

**IN THE
SUPREME COURT OF MISSOURI**

No. SC93439

**ST. LOUIS COUNTY, MISSOURI, *et al.*,
Plaintiffs/Appellants**

v.

**STATE OF MISSOURI, *et al.*,
Defendants/ Respondents**

**APPEAL FROM THE CIRCUIT COURT OF COLE COUNTY
CAUSE NO. 12AC-CC00801**

HONORABLE PATRICIA S. JOYCE

Brief of Appellants St. Louis County, Missouri, *et al.*

**PATRICIA REDINGTON
COUNTY COUNSELOR
Cynthia L. Hoemann, #28245
Michael E. Hughes, #23360
Associate County Counselors
41 South Central, 9th Floor
Clayton, MO 63105
(314) 615-7042 Fax (314) 615-3732
Attorneys for St. Louis County, *et al.***

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JURISDICTIONAL STATEMENT

This action involves the question of whether the statute creating the Deputy Sheriff Salary Supplementation Fund (§57.278 and 57.280.4 RSMo¹) violates Article III, § 1 of the Missouri Constitution² by delegating legislative authority to the Missouri Sheriff Methamphetamine Relief Taskforce (“MoSMART”) without providing sufficient guidance as to the criteria for paying out monies from the fund, and hence involves the validity of a state statute. Jurisdiction is proper in this Court pursuant to Mo. Const. Art. V, § 3.³

¹ Appendix (“A”) 11-13

² A7

³ A9

STATEMENT OF FACTS

State statutes created the Deputy Sheriff Salary Supplementation Fund to supplement salaries and benefits of county deputy sheriffs throughout the State of Missouri. §57.278.1 RSMo (A11). The Missouri Sheriff Methamphetamine Relief Taskforce (“MoSMART”) administers the DSSF. LF 140. On April 30, 2012 the Superintendent of Police, who by operation of law is the sheriff of St. Louis County⁴ submitted a grant application to supplement the salaries of St. Louis County deputy sheriffs for the 2013 fiscal year, but this was rejected and the stated reason for the rejection was only that the application was not submitted by the sheriff of St. Louis County. LF 143-144. Even though St. Louis County, Missouri has a department that calls itself a police department, as a matter of law it is actually a Sheriff’s Department and the Superintendent of Police is the sheriff of St. Louis, and all the employees listed on the grant application are actually deputy sheriffs. LF 144. In other words, those persons who are referred to as police officers in St. Louis County wear similar uniforms and perform similar work as do the sheriffs of the adjoining counties of Jefferson and St. Charles and as do the sheriffs in counties throughout the State of Missouri. LF 144-147. The grant

⁴ By virtue of the 1979 St. Louis County Charter (LF 20-53 and LF 142-143), the St. Louis County Superintendent of Police is the Sheriff of St. Louis County and the employees listed on the grant application are deputy sheriffs. LF 144; *State on inf. of Dalton ex rel. Shepley v. Gamble*, 280 S. W. 2d. 656, 660 (Mo. 1955).

application for the 2013 fiscal year was submitted timely and met all the technical requirements. LF 144. (A grant application was again submitted by the St. Louis County Superintendent of Police for the 2014 fiscal year and it has been rejected for the same stated reason, that it was not submitted by the Sheriff of St. Louis County.)

Plaintiffs are St. Louis County police officer Sean D. Becker, St. Louis County transportation officer Emil Porter, St. Louis County deputy sheriff Kevin Cissell, St. Louis County Superintendent of Police Tim Fitch, St. Louis County Sheriff Jim Buckles, St. Louis County Director of Department of Justice Services, Herbert Bernsen, and St. Louis County, Missouri (“County”). LF 139-140. Deputies Becker, Porter and Cissell perform essentially the same functions performed by deputy sheriffs throughout the state, including the counties that adjoin St. Louis County, which are St. Charles County, Jefferson County, and City of St. Louis, whose salaries were supplemented by the DSSF. LF 144-147.

Since February 2011 the St. Louis County has collected court costs designated for the Deputy Sheriff Salary Supplementation Fund and the St. Louis County treasurer has remitted well over \$4.3 million to this fund (LF 140), but no DSSF funds have been awarded to supplement the salaries of St. Louis County employees who are licensed peace officers or deputies authorized to perform the same functions as the sheriff (LF 142). In other words, the court costs for civil cases filed in the Circuit Court and Associate Circuit Court of St. Louis County are being used by Defendants to supplement the salaries of deputies in other counties, and no funds are being awarded to supplement

the salaries of the St. Louis County deputies who serve civil process and perform other judicial functions, such as Plaintiff Cissell, who provides courthouse security (LF 140). As of the filing of the initial lawsuit, there was a huge current balance and the amount of monies available to award for FY13 was at least \$6.4 million and the amounts awarded were \$4,575,195. LF 145.

In order to obtain service on Defendants in this case, Plaintiffs paid sheriff fees to Cole County Sheriff, Morgan County Sheriff, Jefferson County Sheriff, St. Charles County Sheriff and Chariton County Sheriff, which fees included the \$10 fee that was remitted by those sheriffs to Defendants and deposited in the DSSF. LF 141.

The Defendants are MoSMART and its purported members, the Missouri Department of Public Safety and its director, and the State of Missouri. LF 140-141.

Plaintiffs seek a declaration in Count IV that, as a matter of law, Chief Fitch is the sheriff of St. Louis County, St. Louis County's employees who perform deputy sheriff functions are county deputy sheriffs, and MoSMART's decision to reject the grant application for the stated reason that Chief Fitch is not the sheriff of St. Louis County, while awarding grant funds to deputies throughout the state performing the same job duties as St. Louis County deputies, is unconstitutional, unlawful, unreasonable, arbitrary and involved an abuse of discretion. LF 150-151.

Count IV also seeks an order directing Defendants to award grant funds so that the St. Louis County deputy sheriffs receive the \$100 per month plus benefits for the 2013 fiscal year that had been awarded to deputy sheriffs throughout the state including the

adjoining counties of the City of St. Louis and Jefferson County according to the 2013 funding formula established by MoSMART. LF 151.

Plaintiffs also seek a declaration that the grant criteria adopted by MoSMART is invalid because it operates to deny salary supplementation to Plaintiffs Becker, Porter and Cissell and other St. Louis County deputies who perform the same duties as deputy sheriffs throughout the state. LF 149-150.

In the alternative, Plaintiffs seek a declaration that the purported appointees to MoSMART have no authority to establish DSSF grant criteria and approve or reject grant applications because their appointments were not made with the advice and consent of the Senate as required by Mo. Const. Article IV, §51 (A8). LF 148-149.

In the alternative, Plaintiffs seek a declaration that St. Louis County and its sheriff have no duty to continue collecting and remitting the \$10 fee for deposit in the DSSF because the statute creating the DSSF (§ 57.278 and 57.280.4 RSMo, A11-13) violates Article III, § 1 of the Missouri Constitution (A7) by delegating legislative power to MoSMART without providing any guidance as to the criteria for paying out monies. LF 147-148.

On April 30, 2013, the trial court entered its judgment granting Defendants' motion to dismiss all four counts of the Petition on the grounds of sovereign immunity and lack of standing. A1, LF 155-161. Plaintiffs timely filed their notice of appeal. LF 162-172.

POINTS RELIED ON

I. The Trial Court erred in dismissing Count I of Plaintiffs' First Amended Petition on the grounds of sovereign immunity and lack of standing because Plaintiffs stated facts entitling them to a declaration as to the constitutionality of the statute creating the Deputy Sheriff Salary Supplementation Fund ("DSSF") in that Plaintiffs are directly and adversely affected by the unlawful delegation of legislative power to MoSMART and therefore have a legally protected interest that entitles them to prospective relief from the burden of collecting and remitting this unconstitutional charge and sovereign immunity does not bar this action to prevent state officials from enforcing an unconstitutional statute

Merchants' Exchange of St. Louis v. Knott, 111 S.W. 565 (Mo. banc 1908)

Kelly v. Hanson, 959 S.W.2d 107 (Mo. banc 1998)

Missouri Association of Nurse Anesthetists, Inc. v. State Board of Registration for the Healing Arts, 343 S.W. 3d 348 (Mo. banc 2011)

Ex parte Young, 209 U.S. 123, 28 S. Ct. 441 (1908)

Mo. Const. Art. III, §1

II. The Trial Court erred in dismissing Count II of Plaintiffs' First Amended Petition on the grounds of sovereign immunity and lack of standing because Plaintiffs stated facts entitling them to a declaration

as to whether the purported appointees to MoSMART whose appointments were not made with the advice and consent of the Senate have authority to approve or reject grant applications in that Plaintiffs have a legally protected interest that entitles them to relief from Defendants' unauthorized actions and sovereign immunity does not bar such relief because Count II is not an action against the state

Merchants' Exchange of St. Louis v. Knott, 111 S.W. 565 (Mo. banc 1908)

Kelly v. Hanson, 959 S.W.2d 107 (Mo. banc 1998)

Missouri Association of Nurse Anesthetists, Inc. v. State Board of Registration for the Healing Arts, 343 S.W. 3d 348 (Mo. banc 2011)

Ex parte Young, 209 U.S. 123, 28 S. Ct. 441 (1908)

Mo. Const. Art. IV, § 51

III. The Trial Court erred in dismissing Count III of Plaintiffs' First Amended Petition on the grounds of sovereign immunity and lack of standing because Plaintiffs stated facts entitling them to a declaration as to whether the grant criteria adopted by MoSMART is invalid in that Plaintiffs have a legally protected interest that entitles them to relief from the grant criteria that operates to deny salary supplementation to Plaintiffs Becker, Porter and Cissell and sovereign immunity does not bar such relief because Count III is not an action

**against the state and §536.050 RSMo is an express consent to be sued
for the very relief that Plaintiffs seek**

Merchants' Exchange of St. Louis v. Knott, 111 S.W. 565 (Mo. banc 1908)

Kelly v. Hanson, 959 S.W.2d 107 (Mo. banc 1998)

*Missouri Association of Nurse Anesthetists, Inc. v. State Board of Registration for
the Healing Arts*, 343 S.W. 3d 348 (Mo. banc 2011)

Ex parte Young, 209 U.S. 123, 28 S. Ct. 441 (1908)

§ 536.050 RSMo

St. Louis County Charter of 1979

IV. The Trial Court erred in dismissing Count IV of Plaintiffs' First Amended Petition on the grounds of sovereign immunity and lack of standing because Plaintiffs stated facts entitling them to a declaration as to whether MoSMART's rejection of Plaintiffs' grant application for the stated reason that Chief Fitch is not the sheriff of St. Louis County is incorrect as a matter of law in that Plaintiffs have a legally protected interest that entitles them to relief from Defendants' unlawful denial of salary supplementation for Plaintiffs Becker, Porter and Cissell and other St. Louis County deputy sheriffs performing the same job duties as deputies throughout the state who were awarded salary supplementation and sovereign immunity does not bar such relief because Count IV is not an action against the state and Missouri

**Constitution Article V, §18 and §527.010-527.130 and §536.150 RSMo
are consents to be sued for the relief that Plaintiffs seek**

Merchants' Exchange of St. Louis v. Knott, 111 S.W. 565 (Mo. banc 1908)

State ex rel. Stewart v. Civil Service Commission of the City of St. Louis, 120
S.W.3d 279 (Mo. App. E.D. 2003)

Missouri National Education Association v. Missouri State Board of Education, 34
S.W. 3d 266 (Mo. App. W.D. 2000)

State on inf. of Dalton ex rel. Shepley v. Gamble, 280 S. W. 2d. 656 (Mo. 1955)

Mo. Const. Art. V, §18

§527.010-527.130 RSMo

§536.150 RSMo

St. Louis County Charter of 1979

INTRODUCTION

There is no question that Plaintiffs Becker, Porter and Cissell have a direct and substantial interest in receiving the same salary supplementation as deputies throughout the state who perform the same job duties. Nor is there any question that the grant application filed on their behalf by the St. Louis County Superintendent of Police was rejected by Defendants for a stated reason that is incorrect as a matter of law. By virtue of the 1979 St. Louis County Charter (LF 20-53 and LF 142-143), the St. Louis County Superintendent of Police is the Sheriff of St. Louis County and the employees listed on the grant application are deputy sheriffs. LF 144; *State on inf. of Dalton ex rel. Shepley v. Gamble*, 280 S. W. 2d. 656, 660 (Mo. 1955).

As more fully explained below, Plaintiffs are directly and adversely affected by the denial of the grant application and therefore have standing to obtain the requested relief from Defendants' actions, including a declaration that the St. Louis County Superintendent of Police is the sheriff of St. Louis County and is therefore entitled to submit grant applications on behalf of Deputies Becker, Porter and Cissell and the other St. Louis County employees who perform the same job duties as deputies throughout the state who were awarded salary supplementation by Defendants, and this relief is not barred by sovereign immunity.

I. The Trial Court erred in dismissing Count I of Plaintiffs’ First Amended Petition on the grounds of sovereign immunity and lack of standing because Plaintiffs stated facts entitling them to a declaration as to the constitutionality of the statute creating the Deputy Sheriff Salary Supplementation Fund (“DSSF”) in that Plaintiffs are directly and adversely affected by the unlawful delegation of legislative power to MoSMART and therefore have a legally protected interest that entitles them to prospective relief from the burden of collecting and remitting this unconstitutional charge and sovereign immunity does not bar this action to prevent state officials from enforcing an unconstitutional statute

A. Standard of Review

The standard of review for a trial court’s grant of a motion to dismiss is *de novo*. *Lynch v. Lynch*, 260 S.W. 3d 834, 836 (Mo. banc 2008). The facts contained in the petition are treated as true and they are construed liberally in favor of the plaintiffs. *Id.* In testing the sufficiency of a petition purporting to state a claim for declaratory relief, the question is not whether the petition shows that the plaintiffs are entitled to the declaratory relief they seek in accordance with the theory they state, rather, it is whether under the averments of the petition the plaintiffs are entitled to a declaration of rights at all. *Dujakovich v. Carnahan*, 370 S.W. 3d 574, 577 (Mo. banc 2012).

B. Plaintiffs pled facts demonstrating a legally protected interest entitling them to prospective relief from the burden to collect and remit fees pursuant to the statute delegating legislative authority to MoSMART

Count I seeks a declaration that St. Louis County and its sheriff have no duty to continue collecting and remitting the \$10 sheriff fee imposed by §57.280.4 RSMo (A13) because the statute creating the DSSF is an improper delegation of legislative authority. LF 147-148. Plaintiffs paid this unconstitutional charge when they paid sheriff fees to obtain service of process on Defendants, LF 141 at ¶19, and the individual Plaintiffs will be required to pay the unconstitutional charge again and again to obtain service of process in future lawsuits.

When seeking declaratory relief, the criterion for standing is whether the plaintiff has a legally protectable interest at stake. *Kelly v. Hanson*, 959 S.W.2d 107, 110 (Mo. banc 1998). A plaintiff must establish present legal rights against the defendants with respect to which plaintiff may be entitled to some consequential relief immediate or prospective. *Id.* A legally protected interest exists if the plaintiff is directly and adversely affected by the action in question or if the plaintiff's interest is conferred by statute. *Missouri Association of Nurse Anesthetists, Inc. v. State Board of Registration for the Healing Arts*, 343 S.W. 3d 348, 354 (Mo. banc 2011).

Plaintiffs are directly and adversely affected by the unlawful delegation of legislative power to MoSMART that resulted in denial of Plaintiffs' grant application and therefore have a legally protected interest entitling them to prospective relief from the

burden of collecting, remitting and/or paying this unconstitutional fee. LF 147-148.

C. Count I is not barred by sovereign immunity

Plaintiffs' request for declaratory and injunctive relief against the enforcement of § 57.280.4 RSMo (A13) is not barred by sovereign immunity. It is settled beyond question that actions attacking the constitutionality of a state statute are not actions against the state. *Ex parte Young*, 209 U.S. 123, 28 S. Ct. 441 (1908); *Merchants' Exchange of St. Louis v. Knott*, 111 S.W. 565 (Mo. banc 1908); *State ex rel. Robinson v. Superior Court for King County*, 46 P. 2d 106 (Wash. 1935). In *Ex parte Young*, the United States Supreme Court said:

The act to be enforced is alleged to be unconstitutional; and if it be so, the use of the name of the state to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of, and one which does not affect, the state in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting, by the use of the name of the state, to enforce a legislative enactment which is void because unconstitutional.

Id. 209 U.S. at 158-59; 28 S. Ct. at 454.

Recognizing that actions challenging the constitutionality of a state statute are not actions against the state, this Court held that an action to restrain the Railroad and Warehouse Commissioners from enforcing the Missouri grain inspection law, on the ground that such statutes are unconstitutional, was not barred by sovereign immunity:

Finally, it is argued that defendants, as members and employees of the State Board of Railroad and Warehouse Commissioners, are in effect the state of Missouri; therefore, this suit, to all intents and purposes, is against the state, and, as a sovereign state cannot be sued by its citizens, the plaintiffs must be cast. We shall not enter upon the discussion of that theory. That the sovereign state may not be sued is a truism. It was the proud boast of Louis XIV that: "I am the state" (L'état, c' est moi). But defendants are scarcely entitled to the protection of that imperial dogma in this case. They are mere plain ministerial officers, charged to be about to do irreparable injury to the business interests of their fellow citizens by unlawful acts. As such ministerial officers, so charged, they are not beyond the strong arm of a court of equity. See authorities cited by counsel for plaintiffs. The highest court in the land has so lately held this matter in judgment and decided it against the contention of the learned Attorney General (Ex Parte Young, Petitioner [decided March 23, 1908, by the Supreme Court of the United States] 209 U. S. 123, 28 Sup. Ct. 441, 52 L. Ed.—, that it would be supererogation to prolong this opinion otherwise than by announcing our conclusion that the point is ruled against defendants.

Merchants' Exchange, 111 S.W. at 574.

Just like the plaintiffs in *Merchants' Exchange*, Plaintiffs in this case are suing to prevent state officials from enforcing a legislative enactment which is void because

unconstitutional. LF 147-148. Count I seeks a declaration that St. Louis County and its sheriff have no duty to continue collecting and remitting the \$10 sheriff fee imposed by §57.280.4 RSMo (A13) because the statute creating the DSSF is an improper delegation of legislative authority in violation of Mo. Const. Art. III, §1(A7). It does not seek a refund of monies already remitted to the state. LF148. The Trial Court characterizes Plaintiffs' request for an injunction against spending from the DSSF "except as specifically ordered by this Court," as an "indirect request for monetary relief through an undefined court order." LF 158. It is no such thing. An injunction against spending does not remove any money from the state treasury – it only prevents state officers from carrying out the provisions of an unconstitutional statute. Defendants have no authority to disburse grant monies collected under an unconstitutional statute, and sovereign immunity does not bar such injunctive relief. *See Merchants' Exchange*, 111 S.W. 565, affirming the judgment granting a permanent injunction restraining state officials from carrying or attempting to carry out the provisions of a statute that violated Mo. Const. Art. III, §1 by delegating legislative power to the Board of Railroad and Warehouse Commissioners.

II. The Trial Court erred in dismissing Count II of Plaintiffs' First Amended Petition on the grounds of sovereign immunity and lack of standing because Plaintiffs stated facts entitling them to a declaration as to whether the purported appointees to MoSMART whose appointments were not made with the advice and consent of the Senate have authority to approve or reject grant applications in that Plaintiffs have a legally protected interest that entitles them to relief from Defendants' unauthorized actions and sovereign immunity does not bar such relief because Count II is not an action against the state

A. Standard of Review

The standard of review for a trial court's grant of a motion to dismiss is de novo. *Lynch v. Lynch*, 260 S.W. 3d 834, 836 (Mo. banc 2008). The facts contained in the petition are treated as true and they are construed liberally in favor of the plaintiffs. *Id.*

B. Plaintiffs pled facts demonstrating a legally protected interest entitling them to a declaratory judgment as to Defendants' authority to establish criteria and approve or reject grant applications

Count II pleads facts establishing that the purported appointees to MoSMART have no authority to approve or reject grant applications, establish criteria, or otherwise act because their appointments were not made with the advice and consent of the Senate as required by Mo. Const. Article IV, § 51 (A8). LF148-149. Deputies Becker, Porter and Cissell have a direct and substantial legal interest in challenging Defendants'

authority to administer the DSSF because their right to receive salary increases and employee benefits via the DSSF has been called into question by MoSMART's arbitrary denial of Plaintiffs' grant application for the stated reason that Superintendent of Police Tim Fitch is not the sheriff of St. Louis County. Chief Fitch, Sheriff Buckles, Director Bernsen and St. Louis County also have a direct and substantial interest in challenging Defendants' authority to administer the DSSF because their continued ability to employ and retain deputy sheriffs is directly affected by use of DSSF funds to supplement salaries of deputies in adjacent counties (St. Charles, Jefferson, and City of St. Louis) which might cause the St. Louis County's deputies to leave their service without salary supplementation from the DSSF and also causes diminished morale.

C. Plaintiffs' request for declaratory and injunctive relief is not barred by sovereign immunity

Plaintiffs' request for a declaration that none of the appointees to MoSMART has or had any authority to establish criteria and approve or deny grant applications is not barred by sovereign immunity because it is not an action against the state, *see Ex parte Young*, 209 U.S. at 158-159; and *Merchants' Exchange of St. Louis*, 111 S.W. at 574. Nor does sovereign immunity bar Plaintiffs' request for an order restraining Defendants from disbursing monies from the DSSF, which is necessary to prevent Defendants from depleting state funds that they have no authority to deplete. *Id.*

III. The Trial Court erred in dismissing Count III of Plaintiffs' First Amended Petition on the grounds of sovereign immunity and lack of standing because Plaintiffs stated facts entitling them to a declaration as to whether the grant criteria adopted by MoSMART is invalid in that Plaintiffs have a legally protected interest that entitles them to relief from the grant criteria that operates to deny salary supplementation to Plaintiffs Becker, Porter and Cissell and other St. Louis County deputies performing the same job duties as deputies throughout the state that were awarded salary supplementation and sovereign immunity does not bar such relief because Count III is not an action against the state and § 536.050 RSMo is an express consent to be sued for the very relief that Plaintiffs seek

A. Standard of Review

The standard of review for a trial court's grant of a motion to dismiss is *de novo*. *Lynch v. Lynch*, 260 S.W. 3d 834, 836 (Mo. banc 2008). The facts contained in the petition are treated as true and they are construed liberally in favor of the plaintiffs. *Id.* When the petition is a request for the interpretation of a statute, if a construction of the statute is necessary to refute the claim of right of the plaintiff, then the petition may not be dismissed. *Crain v. Missouri State Employees' Retirement System*, 613 S.W. 2d 912, 915 (Mo. App. W.D. 1981).

B. Plaintiffs pled facts demonstrating a legally protected interest entitling them to a declaratory judgment as to whether the grant criteria are invalid

Count III pleads facts establishing that the grant requirements and criteria set forth in the DSSF 2013 Local Solicitation are without statutory authority, conflict with state law, and operate to discriminate against St. Louis County deputies who perform the same job duties as deputy sheriffs throughout the state who have been awarded salary supplementation. LF 149-150. Deputies Becker, Porter and Cissell have a direct and substantial legal interest in challenging the grant criteria that caused denial of Plaintiffs' grant application because their right to receive salary increases and employee benefits now and in the future has been called into question by MoSMART's denial of Plaintiffs' 2013 DSSF application for the stated reason that Chief Fitch is not the sheriff. *See Missouri Association of Nurse Anesthetists*, 343 S.W. 3d at 354; and *Kelly*, 959 S.W. 2d at 110. Chief Fitch, Sheriff Buckles, Director Bernsen and St. Louis County also have a direct and substantial interest in challenging the grant criteria that caused denial of Plaintiffs' grant application for a reason that is incorrect as a matter of law⁵ because their

⁵ By virtue of the 1979 St. Louis County Charter (LF 20-53 and LF 142-143), the St. Louis County Superintendent of Police is the Sheriff of St. Louis County and the employees listed on the grant application are deputy sheriffs. LF 144; *State on inf. of Dalton ex rel. Shepley v. Gamble*, 280 S. W. 2d. 656, 660 (Mo. 1955).

continued ability to employ and retain deputy sheriffs now and in the future is directly affected by use of DSSF funds to supplement salaries of deputies in adjacent counties (St. Charles, Jefferson, and City of St. Louis) which might cause St. Louis County's deputies to leave their service without salary supplementation from the DSSF and also causes diminished morale. *Id.* All of these Plaintiffs are therefore aggrieved persons who have standing to challenge the rule pursuant to Section 536.053 RSMo (A24), which specifically confers such standing.

C. Plaintiffs' request for equitable relief is not barred by sovereign immunity

Plaintiffs' request for a declaration that the grant requirements and criteria are an invalid rule is not barred by sovereign immunity because it is not an action against the state. *See Ex parte Young*, 209 U.S. at 158-159; and *Merchants' Exchange of St. Louis*, 111 S.W. at 574. Plaintiffs' request for an injunction against spending from the DSSF "except as specifically ordered by this Court," merely prevents Defendants from continuing to disburse state monies based on unlawful criteria that operate to deny salary supplementation to Plaintiffs Becker, Porter and Cissell. Section 536.050.1 RSMo. (A21) specifically grants "power to the courts of this state to render declaratory judgments respecting the validity of rules, or of threatened applications thereof." Section 536.050.3(A21) provides, "A nonstate party who prevails in an action brought pursuant to subsection 1 of this section shall be awarded reasonable fees and expenses, as defined in § 536.085 incurred by that party in the action." The definition of "reasonable fees and expenses" includes attorney fees and costs. Section 536.085 RSMo (A25). Therefore §

536.050 RSMo is an express consent to be sued for the very relief that Plaintiffs seek in Count III.

IV. The Trial Court erred in dismissing Count IV of Plaintiffs' First Amended Petition on the grounds of sovereign immunity and lack of standing because Plaintiffs stated facts entitling them to a declaration as to whether MoSMART's rejection of Plaintiffs' grant application for the stated reason that Chief Fitch is not the sheriff of St. Louis County is incorrect as a matter of law in that Plaintiffs have a legally protected interest that entitles them to relief from Defendants' discriminatory denial of salary supplementation for Plaintiffs Becker, Porter and Cissell and other St. Louis County deputy sheriffs performing the same job duties as deputies throughout the state who were awarded salary supplementation and sovereign immunity does not bar such relief because Count IV is not an action against the state and Missouri Constitution Article V, § 18 and §527.010-527.130 and §536.150 RSMo are consents to be sued for the relief that Plaintiffs seek

A. Standard of Review

The standard of review for a trial court's grant of a motion to dismiss is de novo. *Lynch v. Lynch*, 260 S.W. 3d 834, 836 (Mo. banc 2008). The facts contained in the petition are treated as true and they are construed liberally in favor of the plaintiffs. *Id.*

B. Plaintiffs pled facts demonstrating a legally protected interest entitling them to a declaratory judgment as to whether the stated reason for rejection of Plaintiffs' grant application is incorrect as a matter of law

Count IV pleads facts establishing that the denial of Plaintiffs' 2013 grant application for the stated reason that Chief Fitch is not the Sheriff of St. Louis County is incorrect as a matter of law⁶ and discriminates against Plaintiffs Becker, Porter and Cissell and other St. Louis County deputies performing the same job duties as deputies throughout the state. LF 150-151. If Defendants' rejection of the 2013 grant application is allowed to stand, Defendants will be free to deny Plaintiffs' DSSF applications for the same unlawful reason year after year. Deputies Becker, Porter and Cissell have a direct and substantial legal interest in receiving the same salary supplementation as deputies throughout the state who perform the same job duties. *See Missouri National Education Association v. Missouri State Board of Education*, 34 S.W. 3d 266, 275 (Mo. App. W.D. 2000); *State ex rel. Stewart v. Civil Service Commission of the City of St. Louis*, 120 S.W.3d 279, 284 (Mo. App. E.D. 2003). Chief Fitch, Sheriff Buckles, Director Bernsen and St. Louis County also have a direct and substantial interest in challenging the stated

⁶ By virtue of the 1979 St. Louis County Charter (LF 20-53 and LF 142-143), the St. Louis County Superintendent of Police is the Sheriff of St. Louis County and the employees listed on the grant application are deputy sheriffs. LF 144; *State on inf. of Dalton ex rel. Shepley v. Gamble*, 280 S. W. 2d. 656, 660 (Mo. 1955).

reason for the denial because their continued ability to employ and retain deputy sheriffs is directly affected by use of DSSF funds to supplement salaries of deputies in adjacent counties (St. Charles, Jefferson, and City of St. Louis) performing the same job duties as St. Louis County deputies and also causes diminished morale.

Whether a person has standing to seek judicial review of an administrative decision depends upon a number of factors including the nature and extent of the interest of the person asserting standing, the character of the administrative action, and the terms of the statute that enables the agency action. *Missouri National Education Association* at 276; *State ex rel. Stewart*, 120 S.W.3d at 284. In *Missouri National Education Association*, the Court held that MNEA members had standing to seek judicial review of the State Board's decisions granting exemptions to certain school districts because the State Board's decisions adversely affected a legally protected interest of MNEA members who were employed as certified staff in those school districts. In reaching this conclusion, the Court noted that the certified staff of a school district is the intended beneficiary of the statute requiring school districts to expend a certain percentage or current operating costs for compensation of certificated staff unless the State Board grants an exemption. Similarly, Plaintiffs in this case are intended beneficiaries of the DSSF, and they have standing under § 536.150 RSMo (A27) to obtain a declaration of their rights or privileges to be treated the same as deputy sheriffs throughout the state. *State ex rel. Stewart*, 120 S.W.3d at 284.

Moreover, Missouri's declaratory judgment statute, §527.010 – 527.130 RSMo (A16-20), provides an additional basis for the declaratory relief requested in Count IV. Section 527.010 (A16) provides that Missouri courts “have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed.” Missouri's declaratory judgment statutes are to be liberally construed and administered to terminate the controversy or remove an uncertainty. *Missouri Association of Nurse Anesthetists*, 343 S.W. 3d at 353. Plaintiffs have the right to a declaration as to whether St. Louis County employees who perform deputy sheriff functions are county deputy sheriffs who are entitled to be treated, for purposes of salary supplementation, the same as deputy sheriffs throughout the state.

C. Plaintiffs' request for equitable relief is not barred by sovereign immunity

Plaintiffs' request for a declaration that Superintendent of Police Tim Fitch is, by operation of law, the sheriff of St. Louis County and therefore has the right to submit grant applications on behalf of St. Louis County deputies is not barred by sovereign immunity because it is not an action against the state. *See Ex parte Young*, 209 U.S. at 158-159; and *Merchants' Exchange of St. Louis*, 111 S.W. at 574.

Nor does sovereign immunity bar the requested relief directing Defendants to award \$100 per month plus eligible fringe benefits to supplement the salaries of each of the deputies listed on the Fitch Grant Application. LF 151. The Trial Court cites *Redmond v. State*, 328 S.W. 3d 818 (Mo. App. 2011) and *State ex rel Kansas City Symphony v. State*, 311 S.W. 3d 272 (Mo. App. 2010) for the proposition that claims

ostensibly seeking declaratory and injunctive relief, but with significant financial consequences, are barred by sovereign immunity. LF158. Plaintiffs' request in this case for an order reversing the unlawful denial of the Fitch Grant application is far different from the relief requested in *Redmond*, where the plaintiff sought a judgment requiring the State and State Treasurer to pay \$283, 364, 390 to the Life Sciences Research Trust Fund plus interest, and *Kansas City Symphony*, where the plaintiff sought an order requiring the State to pay the delinquent amount of \$63,902,716, plus interest, to the Arts Trust Fund.

The requested order reversing the unlawful denial of Plaintiffs' 2013 grant application for a reason that is incorrect as a matter of law (LF 143-147, ¶31-59) is essential to enforce the provisions of Mo. Const. Art. V, §18 (A10), which provides for judicial review of actions of administrative agencies that affect private rights and § 536.150 RSMo (27), which affords judicial review of a non-contested case when the agency action determines "the legal rights, duties or privileges of any person" and specifically provides that the court "may order the administrative officer or body to take such further action as it may be proper to require." These provisions operate as a waiver of sovereign immunity. *See Ring v. Metropolitan St. Louis Sewer District*, 969 S.W. 2d 716, 719 (Mo. banc 1998) where the Court held that Article X, § 23 of the Missouri Constitution operates as a waiver of sovereign immunity and permits taxpayers to obtain refunds of taxes collected in violation of Article X, § 22(a). Moreover, when a statute provides a benefit, the requisite waiver of immunity from suit to enforce the benefit is

inferred. *Crain*, 613 S.W. 3d at 917, citing *V.S. DiCarlo Construction Co., Inc. v. State*, 485 S.W. 2d 52 (Mo. 1972). Section 57.278 RSMo (A11) creates a benefit for all county deputy sheriffs throughout the state, including Deputies Becker, Porter and Cissell, to receive salary increases via the DSSF, and the General Assembly has appropriated ample funds for such benefits, Petition ¶ 44 and 46, LF145.

The only financial consequence to the state from an order reversing the denial of the Fitch Grant application is that benefits will be awarded in a manner that carries out the purpose of the statute creating the DSSF and St. Louis County employees who perform deputy sheriff functions will be treated, for purposes of salary supplementation, the same as deputy sheriffs throughout the state. Sovereign immunity does not bar such relief, which is specifically authorized by § 527.080 RSMo (A18) and §536.150 RSMo (A27).

CONCLUSION

The judgment of the trial court must be reversed because Plaintiffs have standing to obtain the requested relief from Defendants' actions, including a declaration that the St. Louis County Superintendent of Police is the sheriff of St. Louis County and is therefore entitled to submit grant applications on behalf of Plaintiffs Becker, Porter and Cissell and the other St. Louis County employees who perform the same job duties as deputies throughout the state, and this relief is not barred by sovereign immunity.

**PATRICIA REDINGTON
COUNTY COUNSELOR**

/s/ Cynthia L. Hoemann
Cynthia L. Hoemann, #28245
Michael E. Hughes, #23360
Associate County Counselors
41 South Central Ave.
Clayton, Missouri 63105
(314) 615-7042
Fax (314) 615-3732
choemann@stlouisco.com
mhughes2@stlouisco.com

Attorneys for Appellants

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of August, 2013, a true and correct copy of the foregoing was served via the Court's electronic filing system upon Robert Presson, Assistant Attorney General.

/s/Cynthia L. Hoemann
Cynthia L. Hoemann

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Rule 84.06(b) of the Missouri Rules of Civil Procedure. This brief was prepared in Microsoft Word 2007 and contains 6,774 words, excluding those portions of the brief listed in Rule 84.06(b) of the Missouri Rules of Civil Procedure. The font is Times New Roman, proportional spacing, 13-point type.

/s/ Cynthia L. Hoemann
Cynthia L. Hoemann