

No. SC91109

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IN THE  
SUPREME COURT OF MISSOURI

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ARBOR INVESTMENT, COMPANY, LLC, ET AL.

Appellants,

v.

CITY OF HERMANN,

Respondent.

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Appeal from the Circuit Court of Gasconade County  
The Honorable Gael D. Wood, Circuit Judge

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BRIEF OF *AMICUS CURIAE* MISSOURI MUNICIPAL LEAGUE  
IN SUPPORT OF RESPONDENT CITY OF HERMANN

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## **STATEMENT OF FACTS**

The Missouri Municipal League (the “MML”) files this Amicus Brief, consented to by all parties, in support of Respondent City of Hermann (the “City”) and against the position of Appellants Arbor Investment Company, LLC (the “Appellants”).

The MML was organized in 1934 as an agency for the cooperation of Missouri cities, towns, and villages to promote the interest, welfare, and closer relations among local governments in order to improve municipal government and administration in the State of Missouri. The MML consists of 660 Missouri cities and villages, representing approximately ninety-five percent (95%) of the urban population in Missouri.

The MML submits this Amicus Brief to oppose Appellants’ requested broadening of the Hancock Amendment and abandonment of the Supreme Court precedent which indisputably supports the trial court’s decision in favor of the City. The interests of the MML and its local government members support preservation of the constitutional text and current application of that text that does not apply the Hancock Amendment to contractual municipal service fees, irrespective of whether revenues are generated or used for other services. This Amicus Brief also sets out the far-reaching and damaging implications that a broadening of the Hancock Amendment would have on local governments throughout Missouri and the taxpaying public that rightfully expects its elected officials to generate fair and reasonable revenue from public property and resources.

## ARGUMENT

### **I. THE TRIAL COURT PROPERLY HELD THAT THE CITY'S UTILITY CHARGES WERE NOT SUBJECT TO THE HANCOCK AMENDMENT AND APPELLANTS' REQUESTED EXPANSION OF THE HANCOCK AMENDMENT SHOULD BE REJECTED**

Appellants seek in this appeal not only to reverse the considered judgment of the trial court, but in effect to have this Court overturn its own established holding in *Keller* that “this Court holds that increases in the specific charges for services actually provided by [the local government] are not subject to the Hancock Amendment.” *Keller v. Marion County Ambulance Dist.*, 820 S.W.2d 301, 305 (Mo. 1991). Appellants seek to return to the abrogated and “overly broad” interpretation of the Hancock Amendment that this Court has long ago rejected that sought to require a Hancock vote for all increased “revenues” rather than only to the “levying” of “any tax, license or fees” as actually specified in the text of Article X, § Section 22(a)(the “Hancock Amendment”). In short, Appellants seek to ban all service fees that generate “revenue” above the “cost” of the service. It is this drastic reversal of decades of settled law that the MML opposes on behalf of municipalities across the state, and on behalf of the taxpaying constituents they represent, that have the right to use public services as a means to generate fair market revenues and compensate local governments to provide other services for the public and minimize tax burdens.

**A. APPELLANTS SEEK TO OVERTURN APPLICATION OF  
KELLER BASED ON A MISSTATEMENT OF ITS  
“HOLDING”**

The trial court correctly determined that municipal utility service charges received by the City were “not subject to the Hancock Amendment.” LF 308. The MML defers to, and need not repeat, the well-articulated application of the *Keller* five-factor test found in Substitute Brief of Respondent City of Hermann that was properly upheld by the trial court.

Contractual utility fees for services actually rendered, paid by the consumer when received, which increase or fall based on the amount of service consumed, and which are not mandated by law to be paid are simply not a “tax” under the *Keller* test or the actual holding of *Keller* and all other subsequent law applying the Hancock Amendment. Appellants therefore ask this Court to “abandon” *Keller*, and by necessity subsequent decisions, and return this Court to the “overly broad” interpretation of the Hancock Amendment applying the Hancock Amendment to any “revenues” implied in the now *abrogated* decision of *Roberts v. McNary*, 636 S.W.2d 332 (Mo. 1982). In summary, Appellants’ Point Relied On and argument claim that municipal service fees are a “tax” subject to the Hancock Amendment when they “raise general revenue” or the “object of the requirement is to raise revenue.” *See* Substitute Br. of Appellants at 20, 35.

In arguing for this effective return to *McNary*, not only do Appellants seek to upset decades of established law, but they do so by relying on a clear misstatement of the actual “holding” of *Keller* to imply support for the “overly broad” “revenue” test which

subjected a true user fee for municipal services to a Hancock vote requirement simply because the service may generate “revenue.” As discussed below, this is contrary not only to the actual holding of *Keller*, but also the actual language of the Hancock Amendment.

Specifically, Appellants state in its brief that:

The holding of *Keller* is that **fees or charges** to be paid by certain individuals to public officials for services rendered in connection with a specific purpose ordinarily are not subject to the Hancock Amendment, ***unless the object of the requirement is to raise revenue to be paid in to the general fund of the government to defray customary governmental expenditures . . .***” Substitute Br. of Appellants at 20 (emphasis added).

First, this is simply not the holding of *Keller*, but rather a reference to a separate line of cases cited in the middle of the decision that includes a citation to *McNary*, which this Court then proceeded to expressly overrule! *Keller*, 820 S.W.2d at 304-05. More importantly though, is that Appellants’ incomplete quotation of this purported “holding” omits critical limiting language that misstates the quote and the context within the *Keller* opinion.

Appellants’ partial quotation of *Keller* leaves out the crucial phrase “*prescribed by law*” that qualifies the type of “fees and charges” that are actually addressed in this Court’s cited quotation. *Keller*, 820 S.W.2d at 303-04 (emphasis added). The actual quote from the string cite of cases simply ruled that “fees or charges *prescribed by law*” are not subject to Hancock if they do not “generate revenue.” *Id.* (emphasis added).

Appellants’ omission of the qualifier “prescribed by law” thereby leaves the suggestion that this particular line of cases barred “revenue generation” from *all* “fees or charges” rather than as stated in the actual quote, which limited application only to those “fees or charges prescribed by law . . .” *Id.* (emphasis added). The line of cases at issue involved regulatory fees mandated by law, not voluntary municipal service fees.<sup>1</sup> As noted below, only “levied” fees – and thus fees legally prescribed or mandated – are subject to the Hancock Amendment, which explains why the decision in *McNary*, which suggested that the Hancock Amendment applied to “*all* revenue increases,” was the one case in that string cite that was overruled. *Keller*, 820 S.W.2d at 304-05 (emphasis in opinion). Notably, Amici Attorney General and State Auditor accurately quote this limiting

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<sup>1</sup> The cases cited stem from and include pre-Hancock authority exempting certain government regulatory charges “*prescribed by law*” from being considered taxes if they simply reimburse the cost of a mandatory government program, such as the government enforcement of insurance law (*Leggett v. Missouri State Life Ins. Co.*, 342 S.W.2d 833 (Mo. 1961)), mandatory waste water requirements (*Craig v. City of Macon*, 543 S.W.2d 772 (Mo. 1976)), and street assessments (*Zahner v City of Perryville*, 813 S.W.2d 855 (Mo. 1991)). Notably, only *McNary*, which involved contractual fees (parks fees) and mandated regulatory fees (building permits), was overruled by this Court as it was the only case to improperly broaden the “tax” definition to include revenue generating non-mandated fees. *Keller*, 820 S.W.2d at 304-05.

language and concede that non-mandated or “contractual” service fees do not fall within the scope of the Hancock Amendment. Br. of AG Amici at 3-6. Amici, however, asks this Court to make a new rule for “exclusive” services. *Id.* at 6-18.

In short, the actual holding of *Keller* was that “this Court holds that increases in the specific charges for services actually provided by [the local government] are not subject to the Hancock Amendment.” *Keller*, 820 S.W.2d at 305. This holding clearly does not support Appellants’ claim that “revenue” generation is even a relevant factor. In reaching its holding, *Keller* expressly overruled the prior suggestion in *McNary* that “all revenue increases, including ‘fee’ increases” were subject to the Hancock Amendment, and left intact the remaining cases within that line that separately excluded from “tax” status even mandated charges (i.e. “levied”), if they did not generate revenue like a tax. *Id.* 304-05 (emphasis in original). Thus, while even mandated regulatory charges (fees “prescribed by law”) are not subject to the Hancock Amendment unless they “raise revenue,” non-mandated fees – such as the contractual ambulance service charges in *Keller* – are simply not subject to the Hancock Amendment without regard to whether they generate “revenue.”

**B. THE HANCOCK AMENDMENT DOES NOT APPLY TO CHARGES IMPOSED BY CONTRACT, BUT ONLY “TAX, LICENSE OR FEES” IMPOSED BY “LEVY”**

This Court’s holding in *Keller* excluding actual user fees from the Hancock Amendment is consistent with its actual text, which clearly was not drafted to include rates or fees for municipal services or other “revenues” that are not actually mandated or

“levied” as taxes in form or substance. The Hancock Amendment, Mo. Const. Art. X. § 22(a), states:

Section 22. (a) Counties and other political subdivisions are hereby prohibited from levying any tax, license or fees, . . . or from increasing the current levy of an existing *tax, license or fees*, above that current levy . . . without the approval of the required majority of the qualified voters . . . (emphasis added).

When describing the type of tax, license or fee covered by the Hancock Amendment, the provision uses the limiting word “levy” six times. *Id.* Therefore, the very first element that must be present for the Hancock Amendment to apply is that the charge must be one that is “levied” by the government and therefore does not apply to mere contractual payments for services or other payments that are not imposed by force of law or taxing power.

**(1) The term “levy” requires that the charge be “imposed” by law**

By definition, a contract service fee is not “levied” but rather a fee paid upon by assent in exchange for a service, not by force of penal tax imposition. Black’s Law Dictionary defines “levy” as “[t]he imposition of a fine or tax; the fine or tax so imposed[.]” and the money obtained from a “legally sanctioned seizure and sale of property[.]” Black’s Law Dictionary (9<sup>th</sup> ed. 2009). Likewise, this Court has previously defined a “levy” as “the formal and official action of a legislative body invested *with the power of taxation* . . . whereby it determines and declares that a tax of a certain amount,

or of a certain percentage on value, shall be *imposed* on persons and property subject thereto.” *State ex rel. Indus. Services Contractors, Inc. v. County Comm'n of Johnson County*, 918 S.W.2d 252, 256 (Mo. 1996)(emphasis added); *See Franklin County ex rel. Parks v. Franklin County Comm'n*, 269 S.W.3d 26, 28 (Mo. 2008)(Same). Thus, only charges that are “imposed” by law under the power of taxation, and thus subject to fine or penalty, qualify as “levied” taxes, licenses or fees.

This clear limitation in the language of the Hancock Amendment has been recognized by both Missouri courts and Missouri attorney generals that have held and opined that the Hancock Amendment simply does not apply to contractual or other municipal services that are not imposed by law via a legal “levy.” As early as 1982, Attorney General Ashcroft issued Opinion No. 122-82, stating that the Hancock Amendment simply did not apply to increases in the prices charged for hospital room rates in a local government hospital. Ashcroft reasoned:

The language of Section 22(a) reflects the voter's intent to require voter approval of only certain charges collected by a political subdivision. If the voters intended to include all charges collected by a county or political subdivision in the proscription of Section 22(a), the language of that provision easily could have been written to express this intent. Instead, the language of Section 22(a) singles out only certain charges, those constituting a ‘tax, license or fees,’ which must be submitted to a voter referendum. . . . ***The use of the term ‘levy’*** in this provision supports the argument that the phrase ‘tax, license or fees’ ***does not apply to charges***

*collected by a county or other political subdivision pursuant to contract,* but only to those charges which a political subdivision *mandates or requires* from its citizens. *Clearly, hospital charges are not imposed by legal process, authority or power in the same sense as are taxes, licenses and fees.* The hospital's right to payment of such charges is grounded in contract whereby a patient agrees to pay the charge and, if contested, upon proof that the charges are reasonable and for services necessary in connection with the treatment required or requested by the patient. Mo. Op. Att’y Gen. 122-82 (1982)(emphasis added)

Attorney general opinions have unanimously interpreted the Hancock Amendment to exclude service fees. *See, e.g.,* Mo. Op. Att’y Gen. 76-85 (1985)(Rejecting application of the Hancock Amendment to water district rates because they are “contractual in nature,” citing *Pace v. City of Hannibal*, 680 S.W.2d 944 (Mo. banc) at 1.c. 948); Mo. Op. Att’y Gen. 91-87 (1987)(Rejecting application of the Hancock Amendment to cemetery charges: “Providing a grave lot in a cemetery owned by a city is one of those types of services that is contractual in nature. The decision to increase the price of grave lots in a cemetery owned by a city does not come within the purview of the Hancock Amendment.”). The established authority clearly requires a “levy” in order to implicate the Hancock Amendment.

**(2) Ordinary utility charges and service fees are simply not  
“levied”**

In *Roberts v. McNary*, 636 S.W.2d at 336, subsequently abrogated, this Court appeared to initially interpret the Hancock Amendment to apply to all “increases in governmental revenue” without distinction as to whether they were contractual or rather imposed by “levy.” However, this Court quickly limited this interpretation of *McNary* in recognizing the limitations in the actual scope and language of the Hancock Amendment.

For example, in *Pace v. City of Hannibal*, 680 S.W.2d 944, 947-48 (Mo. 1984), *separate jurisdictional grounds overruled by Kuyper v. Stone County Comm’n*, 838 S.W.2d 436, 438-39 (Mo. 1992), this Court directly addressed the issue raised by Appellants here in upholding an increased utility rate which generated additional “revenue” for the general fund due to transfers from the service fees in the approximate amount of a “franchise tax” that a private utility would otherwise pay. In finding that such service rate increases or transfers to the general fund did not come within the Hancock Amendment, this Court held that:

[T]he payments in lieu of franchise tax *were not imposed by statute, charter or ordinance, but represented voluntary payments* by the board into the city’s general revenue fund. . . . To hold that the payments in lieu of franchise tax are covered by the Hancock Amendment would enlarge upon its plain language, contrary to the teaching of *Roberts v. McNary*, *supra*. *Id.* at 948 (emphasis added).

Thus, as early as 1984, this Court limited the scope of *McNary* by refusing to apply the Hancock Amendment to charges that were not imposed by law – consistent with the express “levy” limitation in Section 22(a). This Court specifically noted that such transfers were “appropriate” to compensate the city for “fair value” of the use of the rights-of-way. *Id.*

Such transfers of “revenue” to city general funds from utility service rates have consistently been held not to be “taxes” or other unlawful imposition. For example, in *United States v. City of Columbia*, 914 F.2d 151 (8<sup>th</sup> Cir. 1990), the court specifically addressed payments in lieu of taxes (“PILOTS”) that were paid from municipal service fees to the city general fund. The Eighth Circuit, as did this Court in *Pace*, explained the long-standing distinction between a voluntary, contractual payment which is not a tax and a charge prescribed by imposition of law which is a tax, noting:

[W]hile failure to pay a tax results in civil and sometimes criminal penalties, the failure to pay a portion of a utility rate results in termination of services. The United States' obligation to pay the PILOT arises only from its consensual purchase of the City's property; it does not arise automatically, as does tax liability, from the United States' status as a property owner, resident, or income earner. When the United States purchases water, electricity, and related services, and then pays the utility bill, it does so as a vendee pursuant to its voluntary, contractual relationship with the City. *Id.* at 155-56.

Thus, municipal service charges simply do not qualify as “levied” taxes or fees when they are not imposed by force of law, such as when the fees are municipal charges for actual services rendered.

**(3) The Hancock Amendment is not available to control the price charged for municipal services**

In explaining the flaw in *McNary*, *Keller* made clear that the Hancock Amendment simply does not control “how much” a government should charge for municipal services:

The Hancock Amendment, in order to keep the public burden of taxation under control, does not prohibit these organizations from shifting the burden to the private users of these services. **How much to charge users is for those elected to run the organizations. If the decisions are unpopular, the directors may be voted out of office.** *Keller*, 820 S.W.2d at 304 (emphasis added).

*Keller* then specifically overruled *McNary* to the extent its holding suggested that “all revenue increases, including ‘fee’ increases, are subject to the Hancock Amendment.” *Id.* at. 304-05 (emphasis in original). Appellants’ argument now that fees for services that “generate revenue” violate the Hancock Amendment is simply an attempt to control “how much” a municipality charges for services rendered – something this Court said was appropriately dealt with through the election of officers. *Id.* at 304. In short, if the voters sought to impose rate regulation on services, it would not have limited the requirement to “levied” charges but simply “all” taxes, licenses and fees. *Keller*, *Pace*, and *City of Columbia*, and *Beatty v. Metro. St. Louis Sewer Dist.*, 867

S.W.2d 217 (Mo. 1993), *Feese v. City of Lake Ozark*, 893 S.W.2d 810 (Mo. 1995), and *Missouri Growth Ass'n v. Metro. St. Louis Sewer Dist.*, 941 S.W.2d 615 (Mo. App. E.D. 1997), discussed below, and the numerous cited attorney general opinions have all properly rejected such an “overly broad” application.

#### (4) **Post-Keller authority**

Appellants cite the decisions applying *Keller* in *Beatty*, *Missouri Growth Ass'n*, and *Freese* as good reasons to nevertheless abandon the *Keller* test (and presumably its actual holding) as unworkable. Substitute Br. of Appellants at 36-41. However, these cases support the distinction made in *Keller* and other authority cited above, *i.e.*, that only mandatory charges that generate revenue as a tax implicate the Hancock Amendment. These cases simply follow the rule that a “fee” that generates revenue may actually be considered a tax if it is “prescribed by law,” and especially if the charge is not a true fee that changes with the amount of service actually provided – neither of which is involved here.

In *Beatty*, this Court struck down a government imposed flat sewer charge that was not tied to the amount of service provided. *Beatty*, 867 S.W.2d at 220-21. Even here, this Court acknowledged the difficulty in finding that this was a tax subject to the Hancock Amendment, but noted in particular the fact that the government enforced the charge as a lien “by operation of law.” *Id.* at 221. Although unclear from the opinion in this Court, the court of appeals twice-noted that the government charge was “mandatory” and that “[e]very new home, factory and business situated near a trunk sewer line is taxed.” *Beatty v. Metro. St. Louis Sewer Dist.*, 1993 WL 199155, \*6-7 (Mo. App. E.D.

1993). Once again, charges that are mandatory and imposed by law address the “levy” requirement to characterize the fee as a tax – something not present in ordinary service fees. Note, that after MSD eliminated the flat tax-like charge for a new usage fee that applied only to the users of the service, the fees were upheld as not being subject to the Hancock Amendment even over appellants’ argument, exactly as raised here, that it was a tax because “revenue” was paid into the “general fund.” *Missouri Growth Ass’n*, 941 S.W.2d at 623-25.

In *Feese*, this Court found the facts to be almost identical to *Beatty* but found the decision to be much easier because the “the City assesses its sewerage charges against property not connected to the sewerage system.” *Feese*, 893 S.W.2d at 812. Thus, unlike here and in *Keller*, the charge imposed was required where services were not “actually rendered.” Therefore, this Court held that “[o]n the strength of *Keller*, we hold that the sewerage service charges in this case are a tax, license or fee within the meaning of Section 22(a).” *Id.*

There is simply no basis to abandon *Keller* or its factors – if the fee is for a service and not mandated by law, it is not a tax; if it is mandated, it can be a tax if it generates revenue and otherwise is a tax in all but name. All of these cases – *Keller*, *Pace*, *Beatty*, *City of Columbia*, *Missouri Growth Ass’n*, and *Feese* – reach this result and none allow the Hancock Amendment to be used as a tool to set the prices for municipal services or bar revenue generation when the fee is not “levied” by imposition of law.

**II. APPLYING THE HANCOCK AMENDMENT TO ANY CONTRACTUAL SERVICE THAT GENERATES “REVENUE” IS NOT ONLY UNSUPPORTED BY LAW, IT WOULD VIOLATE THE PUBLIC POLICY OF THIS STATE AND DEPRIVE THE PUBLIC OF FAIR COMPENSATION FOR USE OF PUBLIC PROPERTY AND SERVICES**

**A. Local governments offer a vast range of services, goods, and assets to private purchasers that include reasonable fees above “cost” in order to benefit the taxpayer**

Local governments – through their elected public offices subject to annual elections – provide countless services to citizens: sale, lease or use of government property, including parking spaces within lots or along streets, meeting rooms or convention facilities, space for private antennas and towers, and otherwise; services from municipal hospitals and clinics, golf courses and pro shops, sport complexes, recreational facilities such as pools, skating rinks, and parks, utilities including water, electric, gas, sewer, and high-speed internet access in both rural and urban areas, among countless other additional and ancillary goods and services provided as part of these programs. These goods and services may be offered within a general operating fund or by a separate special fund, as part of a single department or combined with other departments, and may be sold at prices that are subsidized, cost-based or revenue generating.

For example, a municipal golf course may operate from a general fund with the parks department staff selling golf balls and hamburgers at the pro shop at a revenue above cost that is used to support other municipal services, such as police services or

even flu vaccinations offered at subsidized or no charge. Unlike private corporations, a municipality makes no actual “profit” that can be diverted from taxpayer use because any revenue above “cost” it generates still must be used for a “public” purpose, which directly benefits the municipal taxpayers. The Hancock Amendment nowhere dictates to public officials that the “revenue” above cost from rental property, utility service or even concession stand snow cones is illegal without voter approval, or that the revenue must stay within that concession stand, that pool complex, that park department or that general or particular accounting fund.<sup>2</sup>

For example, fair market rent for the use of land at city hall for a telecommunication tower will not necessarily correlate to the “cost” of holding that land and such rent reasonably may be used to support the police department or public works within the city, even if “city hall” where the tower is located happens to be a different department or “accounting fund.” This is simply “good government” utilization of public resources that the taxpayers rightfully expect and nothing in the Hancock Amendment sets prices for goods and services or plays accounting games regarding which “fund” or “department” the service is provided from.

Under Appellants’ view, however, the constitution should now be read to invoke a new “fund accounting” rule as a new constitutional mandate precluding transfers between

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<sup>2</sup> Nor is there any basis whatsoever to simply disregard this legal defect in Appellants’ argument by claiming that all of the services described above (other than utilities), is “de minimis” revenue as suggested by Appellants. Substitute Br. of Appellants at 47.

funds without voter approval. Such a rule would either: (1) force all cities to have only one fund or (2) simply prohibit, without voter approval, the actual use of market rates above cost in setting charges for use of municipal property or services. Neither absurdity is anywhere imposed within the language or intent of the Hancock Amendment.

**B. Missouri law supports rather than prohibits obtaining fair market value and revenue for the use of public property or services by private parties**

Neither Appellants nor Amici Attorney General and State Auditor are able to cite any binding decision of this Court or otherwise for the proposition that local governments must set non-mandated service fees at “cost” thus denying the taxpayers the right to collect (and use for other services) the fair market rate from the private use of public property or services. This is because the authority is just to the contrary.

First, it is undisputed that municipalities are authorized to generate revenue from use of municipal services or property, including from utilities. *St. Louis Brewing Ass’n v. City of St. Louis*, 37 S.W. 525, 527 (Mo. 1896)(“While the ownership of waterworks by the city and its right to distribute water to its inhabitants is for a public purpose, the charge it has the right to impose for the use of water is not derived from the taxing power, but is an exaction the city has the right to make as compensation for the use. The obligation of one who uses water to pay for it rests upon contract.”); *See City of Columbia*, 914 F.2d at 153, 155-56 (8<sup>th</sup> Cir. 1990)(“This is not a case in which a party has challenged a municipality’s basic power to obtain some measure of profit from its utility enterprise. That a municipality may do so appears accepted[,]” upholding city utility rate

that expressly was designed create a “surplus.”); 12 McQuillin, *Municipal Corporations*, § 35.59 (3d rev. ed. 1986)(“A city is entitled to a reasonable profit [in operating a utility] and it may even use that profit for other valid municipal purposes.”); *Executive Air Taxi Corp. v. City of Bismark*, 518 F.3d 562, 566 (8<sup>th</sup> Cir. 2008)(“A city has a legitimate interest in generating revenue from operating an airport and from selling fuel at the airport.”).

For example, municipal utilities are expressly empowered by statute to charge different, higher rates to non-residents – an authority that clearly negates any argument that utility fees are limited to “cost.” *See* § 250.190 RSMo. (“Rates charged for sewerage services or water services to premises outside the corporate boundaries may exceed those charged for such services to premises within the corporate limits.”). Similarly, state law authorizes local governments to charge a franchise fee to cable television providers for use of the rights-of-way in an amount up 5% of gross revenues of the providers as a fair compensation to the public and without regard to specific local government costs. *See* § 67.2689.1-4 RSMo. (Authorizing franchise fee and annual increases up to a 5% cap). This is exactly the kind of compensation held by *Pace* to be outside the scope of the Hancock Amendment.

But more importantly, in addition to *Pace*, *Keller*, *City of Columbia*, and the numerous attorney general opinions cited above, it is also clear that obtaining fair market revenue for public property or services is not only *authorized* it is supported by constitutional provisions precluding giving away public value to private users. *See* Mo. Const. Art. VI, § 23 (“No county, city or other political corporation or subdivision of the

state shall . . . lend its credit or grant public money or thing of value to or in aid of any corporation, association or individual, except as provided in this constitution.” ); Mo. Const. Art. VI, § 25 (“No county, city or other political corporation or subdivision of the state shall be authorized to lend its credit or grant public money or property to any private individual, association or corporation . . .”).

Three different attorney generals have thus opined that a local government is prohibited by the Missouri Constitution from giving public property to a private individual for less than fair or market value. *See* Mo. Op. Att’y Gen. 98-96 (1996)(Attorney General Nixon opined that a city cannot convey to a non-for-profit corporation a lot for nominal consideration because such would essentially be a “grant of public property” in violation of Art. VI, §§ 23 & 25 of the Missouri Constitution); Mo. Op. Att’y Gen. 63-79 (1979)(Attorney General Ashcroft opined that a county library may not lease a room to the Bollinger County Historical Society where the Society would build a room and use such room rent free); Mo. Op. Att’y Gen. 124-83 (1983)(Attorney General Ashcroft again explained that “[t]he Boone County Court may temporarily lease such property to a private individual or corporation for its fair market value . . . [but] we note that with exceptions not relevant here, Article VI, Sections 23 and 25, Missouri Constitution, prohibit counties from granting public property and things of value to corporations and individuals. Therefore, we assume for purposes of this opinion that the lease you have in mind is one for the fair market value of the property . . .”).

Note that, Article VI, §§ 23 & 25 do not say “real property.” Indeed, Art. VI, § 23, prohibits the “grant [of] public money or *thing of value*” and Art. VI, § 25 uses the

language “public money or property” (emphasis added). If local governments are barred from providing non-mandated services, goods or property over “cost” without voter approval, then these public services and property will be given to private corporations and individuals at below market value – thus forcing the “revenue” portion of a service fee or rent to be given away to the private user at the public expense – something that clearly the letter and spirit of the cited constitutional provisions prohibit. While a public purpose certainly may be established to authorize a subsidy of such public services or rent by selling at cost or below where a public purpose is established, a blanket ban on doing what the constitution otherwise demands – obtaining fair value from property or services used by private parties – is clearly not supported.

Moreover, such a rule also would distort the marketplace by mandating that local governments charge rates that undercut for-profit entities. For example, if internet connection services provided by a city legally must be priced at cost, the local government rates may actually provide a disincentive for any private enterprise to compete in that marketplace. Thus, the “monopoly” concern of the Amici Attorney General and State Auditor would actually be made more likely by their proposed Hancock rule because local governments would be forced to sell below market rate the services that could also be provided by private competitors and potential competitors. Often cities provide certain services simply because there is no good competition, yet – the constitution surely does not require the local government to impose prices that may effectively eliminate competition.

Indeed, this Court expressly recognized in *Pace* that the revenue component of a utility charge and transfer to the general fund was designed “to place municipal utilities on the same basis as investor-owned utilities.” *Pace*, 680 S.W.2d at 948. While the voters clearly could have enacted a ban on selling public property or services above cost – despite its potential negative consequences described above – they clearly have not done so and one should not be manufactured.

**C. Appellants’ view also conflicts with numerous statutes authorizing the transfer to general fund of surplus revenues**

Finally, Appellants appear to argue that a transfer of surplus funds from a public service to the general fund itself violates the Hancock Amendment. This of course has already been rejected as a transfer by its very nature is not tax. Indeed, as noted by this Court, a transfer does not increase the revenue of local governments nor increase the amount of fees or taxes that a citizen is responsible for paying. *See Pace*, 680 S.W.2d at 948 (Specifically finding that a voluntary transfer in no way implicates the Hancock Amendment); *see also City of Columbia*, 914 F.2d at 153-56 (8<sup>th</sup> Cir. 1990); 12 McQuillin, Municipal Corporations, § 35.59.

Moreover, disallowing local governments fund transfers or charges in excess of cost would radically change the current financial constraints on local governments and require this Court to strike down numerous statutes specifically authorizing such transfers, including where net revenue is generated from a service. *See e.g.*, § 82.485 RSMo. (Requiring parking fees to be “transferred to the general fund of the city”); § 50.020 RSMo. (Authorizing that “balance be transferred to the credit of the general

revenue fund of the county, or to such other fund as may, in their judgment, be in need of such balance.”); § 250.150 RSMo. (Authorizing transfers from sewerage service fund to other funds “by action of the governing body thereof . . .”); *Brawley v. McNary*, 811 S.W.2d 362, 366 (Mo. 1991)(“St. Louis County convention and tourism fund” was surplus “and [lawfully] subject to the transfer to the County's general revenue fund . . .”). There is nothing to suggest that the voters intended to strike down fund transfers – or implicated fund accounting at all – when they sought to limit the “levying” of increased taxes and fees contemplated by the Hancock Amendment.

As noted by this Court and others, transfers reasonably allow for the reimbursements of costs from other funds but also provide a city with “fair value” for use of public property and services. *See Pace*, 680 S.W.2d at 948. Indeed, the mere monetary risk of the public in investing in massive infrastructure needed to provide utilities, hospitals or other services – including the risk of “bail outs” during hard times – is itself an appropriate cost to be allocated to the taxpayer general fund even if “cost” accounting were somehow implied into the Hancock Amendment in fees for contractual services. Yet, deciding what to “count” in providing a service and “where” the revenue could be spent would send the vast list of non-mandatory municipal services into a nightmare of accounting, turning judges into the Accountant-in-Chief, and costing taxpayers enormously by overlaying new accounting requirements that would be paid for by either the taxpayer or by increased rates from the private service user (but only if that accounting cost was also properly accounted for in some artificially imposed “fund” or department created by new opinions of the courts).

The Hancock Amendment simply does not prohibit revenue generation from non-regulatory municipal service fees.

### **III. AMICI ATTORNEY GENERAL AND STATE AUDITOR’S NEW “EXCLUSIVE SERVICE” EXCEPTION IS NOT SUPPORTED BY MISSOURI POLICY OR THE MISSOURI CONSTITUTION AND IS AN UNWORKABLE DISTINCTION**

#### **A. No Missouri authority supports a monopoly exception to expand the Hancock Amendment**

The Amici Attorney General and State Auditor specifically acknowledge that contractual user fees are not subject to the Hancock Amendment. Br. of AG Amici at 1-6. Unlike Appellants, Amici Attorney General and State Auditor correctly quote the full relevant text in *Keller* including the actual holding that municipal service fees are not subject to the Hancock Amendment. *Id.* at 1-4. The Amici Brief also properly acknowledges the full reference to regulatory user fees “prescribed by law” which are independently also not subject to the Hancock Amendment if they do not generate revenue. *Id.* at 3-4.

Yet, Amici Attorney General and State Auditor, without citing any supporting authority, seek this Court to alter *Keller’s* holding by creating a new “monopoly” or “exclusive provider of an essential service” exception to *Keller* even when the service is contractual or otherwise not “prescribed by law.” *Id.* at 6-10. The level of competition as to a particular service is simply not in the text of the Hancock Amendment or *Keller* and is not supported by any authority as criteria for expanding the Hancock Amendment.

To the contrary, *Keller* specifically states that if fees to the private users of these services are too high, and “the decisions are unpopular, the directors may be voted out of office.” *Keller*, 820 S.W.2d at 304.

The authority cited by the Amici Attorney General and State Auditor nowhere supports the new proposed “exclusive provider of an essential service” or “monopoly” expansion of the Hancock Amendment. The Amici Attorney General and State Auditor acknowledge past attorney general opinions citing *Pace* and finding that contractual municipal service fees are simply not within the Hancock Amendment, such as fees for grave lots, municipal water service fees, and hospital fees. Br. of AG Amici at 4-8. In none of these circumstances was it discussed as even relevant whether competition was limited or not. Nor did this Court in *Keller*, *Beatty*, *Feese*, *Missouri Growth Ass’n*, *City of Columbia*, *Pace* or any other cited authority inquire into the competition for the particular service.

Amici Attorney General and State Auditor also suggest that a transfer to the general fund implicates the Hancock Amendment. Br. of AG Amici at 12. However, *Pace*, which has also been recognized by the Amici Attorney General and State Auditor, specifically rejects the argument that a transfer to the general fund implicates the Hancock Amendment. *Id.* at 7, 14-15; *Pace*, 680 S.W.2d at 948 (holding that a transfer in itself no way implicates the Hancock Amendment).

If the drafters of the Hancock Amendment had desired to impose rate regulation on municipalities they could have subjected municipal services to the Public Service Commission or simply included “all” fees (as opposed to only those that are “levied” like

taxes) in the Hancock Amendment. They did neither. Unlike users of services from private corporations, municipal users can rely not only on the protections of the Fourteenth Amendment and other substantive law applicable to governments, they have the enviable remedy of directly tossing out the “board of directors” of the service provider – the elected officials – exactly as noted by this Court in *Keller*. *Keller*, 820 S.W.2d at 304.

**B. A monopoly exception is neither objective or workable**

Besides the fact no law supports this new exception, the Amici Attorney General and State Auditor also overstate how “objective” and workable this new proposed exception really would be. For example, how many competitors must exist to escape a monopoly labeling? How competitive does the other provider have to be? Would a city have to analyze the sales of other providers to determine if such is a “real” competitor? What if the competition is limited simply *because* the city is forced to undercut the market by having to charge “cost”?

The Amici Attorney General and State Auditor’s own examples demonstrate the problem. In supporting the former attorney general opinion opining that hospital fees were not subject to the Hancock Amendment, Amici claims that citizens “certainly can go to a competing hospitals.” Br. of AG Amici at 8. Really? Someone suffering a heart attack in a rural county would most certainly disagree with that conclusion. Nor is a cemetery plot a good choice if the price of private cemeteries is drastically higher or location farther. Clearly, attempting to use lack of competition as a test to turn a voluntary fee into a “levied” tax would be an unworkable rule; as every non-mandated

service is subject to a choice at some price or circumstance but equally not really a choice at another price or circumstance. Is it therefore to be held a tax for some people (the heart attack victim) but not for others (the mild acne patient)? In reality, only a true monopoly imposed by law that prohibits competitors and prohibits the obtaining of alternatives would eliminate choice to all users – an unrealistic situation that is not in the record.

For example, if the user wishes to by-pass city provided natural gas, the customer may simply purchase propane from private vendors. If the city sells water, the user might seek alternative private water sources, dig a well or even use the long-standing (and now returning) practice of using rainwater (cisterns). Private household electric generation is now not only common-place; it has been adopted as part of the legal policy of this state as a result of state-wide ballot and state-mandated accommodation. *See* Proposition C (“The Missouri Clean Energy Initiative”)(2008); § 393.1030 RSMo. (Requiring rebate to user for each “installed watt for new or expanded solar electric systems sited on customers' premises . . .”); § 386.890 RSMo. (Requiring the electric supplier to “[m]ake net metering available to customer-generators . . .”). In short, there is simply no “exclusive” service to measure – rather, at best, services that have differing levels of cost and number of options. Again, the Hancock Amendment simply does not apply to any of these issues.

Creating such a “monopoly” exception is therefore not only completely unsupported by any legal authority but also would create an impossible dilemma for

elected officials to know when there is enough competition for public land or services, knowing which service or part of the service must be tested, and for which users.

### **CONCLUSION**

WHEREFORE, *Amicus Curiae MML* respectfully requests this Court to affirm the trial court's decision finding that the City's utility charges are not within the purview of the Hancock Amendment and confirm that the Hancock Amendment does not limit municipalities from generating revenues or compensation from contractual services.

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on the 4<sup>th</sup> day of November, 2010, one (1) copy of the Amicus Curiae Brief in the form specified by Supreme Court Rule 84.06(a) and one (1) copy of the Amicus Curiae Brief in the form specified by Supreme Court Rule 84.06(g) were mailed, postage prepaid (unless otherwise requested), to the following counsel of record:

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**CERTIFICATE PURSUANT TO SUPREME COURT RULE 84.06(c)**

The undersigned hereby certifies that this Amicus Curiae Brief complies with the limitations contained in Supreme Court Rule 84.06(b) and contains 7,520 words, excluding the cover, the Certificate of Service, this Certificate, and the signature block according to the word processing system used to prepare this Amicus Curiae Brief. The undersigned further certifies that the disk containing the Amicus Curiae Brief has been scanned for viruses and is virus-free.

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