysis is an activity or service that the sheriff undertakes, not the activities of firearm safety instructors, the director of revenue, or any other entities. *See St. Charles Co. v. Director of Revenue*, 961 S.W.2d 44, 48 (Mo. banc 1998) (in a county's challenge, refusing to consider new activities required of director of revenue).

Turning to the application and endorsement process upon which plaintiffs exclusively focus in their Memorandum, pp. 13-18, it is not clear that the 2003 Amendments require a new activity or service, within the meaning of Article X, § 21, at all. Under §571.094.5, a sheriff takes fingerprints, requests a criminal background check, issues a certificate of qualification, revokes a certificate upon notice, and "make[s] only such inquiries as he or she deems necessary into the accuracy of the statements made in the application." Under §571.094.6, a sheriff notifies, in writing, applicants who are denied. Section 571.094.7 establishes a time limit for a sheriff to issue an application, and requires an applicant to sign his certificate of qualification in person. Under §571.094.8, the sheriff keeps a record of applications and reports the issue of certificate's qualification to the Missouri Uniform Law Enforcement System. The sheriff issues renewal certificates under §571.094.14, and replacement certificates under §571.094.17, and suspends certificates upon proper

notification under §571.094.21.

Aggrieved applicants may appeal in small claims court; the sheriff is the proper defendant. §571.094.28. Costs may not be assessed against a sheriff unless the sheriff behaved arbitrarily and capriciously. *Id.* Finally, a sheriff is not liable for damages in any civil action, as long as the sheriff acted in good faith. §571.094.31.

Though plaintiffs avoid any inquiry more searching than cursory review of the 2003 Amendments, they are not entitled to presumptions, regardless of how they would couch the impact of the new law.² *Miller v. Director of Revenue*, 719 S.W.2d 787, 789 (Mo. banc 1986) (rejecting driver's argument that he termed simply "common sense"). Moreover, it is appropriate to consider the operations of the sheriff in their entirety. *Miller*, at 789 (considering operations of the police as a whole in context of an Article X, § 21 challenge to a new reporting requirement).

Under current law, sheriffs already issue concealed weapons permits. §571.090, RSMo (2000). The permit process contained in that statute is in fact substantially similar to that contained in new §571.094. For example, §571.090.2 requires a sheriff to accept applications. "Before a permit is issued, the sheriff shall make only such inquiries as he deems necessary into the accuracy of the statements made in the application." §571.090.3. The sheriff must notify an applicant in writing of the reason for refusal of an application.

² Plaintiffs' Memorandum heading for their Article X, §21 argument asserts that the new law violates the constitutional provision "On Its Face[.]" Memorandum, p. 13

§571.090.8. The appeal procedure, § 571.090.9, is also in the small claims court, against the sheriff, and costs shall not be assessed against a sheriff, § 571.090.11.

Chapter 57, RSMo (2000), more generally addresses the wide variety of sheriffs' duties, including a panoply of administrative tasks such as the execution of process, §57.100; certifying recognizance, §57.110; collecting fines, penalties, forfeitures and other sums of money, §57.130, RSMo Supp. (2002); charging for services in criminal cases, §57.290; and making reports on county jails, §57.407. And since at least the 1960's, sheriffs have had the duty of investigating the qualifications of prospective jurors, §57.125, §57.355, and §57.395, and under certain circumstances, to examine or investigate applicants who would be appointed deputies and assistants, §57.125. County counselors or prosecuting attorneys generally represent sheriffs in civil matters. §§57.060, .293, and .640.

New activities or services, or increased activities or services are, by definition in Article X, §21, those services and activities "beyond that required by an existing law." Activities or services that are already within the duties of a local government entity do not qualify. *See County of Jefferson v. Quik Trip Corp.*, 912 S.W.2d 487, 492 (Mo. banc 1995) (statute requiring new manner of distribution of tax revenue did not violate Article X, § 21, as distributing tax revenue is part of normal operations of any county); *In re. The 1984 Budget for the Circuit Court of St. Louis County v. Simon*, 687 S.W.2d 896, 900 (Mo. banc 1985) (county paid attorney fees before and after adoption of Hancock Amendment; requiring county to pay attorney fees in two challenged cases, subsequent to Hancock

Amendment, did not violate § 21). In short, the 2003 Amendments do not call for a new activity or service, nor is there any evidence that there will be an increase in the level of any activity or service beyond those activities and services that a sheriff is already required to perform by existing law. Plaintiffs therefore cannot clearly and undoubtedly establish the first element of their claim under Article X, §21.

Plaintiffs' Article X, § 21 claim also requires them to demonstrate, as the second element, resulting increased costs. They have not and cannot. The 2003 Amendments permit a sheriff to charge a fee not to exceed \$100 for an application, §571.094.10, and a renewal fee not to exceed \$50, §571.094.11. The fees are deposited into an interest bearing fund, to be expended at the direction of the county or city sheriff. §50.535.1. The fund may only be used by law enforcement agencies; unexpended balances remain in the fund from year to year. §50.535.2. Nothing in the 2003 Amendments requires the application fees to be used for purposes related only to the new law, although a sheriff of a county of the first classification may designate the chief of police of any town, city or municipality within that county to handle the application process, and to reimburse the chief of police out of the fund for any reasonable expenses related to accepting and processing the applications. §50.535.3.

In the *Miller* case, *supra*, the Court held that even assuming the new statutory reporting function required of police officers constituted an increase in activity or service for purposes of Article X, § 21, "it does not necessarily follow that a political subdivision also experiences increased costs." *Id.* Looking at the job duties of police officers as a whole even

undercut the driver's argument. It was "not unreasonable to infer, among other things, that the reporting requirements [of the new law] constitute such a minor imposition on police officers' time that the City experiences no quantifiable increased cost." *Id.* Given the presumption of constitutionality, and that the driver was required to demonstrate unconstitutionality "clearly and undoubtedly," but rested on nothing more than speculation and conjecture, the court rejected his claim. *Id.* This court should likewise reject plaintiffs' claim here. Plaintiffs, to date, have never put on evidence of the cost of the application process. To make their Article X, §21 claim, they must.

Their claim would nevertheless fail. The 2003 Amendments contain the funding mechanism of the application and renewal fees. Actual receipt of such fees defeats an Article X, § 21 challenge, in the absence of evidence that the increased costs in fact exceed the fees. *City of Jefferson*, 916 S.W.2d at 797.

Moreover, any evidence that increased costs exceed the fees must be established on an entity-by-entity basis. The Court in *City of Jefferson* reversed judgment in favor of the political subdivisions that failed to put on evidence at trial of their own increased costs. *Id.* at 796-797. The plaintiffs were limited to an entity-specific remedy, that depended upon the evidence the plaintiffs adduced. *Id.* Entities that did not produce cost evidence were not entitled to relief under Article X, § 21. *Id.* And those entities that do produce evidence are at most excused from complying with any new statutory obligation until such time as the legislature makes an appropriation. *Id.* at 796, citing *Fort Zumwalt School Dist. v. State*, 896

S.W.2d 918, 923 (Mo. banc 1995).

In other words, political subdivisions that are nonparties to the instant case are not entitled to any relief whatsoever. Even if a plaintiff taxpayer of a political subdivision were to put on evidence, the only remedy that this court could afford would be limited to that particular subdivision's obligations under the 2003 Amendments. Plaintiffs are not entitled to a *statewide* "stay" under Article X, § 21, even if they could demonstrate, in isolated instances, new service and activities, and resulting increased costs within the meaning of the provision. Regardless of whether plaintiffs can demonstrate entity-specific costs, it is doubtful that plaintiffs can demonstrate costs within the requirements of Article X, §21 under these circumstances – no court has ever afforded any political subdivision relief under Article X, §21 on the basis of hypothetical future costs. Article X, §21 is not couched in such hypothetical terms, and any law challenged thereunder is entitled to the strong presumption of constitutionality, including the 2003 Amendments.

Finally, whatever the Article X, § 21 implications of § 571.094 – plaintiffs' exclusive focus – their challenge does not implicate any portion of the 2003 Amendments that is separate from the application process. *See, e.g.*, §571.030 (transportation of concealable firearms in motor vehicles). Any remedy under Article X, §21 is thus limited only to that portion of the 2003 Amendments concerning the application process; the remainder of the 2003 Amendments are in all respects complete and susceptible of constitutional enforcement. The General Assembly is presumed to have intended that effect be given any portion of the

law that is not invalidated. *Akin v. Director of Revenue*, 934 S.W.2d 295, 300-301 (Mo. banc 1996).

The fact of a statutory change does not establish an Article X, §21 violation. To the contrary, a law is presumed constitutional. Plaintiffs did not overcome this presumption by establishing that the 2003 Amendments “clearly and undoubtedly” violate the letter of Article X, §21. Indeed, the new law comports with Article X, §21. In any event, plaintiffs overreach in their request for relief. An Article X, §21 violation does not void a law altogether. At most, the relief available to a successful challenger is limited to a stay of its obligation to comply with the new law until such time as an appropriation is made, and is applicable only to those specific entities for whom evidence of increased costs was adduced.

II. The court must reject the Article III, §1 and Article II, §1 claims as inappropriate invitations to usurp the role of the General Assembly

Plaintiffs argue that the 2003 Amendments violate Art. III, § 1, because they exceed the police power. Plaintiffs misunderstand Art. III, § 1 and police power. “Unlike the Congress of the United States, which has only the power delegated to it by the U.S. Constitution, the legislative power of Missouri’s Legislature is plenary, unless it is limited by some other provision of the constitution.” *Bd. of Educ. of the City of St. Louis v. City of St. Louis*, 879 S.W.2d 530, 532-533 (Mo. banc 1994). “Any constitutional limitation, therefore must be strictly construed in favor of the power of the General Assembly[and the] [d]eference due the General Assembly requires that doubt be resolved against nullifying

its action if it is possible to do so by any reasonable construction of that action or by any reasonable construction of the Constitution.” *Id.*

Applying this standard, plaintiffs cannot succeed on their claim that this legislation violates the police powers because they cannot overcome the strong deference that is owed to the actions of the General Assembly. The enactment of this legislation is clearly within the broad powers of the legislature to secure the peace, comfort, safety, health and welfare of the people of the State of Missouri, and the proponents of this legislation have long contended that it will enhance the same. Plaintiffs’ suggestion to the contrary is nothing more than a thinly veiled policy argument, an argument that was had and lost in the body who could properly act on it – the General Assembly. Plaintiffs can, of course, continue this argument and, if they are willing to do the work, can bring a referendum on this legislation to the voters of this state and secure the public’s ruling on this legislation. *See* Art. III, §§ 49, 52(a). In any event, it should be obvious that it is not for the courts to rule as a matter of constitutional law this policy argument, as the power to decide this political question is vested elsewhere in our system. *See Batek v. Curators of Univ. of Missouri*, 920 S.W.2d 895, 899 (Mo. banc 1996) (“It is not the Court’s province to question the wisdom, social desirability or economic policy underlying a statute as these are matters for the legislature’s determination,” and cases cited therein); *State ex inf. Dalton v. Miles Laboratories, Inc.*, 365 Mo. 350, 282 S.W.2d 564, 574 (1955) (en banc) (“when the legislature, acting within its constitutional orbit, has declared the public policy of the state, ‘such declared policy is sacred

ground which we [the courts] may not invade”); *State v. Dunbar*, 360 Mo. 788, 230 S.W.2d 845, 849 (1950) (“it is not for courts to declare public policy. That is a function of the legislative department”).

Whether the General Assembly wisely exercised its police power in enacting this new legislation is a quintessential political question over which the court has no jurisdiction. “The political question doctrine establishes a limitation on the authority of the judiciary to resolve issues, decidedly political in nature, that are properly left to the legislature.” *Maryland Heights Leasing v. Mallinckrodt, Inc.*, 706 S.W.2d 218, 220 (Mo. App. 1985). “If a case actually involves the resolution of a political question, the matter is immune from judicial review.” *Bennett v. Mallinckrodt, Inc.*, 698 S.W.2d 854, 864 (Mo. App. 1985). There is simply no mechanism for the court to evaluate plaintiffs’ claim that permitting the carrying of weapons under the circumstances permitted by the statute would be bad for the citizens of this State. Any determination of that kind would inevitably involve an expressed lack of respect for the branch of government to whom the question is dedicated – the General Assembly. Plaintiffs’ suggestion that the General Assembly violated Art. III, § 1 by enacting legislation that exceeds the police powers because it is bad policy must be rejected.

Next, plaintiffs allege that the new law violates Article I, § I of the Missouri Constitution, which states that all political power is vested in and derived from the people,

in that the new statute is contrary to the will of the voters as expressed in a 1999 referendum.³ This claim would be laughable were not made in an apparently cynical effort to thwart the democratic principles it purports to protect. Obviously, the electorate in the state of Missouri, and elsewhere, changes. It changes demographically, and it changes its mind as new circumstances present themselves. Demographically, the number of registered voters in Missouri in 1998, immediately prior to the referendum result that plaintiffs apparently believe sacrosanct, was 3,635,991. Official Manual, State of Missouri, 1999-2000, p. 555. The number of registered voters in 2002, those voters who elected the General Assembly that enacted the new law, numbered 3,681,844, an increase in the number of registered voters that exceeds the number of voters that defeated the 1999 ballot measure. See <http://www.sos.mo.gov/elections/registeredvoters.asp>.

More importantly, people change their views on many public issues. Certainly, it would be a bizarre form of democracy if any legislative body, either a representative one or the body of the whole, could only decide an issue one time and then never again reconsider it. Most students of the legislative process are well aware that it can take more than one legislative cycle to build support for a controversial new idea. If accepted, plaintiffs' argument – that a legislative body is forever bound by the legislative decisions of a prior

³ At a special election held on April 6, 1999, conceal and carry legislation was submitted to Missouri voters: 634,809 voters agreed that the legislation should be enacted, while 678,652 voters rejected the proposed legislation. Official Manual of the State of Missouri, 1999-2000, p. 619.

legislative body – would inevitably lead to tyranny, a tyranny of the past. And if plaintiffs’ constitutional arguments here fail, no legislative body could later rescind the legislative action about which plaintiffs so fiercely complain. This is folly. The public and its elected representatives have the right to change their mind.

The General Assembly, whose members are elected by the people of their legislative district to enact laws for the State of Missouri, was the entity that voted to implement this legislation after considerable debate and an historic override of the governor’s veto. The enactment of this new law is, under our system of government (and regardless of whether plaintiffs agree with it), irrefutable evidence that the position of Missourians has changed since the 1999 referendum. “The General Assembly, unless restrained by the constitution, is vested in its representative capacity with all the primary power of the people.” *Three Rivers Junior College District of Poplar Bluff v. Statler*, 421 S.W.2d 235, 238 (Mo. banc 1967). Should the voters disagree with their elected representatives, the Missouri Constitution provides a mechanism to clearly articulate their position. Art. III, §§ 49, 52(a). It is not for plaintiffs or the courts to avoid current expressions of the popular will based on earlier expressions related to the same subject matter. The Constitution provides no mechanism for the courts to remake the policy choices that the General Assembly has made; to the contrary, the Constitution forbids the encroachment of one branch upon another. Art. II, § 1. Since the General Assembly that enacted this new law was duly elected by the people

of the State, the political power for the implementation of it was in fact derived from the people. As a result, plaintiffs' claim that the new law violates Art. I, § 1 must fail.

III. The court must reject the vagueness argument, which plaintiffs lack standing to make and is in any event based on fancy, rather than fact

Plaintiffs argue that the "poor draftsmanship" of the 2003 Amendments make them void for vagueness. Plaintiffs' Memorandum, p. 22. That the plaintiffs would have chosen different wording, or postulate fanciful circumstances in which the law might be vague, does not make an actionable claim.

The vagueness doctrine is rooted in fundamental fairness. *See Colten v. Kentucky*, 407 U.S. 104, 110, 92 S.Ct. 1953, 1957, 32 L.Ed.2d 584 (1972). It is designed to give individuals notice of proscribed conduct and to protect them against "arbitrary and discriminatory" enforcement. *Entertainment Ventures.*, 44 S.W.3d at 386, *citing State ex rel. Cook v. Saynes*, 713 S.W.2d 258, 260 (Mo. banc 1986). Accordingly, "[n]either absolute certainty nor impossible standards of specificity are required" for a statute to withstand scrutiny. *State v. Ellis*, 853 S.W.2d 440, 447 (Mo. banc 1993), *citing State v. Duggar*, 806 S.W.2d 407, 408 (Mo. banc 1991). A statute is impermissibly vague only if it fails to provide "a person of ordinary intelligence a reasonable opportunity to learn what is prohibited." *State v. Entertainment Ventures I, Inc.*, 44 S.W.3d 383, 386 (Mo. banc 2001) (citations omitted).

As a threshold matter, and consistent with fundamental fairness, the language must be evaluated by "applying it to the facts at hand." *State v. Mahan*, 971 S.W.2d 307, 312 (Mo. banc 1998), *quoting State v. Young*, 695 S.W.2d 882, 883-84 (Mo. banc 1985). One must

claim that a statute is vague “as to that person’s own conduct.” *See State v. Ellis*, 853 S.W.2d at 446. A party who attempts to assert that a statute is vague as it *might* be applied to others – as plaintiffs claim here – lacks standing. *State v. Ellis*, 853 S.W.2d at 446-47 and *State v. Mahan*, 971 S.W.2d at 311. Plaintiffs do not have standing to challenge the 2003 Amendments simply because they have charged that the Amendments are invalid.⁴ *See State v. Stottlemyre*, 35 S.W.3d 854, 861 (Mo. Ct. App. 2001), quoting *State v. Pizzella*, 723 S.W.2d 384, 387 (Mo. banc 1987). Thus, to have standing to mount a constitutional challenge, a plaintiff must show that he is “adversely affected” by the challenged statute. *See State v. Pizzella*, 723 S.W.2d at 386-87. Plaintiffs here do not claim that they wish to carry a concealed weapon, or obtain an endorsement to carry; hence, they have not alleged nor are they in fact “adversely affected” by the perceived vagueness of the 2003 Amendments, which actually provide a person of ordinary intelligence fair warning of what is proscribed. Plaintiffs simply do not have standing to challenge the 2003 Amendments for alleged vagueness.

Moreover, the Declaratory Judgment Act, §§ 527.010, *et. seq.*, does not authorize an

⁴ There is an important distinction between a vagueness challenge and an over breadth challenge under the First Amendment. In stark contrast to the Due Process vagueness challenge here, one has standing to make a First Amendment challenge to prevent an overbroad statute from chilling free speech even though the plaintiff is concerned with how the law may be applied to others. *See State v. Mahan*, 971 S.W.2d at 311-12, citing *Broadrick v. Oklahoma*, 413 U.S. 601, 612, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973). None of the plaintiffs here, however, have alleged or even attempted to argue any First Amendment over breadth claim.

interpretation of the rights and interests of the parties in this case. *See Cottleville Community Fire Protection Dist. v. Morak*, 897 S.W.2d 647, 648-49 (Mo. App. ED 1995). Carrying a concealed weapon without an endorsement or otherwise in violation of the 2003 Amendments could constitute a criminal offense. *See* § 571.030.1. But the Declaratory Judgment Act does not authorize the interpretation of a criminal statute in a civil action. *See Cottleville*, at 649. In that case, the fire protection district sought a declaratory judgment with respect to a conflict of interest statute with criminal penalties. At issue was whether one member of the district board could participate in a vote. *Id* at 648. Because the underlying statute imposed criminal penalties, the Court of Appeals held that the circuit court had no authority to entertain a declaratory judgment. *Id*. In these circumstances, a civil judgment would be “legally meaningless” since it could not bind the State in its enforcement of the criminal law. *Id*, 897 S.W.2d at 649. Consequently, this court should simply dismiss the plaintiffs’ claims insofar as they seek declaratory relief with respect to a criminal statute.

For the sake of argument, the defendants apparently give the ordinary citizen far more credit than do plaintiffs. The plaintiffs’ suggestion that the law is unconstitutionally vague because the average Missourian wouldn’t know if he walked into a “restaurant” is patently absurd. Plaintiffs’ Memorandum, p. 23, ¶ 4. If a Missourian wants to know who the owner or manager of an establishment is, where the bar is, or how many persons a restaurant seats, he or she can find someone to ask. Plaintiffs’ Memorandum, p. 23, ¶¶ 1, 2, and 5. In short, the plaintiffs’ six “examples” of the allegedly impermissible vagueness of the 2003

Amendments deserve far less attention than we have already given them.

Plaintiffs state no claim for vagueness.

IV. Conclusion

For the foregoing reasons, and the reasons stated in the defendants' Brief Support of Judgment in Their Favor, on Plaintiffs' Claim for Declaratory and Injunctive Relief, the state defendants respectfully request that this court dismiss with prejudice the claims of the Institute for Peace and Justice, and the claims of each of the other plaintiffs insofar as they are asserted in the plaintiffs' "official capacities." With respect to the remaining claims for injunctive and declaratory relief, brought in the plaintiffs' individual capacities, the defendants respectfully request that this court enter FINAL JUDGMENT in defendants' favor on those claims, declaring that the 2003 Amendments are constitutional in all respects, vacating its earlier preliminary injunction in this matter, and awarding to Defendants such other and additional relief as this court deems just and proper.

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General

Paul Wilson
by Paul Wilson
MO# 38104

PAUL WILSON
Missouri Bar No. 40804
Deputy Chief of Staff

Alana M. Barragan-Scott

ALANA M. BARRAGÁN-SCOTT
Missouri Bar No. 38104
Chief Counsel

WILLIAM J. BRYAN
Missouri Bar No. 37711

Assistant Attorneys General

Broadway State Office Building
221 West High Street, 8th Floor
Jefferson City, Missouri 65102
(573) 751-3321
(573) 751-8796 (facsimile)

ATTORNEYS FOR DEFENDANTS STATE OF
MISSOURI AND ATTORNEY GENERAL

CERTIFICATE OF SERVICE

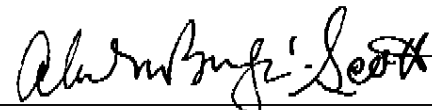
The undersigned hereby certifies that a copy of the foregoing was mailed, postage prepaid, and sent by facsimile on this 23rd day of October, 2003, to:

Burton Newman
Lacks & Newman
130 South Bemiston
8th Floor
Clayton, MO 63105

Richard C. Miller
Monsees, Miller, Mayer, Presley & Amick, P.C.
4717 Grand Ave., Suite 820
Kansas City, MO 64112-2258

Gordon D. Schweitzer, Jr.
Schweitzer & Schweitzer
3176 Hampton Avenue
St. Louis, MO 63139

Peter von Gontard
Russell L. Makepeace
Sandberg, Phoenix & von Gontard, P.C.
One City Centre, 15th Floor
St. Louis, MO 63101-1880



Assistant Attorney General