MEMORANDUM

TO: Honorable Members of the Missouri Senate

FROM: Pam Fichter, President
James S. Cole, General Counsel

RE: SS#2 SCS SB 389

DATE: February 15, 2007

Missouri Right to Life has been told that certain revisions of SCS SB 389 are contained in Senate Substitute #2. To the extent that SS #2 as offered includes language that we have examined in draft form, it fails to cure the overarching problems that are caused by Amendment 2 (Art. III, Sec. 38(d) of the Missouri Constitution) in respect to pro-life protections.

Subsection 7 of section 173.475 attempts to limit disbursements of MOHELA sale proceeds for life science projects to those projects that are eligible for federal funding. Unfortunately, four different provisions of Amendment 2 nullify this restriction. Three of them were described in the memorandum that Missouri Right to Life disseminated on February 12 (subsections 5, 7, and 2(7) of Art. III, Sec. 38(d)), and we are confident that those provisions nullify the restriction to eligibility for federal funding just as they invalidate the attempt to exclude certain buildings from the list of capital projects.

The fourth provision that nullifies the proposed restriction is found in connection with the clause in Amendment 2, subsection 2, that says (in the relevant portion), "any stem cell research permitted under federal law may be conducted in Missouri . . . subject to the requirements of federal law . . ." At first blush, this language suggests that the restriction limiting research to what is federally-funded is enforceable. The language seems to imply that whatever is not federally funded is not "permitted under federal law." However, as with so many other things in Amendment 2, there is a definition at the end of the Amendment that takes away the substance of what is said earlier in the Amendment.

In subsection 6 of Amendment 2, there is the following definition of the key phrase, "permitted under federal law":

(8) 'Permitted under federal law' means, as it relates to stem cell research and stem cell therapies and cures, any such research, therapies, and cures that are not prohibited under federal law from being conducted or provided, regardless of whether federal funds are made available for such activities.

We invite your close attention to the last phrase, "regardless of whether federal funds are made available for such activities." It means that any restriction on federal funding does not count. It is only a restriction by federal law that is unconnected with funding that counts. Amendment 2 says that the restrictions on federal funding cannot be considered; what can be considered is only whether other federal law prohibits the activity in question. Since proposed subsection 7 refers only to limitations on federal funding, and Amendment 2 says such limitations cannot count as what is or is not “permitted under federal law," the limitation is void and unenforceable.

Subsection 8 of section 173.475 is also proposed as pro-life protection. It says that if the courts declare any of the foregoing provisions of section 173.475 null and void, then all the provisions that authorize the MOHELA sale will be

null and void. This restriction, like the others, fails to take into account the over-arching authority of Amendment 2 as a provision of the Constitution. The very clause that says the other parts of section 173.475 would become null and void would constitute a restriction or limitation on funding for "stem cell research" under Amendment 2, and so it would be struck down and the deal would proceed.

A rough comparison may illustrate the point. In Missouri law, a will can say that anyone who challenges the will loses all inheritance rights under it. This is called an "in terrorem" clause. Missouri probate law has no overarching prohibition against such clauses, and the courts enforce them here. However, some other states refuse to allow their courts to enforce “in terrorem” clauses.

Amendment 2, in essence, operates like the other states' probate laws. Its overarching nullifications of restrictions effectively prohibit an "in terrorem" clause in connection with the allocation of money by the state. The courts will see that the "in terrorem" clause operates to keep money from institutions that would otherwise get it, and the courts will be compelled by Amendment 2 to strike down the "in terrorem" clause from SB 389 along with the other restrictions on the uses of MOHELA money. Amendment 2 binds the courts to hold the “in terrorem” clause unconstitutional for the same reasons as it invalidates the exclusion of certain building projects.

There are many additional problems in section 173.475 of SCS SB 389, including the ambiguous description, instability, and unenforceability of the resolution of the Missouri Development Finance Board and the cooperation agreement that are referred to in the section. There is no need to discuss the statutory problems here in view of the paramount constitutional problems created by Amendment 2. Missouri Right to Life remains opposed to the MOHELA sale portion of SB 389 as it is presently configured.