

**IN THE SUPREME COURT OF MISSOURI**

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**No. SC91742**

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**LEGENDS BANK and JOHN KLEBBA**

**Plaintiffs/Respondents**

**v.**

**STATE OF MISSOURI and THE MISSOURI  
ETHICS COMMISSION and ITS COMMISSIONERS:  
JIM WRIGHT, JAMES R. TWEEDY, JEFFREY B. DAVIDSON,  
DENNIS ROSE, LOUIS J. LEONATTI and VERNON DAWDY,  
in their Official Capacities,**

**Defendants/Appellants.**

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**Appeal From Cole County Circuit Court  
The Honorable Daniel R. Green, Judge**

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**RESPONDENTS' CORRECTED REPLACEMENT BRIEF**

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## **JURISDICTIONAL STATEMENT**<sup>1</sup>

This appeal concerns whether Senate Bill 844 contains more than one subject in violation of Article III, section 23 of the Missouri Constitution and/or whether it was amended in its passage so as to change its original purpose in violation of Article III, section 21 of the Missouri Constitution. Because this appeal involves the constitutionality of one or more statutes, it is within the exclusive jurisdiction of this Court. MO. CONST. Art. V, § 3.

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<sup>1</sup> Respondents provide this Jurisdictional Statement under Rule 84.04(f) because Appellants' Brief does not comply with Rule 84.04(b) in that it contains no such statement.

## **STATEMENT OF FACTS**

Respondents supplement Appellants' Statement of Facts pursuant to Rule 84.04(f) for the purpose of completeness.

### **The Parties**

Plaintiff/Respondent Legends Bank ("Legends") is a Missouri state chartered bank doing business in the State of Missouri. L.F. 206. It exists under the provisions of Chapter 362, RSMo. *Id.* Legends has a history of contributing to state political action committees ("state PACs") and desires to do so in the future, including state PACs formed by members of the Missouri Bankers Association. L.F. 206, 209. Plaintiff/Respondent John Klebba ("Klebba") is a resident and taxpayer of the State of Missouri. L.F. 206-07.

Defendants are the State of Missouri, the Missouri Ethics Commission, and its individual Commissioners who are sued in their official capacity. L.F. 7-6, 207. The Ethics Commission is responsible for enforcing Missouri laws related to campaign finance, ethics and lobbying. L.F. 36.

### **Legislative Background**

#### **Senate Bill 844 as Introduced**

Senate Bill 844 ("S.B. 844") was introduced on January 27, 2010. L.F. 17, 100. As originally proposed, the bill was titled "An Act to amend chapter 37, RSMo, by adding one new section relating to contracts for purchasing, printing, and services for statewide elected officials." *Id.* True to its title, the bill enacted one new section, called section 37.900. The entire bill was one page long.

The only section of the original version of S.B. 844 contained three subsections, which allowed a statewide elected official to use the office of administration ("OA") for determining the lowest bidder during procurement. Significantly, OA was to be involved only after the statewide official had put together the bid documents and established the evaluation criteria (§ 37.900.2), disseminated the bid documents in some unspecified fashion to potential bidders or offerors, and had received bids or proposals in response<sup>2</sup>. L.F. 100. Also, this new section 37.900 did not require OA to inquire of or negotiate with any offeror. L.F. 100.

Under procurement law separate from S.B. 844, negotiations would only occur in the case of an RFP, and the contract would be let to the lowest and best offeror as determined by the evaluation criteria established in the request for proposal and any subsequent negotiations conducted, which could include revisions to proposals in order to secure from the bidder a "best and final offer" or "BAFO".<sup>3</sup> When OA uses the existing process and conducts a procurement from beginning to end, the evaluation of best and lowest takes place after any BAFO revisions are made through inquiries and negotiations.<sup>4</sup> But under the new section 37.900, any such inquiries and negotiations

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<sup>2</sup> Section 34.010.2, RSMo, states, "The term 'lowest and best' in determining the lowest and best award, cost, and other factors are to be considered in the evaluation process. Factors may include, but are not limited to, value, performance, and quality of a product."

<sup>3</sup> § 34.042.3, RSMo.

<sup>4</sup> *Id.*

would not be made through OA but by the statewide elected official's office. L.F. 100.

### **Senate Bill 844 as Perfected by the Senate**

On March 17, 2010, S.B. 844 was taken up on the Senate floor and perfected with the two amendments. L.F. 101, 207. One amendment dealt with procurement and stated that OA could not prohibit the purchase of supplies from an authorized General Services Administration vendor (§ 1 of Perfected S.B. 844). L.F. 102, 207. The second amendment required the commissioner of administration to provide each member of the senate and house of representatives a key to the dome of the state Capitol (§ 8.016 of Perfected S.B. 844). L.F. 101, 208.

This keys to the Capitol dome provision had been added to several bills over several sessions. During the 2010 session, it was also enacted by two other bills as evident from the Revisor's note found after section 8.016, RSMo Cum. Supp. 2010, stating "L. 2010 H.B. 1868 merged with H.B. 2285 merged with S.B. 844." Two previous Truly Agreed and Finally Passed ("TAFP") bills containing the keys to the Capitol dome provision had been vetoed in the past, specifically because of safety and security concerns about that specific provision. TAFP H.B. 1689 was vetoed in 2008 by Governor Blunt<sup>5</sup> and TAFP H.B. 544 was vetoed in 2009 by Governor Nixon.<sup>6</sup> The title

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<sup>5</sup> Journal of the House, Veto Session, 2<sup>nd</sup> Regular Session, 94<sup>th</sup> General Assembly, First Day, Wednesday, September 10, 2008, p. 3 (App. A10).

<sup>6</sup> Journal of the House, Veto Session, 1<sup>st</sup> Regular Session, 95<sup>th</sup> General Assembly, Wednesday, September 16, 2009, p. 23-24 (App. A12-A13).

of Perfected S.B. 844 was not changed by the Senate except to add "chapter 8 and" after the words "An act to amend." *Cf.* L.F. 100 to 101; L.F. 208.

### **House Committee Substitute Number 2 for S.B.844**

Senate Bill 844 as perfected left the Senate and moved to the House. L.F. 208. With only one week until the end of the legislative session<sup>7</sup>, a House Committee adopted its Substitute No. 2 for Senate Bill 844 ("H.C.S. No. 2 for S.B. 844") which was reported to the full House and adopted, all in the same day (May 6, 2010). L.F. 208.

H.C.S. No. 2 for S.B. 844 removed the keys to the Capitol dome provision from the Senate version but retained the procurement sections. *Cf.* L.F. 101-02 with L.F. 103-06, 165. Then, H.C.S. No. 2 for S.B. 844 repealed 29 sections of law and enacted 49 sections of law, which for the first time included provisions in chapters 105, 115 and 130, RSMo. *Cf.* L.F. 100, 102 and 103; L.F. 208. The title of H.C.S. No. 2 for S.B. 844 was now changed to "relating to ethical administration of public institutions and officials, with penalty provisions and a contingent effective date for certain sections." L.F. 103, 209.

### **Conference Committee Substitute No. 3/TAFP**

On May 11, 2010, the Senate refused to accept the House changes in H.C.S. No. 2 for S.B. 844 and the two Chambers agreed to conference on the bill.<sup>8</sup> L.F. 209. The

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<sup>7</sup> MO. CONST. Art. III, § 20(a) ("All bills in either house remaining on the calendar after 6:00 p.m. on the first Friday following the second Monday in May are tabled.")

<sup>8</sup> Journal of the Senate, 2<sup>nd</sup> Regular Session, 67<sup>th</sup> Day (May 11, 2010), p. 1440 (App.

conference committee produced two compromise versions which were not accepted by the full bodies. Finally, on the third try, Conference Committee Substitute No. 3 was adopted by the House and the Senate on the last two days of session.<sup>9</sup> L.F. 209.

The bill, which now reflected its convoluted history with the name "Conference Committee Substitute No. 3 for House Committee Substitute No. 2 for Senate Bill 844" was truly agreed to and finally passed ("TAFP") on May 14, 2010, the last day of session.<sup>10</sup> L.F. 209. TAFP S.B. 844 was now titled "An Act . . . relating to ethics, with penalty provisions." L.F. 17, 209. It spanned the statutes (from Chapter 8 to Chapter 575) and was 85 pages long.

The original section 37.900 remained in TAFP S.B. 844. L.F. 18, 209. The Senate-added provision regarding purchasing supplies from a General Services Administration vendor also remained. L.F. 17-18, 209. The keys to the Capitol Dome provision, section 8.016, that had been added in the Senate Perfected version (L.F. 101) but removed in House Committee Substitute No. 2 (L.F. 103-06, 165), was back in the bill via the conference process (L.F. 17).

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A15).

<sup>9</sup> Journal of the Senate, 2<sup>nd</sup> Regular Session, 69<sup>th</sup> Day (May 13, 2010), pp. 1861, 1905-07 (App. A17-A20); Journal of the House, 2<sup>nd</sup> Regular Session, 71<sup>st</sup> Day (May 14, 2010), pp. 1914-17 (App. A22-A25); Journal of the Senate, 2<sup>nd</sup> Regular Session, 70<sup>th</sup> Day (May 14, 2010), p. 1943 (App. A27).

<sup>10</sup> *Supra* note 7.

Additionally, TAFP S.B. 844 repeals nine and enacts ten sections from Chapter 105, RSMo, enacts a new section in Chapter 115, RSMo, repeals and enacts ten sections from Chapter 130, amends section 266.033, and enacts a new section to Chapter 575 making it a misdemeanor to obstruct an ethics investigation. L.F. 17-85, 209.

So, what started as a one section, one page, bill titled "related to purchasing, printing and services for statewide elected officials" now contained numerous provisions, sprinkled across its 85 pages. Some particular examples include:

- §105.963 limiting the aggregate fine the Ethics Commission may levy when candidates fail to file campaign finance reports on time.
- §115.364 specifying that if a candidate has previously been disqualified from the ballot, they may not be nominated by a party nominating committee.
- §130.011(25) eliminating county, city and area political party campaign finance committees.
- §130.031.13 prohibiting political action committees from accepting contributions from other political action committees and from many entities including banks like Legends.

On July 14, 2010, the Governor signed TAFP S.B. 844. L.F. 207.

### **Litigation at the Trial Court**

In February 2011, Plaintiffs Legends and Klebba filed a First Amended Petition for Declaratory Judgment and Injunctive Relief, asserting that: S.B. 844 violates the single subject requirement of Article III, Section 23 of the Missouri Constitution (Count

I); S.B. 844 violates the prohibition on a change from the original purpose of Article III, Section 21 of the Missouri Constitution (Count II); subsection 13 of section 130.031, as enacted by S.B. 844, prohibits state PACs from receiving money from Missouri state chartered banks formed under Chapter 362, RSMo, such as Legends Bank, but allows state PACs to receive money from individuals, unions, federal PACs, and corporations, associations and partnerships formed under Chapters 347 to 360, RSMo, violates the First and Fourteenth amendments to the United States Constitution (Count III). L.F. 7-16.

The case was submitted upon cross-motions for judgment on the pleadings. L.F. 206, 173-199. After briefing and argument, the trial court rendered judgment on March 30, 2011: (a) finding that procurement was the original controlling purpose of the bill; (b) finding that S.B. 844 was enacted in violation of the single subject requirement of Missouri Constitution Article III, Section 23; (b) voiding as unconstitutionally enacted all of the provisions of S.B. 844 except those relating to procurement (sections 37.900 and 34.048); (c) enjoining defendants from enforcing the void provisions; (d) declaring that section 130.031.13 violated the United States Constitution and Missouri Constitution and awarding attorneys' fees under 42 U.S.C. § 1988<sup>11</sup>. L.F. 5, 212-13. The Court did not make any finding as to Plaintiffs' claim of original purpose violation because the other findings disposed of the case. L.F. 212.

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<sup>11</sup> The State has not appealed the declaration concerning section 130.031.13 or the award of attorneys fees.

## STANDARD OF REVIEW

The appellate court is a court of review and an appeal "provides an opportunity to examine asserted error in the trial court which is of such a nature that the complaining party is entitled to a new trial or outright reversal or some modification of the judgment entered." *Thummel v. King*, 570 S.W.2d 679, 686 (Mo. banc 1978). It is the appellant's burden on appeal to demonstrate error by the trial court. *Id.* at 687. Accordingly, a point relied on must clearly state the contention on appeal to inform the court of the issues presented for resolution. *Id.* at 686. An "argument not set out in the point relied on but merely referred to in the argument portion of the brief does not comply with the requirements of Rule 84.04(d) and the point is considered abandoned in this Court." *Brizendine v. Conrad*, 71 S.W.3d 587, 593 (Mo. banc 2002).

Additionally, the failure to cite legal authority for a claim of error fails to preserve the point for appellate review. *Jackson Co. v. State of Mo.*, 207 S.W.3d 608, 614 (Mo. banc 2006). Simply citing a case is inadequate; one must show how the authorities cited demonstrate error by the lower court. *Burkholder v. Burkholder*, 48 S.W.3d 596, 598 n.3 (Mo. banc 2001); *accord Thummel*, 570 S.W.2d at 687.

If the Appellant has accomplished the foregoing, this Court conducts a *de novo* review of constitutional challenges to a statute. *Jackson Co.*, 207 S.W.3d at 611, 614 (appellant failed to cite any authority for a clear title challenge, so the court determined it was not preserved for appellate review).

## INTRODUCTION

There is no dispute that S.B. 844 contains multiple subjects. The State concedes a violation of the single subject requirement in its first point relied on, in the body of its argument and in its request for relief. The dispute is that the State claims S.B. 844 contains two subjects – ethics and keys to the Capitol dome, while Legends and the trial court believe S.B. 844 contains three subjects – procurement, ethics and keys to the Capitol dome. All parties agree the bill contained more than a single subject and examination of the case law confirms it.

S.B. 844 also violated the original subject requirement of the Constitution. Although the single subject violation arguably makes this point moot, the original purpose violation may be relevant depending on whether this Court conducts a severability analysis. The original purpose of the original version of S.B. 844 was, according to its title and the sole section contained in the one page bill, procurement. But the bill was amended in its passage to add provisions regarding keys to the Capitol dome and campaign finance provisions including a provision banning Legends from contributing to political actions committees ("PACs") and banning PACs from contributing to each other. L.F. 71-72. These provisions have nothing at all to do with the bill's original purpose. Moreover, since the state has conceded that providing keys to the Capitol dome is a separate purpose from the remainder of the bill, the state should also concede that the addition of this provision altered the original purpose.

The conclusion that the bill was enacted in a manner violating the Constitution is easy to reach. The more interesting aspect of this appeal is the issue of severability. This

case presents an excellent opportunity to follow through on the process begun in *St. Louis County v. Prestige Travel*, No. SC91228, 2011 WL 2552572 (Mo. banc June 28, 2011). This Court should use this case as an opportunity to acknowledge that severability analysis is not appropriate when a bill has been found to be unconstitutional. But if this Court is not yet prepared to recognize this standard, the Court should re-affirm and expand upon *Hammerschmidt's* holding. Severability analysis begins with the original purpose of a bill and severs offensive amendments that were added during the process so as to make the bill unconstitutional. Severability does not begin with the ending title of a bill that has already been found to have been unconstitutionally amended.

## ARGUMENT

**I. THE TRIAL COURT DID NOT ERR IN FINDING THAT S.B. 844 CONTAINED MULTIPLE SUBJECTS IN VIOLATION OF THE MISSOURI CONSTITUTION BECAUSE S.B. 844 DID CONTAIN MORE THAN A SINGLE SUBJECT IN THAT THE BILL EMBRACED THE SUBJECTS OF PROCUREMENT, KEYS TO THE CAPITOL DOME, AND ETHICS (RESPONDS TO APPELLANTS' POINT I).**

The Missouri Constitution, Article III, Section 23, requires that "[n]o bill shall contain more than one subject which shall be clearly expressed in its title." The trial court followed existing Missouri precedent and reached the well-reasoned conclusion that S.B. 844 contained three subjects – ethics, procurement and keys to the Capitol dome. L.F. 211. The State's brief concedes that the bill contains at least two subjects (ethics and keys to the Capitol dome).

The State's first point relied on should be denied based solely on the State's concession of multiple subjects. If this Court looks past the concession, it is clear that S.B. 844 contained more than one subject. This Court may find the subject of S.B. 844 in its title, "relating to ethics." The subject encompassed by this title has already been litigated and defined in *Trout v. State*, 231 S.W.3d 140 (Mo. banc 2007). To the extent this Court allows "relating to ethics" in this case to cover more territory than it did in *Trout*, the Court should consider prior decisions discussing titles that satisfy the constitution's clear title requirement, but are nevertheless "amorphous." See *Carmack v. Director, Dep't of Agric.*, 945 S.W.2d 956 (Mo. banc 1997). In addition, courts may

locate the subjects of the bill by looking to the organizational structure of existing statutes and comparing that structure to the contents of S.B. 844 as passed. Regardless of whether this Court addresses the State's point relied on by relying on the State's concession, examining the title of the bill to determine its subject or examining the contents of the bill, the Court will reach the conclusion that S.B. 844 as finally enacted contained more than one subject and the subjects it contained were not expressed in the title.

**A. The State's Brief Concedes that S.B. 844 Violated the Single Subject Requirement of the Constitution.**

The State's first point relied on says that the trial court erred "in finding that S.B. 844's provisions relating to competitive bidding were not related to or congruous with the subject of the bill." Appellants' Br. 4. But even if that statement were true, it remains that the trial court found S.B. 844 "contains subjects other than 'ethics': (1) procurement . . . and (2) access to the Capitol dome (§8.016)." L.F. 211 (Emphasis added). The Appellants' point relied on does not claim that the trial court erred in the finding that keys to the Capitol dome was an additional subject in violation of the one subject requirement. Instead, the first point relied on asserts that the trial court erred by finding there were two subjects in the bill. Since the trial court found there were three, no error is preserved. *Brizendine*, 71 S.W.3d at 593. Whether there were two subjects or three is immaterial – so long as there was more than one.

The body of the Appellants' brief also concedes that S.B. 844 contained multiple subjects. On pages 13 and 22-23 of Appellants' Brief, the State discusses whether

procurement by statewide elected officials (§ 37.900) is related to ethics<sup>12</sup> and includes an admission that with the title being "ethics," "what might not be intimated is that keys to the capitol dome were included. Thus that provision would be a different subject." Appellants' Br. 13 (Emphasis added). Similarly, Appellants' Brief concedes that the keys to the Capitol dome provision of the bill was "hidden from legislators." The brief candidly admits (as was done below) that "the state does not defend" the inclusion of the provision related to keys to the Capitol dome. Appellants' Br. 25.

Finally, in the conclusion section of Appellants' Brief, where Rule 84.04(a)(6) requires Appellants to state "the precise relief sought," the State asks this Court to reverse the trial court but order portions of the bill severed<sup>13</sup> – a clear concession that the State

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<sup>12</sup> As it does throughout its Brief, the State notably focuses on one procurement provision, but fails to discuss the other procurement provision in the bill, section 34.048. The State argues that section 37.900 is related to ethics because it allows a new method of procurement and thus somehow allows more ethical procurement. The state has not suggested that this argument applies to the other procurement section enacted in S.B. 844, section 34.048 which prohibits the office of administration from doing anything to prevent state officials from using a federal procurement system.

<sup>13</sup> The State requests alternative forms of relief but both concede constitutional violations by requesting severance ("strike only the keys to the dome provision or alternatively the keys to the dome and competitive bidding provisions"). Appellants' Br. 30. The State's brief never requests outright reversal or that the trial court should have preserved S.B.

believes the bill as passed is unconstitutional. Appellants' Br. 30. Therefore the State has conceded that S.B. 844 contained multiple subjects in violation of Article III, Section 23. The portion of the trial court's ruling that makes that finding must be affirmed. The only real issue in this case is the severability analysis, discussed herein.

**B. The Trial Court's Analysis was the Proper Analysis.**

Even without the very candid concession from the State, it is clear that the trial court's analysis of single subject was correct. The State alleges "the trial court erred by looking only at the title of original SB 844 to determine satisfaction of the single subject requirement." Appellants' Br. 21. The State argues the trial court should have looked at the title of the bill as finally passed — "relating to ethics" — and determined whether all the provisions of the bill as passed were within the single subject of ethics.

But this is exactly the analysis the trial court performed.<sup>14</sup> The trial court found that "for a single subject analysis, the general core purpose of S.B. 844 is determined by the title of the bill as enacted. In this case, that is 'relating to ethics.'" L.F. 211. The Appellants' Brief claims that the trial court "skipped a step" in the analysis and "ignored

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844 *in toto*.

<sup>14</sup> Although the Appellants' Brief alleges that this Court and others frequently "confuse" original purpose and single subject, it is the Appellants' Brief that appears to confuse the analysis of whether a bill contains multiple subjects and an analysis of which portions of a bill containing multiple subjects are to be stricken. It is the severability analysis, not the single subject analysis, where the trial court looked to the title of the original bill.

the analysis . . . that requires the court to examine whether the original provisions of S.B. 844 related to, were connected with or were incident or merely a means of enforcing the provisions of the final subject 'relating to ethics.'" Appellants' Br. 21-22.

If someone has "skipped a step" in this case, it is not the trial court but rather the State. The trial court's judgment followed the law and the same analysis urged by the State.<sup>15</sup> When one reads the trial court's actual judgment, one wonders how the State reaches this conclusion. After looking at the final title of the bill to determine the subject, (L.F. 211) the trial court found "TAFP SB 844 contains matters that do not fairly relate to ethics, have a natural connection to ethics or are a means to accomplish the law's purpose as enacted." *Id.* at ¶ 45. The State's assertion that the trial court did not follow earlier jurisprudence on the issue of single subject is simply wrong.

### **C. S.B. 844 Contained More than a Single Subject.**

The trial court performed the right analysis and, more important, reached the right result. Unlike an original purpose challenge which focuses on the bill as introduced, the determination of whether a bill violates the Constitution's single subject requirement is based upon the final version of the bill. *Trout*, 231 S.W.3d at 146. Defining the term "one subject" has proven difficult, not just for this Court but for courts around the country. Michael D. Gilbert, *Single Subject Rules and the Legislative Process*, 67

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<sup>15</sup> The State failed to comply with Rule 84.04(h), which required the State to include a copy of the trial court's Judgment in an appendix. Respondent provides a copy of the Judgment for the Court's review. App. A1-A8.

U.PITT.L.REV. 803, 825 (2006).

The dictionary definition of the word "subject" is "a topic of interest." WEBSTER'S II NEW COLLEGE DICTIONARY 1097 (2001). The definition of "topic" provides a circular reference: "a subject of discussion or conversation... a subdivision of a theme, thesis or outline."<sup>16</sup> *Id.* at 1162. "[T]he term 'subject' is problematic to define with any precision because almost any two legislative measures may be considered part of the same subject if that subject is defined with sufficient abstraction." *Manduley v. Superior Court*, 41 P.3d 3, 37 (Cal. 2002). Missouri has struggled with this problem but has come to a reasonable solution. "If multiple matters may be lumped together under excessively general headings, the single subject restriction . . . would be rendered meaningless. . . . the Court will not adopt a construction of the words 'one subject' that renders the constitutional prohibition against multiple subjects meaningless." *Missourians to Protect the Initiative Process v. Blunt*, 799 S.W.2d 824, 832 (Mo. banc 1990). Courts determine the core subject of the bill using different indicia, but they all produce the same result, and certainly will in this case.

Many cases involve challenges under both Article III, Section 21 (original purpose) and Article III, Section 23 (single subject) and, as in *Hammerschmidt v. Boone*

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<sup>16</sup> In spite of the fact that the words "subject" and "topic" are synonyms (ROGET'S INT'L THESAURUS, 711, 1242, 1262 (5<sup>th</sup> ed. 1992)), the State's brief claims the single subject provision of the Constitution "was not intended to impede or obstruct the process and certainly not to prevent bills containing multiple topics." Appellants' Br. 25.

*Co.*, 877 S.W.2d 98, 101 (Mo. banc 1994), note that the provisions are corollary and together facilitate "orderly legislative procedure." *C.C. Dillon Co. v. City of Eureka*, 12 S.W.3d 322, 326 n.3 (Mo. banc 2000). Although the State complains much of *Hammerschmidt's* use of the phrase "purpose" in a single subject analysis, that does not mean it should be overturned or that the trial court's judgment should be reversed. *Hammerschmidt* does not confuse original purpose and single subject analyses simply because of the terms it uses.

**1. The Title of the Bill as Finally Passed Assists in Determining at Least One of the Subjects in the Bill.**

The analysis of single subject requires the Court to examine how many subjects there are in the bill. Thus, the first task is how to determine what the subject(s) of the bill are. Since the constitution requires that a single subject is supposed to be expressed in the bill's title, the title will be relied upon "if the purpose is clearly expressed in the title of the bill." *SSM Cardinal Glennon Children's Hospital v. State*, 68 S.W.3d 412, 416 (Mo. 2002). See also *C.C. Dillon*, 12 S.W. 3d at 328; *Hammerschmidt*, 877 S.W.2d at 102.

The test is to determine whether the individual provisions "'fairly relate' to the subject described in the title of the bill, have a 'natural connection' to the subject, or are a means to accomplish the law's purpose." *SSM Cardinal Glennon*, 68 S.W.3d at 416; accord *C.C. Dillon*, 12 S.W.3d at 328. If all of the individual provisions of the bill pass this test, "then the law has a single subject and withstands a constitutional challenge." *Id.*

S.B. 844's final title was "relating to ethics." L.F. 211, 17. As the trial court

correctly found, S.B. 844 does contain some individual provisions that fall within its subject as stated in its title, of "relating to ethics," but other individual provisions clearly do not fairly relate to this subject. The fact that there are subjects outside of the one subject expressed in the title means the bill is unconstitutional *per se*. Throughout its brief, the State makes many references to whether the public or legislators were misled by the bill or its title. Whether the bill contains more than one subject is a separate question from whether the title is misleading. If "the act clearly contains two incongruous subjects, whether expressed in the title or not, the act is void *per se* without regard to whether legislators or people were misled or not." *State v. Burgdoerfer*, 17 S.W. 646, 651 (Mo. 1891).

To consider whether the bill contains subjects outside of the title "ethics," this Court need only consult the *Trout* case, where the parameters of the subject "relating to ethics" have already been defined. *Trout*, 231 S.W.3d at 143. In *Trout*, this Court held that the contents of H.B. 1900 represented the outer limit of constitutionality as to the subject of "ethics." *Id.* at 145. H.B. 1900 contained provisions in Ch. 105, RSMo, regarding lobbyists (who register with the Ethics Commission), personal financial disclosure statements made by public officials and employees (which are filed with the Ethics Commission), how the Ethics Commission is to respond to complaints to it and the assessment of fines by the Ethics Commission for campaign finance reports filed late; Ch. 115, RSMo, regarding qualifications to hold elected public office; Ch. 130, RSMo, regarding campaign finance provisions; and one new section that required the Ethics

Commission to conduct a study regarding "political telephone solicitations."<sup>17</sup> The *Trout* Court reasoned that these subjects were fairly related to and fell under the umbrella of "ethics."

Now, the State asks this Court to enlarge the umbrella to a point where "ethics" covers virtually any subject the legislature can come up with. The final version of S.B. 844 contains the *Trout*-sanctioned provisions regarding lobbying, campaign finance, and the Missouri Ethics Commission's powers and duties. But it also contains subjects other than "ethics." In *Trout*, this Court explained that the subject of "ethics" includes "the regulation of the ethical conduct of lobbyists, public officials and candidates." *Id.* at 145. But S.B. 844 also includes provisions relating to (1) procurement (§ 34.048 and § 37.900); and (2) keys to the Capitol dome (§ 8.016).

The State makes no argument that a key to the Capitol dome provision is related to ethics, but -- undeterred by the holding of *Trout* -- mounts a chain-reasoning defense that the procurement provisions are fairly related. This Court's analysis in *Trout* leads to the simple conclusion that the procurement provisions were not related to ethics because they do not regulate ethical conduct. Both the keys to the Capitol dome provision and the procurement provisions certainly regulate conduct, but they are not fairly related to ethics. One provision requires OA to provide dome keys to all legislators while the other requires OA to calculate the lowest bid for all statewide officials. Both are simply

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<sup>17</sup> Session Laws of Missouri Passed during the 93<sup>rd</sup> General Assembly, pp. 409-435.

procedural mandates on OA, yet the State concedes one does not relate to ethics while defending the other.

The State argues that "bidding by statewide elected officials has a natural connection to ethics." Appellants' Br. 22. The State's argument is that S.B. 844's procurement provision section 37.900 "allowed statewide elected officials to use the non-partisan process of determining winning bidders without allegations of favoritism to friends and supporters." Appellants' Br. 23.<sup>18</sup> In doing so, the state is engaged in what one commentator describes as "chain reasoning." Alexander R. Knoll, *Tipping Point: Missouri Single Subject Provision*, 72 MO.L.REV. 1387, 1405-06 (2007). The State's position would expand the ethics umbrella established by *Trout* to include any description of conduct in any legislation. The State's argument is that anything that might result in "lessened fear of ethical complaints and reduce[] the likelihood of alleged violation of informal and formal ethics rules and principles" would be related to ethics. Appellants' Br. 23. Under this reasoning, the State could have argued that the keys to the Capitol

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<sup>18</sup> In addressing the procurement provisions of S.B. 844, the State focuses on section 37.900, but practically ignores another provision related to procurement, section 34.048. Section 34.048 precluded the OA from preventing any agency of the state making purchases through a vendor of the federal government's General Services Administration. The State makes no effort to explain how this specific section is related to ethics, rather, the State seems to generally assert that anytime the legislature deals with the issue of procurement, it is within the subject of "ethics." Appellants' Br. 22-23.

dome is related to ethics because it requires OA to provide keys to all legislators without allegations that OA showed favoritism to any individual legislator. But even the State acknowledges the unfairness of this connection.

This improper "chain reasoning" approach has been rejected. In *SSM Cardinal Glennon*, the State reasoned that a bill relating to "professional licensing" could include provisions relating to hospitals because they are in fact licensed. This Court rejected the State's logic there and held that a hospital lien provision in a professional licensing bill violated the single subject requirement – "To the extent there is any connection at all between the act of professional licensing and hospital liens, it is simply too extended and too tenuous." *SSM Cardinal Glennon*, 68 S.W.3d at 417. "The single subject limitation requires the *contents* of the bill, not the *[persons] affected by* the bill, fairly relate to the subject expressed in the title." *Id.* (quoting *Missouri Health Care Ass'n v. Attorney General of the State of Mo.*, 953 S.W.2d 617, 623 (Mo. banc 1997)(emphasis added)).

The State's argument here is the same. The State argues that because elected officials might be subject to ethics complaints and because that might happen during the course of procurement, authorizing – but not requiring – the use of the office of administration for parts of procurement is reasonably related to the general title of ethics. The connection is simply too extended and tenuous. The bill may properly contain all of the subjects contemplated by *Trout* (i.e., campaign finance, lobbyist registrations and the like) but procurement and keys to the Capitol dome simply prove too much.<sup>19</sup> This Court

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<sup>19</sup> As discussed herein, it is the keys to the Capitol dome and the procurement provisions

should continue the wisdom articulated earlier: "If multiple matters may be lumped together under excessively general headings, the single subject restriction . . . would be rendered meaningless. . . . the Court will not adopt a construction of the words 'one subject' that renders the constitutional prohibition against multiple subjects meaningless." *Missourians to Protect the Initiative Process*, 799 S.W.2d at 832.<sup>20</sup> This Court should stick to the holding in *Trout* and reject a construction of the term ethics that leaves the single subject meaningless.

Under the State's logic, it is hard to envision any legislation that would not be related to ethics. To say that these provisions are related to the ethical conduct of public officials is tantamount to saying that a bill governing telephone usage is related to ethics because the telephone might be used to engage in ethical or unethical behavior.

**2. The Title of a Bill is Not the Only Way to Find its Subject,  
Particularly when the Title is Amorphous.**

The trial court relied on the title of S.B. 844 as finally passed and found that keys to the Capitol dome and procurement were not fairly related to "ethics." Legends agrees

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that prove the bill goes beyond the subject expressed in the title of the bill. But a proper severability analysis begins with the assumption that the bill was Constitutional when introduced and attempts to preserve the original procurement sections.

<sup>20</sup> This case dealt with an initiative petition, not an act of the General Assembly. The single subject ban applies to both although initiatives obviously do not have a title. MO. CONST. Art. III, § 50.

with the trial court, but acknowledges the title in this case may fall under prior decisions about "amorphous" titles. The title should be relied upon "if the purpose is clearly expressed in the title of the bill." *SSM Cardinal Glennon*, 68 S.W.3d at 416. However, this Court has long recognized that the title as passed is only one way to determine the "core subject" of the bill. "Where an amorphous title to a bill renders its subject uncertain, but the party challenging the bill claims a 'one subject' violation and not a 'clear title' violation of Section 23, the Court may determine the subject from two sources," the Missouri Constitution and the contents of the bill as originally filed. *Carmack*, 945 S.W.2d at 960.<sup>21</sup> This principle was reiterated in *Stroh Brewery Co. v. State*, 954 S.W.2d 323, 327 (Mo. banc 1997), although the Court there saw no need to consult additional sources. *Carmack* looked to the Constitution itself, which is organized into subjects, and compared those subjects to the contents of the bill as originally filed. 45 S.W.2d at 960-961.

In this case, the Missouri Constitution contains no sections specifically related to ethics, procurement or access to the capitol dome. However, Article VII of the Constitution relates to public officers including the basis for removal of those officers from office. In that sense, it is related to the ethical conduct of those officers. The office

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<sup>21</sup> As this Court knows, counsel for Respondent Legends was also counsel for Mr. Trout. Trout's briefing argued strongly that "relating to ethics" is not a clear title and is simply too ambiguous to withstand muster. But Trout lost that battle and Legends accepted this Court's ruling and did not challenge the clear title below.

of administration, which is the agency of government discussed in both the keys to the Capitol dome provision and the procurement sections, is governed by a completely different article, Article IV, Section 50. Consulting the contents of the bill as originally filed leads to the conclusion that procurement was one distinct subject.

In *Carmack* the court found the bill's title amorphous and struck down a bill which covered the department of agriculture and the department of economic development because those departments are in different *sections* of the Constitution, although they were in the same *article*. In this case, S.B. 844 deals with subjects that are placed in completely separate articles of the Constitution. It therefore contains multiple subjects in violation of the Constitution.

Similarly, the Courts have at times consulted the statutory subjects the legislature itself has identified and compared those subjects to the contents of the challenged bill. Although this analysis has not been specifically articulated in prior case law, the *Carmack* court looked to the Titles within the Missouri Revised Statutes for guidance on the subject matter of the statutes. The Court conducted a similar analysis in *National Solid Waste Mgmt. Ass'n v. Director of the Dep't of Natural Res.*, 964 S.W.2d 818 (Mo. banc 1998) and pointed out that solid waste and hazardous waste are distinct subjects within the existing statutes to reach the conclusion that amending a solid waste bill to govern hazardous waste was improper. *Id.* at 820.<sup>22</sup> Relying on the legislature's own

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<sup>22</sup> In *Missourians to Protect the Initiative Process*, this Court was faced with amendments to the Constitution and applied similar logic by looking at the way the Constitution was

guidance concerning subject matter would provide a bright line test that would significantly improve the jurisprudence in the single subject area.<sup>23</sup>

Pursuant to Chapter 3 of the revised statutes, the Committee on Legislative Research publishes the Revised Statutes of Missouri. In section 3.050, RSMo, "the committee may prefix to the statutory law a table of contents and shall prepare suitable headnotes or catch words to indicate briefly the subject matter of the several sections." Furthermore, "the committee shall classify and arrange the entire body of statute laws in a logical order throughout the volumes, the arrangement to be such as will enable subjects of a kindred nature to be placed under one general head with necessary cross references."

*Id.*

As acknowledged in *Carmack*, the statutes are themselves grouped into "Titles" in apparent compliance with the mandate of Chapter 3. *Carmack*, 945 S.W.2d at 961. Relevant to S.B.844, Title II of the Revised Statutes is "Sovereignty, Jurisdiction and Emblems." Grouped within this title are "subjects of a kindred nature" (§ 3.050, RSMo) including state boundaries and state buildings (Chapter 8 of the Revised Statutes). The

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organized to determine how many subjects were in the proposed amendments to the Constitution. 799 S.W.2d at 831.

<sup>23</sup> As stated in *Missourians to Protect the Initiative Process*, the fact that a proposal amends more than one section of the Constitution (or the statutes) should not be a "*per se*" violation of the single subject requirement; however, "a proposal having such effect is suspect." 799 S.W.2d at 831.

keys to the Capitol dome provision was an amendment to Chapter 8 and therefore a change that is within the subject described in Title II. The procurement provisions of S.B. 844 were changes to Chapters 34 and 37 of the revised statutes. These chapters are grouped with "subjects of a kindred nature" in Title IV, "Executive Branch." S.B. 844 also contained provisions relating to the Ethics Commission by amending Chapter 105. That Chapter is grouped with "subjects of a kindred nature" in Title VIII "Public Officers and Employees, Bonds and Records." Finally, S.B. 844 dealt with campaign finance issues by amending Chapter 130. Chapter 130 is grouped with its kindred in Title IX "Suffrage and Elections." Using the groupings adopted by the committee on legislative research – groupings specifically required by the General Assembly itself, one would conclude that S.B. 844 contained at least four separate subjects, namely state buildings, the executive branch, public officers and elections.

Regardless of whether this Court chooses to find the core purpose of S.B. 844 solely in the title, looks to the subjects in the constitution, or accepts the legislature's own guidance on what falls within a single subject, it is clear that TAFP S.B. 844 contained more than one subject. The trial court did not err by so finding and this Court must affirm that portion of the ruling.

**II. THE TRIAL COURT'S FINDING THAT S.B. 844 WAS UNCONSTITUTIONALLY ENACTED IS CORRECT BECAUSE S.B. 844 WAS AMENDED TO CHANGE ITS ORIGINAL PURPOSE IN THAT THE ORIGINAL PURPOSE OF S.B. 844 WAS PROCUREMENT AND AMENDMENTS WERE ADDED TO CHANGE THAT PURPOSE. (ALTERNATIVE BASIS TO AFFIRM).**

"This Court is primarily concerned with the correctness of the result, not the route taken by the trial court to reach it; the trial court's judgment will be affirmed if it is correct on any ground supported by the record, regardless of whether the trial court relied on that ground." *Missouri Soybean Ass'n v. Missouri Clean Water Comm'n*, 102 S.W.3d 10, 22 (Mo. banc 2003); accord *Rizzo v. State*, 189 S.W.3d 576, 578 (Mo. banc 2006). In *Rizzo*, the trial court found a provision of a bill unconstitutional based upon an equal protection violation and denied all other constitutional claims as moot. *Id.* at 578. The Missouri Supreme Court examined whether *Rizzo's* multiple subject claim had merit and determined that it did, finding the bill violated the single subject requirement. *Id.* at 581. In this case, a similar result must be reached because the bill violated the original purpose requirement of the Missouri Constitution. This Court can uphold the trial court's result based upon the original purpose challenge not ruled on by the trial court. This challenge was included in Legends' petition to the Court and thus preserved below.

Article III, Section 21 specifies that "no bill shall be so amended ... to change its original purpose." This is a section of the Constitution completely separate and distinct from, Article III, Section 23's requirements of clear title and single subject. A bill could

have a very clear title and a single subject, but still have been amended to change its original purpose. S.B. 844 was amended through its passage to change its original purpose. Legends believes that original purpose was procurement, but even if the Court were to find a different purpose of ethics, the bill was still amended to change that purpose when the keys to the Capitol dome provision was included.

**A. The Original Purpose Analysis.**

To determine whether a bill was amended to change its original purpose, the Court must look to the purpose at the time of the bill's introduction, as gleaned from both its "earliest title and contents." *Missouri Ass'n of Club Executives, Inc. v. State of Mo.*, 208 S.W.3d 885, 888 (Mo. banc 2006). Even when a bill's title changes through the process, the focus remains on the original contents.

For example, in *Club Executives* the original title of the bill was "relating to intoxication-related traffic offenses." *Id.* at 887. The title was later broadened to "relating to alcohol-related offenses" before being finally broadened to "crime." *Id.* To decide whether the changes to the bill adding provisions regulating sexually oriented business were consistent with the original purpose of the bill, the Court ignored the enacted title of "crime" and instead worked from the original purpose, which the Court said was as set forth in the title as introduced. Because the original purpose was "intoxication-related traffic offenses," provisions regulating sexually oriented business changed the original purpose. *Id.* at 887-88.

The prohibition against a change in original purpose "is against amendments that are clearly and undoubtedly not 'germane'; that is, they are not '[r]elevant to or closely

allied' with a bill's original purpose." *Trout*, 231 S.W.3d at 144. In *Trout*, this Court held that although the title of the bill at issue in that case as introduced was "relating to campaign finance", "ethics" could fairly be said to be the original purpose of H.B. 1900 because of the content of the bill. *Id.* at 145. *Trout* instructs that a Court should consider both the title of the bill and the original contents of the bill.

*Prestige Travel*, 2011 WL 2552572 appears to be the most recent pronouncement of this court on the issue. In that case, the Court used the traditional original purpose analysis. First, determine the original purpose of the bill, measuring it at the time of introduction. *Id.* at \*5. In both *Trout* and *Prestige Travel* this Court found that the original purpose of the bill was not exactly the same as what was contained in the title of the bill.<sup>24</sup> In the case of S.B. 844, however, the title of the bill and the contents of the bill match exactly.

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<sup>24</sup> Although Missouri law appears to be consistent that the original title of a bill is not dispositive in determining its original purpose, there is some support in the actual language of the Constitution for the proposition that the original title of the bill *should be* the sole inquiry when determining original purpose. Article III, Sec. 23 requires every bill to contain but one subject and requires that subject to be clearly expressed in the title. The plain meaning of the constitution appears to be that when a bill is first introduced, it must only contain one subject and *that subject* must be clearly expressed in the title. If the bill complies with the constitution, the original title is also the original subject.

## B. S.B. 844 Fails the Original Purpose Requirement

As originally introduced, S.B. 844's title was "An Act to amend chapter 37, RSMo, by adding one new section relating to contracts for purchasing, printing, and services for statewide elected officials." L.F. 100. The contents of the bill are part of the record and speak for themselves. The title and the contents make clear that the original purpose of S.B. 844 related to procurement. There is no indication from either the title or the contents of the bill that it had a broad purpose of "ethics" and certainly no reason to think it had to do with keys or the Capitol dome. This situation is exactly the same as the Court confronted in *Club Executives*. There the State's arguments that the original purpose of the bill was "crime" fell on deaf ears. The original contents are established at the time of introduction and were not affected by later attempts to mask the purpose of the bill with title amendments.

Unlike in *Trout*, where the original contents of the bill broadly affected several different areas through campaign finance regulations – the bill impacted all elected officials and all those making donations to them – in this case the original purpose of the bill was constrained to procurement. The State's argument that the bill as introduced "related to the ethics of statewide elected officials"<sup>25</sup> because it might reduce concerns that procurement was being carried out in an unethical manner unreasonably stretches the

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<sup>25</sup> Of course, the final bill goes far beyond the ethics of statewide elected officials, extending to the ethics of all officials, lobbyists and even political action committees dealing only with each other regardless of whether they contribute to elected officials.

holding in *Trout* beyond reason, as discussed in Point I. It would take "ethics" to a broader meaning than was allowed in *Trout*, where the Missouri Supreme Court held that the scope of the term "ethics" was, in that case, at the outer limit. 231 S.W.3d at 145. To allow a procurement bill to be amended to include any provision that could arguably involve ethical conduct takes the term beyond the line drawn by this Court in *Trout*.

Given that the original purpose of S.B. 844 is procurement, as reflected in the contents and also in the title of the bill as introduced, the question is whether additional provisions added throughout the legislative process and resulting in the final version of S.B. 844 are clearly and undoubtedly not germane to procurement – that they are not relevant to or closely allied with procurement. *Trout*, 231 S.W.3d at 144; *Prestige Travel*, 2011 WL 2552572 at \*6.

Campaign finance, lobbying, personal financial disclosure statements and keys to the Capitol dome, among others, are not relevant to or closely allied with procurement. Guidance for this analysis can be found in *Prestige Travel* where the original bill had to do with taxes and the court found that adding provisions relating to taxes did not change the original purpose. In that case, the original bill was titled as relating to "city sales taxes" and the court determined the original purpose was regulating taxes. *Id.* at \*5-6. As such, the court found that the exhibition center and recreational facility sales tax being challenged was germane to the regulation of taxes. *Id.* at \*6.

In this case, S.B. 844 could of course have included additional procurement provisions without changing the original purpose. Arguably, the bill could have drifted into campaign finance or ethics related issues that had something to do with procurement

(i.e., a requirement of disclosures of conflicts related to procurement, restrictions on campaign contributions from vendors, etc...). See, e.g., *Club Executives*, 208 S.W.3d at 888 (When the bill's original purpose was alcohol-related traffic offenses, amendments dealing with non-traffic related alcohol offenses "could be" viewed as connected to the original purpose, but regulating adult entertainment could not be so viewed). But no one can argue with a straight face that the later amendments to S.B. 844 were fairly related to procurement.

The best example is the very provision challenged by Legends – a provision which prohibit banks and other corporations from contributing to political action committees. Who may give money to a political action committee (L.F. 71-72) is a total non-sequiter when addressing the subject of procurement as is whether political action committees may give money to each other (L.F. 72), whether Senator Jason Crowell should be given a key to the Capitol Dome, whether to eliminate county and city political party committees (L.F. 59) and whether a candidate who has been previously disqualified for an office may be nominated for the same office by a party nominating committee (L.F. 50).

The inquiry is not whether a particular provision is "incidentally related" to the over-arching subject expressed in the title or whether there is some language that might arguably relate to the title. Instead the Court must look at the "*raison d'être*" of the original provisions and determine their true purpose, then compare other provisions to see if they are consistent with that *raison d'être*. *Rizzo*, 189 S.W.3d at 580 (citing *Hammerschmidt*, 877 S.W.2d at 103). Here the *raison d'être* of the procurement sections

of S.B. 844 was not to regulate the ethical conduct of officials, rather it was simply to make a procedural change to the way procurement might be conducted. Any provisions that go beyond this basic *raison d'être* are a change to the original purpose.

The original purpose analysis of Article III, Section 21 sets a limit on alterations to a bill "that bring about an extension or limitation" to its scope. *Stroh Brewery*, 954 S.W.2d at 326. The scope of S.B. 844 was clearly extended beyond its original purpose. Therefore the bill is unconstitutional.

**III. THE TRIAL COURT DID NOT ERR BY STRIKING THE CAMPAIGN FINANCE AND ETHICS PORTIONS OF S.B. 844 BECAUSE THOSE PROVISIONS WERE NOT INCLUDED IN THE ORIGINAL SUBJECT MATTER OF THE BILL IN THAT THE ORIGINAL S.B. 844 WAS CLEARLY CONCERNING PROCUREMENT. (RESPONDS TO APPELLANTS' POINT II).**

The trial court's decision to sever portions of S.B. 844 is challenged in Appellants' second point relied on. This point in the State's brief is very short and cites only three cases: *Hammerschmidt*, which the State asks the Court to over-turn, *Missourians to Protect the Initiative Process*, which the State says does not apply to legislative enactments (Appellants' Br. 29) and a case pre-dating not only the current constitution, but the 1875 constitution as well, *County Court of St. Louis County v. Griswold*, 58 Mo. 175 (Mo. 1874) (Appellants' Br. 28). The State never specifically tells this Court which case it believes should control the severability analysis.

*Griswold* is not a case about the constitutional requirements for the enactment of a

bill. It is a case about the Constitution's just compensation requirement for takings of private property for public use. *Griswold* was about the act that created Forest Park, and the severability analysis was limited to the section of the act establishing the methods for determining "just compensation" to private landowners whose property was to be taken to be included in the park. 58 Mo. at 9, 14-15. The statute on this set forth in detail a procedure for fixing the value, including a provision at the tail end that stated that "in all cases, the assessment of the county assessor for the year 1873 shall be taken as guide in fixing the value of property to be condemned or appraised." *Id.* at 9. The issue of "severability" was whether to sever the offending language, just quoted, from the rest of the statute that addressed the determination of just compensation. The court decided it could do that, because the remaining part of the statute could be carried out without the offending provision. *Id.* at 15. *Griswold* is about severing parts of a single statute, not about severing parts of a bill unconstitutionally enacted. It does not support Appellants' argument. The State's Point II also makes a passing reference to the "traditional [severability] analysis codified in section 1.140 [RSMo]," but never explains how that analysis applies to the facts of this case. Because of this approach, Legends is not sure what analysis the state advocates. Adding to the confusion is the State's failure to identify the three principle sources upon which the point relies. *See* Rule 84.04(d)(5)<sup>26</sup>.

As best Respondents can tell, the State believes the trial Court should have conducted a "common law" severability analysis that existed prior to the revisions of the

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<sup>26</sup> None of the State's Points Relied On are in compliance with the Rule in this regard.

Missouri Constitution in 1865. (Appellants' Br. 27). But the State has not explained, nor can Respondent locate, what Missouri case law should be followed from that era. Because the State has not explained how the authorities cited are relevant to the trial Court's alleged error regarding severability, precedent suggest the Point should be denied and the trial Court should be affirmed. *Burkholder*, 48 S.W.3d at 598.

To the extent the State is suggesting that the common law severability analysis was "codified" in section 1.140, RSMo, it does not support the State's theory that a bill's title is relevant to severability because this statute contains no reference to the title of a bill (indeed, it never uses the word "bill"). If this Court accepts the State's apparent invitation to apply section 1.140 to a bill, the statute should be amended to read as follows:

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

This amending exercise points out the fallacy of the State's position. Section 1.140 would begin by saying "if any provision of a bill" is found to be unconstitutional, the Court should sever other portions of the bill. But in a single subject challenge, no

portion of the bill is unconstitutional. The whole bill is infirm. As a result, section 1.140 is of no assistance because it doesn't even purport to govern the situation in this appeal.

With little guidance from the State's brief, Respondent Legends provides the following severability analysis. During the proceedings below, Legends argued first that S.B. 844 was changed from its original purpose. L.F. 178. But the trial court was more persuaded by Legends' additional argument that the bill contained more than a single subject. As explained *supra*, S.B. 844 is unconstitutional under either analysis. Although no Court has said it this concisely, a review of case law reveals that the existing severability analysis proceeds along the same lines no matter whether the bill violated original purpose or single subject restrictions. The logic of this approach is sound.

**A. Severing Portions of a Bill when the Bill Violates the Original Purpose  
Restriction Starts with a Bill's Original Purpose and Severs Portions  
that do Not Fairly Relate to that Purpose.**

Respondent Legends has consistently argued that S.B. 844 was amended in its passage through the legislature to change its original purpose. As discussed *supra*, the original purpose of the bill – as reflected in its first title and contents – was procurement. The provisions of the final bill – keys to the Capitol dome, ethics topics and campaign finance – are not logically connected to or germane to that original purpose. As a result it would have been proper for the Court to strike those provisions as unconstitutional under an original purpose violation claim.

Although the State's brief does not address severability of S.B. 844 under an original purpose analysis, the logic of the State's brief dictates that the non-procurement

provisions will be severed if this Court believes the original purpose of the bill was procurement. Appellants' Br. Point II. This Court's jurisprudence on that issue is straightforward. When confronted with a bill that was unconstitutionally amended to change its original purpose, any provision that was not germane to that original purpose must be severed. *E.g., Club Executives*, 208 S.W.3d at 888. In this case, all of the provisions that are not germane to procurement must be severed.

If this Court concludes that S.B. 844 was amended as to change its original purpose and that purpose was procurement, the trial Court's decision on severability should be affirmed. In that case, the Court would not need to proceed to severability analysis under a single subject violation scenario. But if the Court concludes that the original purpose was not what was expressed in the title of the original bill and was instead related to ethics, the Court must still examine what to do with a bill that contains the subject of ethics and access to the Capitol dome.

**B. Severing Portions of a Bill when the Bill Violates the Single Subject Rule Also Begins with the Original Purpose.**

The analysis focused upon by the State's brief is whether and how to sever portions of a bill that is unconstitutional because it violates the single subject requirement of the Constitution. According to the introductory section of its brief, the State apparently argues for a severability analysis that would look "at the title of the bill as passed to determine the subject and [strike] only the provisions not within that subject." Appellants' Br. 9, discussing *Hixon v. Lafayette County*, 41 Mo. 39 (1867).

But *Hixon* was decided under a previous version of the clear title and single

subject constitutional provision – the Missouri Constitution of 1865, Art. IV, Sec. XXXII – which stated, "No law enacted by the general assembly shall relate to more than one subject, and that subject shall be clearly expressed in the title, but if any subject embraced in an act be not expressed in the title, such act shall be void only as to so much thereof as is not so expressed." (Emphasis added). This provision was not changed until the Constitution of 1875.

In *Hixon*, the title was "An act to provide for appeals in contested election cases" but the bill included provisions regarding the right to appeal in civil cases other than contested election cases. The *Hixon* Court struck the provision having nothing to do with contested election cases by application of the Constitutional requirement to do so, and not for any other reason.<sup>27</sup>

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<sup>27</sup> Each of the other cases cited in the State's brief in its "History of Single Subject in Missouri" was decided during the time period that the 1865 Constitution, and therefore the previously-quoted Article IV, Section XXXII, was in effect. *City of St. Louis v. Tiefel*, 42 Mo. 578 (Mo. 1868); *State v. Miller*, 45 Mo. 495 (Mo. 1870); *State v. Mathews*, 44 Mo. 523 (Mo. 1869); *State v. County Court of Saline County*, 51 Mo. 350 (Mo. 1873). It is not at all evident from reading these cases what purpose they serve to support Appellants' argument regarding severability (because that was based upon specific constitutional language) or even multiple subject analysis generally. The cases do not involve subjects like "ethics" or "procurement"; indeed the broadest subject in those cases is *Mathews'* "to create an insurance department."

**1. Modern Precedent Does Not Rely on the Final Title of the Bill for Severability Analysis.**

The State acknowledges that the trial court followed existing precedent in the form of *Hammerschmidt* but then declares *Hammerschmidt* to have been an "incorrect approach." Appellants' Br. 29. The State's position is rather succinctly summed up when it claims that the trial court "logically but erroneously ... determined that for severance purposes it could ignore the title of the enacted bill." *Id.* The fallacy in the State's thinking is also pointed out in the statement that "for severance analysis in a 'single subject' case the court simply cannot look to the original bill (or its title)." *Id.* The State cites no authority for its statement and none can be located. Indeed severability analysis does not depend on the reason a bill is unconstitutional, rather it is – and has always been – the same regardless of the reasons the bill is unconstitutional. The analysis returns to the original purpose of the bill and reasons from there.

The simple response to the state's position is that once a bill has been determined to violate the single subject rule, the title to the bill is also unconstitutional. A bill containing multiple subjects cannot have a title that clearly expresses the single subject of the bill, because there is no single subject. Therefore, it would seem that the entire bill must fall, as was the result in *Missouri Health Care Ass'n*, 953 S.W.2d 617. In *Missouri Health Care Ass'n* the house bill as introduced was titled "relating to the division of aging" and had but one statute in it – section 660.050 – requiring the division of aging to publicize a particular program. *Id.* at 619. In the Senate, additional provisions were added, one also in Chapter 660, but another in the merchandising practices act in Chapter

407, that affected certain long term care facilities. *Id.* at 619-20. As finally passed, there were three sections in the bill, sections 660.050, 660.546 and 407.020. *Id.* at 620. The final bill was titled "relating to the department of social services." *Id.* The court determined that the bill contained multiple subjects. The fact that the Chapter 407 amendment affected entities that were under the jurisdiction of the department of social services was, at best, a *de minimis* connection that would render the single subject requirement meaningless. The *Missouri Health Care Ass'n* court struck the entire bill, not just the Chapter 407 provision.<sup>28</sup> The case contains no severability analysis. *See also St. Louis Healthcare Network v. State*, 968 S.W.2d 145 (Mo. banc 1998) (When title of the bill was not clear, the *entire bill* is unconstitutional).

Nevertheless, this Court's current severability analysis requires an examination of "the challenged provisions" to determine whether these provisions are "so essential to the efficacy of [the bill] that the legislature would not have passed the bill without them or that [the remaining provisions of the bill] standing alone, are incomplete and incapable of being executed in accordance with legislative intent." *Prestige Travel*, 2011 WL 2552572 at \*6. When conducting this analysis, then, one must first determine what "the challenged provisions" are.

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<sup>28</sup> Although the fact that the entire bill was void can be determined from the lack of any severability analysis, the Revisor's notes to sections 407.020, 660.050 and 660.546 (RSMo 2000) confirm that the amendments to the respective sections in 1995 C.C.S. H.B. 409 are unconstitutional.

In this case, Legends specifically objected to the campaign finance portions of the bill and the trial court determined one of those provisions was unconstitutional on First Amendment grounds.<sup>29</sup> In the original purpose portion of the challenge, Legends argued that procurement was the original purpose and challenged all provisions other than procurement. To the extent "the challenged provisions" are designated by the Plaintiff, the trial court's striking of the ethics provisions challenged by Legends while leaving the unchallenged procurement provisions intact, was correct.

But a single subject challenge does not necessarily challenge any specific section of the bill. It is instead a challenge to the entire bill. It is not the fact that one particular subject was added that is challenged, it is the fact that as finally passed the bill ended up with multiple subjects and therefore violates the constitutional restrictions. When a court concludes that a bill has multiple subjects, all of the subjects are "the challenged provisions" and a plaintiff provides no place to start the analysis. The court has therefore determined that it is appropriate to return to the original subject and track the bill through the process to determine at what stage in the process the bill went from a constitutional one – containing only one subject clearly expressed in the title – to an unconstitutional one containing multiple subjects.

## **2. Modern Cases Sever from the Original Subject of the Bill.**

The *Hammerschmidt* Court articulated this standard as "the entire bill is

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<sup>29</sup> This violation of the United States Constitution was so blatant and obvious that the State declined to appeal the trial court's adverse ruling.

unconstitutional unless the Court is convinced that one of the bill's multiple subjects is its original controlling purpose and the other subject is not." *Hammerschmidt*, 877 S.W.2d at 103 (emphasis supplied). This analysis has been consistently followed in cases such as *Carmack*, 945 S.W.2d 956; *SSM Cardinal Glennon*, 68 S.W.3d 412; *Rizzo*, 189 S.W.3d 576. It is a sound logic that essentially retraces legislative steps in order to determine where the legislature went wrong. It looks to the original bill and, if that bill contains only a single subject which is also expressed in the title, it tracks the amendments to see whether each of those is germane to the original purpose. If an amendment is added that would change the bill from a proper single subject to an improper multiple subject bill, that amendment is severed. It matters not whether the latter amendment contains such a broad subject that it becomes the bigger portion of the bill, as happened in this case. Multiple subjects are not allowed.

To do it any other way would run afoul of constitutional requirements. The facts of this case are the perfect argument against the state's new severability analysis. The State asks this Court to abandon *Hammerschmidt*, *Carmack*, *SSM Cardinal Glennon* and *Rizzo*, for a standard that looks to the title of the bill as finally passed in order to ascertain the subject and then sever everything not within that subject. In this case, the state urges the Court to determine that the subject of the bill is ethics and then sever the provisions related to procurement and keys to the Capitol dome.

But if the Court were to do what the State asks, this Court would itself produce an unconstitutional bill because severing out procurement would change the original purpose of the bill, a result the Constitution specifically prohibits. Since the original purpose of

the bill was procurement, it is not possible to sever that subject from the bill and still comply with the Constitution.<sup>30</sup> Returning to the original subject of the bill and reasoning forward through the process, as articulated in *Hammerschmidt*, is the only proper way to conduct a severability analysis.

**C. Alternatively, the Trial Court's Striking of the Campaign Finance/Ethics Provisions of the Bill Should be Upheld because the Entire Bill is Unconstitutional and No Severance was Appropriate.**

Another basis to uphold the trial court is that S.B. 844 is unconstitutional in its entirety and no provision should be severed. *Missouri Health Care Ass'n*, 953 S.W.2d 617. The Court is well aware of the policy reasons for such a result. *Prestige Travel*, 2011 WL 2552572 at \*7 n.5. As this Court unanimously pointed out in *Prestige Travel*, "there may come a time when this Court should reconsider whether the judicial doctrine of severance has served to support and protect the Missouri Constitution." *Id.* at \*7 n.6. Respondent Legends suggests there is no time like the present. This case presents a very

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<sup>30</sup> As discussed *infra*, the State urges a position that would include procurement within the subject of ethics even though the *Trout* decision has clearly defined the boundaries of the subject of ethics as not extending past the concepts of campaign finance reform, lobbyist registration and the state ethics commission. Presumably, this is the basis for the State's request for alternative remedies from this Court – to strike either keys to the Capitol dome or both procurement (competitive bidding) and keys to the Capitol dome. Appellants' Br. 30.

good example of why severability analysis in multiple subject cases does violence to the Constitution.

**1. The Language of the Constitution does not Support Severability.**

Although this Court has conducted a severability analysis for decades, the specific language of the Constitution appears to prohibit such an analysis. This Court should look to the plain language of the Constitution for its meaning. *St. Louis Univ. v. Masonic Temple Ass'n of St. Louis*, 220 S.W.3d 721, 726 (Mo. banc 2007). The Constitution is very clear that "No law shall be passed except by bill, and no bill shall be so amended in its passage through either house as to change its original purpose" MO. CONST. Art. III, Section 21, and that "No bill shall contain more than one subject which shall be clearly expressed in its title" MO. CONST. Art. III, Section 23. The Constitution's mandate is clear that if a bill is passed in violation of these sections, it is the bill itself that is unconstitutional and there is no directive to inspect individual provisions.

This Court may also find guidance in the way the Constitution has been amended throughout history. *Lovins v. City of St. Louis*, 84 S.W.2d 127, 128 (Mo. 1935)(en banc). Although the case needs to be dusted off, *Burgdoerfer* provides some important analysis. 17 S.W. 646. There, the Supreme Court analyzed the changes to the Constitution of 1865 (the first Constitution to contain a prohibition on multiple subject legislation).

The *Burgdoerfer* Court pointed out that some "apparently important changes were made" when the Constitution of 1865 was amended. First, the 1865 Constitution prohibited a "law enacted by the general assembly" from relating to more than one subject. The phrase "law enacted by the general assembly" was replaced with the word

"bill." As the Court pointed out "there is, of course, a marked difference between 'bill' and 'a law enacted by the general assembly.'" Next, the Constitution of 1865 contained a directive of severability, requiring that "if any subject embraced in an act be not expressed in the title, such act shall be void as to so much thereof as is not expressed." *Id.* at 650-651. This severability clause was specifically removed from the Constitution of 1875 and is not found in any version since.<sup>31</sup>

The Constitution itself no longer contains a severability clause and the history of the Constitution leads to the conclusion that the removal of the clause was significant and should be considered a directive against sever portions of an unconstitutional bill. If this Court relies solely on the language of the constitution, no "bill" shall contain more than one subject. It is the entire bill that is unconstitutional and there is nothing to sever.<sup>32</sup>

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<sup>31</sup> The framers of the Constitution of 1875 said the single subject, clear title and original purpose requirements were adopted "[t]o afford security against hasty legislation and guard against the possibility of bills becoming laws, which have not been fairly and considerately passed upon, wholesome restrictions are thrown around the law makers and greater particularity required in the enactment of laws than heretofore." *Allied Mutual Ins. Co. v. Bell*, 185 S.W.2d 4, 8 (Mo. 1945)(quoting Address to Accompany the Constitution Volume II, Journal (Loeb-Shoemaker), Missouri Constitutional Convention of 1875, p. 878).

<sup>32</sup> This Court has at times cited to section 1.140 RSMo for severability analysis in these types of cases. See *National Solid Waste Management*, 964 S.W.2d at 822, *Club*

## 2. The Court's Existing Severability Analysis is an Attempt to Guess the Will of the Legislature.

The Court's current severability analysis should also be abandoned because it is far too subjective and far too imprecise a method to determine legislative intent. The current test asks the Court to consider "legislative intent" and "whether the legislature would have enacted" the bill without an offending provision. *National Solid Waste*, 964 S.W.2d \_\_\_\_\_, 208 S.W.3d at 889. But the plain language of that statute reveals that it does not apply to a "bill" but rather applies to a "statute." There is a difference between a bill and a statute. The whole point of the Constitutional limitations on bills is to make sure that they do not become statutes. A bill passed in violation of the Constitution is no statute at all and never has been. So while the legislature has provided guidance that an unconstitutional provision of a statute, *i.e.*, a provision that was properly enacted but improperly burdens free speech or violates equal protection, should be severed from the remainder of the statute (*see Trout*, 231 S.W.3d at 147), there is no directive concerning what to do with a bill that is unconstitutional in its entirety and thus was not properly enacted. In fairness to prior reliance on this statute, it may be that the statute is cited as a shorthand way of explaining the misplaced common law severability analysis and prior cases did not mean to hold or imply that section 1.140, RSMo controls the severability analysis for a bill. To the extent that statute does purport to control the analysis, it is arguably contrary to the Constitution. The better course is to interpret the statute as only applying to "statutes" and not to "bills."

at 822. This analysis focuses on whether the additional subject is essential to the bill, whether the bill would be incomplete without the section or whether the legislature would have adopted the bill without the provision. *Buchanan v. Kirkpatrick*, 615 S.W.2d 6, 13 (Mo. banc 1981).

If one can identify the offending provision (i.e. a provision that was added late in the process to change the original purpose) parts of this analysis are workable. It is possible to determine if a late added provision is necessary to make the bill complete or to make it effective. But even this part of the analysis is problematic in a case of multiple subjects where the court is faced with one bill that contains three subjects. The bill itself is unconstitutional and none of the subjects should have been included. This Court has valiantly struggled to uphold portions of legislative enactments by returning to the original purpose and attempting to find out where the process went wrong. *Hammerschmidt*, 877 S.W.2d at 103-105. This process starts with a bill that is presumed to be Constitutional and tries to draw a line at the point where subjects were added to make the bill unconstitutional, and then sever everything after that point.

But at the end of the day, it is impossible to say what the legislature would have done with a bill that was not the final, unconstitutional, version upon which they voted. One cannot predict whether Senator Crowell would have filibustered S.B. 844 had the provision on keys to the Capitol dome been removed nor can one predict whether the bill would have obtained a constitutional majority had the campaign finance provisions or the

procurement provisions not been in the bill.<sup>33</sup> By trying to read the collective mind of the legislature, this Court is engaging in a fool's errand that can only result in thwarting the will of some legislators – which ones is impossible to know. *See Schaefer v. Koster*, 342 S.W.3d 299, 307 (Mo. banc 2011)(Fischer, J., dissenting). The Court should abandon this analysis, at least in the case of multiple subject analysis and follow the precise language of the Constitution.

### **3. This Appeal Provides a Very Good Example of Why Bill Provisions Should not be Severed.**

This Court has recently cited with favor a University of Pittsburgh Law Review article that addresses severability. *Prestige Travel*, 2011 WL 2552572 \*7 n.5. That article articulately points out that "with respect to riders, severing them fails to provide legislators with an incentive not to engage in this behavior" and actually "encourages legislators to attach riders" because there is no consequence to their actions in that a rider will be attached to many bills with the full knowledge that there is no consequence to the underlying bill. *Prestige Travel*, 2011 WL 2552572 \*7 n.5 (quoting *Single Subject Rules and the Legislative Process*, 67 U.PITT.L.REV. 803, 867). The keys to the Capitol dome provisions in this case are exactly such a rider. Senator Jason Crowell asked for keys to the Capitol dome on several occasions. Two different Governors, of different parties,

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<sup>33</sup> Indeed, it may be that legislative leadership would have never brought the bill for a vote without a particular provision in the bill.

vetoed bills because of the inclusion of the Crowell's keys provision.<sup>34</sup> Senator Crowell publicly and candidly announced that he "will put this on every bill I possibly can until I find one the governor can't veto." Jeremy Essig, *Legislators Unlikely to Override Any of Gov. Nixon's 22 Vetoes*, Columbia Missourian, September 16, 2009.<sup>35</sup> App. A30-A31. This example is a classic one of logrolling and riders. In the case of S.B. 844, Senator Crowell's fellow members apparently acquiesced to his desire to put the provision in a bill the Governor couldn't veto. They likely did so because they assumed it would be severed from the underlying bill if the bill were challenged (a position the State now fully concedes and endorses). There should be consequences for violation of the State Constitution. This court should not participate in allowing a logrolling rider onto a bill only to have the state immediately surrender and say it shouldn't matter to the underlying validity of the bill. This case presents the right opportunity to return to the plain language of the Constitution and the sound policies behind it. The Court should acknowledge that S.B. 844 is unconstitutional and it is not appropriate to sever any of its provisions.

### **CONCLUSION**

For all the foregoing reasons, Respondents respectfully request this Court to affirm the decision of the trial court declaring certain sections of S.B. 844 to have been

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<sup>34</sup> *Supra* notes 5 and 6.

<sup>35</sup> <http://www.columbiamissourian.com/stories/2009/09/16/legislators-not-expecting-overrides/>

unconstitutionally enacted and enjoining their enforcement. These sections are unconstitutional either because they must be severed from the original, procurement purpose of the bill, or because the entire bill was unconstitutionally enacted and all of its provisions, including the ones declared invalid by the trial court, are invalid.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

The undersigned counsel hereby certifies that pursuant to Rule 84.06(c), this brief: (1) contains the information required by Rule 55.03; (2) complies with the limitations in Rule 84.06(b); and (3) contains 12,716 words, exclusive of the sections exempted by Rule 84.06(b), determined using the word count program in Microsoft® Office Word 2007.

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**CERTIFICATE OF SERVICE**

I certify that Respondents' Corrected Replacement Brief and Appendix were served by the electronic filing system on this 23rd day of September, 2011, to:

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